RULE BY LAW

The Politics of Courts in Authoritarian Regimes

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several other officials for a six-month period. Several senior judges decried the government's actions as well, and the judges and lawyers joined in a one-week strike, although they later apologized to the country for this gesture of protest. In June, the donor community asked the government for assurances that it would desist from further efforts to undermine the courts and donors announced a significant contribution to the judiciary improve the ability of the courts to carry out their work. Judges and lawyers continued to articulate their concerns in public over the following months.

By January 2008, it remained unclear whether the government would take further action against the courts, or whether it would agree to improve respect for the separation of powers. It took no definitive measures against particular judges it considered unfavorable, however, and it did not urge a general uprising against the courts, a step Robert Mugabe pursued in Zimbabwe. Although politics entered the selection of new judges, there were no full-scale efforts to oust those already in office. At the same time, some judges reported pressure to decide cases in favor of the government, and the president and his associates insisted that the courts had no authority to adjudicate matters that were part of a broad reading of executive powers. Again, for at least a brief period, a fragile entente appeared to set in. In local newspapers, a few citizens began to wonder in print whether the courts were being asked to do too much, to carry responsibility for the country's fate when the separation of powers ought more reasonably to be preserved by actions of parliament and of opposition politicians, who clearly had a stake in preventing executive abuse of authority and had a greater ability to speak out.

Zimbabwe: Unhappy Outcomes

In 2000, the judiciary in Zimbabwe had an especially strong reputation for independence on the African continent. A series of impressive judges had led the court; some were non-African citizens of Zimbabwe, and some, like Enoch Dumbetshena, were important Zimbabwean insiders. The court had stood firm in the face of executive branch resistance on a variety of issues, from suspension of habeas corpus (ruled out) and reasonable time to trial to freedom of speech. Members of the public had come out on the streets in support of the courts when the government sought to interfere with their operation. However, chief justices in neighboring countries occasionally expressed worry that their Zimbabwe counterparts were too public, too visible – that they provoked the ire of the executive and would eventually find themselves closed down. They knew too well the difficulty of dealing with authorities unversed in law who were often highly self-interested and very intolerant of criticism.

After many years of institutional independence, the Zimbabwe judiciary lost its protected status in the wake of several controversial, anti-government rulings beginning in 2000. Although the initial focal point was a decision about land reform, political contestation was the underlying concern, as it would be a few years later in Uganda. President Robert Mugabe, then in his late seventies, had held office since 1980. Serious opposition had developed, led by the Movement for Democratic Change, a political party, and its leader, Morgan Tsvangirai. The Mugabe government had tried various ways to constrain the power of the party, a group that was well organized and large by African standards. It had also tried to draft a new constitution that would make the government and the military immune from prosecution for illegal acts, allow confiscation of farms, and concentrate more power in the president's hands. The new constitution had failed at referendum, as Zimbabweans chose to vote against the wishes of their president.

With parliamentary elections scheduled for June 2000, Mugabe's supporters reached for every tool they could find to build support. With the economy on the ropes, there were few options. One of these was the confiscation of land held by white farmers and the distribution of that land to ruling party members. A militia group led the effort, causing severe disruption and taking land from black farmers as well as white.

Land had long been a sensitive issue in Zimbabwe. Its white settlers, many of them former British air force personnel who had trained in the area during World War II, had made a unilateral declaration of independence, ushering in minority white rule. An armed struggle ensued, ending in an internationally brokered settlement and Mugabe's accession to the presidency. Yet, much of the best land remained in white hands. An internationally financed program was put in place to finance the gradual purchase of these farms on a "willing buyer, willing seller" basis. The program was mismanaged, however, and few purchases by small buyers occurred, although some larger tracts were transferred to powerful Mugabe supporters. In 1997, Tony Blair took the lead in ending the financing arrangement for this program. As the election of 2000 loomed and Mugabe's popularity ratings fell, the ability to pass out land in return for votes looked increasingly attractive.

The courts interfered with the electoral maneuvering. In April 2000, the Zimbabwe Supreme Court upheld a lower court ruling ordering squatters and veterans off farms seized under Mugabe's chaotic land reform program.[15] Mugabe had ignored the earlier decision, and openly admitted that he had not

[15] "Zimbabwe court orders veterans, squatters off white-owned farms," *The Associated Press*, March 17, 2000 accessed through LexisNexis.

ordered police to enforce it.[16] He ignored this ruling too, aided by a furious response from the Harare branch of the Zimbabwe Law Veterans Association, who demanded the judiciary step down or be removed by force.[17] At the time there were suspicions that the executive was actively encouraging the veterans to protest against the decision. This suspicion was confirmed by events like that which occurred in November 2000, when war veterans stormed the Supreme Court. Although police were present, they merely stood by and watched while the judges hid in their chambers.

The judiciary did not retreat from controversy. The June 2000 parliamentary elections were riddled with fraud. The new Parliament enacted a law that would strip the courts of a role in deciding challenges to the election results, thereby preventing the likely invalidation of thirty-seven parliamentary constituency races won by ZANU-PF, the ruling party.[18] In early 2001, the Supreme Court ruled this law unconstitutional. ZANU-PF lawmakers responded by passing a vote of no confidence in the Supreme Court. Minister of Information and Publicity, Jonathan Moyo, chief ZANU spin doctor until his fall from grace a few years later, accused the judiciary of favoring the Movement for Democratic Change (MDC) and whites, saying. "There can be no judicial independence without judicial impartiality, and as such the Supreme Court has lost its independence, it is because and only because the court has failed to be impartial."[19]

The government then began to use an array of tactics to infringe judicial independence. In February 2001, the government forced the chief justice, Anthony Gubbay, to resign, claiming that it could not guarantee his safety if he stayed in office.[20]

Two other justices – Ahmed Ibrahim and Nicholas McNally – were also asked to resign, but refused. Justice, Legal and Parliamentary Affairs Minister Patrick Chinamasa responded by saying that they could continue practicing and "would not be harmed."[21] Chinamasa also said that the government will "continue reforming the judiciary until it reflects the racial composition of the

[16] "Zimbabwe; Mugabe crosses the Rubicon," *Africa News*, April 13, 2000, accessed through LexisNexus.

