RULE BY LAW

The Politics of Courts in Authoritarian Regimes

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rule and to strengthen discipline within their states' burgeoning administrative hierarchies.

A variant of this logic is found in situations in which judicial institutions are used to formalize ad hoc power sharing arrangements among regime elites. Maintaining cohesion within the ruling coalition is a formidable challenge, and elite-level cleavages require careful management to prevent any one faction from dominating the others.[5] As with control of administrative agents, judicial mechanisms can be employed to mitigate fragmentation within the ruling apparatus.

Pinochet's Chile provides the most lucid example of how constitutions have been used to formalize pacts among competing factions within authoritarian regimes and how judicial institutions are sometimes used to balance the competing interests among those factions. According to Barros (2002), the 1980 Chilean Constitution represented a compromise among the four branches of the military, which were organized along distinct, corporatist lines with strong, cohesive interests, whereas the 1981 *Tribunal Constitucional* provided a mechanism that enabled military commanders to arbitrate their differences in light of the 1980 document. This institution, perhaps in unanticipated ways, therefore played a major role in maintaining cohesion among the military and in consolidating the 1980 Constitution.

Credible Commitments in the Economic Sphere

The central dilemma of market-based economies is that any state strong enough to ensure protection of property rights is also strong enough to intrude on them (Weingast 1995). Governments must therefore ensure that their promises not to interfere with capital are credible and that they will not renege when politically convenient later on. Establishing autonomous institutions is a common strategy to ensure credible and enduring policies in the economic sphere – in monetary policy, securities regulation, and other areas. Autonomous courts are one variant of this strategy. As elaborated by Hilton Root and Karen May in this volume (Chapter 12), by establishing a neutral institution to monitor and punish violations of property rights, the state can make credible its promise to keep its hands off. Autonomous courts allow economic actors to challenge government action, raising the cost of political

[5] O'Donnell and Schmitter (1986: 19) observe that "there is no transition whose beginning is not the consequence – direct or indirect – of important divisions within the authoritarian regime itself." Similar arguments can be found in a number of other studies including Haggard and Kaufman (1995), Huntington (1991), and Rustow (1970).

interference with economic activity. Root and May emphasize that there is no necessary connection between the empowerment of the courts and the ultimate liberalization of the political system.

Different regimes may be differently situated with regard to the ability of courts to provide credibility. Authoritarian judiciaries vary in their initial endowment of quality, and utilizing courts to make commitments credible may be easier in postcolonial Hong Kong than in, say, Cambodia or Vietnam. Ceteris paribus, there may be a greater incentive to utilize courts when preexisting levels of judicial quality are already high.

At the same time, a global trend toward economic liberalization in recent decades has encouraged and facilitated the establishment or reform of more robust judicial institutions. Courts provide transparent, nominally neutral forums to challenge government action, and hence are useful for foreign investors and trade. The WTO regime explicitly requires states to provide judicial or quasi-judicial institutions in trade-related arenas; a network of bilateral investment treaties promises neutral dispute resolution to reassure investors; and multilateral institutions such as the World Bank and Inter-American Development Bank expend vast resources to promote judicial reform in developing countries. In the age of global competition for capital, it is difficult to find any government that is ***not*** engaged in some program of judicial reform designed to make legal institutions more effective, efficient, and predictable. While the challenges of globalization are formidable for many developing countries, the option of opting out is increasingly one of economic suicide.

This suggests that there are secular pressures toward judicialization of economic activity. However, this does not mean that all state leaders have the equal ability, incentive, or desire to utilize courts in this fashion. Root and May emphasize that there is no reason to think that authoritarian rulers will always pursue broad-based growth – indeed, for many regimes, broad-based growth would undermine the ruling coalition. Similarly, authoritarian regimes in resource-rich states, such as Myanmar or Saudi Arabia, need not develop broad-based legal mechanisms to shelter investment and growth, but can instead rely on narrow bases of regime finance. For such regimes, the potential costs of judicial autonomy may outweigh any benefits, and they will seek to utilize other mechanisms to establish whatever levels of credibility are needed.

The Delegation of Controversial Reforms to Judicial Institutions

Authoritarian rulers also find great advantage in channeling controversial political questions into judicial forums. In democratic settings, Tate and others

describe this process as "delegation by majoritarian institutions" (Tate 1995: 32). Several studies observe that democratically elected leaders often delegate decision-making authority to judicial institutions either when majoritarian institutions have reached a deadlock, or simply to avoid divisive and politically costly issues. As Graber notes (1993: 43), "the aim of legislative deference to the judiciary is for the courts to make controversial policies that political elites approve of but cannot publicly champion, and to do so in such a way that these elites are not held accountable by the general public, or at least not as accountable as they would be had they personally voted for that policy." Seen from this perspective, some of the most memorable Supreme Court rulings are not necessarily markers of judicial strength vis-à-vis other branches of government; rather they might be regarded as strategic modes of delegation by officeholders and strategic compliance by judges (with somewhat similar policymaking preferences) who are better insulated from the political repercussions of controversial rulings.

