RULE BY LAW

The Politics of Courts in Authoritarian Regimes

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

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

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

At times courts in the USSR did possess politically important jurisdiction. Thus, during the 1920s the Supreme Court of the USSR was responsible for handling constitutional disputes between republican governments and the central government; that is, the regulation of Soviet federalism. The 1924 Constitution of the USSR gave full jurisdiction for most areas of law and its administration to republican governments, and did not allow appeals from republican supreme courts to the USSR one. The USSR Supreme Court was empowered to assess, at the request of governmental authorities (e.g., the presidium of the Central Executive Committee, a parliamentary body), whether particular laws of the republics conformed with All-Union law, including the Constitution; at the initiative of republican governments (or on its own initiative), it could consider the legality of administrative orders issued by central agencies. In both instances, the role of the Supreme Court was only advisory. It was up to the Presidium of the Central Executive Committee to act on the Court's interpretations. Between 1924 and 1929 the Court issued eighty-six judgments about the legality of agency acts and eleven relating to laws of the republics. In most instances the politicians accepted its advice (Dobrovolskaia, 1964; Bannikov 1974; Solomon 1990).

The chairman of the USSR Supreme Court, Aron Vinokurov, sought to enhance the constitutional review powers of his Court, and in a new draft statute for the Court proposed in 1928 that it gain the right to review All-Union legislation and republican legislation at its own initiative. These proposals raised objections from many quarters and a discussion in which some politicians sought to take away from the Court some of the powers it already possessed. Vinokurov was forced onto the defensive, stressing that there was no violation of "separation of powers" when the Court's role was advisory, and how vital its role was for maintaining the hierarchy of laws. For the most part, Vinokurov won the battle (the Court even gained the right to review republican legislation on its own initiative), but lost the war. The very functions he had defended lost their relevance when the regime launched its war against the peasantry (collectivization) and legal standards and norms were all but abandoned for a time (Mitiukov 2005).

While eventually (in 1934) losing its albeit limited constitutional role, the USSR Supreme Court gradually gained the right to supervise lower courts, and with the Constitution of 1936 its appellate jurisdiction became unlimited. Because any case could be appealed to the top, the Court played a large role in assuring that the priorities of the centre took precedence over local ones.

This centralization of power within the judiciary was itself a reflection of the decision taken by Stalin and his circle in the mid-1930s to revive the traditional authority of law, so that it could serve as an instrument of rule and

better perform the function of social control. In this context law meant nothing more than the laws and regulations promulgated by the state, and there was no pretence that they might constrain the leader. But reviving the authority of law did entail ensuring that judges and other legal officials had legal education and encouraging the pursuit of legal careers (the bureaucratization, if not also the professionalization of the judiciary). The official explanation for embracing law and giving a new priority to the administration of justice was that, with the building of socialism completed, the new economy and society needed the stability and order that strong legal institutions could provide. On the practical level, Stalin wanted criminal justice that would check the plague of disorder in the overcrowded cities, including drunken rowdy behavior and the activities of juvenile gangs (Solomon 1996: ch. 5).

The leadership also recognized the utility of law as a source of legitimacy for the regime and its practices. To begin, one group of judges on the USSR Supreme Court, members of the Special Collegium, assumed the task from 1934 to 1938 of hearing prosecutions for political or counterrevolutionary crimes characteristic of the era of purges and terror. While most such charges were reviewed summarily by the infamous three-person boards known as *troiki*, a small percentage of these charges were brought to the Supreme Court, in order to legitimate the repression. Thus, a panel from the Special Collegium heard the three famous show trials held from 1936 to 1938, in which leading politicians, past and present, confessed to participation in the most outrageous conspiracies that script writers could imagine.

At the same time, the new USSR Constitution was promulgated in December 1936, in large part to legitimate the political order that had been created through the collectivization and industrialization drives with both domestic and foreign audiences. This political order was characterized by the extreme centralization of power within the government and by the continued mobilization of the law to suit the regime's political purposes. In contrast, the 1936 Constitution emphasized the rights of citizens and democracy and called for courts that appeared normal and independent, even as they implemented regime policies. But there was no mechanism for enforcement of the constitution, considerable parts of which bore little relation to reality. In short, the Soviet Constitution of 1936 represented an entrenchment of neither rights nor judicial power, but rather a further twist in the manipulation of law and courts for political purposes, which now included regime legitimation (Solomon 1996: chs. 6 and 7).

Administrative justice also had a chequered history under Soviet rule. The Bolsheviks continued discussion of the establishment of administrative courts (which the Provisional Government had endorsed), but by the mid-1920s

decided against this step. They preferred to empower the Procuracy (and for a time the Workers Peasants Inspectorate) with the task of reviewing complaints against the legality of acts of officials and ordering illegal actions corrected. Under the Bolsheviks the Procuracy combined its late Tsarist function of prosecution with its earlier mandate (pre-1864) of supervising the legality of public administration. This mandate involved not only responding to complaints but also undertaking fishing expeditions ("raids") on state enterprises and agencies. Over the years, in parallel with the Procuracy complaints procedure, courts did gain the right to review a short list of specific complaints, including seizures of property to cover unpaid taxes, fines and license suspensions imposed by the police, actions of judicial enforcers engaged in debt collection, and certain complaints against housing officials (Solomon 2004; Starilov 2001).

