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Lauren A. Shumate

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EVALUATING LEGISLATIVE JUSTICE SECTOR REFORMS: CREATING AN ENVIRONMENT FOR SURVIVAL

Lauren A. Shumate[†]

INTRODUCTION

The famous adage “justice should not only be done, but should manifestly and undoubtedly be seen to be done,” is as applicable in legal systems around the world today as it was over eighty years ago when Lord Chief Justice Hewart first introduced it in the landmark English case *Rex v. Sussex Justices*.¹ In recent decades, countries around the globe have engaged in rule of law and judicial reform initiatives.² As Thomas Carothers suggests, it is impossible to engage in foreign policy debate without the rule of law being offered as the solution to the world’s problems.³ The notion of the rule of law is a powerful political ideal in contemporary global discourse and “[e]veryone, it seems, is for the rule of law.”⁴ Multi-million dollar democratization projects across the globe have shaped many legislative justice sector reform initiatives to help strengthen the rule of law, establish judicial independence, and promote democratic principles around the world.⁵ Furthermore, aid and development programs have focused specifically on judicial independence due to the positive relationship between economic growth and countries with an independent judiciary.⁶

Such reform efforts have been most prominent in transitional democracies and in post-conflict and post-communist countries. Eastern Europe has been one of the most fertile regions for rule of law reform with concentrated efforts to “de-

[†] Candidate for Juris Doctor, University of Notre Dame Law School, 2017; MA, University of South Florida, 2014; BA, University of South Florida, 2010. I would like to extend my sincerest gratitude to Professor Anthony J. Bellia (University of Notre Dame Law School) for his invaluable comments and guidance throughout this process, Dr. Steven Tauber (University of South Florida) for his assistance and thoughtful input during the development of the quantitative analysis for this note, Dr. George Douglas Lunsford (University of South Florida) for providing additional aid with my statistical analysis, and the Honorable Judge Raymond O. Gross for his unwavering support and encouragement. I would also like to thank my family for their love, support, and belief in me. Lastly, I would like to express my appreciation to the *Journal of Legislation* for their feedback and work in editing this note.

1. *Ex parte McCarthy*, [1924] 1 K.B. 256, 259 (1923).

2. Gretchen Helmke & Frances Rosenbluth, *Regimes and the Rule of Law: Judicial Independence in Comparative Perspective*, 12 ANN. REV. POL. SCI. 345, 346 (2009).

3. Thomas Carothers, *The Rule-of-Law Revival*, IN PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE 3, 3 (Thomas Carothers ed., 2006).

4. Brian Z. Tamanaha, *The History and Elements of the Rule of Law*, SING. J. LEGAL STUD. 232, 232 (2012).

5. *Id.* at 232; see also Helmke & Rosenbluth, *supra* note 2, at 346 (indicating that international and economic organizations such as the World Bank are using their financial power to facilitate judicial reform in developing countries, citing statistics that link the rule of law to economic growth).

6. Bernd Hayo & Stefan Voigt, *Explaining de facto Judicial Independence*, 27 INT’L REV. L. & ECON 271 (2007) (finding that GDP growth per capita is positively related to de facto judicial independence).

Sovietize” and reform their legal systems.⁷ However, rule of law initiatives have not been limited to Eastern Europe and former Soviet countries. Other regions that continue to be involved in rule of law reform include Asia, sub-Saharan Africa, the Middle East, and Latin America.⁸ These comprehensive law and development reform efforts have included the rewriting of constitutions, drafting of new codes or statutes, reforming of government institutions, providing for legal education, and training of legal personnel.⁹ Regrettably, these efforts have proven to be slow and challenging, yielding results that are often indecisive or outright ineffective.¹⁰ Nevertheless, the rule of law continues to be pursued as a universal political ideal because of its widespread appeal.¹¹ Unfortunately, conceptual definitions of judicial independence and the rule of law remain elusive and contested.¹² Failures in conceptualization, whereby judicial independence is included in measures of the rule of law, has led to the inability to effectively analyze the relationship between the two and has undermined the necessity of an independent judiciary for the effective establishment of rule of law legislation in transitioning countries. Furthermore, the lack of supportive legal, social, and political cultures in transitioning countries has also hampered legislative justice sector reforms.

This Note argues that judicial independence, particularly de facto judicial independence, is a strong indicator of the rule of law and an important part of the broader legal culture needed to support legislative rule of law reform. Additionally, this Note argues that the type of legal system and characteristics of the political regime in power are also important in establishing an environment conducive to supporting a reformed rule of law. Part I of this Note will review definitions of the rule of law and judicial independence, including how both concepts have been defined for legislative reform purposes and will address some of the challenges facing global reform initiatives. Part II presents a quantitative analysis that examines the effect of judicial independence on the establishment of the rule of law and analyzes whether the type of political regime and legal system a country possesses also affects the rule of law. These results are then applied to the case of Serbia in Part III. In particular, this Note examines the legislative justice sector reforms currently underway in Serbia and examines how a lack of de facto judicial independence has hindered legislative reforms. Part IV argues for a less theoretical and more practical approach to judicial independence based on a de facto measure; this will more accurately reflect the level of judicial independence and thereby lead to a more accurate depiction of its effect on the rule of law. Furthermore, a more thorough conceptual understanding of judicial independence and the rule of law and

7. Carothers, *supra* note 3, at 8.

8. Carothers, *supra* note 3, at 3; see also Brian Z. Tamanaha, *The Primacy of Society and the Failures of Law and Development*, 44 CORNELL INT’L L.J. 209, 217-18 (2011).

9. Carothers, *supra* note 3, at 8.

10. Tamanaha, *supra* note 8, at 217.

11. BRIAN Z. TAMANAHA, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY 1, 3-4 (2004).

12. Tamanaha, *supra* note 4, at 232; Ricardo Gosalbo-Bono, *The Significance of the Rule of Law and its Implications for the European Union and the United States*, 72 U. PITT. L. REV. 229, 231 (2010); Daniel B. Rodriguez, et. al., *The Rule of Law Unplugged*, 59 EMORY L.J. 1455, 1458, 1464 (2010) (suggesting the rule of law is a contested concept); Lydia Brashear Tiede, *Positive Political Theory and the Law: Judicial Independence: Often Cited, Rarely Understood*, 15 J. CONTEMP. LEGAL ISSUES 129, 129-30 (2006) (stating that a consistent and concrete definition of “judicial independence” is elusive).

the relationship between the two will better equip policy makers to more effectively implement legislation to shore up the rule of law in transitional countries. This Note concludes by suggesting that, in addition to establishing de facto judicial independence to help ensure success of legislative reforms designed to strengthen the rule of law, greater efforts should be made to cultivate a legal, social, and political culture that is more willing to accept and support legislative justice sector reforms.¹³

I. JUDICIAL INDEPENDENCE, THE RULE OF LAW, AND LEGISLATIVE JUSTICE SECTOR REFORMS

Despite the fact that concepts of judicial independence and the rule of law continue to be contested among political and legal scholars, popular wisdom and belief in the international community suggests that an independent judiciary is the cornerstone of a democratic, market-based society based on the rule of law.¹⁴ The concept of judicial independence and the rule of law is a “venerable part of Western political philosophy” seen as a “rising imperative during the era of globalization.”¹⁵ However, while judicial independence makes sense on paper, aid providers and legal scholars have found that merely enacting new laws does not bring about the intended results without changing the process of implementation and enforcement.¹⁶ Nevertheless, research suggests a close relationship between the rule of law and human rights, and it stresses the importance of an independent judiciary in securing human rights¹⁷ and the rule of law.¹⁸ Over time, elements such as the separation of powers and judicial review, along with many other legal and democratic concepts have been borrowed from the American legal system and “transplanted” into numerous legal systems around the world.¹⁹

13. This research is by no means comprehensive, nor does it deal with all of the conflicting theoretical arguments and complexities surrounding democracy, political culture, judicial independence, and the rule of law. It is merely intended to further the understanding of the relationship between judicial independence and the rule of law and demonstrate the need to go beyond mere legislative reforms on paper.

14. Emma Phillips, *The War on Civil Law? The Common Law as a Proxy for the Global Ambition of Law and Economics*, 24 WIS. INT’L L.J. 929-30 (2007) (citing USAID, Office of Democracy and Governance, *Guidance for Promoting Judicial Independence and Impartiality* 6 (Jan. 2006)).

15. Carothers, *supra* note 3.

16. Carothers, *supra* note 3, at 11-12 (stating that major judicial reform efforts have foundered on the assumption that external aid can substitute for the will to reform).

17. Linda Camp Keith, *Judicial Independence and Human Rights Protection Around the World*, 85 JUDICATURE 195 (2002).

18. See Lydia Brashear Tiede, *Judicial Independence: Often Cited, Rarely Understood*, 15 J. CONTEMP. LEGAL ISSUES 129, 129 (2006) (stating “[j]udicial independence is frequently touted as the lynchpin of a democratic society and the rule of law.”); Roberto Laver, *The World Bank and Judicial Reform: Overcoming “Blind Spots” in the Approach to Judicial Independence*, 22 DUKE J. COMP. & INT’L L. 183, 183 (2012) (asserting “an independent judiciary is fundamental to the rule of law.”); Daniel B. Rodriguez, et. al., *supra* note 12, at 1461; Erik S. Herron & Kirk A. Randazzo, *The Relationship Between Independence and Judicial Review in Post-Communist Courts*, 65 J. POL. 422, 422-23 (2003).

19. Máximo Langer, *From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure*, 45 HARV. INT’L L.J. 1, 1-2 (2004).

A. Judicial Independence

A close cousin to rule of law development has been judicial reform, which like the rule of law, has gained widespread support. Judicial independence has enjoyed nearly universal consensus as to its normative value as an institutional mechanism to protect and uphold the rule of law, along with its importance in the effective operation of constitutional democracy;²⁰ it has been cited as the “lynchpin of a democratic society and the rule of law.”²¹ The United Nations has endorsed the importance of an independent judiciary requiring each member state to guarantee the independence of its judiciary in its constitutions or laws.²² Furthermore, the European Convention on Human Rights recognizes the critical role of judicial independence by enshrining it in Article 6 of the Convention, which guarantees the right to be heard by an independent tribunal.²³

Membership in many international organizations, along with respect in the international community, has helped to encourage widespread legislative justice sector reform initiatives. International and economic organizations, such as the World Bank, are using their financial power to facilitate judicial reform in developing countries.²⁴ In addition, sought-after membership in the European Union has provided major incentive to implement rule of law reforms, with one of its entrance criteria being an independent and impartial judiciary. Moreover, multimillion-dollar democratization projects across the globe, including large financial contributions from the United States, have played a significant role in shaping a wide range of judicial reform initiatives.²⁵ As a result of such widespread support and belief in the inherent values of judicial independence and the rule of law, global legislative reform efforts have primarily been focused on the justice sector.

