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Courts and Judges in Authoritarian Regimes

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Review Article

COURTS AND JUDGES IN AUTHORITARIAN REGIMES

By PETER H. SOLOMON, JR.*

Lisa Hilbink. *Judges beyond Politics in Democracy and Dictatorship: Lessons from Chile*. Cambridge and New York: Cambridge University Press, 2007, 304 pp.

Tamir Moustafa. *The Struggle for Constitutional Power: Law, Politics, and Economic Development in Egypt*. Cambridge and New York: Cambridge University Press, 2007, 328 pp.

Anthony W. Pereira. *Political (In)justice: Authoritarianism and the Rule of Law in Brazil, Chile, and Argentina*. Pittsburgh, Pa.: University of Pittsburgh Press, 2005, 262 pp.

POLITICAL developments in the late twentieth century dramatically increased the importance of courts and judges for the study of comparative politics. The spread of constitutional review to courts in new and fragile democracies and countries with hybrid or authoritarian regimes, and their role in the defense of rights and checking actions of the executive, have made the power of judges a vital matter for understanding politics in authoritarian as well as democratic states. Moreover, students of political transition (or democratization) have treated independent and powerful courts as a necessary ingredient in the ideal model of consolidated democracy.¹

There is every reason, therefore, to welcome the appearance of a new generation of research and scholarship on courts and judges in countries outside the world of established democracies. In this review I reflect on three new and especially fine representatives of this scholarship that deal with countries of Latin America and the Middle East, but I will refer also to others, including recent and forthcoming studies of courts in countries in Asia and the former USSR.

* I am grateful to Ran Hirschl, Jeff Kopstein, Alexei Trochev, and three anonymous reviewers for helpful criticisms on an earlier draft.

¹ Juan Linz and Alfred Stepan, *Problems of Democratic Transition and Consolidation: Southern Europe, South America, and Post-communist Europe* (Baltimore: Johns Hopkins University Press, 1996).

The books under review deal with different, but complementary questions. Why at times of threat or instability do some authoritarian regimes simply repress enemies extra-judicially while others use military courts to varying degrees? (Pereira). Why in calmer times do authoritarian leaders sometimes empower courts and what are the consequences for the independence of judges? (Moustafa). Why in some countries do judges who have independence and power support illiberal, even unjust, policies, notwithstanding changes in regime type, and what dangers does the ideal of an apolitical judiciary hold? (Hilbink). The books focus on Brazil in comparison with Chile and Argentina, on Egypt under Mubarak, and on Chile under Pinochet and after, but each has implications that go beyond their geographies. At the same time, these are deep, historically informed studies that emphasize institutional legacies as well as historical contingencies and provide rich accounts of relevant jurisprudence in addition to the political stories.

Underlying all of these studies and the study of courts in authoritarian states more generally, is a basic dilemma—the idea of empowered judges does not fit with the classic understanding of authoritarianism. By definition, authoritarian regimes concentrate power in one place, usually in the hands of a dictator or an oligarchy. Any real judicial power involves compromise with this principle, that is, some yielding of power by the leader(s), and in practice this leads to tension, if not outright conflict. It may be that in authoritarian settings judicial power tends to be contingent rather than institutionalized and subject to curtailment should the leader(s) become displeased. At the same time, authoritarian settings may well affect the ways in which the universal tradeoff between the independence, power, and accountability of courts is or can be resolved. In democracies and authoritarian states alike, the more power judges acquire, the greater the demands for accountability, many forms of which impinge upon the independence of judges. In authoritarian states, where judicial independence tends to be less entrenched to begin with, the danger of such a scenario is enhanced.²

Therefore, to appreciate the new writing on courts in authoritarian regimes, it is important to place it in two contexts—previous thinking about the independence, power, and accountability of courts and judges; and scholarship on judicial power and courts in authoritarian states. I begin with these matters, then discuss the three books under review, and finally explore their implications and questions for future research.

² On this relationship see Peter H. Solomon, Jr., “Courts in Russia: Independence, Power, and Accountability,” in Andras Sajo, ed., *Judicial Integrity* (Leiden and Boston: Martinus Nijhoff, 2004).

INDEPENDENCE, POWER, AND ACCOUNTABILITY OF JUDGES

For courts to be effective, let alone gain public trust, they need a considerable degree of independence, especially freedom from external influences if not also from dependency on higher courts. By independence, I mean structural arrangements that minimize dependencies and improve the chances of judges' rendering impartial decisions. Such arrangements may include security of tenure (preferably life appointments and, at a minimum, protection from firing except for cause); good salaries; adequate financial support for the courts; and control by judges of aspects of judicial administration.³ A big problem in many, if not most, authoritarian states is weakness of the institutional arrangements that might protect judges, so that the independence of judges is compromised from the start. Moreover, the expansion of judges' power in the form of politically important jurisdiction (constitutional, administrative, commercial) often arouses concern about their accountability and leads to measures that further impinge on judicial independence—in democratic as much as in authoritarian states!

As Martin Shapiro explains in his classic study of courts and politics, the acquisition by courts of new jurisdiction or discretion inevitably involves a shift of power away from the leaders who in turn try to check or regulate that power, in part through measures of accountability. In democracies as well as in authoritarian states the latter may include removal from the courts of particular areas of jurisdiction or even individual cases and, notably, the "development of systems of recruitment, training, evaluation, promotion, and discipline that encourage conformity with regime expectations"—in short, judicial bureaucracies.⁴ The judicial bureaucracies of civil law countries serve as mechanisms of accountability for individual trial court judges. To what extent these bureaucracies make lower court judges dependent on judges higher up the judicial hierarchy (and also on regime expectations) varies with the country and eye of the beholder.⁵ An alternative mechanism of judicial accountability that also has unfortunate results for judicial independence

³ See Peter H. Russell, "Toward a General Theory of Judicial Independence," in Peter H. Russell and David O'Brien, eds., *Judicial Independence in the Age of Democracy: Critical Perspectives from around the World* (Charlottesville, Va., and London: University Press of Virginia, 2001); and *Valente v. the Queen* 2 S.C.R. (Canada, 1985), 673.

⁴ Martin Shapiro, *Courts: A Comparative and Political Analysis* (Chicago: University of Chicago Press, 1981), 32–35.

⁵ For the debate on one of the strongest judicial bureaucracies in the world, that of Japan, see Frank Upham, "Political Lackeys or Faithful Public Servants? Two Views of the Japanese Judiciary," *Law and Social Inquiry* 30 (2005).

is the election of judges, especially the partisan elections as practiced in some states of the U.S.⁶

For their part, authoritarian leaders may take steps to limit the impact of judicial empowerment beyond those that are acceptable in democracies. These include direct intervention in individual cases (what the Russians call “telephone law”), limiting court access of potential claimants through unusually tough rules of standing, and the failure or refusal to implement court decisions. More radical reactions may include manipulation of the composition of courts through successful court-packing and wholesale elimination of courts that displease leaders (for example, the constitutional courts of Belarus and Kazakhstan). The mere threat of such actions, more credible in authoritarian than democratic states, may act as a constraint on judges.

