Constitutions Without Protection?

Judicial Strength in a State of Emergency

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Abstract. To what extent is the judiciary able to act as an effective guardian of constitutional provisions during the state of emergency? Modern democracies face a dilemma which is to balance state powers in times of crises. To deal efficiently and effectively with exceptional situations, governments are able to declare the state of emergency to change the political structure in favor of the executive branch. The role of the judiciary – as a central institution to control executive action – is hardly known once it comes to the state of emergency. We address the role of the judiciary measuring the strength of the legal system in times of crisis by coding constitutional emergency provisions in 83 democracies from 2000 to 2010.

Based on a theoretical framework linking the literature on the state of emergency to the judiciary, we compare the *de jure* judicial strength in an emergency across legal traditions and continental regions. Moreover, we analyze the *de facto* influence of the judiciary applying linear regression with region-year fixed effects. To do so we linking our measure of judicial strength to measures on executive compliance with legal decisions and legislative oversight of the executive when implementing legal decisions from the Varieties of Democracy Project (V-Dem). We also assess the relationship between the protection of civil liberties and the strength of the judiciary. Results show that the judiciary in countries with a common law tradition has a stronger position than the judiciary in civil law countries. Civil liberties are better protected in states with a strong judiciary while executive compliance is frequent in states with a weaker judiciary. A strong judiciary contributes to a healthy political system balancing state powers in times of crises.

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1 Introduction

To what extent is the judiciary an effective guardian of constitutional provisions during the state of emergency? A state of emergency is "a *de facto* situation, which, because of its nature, prompts the state to temporarily change some state structures so that it can more effectively and efficiently address the situation at hand" (Zwitter, 2012, 7).

The definition includes a dilemma for modern democratic constitutions. Constitutions are designed to balance the relationship between the executive, the legislature and the judiciary in order to prevent a possible misuse of state power. But once the state faces a crisis, the need for checks and balances contradicts the need for an effective and an efficient response in order to deal with extraordinary circumstances. Therefore, a democratic state faces the dilemma that "[t]he rights and protections it provides and preserves can prevent the government from responding efficiently and energetically to enemies that would destroy those rights and, perhaps, even the constitutional order itself" (Ferejohn and Pasquino, 2004, 210). Accordingly, the motive for establishing emergency provisions is to reduce the degree of democratic control in order to efficiently respond to extreme situations with the objective to ensure the viability of the democracy (Zwitter, 2012, 12; Ferejohn and Pasquino, 2004, 210). This process can lead to a suspension of fundamental constitutional rights limiting mechanism of democratic control. This is why judges, as guardians of the constitution, are of particular importance in a state of emergency. Nevertheless, fairly little is known about the role of the judiciary in those times.

To address this gap we compile novel data to assess the strength of the judiciary in a state of emergency in 83 democracies from 2000 to 2010. We argue that the judiciary is a vital player in times of crises but the strength of the judiciary in an emergency may vary depending on a countries legal tradition. Judicial strength is the sum of the protection of the judiciary and the scope of judicial action in extraordinary circumstances.

We claim nothing more than to present first insights of an exploratory study on the role of the judiciary in a state of emergency. In what follows we review the literature on

the state of emergency to link this research to theoretical considerations on the judiciary in uncertain times. Afterwards, we outline our data collection to illustrate how we conceptualize the strength of the judiciary in a state of siege.[1] In the following empirical analysis we compare the *de jure* strength of the judiciary across legal traditions and continental regions before we assess the *de facto* influence of the judiciary using linear regression with region-year fixed effects. Results show that the judiciary is stronger in countries following a common law tradition once a state of emergency is proclaimed. Furthermore, a stronger judiciary is embedded in a healthier political system as possible executive non-compliance with legal decisions is safeguarded by legislative oversight and a strong acceptance of the rule of law protecting civil liberties. The conclusion summarize these finding and presents avenues of further research.

This has implications for understanding the balance of power in a sate of emergency. The judiciary is stronger than conventional wisdom suggests (see e.g. Gross and Aoláin, 2006, 63) but dependent on a countries legal tradition.

2 Constitutional Law & the State of Emergency

From a conceptual point of view, a democracy can face two diametrically opposed situations: first, the situation under ordinary conditions where the three fundamental principles on which a democracy's legitimacy rests – equality, freedom, and control (Bühlmann, Merkel and Wessels, 2008) – are balanced. Second, the situation under exceptional circumstances, triggered by a man-made disaster (e.g. a massive economic crisis, a terrorist attack, or an act of war) or a natural disaster (e.g. a hurricane, flood, or an earthquake) where the well-balanced structure must be partly suspended by the state in order to deal with the exceptional situation. In the state of normality the basic principles - freedom and equality - are guaranteed by multilayered control mechanism like

[1] We use the state of siege, the state of exception, and the state of emergency as synonyms (Agamben, 2004, 9; Gross and Aoláin, 2006)

the judiciary (Bühlmann, Merkel and Wessels, 2008, 13), while in the state of exception these three principles become questioned in favor of a stronger executive capacity.

In a state of emergency democratic constitutions are partly suspended, especially with regard to individual rights and civil liberties (Bjørnskov and Voigt, 2016*b*)[2]. Hardly anything is known about the role of the judiciary as the basic institution to monitor the suspension of constitutional provisions: "Most constitutions are silent on this matter" (Gross and Aoláin, 2006, 63). Despite the fact that this is an unprecise claim, as we will show in our analysis, there is only limited research on this topic (Bjørnskov and Voigt, 2016*a*, 11; Scheuerman, 2006, 265-270). The following two parts will deal with a theoretical examination of the state of emergency and the role of the judiciary in the state of emergency.

2.1 The State of Emergency

Research on the state of emergency has noticeable increased since the beginning of the 21th century, corresponding with the terrorist attacks of September 11, 2001. There is a vast research effort by legal scholars (Ackerman, 2004; Dyzenhaus, 2006; Gross, 2003; Gross and Aoláin, 2006), but as Scheuerman (2006, 258) points out in his comprehensive literature review, there is only a small effort to link the theoretical findings from the legal literature to the empirical research in the social sciences.

