RULE BY LAW

The Politics of Courts in Authoritarian Regimes

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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.

the executive, the regular judiciary, or the armed forces and its branches. Since authoritarian regimes are likely to combine various modalities of political control, rather than identify a single repressive legal strategy for each case as Pereira does (2005; see also Chapter 1), I think that research should try to identify and reconstruct punitive spaces and networks, as well as trace stages in their evolution, notwithstanding the informational problems that hamper empirical research on authoritarian repression.[20]

To fully comprehend the political-institutional context in which courts operate, we need to be able to make sense of these authoritarian punitive spaces in their institutional and practical complexity, as this varied field shapes the pressures facing courts, something that this chapter only sketches. In this regard, it is important to note not only that multiple competing organizations may be engaged simultaneously in repressive activities but also that different components of a single institution may engage in multiple modes of repression; for example, simultaneous army engagement in clandestine repression and military justice. Similarly, the distinction between summary judicial repression and legal repression does not have to imply a set division between special and regular courts. Special courts may apply regular legal procedures or far less stringent standards depending on states of events anticipated by law and so successively organize legal or summary repression. This pattern was characteristic of military justice systems in both countries, as procedures and burdens of proof varied enormously depending on whether courts were operating under juridical time of war or peace.[21] In a similar fashion, a regime can define trial procedures for specific categories of crimes and through such legislation compel regular courts to use summary procedures and thereby implicate them in a regime's quasi-judicial shams. The same effect can also be achieved when the administrators of justice disregard standing rules and convert in practice what might formally have been a legal trial form into a mechanism for

[20] Brysk (1994b) discusses the obstacles faced by any assessment of the full extent of extrajudicial repression. It should additionally be noted that our images of patterns of repression in different cases have been greatly influenced by the work of national truth commissions, which have produced necessarily partial accounts given that their mandates are usually delimited to specific types of rights violations. Another complication is the limited availability of documentation of military justice systems in most cases. In Latin America, the slimmest public documentary record probably concerns administrative forms of repression.

[21] In time of peace, military justice provided considerable guarantees to defendants. The Chilean code, for example, assimilated ordinary judicial rules and procedures from the organic code regulating the civilian courts. Military justice in time of war, on the other hand, was summary and afforded defendants few guarantees. This was also the case in Argentina. The Argentine procedures in force during the 1970s, for example, allowed a defendant facing a *Consejo de Guerra* only three hours to prepare his defense and only one hour to appeal a conviction. See arts. 497 and 501, respectively (Igounet h. and Igounet 1985: 149, 150).

summary punishment or exacerbate the arbitrary character of an already summary procedure.

This array of possible modes of punitive action and the multiplicity of potential enforcers suggest that types of regimes, subtypes, and specific cases are likely to differ in their matrices of political control. Clearly, competitive democratic regimes are subject to greater legal, political, and ideological constraints on the modalities of repression that can be publically employed because under normal political conditions only legal forms of repression are permissible. Different types of nondemocratic regimes, on the other hand, may draw on a broader range of modes and agents of control as a function of the institutional or political basis of their ruling bodies, the format of their internal organization of power, their capacity for institutionalizing their rule by absorbing social demands, and, most centrally, the extent to which ruling elites consider themselves to be threatened and insecure. As I am suggesting here, how a regime carries out political control fundamentally shapes the judiciary's ability to protect rights, particularly those of individuals targeted by state coercive activity.

JUDICIAL FAILURE IN CONTEXT

As already described, the Argentine and Chilean military regimes were dictatorships that emerged as exceptions within liberal-democratic political, constitutional, and ideological frameworks, following severe social, political, and institutional crises that had arisen from processes of intense popular political mobilization and elite counter-reaction. In this broad context, as I have noted, the ruling military juntas sought to procure their supremacy by suppressing perceived threats to state security and restoring order on their terms. The urgency and severity of this situation as experienced by the military led to setting aside ordinary legal constraints, as was evidenced in the swell of repressive force that was unleashed; the modalities of repression ranged over the extralegal, administrative, and quasi-judicial forms just described, with a preponderance, at least during the worst years of repression, of arbitrary state terror, in a context of censorship, restrictions on rights, and a general prohibition upon political party and union activity.

In both Argentina and Chile this turn toward repressive military dictatorship took place against the backdrop of standing judicial systems whose courts were left largely on the margins of this punitive process. However, this dictatorial dejuridicalization of political control, despite the separation and autonomy of political repression from the judiciary, necessarily implicated the courts,

given the expectations that each populace had of the legal and judicial system. Following liberal notions of the separation of powers and constitutionalism in Argentina and Chile the judiciary held exclusive power to try civil and criminal cases, subject to constitutional guarantees designed to protect individual liberty from unlawful restriction, and to review the constitutionality of legislation when questioned in cases before the courts.[22] Thus, although each dictatorship's repressive activities generally bypassed the courts, it was inevitable that individuals and families affected would seek remedy before the courts, since it was the judiciary's task to apply the law and to guarantee freedom from arbitrary abuses of power.

