RULE BY LAW

The Politics of Courts in Authoritarian Regimes

Edited by Tom Ginsburg and Tamir Moustafa

CAMBRIDGE

CAMBRIDGE www.cambridge.org/9780521895903

measures of investor perceptions than the reality on the ground. Still, the new institutional environment was one of the primary reasons for the increase in private investment starting in the 1980s after a full decade of failed attempts to attract capital without institutional reforms.[23]

The success of these institutional reforms should not be overstated. The Egyptian judiciary continued to face overwhelming problems, particularly in terms of limited capacity (Arab Republic of Egypt 1998; Bentley 1994), which to this day has an adverse impact on the country's investment climate (Zaki 1999). What is intriguing is that an authoritarian regime was first compelled to use rule-of-law rhetoric, eventually going well beyond mere statements to carry out concrete and meaningful institutional reforms. The pressures facing the regime were not idiosyncratic, nor were the motives for initiating judicial reform. In fact, the government was grappling with many of the same dysfunctions that plague other authoritarian regimes. With unchecked power, the government was unable to attract private investment. With low levels of transparency and accountability, the government faced difficulties maintaining order and discipline throughout the state's administrative hierarchy. With the failure of pan-Arabism and the deterioration of the economy, the substantive basis of the regime's legitimacy suffered.

The new Supreme Constitutional Court and the reformed administrative courts helped the regime ameliorate these pathologies by attracting investment capital, strengthening discipline within its own administrative bureaucracy, forging a new legitimizing ideology around "the rule of law" and a "state of institutions," and doing away with populist, Nasser-era legislation in a politically innocuous way (Moustafa 2007).[24] However, judicial reforms provided institutional openings for political activists to challenge the executive in ways that fundamentally transformed patterns of interaction between the state and society. For the first time since the 1952 military coup, political activists could credibly challenge regime legislation by simply initiating constitutional litigation, a process that required few financial resources and enabled activists to circumvent the regime's highly restrictive, corporatist political framework.

[23] It must also be noted that 1979 was the year that Anwar Sadat signed the peace treaty with Israel, thus putting to rest one of the most important foreign policy concerns of foreign investors.

[24] Elsewhere (Moustafa 2007), I examine how dozens of rulings in the areas of privatization, housing reform, and labor law reform enabled the regime to overturn socialist-oriented policies without having to face direct opposition from social groups that were threatened by economic reform. Liberal rulings enabled the executive leadership to explain that they were simply respecting an autonomous rule-of-law system rather than implementing controversial reforms through more overt political channels.

MOBILIZING THROUGH THE COURTS

From the beginning of its operations in 1979, the Supreme Constitutional Court did not shy away from challenging the government on a number of politically charged issues. In one of its earliest rulings, the SCC enabled hundreds of prominent opposition activists to return to political life, including Wafd Party leader Fuad Serag al-Din and the Nasserist Party founder Dia' al-Din Dawud.[25] Another ruling in 1988 forced the legalization of the opposition Nasserist Party against government objections.[26] The SCC even ruled national election laws unconstitutional in 1987 and 1990, forcing the dissolution of the People's Assembly, the creation of a new electoral system, and early elections.[27] Two similar rulings forced comparable reforms to the system of elections for both the Upper House (*Majlis al-Shura*) and local council elections nationwide.[28] Although the rulings on election laws hardly undermined the government's grip on power, they did significantly undermine the corporatist system of opposition control by opening the political field to independent candidates and enabling the Muslim Brotherhood to run independent candidates in the 2000 and 2005 People's Assembly elections.

The SCC also issued a number of important rulings in the area of press liberties.[29] In February 1993, the SCC struck down a provision in the code of criminal procedures dealing with libel cases. The provision required defendants charged in libel cases to present proof validating their published statements within a five-day period of notification by the prosecutor. The SCC ruled that the time limit was too strict and that it interfered with the ability of the press to monitor the government, to uncover corruption and inefficiencies, and to encourage good governance. The ruling asserted that freedom of expression is an essential feature of a proper functioning democracy and that the five-day provision was a flagrant and unnecessary violation of article 47 of the constitution.[30] Following on the heels of this legal victory, the Labor Party successfully defeated a law that had made heads of political parties responsible for all publications in party newspapers, along with the reporter and the

[25] SCC, 26 June 1986, *al-Mahkama al-Dusturiyya al-'Ulya* [hereafter *al-Mahkama*], vol. 3, 353.
[26] SCC, May 7, 1988, *al-Mahkama*, vol. 4, 98.
[27] SCC, May 16, 1987, *al-Mahkama*, vol. 4, 31; SCC, 19 May 1990, *al-Mahkama*, vol. 4, 256.
[28] SCC, April 15, 1989, *al-Mahkama*, vol. 4, 205; SCC, April 15, 1989, *al-Mahkama*, vol. 4, 191.
[29] The SCC also issued a number of rulings protecting other important civil liberties throughout this period, but due to space constraints I discuss only those pertaining to press liberties. Other notable rulings overturned laws presuming the guilt of the accused and those empowering the executive to punish suspects without trial. See SCC, Jan 2, 1993, *al-Mahkama* vol. 5.2, 103 and SCC, June 15, 1996, *al-Mahkama* vol. 7, 739.
[30] SCC, Feb. 6, 1993, *al-Mahkama*, vol. 5(2), 183.

editor-in-chief of the newspaper in cases of libel claims against public officials. Two years later, the SCC extended its ruling to ban the application of vicarious criminal liability to libel cases involving the editors-in-chief of newspapers.[31]

This ruling represented an important precedent, as it was the first time that a human rights nongovernmental organization (NGO), the Center for Human Rights Legal Aid (CHRLA), successfully challenged legislation in front of the Supreme Constitutional Court. The CHRLA represented a new breed of human rights organization that went beyond simply documenting human rights abuses to confronting the government in the courtroom. It quickly became the most dynamic human rights organization, initiating 500 cases in its first full year of operation, 1,323 cases in 1996, and 1,616 by 1997. In hopes of emulating the model provided by CHRLA, human rights activists launched additional legal aid organizations with different missions. The Center for Women's Legal Aid was established in 1995 to provide free legal aid to women dealing with a range of issues including divorce, child custody, and various forms of discrimination.[32] The Land Center for Human Rights joined the ranks of legal aid organizations in 1996 and dedicated its energies to providing free legal aid to peasants.[33] The Human Rights Center for the Assistance of Prisoners (HRCAP) similarly provided legal aid to prisoners and the families of detained individuals by investigating allegations of torture, monitoring prison conditions, and fighting the phenomenon of recurrent detention and torture through litigation.[34] Opposition parties began to offer free legal aid as well, with the Wafd Party's Committee for Legal Aid providing free representation in more than 400 cases per year beginning in 1997.[35]

Legal mobilization became the dominant strategy for human rights defenders not only because of the opportunities that public interest litigation afforded

[31] SCC, Feb. 1, 1997, *al-Mahkama*, vol. 8, 286.