However, the importance of judicial independence to the rule of law has led to judicial independence being included in definitions of the rule of law.²⁶ Judicial independence is also often considered a component of the rule of law and is frequently included in measures of the rule of law.²⁷ This Note argues that such

20. Christopher M. Larkins, *Judicial Independence and Democratization: A Theoretical and Conceptual Analysis*, 44 AM. J. COMP. L. 605, 607, 625 (1996).

21. Tiede, *supra* note 18, at 129.

22. U.N. DEP'T of INT'L ECON. & SOC. AFFAIRS, SEVENTH UNITED NATIONS CONGRESS ON THE PREVENTION OF CRIME AND TREATMENT OF OFFENDERS, at 59-60, U.N. Doc. A/CONF. 121/22/Rev.1, U.N. Sales No. E.86.IV.1 (Annex: *U.N. Basic Principles on the Independence of the Judiciary*) (1985) [hereinafter *Basic Principles on the Independence of the Judiciary*].

23. European Convention on Human Rights art. 6, Sept. 3, 1953 213 U.N.T.S. 221; *see also* USAID, GUIDANCE FOR PROMOTING JUDICIAL INDEPENDENCE AND IMPARTIALITY, 5-6 (2002) (agreeing with the prevailing view of the court's role in protecting individual rights, stating that judicial independence contributes to the enforcement of contracts and private property rights, the reduction of corruption, and the protection of civil and political rights, and it provides restraints on arbitrary government action).

24. Helmke & Rosenbluth, *supra* note 2, at 346.

25. Carothers, *supra* note 3, at 4.

26. Gosalbo-Bono, *supra* note 12, at 231 (submitting that a universal definition of the rule of law must incorporate an independent judiciary to apply the law to specific cases).

27. *See Freedom in the World 2015 Methodology*, FREEDOM HOUSE (2015), https://freedomhouse.org/sites/default/files/Methodology_FIW_2015.pdf (measure of civil liberties includes “rule of law” indicator which incorporates a measure of judicial independence); THE WORLD JUSTICE

conceptualization and operationalization of judicial independence is flawed. That is, judicial independence is not synonymous with the rule of law, nor can it be defined by the rule of law. Problems of conceptualizing judicial independence and the rule of law have led to heated debates over the proper definition and measurement of each, which has resulted in further difficulties in formulating and implementing effective justice sector reform legislation. Specifically, this Note argues that judicial independence, and in particular de facto judicial independence, is an important piece of the legal and political cultural fabric necessary for legislative rule of law reforms to be successful.

Defining Judicial Independence: De jure and De facto Conceptualization

Despite many efforts to define judicial independence, it has remained a difficult concept to measure in reality and has often resulted in a country's judiciary being evaluated according to its legal status and establishment in a country's constitution. In its most general sense, judicial independence requires a neutral judge to make fair and impartial decisions, free from outside pressure or coercion.²⁸ In addition, the judiciary as a whole must be independent and separate from the government and other concentrations of power.²⁹ Judicial independence centers on the notion of conflict resolution by a neutral third party. This is important for two reasons. First, it is essential for justice to prevail. A neutral judge will allow all individuals equal treatment before the law and safeguard the protection of their rights. Second, independence of the judiciary is critical when the government is a party to the case to ensure that judges will not be biased in favor of the government. As such, judges must be protected from threats, interference, and manipulation that may cause them to unjustly favor the state. While it is important that an independent judiciary is guaranteed and established in the supreme law of a country, it is equally important that its independence does not only exist on paper, but is also carried out in practice. Unfortunately, too often the reliance on formal indicators of judicial independence does not match reality—it is not representative of the way in which the judiciary behaves in practice.³⁰ Studies have indicated the need to go beyond analyzing and assessing formal judicial independence in order to determine the actual level of judicial independence based on the behavior of the judiciary in practice.³¹

Definitions of judicial independence have included a number of elements including that an independent judiciary decides matters in accordance with the law; it equally and impartially enforces the constitution; it upholds political and civil

PROJECT, RULE OF LAW INDEX 4 (2012); INTERNATIONAL COUNTRY RISK GUIDE, METHODOLOGY (2012) (“law and order” component includes a measurement of judicial independence); Emily J. Barton, *Pricing Judicial Independence: An Empirical Study of Post-1997 Court of Final Appeal Decisions in Hong Kong*, 43 HARV. INT’L L.J. 361, 364 (2002) (testing the “strength of the perceived relationship between rule of law (measured by judicial independence) and the strength of financial markets”).

28. Justice F.B. William Kelly, *Vancouver: International Centre for Criminal Justice Reform and Criminal Justice Policy*, AN INDEPENDENT JUDICIARY: THE CORE OF THE RULE OF LAW 1, 6 (1996).

29. *Id.* at 6.

30. Larkins, *supra* note 20, at 615.

31. Camp-Keith, *supra* note 17, at 199; *see also* Robert M. Howard & Henry F. Carey, *Is an Independent Judiciary Necessary for Democracy?*, 87 JUDICATURE 284, 285-86 (2004).

rights; it can expect its decisions to be implemented and not impeded by other branches of the government; and it is free to make decisions without fear of retribution from other branches of government or political entities.³² Once conceptualized, it is important to distinguish between two types of judicial independence— de jure judicial independence and de facto judicial independence. De jure judicial independence is derived from the letter of the law, and it focuses on the legal foundations of judicial independence taking into account the method of nominating and/or appointing judges, term lengths, possibility of reappointment, and so forth.³³ On the other hand, de facto judicial independence is defined as the *actual* independence enjoyed by judges, and it focuses on the factually ascertainable degree of judicial independence.³⁴ De facto judicial independence accounts for variables such as effective average term lengths, the number of times judges have been removed from office, judges' salaries, and whether the decisions of the highest court are dependent upon some other branch or body of government in order to be implemented.³⁵

Research suggests that many countries that have high levels of de jure judicial independence have low levels of de facto judicial independence.³⁶ This finding and distinction between de jure and de facto judicial independence suggests that while it is important and *necessary* to establish de jure judicial independence, it is by no means *sufficient* to merely enshrine judicial independence within the context of legal documents. Judicial independence must go “beyond mere de jure provisions that seemingly protect judicial independence in a democratic and constitutionally responsible manner.”³⁷ Furthermore, although countries may have a constitutionally established judiciary, the lack of independence in practice can lead to significantly lower levels of political and civil rights for citizens, which results in a decrease in respect for human rights.³⁸ Therefore, this Note argues that it is essential that judicial independence be established not only on paper, but also in practice in order for legislative justice sector reforms to be successful.

B. The Rule of Law

The rule of law is a concept that has garnered near universal appeal and support and has become “perhaps the most powerful and often repeated political ideal in contemporary global discourse.”³⁹ The widespread acceptance and appeal of rule of law reform is reflected in the countless projects and statements of powerful influential U.S. and international public and private agencies.⁴⁰ These institutions

32. Shannon Ishiyama Smithey & John Ishiyama, *Judicious Choices: Designing Courts in Post-Communist Politics*, 33 COMMUNIST AND POST-COMMUNIST STUDIES, 163, 165-67 (2000); see also Larkins, *supra* note 20, at 608; Hayo & Voigt, *supra* note 6, at 278-280.

33. Lars P. Feld & Stefan Voigt, *Economic Growth and Judicial Independence: Cross-Country Evidence Using a New Set of Indicators*, 19 EUR. J. POL. ECON. 497, 501 (2003).

34. *Id.* at 498.

35. Feld & Voigt, *supra* note 33, at 503-4.

36. Feld & Voigt, *supra* note 33, at 505.

37. Howard & Carey, *supra* note 31, at 286.

38. *Id.* at 290.

39. Tamanaha, *supra* note 4, at 232.

40. Tamanaha, *supra* note 8, at 217 (including the World Bank, the United States Agency for

fund and help carry out law and development reforms. Legislative justice sector reform efforts have included drafting constitutions and codes, implementing judicial reforms, transplanting laws and institutions, enhancing legal education and training, and combating corruption.⁴¹

Increasingly, the rule of law has become an important principle and doctrine in state building, and it has been viewed as necessary in order for “failed states” to successfully transition from conflict to durable peace.⁴² This is likely because of the profound relationship between the rule of law and liberal democracy.⁴³ The rule of law promotes individual rights, which are at the core of liberal democracy.⁴⁴ Liberalism represents a particular approach to government, which emphasizes a commitment to the rule of law, individual rights, and representative government with limitations on the powers of the state.⁴⁵ Reformers and scholars insist that the “rule of law is an unalloyed good, promoting and safeguarding values that are intrinsically desirable, such as economic development and social progress . . . [and is] essential to a justice-seeking polity.”⁴⁶ Thus, despite theoretical controversy as to whether democracy is the best form of government, current practice in the global community suggests that liberalism is closely connected with rule of law reform initiatives.

Conceptualizing the Rule of Law: Thick versus Thin Definitions

The phrase “rule of law” has become a popular one in international and domestic politics, but its meaning has remained elusive. Aristotle stated more than two thousand years ago that “[t]he rule of law is preferable to that of any individual.”⁴⁷ It is a system in which the laws are public knowledge, they are clear in meaning, and apply equally to everyone.⁴⁸ Such a system upholds the political and civil liberties that have gained status as universal human rights over the past several decades.⁴⁹ The United Nations has attempted to establish a common rule of law definition designed to guide the work of various agencies and programs within the United Nations. According to the United Nations, the rule of law is said to be a principle of governance whereby all individuals, including the state, are equally subjected and accountable to the law, which is equally enforced and independently adjudicated, and includes measures to ensure the separation of powers, participation

International Development (USAID), the Carnegie Endowment for International Peace, the UN Development Program (UNDP), and the American Bar Association (ABA)).

41. Tamanaha, *supra* note 8, at 217; *see also* Rodriguez, *supra* note 12, at 1460.

42. *See generally* Richard Sannerholm, *Legal, Judicial and Administrative Reforms in Post-Conflict Societies: Beyond the Rule of Law*, 12 J. CONFLICT & SECURITY L. 65 (2007).

43. *See* Carothers, *supra* note 3, at 4 (indicating that democracy includes institutions and processes that are rooted in a particular legal system).

44. *See* Carothers, *supra* note 3, at 4.

45. *See* SCOTT BURCHILL, *Liberalism*, THEORIES OF INTERNATIONAL RELATIONS 57, 58-62 (4th ed., PALGRAVE MACMILLAN 2009) (indicating the influence of liberalism and its emphasis on the rule of law).