The tragedy, which perhaps was also inevitable, was that the standard writs and remedies available within the legal system, out of context, could at best effect marginal, generally insignificant, correctives, while the court's jurisprudence developed during democratic periods regarding political questions, out of context, only validated the space of dictatorial prerogative. The resulting judicial failures illustrate the structural weaknesses of carryover judiciaries in contexts of dictatorship, particularly in areas concerning individual rights.

From a standpoint of rights, the task before each judiciary was to guarantee that each dictatorship contained its acts of political control within the limits of what I have above called legal repression and, if a less stringent view is allowed, the strict confines of preestablished constitutional emergency powers. In other words, the judiciary ought to have assured that political control proceeded through courts that followed reasonable procedures of justice, under the supervision of the Supreme Court or, if one concedes that exceptional situations may warrant administrative detention, through administrative measures that conformed to law.

In both countries, the reality on the ground far exceeded these limits and, as the CONADEP and the *Comisión Rettig* reports insisted, the judiciary was incapable of checking arbitrary dictatorial repressive force. With intensities and mixes that varied at different conjunctures, in both countries state agents engaged in acts of repression that involved summary military courts, administrative detentions and exile, and absolutely extrajudicial abduction,

[22] The judiciary's exclusive power to exercise judicial functions, as well as express prohibitions on judging by the executive (Argentina) and by both the executive and Congress (Chile), was established in articles 94–95 of the Argentine Constitution and article 80 of the Chilean Constitution. Guarantees conforming to rule-of-law standards for detention and trial were given in articles 18 and 11–20 of the respective constitutions, whereas the constitutional review powers of the respective Supreme Courts were established in article 86 of the Chilean Constitution and in Argentina by the Court's own jurisprudence in 1887.

torture, and execution.[23] Generally, extrajudicial acts of repression were executed in secret, with victims abducted by unidentified teams and sequestered in clandestine detention centers where their fate was decided.[24] Thus, as I have been suggesting, not only did lethal political repression sidestep the courts during the most intense periods of state violence; it also was deliberately shrouded from judicial oversight and further shielded by restrictions on press freedoms that prohibited reporting on political acts of violence (Knudson 1997). These forms of clandestine repression could not be restrained with standard judicial remedies, as these remedies were disabled by each regime's obstinate denial that it was effecting the acts that each was in fact executing in secret.

The principal shortcoming of regular judicial remedies was that they were designed to be effective within a system of rule of law, not an autocracy intent on crushing its political enemies. Out of context, these instruments, especially the writ of habeas corpus, became inane. In both legal systems, habeas corpus or the *recurso de amparo*, as it is called in Chile, was the traditional instrument with which a person who was arbitrarily detained, or a party on his behalf, could file to have a court remedy an unlawful detention. In both Chile and Argentina the writ was absolutely ineffectual before disappearances, as the petition presumes that illegal detentions are unlawful on the margins of an otherwise lawful system of justice, not wholly unlawful, clandestine acts that completely circumvent the legal system.[25] As the Second Chamber of the

[23] The number of deaths resulting from state repression is evaluated in each truth commission's reports and, particularly in Argentina, remains a subject of debate. The CONADEP concluded that 9,000 people were murdered in Argentina, whereas other estimates of the number of disappeared reach 30,000.

A careful comparative analysis of the specific organization of repression within each dictatorship is needed to evaluate how internal tensions may or may not have arisen in each case over the "costs of repression" and led some officers to seek to rein in extrajudicial and quasi-judicial modes of coercion. In both countries, military justice in time of war was closely integrated within the chain of command and applied by ad hoc war councils formed on the order of regional zone and subzone commanders. In broad strokes, after an initial period of open mass repression, extrajudicial repression in Chile was primarily, though not exclusively, centralized within a specialized security apparatus, the DINA, which was subordinate to President Pinochet. In Argentina, on the other hand, special units within the army and the navy operated within each military zone. These military units, which operated covertly, were organized outside of the regular chain of command and operated with considerable autonomy from superior officers.

[24] According to Calveiro (1995: 38–39) in Argentina the stages in the disappearance of an individual – abduction, interrogation, confinement, and execution – were compartmentalized into discrete tasks discharged by different groups of officers and soldiers, which limited knowledge of the overall process even among many of those directly implicated.