[17] "Law Society Condemns Threats to Zimbabwe," *Zimbabwe Independent*, November 17, 2000, accessed through LexisNexus.

[18] "Zimbabwe judiciary biased in favor of whites, opposition: minister," in *Agence France Presse*, English, February 12, 2001, accessed through LexisNexus.

[19] Ibid.

[20] "Zimbabwe's Judges Are Feeling Mugabe's Wrath," *New York Times*, February 4, 2001, accessed through LexisNexus.

[21] "Zimbabwe minister says judges who refused early retirement "will not be harmed," BBC Monitoring Africa, February 23, 2001, accessed through LexisNexus.

country."[22] South African Constitutional Court judge Kate O'Regan remarked at the time, "It is with grave regret . . . that we observe what appears to be a grave threat to judicial independence developing in our neighboring state."[23]

In short order, Mugabe expanded the Supreme Court bench to include three additional judges. He appointed a new chief justice, Godfrey Chidyausiku, who was widely perceived as a government supporter, and who chaired the 1999–2000 Constitutional Commission.[24] It was unsurprising then, in October 2001, that when asked to reconsider the rulings from the previous year, the new Supreme Court ruled in favor of the government's land claim program. In the 4–1 ruling, three of the judges had been appointed just two months previously ruled in favor. More senior judges, such as Wilson Sandura, Simba Muchechetere, and Nicholas McNally, were excluded from the hearing.[25]

Other changes in personnel followed. Michael Gillespie, a senior judge of Zimbabwe's High Court resigned and wrote in his final judgment that his departure was due to the "the breakdown to mob rule" as the government "renounces its commitment to the rule of law . . . [through] . . . controlling acts of violence and intimidation throughout the country." He went on to say, "A judge who finds himself in the position where he is called upon to administer the law only against political opponents of the government and not against government supporters, faces the challenge to his conscience, that is whether he can still consider himself to sit as an independent judge in an impartial court."[26] Minister of Information Jonathan Moyo responded by describing Gillespie as "an unrepentant racist former Rhodesia," with his departure being "really good riddance to bad rubbish."[27] Justice Ishmael Chatikobo also resigned, and moved to Botswana after one of his judgments, allowing an independent radio station to broadcast, was countermanded by Moyo.[28]

Some within the judiciary tried to resist intimidation, and in February 2002 Justice Ahmed Ebrahim ruled against an electoral law passed by parliament.[29]

[22] Ibid.

[23] "South African judge expresses concern at threat to Zimbabwe judiciary," *Agence France Presse* English, February 23, 2001, accessed through LexisNexus.

[24] "Zimbabwe's judiciary no longer independent: farmers' lawyer," *Agence France Presse* English, October 2, 2001, accessed through LexisNexus.

[25] "Zimbabwe; Chinamasa Slammed for 'Simplistic' Remarks On Judges," *Africa News* from *Zimbabwe Independent*, October 5, 2001, accessed through LexisNexus .

[26] "Top former judge says Mugabe 'engineered lawlessness,'" *Deutsche Presse-Agentur*, October 6, 2001, accessed through LexisNexus.

[27] Ibid.

[28] "Zimbabwe; US Judge Slams Interference," *Africa News* from *Zimbabwe Standard* December 16, 2001, accessed through LexisNexus.

[29] "UN Experts Criticize Mugabe over Judicial Defiance," Panafrican News Agency (PANA) Daily Newswire, March 8, 2002, accessed through LexisNexus.

Mugabe simply ignored the ruling and published an edict reinstating the act.[30] Ebrahim resigned, making him the last of seven Supreme Court judges to step down since Anthony Gubbay's forced retirement.[31] UN Special Rapporteur on the Independence of Judges and Lawyers, Dato' Param Cumaraswamy, maintained at the time, "This action is a blatant violation of the UN Basic Principles of the Independence of the Judiciary, which expressly provides that states should guarantee the independence of the judiciary and that decisions of the courts should not be subject to revision save by lawfully constituted appellate courts."[32]

Former High Court judge Fergus Blackie (who is white) was arrested in the early hours of the morning and held in jail for three days – during the first day of imprisonment he was allegedly denied contact with his lawyers and family, not fed, and denied access to his heart medication. He was charged with attempting to pervert the course of justice, after he acquitted Tara White, a white accountant charged with theft, in one of his last rulings. Chief Justice Chidyausiku had ordered the investigations into Blackie, saying that he had acquitted White in order "to prevent a white person from going to jail." What seemed a more likely reason for the investigations was that another of Blackie's last judgments before his retirement in July was to order the arrest of Justice Minister Patrick Chinamasa for ignoring a summons to appear in court to answer charges of contempt of court. Chinamasa responded by saying that the judge's orders "should not be tolerated," and the police did not carry out Blackie's order.[33]

The attacks also reached the lower levels of the court. Walter Chikwanha, a magistrate in Chipinge, Manicaland, was assaulted and dragged out of court by a group of "war veterans." The attack occurred after he refused to place five members of the MDC into custody. The veterans then assaulted the lawyer who represented the MDC officials, and vandalized his car. Magistrates and prosecutors in Manicaland launched a week-long strike in protest.[34] Godfrey Gwaka, the magistrate for Zaka district, Masvingo, was stabbed shortly thereafter. It was suspected that the attack was related to judgments Gwaka had made on political parties. He was hospitalized after the attack.

