Judicial Backsliding … and resurgence

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Protests against judicial reforms in Israel (Credit: Wikimedia Commons)

Protests at the Mexican senate against proposed judicial reforms (Credit: FMT)

What is judicial backsliding?

-The process through which duly-elected executives reduce court independence and thus collapse the separation of powers

-Institutional changes achieved through various devices in the autocrat's toolbox

How does it occur?
The Autocrat's toolbox for judicial backsliding

Type of assault	Examples	Observable implications
Assaults on court powers	Court stripping (limiting or changing the type and scope of judicial review); creating new courts or judicial hierarchies; limiting access and availability of judicial review and remedies; constraining judges through voting rules; empowering other political actors to intervene in legal processes.	Courts vulnerable to such assaults show extreme congruence between their decisions and the executive's preferred policy positions.
Assaults on judicial personnel	Changing rules regarding judicial selection, discipline and removal; forcing judges off courts (purges) in order to bring in quiescent judges (packing). Creating subordinate bodies to the executive, such as judicial commissions, that select, discipline, and remove judges.	Purges and packing eliminate or intimidate judges willing to challenge executive preferences.
Defunding	Reducing funding for courts and judges' salaries; manipulating court budgets and who controls them.	Courts vulnerable to defunding align rulings with those in charge of budgets.

Relevant theories related to judicial independence

1. Political fragmentation

-Courts are likely to have less independence (and be more deferential to the executive) when executive's have more party support in the legislature.

-Conversely, the judiciary should be more independent under divided or fragmented government… and thus attacks should be less likely

(McCubbins, Noll and Weingast 1995, 2006; Eskridge 1991; Gely and Spiller 1990; Bergara et al. 2003; Iaryczower, et al. 2002).

Theory

2. Horizontal constraints

While executives are likely to initiate backsliding efforts, *legislatures* and other agencies are consequential

- Legislatures and other agencies have to acquiesce, or even support, executive efforts to weaken horizontal checks
- Judicial independence hinges on legislatures and other agencies checking executives
- As horizontal constraints on the executive decrease, attacks on the judiciary are more likely.

(See generally O'Donnell 1998; Fish and Kroenig 2012)

Countries meeting criteria for electoral democracy sample, 1990-2021

Albania	Dominican Republic	Lithuania	Serbia
Argentina	Ecuador	Luxembourg	Sierra Leone
Australia	El Salvador	Madagascar	Slovakia
Austria	Estonia	Mali	Slovenia
Bangladesh	Finland	Malta	Solomon Islands
Barbados	France	Mauritius	South Africa
Belgium	Georgia	Mexico	South Korea
Benin	Germany	Moldova	Spain
Bhutan	Ghana	Mongolia	Sri Lanka
Bolivia	Greece	Namibia	Suriname
Bosnia and Herzeg.	Guatemala	Netherlands	Sweden
Botswana	Guyana	New Zealand	Switzerland
Brazil	Honduras	Nicaragua	Taiwan
Bulgaria	Hungary	Niger	Thailand
Burkina Faso	Iceland	North Macedonia	Timor-Leste
Canada	India	Norway	Trinidad and Tobago
Cape Verde	Indonesia	Panama	Tunisia
Chile	Ireland	Papua New Guinea	Turkey
Colombia	Israel	Paraguay	Ukraine
Costa Rica	Italy	Peru	United Kingdom
Croatia	Jamaica	Philippines	USA
Cyprus	Japan	Poland	Uruguay
Czech Republic	Latvia	Portugal	Venezuela
Denmark	Lesotho	Romania	Zambia
	Liberia	Senegal	