[25] This point becomes apparent if one examines the contemporary statutory and constitutional regulation of habeas corpus. Articles 11–16 of the Chilean Constitution and articles 306–17 of the Chilean penal code, as well as articles 617–645 of the Argentine penal code, regulated the

Chilean Supreme Court noted in an April 1978 decision, to put an end to an arbitrary deprivation of freedom, "the precise place where the *amparado* is must be known."[26] In such circumstances, when the whereabouts of a person presumably detained was unknown, the courts had little alternative but to follow the standard procedure of requesting, by official letter, information from the Minister of the Interior, local military authorities, or intelligence agencies as to whether they had in detention the person in question. In these instances, when the official response, whether out of duplicity or ignorance, informed the judge that no registry could be found indicating that the person in question was being held by the executive under state-of-siege authority or under indictment before the military courts, the courts had little further recourse. Neither judiciary possessed its own independent investigative police. Each could investigate allegations of illegal detention only by eliciting the cooperation of executive and military agencies that were either directly associated with clandestine repression, complicit in protecting these perpetrators, or being kept in the dark about these acts by knowing officials.

Given the scope of repression in each country, the repetition of this pattern on thousands of occasions, and the attendant breakdown of *habeas corpus* as an effective remedy placed considerable strain upon the courts. In both cases there is evidence that these situations created tensions between the judiciary and each dictatorship, which indicates that justices were cognizant that the intelligence agencies' refusal to provide accurate information to the courts was impeding the judiciary's ability to defend individual liberty and life. These tensions between the Appellate Court of Santiago and the National Directorate of Intelligence (DINA) in 1975 were particularly deep (Barros 2002: 147–149), whereas in Argentina the stone wall before the Supreme Court during 1978 was so firm that the Court exhorted the military executive to create conditions in which the courts could effect justice in the many cases where parties were seeking the protection of individual liberty in the face of disappearances.[27]

writ in reference to the order of arrest or imprisonment; the legal irregularities that habeas corpus was to correct related to the competence of the authority ordering an arrest, its legal merit, and the adherence to procedural formalities.

[26] "*Hernán Santos Pérez*," May 8, 1978. This decision confirmed an appellate court resolution. The Rettig Commission resolved that Santos Pérez, on leaving his workplace in October 1977, had been abducted by DINA agents and, henceforth, his whereabouts are unknown.

[27] The decision "*Pérez de Smith, Ana María y otros s/pedido*" was handed down on April 18, 1978, and reiterated on virtually identical terms on December 21, 1978 (*Fallos de la Corte Suprema*, vol. 297, p. 338 and vol. 300, p. 1282, respectively). The principal condition that the Court demanded as requisite for the judiciary to effect justice was that the executive be forthcoming with information regarding the whereabouts and situation of the individuals reported as disappeared. The case is discussed in Carrió (1996: 102–105). In Chile the military

As to administrative and quasi-judicial forms of authoritarian political control, the courts in both countries, on the grounds of the separation of powers, largely forsook any judicial oversight of the military executives and the military justice systems. In neither country were courts, particularly the High Courts, willing to challenge the executive's use of state-of-siege powers. Legal challenges to these measures were consistently rejected as being political questions beyond the courts' authority: long-standing jurisprudence in both countries defined state-of-siege powers as exceptional administrative powers whose merit and use were solely the prerogative of the executive authorized to employ them. On this basis, it was held that to review the merit of these acts would be to invade the legitimate domain of executive authority and encroach upon the separation of powers.

Strikingly, these references to the separation of powers ignored the momentous fact that in contexts of dictatorship the executive was no longer exercising exceptional powers that had been conferred by another regular and separate constitutional power (i.e. Congress); this incongruity was rendered innocuous by each court's countenance of the concentration of executive, legislative, and constituent powers in the military. Subject to these limitations, then, courts in Argentina and Chile did on rare occasion accept habeas corpus petitions that challenged the executive's failure to observe the formalities legally prescribed during the use of state-of-siege powers. These, however, were constraints on the margins that had little or no impact upon the overall situation, but that in these rare instances held the executive to the legal bounds of emergency powers.[28] Generally, however, in cases where an administrative detention was officially acknowledged, once the courts received notification that an individual was being held by order of the executive in application of the state of siege, they would reject the appeal for habeas corpus.

The courts took a similar tack in response to complaints filed to challenge the constitutionality of military war councils or to petition the Supreme Court to correct legal errors committed by military courts. Just two months after the coup of September 11, 1973, the Chilean Supreme Court sidestepped this

repeatedly pressured the courts to limit the number of *recursos de amparo* or else to allow them to be processed by the military courts.

