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978-0-521-72041-0 - Rule by Law: The Politics of Courts in Authoritarian Regimes

Edited by Tom Ginsburg and Tamir Moustafa

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Introduction: The Functions of Courts in Authoritarian Politics

Tamir Moustafa and Tom Ginsburg

Two decades ago, Martin Shapiro urged public law scholars to expand their horizons and begin studying “any public law other than constitutional law, any court other than the Supreme Court, any public lawmaker other than the judge, and any country other than the United States” (Shapiro 1989). Shapiro recognized that American public law scholarship stood at the margins of political science because it did not adequately engage the broad questions in the field. Perhaps more importantly, Shapiro recognized that judicial institutions had become important political players in a number of countries and that a “judicialization of politics” was on the advance across much of the world.

Since Shapiro’s first call for more comparative scholarship, there has been an explosion in the judicial politics literature focused on a variety of regions and themes, including the role of courts in democratizing countries, the relationship between law and social movements, and the judicialization of international politics. However, there has been relatively little research on the dynamics of judicial politics in non-democracies.¹ This gap in the literature is likely the result of a long-standing presumption among many political scientists that courts in authoritarian regimes serve as mere pawns of their rulers, and that they therefore lack any independent influence in political life.

Note: This introduction includes material from *The Struggle for Constitutional Power: Law, Politics, and Economic Development in Egypt* by Tamir Moustafa (Cambridge University Press, 2007). For a more detailed elaboration of the theoretical framework undergirding this introduction, see Chapter 2, “The Politics of Domination: Law and Resistance in Authoritarian States.”

¹ This is somewhat puzzling given the longstanding view among some scholars that judicial policymaking is antidemocratic (Dahl 1957, Hirschl 2004). The normative debate over judicial governance in democratic theory indirectly suggests certain affinities between governance by judiciary and nondemocratic regimes. After all, if courts constrain majorities, perhaps they may be useful for regimes that have no interest at all in democracy.

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Yet, as many of the contributors to this volume have demonstrated elsewhere (Barros 2002, Hilbink 2007, Moustafa 2007, Pereira 2005, Solomon 1996), the empirical reality in many authoritarian regimes cuts against this conventional wisdom.

Through a range of case studies and more general chapters, this volume explores the conditions under which authoritarian rulers delegate decision-making to judiciaries and the political consequences of that choice. The approach is institutionalist in character in that it does not presume the reach of law and courts, but views the scope of judicial authority and power as a target for inquiry (Ginsburg and Kagan 2005). This introduction raises some issues related to understanding courts in authoritarian politics, themes that are elaborated in the chapters that follow.

WHY STUDY COURTS IN AUTHORITARIAN REGIMES?

Our project should be viewed as a contribution to the burgeoning literature on the judicialization of politics (Tate and Vallinder 1995; Shapiro and Stone 2002; Sieder, Schjolden, and Angell 2005). In many different countries, the scope and impact of judicial authority are expanding, and judges are making decisions that were previously reserved for majoritarian institutions. But while the focus to date has been on democracies, we should not assume that judicial institutions are irrelevant to political life in authoritarian polities.

Our inquiry is, alas, particularly timely. The 1990s notion of the Washington Consensus, namely that democracy, markets, and the rule of law all would develop in unison, looks hopelessly naïve a decade later. At this writing, leftist populism is on the rise in Latin America; Russia and most of the former Soviet republics are best characterized as illiberal democracies, if not openly authoritarian; “Market-Leninism” is alive and well in China and the rest of socialist Asia; most of the Middle East remains unfree; and most African states alternate between unconsolidated democracy and soft authoritarianism. Yet, as we demonstrate in the chapters to come, many of these states exhibit an increasingly prominent role for judicial institutions. Courts are often used to advance the interests of authoritarian regimes, and yet paradoxically, they are also sometimes transformed into important sites of political resistance. In a surprising number of cases, courts become the focal point of state-society contention, resulting in a “judicialization of authoritarian politics” (Moustafa 2003, 2007). Simply put, courts should be studied in authoritarian states because they matter to political life. With more than half of all states categorized as authoritarian or semi-authoritarian and more headed in that direction, it is

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crucial for us to get a grip on the reality of judicial politics in nondemocratic environments.²

