Law and Courts in Authoritarian Regimes

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Abstract

Once regarded as mere pawns of their regimes, courts in authoritarian states are now the subject of considerable attention within the field of comparative judicial politics. New research examines the ways in which law and courts are deployed as instruments of governance, how they structure state-society contention, and the circumstances in which courts are transformed into sites of active resistance. This new body of research constitutes an emergent field of inquiry, while simultaneously contributing to a number of related research agendas, including authoritarian durability and regime transition, human rights, transitional justice, law and development, and rule-of-law promotion. Moreover, this research offers important insights into the erosion of rights and liberties in "consolidated democracies."

INTRODUCTION

Until recently, courts in authoritarian regimes were generally regarded as little more than window dressing for dictators. The assumption was so widely accepted that research on judicial politics in nondemocracies was rare prior to the 1990s.[1] As a general rule, the same nuanced understanding of courts as contested sites in democracies was largely missing from our approach to authoritarian politics. But what began as a trickle in the 1990s turned into a flood of new research over the past decade. There has been a surge of interest in the topic and an increasing recognition of the important and complex roles that law and courts play in authoritarian politics, both as institutions of repression and, in many cases, as sites of active resistance. Research in the 1990s focused primarily on case studies, often with the goal of understanding the forces at play in seemingly anomalous, local contexts (Brown 1997, Loveman 1993, Lubman 1999, Mahmud 1993, Muller 1991, Newberg 1995, Osiel 1995, Pereira 1998, Rosberg 1995, Solomon 1996, Tate & Haynie 1993). Over time, however, scholars have become more aware of their position within an emerging research agenda. Research on the topic is increasingly diverse in terms of method and scope, and more ambitious in terms of theoretical reach.

To a large extent, this emergent body of literature addresses many of the core questions that were posed in the late 1990s:

> What motivates authoritarian rulers to grant nominal or even substantial independence to judicial institutions? What strategies do judges adopt to expand their mandate and increase their autonomy? Are there discernible patterns of conflict, accommodation, and cooperation between judicial actors and state leaders over time? How do courts in authoritarian systems structure political conflict and state-society interaction? To what extent do courts in authoritarian systems provide avenues for political activists to challenge the state, and what role do courts play in regime transition or sustained authoritarianism? (Moustafa 1999; Moustafa 2003, p. 885)

Although the answers to these questions vary across particular cases, a variety of working theories have emerged to explain the dynamics of judicial politics in authoritarian regimes. The volume of new research and frequent cross-referencing suggest that we have moved well beyond simplistic caricatures of kangaroo courts and telephone justice—at least among the growing number of scholars conducting work on judicial politics in authoritarian settings. This scholarship examines the various ways in which regimes use law and courts as instruments of governance. And more counterintuitively, this work finds that courts rarely serve as mere pawns of their regimes. Instead, courts more typically become lively arenas of contention, resulting in a "judicialization of authoritarian politics" (Moustafa 2003, p. 926).[2]

This article provides a roadmap to the new literature on law and courts in authoritarian regimes.[3] I begin by reviewing work that seeks to understand why and how regimes use law and courts as instruments of governance. Next, I survey research focused on the dynamics of legal mobilization and legal contention in this most unlikely environment. I then turn to the various strategies that authoritarian rulers employ to contain judicial activism and to constrain the

[1] Notable exceptions are Fraenkel (1941), Kirchheimer (1961), and Toharia (1975).

[2] A judicialization of politics is defined elsewhere as "(1) the process by which courts and judges come to make or increasingly to dominate the making of public policies that had previously been made (or, it is widely believed, ought to be made) by other governmental agencies, especially legislatures and executives and (2) the process by which nonjudicial negotiating and decision making forums come to be dominated by quasi-judicial (legalistic) rules and procedures" (Tate 1995, p. 28). This review concentrates primarily on the first mode of judicialization of politics.

[3] Given the volume of new scholarship, it is impossible to include every study in this review. Writing on the politics of law and courts in China alone is worthy of a stand-alone review in the *Annual Review of Law and Social Science*.

emergence of synergistic support networks between courts and activists in civil society. Finally, I suggest future lines of inquiry in this still nascent field of research. As the work examined here suggests, not only does the new literature on law and courts in authoritarian regimes constitute an emergent subfield of comparative judicial politics, but it also contributes to a variety of substantive research agendas, including authoritarian durability and regime transition, transitional justice, human rights, law and development, and rule-of-law promotion in fragile states. Equally important, this literature is increasingly relevant for the politics of many *democratic* states—perhaps more so than many of us wish to acknowledge. More than a boutique niche, this research offers important insights into the erosion of rights and liberties in "consolidated democracies."

INSTITUTIONALIZING AUTHORITARIAN RULE THROUGH LAW AND COURTS

Recent work examines the ways in which law and courts are deployed as instruments of governance in authoritarian states. Although there is considerable variation across specific cases, a number of common functions are noted. Law and courts are frequently deployed to (*a*) exercise state power vis-à-vis opposition, (*b*) advance administrative discipline within state institutions, (*c*) maintain cohesion among various factions within the ruling coalition, (*d*) facilitate market transitions, (*e*) contain majoritarian institutions through authoritarian enclaves, (*f*) delegate controversial reforms, and (*g*) bolster regime legitimacy.

