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The Strength of Weak Review: National Courts, Interpretive Canons, and Human Rights Treaties

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Enforcement of international law is often delegated to national courts, creating a space for them to play a part in international judicialization. Under what conditions can they do so? We argue that the answer depends on the relationship between the political and legal constraints national courts face. National courts must be careful to safeguard their independence in the face of potential backlash, but they face constraints in terms of the legal mechanisms available to them when enforcing international law. We focus on the availability of two legal mechanisms: *direct effect*, under which courts apply treaties directly, setting aside inconsistent domestic laws; and *canons of interpretation*, under which courts strive to interpret domestic laws in conformity with treaties. We find that the effects of human rights treaty ratification is greater when courts have the canon available to them than it is when courts have direct effect available to them.

Introduction

Under what conditions can national courts play a part in international judicialization? International law is often enforced through national judicial systems. When they find violations of international legal commitments, some national courts can overturn laws and impose penalties, which can punish, as well as deter violations. Litigants often have better access to national courts than international courts. National litigation may shift power away from executives and legislatures toward litigants, judges, and other nonstate actors (Alter, Hafner-Burton, and Helfer 2019). Thus, litigation in national courts to enforce international law is one of the key indicators of the judicialization of international relations.

Yet national courts are not always able to use these powers. They are subject to political and legal constraints, which may limit their ability to enforce international law and, in turn, participate in international judicialization (Keith 2002; Apodaca 2003; Powell and Staton 2009; Lupu 2013a) Politically, even independent judiciaries in countries with strong respect for the rule of law are attentive to the possibility of backlash, which threatens their legitimacy (Carrubba 2009). By *backlash*, we refer to efforts by other actors to "reframe and organize counter-mobilizations against unwanted legal rulings," which can undermine the court's ability to perform its functions in the future (Alter et al. 2019).[1] Legally, the application of international law by national courts is mediated by legal doctrines that govern the status of international commitments in the domestic legal system. While these doctrines can empower courts to enforce human rights treaties, they often limit their ability to do so.

Our study examines how national legal doctrines shape national judicial strategies and, in turn, the effects of international law. We argue that in enforcing international law, national judges act strategically to avoid political backlash, while being constrained by national legal doctrines on the application of treaties. We develop this argument by focusing on how national courts enforce international human rights treaties. This is a crucial area for the role of national courts in international judicialization because enforcement of international human rights law is often delegated to domestic courts. Existing work suggests the importance of political constraints on this process, that is, that courts can effectively enforce human rights treaties to the extent they are independent. Yet, their ability to do so—and thus the extent to which they play a part in international judicialization—is further moderated by legal doctrines and the relationship between those doctrines and political constraints on courts.

What are the legal mechanisms national judges use to enforce international law, and what is the relationship between these mechanisms and political constraints? The first mechanism, which we refer to as *direct effect*, allows national courts to apply treaties directly, and typically provides that treaties trump ordinary legislation. In countries where this mechanism is available, treaties are quasi-constitutional, and courts can use them to set aside inconsistent domestic laws and government actions. A second mechanism is the use by national courts of *canons of interpretation*, doctrines under which domestic law should be interpreted in conformity with treaties. As we will explain, these doctrines allow courts to modify how domestic laws are interpreted without formally invalidating them. From a purely legal perspective, direct effect is thus a stronger mechanism. Courts have discretion to use or not use the legal mechanisms available to them.

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[1] See also Fontana and Braman (2012); Alter (2000); Helfer (2002).

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In addition, in a given country, one, both, or neither of these legal mechanisms may be available. The availability of these mechanisms has changed over time in many countries.

Courts are understandably mindful of the need to maintain their independence and, thus, they are concerned with the possibility of political backlash against their decisions at the feedback stage, in which we witness "the strategies and actions that follow from a legal victory or loss" (Alter et al. 2019). The direct-effect mechanism is more likely to lead to backlash because it is more likely to be viewed as a political or abusive use of judicial power. By contrast, when courts use the canon of interpretation mechanism, other government actors and the public are more likely to perceive their decisions as legitimate—because interpreting the law is perceived as being a core judicial, rather than political, function. Thus, while direct effect might appear to be the stronger legal mechanism for enforcing legal claims, its use raises a greater potential for negative political consequences for national courts. Although it may be available to them, national courts often strategically choose not to use it to avoid political backlash. As a result, we expect human rights treaties to be more effective in countries in which the courts have the canon of interpretation mechanism available to them.

To test this argument, we focus on the relationship between these legal mechanisms and the effects of ratification of the International Covenant on Civil and Political Rights (ICCPR) and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) on human rights outcomes. Drawing on new data, we measure the extent to which each mechanism is available to a country's courts. Our empirical models exclude physical integrity rights because prior work shows that even independent courts may not be able to deter violations of such rights (Lupu 2013a). We find that the availability of the canon of interpretation mechanism to domestic courts increases the extent to which ICCPR ratification reduces abuses of civil and political rights, and the extent to which CEDAW ratification reduces women's rights violations. More importantly, our results indicate that the extent to which the canon of interpretation mechanism increases the effects of ICCPR and CEDAW ratification is significantly greater than the extent to which the direct-effect mechanism does so. In other words, the canon of interpretation mechanism, which is a legally weaker form of review, is more effective overall in giving effect to international human rights treaties.

This article makes several contributions. First, we explain how the role of national courts in international judicialization depends on the relationship between political and legal constraints on courts. While national courts are constrained in terms of the legal enforcement mechanisms available to them, these mechanisms have differing political consequences. Because of the interplay between these constraints, national courts may play a greater part in the international judicialization of human rights in countries in which the weaker legal mechanism is available to them. Second, our argument demonstrates how the adjudication phase of judicialization politics is closely related to the compliance and feedback phases (Pelc and Busch 2019; Staton and Romero 2019). Judges, concerned with the possibility of backlash in the feedback phase strategically alter their behavior in the adjudication phase, which in turn affects the extent of compliance. Finally, ours is the first study to analyze systematically how the availability of legal enforcement mechanisms conditions the effects of human rights treaties (Keith 1999; Hathaway 2002; Hafner-Burton and Tsutsui 2005; Dai 2007; Simmons 2009; Hill 2010; Conrad and Ritter 2013; Lupu 2013a, 2013b; Conrad 2014; Fariss 2014; Creamer and Simmons 2015, 2015, 2016; Ritter and Conrad 2016, 2019; Lupu and Wallace 2019). We provide novel empirical results regarding the conditions under which human rights treaty commitment can lead to improved human rights practices.

The rest of this article proceeds as follows. In Section 2, we briefly discuss the key arguments and empirical results on which our argument builds. Section 3 describes our theory regarding the mechanisms by which domestic courts can enforce international human rights law. In Section 4, we describe the research design we used to test our hypotheses. Section 5 presents our results. Section 6 offers conclusions and implications for future research.

National Courts, Constraints, and Human Rights Treaties

In this section, we briefly review the key arguments and findings upon which our theory builds. We begin by discussing the relationship between courts and their audiences and the possibility of judicial backlash. Then, we discuss what we know from prior work about the relationship between national courts and human rights treaties.

Political Constraints on National Courts

National courts depend on the executive branch to enforce their decisions, including when such decisions go against the executive branch. Executives often comply with judicial decisions for at least two reasons (Chilton and Versteeg 2018).

One is the functional utility of courts and, specifically, their ability to clarify law and to provide focal points for coordination among the political branches. The judiciary is valued as a neutral arbiter that helps political actors to coordinate upon a set of rules by which they conduct their political affairs (Hardin 2013, 52). While the initial task of coordinating government falls upon the constitution itself, the judiciary can further aid coordination by clarifying the rules and announcing when political actors have overstepped their powers (McAdams 2015). Because courts can bring important coordination benefits, political actors will value having an independent court that can interpret the constitution. It is for this same reason that they comply with judicial rulings, even unfavorable ones (Hardin 2013, 57).