[32] The Center initiated 71 cases in its first year, 142 in 1996, and 146 in 1997, in addition to providing legal advice to 1,400 women in its first three years of activity.

[33] With the land reform law 96 of 1992 coming into full effect in October 1997, hundreds of thousands of peasants faced potential eviction in the late 1990s. Lawsuits between landlords and tenants began to enter into the courts by the thousands. Between 1996 and 2000 the Land Center for Human Rights represented peasants in more than 4,000 cases and provided legal advice to thousands more (Interview with Mahmoud Gabr, Director of Legal Unit, Land Center for Human Rights, November 18, 2000).

[34] In each of its first five years of operation, the Human Rights Center for the Assistance of Prisoners launched more than 200 court cases and gave free assistance (legal and otherwise) to between 7,000–8,000 victims per year (Correspondence with Muhammad Zar'ei, Director of the Human Rights Center for the Assistance of Prisoners, January 24, 2002).

[35] Interview with Muhammad Gom'a, vice-chairman of the Wafd Committee for Legal Aid, February 17, 2001.

but also because of the myriad obstacles to mobilizing a broad social movement. Gasser 'Abd al-Raziq, director of CHRLA for much of the 1990s, explained that "in Egypt, where you have a relatively independent judiciary, the only way to promote reform is to have legal battles all the time. It's the only way that we can act as a force for change."

This brief review of opposition and human rights activism through the 1990s illustrates how the new Supreme Constitutional Court and the administrative courts provided institutional openings for political activists to challenge the state. For the first time since the 1952 military coup, political activists could credibly challenge the government by simply initiating litigation, a process that required few financial resources and allowed activists to circumvent the highly restrictive, corporatist political framework. Most importantly, litigation enabled activists to challenge the government without having to initiate a broad social movement, a task that is all but impossible in Egypt's highly restrictive political environment.

THE LIMITS OF LEGAL MOBILIZATION: STATE SECURITY COURTS AND "INSULATED LIBERALISM"

Although the Supreme Constitutional Court took surprisingly bold stands on most political issues, there were important limits to SCC activism. At odds with its strong record of rights activism, the SCC ruled Egypt's Emergency State Security Courts constitutional, and it has conspicuously delayed issuing a ruling on the constitutionality of civilian transfers to military courts. Given that Egypt has remained in a perpetual state of emergency for all but six months since 1967, the Emergency State Security Courts and, more recently, the military courts have effectively formed a parallel legal system with fewer procedural safeguards, serving as the ultimate regime check on challenges to its power (Brown 1997; Center for Human Legal Rights Aid 1995; Ubayd 1991).[36]

By 1983, dozens of cases had already been transferred to the Supreme Constitutional Court contesting a legal provision denying defendants the right to appeal rulings of Emergency State Security Courts in the regular judiciary. Plaintiffs contended that the provision violated the right of due process and the competency of the administrative courts, as defined in articles 68 and 172 of

[36] For more on the structure, composition, and procedures of the Emergency State Security Courts and the Military Courts see Brown (1997), Ubayd (1991), and The Center for Human Rights Legal Aid (1995).

the constitution.[37] But the following year the Supreme Constitutional Court ruled the Security Courts constitutional (Arab Republic of Egypt, *al-Mahkama* 1984: 80). The SCC reasoned that since article 171 of the constitution provided for the establishment of the State Security Courts, they must be considered a legitimate and regular component of the judicial authority.[38] Based upon this reasoning, the SCC rejected the plaintiff's claim concerning article 68 protections guaranteeing the right to litigation and the right of every citizen to refer to his competent judge. The SCC also reasoned that the provision of law 50/1982, giving the State Security Courts the sole competency to adjudicate their own appeals and complaints, was not in conflict with article 172 of the constitution. Finally, the SCC contended that the procedures governing State Security Court cases were in conformity with the due process standards available in other Egyptian judicial bodies, such as the right of suspects to be informed of the reasons for their detention and their right to legal representation.

Although this ruling was based on legal reasoning that many constitutional scholars and human rights activists found questionable at best, the Supreme Constitutional Court never looked back and refused to revisit the question of State Security Court competency. Six months after this landmark decision, the SCC summarily dismissed forty-one additional cases contesting the jurisdiction of the State Security Courts (*al-Mahkama* 1984: 90–95). The SCC dismissed another thirty cases petitioning the same provision over the course of the following year (*al-Mahkama* 1984: 108–113, 152–157, 189–194). The flood of cases contesting the competency of the State Security Courts in such a short period of time reveals the extent to which the regime depends upon this parallel legal track as a tool to sideline political opponents. The large volume of cases transferred to the SCC from the administrative courts also underlines the determination of administrative court judges to assert their institutional interests and to fend off encroachment from the State Security Courts. Finally, the Supreme Constitutional Court's reluctance to strike down provisions denying citizens the right of appeal to regular judicial institutions, despite the dozens

[37] Article 68 reads, "The right to litigation is inalienable for all. Every citizen has the right to refer to his competent judge. The state shall guarantee the accessibility of the judicial organs to litigants, and the rapidity of rendering decisions on cases. Any provision in the law stipulating the immunity of any act or administrative decision from the control of the judiciary shall be prohibited." Article 172 of the Constitution reads that "[t]he State Council shall be an independent judicial organ competent to take decisions in administrative disputes and disciplinary cases. The law shall determine its other competences."