Perhaps the best example of this phenomenon is the continued postponement of urgently needed economic reforms in postpopulist, authoritarian regimes. Authoritarian rulers in these contexts are sensitive to the risks of retreating from prior state commitments to subsidized goods and services, state-owned enterprises, commitments to full employment, and broad pledges to labor rights generally. They rightly fear popular backlash or elite-level splits if they renege on policies that previously formed the ideological basis of their rule. However, if authoritarian leaders can steer sensitive political questions such as these into "nonpolitical" judicial forums, they stand a better chance of minimizing the political fallout. Moustafa (2007) examines how dozens of Egyptian Supreme Constitutional Court (SCC) rulings enabled the regime to overturn socialist-oriented policies without having to face direct opposition from social groups that were threatened by economic liberalization. SCC rulings enabled the executive leadership to claim that they were simply respecting an autonomous rule-of-law system rather than implementing sensitive reforms through more overt political channels.

Complementarities among the Functions

The above list is hardly exhaustive, but does capture several common circumstances that motivate authoritarian leaders to empower courts. It is worth noting that these functions are not exclusive, but complementary. For example, two of the great threats to security of investment are low-level corruption and bureaucratic arbitrariness. An administrative law regime that reduces agency costs in administration is also likely to enhance credible commitments

to property rights. In turn, economic growth and administrative quality are likely to enhance a regime's claims to legitimacy. Pereira's study here and Chaskalon's (2003) discussion of South Africa both suggest that even harsh regimes may be relatively legitimated if the social control function is domesticated through legal means. In short, the functions of courts are likely to be mutually supportive.

TIME HORIZONS AND THE DOUBLE-EDGED SWORD

To this point, we have catalogued a number of reasons why regimes may wish to rely on judicial forms of governance. Some of these functions are likely to be particular to authoritarian regimes, whereas others represent more general dilemmas of states. Yet not every authoritarian regime chooses to utilize courts to perform these functions. Under what circumstances are regimes more likely to resolve these dilemmas with courts?

A crucial issue is the time horizon of the regime. Entrenched regimes with long time horizons are more likely to turn to courts for core governance functions for several reasons. First, relatively secure regimes have the opportunity to experiment with more sophisticated forms of institutional development. In the economic sphere, for example, secure regimes are more likely to prioritize institutional reforms such as courts that maximize long-term economic growth and tax revenues. In contrast, regimes with a precarious grip on power are generally less concerned with the long-term payoff of institutional reform and are more likely to engage in predatory behavior (Olson 1993).

The same logic holds for the administrative functions that courts perform. The principal-agent problems associated with bureaucracies are likely to become more severe over time and in step with the degree of bureaucratic complexity of the state. Ginsburg's contribution in this volume (Chapter 2) ties the shift toward administrative law to a decline in ideology as a basis for regime legitimation and control of agents. Once again, relatively mature regimes have the luxury of experimenting with more sophisticated forms of institutional development and administrative discipline.

Third, there is also reason to believe that the longer a regime survives, the more it is likely to shift its legitimizing rhetoric away from the achievement of substantive concerns to rule-of-law rhetoric. For example, Nasser (1954–1970) pinned his legitimacy to the revolutionary principles of national independence, the redistribution of national wealth, economic development, and Arab nationalism. However, when the state failed to deliver, Anwar Sadat (1970–1981) explicitly pinned the regime's legitimacy on "*sayadat al-qanun*" (the rule of law) to distance himself from those failures. Ginsburg notes a

similar transformation to rule-of-law rhetoric in China. Mao Zedong almost completely undermined judicial institutions after founding the People's Republic of China in 1949, but rule-of-law rhetoric is being increasingly used by the regime to distance itself from the spectacular excesses and failures of its past, and to build a new legitimizing ideology.[6]

Note that the timing of judicialization outlined here contrasts with that found in democratic environments. Hirschl (2004) argues that judicialization results when "departing hegemons" seek to extend their substantive policies after prospective electoral loss. Similarly, Ginsburg (2003) views the establishment of judicial review as a strategy of political insurance by parties that foresee themselves out of power in the near future. In both accounts, ruling parties that will soon be displaced by their opponents have an incentive to empower the judiciary, because they believe the regime and its institutions will continue without them. In authoritarian environments, by contrast, entrenched regimes (i.e., authoritarian regimes with *longer* time horizons) are more likely to empower the judiciary, precisely to extend the life of the regime and guard against a loss of power.

While the electoral logic of judicialization in democracies clearly does not apply in authoritarian settings, our findings are broadly consistent with the Ginsburg-Hirschl argument in the following sense. The electoral story hinges at bottom on the disaggregation of interests within a governing regime. The presence of two competing groups with different views of policy facilitates the empowerment of the judiciary in democracies. Similarly, many of the dilemmas that prompt authoritarian regimes to empower courts are intensified by disaggregation within the regime. For example, the need for courts to resolve internal coordination problems, as identified by Barros (2002), arises from a degree of fragmentation within the ruling coalition. The need for control of administrative agents is exacerbated by state fragmentation, as Ginsburg's account of China here suggests. Thus, when we expand the focus from a simple electoral model to a broader one of state fragmentation, authoritarian and democratic regimes may not be as dissimilar as first appears in terms of the timing of judicial empowerment.