Visualizing statistically significant backsliding

Judicial backsliding in North Macedonia (1991-2021)
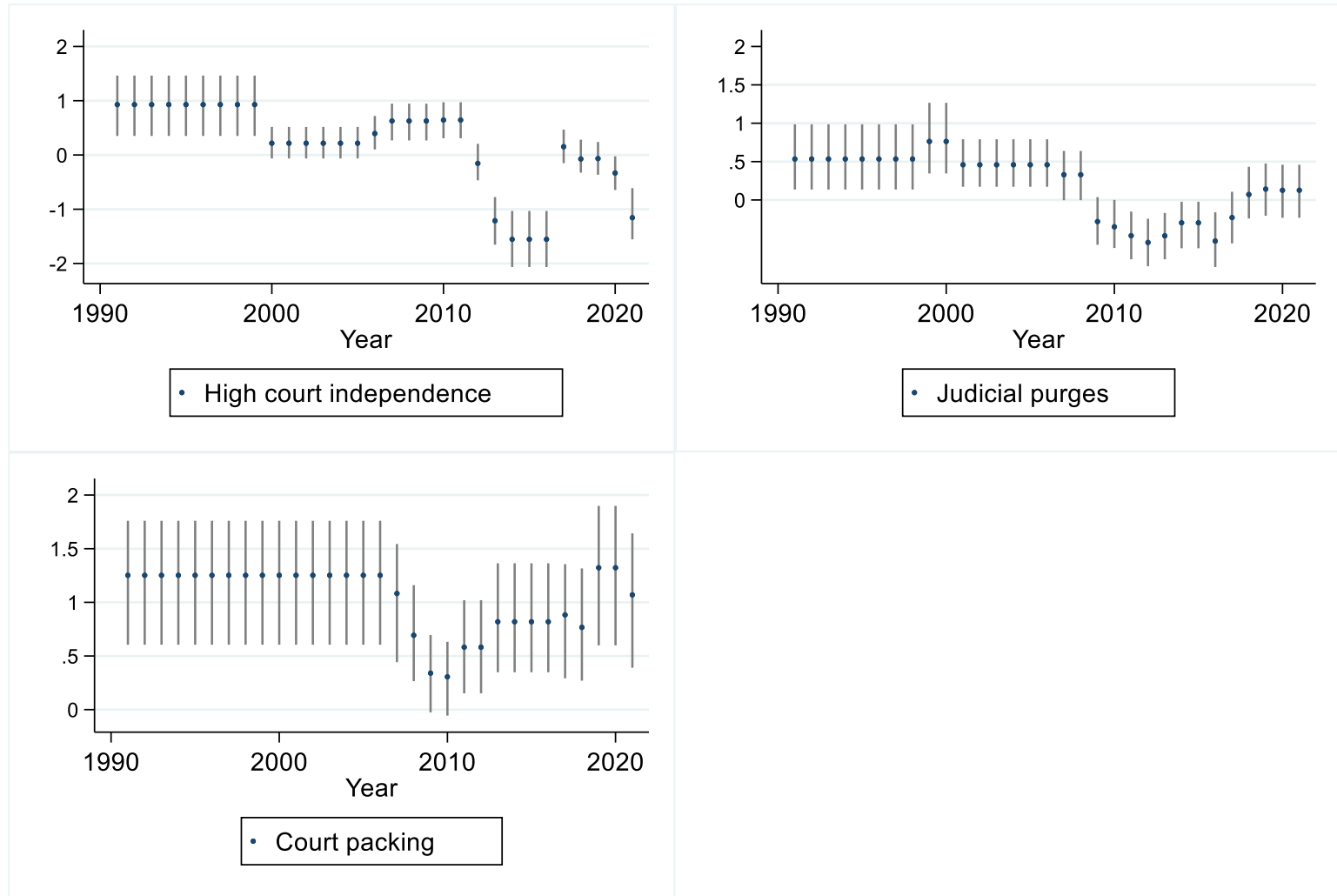
Number of countries
with judicial backsliding onsets

High court independence	36
Judicial purges	49
Court packing	27

Statistical Results

Weakening of horizontal constraints leads to **judicial backsliding onsets**; but the executive's party control in the legislature is <u>not</u> statistically significant.

The executive's party support in the legislature may, however, make judicial backsliding last longer or influence duration

Populist leaders in power (favoring majoritarian institutions) more likely to attack courts and judicial independence

Regularity of theory relating weakening of horizontal constraints to judicial backsliding

Unit of analysis	High court Independ.	Purges	Packing
# Countries with theorized regularity/ # Countries with onsets	28/36 78%	30/49 61%	17 /27 63%

Case studies: Pinpointing the mechanisms leading to judicial backsliding onsets

Example: North Macedonia, clearer case of lack of horizontal constraints on the executive

- Evidence of opposition missing from National Assembly
- Evidence of boycotts and closure
- Evidence of oversight committees not meeting
- Evidence of manipulation of Judicial Council

- but some evidence of executive's party strength in the legislature allows PM Gruevski to achieve his agenda

Larger research project will verify evidence within each judicial backsliding country for posited causal mechanism and also look for other determinants.

What about the reverse? Judicial resurgence

-What conditions and how do countries high courts recover from judicial backsliding?

-Judicial resurgence: statistically significant increases in judicial independence following judicial backsliding incidents.