[38] Article 171 of the Constitution reads, "The law shall regulate the organization of the State Security Courts and shall prescribe their competences and the conditions to be fulfilled by those who occupy the office of judge in them."

of opportunities to do so, illustrates the SCC's reluctance to challenge the core interests of the regime.

In the 1990s, the SCC faced a similar dilemma with even more profound implications when it received petitions requesting judicial review of the regime's increasing use of military courts to try civilians. Despite the extensive controls that the president holds over the Emergency State Security Courts, there were isolated cases in which the emergency courts handed down rulings that were quite embarrassing for the regime in the late 1980s and early 1990s.[39] These occasional inconveniences in the Emergency State Security Courts prompted the regime to begin using the military courts (*mahakim al-askariyya*) to try terrorism cases throughout the 1990s.[40] Military courts provide an airtight avenue for the regime to try its opponents; all judges are military officers appointed directly by the Minister of Defense and the president for two-year renewable terms, and there are almost no procedural safeguards, with trials held in secret and no right to appeal.

The first cases transferred to the military courts concerned defendants accused of specific acts of terrorism. However, within just a few years the regime began to try civilians for mere affiliation with moderate Islamist groups, such as the Muslim Brotherhood.[41] The regime's use of military courts to try civilians was hotly contested, and opponents of the regime attempted to wage a legal battle over the procedure in the early 1990s. Both liberal reformers and Islamist activists argued that, at best, military law 25/1966 gave the president the authority to transfer whole categories of crimes to the military judiciary, but it did not permit the president to hand-pick individual cases for transfer

[39] For example, in 1990 an emergency court acquitted Sheikh Omar Abdel Rahman and forty-eight of his followers when it was revealed in court that confessions were extracted through torture. The government was able to overturn the verdict on "procedural grounds" and retry the defendants, but only after an uncomfortable exposition of the regime's disregard for human rights. In another trial of twenty-four Islamists charged with assassinating parliamentary speaker Rifa't al-Mahgoub in the early 1990s, the panel of judges again dismissed the case when they found that confessions were extracted through torture. Judge Wahid Mahmud Ibrahim did not spare any details, announcing that medical reports proved the defendants had been severely beaten, hung upside down, and subjected to electric shocks to their genitals (Farahang 1997). Additional acquittals based upon allegations of torture are provided in Brown (1997: 98–99).

[40] The first such case was transferred to a military court by Mubarak by Presidential Decree 375/1992. From December 1992 through April 1995 alone a total of 483 civilians were transferred to military courts for trial. Sixty-four were sentenced to death. According to the 1998 annual report of the Arab Center for the Independence of the Judiciary and the Legal Profession, civilian transfers to military courts reached as high as 317 in 1997 alone.

[41] Presidential Decree No. 297/1995 transferred the cases of forty-nine members of the Muslim Brotherhood from Lawsuit 8 Military No. 136/1995 in the Higher State Security court to the military judiciary (Center for Human Rights Legal Aid 1995). In 1996 the government again transferred twelve members of the emerging Wasat Party to the military court.

(Brown 1997: 115). Despite an extensive legal battle, activists were unable to prevail.

SCC justices must look after their long-term interests vis-à-vis the regime and pick their battles appropriately.[42] Although the Supreme Constitutional Court had ample opportunities to strike down the provisions denying citizens the right of appeal to regular judicial institutions, the SCC almost certainly exercised constraint because impeding the function of the exceptional courts would likely have resulted in a futile confrontation with the regime.

Even outside of the military courts the regime effectively detains its political opponents for long periods of time through a procedure known as "recurrent detention." Under article three of the emergency law, prosecutors can detain any citizen for up to thirty days without charges. Once a subject of administrative detention is released within the required thirty-day period, he is sometimes simply transferred to another prison or holding facility and then registered once again for another thirty-day period, essentially allowing state security forces to lock up anyone it wishes for months or even years at a time. Human rights organizations first brought the phenomenon of recurrent detention to light through extensive documentation in the 1990s. The Egyptian Organization for Human Rights (EOHR) noted that the problem became particularly prevalent after 1992 when the regime began to wage a protracted campaign against militant Islamists.[43] Between 1991 and 1996 the EOHR documented 7,891 cases of recurrent detention, and the number of actual cases was almost certainly much higher (EOHR 1996). Ninety percent of EOHR investigations revealed that detained subjects suffered from torture, and most were denied the right to legal representation or family visits.

Article three of the emergency law permits the President of the Republic, or anyone representing him, to "detain persons posing a threat to security and public order." However, the emergency law does not define the terms "threat," "security," and "public order," leaving it to prosecutors to apply the provision with its broadest possible interpretation. Administrative courts issued a number of rulings attempting to define and limit the application of article three, but their rulings landed on deaf ears.

Ironically, the regime's ability to transfer select cases to exceptional courts and even to detain political opponents indefinitely through the practice of

[42] In an interview, former Chief Justice Awad al-Morr described the Egyptian political system as a "red-line system," where there are implicit understandings between the regime and the opposition over how far political activism will be tolerated (personal interview, June 11, 2000).

[43] The problem of recurrent detention was further aggravated by the "antiterrorism" law 97/1992, which expanded the authority of the public prosecutor's office and weakened the oversight of the administrative courts.

recurrent detention facilitated the independence of the regular judiciary. The Supreme Constitutional Court and the administrative courts were able to push a liberal agenda in less significant areas of political life and to maintain their autonomy from the executive largely because the regime was confident that it ultimately retained full control over its political opponents. Supreme Constitutional Court activism may therefore be characterized as "insulated liberalism." Court rulings had an impact upon state policy, but judicial institutions were ultimately bounded by a profoundly illiberal political system.

