

RULE BY LAW

The Politics of Courts
in Authoritarian Regimes



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the other hand, the secular establishment and center-left parties have continuously presented these campaign promises as evidence of disregard for the rule of law and as threats to secularism, hence justifying the continued vigilance of the military and the judiciary in protecting the “civilizing mission” of the state.

Similarly, the closing of numerous political parties, cultural associations, and publications and the frequent jailing of political activists have only had limited success in eliminating social and political movements that challenge the ideology of the state. Closed political parties, particularly those with Islamist or pro-Kurdish social bases, quickly reorganize and appear under a new banner to challenge the boundaries imposed by the state. The continued survival of these movements, and in the case of Islamist and pro-Kurdish political parties their ability to win elections, in turn is used to justify the need to vigilantly protect the civilizing mission of the state.

Even when the courts have ruled against the state, and there are many such instances, the rulings have tended to legitimate the continued division of sovereignty. In the mid-1990s, for example, when a number of prominent secular intellectuals were assassinated or attacked by terrorists with links to fundamentalist religious circles, the Council of State ruled that the state had failed to provide adequate protection to the individuals involved and therefore was liable (Orucu 2000: 694). Although on the face of it these rulings were victories against the state, they, of course, underlined the continued threat to secularism and the inability of the elected governments to deal with it.

In short, in Turkey’s bifurcated political system the courts play an important role in protecting the civilizing mission of the state and maintaining the division of sovereignty between elected and unelected institutions. As the brief discussion of the Iranian case in the next section demonstrates, this situation is not unique to Turkey and is a function of the dissonant institutionalization in the political system rather than any particular ideology.

COURTS IN THE ISLAMIC REPUBLIC OF IRAN

The Iranian constitution of 1979 recognizes God as the only legitimate source of sovereignty.¹² Nevertheless, the dynamics of a mass revolution and the pluralism of the Shia political thought and religious establishment meant that the framers of the constitution also had to recognize the people as a source of sovereignty (Chehabi 2001). Accordingly, the constitution created a number of elected institutions, including a Parliament and a president. As in

¹² Article 56.

Turkey, however, the power of the elected institutions is subject to supervision by unelected institutions. Whereas in Turkey this supervisory role is played by the military, in Iran it is the Supreme Leader who as the highest religious-political authority supervises all institutions of the state, including the Parliament and the presidency.¹³ While the Parliament and the president represent the will of the nation as expressed through elections, the Supreme Leader draws his legitimacy from representing the sovereignty of God based on the doctrine of the guardianship of the jurist (*velayat-i faqih*). The Iranian political structure hence is based on competing notions of sovereignty and includes institutions that are often at odds with each other (Brumberg 2001; Buchta 2000). Consequently, high levels of tension are endemic in the Iranian political system.

Similar to Turkey, the Iranian political system relies on a number of extrapolitical and semi-judicial institutions to manage the tensions created by “dissonant institutionalization.” The most important actor in this regard is, of course, the Supreme Leader himself, who is the final arbiter in all disputes. The Supreme Leader, however, like the military in Turkey, can only play this role if he can publicly maintain an above-politics posture. Consequently, the Supreme Leader relies on a complex web of institutions to control elected institutions. Courts and court-like institutions are an integral part of this system and play an important role in both managing and maintaining the tension-ridden political structure.

Iran does not have a proper mechanism for constitutional review. The initial attempts to establish a constitutional court based on the French Constitutional Council were rejected in favor of a system unique to Iran. In the Iranian system the power to review the constitutionality of legislative acts belongs to the Council of Guardians. The Council of Guardians is simultaneously an upper legislative house, a constitutional council controlling the constitutionality of laws, and a religious assembly vetting un-Islamic ordinances and candidates. As the upper house of the Parliament, the Council has to approve all pieces of legislations before they can become law. In reviewing legislation, however, the council does not limit itself to political considerations, but also makes a final decision on the constitutionality of proposed acts. The constitution further instructs the Council to also assure that all legislation meets requirements prescribed by religious law.¹⁴ In addition to these functions, the Council also

¹³ Technically, the Supreme Leader is an indirectly elected official, since a popularly elected Assembly of Experts, consisting of religiously qualified members of the clergy, selects him. He is, however, completely unaccountable and serves for life.

