RULE BY LAW

The Politics of Courts in Authoritarian Regimes

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> idealize about. There's nothing communist about it except that it is a one-party system and it is determined to do everything, including changing its own nature to stay in power. The new principle as it is written in the Party Constitution now – the Party represents the most advanced production force, which means the capitalists or the capital owners; it represents the most advanced culture, which means professionals, intellectuals, and advanced "everybody's interests," which is just . . . covering every aspect.

The adaptation of judicial independence within a limited sphere of activity does not imply that political liberalization will ultimately result. Local dispute resolution may contribute to growth as a strategy to ensure continued centralized authority, but growth may also increase inequality, which works to the advantage of the ruler. Inequality can be exploited by the autocrat to further cement control by increasing the loyalty premium the ruler can extract from the winning coalition. When being cut off from the winning coalition means mediocre access to resources, the cost to the ruler of gaining loyalty is reduced. Thus, members of the winning coalition have more to lose when the society is more unequal – so loyalty can be purchased more inexpensively. The courts can become effective as vehicles for the activism of opposition only once the regime has already started to weaken. Hongying Wang continues as follows:

> People [are] looking at their neighbors, their urban cousins getting rich. . . . Some of these protests are about local environment issues, . . . unemployment . . . about half of [college students] them end up graduating not immediately finding jobs. . . . I think on the one hand it does represent a serious challenge to the legitimacy of the government; on the other hand I don't think in the near future it's going to generate the kind of collapse that people are sometimes talking about, because the Chinese Communist Party has been very smart from its own point of view in that you can protest as long as you guys don't get organized. You can talk all you want, so there is much more freedom now in China in terms of people's ability to express their discontent – just don't get organized. And the problem is if you are thinking of a revolution or any kind of meaningful upheaval without organization these protests are not going to cause any major change.

The Chinese example demonstrates that the granting of limited freedoms can be a strategy for legitimizing the regime without sacrificing central authority. As an instrument of that authority, the courts can still rule in favor of local plaintiffs in cases of low-level corruption without jeopardizing the political security of central leadership. Judgments that favor selectorate members reduce the threat of potential challengers from within to the winning coalition. In China, for example, Jiang Zemin rarely challenged the Shanghai Gang and

his allies among the princelings, the children of revolutionary leaders, leaving behind a legacy of high-level corruption that his successor Hu Jintao is trying to erase. In effect, by becoming the party of the haves, the capitalists, and the bourgeoisie, the Communist Party has eliminated any meaningful and serious threats to it.

Revolution or Evolution

Further research on the nature of court cases in China is needed to determine the extent to which access to administrative courts is giving a voice to a new set of democratic challenges to the legitimacy of the CCP. Even if it is, this discourse is not initially dangerous until the regime starts to weaken due to other inherent contradictions or pressures. It is possible that the growing inequality in China constitutes such a contradiction. The courts could potentially be used to expose underlying instability in the coalitional structure that could lead to dramatic political change. Dualism may serve as an adaptation that provides regime stability, but because the incentives of autocratic rulers may diverge dramatically from the interests of society, courts that were originally designed to facilitate and lengthen authoritarian rule may actually become weapons against the regime (Moustafa 2007).

This occurred in Old Regime France, as de Toqueville argued. By supplanting the reciprocal bonds between lord and peasants with central bureaucratic codes, the monarchy initiated a revolutionary process that ultimately led to the regime's demise. In *The Old Regime and the Revolution* (1856/1998) de Tocqueville contends that it was the Crown's attempts at reform that "roused the people by trying to offer them relief." The shift to a rule-based system of centralized authority that weakened the Seigneurie created political space in which reforms became "practices thanks to which the government completed the people's revolutionary education." Inequality of status, symbolized by residual feudal dues owed to local seigneurs, became suspect. Seigneurial roles for the local community had become tenuous, and their tax-exempt status became more odious as their authority became more residual. The courts provided a venue to air long-standing grievances against seigneurial exactions and domination (Root 1985).