Rule by Law

The principal and most apparent function of law and courts in authoritarian regimes is the efficient and disciplined exercise of state power. Jothie Rajah's (2012) *Authoritarian Rule of Law* provides a detailed example of the ways in which law and courts were deployed in the service of authoritarianism by the government of Singapore. Through a detailed examination of the workings of the Press Act, the Public Order Act, and other legislation, Rajah (2012, p. 46) demonstrates that law "has been a key tool effecting the decimation of opposition parties[,]. . .the dismantling of independent media[,]. . .and the thwarting of an autonomous civil society." As such, Singapore provides a textbook model for the ways in which law and legal institutions can be deployed to sideline opposition and maintain political dominance without resorting to brute force. Perhaps more important, Rajah shows us that many of the same institutions that we more typically associate with liberal democracy—constitutions, elections, legislatures, law, and courts—can be used as tools to subvert representative democracy and liberal rights.

Moustafa (2007b) similarly details the ways in which law served as the primary means by which political opponents were sidelined in Mubarak's Egypt. The exercise of political control through law was most obvious in the state security courts, but law was also the principal tool to co-opt and constrain opposition through the political parties' law, the law on civil associations, laws governing professional syndicates, and a web of regulations imposed on media. To be sure, the deployment of extrajudicial force was the rare exception in Mubarak's Egypt, not the rule. By advancing a thin conception of rule of law—or, more accurately, "rule by law" (Ginsburg & Moustafa 2008)—the regime dominated the opposition for decades while maintaining many of the trappings of a liberal state, an important theme that I return to at the conclusion of this review.

Administrative Discipline

Many regimes also deploy law and courts to bolster discipline within the state administration. In his seminal study, *Courts*, Martin Shapiro (1981) observes that judicial institutions are often used

to generate an independent stream of information on bureaucratic misdeeds. He explains that "a 'right' of appeal is a mechanism that provides an independent flow of information to the top on the field performance of administrative subordinates" (p. 50). Shapiro's observation helps explain why even authoritarian regimes with little regard for civil liberties often preserve the right of citizens to have their day in court.

Peerenboom's (2002) account of the Chinese administrative courts provides a concrete example of the ways in which judicial institutions are deployed to resolve principal–agent problems between the center and periphery. Two of the most urgent problems facing the Chinese central government are widespread corruption by local officials and tenuous control of the periphery. Both problems are exacerbated by the sheer size and increasing complexity of the Chinese state. According to Peerenboom (2002), efforts to address these problems began in 1988 with the establishment of 1,400 specialized administrative courts across the country. The administrative courts were designed to provide Chinese citizens with an avenue through which they could contest the decisions of local officials based on a variety of charges, including inconsistency, procedural irregularities, arbitrariness, and inappropriate delay (p. 423). What is perhaps most surprising is the fact that plaintiffs win 40% of the cases that they initiate, in whole or in part (p. 8). Although paradoxical at first blush, Peerenboom suggests that the administrative courts serve as a useful mechanism to police and discipline state bureaucrats. Lubman (1999, pp. 258–69) and others point to a host of problems that the administrative courts in China face, from a lack of sufficient autonomy to the ineffective implementation of court rulings. Yet despite these difficulties, law and courts are viewed by the central regime as "a way to rein in increasingly independent local governments and ensure that central Party and government policies are carried out" (Peerenboom 2002, p. 60).

A strikingly similar story emerges from studies of other authoritarian regimes. Rose-Ackerman (2003) traces the origins of the Polish administrative court back to 1980, well before Poland's transition to democracy, as a means by which the regime could increase the accountability of the bureaucracy to the central regime. Similarly, Verner (1984, p. 486) finds that during the six-decade stretch of single-party rule in Mexico, citizens were encouraged to use the courts "for protection against arbitrary applications by capricious individuals" who staffed various agencies of the state. Verner underlines the fact that the government did not provide recourse to judicial institutions out of pure benevolence. Rather, judicial mechanisms were used to better institutionalize its rule and to strengthen discipline within its burgeoning administrative hierarchy. Similarly, Bourchier (1999) finds that an administrative court system was established in Soeharto's Indonesia after decades of failed attempts to stamp out corruption in the government bureaucracy. Bourchier explains "the most important factor behind the establishment of the Administrative Courts appears to have been the desire of senior government officials to improve the efficiency of the bureaucracy" (p. 248). And in Egypt, Rosberg (1995) and Moustafa (2007b) trace how the administrative court system was vastly expanded in the 1970s, again to restore discipline to a rapidly expanding and increasingly unwieldy bureaucracy.

Elite-Level Cohesion

Judicial institutions are also sometimes used to maintain cohesion among regime elites. According to Barros (2002), the 1980 Chilean constitution and the Tribunal Constitucional were designed to arbitrate among the four branches of the military.[4] Similarly, Skidmore (1988) and Stepan

[4]Ironically, the Tribunal Constitucional eventually turned against the regime and became an important institution paving the way for the return to democracy.

(1971) explain that the junta ruling Brazil from 1964 to 1985 had institutionalized a rotation of power and codified concrete limits on presidential powers in order to prevent the regime from slipping into a personalistic form of authoritarian rule. Albertus & Menaldo's (2012) large-*N* study suggests a more general pattern. Among the 71 cases surveyed between 1950 and 2002, they find that constitutions were frequently used to define and consolidate a distribution of power within a ruling coalition. Moreover, they find that the regimes using constitutions in this way tended to retain power for longer periods of time.[5]

Judicial Institutions as Economic Infrastructure

The simultaneous opening of economies throughout the former Eastern Bloc, Latin America, Asia, and Africa has meant fierce international competition over a finite amount of investment capital, and judicial reform has been identified as one of the most important institutional enhancements necessary to facilitate a functional market economy and competitive investment environment. In the age of global competition for capital, it is difficult to find any government that is not engaged in some program of judicial reform designed to make legal institutions more effective, efficient, and predictable for the purpose of attracting global capital.