46. Rodriguez, *supra* note 12, at 1456.

47. ARISTOTLE’S POLITICS, BOOK III 16 (1286).

48. Carothers, *supra* note 3, at 4.

49. *Id.*

in decision-making, and procedural and legal transparency.⁵⁰

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

Formal conceptions of the rule of law address the manner in which the law was promulgated; the clarity of the ensuing norm; and the temporal dimension of the enacted norm. . . Formal conceptions of the rule of law do not seek to pass judgment upon the actual content of the law itself. Those who espouse substantive definitions go beyond this. They accept that the rule of law has the formal attributes mentioned above. . . but certain substantive rights are said to be based on, or derived from, the rule of law.⁵¹

Thus, thin definitions are more formalistic and akin to “rule by law” without any emphasis on content. These definitions see the rule of law as an instrument of government action wherein people are ruled by it.⁵² In other words, thin rule of law may not actually be the rule of *good* laws. Joseph Raz emphasizes this point by opining that the rule of law should not be confused with democracy, justice, equality, or human rights. According to Raz “the rule of law” means literally what it says: the rule of the law, where taken in its broadest sense, means people should obey the law and be ruled by it.⁵³ Thus, Raz states that:

A non-democratic legal system, based on the denial of human rights, on poverty, on racial segregation, sexual inequalities. . . may in principle, conform to the requirements of the rule of law better than any of the legal systems of the more enlightened Western democracies. . . This does not mean that the nondemocratic system will be better. . . It will be an immeasurably worse legal system, but it may excel in one respect: in its conformity to the rule of law.⁵⁴

However, even with his literal stance regarding the meaning of the rule of law, Raz acknowledges some of the overlap between law and morality and the moral virtue of the rule of law. This appears to recognize that the rule of law is more than adherence to formal rules. If the rule of law is to minimize the danger of law itself, this seems to suggest that the rule of law should protect against the type of repressive, authoritarian system described above. Consequently, Raz may not be on the very extreme rule by law end of the continuum, but he nonetheless advocates a

50. U.N. Secretary General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, U.N. Doc. S/2004/616 (Aug. 23, 2004).

51. TAMANAHA, *supra* note 11, at 91-2.

52. JOSEPH RAZ, *The Rule of Law and Its Virtue*, LIBERTY AND THE RULE OF LAW 5 (Robert L. Cunningham ed., Texas A&M University Press 1979).

53. *Id.* at 5.

54. *Id.* at 4.

“thinner” definition of the rule of law.

In contrast, thick rule of law definitions are more substantive with greater emphasis placed on the content of the rules or laws themselves. As a result, a thick definition of the rule of law requires that the law comply with substantive ideals, including liberal and/or social human rights.⁵⁵ According to Thom Ringer, a thick view of the rule of law necessarily comprises certain universal moral principles or virtues, inherently liberal in character, and related to freedom.⁵⁶ Brian Tamanaha characterizes this thick view as a substantive view that includes individual rights within the rule of law, and draws on Ronald Dworkin’s “rights conception” stating that:

[t]he rule of law on this conception is the ideal rule. . .it assumes that citizens have moral rights and duties with respect to one another, and political rights against the state as a whole. . .It requires, as a part of the ideal of law, that the rules in the rule book capture and enforce moral rights.⁵⁷

The research presented in this Note relies on a thick, or substantive, definition of the rule of law. This is primarily because it is this conception that has gained force and recognition with international organizations and institutions and foreign aid donors that seek to promote and fund rule of law reform initiatives in post-conflict and newly democratic states because of the rule of law’s close connection to human rights. This conceptualization is also often that which is utilized in global indices measuring the strength of the rule of law.⁵⁸

C. Failed Attempts of Legislative Justice Sector Reforms

Despite the universal appeal of rule of law and judicial reform, law and development efforts have encountered significant challenges and have ended up with disappointing results.⁵⁹ Law and development initiatives have generally taken the form of transplanting Western legal institutions and codes into developing countries, but these efforts have been generally viewed as failed attempts.⁶⁰ Such efforts have failed for a number of reasons. However, most significant have been the lack of a supportive legal culture and the lack of an independent judiciary actually operating independently and impartially in practice.⁶¹

There is limited empirical evidence that focuses specifically on the relationship

55. Svend-Erik Skanning, *Measuring the Rule of Law*, 63 POL. SCI. RES. Q. 449, 451 (2010).

56. Thom Ringer, *Development Reform, and the Rule of the Law: Some Prescriptions for a Common Understanding of the ‘Rule of Law’ and its Place in Development Theory and Practice*, 10 YALE HUM. RTS. & DEV. L.J. 178, 190 (2007).

57. TAMANAHA, *supra* note 11, at 102.

58. This Note does not attempt to argue which theoretical conception of the rule of law is better, but rather it attempts to adopt a conceptual definition that is consistent with those used in justice sector reform initiatives.

59. See Tamanaha, *supra* note 4, at 209; John C. Reitz, *Politics, Executive Dominance and Transformative Law*, 5 U. ST. THOMAS L.J. 743, 745-46 (2008).

60. Tamanaha, *supra* note 8, at 211.

61. *Id.* at 211, 222-23.

between judicial independence and the rule of law, and there is debate as to whether an independent judiciary guarantees the establishment of the rule of law.⁶² Specifically, skepticism exists regarding the relationship between the rule of law and judicial independence and whether the rule of law *requires* judicial independence.⁶³ An additional problem is that in many cases, judicial independence is included in the definition and measurement of the rule of law. Disagreement over conceptual definitions of judicial independence has hidden its true value and importance to the rule of law. This has significantly undermined legislative justice sector reforms and contributed to failed law and development efforts in transitioning countries. Specifically, the lack of de facto judicial independence has resulted in many of the legal legislative reforms, such as constitution and code drafting simply failing to take hold. This Note argues that legislative justice sector reforms have primarily failed because of a lack of de facto judicial independence. This lack of judicial independence in practice has resulted in the failure to uphold newly drafted constitutions and legal codes that are part of the broader rule of law reform effort. However, it is also argued here that such legislative rule of law reforms have failed in transitioning states because they lack an environment conducive to the survival of the newly drafted laws, constitutions, and policies. De facto judicial independence makes up a part of that environment along with the type of legal system and characteristics of the political regime in power.

II. COMPARATIVE QUANTITATIVE ANALYSIS

A. Method and Data

This Note uses OLS multiple regression analysis to analyze the effect of three independent variables (legal system, type of political regime, and judicial independence) on one dependent variable (the rule of law) using data available from 2007 through 2012. This data is comprised of a set of indicators of judicial independence and the rule of law covering fifty-one countries. The results demonstrate the strong relationship between judicial independence and the rule of law. Specifically, the results show the high importance of de facto judicial independence in establishing and strengthening the rule of law. Therefore, the results support the argument that justice sector reforms must do more than merely enact legislative changes on paper. Rather, in order to be successful, justice sector reforms must also be established *in practice*.

B. Variables

1. Dependent Variable: Rule of Law

When testing the effect of judicial independence on the rule of law, the dependent variable is the rule of law, which is represented as an index score

62. Helmke & Rosenbluth, *supra* note 2, at 346-47.

63. Micah B. Rankin, *Access to Justice and the Institutional Limits of Independent Courts*, 30 WINDSOR Y.B. ACCESS JUST. 101, 131 (2012).

between zero and one, with low values denoting a weaker rule of law and high values indicating a strong rule of law. As previously stated, rule of law definitions vary between “thick,” or substantive definitions and “thin,” or formal definitions. This Note relies on a “thick,” or substantive definition of the rule of law, as this conception is that which has gained force and recognition with international organizations and institutions along with foreign aid donors that seek to promote and fund rule of law reform initiatives in post-conflict and newly democratic states. Therefore, the rule of law here is conceptualized to mean that people obey and respect the law and are ruled by it, while the government, which respects its citizens’ individual political rights and civil liberties, is also ruled by the law and subjected to it.

To measure the rule of law this Note relies on the Rule of Law Index constructed by the World Justice Project (WJP).⁶⁴ The WJP defines the rule of law as a

rules-based system in which four universal principles are upheld: 1) the government and its officials and agents are accountable under the law; 2) the laws are clear, publicized, stable, and fair, and protect fundamental human rights, including security of persons and property; 3) the process by which the laws are enacted, administered, and enforced is accessible, fair, and efficient; and 4) justice is delivered timely by competent, ethical, and independent representatives and neutrals who are of sufficient number, have adequate resources, and reflect the makeup of the communities they serve.⁶⁵

Because this Note seeks to analyze the relationship between judicial independence and the rule of law, it is important that the measures of these variables do not overlap. A factor designed to measure the level of judicial

64. See ARAST, M., BOTERO, J., PONCE, A., & PRATT, C., THE WORLD JUSTICE PROJECT, WJP RULE OF LAW INDEX 2 (2012-13). The WJP Rule of Law Index is derived from a set of principles that represent a working definition of the rule of law and is intended to provide a comprehensive assessment of the extent to which countries adhere to the rule of law in practice. It covers a total of ninety-seven countries and is measured according to nine factors that are further broken down into forty-eight sub-factors. The index scores are constructed from over four hundred variables that are drawn from the collection of two original sources of data: a General Population Poll (GPP) conducted by leading local polling agencies using a representative sample of one thousand respondents in three cities per country; and a series of Qualified Respondents’ Questionnaires (QRQ) which consists of closed-ended questions and is completed by country experts, practitioners, and scholars who have qualified expertise in civil and commercial law, criminal justice, labor law, and public health. To conceptualize the rule of law, the WJP constructs a working definition according to a set of principles that were derived from international standards and norms as well as national constitutions. The WJP attempts to balance its definition between thin and thick conceptions of the rule of law by incorporating both substantive and procedural elements. Nevertheless, their definition can be said to be more on the thick, or substantive side of the rule of law continuum with its incorporation of factors that capture the extent to which a country respects core human rights.

65. *Id.* at 2, 9, 12. The eight factors that capture the measurement of the four principles listed above include: limited government powers; absence of corruption; order and security; fundamental rights; open government; regulatory enforcement; civil justice; and criminal justice. The final scores and rankings were constructed based upon codifying questionnaire items into numeric values and producing raw country scores by aggregating the responses from several individuals (experts or general public). The raw scores were then normalized and aggregated into sub-factors and factors using simple averages and the final rankings and scores were produced using the normalized scores.

independence cannot be included in the measurement of the overall rule of law score, and vice versa. The WJP Rule of Law Index includes several factors that are related to the independence of the judiciary. Therefore, it was necessary to subtract these factors out and recalculate the rule of law index score for each country in the analysis.⁶⁶ The final result was eight factors designed to provide a comprehensive measure of the rule of law that together were further broken down into a total of forty sub-factors. This was then recalculated providing for an overall rule of law index score for each country in the analysis.⁶⁷

2. Independent Variable: Judicial Independence

Judicial independence is an independent variable in the study, which is represented as an index score between zero and one, with low values being associated with low levels of judicial independence and high values being associated with high levels of judicial independence. The *Basic Principles on the Independence of the Judiciary*, as outlined by the United Nations, defines judicial independence to be the duty of all governmental institutions to respect and observe the independence of the judiciary, and that this independence is guaranteed by the supreme law of the country.⁶⁸ Additional definitions have included that an independent judiciary decides matters in accordance with the law and justice; it equally and impartially enforces the constitution; it upholds political and civil rights; it can expect its decisions to be implemented and not impeded by other branches of the government; and it is free to make decisions without fear of retribution from other branches of government or political entities.⁶⁹ Lars Feld and Stephan Voigt devised a measure of judicial independence to measure such factors by analyzing the judiciary as established by law in the country and also how it operates in practice.⁷⁰

Judicial independence is conceptualized here as the impartial resolution of conflict by a neutral third party and the extent to which a judiciary is free to exert its own judgment without fear of retribution; all governmental institutions and branches respect this freedom; and it is guaranteed by the supreme law of the country. To measure judicial independence, this Note relies on the dataset developed by Feld and Voigt that gauge judicial independence according to a set of two indicators—de jure judicial independence and de facto judicial independence. De jure judicial independence is defined to be that which is established by law and

66. When recalculating scores for the rule of law index, the same method of calculation as outlined by the WJP was followed. Once the necessary sub-factors were removed, the scores for each of the eight factors were recalculated by adding the sub-factor scores contained within each factor together and dividing by the number of sub-factors to obtain a new aggregated score for each factor. The eight factor scores were then added together and divided by eight to produce a new rule of law index score between zero and one for each country.