6

Courts Out of Context: Authoritarian Sources of Judicial Failure in Chile (1973–1990) and Argentina (1976–1983)

Robert Barros

INTRODUCTION

The purpose of this chapter is to investigate how military dictatorships that concentrate formerly separated and shared powers affect the activity of regular courts that survive from a prior, formally constitutional regime. Specifically, I explore two dictatorships, the Argentine (1976–1983) and the Chilean (1973–1990), to examine whether courts can conceivably uphold rights and liberties, as warranted by the constitutional definition of their powers, out of context; that is, once dictatorship has displaced the regular constitutional-institutional framework. This study thus points to the limits on courts in authoritarian regimes and to the limits of what might be called "partial constitutionalism" – the idea that a judiciary, as structured by a given constitution, ought to uphold and defend another part of the constitution, its guarantees of rights, even after the core institutions of that constitution – elected legislative and executive institutions – have been suppressed and displaced by an autocratic centralization of power.

This formulation may appear peculiar, but it is noteworthy that such expectations regarding the potentialities of courts in authoritarian regimes are implicit in many critical accounts of the judiciary under dictatorship. Such expectations are even to be found in the final official reports issued by the truth commissions formed in the aftermath of military rule to clarify the worst violations of rights in Argentina and Chile, the *Comisión Nacional sobre la Desaparición de Personas* (hereafter CONADEP) and the *Comisión Nacional*

This chapter benefited from discussions with Paola Bergallo, Martín Böhmer, María Angélica Gelli, Lucas Grosman, and the participants at the Philadelphia conference on courts in authoritarian regimes.

de Verdad y Reconciliación's (hereafter *Comisión Rettig* [1]), respectively. Each of these reports squarely identified the national armed forces, intelligence, and police agencies as responsible for the massive rights violations that each state for the first time thus officially recognized, quantified, and began to seek to repair (CONADEP 1984 and *Comisión Rettig* 1991); however, each report also included a chapter on the judiciary that maintained that the courts were partially responsible for the massive rights violations that had occurred.

The arguments of both reports are strikingly similar: in the face of unprecedented, systematic, arbitrary repressive acts by organs of the state, the power charged with upholding rights, the judiciary, had absolutely failed to protect the thousands of individuals who were victims of this onslaught of illegal force. More specifically, in both countries the courts had allowed the state free rein in its use of powers applicable under states of siege, stood aloof from supervising military courts, and abandoned the disappeared to their fate by making complacent, formalistic decisions on the writ of habeas corpus. Both commissions found that the judiciary had failed in its constitutional mission to uphold rights and had thereby been complicit in the deaths of thousands of victims of state violence. The tone of these charges is clear from the following excerpts. According to the CONADEP (1984: 392), "The Judicial Power, which should have set itself as a brake on the prevailing absolutism, became in fact a simulacra of the jurisdictional function to protect its external image. . . . The reticence, and even the complacency of a good part of the judiciary, completed the picture of abandonment of human rights." In Chile, the *Comisión Rettig* maintained that the stance adopted by the judiciary during the military regime "produced, in some important and involuntary measure, an aggravation of the process of systematic human rights violations, both in regards to immediate violations, by not providing protection to the persons detained in the cases denounced, as well as by giving repressive agents growing certainty of impunity for their criminal actions" (*Comisión Rettig* 1991: 97).

The objective of this chapter is not to criticize these reports, defend the actions of the Argentine or the Chilean judiciary, or evaluate the ethical dilemmas before judges in authoritarian situations. Rather I seek to contribute to an understanding of judicial institutions in autocratic polities by exploring the counterfactual implicit in each truth commission's finding that the judiciary had failed: that even in authoritarian contexts, if there had been

[1] This unofficial name was coined after the commission's president, the former Senator Raúl Rettig.

the appropriate volition among judges, courts could have effectively exercised their powers and upheld the liberties and legal procedures whose defense was ascribed to each judiciary under their respective national constitutions.[2] I address this question by examining how the broader political context created by dictatorship impinged upon the operation of courts as institutions setting limits upon arbitrary repressive practices in the two cases.

One might argue that to concentrate on judicial failure in the face of state terrorism is to focus on an extreme situation that cannot possibly elucidate the operation of courts in authoritarian regimes. However, I suggest that the mutations in the political-institutional setting of the courts not only explain the judiciary's inability to uphold rights of due process, liberty, and integrity but also illustrate general dynamics that constrain courts in authoritarian regimes; these dynamics in turn reflect and intensify restrictions upon judicial activity that are common in regular constitutional systems.

The shifts effected by dictatorship that transformed the political-institutional setting of courts, with variations in each case, involved the following: (a) a turn toward the mass utilization of discretional forms of coercive political control by state agents situated outside of the judiciary, such as administrative detention under state- of-siege powers and absolutely unlawful abduction and extrajudicial murder; (b) the activation of special courts also external to the judiciary that employed procedures and standards of proof far less demanding and rule-bound than regular judicial procedures and that were staffed by officials tied to the same military hierarchies that wielded legislative and executive power; and (c) most fundamentally, the suppression of representation and the separation of powers, as executive and legislative functions were concentrated at the apex of the same military forces whose subordinate officers or units were effecting the repression (a) and exceptional forms of justice (b).

In both Chile and Argentina these institutional mutations were sufficiently consequential as to give rise to the type of judicial failure identified by each country's truth commission. Dictatorships do not have to interfere with judges (although they did in Argentina), nor involve the courts in political repression, to render courts ineffectual before extralegal and/or extraordinary repression. In the face of the formidable shifts in the setting of judicial activity just mentioned, judges had only to apply the law and decide cases following standard procedures to be rendered (1) ineffective before extralegal repression since the

[2] Strikingly, apologists for military rule shared this assumption with critics of military rule when the former insisted that the independence of the courts after military intervention provided for the protection of rights and the rule of law. For a Chilean example, see Navarrete (1974). On the status of the constitutions nominally in force in both countries, see footnote 13.

state agencies that courts regularly turned to for investigatory assistance were now in the hands of agents *directly or indirectly associated with or subordinate* to the forces wielding prerogative repressive force; (2) incompetent before administrative detentions ordered under states of siege because both court systems, under the guise of the separation of powers, had traditionally refrained from qualifying the executive's use of these prerogative powers; and (3) generally secondary and dependent, given each regime's facile capacity to make laws that the courts had to apply and that could be made to circumvent the courts when and if necessary. In this regard, existing features of courts under democracy (2 and 3 just mentioned) facilitated each dictatorship's ability to apply massive coercive force against political enemies unconstrained by the judiciary. These effects were primarily the consequence of transformations in the context external to the judiciary. The courts were devitalized by the authoritarian context, yet it was perhaps inevitable also that the Argentine and Chilean judiciaries would bear part of the blame for rights violations, if only because courts were associated with expectations about rights that had their origins in nonauthoritarian contexts.