Some aim to address this gap, for example Keith and Poe (2004) as well as recently Bjørnskov and Voigt (2016*b*, 2016*a*) or Zwitter, Fister and Groeneweg (2016). In a series of essays, based on a comprehensive dataset summarizing 411 constitutions of 159 countries over a period from 1950 to 2011, Bjørnskov and Voigt (2016*b*) ask which factors determine the inclusion of emergency provisions in constitutions and which political actor receive how much additional power through these emergency provisions (Bjørnskov and Voigt,

[2] Concerning the suspension of basic rights in the state of emergency Humphreys (2006, 678, Fn. 2) lists the following international regulations: "International Covenant on Civil and Political Rights (ICCPR; entered into force 1976), Art. 4; European Convention on Human Rights (ECHR; entered into force 1950), Art. 15; American Convention on Human Rights (ACHR; entered into force 1978), Art. 27."

2016*a*). Among other findings, they show that as time passes the executive collects more power in an emergency. Moreover, if the government came to power after a coup, it is more likely that emergency provisions become part of a respective country's constitution. Zwitter and his colleagues designed a database, collecting declarations of states of emergency in countries around the world. This database was recently extended covering the period from 1995 to 2015 (Zwitter, Fister and Groeneweg, 2016). In addition Zwitter and colleagues published studies on the theory of the state of emergency (Zwitter, 2012), as well as case studies on the state of emergency and the Arab Spring (Zwitter, 2015*a*,*b*).

What defines the state of emergency? As mentioned a state of emergency is "a de facto situation, which, because of its nature, prompts the state to temporarily change some state structures so that it can more effectively and efficiently address the situation at hand" (Zwitter, 2012, 7).

There are two models of the state of emergency. The first is the ancient model of the Roman dictatorship, where in times of external threats the consuls appointed a dictator for a period of six month the most: "The dictator was authorized to suspend rights and legal processes and to marshal military and other forces to deal with the threat of invasion or insurrection for the purpose of resolving the threat to the republic. When he finished this job he was expected to step down, his orders were terminated and their legal effects ended, and the status quo ante was to be restored" (Ferejohn and Pasquino, 2004, 212). The second model is connected to the first one and can be called the "neo-Roman model" (Ferejohn and Pasquino, 2004). The most important distinction between both models is that "the Roman dictator was chosen from among men of special virtues and abilities" whereas in the new model "the person who is to wield emergency powers enjoys a kind of popular or democratic mandate" (Ferejohn and Pasquino, 2004, 213). From a normative point of view the ancient model, with its limited time frame and the regulation that all orders loose their power with the end of the dictatorship, was a "feasible means by which a free and democratic society may preserve itself and its constitutional order in

extreme situations" (Gross and Aoláin, 2006, 36). This is in line with Agamben (2005) who points out that the first modern definition of the state of emergency was written in the degree of the French constituent assembly in 1791 with a focus on times of war but the degree spread covering crises in times of peace as well. As a result "the modern state of exception is a creation of the democratic-revolutionary tradition and not the absolutist one" (Agamben, 2005, 5).

Based on these considerations a state of emergency can be declared when there is an exceptional situation of crisis (Condition of Necessity) within which the state has to react fast and in a certain way (Condition of Concreteness and Urgency) to protect the state's institutions and the citizens (Zwitter, 2012, 7-9). In other words, the state of emergency is "aimed at resolving the threat to the system in such a way that the legal/constitutional system is restored to its previous state" (Ferejohn and Pasquino, 2004, 210). Furthermore, the state of emergency has to be limited in time, since "the state must restore his normal structures again as otherwise the exception becomes the rule" (Zwitter, 2012, 10).

But what happens with the state during a state of emergency? Answering this question, we have to consult the classic and contemporary scholars Giorgio Agamben (2004, 2005), Carl Schmitt (1989, 2005), and Hans Kelsen (2002). During a state of emergency special constitutional provisions partly dissolve the constitutionally provided balance of power, in order to increase the executive's power to ensure the viability of the state. Therefore the state of exception is a legal state, where a minimum of formal legal-validity corresponds to a maximum of actual executive power (Agamben, 2004, 47). Agamben (2004, 45) describes the topological structure of the state of emergency as standing outside the legal system but simultaneously being a part of it, since the state of emergency defines the boundaries of the legal system by suspending the system (Agamben, 2004, 11).

What is the foundation for taking decisions when there is a situation inside as well as outside the legal order? The concept of the dictatorship according to Carl Schmitt offers some answers. In this regard, the actor who can decide on the state of emergency is the sovereign (Schmitt, 2005, 5). Accordingly, the question of what to do transforms from

an issue of law into an issue of power in a state of emergency (Schmitt, 2005, 13). Only the dictator is able to decide what is an exception and what is "normal". There are two concepts of dictatorship in the work of Schmitt. First, the provisional or commissarial dictator who suspend the constitution in times of emergency but still rests on it and second, the sovereign dictator who abrogates the whole constitution in order to create a complete new one (Schmitt, 1989, Chap. IV; Agamben, 2004, 42-45). Since the following analysis will rest complete on current democracies, the focus should rests on the first concept of "dictatorship."

Within this concept the actions of the dictator can be described as *material emergency law*, defined as "ad hoc created norms on the basis of emergency powers granted by formal emergency law" (Zwitter, 2012, 13). In other words, the executive power in a state of emergency still rests on the constitution, but the dictator is free to act without limitations. Besides the material emergency law there is the *formal emergency law*, defined as "constitutional norms determining the procedures for initiation, execution and termination of the emergency powers" (Zwitter, 2012, 13). This "Kelsenian viewpoint" (Zwitter, 2012, 13) describes an extension of the executive power to face exceptional circumstances but resting on the legal system and being controlled by it. Therefore, both the state of normality and the state of emergency are integral parts of the same legal system, with the consequence that all legal provisions that are not explicitly suspended by the declaration of the state of emergency are still valid in times of emergency (Zwitter, 2012, 15). This is connected to the Kelsenian *identity thesis* which states that the state is obliged to act within the legal order otherwise the state acts outside of it (Kelsen, 2002, § 48 ; Zwitter, 2012, 15). Thus "the norms of a state of exception are still guided by the principles of democracy and rule of law, because they are the only political norms that guaranty justice" (Zwitter, 2012, 15).

For democracies, which are of interest here, the Kelsenian viewpoint is more applicable than Schmitt's (Zwitter, 2012, 17-18). The reason is twofold: first, authoritarian regimes do not know a system of checks and balances and second, within the most democratic constitutions emergency provisions are incorporated and therefore reviewable by the

judiciary, just as every other constitutional provision (Ferejohn and Pasquino, 2004, 215). Ensuring justice in modern democracies is delegated to the judiciary. However, what is the judiciary's role in the state of emergency, when executive powers expand? Before answering this question, it is important to specify the role of the judiciary within the different legal traditions.

