

RULE BY LAW

The Politics of Courts
in Authoritarian Regimes



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CAMBRIDGE

TABLE 7.3. *Turnover rates of justices of the Supreme Court*

Range of term (years)	Percentage
1 to 5	39%
6 to 10	27%
11 to 15	25%
16 to 20	7%
21 to 25	2%
Average term	10
Average age of incoming justices	56
Average age of outgoing justices	63

Source: Magaloni 2003.

The standing president could thus employ a combination of inducements, sanctions, and threats to entice Supreme Court justices to behave as loyal agents. He could appoint amicable justices who would guard the implementation of his policy agenda; he could threaten to remove rebellious justices despite life appointments; and he could change constitutional rules to either expand the size of the Court or change its constitutional prerogatives. All of these measures turned the Court into a highly political body that responded to the president.

3. Until 1994, Mexican politicians purposely chose *not to delegate enough power* to interpret the constitution to the Supreme Court and the federal judicial power, excluding from judicial review virtually all cases with so-called political content: cases related to the organization, monitoring, and implementation of elections and electoral laws; “constitutional controversies” or conflicts among different branches or levels of government with respect to their constitutionality of their acts; and expropriation and distribution of property rights in the countryside. This meant that an impressive variety of cases were out of the reach of the courts.

If courts were prevented from ruling on so many types of conflicts, what then was their role in the autocracy? The Supreme Court and federal tribunals decided on *amparo* trials. Through the *amparo*, individuals can sue the state for violating their rights or issuing and applying laws that go against the constitution. However, the federal courts seldom questioned the substantive content of the regime’s laws, and even when courts did question those laws, decisions on constitutionality on *amparo* trials did not have general effects, but only affected the parties in the specific dispute. If a law was declared

unconstitutional five times, this had the effect of creating a general legal precedent (*jurisprudencia*) that obliged lower level courts. However, since the *amparo* trial had very strict procedural rules and could only be initiated within a short period of time following the application of the challenged law or state act, the precedent only protected those who were able to sue the government within the required time. In practice this meant that the autocracy was able to legally continue to apply laws even when the federal courts had declared these laws unconstitutional. Since there was virtually no publicity given to these decisions, their political consequences were minor.

The *inter partes* clause had the effect of reducing courts to institutions fully devoted to controlling the application of the laws. On a case-by-case basis – a forum where individuals could confront government officials, mostly for minor violations, and challenge the decisions of lower level courts. Federal courts were thus in charge of monitoring that lower-level bureaucrats and state officials acted in accordance with the directives of top-level government officials. The system for monitoring and sanctioning played a similar function to the “fire-alarm” versus “police patrol” regime in the United States in which administrative procedures are established so that Congress can control the bureaucracies indirectly and in a decentralized fashion, through citizens’ claims, rather than setting direct controls on federal agencies (Shapiro 1981). In Mexico the president as top leader of the party and chief executive played the role of the principal, low-level government officials and judges were its agents, and the federal courts served to monitor and sanction behavior but only if citizens enticed courts to act through an *amparo* suit.

To make sure that courts acted as agents of the regime and its central leadership, several institutional controls were devised. As mentioned above, the president shaped the composition of the Supreme Court, nominating individuals who were loyal to the autocracy and had similar ideological predispositions. The president also retained powerful informal mechanisms to sanction independent justices who refused to interpret the laws according to his commands, ensuring that the Supreme Court *shifted its interpretations according to the changing policy agenda of incoming administrations*. These controls guaranteed a very responsive and politicized Supreme Court rather than a body insulated from politics.

Furthermore, the autocracy delegated to Supreme Court justices all the authority to discipline, promote, and sanction lower level federal courts. This meant that federal judges who were interested in keeping their jobs and ascending the ladder of promotions were obliged to closely follow the Court’s legal interpretations, which were highly responsive to the regime’s top leadership.

The system worked in such a way that it imprinted a strong pro-regime ideological bias in the entire federal judiciary.

Finally, the *amparo* trial was designed to ensure that the president and the party's central leadership could exert strong controls over the states' courts. The states' courts were highly responsive to the governors, who controlled appointments and promotions. However, the rulings of every single trial in the country – criminal, civil, commercial – could be appealed first before the states' Supreme Tribunals (*Tribunales Superiores de Justicia*), second before the federal courts, and lastly before the Supreme Court. This meant that the Supreme Court was the last court of appeals in charge of controlling and reviewing the application of the laws by judges in the entire country. Since the Court was an agent of the president's office, through the appeals process the president was able to set the criteria for the interpretation of the laws in the entire country.

CITIZENS' RIGHTS AND AUTOCRATIC ABUSE

The official discourse was that the *amparo* trial established the necessary constraints for the creation of a limited government and the rule of law. This discourse was to a large extent also promoted by the legal profession and the law schools. In practice, however, the overwhelming majority of *amparo* cases were dismissed, and citizens found little effective redress for their grievances through the courts.

The Mexican Constitution established a series of fundamental rights, including the right to own property, to due process of law, to associate politically and to protest peacefully, to vote, and to free speech, among others. To any autocratic regime, this list of rights would sound threatening, but in practice they were extremely limited. Those who confronted the regime or who had to deal with the police and state bureaucracies found themselves at the mercy of government officials and courts that served the interests of those officials. The autocratic regime was carefully designed such that courts were powerful enough to allow the president to supervise and control its agents in the bureaucracy and lower level courts, but weak enough to prevent citizens from effectively enforcing their rights vis-à-vis the regime.