67. These countries were cross-referenced with those for which both de facto and de jure judicial independence scores were available. Countries were eliminated that were not included in the dataset for judicial independence.

68. *Basic Principles on the Independence of the Judiciary*, *supra* note 22, at 60.

69. Ishiyama & Smithey, *supra* note 32, at 165-167; *see also* Larkins, *supra* note 20, at 608; Hayo & Voigt, *supra* note 6, at 278-280.

70. *See* Feld & Voigt, *supra* note 33.

de facto judicial independence is defined to be that which is actually adhered to and carried out in practice.⁷¹

The de jure judicial independence indicator is based on the legal foundation as found in legal documents of a country and is comprised of twenty-three characteristics that are grouped into twelve variables. Each of the variables is given a value between zero and one, with higher values indicating a higher level of judicial independence while lower values are associated with a lower level of judicial independence.⁷² The de facto indicator focuses on the extent to which judicial independence is factually implemented and uses eight variables that are also assigned a value between zero and one with higher values indicative of higher levels of judicial independence.⁷³ This Note derives an overall judicial independence score for each of the fifty-one countries by adding the de jure and de facto scores together and dividing it by two (assuming equal weight for both indicators) and obtaining a value between zero and one.⁷⁴ Data for the de jure indicator was available for seventy-five countries, while data for the de facto indicator was only obtainable for sixty-six countries.⁷⁵

3. Independent Variable: Political Regime

Although the extent to which democracy plays a role in the establishment of an independent judiciary is highly contested, a significant portion of research indicates that independent judiciaries are more likely to be found in democratic societies.⁷⁶ The development of international legal organizations and institutions that support

71. *Id.* at 501, 503.

72. *Id.* at 501-503. Because information was not available for all twelve indicators, the sum of the coded variables that were available were divided by the total number of variables, resulting in an overall de jure score between zero and one. The twelve variables that make up the de jure indicator include whether the highest court is established in the constitution; the level of difficulty in amending the constitution; the appointment procedure of judges; judicial tenure; the determination of judicial salary; adequate compensation; the ability to remove judges from office with the exception of doing so by legal procedure; whether judicial terms are renewable; accessibility of the court and ability to initiate proceedings; the allocation of cases; the presence of judicial review; and whether court decisions are published and available to the public.

73. *Id.* at 504. In order to ensure some level of accuracy, only countries that had at least three variables for de facto independence available were scored and ranked. The 8 factors making up the de facto indicator include the effective average term length; whether a judge was removed before the end of term; influence of a judge dependent upon the number of judges on the court; whether judicial incomes remained constant in real terms; development of the court's budget; changes in the basis of the legal foundation of the highest court; and whether decisions of the highest court are dependent upon some other branch or body of government in order to be implemented.

74. Because one of the arguments in this Note centers on the proposition that a de facto measure of judicial independence is a better indicator of the actual level of independence, and thus a better predictor of the rule of law, both the overall judicial independence score constructed using the Feld and Voigt indicators is used along with the de jure and de facto scores being used as individual scores when testing the effects of judicial independence on the rule of law.

75. *Id.* at 504. Countries were only included in the dataset if they contained a minimum of three variables for the de facto indicator, which explains the unequal and relatively low number of countries in the dataset. Due to the unequal numbers between the set of indicators, the countries were cross-referenced to ensure the same countries were represented in both datasets. Countries that appeared in one of the indicators but not the other were dropped from the dataset.

76. Ishiyama & Smithey, *supra* note 32, at 164; *see also* Douglas M. Gibler & Kirk A. Randazzo, *Testing the Effects of Independent Judiciaries on the Likelihood of Democratic Backsliding*, 55 AM. J. POL. SCI. 696, 696-709 (2011); Phillips, *supra* note 14, at 929.

and advocate democratic principles and human rights, along with the further development of international law and widespread democratization initiatives appears to largely be due to the influence of liberalism and its emphasis on the importance of global standards and the rule of law.⁷⁷ Despite weaknesses and limitations in explaining the relationship between states, current practices of many post-conflict countries suggest that liberal democratic theory seems to be the basic justification for the numerous reform initiatives taking place that promote democratic principles, including the rule of law, judicial independence, and human rights.

Therefore, this Note contends that a democratic system provides a political culture more conducive to legislative rule of law reform efforts. As such, the second independent variable is the type of political regime, which is defined as the system of government that is in power. For the purposes of this study, the type of political regime is classified as either democracy or non-democracy. The “governing authority” factor of the Polity IV dataset is used, which ranges from “fully institutionalized autocracies” through “mixed authority regimes” to “fully institutionalized democracies” to determine a country’s controlling political regime.⁷⁸ For this analysis, countries that score in the range of a democracy are coded one and all others (those classified as either anocracies or autocracies) are classified as non-democracy and are coded zero.

4. Independent Variable: Legal System

As a result of the global initiative to reform and firmly establish the rule of law, the civil law approach has increasingly come under attack, facing criticisms of lacking transparency, being inefficient, unaccountable, and unable to protect the individual rights of citizens.⁷⁹ In addition to widespread movement for countries based on a civil law tradition to adopt elements and borrow concepts from the common law system, nations are increasingly looking specifically to the American adversarial model.⁸⁰ In contrast to the civil law system, the common law approach has been upheld as being both transparent and accountable. It has been seen to offer a better opportunity for establishing an independent and impartial judiciary, which has been viewed as a core element of the rule of law and essential to providing the necessary foundation for economic growth.⁸¹ This is not to say that common law is better than or superior to civil law or any other type of legal system for that matter. Rather, this Note argues that a common law system will produce an environment better suited for the success of rule of legislative law reforms—in this case, a

77. BURCHILL, *supra* note 45, at 58-62.

78. MONTY G. JAGGERS & BENJAMINE R. COLE, CENTER FOR SYSTEMIC PEACE – POLITY IV PROJECT, STATE FRAGILITY INDEX AND MATRIX 2012 (2012). This categorization is based upon a twenty-one-point scale that ranges from (-10) hereditary monarchy to (+10) consolidated democracy, and is divided into three categories: autocracies (-10 to -6), anocracies (-5 to +5), and democracies (+6 to +10). The Polity IV dataset covers all major independent countries with a population of five hundred thousand or greater in the most recent year over the period of 1800-2010, and it measures regime characteristics and change.

79. Phillips, *supra* note 14, at 916.

80. Phillips, *supra* note 14, at 916; *see also* Langer, *supra* note 19, at 1, 5.

81. Phillips, *supra* note 14, at 919.

substantive conception of the rule of law including protection for basic human rights.

Therefore, the last independent variable is the type of legal system, which is conceptualized as the legal tradition upon which a country bases its laws. This information was obtained from the CIA World Fact Book.⁸² A country's legal system is ranked on the basis of the type of legal tradition in place in the country. Based on research that suggests that the common law legal tradition provides a better environment for the rule of law to prevail,⁸³ this study gives common law the highest ranking and goes downward from there. However, it is difficult today to find a legal system that is purely common law or civil law, and thus it becomes necessary to account for this when coding and/or ranking the legal systems of various countries. Thus, the legal systems are coded in the following manner: a purely common law system is coded "1;" civil/common law mixed is coded "2;" a purely civil law system is coded "3;" and a mixed system of civil/common law mixed with customary/Islamic/religious/traditional law is coded "4."

5. Control Variables

In all models the analysis controls for political violence and armed conflict, political characteristics of the regime in power, and the number of years since the constitution was last amended. Although GDP has been correlated with both the rule of law and judicial independence, GDP in fact has been shown to be a *result* of judicial independence⁸⁴ and the rule of law.⁸⁵ In other words, economic development is dependent upon the existence of a strong rule of law and a de facto independent judiciary to ensure the application of such rules and law. Therefore, it would not be appropriate to control for this variable as a potential *cause* of judicial independence or the rule of law.

Research suggests that military crises in a country can lead to the rejection of democratic institutions and principles, and thus could affect results obtained for judicial independence and the rule of law.⁸⁶ Furthermore, it is expected that an unstable country with frequent regime changes and armed conflict will result in a

82. *The World Fact Book*, WASHINGTON, DC: CENTRAL INTELLIGENCE AGENCY (Jan. 15, 2016), <https://www.cia.gov/library/publications/the-world-factbook/fields/2100.html#xx>. Information on a country's legal system includes information regarding systems based on civil law (including French law, the Napoleonic Code, Roman law, Roman-Dutch law, and Spanish law); common law (including British and United States common law); customary law (legal systems where laws are seldom written down, they embody an organized set of rules regulating social relations, and they are agreed upon by members of the community); religious law (stemming from the sacred texts of religious traditions and, in most cases, professes to cover all aspects of life as a seamless part of devotional obligations to a transcendent, imminent, or deep philosophical reality); and mixed law (consists of elements of some or all of the other main types of legal systems—civil, common, customary, and religious).

83. See Phillips, *supra* note 14, at 929-30.

84. Feld & Voigt, *supra* note 33, at 497, 516 (finding that de facto judicial independence does positively influence real GDP growth per capita).

85. Phillips, *supra* note 14, at 915, 928 (asserting that the rule of law leads to economic development growth).

86. Gibler & Randazzo, *supra* note 76, at 699; see also Michael C. Desch, *War and Strong States, Peace and Weak States?*, 50 INT'L ORG. 237 (1996); William R. Thompson, *Democracy and Peace: Putting the Cart before the Horse?*, 50 INT'L ORG. 141 (1996).

weaker and less developed rule of law. This is controlled for by using the “Security Effectiveness” score from the Center for Systemic Peace – State Fragility Index (SFI).⁸⁷ In addition to stability and armed conflict being linked to levels of judicial independence and the rule of law, research also suggests that political regime characteristics are linked to democratic principles, which in turn can affect the strength of the rule of law in a particular country. Democracies and their inherent characteristics make them a more peaceful form of government because they ascribe importance to respect for law and value liberty, humanity, and welfare above power.⁸⁸ To account for this, the State Fragility Index Political Legitimacy score is used, which measures regime-governance inclusion.⁸⁹ It is anticipated that countries that have authoritarian characteristics, or lower political legitimacy scores, will be more likely to have low levels of judicial independence and rule of law, thereby limiting the effectiveness of legislative reforms adopted on paper.