¹⁴ Article 91.

has the controversial duty to determine the qualifications of the candidates for the various elections in the Islamic Republic, including those for the presidency and the Parliament.

The structure of the Council and its procedures ensure that it closely follows the ideological line established by the Supreme Leader. Six members of the Council are religious scholars directly appointed by the Supreme Leader. The Council also includes six nonclerical members selected by the Parliament. However, the Parliament's role in determining the composition of the Council is limited by the constitutional requirement that the Head of the Judiciary, an official appointed by the Supreme Leader, nominates the candidates. On matters concerning constitutionality, all twelve members take part in decisions, but the support of three-fourths of the members of the Council is required for a ruling on the constitutionality of legislative acts. In other words, at least three clerical members must support a decision on constitutionality. Only the six clerical members, on the other hand, conduct reviews based on Islamic law, and those decisions are made by a simple majority.¹⁵

Through the Council, the conservative factions within the Islamic Republic were able to stop the reformist government of President Mohammad Khatami from adopting many of its reform proposals. Between 1997 and 2005, the council rejected 37 percent of the laws adopted by the Parliament and disqualified scores of reformist candidates from standing in various elections, including those for the Parliament and the presidency (Secor 2005: 64).

The tensions in the Iranian political system are not limited to ideological differences between reformists and more conservative factions. They are an integral part of the system and are caused by the structure of the Islamic Republic. Soon after the establishment of the Islamic Republic, it became clear that the tensions between the Parliament and the Council of Guardians, and more generally between elected and unelected institutions, had the potential of paralyzing the political system. This realization led to the creation of another constitutional body, the Expediency Council.

The Supreme Leader appoints all members of the Expediency Council. In addition to the heads of the three branches of the government (the Speaker of the Parliament, the President, and the Head of the Judiciary), the council also includes the six clerical members of the Council of Guardians and other personalities of the regime appointed by the Supreme Leader. As the composition of the Expediency Council suggests, it is a forum for joint policymaking by elected and unelected institutions. Its main function is to arbitrate differences between the Parliament and the Council of Guardians and to establish the

¹⁵ Iranian Constitution, Articles 91–99.

overall policies of the Islamic Republic. Its formation was a recognition of the high levels of tension endemic in the political system.

This system is complemented by a heavy reliance on courts and the judiciary. The Iranian judiciary is set up as a separate bureaucracy attached to the office of the Supreme Leader. The head of the judicial branch is directly appointed by the Supreme Leader and answers to him, rather than to the elected president or the Parliament. The head of the judiciary is responsible for the appointment of all judges and even nominates the Minister of Justice, who is a member of the president's cabinet. Furthermore, the Head of the Judiciary is an active participant in the policymaking process. He not only nominates the nonclerical members of the Guardian Council but he is also a member of both the Expediency Council and the National Security Council.

Despite constitutional guarantees of judicial independence, the Iranian judiciary is designed as a political institution that is responsible not only for the administration of justice but also for the implementation of the ideological/political line advocated by the Supreme Leader. The judiciary carries out its multiple functions through a complex system that relies heavily on specialized courts, such as the Press Court, responsible for matters related to the media, and the Special Court for the Clergy.

The judiciary emerged as an important political player during the presidency of Khatami (1997–2005). With the unexpected election of Khatami and the emergence of the reform movement as a viable political alternative, tensions in the Iranian political structure reached a new peak. As Eric Rouleau notes, “The cohabitation between the faqih Ayatollah Khamenei, the supreme politico-religious authority, and President Mohammad Khatami [came] to resemble a multi-faceted guerrilla war” (Rouleau 1999). Having lost at the ballot box, the conservatives, like their Turkish counterparts, relied on the courts to contain the reform movement.

During Khatami's tenure in office, political trials targeting his supporters became common, and dozens of politicians, activists, journalists, and intellectuals were convicted of a range of political crimes. In addition, the Press Court systematically closed many reformist newspapers (Khiabani and Sreberny 2001). Although the accused were often charged with undermining the regime, many of them were “children of the revolution” who not only had participated in the revolution but also had held high governmental positions in the Islamic Republic. Furthermore, the objective of these trials was not to punish the individual culprit, so much as to stop the political movement of the reformers.¹⁶

¹⁶ See for example the remarks of journalist Akbar Ganji, one of the leading ideologues of the reform movement who was himself convicted for his writings, cited in Khiabani and Sreberny (2001: 206).