Others argue that courts owe compliance to their legitimacy, particularly in the eyes of the general public (Easton, 1965, 1975; Gibson, Caldeira, and Baird 1998). Courts can draw on what David Easton called "diffuse support," that is, "a reservoir of favorable attitudes or good will" toward the institution overall, "that helps members to accept or tolerate outputs to which they are opposed" (1965, 273; 1975, 444). Diffuse support, or legitimacy, is distinct from "specific support," in other words, "the satisfactions that members of a system feel they obtain" from specific decisions and outputs (Easton 1975, 437). High levels of diffuse support can mitigate the effects of dissatisfaction with an unpopular opinion that enjoys low levels of specific support (Gibson and Caldeira 1995; Gibson et al. 1998; Lupu 2013a, 440–45). Thus, because the court as a whole is perceived as legitimate, political actors will comply with its decisions even when they do not like them.

How do courts build and maintain legitimacy? In a study of the high courts of eighteen European Union member states, Gibson et al. find that building institutional legitimacy requires the creation of specific support within

successive, nonoverlapping constituencies (1998, 355). In order to be able to issue an unpopular decision, a court needs to render a range of popular decisions first (Gibson et al. 1998, 355). Scholars of American politics have observed that this insight also explains the behavior of the US Supreme Court, which only rarely issues decisions that are truly countermajoritarian in nature. Comparative scholars have reached similar conclusions about constitutional courts in Russia, Germany, and elsewhere (Epstein, Knight, and Shvetsova 2001).

Backlash

While both of these explanations (i.e., coordination benefits and legitimacy) suggest that judges can be important enforcers of human rights, they also suggest that judicial power is not unlimited. A key problem for judges is the possibility of backlash, that is, a negative reaction to a judicial decision, formal or informal, that can limit a court's ability to perform its obligation in the future (Fontana and Braman 2012; Alter 2000; Helfer 2002; Abebe and Ginsburg 2019). Both national and international courts can face backlash, and our focus in on national courts. The potential for backlash can constrain national judges' ability to enforce international law. They therefore act strategically to avoid it.

Judicial backlash can take several forms. One is criticism of the court's decision by the public, including mobilization by civil society groups to offset or counteract a judicial decision. Among the most famous examples of judicial backlash is the reaction by antiabortion activists the US Supreme Court's prochoice decision in *Roe v. Wade* (1973). Such backlash can occur when courts make decisions that are highly unpopular among the public—and especially among coordinated groups—prompting analysts to warn that effective courts must be aware of their public audiences (Helfer and Slaughter 1997). Backlash can also take the form of action by another branch of government. For example, when the Judicial Committee of the Privy Council issued a series of unpopular opinions that effectively abolished the death penalty in three Caribbean countries that had retained the Privy Council, these countries withdrew from their human rights treaty commitments entirely (Helfer 2002).

When backlash comes in the form of formal action by other governmental actors directed at the court, it is sometimes referred to as court curbing. For example, when the US Supreme Court repeatedly struck down social welfare legislation during the Lochner era, President Roosevelt responded with a court-packing plan that would alter the composition of the court and bring it in line with popular majorities.[2] More recently, the Polish government passed a series of laws that allowed it to alter the composition of its high court (Chilton and Versteeg 2018). In other cases, government actors respond to judicial decisions by amending the constitution (Versteeg and Zackin 2016).

As Alter et al. (2019) observe, the purpose of "backlash politics" is to "overturn a precedent, eliminate or circumvent a legal ruling, or avert future losses in similar cases." Backlash can have important effects on courts. Where courts face backlash, they can lose their legitimacy and thus their ability to compel compliance with their rulings going forward (Larsson and Naurin 2019). Recent controversies involving decisions by constitutional courts in Turkey, Hungary, Romania, Pakistan, Sri Lanka, South Africa, and Israel show the potential for backlash, and how it threatens the ability of courts to enforce rights (Gardbaum 2015a). In some cases, a court may have built up sufficient legitimacy over time to withstand backlash, but this is not always the case. As Tom Clark (2009, 974) argues, "political attacks on the Court serve as signals of a lack of specific support for the Court, which in turn indicates that further judicial recalcitrance will not be tolerated and that the Court will not be able to effectively set policy." Backlash might also mean that the strong negative response to the judicial ruling outweighs the coordination benefits that courts bring.

Backlash occurs in the fourth and final phase of judicialized politics, and it is part of the "strategies and actions that follow from a legal victory or loss," as Alter et al. (2019) note. In addition, the possibility of backlash affects earlier phases of judicialized politics, including the adjudication and compliance phases. Because the potential for backlash imposes a constraint on courts, they often act strategically to avoid it (Carrubba 2009; Pelc and Busch 2019; Staton and Romero 2019). Both public opinion and appeals from interest groups have been shown to affect judicial decision-making (Staton 2006). For example, the US Supreme Court is more likely to strike down federal laws when public support for the court is greater (Clark 2009). Judges also choose the precedents they cite based, in part, on the preferences of other actors both within and outside the court (Lupu and Voeten 2012). They strategically attempt to set precedents that they believe will be followed and implemented by other actors, including political actors (Knight and Epstein 1996).

Courts also use legal reasoning to avoid backlash. Specifically, creating the perception that courts are apolitical is crucial to avoiding backlash. When individuals believe judges make decisions based on political rather than legal reasons, they are less likely to abide by those decisions (Staton 2010). By contrast, when individuals believe judges make decisions based on legal doctrine, they are more likely to support those decisions (Gibson, Caldeira, and Spence 2005). Indeed, among the key "checklist" items for international judicial effectiveness described by Laurence Helfer and Anne-Marie Slaughter (1997) are awareness of the court's audience and incrementalism—both of which are intended to minimize the potential for backlash (Alter 2000). The same logic applies to domestic courts, which often seek to avoid the appearance of lawmaking or "legislating from the bench."

As we will show in the next section, one way to avoid the appearance of lawmaking is by using legal mechanisms that avoid direct confrontation with the political branches and are incremental in nature. Specifically, we will show that where judges do not invalidate domestic laws directly but interpret them in conformity with a treaty, their decisions might be seen as more legitimate.

National Courts and Human Rights Treaties

International enforcement mechanisms for human rights treaties are generally weak. Enforcement is thus left up to domestic actors, including advocacy groups and legislatures (Simmons 2009; Sikkink 2011; Lupu 2015). National courts are often considered the most important such actor. Even in countries that are subject to the jurisdiction of an international human rights court such as the European Court of Human Rights, claimants must first bring cases through the domestic judicial system. As a result, in the human rights context, the key actors in judicialization are often national, rather than international, courts. Both the Universal Declaration of Human Rights and the ICCPR note that an independent domestic judiciary is crucial to maintaining respect for human rights. By enforcing human rights treaties,

[2] This episode famously ended with Justice Owen Roberts's switch in time in response to Roosevelt's court-packing plan. Cushman (1994, 208–09).

national courts play an important part in international judicialization, but several constraints limit their ability to do so. These constraints on judicial adjudication shape the extent to which domestic courts can enforce international human rights treaties and thus shape the role of domestic courts in international judicialization.

Under what conditions can national courts play this crucial role in international judicialization by enforcing human rights treaties? Existing work has focused on two factors. First is the independence of the national court. A court that is not independent of the other branches of government is unlikely to punish them for abusing human rights. An independent court, however, can prosecute government actors or strike down laws that violate human rights, thus deterring governments from carrying out abuses in the first place (Keith 2002; Powell and Staton 2009). As a result, when enforcing human rights treaties, national courts must be mindful of the possibility of backlash in order to guard their independence. Second are evidentiary concerns. Courts can only act on the basis of legally admissible evidence that is sufficiently strong to meet the relevant standards of proof. With respect to abuses of physical integrity rights such as killings or torture, the government is often able to prevent courts from obtaining such evidence. As a result, even powerful, independent domestic judiciaries are likely to serve as enforcers of human rights treaties primarily with respect to abuses of civil and political rights (Lupu 2013a).