The White Revolution initiated by the Shah of Iran in 1963 provides a more contemporary example of reforms that highlighted deep-seated inequalities, thereby initiating a revolutionary process. The Shah hoped that economic growth would relieve pressures and ultimately provide a source of social coherence, but growth created conflict instead (Root 2006). Opportunities for capital accumulation were linked to a system of social exclusion. Meaningful

policy participation was barred: democratic and meritocratic channels of access within the state were not built. In contrast to the anti-religious sentiment of the Enlightenment in the French Revolution, Khomeini's Iranian revolution in response to the Shah used the banner of organized Islam to provide a framework for the democratic political challenge. While the regime enjoyed early popular support and made social gains in terms of political participation, rules and regulations promoting access to capital for new enterprises not controlled by the government have been stiffly opposed by the incumbent leadership. The revolution's agenda did not emphasize eliminating corruption, or establishing an institutional and legal capacity necessary for a market economy. As a result, Iran's productivity declined after religious rule was established and has stagnated ever since.

Instead of economic conflicts, the courts in the Soviet Union exposed a different set of contradictions after the Communist leadership signed the Helsinki Accords. The Russians were subjected to human rights criteria that undermined the legitimacy of the regime and gave the United States a wedge to impose constraints. One unintended consequence benefited Russian Jews by allowing them to migrate to Israel, but the favoritism they enjoyed led other Russians to ask why they too did not enjoy similar rights; the Helsinki Accords had an unintended subversive effect that set the stage for Soviet decline as domestic discontent was empowered with a universal criteria with which to measure their own leaders.

The Iranian and Russian examples provide evidence to support the notion that a connection exists between the role of the courts and regime disintegration, but not that growth or democracy will necessarily result, or that a formalized democratic constitution will necessarily increase the welfare of society. For two centuries the revolutionary goal of responsibility and equal burden sharing was not met in France. Informal norms continued to reinforce structures of elite domination, including domination over entire sectors of the modern economy.

The celebrated case of England's transition to democracy, led by the rise of Parliament, could be described as more of an evolutionary process than a revolutionary one. The danger in moving reforms too fast is that the contradictions inherent in the regime and the incompatibility between formal and informal institutions can create a backlash situation in which resistance to reform increases, further entrenching authoritarian rule. An often overlooked aspect of this evolution is that for the Parliament to be effective it depended on the ability of the head of state to assert sovereignty over the entire kingdom. In England it was often said that the king was strongest in Parliament because it simplified getting the assent of the entire nation. The French king, who was

ruling over a mosaic nation, had to employ much more cumbersome procedures to gain cooperation from his subjects. A considerable waste of resources resulted.

In systems with diminished winning coalitions and poor institutional infrastructure, resistance to reform of legal institutions is well focused and easy to organize. That opposition can come from entrenched social groups whose interests are threatened by judicial independence. Opposition can also come from within the bureaucracy. Legal ministries might resist the formalization of commercial law, as a rules-over-discretion approach would directly challenge the legitimacy of the regime. Finance ministries may be allied with reform, but they have no jurisdiction to promote it. In such cases, a common law approach may be much more effective at instilling viable procedures for enforcing contracts and mediating civil and commercial disputes. As individual cases are arbitrated, precedents are set and legal efficiency can slowly evolve. This reform strategy has been proposed as a possible mechanism to build up legal capacity in Africa, where legal ministries resist reform efforts because they would constitute a direct challenge to the legitimacy of the autocrat's rule. The French kings of the twelfth century astutely managed the diversity of regional legal institutions not by abruptly abolishing them, but by appointing a royal representative as local supervisor, facilitating a slower transition to a uniform legal code, which was less threatening to local interests.

The Law and Emerging Loyalty to the State

The institutionalist argument for legal reform that seeks to replicate formal structures with effective enforcement of commercial law must be combined with the political argument that takes the ruler's strategy for political survival into account. Building a rule of law is part of the political process in which the state acquires its legitimacy as upholder of the law, and in which the organs of state power are viewed as existing to enforce the law. The first national institutions were identified with the monarch, who embodied the nation morally and politically. The duty of the king to uphold the law became the moral justification for political leadership. Eventually the monarchs of Europe accepted that political power must be defined by law, so that by the eighteenth century, most administrative and legal matters were handled by professional administrators who acted independently of royal prerogative. Paradoxically, it was the strong political identification with the monarch that enabled the growing independence of government administration.