AUTHORITARIAN SOLUTIONS

How have authoritarian regimes addressed the problems of judicial independence and power? What sorts of courts have they established? The starting point is simple, but the range of possibilities more intricate than is commonly imagined. Even authoritarian regimes benefit from courts that handle criminal prosecutions and help the public resolve garden-variety disputes. Authoritarian leaders may choose to give more power to their courts than this and, like their democratic counterparts, include jurisdiction over more sensitive matters such as labor disputes and commercial conflicts, challenges to administrative decisions or regulations, and constitutional review of laws. In authoritarian states, the more sensitive jurisdiction courts have, the greater the likelihood that they will face pressure to deliver results that please the authorities.

In authoritarian states there are four common patterns or models of judicial power and independence. First are politically marginal courts such as those found in the USSR throughout most of its history. In those courts, judges were not independent and faced multiple lines of dependency on political authorities at the same level of government and on vertical superiors, including constant evaluation and the need to have their positions renewed every five years. They were not powerful in the sense of having sensitive jurisdiction and their broad

⁶ Mathew J. Streb, ed., *Running for Judge: The Rising Political, Financial, and Legal Stakes of Judicial Elections* (New York and London: New York University Press, 2007); and Roy A. Schotland, “New Challenges to States’ Judicial Selection,” *Georgetown Law Journal* 95 (2007).

legal discretion was curbed through government policies expressed in court and party resolutions.⁷

Second comes the “Spanish solution,” a divided, or in Tamir Moustafa’s words, a “fragmented judicial system” (pp. 50–52). In Spain under Franco, especially in the later decades, the judiciary might be seen as independent because judges possessed the normal set of institutional protections, but they lacked power, as all matters of interest to the government were placed in the hands of a separate set of tribunals whose adjudicators did not have the protections that the judges had. To be sure, judges on ordinary courts faced the constraints of a well-organized judicial bureaucracy where periodic evaluations encouraged conformist behavior, but they did not suffer from outside interventions or pressures.⁸

Third are courts that are relatively independent and have politically meaningful jurisdiction (one dimension of power) that were created by leaders in authoritarian regimes. Under these circumstances, judges might support the interests of the leaders and avoid conflict or rule against regime interests and perhaps face conflict with the executive. Tsarist Russia after the Judicial Reform of 1864 presents a fine example of the latter, as judges, sometimes with the help of juries, made decisions intolerable to the Tsar and his circle. As a result, adjustments were made that included the removal of politically sensitive crimes to military courts, the declaration of regional states of emergency, and the cultivation of cooperative judges through the management of their careers.

Fourth and final are courts that are formally independent and empowered, but where informal practices ensure that judges do not rule against the interests of the regime. Arguably, this category includes Singapore, which has convinced international business that it has a sound legal system even though regime interests are regularly accommodated by judges.⁹ Another country that fits is post-Soviet Russia under Putin,

⁷ Peter H. Solomon, Jr., *Soviet Criminal Justice under Stalin* (Cambridge: Cambridge University Press, 1996); and *idem* and Todd Foglesong, *Courts and Transition in Russia: The Challenge of Judicial Reform* (Boulder, Colo.: Westview, 2000), chap. 1.

⁸ Jose Toharia, “Judicial Independence in an Authoritarian Regime: The Case of Contemporary Spain,” *Law and Society Review* 9 (Spring 1975). A version of the Spanish solution was found in the early years of Nazi Germany, where politically important matters were put in special tribunals of one sort or another and the regular courts were allowed to continue normal practice for a while in non-political civil cases. The removal of Jews from the judiciary in Germany and occasional directives on types of cases made the situation of judges on ordinary courts less than normal, but there were still grounds for the contention that in certain spheres Germany still had a *rechtsstaat*. Ernst Fraenkel, *The Dual State: A Contribution to the Theory of Dictatorship*, trans. Edward Shils in collaboration with Edith Lowenstein and Klaus Knoor (New York: Octagon Books, 1941). See also Ingo Muller, *Hitler’s Justice: The Courts of the Third Reich* (Cambridge: Harvard University Press, 1991).

⁹ Gordon Silverstein, “Singapore: The Exception that Proves Rules Matter,” in Tom Ginsburg and Tamir Moustafa, eds., *Rule by Law: The Politics of Courts in Authoritarian Regimes* (Cambridge: Cambridge University Press, forthcoming).

whose regime has become more authoritarian. While post-Soviet Russia's courts have considerable independence and power, informal practices or institutions ensure that Russian judges normally do the bidding of powerful persons in cases that matter to them.¹⁰

The first and second models are both stable and straightforward; the third is unstable, involving a constrained judiciary that faces threats to its independence and power; and the fourth involves a gap between formal institutions and reality, which may engender public cynicism and mistrust of the courts. How these models come about, to what kinds or stages of authoritarian development they correspond, and the implications of the choice of model for the later development of the independence or power of courts in post-authoritarian settings, remain to be determined.¹¹ The books under review help answer these questions, but there are further pieces of knowledge that should be added to the mix.

The most prominent theory of judicial empowerment now in circulation focuses upon changes in the balance of power within political systems, in particular, situations where a dominant leader or group faces a credible threat of losing hegemony and turns to the courts either to preserve power or to gain insurance against retaliation by new power groups. Ran Hirschl attributes the spread of judicial power within common-law parliamentary systems (Canada, South Africa, Israel, and New Zealand) in large part to an urge by hegemonic groups to preserve their privileges in the face of a decline—real, perceived, or potential—in their sociopolitical status or power. In like manner, Tom Ginsburg associates the rise of constitutional review in new Asian democracies with a heightened competition for power and the choice by elites of a strategy of insurance. A similar argument is advanced by Jodi Finkel in her studies of judicial reform in Mexico and Argentina, and J. Mark Ramseyer attributes what he sees as a dependent judiciary in Japan to the absence of political competition.¹² In a path-breaking comparative

¹⁰ See Peter H. Solomon, Jr., "Judicial Power in Authoritarian Regimes: The Case of Russia," in Ginsburg and Moustafa (fn. 9); and idem, "Threats of Judicial Counterreform in Putin's Russia," revised and enlarged version, in Kathryn Hendley, ed., *Remaking the Role of Law: Commercial Law in Russia and the CIS* (Huntington, N.Y.: Juris, 2007).

¹¹ There are other ways of classifying the situations of courts in authoritarian states. One could, along with Ginsburg and Moustafa, draw a two-by-two table, distinguishing between high and low levels of independence and power on each axis and placing countries in the boxes. Most of the countries that fall into the third model would land between the boxes (as their degrees of power and sometimes independence were neither high nor low). A three-by-three version, with high, medium, and low positions on each variable would still fail to capture the effects of informal practices or institutions. Tom Ginsburg and Tamir Moustafa, "Introduction: The Functions of Courts in Authoritarian Politics," in Ginsburg and Moustafa (fn. 9).