Observers of the Soviet scene were surprised to discover that the 1977 Constitution in article 58 confirmed that citizens had a right to complain to courts about illegal actions of officials and thus opened the door for the development of this right in legislation (Sharlet 1978). Although issued in the Brezhnev era, the new constitution had its origins in a drafting commission established under Khrushchev in 1962, and the provisions for administrative justice may date back to that time (Lukianova 2001). By the mid-1970s there was considerable support for this idea. From the late 1960s Soviet jurists discussed the matter vigorously, and versions of administrative justice began appearing in Communist countries of Eastern Europe (culminating with the establishment of the Supreme Administrative Court in Poland in 1980; Oda 1984). Whatever its origins, article 58 of the 1977 Constitution did not bear fruit until the Gorbachev era. As we shall see, it was only in 1987 that judicial review of administrative acts was significantly expanded.

From 1931 when the nationalization of productive property in the USSR was almost complete and the state-administered economy fully established, disputes among state economic units (enterprises, agencies) were handled not by courts but by tribunals of the state *arbitrazh* (disputes among units of different agencies) or agency *arbitrazh* (disputes among units of the same agency or ministry). Disputes often revolved around the allocation of blame for failures in contract performance that affected a unit's ability to fulfill its annual plan (especially deliveries). Although the Russian word for these tribunals suggests bodies that arbitrate rather than adjudicate, the panels of the *arbitrazh* system came to act as courts, albeit with an obligation to follow the interests of state administrators. The 1977 Constitution elevated the status of state *arbitrazh* by separating its tribunals from the executive branch of government and treating them as an "independent branch," analogous to courts (Kleandrov 2001: 25–28; Hendley, 1998).

As *arbitrazh* tribunals gradually became more court-like, so the underlying basis of economic disputes changed in ways that did not encourage losers to turn to the court. During the 1970s and 1980s an increasingly large share of economic activity in the USSR came to be performed in the parallel or underground private economy. While many of the same state firms became embroiled in disputes relating to their second-economy activities, the semi-legal or illegal status of this business made it hard to use the courts to resolve the disputes. As result, there developed a set of informal mechanisms for resolving disputes with a second- (illegal private) economy connection, informal mechanisms that carried over in the post-Soviet era (Pistor 1996)

LIBERALIZATION, DEMOCRATIZATION, AND THE COURTS

As of 1985, courts in the USSR remained weak, dependent bodies that lacked public respect, and the career of judge had low status and few rewards. Jurisdiction in matters of political import was limited. Judges were subject to multiple lines of dependency, including to local party leaders, and both judicial salaries and court budgets were miserly. All of this would change, sooner or later.

The decision of Mikhail Gorbachev and his confidantes like Alexander Iakovlev to embark on the liberalization of Soviet authoritarianism led quickly to pressures for democratization, and eventually to the erosion of the authority of the Communist Party of the USSR. This process also had profound implications for the courts, setting in motion attempts to make courts in Russia both independent and empowered. Between 1987 and 1990 the government of the USSR adopted a series of measures to accomplish these goals, which taken together represent a breakthrough from the Soviet past. Yet, before these measures could be fully implemented, they were overtaken by politics. In 1990 and 1991 the government of the Russian republic, still formally a constituent part of the USSR, began asserting its autonomy and in this context moved ahead of the USSR in judicial reform, making this an arena of competition between these two governments and their respective leaders, Yeltsin and Gorbachev. When the USSR fell apart at the end of 1991, the new Russian government had already committed itself to radical judicial reform, and during the next two years approved legislation to implement it. As of the end of 1993, most of the formal institutions of judicial independence and power were in place in Russia (although not in other post-Soviet states like Ukraine and Belarus).

The core plank of Gorbachev's liberalization was the policy of *glasnost*; that is, the opening up of the media and public discourse to allow long overdue criticism of misguided policies and abuses of power. The purpose was to develop public support for the regime's moderate reform policies, for example

in the management of the economy, but the effects were more far-reaching. Muckraking journalists rose to the challenge and with the help of legal scholars exposed not only historical injustices but also recent abuses of the administration of justice and the accusatorial bias in the courts. Pressure mounted quickly for judicial reform, and by 1988 the political leaders had committed themselves in a party resolution (part of the platform for "democratization") to the creation of a "socialist *rechtsstaat*" or law-based state (Solomon and Foglesong 2000: ch.1). While some members of the Soviet leadership (including Iakovlev himself) envisaged a mild rights revolution, most thought they were simply endorsing a state where officials obeyed the laws (Iakovlev 1993). Moreover, the qualifier "socialist" implied that the Communist Party would remain above and beyond the law. All this notwithstanding, the resolution opened the door for the adoption of a series of measures to enhance judicial independence and power.

To curtail the vulnerability of judges to the whims of politicians, the system of appointment and tenure was changed, so that judges would serve for terms of ten years instead of five and for reappointment would face approval not by the party secretary of the same level in the administrative hierarchy but by the regional soviet (legislature) at the next level. Even more important, all appointments required preliminary screening by judicial qualification commissions made up solely of judges, and no judge could be fired during term except for cause and with the approval of the appropriate commission. In addition, interference in the work of the courts (e.g., trying to influence a court decision through an approach to the judge) was made a criminal offense (Solomon and Foglesong 2000).

