RULE BY LAW

The Politics of Courts in Authoritarian Regimes

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recent times moved across the boundary in each direction, are currently firmly on one side and offer courts and democratization as a historical subject rather than one of current concern. One way or another, however, the study of courts and democracy will inevitably entangle us with courts and authoritarianism.

So long as students of law and courts wore constitutional judicial review blinders, they could plausibly believe that even if their attention were drawn to courts in authoritarian regimes, there would really be no there there. As in the former Soviet Union constitutional judicial review would be merely a formal facade unworthy of study by those concerned with real politics. Once the blinders are removed, however, even in authoritarian regimes in which constitutional judicial review is insignificant, other aspects of law and courts may be politically relevant. Administrative judicial review – that is, the judicial oversight of whether administrative agencies have acted according to the statutory law – may be significant even, or especially, to regimes that have enacted statutes authoritarianly. The current Chinese fetish with courts and the rule of law is a dramatic example. Beyond judicial review, authoritarian regimes anxious for foreign investment may, à la the World Bank and IMF, support effective judiciaries for property, contract, and a wide range of other litigation of commercial concern. Once this floodgate is open we are reminded that imperial Rome, China, and Japan, and the numerous nineteenth- and twentieth-century European empires that were democratic at home and authoritarian in their overseas possessions, imposed relatively effective courts on their subjects. Indeed it can be argued that all political regimes, authoritarian and otherwise, will be inclined to institutionalize triadic conflict resolution arrangements simply because their private sectors will do better if such arrangements exist, and once they exist, courts necessarily will do some public policymaking.

This project actually reproduces much of the evolution of the field of study. There remains a heavy emphasis on constitutional courts and constitutional judicial review, but with a new alertness to administrative review. Inevitably, however, there is movement on to criminal, property, and contract law. "Inevitably," because human rights concerns are often expressed in terms of criminal prosecutions of rights violators and because economic development concerns are keyed to property and commercial law. The association of courts with rights protection is the central focus of most of these studies, but a few deal with constitutional division of powers questions and some with services that judges provide to authoritarian regimes that have nothing to do with or are antithetical to rights. Some of the studies are of polities that lie somewhere within the hazy border zone between authoritarian and

democratizing, others of regimes that historically have passed back and forth over the boundary, and some of relatively long-term authoritarianisms.

Juridification and judicialization have become extremely fashionable terms in comparative law and courts studies. Those terms imply that courts did not do much politics yesterday, but do a lot today. And surely there was some real global spread of and increased significance of judicial interventions in public policymaking in the latter half of the twentieth century and beyond. Yet one is tempted to say that the word "juridification" applies more aptly to the study of comparative politics than to the actual politics being studied. To a very large degree it is not so much that courts do more now as that students of politics now see more of what courts do. It would be impossible to argue that common law courts and the civil law courts that for more than a century have been "interpreting" the relatively static language of the national codes have not been making a lot of public policy for a long time. It was just that comparative politics scholars chose to remain fundamentally ignorant of such lawmaking activity. The geographic spread of high-visibility, new constitutional courts, the global fervor over rights, and the central role of the Court of Justice in the development of the European Union, which comparativists could hardly ignore, have led to the judicialization of the field of comparative politics and the comparativization of the field of law and courts. This project, studying courts in what is usually perceived as their least favorable terrain, is a polar expedition in the new political geography of courts.

THE RULE OF LAW

Central to this polarism is a careful reexamination of the rule of law or due process of law. Vital to understanding why courts may be far more than a facade even in regimes that have no regard for rights is that we conflate two norms when speaking of the rule of law. The first is that the powers that be shall rule by, and themselves obey, enacted, general rules, and that they shall change their policies by changing those rules rather than by arbitrary deviations for or against particular persons. The second is that there is a core of individual human rights inherent in law itself, so that the rule of law must include the protection of rights. Central to this volume are two propositions. The first is that authoritarian regimes with no real allegiance to rights may, nevertheless, wish to pledge themselves, or at least their subordinate agents, to the rule of law in the first sense and to institutionalize courts as guarantors of that pledge. They may wish to do so because, quite apart from rights, they see some advantage to themselves in doing so. The second is that precisely

because of the deep, long-standing, and universal association of the rule of law with individual rights, in authoritarian regimes that subscribe to that first sense of rule-of-law courts, such courts enjoy a certain potential for introducing at least some marginal protections for rights. Both of these propositions may be stated as hypotheses – the second probably far more problematic than the first.

