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Judicial Systems and Authoritarian Transitions

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INTRODUCTION: AUTOCRACY, LAW AND DEVELOPMENT

For several decades, development policy specialists and donor agencies have championed investment in the judicial systems of developing countries to promote economic growth and, eventually, democracy. The assumption of a causal link among these three phenomena motivates donors' investments in the physical and human capacity of the legal system. Some reforms are narrowly focused—better enforcement of property rights and contract law—conducive to enhanced trade and investment. Although these narrow reform programs imply that political liberalisation is an ultimate objective, studies are unable to substantiate causality between the rule of law, economic growth and democracy [Carothers (2003)]. Autocratic regimes may establish courts to protect the property rights of regime insiders and to expropriate the rights of outsiders.

In our view a rule of law will have emerged only once the state has achieved legitimacy in the hearts and minds of citizens. The idea that better rule of law would generate economic growth, which would in turn build constituencies for democratic reforms will be questioned in this paper. An alternative view will be suggested, most notably the alignment of national identity with the institutions of the state is critical to establishing a rule of law.

THE ECONOMIC ROLE OF THE COURTS ACCORDING TO REGIME TYPE

The consequences of judicial independence for resource distribution will vary according to regime type. A judicial system and with it judicial politics can be used as a tool to enhance political survival of leaders, within authoritarian regimes just as in democratic ones. Courts may help reduce costs of commercial transactions for private citizens in both contexts. Democratic leaders face incentives to provide such protection broadly, as with the SEC regulations on investment in the U.S. In contrast, autocrats face incentives to provide selective benefits that maximise control over economic activity.[1] An effective legal system depends on coordination with other state functions, which are also politically controlled. Impartial judgment by the courts depends on appropriate police work for evidence gathering, and enforcement of decisions after the court has

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

ruled. Both political and administrative complexities can interfere with the court's independence and credibility in enforcing the law. Insufficient notification of procedural changes, inconsistent interpretation of regulatory requirements, and insufficient enforcement of licensing requirements are just some of the bureaucratic processes that can undermine the court's role in advancing commercial law.

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

In a democratic system, a large pool of citizens has input into the process by which leaders are chosen. This set is called the "selectorate" by Bruce Bueno de Mesquita [BDM (2003)]. A subset of the selectorate actually chooses the leader; this group is the "winning coalition," consisting of the ruler and allies such as the military and other instruments of power. The selectorate potentially has access to the benefits that are distributed by the leader. Both the selectorate and the winning coalition are large in democratic societies, in contrast to small winning coalitions in autocratic regimes, in which the winning coalition is small. With a small winning coalition, the leader has an incentive to provide allies with private goods (or targeted public goods) in exchange for political loyalty, at the expense of evenly distributed public goods. Inequality works to the advantage of the autocrat as membership in the winning coalition becomes more valuable. The most durable autocracies have a small winning coalition with a large selectorate, because members of the winning coalition have more to lose if they do not support the ruler grows over time as the ruler learns the price for which loyalty can be secured; the personal wealth of those with connections to leadership increases as loyalty becomes cheaper to purchase.

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

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

Court systems in authoritarian regimes, like other institutions in large selectorate-small winning coalition systems, are arranged to benefit a winning coalition and maximise the private wealth and political staying power of the autocrat. We will explore the political motivations for leaders of authoritarian regimes to favour independent judiciaries in the context of the authoritarian ruler's incentive to maintain discretion over what the courts can and cannot do, according to the strategy for political endurance. Autocratic leaders often have expensive political agendas, the pursuit of which requires substantial financial means. Their agenda can include conflicts with neighbouring states, the desire to accumulate personal wealth, and the need to bribe elites to buy their support. Among the economic, financial and managerial dilemmas faced by autocrats that can motivate the creation of court systems are a need to attract investors, lack of revenue and failing credibility with regard to loan repayment, and failing central authority due to the inherent contradictions within hierarchical organisations and the private exploitation of information by regime representatives at lower levels.