The press trials and the judicial crackdown on the reform movement closely resemble the activities of the Turkish courts, which have often used their powers to ban political parties and shut down civil associations and media outlets. Fighting social movements through the courts, however, has not always been effective. Many of the banned Turkish political parties, for examples, have often reappeared and shown themselves capable of winning elections. Turkey's present ruling party, the Justice and Development Party, emerged from the ashes of the banned Virtue Party. Virtue itself was the successor to the banned Welfare Party (banned by the TCC in 1998) that had succeeded the National Salvation Party (banned after the 1980 coup), which in turn was formed after the TCC had banned the National Order Party in 1971. Similarly, in Iran, banned newspapers often reappeared with a new title but with the same journalists and editors (Khiabani and Sreberny 2001). As the Iranian dissident Akbar Ganji notes, "In political crimes the court decision is not binding, if it is not accepted as binding by the people" (Ganji 2000: 80).

CONCLUSION

Despite their diametrically opposed ideologies, one being secular and pro-Western and the other theocratic and anti-Western, the Republic of Turkey and the Islamic Republic of Iran have remarkably similar political structures. Institutionally, both regimes are a mixture of democratic and authoritarian regime types. Whereas in Turkey, republican institutions, led by the military and the judiciary, compete with democratically elected institutions, in Iran it is the religious establishment and the Supreme Leader who oversee the elected Parliament and the president. As Volpi notes, "In organizational terms there is little that separates a body of religious overseers from a body of secular republican overseers" (Volpi 2004: 1071). What the two countries have in common is a bifurcated political system in which unelected institutions pursuing a civilizing mission share power with elected institutions that must be sensitive to existing societal interests.

Both the Turkish state and its Iranian counterpart pursue civilizing missions that aim to create new societies based on an ideology defined by the state elite. Since the creation of the Turkish Republic in 1923, the state has pursued a policy aimed at creating a secular and Westernized society. Similarly, the Islamic Revolution in Iran brought to power religious elites who rejected the existing society in favor of a utopian Islamic society ruled as a theocracy. In both countries, however, the state elites' vision of the future is not shared by important and powerful sectors. Consequently, even though the state elites have at least partially accepted the notion of popular sovereignty based on

universal adult suffrage, they have created an institutional setup designed to defend the civilizing mission against its potential internal enemies. The hard-line secularists in Turkey and their religious counterparts in Iran share a common distrust of elected institutions that is reproduced in their respective political structures.

Whether one sees the cohabitation of elected and unelected institutions as the cohabitation of the “wolf and the sheep” or as “guerilla warfare,” it is clear that in both countries the political system is tension ridden. Despite their enormous powers neither the Turkish military nor the Iranian Supreme Leader can guarantee the outcome of elections or the policymaking process. To manage the resultant tensions, such political systems empower so-called neutral institutions such as courts. The courts in these countries however, are not “impartial actors.” Rather, their powers emanate from their partiality in favor of the state’s civilizing mission and the continued domination of the political system by the unelected institutions.

Judicial Systems and Economic Development

Hilton L. Root and Karen May

INTRODUCTION: AUTOCRACY, LAW, AND DEVELOPMENT

A staple of the development policy literature is the idea that a better quality legal system will help generate economic growth, which in turn builds constituencies for democratic reforms. Yet the causal linkages between the judiciary and political liberalization have been difficult to demonstrate empirically. Legal reforms that are narrowly focused on better enforcement of property rights and contract law may be conducive to enhanced trade and investment, but we still have very little firm knowledge about those links and about their ultimate relationship with democracy (Carothers 2003). Our investigation of the political role of the courts during economic transition describes the different incentives for democracies and autocracies to strengthen the role of courts as a framework for investment and trade, fiscal discipline, and administrative centralization. We argue that this choice has different effects on political rents, corruption, and aggregate economic activity in democracies and autocracies. We ultimately conclude that there is little reason to believe that judicial reform will lead to political transition.