¹² Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Cambridge: Harvard University Press, 2004); Tom Ginsburg, *Judicial Review in New Democracies:*

analysis of variation among subnational units (provinces in Argentina), Rebecca Bill Chavez finds a direct correlation between the degree of competition for political power and the independence and power of the courts. In short, it is the arrival (or the prospect of the arrival) of new political competition or a new constellation of power or elites that makes old elites see or accept the utility of legal protection and powerful courts.¹³ This pattern can be observed as well in more remote times. The best account of the emergence of rule of law and the law-based state in Europe (sixteenth to nineteenth centuries) places a similar emphasis on new political competition.¹⁴

The “power preservation thesis,” as Moustafa calls it, does connect to judicial empowerment, but the emergence of a real threat in the form of what another writer calls “robust political competition,” comes most often with the breakdown of authoritarianism or the onset of democratization.¹⁵ However, to say that judicial independence (Ramseyer) or empowerment (Ginsburg, Finkel) requires democratization and that consolidated democracy requires rule of law (Linz and Stepan, et al.), is to come close to circular reasoning (even if it is correct).¹⁶ The presence of political competition may make judicial empowerment more likely, but it does not always lead to judicial independence. In some unstable and unconsolidated democracies, competition has led to an increase in attempts at manipulating courts whose judges may not be in a position to resist.¹⁷

The challenge of ruling or managing authoritarian states not on the verge of demise or facing the emergence of political competition may supply additional reasons for embracing law and courts. There are a number of benefits to strong courts, but one has such a long pedigree that it constitutes part of our intellectual baggage: the role of law in legitimating governments, their rulers, and their policies. Authoritarian leaders may start with other sources of legitimacy, such as charisma

Constitutional Courts in Asia Cases (Cambridge: Cambridge University Press, 2003); Jodi Finkel, “Judicial Reform as Insurance Policy: Mexico in the 1990s,” *Latin American Politics and Society* 47 (Spring 2005); idem, “Judicial Reform in Argentina in the 1990s: How Electoral Incentives Shape Institutional Change,” *Latin American Research Review* 39 (October 2004); and J. Mark Ramseyer, “The Puzzling (In)dependence of Courts: A Comparative Approach,” *Journal of Legal Studies* 23 (June 1994).

¹³ Rebecca Bill Chavez, “The Construction of Rule of Law in Argentina: A Tale of Two Provinces,” *Comparative Politics* 35 (July 2003); and idem, *The Rule of Law in Nascent Democracies: Judicial Politics in Argentina* (Palo Alto: Stanford University Press, 2004).

¹⁴ Roberto Unger, *Law in Modern Society* (New York: The Free Press, 1976).

¹⁵ Tamir Moustafa, “A Judicialization of Authoritarian Politics?” (Paper presented at the APSA, Washington, D.C., September 1–4, 2005); and Anna Grzymala-Busse, “Political Competition and the Politicization of the State in East Central Europe,” *Comparative Political Studies* 36 (December 2003).

¹⁶ Ramseyer (fn. 12); Ginsburg (fn. 12); Finkel (fn. 12); and Linz and Stepan (fn. 1).

¹⁷ See Maria Popova, “Judicial Independence and Political Corruption: Electoral and Defamation Disputes in Russia and Ukraine” (Ph.D. diss., Harvard University, 2006).

or the claim to represent morality, revolution, or order, but in time find support from law and courts increasingly useful. Legal forms may help to justify repression that leaders believe is necessary or such serious and upsetting social transformations as nationalization of property or privatization of previously state-owned property. In fact, the most repressive regimes, including Nazi Germany and Stalinist Russia, often choose to use law and courts. Stalin's prosecutor Andre Vyshinsky understood better than most of his colleagues the importance of holding some trials against alleged political enemies in courts so as to provide a narrative that would support extra-judicial repression.¹⁸

While empowered courts may be useful for authoritarian leaders, the enlargement of judicial power always involves the risk that judges will use that power in ways the leaders dislike. In the USSR under Stalin, more than once judges resisted applying the full force of laws that they found overly broad or punitive.¹⁹ In Brazil under military rule, high-court judges also found ways to resist some of the repressive decrees of the military leaders and mute their impact.²⁰ In both of these examples, the leaders did not tolerate the actions of the judges for long and neither did those leaders succeed in achieving all of their objectives.

I come, then, to the questions explored in the books under review. When, where, why, and how do authoritarian leaders choose to empower and use their courts? Under what circumstances do they change their minds and turn against the courts? When and why do judges cooperate with the goals and tactics of their political masters?

REPRESSION AND THE COURTS

In *Political (In)justice* Anthony Pereira probes and explains the distinctive approach to repressing and containing political enemies pursued by the government of Brazil after its military coup in 1964. Brazil usually prosecuted alleged challengers at public trials in military courts that included one professional civilian judge along with military officers and their decisions could be appealed to higher military tribunals and eventually to the civilian Supreme Court. In contrast, starting in 1973, the government of Chile under Pinochet repressed the bulk of its opponents without trials and, when it did hold trials, they occurred

¹⁸ Solomon (fn. 7), chap. 7. See also Robert Sharlet and Piers Beirne, "In Search of Vyshinsky: The Paradox of Law and Terror," *International Journal of the Sociology of Law* 12 (May 1984).

¹⁹ Solomon (fn. 7), chap. 4, 6, and 11.

²⁰ Mark J. Osiel, "Dialogue with Dictators: Judicial Resistance in Argentina and Brazil," *Law and Social Inquiry* 20 (Spring 1995).

behind closed doors at tribunals consisting only of military officers without legal training. Argentina under Peron (r. 1976–83) engaged in the broadest repression, almost entirely outside the courts.

To be sure, Pereira explains, there were differences in political contexts—the strength of opposition forces (in Brazil the armed left never had the broad-based support it had in Argentina) and the extent to which new rulers sought to preserve the old order. There were also discrepancies in the timing and sequencing of key events. But the most telling differences lay in the histories of these countries, particularly in the degree of trust and cooperation between the civilian judiciary and the military. In an earlier era, security cases in Brazil had been handled by a civilian court and in deference to this tradition Brazilian military justice remained part of the regular justice system. A professional judge was usually the dominant figure on the military tribunals and both the prosecutor and defense counsel were civilian lawyers. Not only did the military and the judiciary work together and know each other, they also shared views about threats and how they should be confronted, including the importance of using legal procedures. In contrast, Chile, a country known for its legalistic culture, had a system of military justice wholly removed from the civilian courts and staffed by only military leaders who did not trust the judiciary. In Argentina the National Penal Tribunal of 1971–73 had proven slow and erratic in its operations, and the early release of many of its convicts through what the military saw as an irresponsible amnesty eroded the remnants of its respect for judges. After the military's second coup (1976), its earlier negative experience with the civilian tribunal's handling of political opponents led the military to operate on its own.

Not only did Brazil place most of its repression within courts, but the performance of the courts gave the accused opportunities for a real defense and reasonable outcome. The death penalty was not used and terms of imprisonment were not excessive (63 percent of convicted persons received sentences of less than four years and only 18.5 percent actually spent more than a year in prison). But the most striking feature of Brazilian military/political justice was the high rate of acquittal, which averaged 55 percent for a fifteen-year period and ranged from 40 percent at the start to over 80 percent later on (pp. 75–85).

