

Introduction: The Functions of Courts in Authoritarian Politics

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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. 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.

A-Head 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 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 legitimation 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.

A-Head 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.³ 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.⁴ This section describes each function in turn.

B-Head 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.⁵ 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 1971).

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.

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.

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

B-Head 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 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.⁶ 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.

B-Head 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 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.

B-Head 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 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.

B-Head 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 to property rights. In turn, economic growth and administrative quality are likely to enhance a regime's claims to legitimacy. Pereira's study here and Chaskalon's (2003) discussion of South Africa both suggest that even harsh regimes may be relatively legitimated if the social control function is domesticated through legal means. In short, the functions of courts are likely to be mutually supportive.

A-Head TIME HORIZONS AND THE DOUBLE-EDGED SWORD

To this point, we have catalogued a number of reasons why regimes may wish to rely on judicial forms of governance. Some of these functions are likely to be particular to authoritarian regimes, whereas others represent more general dilemmas of states. Yet not every authoritarian regime chooses to utilize courts to perform these functions. Under what circumstances are regimes more likely to resolve these dilemmas with courts?

A crucial issue is the time horizon of the regime. Entrenched regimes with long time horizons are more likely to turn to courts for core governance functions for several reasons. First, relatively secure regimes have the opportunity to experiment with more sophisticated forms of institutional development. In the economic sphere, for example, secure regimes are more likely to prioritize institutional reforms such as courts that maximize long-term economic growth and tax revenues. In contrast,

regimes with a precarious grip on power are generally less concerned with the long-term payoff of institutional reform and are more likely to engage in predatory behavior (Olson 1993).

The same logic holds for the administrative functions that courts perform. The principal-agent problems associated with bureaucracies are likely to become more severe over time and in step with the degree of bureaucratic complexity of the state. Ginsburg's contribution in this volume (Chapter 2) ties the shift toward administrative law to a decline in ideology as a basis for regime legitimation and control of agents. Once again, relatively mature regimes have the luxury of experimenting with more sophisticated forms of institutional development and administrative discipline.

Third, there is also reason to believe that the longer a regime survives, the more it is likely to shift its legitimizing rhetoric away from the achievement of substantive concerns to rule-of-law rhetoric. For example, Nasser (1954–1970) pinned his legitimacy to the revolutionary principles of national independence, the redistribution of national wealth, economic development, and Arab nationalism. However, when the state failed to deliver, Anwar Sadat (1970–1981) explicitly pinned the regime's legitimacy on "*sayadat al-qanun*" (the rule of law) to distance himself from those failures. Ginsburg notes a similar transformation to rule-of-law rhetoric in China. Mao Zedong almost completely undermined judicial institutions after founding the People's Republic of China in 1949, but rule-of-law rhetoric is

being increasingly used by the regime to distance itself from the spectacular excesses and failures of its past, and to build a new legitimizing ideology.⁷

Note that the timing of judicialization outlined here contrasts with that found in democratic environments. Hirschl (2004) argues that judicialization results when “departing hegemons” seek to extend their substantive policies after prospective electoral loss. Similarly, Ginsburg (2003) views the establishment of judicial review as a strategy of political insurance by parties that foresee themselves out of power in the near future. In both accounts, ruling parties that will soon be displaced by their opponents have an incentive to empower the judiciary, because they believe the regime and its institutions will continue without them. In authoritarian environments, by contrast, entrenched regimes (i.e., authoritarian regimes with *longer* time horizons) are more likely to empower the judiciary, precisely to extend the life of the regime and guard against a loss of power.

While the electoral logic of judicialization in democracies clearly does not apply in authoritarian settings, our findings are broadly consistent with the Ginsburg-Hirschl argument in the following sense. The electoral story hinges at bottom on the disaggregation of interests within a governing regime. The presence of two competing groups with different views of policy facilitates the empowerment of the judiciary in democracies. Similarly, many of the dilemmas that prompt authoritarian regimes to empower courts are intensified by disaggregation within the regime. For example, the need for courts to resolve internal coordination problems, as identified by Barros (2002), arises from a degree of fragmentation within the ruling coalition.