First of all, despite the constitutional discourse there was no due process in the autocratic regime. The Mexican criminal justice system was purposely designed to give the executive leeway to apply the law with ample discretion, ensuring punishment for the dissident while guaranteeing impunity to the ally. The criminal justice system was designed such that law enforcement agencies (public prosecutors and their agents in the *ministerio público*, MP) and the police, had the monopoly over investigative and prosecutorial

actions,” which meant that no other authority could compel the MP to initiate an investigation and to prosecute a crime before a court of law.⁴ In addition, courts lacked jurisdiction over the broader investigative and prosecutorial process. Finally, in practice all detainees were regarded as guilty until proven innocent.

The criminal justice system allowed the ruling class to prey with impunity – corruption and rent-seeking was rampant, the state coffers were systematically abused, and numerous crimes were committed – and politicians would never be punished because the regime used its monopoly over the investigatory and prosecutorial apparatus to protect members of the ruling class. The enormous legal discretion promoted state arbitrariness in the application of the laws *even in cases that had no political significance*. Torture was frequent and systematic. Methods included beatings, electric shocks, simulated executions, suffocation with plastic bags, and deprivation of food and water. Torture was used (and continues to be used) as an investigative tool for obtaining information or confessions. Coerced confessions were used as evidence – often the main evidence against the accused. Members of the police and military who committed torture were generally not punished. Despite the fact that detainees had to be judged by a tribunal, criminal cases were decided on the basis of what transpired *before* the suspect was brought to a judge (Magaloni and Zepeda 2004).

Given formal restrictions on the *amparo* trial and the Supreme Court’s own jurisprudence, these human rights abuses could not be sanctioned and controlled through the judiciary. For example, acts of state brutality could not be redressed through the *amparo* trial because the Court regarded those acts as “consumed acts not subject of appeal.” Despite evidence that the police systematically employed torture and illegal detention to obtain confessions, the Supreme Court’s jurisprudence established that confession should be regarded as the “queen of a trial’s evidence.” These permissive laws and legal precedent allowed judges to condemn victims on the basis of these confessions while ignoring abuses. The autocratic regime was pressed by the international community and civic society organizations to put in place human rights commissions in the 1990s. However, the autocracy purposely designed powerless institutions, whose recommendations were “nonbinding” and of a non-compulsory nature for the authorities to which they are addressed. Furthermore, human rights commissions possessed no legal authority to institute

⁴ In 1995 President Zedillo introduced a reform that allows citizens to seek a court injunction against the MP’s decision not to prosecute (*ejercer la acción penal*).

legal proceedings to conduct criminal investigations, severely limiting their ability to protect human rights.

Second, Mexican courts were also prohibited from enforcing political rights – the right to vote, the right to form political parties, the right to free speech, etc. In 1946 the PRI modified the constitution to centralize the organization, monitoring, and adjudication of elections in the hands of the federal government and the PRI's central bureaucracies (Molinar 1991). Through this constitutional reform, the PRI acquired impressive institutional power over the whole electoral process, including voter registration, monitoring of the ballots, and the so-called self-certification of the elections. Opposition political parties could not resort to the courts to contest electoral fraud and other electoral misdeeds, including the manipulation of voter registration, the government's refusal to grant legal registry to its candidates, the partisan abuse of state finance, and the exclusion of opposition candidates from the mass media, among many others. Furthermore, the "self-certification of the electoral process" implied that the majority of the incoming elected congressional politicians from the PRI were in charge of officially sanctioning the elections. The *amparo* trial was not permitted to contest electoral laws, which meant that these were not subject to judicial review. All of these implied an absolute absence of political rights.

These electoral institutions began to change in the 1990s, when Electoral Courts were first established (Eisenstadt 2004). The most fundamental institutional reform, however, was the granting of true independence to the Federal Electoral Institute (IFE), the body charged with organizing the elections, with the 1994 electoral reform (Magaloni 1996). As I discuss later, the Supreme Court was given jurisdiction over electoral matters in 1996, when the Electoral Courts were brought into the judiciary and judicial review over electoral laws was finally permitted (Magaloni 2003).

Third, property rights were also subject to state arbitrariness. The autocracy flourished under a system of mixed property rights in which a private economy coexisted with a highly activist state. The Mexican Constitution gave incredible economic powers to the state. Article 27 established that all land and natural resources originally belonged to the state, which could expropriate private property if it could be justified in light of the "common good." The article also established that the state would be in charge of redistributing land and defining the property right structure of the countryside, where strict limits to the size of property were established. Articles 25 and 28 of the constitution also gave the state ample leeway to regulate the economy, intervene in key sectors, direct industrialization, and restrict commerce and international trade.

Expropriations were fairly common during the 1930s and 1940s, when land reform began to be implemented on a massive scale, and when many important industries, including oil, were nationalized. Many of these conflicts ended in the Supreme Court, as discussed above, triggering Lazaro Cardenas' (1934–1940) decision to crack down on the liberal Court and to appoint a new, enlarged body of more amicable justices. After numerous conflicts that entailed the government's refusal to adequately compensate property owners whose lands were expropriated, the Court established the criterion that it was legal to expropriate with a mere promise to compensate, leaving citizens at the mercy of government abuse. The original wording of article 27 was that expropriation should be carried out *previa indemnizacion* (through compensation that should be given prior to the expropriation). The Court established, however, that expropriations could be carried out *mediante indemnizacion* (through compensation). The constitutional article was later changed to adjust this subtle wording difference, which would allow ample leeway to expropriate by promising a noncredible and unenforceable future compensation. The numerous land expropriations carried out during the autocratic era left property owners with no effective legal recourse against the regime. The tremendously insecure property rights in the countryside destroyed incentives to invest and to a large extent are responsible for the tremendous decline in agricultural productivity that made Mexico a net importer of foodstuff by the late 1960s.