C. Results

Since the dependent variable used in this study is measured at the interval level, OLS multiple regression is employed to analyze the models in the study. Table 1 reports the means and frequencies of the independent and dependent variables, in addition to how each is measured in the model. Table 2 is the correlation matrix for the independent and dependent variables included in the analysis.

Table 1: Variable Information

Variables	Measurement	Mean	Frequency %
JI-overall	Continuous between 0 and 1	.610	0-.199=2% .2-.399=11.8% .4-.599=25.5% .6-.799=45.1% .8-.999=15.7%
JI-de jure	Continuous between 0 and 1	.686	0-.199=0% .2-.399=3.9% .4-.599=21.6% .6-.799=49% .8-.999=25.5%
JI-de facto	Continuous between 0 and 1	.552	0-.199=9.8% .2-.399=11.8%

87. JAGGERS & COLE, *supra* note 78, at 8. The Security Effectiveness score represents total residual war and provides a measure of general security and vulnerability to political violence, including armed conflict episodes. The score is calculated according to three indicators: the sum of annual scores for all wars in which the country is directly involved for each continuous period of armed conflict; interim years of “no war” between periods of armed conflict; and years of peace, or no war, since the end of the most recent war period. The final value is converted to a four-point fragility scale.

88. Joe D. Hagan, *Domestic Political Systems and War Proneness*, 38 MERSHON INT’L STUD. REV. 183, 185 (1994).

89. JAGGERS & COLE, *supra* note 78, at 8-9. The five indicators used to determine this score include: factionalism; ethnic group political discrimination against 5% or more of the population; political salience of elite ethnicity; polity fragmentation; and exclusionary ideology of ruling elite. The final score is calculated by adding together these five indicators.

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

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

	JI Overall	JI de facto	Rule of Law
JI Overall	1		.272 (.053)
JI de facto		1	.415 (.002)**
JI de jure		-.269 (.056)	.021 (.882)
Legal System	.140 (.328)	.415 (.002)**	-.321 (.021)*
Political Regime	.274 (.052)	-.127 (.374)	.389 (.005)**
Constitution Amendment	.126 (.377)	.403 (.003)**	.253 (.073)

SFI Security Effectiveness	.122 (.394)	.225 (.113)	.532 (.000)***
SFI Political Legitimacy	-.027 (.852)	-.122 (.392)	-.444 (.001)**

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

The first model analyzed the effect of judicial independence expressed as an overall score (combining de facto and de jure measures), type of legal system, and type of political regime on the rule of law. The model controlled for the number of years since the constitution was amended, security effectiveness, and political legitimacy. The results of the OLS multiple regression analysis are reported in Table 3. Overall, the regression was significant with results of the ANOVA significant at less than .001, $F(6,44) = 12.093$, $p < .05$.⁹⁰ Of the predictors investigated, four of them were significant, namely judicial independence, type of legal system, security effectiveness, and political legitimacy. Judicial independence was significant ($b = .202$, $t = 2.298$, $p < .05$) and exhibited a positive relationship with the rule of law. This suggests higher levels of judicial independence result in an increase in the rule of law.

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

Model I.

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

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

The type of legal system was also significant ($b = -.042$, $t = -2.274$, $p < .05$).⁹¹ The negative relationship observed between the type of legal system and the rule of law suggests that systems that are based upon the common law legal tradition are more likely to have a strongly established rule of law. Although the type of political regime was not statistically significant, it may still be affecting the strength of the rule of law ($b = .074$, $t = 1.945$, $p > .05$).⁹² It deserves mention that this factor

90. The adjusted R-square (.571) demonstrates that the variables judicial independence, type of legal system, type of political regime, number of years since constitution was amended, security effectiveness, and political legitimacy accounted for fifty-seven percent of the variance in the rule of law. The standard error of the estimate value was .0952. The results showed no issues of multicollinearity, with tolerance levels for all predictors ranging between .853 and .958 and the Variance Inflation Factor (VIF) was less than two for each predictor in the model.

91. Recall that the type of legal system was measured by ranking a country's legal system one through four, with a value of one being a purely common law legal system and most likely to provide an environment conducive to the rule of law, and four being a mixed system of civil/common/traditional/religious/customary law and being the least likely to produce an environment that would support the rule of law. If the number increases with respect to the type of legal system, or in other words moves further away from common law, the strength of the rule of law will decline.

92. The p-value for this predictor at .058 was just over what was required for statistical significance.

comes close to being statistically significant and exhibits a positive relationship with the rule of law. This could suggest that countries that are democratic would be more likely to have a strongly established rule of law versus those that are non-democratic.

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

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

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

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

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

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

Overall, the regression was significant with results of the ANOVA significant at less than .001, $F(7,43) = 10.967, p < .05$.⁹³ Of the predictors investigated, four of

This result could be in part due to the small “n” of only fifty-one countries in the analysis.

93. The adjusted R-square (.583) demonstrates that the variables de facto judicial independence, de jure judicial independence, type of legal system, type of political regime, number of years from when the constitution was amended to 2012, security effectiveness, and political legitimacy accounted for fifty-eight percent of the variance in the rule of law. The standard error of the estimate had a value of .0939. The model was tested for multicollinearity and the results indicated no issues of multicollinearity with tolerance levels for all predictors ranging between .735 and .919 and the Variance Inflation Factor (VIF) was less than two for each predictor in the model.

them were significant, namely de facto judicial independence, type of legal system, security effectiveness, and political legitimacy. The most notable change in this model is that de jure judicial independence is not significant ($b = -.003$, $t = -.030$, $p > .05$), while de facto judicial independence is highly significant ($b = .181$, $t = 2.661$, $p < .05$). This suggests that de jure independence is not a significant predictor of the rule of law. This substantiates the claim that a constitutionally established judiciary does not guarantee the independence of the judiciary in practice and does not necessarily lead to a strongly established rule of law. By contrast, de facto judicial independence appears to be a very strong predictor of the rule of law and exhibits a positive relationship with the rule of law.

The type of political regime was still not significant ($b = .152$, $t = 1.476$, $p > .05$). The type of legal system ($b = -.043$, $t = -2.276$, $p < .05$), security effectiveness ($b = -.077$, $t = -5.013$, $p < .05$), and political legitimacy ($b = -.039$, $t = -2.737$, $p < .05$) mostly remained the same and were still significant. Additionally, each of these three variables still had a negative relationship with the rule of law. The number of years from when the constitution was amended to 2012 was not significant ($b = .001$, $t = .910$, $p > .05$). The regression equation for the effect of de jure and de facto judicial independence on the rule of law is:

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

There are shortcomings in the analysis based on the fact that only fifty-one countries are used. Namely, there are not an equal number of countries from the various regions around the world. Some areas such as countries in the Middle East and Africa are underrepresented in the study. However, there is substantial variance among the fifty-one countries that are included in terms of the type of political regime and legal system and also the level of judicial independence and strength of the rule of law. Additionally, although not all regions are represented equally, each region of the world is included.

III. LEGISLATIVE JUSTICE SECTOR REFORMS IN SERBIA: CURRENT STATUS AND CHALLENGES

Eastern Europe has been fertile ground for introducing legislative rule of law and justice sector reforms in its effort to move away from communist rule. Serbia is a snapshot specific example of the judicial and rule of law reforms that are occurring both in Eastern Europe and around the world today. The case study of Serbia provides an example of the global effort to reform the rule of law and establish an independent judiciary and demonstrates the need to enshrine judicial independence not only within the content of legal documents but also in practice and implementation. Specifically, Serbia is used as an example to demonstrate that it is possible to establish an independent judiciary in a written constitution, but this does not ensure the judiciary will operate independently in practice. Additionally, recent laws passed in Serbia regarding the justice sector have yet to fully take hold. It is argued here that this is, in part, because of a lacking supportive legal and political culture. This again demonstrates that laws merely enacted on paper are not effective without a proper environment that is receptive to their adoption.

Serbia comes from a highly complex and complicated background that involves

a history of conflict, communism, and contested rule. Since the end of Milosevic's regime, Serbia has sought to strengthen the independence of the judiciary and enhance its role in advancing legal and judicial reforms. Serbia is currently sitting at the crossroads of two distinct frameworks, and is in the relatively early stages of implementing recently launched rule of law and judicial reform initiatives. Although Serbia has made significant strides towards establishing an independent democratic nation based on the rule of law and also in the development of the justice sector, the integrity of the justice system itself remains inadequate. Despite substantial institutional changes, along with amendments to the national legal framework, high levels of corruption exist within the justice and law enforcement systems, and the quality of services provided within the justice system remains low. The lack of success of new rule of law and justice sector legislation can be linked to the existence of a weak *de facto* independent judiciary, which is a small but important piece in the broader legal and political culture of the country.

A. Serbia's Historical Background

Modern day Serbia was not officially born as an independent state until 2006 when Montenegro declared itself independent. Prior to this, Serbia had been a part of the Socialist Republic of Yugoslavia until 1990, when it adopted a constitution in which it formally severed ties with socialist constitutionalism. The Constitution of 1990 guaranteed fundamental rights and freedoms of Serbian citizens.⁹⁴ It also established formal separation of powers and provided for an independent judiciary.⁹⁵ Unfortunately, the Constitution looked better on paper than it did in actual practice. These constitutional principles of independence and autonomy of the judiciary were never taken further beyond being principles on paper.⁹⁶ During the "Milosevic Era" the Constitution was little more than a common political instrument, and judges were pressured into deciding cases in a way that conformed to the desires of the executive and legislative authorities.⁹⁷ The existing ideology of the then existing political and state legal system was one that intended and understood the judiciary to be dependent and non-autonomous.⁹⁸

Serbia was part of the State Union of Serbia and Montenegro, which evolved from the Federal Republic of Yugoslavia, from 2003 to 2006.⁹⁹ When Montenegro declared its independence in May 2006, Serbia held a two-day referendum that

94. THE CONSTITUTION OF THE REPUBLIC OF SERBIA, Sept. 28, 1990, art. 1-2.

95. THE CONSTITUTION OF THE REPUBLIC OF SERBIA, Sept. 28, 1990, art. 9, 96.

96. REPUBLIC OF SERB. MINISTRY OF JUST., NAT'L JUD. REFORM STRATEGY 4-5 (2006) (The National Assembly of the Republic of Serbia adopted the National Judicial Reform Strategy for the period of 2006-2011) [hereinafter *2006 Strategy*].