The need for control of administrative agents is exacerbated by state fragmentation, as Ginsburg's account of China here suggests. Thus, when we expand the focus from a simple electoral model to a broader one of state fragmentation, authoritarian and democratic regimes may not be as dissimilar as first appears in terms of the timing of judicial empowerment.

The decision to accord autonomy to courts depends on the particular configuration of challenges faced by authoritarian regimes, but in an astonishing array of circumstances, limited autonomy makes sense. The strategy, however, is hardly risk-free. Once established, judicial institutions sometimes open new avenues for activists to challenge regime policy. This is perhaps an inevitable outcome, because, as Moustafa has previously noted, the success of each of these regime-supporting functions depends upon some measure of real judicial autonomy (2007). For example, commitments to property rights are not credible unless courts have independence and real powers of judicial review. Administrative courts cannot effectively stamp out corruption unless they are independent from the political and bureaucratic machinery that they are charged with supervising and disciplining. The strategy of "delegation by authoritarian institutions" will not divert blame for the abrogation of populist policies unless the courts striking down populist legislation are seen to be independent from the regime. And finally, regime legitimacy derived from a respect for judicial institutions also rings empty unless courts are perceived to be independent from the government and they rule against government interests from time to time.

Not all regimes will empower courts to capitalize on these functions, but those that do create a uniquely independent institution with public access in the midst of an authoritarian state. This provides one venue for what O'Brien and Li (2005) call "rightful resistance," defined as "a form of popular contention that operates near the boundary of authorized channels, employs the rhetoric and commitments of the powerful to curb the exercise of power, hinges on locating and exploiting divisions within the state, and relies on mobilizing support from the wider public." Even when activists do not win particular cases, courts can facilitate rightful resistance by providing publicity about government malfeasance, deterring future abuses and developing skill sets for activist leaders. Together, courts and activists can form what Moustafa (2007) calls "judicial support networks," namely institutions and associations, both domestic and transnational, that facilitate the expansion of judicial power by actively initiating litigation and/or supporting the independence of judicial institutions if they come under attack. In authoritarian contexts, the fate of judicial power and legal channels of recourse for political activists is intertwined.

Halliday, Feeley, and Karpik (2007) similarly find that the nature of the relationship among the various elements of the "legal complex" is a key variable in curbing excessive state power. The bench, bar associations, prosecutors, and nongovernmental organizations can work together to bolster judicial autonomy even in the face of authoritarian political systems. In Taiwan, for example, the alternative bar association became a key site of organizing resistance to the KMT regime, and both Korea and Taiwan had lawyer-activists as presidents in the early twenty-first

century (Ginsburg, 2007). Legality in the authoritarian period provided the seeds for a complete institutional transformation once democratization began. Similar dynamics seemed to potentially be underway in Pakistan in mid 2007 when Chief Justice Muhammad Chaudhry relied on the support of the bar association to resist an attempt by General Musharraf to remove him from office. Ultimately, the bar and the courts were subjected to attack when Musharraf suspended the constitution; still, the courts have provided some space for regime opponents, and may do so again once political circumstances are less charged.

A-Head HOW REGIMES CONTAIN COURTS

Given the potential use of courts as a double-edged sword, a central challenge for authoritarian rulers is to capitalize on the regime-supporting roles that courts perform while minimizing their utility to the political opposition. Courts in authoritarian states face acute limitations, but the most serious constraints are often more subtle than tightly controlled appointment procedures, short term limits, and the like. Direct attacks on judges, such as the crude campaign of physical intimidation of the judiciary in Zimbabwe documented here by Jennifer Widner in Chapter 9, are also rare. More typically, regimes can contain judicial activism *without* infringing on judicial autonomy. Following Moustafa (2007), we outline four principal strategies: (1) providing institutional incentives that promote judicial self-restraint, (2) engineering fragmented judicial systems, (3) constraining the access to justice, and (4) incapacitating judicial support networks.