The insecurity of property permeated beyond the countryside, to the banking and industrial sectors as well. The methods employed to prey on citizens varied, however. For example, when President Lopez Portillo (1976–1982) nationalized the banking system and expropriated savings through the infamous Mexdollar fraud where dollar-denominated bank deposits were returned at their pre-devaluation rate, numerous individuals resorted to the Supreme Court to challenge the president. This time the administration responded by changing the constitution to legalize the nationalization of the banks. In the autocratic regime, the president was the ultimate authority and his powers were not limited by the courts in any fundamental way.

ENFORCING POLITICAL ORDER

During the era of PRI hegemony, the constitution did not constrain power holders, because the ruling party could easily reverse any rule, including constitutional ones. The Supreme Court did not possess jurisdiction to adjudicate political conflicts arising among different levels and branches of government

and among politicians competing for political office in elections. The president, as chief executive and leader of the autocratic ruling party, was the ultimate arbiter. This section shows the how the system generated incentives for politicians to obey the president's decisions, rather than turning to violence to settle their disputes.

After the Mexican revolution ended, power was extremely fractionalized among warlords, and conflicts were often settled through violence. The consolidation of the PRI as a hegemonic party took place during the 1930s and early 1940s (Garrido 1982). The federal government had first to disarm the warlords, consolidate military power in the center, and put the army under civilian control (Camp 1992). The revolution was fought under the banners "sufragio efectivo, no reelección"⁵ and "la tierra es de quien la trabaja"⁶ against the dictator, Porfirio Díaz, who had ruled Mexico for more than thirty years. The political pact that symbolized the end of the revolution – the 1917 Constitution – forbade presidential reelection and reestablished multiparty elections. After having modified the constitution to allow for his reelection, President Alvaro Obregón was murdered in 1928. After the assassination of Obregón, politicians created the predecessor of the PRI with the explicit intent to make the transition from a system of "caudillos" to one of "institutions." The goal of the PRI was to prevent personal dictatorship – any individual from grabbing all the pie for himself – while allowing members of the "revolutionary family" to share the spoils of office among themselves (Magaloni 2006).

The system granted immense powers to the president during his six-year term. The balance of power between the president and the numerous states' warlords shifted in favor of the former with the 1933 constitutional reform, which established the rule of nonconsecutive reelection for all elective offices – governors, local and federal legislators, and municipal presidents. After this reform, local bosses could no longer count on enduring power and had to channel their ambition in search of attractive positions in the federal government. The president, as leader of the official party, thus became an extremely powerful political player, because he was in charge of distributing offices among the ruling elite.

A simple game-theoretic framework reveals the factors that allowed the president to enforce political order. There are three political players, the president, P, and two other elected political actors, G and L (e.g., a governor and a local legislative assembly or two politicians competing for nomination). The president must decide how to adjudicate a conflict between the two political

⁵ The English translation is "No reelection and the right to have votes effectively counted."

⁶ The English translation is "land for the tiller."

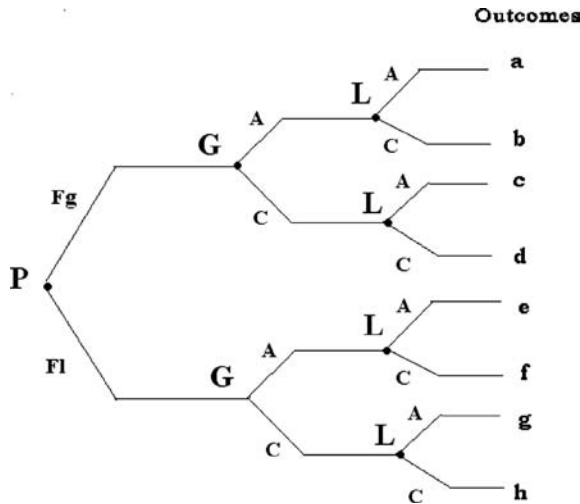


FIGURE 7.1. Game of presidential arbitration of authoritarian political order.

actors; for example, whether a governor can dissolve the local assembly or the local assembly can impeach the governor. The president has two available strategies: decide in favor of G (Fg) or decide in favor of L (Fl). These two actors, in turn, have two available strategies: abide by the president's decision (A) or contest it (C) by openly disobeying and resorting to violence. The game is depicted in its extensive form in Figure 7.1.

Each actor's preferences are derived from the following assumptions. The president prefers to "get his way," deciding in favor of whichever actor he sincerely prefers. I assume that he prefers to decide in favor of G. However, the president also seeks to protect the existing political order so he would rather have both actors not challenge his decision than decide in favor of his preferred actor. Thus, the president's most preferred alternative is *a*, to get his way: decide in favor of G, his preferred player, and have both actors comply. His second most preferred outcome is *e*: decide in favor of L and have both actors comply. The third most preferred alternative is to decide in favor of G and that only one actor, L, contests. He then prefers to decide in favor of L and that only one actor, G, contests. Obviously, the worst possible outcome, *h*, is to decide against his most preferred player, G, and that both actors contest.