The tight link between judicial reform and the transition to a market economy is the focus of considerable work on China in particular (Kennedy & Stiglitz 2013). Lubman (1999) and Peerenboom (2002) provide two of the most comprehensive accounts of the rapid expansion of legal and judicial infrastructure in post-Mao China. They detail the various ways that Chinese leadership came to understand law and courts as integral to the success of the new market economy. Law and courts came to be seen as "a weapon to be used in the fight against corruption and a means of promoting economic development" (Peerenboom 2002, p. 60). Furthermore, courts are relied upon to promote some measure of stability amid the displacement of millions of people in China's transition to a market economy (He 2014, Su & He 2010). Woo & Gallagher (2011) examine the dynamics civil litigation in China, both in and around new legal institutions established by the Chinese state. Sidel (2008) presents a similar account of market-oriented judicial reform in Vietnam.

An important question raised in many of these studies is the degree to which judicial reform necessarily leads to political spillover (Massoud 2014; Moustafa 2003, 2007b; Peerenboom 2010; Rajah 2012; Silverstein 2008; Solomon 2010). Moustafa (2003, 2007b) shows that the Egyptian Supreme Constitutional Court was granted a remarkably autonomous appointment process and the power of judicial review as a way to assuage investor concern over the security of property rights. Yet, within a decade of its establishment, the Court became an important engine for political reform, often ruling against regime interests and incrementally expanding political rights. Drawing lessons from Sudan, Massoud (2014) argues that international arbitration provides avenues through which regimes can provide credible commitment to property rights beyond the purview of the domestic judiciary, thus circumventing the possibility of political spillover from empowered domestic courts. But it is perhaps the accounts of Singapore (Rajah 2012, Silverstein 2008) that best illustrate the fact that regimes can sometimes use law and courts to promote both economic growth and political control. As Silverstein (2008) and Rajah (2012) point out, Singapore has become something of a model for authoritarian regimes, especially those in Asia, that seek to advance a market-led economy while maintaining a firm hold on power.

[5] See Ginsburg & Simpser (2013) for more on the role of constitutional text, specifically.

Courts as Authoritarian Enclaves

Courts are also deployed to contain majoritarian institutions, particularly in hybrid regimes. Turkey provides perhaps the clearest example of how "institutions that might ordinarily be expected to secure democratic space, such as a strong and independent judiciary, may instead serve as a constraint on political liberalization" (Bali 2012, p. 235). The Constitutional Court of Turkey banned dozens of political parties and stymied political reform for decades. Belge (2006) traces these rulings back to a foundational alliance and a set of institutional arrangements that served to preserve the ideological and political hegemony of the Kamalist elite in Turkish political life. These findings echo Hirschl's (2000, p. 95) thesis that judicial review can provide "an efficient institutional way for hegemonic sociopolitical forces to preserve their hegemony and to secure their policy preferences." More recently, Nardi (2010) understands the establishment of a constitutional tribunal in Myanmar's 2008 constitution as a mechanism that is likely intended to perpetuate the military's dominance in political life rather than constrain it.

In a twist on this theme, Trochev (2004, 2008) shows that subnational constitutional courts were established in postcommunist Russia as a means for regional governors to consolidate power and establish autonomy vis-à-vis local and federal governments. In his examination of 89 regions across Russia, Trochev shows that subnational constitutional courts were not established in those regions that had experienced a flowering of democracy or a balance of power between contending political factions, as cited in much of the literature on the emergence of judicial power (Chavez 2004, Ginsburg 2003, Landes & Posner 1975). Instead, Trochev (2004, 2008) finds that subnational constitutional courts were established only in those regions where power was concentrated. In this instance, courts did not serve to expand democratic or liberal rights, but rather they served as an additional tool for subnational governors to entrench their power.

Delegation of Controversial Reforms to Judicial Institutions

Authoritarian regimes also sometimes benefit from channeling divisive political questions into the courts. This phenomenon is more familiar in democratic settings, where elected leaders sometimes delegate decision-making authority to judicial institutions (Graber 1993, Lovell 2003). But it is apparent that authoritarian regimes also prefer to steer clear of controversial issues that may incite opposition or produce splits within the ruling coalition. This is particularly true in the case of postpopulist authoritarian regimes that wish to implement unpopular economic reforms. For example, Moustafa (2007b) shows how dozens of Egyptian Supreme Constitutional Court rulings enabled the Mubarak regime to overturn Nasser-era socialist-oriented policies without having to face direct opposition from groups that opposed economic liberalization. Court rulings gradually liberalized the economy while allowing the regime to claim that it was simply following the judiciary and respecting the rule of law.

Law and Legitimacy in Authoritarian Regimes

The selective delegation of policy making to judicial institutions points to a broader concern of authoritarian leaders: the maintenance of legitimacy in lieu of credible mechanisms of public accountability. Authoritarian regimes typically pin their legitimacy to the achievement of substantive outcomes, such as income redistribution, economic growth, political stability, and the like. But to varying degrees, they also attempt to make up for questionable procedural legitimacy by preserving judicial institutions that give the image, if not the full effect, of constraints on arbitrary rule.

