RULE BY LAW

The Politics of Courts in Authoritarian Regimes

Edited by Tom Ginsburg and Tamir Moustafa

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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.

and their supporters. Furthermore, the institutional form of repression may influence post-transition attempts to engage in transitional justice in important ways.

This chapter argues that a key factor in understanding the different uses of security courts in Brazil and the Southern Cone is the timing and sequence of institutional changes in the realm of political repression. Specifically, differing degrees of integration and consensus between judicial and military elites prior to those regimes, as well as the interaction between the legal system and defense lawyers and civil society groups, produced the different outcomes described above.

Judicial and military elites constitute corporate status groups, each with its own powerful organization within the state apparatus, and these status groups strongly influence the development and application of law under authoritarian regimes.[10] Consensus is defined here as substantial elite agreement about the overall design, goals, and tactics of policy (Melanson 1991: 1–12). Key factors in the formation of consensus between the groups are the organizational contours of the military justice system, the dominant military factions' and their supporters' perceptions of threat, the history of relations between military officers and the judiciary, and the degree of conflict between these groups over interpretations of national security law. My contention is that this kind of integration and consensus was highest in Brazil and lowest in Argentina, with Chile occupying a middle position.[11] The argument is historical because conditions before the formation of each authoritarian regime were important in shaping subsequent decisions by regime leaders. While the selection of policy options that shaped the legal system under military rule all took place after military coups, these prior conditions shaped attitudes among and relations between judicial and civilian elites. The subsequent policy decisions that occurred after regime change were decisive because they formed systems that endured for a relatively long period of time. It is striking that, once established, the basic legal orientation of the regimes examined here did not fundamentally change during the course of military rule.

It might be objected that it is difficult to measure judicial-military integration and consensus independently of the variable they are supposed to explain – the legal strategy adopted by the military regime. It is difficult, but

[10] A status group is a collection of people who share an effective claim to social esteem – and perhaps also status monopolies – based on lifestyle, formal education or training, or traditions. See Weber (1978).

[11] While I agree with Gerardo Munck that overall, the elite consensus was probably higher in Chile's military regime than it was in Brazil's, I argue that, in the specific area of authoritarian legality and judicial-military cooperation, Brazilian consensus was higher. See Munck (1998).

not impossible. I have used two indicators to gauge the degree of consensus and integration between military officers and judicial elites. First, the organizational architecture of the security court system is a key variable. The degree of formal connection between military and judicial elites in the application of national security law matters. Where security courts are part of the civilian justice system, with the participation of civilian judges and prosecutors, as in Brazil, military and judicial elites are compelled, through their common participation in the same hybrid system, to construct and maintain a cross-organizational understanding of the concrete meaning and applicability of national security law. Where security courts at the first level are completely separate from civilian justice, as in Chile, the military can more easily act upon its own view of "political justice," without regard for the ideas of civilian judges and lawyers. This variable can be discerned in the formal architecture of the security court system, but its significance goes beyond the architecture itself and affects the attitudes, dispositions, and mutual understandings of military and judicial elites.

Consensus is harder to measure. Consensus refers to the extent of agreement across status groups about key national security ideas and how to apply them. The opinions of both civilian legal experts and military officers on national security legality can reflect consensus or dissensus. These views can be found in newspapers, memoirs, academic studies, legal decisions, and specialized journals dealing with the military, the law, and military justice. This is a qualitative judgment, but consensus between military officers and civilian judicial elites can be adduced to be high, medium, or low, depending on the harmony between the military and civilian views expressed in these sources. Brazilian sources reflect a high degree of consensus, Chilean sources indicate medium consensus, and materials from Argentine exhibit signs of low consensus. It is important to point out that this is a relative judgment, and that there was conflict within and between the military and judiciary in all three cases. In many instances in Brazil, for example, the military regime imposed changes on an intimidated judiciary. However, my claim is that there was more judicial-military consensus at the heart of the system that tried political prisoners (the lowest level of the security courts) in Brazil than there was in Chile and Argentina.

Consensus between and integration of military and civilian elites on national security issues do not imply "hegemony" or some other term connoting consensus beyond these elite groups. Many divergent views of the security courts prevailed in all three of the countries analyzed here and can be found in the historical record. Defendants in the security courts certainly held their own views, and when they indicated that they accepted the legitimacy of the courts and the national security legality under which they were being prosecuted,

this was usually done for tactical reasons and was unlikely to have been completely heartfelt. Evidence also suggests that defense lawyers who exalted the legitimacy of security courts during trials then publicly questioned them and the national security legality they enforced in other venues.

Some scholars might prefer the more inclusive term "legal culture" to my terms consensus and integration. However, legal culture connotes many aspects of the judicial sphere that I do not examine; therefore, I prefer to focus on institutions in the sense used by Douglass North, as the formal and informal rules regulating behavior, including both consciously created rules and those that evolve gradually over time (North 1990: 4). These rules include the internal rules of organizations such as the military and judiciary.

Studying judicial-military consensus and integration prior to and during military rule reveals new insights into the issue of regime legality. In Brazil, the 1930 revolution involved civilian-military cooperation that resulted in the organizational fusion of civilian and military justice in the 1934 Constitution. Civil-military cooperation and integration remained a hallmark of the Brazilian approach to political crime. The repression initiated by the 1964 coup was highly judicialized and gradualist; the regime slowly modified some aspects of traditional legality, but did not unleash widespread extrajudicial violence, even after the hardening of the regime in the late 1960s.