A second reason for taking courts in authoritarian regimes seriously is that they provide a useful lens through which to examine a variety of political dynamics in an environment that is otherwise distinguished by a lack of transparency. The public nature of judicial process and the paper trail that courts provide opens a point of access into internal regime dynamics and state-society contention, even if the legal process requires some interpretation. For example, in his study in this volume (see Chapter 8), Pierre Landry uses surveys of court use to illustrate general patterns of norm diffusion in post-Mao China. The Chinese regime has made the rule of law a central component of its legitimization strategy (Peerenboom 2002) and was supportive of Landry's research. What we learn is that political resources like party membership matter with regard to propensities to use government institutions, even in a formally neutral setting such as courts.

A third reason to examine courts in authoritarian regimes is to learn more about the expansion and contraction of judicial power generally. Robert Barros (Chapter 6) argues that the weakness of judicial institutions in the face of rising authoritarianism in 1970s Chile and Argentina illustrates the general problems that courts face when exercising their functions in contexts in which rulers centralize previously separated powers or remove matters from ordinary court jurisdiction. In those military dictatorships, courts were scarcely able to serve as the last bastion for upholding rights when the rest of the constitutional order had been marginalized. Courts need specific institutional configurations and social support to fulfill their missions. By looking at the extreme environment of a dictatorship, then, we may better understand the limited ability of courts to safeguard individual rights and the rules of the political game in democracies facing extraordinary circumstances. Similarly, several of our chapters address the question of whether we are witnessing a "convergence" between authoritarian and democratic regimes in the post-9/11 world. Although our contributors come down on different sides of this debate, the rich discussion underlines the fact that courts in authoritarian regimes provide a useful testing ground for hypotheses on the expansion and contraction of judicial power generally.

² Freedom House, *Freedom in the World* 2006. Twenty-four percent of all countries comprising 36 percent of the world's population were categorized as "not free." An additional 30 percent of all countries comprising 18 percent of the world's population were categorized as "partly free."

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THE FUNCTIONS OF COURTS IN AUTHORITARIAN REGIMES

What motivates state leaders to establish judicial institutions with varying degrees of autonomy? Following Moustafa (2007) we identify five primary functions of courts in authoritarian states. Courts are used to (1) establish social control and sideline political opponents, (2) bolster a regime's claim to "legal" legitimacy, (3) strengthen administrative compliance within the state's own bureaucratic machinery and solve coordination problems among competing factions within the regime, (4) facilitate trade and investment, and (5) implement controversial policies so as to allow political distance from core elements of the regime.³ This section describes each function in turn.

Social Control

The most obvious role played by courts in authoritarian systems is that of exercising social control (Shapiro 1981). The core criminal law function is the central mechanism for this task, but there are a variety of parallel instruments that can be used to accomplish these goals – for example, the ordinary or secret police, paramilitary units, and other components of the security apparatus. One dimension on which authoritarian regimes differ is which of these organizations are relied upon to maintain order and to sideline political opponents.⁴ Thus, a crucial variable is the scope of judicial involvement. The common technique of establishing special security courts shows that authoritarian regimes exercise control over scope by channeling different types of cases to different arenas (Toharia 1975).

Even when courts are used for social control, they vary a good deal in the extent to which they enjoy real autonomy. Stalinist show trials – though a tiny part of the criminal caseload of Soviet judges – utilized courts for political education and the statement of regime policies, employing the form of law without any autonomy given to courts. But other regimes may be less willing or able to dictate outcomes in individual cases. One might categorize the levels of autonomy of courts involved in implementing regime policies, ranging from pure instruments in which outcomes and punishment are foreordained to situations of relative autonomy in which courts can find defendants innocent.

³ These are in addition to the routine and universal function of conflict resolution in low-level disputes (Shapiro 1981).

⁴ Perlmuter's (1981) typology of authoritarian regimes highlights this in its threefold structural categorization: single authoritarian party, bureaucratic-military complex, and parallel and auxiliary structures of domination, such as police and paramilitary. Perlmuter believes that all authoritarian leaders rely on one or another of these mechanisms as the primary instrument of control.