97. *Jud. Reform Index for Serb.*, AM. B. ASS'N, CENT. EUR. & EURASIAN LAW INITIATIVE 2 (2005), available at http://www.americanbar.org/content/dam/aba/directories/roli/serbia/serbia_jri_2005_eng.authcheckdam.pdf [hereinafter *Jud. Reform Index for Serb.*].

98. *2006 Strategy*, *supra* note 96, at 5.

99. *Serb. Background*, AM. B. ASS'N, (Jan. 15, 2016), <http://www.americanbar.org/content/dam/aba/directories/roli/serbia/serbia-legal-system-eng.authcheckdam.pdf>.

ratified a new constitution to replace that of the Milosevic Era.¹⁰⁰ The new constitution of 2006 provides for establishment of the rule of law through “free and direct elections, constitutional guarantees of human and minority rights, separation of power, independent judiciary and observance of [c]onstitution and [l]aw by the authorities.”¹⁰¹ Article 4 specifically establishes separation of powers into three branches (legislative, executive, and judicial) and also explicitly provides for judicial independence.¹⁰² Also in 2006, the Ministry of Justice passed the National Judicial Reform Strategy in order to implement strategic reforms of the judicial system.¹⁰³ The main purpose of the strategy was to “[t]o regain the public trust in the Republic of Serbia judicial system by establishing the rule of law and legal certainty” through a judicial system that is independent, transparent, accountable, and efficient.¹⁰⁴ Unfortunately, as with the previous constitution and laws of Serbia, the new constitution and strategy have suffered from similar deficits of merely being words on paper and have faced challenges in actual implementation. Namely, the judiciary is still subject to political control and exhibits signs of lacking independence in practice.

B. Structure and Organization of Serbia’s Judiciary

The judiciary and court system in Serbia has its roots in the emergence of an independent constitutional monarchy that emerged in the second half of the 19th century after a prolonged period of Ottoman rule.¹⁰⁵ Serbia’s legal system and judiciary is based on a civil law inquisitorial system and has been influenced by the legal traditions of its European neighbors such as Germany, Austria, and France; the most significant and enduring influence on Serbia’s judicial system, however, has been the legacy of socialist rule in Yugoslavia.¹⁰⁶ The court system in Serbia is divided into two divisions—the courts of general jurisdiction and specialized courts.¹⁰⁷ The courts of general jurisdiction include the Basic, High, and Appellate Courts and the Supreme Court of Cassation, which is the highest judicial institution in the country.¹⁰⁸

Currently, Serbia has a national judicial system headed by the High Judicial Council, which is chaired by the Chief Justice of the Supreme Court of Cassation.¹⁰⁹ The High Judicial Council (HJC) was established as a constitutional institute in Articles 153–155 of the Serbian Constitution of 2006.¹¹⁰ The principle function of the HJC includes the selection, promotion, and discipline of judges,

100. *Id.*

101. THE CONSTITUTION OF THE REPUBLIC OF SERBIA, 2006, art. 3.

102. THE CONSTITUTION OF THE REPUBLIC OF SERBIA, 2006, art. 4.

103. *2006 Strategy*, *supra* note 96, at 3–4.

104. *2006 Strategy*, *supra* note 96, at 4.

105. *Jud. Reform Index for Serb.*, *supra* note 97, at 2.

106. *Jud. Reform Index for Serb.*, *supra* note 97, at 2.

107. *Jud. Institutions in Serb.*, ORG. FOR SECURITY & CO-OPERATION IN EUR. 1 (Jan. 15, 2016), <http://www.osce.org/serbia/82759?download=true> [*hereinafter* *Jud. Institutions in Serb.*].

108. *Id.* at 4.

109. Eugene J. Murret, *Jud. Reform in Serb.*, 94 JUDICATURE 28, 28 (2010) [*hereinafter* Murret].

110. Vesna Rakić Vodinečić, et al., *Jud. Reform In Serb* 47 (May 8, 2013).

proposing the judiciary budget, and nominating court presidents who are elected by the National Assembly.¹¹¹ The HJC was established to promote judicial reform and the independence of the judiciary; however, it has largely been unsuccessful in fulfilling these goals.

C. Justice Sector Reforms in Serbia

Since the end of Milosevic's regime, Serbia has sought to strengthen the independence of the judiciary in practice and enhance its role in advancing legal and judicial reforms.¹¹² Serbia's recent commitment to strengthening its rule of law and establishing a truly independent judiciary can be linked to its efforts in gaining membership to the European Union.¹¹³ The judiciary in post-socialist Serbia is regulated by a "package of laws on the judiciary," which was originally adopted in 2001.¹¹⁴ However, amendments to these laws in 2002 and 2003 shifted leading responsibilities to the legislative branches of government.¹¹⁵ This led to a reduction in judicial independence with the judiciary in fact becoming more dependent upon the government. However, with the amendment to the package in 2004, the judiciary regained some of its former institutional independence.¹¹⁶ In 2008, the Parliament approved a new package of laws that introduced substantive changes in Serbia's judicial system.¹¹⁷ This package includes the "Law on Organization of Courts, High Judicial Council, State Prosecutorial Council, and Seat and Territorial Jurisdiction of Courts and Public Prosecutor's Offices," which took effect January 1, 2010.¹¹⁸

The Judicial Reform Strategy adopted in 2006 [hereinafter referred to as 2006 Strategy] is primarily devoted to the reform of Serbia's court system. It laid out fundamental principles regarding the position of the judiciary within the justice system. Central to these principles was the need to "guarantee the independence and autonomy of the judiciary honoring the principle of the division of power based on the checks and balances between the three branches."¹¹⁹ The 2006 Strategy accused the former constitution of being an "unavoidable obstacle on the path to the establishment of the rule of law as the supreme value of the constitutional order" and stated the need for the new constitution to reflect new legal, political, and economic needs.¹²⁰ The 2006 Strategy put forward the framework for judicial reform focusing primarily on four key principles, including judicial independence, transparency, accountability, and efficiency spanning from 2006-2013.¹²¹ Each

111. Murret, *supra* note 109, at 28.

112. Interview with AnnaLou Tirol, Regional Director, Off. of Overseas Prosecutorial Dev. Assistance & Training, U.S. Dep't of Just., in Belgrade, Serb. (Apr. 6, 2012) [hereinafter Interview with AnnaLou Tirol].

113. *Id.*

114. *Jud. Reform Index for Serb.*, *supra* note 97, at 1.

115. *Jud. Reform Index for Serb.*, *supra* note 97, at 1.

116. *Jud. Reform Index for Serb.*, *supra* note 97, at 2.

117. *Jud. Reform Index for Serb.*, *supra* note 97, at 1.

118. *Jud. Reform Index for Serb.*, *supra* note 97, at 1.

119. *2006 Strategy*, *supra* note 96, at 5.

120. *2006 Strategy*, *supra* note 96, at 4-5.

121. *2006 Strategy*, *supra* note 96, at 9.

principle is further broken down into fundamental reform goals, three of which fall under each key principle and are designed specifically to address the challenges facing Serbia's judiciary.

On July 1, 2013, Serbia adopted a new National Judicial Reform Strategy [hereinafter referred to as the "New Strategy"] for the period of 2013-2018.¹²² This came after a failed reform effort launched in 2009.¹²³ The New Strategy is conceived as a five-year strategic framework, which sets forth key principles, their strategic objectives, and long-term guidelines for achieving the objectives. Where the previous 2006 Strategy identified four fundamental principles, the New Strategy identifies five key principles, including independence, impartiality, and quality of justice, competence, accountability and efficiency.¹²⁴ The strategy objective expands upon that of its predecessor, stating the current objective to include "[t]he improvement of the quality and efficiency of justice, strengthening the independence and accountability of the judiciary, with the aim of strengthening the rule of law, democracy, legal certainty, improving access to justice for citizens and restoring trust in the judicial system."¹²⁵

The New Strategy also calls for adoption of an Action Plan for implementation of the Strategy. On July 31, 2013, Serbia passed Resolution No. 700-6579/2013 on the Adoption of the Action Plan for the National Judicial Reform Strategy for the Period 2013-2018.¹²⁶ Further elaboration of particular measures and activities is carried out in the Action Plan, which is to be updated annually, based on an analysis of the previously achieved results.¹²⁷ Specifically, the Action Plan defines "strategic guidelines, measures and activities for the implementation of the Strategy; the competent authority responsible for implementing the activities; deadlines for completion of the activities; and sources of funds."¹²⁸

In addition to the numerous legislative reforms Serbia has taken to strengthen its rule of law and judicial independence, there have also been many policy and program initiatives by international agencies. In an effort to aid Serbia on its path to gaining EU membership, the United States has offered multimillion-dollar funding to help establish judicial reform and rule of law programs. The United States Agency for International Development (USAID) launched a five-year \$21.8 million project in October 2011 to strengthen Serbia's rule of law and help detect and prevent corruption.¹²⁹ This program—the Judicial Reform and Government

122. REPUBLIC OF SERB. MINISTRY OF JUST., NAT'L JUD. REFORM STRATEGY (2013) (National Assembly of the Republic of Serbia, on the session of the Seventh Extraordinary Session in 2013, held on July 1, 2013 adopted the National Judicial Reform Strategy for the Period of 2013-2018) [hereinafter *New Strategy*].

123. Misha Savic, *Serb.*, NATIONS IN TRANSIT 2014 543-46, (Rowman & Littlefield Publishers 2014).

124. *New Strategy*, *supra* note 122, at 3.

125. *New Strategy*, *supra* note 122, at 2.

126. REPUBLIC OF SERB. MINISTRY OF JUST., ACTION PLAN FOR THE NAT'L JUD. REFORM STRATEGY FOR THE PERIOD 2013-2018 (2013) (The Government of the Republic of Serbia, upon the proposal of the Ministry of Justice and Public Administration, on July 31th, 2013 passed the Resolution No. 700-6579/2013 on the Adoption of the Action Plan for the National Judicial Reform Strategy for the Period 2013-2018) [hereinafter *Action Plan*].