Acquittal rates at these levels are rarely encountered in regular courts anywhere at any time, and they are not wholly explained by the author of this admirable book.²¹ Another observer, Mark Osiel, attributes the

²¹ On comparative rates of acquittal see Peter H. Solomon, Jr., "The Case of the Vanishing Acquittal: Informal Norms and the Practice of Soviet Criminal Justice," *Soviet Studies* 39 (October 1987).

high rates of acquittal in part to the appointment to the military tribunals of “soft-line officers.”²² To be sure, in the realm of political justice, as Otto Kirchheimer so eloquently explains, the purpose of the exercise may lie in deterrence and temporary incapacitation rather than in retribution. Political and military leaders in Brazil may have believed that a period of uncertainty lasting two to three years including trials and appeals and, sometimes, pretrial detention, served these purposes for most of the accused.²³ Still, courts that acquit well over half of the persons brought before them, not to speak of a military court handling cases of alleged threats to the security of the state, require further explanation. I wonder whether political leaders in Brazil provided any specific directives or at least hints that convictions were not necessary. As befits a country with a longstanding federal system, there was considerable variation among different regions of Brazil, but the rates of acquittal everywhere in Brazil were high. Note that even Chile’s military courts recorded a 12.42 percent rate of acquittal in national security trials and that this figure masks even more significant regional variations, with some courts acquitting 20–25 percent of defendants (one recorded 46 percent) while others acquitted no one. Within civil law countries, rates of acquittal in regular courts vary from lows in the 1–3 percent range (where there is significant prosecutorial screening or pressures on judges to convict) to highs around 30 percent (where there is compulsory prosecution of all cases started by the police). For political or security cases, acquittal rates are usually lower than for ordinary criminal charges.

In an engaging intellectual exercise, Pereira tests the power of his explanation by considering its application to three authoritarian regimes in European history, Nazi Germany, Franco’s Spain, and Salazar’s Portugal (chap. 9). He finds rough analogies on the one hand between the separation of military and judicial perspectives in Germany and Argentina and, on the other hand, between the strong connections of the two in both Brazil and Portugal. For their part, Chile and Spain shared a pattern of strong extra-judicial violence combined with a modest attempt at legitimation through courts that eventually grew in scope, but the courts used in Chile and Spain were military tribunals whose members lacked the protections of judicial independence even when, as in the case of Spain, they were judges.

I have great respect for Pereira’s sophisticated analysis of continuities in the penetration of law into a country’s public life, and it is equally

²² Osiel (fn. 20).

²³ Otto Kirchheimer, *Political Justice: The Use of Legal Procedure for Political Ends* (Princeton: Princeton University Press, 1961).

possible to observe diachronic differences in the use of courts in political repression. The USSR under Lenin and Stalin stands as a case in point. One can distinguish at least four approaches in the course of Soviet history up to 1953, all of which involved some use of courts for dealing with political enemies. First, during the early years of civil war and foreign interventions, Soviet leaders extended the tsarist use of military tribunals with new “revolutionary tribunals” and at the same time authorized widespread extra-judicial repression of enemies directly by the political police (not the army). Second, during the collectivization drive the regime’s representatives used courts to seize land and property from peasants but relied on police and other deputized authorities to arrest and deport peasants who resisted the process. In both of these periods most of the repression was extra judicial. However, during the Great Terror of 1937–38, the third example, Stalin and Vyshinsky gave a legal casing to the whole process of repression—all persons sentenced to execution or labor camps passed before some tribunal, in the main, the *troiki* of the police. Added legal justification for the repression was provided by the hearing of a small share of political offenses in courts (the special collegia of regional and republican supreme courts and the military collegium of the USSR Supreme Court), many of whose judges had political or police credentials. Finally, in the post–World War II period, the USSR placed responsibility for political cases in the hands of military courts, which were staffed entirely by professional judges who were on average better educated than the judges on civilian courts. Even though the judges on the military courts lacked security of tenure, they gained a reputation for a higher level of procedural fairness than was delivered in the regular courts.²⁴

Soviet history demonstrates, even more than that of Chile or Nazi Germany, the potential for change over time in how authoritarian regimes handle political enemies and the part played by courts in the process. Soviet leaders were prepared to use courts and judges at all times, but tended to rely on more direct forms of repression for matters of high priority, especially during the key periods of revolutionary change. As the regime became more conservative, it paid more attention to legal forms and the legitimation supplied by the use of courts even though there was enough falsification and pretense to make the legitimation virtual. But, as this review argues, legitimacy through law and courts matters, all the more so in a global and interconnected world.

²⁴ Author interviews with former Soviet jurists in emigration, 1985–86.

JUDICIAL EMPOWERMENT IN AUTHORITARIAN STATES

The legitimacy conferred by laws implemented by strong courts played a major part in the 1979 decision of Egyptian leader Anwar Sadat to establish and empower the Supreme Constitutional Court (SCC), the story of which forms the core of Tamir Moustafa's book *The Struggle for Constitutional Power*. It is a rich and paradigmatic story of an authoritarian regime enlarging judicial power and tolerating decisions that went against its interests for more than two decades before ultimately attacking the Court's autonomy and limiting its accessibility by groups that challenged government interests. Moustafa goes on to connect the experience of Egypt with that of other countries and provides a useful theoretical guide to the subject of judicial power in authoritarian states, including the purposes of empowerment, the risks run by political leaders, and the means available for containing or constraining judges short of attacking their independence of power.

The establishment of Egypt's SCC in 1979 was part of a strategy to convince foreign business firms that the country represented a safe place for investment. While the Constitution of 1973 guaranteed the security of private property, foreign investment had not recovered from the recent experience of wholesale nationalization of assets under Nasser, and Egyptian leaders were not confident that they could implement privatization programs without incident. According to Moustafa's well-placed informants (including the prime minister of that time and also a key member of the committee that drafted the law on the Supreme Constitutional Court) (pp. 77–78), the intention when creating the SCC was to develop legal support for controversial government economic policies and convince the global business community that Egypt belonged on its radar screen. Judges on the new Court had security of tenure (to retirement age) and the Court's chief, though appointed by the president, was normally the senior judge in waiting. While citizens did not have direct access to the SCC, cases could be referred to it by a variety of governmental bodies, including all regular courts.

Through careful analysis of the decisions of the SCC, Moustafa demonstrates that it fulfilled regime expectations in the economic realm, enabling land reform, supporting privatization schemes, and dismantling rent control in the housing market. The Court also made key decisions on compensation and taxation, some of which cost the government money, but overall the Court furthered government economic policies. At the same time, though, the Court became increasingly active in political cases, defending press freedoms and assessing the legality of

elections and electoral arrangements. In time the Court emerged as a key point of access for both rights groups and opposition political parties and developed cooperative relationships with groups that practiced legal mobilization. The development of these groups, well chronicled by Moustafa, invites comparison with the most positive examples presented by Charles Epp in *The Rights Revolution* (e.g., Canada).²⁵ Still, the SCC in Egypt observed limits in its excursions into the political realm. Thus, it supported the constitutionality of the State Security Courts and Emergency State Security Courts, even though these courts did not meet normal procedural standards (such as the right to appeal) (pp. 46–50). Moreover, the SCC also consistently supported the regime's needs in Islamist litigation during the 1980s and 1990s and by so doing enhanced its utility to the regime.²⁶ For a long time the SCC was reluctant to make decisions that challenged any of the core interests of the regime and engaged in what Moustafa calls “bounded activism” (p. 8).