In Chile, in contrast, the military was much less closely associated with a civil-military political project in the interwar years. Instead, it disdained civilian politics, and gained a reputation for a "Prussian" degree of professionalization and autonomy. Military justice in the first instance was strictly separated from civilian courts. When the military occasionally intervened in local areas at times of conflict, it temporarily usurped judicial authority rather than, as in Brazil, working within civil-military institutions established by consensus. This pattern can be seen again after the 1973 coup. The legality of the Pinochet regime was more radical and militarized than Brazil's, even after the adoption of "peacetime" military courts in 1978 and the ratification of the 1980 Constitution.

Argentina represents yet another path – a radical break with previous legality and a largely extrajudicial assault on regime opponents. If the Chilean military tended to usurp judicial authority, its Argentine counterpart periodically rejected and overrode it altogether. Mediating conflict in a highly polarized polity, the Argentine military was prone to use force directly, and then induce a dependent judiciary to ratify its *de facto* power. Here we see the least amount of civil-military cooperation and integration in the judicial realm.

During military rule from 1966 to 1973, regime leaders tried to build authoritarian legality along the lines of their Brazilian and Chilean counterparts. The *Camarón* or National Penal Court was a special court created under military

rule in 1971 to prosecute political prisoners. It convicted more than 300 defendants over a two-year period, but it was abolished in 1973 when the Peronists returned to power, and all of the prisoners who had been convicted were given amnesty and released. Military officers saw this failure to judicialize repression as requiring new tactics in the struggle against "subversion," and dirty war practices subsequently escalated. When the military seized power again in 1976, the dirty war became national policy. Prior failure to institutionalize security courts thus helps explain the Argentine case.

Political trials in security courts "worked" for the Brazilian and Chilean military regimes that used them. That is, they stabilized expectations on both sides of the repression-opposition divide, gave the security forces greater flexibility in dealing with opponents, helped marginalize and de-legitimate the opposition, purchased some credibility for the regimes both at home and abroad, and provided regime leaders with information about both the opposition and the security forces, thus facilitating the adaptation and readjustment of repressive policies. It is also plausible that the political trials in both Brazil and Chile helped consolidate and prolong authoritarian rule. It may not be a coincidence that the shortest-lived military regime of the three examined here, the Argentine, was also the one that engaged in the most extrajudicial repression.

My argument therefore makes distinctions among authoritarian regimes based on their approach to the law. I contend that, under authoritarian rule, military/judicial consensus and integration moderate political repression by allowing for its judicialization. Under judicialized repression, defense lawyers and civil society opposition groups can defend democratic principles to some degree, even if this space is highly constricted. Where the military views the judiciary with suspicion or outright hostility, on the other hand, it is likely to usurp judicial functions and engage in purely military court proceedings, as in Chile, or completely ignore the law altogether, and treat defense lawyers and sometimes even judges as subversive "enemies," as in Argentina. The scope for the defense of democratic principles is more limited in the former, and almost impossible in the latter. The danger in military regimes is that the military will bypass or even destroy the judiciary and engage in an all-out war against its perceived opponents; in such an outcome, defense lawyers and civil society groups can only demand justice with any hope of success after the end of the authoritarian regime.

Pushing the Envelope in Brazil's Security Courts

Brazil's relatively conservative authoritarian legality led to a series of political trials that preserved more elements of traditional legal procedures and doctrine

than did the repressive tactics of the later Chilean and Argentine military regimes. Of these three cases, it was only in Brazilian security court trials that defense lawyers were able to gradually roll back some of the most draconian interpretations of national security law. Brazilian defense lawyers successfully won the recognition of certain individual rights from the military court judges, including the right to express certain political beliefs, to criticize government officials, to possess (if not distribute) "subversive" materials, and to disseminate such material to small, elite audiences. Brazil's defense lawyers shifted the boundaries of national security legality in the courts.

Brazilian national security law, like national security law in Chile and Argentina, was notoriously broad and vague. In political trials judges were forced to interpret the concrete meaning of such terms as "subversion," "offense against authority," "subversive propaganda," "psychosocial subversion," and the like. Military court judges had to decide which thoughts and actions were actually proscribed by national security laws and which were not. These decisions involved complex political, ideological, and legal judgments. In making them, judges transformed formal or paper laws into an evolving system of norms. This system of norms redrew boundaries between licit and illicit behavior and ideas, creating a new, more repressive legal system, but one that was not as severe or as discontinuous with the past as those of the other authoritarian regimes in the region. For example, Brazilian security courts were more likely than their Chilean counterparts to acquit certain categories of defendants, especially priests and defendants accused of recently created national security crimes. Perhaps most importantly, the boundaries shifted, toward greater leniency, in part because the perceived threats to the regime diminished in the 1970s, but also because the arguments of defense lawyers and critics of national security legality hit home.

A civilian-military consensus about the trials and the judgments made in them posed formidable obstacles to defense lawyers in Brazil's military courts. The defense faced judges who generally believed that the country was in a dire political emergency that required an extraordinary judicial response. The judges were not constrained by the need to be consistent, and they deliberately considered the political ideas of the accused as relevant to their rulings. Furthermore, the existence of an armed left made them relatively intolerant of criticisms of the regime, because they saw such criticisms – even if unaccompanied by any actions – as potential psychosocial subversion that was antinational.

On the other hand, legally recognized detainees were spared extrajudicial execution, and the workings of the military courts, while procedurally stacked against the defense, were closer to ordinary criminal justice than were most

systems of military justice, including that of Chile. Furthermore, repudiations of oppositional political views and expressions of remorse were taken seriously by the judges and tended to result in leniency. Defense lawyers were able to take these slight opportunities and use them to their advantage.