THE ECONOMIC ROLE OF THE COURTS ACCORDING TO REGIME TYPE

A judicial system can be used as a tool to enhance the political survival of leaders within authoritarian regimes just as in democratic ones. Courts may help reduce costs of commercial transactions for private citizens in both contexts. However, the consequences of judicial independence for resource distribution will vary according to regime type. Democratic leaders face incentives to provide such protection broadly, for example by guaranteeing broadly accessible, functioning capital markets, stable monetary policies, nondiscriminatory contract enforcement and regulation, and transparent tax incentives for investment

to ensure a level playing field. In contrast, autocrats face incentives to provide selective benefits that maximize control over economic activity.¹ Instead of transparent, predictable, and accountable public policies, procedures, and institutions, autocrats may overlook or even encourage opacity, corruption, or inadequate capacity of the commercial law system to motivate investors to depend on government officials for the protection of their investments. In Indonesia, for example, Suharto had little interest in improving the outdated Dutch commercial codes because the ineptness of the court system made investors dependent on interventions by the head of state. This dependence provided regime officials with numerous venues for amassing rents and private wealth. In Latin America, according to the work of Paul Holden (1997), inadequate bankruptcy law reflects the social foundations upon which most Latin American regimes have been built. Without laws that facilitate the seizure of collateral, the assets of wealthy elites were protected from the risks of market competition.

An effective legal system depends on coordination with other state functions, which are also politically controlled. Impartial judgment by the courts depends on appropriate police work for evidence gathering, and enforcement of decisions after the court has ruled. Both political and administrative complexities can interfere with the court's independence and credibility in enforcing the law. Insufficient notification of procedural changes, inconsistent interpretation of regulatory requirements, and insufficient enforcement of licensing requirements are just some of the bureaucratic processes that can undermine the court's role in providing even protection of citizen rights.

The preferential or discretionary enforcement of property rights may still generate observable growth, but surpluses are not distributed evenly. This is a critical difference between the applications of jurisprudence in democratic societies versus autocratic ones: the more surplus an autocrat generates, the more she can pay off critical supporters that will maximize her tenure in office. Court functions that we associate with facilitating economic growth – attracting capital, enforcing contracts, helping to build a revenue base, and maintaining bureaucratic discipline – are applied selectively in order to reward the winning coalition.

In a democratic system, a large pool of citizens has input into the process by which leaders are chosen. This set is called the “selectorate” by Bruce Bueno de Mesquita et al. (2003). A subset of the selectorate actually chooses the leader,

¹ Control does not equate to central planning. Control may mean that the market is allowed to function freely in certain sectors, whereas in others economic activity is tightly controlled through licenses.

and this group is the “winning coalition,” consisting of the ruler and allies such as the military and other instruments of power. The selectorate potentially has access to the benefits that are distributed by the leader. Both the selectorate and the winning coalition are large in democratic societies, in contrast to small winning coalitions in autocratic regimes. With a small winning coalition, the leader can exchange private goods (or targeted public goods) in exchange for political loyalty, at the expense of evenly distributed public goods. Inequality works to the advantage of the autocrat as membership in the winning coalition becomes more valuable. The most durable autocracies have a small winning coalition with a large selectorate, because members of the winning coalition have more to lose if they fail to support the ruler. The incumbency advantage grows over time as the ruler learns the price for which loyalty can be secured; the personal wealth of those with connections to leadership increases as loyalty becomes cheaper to purchase.

Growth in autocratic regimes therefore has a very different effect than growth in democratic systems. Democratic rulers have strong incentives to promote growth as a public good that is broadly distributed to the selectorate and general population. A democratic leader who fails to provide public goods may be removed from office. For the autocrat who has secured a solid base of support, the reciprocal arrangements between the state and the winning coalition do not require economic growth to be sustained. Sometimes better economic performance in certain sectors may work to the advantage of the winning coalition, but often corruption and economic inefficiency increase as the autocrat becomes more politically entrenched.

Contrary to Mancur Olsen’s “stationary bandit” argument (1993) that an autocrat’s political security is directly tied to growth, autocrats who promote broadly distributed economic development may actually see their tenure in office decline because the interests of society are at odds with those of the ruler. Instead of providing a larger revenue stream to an autocrat, growth may instead help enemies of the regime or weaken regime stalwarts. Either way, growth conceived as a public good can weaken the incumbent. The interests of leadership and those of the population are often not aligned, and autocratic regimes offer few mechanisms to correct that misalignment.