Qualitative studies of the origin of the rule of law in Western Europe have shown that the existence of courts does not necessarily lead to the acceptance

of the supremacy of law, nor to the emergence of an authority that will enforce the law (Strayer 1970: 7). Rather change in judicial systems, as an adaptive process like evolution, does not produce an optimal and consistent outcome such as a recognizable liberal regime. The legitimacy of leadership must first be established before the courts will be viewed as upholders of a society based on law. In Western Europe the development of a society of law was an integral part of the political process of state-building. The courts emerged as institutions of law that strengthened the political identity of the group; local identity fused with loyalty to the state and ultimately with nationalism. This fundamental aspect of the European tradition – the emphasis on national cohesion embodied by a unifying national symbol – has been surprisingly embraced by the Chinese. In this case, the Communist Party functions as that symbol rather than the monarchy. The Chinese are only now just beginning to create law schools and to train judges, fifty years after the process of building a modern state began, and three decades after pro-market reforms were initiated.

For the courts to function in any society there must be an ability to distinguish between public and private –a distinction that is only beginning to take root in the habits and beliefs of the population in many emerging nations. In many developing countries basic security comes from pre-state organizations – family, neighbors, and the local strongman – not from the state. In many patrimonial African regimes that emerged after the colonialists departed, the strongest loyalties were to family and persons rather than to abstractions such as the national state. Instead of providing enduring institutions to deliver efficient administration, the strategy of political leaders was to gain control over existing governments or over residual colonial institutions for purposes of personal aggrandizement, and they accordingly used the courts to protect the income and prerogatives of the leadership. Latin America's courts functioned primarily to protect the private interests of the wealthy. In both examples the existence of courts does not lead to the acceptance of the supremacy of law.

Communist regimes, by comparison with African and Latin American legal systems, more effectively laid a foundation for broad public acceptance of the institutions of government. Communist societies deliberately avoided distinguishing between the private interests of citizens and the public concerns of the state. They elevated the interests of the state above all else and so dissolved primordial loyalties and networks of clientage and dependency that still exist in many former colonial regimes.

The desire of the poorer classes for security and good government in authoritarian countries has been constantly frustrated by the fact that leaders sought stability and longevity by appealing to the propertied classes. This process of

mass identification with the symbols of state power has often failed to occur in many authoritarian regimes for both external and internal reasons. Many leaders during the Cold War cooperated with the geopolitical strategies of the major industrial powers in exchange for the resources needed to gain the approval of the privileged minorities. Governments could secure power without providing public services such as broadly available law, security, health, and sanitation that citizens demand in exchange for loyalty and resources. Necessary improvements in legal processes could be postponed. As a result loyalty to the state must vie with other loyalties. The state, without a real impact on the quality of people's lives, enjoys only limited respect.

The national leaders of many Third World nations have little in common with the citizenry. Local leaders, sometimes members of politically suspect groups who are involved with day-to-day security, are not recognized by government to create judicial institutions. Examples such as Hezbollah or the war lords of Afghanistan come to mind. In contrast, during European development the more competent local leaders were the first to establish courts and other instruments of state power. But many leaders today derive their fiscal capacity to rule from resources that are independent of the people who are being governed. Autocrats often survive because they have access to external resources and as noted base the stability of their regime on the support of the propertied and politically privileged groups; thus, their political survival strategies differ fundamentally from democratically elected leaders. External processes triggered by the Cold War that provided external funding for compliant dictators, and the resource curse that put resources into the hands of government elites, all interfered with the emergence of strong and accountable national states. External resources, generally available only to the incumbent leadership, lessen the efficacy of domestic political challengers, reducing the incentives for incumbents to be concerned with structural reforms and institution-building.