Most defendants accused of political crimes in Brazil's security courts did not make impassioned defenses of their political views – describing their revolutionary beliefs and denouncing the military regime – before the judges. These kinds of defenses were punished harshly, usually with the maximum sentence, because the judges viewed them as proof of the dangerousness and incorrigibility of the defendant, even if he or she had not participated in violent actions.

Defense lawyers usually persuaded their clients to avoid political defenses and make one of two other kinds of defenses. The judicial defense involved the defendant abjuring any belief in so-called subversive ideas and denying that he or she had committed any violation of the national security laws. The mixed defense was a combination of a purely juridical defense and a political one. The defendant might defend some of his or her ideas and actions, but deny that they were subversive. Or the defendant might appeal more directly to the political sympathies of the judges, claiming that he or she had abandoned political activity, was remorseful, and/or disagreed with revolutionary ideas.

By mounting defenses of these kinds, defense lawyers found ambiguities and loopholes in the national security laws and argued for favorable interpretations in ways that sometimes achieved benefits for their clients. Defense lawyers' legal strategies were shaped by the courts. The political trials were not really the triadic conflicts between a prosecutor, defense attorney, and independent and neutral judge depicted in classic courtroom drama and legal theory (Shapiro 1975: 321–371). Instead, their proceedings were dyadic and inquisitorial, with the defense on one side, and the prosecution and the judges together on the other. Four of the five judges were active-duty military officers, making them members of one side of the military regime's antisubversive campaign. The civilian judges in the military courts were generally known for their pro-regime views. The judges' presumption was therefore usually that the prosecution's case had merit. Furthermore, the judges could actively question witnesses. Judges were thus at the same time active participants in the construction of the case against the defendants, arbiters of the court's proceedings, and signatories of the final verdict and sentence in the case.

This delicate situation presented special challenges to defense lawyers. If they were too aggressive in the defense of their clients, they risked alienating the judges. If they were too passive, they might allow the judges to taint their defendants and create the legal justification for a stiff punishment. The

situation therefore called for tact, guile, finesse, and knowledge of the personal and political predilections of the judges, especially the civilian judges. Some lawyers appealed to judges to apply the national security laws according to the dictates of government – this was an appeal to the aspirations of some judges for a new "revolutionary" legality. Others appealed to the conservative image that some judges held of themselves as defenders of the traditional rule of law, urging them to fulfill the liberal function of an independent judiciary (de Matos 2002: 93–95).

Overall, lawyers achieved important victories in several areas of national security law. Defense lawyers stretched the boundaries of permissible activity and speech within national security law and served to lay the foundations for a proto-civil society, one that demanded fuller respect for human rights. Analysis of a sample of court cases reveals that defendants accused of newer crimes created by the most recent national security legislation and crimes such as offenses against authority that did not necessarily involve "subversive" intent were convicted at lower rates than defendants accused of crimes involving violence, such as armed robbery. Furthermore, certain categories of defendants – such as clerics – were treated more leniently than others, such as journalists, reflecting the courts' deference to traditional institutions such as the Catholic Church.[12]

Furthermore, defense lawyers were able to move the boundaries of legal interpretation over time, rolling back some of the most repressive interpretations of national security law. For example, in 1979 the Superior Military Tribunal, the appeal court within the military justice system, acquitted a defendant because of evidence that he had been tortured into confessing while in detention, a concession to human rights norms that had been routinely violated by judges in the early years of military rule.[13]

Defense lawyers not only changed the application of national security law but they also served as interlocutors between regime authorities and the opponents of the regime, serving as a kind of "loyal opposition" when that role was extremely limited for elected representatives in the national Congress. The lawyers also played a part in the opposition's reevaluation of armed struggle

[12] In a sample of 220 of the roughly 700 cases at the first level of Brazil's military courts in the 1964–1979 period, defendants accused of offenses against authority were acquitted at a rate of 80 percent, compared to 25 percent for robbery. In a sample of 193 cases from the same period, clerics were acquitted at a rate of 93 percent, compared to 40 percent for journalists. See Pereira (2005: 83–85).

[13] See the written judgment in STM case number 41,264 in the *Brasil: Nunca Mais* archive. Information about this case comes also from the author's interview with former STM judge Júlio Sá Bierrenbach, Rio de Janeiro, November 17, 1996.

and its evolution into a group of legal political parties based in grassroots social movements.

Tamir Moustafa writes that the judicialization of politics in authoritarian regimes can create a synergy between activists and judges, pushing the boundaries of regime legality (Moustafa 2007). The synergy in Brazil was primarily between a few dozen defense lawyers for political prisoners, on one hand, and defendants and social movement activists, on the other. Social movements such as the campaign for political amnesty and various domestic organizations such as the peace and justice commission and the Brazilian Bar Association, as well as international NGOs such as Amnesty International, were engaged in these synergistic relationships. All of the actors in these networks shared a critical view of authoritarian legality and a commitment to a more liberal, democratic approach to the law.

The military court judges were part of this synergy in a much more indirect way. While they ruled in favor of defendants in individual cases, and may even have expressed views that civilians should not be tried in military courts, or that the national security laws should be liberalized, they were generally staunchly pro-regime compared to the rest of the judiciary. They would probably have denied that their rulings were antiregime in any sense. After the end of military rule, several publications written by military court judges and prosecutors extolled the performance of the security courts under authoritarian rule, indicating that these officials did not see themselves as reformers, but rather as faithful servants of the military regime (da Costa Filho 1994; Fernandes 1983: 7–50; Ferreira 1984/85: 23–88).

Neither in Chile from 1973 to 1978 (under wartime military justice) nor in Argentina from 1976 to 1983 did the type of jurisprudence in Brazil's security courts exist. In these latter two countries, defense lawyers were "communities of memory," recording and protesting vainly against the machinations of an authoritarian legal order based on violence and intimidation (Lobel 2004). In Brazil, defense lawyers were also this but something more. They were active shapers of national security legality.