The payoffs of the game for players G and L depend on the prevailing "state of the world" of partisan politics, which is derived from three sets of issues: the distribution of military power among the players, the probability that both actors belong to the same party or a different one, and the degree of party discipline within the PRI. For the sake of simplicity, I assume that the PRI

has already consolidated military power in the center, local bosses have been disarmed and no single local political actor can mount a successful violent insurrection to unseat the president.

To solve the game, I distinguish three eras of partisan politics during this period. The first is the hegemonic era of the PRI, when this party has the monopoly of office. In this era, players G and L belong to the same party, and the PRI strongly sanctions lack of discipline with expulsion from the party. The sub-game perfect equilibrium in the game of presidential arbitration of authoritarian political order is outcome a , the president gets his way, deciding in favor of the actor he prefers, and both actors comply with the decision.

To see why both actors comply, suppose that the president solves a conflict between G and L by asking the governor to resign. The payoff for the governor of this sanction is o . Why would a PRI politician choose to give up his post instead of rebelling? The answer to this question lies in the continuation value (the payoff from the next period forward) and the costs of disobeying. If the politician obeys the president, he gets o in this period but he has a probability, p , that he will be rewarded by the party with office in the future, O_t . Assume that the party guarantees some form of progressive ambition so that the next office is more valuable than the previous ones according to a constant parameter π such that $O_{t+1} = O_t(1 + \pi)$. This means that the politician who obeys the president gets $\frac{\delta}{1-\delta}dO(\frac{1+\pi}{\pi})$ which is the expected value of getting o in this period and getting a career in office with probability d (for the practice called *dedazo* or finger pointing) after that. The payoffs are discounted at a rate $\delta \in (0, 1)$.

The politician who chooses to rebel knows that he will be expelled from the party. He has a probability f of keeping control of office after fighting for it. Fighting imposes a cost of c . However, once expelled from the party, the politician would need to challenge it through elections to attain office in the next period. The probability of winning the elections is e . Thus, the politician who disobeys the president gets $O_f - c + \frac{\delta}{1-\delta}Oe$. The politician will not rebel against the president as long as

$$\frac{\delta}{1-\delta}dO\left(\frac{1+\pi}{\pi}\right) > O_f - c + \frac{\delta}{1-\delta}Oe \quad (7.1)$$

This says that the politician will abide by the autocratic political order as long as the continuation value of remaining loyal to the ruling party is larger than what the politician would obtain by fighting to retain his current post and the expected value of contesting for office outside the party through elections in the next period. This condition is likely to be true as long as

(1) the expected value of being rewarded with office and spoils in the future is large, (2) the expected chance of winning an election *against* the PRI is low, (3) the costs of fighting are large, and (4) the politician does not discount the future too heavily. Note that the value of fighting for office is relatively low during the era of hegemony because, given the rule of nonconsecutive reelection, the politician unavoidably needs to step down from office at time $t + 1$. If reelection were possible, the incentives to grab power by force increase because, after a successful rebellion, the politician could presumably impose a “local dictatorship” and hold on to office thereafter.

Thus, in this account the rule of nonconsecutive reelection not only makes politicians dependent upon the party’s nomination for access to political office but also lessens the desire to employ violence by reducing the value of office. This form of political order is autocratic in the sense that the president “gets his way” and political conflicts are not decided according to the constitution.⁷ Federalism exists only in the constitution, and power in practice is extremely centralized.

The Crumbling of the Autocratic Political Order

The game of presidential arbitration of authoritarian political order unravels when the PRI loses its monopoly of office and it unravels for two reasons. First, once multiparty politics emerges, the president must adjudicate conflicts among politicians belonging to different parties, and the opposition possesses no incentives to abide by what the president decides unless the decision favors it. Second, once multiparty politics emerges, disgruntled PRI politicians possess more incentives to rebel against the president because the difference between d and e in equation 1 decreases. Now the expected chance of attaining office by challenging the PRI electorally increases.

The game with multiple parties has two possible equilibria depending on the extent to which the players can credibly threaten to rebel – I assume that G belongs to the PRI and L to the opposition. Consider the following possibility: the opposition politician threatens that if the president does not decide in his favor, he will paralyze the state, call for a boycott of commercial activity, and mobilize the population to engage in civil resistance. Assuming that the president refuses to employ brute force to repress the opposition, he will side with L if he anticipates that the PRI politician will abide by his decision. Thus,

⁷ I assume that politicians within the PRI will not coordinate their actions to overthrow the president – in this game there are no incentives to coordinate because at least one of the players obtains a reward from compliance.

a sub-game perfect equilibrium of the game in the era of multipartyism and high discipline within the PRI is e : the president decides in favor of L and both actors comply. This derives from three assumptions: first, the president seeks to maintain political order and refuses to brutally repress the opposition; second, an opposition politician can respond with a costly civil mobilization to an adverse decision by the president; and third, the PRI politician abides by the president's decision because he fears the future costs of expulsion from the party.

During the Salinas presidency (1988–1994), these forms of bargains appear to have been fairly common. The *concertaciones* were postelectoral bargains through which the president transferred elective office from the PRI to the opposition after the latter protested the official results through postelectoral mobilization. The most infamous *concertación* took place in the 1991 gubernatorial elections of Guanajuato, where the postelectoral bargain transferred the gubernatorial seat to Carlos Medina Placencia, of the PAN. Salinas also asked the PRI governor-elect of the 1991 elections in San Luis Potosí and the governor-elect of the 1992 elections in Michoacán to resign for similar causes. In these cases, however, interim PRI governors more agreeable to the opposition were appointed as substitutes.