2.2 Legal Traditions and the Judiciary in a State of Emergency

In general, the judiciary is obliged to act as the stronghold to insure rights and freedom against abuse or misuse of power by the state in a democracy. Especially the highest courts with constitutional review power – constitutional courts or supreme courts – can be characterized as a general insurance for citizens and political minorities against an empowered state (Ginsburg, 2003; Vanberg, 2015, 172-175). This is mostly because of the courts ability to review administrative acts, ordinary laws, as well as constitutional provisions. Since there are different types of emergency situations (e.g. economic crisis, natural disaster, internal riot, external threats), courts equipped with a variety of tools for judicial review are well suited to deal with possible state excesses in times of crisis (Scheuerman, 2006, 266). Moreover, individual rights and civil liberties become limited in a state of emergency which is why the judiciary must be critical reviewing executive action. Bjørnskov and Voigt (2016*a*, 11) argue that the judiciary is especially important in the post-emergency period, while its role during the emergency is questionable. This is what Oren Gross (2003, 1034) characterizes as a "systemic failure" because "in state of emergency, national courts assume a highly deferential attitude when called upon to review governmental actions and decisions."

But also in a state of emergency, different democratic systems provide for different competencies of the judiciary, which are barely studied by social scientist. Therefore it is important to differentiate between different legal cultures and traditions, in order to fully understand the role of the judiciary in a state of emergency. In this regard, there are

two dominant legal traditions among western countries and among countries adopting the legal traditions from western democracies: the common law tradition and the civil law tradition (Dainow, 1966). Legal systems in general have the aim to regulate the social coexistence and to harmonize possible social conflict. The legal traditions define the way how these systems are structured because they are characterized by a "set of deeply rooted, historically conditioned attitudes about the nature of law, about the role of law in the society and the polity, about the proper organization and operation of a legal system, and about the way law is or should be made [and] applied" (Tetley, 2000, 682).

The most important distinction between the civil law tradition and the common law tradition lies in their foundations. The civil law tradition is based on legislation with written constitutions where large areas of the law are codified. These documents manage the civil and political life, but they are less "a list of special rules for particular situations; rather, a body of general principles carefully arranged and closely integrated" (Dainow, 1966, 424). Accordingly, the civil law tradition distinguishes between constitution law and ordinary laws. The most European countries have adopted this tradition as well as former European colonies in Africa. The common law tradition is mostly based on case law meaning that if "a court decided a particular case, its decision was not only the law for those parties, but had to be followed in future cases of the same sort, thereby becoming a part of the general common law. This, the common law, as a body of law, consisted of all the rules that could be generalized out of judicial decisions" (Dainow, 1966, 424-425). The common law tradition is dominant among former countries of the Commonwealth and countries in North America. In conclusion the civil law tradition rests on codified, structured declarations summarizing broad and abstract principles, while in the common law tradition regulations are mostly uncodified and legality is based on specific cases making common law more detailed and concrete (Tetley, 2000, 683-684).

These different legal characteristics are reflected in the different judicial systems. The judiciary in common law systems has an equal status to the executive and the legislature (Stone Sweet, 2000, 32). The process of judicial review is *diffused* and *concrete*. On the one

hand, every court is able to review laws and acts by authorities while the upreme court presents the last and binding authority (diffuse). On the other hand, an actual case has to provide for a legal disputes (concrete) and judicial review is limited to laws that are in force (a *posteriori* review). Every person who is engaged in a real case can initiate a dispute settlement (Epstein, Knight and Shvetsova, 2001, 121). The judiciary in civil law systems is separated into a judicial branch for cases concerning ordinary laws with a variety of different types of courts, and a judicial branch for cases concerning constitutional law with the constitutional court as a separate institution. In contrast to the diffuse system, the civil law system is a *specialized* or *centralized* system of constitutional review. The review of laws and disputes can be concrete, like in the common law system, but also *abstract* in the absence of a real case. Moreover review can be posteriori as well as *a priori* when a law in question is not yet in force. Plaintiffs are executive and legislative actors, political and civil organizations, companies, as well as individual citizens (Epstein, Knight and Shvetsova, 2001, 121).

The rational behind the specialized constitutional review dates back to Hans Kelsen (2008) who – under the influence of the political consequences derived from the misuse of the emergency provision within the Constitution of the Weimar Republic (Art. 48)[3] – established the idea that constitutional courts have to be the guardian of the constitution. The separation between ordinary courts and constitutional courts is possible because the civil law tradition differentiates between ordinary and constitutional law. Furthermore, a special court is necessary to protect constitutional provisions. The reason is that the constitution itself is a law which can lead to conflicts between constitutional law and state institutions or civil actors. The specialized constitutional court is necessary to negotiate these kind of conflicts (Navia and Rios-Figueroa, 2005, 191). Those, the main goal of

[3] Between the years 1919 to 1932 article 48 was proclaimed more than 250 times (Gross and Aoláin, 2006, 84). Giorgio Agamben claims that without understanding and analyzing the (mis-)usage of article 48 it is not possible to understand the rise of Adolf Hitler (Agamben, 2004, 22). See Agamben (2004, 22-24) for a short history of the use of article 48 and Gross and Aoláin (2006, 83-85) for an interpretation of the power of article 48.

constitutional courts is "to channel conflicts among powers in a federal state and to protect the minority from the oppression of the majority" (Navia and Rios-Figueroa, 2005, 191).

In the context of the state of emergency we assume that *among civil law systems the judiciary has a stronger position when it comes to a state of emergency then the judiciary in common law systems*. The judiciary and in particular constitutional courts in civil law systems are established to protect the constitution and for most to protect the individual rights and civil liberties against abuse by the executive branch. In contrast, the judiciary in common law countries is not specialized to interpreted and protect constitutional provisions in general but has to rely on specific developments.