Nevertheless, the very characteristics of the military justice system that made it flexible and amenable to changes in interpretation – thus offering some relief to political prisoners – were also beneficial to the regime. They allowed the regime to collect information about opinion in society, facilitated cooperation within and between the legal and military establishments, and allowed the regime to modify its rule incrementally. (A controlled Congress fulfilled much the same function.) While flexible and malleable on the margins, the institutions of the Brazilian legal order were "sticky" with respect to their essential features. The hybrid civil-military nature of the system and its broad sharing

of responsibilities across an array of officials, including civilian prosecutors and judges as well as military officers, gave many figures in the state apparatus a vested interest in the continuation of the near status quo. The defense lawyers' actions produced concrete results in sparing political prisoners from treatment that could have been worse. They created a record that enabled the lawyers and their supporters to accurately and thoroughly condemn the legality of the authoritarian regime. But they created little foundation for the overhaul of the legal system under democracy. The Brazilian self-amnesty of 1979 closed the book on the political trials and the authoritarian manipulation of the law far more conclusively than a similar Chilean amnesty of 1978 or the attempted self-amnesty in Argentina in 1983.

Otto Kirchheimer wrote, "Justice in political matters is the most ephemeral of all divisions of justice; a turn of history may undo its work" (1961: 429). The jurisdiction of security courts can be quickly reduced when political circumstances change, but the legacies of their authoritarian legality can endure. Each form of authoritarian legality leaves a distinctive legacy with which democratic reformers must grapple. In Argentina, the law was skirted, violated, and broken under military rule, and the rule of law had to be reconstituted. In Brazil, the law was manipulated, bent, and abused, and had to be reformed. The first challenge was probably met better than the second, in part because in Argentina there was broad consensus that reform was necessary. Brazil experienced the least transitional justice after democratic transition of all three cases, in part because the gradualist and conservative authoritarian legality of its military regime involved the participation of much of the legal establishment and continued to be legitimized under democracy. Thus Brazil did not witness the kind of reformist backlash that occurred in Argentina and Chile, in which coalitions with significant political support were able to overturn key aspects of authoritarian legality. In particular, Brazil did not replicate the sustained and serious judicial reform that took place in Chile. This chapter therefore suggests a paradox. Conservative legal systems such as the Brazilian system may prevent some excesses on the part of the security forces, but they are far more intractable once authoritarian rule ends.

EXTENDING THE ANALYTICAL FRAMEWORK

Analyzing the nexus between military and judicial elites can help explain the judicialization of repression and its absence elsewhere. In particular, the pattern we see in Brazil and the Southern Cone appears to hold in other cases: a radical approach to the law and the deployment of extrajudicial violence are more likely in regimes without much judicial-military cooperation,

integration, and consensus. On the other hand, more conservative, incremental approaches to the law and judicialized repression are more common in regimes with a high degree of such cooperation, integration, and consensus.

It is easy to see why this pattern might apply to military regimes.[14] When militaries control the executive and seek to judicialize their repression, they are likely to rely on some elements of the traditional judiciary to do so. This is important, because the most ubiquitous type of authoritarian regime in the twentieth century was the military dictatorship (Brooker 2000: 4). Even today, when military regimes are less common than in the past, the threat of military coup remains a political factor in many countries.[15]

However, Booker argues that the real innovation in twentieth-century dictatorship was the dictatorship of a political party (Brooker 2000). Especially in the interwar years, new authoritarian regimes with powerful new ideologies emerged in Europe. The framework developed here can help explain the authoritarian legality of some of these regimes. A focus on military and judicial elites sheds light on the legal dimension of regime repression in three well-known dictatorships: the Nazi regime in Germany (1933–1945), the Franco dictatorship in Spain (1939–1975), and the Salazarist regime in Portugal (1926–1974). Each of these regimes closely resembles one of our three cases in its approach to legality: the Nazis with the Argentine *proceso*, Franco's Spain with Pinochet's Chile, and Salazar's Portugal with the Brazilian regime.[16]

A comparison of this type has many potential pitfalls, not least because of the widely differing life-spans of these dictatorships, ranging from seven years in Argentina to forty-eight years in the Portuguese case. The longer running regimes, especially, were subject to complicated transformations. Furthermore, each of the European regimes – which were part of an interwar authoritarian wave that predated the Brazilian and Southern Cone cases by

[14] I define military regimes here broadly as regimes in which the executive is controlled by a military junta or cabinet, as well as regimes with military presidents who to some degree control or represent the armed forces. Regimes with civilian presidents in which real power and control lie with the armed forces should also be included in this category, although such regimes can be difficult to evaluate. (An example is the Uruguayan regime headed by civilian President Bordaberry from 1972–1976.) See the discussion in Brooker (2000: 44–52).

[15] Strikingly, there are few military regimes in the contemporary world; one source lists only four (Burma, Libya, Syria, and Sudan) with Pakistan classified as a military-led "transitional government." From Central Intelligence Agency (2004) *World Fact Book*, accessed in August 2004 at http://www.cia.gov/cia/publications. More recently, Bangladesh and Fiji could be added to this list.