B-Head Judicial Self-Restraint

The assumption that courts serve as handmaidens of rulers obscures the strategic choices that judges make in authoritarian contexts, just as they do in democratic contexts.⁸ Judges are acutely aware of their insecure position in the political system and their attenuated weakness vis-à-vis the executive, as well as the personal and political implications of rulings that impinge on the core interests of the regime.

Core interests vary from one regime to the next depending on substantive policy orientations, but all regimes seek to safeguard the core legal mechanisms that undergird their ability to sideline political opponents and maintain power. Reform-oriented judges therefore occupy a precarious position in the legal/political order. They are hamstrung by a desire to build oppositional credibility among judicial support networks, on the one hand, and an inability to challenge core regime interests for risk of retribution, on the other hand. Given this precarious position, reform-minded judges typically apply subtle pressure for political reform only at the margins of political life.

Core regime interests are typically challenged only when it appears that the regime is on its way out of power. In most cases, reform-oriented judges bide their time in anticipation of the moment that the regime will weaken to the extent that defection is no longer futile, but can have an impact on the broader constellation of political forces (Helmke 2002, 2005). Strategic defection in such a circumstance is also motivated by the desire of judicial actors to distance themselves from the

outgoing regime and put themselves in good stead with incoming rulers. The more typical mode of court activism in a secure authoritarian regime is to apply subtle pressure for political reform at the margins and to resist impinging on the core interests of the regime.

The dynamics of “core compliance” with regime interests are noted in dozens of authoritarian states. In the Egyptian case, the Supreme Constitutional Court issued dozens of progressive rulings that attempted to expand basic rights and rein in executive abuses of power, but it never ruled on constitutional challenges to the emergency laws or civilian transfers to military courts, which formed the bedrock of regime dominance. Similarly, in the early days of the Marcos regime, the Philippine Supreme Court did not attempt to resist the decree of martial law, the imposition of a new constitution, or decrees placing new constraints on the jurisdiction of the courts. Rather, the court yielded to Marcos’s seizure of power, and it continued to submit to the regime’s core political interests for the next fourteen years of rule. Philippine Justices Castro and Makalintal candidly acknowledged the political realities that undoubtedly shaped the court’s unwillingness to confront the regime, stating in their ruling that “if a new government gains authority and dominance through force, it can be effectively challenged only by a stronger force; no judicial dictum can prevail against it” (Del Carmen 1973: 1059–1060). Similar dynamics are noted in Pakistan, Ghana, Zimbabwe, Uganda, Nigeria, Cyprus, Seychelles, Grenada, and other countries (see, e.g., Mahmud 1994).

In such circumstances, formal judicial independence can clearly exist within an authoritarian state. One can also understand why an authoritarian ruler would find it politically advantageous to maintain formal judicial independence. Del Carmen's (1973: 1061) characterization of judicial politics under Marcos is particularly illuminating:

While it is true that during the interim period...the President can use his power to bludgeon the Court to subservience or virtual extermination, the President will most probably not do that – ironically, because he realizes that it is in his interest to keep the Court in operation. On the balance sheet, the Court thus far has done the President more service than disservice, more good than harm.

The important dynamic to note in each of these instances is that authoritarian regimes were able to gain judicial compliance *and* enjoy some measure of legal legitimation without having to launch a direct assault on judicial autonomy. The anticipated threat of executive reprisal and the simple futility of court rulings on the most sensitive political issues are usually sufficient to produce judicial compliance with the regime's core interests. An odd irony results: the more deference that a court pays to executive power, the more institutional autonomy an authoritarian regime is likely to extend to it.⁹

The internal structure of appointments and promotions can also constrain judicial activism quite independently of regime interference. The judiciary in Pinochet's Chile is a good example of a court system that failed to act as a meaningful constraint on the executive, despite the fact that it was institutionally

independent from the government. According to Hilbink (chapter 4), this failure had everything to do with the process of internal promotion and recruitment, wherein Supreme Court justices controlled the review and promotion of subordinates throughout the judiciary. The hermetically sealed courts did not fall victim to executive bullying. Rather, the traditional political elite controlling the upper echelons of the court system disciplined judges who did not follow their commitment to a thin conception of the rule of law.¹⁰

The case of Singapore, discussed here by Gordon Silverstein in Chapter 3, provides a further example. Silverstein documents how Singapore's courts do very well on formal measures of independence, yet despite having a good deal of autonomy in economic and administrative matters they do not constrain the government politically. With its commanding majority in the Parliament, Lee Kuan Yew's Peoples Action Party easily issued new legislation and even constitutional amendments to sideline political opponents, all the while respecting formal judicial independence. All of these cases suggest that formalist conceptions of the rule of law are not enough to ensure substantive notions of political liberalism.