By April 2003, the state had built up an impressive record of noncompliance with court orders. Zimbabwe Lawyers for Human Rights (ZLHR) documented

[30] Ibid.
[31] Ibid.
[32] Ibid.
[33] "SA Chief Justice Deplores Treatment of Zim Judge," SAPA (South African Press Association), September 19, 2002, accessed through LexisNexus.
[34] "UN Expert Calls for Rule of Law in Zim," SAPA (South African Press Association), September 2, 2002, accessed through LexisNexus.

at least twelve cases since 2000 in which the state has ignored court rulings. In a statement to the *Zimbabwe Independent* newspaper, the lawyers said failure by the state to enforce court orders would lead to a breakdown of the rule of law. "The state has systematically abrogated its responsibility to enforce or comply with court orders whether favorable to the state or not," said ZLHR director Arnold Tsunga.[35] Police and the army detained citizens without bringing them to court and ignored *habeas corpus* rulings. Orders issued by courts to police to arrest suspects with ZANU-PF ties were routinely ignored. Mugabe directed that it was acceptable to defy a judgment of any court in Zimbabwe if the affected party considered the outcome to have been the result of bias by a judicial officer.

Further evidence of the lack of judicial independence, and of a general breakdown in the legal system, was in evidence at Tsvangirai's treason trial. Judgment in the trial was "indefinitely postponed" after Judge Garwe failed to consult his two assessors on the verdict he allegedly proposed to hand down. The assessors blocked the judgment until they could review transcripts of the trial. Part of the problem was that fourteen hours of Tsvangirai's testimony were unrecorded because the court's audio equipment was faulty, and it took at least three days for the court to discover that they had no record of the accused's testimony. Garwe offered his own handwritten notes to be used as the transcript.[36] The state's two witnesses, Ari Ben-Menashe – whom Tsvangirai allegedly contracted to assassinate Mugabe – and his employee Tara Thomas, were singularly unconvincing, with Thomas even referring to notes during her testimony.[37]

Tsvangirai was eventually acquitted in what Justice, Legal and Parliamentary Affairs Minister Patrick Chinamasa said was evidence that the country's judiciary was independent and second to none: "Its judges act and decide on cases put before them independently and without fear or favor or interference. This is as it should be. The government believes that genuine democracy and rule of law dictate an unselective and unconditional application of the law. Where there is prima facie evidence of unlawful conduct, law enforcement agencies will and have a duty to act within the confines of the law."

As court packing and attacks on the judiciary progressed, self-dealing and lack of discipline became a problem within the judiciary. For example, the Judge President of the High Court, the second highest judge in the country

[35] "Justice System Eroded by State Non-Compliance, *Zimbabwe Independent* – AAGM, April 18, 2003, accessed through LexisNexus.

[36] "Zimbabwe's judicial system is on trial," *Business Day* (South Africa), August 16, 2004, accessed through LexisNexus.

[37] "Zimbabwean opposition leader's acquittal evidence of judicial independence: govt.," Xinhua General News Service, October 15, 2004, accessed through LexisNexus.

and the presiding judge in the government's treason case against opposition leader Morgan Tsvangirai, seized a white farm and installed members of the ZANU-PF.[38] Demands for better emoluments became the stock in trade, in lieu of challenging judgments.

As in the Uganda case, civic groups voiced opposition to the government's actions. In April 2002, the president of the Law Society of Zimbabwe (LSZ), Sternford Moyo, released a statement, questioning the competence of the Supreme Court. He suggested that the "government may have stuffed the Supreme Court with its sympathizers, thereby undermining the independence of the judiciary," and commented, "We have observed a significant departure from the culture of upholding the Bill of Rights in the Supreme Court. . . . We have seen a number of judgments which have caused us some anxiety, but we are still monitoring judgments to see whether a firm trend can be discerned from them." He also said, "The allegation that all white judges do not protect the rights of ordinary Zimbabweans is unfair, defamatory and contemptuous . . . and that "conditions of service for judges in Zimbabwe were among the worst in the southern African region."[39] University legal scholars joined the chorus. Constitutional lawyer and University of Zimbabwe lecturer Lovemore Madhuku told the *Financial Gazette*, "There is a pattern that is there for all to see. . . . ZANU PF complains and castigates the AG in cases in which political players from the opposition MDC are involved as well as individuals perceived to be enemies of the status quo."[40] The MDC voiced calls for change, causing its leader to be charged with treason.

POINTS OF DIFFERENCE AND THEORY-BUILDING

It may be premature to consider the Uganda tale to have ended differently from Zimbabwe's story. For the purposes of theory-building, it is worth pondering the points of difference and similarity, however.

External Leverage

In fairly authoritarian semi-democracies, domestic constituents for democracy or greater adherence to the rule of law may be organized and vocal, but they are also likely to lack the leverage to force a change in policy. Thus, as Robert

[38] "Zimbabwe judge secretly grabs white-owned farm," *The Daily Telegraph* (London), April 19, 2003, accessed through LexisNexus.

[39] "Zimbabwe; Lawyers Attack Supreme Court Judgments," *Africa News*, April 16, 2002, accessed through LexisNexus.

[40] Ibid.

Bates once wrote in an essay, policy change may be domestically demanded but externally supplied (Bates 1992). Pressure from international investors or donors will have more significance during such times in a country's history.