The decision to accord autonomy to courts depends on the particular configuration of challenges faced by authoritarian regimes, but in an astonishing array of circumstances, limited autonomy makes sense. The strategy, however, is hardly risk-free. Once established, judicial institutions sometimes open new

[6] For Nasser, these included the failure to deliver economic development, defeat in the 1967 war, and the collapse of the United Arab Republic with Syria. For Mao Zedong, these included the Great Leap Forward, which resulted in the largest famine in human history with 30 million deaths, the chaos of the Cultural Revolution, and the failure to deliver economic growth.

avenues for activists to challenge regime policy. This is perhaps an inevitable outcome, because, as Moustafa has previously noted, the success of each of these regime-supporting functions depends upon some measure of real judicial autonomy (2007). For example, commitments to property rights are not credible unless courts have independence and real powers of judicial review. Administrative courts cannot effectively stamp out corruption unless they are independent from the political and bureaucratic machinery that they are charged with supervising and disciplining. The strategy of "delegation by authoritarian institutions" will not divert blame for the abrogation of populist policies unless the courts striking down populist legislation are seen to be independent from the regime. And finally, regime legitimacy derived from a respect for judicial institutions also rings empty unless courts are perceived to be independent from the government and they rule against government interests from time to time.

Not all regimes will empower courts to capitalize on these functions, but those that do create a uniquely independent institution with public access in the midst of an authoritarian state. This provides one venue for what O'Brien and Li (2005) call "rightful resistance," defined as "a form of popular contention that operates near the boundary of authorized channels, employs the rhetoric and commitments of the powerful to curb the exercise of power, hinges on locating and exploiting divisions within the state, and relies on mobilizing support from the wider public." Even when activists do not win particular cases, courts can facilitate rightful resistance by providing publicity about government malfeasance, deterring future abuses and developing skill sets for activist leaders. Together, courts and activists can form what Moustafa (2007) calls "judicial support networks," namely institutions and associations, both domestic and transnational, that facilitate the expansion of judicial power by actively initiating litigation and/or supporting the independence of judicial institutions if they come under attack. In authoritarian contexts, the fate of judicial power and legal channels of recourse for political activists is intertwined.

Halliday, Feeley, and Karpik (2007) similarly find that the nature of the relationship among the various elements of the "legal complex" is a key variable in curbing excessive state power. The bench, bar associations, prosecutors, and nongovernmental organizations can work together to bolster judicial autonomy even in the face of authoritarian political systems. In Taiwan, for example, the alternative bar association became a key site of organizing resistance to the KMT regime, and both Korea and Taiwan had lawyer-activists as presidents in the early twenty-first century (Ginsburg, 2007). Legality in the authoritarian period provided the seeds for a complete institutional transformation once democratization began. Similar dynamics seemed to potentially be underway

in Pakistan in mid 2007 when Chief Justice Muhammad Chaudhry relied on the support of the bar association to resist an attempt by General Musharraf to remove him from office. Ultimately, the bar and the courts were subjected to attack when Musharraf suspended the constitution; still, the courts have provided some space for regime opponents, and may do so again once political circumstances are less charged.

HOW REGIMES CONTAIN COURTS

Given the potential use of courts as a double-edged sword, a central challenge for authoritarian rulers is to capitalize on the regime-supporting roles that courts perform while minimizing their utility to the political opposition. Courts in authoritarian states face acute limitations, but the most serious constraints are often more subtle than tightly controlled appointment procedures, short term limits, and the like. Direct attacks on judges, such as the crude campaign of physical intimidation of the judiciary in Zimbabwe documented here by Jennifer Widner in Chapter 9, are also rare. More typically, regimes can contain judicial activism *without* infringing on judicial autonomy. Following Moustafa (2007), we outline four principal strategies: (1) providing institutional incentives that promote judicial self-restraint, (2) engineering fragmented judicial systems, (3) constraining the access to justice, and (4) incapacitating judicial support networks.

Judicial Self-Restraint

The assumption that courts serve as handmaidens of rulers obscures the strategic choices that judges make in authoritarian contexts, just as they do in democratic contexts.[7] Judges are acutely aware of their insecure position in the political system and their attenuated weakness vis-à-vis the executive, as well as the personal and political implications of rulings that impinge on the core interests of the regime.

Core interests vary from one regime to the next depending on substantive policy orientations, but all regimes seek to safeguard the core legal mechanisms that undergird their ability to sideline political opponents and maintain power. Reform-oriented judges therefore occupy a precarious position in the legal/political order. They are hamstrung by a desire to build oppositional credibility among judicial support networks, on the one hand, and an inability to challenge core regime interests for risk of retribution, on the other hand.

[7] A classic account in the American context is Murphy (1962).

Given this precarious position, reform-minded judges typically apply subtle pressure for political reform only at the margins of political life.

Core regime interests are typically challenged only when it appears that the regime is on its way out of power. In most cases, reform-oriented judges bide their time in anticipation of the moment that the regime will weaken to the extent that defection is no longer futile, but can have an impact on the broader constellation of political forces (Helmke 2002, 2005). Strategic defection in such a circumstance is also motivated by the desire of judicial actors to distance themselves from the outgoing regime and put themselves in good stead with incoming rulers. The more typical mode of court activism in a secure authoritarian regime is to apply subtle pressure for political reform at the margins and to resist impinging on the core interests of the regime.