But things changed. The cumulative effects of the symbiotic relationship between the Court and human rights groups prompted the government of Egypt to develop a highly restrictive law regarding NGOs that forbade them from receiving foreign funding and, in some cases, forbade all contact with foreigners. The SCC declared this law unconstitutional on procedural rather than substantive grounds, and the government went back to process a similar law in an acceptable way. Then, regarding the monitoring of elections, the Court made decisions that threatened to undermine government control, for example requiring that all election stations be monitored by judges. The government reacted to this by twisting implementation of the Court's decision so that “judges” in the monitoring included prosecutors, and election monitoring was organized by the ministries of justice and the interior.

These decisions by the Court supplied the straw that broke the camel's back. First, the government turned against the SCC by appointing a reliable new chief from outside the Court (a ministry of justice official) and expanding the number of judges to allow additional new appointments (court packing). The new chief further constrained the Court by placing the more radical judges on new panels that did not deal with

²⁵ Charles Epp, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective* (Chicago: University of Chicago Press, 1998).

²⁶ Ran Hirschl, “Constitutional Courts vs. Religious Fundamentalism: Three Middle Eastern Tales,” *Texas Law Review* 82 (June 2004). Note that Hirschl has argued that the SCC's role in fighting religious fundamentalism was the main reason why the regime tolerated its meddling in narrowly political matters (Moustafa mentions but does not give much weight to this, p. 109) and even a reason for the SCC's earlier empowerment, a point not supported by Moustafa's research. According to Hirschl, the Constitutional Court of Turkey has also become “a bastion of secularism in an otherwise increasingly theocratic policy” (personal communication).

constitutional issues. At the same time, a new NGO law was passed, no less draconian than the one it replaced. In addition, the chief of the SCC was recruited to head the electoral commission and provision made that future challenges to electoral laws take place before the laws are adopted, despite the absence of an a priori review requirement in the law establishing the SCC. In short, the SCC was tamed, in part through actions that compromised its autonomy.

Combining the Egyptian story with the experiences of other authoritarian regimes that have empowered and used their courts (China, Mexico, Indonesia, Chile, the Philippines, and Spain under Franco), Moustafa also presents a theoretical framework for understanding the role and power of courts in nondemocratic settings. To begin, he portrays the empowerment of courts by authoritarian leaders as a rational choice pursued in response to common pathologies of authoritarian governments and contributing to the institutionalization of the regime's rule. These pathologies include difficulties in creating credible commitment to property rights, holding state officials accountable, maintaining elite cohesion, pursuing controversial reforms, and reinforcing the legitimacy of the state or regime. Countries such as Singapore and China, like Egypt, have sought to convince foreign investors of the security of the investment climate in their countries, and the idea that a credible legal framework encourages both investment and economic development has, for better or worse, become an axiom in the world of international development.²⁷ Empowering the courts may well be a common institutional tool for securing property rights, but in many countries (e.g., Russia) informal practices undermine the impact of formal institutions like courts.

The use of administrative courts or tribunals to mobilize citizens and provide a fire-alarm model of oversight is also becoming common within authoritarian states.²⁸ The Egyptian judicial reform of 1979 included the revival and strengthening of administrative courts as a check on public servants and, like Poland in the 1980s, communist China is developing administrative justice as has Mexico and Indonesia (pp. 28–34). Administrative justice in the form of court review of citizen complaints against the legality of actions by state officials, including

²⁷ Not surprisingly, Moustafa grounds his argument in new institutionalist theory as developed by Douglas North and Barry Weingast (see pp. 22–24). More important is his finding that Egyptian politicians seem to have embraced this logic in making policy choices. Whether the premises of institutionalist literature on property rights are self-evident or conveyed to domestic authorities by representatives of international organizations or local economic advisors, this line of thought sometimes has practical impact.

²⁸ Tom Ginsburg, "Administrative Law and the Judicial Control of Agents in Authoritarian Regimes," in Ginsburg and Moustafa (fn. 9).

regulations issued by those officials, has flourished in post-Soviet Russia and continues even as the regime becomes less democratic and more authoritarian.²⁹ Policing the state through administrative justice may also warn against power grabs by dissident factions and help to maintain elite cohesion overall.

Finally, in Moustafa's scheme legitimating the state and its policies through judicial approval is perhaps the most common reason for enhancing judicial power in authoritarian states. This applies to the use of repression or violence (as we have seen in Pereira's analysis of Brazil), the pursuit of economic reform that is antipopulist (privatization of state resources and reducing the benefits of the welfare state), the delivery of a public service (a place for impartial adjudication of disputes), and the justification of a regime's existence.

While authoritarian leaders may have good reasons for empowering at least some of their courts, they also face risks in so doing. By creating an alternative center of power, they provide an opportunity for legal mobilization so that groups, including the opposition, may use the courts for purposes not desired by the regime. As a result, the courts may end up protecting or even nourishing civil society, as they did in Egypt. This risk is inherent in judicial empowerment whenever the courts in question are independent and opportunities for legal mobilization are present. In Moustafa's words, such courts have the potential for "dual use"—use by the regime and use by the regime's opponents or critics (p. 10).

But authoritarian leaders have many ways of constraining courts and ensuring that they do not emerge as antiregime centers. As a rule, judges on new or newly empowered courts (such as constitutional courts) in authoritarian states understand the limits of what is possible and do not challenge the regime's core interests unless the regime is losing or leaving power (the phenomenon of "strategic defection" is identified and well analyzed by Gretchen Helmke).³⁰ In fact, some court leaders push all judges to avoid confrontations with the interests of the executive in order to protect the institutional autonomy of the courts. This pattern is documented for Japan by J. Mark Ramseyer and for Chile by Lisa Hilbink.³¹

Other approaches to constraining courts include placing sensitive matters in courts other than the ones that are empowered—the Spanish solution discussed above—or what Moustafa calls fragmentation of

²⁹ Peter H. Solomon, Jr., "Judicial Power in Russia: Through the Prism of Administrative Justice," *Law and Society Review* 38 (September 2004).

³⁰ Gretchen Helmke, *Courts under Constraints: Judges, Generals, and Presidents in Argentina* (Cambridge: Cambridge University Press, 2004); and idem, "Checks and Balances by Other Means: Strategic Defection and Argentina's Supreme Court in the 1990s," *Comparative Politics* 35 (January 2003).

³¹ Ramseyer (fn. 12).

court systems; limiting access to justice through tough rules of standing and incapacitating judicial support networks through limits placed on foreign funding. But the ultimate response of authoritarian leaders to judges who threaten their core interests is simply to attack the independence of the courts, if not also their power. As we have seen, Mubarak used both approaches.

In short, the situation of judges on empowered (high) courts in authoritarian regimes is often precarious and almost always contingent. In democratic states, unpopular judicial decisions may be greeted with resistance to implementation and efforts to overrule their impact through legislation or constitutional amendment, along with denunciation of the judges for their activism. But rarely is the power of judicial review or the existence of a particular court open to challenge.³² I will return to the similarities and differences among empowered courts in democratic and authoritarian states after adding another element to the equation.