In some cases, authoritarian rulers use courts as a fig leaf for a naked grab at power. Del Carmen (1973) notes that after seizing control of the Philippine government in 1972, Ferdinand Marcos swiftly declared martial law, took over the media, arrested political opponents, and banned political parties, but he did not shut down the Supreme Court. On the contrary, in his first public statement, Marcos reassured the public that "the judiciary shall continue to function in accordance with its present organization and personnel" (Del Carmen 1973, p. 1050). Marcos did not close the Supreme Court, nor did he dismiss sitting justices. Instead, the regime adopted a number of less direct measures to constrain the Court. The important point here is not whether there were in fact effective checks and balances on the Marcos regime—there were not. Rather, the point is that Marcos felt compelled to make such statements and to keep the Supreme Court functioning to provide legal cover for his seizure of power. Similarly, Pereira (1998, pp. 54–55) observes that in Brazil, "the regime pointed to the courts to claim legitimacy" whose legitimacy in turn "was bolstered by a certain measure of autonomy." Pereira (2005) notes that the Brazilian case is not unique but rather illustrative of regimes throughout the Southern Cone of Latin America.

In many cases, rule-of-law rhetoric is adopted as a legitimizing narrative only after popular support has faded. Moustafa (2007b) notes that Nasser of Egypt pinned his legitimacy on revolutionary principles of national independence, redistribution of wealth, economic development, and Arab nationalism, whereas his successors explicitly pinned their legitimacy to *sayadat al-qanun* (the rule of law). Peerenboom (2002) and Lubman (1999) note a similar transition to rule-of-law rhetoric in China. Mao Zedong almost completely undermined judicial institutions after founding the People's Republic of China in 1949, but rule-of-law rhetoric is now employed by the regime in part to fill the ideological vacuum. In both Egypt and China, incoming leaders used rule-of-law rhetoric to build a new legitimizing ideology and to distance themselves from the spectacular excesses and failures of their predecessors. Granting access to the courts was a concrete way to relieve political pressure without opening the political system. But for such legitimizing functions to succeed, judicial institutions must enjoy some degree of real autonomy from the executive, and they must, at least on occasion, strike against the expressed will of the regime. As E.P. Thomson (1975, p. 263) famously noted, "[T]he essential precondition for the effectiveness of law, in its function as ideology, is that it shall display an independence from gross manipulation." Otherwise, legal institutions "will mask nothing, legitimize nothing."

THE AMBIGUITY OF LAW AND COURTS IN AUTHORITARIAN REGIMES

Despite the fact that authoritarian regimes use law and courts as instruments of political control, judicial institutions never advance the interests of rulers in an unambiguous and straightforward fashion. Rather, courts more typically serve as dual-use institutions, paradoxically opening new (albeit limited) avenues for activists to challenge the state. Not all regimes choose to institutionalize their rule through law and courts. But to the extent that they do, they create a unique field of contention within the authoritarian state.

Diamant et al.'s (2005) edited collection *Engaging the Law in China* and Balme & Dowdle's (2009) edited collection *Building Constitutionalism in China* provide two rich sets of essays focused on how courts have opened a space for entirely new modes of state-society interaction and contestation in China. Similarly, in the context of Egypt, El-Ghobashy (2008) and Moustafa (2002; 2003; 2007a,b) find that courts enabled activists to challenge state policy without having to initiate a broad social movement—a difficult task even in established democracies (Zemans 1983). Tam (2013) identifies similar advantages to legal mobilization in postcolonial Hong Kong, and

Chua (2014) examines the unique constraints and opportunities faced by gay rights activists in Singapore. Tezcür (2009) examines the circumstances under which activists were able to exploit limited openings in lower-level courts in Turkey. Groups that engage the courts might include opposition parties, rights organizations, legal professional associations, and individuals who file cases on their own initiative. For all these actors, courts afford unique opportunities to challenge state policy through formal legal/political institutions. And yet, Chen & Xu (2012) observe that courts may also stymie the emergence of more transformative rights claims by breaking collective grievances into individuated disputes.

Moving beyond winning and losing, Moustafa (2007b) finds that courts can also provide important symbolic resources. He shows that activists initiated high-profile cases challenging the emergency law, state security courts, and civilian trials in military courts in Mubarak's Egypt with the full knowledge that they would never prevail. The purpose of the litigation was not to win, but rather to expose the chasm between the regime's rule-of-law rhetoric and the realities on the ground and to generate fodder for the opposition press. As in democratic settings, litigation can serve to raise the salience of political issues, which can be an important objective in and of itself.

Judges clearly occupy a strategic position in the interpretation, application, and (in some cases) review of regime legislation. As agents of the state, judges generally administer the will of the regime, but they never do so in an automatic fashion. Their identities and aspirations are shaped by their training, which might emphasize thin (procedural) conceptions of the rule of law but, to varying degrees, inevitably contain thick (substantive) conceptions of fundamental rights. Transnational epistemic communities also shape how judges understand their role in advancing a thick conception of the rule of law (Slaughter 2004, pp. 65–103).