Theory: Enforcing International Human Rights Treaties in Domestic Courts

The discussion above of the political environment in which national courts operate sets the stage for the theory we develop in this section. In this section, we explain the relationship between political and legal constraints on national courts, as well as how this relationship shapes the extent to which national courts can enforce human rights treaties and participate in international judicialization. Our argument highlights both the relationship between the various phases of judicialized politics and the relationship between domestic institutions and international judicialization. We begin by describing two legal mechanisms by which national courts may apply international human rights treaty commitments: the *direct-effect* mechanism and the *canon of interpretation* mechanism. We also explain how national legal doctrines determine the extent to which these mechanisms are available to national courts and the extent to which courts are constrained from using them. We argue that, while direct effect is a stronger legal enforcement mechanism, it raises a greater risk of backlash to the court's decision than the legally weaker canon of interpretation. Thus, because of this relationship between legal enforcement mechanisms and political constraints, national courts are more likely to be able to enforce human rights treaties when they are able to use the canon of interpretation mechanism than when they are able to use the direct-effect mechanism.

Legal Mechanisms and Legal Constraints

In 2009, Madonna Louise Ciccione—better known as the singer Madonna—applied to adopt Chifundo James, an infant living in rural Malawi. The country's law prohibited adoption by "any applicant who is not resident in Malawi." When the case reached the Malawi Supreme Court of Appeal, Madonna's lawyers invoked the Unite Nations Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child. These human rights treaties, both ratified by Malawi, required that adoption decisions be made in the best interests of children, including through international adoption where appropriate. But under Malawi's constitution, treaties are not part of domestic law unless and until Parliament adopts implementing legislation.

Because the treaties had not been implemented, Malawi's courts could not apply them directly to override the adoption law. The court instead applied a legal doctrine known as canon of interpretation, stating, "the courts will try as much as possible to avoid a clash between what our laws say . . . and what the international agreements or conventions are saying."[3] Thus, the court, even though it lacked the constitutional power to enforce human rights treaties directly and displace domestic law, reached the same result—allowing the adoption to proceed—by reshaping the meaning of the adoption law to comply with the treaties.

The case illustrates how domestic courts can use different legal tools to give effect to human rights treaties. When a state ratifies a treaty, this does not automatically mean the treaty becomes part of the country's domestic law and thus enforceable by its courts. The effect of treaties in the domestic legal system is governed by doctrines that vary across countries. There are two principal mechanisms under which domestic courts may be empowered to apply treaties: they may give them *direct effect* or use *canons of interpretation* to interpret domestic law in conformity with treaties.[4]

The first mechanism, *direct effect*, means that "domestic law authorizes a domestic court to apply that treaty provision as a rule of decision" (Sloss 2009, 11). The court may sanction a violation of the treaty much like a violation of a statute or other domestic law. If, in addition to being given direct effect, treaties are considered superior to domestic laws, the court may also invalidate statutes inconsistent with the treaty. For example, in 1997, the Bulgarian Supreme Court of Cassation heard a challenge to an article of the Criminal Procedure Law that prohibited courts from releasing prisoners prior to trial in several circumstances, including recidivism.[5] Bulgaria was a party to the ICCPR, whose Article 9(3) provides that "it shall not be the general rule that persons awaiting trial shall be detained in custody." Under the Bulgarian constitution, ratified treaties become part of domestic law. Because the Criminal Procedure Law categorically mandated pretrial detention, the court held that it contradicted Article 9(3) and it was preempted.[6] Similarly, the Turkish Constitutional Court, in a landmark 2013 decision, decided that that CEDAW (along with the European Convention of Human Rights) prevailed over the Turkish civil code that requires women to change their last name upon marriage.[7] The court applied CEDAW directly to set aside the civil code, thereby allowing women to keep their maiden name upon marriage.[8]

[3] Adoption of Children Act Chapter 26:01, Re, Ciccone, Appeal judgment, MSCA Adoption Appeal No 29 of 2009, [2009] MWSC 1, ILDC 1345 (MW 2009), June 12, 2009, Supreme Court of Appeal.

[4] The distinction between these mechanisms is distinct from the concept of judicial independence, which focuses on the relationship between the judiciary and other branches of government. A fully independent judiciary may not have either of these mechanisms available to it, depending on domestic legal doctrine.

[5] Prosecutor General, Ruling on a proposal to adopt an interpretative decision, Case No 1/1997, Ruling No 1, ILDC 611 (BG 1997).

[6] *Encheva v Pazardzhik District Investigation Service*, Cassation appeal, Judgment No 719, Civil Case No 2397/2001, ILDC 613 (BG 2002).

[7] Anayasa Mahkemesi [AM] [Constitutional Court], App No 2013/2187, December 19, 2013.

[8] The court did this under the individual complaint procedure under the Constitution. Decisions reached under this procedure only apply in individual cases,

The second mechanism consists of applying a *canon of interpretation* under which domestic law must be interpreted to comply with the state's treaty obligations. In the United States, this is often called the "Charming Betsy" doctrine, after a nineteenth-century Supreme Court case.[9] Instead of applying the treaty itself as a rule of decision, the court applies domestic law as interpreted in light of the treaty. Under this mechanism, the treaty's effect is derivative rather than direct: it cannot apply in the absence of some domestic law on point, and it cannot displace domestic law that clearly contradicts it. Thus, the canon of interpretation is in principle a legally weaker mechanism, giving the court less legal power to override treaty-inconsistent state action.

Several additional observations regarding these mechanisms are worth noting because they inform our argument about their political effects, which we develop in Section 3.2 below. First, legal rules that govern the status of treaties in domestic law may make either or both mechanisms unavailable. The direct-effect mechanism is typically unavailable in countries that, like Malawi, follow a "dualist" approach under which ratified treaties are not part of domestic law and cannot be enforced by domestic courts without implementing legislation.[10] This approach is common: as of 2012, treaties can only have direct effect in 55 percent of the countries in our sample (Verdier and Versteeg 2015). By contrast, other countries such as Bulgaria follow a "monist" approach, under which ratified treaties become part of domestic law without implementing legislation. In such countries, courts are, in principle, empowered to give direct effect to human rights treaties.

Likewise, the canon of interpretation mechanism is recognized in some countries but not others. In several countries, including the United States, well-established judicial precedent requires courts to apply the canon to avoid conflicts between treaties and domestic law (Nollkaemper 2011; Shelton 2011; Verdier and Versteeg 2015). In some countries, the canon is codified in the constitution itself. Article 233 of the South African constitution provides that "[w]hen interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law." According to our data, the canon of interpretation is available in 65 percent of countries as of 2012. In many of these countries, courts cannot use direct effect to treaties, so the canon of interpretation provides an alternative mechanism through which courts can use those treaties to shape the interpretation of domestic law (Nollkaemper 2011).[11]

In some countries, courts have both enforcement mechanisms available to them. In principle, this provides courts two levels of discretion.[12] First, they can choose whether to enforce a human rights treaty against another branch of government. Second, they can choose whether to do so by directly applying a human rights treaty or by using the canon of interpretation. In Section 3.2 below, we discuss our expectations for how courts can make these decisions strategically.

Second, the rules that affect the availability of the direct-effect and canon-of-interpretation mechanisms bear some relationship to the broader legal tradition of a country. Scholars often focus on a distinction between common law and civil law countries that obscures additional important ways in which legal systems vary.[13] One might generalize that common law countries traditionally followed a dualist approach to international law, which means that the direct-effect mechanism is not available. By contrast, civil law countries traditionally followed a monist approach, which typically makes the direct-effect mechanism available to courts.[14] Nonetheless, the relationship between legal system and the availability of these mechanisms is far more complex. For example, some common law countries have begun to apply treaties directly (such as Kenya, South Africa, and Namibia), thus making the *direct-effect* mechanism potentially available to their courts. Other countries often classified as civil law (such as Denmark, Finland, Iceland, and Norway) do not allow courts to enforce treaties directly. Courts both in some common law systems and in various types of civil law systems use the canon of interpretation mechanism.[15]

Third, courts retain substantial discretion in deciding whether to invoke each mechanism. This point may seem surprising, because on their face, the doctrines often speak imperatively. Under the Bulgarian constitution, treaties "shall have primacy" over domestic law, which seems to indicate that courts are bound to apply them. Nevertheless, courts have developed numerous doctrines they can invoke to avoid giving direct effect to treaties. For example, many courts recognize a distinction between "self-executing" and "non–self-executing" treaties, and often refuse to give direct effect to human rights treaties on that ground. Because the legal standard for determining whether a treaty is "self-executing" is imprecise, courts exercise significant discretion. Courts can also invoke several other "avoidance doctrines" to decline to give direct effect to a treaty.