3 Findings: The Judiciary in a State of Emergency

3.1 Cross-Country Data on the State of Emergency

To test our assumption we code explicit emergency provisions in constitutions of democratic states from 2000 to 2010. As Zwitter (2012, 18) has outlined authoritarian regimes are either in a constant state of exception or do not know the state of emergency: "Putting it differently, if a state of exception results in a restructuring of the separation of powers and an authoritarian regime do not know such a separation per definitionem, then either the authoritarian regime is in a constant state of exception [...] or the concept is the less applicable the close a state comes to be an authoritarian states." Therefore, exclusively focusing on democracies is plausible.

Our sample selection results in 98 democracies traced over ten country-years from 2000 to 2010.[4] However, we are only interested in emergency provisions in written constitutions and not all of the 98 countries have written emergency provisions in their constitutions.

[4] The country selection is driven by the *Boix-Miller-Rosato Dichotomous Coding of Democracy* (Boix, Miller and Rosato, 2013). We code a country as a democracy if the country is either (1) a democracy in every year from 1990 to 2010, or (2) a democracy from 1990 to 2010 except for one year, or (3) became a democracy before 2010 remaining democratic until 2010. This coding has to be confirmed by at least one of two other studies being *Freedom House* or *Polity IV* (Marshall, Gurr and Jaggers, 2016).

Instead, we have to exclude Australia, Bosnia and Herzegovina, Canada, Costa Rica, Croatia, Denmark, Iceland, Japan, Luxembourg, the Marshall Islands, Monaco, New Zealand, Norway, the United States of America, and Uruguay. Identifying constitutions from various sources, mainly from the *Constitute Project* (Elkins, Ginsburg and Melton, 2014)[5] , yields a population of 83 democracies with explicit emergency provisions in their written constitutions.[6]

The emergency provisions are used to assess the *de jure* power of the judiciary in a state of emergency. To further analyze the *de facto* power of the judiciary in a political system, we merge expert information from the *Varieties of Democracy Project* (V-Dem) to our data (Coppedge et al., 2016). V-Dem does not provide information on all the countries in our sample which reduces the sample size to 70 countries.[7]

In sum, our sample includes 83 democracies with emergency provisions in their constitutions which we will use to map the *de jure* role of the judiciary under exceptional circumstances. In addition, we will assess the *de facto* judicial power in 70 democracies with emergency provisions. In what follows, we outline the key variables used to measure and to analyze the strength of the judiciary under a state of emergency.

3.2 Operationalisation: Judicial Strength & Additional Concepts

The major concept of interest is `judicial strength` in a state of emergency. Some scholars argue that institutional features, such as the selection of judges or certain legal procedures, define the power of a court as a veto player (see e.g. Hönnige, 2008; Kneip, 2007). These studies often focus on courts with constitutional review powers only and discuss measures in the absence of exceptional circumstances. While the institutional setup of a court is defined prior to a state of emergency we are interested in the latent strength of courts

[5] Other sources used by the authors are: `http://verfassungen.eu/`, `http://www.servat.unibe.ch/icl/`, `http://confinder.richmond.edu`, `https://www.legal-tools.org/en/browse/ltfolder/0_29315/`, and `http://legislationline.org/`.

[6] In 39 countries the judiciary is mentioned in emergency provisions but not in 44 countries.

[7] Countries that V-Dem has no information on are: Andorra, Bahamas, Dominica, Federated States of Micronesia, Grenada, Kiribati, Liechtenstein, Malta, Palau, Saint Kitts and Nevis.

under special circumstances. Hence, we are less concerned with the initial institutional setup but we are "far more sensitive to [...] the political and societal factors that likely condition the effects of these institution" (Rios-Figueroa and Staton, 2014, 105).

This is related to ideas on the *de jure* and the *de facto* independence of the judiciary (Feld and Voigt, 2003; Rios-Figueroa and Staton, 2014; Melton and Ginsburg, 2014). *De jure* independence refers to the formal rules that isolate judges from political and societal pressure (Feld and Voigt, 2003, 498).

Measuring judicial strength in a state of emergency we follow this approach. Judicial strength is defined by the sum of the judiciaries protection in a state of emergency (protection component) and the scope of judicial action in exceptional times (scope component). The protection component is coded based on the question whether "the judiciary is protected during a state of emergency/exception/siege or is it possible to simply dissolve the judiciary or any of its branches?" The judiciary is weak once it can be dissolved (= 1), a bit stronger once it cannot be dissolved but limited in its powers (= 2), but the strongest once it cannot be dissolved or limited at all (= 3). The scope component is coded based on the question whether "the judiciary is involved to solve and perform general tasks during a state of emergency/exception/siege, like oversight of legislative and executive work, or is the judiciary assigned particular tasks only, like judging on detained people?" The judiciary is weak once no tasks are defined (= 1), a bit stronger once it is assigned special tasks related to the state of emergency only (= 2), stronger once it can perform general tasks only (= 3), and the strongest once it can perform general and specific tasks (= 4). The scores of a county in a particular year on both components are obtained from manually coding the emergency provisions of a respective constitution. Afterwards the scores are combined in an additive index which is normalized by the number of categories for each component (Schnell, Hill and Esser, 2005, 171). We can only build our index in the outlined exploitative way as there are no particular quality criteria that define the strength of courts in a state of emergency (see Schnell, Hill and Esser, 2005, 169). In sum, judicial strength is a normalized additive index theoretically

reaching from 0.583 to 2. Lower values refer to a judiciary in a respective country having a weak position under a state of emergency while higher values refer to a judiciary having a stronger position.

As outlined in our theoretical considerations we expect differences in the judiciaries strength comparing different `legal traditions` across countries. Therefore, we code an indicator variable 0 if the highest court with constitutional review power in a country is a supreme court following the common law tradition and 1 if the highest court with those rights is a constitutional court following the civil law tradition. Information on this variable is obtained from the *CIA World Factbook* (CIA, 2013).

Judicial strength and the legal tradition are measures of static institutionalized features defined (by emergency provisions) in the constitution. To introduce dynamics into our analysis we use expert ratings on governmental interaction with the judiciary measured by V-Dem. We will use these ratings to understand the actual influence of judicial systems with different strength. In this regard, the analysis is connected to assessments on the *de facto* judicial independence defined as "the factually ascertainable degree of judicial independence" (Feld and Voigt, 2003, 498). Even the strongest judiciary can be limited in its powers if political actors do not comply with decisions (compare Vanberg 2005; Staton 2010). V-Dem offers an interval measure on "how often would you say the government complies with important decisions of the high court with which it disagrees"[8] with lower values indicating non compliance and higher values indicating compliance. This measure is independent of constitutional features but dependent on the system that a country mostly lives in which is not the state of emergency.