In both Zimbabwe and Uganda, domestic actors took to the streets to protest the executive's behavior toward the judiciary. In neither instance was this vocal opposition sufficient to alter the policies of the head of state or parts of his government. Those who objected to the actions of the executive branch had few critical resources with which to bargain. Heads of state and their entourages sometimes salt so many resources away in countries outside Africa that demonstrations and boycotts have little impact on their financial positions or they are simply unaffected by the economic downturns that may result, having built their own sinecures. Further, declining popular legitimacy may be of no consequence if leaders' time horizons are relatively short and the game is all about who can control jobs and money tomorrow, not about the views of citizens at the ballot box several years hence.

In these circumstances, international actors may prove helpful. However, external pressure is a fickle tactic. Its effectiveness varies across cases and often diminishes over time. Where an incumbent faces significant electoral pressure and has been unable to amass a personal fortune outside the country's boundaries (and thus create a destination to which he can exit), securing a continuing flow of international aid may be important for holding office and the executive branch will be more inclined to listen to donors. Similarly, where there is some sort of regional economic or political organization in which membership confers considerable benefit, heads of state may be more inclined to pay attention to the views of outsiders. These conditions vary across African countries. Even where they are favorable to the effective exercise of donor influence, diminishing returns may prove troublesome. The withdrawal of aid itself produces a loss of leverage. A donor can use the ploy once, but it then lacks the local assets to exercise leverage as effectively a second or third time. Furthermore, it is all too possible in resource-rich Africa to push a leader to choose short-term plunder, evisceration of state capacity, and escape rather than remaining in power as a stationary bandit, to borrow Olson's (1993; 2000) terminology. And of course, there is a risk that heavy external pressure will lead the government in power to associate things like rule of law with the foreign or international community, a ploy that may bring some leverage over local opinion.

Members of the international community expressed their concern about the government's actions in the Zimbabwe case, as well as in Uganda. Because of the earlier collapse in donor aid to Zimbabwe, however, leverage may have been more limited there than it was in the Uganda case a few years later.

(By contrast, Uganda was an international community poster child until the late 1990s.) Although one suspects that Museveni and his entourage have provided well for themselves, there is no question that Mugabe has lined his pockets through activity in the disrupted Democratic Republic of the Congo. Whether his country survives economically is not important to him. Further, the statements from the International Bar Association and other groups in Zimbabwe were powerful but may have aggravated Mugabe's sense of having come under assault from the West, a constant refrain in his speeches well before the clash with the courts in 2000.

Factions and Ideas

There were some other differences between the two countries that may partially account for the differences in outcomes. Division of opinion within the two governments may have varied in intensity. There is suggestive evidence that the Museveni government harbored people of quite different views on separation of powers questions. A stronger rule-of-law mentality prevailed in some parts of the civilian administration than in the military. Some of the better-positioned members of this elite appear to have offered at least muted criticism at least of the first infringements of judicial independence. They were not immediately dismissed for their divergent opinions. They may have succeeded in shaping the president's response or their actions may have helped illuminate just how far the executive could go before dissenters would leave and form their own parties. By contrast, in Zimbabwe, at the time of the events in question, there was little evidence of diversity of opinion and the president appeared to have the capacity to crush dissent on this subject.

Second, historical legacies may have played a role in shaping norms. In Uganda, there was no effort to decentralize violence against the judiciary, as there was in the Zimbabwe case. Although Ugandan ministers complained about the courts, they did not generally incite violence against them and most said nothing. There is no evidence that the military ever tried to empower others to attack the judiciary, and violence against judges themselves did not seem part of the repertoire, although certainly the judges themselves were very nervous. Some members of the military might have condoned the kind of action that had occurred in Zimbabwe, but they either thought it would attract an unfavorable reaction or they could not get others to go along with them.

Although the actions of the Ugandan Attorney General and the army were insupportable, they drew fairly heavily on elements of the language of law. They used the law as a weapon, but with some notable exceptions they tended

to use law and not the street. They were guilty of abuse of process, among other things, but very often they simply exploited gaps and tried to use broad standards to their advantage in the absence of bright-line rules and clear precedents. In contrast, there was little attempt to use the language of law as a cloak in Zimbabwe.

Both countries had a thoughtful independent press in the mid-1990s, and judicial independence was a subject of reportage and editorial remark. Whereas the Mugabe government cracked down on opposition and closed presses, however, the Museveni government neither aimed to end press freedom nor succeeded in imposing limitations. Ugandans remained outspoken, and the country's independent newspapers ran considered editorials opposing the government's actions throughout the events described earlier. The brief ban on publishing imposed after the Black Mamba incident did not win compliance.

Arguably, even the effort to create a court martial in Uganda could be seen as mimicking the behavior of the Bush administration's legal team. If the Black Mambas and their patrons were indeed part of the Antiterrorism Task Force, funded by the U.S. government, and if they watched U.S. debates on the legality of special tribunals and courts martial, they may well have considered most of their actions acceptable. The outcome of *Padilla v. Rumsfeld* followed the Ugandan decision to try Besigye in the civilian court on criminal charges, however, suggesting that there may not have been a close mirroring.

The different lessons and legacies of the past may have distinguished the countries in this regard. It is possible that the miserable history of Idi Amin and Milton Obote and the near-experience of a very orderly rebel struggle induced a modicum of restraint and helped more moderate factions gain slightly more influence as the Ugandan conflict proceeded. By contrast, Zimbabwe's history has made it possible to invoke white domination as a specter to justify a wide range of abuses. Much of the population appears wise to the victimhood ploy, but the government views the tactic as useful nonetheless.