The canon of interpretation, as articulated in most countries, also appears to speak imperatively. Article 233 of the South African constitution provides that courts "must prefer any reasonable interpretation of the legislation that is consistent with international law." Yet this instruction only applies when such a "reasonable" interpretation is available. If the interpretation consistent with international law stretches the legislation's meaning beyond reason, the canon does not apply and the domestic legislation prevails. Because reasonableness is an imprecise standard, the court retains

and are not binding upon other courts. The result is that, until the legislature revises the civil code, women have to keep initiating the individual complaint procedure to keep their own last name. See Zand and Öcal Apaydin (2016).

[9] *Murray v The Schooner Charming Betsy*, 6 US (2 Cranch) 64(1804).

[10] For example, the highest British court has held that the executive's power to ratify treaties "does not extend to altering the law or conferring rights on individuals . . . without the intervention of Parliament." *J.H. Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418, 500.

[11] The availability of direct effect is usually governed by the state's constitution. By contrast, the canon of interpretation mechanism is usually not specifically enshrined in the constitution but established by other legal sources, including prior judicial decisions. Its availability typically rests on well-established case law and legal doctrine that predate modern human rights treaties, and does not relate only to human rights treaties but to all treaties (and often other international law rules as well). Conditional on their availability in the relevant legal system, national courts have substantial discretion whether to apply the mechanisms in any particular case.

[12] As of 2012, the courts of twenty-four countries (including, e.g., Mexico, the Netherlands, Sweden, and Turkey) had both mechanisms available to them.

[13] Indeed, while the civil/common law distinction is correlated with several country characteristics (judicial independence, property rights, religion, colonizing state, monism, dualism, etc.), there is significant variation within both types of systems. Our analysis aims to contribute to open up the black box of this divide and explore directly the effects of additional features of domestic legal systems. See, e.g., Klerman, Mahoney, Sapmann, and Weinstein (2011); La Porta et al. (2008).

[14] The availability of the direct effect mechanism also requires that international law be considered hierarchically superior to domestic law, which is not the case in all monist countries.

[15] Examples include Mexico, Brazil, Chile, Argentina, the Netherlands, Belgium, Luxembourg, France, Italy, Greece, Senegal, the Ivory Coast, Turkey, Egypt, and the Philippines.

substantial discretion in deciding whether to apply the canon. In the Madonna case, the Zambian court went quite far in reinterpreting the term *resident* to fulfill the treaty's command. Other courts have been less bold.

Fourth, although the canon of interpretation is a legally weaker tool than direct effect, it can nonetheless be effective in fulfilling treaty obligations. Courts can deploy the canon in multiple ways to reshape domestic law and enforce treaty rights, providing "a powerful alternative" to direct effect (Nollkaemper 2011, 139, 143–44; Waters 2007). The following examples illustrate such applications.

The most straightforward application is for courts to apply the canon to privilege an interpretation of domestic law that conforms to human rights treaties. In some cases, this allows courts to punish clear rights violations. Consider the following example. After the reunification of Germany, East German border guards were prosecuted for killing a man attempting to cross the Berlin Wall. The guards argued that their actions were permitted by East German laws and by their orders, under which it was "better the fugitive dies than the escape succeeds."[16] The Federal Supreme Court held that because German Democratic Republic (GDR) ratified the ICCPR, the canon required that its laws be interpreted in light of the treaty rights to life and to leave one's country, even though the ICCPR did not have direct effect under GDR law. As a result, the court rejected the border guards' justification for the killing. Beyond punishing or deterring violations, domestic courts can use the canon to reform domestic law in light of human rights treaties, as in the Madonna case.[17]

Domestic courts reviewing the legality of administrative decisions can also invoke the canon to use human rights treaties as a benchmark. In reviewing an administrative decision to deport a father convicted of drug trafficking, the Australian High Court held that because Australia had ratified the Convention on the Rights of the Child, immigration authorities had to consider the "best interests of the child."[18] Courts in Canada, New Zealand, and Hong Kong have also relied on human rights treaties in reviewing administrative action. As another example, the High Court of Hong Kong has held that domestic law should be interpreted so as to implement Hong Kong's obligations under CEDAW. As a result, a system whereby boys were accepted into secondary schools with lower test scores compared with girls (based on the theory that boys were late bloomers and thus less likely to perform well on the test) violated the Sex Discrimination Ordinance as interpreted in line with CEDAW. Specifically, the court held that Article 10 of CEDAW requires governments to eliminate gender stereotypes, and the government's reasoning on how boys and girls develop could not be used as a justification to discriminate against girls in school.[19] Importantly, some countries in which treaties lack direct effect have a strong tradition of judicial review of administrative action under which this approach can be deployed.

Finally, domestic courts can deploy the canon to interpret the constitution itself. Used in this way, the canon can be a powerful tool in countries with a constitutional bill of rights, effectively empowering courts to displace legislation inconsistent with human rights treaties even when they lack direct effect. In 2007, Canadian unions challenged a provincial law restricting collective bargaining in health and social services. The challenge was based on s. 2(d) of the Canadian Charter of Rights and Freedoms, which protects freedom of association. The Supreme Court interpreted s. 2(d) to protect collective bargaining against undue interference and held the law unconstitutional. It based this interpretation on several human treaties ratified by Canada but which lacked direct effect. It reiterated, "the Charter should be presumed to provide at least as great a level of protection as is found in the international human rights documents that Canada has ratified."[20]

The Supreme Court of Bangladesh adopted a similar approach in a case alleging that an education official had insulted and threatened a headmistress for failing to wear a headscarf. The court held that attempts to coerce or impose a dress code on women without legal authority amounted to sexual harassment, which was a discriminatory act violating the constitution and international standards. It also held that "arbitrary and abusive gender-based codes" violated the rights to privacy and self-expression protected by human rights treaties. As a dualist country, Bangladesh did not give these treaties direct effect. However, the court stated that it could "look into these conventions and covenants as an aid to interpretation of . . . [the constitutional bill of rights]."[21] The Court ordered the Ministry of Education to ensure that women working in schools are not subject to harassment or required to wear hear covering. In other cases, human rights treaties are cited to support a certain constitutional interpretation, but the court is less explicit about the extent to which the treaty altered the interpretation of the constitution. For example, US Supreme Court Justice Ginsburg's concurring opinion in *Grutter v Bollinger*, a landmark decision that upheld the University of Michigan's affirmative action policy, cited CEDAW in support of the interpretation reached by the court.[22]

Political Effects of Legal Mechanisms

In 1985, the Indian Supreme Court struck down a domestic law that limited alimony for divorced Muslim women.[23] The decision, which was based on secular norms of gender equality as found in the country's Criminal Procedure Act, generated substantial backlash. After massive street protests by Muslims, who viewed the decision as an attack on their religion and their right to their own personal laws, India's Parliament superseded the Supreme Court ruling by passing a new statute limiting alimony for divorced Muslim women (Mody 1987). This decision, in turn, generated backlash against the majority Congress Party and strengthened the Hindu right wing, which saw the law as undermining secular principles of gender equality (Hirschl 2013, 434). Since then, the Supreme Court has operated much more cautiously in this area. When personal laws clash with gender equality, it does not strike these laws directly, but has used canons of interpretation (Mehra 2012, 399, 407; Hirschl 2013, 434). It has also followed this approach in cases where similar substantive issues have been brought before the Court under CEDAW; none of its later decisions

[16] Border Guards Prosecution Case, 100 ILR 364, 377 (1992).

[17] Courts in some common law systems can also use human rights treaties as a guide to reform common law rules. The New Zealand Supreme Court has drawn on the ICCPR to develop new common law rules governing breach of privacy. Waters (2007, 670).

[18] *Minister of State for Immigration and Ethnic Affairs v. Teoh*, 183 CLR 273 (1995).

[19] *Equal Opportunities Commission v Director of Education*, HCAL1555/2000 (2000).

[20] *Health Services and Support v British Columbia*, [2007] 2 SCR 391.

[21] *Dolon and Hossain (joining) v Government of Bangladesh*, Writ petition, No 4495 of 2009, ILDC 1917 (BD 2011).

[22] *Grutter v Bollinger*, 539 US 306 (2003).