THE CONTEXT OF JUDICIAL FAILURE: MILITARY DICTATORSHIP AND CONSTITUTIONAL EXCEPTION

Notably, "judicial failure" arose in countries that, otherwise, were very different along significant dimensions, such as their prior political-institutional history, traditions of judicial independence, and nature of the crises that gave rise to military rule, as well as each dictatorship's organization of authority, composition of its security apparatus, and patterns of repression. The significance of many of these variables, particularly those that concern the organizational format of each authoritarian regime, for the operation of courts is unclear: we lack the fine-grained knowledge of the inner workings of these dictatorships that would allow us to analyze how the characteristics mentioned impinged upon the situation, strategies, and decisions of military and judicial actors. Nevertheless, these dimensions are worth sketching as they provide context for the analysis that follows, are a source of hypotheses for further research, and, given judicial failure in both polities, suggest that the common institutional mutations associated with military rule were more significant than differences in prior political-institutional history, particularly in regard to the judiciary, or in the structure of each authoritarian regime.

Within the post-World War II Latin American context, the Chilean and Argentine polities stood at opposite extremes on a continuum of regime stability and instability. Chile, along with Uruguay, was the exception to the Latin

American pattern of recurrent military intervention, typified and taken to an extreme by Argentina. Prior to the 1973 coup, Chile was renowned for its highly legalistic, competitive politics and the solidity of its representative and judicial institutions – the operation of Congress, for example, had only been interrupted briefly on two occasions during the twentieth century (in 1924 and 1932). This institutional stability was associated with the emergence of professional armed forces, as well as a functionally independent judiciary that never experienced the political dismissal of justices that accompanied regime crises in Argentina. A further consequence of this history – one that weighed heavily on the military government – was that the breakdown of democracy in Chile emerged from within the constitutional system, after a democratically elected left-wing government – the *Unidad Popular* – attempted to implement a program of socialist transformation through legality. These events precipitated sharp social conflict, polarization, an insoluble constitutional crisis, and eventually military intervention. Prior to the coup the clash between government and opposition increasingly took the form of a conflict over the legality and constitutionality of the Allende government's measures; over time the Supreme Court fell in with the opposition after repeatedly lodging complaints that government officials were not implementing judicial resolutions.[3] Against this backdrop, within a day of the military coup the president of the Supreme Court publicly declared his satisfaction with the new government's intention to uphold judicial rulings without interference.

After the first *coup de etat* in 1930, the Argentine political history leading up to the 1976 military coup, as is also well known, was one of repeated military intervention following brief interludes of civilian government and a failure – particularly after the emergence of Peronism in the mid-1940s – to find a political-institutional formula that could protect dominant class interests without involving military rule or the proscription of Argentina's single largest political party, the Peronist *Partido Justicialista*. With military coups in 1943, 1955, 1962, 1966, and 1976, this "impossible game" entangled the military and the judiciary in the "Peronist" versus "anti-Peronist" struggle, generating

[3] On at least eleven occasions the president of the Supreme Court notified President Allende or his Minister of the Interior of situations when judicial resolutions were not being implemented. The rulings in question usually ordered the eviction of illegally occupied farms or factories. These notes are reproduced in Orden de Abogados (1980: 69–129). The Supreme Court was not involved in the central constitutional controversy that divided the government and the opposition Congress, which concerned the super-majority required to override a presidential veto of a constitutional reform. This task fell to the newly created Constitutional Tribunal, which declared itself incompetent to decide. On Chile's first Constitutional Tribunal, see Silva Cimma (1977).

factionalism within the armed forces and unstable tenure among Supreme Court justices, notwithstanding the 1853 Constitution's provision for office during "good behavior."

After the first Peronist government impeached three of five justices in 1946, the military responded upon taking power in 1955 with a purge of the court. This purge proved to be the first act in what would become a cycle of judicial turnovers whereby the Supreme Court was reappointed with each transition to and from military rule.[4] A related byproduct of this pattern of regime instability was the development by the Supreme Court of a peculiarly Argentine branch of jurisprudence, the "*doctrina de facto*," regarding the continuous force of the legal enactments of "*de facto*" governments.[5]

This ongoing history also shaped the events that culminated in the 1976 coup. Shut out by proscription and military rule, factions within Peronism and the Left turned to armed activity in 1970 as a tactic to push for a return to civilian rule. These operations, however, continued after the military withdrew in 1973 and Peron himself returned to Argentina and the presidency. In contrast to Chile, the threat to order in Argentina emerged outside of constitutional channels. Particularly after Peron's death in 1974, it took the form of internecine warfare between right-wing and left-wing factions of Peronism, as government-organized death squads responded to the left guerrillas, as well as clashes between the guerillas and the military.

Argentina and Chile prior to the onset of military rule, therefore, were societies with very different patterns of political organization and conflict, had undergone very different crises, and bore very different traditions of judicial independence, understood as independence from the executive. These contrasts in political, institutional, judicial, and military history were associated

[4] Following coups in 1955, 1966, and 1976, the entering military governments sacked the Supreme Court. In turn, succeeding civilian presidents maintained the cycle by appointing new justices after the resignation of the military appointees. Except for the first coup in 1930, the 1962 coup, which ousted President Arturo Frondizi after Peronist-backed candidates won gubernatorial and legislative elections, was the only coup that did not involve military reappointment of the Supreme Court. Following Peron's presidency the change in the turnover rates of Supreme Court justices is striking: prior to his government 82% of all justices' terms ended because of death or retirement; subsequently, 91% of all justices left the court prematurely because of irregular removal, resignation, or impeachment (Iaryczower, Spiller, and Tommasi 2002: 702). On the relations between the Supreme Court and prior military governments, see Ancarola (2001), Carrió (1996), Gelli 2000, Pellet Lastra 2000, and Snow (1975).