Alternatively, one can imagine courts that have a very broad scope of activity, but have relatively little autonomy. Scope is a distinct issue from autonomy (see Guarnieri and Pederzoli 2002.) Magaloni's account in this volume (see Chapter 7) of the Mexican judiciary under the PRI seems to illustrate the model of a judiciary with a wide scope of formal authority but little autonomy. Judicial appointments were highly centralized, and the judicial process was used to suppress the opposition.

B-Head Fragmented versus Unified Judicial Systems

Authoritarian regimes also contain judicial activism by engineering fragmented judicial systems in place of unified judiciaries. In the ideal type of a unified judiciary, the regular court hierarchy has jurisdiction over every legal dispute in the land. In fragmented systems, on the other hand, one or more exceptional courts run alongside the regular court system. In these auxiliary courts, the executive retains tight controls through nontenured political appointments, heavily circumscribed due process rights, and retention of the ability to order retrials if it wishes. Politically sensitive cases are channeled into these auxiliary institutions when necessary, enabling rulers to sideline political threats as needed. With such auxiliary courts waiting in the wings, authoritarian rulers can extend substantial degrees of autonomy to the regular judiciary.

Examples can be found in a number of diverse contexts. In Franco's Spain, Jose Toharia (1975: 495) noted that "Spanish judges at present seem fairly independent of the Executive with respect to their selection, training, promotion, assignment, and tenure." Yet Toharia also observed that the fragmented structure of judicial institutions and parallel tribunals acted "to limit the sphere of action of the ordinary judiciary." This institutional configuration ultimately enabled the regime to manage the judiciary and contain judicial activism, all the while claiming respect and deference to independent rule-of-law institutions. Toharia explains that "with such an elaborate, fragile balance of independence and containment of ordinary tribunals, the

political system had much to gain in terms of external image and internal legitimacy. By preserving the independence of ordinary courts...it has been able to claim to have an independent system of justice and, as such, to be subject to the rule of law.”

All other things being equal, there is likely to be a direct relationship between the degree of independence and the degree of fragmentation of judicial institutions in authoritarian contexts. The more independence a court enjoys, the greater the likely degree of judicial fragmentation in the judicial system as a whole. Boundaries between the two sets of judicial institutions also shift according to political context. Generally speaking, the more compliant the regular courts are, the more that authoritarian rulers allow political cases to remain in their jurisdiction. The more the regular courts attempt to challenge regime interests, on the other hand, the more the jurisdiction of the auxiliary courts is expanded.

In authoritarian states, the regular judiciary is unwilling to rule on the constitutionality of parallel state security courts for fear of losing a hopeless struggle with the regime, illustrating both the core compliance function at work and the awareness among judges that they risk the ability to champion rights at the margins of political life if they attempt to challenge the regime’s core legal mechanisms for maintaining political control. Returning to the Egyptian example, the Supreme Constitutional Court had ample opportunities to strike down provisions that denied citizens the right of appeal to regular judicial institutions, but it almost certainly exercised restraint because impeding the function of the exceptional courts would result in a futile confrontation with the regime. Ironically, the regime’s ability to

transfer select cases to exceptional courts facilitated the emergence of judicial power in the regular judiciary. The Supreme Constitutional Court was able to push a liberal agenda and maintain its institutional autonomy from the executive largely because the regime was confident that it ultimately retained full control over its political opponents. To restate the broader argument, the jurisdiction of judicial institutions in authoritarian regimes is ironically dependent on the willingness of judges (particularly those in the higher echelons of the courts) to manage and contain the judiciary's own activist impulses. Judicial activism in authoritarian regimes is only made possible by its insulation within a fundamentally illiberal system.