The dynamics of "core compliance" with regime interests are noted in dozens of authoritarian states. In the Egyptian case, the Supreme Constitutional Court issued dozens of progressive rulings that attempted to expand basic rights and rein in executive abuses of power, but it never ruled on constitutional challenges to the emergency laws or civilian transfers to military courts, which formed the bedrock of regime dominance. Similarly, in the early days of the Marcos regime, the Philippine Supreme Court did not attempt to resist the decree of martial law, the imposition of a new constitution, or decrees placing new constraints on the jurisdiction of the courts. Rather, the court yielded to Marcos's seizure of power, and it continued to submit to the regime's core political interests for the next fourteen years of rule. Philippine Justices Castro and Makalintal candidly acknowledged the political realities that undoubtedly shaped the court's unwillingness to confront the regime, stating in their ruling that "if a new government gains authority and dominance through force, it can be effectively challenged only by a stronger force; no judicial dictum can prevail against it" (Del Carmen 1973: 1059–1060). Similar dynamics are noted in Pakistan, Ghana, Zimbabwe, Uganda, Nigeria, Cyprus, Seychelles, Grenada, and other countries (see, e.g., Mahmud 1994).

In such circumstances, formal judicial independence can clearly exist within an authoritarian state. One can also understand why an authoritarian ruler would find it politically advantageous to maintain formal judicial independence. Del Carmen's (1973: 1061) characterization of judicial politics under Marcos is particularly illuminating:

> While it is true that during the interim period . . . the President can use his power to bludgeon the Court to subservience or virtual extermination, the President will most probably not do that – ironically, because he realizes that

it is in his interest to keep the Court in operation. On the balance sheet, the Court thus far has done the President more service than disservice, more good than harm.

The important dynamic to note in each of these instances is that authoritarian regimes were able to gain judicial compliance *and* enjoy some measure of legal legitimation without having to launch a direct assault on judicial autonomy. The anticipated threat of executive reprisal and the simple futility of court rulings on the most sensitive political issues are usually sufficient to produce judicial compliance with the regime's core interests. An odd irony results: the more deference that a court pays to executive power, the more institutional autonomy an authoritarian regime is likely to extend to it.[8]

The internal structure of appointments and promotions can also constrain judicial activism quite independently of regime interference. The judiciary in Pinochet's Chile is a good example of a court system that failed to act as a meaningful constraint on the executive, despite the fact that it was institutionally independent from the government. According to Hilbink (chapter 4), this failure had everything to do with the process of internal promotion and recruitment, wherein Supreme Court justices controlled the review and promotion of subordinates throughout the judiciary. The hermetically sealed courts did not fall victim to executive bullying. Rather, the traditional political elite controlling the upper echelons of the court system disciplined judges who did not follow their commitment to a thin conception of the rule of law.[9]

The case of Singapore, discussed here by Gordon Silverstein in Chapter 3, provides a further example. Silverstein documents how Singapore's courts do very well on formal measures of independence, yet despite having a good deal of autonomy in economic and administrative matters they do not constrain the government politically. With its commanding majority in the Parliament, Lee Kuan Yew's People's Action Party easily issued new legislation and even constitutional amendments to sideline political opponents, all the while respecting

[8] This observation should also call into question our common understanding of the concept of "judicial independence." If we understand judicial independence to mean institutional autonomy from other branches of government, then we must conclude that more than a few authoritarian states satisfy this formal requirement. In both democratic and authoritarian contexts, formal institutional autonomy appears to be a necessary condition for the emergence of judicial power, but in both cases it is insufficient by itself to produce effective checks on power.

[9] Hilbink finds that the independent Chilean Supreme Court ironically became a significant obstacle to democratic consolidation, challenging the assumption in the vast majority of the political science literature that independent courts provide a check on executive or legislative abuses of power and that courts consistently work to protect basic rights that are essential for a healthy democracy.

formal judicial independence. All of these cases suggest that formalist conceptions of the rule of law are not enough to ensure substantive notions of political liberalism.

Alternatively, one can imagine courts that have a very broad scope of activity, but have relatively little autonomy. Scope is a distinct issue from autonomy (see Guarnieri and Pederzoli 2002). Magaloni's account in this volume (see Chapter 7) of the Mexican judiciary under the PRI seems to illustrate the model of a judiciary with a wide scope of formal authority but little autonomy. Judicial appointments were highly centralized, and the judicial process was used to suppress the opposition.

Fragmented versus Unified Judicial Systems

Authoritarian regimes also contain judicial activism by engineering fragmented judicial systems in place of unified judiciaries. In the ideal type of a unified judiciary, the regular court hierarchy has jurisdiction over every legal dispute in the land. In fragmented systems, on the other hand, one or more exceptional courts run alongside the regular court system. In these auxiliary courts, the executive retains tight controls through nontenured political appointments, heavily circumscribed due process rights, and retention of the ability to order retrials if it wishes. Politically sensitive cases are channeled into these auxiliary institutions when necessary, enabling rulers to sideline political threats as needed. With such auxiliary courts waiting in the wings, authoritarian rulers can extend substantial degrees of autonomy to the regular judiciary.

Examples can be found in a number of diverse contexts. In Franco's Spain, Jose Toharia (1975: 495) noted that "Spanish judges at present seem fairly independent of the Executive with respect to their selection, training, promotion, assignment, and tenure." Yet Toharia also observed that the fragmented structure of judicial institutions and parallel tribunals acted "to limit the sphere of action of the ordinary judiciary." This institutional configuration ultimately enabled the regime to manage the judiciary and contain judicial activism, all the while claiming respect and deference to independent rule-of-law institutions. Toharia explains that "with such an elaborate, fragile balance of independence and containment of ordinary tribunals, the political system had much to gain in terms of external image and internal legitimacy. By preserving the independence of ordinary courts . . . it has been able to claim to have an independent system of justice and, as such, to be subject to the rule of law."