[5] On the "*doctrina de facto*" and its evolution since 1930, see Bidart Campos (1989: II:505–537); Cayuso and Gelli (1988), and Groismann (1989). This jurisprudence did not impugn the illegitimacy of authoritarian power. Rather on the grounds of a "*de facto*" government's factual control of power, it sought to define the scope of the powers possessed by military regimes and, in particular, the validity over time and transitions of their administrative and legislative acts.

with important differences in the specifics of how each military dictatorship organized its rule[6]; some of these differences were also influenced by lessons that military officials and advisors in one country drew from events in the other.[7] Nevertheless, these many differences also were set within broadly similar political-ideological universes that defined some variant of liberal constitutional democracy as the "normal" political order, even as important sectors of the upper and middle classes, the political class, and the military in both countries came to advocate military rule as an "exception" that was preferable to continued political conflict and social disorder.

[6] The interservice negotiations within the Argentine military in 1976, for example, are said to have been overshadowed by prior experiences of military rule, particularly the preceding dictatorship of General Juan Carlos Ongania, in which Ongania exercised executive and legislative powers without a military junta. To avoid such personalization of power, the armed forces in 1976 formed a military junta that, as "supreme organ of the Nation," designated the president and granted him executive and legislative powers, but retained powers associated with the armed forces as well as the declaration of the state of siege. Provision was also made for junta participation in the legislative process through a legislative advisory commission whenever this commission resolved that a bill submitted by the executive was of "significant transcendence." The legislative advisory commission was staffed by three representatives from each of the three branches of the armed forces. Both the military junta, except when considering the removal of the president, and the legislative advisory commission were to decide by absolute majority. At least on paper, these were the terms of the dictatorship's internal organization as stipulated in the "Statute for the Process of National Reorganization" and Law 21.256, respectively published in the *Boletín Oficial*, March 31, 1976 and March 26, 1976. Whether and how these institutions operated in practice is only hazily known. The chief source (Fontana 1987) is based on scant documentation of the internal workings of the dictatorship.

Similarly, it has been suggested that the reversals of repressive legislation and policy upon each pendular shift in regime in Argentina, particularly the 1974 amnesty of political prisoners, convinced high-ranking military officers of the futility of administrative (state of siege) and repressive penal responses to subversion and contributed to the turn to a strategy of physical annihilation of opponents (Acuña and Smulovitz 1995; 29; Pereira 2005; 130).

In Chile, on the other hand, despite the concentration of executive power in General Pinochet and the widespread interpretation of the Chilean regime as a personalistic dictatorship, Pinochet's hold on the executive, important sectors of the political class, and the military was counterbalanced by a military junta that wielded legislative and constituent powers. Until the 1980 Constitution went into force in March 1981, General Pinochet was one of four members of the junta; subsequently an army general represented him. However, unanimity was the effective decision rule, which allowed Pinochet and his later delegate to veto legislation, but it also denied him of the power to legislate without the agreement of the other commanders. The adoption of these institutions and their effect upon the military regime are reconstructed in Barros (2002).

[7] Thus, Acuña and Smulovitz (1995: 29) conjecture that a clandestine strategy of repression was adopted in Argentina to avoid the international protests and pressures that the Chilean military faced after an initial period of open repression. In Chile, Pinochet's chief constitutional advisor, Jaime Guzmán, on the other hand, explicitly referred to Argentina to argue that prolonged military rule was futile and that a new constitution was imperative (Barros 2002: 206).

Military Dictatorship as Constitutional Exception

This liberal-constitutional political-ideological backdrop to the Argentine and Chilean political crises of the 1970s shaped the range of alternatives to civilian rule that were acceptable internationally and internally, and indirectly contributed to defining the character of each military dictatorship.[8] In particular, this liberal-constitutional tradition, however qualified in practice by the reality of dictatorship, set constraints on how law and the courts could be utilized publicly by each authoritarian regime.[9] As a result, in Chile and Argentina the military presented their intervention and rule as an exception impelled by the force of circumstances and stipulated that their government would last only until the normalization of conditions allowed democracy to be restored. In both cases, the military made clear that temporary rule could be protracted and that it was the regime's prerogative to decide when normalcy prevailed. Nevertheless, the range of conceivable regimes tended to be restricted to two forms: either some variant of constitutional democracy, which in the short term appeared untenable, or military rule that could be more or less prolonged, but could not easily be established as an acceptable form of regular rule. Accordingly, unlike their totalitarian or revolutionary counterparts, neither military dictatorship set out to organize a "new regime" on a permanent basis.[10]

In their form and objectives, both regimes then portrayed themselves as variants on the classical model of dictatorship: in response to severe threats to state continuity, a body or individual assumed extraordinary powers of rule, unconstrained by ordinary constitutional limits, precisely to restore order and

[8] As Juan Linz noted in reference to the post-1964 Brazilian military dictatorship, the international political-ideological climate after World War II left little room for nonliberal, authoritarian experiments. Given these constraints, he characterized the Brazilian military government as an "authoritarian situation," rather than an authoritarian regime because it enjoyed little space to institutionalize itself as a regime. On similar terms, recent Latin American dictatorships were distinguished from interwar European mobilizing totalitarian regimes during the theoretical discussion of the late 1970s (Cardoso 1979).

[9] In many situations the consequences of these constraints were perverse because their acknowledgment by military rulers tended to result in the opposite of freedom and worse, as what could not be done legally in public was done without judicial oversight in secret by each dictatorship's security forces. Elsewhere (Barros 2002: 152–158) I have shown that the turn to clandestine repression in Chile occurred after members of the junta recognized that they could not lawfully try prominent figures from the Allende regime. Similarly, Osiel (1995: 521, 524) suggests that the Argentine military's perception that Supreme Court judges were not sufficiently cooperative drove political repression underground.