[16] For purposes of this discussion, I do not place Nazi Germany in a distinctive category of totalitarian regimes. For some types of analysis in comparative politics, the totalitarian label is no longer seen as useful; see Brooker (2000: 8–21).

forty years – clearly had important idiosyncrasies.[17] For example, Nazi repression had a strong ethnic and racial dimension lacking in most of the other cases, and the Nazi regime was engaged in a total war for half of its existence. The Franco regime emerged from a full-blown and heavily internationalized civil war absent in the other cases. Similarly, Salazar's Portugal was smaller and more rural than any other regime analyzed here, and the only one that managed a long-standing and extensive colonial empire. Such differences undoubtedly affect patterns of regime repression. Nevertheless, a focus on judicial-military relations can shed light on variation in the use of security courts by these regimes.

Nazi Germany

The Nazi regime in Germany was radical in its approach to the law and, especially in the last few years of its rule, resorted heavily to the extrajudicial extermination of large numbers of people. As in Argentina, the Nazi case seems to have been marked by a low level of integration and consensus between military and judicial elites, and purges of both corporate groups. The German case goes well beyond the Argentine in that the Nazi party hierarchy led by Adolph Hitler eventually made an end-run not only around the judiciary (as in Argentina) but largely the military as well. The extermination policy that came to be known as the "Final Solution" was carried out largely by the SS, a special political-military body, rather than the army or another conventional branch of the armed forces.

Less well known than the Final Solution is the Nazis' use of courts. A large number of political trials took place in the People's Court (*Volksgerichtshof*, or VGH) in Nazi Germany between 1934 and 1945. The People's Court was a security court created by the Nazis to try cases of treason and terrorism. However, the Nazis created a large area of extrajudicial repression alongside and completely beyond the purview of the People's Court. It was not uncommon, after 1936, for the Gestapo to rearrest people acquitted in the People's Court and send them to concentration camps (Köch 1989: 3–6). And after November of 1942, Jews were not subject to the People's Court or any other kind of legal procedure. At that time the Ministry of Justice confidentially instructed state officials that "courts will forego the carrying out of regular criminal

[17] I am not the first to make a connection between the authoritarian regimes founded in interwar Europe and the Brazilian and Southern Cone military regimes. The "bureaucratic-authoritarian" label that O'Donnell applied to the latter was borrowed from Janos's analysis of Eastern European regimes in the 1920s and 1930s. See Janos (1970).

procedures against Jews, who henceforth shall be turned over to the police" (Miller 1995: 52).

The grotesque perversion of justice represented by the People's Court was created by what Miller calls the Nazi regime's "legal atheism" and its specific measures to distort and manipulate the law for its own ends. For example, roughly one-fifth of the legal profession was purged under Hitler; Jewish, socialist, and democratic members were removed (Müller 1991: 296). Furthermore, the 1933 Law for the Restoration of the Professional Civil Service allowed the executive branch to dismiss judges for any reason – an effective instrument for keeping those who had not been purged in line, and one also used by the Southern Cone military regimes. In 1939, Nazi prosecutors were allowed to appeal acquittals (Miller 1995: 52).[18] The Nazi regime encouraged jurists to prioritize the political needs of the regime and to attempt to see the spirit, not the letter, of the law, leading to artful constructions of laws that completely gutted them of specificity and justified extreme harshness by the state.[19] And using special courts could reduce the uncertainty of trusting political cases to the ordinary judiciary. In this way the People's Court gained almost complete jurisdiction over crimes of terrorism and treason, while over time treason itself was defined in ever-expanding ways. The court's judges were handpicked for their devotion to National Socialism and their expertise in espionage and national security.

However, the political trials in the People's Court were also shaped by the politics of the pre-Nazi Weimar regime and the Second Reich (1871–1918). The legal bases of VGH judgments were two long-standing definitions of treason. Köch writes "neither the legal basis for, nor the legal procedure of, the VGH differed significantly from treason trials of the past" (Köch 1989: 3). The prohibition of the right of appeal in treason trials was promulgated in 1922, eleven years before the Nazis took power. The artful interpretations of the spirit rather than the letter of the law favored by the Nazi regime reflected an authoritarian and predemocratic legal ideology prevalent among German jurists since at least the late nineteenth century (Müller 1991: 296). Criminal trials under the Second Reich had been inquisitorial and heavily biased in favor of the state. For example, the prosecutor addressed the court while located on

[18] The Brazilian military regime also used this tactic in cases involving national security.

[19] Scholars of Nazi legality seem to agree that rigid adherence to legal positivism was not a characteristic of Nazi justice and not responsible for the horrors of the regime. Köch (1989), Miller (1995), and Müller (1991) all agree that the problem was the opposite – that judges engaged in politically motivated searches for the "fundamental idea" of the laws and often disregarded statutory language.

the same level as the judge, whereas the defense attorney sat at a lower level with the accused. The bench and bar posed no opposition to Hitler when he assumed power in 1933 (Miller 1995: 44).[20]

For Köch, the roots of the People's Court "lay in the Weimar Republic, when the judiciary had become politicized" (1989: x). Many in the judiciary shared the widespread belief that Germany had lost World War I due to treason and revolution (it had been "stabbed in the back"). In 1924 Hitler in *Mein Kampf* had advocated the creation of a special court to try tens of thousands of people responsible for this treachery (Müller 1991: 140). However, even in a regime as ruthless and as ambitious as the Third Reich, political justice was shaped by conditions inherited from previous political regimes. Nazi legality was a distorted and intensified version of existing tendencies within the law, rather than an entirely new creation. For that reason, it proved to be highly resistant to feeble attempts at "de-Nazification" after World War II. While under Allied occupation the political trials described above came to an end, Müller shows how the mentalities and decisions of many judges did not change. Even in 1985, the German Parliament could not bring itself to take the symbolic action of declaring convictions in the People's Court and Special Courts under Nazi rule null and void (Müller 1991: 284–292).