[28] In Chile the few rulings that I am aware of that ordered the Minister of the Interior to rectify procedural irregularities concerned the holding of a minor among common criminals – a violation of the constitution's requirement that administrative detainees be held apart from criminals – and a 1978 petition involving prominent members of the Christian Democratic Party who had been transferred to a province other than that indicated on the executive's order. In Argentina the principal case associated with the use of state-of-siege powers was the internationally high-profile case of Jacobo Timerman. Timerman, the publisher of the daily *La Opinión*, was expelled from the country after the Supreme Court ordered his release.

potential confrontation with the military by ruling that military tribunals in time of war fell outside the Supreme Court's constitutional authority to oversee and discipline all courts of justice. The reason, which though controversial may not have been without foundation from a rule-of-law standpoint given the summary character of the war councils, was that military tribunals in time of war were not courts of law but a part of the military command function. This finding was reiterated in a 1976 decision that again declared the Supreme Court's incompetence, explicitly stating, "The military tribunals of time of war configure a hierarchical organization autonomous and independent of all other authority of the ordinary or special jurisdiction, which culminates in the General in Chief to whom is granted the plenitude of this jurisdiction."[29] In effect, the Chilean High Court was disavowing competence to correct the injustices of summary proceedings on the grounds that that they were summary and hence non-judicial![30] When faced with challenges to the constitutionality of military war councils, the Argentine Supreme Court did not elaborate separation of power arguments, but following prior jurisprudence merely asserted that summary military trials of civilians in emergency situations were not incompatible with the constitution's guarantee of a fair trial.[31]

In these three domains of dictatorial punitive activity – extra-juridical repression, administrative repression, and summary quasi-judicial repression – judicial interference with executive measures was avoided by bypassing ordinary courts and trial procedures. Clandestine detention centers, official camps for holding individuals detained under states of siege, and military tribunals were the sites where political control was effected beyond the superintendence

[29] *"Jorge Garrido y otro. Recurso de queja," Rol 10.397*, September 21, 1976.

[30] This reasoning suggests that the Court conceived its superintendency over all tribunals to be internal to courts whose organizations and procedures could be assimilated to minimal standards of the rule of law. This hypothesis also suggests that the Supreme Court justices were implicitly acknowledging that to correct and contain quasi-judicial practices external to the regular court system implied a confrontation with the military regarding the rationality and merit of summary procedures. I suspect that the juridical-ideological worldview of these jurists, as well as strategic considerations, limited contemplation of this alternative.

[31] "Saravogi, Horacio Oscar s/alteración del orden público," November 9, 1978, *Fallos de la Corte Suprema*, vol. 300, p. 1173. Another constitutional issue that generated considerable controversy in Argentina was the regime's repeated suspension of the constitutional "*opción de salida*" whereby individuals subject to administrative arrest during a state of siege could opt to leave the country. The Supreme Court accepted these restrictions on the grounds that the *Actas Institucionales* that suspended the right to option, like the *Estatuto para el Proceso de Reorganización Nacional*, were norms that integrated the constitution as long as the conditions that gave them legitimacy persisted – as long as there was, in the words of the Court, "a real state of necessity that forced the adoption of measures of exception." For the November 1, 1977, ruling, see "Lokman, Jaime," *Fallos de la Corte Suprema*, vol. 299, p. 142.

of the courts. As I have noted, on the grounds that they involved "political questions" or stood outside the regular judicial system, both the Argentine and the Chilean Supreme Courts stood aloof from directly confronting each dictatorship's use of emergency powers and administration of military justice.

While in the three areas of political control just examined the military dictatorships acted without restriction by sidestepping the courts, in both countries the military also subordinated the courts to their purposes by means of their capacity to legislate new law or modify standing provisions. Thus, despite the apparent independence of the judiciary from the ruling military executives, courts were immediately subject to the dictatorships insofar as they were bound by the law enacted by each dictatorship. Not only were the courts compelled to apply each regime's law when applicable in litigation but dictatorial law was also used to directly keep the courts in line. By enacting new legislation or modifying constitutional norms, the military ruling bodies asserted their supremacy over the judiciary. Unfavorable rulings were overturned through such modifications, and any progress that judges made in investigating crimes committed by agents of each dictatorship was hindered by altering jurisdictions or through amnesties.[32] And, particularly once military justice became politically costly, law could be used to attempt to drag the courts into political disciplinary activity by placing repressive legislation under their jurisdiction.

This dependence of courts on legislation that structures not only the organization, jurisdiction, and procedures of the court system but also the substantive law that the courts must apply is hardly exclusive to authoritarian regimes; as Martin Shapiro (1981) insisted in his now-classic volume on courts, judiciaries, such as the English that are generally seen as independent, are in fact subject