Reform-minded judges may work to push the envelope through their judgments, capitalizing on the important state functions that they perform to leverage pressure in the direction of political reform. For instance, Moustafa (2003, 2007b) examines how the Egyptian Supreme Constitutional Court leveraged the important role that it played in the regime's economic reform program to simultaneously push for a modest expansion of political rights. In other instances, courts have managed to expand their mandate by exploiting divisions between state institutions. For example, Ip (2012, p. 331) finds that the Supreme People's Court of China was able to act "with considerable autonomy to influence an ever-widening range of policy domains" by navigating fissures within the Chinese state.

Turning to local-level disputes in contemporary China, Stern (2010, 2013) provides a rich contextual study of the opportunities and constraints that both lawyers and judges must navigate on a daily basis. Rather than focusing on high-profile and unambiguously political cases, she examines environmental litigation—an area that presents urgent policy dilemmas yet simultaneously involves powerful public and private stakeholders. Stern examines the strategic dilemmas that this presents for lawyers, activists, and judges who must navigate inconsistent and ambiguous signals from local and central government.

Many studies note the important political roles that lawyers play outside of litigation, especially through organized bar associations. In some cases, like that of Egypt, legal professional associations have been important political actors for more than a century (Reid 1981, Ziadeh 1968). In others, such as China, it is remarkable how quickly activist lawyers take up new roles, in the face of tremendous personal risk, when the legal profession was virtually nonexistent only a generation earlier (Halliday & Liu 2007).

What is perhaps most striking is the synergy that sometimes emerges from the "legal complex," which is defined by Karpik & Halliday (2011) as networks of judges, lawyers, and other legally trained professionals who, under certain circumstances, work together to advance fundamental

rights.[6] For example, Ghias (2010) examines the remarkable confrontation between legal professionals and the Musharraf regime in Pakistan, tracing how the courts shielded the bar association from regime interference and, in return, how the bar association mobilized to protect the bench from regime backlash.[7] Similarly, Moustafa (2007a,b) documents the synergies that emerged between opposition parties, rights organizations, and activist judges in Mubarak's Egypt. Drawing on recent literature and dozens of concrete examples, Trochev & Ellett (2014) provide an excellent review of off-bench activism by judges in hybrid regimes. They examine the "repertoires of off-bench resistance" (p. 71), exploring the various ways that judges work to enhance judicial autonomy.

Because of courts' double-edged capacity, authoritarian rulers must constantly reassess the costs and benefits of law and courts as instruments of authoritarian rule. Ultimately, regimes can reverse course, as happened in Egypt after a two-decade stretch of court activism (Moustafa 2007b) and as may come to pass in China (Liebman 2014, Minzner 2011). But to the extent that regimes depend on courts for the governance functions outlined above, reversing course entails its own costs. Short of abandoning law and courts as instruments of governance, authoritarian regimes more often work to contain them.

HOW REGIMES CONTAIN COURTS

Nowhere in the world do courts operate free of political constraints. Judges always face limits on how far they can push legal claims, and this is particularly true in authoritarian contexts. But authoritarian rulers often work to contain judicial activism without infringing on judicial autonomy through at least four principal strategies: (*a*) providing institutional incentives that promote judicial self-restraint, (*b*) engineering fragmented judicial systems, (*c*) constraining access to justice, and (*d*) incapacitating judicial support networks.

Judicial Self-Restraint

Judges everywhere are finely attuned to the political environment that they operate within—they anticipate the likely political fallout of their rulings, and they are generally aware of both the reach and limits of their influence. The assumption that courts serve as handmaidens of rulers obscures the political pressures that judges must navigate in authoritarian contexts, just as they do in democratic contexts. Judges are acutely aware of their insecure position and their attenuated weakness vis-à-vis the executive, particularly when the cases before them impinge on core regime interests.

Core interests vary from one regime to the next depending on substantive policy orientations, but all regimes seek to safeguard the core legal mechanisms that undergird their ability to sideline political opponents. Reform-minded judges can apply subtle pressure for political reform at the margins of political life (Ellett 2013), but core regime interests are typically challenged only if it appears that the regime is on its way out of power. In most cases, reform-oriented judges bide their time in anticipation of the moment that the regime will weaken to the extent that defection can tip the broader constellation of political forces (Helmke 2002, 2005).[8]

[6]For dozens of case studies of the legal complex in action (and sometimes taken out of action), see Halliday & Karpik (1997) and Halliday et al. (2007, 2012).

[7]Also see Aziz (2012) and Munir (2012). For more on the Pakistani judiciary under dictatorship and democracy, see Newberg (1995).

[8]Strategic defection in such a circumstance is also motivated by the desire of judicial actors to distance themselves from the outgoing regime and put themselves in good stead with incoming rulers.

These core-compliance dynamics are noted in dozens of authoritarian states. As an observer of judicial politics in Argentina under authoritarian rule, Verner (1984, p. 487) concludes that "although possessing the power of judicial review, the Supreme Court has used considerable restraint in its exercise, and it has defined as political any issue that might lead to a major conflict with the executive branch – a conflict that all justices realize they would certainly lose." In the Egyptian case, Moustafa (2003, 2007b) notes that the Supreme Constitutional Court issued dozens of progressive rulings to rein in executive abuses of power, but it never ruled on constitutional challenges to the emergency laws or civilian transfers to military courts, which formed the ultimate check on political opposition. Similarly, Del Carmen (1973) notes that, in the early days of the Marcos regime, the Philippine Supreme Court did not attempt to resist the decree of martial law. Rather, the court yielded to Marcos's seizure of power and continued to submit to the regime's core political interests for the next 14 years of rule. Mahmud (1994) uncovers similar dynamics in Pakistan, Ghana, Zimbabwe, Uganda, Nigeria, Cyprus, Seychelles, and Grenada. More recently, Urribarri (2011) traces similar dynamics in Venezuela under Chávez. In these circumstances, formal judicial independence exists within an authoritarian state.