[10] This claim may appear controversial in regard to the 1980 Chilean Constitution. However, despite the constitution's objectionable features and associations with prolonging military rule, it was conceived as a variant of constitutional democracy. On this point, see Barros (2002).

conditions under which the constitution could again function. Despite this characterization, the distance from the classical model was always in evidence: in neither military dictatorship were exceptional absolute powers conferred by civilians according to prior constitutional procedures, nor were dictatorial powers authorized subject to a temporal limit.[11] Still, in both Argentina and Chile, notwithstanding the fact of usurpation, the military regimes that took power in the 1970s bore some affinity, although qualified, to the model of dictatorship: in both cases an exceptional institute had been constituted that obtained – in fact, arrogated – supreme power to confront a situation perceived to be beyond the capacity of regular constitutional institutions. Fundamentally, this meant that neither military regime could easily move beyond the dichotomy that opposed constitutional and exceptional regimes.[12]

Exception, Dictatorship, and the Courts

This type of exceptional military dictatorship involved at least two types of departure from the rule of law that impinged upon the operation of the preexisting judicial system in each country. The first concerned the constitution as a higher law. In both cases, the military's arrogation and centralization of legislative and executive power shattered the constitutional organization and separation of powers. This had the effect of "deconstitutionalizing" the constitutional text nominally in force, as the constitution became endogenous to the authoritarian ruling body that could at its prerogative enact or amend nominally constitutional norms.[13] The second departure concerned the rule

[11] For the same reason, neither case can be subsumed under Schmitt's (1923/1985) category of "commissary dictatorship." On the classical model of dictatorship, see Nicolet (2004) and Rossiter (1948). As discussed later, both military regimes drew upon each country's constitutional provisions for exceptional powers to frame and justify some emergency measures, particularly administrative detentions and restrictions on rights. However, in neither case were the extraordinary measures taken limited to those permissible by pre-coup constitutional emergency powers. Similarly, in neither case was the use of emergency powers conferred by the constitutionally defined authorizing power, as the Congress had been suppressed in both countries.

[12] In both cases, factions advocated permanent military rule and presented projects to mobilize civilians. However, proponents of a military-civic movement made no headway in Chile, whereas the best-known project of civil-military convergence in Argentina, Admiral Massera's scheme to co-opt Montonero prisoners, was intended to build a personal power base in anticipation of eventual competitive elections.

[13] Regarding the status of the constitution under each dictatorship, there are some interesting differences. The Chilean junta, after specifying that it had assumed Supreme Command of the Nation (*Mando Supremo de la Nación*), declared in its "Act of Constitution of the Junta of Government" that it would guarantee the full powers of the Judiciary and respect the Constitution and the laws, but conditioned upon "the extent that the present situation

of law as a procedural guarantee of rights. Under the imperative of the emergency situation, constitutionally anticipated emergency powers allowed the abeyance of regular legal forms. The chief instrument that effected and typified this type of displacement of law was the provision for administrative arrest and detention without legal cause or due process under powers given by a state of siege.

Both types of departure from the rule of law – the collapse of higher law constitutionalism and the suspension of due process – involved a shift from legalistic to discretionary forms of articulating political power. This shift was intensified in both Chile and Argentina by the parallel activation of military courts that, particularly when operating under provisions for time of war, followed less than standard burdens of proof and evidence.

In this regard, in contexts of severe political and social crises, the immediate tasks of social control faced by each dictatorship were conceived as essentially extrajuridical. In both Chile and Argentina, political repression largely sidestepped the regular system of justice and was situated within the ruling military-administrative apparatus; it produced an awesome, unpredictable area of discretionary power, which generally overstepped the extraordinary powers associated with constitutional states of exception. These discretionary mechanisms of social control – extrajudicial repression, administrative emergency powers, and military courts – were centered in the military and were not legalistically rule-bound. To the extent that these control mechanisms were

of the country allows" (Decree-Law No. 1, [hereafter, DL], *Diario Oficial*, [hereafter, DO], September 18, 1973)." Subsequent decree laws clarified that the junta held constituent powers, and in late 1974 at the instigation of the Supreme Court the junta established that only decree laws enacted in express exercise of constituent powers would modify the 1925 Constitution.

A similar concern with the formalities of the 1853 Constitution was apparently absent from the 1976 Argentine dictatorship. The already mentioned "Statute for the Process of National Reorganization" invoked the constitution only as a source for the specific powers that were divided between the president and the junta. Otherwise, this founding document asserted the sovereignty of the junta, describing it as "supreme organ of the Nation" that would "ensure the normal functioning of the rest of the powers of the State and the basic objectives to be reached (art. 1)." Articles 9 and 10 regulated new appointments to the Supreme Court, even guaranteeing justices tenure in good behavior. Strikingly, despite the absence of any reference to the 1853 Constitution, the junta decreed the statute in express "exercise of the constituent power," thus suggesting that the junta had arrogated constituent powers. The absence in 1976 of any explicit acknowledgment of the continued force of the constitution, albeit qualified, was a departure from the founding acts of the 1955 and 1966 dictatorships, each of which stated that the constitution and the law would remain in force but only as long as they did not thwart each revolution's objectives. It should be noted that the 1955 regime's acknowledgment of the constitution did not inhibit it from suppressing the constitution in force – Peron's 1949 Constitution – and restoring the 1853 Constitution as it stood when it had been replaced in 1949.

recognized, they were generally portrayed by the ruling militaries as exceptional political measures or command functions, not acts of adjudication, and therefore were held to be beyond the supervision of the ordinary judiciary.

This separation of political repression from the judiciary permitted the courts to operate with legal standards of justice in areas subject to their jurisdiction and gave shape to a dual state of prerogative and law, as well as some semblance of judicial independence.[14] However, the sidestepping of the judiciary did not leave the courts untouched, as in both cases the judiciary ended up being tainted by their failure to provide redress to the thousands and thousands of families and individuals who turned to the courts to protect rights in the face of administrative and extralegal dictatorial force.