[32] Thus in Chile after the worst years of repression the discovery of evidence of heinous crimes often gave rise to the following sequence: semi-tolerated institutions, such as the Catholic Church, would express outrage; the Supreme Court would appoint a special investigatory judge (*Ministro en Visita*); the judge would discover evidence of military involvement; the judge would declare his incompetence given the involvement of persons subject to military jurisdiction; once in the hands of the military courts, the case would be dismissed if it fell under the 1978 amnesty law. This cycle occurred for the first time after the discovery of the remains of fifteen persons in a clay pit in Lonquen in November 1978. The investigation of notorious crimes committed by state agents after the 1978 amnesty usually languished or was dismissed after being transferred into the military justice system. On one occasion, however, the diligent work of the special investigating judge, José Cánovas Robles, produced solid evidence that members of the national police, *Carabineros*, were behind the March 1985 assassination of three members of the Communist Party, leading to the arraignment of high-level officers of the national police force and the resignation of its director, who was also a member of the military junta. For the case, which was eventually dismissed after repeated obstructions, see Cavallo, Salazar, and Sepulveda (1989: 468–478).

to legislation. However, under dictatorships this subordination is taken to an extreme that usually leaves very little space for "judicializing" authoritarian politics. If, as contemporary strategic theories of judicial behavior suggest, courts can diverge from the legal status quo only when the fragmentation of political forces within a legislature allows judges to anticipate that their rulings will not be overturned, then these conditions were generally absent under the Argentine and Chilean dictatorships.[33] In both cases, legislative and constituent powers were concentrated in the hands of an extremely limited number of actors. Despite our generally limited knowledge regarding the internal workings of both military regimes, there is evidence that differences emerged in each authoritarian legislative process. However, to what extent these differences were known to the courts is unknown, particularly as the legislative function was exercised in secret in each regime. Still, a central implication of strategic approaches to judicial politics is that divergent judicial interpretations in contexts of dictatorship could not emerge on issues around which the ruling military actors remained united.[34]

PRELIMINARY CONCLUSION

In this chapter, I have avoided attributing "judicial failure" in Argentina and Chile to irresolute or complicit judges and instead have tried to sketch the larger political and institutional context in which courts operated under the two dictatorships. It is indeed the case that many judges in both countries celebrated military intervention. Still, further comparative research on courts under military rule in Argentina and Chile would also reveal that there were judges who were resolute in their pursuit of justice even when deference appeared to be the only rational strategy for judges interested in their careers. In a number of cases, this independence cost judges their jobs, suggesting in fact that the explanation for "judicial failure" during recent military dictatorships in Latin America should go beyond charges about reprehensible judges and analyze judicial activity in the broader political and institutional context created by authoritarianism.

[33] For the argument that fragmentation among political forces is a condition for judges to pursue preferred modes of judicial interpretation or policies, see Ferejohn and Weingast (1992) and Ferejohn (2002).

[34] It is on this point that differences in the internal organization of regimes become relevant. As I have documented (Barros 2002), institutionalized intraservice differences within the military junta provided the ballast that allowed the 1980 Constitution to take on a life of its own through constitutional court decisions.

This type of research is all the more necessary because criticisms of judicial behavior under military rule rest upon a striking theoretical assumption: that courts, as structured by a given constitution, ought to able to uphold and defend another part of the constitution, its guarantees of rights, even after the core institutions of the constitution have been destroyed by a military usurpation of legislative and executive powers. As I have tried to show in this chapter, this assumption is probably untenable: military authoritarianism in Argentina and Chile destroyed the ordinary context of judicial activity in the realm of protecting individual liberties. Out of context, available judicial procedures were of little avail before state agencies that had ceased to accept legality as a binding constraint.

This question of the existence of constitutional and, in particular, judicial devices to check an authoritarian state brings to mind John Locke's argument that there is no legal remedy in the face of a state turned tyrant, only the remedy of an "appeal to heaven" – Locke's euphemism for violent resistance. Leaving aside the strategic and ethical dilemmas associated with the use of force, it might first be objected that Locke's theory is pre-constitutional and that modern constitutional systems contain internal mechanisms that guarantee rights and ward against abuses of power. However, it must be underscored that these mechanisms are designed and intended to function within the context of an ongoing constitutional regime, not a dictatorship. As I have argued here, out of context the parts of a constitution are likely to be woefully inadequate in service of their original purposes. In this regard, Locke was right. Any move by the Chilean or the Argentine judiciary to step beyond their regular jurisdiction would have placed either judiciary at loggerheads with the military over essentially political questions for which there were no shared legal criteria nor acknowledged mechanism of resolution. This never happened, but the point holds that only political decision, not judicial action, could contain, if not always eliminate, nonjudicial state punitive action under these dictatorships.

Perhaps inevitably, what I have been calling "judicial failure" has cast a long shadow over research on judicial behavior in Latin American authoritarian regimes. Nevertheless, the judiciary is one institution for which we have available considerable documentary sources even for the military periods. In this regard, my sketch of the broad context of judicial activity needs to be complemented by further research, particularly on lower courts, which have usually not been studied. Furthermore, research on the ordinary aspects of judging might also reveal points of tension between the courts and the military. Though its possibility has been overshadowed by the fact of judicial failure, we should not scoff at the idea that the judiciary's defense of legality

within its ordinary jurisdiction may have prevented a spillover of arbitrary power beyond the realm of emergency punitive control. This possibility will never repair the crimes of the military dictatorships, but it may open up questions that allow us to begin to explore less diametric understandings of judicial activity under military autocratic regimes.