THE DEVELOPMENT AND RIGHTS STORY

In a sense this volume is designed to test a story much touted by various purveyors of economic and political development strategies. The story runs as follows. Anxious to attract foreign investment, authoritarian regimes can be persuaded to institutionalize relatively independent and effective courts to assure investors of legal protections. Moreover written constitutions with some sort of bill of rights have become almost like national flags as an integral symbol of national sovereignty for all states, including authoritarian regimes that have no intention of doing anything other than waving them in the international arena. Because they provide an authoritarian regime benefits in terms of assuring international investors, such a regime will begin to tolerate, indeed encourage, judicial decisions protecting property rights. From that base the courts can and will move on incrementally to protect the human rights enshrined in the national constitution and supported by the international fervor for human rights. Even an authoritarian regime hostile to human rights will then let courts get away with an increasing level of even nonproperty rights protections because it wishes to maintain the competitive investment attraction advantages it receives from a property-protecting independent judiciary.

This project calls that story deeply into question. First, authoritarian regimes have a wide variety of tools, richly illustrated in our studies, for controlling judiciaries even while maintaining some facade of judicial independence for them. In particular, even courts seemingly devoted to defending the rule of law may faithfully serve an authoritarian regime that is making the law the rule of which the courts are protecting. In authoritarian regimes, either by compulsion or conviction, judges can independently and effectively pursue rule of law in the sense of government obedience to its own rules without acknowledging rights endowed with priority over those rules. In such situations an independent judiciary may not only be an ineffective rights protector against an authoritarian legislator but may even serve as an instrument of rights suppressions legislated by the regime.

Perhaps just as centrally, international investors may indeed be attracted by an independent, property-right-protecting judiciary but be quite content that

the authoritarian state in which they are investing prevents courts from moving on from property rights to other rights. Indeed where anticipated returns on investment are high enough, or where a high enough risk premium can be extracted, foreign investors may plunge in with little or no assurance of legal protections, even in the face of considerable extortion, and without much concern about rights violations, property or otherwise.

OF INDIVIDUALS AND INSTITUTIONS

Like most efforts at the "new institutionalism" this project also points out that individual ideologies and skills as well as institutional design may be crucial to what actually happens. Even if we believe that there is a kind of inherent inclination of courts toward the protection of rights, and that belief is far from certain, independent judges may only defend rights if they want to. Here notions of formalism or positivism are often invoked. It is said that judges educated in a traditional positivist or formalist legal tradition, and thus seeing themselves as mere servants of the commands of the statutory law enacted by the legislature, will not intervene to protect individual rights against legislative incursion even if courts are quite independent. This argument arises in a number of our studies, but is somewhat problematic. Where there is a constitution with a bill of rights and formal provisions for judicial enforcement of that bill of rights, then positivist formalism would require that the judge enforce this command of the higher law to invalidate conflicting lower, that is statutory, law. The arch-positivist, Hans Kelsen, is as much a father of constitutional judicial review as is John Marshall. It is not positivism or formalism itself that intrinsically counsels judicial deference to statutes in legal regimes that formally command the courts to positively subordinate statutory to constitutional commands. Instead we must ask whether or why a formalist or positivist legal tradition has, in a particular national judiciary, turned into a perceived judicial duty to serve the legislature or the executive.