The larger process of building political legitimacy for the instruments of state power will ultimately determine if the courts emerge as upholders of the supremacy of law. The legitimacy of the state determines the legitimacy of its institutions, such as the courts. As part of the basis for state-building, the judicial system will not be truly effective until the other basic institutional components – both formal and informal – are already in place. The integrity of the courts and of the laws they uphold will flourish only once loyalty to the state becomes an item of faith for large majorities as opposed to small winning coalitions. To sustain such faith, legal reforms must be incentive-compatible across many dimensions – financing, credibility, security, and general welfare – with the ruler's strategy for survival and the interests of population at large.

As the case studies in this volume show, many of today's autocracies have court systems that are better organized than in the past. It remains an open question whether more effective courts will produce greater loyalty to the ruler and to the state or whether they will be a forum for opposition and for the replacement of the existing regime.

To assist policymakers, scholars must work toward mapping the characteristics of courts in regimes that have effectively implemented growth-enhancing institutions, those that have working democracies, and the rare cases in which legal and institutional reforms do in fact lead to growth *and* democracy. We must ask when these are two separate issues and when they converge.

For the courts to facilitate social change, they must be venues that encourage innovation and competition. This is rarely the purpose for which courts are created. Protecting innovation must be distinguished from the simple protection of property rights, which will inevitably focus on protecting elites to the exclusion of more marginal constituencies. The Coase Theorem that stresses reduction of transaction costs is not very helpful in the context of developing economies since the poor lack the resources to defend their property rights.

Finally, imposing formal institutional structures on a society with incompatible traditions is unlikely to succeed in bringing about lasting reform. Courts in the United States derive their authority from a constitutional mandate to interpret legislation. In most other societies the courts are an extension of the executive function. Without the balancing effect of the other branches, the scope for reform via the courts is limited. We tend to assume that court and legal reform along these lines form a healthy, inevitable pattern of evolution that contributes to human betterment – others see reform as a means to an end, an end for which there may be better alternative means.

CONCLUSION

The links between judicial institutions and liberalization are ambiguous at best. Even when the courts enforce property rights, contract, and family law, judicial power may block innovation and competition by selectively promoting the rights of established firms and technologies they control. Underneath the rules and procedures of formal constitutions and codes of conduct, the courts can be used to protect incumbent wealth. Governments may employ courts to improve contract enforcement, loan repayment, and bureaucratic discipline and still not allow citizens the right to assemble, mobilize, and organize for political purposes. As already noted, in autocracy the inclusiveness of legal rights and protection does not need to be any larger than the coalition that the leader cultivates to elevate his or her political power. Leaders who do

not depend on broad coalitions have numerous ways to extend their tenure in office by manipulating judicial institutions. For this reason it is necessary for future analysis to distinguish between those functions of the court that advance or retard democratic change. It is not just the institutional framework that matters, but rather that legal reform is part of a broader context of social reform. The judicial system will lack legitimacy until the other instruments of national sovereignty win citizen acceptance.

Modern autocrats in contemporary Russia and Kazakhstan have learned how to prevent people from coordinating political activism or dissent while at the same time encouraging foreign investment. The key point for the literature to absorb is that the interests of leaders can be divorced from the national interests of the populations they lead. Modern autocrats can actually decrease the probability of revolt by being successful economically, so we must learn to distinguish between those who come to power in existing arrangements and those leaders who pose a revolutionary challenge that will alter the regime's coalitional foundations and expand the winning coalition by increasing the provision of public goods. Such leaders will inevitably undertake revolutionary transformations of the legal system. But so far we have not found any reason to believe that judicial institutionalization makes democratic reform more likely. Turkey provides an example of the judiciary working closely with the military that modernized the country, and the implication is clearly that judicial power conflicts directly with the emergence of democratic forces that contain strong anti-modern elements.

There may be particular institutional innovations that contribute to democratic reform, and we need to identify those and distinguish them from the general process of legal reform. It may be possible that leaders can reduce the likelihood of democratic revolt by providing courts that offer citizens redress to the performance of the administrative functions of government. We have also suggested that corruption in the courts can increase when the judicial system is underfunded so that, even if the judges have lifetime tenure, their credibility can be undermined simply by underpaying them. A weak financial base can make it possible for the courts to be intimidated by nonstate actors.