7

Enforcing the Autocratic Political Order and the Role of Courts: The Case of Mexico

Beatriz Magaloni

INTRODUCTION

Autocrats have a hard time enforcing political order. They are unable to rely solely on coercion to enforce rules against their subordinates in the state apparatus, the citizenry, and powerful members of the ruling clique. This chapter explores the various strategies the Mexican autocratic regime employed to enforce political order and how courts were transformed from weak to more powerful institutions.

In democratic political systems, courts are employed to arbitrate all sorts of conflicts, ranging from commercial disputes, labor disagreements, and criminal cases to major constitutional conflicts arising between citizens and the state and between different branches and levels of government. Autocrats employ courts to enforce their commands directed to bureaucratic subordinates and the citizenry, but they normally do not resort to these institutions to arbitrate conflicts among members of the ruling elite. These types of conflicts are more likely to erupt into violence. What alternative instruments do autocracies use to enforce political order and arbitrate conflicts among members of the ruling elite? When are autocracies likely to empower courts to settle political conflicts? What other roles do courts play in autocratic regimes? This chapter answers these questions in the context of Mexico.

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The literature stresses that autocracies often turn to courts as mechanisms for inducing bureaucratic discipline within the administrative apparatus (Moustafa 2006; Shapiro 1981). Akin to "fire-alarm" oversight mechanisms (McCubbins and Schwartz 1984), this form of oversight is driven by the citizenry, who can generate an independent stream of information about bureaucratic abuses that other forms of vertical oversight cannot. This chapter emphasizes that in designing courts to oversee their subordinates, autocrats face a dilemma – creating a system of courts strong enough to allow top-level state officials to monitor lower level officials and judges, but weak enough to prevent citizens from enforcing their rights vis-à-vis the regime.

The chapter discusses how the Mexican autocratic regime solved this dilemma by establishing a procedure for citizens to challenge state abuses before federal courts (the *amparo* trial) and at the same time giving to these courts very limited "constitutional space" to keep them weak. In important issues involving expropriation of property, harsh economic regulation, and the violation of due process, citizens were subject to government abuses but could not challenge these abuses through the courts. Key to the maintaining the judicial system for the benefit of the autocracy was the politicization of the federal courts – nominations and promotions were decided by the Supreme Court, which in practice behaved entirely as an office of the presidency. With these institutions, the Mexican autocracy managed to create a highly responsive and subservient judiciary, whose main role was to ensure that subordinates applied the laws according to the top leadership's commands.

Courts were purposely given no jurisdiction over so-called political conflicts, the numerous fights arising among the members of the ruling elite; such conflicts were more likely to erupt into violence than those arising between individual citizens and the state. How then did the Mexican autocracy enforce political order vis-à-vis members of the ruling clique? To answer this question, I develop a theoretical framework making use of a simple game. The Mexican PRI (Institutional Revolutionary Party) created an ingenious system to enforce political order among members of the ruling elite that was based on three mechanisms: (1) the president was the arbiter of political conflicts among members of the ruling clique; (2) the president was leader of the official party, which had the monopoly of office and the spoils derived from it; and (3) the party sanctioned noncompliance with the president's decisions with expulsion. The game shows that the ruling elite submitted to the autocratic political order based on presidential arbitration instead of fighting because the system was self-enforcing *as long as the PRI retained a monopoly on political office* and could guarantee members of the ruling elite a share of power over the long run. With multiparty competition emerging in the 1990s, the political order began

to unravel because the president's leadership was challenged, first by opposition politicians and then by his co-partisans. The president was forced either to side with the opposition and offend the PRI or to side with the PRI and repress the opposition. To solve this dilemma and enforce political order, I argue that the president opted to empower the Supreme Court as the new arbiter of political conflicts. In acquiescing to empower the Supreme Court, the former ruling party faced the dilemma of creating an institution that would protect its interests but would not turn against this party in the event it lost power.

My account is consistent with Ginsburg (2003) 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.

The chapter unfolds as follows. The next section discusses the nature of autocratic rule in Mexico and the role courts played. It discusses the nature of the *amparo* trial and how courts were given limited jurisdiction to solve small conflicts, while important political disputes remained in the president's sphere. The third section focuses on autocratic abuse and citizens' rights. The fourth section discusses how the Mexican autocracy solved the dilemma of enforcing political order among members of the ruling elite. Through the use of a simple game, I show that the president could serve as ultimate arbiter only because he was the leader of the official party, which had a monopoly on political office. After a large number of politicians from different political parties acceded to office at the subnational level in the 1990s, the president's authority was challenged, generating the need to empower the Supreme Court. The fifth section discusses the 1994 constitutional reform that created a powerful Supreme Court. The sixth section presents a discussion of empirical findings concerning the functioning of the new Supreme Court in the last years of authoritarian rule in Mexico and after 2000, when the official party finally lost power. The seventh section contrasts my approach with the existing literature on judicial review in systems in transition. I end the chapter with a conclusion.