Nevertheless, we assume that the measure transfers to our assessment. Countries in a state of emergency will temporarily increase the power of the executive branches (Bjørnskov and Voigt, 2016*a*) which is why we assume that an empowered executive should not change its behavior towards the court. There is no need to become more friendly towards the judiciary. This is why we will use the `executive compliance measure` to

[8] Question 9.11 - V-Dem Version 6, March 2016. In what follows quoted as: Q9.11 - V-Dem V6.

Table 1: Variables Used to Map the Role of the Judiciary in States of Emergency

Variable	Range		Median	Mean	SD	*N* Countries
Judicial Strength	0.583	2	1.250	1.478	0.318	83
Protection Component	0.333	1	1	0.959	0.119	83
Scope Component	0.25	1	0.500	0.519	0.297	83
Legal Tradition	0	1	1	0.525	0.500	83
Executive Compliance	-1.177	2.816	1.287	1.229	0.781	70
Legislative Oversight	-1.193	3.552	1.290	1.204	0.965	70
Civil Liberties	0.487	0.992	0.895	0.871	0.115	70

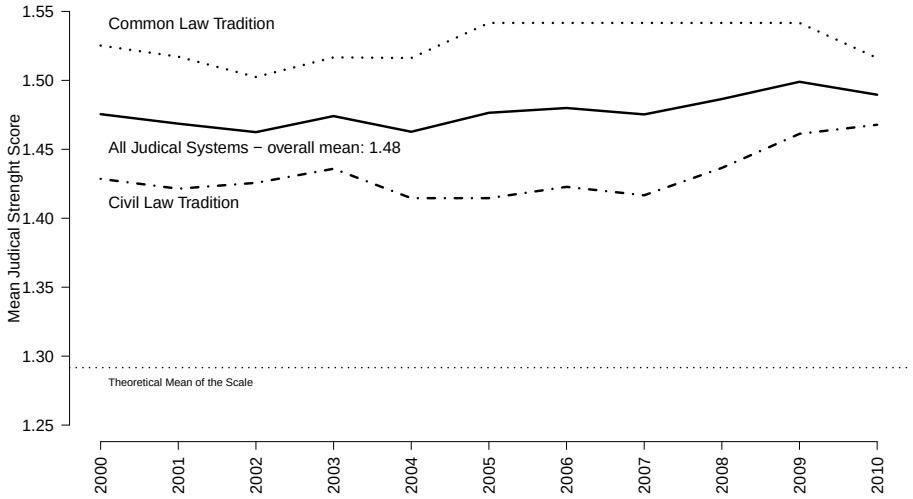
Measures of central tendency and dispersion reported by sample.

assess the extent to which political actors accept the court's activism in exceptional circumstances. However, to account for a limit to executive powers we will control for `legislative oversight` using an interval measure by V-Dem. Lower scores on the measure indicate that it is less likely that the legislature will investigate unconstitutional executive action while higher scores make an investigation more likely (Q7.5 - V-Dem V6).

Finally, we explore the relationship between our measure on the strength of the judiciary and the summary measure on the extent to which `civil liberties` and the rule of law protected and observed by a country (Q29.1 - V-Dem V6). This interval measure is the higher the stronger civil liberties are protected. We assume that the stronger the judiciary in a state of emergency the more protection exists.

Table 1 summarizes measures of central tendency and dispersion of the outlined variables with information on the number of countries in the sample. While the subset of 83 countries will be used for descriptive analysis the subset of 70 countries will be used to draw inference. We claim nothing more than that our approach is exploratory to gain first insights about the role of the judiciary in a state of emergency (Bjørnskov and Voigt, 2016*a*, 11).[9]

Figure 1: Mean Judicial Strength in Emergency Provisions separated by Legal Traditions



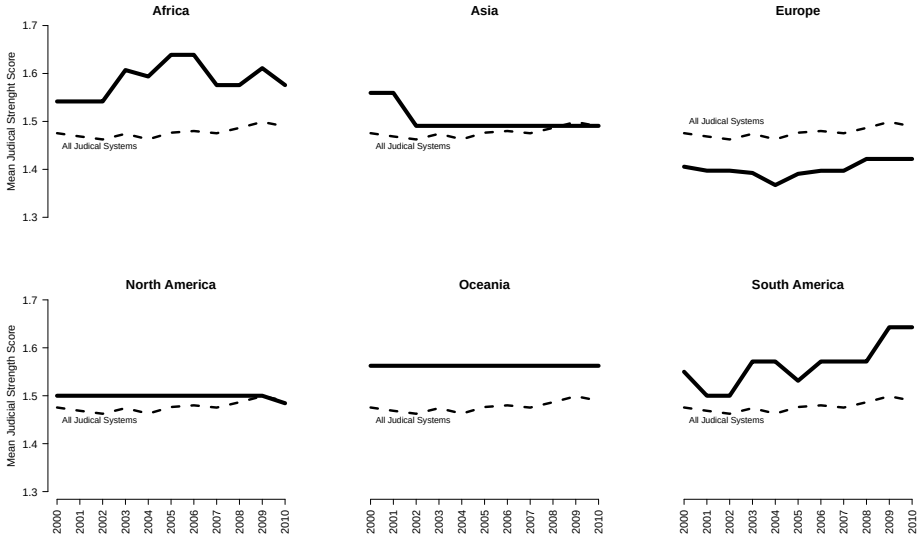
$N = 83$ democracies over ten country years of whom $N_{sc} = 39$ countries follow a common law tradition and $N_{cc} = 46$ follow a civil law tradition. The Dominican Republic and Indonesia are counted in each category. The former has changed from a common law tradition to a civil law tradition in 2010 and the latter has changed in 2002.

3.3 Results: Judicial Strength in Exceptional Circumstances

Figure 1 summarizes the mean judicial strength in an emergency situation over years separated by the legal traditions. The plot illustrates that on average the judiciary is stronger (solid line) than the theoretical mean of the judicial strength scale (thin, dotted line). On average the judiciary in democracies has a strong position once a state faces extraordinary circumstances. The overall average of 1.48 is only 0.52 points below the theoretical maximum of the judicial strength scale which is 2. The judiciary in countries following the civil law tradition (dashed-dotted line) is on average weaker compared to the judiciary in countries following a common law tradition (dotted line). The overall mean difference between both legal traditions is statistically significant (t-test with $p = 2.3^{-11}$). The illustration highlights some moderate variation over years and while the judiciary in common law countries follows a linear trend the strength of the judiciary in civil law countries has on average increased from 2007 to 2010. This variation can be explained by constitutional amendments effecting emergency provisions such as in Slovakia in 2001 and

[9] See Appendix 1 for more information on our sample.