The Court

The two judiciaries, both independent at the start, also differed in telling ways. At the conclusion of Zimbabwe's struggle, many of the country's lawyers were white or Asian, as was true of a number of African countries. Although most of those remaining shared nationalist sympathies and a preference for one person/one vote, by and large they were not among those who had been imprisoned or who had fought alongside Mugabe. In Uganda, by contrast, several respected members of the court whom Museveni had brought back

from exile or jail had been advisers or critics since the beginning of the struggle. They had nationalist credentials. The difference in experience may be significant not so much in the preferences or perspectives created but in the channels of communication that existed between the court and the government in the Ugandan case compared to Zimbabwe.

The way in which the judges conducted themselves differed too. One might not be entirely happy with the intellectual elegance, or lack thereof, of some of the Uganda opinions. No doubt there are times when a judge might be criticized for having given a party too much latitude. But there is sometimes wisdom in issuing messy judgments that create a principle or set a standard, on the one hand, and set aside immediate and drastic action, on the other. Some of the Uganda judgments had that character. By letting cases go ahead despite ambiguous charges while issuing a passport to the defendant, drawing out proceedings until election tempers cooled, allowing a result to stand while condemning violations of the law, etc., the Ugandan courts may have been able to build strength gradually, develop public understanding and norms, and induce some parts of the government and opposition to trust their actions, even if the results were far from perfect from the standpoint of justice. Although certain government actions provoked condemnation from senior judges, many of the statements were coupled with phrasing designed to calm tempers. The Zimbabwe judgments, which were often elegant, tended to be more hard-hitting, and sharp public statements by judges in the years before the clash may have aggravated relationships. Human rights lawyers might disagree with this assessment, but it is always well to remember that the U.S. Supreme Court issued the murky *Marbury* in a charged atmosphere and exercised restraint subsequently, gradually building a reservoir of trust.

TENTATIVE IMPLICATIONS

Social scientists often draw a distinction between "institutional origins" questions and much of the rest of the intellectual territory at the heart of political science – policy choice, political behavior, etc. How an institution gets started may be highly idiosyncratic, based on contextually specific distributions of preferences and bargaining choices. The early years in the life of an institution may have a similar character, though the underlying conditions we often use in explanations may shape an organization's longevity. The broad-coverage laws that are the stuff of much political science provide intellectual leverage mainly when institutions are stable. Thus, in accounting for the rise of independent judiciaries, the talents of game theorists and historians may prove more helpful than any resort to general explanations.

Nonetheless, it is possible to offer a few adages that arise from reflection upon the two cases described in this chapter. The first is clearly that infringements of judicial independence are likely to increase before and during elections in semi-democracies or new democracies. When it is not clear that opponents will reflect the rules of democratic alternation in power, the temptation to try to circumscribe contestation is great. The longer time horizons that make delegation of power to independent bodies a sensible proposition come only after years of successful alternation of parties in power.

Second, some countries may provide more fertile ground than others for the success of *Marbury*-like stratagems. The more viewpoint diversity within the executive and legislative branches, the lower the likelihood that the party in power will infringe the independence of the courts. Why? For the overtures of judges to receive a hearing, there must be people open to alternative perspectives in the president's inner circle or among his or her advisers. One might expect to see greater respect for judicial independence in countries where coalitions govern or where the chief executive shows some aptitude for listening to alternative perspectives. Similarly, where a high proportion of the senior members of the judiciary share important background traits with those in government, the likelihood of infringement may be lower, simply because communication is better and the judiciary is less likely to be viewed as foreign.

Third, although it is not possible to manufacture "Marbury moments," some kinds of institutional designs or personnel practices might make them more likely. For example, constitutions that grant clear powers of judicial review and are themselves strongly entrenched, making quick amendment more difficult, may provide more scope for such decisions. Constitutions that grant courts very narrow powers or allow legislatures to alter the language of fundamental documents very easily give judges neither the power nor the incentive to act as Marshall did in similarly trying times in U.S. history.

Finally, one must ask whether there are situationally specific reasons why the executive may be disinclined to fight back when a court rules in a way that limits the leader's power. 1) Do the leaders simply share the view that what the courts say deserves respect? Apartheid South Africa did not have a liberal, democratic leadership, but infringement of judicial independence was still considered unacceptable. 2) Does the leader see himself or herself as a citizen, likely to remain in the country? If so, popular protests in support of the judiciary may have more teeth than they would otherwise. 3) Can popular protest in support of the judiciary trigger serious armed insurrection or injure critical economic interests? If so, the threat of popular protest may prove effective. 4) Can the leader and key members of the entourage remain in the country and continue to earn incomes if displaced from power? If so, the incentive

to infringe the independence of the judiciary may be lower. 5) Do the court rulings empower people who may, in turn, limit or channel the activities of more dangerous opponents? If a court ruling opens up elections and a militarized opposition must compete and put its popular legitimacy to the test, the more serious threat to the corporate interests of the leader's entourage may diminish. 6) If the leader's entourage is aid-dependent and donors threaten to withdraw assistance in the event the court is threatened, the executive may refrain from infringing judicial independence. 7) If the leader sees respect for the court as a prerequisite for his own acceptance by a global community of leaders, and he values membership in that community, then the risk of infringement may be lower. 8) If the leader and his entourage can support themselves through private business activities and do not need to control the government to earn a living, the incentive to infringe the independence of the judiciary may be lower, at least in political cases.

10

Judicial Power in Authoritarian States: The Russian Experience

Peter H. Solomon, Jr.