Of our Latin American cases, Argentina comes closest to the Nazi experience. As in Argentina, the lack of a consensus within and between judicial and military elites contributed to the extrajudicial horrors of the Nazi regime. As Gordon Craig shows in his study of the Prussian Army, Hitler was able to purge and Nazify the Army and to effectively subject military officers to his control (1955: 468–503). But even this subjugated army was not completely reliable as an instrument of repression from the Nazis' point of view, and neither was the judiciary.

When it came time to implement the Final Solution, the Third Reich did not entrust the main tasks either to the courts or to the army. Even a court that executed half the defendants that came before it, such as the People's Court, was too restrained for the Nazi leadership's plan, and even an army that had already proved its willingness to massacre civilians was deemed unprepared for the systematic mass slaughter that was to be perpetrated. Instead, the responsibility was entrusted to the Economic and Administrative Main Office (*Wirtschafts und Verwaltungshauptant*, WVHA) of a special political-military body, the SS. The SS was controlled by the Armed Forces High Command or

[20] Miller reports the acquittal rate in Germany's criminal trials in 1932 as 15%, similar to that in the People's Court.

OKW (*Oberkommando der Wehrmacht*), directly under Hitler. The concentration and labor camps of the SS in Germany and the occupied territories, managed by the WVHA from 1942 to 1945, imprisoned roughly ten million people, killing millions of them.[21] As bad as the People's Court was, the number of victims of its lethal "justice" – 13,000 – was small compared to the camps run by the SS.[22] Nazi political repression was thus largely extrajudicial and radical with respect to preexisting legality.

It was thus not trust and consensus between judicial and military elites that led to the Nazis' particularly perverse form of dual state, but its absence, and in particular a reluctance on the part of Hitler and his inner circle – including military officers – to entrust the highest political goals of the regime to either judges or fellow generals. For example, Hitler himself assumed command of the army between 1941 and 1945. And only an inner circle of Nazi party officials was allowed to direct and profit from the horror of the death camps.

Franco's Spain

If Argentine repression bears some resemblance to that of Nazi Germany, Chile's repression looks more like that of Franco's Spain (1939–1975). As in Chile, Franco's forces were involved in a "rollback" military action, in this instance trying to undo the extensive mass mobilization of Republican rule. Similarly, the initial repression was quite violent, was led by a highly insulated military that had declared martial law throughout the whole national territory, and was only partially judicialized. However, despite Franco's declaration that his regime was "based on bayonets and blood" (Mathews 2003), the regime judicialized its repression over time, as did the Pinochet regime in Chile.

During the Spanish civil war of 1936–1939, *consejos de guerra* (military courts) tried people for political crimes. These military courts operated during a ferocious conflict marked by the "red terror" of the Republicans and the "white terror" of the Nationalists.[23] Shortly after the July 17, 1936, military rebellion that began the war, on July 28, the forces of General Francisco

[21] From the Harvard Law School Library Nuremberg Trials Project (A Digital Document Collection): "Introduction to NMT Case 4, *U.S.A. v Pohl et al*" at http://nuremberg.law.harvard.edu accessed on July 7, 2007.

[22] The People's Court was not the only venue for judicialized repression under the Nazis. From 1933 to 1945, German military courts sentenced about 50,000 people to death, most of them after 1942. See Stölleis (1998: 151–152) and Müller (1991: 194).

[23] This is not to imply that there were an equal number of killings on each side. Payne concludes that more people belonged to leftist organizations than to identifiably right groups, so the Nationalists had more perceived enemies to eliminate, and their executions probably exceeded those on the other side. See Payne (1967: 415).

Franco y Bahamonde declared martial law throughout Spain. All civilian and military crimes were thenceforth regulated by the Military Code. Civilian jurists were supposed to play an auxiliary role in military court trials, but apparently this was done only when conservative jurists were available and military commanders were willing to employ them.

The military court trials took place in a climate of intense reprisals and repression. Executions without any sort of judicial procedure were common. From July 1936 until roughly July 1937, mass killings occurred all over Spain, conducted by the army, the Civil Guard, the Falangists,[24] and right-wing militias. In Payne's words, "the various elements on the Nationalist side were, in effect, free to kill almost whomever they chose, as long as it could be said that the victim had supported the [Republicans'] Popular Front" (1967: 416). Peasants and workers who were found with trade union cards, people suspected of having voted for the Republicans, Freemasons, officeholders in the Republic, or people with "red" or even liberal political views were shot after two-minute hearings by military courts or no hearings at all. The mass executions even bothered the German attaché, a Nazi, who reportedly met with General Franco twice to urge him to stop them, to no avail (Payne 1967: 411–412).

As in Chile, the uncoordinated and largely extrajudicial violence of this early period was later replaced by a more centralized, judicialized type of repression. This shift occurred during the course of 1937. On October 31 of that year, the new chief of internal security, public order, and frontier inspection decreed that executions could not take place without a military court passing a sentence. This decree does not seem to have slowed down the rate of executions, but it did provide a legal cover for the killings. On February 9, 1939, less than two months before the end of the war, the Franco forces promulgated the Law of Political Responsibilities to regulate and civilianize the prosecution of political crimes. This law extended the liability for political crimes back to October 1, 1934 (almost two years before the military rebellion that initiated the Franco regime) and included as a political crime "grave passivity." This measure meant that people who had lived in Republican zones and who had not been members of the government or leftist groups, but who could not demonstrate that they had actively fought against the Republicans were liable for prosecution. Special Courts of Political Responsibilities were established, composed roughly equally of Army officers, civilian judges, and Falangist representatives (Payne 1967: 418).

[24] The Falangists were members of a fascist political party, called the Falange Española, founded in 1933 by José António Primo de Rivera, son of a former Spanish dictator.