CONSERVATIVE JUDGES AND THE IDEA(L) OF APOLITICISM

Empowered judges do not always threaten the policies or core interests of politicians in authoritarian states. There is another model, represented at its best by the experience of Chile.

In *Judges beyond Politics in Democracy and Dictatorship*, Lisa Hilbink starts with a nagging puzzle: Why was it that Chilean judges, “trained under and appointed under democratic governments” (p. 13) and working in a country with a strong legal tradition, capitulated so completely to Pinochet’s military regime, condoning and giving a legal face to its repressions? Her answer, complex and nuanced, focuses not on the standard but unsatisfactory explanations of personal attitudes, social class, or attachment to legal positivism. Rather, she argues, it was a long-standing commitment to apoliticism, raised to the level of institutional ideology and enforced through a strong judicial bureaucracy, that best accounts for the behavior of judges under and even after Pinochet.

Like the authors of the previous two studies, Hilbink emphasizes the impact of institutions and lays out the historical roots of her dependent and independent variables. After an excursion deep into the nineteenth century, she lands at the 1925 Constitution that established not only a modest form of judicial review but also the dominant role of the Supreme

³² The coup d’état launched by President Musharraf of Pakistan against his country’s Supreme Court in November 2007 stands as an exception. When the Court threatened to declare Musharraf’s rule illegitimate, he chose to declare a state of emergency and fire all members of the Court rather than accept its judgment. In so doing, however, the president acted like an authoritarian rather than a democratic leader.

Court in managing judicial careers, including its own regeneration. Beginning in 1925, the judiciary in Chile was autonomous, but individual judges faced evaluations every three years for their “efficiency, zeal, and morality” (evaluations were annual after 1971) and there were many ways to punish judges who did not meet the expectations of their superiors or peers (pp. 35–38). The result, as a rule, was a judicial passivity on rights issues and a tendency to defer to state and elite interests on matters relating to property, contracts, and security. When the country entered its most liberal phase (1963–73) and featured policies attacking those interests (including the nationalization of property under Allende), the courts, including the Supreme Court, followed a path of conservative activism, notwithstanding the middle-class background of most of the judges, through narrow and what judges saw as legal, as opposed to political, interpretations of the constitution. All this made the readiness of judges to support Pinochet on their own initiative predictable, if unethical. This support took the form of narrowing its own jurisdiction vis a vis military justice and refusing to accept most habeas corpus petitions as well as concrete decisions supporting the regime and its repressions, which receive detailed analysis in Hilbink’s book.

To probe what was going on in the judges’ minds, Hilbink conducted an exhaustive set of in-depth interviews (with 115 legal scholars and practitioners, former ministers of justice, and judges) (p. 9), which she uses to good advantage in the book through both quotations and statistical analysis. She demonstrates convincingly that only a minority of the high-court judges (Supreme Court and top regional courts) were committed supporters of Pinochet and that another sizable group had democratic inclinations, but all of them felt constrained, in part by the fear of losing their jobs or suffering other sanctions. At the same time, many took comfort from the fact that staying out of politics was considered the appropriate behavior for a judge.

With the end of the Pinochet regime and revival of democracy under Patricio Aylwin and Eduardo Frei, most judges in Chile avoided facing the controversial and bitter legacy of past repressions and continued to use narrow positivistic interpretations to avoid advancing rights or taking stands of a liberal coloration. In fact, for the first decade after Pinochet, judges emerged as an obstacle to political change, a tendency revealed in Hilbink’s careful analysis of their jurisprudence. Moreover, in the name of apoliticism, the Supreme Court managed to block a major part of a planned judicial reform that might have undercut its control of the judiciary and the institutional basis for its conservatism. Ironically, the actions of the courts in the United Kingdom vis a vis the former dicta-

tor Pinochet embarrassed judges of the Supreme Court of Chile and pushed its members, many of them new appointees, to act differently.

From a superb account of the Chilean story, written in elegant prose, Hilbink expands her horizon to address comparative issues, of both empirical and normative kinds. Having established the deleterious effects of the apolitical ideal in Chile, she asks how general this pattern is. To begin, she establishes that Chile's neighbors Argentina and Brazil share neither the commitment to apoliticism among their judges nor a career judiciary of the civil-law type and, as a result, judges in those countries sometimes take political stands. She goes on to address a more telling question: Are there other countries where an ideology of apoliticism reigns in the judiciary and is backed up institutionally by a judicial bureaucracy that not only manages the careers of judges but also reproduces conservatism and conformity among them? For students of courts and judges in the civil law world, the answer is obvious and Chile becomes only one of a number of paradigmatic examples. Hilbink refers to the experiences of Italy before World War II, Spain under Franco, and Japan since World War II (a possessor of a particularly confining and well-documented judicial bureaucracy, also under a Supreme Court). She could have added to this list the former Soviet Union, post-Soviet Russia and its neighbors, and also France, the country at the heart of the civil law tradition.

Of course, Hilbink is well aware that the civil law tradition features distrust of judges and in its purest form idealizes judges as mechanical appliers of the law as opposed to its interpreters, let alone as policymakers. In terms of positive values, civil law countries privilege consistency and equity over legal creativity and a concern with rights in court decisions and assume that legislatures should play the dominant role in these domains. The historical emergence of a career judiciary managed by either ministries of justice or supreme courts represents an appropriate institutional response to this value choice, its negative consequences notwithstanding. (Arguably, judicial bureaucracies can be well managed and incentive systems designed to produce judges who are not overly conformist—as in Germany—but this is the exception rather than the rule).

In civil law countries where a supreme court stands at the head of a judicial bureaucracy, its judges are likely to represent a conservative mold and when given the power of judicial review, use it in a conservative manner. The behavior of the supreme courts of Chile and Japan give added support to the alternative form of judicial empowerment that is favored in the civil law world, namely the creation of constitutional courts separate from the rest of the judiciary and staffed on

the whole by legal scholars and other nonjudges. The Constitutional Court of Germany stands as the shining example of a newly empowered court that was not burdened with a tradition of apoliticism or members molded by careers in a judiciary committed to apoliticism.³³ The constitutional courts of Spain, Hungary, the Czech Republic, Poland, and other new democracies have done almost as well, often coming into conflict with supreme courts that are more conservative, if not also uncomfortable with policy initiatives.³⁴

Returning to the world of authoritarian regimes, we are forced to recognize that even a position separate from the judicial bureaucracy is no guarantee that a constitutional court will be able to serve as a creative force in defense of rights for more than a short time. The experience of Egypt discussed above is a case in point, as is that of the Constitutional Court in post-Soviet Russia, which in the closing period of Putin's presidency had become more subservient to the executive branch and more conservative in its interpretations of rights than it had been in the Yeltsin years.³⁵

But Hilbink's argument remains valid. A commitment to an apolitical judiciary institutionalized in the form of a judicial hierarchy does tend to make adjudication a "bureaucratic or technocratic function," discourage judges from "taking principled stands against the government," and make them favor established interests. Moreover, the cross-national validity of this pattern leads her to take a brave normative stance and denounce as misguided the whole effort to separate judges from politics. In the section "In Defense of Political Courts," she concludes that "if the goal is to produce courts whose members are willing and able to assert themselves in defense of rights and rule of law principles, the political nature of the judicial role must be acknowledged and institutionally cultivated." (p. 244)

She makes the argument carefully. She does not dismiss the need for formal protections associated with judicial independence (tenure, salaries) or condone open politicization of the courts. But she insists that a

³³ Georg Vanberg, *The Politics of Constitutional Review in Germany* (Cambridge: Cambridge University Press, 2005).