The first empowerment of courts under Gorbachev came in the area of administrative justice. Reviving the struggle to realize article 58 of the Constitution, jurists succeeded in getting a significant expansion in judicial review of administrative acts introduced already in 1987. While the new law opened up the right of complaint to almost any subject matter, it did not apply to decisions taken in the name of a collegial body (like a city council), and complainants had to exhaust all administrative remedies before going to court. A second law on the subject in 1989 eliminated the first of these restrictions (Solomon 2004).

The commitment to a law-based state called for the establishment of a hierarchy of laws and new attempts to ensure that laws of different levels of government were consistent. The government of the USSR opted for a weak form of constitutional review, and entrusted this function in a new "Constitutional Supervisory Committee," approved in December 1988 and starting operation in May 1990, after a new union treaty revamped the relationship

between the republics and the central government. Empowered to review the constitutionality of republican and All-Union legislation, this body was attached to the legislature (technically, it was not a court), and its decisions were advisory except with regard to Union laws violating human rights. (Decisions of the Constitutional Tribunal founded in Poland in 1985 also required confirmation by Parliament to become valid). In practice, almost all of its rulings were issued at the initiative of the Constitutional Supervisory Committee itself; the USSR government did initiate suits, whereas most of the republican ones did not. The period of the Committee's operation coincided with the separatist movements and the pressures that led to the breakup of the USSR (Trochev, 2005, 75–79; 118–122; Brzezinski 1998; Mitiukov 2006).

Constitutional review represents a subject on which Yeltsin's Russian government moved ahead of the Soviet one. Already in 1990 discussion of a new Russian constitution began, and the Yeltsin team decided to outdo the Soviet government by establishing a full-fledged Constitutional Court. The decision was formalized in an amendment to the 1978 Constitution of the RSFSR in December 1990 and in the Law on the Constitutional Court of May 1991. The initial membership of the Court was approved by the Congress of Peoples Deputies in October 1991 (Trochev 2005a: 97–104). This was a proper Constitutional Court, with jurisdiction modeled on its German counterpart, including the review of petitions from citizens (concrete review) and decisions on the constitutionality of any law that were to be authoritative and binding. As it happened, by the time the Constitutional Court began work in 1992, Russia was already an independent "democratic" country.

During 1991, while the leaders of the USSR struggled to keep the country together, the Russian leaders under Yeltsin moved ahead with a reform agenda on many fronts, from economic to legal. Thus, in July 1991 the Russian government took the lead in converting the system of state *arbitrazh* into *arbitrazh* (or commercial) courts, this in recognition of the emerging legal private economy and its needs (Hendley 1998). More dramatic was the approval by the Supreme Soviet in October 1991 of the *Conception of Judicial Reform of the RSFSR*. Written by nine legal scholars, among them the leading criminal procedure specialists, the Conception (a 100-page critique of the justice system) called for a revamping of courts, prosecutions, and investigations to eliminate accusatorial bias and make the administration of justice fair. *Inter alia*, the *Conception* endorsed life appointments for judges, even broader judicial review of administrative acts. and a new role for courts in supervising pre-trial investigations, including approval of pre-trial detention; it also recommended improved funding of courts and the conversion of trials to an adversarial process, including the revival of trial by jury (Solomon and Foglesong 2000: 10–11). All this was

to come on top of the achievement in 1990 of the right to counsel during the pre-trial phase.

Much (but not all) of the *Conception's* agenda for reform was realized during 1992–1993. Under the lead of Sergei Pashin, reform-oriented jurists in the presidential administration secured passage of legislation that gave judges life tenure (after a three-year probationary term), while retaining the system of judicial qualification commissions with the exclusive right to remove judges; established judicial review of pre-trial detention decisions by procurators; established trial by jury; and eliminated the remaining restrictions on judicial review of administrative acts, so that prior administrative remedies did not have to be tried before approaching a court (Solomon and Foglesong, 2000: Solomon 2004; Solomon and Foglesong 2000).

As a result, when the first Russian republic ended in December 1993 with the passage of a new Russian Constitution, Russia had courts designed to encourage judicial independence and empowered to deal with important issues of concern to powerful persons.

RUSSIAN COURTS IN AN AGE OF COMPETITIVE AUTHORITARIANISM

In the new millennium, the Second Russian republic – that is, the Russian government operating under the Constitution of 1993 – moved from an electoral (or perhaps delegated) democracy in the mid-1990s to a regime best described as "competitive authoritarian" or "electoral authoritarian." Throughout the period, the state has been weak, and from 1994 to 1999 there was considerable decentralization of power to the regional level, at which regional cliques (even clans) dominated the scene and the transfer of revenue to the center for redistribution became difficult. As president since 2000, Vladimir Putin has made every effort to reconstitute the power of the federal government and make the Russian Federation an effective state. However, in the process he chose to sacrifice democratic elements, such as competitive elections for governors and presidents, which in his view interfered with the creation of a reliable chain of political command, so essential in an age of clans and terrorism. Moreover, power in the centre became fully concentrated in the hands of the president and his staff, with the federal legislature coming under his control and the checks provided by federalism weakened.