The Democrat's toolbox for judicial resurgence

Type of assault from which recovery needed	Potential tools to re-establish judicial independence
Assaults on court powers	**Restore** powers to courts that were previously stripped, such as judicial review; Either **eliminate new courts or judicial hierarchies** created by autocrats to gain control or ensure that they **meet democratic standards of accountability and transparency; restore access** and availability of judicial review and remedies; **increase judges' discretion**; **limit ability of other political actors to intervene** in legal processes.
Assaults on judicial personnel	**Evaluate and if needed reverse rules** used by autocrats to gain control of the judiciary related to judicial selection, discipline and removal; **Attempt to reverse court packing and purging** by prior autocrats in the most democratic way possible, **avoiding criticism of "militant democracy."**
Defunding	**Restore** funding for courts and judges' salaries; protect judicial budgets. Establish **safeguards** to end manipulation through funding.

Determinants of resurgence: Preliminary evidence

Crucial election: Replace autocratic incumbent or shift in party configuration

of seats in legislature

Increase horizontal accountability on the executive

-Put differently, judicial independence hinges on legislatures and other

agencies checking executives

Divided government contributes to resurgence

-May ensure that governments wanting to pass legislation to restore

judicial independence need to compromise more

Judicial backsliders with and without resurgence, 1990-2021

Judicial backsliders with resurgence	Judicial backsliders without resurgence	Judicial backsliders with backsliding continuing until 2021	
Argentina	*Bolivia*	Bangladesh	Portugal
Ecuador	*Brazil*	Benin	Suriname
Georgia	*Honduras*	Cape Verde	Thailand
Liberia	*Niger*	El Salvador	Turkey
Madagascar	*Panama*	Guatemala	Venezuela
Moldova	*Paraguay*	Hungary	
North Macedonia	*Sri Lanka*	India	
Peru		Mexico	
Romania		Namibia	
South Korea		Nicaragua	
Spain		Philippines	
Ukraine		Poland	

Share of cases with posited mechanisms

12/12 Horizontal constraints increased (Δ variable constructed from Vdem)

10/12 Opposition party gains (NELDA)

9/12 Decrease in government coalition seat share (DPI)

7/12: Incumbent's party loses (NELDA)

6/12: Incumbent leader replaced (NELDA)

Case study
North Macedonia: Jbacksliding 2012 to 2016/ rebound 2017

<u>Rebound (DV):</u>

In 2017, the EU Senior Experts group made recommendations for systematic and urgent rule of law reforms for the country. In May of 2017, the new SDSM-DUI-AA government put through a reform plan in response to the recommendations referred to as 3-6-9 for implementation of the plan over three-month time periods.

<u>Independent variables:</u>

-Increase in horizontal constraints: Creation of special prosecutor's office (SJO) to deal with Gruevksi's wire tapping scandal in 2016

-New leaders: resignation of Prime Minister Gruevski in 2016 resulting from the Pržino Agreement negotiated in 2015. In 2017, President Ivanov gave Zaev formed a new government coalition made up of his party, SDSM, the DUI, and the Alliance of Albanians : **first major power shift since Gruevski.**

Government party vote share : Decreased from the time that Gruevski left office to Zaev's assumption of power

Resurgence is fragile

-SJO had its own scandals and eventually disbanded

-Civil society protest against judicial reforms in 2017 as not going far enough

-VMRO won power back in 2024

Future research

- Other areas to explore
    - Strength and role of civil society
    - Strength and role of international, regional organizations and advocacy groups
    - Role of monitoring rule of law reforms
    - Societal and political polarization

Thank you!

Please contact me with any questions at

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Extra slides if needed

Countries exhibiting regularity of theory relating decrease in horizontal constraints to a significant regress in dependent variables (1,1)

Country	High court independence	Purges	Packing
Argentina		2015, 2020	
Bangladesh	2009	2017	
Benin	2018	2020	
Bolivia	2010	2006	2011
Brazil	2016	2020	2021
Bulgaria		2009, 2012, 2014	2017
Cape Verde	2021		
Czech Republic			2016
Dominican Rep.		2016	
Ecuador	2008	2009	2011

(1,1) countries

Country	High court independence	Purges	Packing
El Salvador	2021	2021	2021
Germany		2021	
Guatemala	2021	2021	
Hungary	2012	2011	2011
India	2020	2017	2019
Lesotho		2018	
Lithuania		2003	
Madagascar	2010		
Mali	2013	2021	
Mexico	2020	2019	