³⁴ Heidi Ly Beirich, "The Role of the Constitutional Tribunal in Spanish Politics (1980–1995)" (Ph.D. diss., Purdue University, 1998); Herman Schwartz, *The Struggle for Constitutional Justice in Post-Communist Europe* (Chicago: University of Chicago Press, 2000); Kim Lane Scheppele, "The New Hungarian Constitutional Court," *East European Constitutional Review* 8 (Fall 1999), 81–87; Laszlo Solyom and Georg Brunner, eds., *Constitutional Judiciary in a New Democracy: The Hungarian Constitutional Court* (Ann Arbor, Mich.: University of Michigan Press, 2000); and Alexei Trochev, "Judicial Pluralism and the Rule of Law: Lessons from Central and Eastern Europe" (Paper presented at "Judicial Reforms in the CEE Countries," Université Libre de Bruxelles, November 17, 2006).

³⁵ Alexei Trochev, *The Role of the Constitutional Court in Russian Politics, 1990–2006* (Cambridge: Cambridge University Press, forthcoming). See also his "Less Democracy, More Courts: The Puzzle of Judicial Review in Russia," *Law and Society Review* 38 (September 2004).

rights-oriented judiciary must have a set of professional attributes that run against the apolitical ideal. These include critical distance from the matters before it and a sense of professional connection and responsibility to the society of which they are a part.

I agree with her argument. These attributes, and a culture that would support them, are discouraged by the ideal of the apolitical judge. In addition, it is clear that the alternative ideal of a socially responsible, engaged, and creative judge will do more for the protection of rights and advancement of rule of law than the ideal of the apolitical judge. But I see problems with its universal promotion. There are countries where the protection of rights and advancement of law are not paramount values and where politicians prefer to reserve for themselves the power to make relevant decisions that bear on rights. In addition, there are extra dangers associated with an empowered and activist judiciary where judicial independence is not an established tradition. It is all too easy for politicians to turn against the courts and introduce measures that further compromise judicial independence, such as changing the systems of judicial appointment or discipline, when judges do not approve their decisions. The irony is that the apolitical ideal is presented as a way to develop the institutional independence of the judiciary, albeit at great cost to the autonomy of individual judges. In short, while I agree with Hilbink's diagnosis of the negative consequences of the ideal of the apolitical judge, I fear the effects of promoting its opposite, especially where the regime is authoritarian.³⁶

IMPLICATIONS AND WHAT NEXT?

The comparative study of courts and judges, so well represented by the three books under review, has opened up new lines of inquiry that are worth developing further. Here I explore three of these: how courts and the situation of judges differ across regime types, especially authoritarian versus democratic; how differences among the types of authoritarian states matter for courts and judges; and what patterns of continuity and change can be observed in the independence and power of courts and judges within particular countries.

Directly or indirectly all three books challenge the stereotypical view that courts do not matter for authoritarian leaders and do not get empowered in their states. Moustafa shows how judicial power can serve

³⁶ For a strong, empirically based defense of a policy-oriented court with politically motivated justices in a common law democracy such as the United States, see Terri Jennings Peretti, *In Defense of a Political Court* (Princeton: Princeton University Press, 1999).

an authoritarian leader just as it does democratic ones, and Pereira grapples with one authoritarian regime's decision to ground repression of enemies in law and courts, as might have happened in a democracy. Moreover, Hilbink's study of judicial apoliticism in Chile argues explicitly that the force of this ideology and its institutional manifestation in judicial bureaucracy produces a similar effect in both democratic and authoritarian contexts. Underlying her argument is an important conceptual point—the degree to which the relationship between judges and politicians displays common dynamics regardless of the regime type.

On a grander level, these new studies of courts and judges in authoritarian states demonstrate that the focus on the power implications of judicial behavior is productive for the comparative study of courts and judges. The political approach to courts developed by Shapiro (reflecting to a degree insights of Robert McCloskey), and advanced by political scientists such as Alec Stone Sweet, Peter Russell, Carlo Guarnieri, and especially Malcolm Feeley and Edward Rubin in their innovative study of judicial policy making in the United States, delivers payoffs whatever the polity (democratic versus authoritarian) or legal system (common law versus civil law).³⁷

At the same time, for some purposes differences in regime type may matter a good deal. For example, in any state, as explained above, a tradeoff occurs among three aspects of judges' situations—their independence (in the form of institutional protections); their power (jurisdiction, discretion, and authority); and their accountability. In democratic contexts where judicial independence is a given, increases in the power of judges often lead to demands for new or improved forms of accountability, if only to counteract trends in judicial policy-making disliked by some players. But in authoritarian settings the reactions may be more severe: the measures available to constrain or bind judges are greater in number or easier to use (e.g., court packing and restrictions on access to the courts, as Moustafa demonstrated) and more threatening to the independence of judges, which is typically less secure to begin with. Moreover, judges may anticipate such possibilities and deliberately exercise caution in matters of importance to the regime (a syndrome exemplified

³⁷ Shapiro (fn. 4); Robert G. McCloskey, *The American Supreme Court* (Chicago: University of Chicago Press, 1960); Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000); Peter H. Russell and David M. O'Brien, *Judicial Independence in the Age of Democracy* (Charlottesville, Va., and London: University Press of Virginia, 2001); Paul Howe and Peter Russell, eds., *Judicial Power and Canadian Democracy* (Montreal: McGill Queen's Press, 2001); Carlo Guarnieri and Patricia Pederzoli, *The Power of Judges: A Comparative Study of Courts and Democracy* (Oxford: Oxford University Press, 2002); and Malcolm Feeley and Edward L. Rubin, *Judicial Policy Making and the Modern State: How the Courts Reformed America's Prisons* (Cambridge: Cambridge University Press, 1998).

by Chilean experience). In fact, it makes little sense to talk about the empowerment of judges or courts in authoritarian settings without asking about its effect on judicial independence, which is, after all, so often a deficit in such states.

Another phenomenon found in all political regimes but that is more common or systematic in authoritarian settings is the gap between formal institutions and informal practices. Studies of criminal justice in the United States, for example on courthouse cultures and also on the use of laws by police to serve their purposes, reveal the important part played by informal practices (even institutions) in law enforcement in a democracy.³⁸ Arguably, though, a major gap between the formal and informal is more common in authoritarian contexts, if only because countries with less-developed institutions are more likely to be authoritarian than democratic.³⁹

Courts and judges in the Russian Federation today present a paradigmatic example of conflict between a set of formal institutions designed to promote judicial independence (and, by and large, meet world standards) and informal practices that undermine the effect of those institutions. Thus, while the law provides judges security of tenure until retirement age with cause as the only possibility for firing (after peer review), in practice chairs of courts find pretexts and have sufficient influence over the regional judicial qualification commission to get rid of judges whom they dislike, especially those who do not conform to the expectations enshrined in the operation of the judicial bureaucracy.⁴⁰

In like manner, Hilbink contends that the mere empowerment of judges in formal terms does not produce defenders of rights. Those judges must also develop a number of professional attributes, such as distance from the issues and connection to community values, for which informal practices, not to speak of culture, may have a determinative impact.