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

The internal structure of appointments and promotions can also constrain judicial activism, quite independent of regime interference. The judiciary in Pinochet's Chile is a good example of a court system that failed to act as a meaningful constraint on the executive, despite the fact that it was institutionally independent from the government. According to Hilbink (2007), this failure had everything to do with the process of internal promotion and recruitment, wherein Supreme Court justices controlled the review and promotion of subordinates throughout the judiciary. The courts did not fall victim to executive bullying. Rather, the traditional political elite controlling the upper echelons of the judiciary disciplined judges who did not follow their commitment to a thin conception of the rule of law. Hilbink's Chilean example illustrates why judicial independence is not, by itself, an unqualified good. A court system can enjoy complete formal independence from the executive in terms of appointments, promotions, and discipline and yet face a corporatist form of political control that is equally stifling when practiced within the judiciary.

Fragmented Versus Unified Judicial Systems

Authoritarian regimes often contain judicial activism by further engineering fragmented judicial systems wherein one or more exceptional courts run alongside the ordinary courts. The executive retains tight controls in these exceptional courts through nontenured political appointments and heavily circumscribed due process rights. Politically sensitive cases are channeled into these auxiliary institutions when necessary, enabling rulers to sideline political threats as needed. With auxiliary courts waiting in the wings, authoritarian rulers can extend substantial degrees of autonomy to the regular judiciary while risking little.[9]

[9] In an interesting twist on this dynamic, Hendley (2009) explains that Russia does not have a system of parallel security courts. Instead, there are cases of telephone law that result in compliant judgments in sensitive political cases. Yet Hendley explains that these cases are the rare exception, not the rule. In this way, telephone law and rule-of-law functions are carried out within the same institution.

Examples can be found in a number of diverse contexts. In Franco's Spain, Toharia (1975, p. 482) notes, "Spanish judges at present seem fairly independent of the Executive with respect to their selection, training, promotion, assignment, and tenure." Yet parallel tribunals acted "to limit the sphere of action of the ordinary judiciary" (p. 487). This institutional configuration ultimately enabled the regime to manage the judiciary and contain judicial activism, all the while claiming respect and deference to independent rule-of-law institutions. Toharia (1975, p. 495) explains, "[W]ith such an elaborate, fragile balance of independence and containment of ordinary tribunals, the political system had much to gain in terms of external image and internal legitimacy. By preserving the independence of ordinary courts. . .it [was] able to claim to have an independent system of justice and, as such, to be subject to the rule of law."[10] Likewise, Moustafa (2003, 2007b) notes that the state security and military courts in Egypt form a parallel legal system with fewer procedural safeguards, serving as the ultimate check on challenges to regime power. In fascist Italy, the Tribunale Speciale per la Sicurezza dello Stato performed the same functions. In Portugal under Salazar, it was the Tribunais Plenários (Guarnieri & Magalhaes 1996). In Nazi Germany, the regular judiciary continued to deal with everyday aspects of governance, including business and family law, but it ceded authority to exceptional courts whenever required (Fraenkel 1941, Muller 1991). Loveman's (1993) classic, *The Constitution of Tyranny*, examines the historical origins and political functions of "regimes of exception" throughout Spanish America, noting that formal rights provisions were possible only as the result of emergency clauses that allowed for the easy suspension of rights.

The more that ordinary courts comply with core regime interests, the more they tend to enjoy institutional autonomy and discretion. The more they challenge regime interests, however, the more we tend to see an expanded purview for auxiliary courts or the use of extrajudicial violence. Returning to the Egyptian example, Brown (1997) and Moustafa (2007b) note that the Supreme Constitutional Court had ample opportunities to strike down provisions that denied citizens the right of appeal to regular judicial institutions in Mubarak's Egypt, but the Court almost certainly exercised restraint because impeding the function of the exceptional courts would result in a futile confrontation with the regime. Ironically, the Supreme Constitutional Court was able to push through a mild reform agenda and maintain institutional autonomy largely because the executive enjoyed the ability to transfer select cases to the exceptional courts and was therefore confident that it retained full control of political opponents.

Pereira (2005) notes a similar dynamic between judicial and extrajudicial violence in his study of courts in Argentina (1976–1983), Brazil (1964–1979), and Chile (1973–1989). The three regimes varied in their willingness to use the regular judiciary to sideline political opponents. When courts showed deference to the regime, political cases were routed through the regular judiciary, and repression was therefore routinized and somewhat domesticated. When judicial–military relations were poor, however, violence was extralegal in character, with much more lethal and arbitrary consequences. Brazil and to a lesser extent Chile fit the first pattern; courts were used extensively to sideline regime opponents. In Argentina, by contrast, courts retained a greater degree of autonomy, but their scope of action was sharply reduced, and state violence took on an extrajudicial dimension. Pereira (2005) underlines the fact that these distinctions are more than academic—they had tremendous implications for the type of repression used and the fate of the regime's opponents. Following on this, Aguilar (2013) suggests that the degree of judicial complicity in authoritarian repression may have significant implications for the ability and willingness of courts to facilitate transitional justice following regime transition. Her comparative study of Chile,

[10]Cheesman (2011) argues that in Burma special courts were introduced with the aim of undermining judicial independence.