[23] Mohd. *Ahmed Khan v Shah Bano Begum and Ors* (1985 SCR 3 844).

applies CEDAW directly.[24] As we argue below, this reluctance to apply CEDAW directly in the wake of earlier controversies is not a coincidence but instead shows the Court being mindful of its political constraints.

The Indian example illustrates the importance of the political environment, and the political constraints that courts face. In this section, we develop our argument about the relationship between the legal mechanisms discussed above and political constraints on national courts. Is one of the mechanisms a more politically effective tool for enforcing human rights treaties? In turn, which of these legal mechanisms is more likely to allow national courts to participate in international judicialization?

To answer these questions, we build on three insights discussed above. First, although the canon of interpretation mechanism is a legally weaker form of review, courts can use it to political effect. Second, although judges cannot choose which mechanism(s) are legally available to them, they can choose whether to employ those mechanisms. Third, judges seek to avoid political backlash when possible. Courts are concerned with maintaining their legitimacy and their ability to compel compliance with their decisions more broadly. Backlash against judicial decisions threatens the legitimacy of domestic courts and their ability to enforce international human rights law.

Although legal mechanisms for enforcing human rights treaties are often available to national courts, judges will use their discretion to choose which mechanism, if any, to employ, based in part on whether or not doing so may result in political backlash. If only one mechanism is legally available, judges may decline to issue a treaty-enforcing ruling if the risk of backlash for using that mechanism is too great. If both mechanisms are available, judges may choose to use the one they expect will be less likely to result in backlash.

The relative effectiveness of these mechanisms therefore turns in part on which one is more likely to result in backlash. In order to avoid backlash, courts can resort to various techniques that depoliticize their decisions and show self-restraint. When courts strike down domestic laws based on either the constitution or a treaty, their action is likely to be perceived as an arbitrary exercise of judicial power, especially if the constitution or treaty is ambiguous.[25] At the most general level, courts will attempt to avoid creating the perception that they are usurping the legislature's lawmaking function (Shapiro 1982).

With respect to human rights treaties, we argue that use of the direct-effect mechanism is more likely to be viewed as an abuse of judicial power and thus is more likely to cause backlash compared with the use of the canon of interpretation mechanism. Unlike the direct-effect mechanism, by which domestic courts openly enforce human rights treaties against the political branches by striking down laws, invalidating government actions, or providing other remedies, the canon of interpretation "is essentially a technique to shift power in a subtle way to the courts" (Nollkaemper 2011, 145). Even when direct effect is legally available, by using the canon, domestic courts can also avoid bypassing or overriding domestic laws. As Nollkaemper (2011, 145) observes, "it is primarily a rule of national law that is applied and the courts accordingly do not usurp any legislative powers."

There are various reasons why such decisions reduce the likelihood of backlash. First, the use of the canon of interpretation is less likely to be perceived as a political decision. Striking down a domestic law based on a human rights treaty produces a direct confrontation with the political branches, and it might be seen as judges venturing into the political realm, especially when treaty rights lack precision and leave substantial room for discretion. Even when domestic courts are empowered to directly apply international human rights treaties to displace domestic law, doing so directly challenges the lawmaking authority of the political branches, potentially inviting backlash. In effect, it is similar to exercising constitutional judicial review, the strong exercise of which has produced backlash in many countries (Gardbaum 2015b).

By contrast, using a canon of interpretation relies on a core judicial function: declaring what the law means. It is therefore more likely to be perceived as legitimate by politicians and the public. The canon of interpretation mechanism can avoid direct confrontations with other actors, while still allowing the court to effect justice in the individual case.

Comparative scholars have observed that courts commonly resort to various avoidance canons, through which they can read legislation so that it complies with the constitution rather than invalidating it directly (Delaney 2016). For example, the Turkish Constitutional Court attempted to avoid backlash by reading a highly contested law on headscarves in higher education in conformity with the constitution rather than striking it down as unconstitutional (Roznai and Yolcu 2012, 180–81). Courts can rely on deferral techniques, by which judicial decisions striking down laws are not given immediate application in order to allow the political branches to reform them. Stephen Gardbaum has suggested that constitutional courts in young democracies might prefer a "weak form" of judicial review in which legislatures can override judicial rulings, which produces dialogue between the political and judicial branches.[26] These techniques are means for courts to advance their objectives while avoiding direct clashes with the political branches that might provoke backlash and compromise their independence.

Second, the strongest remedy typically available under direct effect is to declare a domestic law void for inconsistency with a human rights treaty. Such a declaration affects all future cases involving that law, potentially including cases having nothing to do with the human rights violation. It puts the onus on the political branches to react, hopefully by reforming the law consistently with international human rights—but they can also reaffirm the law, setting the stage for a political confrontation with the court. By contrast, the canon of interpretation tends to be used on a case-by-case basis: the law is not invalidated but is read so as to avoid conflicts with the treaty in cases where such a conflict would arise. This does not necessarily require a response by the legislature or government, thus reducing the risk of direct confrontation. By reinterpreting domestic law on a case-by-case basis, courts can thus take an incremental approach to reforming domestic law in line with human rights treaties while avoiding direct confrontations with the political branches.

Third, even if other actors object to the court's interpretation, the use by courts of the canon of interpretation is difficult to circumvent. As far as we are aware, no legislature has generally prohibited courts from taking ratified treaties into account in interpreting domestic law, and such

[24] See, e.g., *Municipal Corporation of Delhi v Female Workers* (Muster Roll) & Anr. (2002).[(2000) 2 SCR 171].

[25] For this reason, there is a growing trend among constitution-makers to draft rights in greater detail. See Versteeg and Zackin (2016).

[26] According to Gardbaum, these weaker forms of review guard the independence of the court in the long-run (2015a, 289). See also,Gardbaum (2013, 21–46).

a prohibition would be difficult to enforce. The legislature can amend laws on a case-by-case basis to reverse interpretations arrived at by courts using the canon, but this is a labor-intensive approach, and since the law itself is still in force, the political impetus to address the issue will likely be weaker. In this sense, use of the canon of interpretation exploits the passivity of legislatures not faced with an emergency.

We now bring this argument back to the role of national courts in human rights treaty enforcement and international judicialization more broadly. As others have argued, if and to the extent national courts can be expected to enforce a human rights treaty, this expectation can deter governments from abusing human rights in the first place, thus improving rights performance. Others focus on judicial independence as the key factor that can raise this expectation of enforcement. Yet courts cannot take this independence for granted, and must act strategically to avoid backlash that would threaten. The greater probability of backlash associated with direct treaty application suggests that, even when this mechanism is available and the court is independent, it may avoid the case or issue a ruling that does not enforce the treaty. In turn, in such countries, the ratification of a human rights treaty may be less likely to deter abuses because governments do not expect the court to enforce the treaty against them. By contrast, if the canon of interpretation is available, the court would be more likely to be able to issue a treaty-enforcing ruling without fear of backlash. Thus, the *de jure* availability of the canon mechanism will work to increase the expectation of judicial enforcement of human rights treaties, raising the expected cost of human rights violations and thus improving rights performance. While direct effect may seem the more powerful legal mechanism in the adjudication phase, the potential political constraints on that mechanism in the feedback phase result in the canon of interpretation mechanism that is more effective in applying human rights treaties. This leads to our conceptual hypothesis:

Conceptual hypothesis: *The canon of interpretation is more effective than direct effect is as a mechanism of human rights treaty enforcement.*

To be clear, our theory does not lead to predictions regarding the *de facto* use of these mechanisms. If our argument is correct, human rights treaty ratification is more likely to lead to improvements in human rights practices when the canon of interpretation is *available* to national courts than when direct effect is available. Along similar lines, our arguments do not lead to specific predictions regarding the extent to which we should or should not observe judicial backlash. Strategic courts attempt to minimize backlash, so the extent to which we observe backlash is a product of multiple factors, including such strategies. Instances of backlash in response to the direct application of treaties may be uncommon precisely because courts avoid using that mechanism when the potential for backlash is greater. Likewise, there is no guarantee that using a canon of interpretation prevents backlash entirely. For example, if the canon were used in such a way that ignores the clear meaning of a domestic statute's text or in a way that stretches the meaning of a treaty provision, a court may still be seen as engaged in lawmaking. Also, courts cannot perfectly anticipate their audiences' reactions. In some cases, courts may underestimate the probability of backlash to their decisions or may take a calculated risk that does not pay off. Courts may also be willing to take the risk of backlash because the legal or normative stakes in a case are high and/or the court believes its legitimacy can weather the storm of a backlash.