All other things being equal, there is likely to be a direct relationship between the degree of independence and the degree of fragmentation of judicial

institutions in authoritarian contexts. The more independence a court enjoys, the greater the likely degree of judicial fragmentation in the judicial system as a whole. Boundaries between the two sets of judicial institutions also shift according to political context. Generally speaking, the more compliant the regular courts are, the more that authoritarian rulers allow political cases to remain in their jurisdiction. The more the regular courts attempt to challenge regime interests, on the other hand, the more the jurisdiction of the auxiliary courts is expanded.

In authoritarian states, the regular judiciary is unwilling to rule on the constitutionality of parallel state security courts for fear of losing a hopeless struggle with the regime, illustrating both the core compliance function at work and the awareness among judges that they risk the ability to champion rights at the margins of political life if they attempt to challenge the regime's core legal mechanisms for maintaining political control. Returning to the Egyptian example, the Supreme Constitutional Court had ample opportunities to strike down provisions that denied citizens the right of appeal to regular judicial institutions, but it almost certainly exercised restraint because impeding the function of the exceptional courts would result in a futile confrontation with the regime. Ironically, the regime's ability to transfer select cases to exceptional courts facilitated the emergence of judicial power in the regular judiciary. The Supreme Constitutional Court was able to push a liberal agenda and maintain its institutional autonomy from the executive largely because the regime was confident that it ultimately retained full control over its political opponents. To restate the broader argument, the jurisdiction of judicial institutions in authoritarian regimes is ironically dependent on the willingness of judges (particularly those in the higher echelons of the courts) to manage and contain the judiciary's own activist impulses. Judicial activism in authoritarian regimes is only made possible by its insulation within a fundamentally illiberal system.

Constraining Access to Justice

Authoritarian rulers can also contain judicial activism by adopting a variety of institutional configurations that constrain the efforts of litigants and judges. At the most fundamental level, civil law systems provide judges with less maneuverability and less capacity to create "judge-made" law than enjoyed by their common law counterparts (Merryman 1985; Osiel 1995). The rapid spread of the civil law model historically was not merely the result of colonial diffusion, in which colonizers simply reproduced the legal institutions of the

mother country. In many cases, the civil law model was purposefully adopted independent of colonial imposition because it provided a better system through which rulers could constrain, if not prevent, judge-made law. Although the differences between civil law and common law systems are often overstated and even less meaningful over time as more civil law countries adopt procedures for judicial review of legislation, civil law judges may be relatively more constrained than their common law counterparts as a formal matter.[10] More important than any legal constraints is the norm that judges in civil law systems are to apply the law mechanically, resulting in a tendency toward thin rather than thick conceptions of the rule of law.

Regimes can engineer further constraints on the *institutional structure* of judicial review,[11] the *type* of judicial review permitted,[12] and the *legal standing* requirements. For example, a regime can constrain judges more effectively by imposing a centralized structure of judicial review in place of a decentralized structure. Centralized review yields fewer judges who must be bargained with, co-opted, or contained, resulting in predictable relationships with known individuals. It was precisely for this reason that the Turkish military imposed a centralized structure of judicial review in the 1982 Constitution.[13] Another technique, recounted here by Peter Solomon in Chapter 10, is to under-enforce judicial decisions.

Most regimes also limit the types of legal challenges that can be made against the state. In Magaloni's account of Mexico under the PRI, citizens could only raise *amparo* cases, radically constraining the Mexican Supreme Court. Similarly, article 12 of the Chinese Administrative Litigation Law empowers citizens to challenge decisions involving personal and property rights, but it

[10] Shapiro explains that the role of the civil law judge as simply applying preexisting legal codes is a myth because it assumes that codes can be made complete, consistent, and specific, which is never fully actualized in reality. The result is that civil court judges engage in judicial interpretation, a fundamentally political role, just as judges do in common law systems (Shapiro 1981).

[11] In a centralized system of judicial review, only one judicial body (typically a specialized constitutional court) is empowered to perform review of legislation. In a diffused system of judicial review, on the other hand, any court can decide on the constitutionality or unconstitutionality of a particular piece of legislation.

[12] Courts with provisions for concrete review examine laws after they take effect, in concrete legal disputes. Courts with provisions for abstract review examine legislation as part of the normal legislative process and can nullify legislation before it takes effect.

[13] In the 1961 Turkish Constitution, courts could practice judicial review if the Constitutional Court had not issued a judgment within a defined period. This procedure was abolished in the 1982 Constitution, and a number of other constraints were put in place to narrow the scope and standing requirements of judicial review (Belge 2006).

does not mention political rights, such as the freedom of association, assembly, speech, and publication. These select issue areas speak volumes about the intent of the central government to rein in local bureaucrats while precluding the possibility of overt political challenges through the courts.

Incapacitating Judicial Support Networks

Finally, authoritarian regimes can contain court activism by incapacitating judicial support networks. In his comparative study, *The Rights Revolution*, Epp (1998) shows that the most critical variable determining the timing, strength, and impact of rights revolutions is neither the ideology of judges, nor specific rights provisions, nor a broader culture of rights consciousness. Rather, the critical ingredient is the ability of rights advocates to build organizational capacity that enables them to engage in deliberate, strategic, and repeated litigation campaigns. Rights advocates can reap the benefits that come from being "repeat players" when they are properly organized, coordinated, and funded.[14] Although Epp's study is concerned with courts in democratic polities, his framework sheds light on the structural weakness of courts in authoritarian regimes.