Argentina, and Spain thus opens a new research agenda that bridges studies of comparative judicial politics in authoritarian regimes with core questions in the field of transitional justice concerning the different pathways taken following regime transition.

Constraining Access to Justice

Authoritarian rulers can also contain judicial activism by adopting a variety of institutional configurations that contain access to justice. It has long been noted that civil law systems provide judges with less maneuverability and therefore a weaker capacity to shape the law in comparison to their common law counterparts (Merryman 1969, Osiel 1995).[11] But regimes can engineer further constraints though the institutional structure of judicial review (centralized versus diffused), the type of judicial review (concrete versus abstract), and narrow legal-standing requirements (Brown 2002). For example, Nasser abolished the diffused system of "abstention control" and imposed a centralized structure of judicial review on the Egyptian courts (Brown 1997). A similar centralization of review powers and narrow rules of standing were imposed in the 1982 Turkish constitution, aligning the judiciary with regime interests and impeding the ability of activists to challenge state policy through the regular courts (Belge 2006).[12] Magaloni (2003) explains that there were limits on the types of legal challenges that could be made against the Mexican state under the Institutional Revolutionary Party (PRI), which placed significant constraints on the Mexican Supreme Court. Similarly, Peerenboom (2002, p. 420) points out that the Chinese Administrative Litigation Law empowers citizens to challenge decisions involving personal and property rights, but not political rights, such as freedom of association, assembly, and speech. These select issue areas speak volumes about the intent of the central government to rein in local bureaucrats while sidelining overt political challenges through the courts.

Incapacitating Judicial Support Networks

Finally, authoritarian regimes can contain court activism by incapacitating judicial support networks. Epp (1998) demonstrates that the most critical variable determining the timing, strength, and impact of rights revolutions in democratic settings is neither the ideology of judges, nor specific rights provisions, nor a broader culture of rights consciousness. Rather, the critical ingredient is the ability of rights advocates to build sufficient organizational capacity to engage in deliberate, strategic, and repeated litigation campaigns. Rights advocates reap the benefits that come from being repeat players (Galanter 1974) only when they are properly organized, coordinated, and funded. Although Epp's (1998) study is concerned with courts in democratic polities, his framework sheds light on the structural weakness of courts in authoritarian regimes.

Not only must activists overcome the collective action problems that bedevil political organizing in relatively liberal political systems; authoritarian regimes actively monitor, intimidate, and suppress organizations that dare challenge the state. Harassment can come in the form of extralegal coercion, but more often it comes in the form of a web of illiberal legislation spun out from the regime. With the legal ground beneath them constantly shifting, rights organizations find it difficult to build organizational capacity before having to disband and reorganize under

[11] Civil law judges are expected to apply the law mechanically, resulting in a tendency toward thin rather than thick conceptions of the rule of law. Shapiro (1981) contends that the differences between civil and common law systems are somewhat overstated.

[12] By contrast, the 1961 Turkish constitution provided that courts could practice judicial review if the Constitutional Court had not issued a judgment within a defined period.

another umbrella association. Given the interdependent nature of judicial power and support network capacity, the framework of laws regulating and constraining the activities of judicial support networks is likely to be an important flash point.

FUTURE LINES OF INQUIRY

The abundance of new literature on law and courts in authoritarian regimes suggests that we have moved well beyond simplistic caricatures of kangaroo courts and telephone justice—at least among the growing number of scholars focused on judicial politics in authoritarian settings. The studies reviewed here all point to the fact that many authoritarian regimes use law and courts as important instruments of governance. More important, this research shows that courts rarely serve as mere pawns of regimes. Instead, they more typically become lively arenas of contention, often resulting in a judicialization of authoritarian politics.

In considering future directions for research, I address both methodological and substantive concerns.

Methodological Concerns

Most of the insights from this research agenda come from studies that are focused on law and courts in specific authoritarian contexts. This is for good reason. Stern's (2010, 2013) work on environmental litigation in China reminds us that theorizing about law and courts in authoritarian regimes is most accurate and compelling when it is informed by "close-to-the-ground" empirical data and the appropriate skill set to interpret those data. This requires language skills, rich knowledge of the local political ecology, and extensive fieldwork. "Constitutional ethnography" (Scheppele 2004a) conducted in a variety of locales over the past two decades is beginning to reveal both common dynamics and distinctive features across regimes, as is clear from frequent cross-referencing in the literature. We are now at the moment when more general theory building might proceed, but the temptation to overreach with universal theoretical claims is ever present. Two approaches are particularly pernicious: (*a*) large-*N* studies that seek to test or generate new theories without context-rich case studies and (*b*) theory building that is not grounded in any empirical data whatsoever but rather proceeds through purely deductive reasoning and formal modeling. Large-*N* studies are ill suited to the study of courts in authoritarian regimes because no readily comparable data are available. And more to the point, even if data were generated from the ground up, large-*N* studies would not adequately capture the way that courts interact with other political institutions over time. Large-*N* comparison and purely deductive modes of theory building risk overlooking the "politics of ambivalence" (Stern 2013), which is a defining feature of judicial politics (and politics at large) in authoritarian contexts. Of course, this does not preclude small-*N* studies with careful cross-national case selection (e.g., Mahmud 1994, Pereira 2005) or studies that incorporate carefully designed, within-country comparison (e.g., Trochev 2004). Indeed, comparative studies that are sensitive to case-specific context have yielded some of the most compelling research findings to date.