However, outcome e is not sustainable as an equilibrium over the medium run because the president can't abuse the leadership conferred by the PRI without facing consequences. The third era I distinguish is that of competitive multiparty politics with lack of discipline within the PRI. The sub-game perfect equilibrium here is b , which entails that the president decides in favor of G and L responds by challenging the president's decision. In this third game, the president's leadership over the party is implicitly challenged by his own co-partisans, because outcome b derives from the fact that off the equilibrium path, the PRI (G) credibly threatens to contest a decision by the president that favors the opposition. Note that for this threat to be credible, PRI politicians must be ready to employ violence.

The Madrazo rebellion against President Ernesto Zedillo illustrates this argument. President Zedillo attempted to solve an electoral conflict in the 1994 elections of the state of Tabasco between the PRD (Party of the Democratic Revolution) and the PRI through a *concertación*. The PRI was no longer willing to swallow these bitter deals. The candidate of the PRI, Roberto Madrazo, threatened to use all the power at his disposal, including asking for support from other governors in the Southern states of Mexico, to defend his victory in the gubernatorial elections of Tabasco (Eisenstadt 2004). The official results of the election gave him 56 percent of the vote against 37 percent to Andrés Manuel López Obrador, of the PRD. The PRD protested

Madrazo's victory by blocking the oil refineries of the state and taking the *Plaza de Armas* by force, which impeded Madrazo to take control of the Gubernatorial Palace. After rumors began to spread that the president would ask Madrazo for his resignation, PRI politicians in the state blocked several roads, and the state's private sector, which was supporting Madrazo, responded with a boycott. Ernesto Zedillo ended up having to swallow Madrazo's refusal to step down from office. In an attempt to appease PRI politicians, Zedillo promised Madrazo that they would "govern together until 2000." Instead of hurting Madrazo, the rebellion ended up boosting his prominence within the PRI.

The Madrazo rebellion against the president marks a turning point in Mexican politics. It signals that something major in the system had changed such that the president could no longer serve as the central arbiter of the autocratic political order. To settle their disputes without resorting to violence, politicians needed to turn elsewhere and they turned to the Supreme Court.

EMPOWERING THE SUPREME COURT AND THE 1994 CONSTITUTIONAL REFORM

The 1994 constitutional reform transformed the Supreme Court into a true constitutional tribunal (see also Cossío 2000, 2001 and González Compeán and Bauer 2002). The reform reduced the number of justices from twenty-five to eleven. Life appointments were changed to fifteen-year appointments. By establishing the "constitutional controversies" and the "constitutional actions," the reform significantly expanded the power of the Supreme Court, which could now adjudicate on all sorts of issues that the president had previously arbitrated. The Court could now hear conflicts among the executive and the legislative branches; the federal government and the states; and the municipalities and the governors.

The constitutional actions are a form of judicial review. Constitutional actions against federal laws or international treaties can be filed by any group of 33 percent of the members of the Chamber of Deputies or the Senate, and against state laws by 33 percent of the members of the local assemblies. The Solicitor General (*Procurador General*) can promote constitutional actions against federal and state laws or international treaties, and the leadership of any political party registered before the Federal Electoral Institute can challenge federal electoral laws. Local parties can also file an action of unconstitutionality against local electoral laws.

To support the constitutional reform, the PRI imposed several limitations to the power of the Supreme Court so as to protect itself. First, the PRI originally

refused to delegate jurisdiction to the Court on electoral issues. The Court did not acquire the right to review the decisions of the Federal Electoral Tribunal and to rule on the constitutionality of electoral laws until 1996.

The second way in which the PRI attempted to limit the power of the Court was to make it harder to undo legislation previously approved by this party. The reform established that the Court's decisions would not have the effect of annulling legislation unless eight of the eleven justices ruled that a law was unconstitutional. The reform also established that the constitutionality of laws must be appealed within thirty days of enactment of the law or the first act of application. In practice, the rule of thirty days significantly reduced the opportunity to challenge many laws.

Third, the reform also reduced the stakes of constitutional controversies by establishing that the decisions of the Supreme Court on constitutional controversies would only have effects *inter partes* (suspending the action only among the parties) when a lower level of government acted as plaintiff against a higher level; for example, when a municipality challenged a state or the federation, a state challenged the federation, in controversies between two states, and in controversies between two municipalities from different states.

The PRI and the president attempted to legitimize the new Supreme Court by giving the opposition a chance to influence its composition. When the constitutional reform was approved, Zedillo was in a position to choose all the Court's justices, because the PRI controlled the two-thirds super-majority in the Senate necessary to ratify nominations single-handedly. However, Zedillo opted to negotiate the nomination of the new justices with the opposition. The PRD and the PT (Labor Party) explicitly denied their support to the constitutional reform and refused to participate in the negotiations for the nomination of the justices. The PAN, however, chose to participate in the process.