Figure 2: Mean Judicial Strength in Emergency Provisions separated by Continental Regions

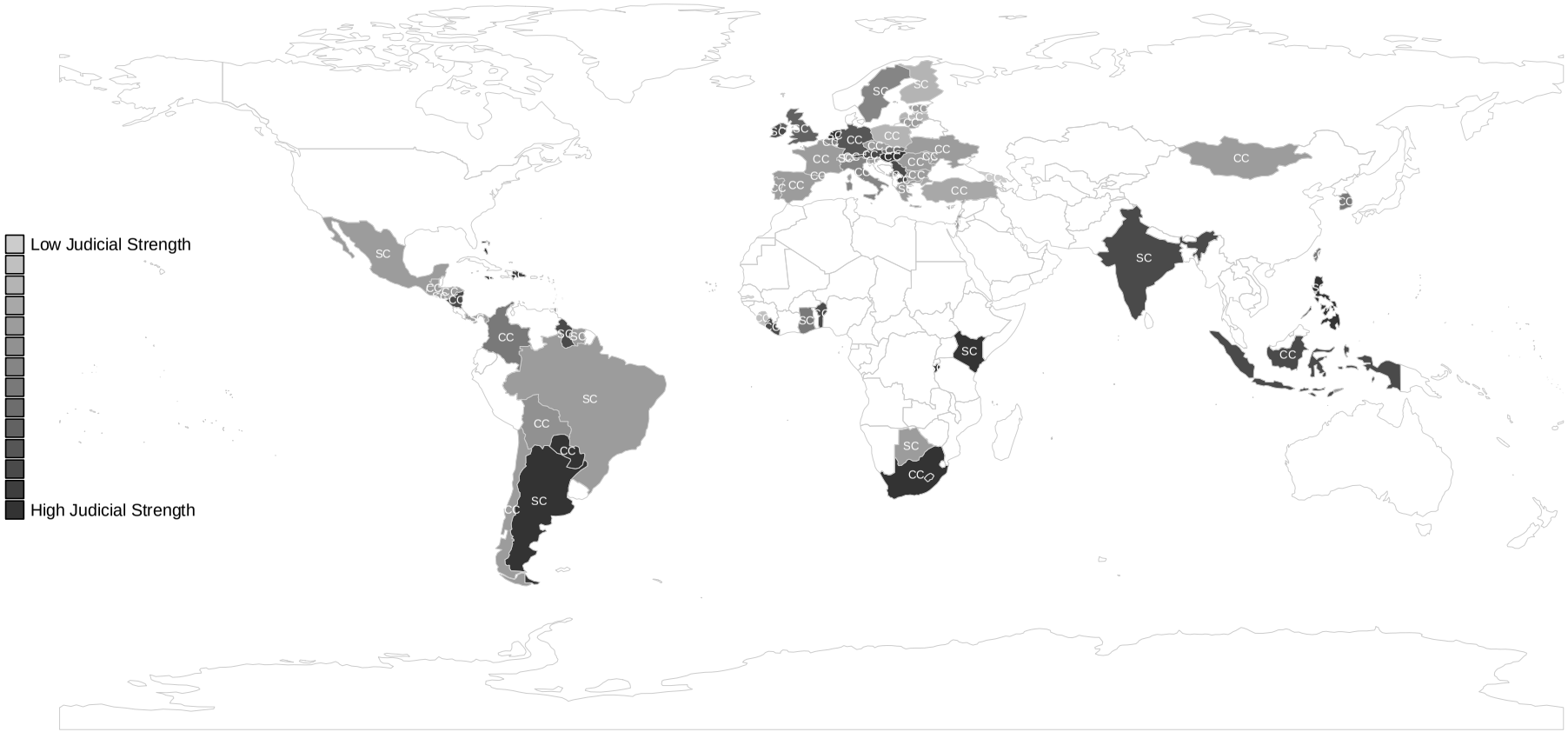


$N = 70$ democracies over ten country years. The dashed line highlights the overall mean across all regions while the solid line is the mean distribution of the respective region over the years.

Bolivia in 2008, or even changes from one legal tradition to another such as in Indonesia in 2003 or in the Dominican Republic in 2009. Although, the judiciary scores high on the judicial strength scale in a state of emergency, Figure 1 does not confirm our expectations, that the judiciary in civil law countries is stronger than the judiciary in common law countries when facing exceptional situations. Nevertheless, the yearly comparison across countries does not rule out the possibility that individual countries have a weaker or stronger judiciary in times of crises.

Figure 3 summarizes the mean judicial strength score per democracy with emergency provisions from 2000 to 2010. The country comparison reveals regional patterns. Figure 2 further highlights these regional patters over years. The judiciary in African countries is stronger compared to the judiciary in Asian countries and both continental regions have a stronger judiciary compared to the European judiciary when facing a state of siege. A clear separation between countries following a common law tradition having supreme courts (highlighted with *SC* in Figure 3) and those countries following a civil law tradition having constitutional courts (highlighted with *CC*) is not obvious. In comparison to

Figure 3: Mean Judicial Strength over Ten Years in Emergency Provisions by Country



$N = 83$ democracies with emergency provisions over ten country years of whom $N_{sc} = 38$ countries follow a common law tradition and $N_{cc} = 45$ follow a civil law tradition.
The Dominican Republic is coded following the civil law tradition and Indonesia is coded as following the common law tradition.
Countries with a civil law tradition are highlighted by *CC* while countries with a common law tradition are highlighted by *SC*.