Substantive Concerns: Bridging the Authoritarian/Democratic Dichotomy

Aside from a deeper understanding of how law and courts operate in authoritarian contexts, this literature further contributes to a wide variety of substantive research agendas, including transitional justice (e.g., Aguilar 2013), human rights (e.g., Keith 2011, Pereira 2005), law and development (e.g., Kennedy & Stiglitz 2013, Moustafa 2007b, Peerenboom 2002), authoritarian

durability (e.g., Hilbink 2007, Moustafa 2007b, Rajah 2012), regime transition (e.g., Chavez 2004; Helmke 2002, 2005), rule-of-law promotion in fragile states (e.g., Massoud 2013), and many others. These works underline the central importance of law and courts to a wider community of scholars working on the nonlegal dimensions of each of these substantive issue areas. Equally important, this research has much to offer those concerned with the erosion of rights and liberties in "consolidated democracies." It is this issue that I wish to focus on for the remainder of this article.

First, it may be worth considering the way that research on law and courts in authoritarian contexts is situated in the judicial politics literature. It is understandable that many studies (including this review) raise the banner of judicial politics in authoritarian regimes. The frame carries a counterintuitive punch and simultaneously establishes the fact that there is a politics to courts in nondemocracies, beyond facile caricatures of telephone justice. Yet this frame may have the unintended consequence of isolating the research as an anomalous niche. And walling the literature off in this way tends to obscure the fact that it may have a great deal to contribute to the study of politics in "democratic" settings.

The once hard-and-fast distinction between democratic and authoritarian polities is increasingly blurred, as is clear from the proliferation of new adjectives and categories to describe hybrid regimes (Bogaards 2009, Diamond 2002, Levitsky & Way 2010). A sharp dichotomy between democratic versus authoritarian political systems is less helpful than ever for understanding the way that power is organized, institutionalized, and contested in any given polity. Authoritarian regimes increasingly rely upon institutional forms commonly associated with liberal democracy, first among them relatively independent judiciaries and multiparty elections (Brownlee 2007). But so, too, have democracies increasingly borrowed from the playbook of authoritarian regimes.

Recent developments in Hungary provide a striking example. Reflecting on authoritarian drift in Hungary, Scheppele (2013a,b) describes the emergence of a "Frankenstate" in the midst of the European Union. The Hungarian Fidesz party came to power with only 53% of the popular vote in 2010, but electoral laws translated this slim majority into 68% of seats in the unicameral parliament—enough to amend the constitution. According to Scheppele's (2013b, p. 561) gripping account, this narrow opening was used to bring in a new constitutional order, including the introduction of "more than 700 new laws, changing everything from the civil code and the criminal code to laws on the judiciary, the constitutional court, national security, the media, elections, data protection, and more." Each of these changes was in line with narrow procedural requirements, and notably, Fidesz pointed to other European countries that had similar substantive laws on the books. For example, Fidesz changed standing requirements to institute a German-style complaints jurisdiction, effectively denying NGOs and opposition the ability to challenge the constitutionality of major institutional reforms that further facilitated the centralization of power (Scheppele 2013a). The difference, according to Scheppele, is that these laws, which are innocuous on their own, work together to make it virtually impossible for opposition parties to unseat Fidesz. Scheppele's (2013a, p. 5) definition of a Frankenstate—"an abusive form of rule, created by combining perfectly reasonable democratic institutions in monstrous ways"—will no doubt have a familiar ring for those who study courts in authoritarian regimes. Indeed, the parallels with Rajah's (2012) account of authoritarian rule of law in Singapore are striking.

Even in so-called consolidated democracies, the democratic/authoritarian dichotomy is increasingly blurred. Consider the rapid, global expansion of emergency powers (Hufnagel & Roach 2012; Lazar 2009; Ramraj 2008; Scheppele 2004b,c). Or, in the United States specifically, consider the widespread and covert domestic surveillance programs, detention of citizens without trial, auxiliary courts that operate with little transparency or oversight, and even targeted assassination of citizens with only a veneer of legality. More than just a boutique niche, research on law and courts

in authoritarian regimes offers a rich literature to draw upon for understanding the ways that law and legal institutions can be subverted and reconfigured to undermine rights, all under the guise of rule of law.

Yet one observes that there is very little cross-fertilization. For example, studies of the emergency features in Western democracies in the wake of 9/11 make little use of the now substantial body of research on states of emergency in authoritarian states. A recent exception is David Landau's (2013) work "Abusive Constitutionalism," which explicitly reaches across regime type to show similar patterns of legal and constitutional manipulation that undermine democratic institutions and entrench the power of incumbents. Similarly, David Law's (2010) "How to Rig the Federal Courts" shows how power can be entrenched through specific institutional rules that might otherwise be understood as merely advancing judicial independence. Law does not predict an imminent takeover of the US federal courts, but he nonetheless alerts us to "the perils of taking institutional design for granted" (p. 834). And in doing so, he suggests that research on law and courts in authoritarian regimes "deserves attention for the insights that it contains into the biases and vulnerabilities concealed within the structure of our own judicial institutions" (p. 835). Let us not regard this new body of literature as merely an exotic niche within the comparative judicial politics literature. The cautionary lessons for beleaguered democracies are too important to ignore.

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