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The contribution here by Anthony Pereira (Chapter 1) highlights these dimensions of scope and autonomy. Pereira examines three contemporaneous military dictatorships in Latin America, which varied widely in their willingness to use the regular judiciary to sideline political opponents. Where courts showed deference to the regime, political cases were routed through the regular judiciary and repression was therefore routinized and somewhat domesticated. Where judicial-military relations were poor, on the other hand, violence was extralegal in character, with much more lethal and arbitrary consequences. Brazil, and to a lesser extent, Chile, fit the first pattern; judicial autonomy was reduced significantly, but courts were used extensively to sideline regime opponents. In Argentina, on the other hand, courts retained a greater degree of autonomy, but their scope of action was sharply reduced and state violence took on an extrajudicial dimension. The degree of judicialization matters for *how* power is exercised in authoritarian regimes, and for the fate of regime opponents.

Courts are also used to maintain social control in a broader, more political sense. Hootan Shambayati's contribution to this volume (Chapter 11) illustrates how regimes with a mixture of elected and unelected bodies use judicial institutions to check the popular will. Turkey and Iran, two countries that are in one sense diametric opposites of one another (the first being a fiercely secular regime and the latter a self-proclaimed theocracy), share a core political dynamic. In Turkey, the secular power elite used unelected judicial institutions to check the Islamist AK Party, which controls the Turkish Grand National Assembly. In Iran, the religious power elite similarly used unelected judicial institutions to effectively check majoritarian institutions that were controlled by reform-oriented politicians. In both cases, courts served as the linchpin of regime control over the popular will.

Legitimation

Legitimacy is important even for authoritarian regimes, if only to economize on the use of force that is also a component of maintaining power. Without the possibility of legitimation at the ballot box, authoritarian rulers often seek to justify their continued rule through the achievement of substantive outcomes, such as income redistribution, land reform, economic growth or political stability in post-conflict environments. But to various degrees, authoritarian rulers may also attempt to make up for their questionable legitimacy by preserving judicial institutions that give the image, if not the full effect, of constraints on arbitrary rule. In Pakistan, for example, judges have reluctantly, but repeatedly, legalized the right of military leaders to rule after coups

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(Mahmud 1993). Similarly, after seizing control and declaring martial law in the Philippines in 1972, Ferdinand Marcos cracked down on political opponents and attacked civil society, but left the courts open. Marcos reassured the public that “the judiciary shall continue to function in accordance with its present organization and personnel” and that his new government would have effective “checks and balances,” which would be enforced by the Supreme Court in a new framework of “constitutional authoritarianism” (Del Carmen 1973: 1050). The veneer of legal legitimation is valuable to authoritarians, and may in fact bolster their image among certain constituencies.

Sometimes the target of legitimation is external rather than internal. When confronted with the threat of Western colonialism in the late nineteenth century, Japan’s rulers engineered a program of forced modernization that was phenomenally successful. Since the Western powers had forced unequal treaties on Japan through a characterization of Japan’s legal system as barbaric, nationalist elites made law the very center of their reform efforts. But in practice, with the political economy organized around state intervention and late development to catch up with the West, law received much less emphasis as a means of social ordering – instead it provided a kind of formal legitimacy to demonstrate to other nation-states that Japan was a member of the club of modernity. Similarly, authoritarian regimes in postwar Korea and Taiwan, dependent like Marcos on the security relationship with the United States, kept an appearance of formal constitutional legality. Courts were relatively autonomous, but the scope of their activity was carefully circumscribed. This staged deference to liberal legality was essential in the Cold War environment.

In many cases, authoritarian regimes switch to the rule of law as a legitimizing narrative only after the failure of their initial policy objectives or after popular support for the regime has faded. Tamir Moustafa’s contribution here (Chapter 5) highlights how Anwar Sadat used rule-of-law rhetoric in Egypt to overcome a tremendous legitimacy deficit left by the failures of Nasserism. In his study in this volume, Pierre Landry (Chapter 8) similarly illustrates how the legal system in post-Mao China has been used to build regime legitimacy for the central government. For such legitimizing functions to succeed, however, judicial institutions must enjoy some degree of real autonomy from the executive, and they must, at least on occasion, strike against the expressed will of the regime. As E. P. Thompson (1975) famously noted, “the essential precondition for the effectiveness of law, in its function as ideology, is that it shall display an independence from gross manipulation.” Otherwise, legal institutions “will mask nothing, legitimize nothing.” However, the more a regime relies on rule-of-law rhetoric, the greater the opportunity for litigants

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and judges to expose the shortcomings of the government. This creates a core tension between empowerment and control of courts.