AUTOCRATIC RULE AND THE COURTS

The PRI governed for seventy-one years, from 1929, when the precursor to the party was created,[1] until 2000, when it lost the presidency to the long-standing

[1] The PNR (National Revolutionary Party) was created in 1929, was renamed the PRM (Party of the Mexican Revolution) in 1938, and subsequently was renamed the PRI in 1946.

opposition party, the PAN (National Action Party). During this period parties other than the PRI were allowed to compete.

The autocratic regime in Mexico was not characterized as particularly repressive. As I explain elsewhere (Magaloni 2006), hegemonic party autocracies do not conform to the model of what we normally regard as dictatorships. Communist regimes, for example, aspired to total domination "of each single individual in each and every sphere of life" (Arendt 1968). In part, this goal was achieved by the atomization of human relationships – the destruction of classes, interests groups, and even the family unit – a process in which terror played a key role. Many military dictators were also very repressive (O'Donnell 1973; Stepan 1971; Wood 2000). Most theories of autocracy are implicitly or explicitly based on the notion of repression. The "existence of a political police force and of extremely severe sanctions for expressing and especially organizing opposition to the government (such as imprisonment, internment in mental hospitals, torture, and execution) is the hallmark of dictatorships of all stripes" (Wintrobe 1998: 34).[2]

The Mexican autocracy was a more benign form of dictatorship. This is not to say that there was no repression at all.[3] Since its creation, the PRI permitted the opposition to compete in multiparty elections – although it banned the Communist Party, a decision that pushed radical left-wing movements into insurgency and was largely responsible for the guerilla activity in the 1960s and 1970s. The 1978 electoral reform legalized the Communist Party and managed to co-opt most of the violent opposition to the regime by significantly reducing their entry costs to the legislature. Through the 1980s and 1990s, the PRI maintained its power through a combination of strategies, including vote buying and electoral fraud, against an increasingly stronger opposition. After a sequence of important institutional reforms in the late 1990s, this party finally lost power in 2000.

The Mexican constitution formally establishes numerous checks and balances, such as division of powers, bicameralism, and federalism. However, the authoritarian political system during the era of hegemonic party rule by the PRI was characterized by a strong *presidencialismo*, a strong dominance of the president over other branches of government, which derived from sources beyond the constitution (Carpizo 1978; Weldon 1997). The conditions driving *presidencialismo*, in particular the executive's domination over Congress, are well understood. Formally the Mexican president was not a

[2] Linz (2000) challenges the view that repression is an essential characteristic of autocracies.

[3] Repression in Mexico was selective, although in some regions and municipalities in the states of Chiapas, Oaxaca, Guerrero and Veracruz, political killings on a per capita basis rivaled levels of per capita repression in military dictatorships. I thank Guillermo Trejo for pointing this out to me.

very powerful player. In practice, however, the president dominated the other branches of government for the following reasons: first, the president was the leader of the hegemonic party; second, the hegemonic party controlled the majority of seats in the Lower Chamber and the Senate; and third, the hegemonic party was extremely disciplined (Casar 2002; Weldon 1997).

Presidencialismo also implied a lack of judicial checks on the executive. Three conditions explained presidential domination over the Supreme Court and the federal judicial branch (Magaloni 2003).

1. The constitution was endogenous to partisan interests. The constitution is formally rigid: amendments require the approval of two-thirds of both federal assemblies plus the majority of state legislatures. During the years of party hegemony, however, the constitution was in practice flexible because the PRI enjoyed the necessary super-majorities to unilaterally amend it without the need to forge coalitions with the opposition parties. Since it was originally drafted in 1917, the constitution has been amended more than 400 times. Many of these changes were substantial, resulting in changes in electoral institutions to the PRI's advantage; the centralization of political power and fiscal resources in the hands of the federal government; the systematic weakening of the judicial power and the Supreme Court; and the restructuring of the system of property rights to the PRI's advantage. During the autocratic era, almost every single president began his six-year term with a long list of constitutional reforms. The practice was to imprint in the constitution the president's policy agenda.