In short, most observers of Russian politics in Russia and the West agree that Russia has rejoined the ranks of authoritarian states, albeit one with competition for some posts and some media freedom. At the same time, Russia possesses a court system that was designed for a democratic political order in the making. That is, it is a judicial system meant to produce independent courts

and impartial adjudication, and one invested with responsibility for important decisions. As was the case in Tsarist Russia, so again the fit between the courts and the polity is imperfect, and there is every basis for tension and strain.

As of 2006 all attempts to reduce the power of courts had failed, and courts handled constitutional, administrative, and commercial cases. Moreover, some of the remaining obstacles to judicial independence, such as inadequate financing, have been removed. Yet, through a combination of new measures to hold judges accountable and the operation of informal institutions, most judges are held in check, and at least some observers argue that the independence of the courts remains compromised.

During the late 1990s, courts throughout the country were taking supplementary payments from local and regional governments to make up for financial shortfalls from the federal budget, which was meant to cover judicial salaries and court expenditures (Solomon and Foglesong 2000: 38–42). To President Putin, taking these payments threatened not just to make courts dependent, but dependent upon the wrong politicians and business leaders. In addition, judicial caseloads, especially of civil cases, were expanding rapidly. To his credit President Putin made funding of the courts a priority, and from 2001 the Russian government has provided large new sums to support expansion of the number of judges (including new justices of the peace), more staff support (new clerks, media officers), repair of court buildings, computerization of the court operations, and the development of Web sites and posting of court decisions. It has also supported expansion of the number and improved training for the bailiffs charted with implementing civil and commercial decisions. In announcing in 2001 and again in 2006 programs for the improvement of the courts, Putin cited as a prime rationale the need to provide a basis for secure property rights and encouragement for potential investors! (MERiT 2006; Solomon 2002).

This same rationale underlay efforts to reduce the appearance (and reality) of judicial corruption through enhancement of accountability. In 2002 the composition of the Judicial Qualification Commissions was changed to require that one-third of the members not be judges (so that judges would not protect their own), and in 2004 there was a serious proposal to increase that requirement to one-half (Solomon 2005: 329–331). The screening of judicial appointees by the presidential administration, especially to *arbitrazh* courts and positions of chair of court, was strengthened, with the unforeseen consequence that the appointment process took longer than a year (Trochev 2005b). In 2006 there were efforts to require judges to submit full financial disclosure, and possibly to disallow employment as judges to persons whose close family members worked as lawyers (Kornia 2006; Sterkin 2006).

Whether this barrage of measures would succeed in reducing the responsiveness of judges (especially on the *arbitrazh* courts) to powerful persons in regional governments or in private firms was uncertain. The situation in which chairs of courts were part of local and regional government circles, as well as beneficiaries, both personally and institutionally, of largesse from local sources, continued, as did the role of chairs as intermediaries between outside interests and judges heading particular cases. Judges depended upon their all-powerful chairs not only for perks and benefits (scheduled to be replaced by higher salaries) but also for good references in the promotion process. Moreover, chairs could always find pretexts for pursuing disciplinary requests, even firing, through the Judicial Qualification Commissions, which were usually responsive to their requests. Thus, if the head of a powerful firm in a region needed the cooperation of an *arbitrazh* court, his friends in the regional government might inform the chair of the court what was needed in the interests of the region (Solomon 2006).

If firms could not influence *arbitrazh* courts directly, in some cases they could nullify the impact of court decisions by ignoring them or failing to cooperate in their implementation. Voluntary compliance with debt collection judgments appears to be a rarity, and many executives know how to hide assets so that bailiffs charged with collection do not find them (Kahn 2002). For a decade or more, some businesses have relied on specialists in private enforcement, whether from the criminal world or (later on) legal firms. Such bodies often rely on intelligence connections to obtain information that would be potentially embarrassing to debtor firms and so gain their cooperation in an effort to avoid publicity or denunciation (Volkov 2002).

Not only *arbitrazh* courts but also the Constitutional Court has had difficulty ensuring compliance with its decisions. The Court keeps records of implementation of its decisions, and sometimes turns to the president or government for help in securing compliance. Part of the problem lies in the civil law tradition, whereby even court decisions holding all or part of a law unconstitutional may not be applied directly, but require a change in legislation. According to Russian law, decisions of the Constitutional Court are directly applicable by officials and other judges, and do not require legislative changes as an intermediate stage of implementation, but many officials and judges in Russia act as if this were not so. In addition, there is competition among different courts and court systems in Russia, as other courts dislike deferring to the Constitutional Court. Then, there is the simple assertion of raw power. The Mayor of Moscow, Yuri Luzhkov, ignored a series of decisions of the Constitutional Court of the Russian Federation that deemed his efforts to restrict residence in Moscow unconstitutional. It required intervention by

President Yeltsin to get the president of the republic of Udmurtia to respect a Constitutional Court decision invalidating a recently enacted procedure for choosing, as opposed to electing, mayors of cities. By 2006, most regional governments were yielding to Constitutional Court decisions on matters relating to federalism, but officials throughout Russia resist rights-related decisions, unless ordered to observe them by political superiors (Trochev, 2005; Solomon and Foglesong 2000: 76–80). The flow of appeals to the European Court of Human Rights in Strasbourg (where nearly 25 percent of cases come from Russia) seems to have had some impact.