The weakness of judicial institutions vis-à-vis the executive is not only the result of direct constraints that the executive imposes on the courts; it is also related to the characteristic weakness of civil society in authoritarian states. The task of forming an effective judicial support network from a collection of disparate rights advocates is all the more difficult because activists not only have to deal with the collective action problems that typically bedevil political organizing in democratic systems but authoritarian regimes also actively monitor, intimidate, and suppress organizations that dare to challenge the state. Harassment can come in the form of extralegal coercion, but more often it comes in the form of a web of illiberal legislation spun out from the regime. With the legal ground beneath them constantly shifting, rights organizations find it difficult to build organizational capacity before having to disband and reorganize under another umbrella association. Given the interdependent nature of judicial power and support network capacity in authoritarian polities, the framework of laws regulating and constraining the activities of judicial support networks is likely to be one of the most important flashpoints of clashes between courts and regimes.

[14] The advantages enjoyed by "repeat players" in the legal system were first examined by Marc Galanter in his classic 1974 article, "Why the 'Haves' Come out Ahead."

The story of courts in authoritarian regimes is likely to involve a dialectic of empowerment – as regimes seek the benefits only judicial autonomy can provide – and constraint, as regimes seek to minimize the associated costs of judicial autonomy. The latter reaction is more likely as courts build up their power, and as activist networks expand their links within and outside of society so as to become a plausible alternative to the regime (Moustafa 2007). Yet, in certain rare cases, the wheels of justice may simply have too much momentum to stop.

CONCLUSION

Judicial politics in authoritarian states is often far more complex than we commonly assume. The cases reviewed in this volume reveal that authoritarian rulers often make use of judicial institutions to counteract the many dysfunctions that plague their regimes. Courts help regimes maintain social control, attract capital, maintain bureaucratic discipline, adopt unpopular policies, and enhance regime legitimacy. However, courts also have the potential to open a space for activists to mobilize against the state, and synergistic alliances sometimes form with judges who also wish to expand their mandate and affect political reform. Authoritarian rulers work to contain judicial activism through providing incentives that favor judicial self-restraint, designing fragmented judicial systems, constraining access to justice, and incapacitating judicial support networks. However, those efforts may not be completely effective. Instead, a lively arena of contention emerges in what we typically imagine to be the least likely environment for the judicialization of politics – the authoritarian state.

We conclude with an expression of modesty. We recognize that our findings in this volume are only a first step, and there is far more work to do to expand the geographic and institutional scope of inquiry into authoritarian regimes. The contributors to this project hope, however, to have collectively identified avenues of inquiry and particular dynamics that will inform future work in this area. Unfortunately, it appears that work on authoritarian regimes will be needed for many years to come.

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1

Of Judges and Generals: Security Courts under Authoritarian Regimes in Argentina, Brazil, and Chile

Anthony W. Pereira

INTRODUCTION

As Ginsburg and Moustafa point out in the Introduction to this volume, few academic studies have taken the law and legal institutions under authoritarian regimes seriously. Most studies of authoritarianism assume that regimes that come to power by force cannot rely on the law to maintain control of society or to legitimate themselves; their unconstitutional origins are seen as making such an effort contradictory and impossible. When analysts do consider the law, they often assume that authoritarian rulers wield it in a direct, unmediated way, relying on their agents to impose their will through consistently compliant courts. Yet even a cursory glance at actual authoritarian regimes, past and present, should lead us to question these assumptions. In fact, authoritarian regimes use the law and courts to bolster their rule all the time, in ways that a simplistic distinction between *de facto* and constitutional (or *de jure*) regimes obscures. Furthermore, this use of the law can be complicated and ambiguous, furnishing regime opponents and activist judges with venues in which to challenge the prerogatives of the regime and to liberalize authoritarian rule.

It might be thought that a security court would be the last place where such contestation might take place. However, such an assumption would also be incorrect. This chapter examines the use of security courts to prosecute political dissidents in three South American military dictatorships – those of Brazil (1964–1985), Chile (1973–1990), and Argentina (1976–1983). It first

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shows the wide variation in the use of security courts for purposes of political repression under these regimes. In the next section, it argues that this variation can be accounted for by examining the different histories of military-judicial collaboration before and during the establishment of the regimes. Section three examines the way that defense lawyers in the Brazilian security courts were able to push the boundaries of regime legality in a liberal direction. Section four considers whether the framework developed to explain variation in the security courts of Brazil, Chile, and Argentina can help us to understand other authoritarian regimes. In section five, the case of the United States after 9/11 is used to ask whether contemporary democracies might be converging on authoritarian regimes with regard to certain institutional mechanisms. Finally, the conclusion recapitulates the overall argument.