Controlling Administrative Agents and Maintaining Elite Cohesion

Another reason to empower courts is to discipline administrative agents of the state. As elaborated in this volume by Tom Ginsburg (Chapter 2), all rulers face the problem of controlling their inferiors, who have superior information but little incentive to share it. These problems may be particularly severe in authoritarian states. Although authoritarian bureaucracies may not have such niceties as civil service protections to insulate them from direct political pressure from above, accurate information on bureaucratic misdeeds is even more difficult for authoritarian regimes to collect because the typical mechanisms for discovery, such as a free press or interest groups that monitor government behavior, are suppressed to varying degrees. Courts can provide a useful mechanism by which rulers gain information on the behavior of their bureaucratic subordinates.

These dynamics are clearly at play in a number of the cases here. Ginsburg describes how the Chinese Communist Party turned to administrative law as ideology waned and conventional tools of hierarchical control became less effective (see also Solomon 2004). Jennifer Widner (2001; Chapter 9) observes the same dynamic in several East African countries both before and after the region's democratic transitions, illustrating the utility of administrative courts for enhancing bureaucratic compliance in both democratic *and* authoritarian regimes. According to Widner (2001: 363), "opportunities to develop judicial independence arose as leaders grew concerned about corruption within the ranks of the ruling parties or with arbitrariness and excess on the part of lower officials whose actions they could not supervise directly. The ability of private parties or prosecutors to bring complaints against wayward civil servants and party members in independent courts helped reduce the need for senior politicians to monitor and cajole." Similarly, Beatriz Magaloni's contribution here (Chapter 7) describes how, during the seven-decade stretch of single-party rule in Mexico, citizens were encouraged to use the judicial mechanism of *amparo* to challenge arbitrary applications by individual bureaucrats without threatening the underlying policy. Finally, Moustafa (Chapter 5) traces how the administrative court system was vastly expanded by the Egyptian regime beginning in the 1970s in order to restore discipline to a rapidly expanding and increasingly unwieldy bureaucracy. In all of these cases the ruling parties did not provide recourse to judicial institutions out of benevolence. Rather, regimes structured these mechanisms to better institutionalize their

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rule and to strengthen discipline within their states' burgeoning administrative hierarchies.

A variant of this logic is found in situations in which judicial institutions are used to formalize ad hoc power sharing arrangements among regime elites. Maintaining cohesion within the ruling coalition is a formidable challenge, and elite-level cleavages require careful management to prevent any one faction from dominating the others.⁵ As with control of administrative agents, judicial mechanisms can be employed to mitigate fragmentation within the ruling apparatus.

Pinochet's Chile provides the most lucid example of how constitutions have been used to formalize pacts among competing factions within authoritarian regimes and how judicial institutions are sometimes used to balance the competing interests among those factions. According to Barros (2002), the 1980 Chilean Constitution represented a compromise among the four branches of the military, which were organized along distinct, corporatist lines with strong, cohesive interests, whereas the 1981 *Tribunal Constitucional* provided a mechanism that enabled military commanders to arbitrate their differences in light of the 1980 document. This institution, perhaps in unanticipated ways, therefore played a major role in maintaining cohesion among the military and in consolidating the 1980 Constitution.

Credible Commitments in the Economic Sphere

The central dilemma of market-based economies is that any state strong enough to ensure protection of property rights is also strong enough to intrude on them (Weingast 1995). Governments must therefore ensure that their promises not to interfere with capital are credible and that they will not renege when politically convenient later on. Establishing autonomous institutions is a common strategy to ensure credible and enduring policies in the economic sphere – in monetary policy, securities regulation, and other areas. Autonomous courts are one variant of this strategy. As elaborated by Hilton Root and Karen May in this volume (Chapter 12), by establishing a neutral institution to monitor and punish violations of property rights, the state can make credible its promise to keep its hands off. Autonomous courts allow economic actors to challenge government action, raising the cost of political

⁵ O'Donnell and Schmitter (1986: 19) observe that “there is no transition whose beginning is not the consequence – direct or indirect – of important divisions within the authoritarian regime itself.” Similar arguments can be found in a number of other studies including Haggard and Kaufman (1995), Huntington (1991), and Rustow (1970).