Of course, one way to avoid irritating rulings of the Constitutional Court is to eliminate the power of constitutional review, which some enemies of the court tried to arrange in 2001. The origins of the attack lay, paradoxically, in proposed amendments to the Law on the Constitutional Court to ensure compliance with its decisions, especially by regional authorities whose legislation the Court had ruled unconstitutional, sometimes stipulating what changes were required. As the changes were being debated in the State Duma, individual legislators (Valery Grebennikov, Oleg Utkin, and Boris Nadezhdin) and the Committee on State Development as well (under Lukianov) began attacking *the very right of the Court to issue rulings binding upon other branches of government*, not to speak of creating legal norms. Some Duma deputies defended the Constitutional Court's prerogatives, but the play of politics produced a dangerous situation, whereby in November 2002 the Duma Committee actually approved proposals that would deprive the Court of its essential power and convert it into an advisory body!

Members of the Constitutional Court (Baglai, Sliva, and Morshchakova) were forced to campaign against the threatened changes in both public forums and directly with the president. Any limit to the binding force of Constitutional Court decisions, they explained, would represent the end of constitutional justice in Russia. Morshchakova warned that, should the changes be introduced, they might be challenged in the Constitutional Court, which was likely to invalidate them. The resistance to potential undermining of the Constitutional Court proved successful, and the relevant Duma factions forced the authors of the offending amendments to withdraw them (Trochev 2002). What happened behind the scenes, including the role of the president in this process, is unknown. But this was not the first time in its young life that the Constitutional Court had to fight for its existence; in October 2003 the work of the CC was suspended for a year and a half after the Court attempted to stop Yeltsin's seizure of power (Sharlet 2003; Trochev 2002).

The Constitutional Court has a reputation as the most independent of all Russian courts, at least from the direct influence of interested parties (Russian

Axis 2003). But its members are keenly aware of the political context in which they operate, including the power of the presidency and the challenge of securing implementation of their decisions. There is every indication that they think strategically, looking beyond individual cases to the larger matter of their court's and judicial authority. In recent years the court has not opposed the president on important issues, such as the constitutionality of the elimination of gubernatorial elections, although a couple of dissenting judges articulated the case against it. (Back in Yeltsin's time the court approved the legality of the first Chechen war). Still, for a Constitutional Court to stand back from engaging in hot political issues does not mean that it is impotent. Arguably, any successful court involved in constitutional litigation must pick its fights with the other branches of government carefully, and not move too far ahead of political or public opinion (McCloskey 1994). Political tact aside, the record of the Russian Constitutional Court overall is admirable, especially given the conditions under which it works. The Constitutional Court of the Russian Federation has done far better than its counterpart constitutional courts in most post-Soviet countries.

Administrative justice must be counted one of the great success stories of post-Soviet judicial reform. In 1993 the requirement to use administrative alternatives before going to court was removed, and in 1995 the definition of officials against whose actions one could complain was broadened. The result was a wide open right to challenge the actions of officials, along with the right to challenge most regulations as well. By 2002 there were hundreds of thousands of complaints against the actions of officials heard in various courts, including military ones, and complainants won in some 70 percent of their attempts! This rate of success was much better than obtained by persons who complained to the Procuracy, who registered around a 25 percent success rate (Solomon 2004).

In addition, after a string of court decisions and legislative changes to boot, most normative acts below legislation were subject to review by some court. Not only regulations from ministries but also resolutions of the cabinet ministers (as long as they do not represent delegated legislation, so that the Constitutional Court has jurisdiction) and even presidential edicts are subject to review by the Supreme Court (though none of the latter has ever been overruled; Konstitutsionnnyi sud RF 2004). Between 1999–2002, the Supreme Court satisfied challenges to the legality of regulations, in whole or in part, in one-third of cases. According to Anton Burkov (2005), the actions of the Supreme Court in reviewing the legality of regulations had come to constitute a source of administrative law (Solomon 2004: 570–571). While the impulse to develop broad judicial review of administrative actions and regulations reflected a

progressive concern with limiting arbitrary actions by officials, the practice also served the interests of the political leadership. The current efforts (from 2005 on) to establish a separate hierarchy of administrative courts, including the power of higher ones to hold governors and mayors to account, appealed directly to those interests (Starovoitov 2005).

One institution of post-Soviet Russian judicial reform that some authorities find hard to tolerate is trial by jury. Started in 1993, and spread to all regional courts for use in serious criminal cases like murder and rape and even political charges a decade later, jury trials take away from authorities the near certainty of conviction, and hence an element of power. In contrast to judges sitting alone who render acquittals in such cases in 0.4 percent of trials, juries acquit in 15–20 percent of trials and insist on leniency (as their right) in others. Many of the acquittals stem not from prosecution of the wrong person but from weak gathering and presentation of evidence, and at least a third of the acquittals are reversed on appeal by panels of the Supreme Court. All the same, law enforcement personnel including procurators get frustrated at their loss of control (power) over the trials, and in some cases (especially political ones) have allegedly arranged to have juries stacked with the right people or to influence individual jurors. A public debate in 2005–2006 about the wisdom of retaining juries reveals much about the misfit between democratic institutions and the larger authoritarian political environment (Solomon 2005; Roshchin 2006; Kommersant 2006; Iakovlev 2006; Nikitinskii 2006; Brabii 2006.)