A large number of our studies involve transitions from relatively liberal democratic to authoritarian regimes and sometimes back toward democracy again. In some instances new constitutions and codes are written. In others the old ones are maintained as mere facades. Very often a kind of due process, rule-of-law constitutionalism is maintained in general, but special areas of military tribunals or simply "disappearances" are carved out. A relatively independent judiciary may be preserved but simply excluded from domains significant to the authoritarian regime. This strategy is one of the many authoritarian resources alluded to earlier. Where the strategy is not used, however, the issue of positivism or formalism does arise. How do judges who value their duty to

the rule of law, or to judicial independence, or to staying out of politics and sticking to law, respond to changes from democratic to authoritarian regimes? This question may be more about the minds of the judges than the design of institutions.

At the most individual and least institutional level of all are questions of prudence and leadership. An authoritarian regime may choose to establish or maintain an inherited, relatively independent, effective judiciary. It may allow that judiciary some human rights leeway. The judges may define the judicial role to include some judicial review of government actions. Nevertheless, no effective judicial protection of rights may occur unless one or more judges combine significant leadership in moving their fellows in the rights direction with a sufficient sense of political strategy. This combination is well illustrated for nonauthoritarian states by John Marshall. A sense of when and where and how more or less incrementally a particular court can move to restrain a regime without triggering damaging or devastating reprisal is essential even in liberal democracies and all the more so in authoritarian states. And the ability to form winning coalitions among judicial colleagues becomes important precisely when and where the judges are relatively free of outside control. No matter what the institutional design, effective, rights-oriented judicial leadership and political prudence may or may not pop up in the courts of any particular authoritarian regime at any particular time.

JUDGES AND SOLDIERS

A number of the studies presented here highlight the relationship between courts and the military. It might appear obvious, and indeed is sometimes obviously true, that military, or military-backed, authoritarianisms will be hostile to judiciaries that attempt to restrain them and vice versa. Our studies also suggest, however, that a certain affinity or even alliance may sometimes arise between two professional corps, each respecting the other's professional integrity. That alliance may move the judges to greater tolerance of security rationales for government actions, or greater regime tolerance of judicial interventions, or both simultaneously.

CONVERGENCE

Not so much as a finding as an issue, convergence is a leitmotif of comparative studies. The responses of democratic states to terrorism almost automatically court convergence rhetoric when the topic is authoritarian states. Such rhetoric is all the more likely when the comparativists involved are law and

courts specialists vitally concerned with human or constitutional rights but not particularly knowledgeable about matters criminal. So the convergence issue will simmer in any effort such as this one.

Scholarly specialists may be at the cutting edge of their own area of specialization, as I have argued the contributors to this project are. Often, however, they are prone to a certain uncritical acceptance of clichés when they borrow from adjoining fields. It is quite easy for those who are not criminal law specialists to readily accept the most conventional, received views of criminal due process or rule of law as defining the appropriate substance of constitutional rights in all circumstances.

The conventional model of criminal due process or rule of law has been elaborated from a particular prototype of the criminal. That criminal operates alone, lacks resources, and repeatedly commits the same crime until he or she is eventually caught, so that if not convicted at the first prosecution, will be by the second or third. Each of the individual crimes costs society relatively little, so that society can afford to wait until the odds on apprehension and conviction catch up with the criminal. Once apprehended, criminals necessarily cease criminal activity and lose any control they had over the prosecution's capacity to make the case against them.

In spite of our continuing allegiance to the conventional criminal due process model, we have learned that the model, unmodified, will not work when the criminal is not prototypic but instead consists of a large number of well-organized, high-resourced criminals who devote a large part of those resources to avoiding discovery and apprehension and can continue the organization's criminal activities, including denying the prosecution the evidence it needs, even after many of its leaders are apprehended. Such criminal organizations commit crimes so massive that society cannot easily contemplate their frequent repetition. Standard criminal due process does not work for organized crime, large-scale drug dealers, street gangs, and corporations. Standard search warrant requirements and uniformed-only police leave crack houses in operation. Prospective witnesses against incarcerated gang members are intimidated by unincarcerated gang members. Corporations hone their skills at deniability of knowledge and intent. Drug lords literally and otherwise fly under the radar. Whole neighborhoods become war zones.