127. *Id.*

128. *Id.*

129. *Jud. Reform and Gov't Accountability Project*, USAID SERB., (Aug. 27, 2012), <http://en.jrga.org/o->

Accountability project—initiated by USAID, will support the independence of the judiciary, increase public awareness of judicial reforms, and strengthen the ability of the Serbian government’s independent agencies and civil society organizations to counter corruption.¹³⁰ Additionally, the Separation of Powers Program, executed by the East-West Management Institute (EWMI) under a contract with USAID, has been implemented as an international project in Serbia designed to deal with court administration reform and court financing.¹³¹

While the above programs are highly important in helping Serbia enhance its rule of law initiatives and strengthen its judiciary, the most recent and most significant institutional and structural change has come in the adoption of a new Criminal Procedure Code. As previously stated, Serbia is based upon a civil law inquisitorial model. In September of 2011, Serbia passed a new Criminal Procedure Code, which went into effect in early 2013, moving its legal system from an inquisitorial model to a more American adversarial model.¹³² The new CPC incorporates adversarial hallmarks such as cross-examination, expanded cooperating agreements, prosecutor-led investigations, and the concept of plea-bargaining.¹³³

Perhaps most importantly, the new CPC involves changes to the role of judges, whereby judges will no longer serve conflicting roles as both investigator and arbitrator, but rather they will act only as neutral arbitrators, resolving disputes between parties based on evidence presented.¹³⁴ In doing so, judges are effectively removed from the role of inquisitor and restored to the role of arbitrator. The CPC that had originally been established in 2001 outlines two investigative stages, police investigation and court investigation, with the investigative judge taking the leading role in the court investigation phase.¹³⁵ Additionally, the judge also had the leading role at trial, with the authority to examine issues beyond the parties’ motions, which would seem contrary to the notion of the impartiality of judges. Prosecutors may now conduct investigations against both identified and unknown subjects, while the defense may also independently carry out its own investigations.¹³⁶ In an effort to increase efficiency, the new CPC also expands the use of plea-bargaining, the use of cooperating witnesses, and summary proceedings. While the new CPC looks good on paper, putting it into practice may prove to be more difficult. It is too early to effectively evaluate the results from this novel change, however it can be anticipated that a great deal of training and education programs will be necessary for effective implementation.

Given that Serbia has adopted a constitution which establishes judicial independence and guarantees human rights and minority rights, these legislative and policy reform efforts are intended to help implement these constitutionally established elements in practice. However, this has been a slow process so far and

projektu/.

130. *Id.*

131. Murret, *supra* note 109, at 29.

132. Interview with AnnaLou Tirol, *supra* note 112.

133. Interview with AnnaLou Tirol, *supra* note 112.

134. Interview with AnnaLou Tirol, *supra* note 112, at 4.

135. Interview with AnnaLou Tirol, *supra* note 112, at 1.

136. Interview with AnnaLou Tirol, *supra* note 112, at 1.

Serbia continues to face challenges with regard to the independence of the judiciary, corruption, and human rights violations adjudicated before the European Court of Human Rights.

D. Evaluating the Legislative Justice Sector Reforms in Serbia

While Serbia's Constitution of 2006 includes fundamental principles like the rule of law, separation of powers among three branches of government, and judicial independence, serious gaps in these areas have been identified, mainly in how they actually operate in practice. Although Serbia has made significant strides with regard to its justice sector reforms, there are still many challenges and failures that are inherent in Serbia's legal system. Namely, while the Constitution provides for an independent judiciary, there are insufficient protections to ensure this is carried out in practice. Additionally, the appointment of judges remains politicized, judges are still subject to improper outside influence, and judicial salaries remain low, thereby producing an environment conducive to corruption.¹³⁷ According to Freedom House Nations in Transit Report for 2014, Serbia's judiciary continues to suffer from inefficiency, political influence, and judicial bias.¹³⁸ Despite the number of substantive legislative and constitutional reforms that have taken place in Serbia since 2006, including the adoption of a new Constitution, Serbia's Judicial Framework and Independence Score has remained unchanged at 4.50 since 2008.¹³⁹ Moreover, this score actually decreased from 4.25 in 2006 to its current level at 4.50.¹⁴⁰ Thus, while Serbia has no doubt made significant strides in reforming its judicial system through the adoption of new legislation, clearly such legislation has not yet gone beyond the four corners of the paper on which it is written. That is, such legislative reforms have not yet taken hold and seen success in practice.

The European Commission's Progress Report of Serbia for 2014 found that the constitutional and legislative framework still leaves room for undue political influence affecting the independence of the judiciary.¹⁴¹ The report indicated that some judges from higher courts were confronted with direct attempts to exert political influence over their daily activities.¹⁴² It also states that while the impartiality of judges is ensured through the constitutional and legal framework, implementation in practice has been hindered by not randomly allocating cases, providing a scope for circumventing the system.¹⁴³ The Report suggested constitutional amendments that would reform the method of election for HJC members along with amendments that would allow for judicial review of dismissal decisions in order to "strengthen the independence, representativeness and hence

137. See generally Interview with AnnaLou Tirol, *supra* note 112, at 1.

138. Savic, *supra* note 123, at 546, 556.

139. Savic, *supra* note 123, at 543, 546.

140. Savic, *supra* note 123, at 543. (The ratings are based on a scale of 1 to 7, with 1 representing the highest level of democratic progress and 7 the lowest. The Democracy Score is an average of ratings for the categories in a given year.)

141. See generally European Commission, *Serbia Progress Report 41*, (Oct. 2014), http://ec.europa.eu/enlargement/pdf/key/documents/2014/201401108-serbia-progress-report_en.pdf.

142. *Id.*

143. *Id.*

legitimacy of these self-governing bodies.”¹⁴⁴

The new Constitution of 2006 does not regulate grounds for discharge of a judge, which results in legislators having a wider margin for prescribing these grounds and allows them to be easily changed.¹⁴⁵ This could have detrimental effects on de facto judicial independence because it would allow legislators to eliminate judges that do not conform their decisions to the desires of the national legislature. Additionally, the new constitution does not automatically provide for permanency of judges upon appointment. Instead, it provides that judges’ first appointment to judicial office shall be for a term of three years and then they may be “re-elected” by the High Judicial Council for life.¹⁴⁶ This is a significant problem for ensuring de facto judicial independence. Recall Feld and Voigt’s de facto measure, which sets out judicial tenure as an indicator of de facto independence. If judges are subjected to re-election after only three years, this leaves room for retribution against judges for their decision-making.

In fact, Judges who were originally appointed to life terms under the 1990 Constitution were subjected to re-election. During the re-appointment procedure in 2009, more than 800 judges were not re-appointed.¹⁴⁷ However, following a 2012 Constitutional Court ruling, 500 of the 877 officials who appealed their non-reappointment were re-instated.¹⁴⁸ The reappointment procedure was carried out in a non-transparent way, which significantly threatened the independence of the judiciary,¹⁴⁹ particularly in regard to de facto judicial independence.

According to the new Judicial Reform Strategy, the reappointment of judges and prosecutors in 2009 was conducted by a non-transparent procedure, and the judicial network was assessed as unsuitable because of shortcomings in the legal framework, which insufficiently guarantees the independence of judges and autonomy of public prosecutors.¹⁵⁰ The New Strategy also indicates there is a lack of transparency in the work of the State Prosecutorial Council and the High Judicial Council.¹⁵¹ In addition to the adoption of the New Strategy, which was designed to address these shortcomings and challenges, a Strategy Implementation Commission led by the Ministry of Justice was established in September 2013.¹⁵² This Commission was charged with monitoring and measuring progress in the implementation of the 2013-2018 national Judicial Reform Strategy and the related Action Plan.¹⁵³ Unfortunately, the commission has not yet been instrumental in securing timely and adequate implementation of judicial reform.¹⁵⁴

The newly reformed judiciary has also failed to uphold constitutionally established human rights. According to data from the ECHR, in 2009 Serbia was

144. *Id.*

145. VODINELIĆ, *supra* note 110, at 44.

146. VODINELIĆ, *supra* note 110, at 45, 62.

147. VODINELIĆ, *supra* note 110, at 44, 94.

148. Savic, *supra* note 123, at 555.

149. VODINELIĆ, *supra* note 110, at 94.

150. *New Strategy*, *supra* note 122, at 1-2.

151. *New Strategy*, *supra* note 122, at 2.

152. European Commission, *supra* note 141, at 40-41.

153. European Commission, *supra* note 141, at 40-41.

154. European Commission, *supra* note 141, at 40-41.

found guilty of human rights violations in 16 cases, the majority of which dealt with the court's failure to protect individual rights and can be traced to the lack of de facto independence of the judiciary.¹⁵⁵ In 2010, the number of cases dropped to 9; 2011 saw an increase of 3 cases with a total of 12; but most notably, all of the violations were classified under the same categories of human rights violations.¹⁵⁶ These cases included violations of right to a fair trial, right to liberty and security, right to effective remedy, protection of property, and the length of proceedings; all of which are constitutionally protected. The year of 2014 saw another increase in violations with the number rising to 18 cases.¹⁵⁷ Again, the majority of judgments were either for violation of the right to a fair trial or the violation of the right to an effective remedy due to the non-enforcement of domestic judgments.¹⁵⁸ The failure of the judiciary to protect and uphold these basic human rights established by law in Serbia has weakened the rule of law (as these are also common elements used in thick, or substantive rule of law definitions) and respect for human rights.

Serbia has made progressed by adopting further legislation including amendments to the law on the organization of courts, the law on judges and the law on public prosecution offices, along with creating a new network of courts of general jurisdiction that started operating in January 2014.¹⁵⁹ Additionally, through adoption of the New Strategy and the accompanying Action Plan, Serbia has attempted to implement its legislative and constitutional reforms in practice. Unfortunately, Serbia has not yet been successful in this. Not only does the implementation of these comprehensive reforms to the judicial system and rule of law in Serbia require a substantial amount of training and educational programs, but it also requires the changing of long held traditional beliefs and attitudes by the judiciary as well as the executive and legislative branches regarding the role and position of the judiciary in the system.

As a result, Serbia serves as an example of the fact that while it is possible to establish an independent judiciary in the constitution and laws of a country, this does not ensure judicial independence in practice. Based on the results obtained from the quantitative analysis, it is de facto rather than de jure judicial independence that is most important for establishing the rule of law. As such, it is unlikely that Serbia will see improvements in the strength of its rule of law, including a reduction in human rights violations, until it successfully establishes de facto judicial independence. The reason these legislative efforts have failed in Serbia is primarily because of the lack of a strong de facto independent judiciary to

155. European Court of Human Rights [Eur. Ct. H.R.], Statistical Information, Table of Violations, *Violations by Article and by State*, at 143 (2009), <http://www.echr.coe.int/Pages/home.aspx?p=court/annualreports&c=>.

156. European Court of Human Rights [Eur. Ct. H.R.], Statistical Information, Table of Violations, *Violations by Article and by State*, at 149 (2010), <http://www.echr.coe.int/Pages/home.aspx?p=court/annualreports&c=>; European Court of Human Rights [Eur. Ct. H.R.], Statistical Information, Table of Violations, *Violations by Article and by State*, at 157 (2011), <http://www.echr.coe.int/Pages/home.aspx?p=court/annualreports&c=>.

157. European Court of Human Rights [Eur. Ct. H.R.], Statistical Information, Table of Violations, *Violations by Article and by State*, at 175 (2014), http://www.echr.coe.int/Documents/Annual_Report_2014_ENG.pdf.

158. European Commission, *supra* note 141, at 45.

159. European Commission, *supra* note 141, at 40.

implement and uphold the new constitutions and legal codes that have been adopted pursuant to the rule of law reform efforts.