Court systems in authoritarian regimes, like other institutions in large selectorate-small winning coalition systems, are arranged to benefit a winning coalition and maximize the private wealth and political staying power of the autocrat. In this chapter, we explore the political motivations for leaders of authoritarian regimes to favor independent judiciaries according to the strategy for political endurance. Autocratic leaders often pursue expensive political agendas, which require substantial financial means. Such agendas can include

conflicts with neighboring states, the desire to accumulate personal wealth, and the need to bribe elites to buy their support. In some circumstances, these agendas present economic, financial, and managerial dilemmas that motivate autocrats to create and empower court systems. For example, autocrats may face a need to attract investors, enhance revenue and credibility with regard to loan repayment, and reinforce central authority to overcome the inherent contradictions within hierarchical organizations caused by the private exploitation of information by regime representatives at lower levels.

INSTITUTIONAL SOLUTIONS TO AN AUTOCRAT'S MANAGERIAL DILEMMAS

Authoritarians face three peculiar managerial dilemmas by virtue of the status of the head of state as “above the law.” That status limits the effectiveness of the state and its institutions because it implies the primacy of discretion over rules. Building a court system restricts executive discretion, but instead of weakening the regime it can actually help establish a stable framework for regime longevity. First, autocrats require investment and therefore must create a legal system to facilitate transactions. Second, they need to enhance revenue collection and credit; therefore, they need a legal framework that holds financial intermediaries accountable for their private debts and for dealing equitably with citizens. Third, they need to ferret out disobedience and noncompliance by subordinates; a legal system that discloses the abuses of officials enhances the leader's renown and ensures greater compliance from citizens. Administrative courts can make the state's administrative apparatus work more smoothly to ensure that information about performance and malfeasance is uncovered (see Chapter 2). Improved loyalty of administrative personnel is thereby attained, as well as a more contented populace.

Dilemma 1: Property Rights and Securing Investment Opportunities for Distribution to Loyalists

The first dilemma faced by autocrats is how to balance the protection of private property rights with the need to secure an effective coalition. The center of the legal reform agenda for liberalization is predictability in the enforcement of property rights and contracts more generally. Development practitioners and political economists often refer to the mandate for secure property rights as “policy stability” – investors should be confident that a country's policies regarding the protection of assets will remain stable, and that their assets will not be confiscated. For example, Hernando de Soto (2000) has emphasized the importance of property rights reform, assuming an empirical correlation

between the rule of law and growth. We accept that clear property rights and rule of law reduce transactional friction and facilitate economic activity. Insofar as they effectively enforce property rights and contracts, courts serve as an institutional intermediary between commercial interests and the leadership of autocrat and democratic regimes alike.

On the surface, promoting a safe investment environment may appear to foreign investors and policy advocates as a progressive liberal improvement. The liberalization of foreign investment, however, may be linked to strategies of coalition building that increase economic inequality and limit local access to the political process. The links between economic and political liberalization are more difficult to establish than is generally understood in the literature on modernization.

Business surveys based on investor perceptions typically identify judicial reforms as a positive step toward advancing political stability and political openness. But perceptions can overstate the synchronicity of institutional reforms to outcomes. They disregard the prospect that judicial reforms may constitute a parallel system of regime legitimacy that rarely serves as an ultimate check on the power of the executive. Although an obvious advantage exists for investors to seek and support the building of effective systems of commercial law around the world, such institutions may have originated for entirely different political reasons, and may buffet authoritarian regimes by enhancing the tools available to the incumbent to buy loyalty.

A fundamental tension exists between the financial incentive of the ruler to attract foreign investment and the autocrat's political incentive to use property rights selectively. Growth is only indirectly linked to the ruler's revenue stream. From the autocrat's perspective, property rights are another tool to facilitate political and economic enrichment of regime followers in which loyalty, not consumer surpluses, is being optimized. Foreign investors may have valuable links to members of the winning coalition, or they may have resources that help leaders circumvent rivals. The ruler has an incentive to maintain a stable policy for enforcing property rights for financial elites because avoiding a financial crisis is essential to ensuring regime survival. But the autocrat may be less gracious with political opponents, and may direct the courts to practice selective enforcement. For example, Singapore's Lee Kuan Yew is alleged to have used the courts to bankrupt political opponents (Mauzy and Milne 2002: 132–136). The courts in Singapore were effective in processing commercial litigation and could identify the asset flows and resources of opponents, and then prosecute them with targeted tax enforcement. Coupled with effective administrative follow-up, the efficiency of the court system made threats to opponents more credible. The institutions that give Singapore a reputation for