Figure 1 countries with a common law tradition are overall stronger but comparing scores of individual countries illustrates that some have a powerful judiciary, like Argentina or India, while others have a weaker judiciary, like Finland or Brazil. The same is true for civil law countries as well, comparing for example South Africa or Indonesia to Poland or Chile. Three examples of countries withe the lowest judicial strength scores are Georgia (CC), Sierra Leone (CC), and Finland (SC) while South Africa (CC), the Philippines (SC), and Paraguay (CC) are three examples of countries with the highest score. The United States has no explicit emergency provisions in the constitution and is not part of our assessment. Austria and Germany which are direct implementations of the suggestions by Hans Kelsen (2008), are listed next to each other in countries with constitutional courts. While on average all countries with a common law tradition have a stronger judiciary in a state of emergency (see Figure 1) there is individual cross-country country variation (Figure 3). Judicial strength in a state of emergency varies over years and by continental region (Figure 2).

After assessing regional patterns we now turn to the de facto role of the judiciary in an emergency. This includes the relationship between the strength of the judiciary and the government's willingness to follow judicial decisions as well as legislative oversight of the executive implementing legal decisions. In addition, we analyze a system's general acceptance of civil liberties in relation to a judiciary in a state of emergency. These are the political indicators summarized in the lower part of Table 1. Some caution is necessary as the non-institutionalized, political measures assessed below are the result of expert ratings not particular considering a state of emergency but rather a country's political system at a respective point in time.

In Table 2 we treat our judicial strength scale as continuous dependent variable estimating a linear model without fixed effects (Model 1) to understand general patterns and a more accurate linear model with region-year fixed effects (Model 2) to account for the panel structure of our data (comparable to Bjørnskov and Voigt, 2016*a*, 13).

The rate of the executive's compliance with judicial decisions is highly significant in

Table 2: OLS Regression of Political Variables on the Judicial Strength Scale

Model	1 - No Fixed Effects		2 - Fixed Effects	
DV	Judicial Strength		Judicial Strength	
Independent Var.	b	SE	b	SE
Executive Compliance	-0.168	0.018 ***	-0.157	0.018 ***
Legislative Oversight	0.022	0.015	0.011	0.016
Civil Liberties	0.213	0.134	0.326	0.142 **
Legal Tradition	-0.135	0.023 ***	-0.127	0.025 ***
(Intercept)	1.526	0.102 ***	1.504	0.121 ***
Adj. R^2	0.15		0.16	
N	697		697	
$N_{Countries}$	70		70	

Significance levels: * $\leq$ .1, ** $\leq$ .05, *** $\leq$ .01.

both models. Executive compliance has a negative effect on the judiciary's strength in a state of emergency. The effect size varies only marginal across models. Hence, the less the executive complies with decisions the stronger the judiciary. An explanation is, that the government's influence prior to a decision should be stronger in systems with a weak judiciary. The government in those systems will already have influenced the judiciary before judges take action. Whereas, if the judiciary is strong the government will only be able to attack decisions made. This said, a strong judiciary can face challenges with executive compliance. This is important as we consider a state of emergency where the government is more powerful compared to times when no emergency exists.

In this regard, it is unsettling that legislative oversight is not related to judicial strength in a state of emergency. In Model 1 and Model 2 the coefficients are insignificant. It is promising that the estimates are consistently positive. If legislative oversight has any affect the legislature would investigate executive non-compliance with judicial decisions when the judiciary is strong. A strong court's evasion would be punished by the legislature. However, we have to acknowledge the insignificance of the small effect.

Missing legislative oversight appears less problematic once assessing the relationship

between judicial strength in times of crises and the protection of civil liberties. The effect of civil liberties is positive in Model 1 and Model 2 but only significant in the latter, more accurate model. Systems which protect civil liberties and closely observe the rule of law have stronger courts in a state of emergency. Even if executive evasion is more frequent the stronger the judiciary gets but legislative oversight is not ensured the rule of law will be still followed more closely. All findings are particular true for systems following the common law tradition. These countries have a stronger judiciary in emergency provision on average, highlighted by the significant indicator variable separating countries with supreme courts (0) from those with constitutional courts (1).

In sum, the exploratory assessment leads to three major finding: First, on average the judiciary is designed stronger in a state of emergency in countries following the common law tradition. A possible explanation might be that actors who designed emergency provisions were considering that in a state of emergency settling substantive and concrete cases, such as somebodies imprisonment, would be more important than reviewing abstract scenarios, such as the justification of a new law. Hence, a strong common law tradition might be preferred in a state of emergency depending on the respective disaster (see theoretical considerations and Scheuerman, 2006, 266). Independent of a country's legal tradition there are global patterns in the strength of the judiciary in a state of emergency. Emergency provisions maybe "contagious" among neighboring countries. Further research should elaborate on these thoughts. Second, a government's compliance with legal decisions in an indicator of a weak rather than a strong judiciary in an emergency. This might not be disconcerting. Instead, a weaker judiciary is simply kept on a short leash by the executive branch. Hence, the government has no reason to evade decisions if the weaker judiciary already accounts for governmental interests. In this regard, the stronger judiciary challenged by evasion is still embedded in a healthier system. The third and final point supports this idea. Less compliance of decisions taken by a stronger judiciary under extraordinary circumstances is not satisfying but at the same

time the rule of law is followed more closely in those systems. The protection of civil liberties is higher compared to systems with a weaker judiciary in a state of emergency.

4 Conclusion

To what extent is the judiciary an effective guardian of constitutional provisions during the state of emergency? Linking theories on the state of emergency and different legal traditions, we were able to demonstrate that the judiciary in democracies around the world has a strong position in times of crises. Our exploratory findings are based on an original dataset summarizing the judiciary's strength in 83 democracies.

We show that the judiciariy in countries with a common law tradition possesses a stronger position than the judiciary in countries with a civil law tradition. A possible explanation is that the judiciary in former countries is well suited for emergency situations because of its case-centered approach. However, executive evasion of legal decision increases with judicial strength. Still, the stronger the judiciary the better its integration into the balance of power. The more civil liberties are protected the stronger the judiciary in a state of emergency. As legislative oversight increases the judiciary becomes stronger as well but while the direction of this effect is coherent the estimate is insignificant.

Nevertheless, our findings have major implications for understanding democracies in times of crises. On the one hand, if countries following the common law traditions have a stronger judiciary in exceptional situations, then we have to call Kelsen's dictum of the constitutional court as the most powerful guardian of constitutional provisions into question. On the other hand, it is promising that judiciaries building on case law are stronger in times of crises. It seems plausible that exceptional situations are driven by case law rather than codified constitutions which are limited in a state of emergency. Furthermore, the strong position of the judiciary contributes to balancing enhanced executive power in a state of emergency. This is why further research has to account for the *de jure* and *de facto* role of the judiciary when assessing the state of siege.