My approach underscores that President Zedillo's reform of the Supreme Court responded primarily to the need to enforce political order among the politicians. Political order began to unravel with the emergence of multiparty politics. There are 31 states in Mexico plus the Federal District and more than 2,400 municipalities. By 1994, the PAN controlled the governorships of Baja California, Guanajuato, and Chihuahua, and it also controlled numerous municipalities, including some of the most important cities in the country. The opposition's victories at the local level significantly accelerated after the 1994 peso crisis, just when the Supreme Court reform was enacted. The opposition won fourteen gubernatorial races between 1994 and 2000, and non-PRI municipalities increased from 12 percent in 1994 to 33 percent in 2000, representing close to 45 percent of the population. The Supreme Court

became the new arbiter of political conflicts once the president could no longer serve this role.

THE DEMOCRATIC COURT

A clear implication of the reform is that the Supreme Court became the new arbiter of federalism, a task that the president used to perform in the era of party hegemony. Table 7.4 presents the constitutional controversies brought to the Supreme Court from its creation until 2005. The overwhelming majority are between the municipalities and the federal government, and between the municipalities and the states' assemblies and the governors. The vast majority of these controversies involve institutions controlled by different political parties. In Magaloni and Sanchez (2006), we code each case by the partisan identity of the public office involved in the dispute. Without considering the 329 controversies over indigenous rights, the defendant was a public organization controlled by the PRI in 72 percent of the constitutional controversies, the PAN in 16 percent, and the PRD in percent. A public organization controlled by the PAN was the plaintiff in 42 percent of the cases, by the PRD in 23 percent, and by the PRI in 17 percent. Hence, constitutional controversies have become the most important vehicle through which the lower levels of government controlled by the PAN and the PRD could fight against the higher levels of government, mainly the states, controlled by the PRI.

We also coded the partisan identity of the parties to the constitutional actions. The PRI was the defendant in 68 percent of the cases, the PAN in 23 percent, and the PRD in 3 percent. One of the smaller opposition parties (e.g., the Mexican Green Party, Social Alliance, or Convergence for Democracy) was the plaintiff in 37 percent of these cases, the PAN in 22 percent, the PRD in 12 percent, and the PRI in 7 percent. Thus, constitutional actions are the most common vehicle of access to the Supreme Court by the smallest parties.

In Magaloni and Sanchez (2006) we explore whether the Court rules disproportionately in favor of the former ruling party. Our results reveal a strong partisan bias in the Court's decisions, in which it disproportionately ruled to strike down legislation or challenge state acts by "opposition-affiliated" institutions and to uphold laws or acts by the former ruling party. Our results also reveal that the Court tended to rule more often in favor of the former ruling party in "important cases." The Court favored the opposition over the former ruling party predominantly in lower salience local-level conflicts.

Our results also indicate that the Court responded strategically to the PRI's lost of power. When the PRI lost the majority of seats in the Lower Chamber

TABLE 7.4. *Constitutional controversies by institution in conflict, 1994–2004* (% in parentheses)*

Plaintiff	Defendant								Total
	Municipality	Local Assembly	Governor	State S. Court	President	Federal Congress			
Municipality	1 (0.14)	155 (22.21)	67 (9.6)	5 (0.72)	16 (2.29)	368 (52.72)	612 (87.68)		
Local Assembly	1 (0.14)	0 (0)	7 (1)	1 (0.14)	0 (0)	2 (0.29)	11 (1.58)		
Governor	7 (1)	18 (2.58)	0 (0)	0 (0)	11 (1.58)	9 (1.29)	45 (6.45)		
State S. Court	0 (0)	16 (2.29)	2 (0.29)	0 (0)	1 (0.14)	0 (0)	19 (2.72)		
President	1 (0.14)	2 (0.29)	2 (0.29)	0 (0)	0 (0)	3 (0.43)	8 (1.15)		
Federal Congress	0 (0)	0 (0)	0 (0)	0 (0)	3 (0.43)	0 (0)	3 (0.43)		
TOTAL	10 (1.43)	191 (27.36)	78 (11.17)	6 (0.86)	31 (4.44)	382 (54.73)	698 (100)		

Source: Magaloni and Sanchez 2006.

of Deputies in 1997, the Court began to rule in favor of the opposition more often so as to build up credibility. As the Court became more credible and its legitimacy increased, however, the propensity to rule in favor of the PRI began to increase again. Most cases have been decided overwhelmingly in favor of the former ruling party even after it lost power in 2000. Our results do not necessarily imply, however, that the Supreme Court decided cases based solely on the partisan affiliation of the parties to a dispute. There are many cases in which ideology clearly matched with party affiliation.

The famous electricity decision illustrates this point. As we discuss in Magaloni and Sanchez (2006), the Mexican Constitution places the electricity sector in the exclusive domain of the state. However, the Electricity Law allows the Federal Electoral Commission (CFE) to buy electricity from private generators. President Vicente Fox from the PAN, in power since 2000, reformed the regulatory framework of the sector to permit a higher percentage of privately generated electricity to be sold to the CFE. The reform did not establish any limits on the amounts of excess energy that private investors could sell to the CFE. Rather, it provided that the executive, through regulations, would set such limits. The PRI and PRD factions in both chambers of Congress brought a constitutional controversy against Fox's electricity reform. For the first time, the Supreme Court had to judge on a dispute between the executive and both chambers of Congress.