The following example illustrates the importance of the *endogeneity* of constitutional rules. To consolidate his power, President Lázaro Cárdenas (1934–1940) began his term by implementing land reform to which the 1917 Constitution had entitled peasants. The existing Supreme Court, representing the interests of conservative forces and property owners, attempted to block the president's agrarian redistribution. Cárdenas responded by dissolving the Supreme Court and reappointing a new, significantly enlarged body with amicable justices; these new justices would serve six-year terms, instead of appointments for life. The crackdown on the Supreme Court required a constitutional change, which President Cárdenas could accomplish only because the PRI had the necessary super-majority in the federal Congress and control of the state assemblies. The implementation of land reform would prove crucial for the consolidation of the PRI's hegemony because it gave this party a key instrument to buy peasants' support. The crackdown on the Court created a powerful precedent that convinced justices never to cross the line where their decisions would offend the president.

2. The president exercised strong control over judicial nominations and dismissals, despite formal rules or so-called judicial guarantees. Table 7.1

TABLE 7.1. *Change of constitutional rules regarding size, appointments, terms, and dismissal of Supreme Court*

	No. of justices	Subunits	Appointments of justices	Terms of justices	Dismissal of justices	Appointments of magistrates and judges (federal judicial) power)	Terms of magistrate and judges (federal judicial power)
1917	11	None	States with a two-thirds vote of Chamber of Deputies and Senate	Life (from 1923)	Impeachment	Supreme Court	4 years(law establishes life tenures for appointments after 1923, not constitution)
1928	16	3	President with approval by majority in Senate	Life	Impeachment "or" misconduct	Supreme Court	Life (law establishes, however, life tenures only for appointments after 1928)
1934	21	4	President with approval by majority in Senate	Six years	Impeachment "or" misconduct	Supreme Court	Six years
1944	26	4	President with approval by majority in Senate	Life	Impeachment "or" misconduct	Supreme Court	Life

(continued)

TABLE 7.1 *(continued)*

	No. of justices	Subunits	Appointments of justices	Terms of justices	Dismissal of justices	Appointments of magistrates and judges (federal judicial) power)	Terms of magistrate and judges (federal judicial power)
1951	26	5	President with approval by majority in Senate	Life	Misconduct with prior impeachment	Supreme Court	4 years and after tenure revision, life
1967	26	5	President with approval by majority in Senate	Life	Impeachment "or" misconduct	Supreme Court	4 years and after tenure revision, life
1982	26	5	President with approval by majority in Senate	Life	Impeachment, according to Title IV of Constitution	Supreme Court	4 years and after tenure revision, life
1987	26	5	President with approval by majority in Senate	Life	Impeachment, according to Title IV of Constitution	Supreme Court	6 years and after tenure revision, life
1994	11	2	President with approval by 2/3rd vote of Senate	15 years	Impeachment, according to Title IV of Constitution	Federal Judicial Board	6 years and after tenure revision, life

Source: Magaloni 2003.

TABLE 7.2. *Number of justices appointed by the president*

President	Number of justices	% of a court appointed by sitting president
Venustiano Carranza (1916–1920)	19	172%
Álvaro Obregón (1920–1924)	10	90%
Plutarco Elías Calles (1924–1928)	3	27%
Portes Gil (1928–1930)	12	75%
Ortiz Rubio (1930–1932)	5	31%
Abelardo Rodríguez (1932–1934)	5	31%
Lázaro Cárdenas (1934–1940)	24	114%
Manuel Ávila Camacho (1940–1946)	24	96%
Miguel Alemán (1946–1952)	12	48%
Adolfo Ruiz Cortínez (1952–1958)	18	72%
Adolfo López Mateos (1958–1964)	9	36%
Gustavo Díaz Ordaz (1964–1970)	14	56%
Luis Echeverría Álvarez (1970–1976)	13	52%
José López Portillo (1976–1982)	16	64%
Miguel de la Madrid Hurtado (1982–1988)	20	80%
Carlos Salinas de Gortari (1988–1994)	8	30%
Ernesto Zedillo (1994–2000)	11	100%

Source: Magaloni 2003.

provides a list of the numerous constitutional modifications to the Supreme Court's appointment and dismissal rules (Magaloni 2003), which had the effect of systematically diminishing the Court's power through the years. After 1988, the Court began to be gradually strengthened, although, as I argue later, it was never to become a fully independent political player until the PRI lost power in 2000.

Notwithstanding life appointments during most of the autocratic era, justices' tenures were extremely short, and every single president from 1934 to 1994 was able to shape the composition of at least 50 percent of the Court (see Table 7.2). Most justices tended to follow *partisan careers* before or after leaving the Court, creating strong incentives to please the leader of the party, namely the president, as a means of furthering their political ambitions (Domingo, 2000). Table 7.3 shows the turnover of justices. Although the average tenure was ten years, close to 40 percent of justices left the Court in less than six years, which is the length of the presidential term. These data reveal that although there were a few very stable tenures (some even lasting for thirty years), the majority of the Court's justices came and went with the presidential term.

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