Understanding the role of the judiciary in extraordinary circumstances is crucial for the concept of democracy in general, since "legislature and executive then [in times of crises] tend to embrace regulation incongruent with the core values of the rule of law, the task of protecting those values necessarily falls to the courts" (Scheuerman, 2006, 266). Yet our study is limited to the written provisions in constitutions. This allows for assessing the strength of the judiciary in emergency situations but we are not able to analyze the actual measure taken in times of crises. Despite data limitations - only eight countries in our sample have experienced at least one state of emergency - further research could elaborate on this. Moreover, research needs to be extended beyond an actual state of emergency as it is expected that the influence of the judiciary is stronger in the immediate post-emergency period once the legality of political actions taken in the crises is assessed (Bjørnskov and Voigt, 2016*b*, 11). Extending our approach to extra-constitutional provisions concerning the state of emergency could further enhance our picture of the judiciary in exceptional situations.

Eventually the finding from Figure 2 require further considerations. Why are there cross-country similarities among neighboring countries in similar continental regions? A possible answer is a process of institutional learning by copying constitutional provisions. This mechanism is known for courts, such as the German Federal Constitutional Court which has been a blue print for Eastern European Courts (Hönnige, 2007, 28). Moreover, it seems possible that legal systems are effected by a growing influence of supranational organizations like the EU, ASEAN, or UNASUR leading to institutional standardization and path dependency in the respective regions.

Democracies exposed to increasing pressure from man-made disasters or natural disasters should invest in a strong judiciary. This will not hinder responses to emergency situations but strengthen the balance of power in times of uncertainty. This contributes to a solution for the constitutional dilemma democracies face when calling a state of emergency.

Appendix 1: Major Characteristics of the Sample

Country	Legal Tradition	Judicial Strength Score	Region	V-Dem
Andorra	CC	2.00	Europe	No
Argentina	SC	2.00	South America	Yes
Austria	CC	1.75	Europe	Yes
Bahamas	SC	2.00	North America	No
Barbados	SC	1.25	North America	Yes
Belgium	CC	1.42	Europe	Yes
Benin	CC	1.75	Africa	Yes
Bolivia	CC	1.34	South America	Yes
Botswana	SC	1.25	Africa	Yes
Brazil	SC	1.25	South America	Yes
Bulgaria	CC	1.25	Europe	Yes
Burundi	SC	2.00	Africa	Yes
Cape Verde	SC	1.25	Africa	Yes
Chile	CC	1.25	South America	Yes
Colombia	CC	1.50	South America	Yes
Comoros	CC	2.00	Africa	Yes
Cyprus	SC	1.25	Europe	Yes
Czech Republic	CC	1.25	Europe	Yes
Dominica	SC	1.25	North America	No
Dominican Republic	SC	1.98	North America	Yes
El Salvador	SC	1.25	North America	Yes
Estonia	CC	1.25	Europe	Yes
Federated States of Micronesia	SC	1.75	Oceania	No
Finland	SC	0.92	Europe	Yes
France	CC	1.25	Europe	Yes
Georgia	CC	0.58	Europe	Yes
Germany	CC	1.67	Europe	Yes
Ghana	SC	1.50	Africa	Yes
Greece	SC	1.25	Europe	Yes
Grenada	SC	2.00	North America	No
Guatemala	CC	1.25	North America	Yes
Guyana	SC	1.75	South America	Yes
Honduras	CC	1.25	North America	Yes
Hungary	CC	2.00	Europe	Yes
India	SC	1.75	Asia	Yes
Indonesia	CC	1.75	Asia	Yes
Ireland	SC	1.75	Europe	Yes
Israel	SC	1.25	Asia	Yes
Italy	CC	1.42	Europe	Yes
Jamaica	SC	2.00	North America	Yes
Kenya	SC	2.00	Africa	Yes
Kiribati	CC	1.50	Oceania	No
Latvia	CC	0.92	Europe	Yes
Liberia	CC	1.75	Africa	Yes
Liechtenstein	CC	1.25	Europe	No
Lithuania	CC	1.25	Europe	Yes
Macedonia	CC	1.75	Europe	Yes
Malta	CC	1.75	Europe	No
Mauritius	SC	1.75	Africa	Yes
Mexico	SC	1.25	North America	Yes
Moldova	CC	1.25	Europe	Yes
Mongolia	CC	1.25	Asia	Yes
Montenegro	CC	1.25	Europe	Yes
Netherlands	SC	2.00	Europe	Yes
Nicaragua	CC	1.75	North America	Yes
Palau	SC	1.25	Oceania	No
Panama	SC	1.25	North America	Yes
Paraguay	CC	2.00	South America	Yes
Philippines	SC	2.00	Asia	Yes
Poland	CC	0.92	Europe	Yes
Portugal	CC	1.25	Europe	Yes
Romania	CC	1.25	Europe	Yes
Saint Kitts and Nevis	SC	1.50	North America	No
Saint Lucia	SC	1.25	North America	No
Saint Vincent and the Grenadines	SC	1.50	North America	No
Sao Tome and Principe	CC	1.25	Africa	Yes
Serbia	CC	1.75	Europe	Yes
Sierra Leone	CC	0.83	Africa	Yes
Slovakia	CC	1.52	Europe	Yes
Slovenia	CC	1.25	Europe	Yes
South Africa	CC	2.00	Africa	Yes
South Korea	CC	1.50	Asia	Yes
Spain	CC	1.25	Europe	Yes
Suriname	SC	1.25	South America	Yes
Sweden	SC	1.42	Europe	Yes
Switzerland	SC	1.25	Europe	Yes
Taiwan	CC	1.50	Asia	Yes
Timor-Leste	SC	1.25	Asia	Yes
Trinidad and Tobago	SC	1.25	North America	Yes
Turkey	CC	1.17	Asia	Yes
Tuvalu	SC	1.75	Oceania	No
Ukraine	CC	1.25	Europe	Yes
United Kingdom	SC	1.66	Europe	Yes

Legal tradition based on the highest court with constitutional review power coded as CC = constitutional court (civil law tradition) and SC = supreme court (common law tradition). The Judicial Strength Score is the mean judicial strength of a country in an emergency as used in Figure 3. V-Dem indicates those 70 countries that are assessed in Table 2 using additional data from the Varieties of Democracy Project.

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