To clarify further, we do not suggest that courts would never use the direct-effect mechanism. Nor do we suggest that invalidating laws based on treaties would always produce backlash. Courts are strategic actors that consider the possibility of backlash. They may use the direct-effect mechanism, for example, when such decisions are not too controversial. Likewise, they may strike down laws when the political branches expect the courts to take such action. Indeed, a number of studies have shown that, sometimes, the political branches want courts to strike down laws, so that they can conveniently blame the court for decisions unpopular with certain constituents (a phenomenon known as blame-shifting) (Hirschl 2004).

Research Design

Key Variables and Operational Hypotheses

TREATIES

We focus on two key treaties that prior work (Powell and Staton 2009; Simmons 2009; Lupu 2013a, 2013b) has indicated can improve human rights and with respect to which courts play an important role: the ICCPR and CEDAW. The ICCPR was adopted in 1966, and entered into force in 1976. As of 2018, 170 states are parties to the ICCPR. The CEDAW was adopted in 1979, and entered into force in 1981. As of 2018, 189 states are parties to the CEDAW.

MEASURES OF CANON OF INTERPRETATION AND DIRECT-EFFECT MECHANISMS

To measure whether the canon of interpretation and direct-effect mechanisms are available to domestic courts, we coded an original data set. Existing initiatives to map international law in domestic legal systems are less systematic and/or more limited in scope. Specifically, Hathaway (2008) and the Comparative Constitutions Project (Ginsburg, Elkins, and Melton 2008) assemble information on the domestic status of international law based on the constitution alone. Yet, many relevant aspects of a domestic legal system's relationship to international law are not found in the text of the constitution but in ordinary legislation, case law, practice, and executive orders.[27] Our data set is based on coding of all these different legal sources.

In collecting our data, a first step was to identify and define the substantive issues that define a state's relationship with international law. We identified fifty issues, including a range of issues that allow domestic courts to use treaties in domestic cases. For each country, we commissioned a written memorandum that provides a narrative answer to each of the questions, and documents how the answers have changed over time. These memoranda were prepared by the authors as well as a number of research assistants and consultants, primarily foreign students with prior knowledge of the relevant legal systems. Each memorandum documents not only the answer to each question but also the sources in answering the question, thus indicating whether the basis for a given answer is found in the constitution, ordinary legislation, court decisions, executive interpretations, or secondary sources. For most countries, the constitution was the starting point for the memorandum, yet it was never the

[27] In addition to quantitative coding of constitutions, several qualitative surveys offer more in-depth information. However, such surveys cover a limited number of countries (Shelton 2011) or specific issues (Sloss 2009), and do not reflect change over time.

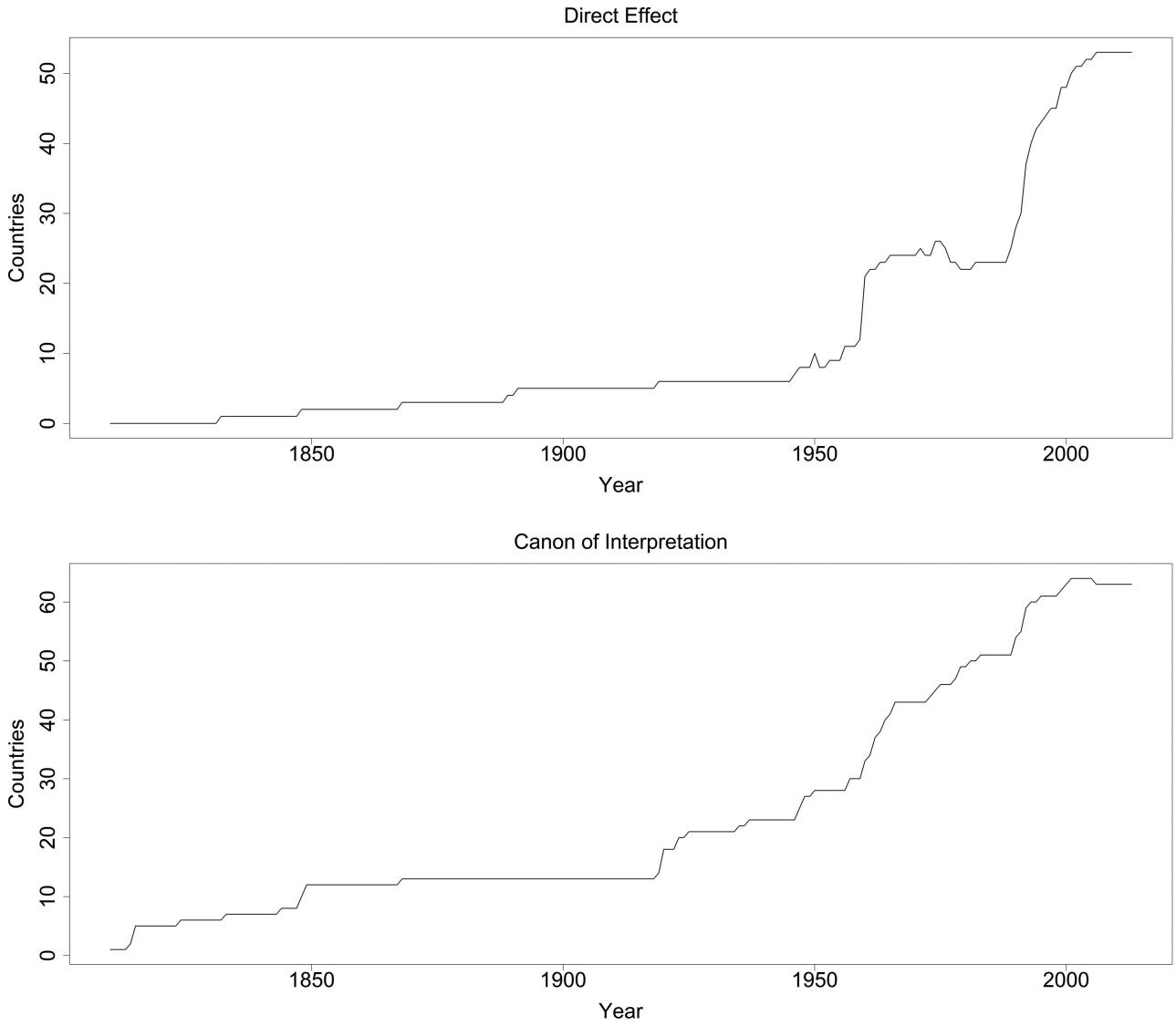

Figure 1. Availability of Legal Mechanisms over Time

sole basis for the answers. The authors of the memoranda were instructed to settle upon one ultimate answer to each question; they were also asked to indicate if there existed multiple interpretations and to elaborate on those. Where multiple interpretations existed, we relied on the most authoritative source of that system to make a judgment call. To code the variables used in this paper, we used data on the following four (of the fifty) issues on which we collected data:

1) Do ratified treaties automatically become part of domestic law without implementing legislation?
2) If the answer to (1) is yes, what is the relationship of treaties to ordinary statutes (superior, equal, or inferior)?
3) Does the constitution expressly refer to international human rights treaties (e.g., the ICCPR or the European Convention on Human Rights)? If so, which ones, and are they formally incorporated into domestic law?
4) Is there a rule or presumption that domestic statutes (and/or other law) should be interpreted in conformity with obligations under ratified treaties?

From the answers to these questions, we constructed two binary indicators on a country-year basis. We combined the answers to questions 1 through 3 into a single binary indicator Direct Effect that takes the value 1 if countries apply treaties directly and designate them as having higher status than domestic legislation *or* if they have incorporated an international human rights agreement directly into their constitution. The second variable we coded captures the degree to which courts can interpret domestic legislation in line with ratified treaties. Canon of Interpretation is coded as 1 if the answer to question 4 is yes. It is possible for both variables to be coded as either 1 or 0 in a given country-year. Section 1 of the Supplementary Information provides more information on this data collection and coding effort, as well as the full list of questions on which we collected data; describes the sources we consulted to create the variables that feature in our analysis; and provides specific examples of the information gained from these sources and how we coded it.