Overall, though, as of fall 2006, Russia has courts that are empowered in significant areas and sufficiently independent at to act impartially in most cases. At the same time, especially through the operation of informal institutions, judges do sometimes experience pressure and come to conform to the wishes of powerful persons in cases that matter to them (the Khodorkovsky trials are a case in point). The result is a public perception that the courts are not sufficiently independent. Through public relations efforts the reputation of the courts may improve, but the vulnerability of judges to pressure will not end as long as the political order remains authoritarian.

Another dimension to judicial power in Russia relates to its government's membership in the Council of Europe and its consequent vulnerability to suits brought to the European Court of Human Rights (ECHR) in Strasbourg. As of summer 2006 the ECHR has ruled in a couple of dozen cases from Russia, but often against the state in favor of private litigants, and there were literally thousands of cases from Russia waiting to be examined, numbering close to one-quarter of the cases submitted to the Court (Sova, 2006; Grigoreva 2006; Matveeva 2006). Some of the cases from Russia were products of the work of NGOs, notably the talented group of young lawyers who constituted the

Ekaterinburg-based firm Sutiazhnik (Sutiazhnik, 2005; Burkov 2006). Embarrassed by the results, the Russian government asked the courts to reduce their vulnerability to Strasbourg appeals, and already in 2003 the top courts issued a resolution calling for wide distribution of Russian translations of Strasbourg court decisions and for judges to pay heed to their lessons (Verkhovnyi sud, 2003). At the same time, Russian authorities see the Strasbourg Court as a resource for its enemies (excessive legal mobilization is not part of Russian tradition), and they are trying to change the ground rules for Strasbourg appeals in their favor.

To the extent that Russia's submission to Council of Europe norms stems from its desire for full membership in the international community, especially economic bodies like the WTO, an interest in foreign investment is at play. What will be the ultimate consequences of the Strasbourg court connection for Russia's legal and political systems is a question for future analysis.

CONCLUSION

Russian experience, under three different regimes, confirms that authoritarian rulers not only need courts to perform their basic functions but also choose at times to empower courts with sensitive jurisdiction. However, unless judicial independence is well established, the empowerment of courts (in whatever form) may lead to efforts to manage or control their handling of the new jurisdiction, often at the expense of judicial independence. Perhaps, some authoritarian rulers avoid these tensions by willingly giving up their power to the courts. But the alternative scenario of attempts to seek to influence how judges handle the new jurisdiction, in general or in specific cases, is equally if not more likely.

Both Tsarist Russia and post-Soviet Russia provide illuminating stories of the limits of judicial power and independence in authoritarian settings – in the first instance, a classic, though liberalizing, autocracy; in the second instance, a "competitive authoritarian" regime, in which democratic forms are prominent, but the urge of rulers to keep or regain power remains strong. In Tsarist Russia the desire of key officials to bring Russian government up to European standards, along with the Tsar's readiness to respond to the gentry's demands for courts that would ensure that they received full compensation for the emancipation of the serfs, led to the establishment of independent and empowered courts, which in their initial form were incompatible with the system of rule.

The post-Soviet story, of course, is ongoing, and how the tensions between a form of authoritarian rule and courts shaped for democracy will play out is far

from certain. It is possible that the core of judicial reform will remain in place, and that sensitive jurisdictions will remain in the hands of the courts, if only to maintain legitimacy of the regime (which has no ideological alternative) and to give investors the impression of secure property rights. At the same time, as long as the dominant style of rule is authoritarian, it is hard to imagine real change in the informal practices and institutions that keep courts responsive to powerful interests and prevent judges from acting impartially in all cases.

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Courts in Semi-Democratic/Authoritarian Regimes: The Judicialization of Turkish (and Iranian) Politics

Hootan Shambayati

Turkey is not a typical authoritarian or democratic regime. For much of the past six decades Turkey has held regular multiparty and reasonably free and fair elections. Power has changed hands numerous times, and governments have come to office and left as a result of elections. Furthermore, even though the Turkish military has intervened in the political process on a number of occasions, unlike in most other developing countries, the periods of direct military rule have been relatively short (1960–1962 and 1980–1983). Finally, for much of the past half-century, Turkey has had lively social and political societies that have acted with relative freedom, although major shortcomings continue to plague both. There is much to suggest that Turkey should be classified as a democracy.

At the same time, however, it is widely recognized that the Turkish political system displays authoritarian tendencies and that the military continues to play an important role in Turkish politics. The Turkish military has formally intervened in politics on four occasions (1960, 1971, 1980, and 1997). In 1960 and 1980, the military officially assumed the reins of power, while in the other two instances it limited itself to issuing a series of ultimatums that eventually brought down the governments of the day without formally interrupting the democratic experience.

The 1960 and 1980 military coups were followed by attempts to restructure political and social life through new constitutions. The military's desire to redesign the political and social life of the polity is, of course, a common feature of many military interventions. Military interventions are frequently reactions to what officers believe to be the shortcomings of the political system and are often followed by attempts to fundamentally alter the basis of the political system. In the Turkish case, the short periods of military rule have meant that the military has had to limit itself to altering the formal rules of the game while leaving the implementation of more deep-rooted changes until

after the return to civilian rule. Consequently, creating a constitutional setup that allowed it to continue to influence civilian politicians and intervene in the political process was one of the major goals of the military leadership in both the 1960 and the 1980 military coups.