Like their democratic counterparts, authoritarian rulers need effective courts to perform the basic functions of courts – to resolve disputes, to impose social control, and to regulate at least aspects of public life (Shapiro 1981). At the same time, these rulers are often reluctant to endow courts with significant power in the form of politically sensitive jurisdiction and the discretion to make far-reaching choices. Yet, the record shows that some authoritarian regimes – for example, well-established or liberalizing ones – do entrust their courts with such responsibilities for holding public administration accountable, managing major commercial conflicts, and even maintaining quasi-constitutional order (Moustafa 2005; Ginsburg 2006). Under what circumstances authoritarian rulers opt for judicial power and with what risks, consequences, and compromises are questions ripe for comparative study.

This chapter examines the experience of three Russian states – Tsarist Russia (from the Judicial Reform of 1864); the USSR (including the late period of liberalization); and post-Soviet Russia (a hybrid regime that moved from electoral democracy to electoral or competitive authoritarianism). The chapter begins with two theoretical issues – (1) judicial independence and its relationship to judicial power and (2) distinctions among types of authoritarian regimes.

THEORETICAL PERSPECTIVES

At least in authoritarian states, judicial independence is not a given. Traditionally, European autocrats retained for themselves the right to dismiss judges whose decisions they disliked (until the seventeenth century, judges in England served "at the pleasure of the King"; Shapiro 1981: 91). Modern authoritarian rulers may also have ways of ridding themselves of offending judges (as was the case through most of Soviet rule), but they may also adopt

security of tenure for most of their judges. Security of tenure, good salaries, good financial support of the courts, and judicial control of key aspects of court administration are recognized as necessary conditions for judges to render impartial decisions (Russell 2001). But they may not be sufficient, especially when judicial bureaucracies create strong incentives for judges to conform to the wishes of political masters and informal institutions support this behavior.

Yet the appearance of judicial independence is essential for the legitimacy of courts. Rather than keep all courts and judges in a state of obvious dependence on the executive, an alternative approach is to place matters of importance to the regime in separate tribunals, leaving the courts with only routine civil and criminal law disputes. Under these circumstances there is little risk in granting to regular judges the protection of tenure, especially if their performance is carefully monitored and only loyal and compliant judges are given promotions. At the same time, the judges serving on the special tribunals hearing the important cases may be carefully screened and lack the protection offered by tenure. This approach was adopted in Spain in the late Franco period. The "Spanish solution" comprised giving courts considerable independence but little power (Toharia 1975).

When rulers decide to enlarge the jurisdiction or discretion of courts, they are, as Shapiro stressed, yielding power to judges. If the rulers do not like the results, they may react in various ways; for example, taking back some of the jurisdiction or discretion already given. They may also be tempted to limit judicial autonomy, if only in the name of "accountability." This can be done by strengthening the filtering procedures of the judicial bureaucracy to ensure that only cooperative judges have good careers. Or powerful actors, government or private, may try to influence what decisions judges render. Another approach on the part of rulers and elites is to ignore court decisions or fail to cooperate in their implementation, which in turn deflates the authority of courts. The Russian experience provides examples of all of these methods of limiting the autonomy of judges. Based on that experience, this chapter argues that *when rulers empower courts that were not previously independent, the results will usually be ambiguous and contested as judges face new challenges to their independence, power, or both.*

What kinds of authoritarian regimes opt for stronger courts? What distinctions can be made among non-democratic states more generally?

Empowered and autonomous courts are unlikely to appear in totalitarian states, like the USSR under mature Stalinism. Where rulers seek to control and manage the economy and limit social organization outside of the state, they are unlikely to decentralize state power away from the executive by empowering courts. Even in what Linz and Stepan call "post-totalitarian states" – that is,

weaker versions of totalitarian regimes – the same generalization applies, although there may be exceptions (e.g. Hungary in the 1970s; Linz and Stepan 1996: ch. 3).

But what about the broad range of authoritarian regimes? Tamir Moustafa proposes that a subset of "institutionalized, bureaucratic-authoritarian states" turn to the courts to address problems associated with authoritarian rule (including holding officials accountable, attracting investment, and reinforcing regime legitimacy). This suggests that older and more established authoritarian regimes are more likely to use courts than new, personalistic ones. This may be so. But the empowerment of courts may also connect to significant policy changes that call for the protection of old elites (as was the case in Tsarist Russia) or to a strategy for modernizing the economy (as in China; see Chapter 2 by Ginsburg). It may connect to liberalization, as was the case in late Soviet Russia and Mexico in the 1990s. It may also represent a legacy of incomplete, failed, or reversed democratization and become an awkward institution in a competitive authoritarian environment (as is the case in post-Soviet Russia).

The awkward truth is that there are many states where rulers aspire to the legitimation that comes from democratic practices like elections and constitutionalism, but who are unwilling to face the risk of leaving office. States that scholars now call competitive or electoral authoritarianism are becoming more common, and they are marked, as critics insist, by façade institutions and parallel political realities (Levitsky and Way, 2002; Diamond 2002; Krastev 2006; Wilson 2005). In this context, courts may acquire power in the form of jurisdiction and discretion, but find that both their authority to compel enforcement (a third dimension of power) and their independence become compromised, at least in the real world of informal practices and institutions.

TSARIST RUSSIA: COURTS AND AUTOCRACY

The Judicial Reform of 1864 instituted a revolutionary change in Russian courts, legal procedure, and the judiciary, producing independent and partially empowered courts that were incompatible with the autocratic regime with which they coexisted. The resulting tensions illustrate the limits of judicial power in an authoritarian state. As we shall see, weak versions of both administrative justice and judicial lawmaking through statutory interpretation were involved, but the challenge of industrialization did not lead to the real empowerment of courts.