Figure 1 describes trends in the availability of these mechanisms to domestic courts over time. The number of countries in which these mechanisms are available has increased substantially over the past two centuries. In addition, in the

most recent decades, many countries have adopted these mechanisms. Specifically, during the years included in our analysis, twenty countries adopted one or both of these legal mechanisms (and one country removed one of these mechanisms). Section 2 of the Supplementary Information provides additional information.[28]

DEPENDENT VARIABLES

We use three measures of civil and political rights recently developed by the Varieties of Democracy Project. For the ICCPR, we first use the Political and Civil Rights index, which measures the freedoms of expression and association. Also for the ICCPR, we use the Freedom of Discussion index, which measures the ability of individuals to discuss political issues openly. Finally, for the CEDAW, we use the Women's Political Empowerment index, which measures women's civil liberties, ability to discuss political issues openly, and representation in politics. All three indices are aggregate measures, estimated by using Bayesian factor analysis models, based on several underlying indicators. These have two advantages over additive indices: (1) they do not arbitrarily assign weights to index components; and (2) they do not assume the independence of underlying indicators.

OPERATIONAL HYPOTHESES

In Section 3.2, we stated that our conceptual hypothesis is that the canon of interpretation is more effective than direct effect as a mechanism of human rights treaty enforcement. Operationalizing this in light of the key measures we are using yields the following operational hypotheses:

H1: *ICCPR ratification more strongly improves political and civil rights when the canon of interpretation is available than when direct effect is available.*

H2: *ICCPR ratification more strongly improves freedom of discussion when the canon of interpretation is available than when direct effect is available.*

H3: *CEDAW ratification more strongly improves women's political empowerment when the canon of interpretation is available than when direct effect is available.*

Hypothesis Testing

Estimating the effects of treaty commitments is known to be difficult. Governments select the treaties they join in part based on their interests and the extent to which they expect to conform their behavior to the treaties' requirements. Preferences drive a significant part of the difference between treaty members and nonmembers: members may be significantly more likely to join a treaty simply because they prefer the policy choices embodied in it (Downs, Rocke, and Barsoom 1996). No methodology can allow us to infer causation based on these observational data without assumptions. We design our analysis to weaken these assumptions as much as possible.

Following recent work, we use a propensity-score matching approach. Propensity- score matching reduces the differences between the group of states that ratified the treaty and the group of states that did not. It does so by pairing observations that are as similar in every relevant way as possible, except that one has ratified the treaty, whereas the other has not. If the observations are similar along all relevant dimensions except that one has ratified the treaty, then observed differences in the dependent variable can be attributed to the treaty. The approach estimates each state's probability of treaty ratification based on factors that predict ratification, and then it matches treaty members to treaty nonmembers based on this probability. Among the advantages of this approach are that it creates covariate balance and weakens distributional assumptions.

A notable limitation of matching, however, is that it relies on conditioning exclusively on observable variables. If an unobservable (or unmeasured) factor affects treaty commitment decisions, this can bias inferences in a manner analogous to omitted-variable bias in a standard regression context. In the context of human rights treaty ratification, Lupu (2013b) argues that a key latent factor is states' preferences for treaty commitments. We include in our models the measure of TREATY COMMITMENT PREFERENCES developed by Lupu (2013b), which is an annual estimate of each country-year's probability of ratifying the applicable treaty. Section 3 of the Supplementary Information contains detailed information.

For each treaty, we match members to non -members based on variables that predict treaty commitment, including TREATY COMMITMENT PREFERENCES and several other variables consistent with recent similar analyses (Hill 2010; Lupu 2013a, Lupu 2013a, 2013b; Chilton and Versteeg 2015, 2016). As a measure of regime type, we use the Polity IV data (POLITY) (Marshall and Jaggers 2002). We include a measure of judicial independence provided by Linzer and Staton (2015) (JUDICIAL INDEPENDENCE). Newer regimes and well-established regimes may have different preferences with respect to treaty commitment, and different incentives with respect to human rights abuses. We control for this factor using the Polity IV data (REGIME DURABILITY). As a measure of interstate wars, we use data from the Correlates of War project (INTERNATIONAL WAR). For civil conflicts, we use data from the UCDP/PRIO armed conflict database (CIVIL WAR). We control for economic development using the natural log of per capita GDP provided by the World Bank (GDP PER CAPITA). The availability of legal enforcement mechanisms may depend on, among other factors, a country's legal system. To address this, we use data on the origins of a country's legal system from La Porta, Lopez-de-Silanes, and Shleifer (2008) (LEGAL ORIGIN). UK legal origin is the base category.

We include the natural log of a state's population, using data provided by the World Bank. We also include a measure of the number of international NGOs (INGOS) in a country (Hafner-Burton and Tsutsui 2005). We include the year of the observation in the matching model because treaty commitments may have been more likely in some years than others. Finally, we include the DIRECT EFFECT and CANON OF INTERPRETATION variables discussed in the next subsection.

There are many units with missing data among these variables. We therefore impute the missing values using the Amelia II Program (Honaker, King, and Blackwell 2011). Section 4 of the Supplementary Information provides additional information.

TREATY RATIFICATION is the dependent variable in the matching model. It is coded "1" if a state has ratified, acceded to, or succeeded to the ICCPR or CEDAW (as applicable) as of a given year and "0" otherwise. We match treaty members to nonmembers using the nearest-neighbor algorithm provided by the MatchIt package in the R programming language. A country-year that has ratified the treaty is

[28] ICCPR ratification is weakly and positively (0.21) correlated to the availability of direct effect and weakly and negatively (-0.07) correlated to the availability of canon of interpretation. CEDAW ratification is weakly and positively (0.12) correlated to the availability of direct effect and weakly and positively (0.005) correlated to the availability of canon of interpretation.