We have acknowledged all this by RICO statutes, modifications in the law of criminal conspiracy, relaxations of the legal definition of entrapment, the employment of highly invasive surveillance techniques, no-knock search warrants, confiscation of property employed in alleged crimes under less than beyond reasonable doubt standards, suspended prosecutions of corporations on the condition that they accept court-appointed monitors, consent decrees,

and many other devices that modify standard criminal due process where the defendant is not your standard burglar or convenience store bandit.

Terrorists are not your standard convenience store bandit. Modification of criminal due process to meet the deadly facts of terrorism is not well analyzed or evaluated under a convergence with authoritarianism banner. Indeed to pose the issue as a stark choice between conventional criminal due process or rule of law on the one hand or authoritarianism on the other would do enormous damage to the cause of constitutional rights in democracies. For there is little question of what choice the demos will make if they are forced to choose between a conventional rule of law ineffective against terrorism and a non-rule of law that is effective. Rather than rule of law and authoritarian banners and slogans, a careful, fact-oriented examination of exactly what devices and practices will achieve precisely what balance between individual rights and effective antiterrorism would best serve those interested in protecting constitutional rights. Nothing will serve authoritarianism better than greeting every attempt to deal with terror as authoritarian convergence.

THE LEGITIMACY PARADOX

A number of our studies also bring forward a catch-22 for courts in authoritarian regimes, particularly where such regimes have replaced more democratic ones and promise eventually to return to democracy. Usurping authoritarians may preserve the formal constitutional position, structure, and even personnel of the relatively independent courts of the previous, more democratic regime. An authoritarian regime may purport to establish an independent judiciary. Given the global appeal of "human rights," with its tendency to associate rights with courts, any set of supposedly or really independent courts is likely to enjoy a certain perceived legitimacy. If the courts challenge the authoritarian regime in which they are embedded to the extent that the regime openly ignores or controls them, they lose that legitimacy, which is about their only resource and defense against the authoritarians. If, however, they placate the regime excessively, they will undermine any public perception of their independence and thus lose their perceived legitimacy. If they manage things just right and maintain some perceived legitimacy, they lend that legitimacy to the authoritarian regime of which they are a part precisely because they are a part of it.

Faced with this conundrum many judges may feel that it is best to wait and fight another day. It may be particularly appealing to argue that "staying out of politics," even at the cost of passively lending a gloss of legitimacy to an authoritarian regime, may preserve a national tradition of judicial independence

through an authoritarian interlude and assist it to flourish fully again upon the hoped-for coming transition to democracy. Or judges may conclude that avoiding the risks entailed in challenging government now, while providing independent conflict resolution in purely private disputes, is a first step toward democratization. Yet, particularly where constitutional judicial review is formally mandated, judicial passivity almost inevitably is read as judicial approval. While there are some devices for doing so, it is hard for a court that has a formal duty to say that something is or is not constitutional, or even just lawful, to refuse to intervene against allegedly unconstitutional or unlawful government acts without, at the very least tacitly, proclaiming the legitimacy of such acts. In this situation a court process risks either de-legitimating itself as an institution by challenging the government and then being crushed by it or legitimating their authoritarians.

COURTS AND REGIMES

Finally any reader of the detailed reports presented here is likely to be impressed by the fragility of courts and their dependence on regime-wide phenomena. The dynamics of courts in any particular polity are probably overdetermined, flowing from multiple and complex causes, many of which are neither directly nor obviously related to courts. In authoritarian regimes probably few political effects can be traced to particular judicial causes. In such regimes, of course, some particular judicial outcomes may be openly and brutally related to particular acts of the power holders. In at least some authoritarian regimes, however, the overall activism or passivity of the judiciary, or its level of activity in rights protection, may be complex and changing and depend at any given moment not only on institutional design but on a whole constellation of political forces and personal proclivities. In some authoritarian regimes at some times there would appear to be real judicial politics as opposed to total judicial subservience. If such a conclusion can be drawn from this project, then it has justified itself and further investigation of its subject.

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