B-Head Constraining Access to Justice

Authoritarian rulers can also contain judicial activism by adopting a variety of institutional configurations that constrain the efforts of litigants and judges. At the most fundamental level, civil law systems provide judges with less maneuverability and less capacity to create “judge-made” law than enjoyed by their common law counterparts (Merryman 1985; Osiel 1995). The rapid spread of the civil law model historically was not merely the result of colonial diffusion, in which colonizers simply reproduced the legal institutions of the mother country. In many cases, the civil law model was purposefully adopted independent of colonial imposition because it provided a better system through which rulers could constrain, if not prevent, judge-made law. Although the differences between civil law and common law systems are often overstated and even less meaningful over time as more civil

law countries adopt procedures for judicial review of legislation, civil law judges may be relatively more constrained than their common law counterparts as a formal matter.¹¹ More important than any legal constraints is the norm that judges in civil law systems are to apply the law mechanically, resulting in a tendency toward thin rather than thick conceptions of the rule of law.

Regimes can engineer further constraints on the *institutional structure* of judicial review,¹² the *type* of judicial review permitted,¹³ and the *legal standing* requirements. For example, a regime can constrain judges more effectively by imposing a centralized structure of judicial review in place of a decentralized structure. Centralized review yields fewer judges who must be bargained with, co-opted, or contained, resulting in predictable relationships with known individuals. It was precisely for this reason that the Turkish military imposed a centralized structure of judicial review in the 1982 Constitution.¹⁴ Another technique, recounted here by Peter Solomon in Chapter 10, is to under-enforce judicial decisions.

Most regimes also limit the types of legal challenges that can be made against the state. In Magaloni's account of Mexico, citizens could only raise *amparo* cases in Mexico under the PRI, which radically constrained the Mexican Supreme Court. Similarly, article 12 of the Chinese Administrative Litigation Law empowers citizens to challenge decisions involving personal and property rights, but it does not mention political rights, such as the freedom of association, assembly, speech, and publication. These select issue areas speak volumes about the intent of the central

government to rein in local bureaucrats while precluding the possibility of overt political challenges through the courts.

B-Head Incapacitating Judicial Support Networks

Finally, authoritarian regimes can contain court activism by incapacitating judicial support networks. In his comparative study, *The Rights Revolution*, Epp (1998) shows that the most critical variable determining the timing, strength, and impact of rights revolutions is neither the ideology of judges, nor specific rights provisions, nor a broader culture of rights consciousness. Rather, the critical ingredient is the ability of rights advocates to build organizational capacity that enables them to engage in deliberate, strategic, and repeated litigation campaigns. Rights advocates can reap the benefits that come from being “repeat players” when they are properly organized, coordinated, and funded.¹⁵ Although Epp’s study is concerned with courts in democratic polities, his framework sheds light on the structural weakness of courts in authoritarian regimes.

The weakness of judicial institutions vis-à-vis the executive is not only the result of direct constraints that the executive imposes on the courts; it is also related to the characteristic weakness of civil society in authoritarian states. The task of forming an effective judicial support network from a collection of disparate rights advocates is all the more difficult because activists not only have to deal with the collective action problems that typically bedevil political organizing in democratic systems but authoritarian regimes also actively monitor, intimidate, and suppress

organizations that dare to challenge the state. Harassment can come in the form of extralegal coercion, but more often it comes in the form of a web of illiberal legislation spun out from the regime. With the legal ground beneath them constantly shifting, rights organizations find it difficult to build organizational capacity before having to disband and reorganize under another umbrella association. Given the interdependent nature of judicial power and support network capacity in authoritarian polities, the framework of laws regulating and constraining the activities of judicial support networks is likely to be one of the most important flashpoints of clashes between courts and regimes.

The story of courts in authoritarian regimes is likely to involve a dialectic of empowerment – as regimes seek the benefits only judicial autonomy can provide – and constraint, as regimes seek to minimize the associated costs of judicial autonomy. The latter reaction is more likely as courts build up their power, and as activist networks expand their links within and outside of society so as to become a plausible alternative to the regime (Moustafa 2007). Yet, in certain rare cases, the wheels of justice may simply have too much momentum to stop.