Congress claimed that Fox's plan to increase the limits of existing regulation on buying excess power from private generators was an encroachment of its legislative power. The Court sided with the congressional factions, arguing that Fox's reform was "a genuine falsification of the law." The majority opinion was divided into two groups. The first considered that the reform contradicted the Electricity Law because its legislative intent had not been to authorize the indirect privatization of the electricity sector. The second group declared that the reform violated article 27 of the constitution, which places the sector exclusively in the hands of the state. The Court's decision resulted in the defeat of President Fox's attempt to promote private investment in the electricity sector and revived the economic nationalism embedded in the constitution that was drafted during the autocratic era of the PRI.

ALTERNATIVE THEORIES OF JUDICIAL EMPOWERMENT

One alternative theory accounting for the creation of powerful courts stresses the need of the autocratic regime to create a credible commitment to property rights to increase investment (Moustafa 2007). The argument would be that President Zedillo wanted to signal to the international financial community

his commitment to the market-oriented reforms, the rule of law, and private property. Judicial review was necessary, according to this account, to credibly limit government predation and the risks of expropriation.

The problem with this approach is that foreign and national investors had more to fear from a powerful court than from the executive's discretion. As the electricity case cited above suggests, the creation of a powerful court entailed serious risks to investors because it made the constitution binding. The Mexican constitution is an extremely obsolete document, combining strong nationalism and statism with a few liberal principles. When the existing constitutional framework is not liberal, judicial review does not provide stronger limits on government predation. Furthermore, the Mexican case also suggests that investors have more to fear from justices whose legal ideologies are nationalistic and old-fashioned than from the uncertainty stemming from a democratically elected government.

Another view stresses Ernesto Zedillo's personality and his desire to bring democracy and the rule of law to Mexico. My approach sees Zedillo as the key proponent of the constitutional reform but emphasizes his desire to solve the critical dilemma of enforcing political order among the politicians rather than his desire to bring about the rule of law for Mexican citizens. The 1994 constitutional reform was fundamentally designed for the politicians, not for the citizens. Emphasis was placed, above all, in establishing a procedure to resolve conflicts among different levels of government because in the new era of multipartyism, these conflicts could only be solved through costly political bargaining and often violence. The new procedures established by the reform (the constitutional actions and the constitutional controversies) can be utilized) exclusively by the politicians, not the citizens. Furthermore, the constitutional reform did nothing to improve the *amparo* trial, which remains one of the key impediments for limiting governmental abuse, suggesting that Zedillo's motivation for carrying out the constitutional reform lay elsewhere.

An alternative account to the empowerment of constitutional courts is provided by Ginsburg (2003). He argues that autocrats will create powerful judicial review institutions as a form of "political insurance" when they calculate that they might lose power in the future. "A constitutional design allowing unlimited flexibility for electoral winners, as in the model of parliamentary sovereignty, is much less attractive in a politically diffused setting than in a setting wherein a single party holds sway. While prospective governing parties would like flexibility, prospective opposition parties value limited government" (25). By contrast, "self-interested politicians will not set up an arbiter to solve disputes about constitutional meaning when they believe they are likely to hold on to political power" (24). This theory is related to various works on

judicial independence, including Ramseyer (1994) and Landes and Posner (1975), as well as works on bureaucratic insulation (McCubbins, Noll, and Weingast 1987 and 1989; Moe 1990) and civil service reform (Geddes 1994).

My account is consistent with these works in stressing that a powerful Supreme Court in Mexico could only come about when power became diffused and the ruling party could no longer anticipate with certainty that it would hold on to power in the future. However, my account stresses that the empowerment of the Supreme Court resulted more from the president's need to find alternative ways to enforce political order among subnational politicians than from his anticipation that the ruling party might lose office. Ernesto Zedillo proposed to Congress the constitutional reform in December of 1994, just one month after assuming office and much before it was clear that the PRI might lose the coming presidential elections of 2000. It is true that the constitutional reform was negotiated during the following months, once the peso crisis had exploded and the PRI began to lose more and more local elections (Magaloni 2006).

Thus, consistent with Ginsburg's (2003) account, the PRI might have reasoned that it was in its interest to support Zedillo's proposal to reform the Court as a form of insurance in the event the party were to lose power. However, it appears that Zedillo's motivation to propose the reform was to solve a more urgent problem, that of enforcing political order among lower level politicians. In the end, the constitutional reform that empowered the Supreme Court resulted from a combination of these two factors – a president interested in finding mechanisms to enforce political order, and a ruling party interested in establishing an institutional insurance in the event it lost power.

CONCLUSION

This chapter explored the strategies the Mexican autocracy employed to enforce political order. The autocracy employed courts to monitor low-level government officials by granting citizens the right to challenge them through the *amparo* trial. The procedure, however, had very limited effectiveness in restraining state abuse. Courts were purposely designed to be weak and subservient. In establishing this “fire-alarm” monitoring device, the Mexican autocracy carefully designed the judicial apparatus to prevent citizens from challenging the regime through these courts.

This chapter distinguished three areas in which citizens were left at the mercy of state abuse. First, the regime gave itself a monopoly over the investigatory and prosecutorial criminal apparatus, which was used to guarantee the impunity of the ruling class. The *amparo* trial could not be used to challenge

state brutality, or to challenge the state's decision *not to prosecute a crime* when powerful political players were involved. By contrast, the system was merciless against the enemy, with suspects being guilty until proven innocent. Second, political rights only existed in the constitution because the PRI's electoral monopoly and its numerous electoral malpractices could not be challenged before the courts, nor could electoral laws be questioned through the *amparo* trial. Third, a private economy coexisted in the shadow of an overpowering state, and property rights were extremely insecure.