(1,1) countries

Country	High court independence	Purges	Packing
Moldova	2016	2015	2001
Nicaragua	2006, 2008	2006	2000
Niger	2011, 2019		
North Macedonia	2012	2010	2010
Philippines		2012, 2018	
Peru			2007
Poland	2017	2017	2015
Portugal	2020		
Romania	2017, 2021	2018, 2021	
Senegal		2017	

(1,1) countries

Country	High court independence	Purges	Packing
South Korea	2013		
Spain	2012	2012	
Sri Lanka	2020	2013	2020
Thailand	2014	2007, 2015, 2018	
Turkey	2016	2010	2015
Ukraine	2010, 2014	2010	
Uruguay		2013	
Venezuela	2004	2000	2000
Zambia			2016

North Macedonia

Horizontal Constraints & Divided party control
North Macedonia (1991 to 2021)
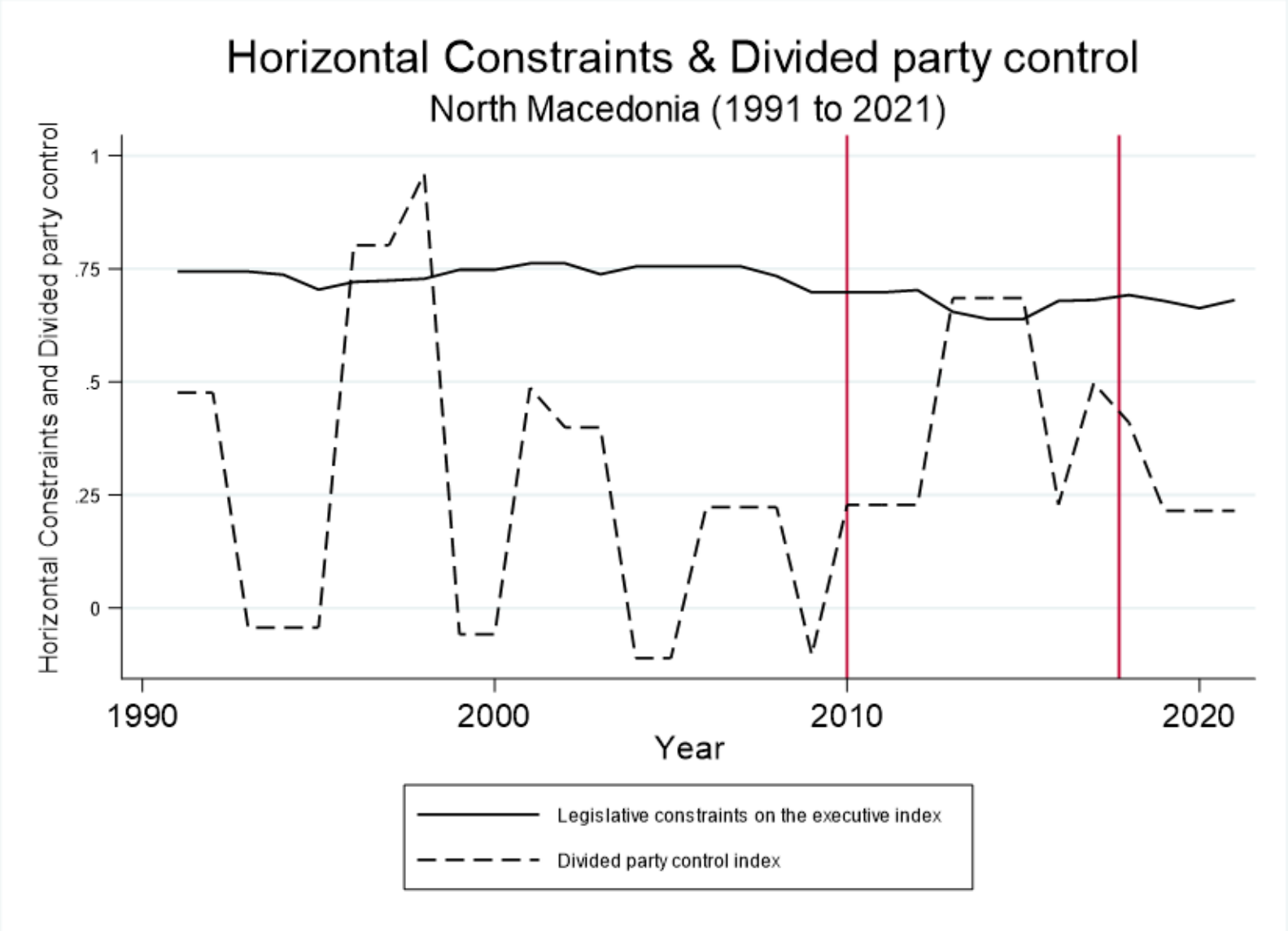
Onset of high court independence backsliding