SECURITY COURTS IN BRAZIL AND THE SOUTHERN CONE

The military regimes of Brazil, Chile, and Argentina used security courts in three very different ways. The regimes were attempting to address three of the five problems of authoritarian regimes identified by Tamir Moustafa – elite cohesion, the tendency toward regime fragmentation, and legitimacy (Moustafa 2007). By channeling politically sensitive cases into security courts, the military regimes could engage in political theater that created a dangerous, subversive "other," thus unifying the regime and its supporters. Such a solution also allowed some degree of independence for the rest of the court system. The security courts, however, did not address the first problem identified by Tamir Moustafa, that of property rights. Furthermore, the security courts were of limited use as a means of control over lower level officials, in the way that administrative courts functioned, as described by Tom Ginsburg in Chapter 2. While the transcripts of the security court trials could have been used by higher regime officials as a source of information on the behavior of lower level officials, they tended not to be so used. Instead, regime officials were mainly interested in using the trials to demonstrate the perfidy and antinationalism of those being prosecuted, and what the trials supposedly revealed about their own commitment to the rule of law. Paradoxically, information from the security court trials was most useful to oppositional groups. Important human rights reports published after the end of military rule in both Brazil and Chile drew heavily from the records of the security court trials (see Table A.1 in the appendix).

Of the three cases described in this chapter, the security courts in Brazil had the slowest and most public proceedings, and gave the widest latitude to defendants and their supporters in civil society to maneuver within the system. These courts were peacetime military courts that had existed before

the creation of the military regime. The regime never suspended the prior constitution *in toto*, but instead selectively overrode it by issuing institutional acts that were exempt from judicial review. Torture was widespread, but disappearances were relatively rare, and trials in military courts involved civilian participation on the bench and at the bar. A civilian judge trained in the law passed judgment along with four military officers who were rotated in and out of the courts for three-month stints, and defense lawyers were usually civilian lawyers. Prosecutors were civilian lawyers who worked for the military. The deck was stacked against defendants, but some room for the defense of the accused was possible. Courts issued death sentences in only four instances, and these were never carried out because they were reversed on appeal. During the period of military rule in Brazil it was always possible to appeal convictions in the military courts to the civilian Supreme Court. Cases took years to wend their way through the system. In a sample of cases from the lowest level of the security court system under military rule, the acquittal rate was about 50 percent, with a slightly higher acquittal rate at the two levels of appeal courts (the Superior Military Tribunal and the Supreme Court).[1]

The Chilean military regime, created nine years after its Brazilian counterpart, was draconian in comparison. The Chilean military suspended the constitution, declared a state of siege, and executed hundreds of people without trial. Torture was common, and most prosecutions that did take place occurred in "wartime" military courts, insulated from the civilian judiciary, for the first five years of the regime. These military courts were more autonomous from the regular judiciary, and more punitive, than their Brazilian counterparts. They were made up of seven military officers, none of whom were required to be trained in the law. The defendants faced rapid verdicts and sentences that were usually issued within a few days. Sentences included the death penalty, and defendants enjoyed few procedural rights and no effective right of appeal. The Chilean Supreme Court refused to review any military court verdicts.[2] In

[1] The sample comes from the *Brasil: Nunca Mais* collection in the Leuenroth archive at the State University of Campinas, Sao Paulo, Brazil. From a total of 707 cases involving 7,367 defendants, I compiled quantitative information on 257 cases (36 percent of the total) with 2,109 defendants (29 percent of the total). While the acquittal rate of 50 percent squares with other accounts of the trials, it should be emphasized that this is not a random sample and therefore may not exactly reflect outcomes in the entire universe of cases. For more on the Brazilian security court trials, see Pereira (2005: 63–89, 201–203).

[2] For the Chilean case, I concentrate only on the period of "wartime" military courts from 1973–1978, due both to a lack of data from the period after that and to clarify the comparisons of types of authoritarian legality made in this chapter (Catholic Church 1989). The great bulk of the material is on trials in the 1973–1978 period. However, these are lawyers' summaries of cases and are not comparable in richness and detail to the cases I examined in the *Brasil: Nunca Mais* archive.

a sample of cases, the acquittal rate in Chile's wartime military courts averaged about 12 percent, well below the Brazilian average.[3]

Both the Brazilian and Chilean military regimes were able to attract international investment and achieve considerable economic success despite their use of security courts and gross violations of human rights. While the claims of either regime to have even a thin rule of law were weak, these regimes, like the People's Action Party regime in Singapore described by Gordon Silverstein in Chapter 3, were able to reassure investors that they would play by the rules of the international capitalist system, despite lacking a genuine separation of powers, constitutional review, or other trappings of a liberal democratic rule of law. The Brazilian "miracle" of double-digit annual economic growth rates occurred exactly in the period of the greatest political repression, 1969–1973. In Chile, the 1973–1978 period saw the military regime engage in both sharp political repression and wholesale economic restructuring along neo-liberal lines; this restructuring paved the way for high economic growth in the late 1980s and 1990s.

The repressive strategy of the last military regime in Argentina, instituted three years after the Chilean coup, was the most drastic of all. In it, courts were largely uninvolved in the repressive system, except to deny writs of habeas corpus[4] and serve as a cover for state terror. Some 350 people were convicted in military courts during the 1976–1983 period, but almost all of these defendants had been arrested prior to the 1976 coup (Nino 1996: 80). After the coup, the modus operandi of the security forces was largely extrajudicial. Police and military personnel picked up people, took them to secret detention centers, interrogated and tortured them, and then "disappeared" them without explanation or record. In such a system, the ability of victims to maneuver within the system was very small, and family members were not even given the consolation of the right to grieve over the body of the victim. Lawyers for political detainees were also targets for repression. About 90 defense lawyers were disappeared between March and December of 1976, something that did not happen in Brazil or Chile (Argentine National Commission on the

[3] The Chilean sample is of 406 cases with 2,689 defendants from 31 military courts throughout the country during military rule. This represents about 45 percent of the roughly 6,000 defendants believed to have been tried in military courts in the 1973–1978 period. As with the Brazilian data, this is not a random sample.