On each occasion the military regime imposed a new constitution on the nation before formally returning power to civilian politicians. Despite some major differences in the area of rights and liberties, the military-inspired 1961 and 1982 constitutions both display the fundamental distrust of the state elite toward politics and politicians (Özbudun 2000: 53–60). As I discuss below, both constitutions recognized the legitimacy of elections and elected officials, but at the same time tried to limit the effectiveness of elected institutions by subjecting them to control by a network of unelected institutions. In the view of military officers and high-ranking bureaucrats, including many jurists, self-interested politicians could not be trusted with serving the national interest. Accordingly, both constitutions were designed to limit the powers of the parliament and elected institutions by subjecting them to control by unelected state institutions.

In their attempts to restrict the powers of the parliament, both constitutions not only provided the military with formally recognized mechanisms to intervene in day-to-day policymaking but also empowered the judiciary to review the decisions of the parliament and the elected governments. As I discuss below, this division of sovereignty between elected and unelected institutions has contributed to the judicialization of Turkish politics and has led to the emergence of Turkish courts, particularly the Constitutional Court and the Council of State, as important political institutions that have often used their powers to counteract the parliament.

The division of sovereignty between elected and unelected institutions, of course, is not unique to Turkey and can be found in many regimes. Nor is it the function of a particular ideology. The prototype of such regimes is the Islamic Republic of Iran where the powers of the elected parliament and the president are subject to review by a web of institutions controlled by a religiously empowered Supreme Leader. As I discuss at the end of this chapter, in Iran too this political structure has contributed to the judicialization of politics.

Since the bulk of this chapter deals with the Turkish case, I begin with a brief discussion of the main characteristics of military-inspired judicial empowerments. I will argue that military regimes might be particularly interested in empowering the courts to become active in the political arena after the military's return to the barracks. I will then proceed to discuss the specifics of the Turkish political system and the role of the judiciary in Turkish politics. The final section of the chapter briefly discusses the Iranian case.

MILITARY-INSPIRED JUDICIAL EMPOWERMENT

Both Bruce Ackerman and Tom Ginsburg have argued that judicial review is associated with weak militaries (Ackerman 1997; Ginsburg 2003: 83). A similar conclusion can be reached based on Ran Hirschl's "hegemonic preservation thesis." According to Hirschl, waning political actors will choose to empower the courts to maintain hegemony in the event they lose control of the Parliament (Hirschl 2004). While a strong military, or for that matter any other strong actor, need not rely on the courts to protect its interest while in power, a military regime might have strong incentives to empower the courts before leaving office. Furthermore, political systems based on competitive elections with unelected "guardians," such as those found in Turkey and Iran, require a network of institutions that often include the courts to control elected institutions without undermining the stature of the guardians as allegedly above politics.

The military does not face the same dilemmas faced by civilian political institutions when empowering the courts. When civilian executives and legislators create constitutional tribunals, they are creating organizations that limit their own powers. When the military empowers the judiciary it creates an institution that limits the powers of civilian institutions without necessarily affecting the position of the armed forces. First, the military's core internal concerns, such as training or promotion, are likely to be outside the competence of the civilian judicial institutions, including constitutional tribunals. In the Turkish case, for example, the 1982 Constitution forbids the civilian courts from reviewing decisions of the Supreme Military Council.[1]

Second, the military is not equally interested in all policy areas. The military is likely to be much more interested in security and order than in public health or price controls, for example. Not only have the courts generally accommodated security needs but also an outgoing military regime can put in place rules and regulations that are exempt from review by judicial authorities. Until its amendment in 2001, for example, the 1982 Turkish Constitution prevented the courts from reviewing the constitutionality of laws and regulations put in place by the military regime.

Third, particularly in civil law countries, the military might see the judiciary as a natural ally in the post-transition period. Like the military, the judiciary in the civil law tradition is a hierarchical organization performing a "technical" role. Judges enter the judicial service shortly after completing their legal education and spend their entire careers within the judiciary. Like military officers, judges see their role as technical and believe that they are merely

[1] Article 125.

applying the law. Judges are trained to view law and politics as two completely distinct arenas. Furthermore, as in the military, the promotion of judicial personnel in the civil law tradition has historically been controlled by the more senior judges, producing an ideologically homogeneous institution with a strong *esprit de corps* that identifies strongly with the state and sees politics and politicians as divisive and corrupt. In short, the military and the judiciary might share a number of common values and assumptions about politics and politicians (Correa Sutil 1993; Galleguillos 1998; Guarnieri and Pederzoli 2002: 49; Hilbink 1999, 2001; Tate 1993).

Finally, an outgoing military regime can create constitutional tribunals and other judicial institutions that will be inclined to give the military's point of view the most favorable of hearings. Self-interested political actors adopt judicial review as an "insurance policy" to protect their interest in the event of future electoral losses (Ginsburg 2003: 25). The institutional design of the judiciary and the high courts, like those of other institutions in a democracy, depends on the relative strength and the interest of the political actors (Ginsburg 2003; Magalhaes 1999: 43; Smithey and Ishiyama 2000, 2002). Their ideal institutional design will produce judicial actors who will be partial to their interest whether they are in or out of power.