Furthermore, courts were not given jurisdiction to solve critical political conflicts among members of the ruling elite. Instead, the autocratic political order was arbitrated by the president, whose power was respected because (1) he was the leader of the official party, (2) the party sanctioned non-compliance with expulsion, and (3) the party possessed the monopoly of political office.

When the PRI lost its monopoly of office and politicians could aspire to office by joining other political parties, this institutional equilibrium began to fall apart. After a significant number of opposition politicians acceded to office at the subnational level, political conflicts needed to be resolved through costly political bargaining or violence. The chapter stresses that the need to create a new arbiter to enforce political order played a prominent role in the 1994 constitutional reform, through which the Supreme Court was empowered to solve "constitutional controversies" among different levels and branches of government and to undertake "constitutional actions," a form of judicial review. After this reform, the Mexican Court gained new prominence in the political system.

8

The Institutional Diffusion of Courts in China: Evidence from Survey Data

Pierre Landry

It should not be surprising that authoritarian regimes seek to establish courts. The victims of the Moscow trials of the 1930s; political opponents in fascist Italy, Argentina, and Brazil in the 1970s, and in China the famous “gang of four” were all tried in formal courts, with the explicit support of their respective regimes. Authoritarian systems rely on courts because formal legal institutions are expected to bring legitimacy to decisions that may not be fair or equitable. These courts’ jurisdiction is not limited to criminal or political cases. Courts handling civil, economic, and administrative cases exist in many authoritarian regimes as well.

What is surprising is the development of genuinely active and popular courts within an otherwise authoritarian system. Tate and Haynie (1993) are rather pessimistic about courts in authoritarian regimes, but others show that view is not always warranted. Argentinean judges tended to sympathize with the dictatorship, but their Brazilian counterparts did not, and used their position to undermine military rule (Osiel 1995). Spanish courts played an active role in the transformation of Francoist dictatorship and the eventual democratization of the regime (Giles and Lancaster 1989; Pinkele 1992; Toharia 1975). Without claiming that an authoritarian regime can establish a genuine “rule of law” as the term is widely understood in democratic societies, legal scholars and social scientists are compelled by the diffusion of formal legal institutions within authoritarian regimes to explain how (and preferably why) these courts do – in some instances – develop into credible institutions.¹

Few cross-national studies on the impact of legal innovations in authoritarian regimes exist, but it appears that the degree to which such courts approach

¹ For a detailed discussion of the underlying theories of institutional diffusion and its application to China, see Tang and Holzner (2006).

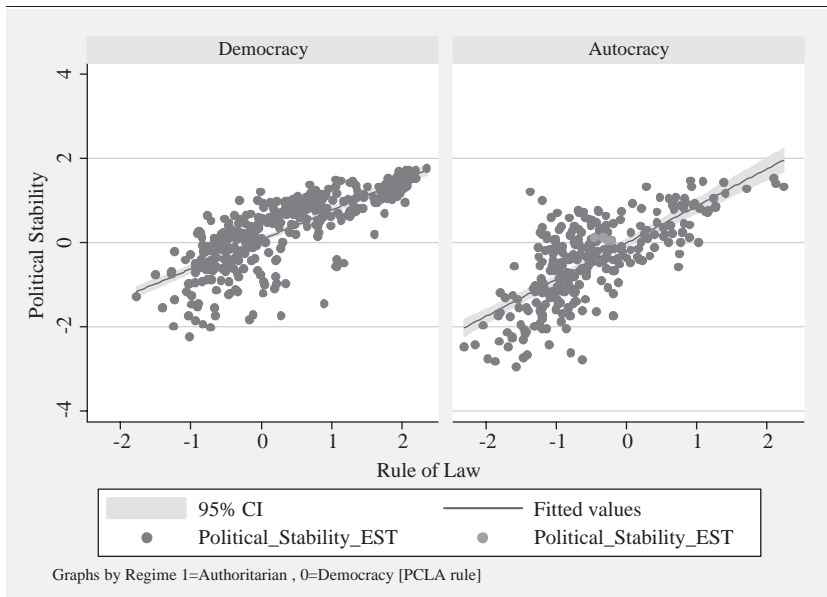


FIGURE 8.1. Rule of law vs. political stability indicators among democracies and autocracies (1994–2002). *Sources:* Global Governance Indicators (2005) and Cheibub and Gandhi (2005). Due to data constraints on regimes, these plots show the results from 1994 to 2002, in two-year increments. The lighter dots represent China.

a meaningful rule of law affects their prospect for survival. Using the global governance indicators (GGI) compiled by Kaufmann, Kraa, and Mastruzzi (2005) and the updated data set on regimes by Cheibub (2004), we find that autocracies that rate highly on the rule-of-law dimension also appear more stable politically (Figure 8.1). It is less clear *how* autocracies successfully introduce reforms that strengthen the rule of law.

The case of the People’s Republic of China since 1978 presents us with a remarkable case in which to unpack the process by which legal innovations are diffused in an authoritarian regime. It is a truism among comparativists that China has never been a democracy, regardless of the specific coding rules that are used to categorize regimes in political science. Therefore, the persistence of authoritarianism in China allows us to rule out any possibility of institutional contamination as occurs when new authoritarian regimes “inherit” legal institutions from the democracy that they overthrow. Historical Chinese regimes may have developed distinctive legal systems (Bernhardt, Huang, and Mark 1994; Huang 2001), but one cannot reasonably claim that Qing, Republican