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interference with economic activity. Root and May emphasize that there is no necessary connection between the empowerment of the courts and the ultimate liberalization of the political system.

Different regimes may be differently situated with regard to the ability of courts to provide credibility. Authoritarian judiciaries vary in their initial endowment of quality, and utilizing courts to make commitments credible may be easier in postcolonial Hong Kong than in, say, Cambodia or Vietnam. *Ceteris paribus*, there may be a greater incentive to utilize courts when preexisting levels of judicial quality are already high.

At the same time, a global trend toward economic liberalization in recent decades has encouraged and facilitated the establishment or reform of more robust judicial institutions. Courts provide transparent, nominally neutral forums to challenge government action, and hence are useful for foreign investors and trade. The WTO regime explicitly requires states to provide judicial or quasi-judicial institutions in trade-related arenas; a network of bilateral investment treaties promises neutral dispute resolution to reassure investors; and multilateral institutions such as the World Bank and Inter-American Development Bank expend vast resources to promote judicial reform in developing countries. In the age of global competition for capital, it is difficult to find any government that is *not* engaged in some program of judicial reform designed to make legal institutions more effective, efficient, and predictable. While the challenges of globalization are formidable for many developing countries, the option of opting out is increasingly one of economic suicide.

This suggests that there are secular pressures toward judicialization of economic activity. However, this does not mean that all state leaders have the equal ability, incentive, or desire to utilize courts in this fashion. Root and May emphasize that there is no reason to think that authoritarian rulers will always pursue broad-based growth – indeed, for many regimes, broad-based growth would undermine the ruling coalition. Similarly, authoritarian regimes in resource-rich states, such as Myanmar or Saudi Arabia, need not develop broad-based legal mechanisms to shelter investment and growth, but can instead rely on narrow bases of regime finance. For such regimes, the potential costs of judicial autonomy may outweigh any benefits, and they will seek to utilize other mechanisms to establish whatever levels of credibility are needed.

The Delegation of Controversial Reforms to Judicial Institutions

Authoritarian rulers also find great advantage in channeling controversial political questions into judicial forums. In democratic settings, Tate and others

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describe this process as “delegation by majoritarian institutions” (Tate 1995: 32). Several studies observe that democratically elected leaders often delegate decision-making authority to judicial institutions either when majoritarian institutions have reached a deadlock, or simply to avoid divisive and politically costly issues. As Graber notes (1993: 43), “the aim of legislative deference to the judiciary is for the courts to make controversial policies that political elites approve of but cannot publicly champion, and to do so in such a way that these elites are not held accountable by the general public, or at least not as accountable as they would be had they personally voted for that policy.” Seen from this perspective, some of the most memorable Supreme Court rulings are not necessarily markers of judicial strength vis-à-vis other branches of government; rather they might be regarded as strategic modes of delegation by officeholders and strategic compliance by judges (with somewhat similar policymaking preferences) who are better insulated from the political repercussions of controversial rulings.

Perhaps the best example of this phenomenon is the continued postponement of urgently needed economic reforms in postpopulist, authoritarian regimes. Authoritarian rulers in these contexts are sensitive to the risks of retreating from prior state commitments to subsidized goods and services, state-owned enterprises, commitments to full employment, and broad pledges to labor rights generally. They rightly fear popular backlash or elite-level splits if they renege on policies that previously formed the ideological basis of their rule. However, if authoritarian leaders can steer sensitive political questions such as these into “nonpolitical” judicial forums, they stand a better chance of minimizing the political fallout. Moustafa (2007) examines how dozens of Egyptian Supreme Constitutional Court (SCC) rulings enabled the regime to overturn socialist-oriented policies without having to face direct opposition from social groups that were threatened by economic liberalization. SCC rulings enabled the executive leadership to claim that they were simply respecting an autonomous rule-of-law system rather than implementing sensitive reforms through more overt political channels.

Complementarities among the Functions

The above list is hardly exhaustive, but does capture several common circumstances that motivate authoritarian leaders to empower courts. It is worth noting that these functions are not exclusive, but complementary. For example, two of the great threats to security of investment are low-level corruption and bureaucratic arbitrariness. An administrative law regime that reduces agency costs in administration is also likely to enhance credible commitments