It is probable that informal practices and institutions are more likely to have disproportionate influence upon the independence and/or power of judges in settings where informal practices play a large part in public life more broadly. This is very much the case in the Russian Federation

³⁸ See, for example, Herbert Jacob, *Felony Justice: An Organizational Analysis of Criminal Courts* (Boston: Little Brown, 1977); and Alfred J. Reiss, *The Police and the Public* (New Haven: Yale University Press, 1971). See also Doreen J. McBarnet, *Crime, Compliance, and Control* (Aldershot, U.K., and Burlington, Vt.: Ashgate/Dartmouth, 2004).

³⁹ On the analysis of informal institutions and practices, see Gretchen Helmke and Steven Levitsky, "Informal Institutions and Comparative Politics: A Research Agenda," *Perspectives on Politics*, 2 (December 2004); and Alena Ledeneva, *How Russia Really Works: The Informal Practices that Shaped Post-Soviet Politics and Business* (Ithaca, N.Y.: Cornell University Press, 2006), especially chap. 1.

⁴⁰ Peter H. Solomon, Jr., "Informal Practices in Russian Justice: Probing the Limits of Post-Soviet Reform," in Ferdinand Feldbrugge, ed., *Russia, Europe, and the Rule of Law* (Leiden and Boston: Martinus Nijhoff, 2007), 79–92.

and other post-Soviet settings, where public administration in general and policing in particular are guided as much by informal norms as by formal rules.⁴¹ To be sure, this may happen in democratic contexts (e.g., the United States of the 1870s and 1880s), but in the twenty-first century it is more common in authoritarian or post-authoritarian states (including the new democracies in Eastern Europe).⁴²

At the same time, authoritarian states differ among themselves (after all, they represent most governments in the world), and it is worthwhile to explore which differences matter most for courts and judges, and how. Some distinctions are suggested in the books under review. Pereira distinguishes between revolutionary and conservative regimes (all new and military in nature), finding that military leaders who sought only to defend an old order against minor challenges were more likely to pursue legal and judicial avenues for confronting their enemies than leaders who faced larger challenges (pp. 68–70). Moustafa suggests that any authoritarian state bent on attracting foreign investment and playing a significant part in the global economy may try to use courts to establish credible property rights.

But there are many other distinctions that may matter—such as the degree of institutionalization, the degree of competition within an authoritarian context, the importance of military or police power in the regime, and the sources of legitimation available to the leadership.

There is also the matter of historical traditions, reflected in institutions and culture alike. The ideal of a judge who, on his or her own, stands up for the rights of the individual against the state (per Hilbink) emerged in the British, American, and, to a degree, European political experience during and since the eighteenth century. Arguably, such notions as the primacy of the individual over the community and law that promotes rights are not (yet?) accepted in many states outside of the Western world, whatever the nature of their regimes. For this reason, Randall Peerenboom, a prominent analyst of courts in China, urges scholars to eschew what might constitute ethnocentric approaches and be more receptive to notions of law and courts that do not share these premises.⁴³

Finally, there is the subject of patterns of change in the independence and power of judges. Increasingly, students of democratization and legal transition alike have become skeptical about the frequency of linear de-

⁴¹ Peter H. Solomon, Jr., “Law in Public Administration: How Russia Differs,” *Journal of Communist Studies and Transition Politics* 24 (March 2008); and idem, “The Reform of Policing in the Russian Federation,” *Australian and New Zealand Journal of Criminology* 38 (2005).

⁴² Anna Grzymala-Busse, “Informal Institutions and the Post-Communist State,” (Manuscript, 2004).

⁴³ Randall Peerenboom, *China's Long March toward Rule of Law* (Cambridge: Cambridge University Press, 2002).

velopment, where progress and goods such as rule of law simply become more and more pronounced.⁴⁴ The experience of any wave of democratization, and certainly of postcommunist Eastern Europe and the former Soviet Union, reminds us how tortured and circuitous the paths are to democracy or legal order, and how few countries may have, in retrospect, even started on them. “Zigzags,” in the apt phrase of Alexei Trochev, are the name of the game. Whether or not progress is cumulative, there are often movements forward and backward, characterized by either authoritarian interludes or simple variations in the groups that hold power. Each of the books under review here underscores this point—Pereira’s emphasis of diverse historical legacies, Moustafa with Mubarak’s turn against the Supreme Constitutional Court, and Hilbink with the Pinochet years.

There have been very few winners in the story of legal transition—countries that over the past four decades have developed courts and judges that meet democratic standards. Among these are probably Spain and, perhaps, Hungary, the Czech Republic, Estonia, and Slovenia, all countries for which pressure from the European Union has mattered and, in the main, have a prior failed experience at least with democracy if not also with autonomous empowered courts. The story of legal transition is not complete in any of these countries and echoes of past problems will be heard for a long time to come. In fact, any of these countries, like almost any modern democracy, can still suffer reversals of fortune. Degrees and types of judicial independence and power vary within democracies as well, and most democracies remain vulnerable on some level to antidemocratic change, if only in the wake of emergencies or security threats.⁴⁵

Merely achieving a desirable standard of judicial independence and power is only a start. Equally daunting is the challenge of maintaining and nurturing it and how countries succeed and fail in this task, be they democratic or authoritarian or subject to fluctuations in type of regime, makes another subject worthy of scholarly inquiry.

⁴⁴ See, for example, Thomas Carothers, “The End of the Transition Paradigm,” in Thomas Carothers, *Critical Mission: Essays on Democracy Promotion* (Washington, D.C.: Carnegie Endowment for International Peace, 2004).

⁴⁵ See Bruce Ackermann, *Before the Next Attack: Preserving Civil Liberties in an Age of Terrorism* (New Haven and London: Yale University Press, 2006); Kim Lane Scheppele, “Other People’s Patriot Acts: Europe’s Response to September 11,” *Loyola Law Review* 50 (2004); Ronald Daniels, Patrick Macklem, and Kent Roach, eds., *The Security of Freedom: Essays on Canada’s Anti-Terrorism Bill* (Toronto: University of Toronto Press, 2001); Kent Roach, “Must We Trade Rights for Security? The Choice Between Smart, Harsh, or Proportionate Security Strategies in Canada and the United Kingdom,” *Cardozo Law Review* 27 (2006); Michel Rosenfeld, “Judicial Balancing in Times of Stress: Comparing the American, British, and Israeli Approaches to the War on Terror,” *Cardozo Law Review* 27 (2006); and Aharon Barak, “The Supreme Court and the Problem of Terrorism,” in *Judgments of the Israel Supreme Court: Fighting Terrorism within the Law* (available at www.mfa.gov.il/MFA/Government/Law/Legal+Issues+and+Rulings/Fighting+Terrorism+within+the+ILaw+2Jan-2-2005.htm).