[4] Writs of habeas corpus are legal orders from courts to prison officials ordering that prisoners be brought to the courts so that judges can decide whether prisoners have been lawfully imprisoned and whether or not they must be released. The Latin term means "you have the body" (Black, Nolan, and Connolly 1979: 638). The inoperability of writs of habeas corpus was one of the features of the military regimes in Brazil and the Southern Cone that made them so repressive.

Disappeared 1986: 413). In institutional terms, the Argentine regime was the most innovative and the most daring of all three military dictatorships. It was the only one of the three that accomplished the rare political feat of creating something truly new.[5]

Although all of the regimes that created these institutional complexes were broadly similar, their use (and nonuse) of security courts was markedly different. The regimes varied in the degree to which their authoritarian legality broke with pre-authoritarian legal forms, as well as the extent to which the treatment of political prisoners was regulated by law, or judicialized. As Table 1 in the appendix shows, the ratio of those prosecuted in courts to those killed by the state varied across regimes. In Brazil the ratio was 23 to 1, or 23 political prisoners prosecuted for every one extrajudicially killed or disappeared. In Chile the ratio was 1.5 to 1, exhibiting a rough parity between judicialized and extrajudicial repression. In Argentina, only one person was put on trial for every 71 people who were disappeared.

It is important to point out that the judicialization of repression in Brazil and Chile took place in the context of very limited independence for courts.[6] In Brazil, the military regime did not engage in widespread judicial purges, but abolished judges' traditional rights to tenure and irremovability, putting all judges and prosecutors on notice that they could be punished if they made decisions against the regime's interests. Furthermore, in 1965 the Brazilian military regime packed the Supreme Court, increasing its membership from eleven to sixteen judges, and then reduced the number to eleven judges again in 1969. In the latter reform some Supreme Court justices were also forcibly retired. These maneuvers were sparked by important decisions by the Supreme Court that went against the military regime (see Osiel 1995). In Chile, the regime's pressure on the judiciary was more indirect. Judges formally retained security of tenure, but as Elizabeth Hilbink explains in Chapter 4, the Supreme Court's ability to punish lower-ranking judges kept the judiciary in check (Hilbink 1999). In 1997 a Supreme Court justice admitted that if the court had

[5] These distinctions between the modes of political repression under the three regimes are not absolute. Disappearances, summary executions, and trials took place under all three regimes. The regimes also frequently ignored their own laws. Nevertheless, the proportion of one form of repression to the others varied considerably across regimes, and I have used the available data as the basis for my classification.

[6] It is important to point out that by judicialization of repression I mean the subjection of political prisoners to some kind of court proceedings. This is therefore a narrower concept than Tamir Moustafa's definition of the judicialization of politics: "the process by which courts and judges come to make or increasingly dominate the making of public policies that had been previously made (or, it is widely believed, ought to be made) by other governmental agencies, especially legislatures and executives" (Moustafa 2007: 26–27).

challenged the Pinochet government's prerogatives, it could have been closed down, as was the Congress from 1973 to 1980.

PATTERNS OF MILITARY-JUDICIAL COLLABORATION

The military regimes of Brazil, Chile, and Argentina are good candidates for comparison. They were all founded in opposition to left-populist movements that had much in common, and they are strongly connected by historical epoch, geographic proximity, common external influences, and roughly equivalent internal dynamics. The three cases are also comparable in terms of level of economic development, position in the global economic system, and cultural traditions of authoritarian rule. They thus allow for a structured, focused comparison that controls for several factors and allows for the exploration of particular explanations for their differing uses of security courts (George 1979: 43–67, 61–63; Laitin 2002: 630–659).

It might be thought that the regimes' various strategies vis-à-vis security courts can be accounted for simply by the strength of the opposition faced by each. The Brazilian coup was preemptive, and the opposition to the military regime very weak; the Chilean coup was a "rollback" coup (Drake 1996: 32–33),[7] but armed opposition to the military regime was relatively insignificant; and the Argentine regime faced what was probably the strongest armed left in Latin America at that time.[8] However, the scope and intensity of regime repression should not be confused with its form. The strength of the opposition does not account for the distinctive institutional matrix of each regime, and the different organizational arrangements for dealing with "subversion" in each case.[9] Why did the Argentine military regime not prosecute more suspected guerrillas in security courts? Why were so few members of the Brazilian armed left "disappeared"? Why were Chile's security court trials so insulated from the civilian judiciary? These questions are important, because the institutional form of authoritarian repression can influence its breadth and intensity and, in particular, how open it is to resistance, challenge, and modification by victims

[7] A preemptive coup is one that occurs before extensive mass mobilization by the incumbent government and is intended to forestall feared or incipient mobilization. A rollback coup is less conservative in that it seeks to reverse the reforms of the deposed regime and to crush high levels of prior mass mobilization.

[8] Some authors contest this, arguing that the armed left had been largely annihilated by the time of the 1976 coup in Argentina. See Andersen (1993).

[9] Another example of the point being made here is that the Tupamaros in Uruguay were one of the strongest armed movements in Latin America in the 1970s, but the Uruguayan military regime did not resort, as did its Argentine counterpart, to a large-scale dirty war.