Before the Judicial Reform of 1864 Russia had weak (and corrupt) courts based on social class distinctions. Judges were local notables without legal education, serving at the pleasure of officials and whose decisions were reviewed by

provincial governors. There were no public or oral trials, and judges examined criminal charges in their offices through a pure version of inquisitorial procedure. The reform established a single hierarchy of courts for the whole population and gave most judges life tenure with firing only for cause. It established as well full public and oral trials, at which the sides were to be represented by counsel, including the option of trial by jury for serious crimes. Moreover, judges gained new discretion in applying the law, including a duty to rely in part upon their conscience, and, at least in the highest courts, the right to interpret the law (Solomon 1997).

The development and adoption of the Judicial Reform of 1864 was an extraordinary event, possible only in unusual times. The context was the mounting of a whole series of reforms all emanating from and related to the emancipation of the serfs. But other ingredients also made the reform process possible. One was the presence of a small cadre of enlightened jurists in high places in the bureaucracy, individuals who promoted and helped write the reform legislation. Second, this group had the advantage of working against the background of a broad consensus that the old system of justice was an embarrassment to Russia among its European neighbors. Third, the reform was facilitated by the recognition among many of the gentry dispossessed by the Emancipation that the protection of their new property rights required strong law and courts. It was the articulation of this concern by nobles close to the Tsar that convinced Alexander II to proceed with the Judicial Reform of 1864 (Wortman 1976). This motivation is consistent with what Tamir Moustafa calls the "power preservation" explanation of judicial empowerment (Moustafa 2005: 6–9).

The 1864 reform produced a judicial system that was bound to challenge the unlimited power of the tsar. No doubt the officials who drafted the reform saw things differently. They assumed that independent courts staffed by legal specialists not only were compatible with autocratic power, but would even strengthen it by ensuring the observance of the tsar's laws. In practice, however, some judicial decisions failed to meet the interests or expectations of the tsar or his advisors, and it became clear that the law was no longer a reliable instrument of autocratic power. As a result, over the decades of implementing the reform, the tsars and their ministers tried to minimize the loss of imperial prerogatives. They decided to remove political offenses from the regular courts and place them in military courts – especially after juries acquitted Vera Zasulich who assassinated a minister in cold blood – and to introduce special emergency regimes in parts of the country. In addition to narrowing the jurisdiction of regular courts, tsarist officials took measures to keep judges in line. Thus a law in 1885 gave the Minister of Justice the right to ask judges

to explain any of their actions and to issue instructions about decisions in cases completed or procedure in future cases. The law also facilitated disciplinary proceedings against judges, increased the grounds for their removal, and allowed for the transfer of judges from one bench or court to another by the Ministry (Wagner 1976). Through these and other new powers of management, judges in Russia became subject to pressures to conform to the interests of their bureaucratic and political masters.

The 1864 reform introduced a pale version of administrative justice into Russia, and prompted many further attempts to strengthen it. Citizens gained the right to sue officials for material losses (albeit with the consent of the officials' administrative superiors), but the provincial commissions that heard these challenges consisted only of administrative officials (not judges) and since the state bore no financial liability, plaintiffs had to collect awards directly from the officials. Appeals might bring the conflicts to the First Department of the Senate, but this remained an administrative rather than a judicial body, to the dismay of Minister of Justice Zamiatnin, who in 1865 tried make it a formal site of an expanded judicial review of administrative acts. A recent study of the operation of the First Department, however, showed that its members acted as if they were judges (despite not having life tenure) and tried to keep government officials in line. It came to allow appeals from public organizations against decisions of governors that they believed infringed their rights. In 1897 Minister of Justice Muraviev tried without success to get this process disallowed. Between 1905 and 1917 the political parties of the center and right end of the spectrum sought reform of administrative justice. This provided the intellectual basis for the short-lived democratic Provisional Government of 1917 to legislate the creation of administrative courts (Pravilova 2000; Wortman 2005).

Underlying the resistance to strengthening administrative justice and the rights of citizens to sue officials was a strong belief shared by both top government officials like Pobedonostev and most legal scholars that judges should never be placed above officials of the executive (Pravilova 2000). This belief reflected both Russian experience and the civil law tradition, especially in its French version.

Officially, the civil law of the Napoleonic Code devalued and reduced to a minimum all forms of judicial discretion, and many of the new Russian jurists shared the preference for written law over legal doctrines developed by judges. But, as Martin Shapiro stressed, in applying laws, judges are forced to interpret their meaning, so that even in civil law countries top courts end up making law (Shapiro 1981: 136–143). Judges in France, according to John Merryman, developed the law of torts for that country, and, in like manner the top civil

court of Tsarist Russia, the Civil Cassation Department of the Senate, in the 1870s and 1880s had a significant impact on the law of family, property, and inheritance (Merryman 1985: 73; Wagner 1994).

Almost immediately after the Judicial Reform of 1864, the Civil Cassation Department asserted that lower courts were obliged to adhere to its published interpretations of the law (whether in directives or cases) in all similar cases – this as a natural extension of its duty to interpret the law and to ensure uniformity. Many legal scholars objected that this principle was not based on law and was dangerous, but lower courts generally observed the precedents, if grudgingly, because they respected the department, recognized the need for uniformity, and feared the loss of time if forced to rehear cases after cassation reviews.