Two aspects of judicial institutions are of particular interest to political actors. First, judicial appointment procedures affect the ability of dominant political actors to appoint like-minded judges or to prevent the appointment of judges whose preferences they do not like. Second, the rules governing judicial careers and the institutions that manage those careers determine the judiciary's responsiveness to political actors. As Magalhaes, Guarnieri,and Kaminis (2007) conclude, "The control of a system of punishments and rewards associated to judicial careers (promotion, assignment, recall) . . . can be used to condition judicial behavior, independently of the actual composition of courts and the policy preferences of judges."

Civilian political actors' preferred institutional design depends on their estimate of their own political prospects under the democratic regime (Magalhaes 1999; Smithey and Ishiyama 2000). In East European countries where the outgoing Communist parties expected to hold onto power by winning the upcoming free elections, they were willing to increase the oversight powers of the political branches over the judiciary. Where they expected to lose the elections, however, they tended to isolate the judiciary from the political branches. Where the incumbent rulers were uncertain of their prospects under the democratic regime, they were more likely to provide a role for the opposition in appointing judges and less likely to introduce sweeping institutional changes (Magalhaes 1999: 47–48).

Transitions from military rule follow a similar logic. However, in these cases the picture is more complex. As a unit of the state, the military will be reincorporated into the state apparatus after the transition and can be certain of its continued participation in the state under the democratic regime. However, the military, unlike civilian authoritarian institutions such as Communist parties, cannot reorganize itself to compete in democratic elections. An outgoing military regime is an actor with no expectation of winning elected office, but certain of the military's continued influence under the new regime. As the Turkish case demonstrates, in such cases the tendency will be toward the creation of politically powerful judicial institutions to act as guardians of the military-sponsored constitutional order without directly involving the military. At the same time, however, the outgoing military regime will try to minimize the influence of the political branches in the affairs of the judiciary, including appointments to the high courts.

THE TURKISH POLITICAL SYSTEM

In 1998, when veteran politician and many times prime minister Süleyman Demirel occupied the presidential office, he was asked to comment on a growing crisis between the then-prime minister Mesut Yilmaz and the military leadership. According to published reports Demirel replied with the following story:

> In an English zoo there was an experiment to have wolves and sheep live together in one cage. Someone asked the director if the experiment was working. The director replied, yes, but occasionally we have to replace the sheep (Bila 1998).

Mr. Demirel should know. As prime minister he had been removed from office by the military in 1971 and 1980; as president he had presided over the military-engineered downfall of the Islamist Welfare party government in June 1997 and the party's eventual closure by the Constitutional Court in January 1998.

As the story above suggests, Turkey is an example of what Daniel Brumberg has called "dissonant institutionalization." According to Brumberg "dissonant institutionalization occurs when competing images of political community and the symbolic systems legitimating them are reproduced in the formal and informal institutions of state and society" (Brumberg 2001: 33–34). As a consequence, systems based on dissonant institutionalization are likely to produce high levels of political tension.

In the Turkish case, dissonant institutionalization has led to a bifurcated political system, where parts of the system aim at transforming the society, while others try to maintain the status quo. The consequence has been a high level of tension between what the Turks refer to as the State (*devlet*), consisting of the security establishment, the presidency, the judiciary, and parts of the civilian bureaucracy, and the government (*hükümet*), consisting of the elected Parliament and cabinet. The management of the resultant tensions is a fundamental concern of the political system.

At the same time, however, the system's continued survival depends on maintaining a high level of tensions between the competing institutions. While the continued coexistence of the wolves and the sheep in the same cage requires mechanisms to keep the two separate from each other, it also needs constant justification. As I have discussed elsewhere, "a regime based on divided sovereignty must prevent social and political tensions from boiling over and threatening the stability of the system, while at the same time generating enough tensions to justify the continued presence of both heads of the executive" (Shambayati 2004).

Regimes such as that found in Turkey are particularly vulnerable to societal challenges. Dissonant institutionalization is an indication that the ideological basis of the regime is weak (Brumberg 2001). In the Turkish case, the state is officially based on Kemalism. Kemalism, however, has never evolved into a full-fledged coherent ideology.

Kemalism aims at transforming society, particularly in areas such as secularism and nationalism, or, in the words of Ataturk, to bring the people to "the level of contemporary civilization."[2] The Turkish state elites see the state and the law as mechanisms for the transformation of society and often find themselves at odds with powerful societal actors whose interests are threatened by the civilizing mission. Furthermore, as the emergence of a modernist Islamist movement and Kurdish nationalism suggests, state policies have had unintended consequences and have led to the emergence of new social and political movements that are not easily incorporated into the existing political structure. From the perspective of the state elite, including many judges, the proper function of the courts is to defend the civilizing mission against potential threats from society, even if at times that means acting against the will of the nation as expressed through elections.

Dissonant institutionalization also contributes to judicialization at another level. As the story of the wolves and the lambs demonstrates, the division of

[2] This oft-repeated phrase is from a speech delivered by Ataturk on the Occasion of the Tenth Anniversary of the Foundation of the Turkish Republic (29 October 1933). See http://www.allaboutturkey.com/ata_speech.htm