	(1)	(2)	(3)
Δ Horizontal constraints	0.20***		0.21***
	(0.02)		(0.02)
Divided party control		-0.08	-0.12
		(0.21)	(0.21)
Populist in power	0.88**	0.92***	0.84**
	(0.36)	(0.35)	(0.36)
Per capita GDP	-0.00***	-0.00***	-0.00***
	(0.00)	(0.00)	(0.00)
Constant	-4.24***	-4.18***	-4.21***
	(0.22)	(0.22)	(0.22)
Observations	2,513	2,513	2,513

Onset of significant judicial purges

	(1)	(2)	(3)
Δ Horizontal constraints	0.22***		0.22***
	(0.01)		(0.02)
Divided party control		0.03	-0.02
		(0.15)	(0.14)
Populist in power	0.96***	1.04***	0.95***
	(0.31)	(0.30)	(0.31)
Per capita GDP	-0.00**	-0.00**	-0.00**
	(0.00)	(0.00)	(0.00)
Constant	-4.47***	-4.42***	-4.46***
	(0.19)	(0.19)	(0.19)
Observations	2,513	2,513	2,513

Onset of significant court packing

	(1)	(2)	(3)
Δ Horizontal constraints	0.21***		0.20***
	(0.08)		(0.08)
Divided party control		0.18	0.20
		(0.21)	(0.21)
Populist in power	1.77***	1.87***	1.82***
	(0.41)	(0.43)	(0.43)
Per capita GDP	-0.00	-0.00	-0.00
	(0.00)	(0.00)	(0.00)
Constant	-4.68***	-4.70***	-4.70***
	(0.30)	(0.31)	(0.31)
Observations	2,513	2,513	2,513

Judicial resurgence

Statistical Results: Judicial resurgence

Strengthening horizontal constraints makes onsets of judicial resurgence more likely;

More political fragmentation or a decrease in the governing party/coalition's seat share in the legislature makes judicial resurgence more likely.

High court resurgence: Biprobit and Heckprobit models

VARIABLES	Biprobit		Heckprobit	
	Resurgence	Backsliding	Resurgence	Backsliding
Decr. Horizontal constraints	-1.56***	0.76***	-1.20***	0.25**
	(0.44)	(0.28)	(0.41)	(0.10)
Gov coal party seat share	-0.85**	-0.29	-0.56	
	(0.40)	(0.30)	(0.64)	
Populist in power		0.59***		0.78***
		(0.15)		(0.24)
Per capita GDP	-0.00	-0.00***	-0.00	-0.00***
	(0.00)	(0.00)	(0.00)	(0.00)
Rho		-0.93***		1.59*
		(0.07)		(0.91)
Constant	-2.14***	-2.03***	-2.37***	0.13
	(0.22)	(0.19)	(0.32)	(0.18)
Observations	2,959	2,959	3,006	3,006

Rare events logit results

VARIABLES	Rare events Total sample	Rare events Constrained sample
Dec. Horiz. constraints	-4.10***	-3.72***
	(1.02)	(1.00)
Gov coal party seat share	-2.24*	-1.61
	(1.29)	(1.65)
Per capita GDP	-0.00	0.00***
	(0.00)	(0.00)
Constant	-3.18***	-4.26***
	(0.61)	(0.85)
Observations	2,959	1,092

Country	Rebound	Leg. constraints increase	Incumbent party seats decrease	Incumbent's party loses	Opposition gains	Incumbent leader replaced
Argentina	1	1	1	1	1	0
Bolivia	0	1	0	1	1	1
Brazil	0	1	1	1	1	0
Ecuador	1	1	1	0	1	1
Georgia	1	1	0	1	1	1
Honduras	0	1	1	1	1	0
Liberia	1	1	1	0	1	0
Madagascar	1	1	1	0	0	0
Moldova	1	1	1	1	1	1
Niger	0	0	1	0	1	0
North Macedonia	1	1	1	1	1	1
Panama	0	0	0	1	1	0
Paraguay	0	1	0	0	0	0
Peru	1	1	1	0	1	0
Romania	1	1	0	1	1	0
South Korea	1	1	1	1	1	1
Spain	1	1	1	1	1	1
Sri Lanka	0	0	0	0	0	0
Ukraine	1	1	0	0	0	0
		Vdem	DPI	NELDA	NELDA	NELDA