Spanish political "justice" under Franco was extremely violent; on a per capita basis, it was much more violent than Pinochet's Chile. According to official figures of the Spanish Ministry of Justice, 192,684 people were executed or died in prison in Spain between April 1939 and June 30, 1944. (Gallo gives the figure of those executed as around 100,000. The total population of Spain in 1935 was 24 million [1974: 21].) This number included 6,000 schoolteachers and 100 of 430 university professors. The total dead in the civil war is estimated at 560,000, including combatants, victims of bombing raids, those executed, and those who died in prison. Gallo calls Spanish justice in the immediate aftermath of the war "a ruthless machine for dealing death," and lists as some of its features confessions extracted by torture and perfunctory trials. Like the leaders of other authoritarian regimes, the Spanish nationalists were capable of ignoring their own laws when it suited them, as when a defendant was officially reprieved, released by authorities, but then picked up again and shot (Gallo 1974: 67–70).

As in Chile, Spanish political trials began as a settling of scores by the new regime, and then evolved into a mechanism of social control. While less active in later years, Francoist courts still executed opponents up to the last days of the regime in 1975. Once again, institutional pathways proved hard to reverse – political trials continued throughout the course of the regime, although at a much less intense level than they had in the 1930s. In addition, state institutions were not on a synchronous path – inquisitorial political trials of the early 1970s coexisted with the liberalization of other state institutions. As with other cases of authoritarian legality, the political trials were not ended until the demise of the regime, in this case in a transition negotiated by key figures both within and without the regime.

The course of Spanish legal repression involved a changing relationship between military and judicial elites. In the early days of the regime during the civil war, integration of and cooperation between both sets of elites were practically nonexistent. Courts had largely stopped functioning during the war, and the military took it upon itself to mete out punishments, with or without hastily conducted legal proceedings. As in Chile, the military usurped judicial authority; this phase of the repression resembles Chilean "wartime" military justice between 1973 and 1978 (even though there was no real war in Chile at that time). Subsequently, after the civil war's end in 1939, Spanish authoritarian legality incorporated civilian judges into the special courts, making this phase roughly comparable to peacetime military justice in Chile from 1978 to 1990. Again, judicial-military consensus was a key component of the judicialization of repression represented by this transformation.

Salazar's Portugal

Another important example of authoritarian legality is that of the Salazar regime (1926–1974) in Portugal.[25] Unlike Nazi and Francoist repression, Salazarist repression can be characterized as dictatorial, aimed primarily at containing, rather than exterminating, declared opponents of the regime.[26] Unlike General Franco in neighboring Spain, Salazar was a civilian. While Franco obtained power through force in a civil war, Salazar was granted power by military officers several years after a coup in 1926. In contrast to the Nazis and the Franquistas in Spain who enjoyed staging theatrical demonstrations of mass support, the Salazar regime – like the 1964–1985 military regime in Brazil – was content with a depoliticized, passively acquiescent population.[27] And like the Brazilian military regime's repression, Salazarist repression came in two distinct waves, the first at the beginning of the regime in 1926, and the second in the middle of its rule, between the electoral campaigns of 1949 and 1958.

In 1933 the Salazar regime created special military tribunals to judge political crimes. Subversion of the "fundamental principles of society" was one of those offenses (Braga de Cruz: 1988: 87). As in other cases, the roots of these political prosecutions lay in the immediate past, in this case in the conflict between the Communist left and the fascist right in the interwar years. Defendants in political trials could be imprisoned prior to sentencing under the law. The *Polícia de Defesa Política e Social* (Police for Political and Social Defense, or PVDE) was in charge of all phases of the political trials and could determine whether a defendant could remain at liberty during his or her trial or be imprisoned. The PVDE was not overly scrupulous about the law; between 1932 and 1945, 36 percent of the political prisoners that it held in special prisons were incarcerated for more time than their sentences stipulated (Braga de Cruz 1988: 88). This is similar to the way in which the Brazilian military regime frequently violated its own laws that restricted the detention of political prisoners to a fixed period of time.

[25] From 1968 to 1974 Portugal was ruled by Salazar's successor Caetano, but I refer to the whole period of authoritarian rule as the Salazar regime.

[26] This distinction comes from Manuel Braga da Cruz (1988: 84).

[27] After the 1926 coup d'etat that ended the Portuguese Republic, Salazar, formerly an economics professor at the University of Coimbra, became Minister of Finance in 1928 and Prime Minister in 1932 (Bermeo 1986: 13–14). In many ways, the Salazar regime is a better approximation of Juan Linz's ideal-type of a nonmobilizing authoritarian regime than is Franco's Spain; see Juan Linz (1975).

In 1945 the special military courts for dealing with political crimes were abolished and replaced with the *Tribunais Criminais Plenários* (Plenary Criminal Courts), special civilian courts located in Lisbon and Porto. Unlike the military courts, these courts were presided over by judges trained in the law. At the same time, the PVDE was reorganized and renamed the PIDE (*Polícia Internacional de Defesa do Estado*, or International Police for the Defense of the State).[28] A 1956 decree gave the PIDE the authority to detain politically "dangerous" individuals for six months to three years, renewable for up to another three years (Braga de Cruz 1988: 92). After the early 1960s, the PIDE also ran notoriously harsh special prisons for political prisoners in the colonies of Angola and Cape Verde. The PIDE had huge administrative discretion, enabling its officials to run a virtual state within a state, without court power to intervene. Deaths during interrogation by the political police sometimes occurred, and even the PIDE sometimes ignored writs of habeas corpus issued by the Supreme Court. In this sense Portuguese repression was somewhat less judicialized than Brazilian repression under military rule. Furthermore, defendants' right to a lawyer were not guaranteed in political trials. As in Brazil, defendants were routinely convicted solely on the basis of confessions extracted by torture.