Before turning to examine why judicial remedies designed for democratic contexts were unlikely to limit authoritarian power, it should be noted that in both Argentina and Chile the turn to administrative-political forms of political control under dictatorship was parasitic upon norms and jurisprudence drawn from the prior legal and constitutional order.[15] Rather than being a response to noncompliant courts, as has been suggested in some theories of courts in authoritarian regimes, the shift away from law and the courts was effected by activating exceptional instruments that were already at hand in the constitution and statutes. This was the case with state-of-siege powers, which were inscribed in both the Chilean 1925 Constitution and the Argentine 1853 Constitution, as well as with the military courts that were regulated in each country's code of military justice.[16] Both military dictatorships immediately built on these

[14] The concept of the dual state is drawn from Fraenkel (1969). His concept is compatible with the dependence of courts upon the legislative enactments of an authoritarian regime – the distinctive feature of Fraenkel's "normative state" is that controversies in this sphere are resolved according to law rather than the arbitrary discretion of the authoritarian ruling body as occurs in the parallel realm of the "prerogative state." Authoritarian law as a limitation on authoritarian judicial independence appears to have been overlooked by Toharia (1975). The fact that even prototypically independent courts, such as the English, are rendered subordinate by legislative sovereignty is a central theme in Shapiro (1981).

[15] More generally, both military regimes enacted decree-laws and statutes to link their rule to already established faculties and legal orders. In part, this was done to assure legal and administrative continuity within the state apparatus. Such references to prior norms also provided a means to establish specific balances among the forces composing each military regime, as the constitution could be drawn upon to specify and distribute particular powers.

[16] Under the Chilean Constitution of 1925 (Art. 72, no. 17) the declaration of a state of siege empowered the president only to restrict personal liberty, "to transfer persons from one department to another and to confine them in their own houses, or in places other than jails or intended for the confinement or imprisonment of ordinary criminals." The Argentine provisions were broader and allowed for the suspension of individual liberties and allowed the executive to detain individuals and transfer them to other parts of the country. By article 23 of the constitution individuals so affected were allowed the option of leaving the country, although the military government immediately and repeatedly suspended this option.

frameworks by enacting through decree-law new penal offenses subject to military jurisdiction, and each, at different points, modified the powers associated with the state of siege. Yet by being framed against prior institutions, these innovations could be tied to an ongoing jurisprudence regarding the state of siege and military justice that tended to favor executive prerogative and noninvolvement of the regular judiciary in both areas.

MODALITIES OF REPRESSION AND THE RULE OF LAW

To make sense of how these authoritarian transformations in the political-institutional context of the courts affected the Chilean and Argentine judiciary's capacity to guarantee individual rights of liberty and personal integrity, it is helpful to distinguish different modes of repression and their relationship to law. The following list orders various modalities by which a state may pursue the repression of political enemies according to the manner that each conforms with or departs from the rule of law.[17] Proceeding from unlawful to legal forms we can distinguish the following four modalities of repression:

(1) Extrajuridical repression (state terror), which consists of all punitive acts inflicted by state agents without any prior authority that affect individual rights and lives without any legal cause, exceptional authorization, or adherence to judicial or administrative formalities. Given their illegality, such arbitrary measures tend to be taken covertly and are rarely acknowledged by state authorities that execute them.[18]

(2) Administrative repression, which includes detentions authorized by a state of siege, as noted above, departs from the rule of law because it involves restrictions on individual liberty without any prior trial and conviction for a

A state of siege had been in force since November 1974 when the Argentine military took power in March 1976 and remained standing until October 28, 1983, only days before the elections that inaugurated the return to democracy. The Chilean military upon taking power immediately declared a state of siege. In effect until March 11, 1978, the state of siege was reinstated on two occasions during the mid-1980s: first in response to mass opposition protests in late 1984 and after the September 1986 assassination attempt on Pinochet. Throughout the period the lower ranking "state of emergency" was also in effect.

[17] Elsewhere (Barros 2003), drawing on Raz (1979), I have explained how the rule of law can be compatible with autocracy. The two intermediate modalities of repression presented here should not be interpreted as points on a continuum toward the rule of law as it is unclear which of the two should be seen as closer to the rule of law. My final category, legal repression, conforms to Raz's conception of the rule of law.

[18] Many times, these acts – abduction, unauthorized detention, torture, disappearance, and execution – are unlawful even by the inflicting regime's own legality. Such measures constitute terror because individuals have no security when a state power arbitrarily disavows legal protections and remedies.

legal violation. In contrast to wholly arbitrary extrajuridical measures, these discretionary administrative acts have some legal foundation when they are anticipated in constitutional and statutory norms governing emergency situations and are effected by competent authorities.[19]

(3) Summary (quasi-) judicial repression, which as a form of punitive action differs from the administrative measures in that it involves some form of trial proceeding. However, such trials depart from rule-of-law standards because they apply laws that are either retroactive, secret, or unclear; limit the defendant's right to a defense; and/or employ doubtful standards of evidence. In these cases, a veneer of legality is given to the discretionary repression of political enemies and opponents.

(4) Legal repression, which is a form of political control that involves the repression of individuals for political offenses but that proceeds via regular judicial mechanisms that afford the accused full protection from arbitrary applications of the law. In other words, individuals may be convicted of political crimes but only after their guilt has been established in a fair and legal trial. Repressive law in this context may be draconian, but it allows individuals to form reasonable expectations about the consequences of different courses of action since it is prospective, public, clear, relatively stable, and fairly applied – individuals can have some certainty that if they submit to the law's constraints they will not be punished.

At different times, one or more, or all of these modalities of political repression may be used by a regime, and the use of one or another may wax or wane as a function of the nature of the specific political targets at which they are directed, levels of perceived threat and insecurity, and the relative costs associated at the moment with the use of each mode.

This classification of extralegal, administrative, summary, and legal modalities of repression leaves open the identity of the agents or institutions that engage in each. This gap is intentional because these different forms of punitive action can be effected by numerous, heterogeneous agencies and organs, which may be specialized or competing, more or less subordinate to or autonomous of superior hierarchies, as well as more or less proximate to

[19] When employed properly, administrative measures can afford individuals some minimal protection insofar as their correct use requires adherence to formalities that can be subject to review. In fact, the legalization of an initially secret illegal detention via its acknowledgment and subsumption under state-of-siege authority often meant that an individual was no longer subject to torture and would not disappear. Whether this actually constituted protection attributable to the institution, however, is unclear, since being in the legal system may only have signaled that someone had decided that the prisoner in question would live. In both countries, individuals under officially authorized administrative detention subsequently disappeared, and tragically thousands of persons disappeared without any protection from emergency powers.