The Civil Cassation Department used this new power for the practical purpose of improving the situation of women who separated from their husbands. The law was heavily biased against them, with divorce very difficult to obtain and separation almost forbidden and imposing no obligation on the husband to support the wife. In a series of decisions in the 1870s and 1880s the Civil Cassation Department held first that spouses could agree to live separately as long as the courts held the reasons to be valid and there was no intent on permanence, and then that lower courts could award the wife support despite the husband's insistence that he wanted to live with her, as long as the courts found the conduct of the husband warranted such action. To be sure, the rulings were applied by lower courts inconsistently, and they were resisted by the Holy Synod. Only in 1914 was the legislation revised, despite many commissions and projects (Wagner 1994).

The last decades of Tsarist rule represented a period of intensive economic development in Russia, including the building of railroads, mines, metallurgy and metal plants, and arms production. Since part of the investment came from the private sector, including foreign sources, one might have expected some efforts to improve the protection of property rights through strengthening the role of courts in commercial disputes. It does not appear that this happened. As of the turn of the century commercial courts operated in Moscow, St. Petersburg, Odessa, and Warsaw. In addition, some disputes were also heard in regular courts; others in the large cities were handled through mediation. In 1903 a new Statute on Court Procedure in Commercial Matters was issued, but it is unclear with what intent or impact (Kleandrov 2001). Whatever the role of courts, high-ranking officials in relevant ministries did not respect laws and court decisions. They insisted, for example, on confirming corporate charters through separate laws that sometimes contradicted the general laws governing this matter. To the eminent jurist Petrazhitskii (writing in 1898) corporate law

in Russia was marked by "bureaucratic arbitrariness." Many rules complicated the conduct of affairs, and officials had the discretion to decide when and how to apply them. The role of courts was so marginal that the major Western study of Tsarist law on corporations does not mention them! What it does record is a fundamental conflict between the Tsarist bureaucrats and the axioms of corporate culture (Owen 1991).

Overall, though, the story of courts in late Tsarist Russia is distinguished by the degree of independence achieved by judges despite the political system. The reluctance to establish administrative justice, the limited role of judicial interpretation in lawmaking, and the absence of a major role for courts in the commercial realm reflected the continuing suspicion of courts among Tsarist administrators and their unwillingness to cede significant power to anyone (Popova 2005).

COURTS IN THE SERVICE OF THE REGIME: JUDICIAL POWER IN THE USSR

For the most part the Soviet period in the history of Russia did not witness the empowerment of courts. Neither constitutional nor administrative justice developed to any significant degree – although versions of both existed in particular periods, and once the economy became largely state owned and administered, courts played a minor role in its regulation. Still, the period is not without interest. When an authoritarian regime aims at the monopolization of political and economic power, it still needs mechanisms for managing its officials and resolving conflicts among them. Major substitutes for courts – the Procuracy and state and agency *arbitrazh* – demonstrate this need. Moreover, even within a would-be totalitarian political order, there were places for limited versions of administrative justice and the use of constitutions in regime legitimation, albeit as a secondary matter. Of course, the last years of Soviet power under Mikhail Gorbachev stand out as a time of liberalization and democratization, and in this context the regime took major initiatives both to secure judicial independence and empower the courts. I deal with this period separately.

The Revolution of 1917 brought to the seats of power Bolsheviks whose attitudes toward law, courts, and lawyers were ambivalent if not negative. While many of them remained attached to the ideal of a society administered without the cumbersome and biased legal institutions of capitalism, most Bolshevik leaders, especially Vladimir Lenin, quickly accepted the utility of law as an instrument of rule and sought to develop law and courts to serve the new regime. A crucial part of this project was ensuring that judges would be loyal, if not also committed to the new order. What progress had been made

under the tsars toward the entrenchment of judicial independence was for the most part reversed by the new Soviet regime, and the traditional autocratic subordination of law to political power was restored. Judicial appointments involved approvals by party officials, and terms in office for judges at all levels were of limited duration, thereby making the question of reappointment (at times in the form of denomination for uncontested election) also subject to political vetting. The system of financing courts mainly from local budgets rather than a central one further reinforced the dependence of judges upon politicians in their bailiwicks and helped assure their cooperation with their political masters. Finally, the strong instrumental conception of law left little place for attachment to the ideal of judicial independence, even though it was declared in the 1936 Constitution. Judges were expected at all times to pay heed to the political demands of the moment (expressed in criminal policy or in recommendations from party officials), while maintaining a public face of impartiality to enhance the court's prestige.

A defining feature of the Bolshevik approach to the administration of justice was the preference for cadres who were loyal over those who were expert. Throughout Soviet history the leaders preferred party members to nonparty members for appointments as judge or procurator, and until the mid-1930s saw little virtue in legal education for legal officials. In fact, most legal officials in the 1920s and 1930s lacked even general secondary education, let alone advanced legal training. In the mid-1930s Stalin and his colleagues decided that competency in law did matter after all and planned an expansion of legal education to produce jurists for the courts, but the fulfilment of this new policy came only after World War II. Even then, the norm was to provide first secondary and then higher legal education by correspondence to the investigators, procurators, and judges of the day; only a small number of well-trained jurists became legal officials. This pattern helped assure that officials who made careers in the legal agencies in the postwar years would not be infected with legal ideals that might threaten their inclination to conform with the expectations of their superiors.

Courts and judges retained the core jurisdiction that they had had under the tsars – that is, over criminal and civil disputes – and in these matters were given considerable discretion. Increasingly, the regime channeled this discretion, and through Supreme Court directives and policy statements outside the law told judges how they were expected to behave. Especially in the years before World War II, judges did not always comply with expectations, but instead made decisions in accordance with their sense of justice. Authorities sometimes viewed this conduct as resistance, and punished judges accordingly (Solomon 1996).