Our analysis indicates that the courts are part of the fabric of broader societal change, but can under restricted conditions precipitate change. Further research on what these conditions are will help define how reform of the courts is interwoven with larger social movements, and whether we can consider legal reform as a driving force, or an important incidental.

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Courts in Authoritarian Regimes

Martin Shapiro

THE EXPANSION OF JUDICIAL STUDIES

This project represents something of a high watermark in the study of law and courts in general and judicial review in particular. Not so very long ago nearly every student of the politics of law and courts concentrated on the constitutional decisions of the U.S. Supreme Court. The very preoccupation with constitutional judicial review has led, in recent years, to more study of lands beyond the United States as constitutional courts and constitutional judicial review, or something very like it, spread to other democratic regimes, particularly after World War II. What once appeared to be a piece of American exceptionalism came into play in most European, continental, democratic states; and in the European Union and the European Convention on Human Rights; in more and more English-speaking countries; and in some Asian democratic states. Overseas realities eventually forced scholars to go beyond their American preoccupations.

At the same time, the very concerns with the politics of law and courts, or the judicial role in politics, that had so dramatically called our attention to the constitutional law of the U.S. Supreme Court and then to other constitutional law and courts eventually lead us to nonconstitutional courts of law, because it could hardly be denied that all sorts of American and foreign courts made significant public policy decisions in all sorts of cases involving all sorts of law.

For a long time the movement outward and downward from the constitutional judicial review of the U.S. Supreme Court remained concentrated on law and courts in democratic regimes. Indeed a strong argument can be made that courts can only make independent and effective public policy decisions in those polities that exhibit relatively high degrees of electoral, party-competitive democracy.

Again, however, global realities pushed scholarly attention onward. We confronted a growing number of "democratizing" states moving from more or less pure authoritarianism or one-party dominance to something like regimes of real party electoral competition. This made for some odd bedfellows: the former East Europe satellites, Mongolia, South Korea, Taiwan, Mexico, Chile, Argentina, some African and Middle Eastern states, and some states like Japan that might be taken as democracies rather than democratizing but had experienced long periods of one-party dominance. All this concern with democratizing naturally led to the twin questions: Was an independent, effective judiciary necessary to the achievement of democracy? Was the achievement of democracy necessary to the establishment of an independent, effective judiciary? On constitutional judicial review there was slightly less dualism. We had a number of examples, particularly in Europe, of democracy without much constitutional judicial review. So it appeared you could democratize without constitutional judicial review. But the question of whether you could have constitutional judicial review without democratizing remained open.

In the current world, concerns with political development or state-building or democratizing have become deeply entangled with economic development concerns. An international epistemic community of investment bankers and lawyers acting through entities ranging from American law schools to the World Bank has been busy trying to persuade the world that one key to national economic success is the "rule of law" enforced by independent judiciaries. Making the democratizing and even the authoritarian states safe for capitalism becomes a powerful incentive for studying courts in those places.

Finally, and a point to be turned to later, the religion of human rights that has so dramatically swept the world for the last half-century leads its believers to push for effective courts everywhere. No doubt in large part due to the American experience and its readings and mis-readings by others, courts, and in particular constitutional courts, have come to be seen by many as the premier protectors of human rights. Given that many of the students of courts, and of constitutional law in particular, are themselves true believers in the rights religion, or at least keen observers of it, they necessarily find themselves moving from the study of an American exceptionalism to the study of a hoped-for worldwide phenomenon.

Embarking on the study of courts in democratizing regimes almost inevitably pushes us on to where this project is – to courts in authoritarian regimes. The word "democratizing" itself suggests a *problematique*. Some authoritarian regimes moving toward democracy may not yet, and may never, pass over the unmarked border between the two. Others, having passed over, may or may not have fallen back. Others yet, such as Chile, having in relatively

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

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

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