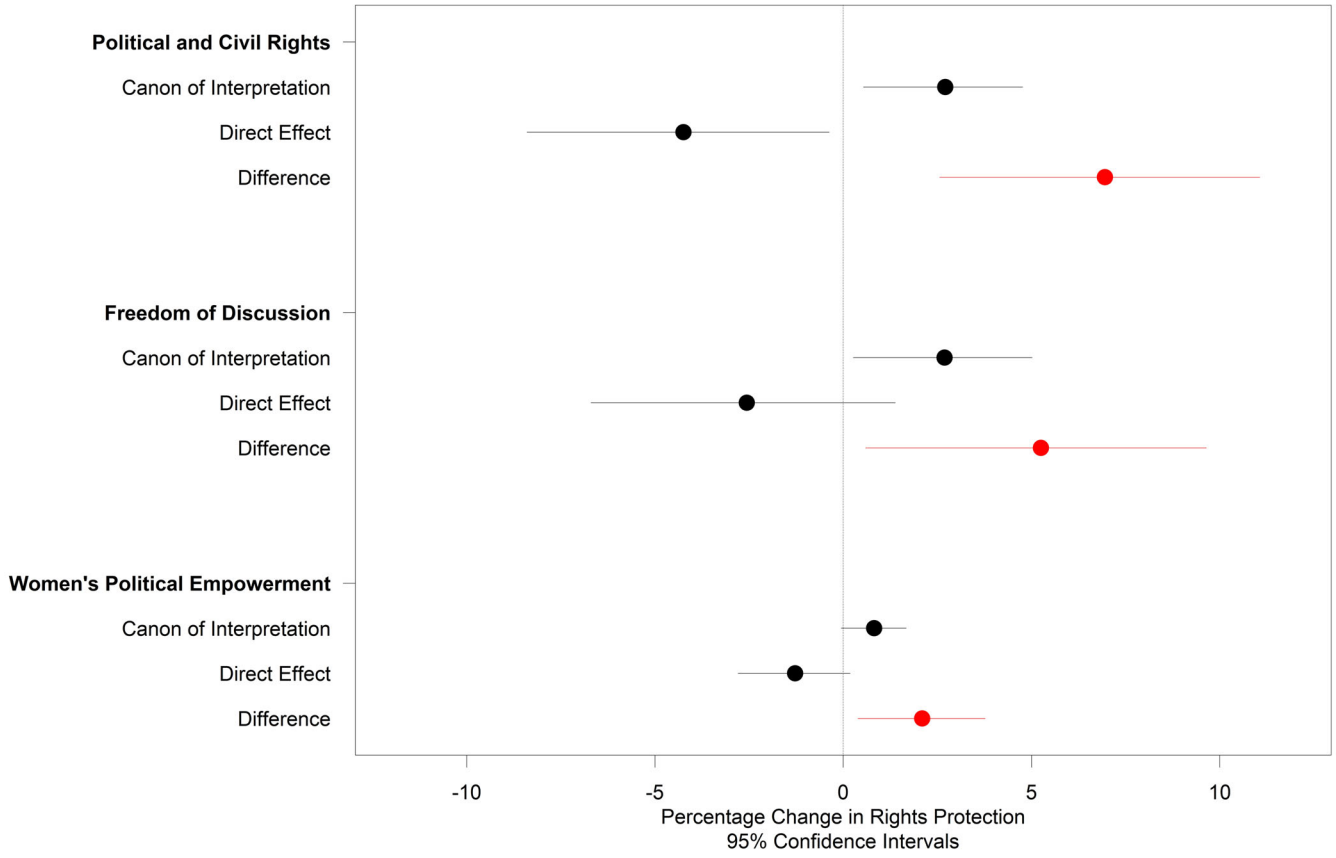

Figure 2. Marginal Effects of Treaty Ratification

matched to another country-year that has not ratified the treaty if the two are estimated to have nearly the same probability of entering the treaty. This creates a matched pair that differs with respect to their treaty commitment but differs very little in terms of their probability of joining the treaty.

We create a matched sample for each of our dependent variables. The matched samples differ slightly from each other because of differing availability of the dependent variable data. Sections 5 and 6 of the Supplementary Information provide additional information.

Because our hypotheses are about the *conditions* under which Treaty Ratification affects human rights practices, we test our hypotheses by interacting Treaty Ratification with Canon of Interpretation and Direct Effect. To address serial correlation, we include a lag of the applicable dependent variable for year $t - 1$. A Lagrange multiplier test indicates that additional lags are not necessary to address serial correlation. The temporal scope of our data includes the years 1982–2007. We test our hypotheses using a series of ordinary least squares models.

Results

Unlike most political science applications, our hypotheses do not require us to test whether a coefficient (or interaction effect) is significantly different from zero, but rather whether two effects are significantly different *from each other*. We therefore compare the extent to which the two legal mechanisms moderate the effect of Treaty Ratification.

Figure 2 provides the results of this analysis.[29] For each right, the figure shows three estimates: (1) the estimated extent to which Canon of Interpretation moderates the effect of Treaty Ratification; (2) the estimated extent to which Direct Effect moderates the effect of Treaty Ratification; and (3) the estimated difference between these moderating effects. All estimated effects are shown as percentage changes in the outcome variable. Given the coding of the dependent variables, a positive effect indicates greater respect for rights, and vice versa. We find support for all of our hypotheses. With respect to all three variables, the extent to which Canon of Interpretation increases the effect of the applicable Treaty Ratification is greater than the extent to which Direct Effect increases the effect of the applicable Treaty Ratification.

The coefficients of other independent variables are consistent with existing findings. Democracies are more likely to respect civil rights, and violations of rights are more likely during civil wars. Instances of rights violations are more likely, else equal, in countries with larger populations, as indicated by the negative coefficients we estimate for these variables. The coefficient of judicial independence is negative, but only significant with respect to with respect to the freedom of discussion. This suggests that we cannot be sufficiently certain whether independent courts are associated with fewer violations of other rights once we control for the legal mechanisms available to those courts, although further research is needed to analyze this point.

[29] The full results of the OLS models are provided in Section 7 of the Supplementary Information.

Conclusions: National Courts as Enforcers of International Human Rights Law

As Alter et al. (2019) observe, national courts have important roles to play in the judicialization of international relations, but we need to better understand the conditions under which they do so. Our aim in this article has been contribute to our understanding of the conditions under which national courts can participate in international judicialization by examining the relationship between (1) the legal mechanisms courts can use to enforce human rights treaties and (2) the politics of human rights and judicial backlash. While other contributions to this special issue examine international judicialization in terms of how national actors behave in the shadow of international courts (Pelc and Busch 2019; Staton and Romero 2019), domestic politics can also become judicialized without an international court enforcing the law.

How and under what conditions can national courts participate in international judicialization? To answer this question, we focus on the legal and political constraints under which national judges make decisions. One of the key contributions of our article is to explain these legal constraints, as well as how they interact with national judges' interest in avoiding political backlash. Our argument focuses on how this legal-political strategic environment shapes the ability of national judges to enforce international law. We hypothesized that the effect of human rights treaties is greater when courts have the canon of interpretation available to them than it is when courts have direct effect available to them. Recognizing the difficulty of identifying the effects of treaty ratification, we tested this hypothesis using a process that weakens the assumptions needed to do so. We found support for this hypothesis with respect to three index measures of civil and political rights: the marginal effects of ICCPR and CEDAW ratification are significantly larger when courts can use the canon of interpretation than when they can use direct effect to enforce the treaty.

This article has broader implications for how international judicialization works at the domestic level. While our most direct focus is on the adjudication phase, in that we describe and assess the effectiveness of mechanisms available to courts when cases of human rights abuses arise, our argument theorizes interactions across phases, and, in particular, how adjudication plays into compliance and how feedback concerns play into adjudication politics (Larsson and Naurin 2019; Pelc and Busch 2019; Staton and Romero 2019). Specifically, we argue that domestic courts' use of legal mechanisms to enforce human rights treaties is constrained by the possibility of future backlash. In turn, this means our argument also has implications for the prelitigation phase. Governments also act strategically, and, to some extent, they can be expected to understand the extent to which their decisions may be sanctioned by courts. Thus, the extent to which governments use the repressive tactics that lead to rights-claiming cases in the first place is influenced by the processes and mechanisms of both the litigation and postlitigation phases. Our argument therefore demonstrates one way in which the phases of the judicialization process are crucially dependent on each other.

Second, this article enhances our understanding of international judicialization by examining in depth the role of national courts in this phenomenon. As Alter et al. (2019) note, "I[i]n countries in which ratified treaties are automatically part of the domestic legal order, courts have broad competence to review claims alleging violations of international law." In addition, human rights are an issue area in which this mechanism is often argued to be especially crucial because international enforcement is often costly or otherwise ineffective. Yet our article demonstrates that, while national courts can enforce human rights treaties, their legal power can also be constrained by political concerns. Specifically, national courts may decide not to use their enforcement power when the legal mechanism available to them is more likely to generate political backlash. This implies that future work should analyze in depth the legal and political concerns that can both facilitate and constrain the ability of domestic national courts to enforce international commitments.

This article also has several implications regarding the effects of human rights treaties. First, as the literature has increasingly recognized, human rights treaty membership can reduce human rights abuses, but such effects are conditional on the availability of actors and institutions that can serve as enforcement mechanisms. Our argument furthers our understanding of these conditions by explaining how and under what conditions domestic courts can effectively enforce such treaties. Second, our argument has potential implications for our understanding of the substitutability of different types of human rights abuses. Governments have a repertoire of forms of repression at their disposal, and in choosing among these forms, one factor they consider is the potential for legal sanctions. If and to the extent governments understand the relative effectiveness of judicial mechanisms, our argument implies that, in countries in which only the direct effect mechanism is available to courts, governments may be more likely to employ violations of the freedoms of association and religion than violations of the freedom of speech. More broadly, in countries in which the canon of interpretation is available to an independent domestic court, meaning that governments can expect civil rights violations to be sanctioned, the availability of this legal mechanism may lead to strategic substitution in favor of harsher tactics, such as physical integrity violations, which are more difficult for such courts to sanction. We hope to explore these possibilities in future work.

Supplementary Information

Appendices and replication materials can be found at www.yonatanlupu.com and at the *International Studies Quarterly* data archive.

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