A-Head CONCLUSION

Judicial politics in authoritarian states is often far more complex than we commonly assume. The cases reviewed in this volume reveal that authoritarian rulers often make use of judicial institutions to counteract the many dysfunctions that plague their

regimes. Courts help regimes maintain social control, attract capital, maintain bureaucratic discipline, adopt unpopular policies, and enhance regime legitimacy. However, courts also have the potential to open a space for activists to mobilize against the state, and synergistic alliances sometimes form with judges who also wish to expand their mandate and affect political reform. Authoritarian rulers work to contain judicial activism through providing incentives that favor judicial self-restraint, designing fragmented judicial systems, constraining access to justice, and incapacitating judicial support networks. However, those efforts may not be completely effective. Instead, a lively arena of contention emerges in what we typically imagine to be the least likely environment for the judicialization of politics – the authoritarian state.

We conclude with an expression of modesty. We recognize that our findings in this volume are only a first step, and there is far more work to do to expand the geographic and institutional scope of inquiry into authoritarian regimes. The contributors to this project hope, however, to have collectively identified avenues of inquiry and particular dynamics that will inform future work in this area. Unfortunately, it appears that work on authoritarian regimes will be needed for many years to come.

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Notes

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.

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."

³ For a more detailed discussion of each of these functions, see Moustafa (2007) chapter two, "The Politics of Domination: Law and Resistance in Authoritarian States."

⁴ These are in addition to the routine and universal function of conflict resolution in low-level disputes (Shapiro 1981).

⁵ Perlmutter'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. Perlmutter believes that all authoritarian leaders rely on one or another of these mechanisms as the primary instrument of control.

⁶ 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).

⁷ For Nasser, these included the failure to deliver economic development, defeat in the 1967 war, and the collapse of the United Arab Republic with Syria. For Mao Zedong, these included the Great Leap Forward, which resulted in the largest famine in human history with 30 million deaths, the chaos of the Cultural Revolution, and the failure to deliver economic growth.

⁸ A classic account in the American context is Murphy (1962).

⁹ This observation should also call into question our common understanding of the concept of "judicial independence." If we understand judicial independence to mean institutional autonomy from other branches of government, then we must conclude that more than a few authoritarian states satisfy this formal requirement. In both

democratic and authoritarian contexts, formal institutional autonomy appears to be a necessary condition for the emergence of judicial power, but in both cases it is insufficient by itself to produce effective checks on power.

¹⁰ Hilbink finds that the independent Chilean Supreme Court ironically became a significant obstacle to democratic consolidation, challenging the assumption in the vast majority of the political science literature that independent courts provide a check on executive or legislative abuses of power and that courts consistently work to protect basic rights that are essential for a healthy democracy.

¹¹ Shapiro explains that the role of the civil law judge as simply applying preexisting legal codes is a myth because it assumes that codes can be made complete, consistent, and specific, which is never fully actualized in reality. The result is that civil court judges engage in judicial interpretation, a fundamentally political role, just as judges do in common law systems (Shapiro 1981).

¹² In a centralized system of judicial review, only one judicial body (typically a specialized constitutional court) is empowered to perform review of legislation. In a diffused system of judicial review, on the other hand, any court can decide on the constitutionality or unconstitutionality of a particular piece of legislation.

¹³ Courts with provisions for concrete review examine laws after they take effect, in concrete legal disputes. Courts with provisions for abstract review examine legislation as part of the normal legislative process and can nullify legislation before it takes effect.

¹⁴ In the 1961 Turkish Constitution, courts could practice judicial review if the Constitutional Court had not issued a judgment within a defined period. This procedure was abolished in the 1982 Constitution, and a number of other constraints were put in place to narrow the scope and standing requirements of judicial review (Belge 2006).

¹⁵ The advantages enjoyed by “repeat players” in the legal system were first examined by Marc Galanter in his classic 1974 article, “Why the ‘Haves’ Come out Ahead.”