Despite the lack of accountability of the Portuguese repressive apparatus, Salazarist political justice was not radical in comparison to prior legality. According to Braga da Cruz, the repression was "paternalistic" and not aimed at the extermination of opponents. The main target was the Communist Party. As in Brazil from 1964 to 1985, the death penalty was not used (the special courts did not issue death sentences), and sentences were comparatively light (only 9 percent of those convicted in political trials between 1932 and 1945 were sentenced to more than five years in prison; Braga de Cruz 1988: 83–85).[29]

Salazar's authoritarian legality ended dramatically with the collapse of the regime, in this case in the 1974 revolution. As in Brazil, the personnel of the special courts were not subject to a widespread purge, but merely transferred to other parts of the bureaucracy. While the institutions responsible for political trials changed in Portugal, the intensity and scope of political trials rose and fell in line with the political contingencies faced by the regime. Once the

[28] Under Salazar's successor, Caetano, the PIDE was again renamed, this time to DGS (*Direção Geral de Segurança*, or General Directorate of Security). After the revolution of April 25, 1974, the DGS was abolished.

[29] The trials were aimed primarily at the lower strata of society; 48% of political prisoners between 1932 and 1945 were workers, while only 14% were middle-class professionals (Braga de Cruz 1988: 95).

machinery of political prosecution was established, it was not dismantled until the regime itself was overthrown by revolution.

The Portuguese case illustrates the effect of a relatively high degree of integration of and consensus between military and judicial elites. As with some of the other cases, political repression became more judicialized and more civilian over time. For most of the regime, political trials were presided over by civilian judges in special courts, rather than by military officers themselves. While this institutional configuration was different from military courts in Brazil, in both systems civilian judges trained in the law were pivotal in administering a highly judicialized form of repression, unlike the repression of the other two types of authoritarian legality.

It seems likely that gradual and judicialized authoritarian legality – the type represented by military Brazil and Salazarist Portugal – is the most common legal form among authoritarian regimes. This is because few authoritarian rulers even aspire to the ruthlessness of the Nazi or Spanish fascists, let alone achieve it. Most authoritarian regimes muddle along with slightly modified versions of previously created legal systems.

Can the judicial-military framework used here help explain the use of security courts in other authoritarian regimes, particularly recent and contemporary ones? The widespread use of military courts to prosecute dissidents and opponents in such countries as Egypt, Nigeria, Pakistan, and Peru indicates the relevance of the question, which can only be answered by examining new research of the kind presented by other chapters in this volume. An equally important question is whether the use of security courts by democratic regimes, especially those confronting new and serious political threats, might follow some of the same dynamics as those in authoritarian regimes described earlier.

THE UNITED STATES AFTER 9/11: AUTHORITARIAN COURTS IN A DEMOCRACY?

Is it possible that twenty-first-century democratic regimes, by modifying their legal systems to cope with the threat of terrorism, are partially converging with authoritarian regimes? Is it possible to speak of the existence of authoritarian practices under a democratic regime? If so, what makes courts authoritarian – the procedural rules, organizational forms, and belief systems that operate within them, or the wider political environment of which they are a part?

The case of the United States after September 11, 2001, raises these questions. Before exploring the issue, however, some basic parameters should be recognized. First, the terrorist threat is genuine and complex, and it justifies

new security measures of some kind. The essential disagreements concern how and how much to adapt traditional constitutionalist compromises and understandings of civil liberties, not whether to adapt them or not. My focus here is very limited and is not an attempt to describe all of the many legal changes in intelligence gathering and other areas of homeland security as part of an authoritarian convergence. Second, criticisms of the institutional innovations described later come not just from the left, but from the libertarian right, including Republicans, and even from states-rights-oriented Southern nostalgists. Third, we might be able to learn from history, because many of the institutional mechanisms being proposed as solutions to the terrorist threat have been tried before, albeit under different conditions. Carefully drawing lessons from these experiences could be a worthwhile exercise.

The overall political context under which new antiterrorist measures are adopted is important. Citizens in the contemporary United States live under a political regime that bears little resemblance to the authoritarian regimes of Brazil and the Southern Cone. Nevertheless, it is not necessarily inappropriate to compare political measures taken against presumed enemies in authoritarian regimes with those adopted in democracies. Democratic governments have certainly engaged in political trials, especially in wartime. For example, Barkan points out that some 2,000 political dissidents were prosecuted in the United States during World War I, mainly for violating laws that forbade most forms of criticism of U.S. involvement in the war (1985: 1).

A new type of security court was created in the United States in response to the attacks of 9/11. President Bush signed an emergency order on November 13, 2001, that established military commissions to try noncitizen "unlawful enemy combatants" accused of terrorism. The Military Commissions Act passed by Congress and signed by President Bush in 2006 ratified the existence and procedures of these courts. As in Brazil and Chile under military rule, the executive in the United States decreed that a terrorist "war" necessitated the use of a special court system, controlled by the executive and insulated from the civilian judiciary. Unlike Brazil and Chile, in the U.S. case this system did not consist of preexisting military courts, but a new institution that was in many ways more severe than ordinary military justice.[30]

In addition, the Bush administration created a new legal regime to deal with suspected terrorists. For citizens, it invented the designation "enemy combatant," and claimed the right to apply this label to anyone it suspected of

[30] As a precedent, the Bush administration cited the military tribunal that tried and sentenced to death German spies captured on U.S. soil during World War II. But this case occurred before the United States signed several major treaties, including the Geneva Conventions.