IV. CHALLENGES TO IMPLEMENTING JUSTICE SECTOR LEGISLATION IN TRANSITIONING COUNTRIES

The results of the quantitative analysis demonstrate that judicial independence, particularly de facto judicial independence, is a significant factor in strengthening the rule of law. Therefore, this section argues that de facto judicial independence is a better indicator of the rule of law than de jure independence. The key to establishing judicial independence is not only enshrining judicial independence within the content of legal documents such as constitutions and statutes, but also to ensure the independence of the judiciary in practice. Furthermore, judicial independence is not interchangeable with the rule of law, nor should it be considered a component in measuring the rule of law because this results in its importance to the rule of law being undermined. Rather, judicial independence must be analyzed separately from the rule of law in order to better assess the conduciveness of the legal environment and whether it is ready to support legislative rule of law reforms. Although de facto judicial independence is but one piece of the broader legal environment, it is argued here that it is an essential one. Additionally, as the results of the quantitative analysis demonstrate, the type of legal system and characteristics of a democratic regime are also key pieces of an environment capable of supporting a strong rule of law.

Constructing an Environment Conducive to Supporting Legislative Rule of Law Reforms

Modern law and development in transitioning countries has generally called for enhancing legal systems and democratic political systems by transplanting Western legal institutions and codes into these countries.¹⁶⁰ Research suggests that such law and development efforts have failed because of the lack of an appropriate legal culture.¹⁶¹ That is, there are a myriad of factors other than the actual written law itself that affect whether the written law will be successful. Brian Tamanaha refers to these other factors as the “connectedness of law principle” indicating some of these factors to include legal institutions; cultural attitudes toward law; history, tradition, and culture of society; the political system; and geo-political surroundings (hostile or unstable neighbors).¹⁶² The analysis advanced here builds on the “connectedness of law principle” advanced by Tamanaha and argues, based upon the quantitative results obtained, that a supportive environment for the rule of law includes a de facto independent judiciary, a legal system more closely aligned with common law, and a political system that is more characteristic of democracy.

To date, the transplanting of legal codes into transitioning countries has

160. Tamanaha, *supra* note 8, at 209, 211.

161. Tamanaha, *supra* note 8, at 213.

162. Tamanaha, *supra* note 8, at 214.

amounted to little more than mere empty words put on paper.¹⁶³ An emerging explanation for these failures has indicated the lack of a supportive legal culture and has emphasized the fundamental fact that “context matters.”¹⁶⁴ This “context” or legal and political culture includes several important factors. First, there must be the presence of a constitution that provides the basic structure and rules of the system, how the government is to carry out its responsibility, and embody substantive rules that authorize and limit governmental powers.¹⁶⁵ However, as is often the case, governmental actors in practice do not adhere to the constitution. Therefore, more is required. The second important factor is an independent judiciary capable of judicial review.¹⁶⁶ Because judicial institutions are important to the fabric of a legal system, a corrupt or dysfunctional judiciary can debilitate an entire legal system.¹⁶⁷ Moreover, the judicial system must include protections that ensure the independence and efficiency of the judicial system as a whole in practice.¹⁶⁸ As it relates to the judiciary and legal culture, Tamanaha describes the “connectedness of law principle” in action this way:

Dysfunctional, oppressive, or unfair legal systems breed popular distrust and contempt for the law. This, in turn, contributes to the incapacity of the legal system, which further generates fear, avoidance, or disregard for the law. The trap can be avoided if courts consistently function over time in ways that meet the needs of citizens, but negative cultural attitudes toward law and judge are slow to change.¹⁶⁹

A third factor is the characteristics of the political system. Liberal democracies tend to be more peaceful in nature and are less likely to go to war with one another.¹⁷⁰ While the objective of most nation-building efforts is to make violent societies more peaceful and not necessarily more democratic, the two typically accompany one another, and political reform efforts usually involve some type of democratization efforts.¹⁷¹ Fourth is the factor of legal origin or type of legal system, a factor that has recently entered the research debate arena.¹⁷² It is suggested that common law systems tend to produce better quality substantive legal outcomes.¹⁷³ Furthermore, in contrast to the civil law system, the common law approach has been upheld as being both transparent and accountable and has offered a better opportunity for establishing an independent judiciary, which has been viewed as a core element of the rule of law and essential to providing the

163. See generally Lawrence M. Friedman, *Legal Culture and Social Development*, 4 L. & SOC'Y REV. 29 (1969).

164. Tamanaha, *Supra* note 8, at 211, 219.

165. Rodriguez, *supra* note 12, at 1475.

166. Rodriguez, *supra* note 12, at 1476-78.

167. Tamanaha, *supra* note 8, at 222.

168. Tamanaha, *supra* note 8, at 222.

169. Tamanaha, *supra* note 8, at 224.

170. JAMES DOBBINS ET. AL., BEGINNER'S GUIDE TO NATION-BUILDING 189-190 (2007).

171. *Id.* at 189.

172. Frank B. Cross & Dain C. Donelson, *Creating Quality Courts*, 7 J. EMPIRICAL LEGAL STUD. 490, 492 (2010).

173. *Id.*

necessary foundation for economic growth.¹⁷⁴

This Note argues that these four factors, while not exhaustive, are nonetheless highly important in creating an environment that is conducive to supporting legislative rule of law reform efforts. Consequently, it is contended that legislative reforms have failed primarily because of the lack of judicial independence. In particular, the lack of de facto judicial independence results in a weakly established rule of law, and legislative justice sector reforms do not take hold in this environment. Furthermore, such legislative reforms have also failed resulting from the lack of a legal and political environment supportive of the rule of law. Specifically, political regimes that exhibit democratic characteristics and have legal systems more closely aligned with the common law legal tradition result in a strengthened rule of law. An environment that embodies the four factors discussed above is more conducive for supporting legislative rule of law reform efforts.

Tamanaha's "connectedness of law principle" is supported by the results obtained from the earlier quantitative analysis. Judicial independence, when tested as an overall score, was a statistically significant predictor of the rule of law. Furthermore, the argument that de facto judicial independence provides a better indicator of the strength of the rule of law was also substantiated. When judicial independence was tested as two separate indicators, de facto judicial independence was highly significant while de jure judicial independence did not come close to being statistically significant. This supports the claim that it is possible to have a constitutionally established judiciary, but does not guarantee its independence in practice, and also does not help to strengthen the rule of law in practice.

The results of this analysis also suggest that a system based on the common law legal tradition provides a more conducive environment for the rule of law to prevail. This is not to say that some level of the rule of law cannot exist in a country that has a legal system based on something other than common law or has a mixed legal system, but rather that the rule of law will be stronger in countries with a legal system based upon common law. Therefore, this tends to support the claim that a legal system, which is more closely aligned with the common law legal tradition will provide a more supportive legal culture for legislative rule of law reform.

Although the type of political regime was not statistically significant, it did appear to have some effect on the level of the rule of law. Because security effectiveness and political legitimacy to some extent represent characteristics of the type of political regime in power, the fact that they were statistically significant tends to support the notion that countries classified as a democracy are more likely to have a strengthened rule of law. Political legitimacy deals with regime/governance inclusion and includes factors that to some degree measure the repressiveness of a regime. A more repressive regime would be characterized as one that is based upon authoritarian rather than democratic principles. Security effectiveness measured the amount of political violence and armed conflict in a country. This too could be characteristic of the type of regime in power since there is a large body of research that argues that democratic regimes are less likely to

174. Phillips, *supra* note 14, at 919.

initiate war or use military force than are authoritarian regimes.¹⁷⁵

Thus, if the amount of conflict and repressiveness of the regime are taken as indicators of the *type* of regime that is in power, the negative relationship between these variables and the rule of law would then lend support to the fact that the type of political regime does affect the level of the rule of law. That is, a country with a greater degree of repressiveness and more involvement in armed conflict or political violence would be more likely to be characterized as an authoritarian regime. As a result, the negative relationship between these two variables and the rule of law means that as scores increase in terms of conflict and repressiveness (indicative of non-democracy), the strength of the rule of law decreases. Therefore, it may be that the type of political regime in power does affect the rule of law but that *characteristics* of a political regime such as amount of conflict (security effectiveness) and government inclusion/repressiveness (political legitimacy) are better indicators of the strength of the rule of law in a given country. This means that a political culture that is more characteristic of a democracy provides an environment more receptive and supportive of the rule of law, and legislative reforms will be more likely to take hold.

V. CONCLUSION

Thomas Carothers categorizes rule of law reform into three main categories. “Type one” reform focuses on the laws themselves by revising laws and codes; “type two” involves strengthening law-related institutions to enhance efficiency and accountability; and “type three” concentrates on the government’s compliance with the law, a key step being the achievement of “genuine” judicial independence.¹⁷⁶ This Note argues that types one and two will not be successful if a “genuine” or de facto independent judiciary is not first established. Based on the results obtained from the quantitative analysis and an examination of failed legislative reforms in Serbia, this Note concludes that successful legislative rule of law reforms must take place within the context of a supportive legal, political, and social environment. Legislative efforts to reform the rule of law in transitioning countries cannot be successful until the independence of the judiciary is actually ensured in practice. Additionally, a more conducive environment in which such reform efforts are more likely to take hold is one that is closely aligned with a common law legal system and has characteristics of democracy.

However, it is important to note that although factors such as de facto judicial independence, legal system, and political regime characteristics are important to constructing a supportive environment, these factors are not exhaustive. It is likely more useful to view these factors as necessary, but not sufficient, for establishing an environment supportive of legislative rule of law efforts. Challenges still remain as to history, tradition, and cultural attitudes of society. For the rule of law to exist, people must identify with the law and perceive it to be worthy of ruling the populous because it reflects their shared cultural beliefs and values and serves their

175. Hagan, *supra* note 88, at 185.

176. Carothers, *supra* note 3, at 7-8.

interests.¹⁷⁷ Unfortunately, in many transitioning nations the government is distrusted, there are negative views towards the law where legal officials are viewed as corrupt and where the law has had a history of enforcing authoritarian rule.¹⁷⁸ A culture of societal distrust for the legal system presents significant challenges to legislative reform efforts.

Additionally, merely transplanting Western laws, codes, constitutions, and ideals also raises challenges. Constitutionalism and democracy mean something different in a variety of countries.¹⁷⁹ Simply exporting an American system of laws and ideals to a country with an entirely different history, tradition, and set of cultural beliefs will likely not be the most successful approach and will probably lead to more disappointing results. There are obviously features of the American system that have proved to be more conducive to supporting a strong rule of law. However, the key challenge will be striking a balance between establishing those factors that have proven successful and yet allowing them to be adapted to a particular legal, social, and political culture.

Despite the nuanced challenges of moving forward with rule of law development legislation, it seems to be clear that prior to a successful legislative rule of law reform, a country first needs a supportive environment in place. This means that merely going from country to country drafting new laws and constitutions will not produce the intended results. Without such a supportive environment, the laws are nothing more than empty words worth only the paper upon which they are written.

177. Tamanaha, *supra* note 4, at 246-47.

178. Tamanaha, *supra* note 4, at 247.

179. Rodriguez, *supra* note 12, at 1479.