An independent judiciary can serve different functions according to a leader's quest for political survival, a perspective which is different from the traditional argument that relates judicial independence to the rise of democratic polities. Even when democratic and autocratic regimes employ the same institutions they have different effects on political rents, corruption and aggregate economic activity. Both democratic and authoritarian regimes require judicial independence for legitimacy, but the distribution of benefits that result from that legitimation differs according to the constitution of the ruler's support base and their strategy for political survival.

INSTITUTIONAL SOLUTIONS TO AN AUTOCRAT'S MANAGERIAL DILEMMAS

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

DILEMMA 1. Property Rights and Securing Investment Opportunities for Distribution to Loyalists

The centre of the legal reform agenda for liberalisation is predictability in the enforcement of property rights and contracts more generally. Development practitioners

and political economists often refer to the mandate for secure property rights as "policy stability"—investors should be confident that a country's policies regarding protection of assets will remain stable, and that their assets will not be confiscated. Hernando de Soto (2000) and others have emphasised the importance of property rights reform, assuming an empirical correlation between rule of law and growth. We accept that clear property rights and rule of law reduce transactional friction, and facilitate economic activity. Insofar as they effectively enforce property rights and contracts, law courts serve as an institutional intermediary between commercial interests and the leadership of autocrat democratic regimes alike.

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

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

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

In Indonesia when export and import markets were freed from controls, the best contracts often depend on partnerships with politically connected figures. Fisman (2001)

has quantified this dynamic in Indonesia after liberalisation and found that the value of political connections actually increased with liberalisation. The distinction between broad growth and targeted economic interventions that reward political allies with investment opportunities is difficult to observe in data, where increased activity may be revealed in growth statistics that do not show the market distortions resulting, for example, from the reward of monopolies to political supporters, and other forms of political rents collected in exchange for economic privileges. With their control over natural resources Indonesia's leadership can establish narrow coalitional foundations by selectively distributing market access as private benefits to regime supporters. Resources relieve it of the need to develop a clean business environment to attract adequate capital to sustain a broad-based governing coalition. Narrowing the winning coalition allows top leaders to keep the maximum returns for their own consumption and to ward off rebellion.

DILEMMA 2: Financial Credibility and Debt Repayment

Institutions that promote rules over discretion provide political leaders with access to private capital at lower cost than would otherwise be the case. This insight is derived from the work of Kydland and Prescott (1977), who focused on the advantage of rules over discretion in monetary policy and the related role of central banks. In one extension of their model Root (1989) explores how the state can enjoy better credit terms, that is a lower interest rate, when able to borrow from intermediaries that are subjected to independent courts for enforcement of non-payment of financial arrears. Such institutions reduce the costs of credit to the state by enabling leaders to draw upon the credibility of intermediary bodies that are themselves subject to a rule of law, whereas the head of state may not be. Constraining sovereign discretion with regard to financial activity actually strengthens the ability of leaders to raise funds from private sources at more attractive rates than those available if the leader attempted to borrow directly from capital markets. Surprisingly, modern day regimes with access to sources of external finance have weaker incentive to develop effective commercial courts, than the kings of early modern European states.

The necessity to secure funds for war drove much of the institutional innovation that occurred in feudal France and England. In both cases, when the monarchs were above the law, they could not be compelled to repay their debts, and so had more difficulty finding sources of credit. As a result of royal discretion, monarchs enjoyed credit that was weaker than that of many of their subjects. The kings' onerous cost of capital could be mitigated by new institutional arrangements that benefited financiers and investors while ensuring a steady supply of government financing. Kings could not borrow against discretion, so they were compelled to create a legal regime that remained after the personality of the king.

In England, the crown needed the revenues of elites and designed a court system that gave rise to a constitutional monarchy with strong protection of the property rights of the landholders and bondholders. North and Weingast (1989) have pointed out that the English kings benefited from the rise of Parliament, by allowing it to raise taxes to fund the kings' debts. The British parliament was worried and wanted to prevent the king from getting money through sources other than the parliament itself. The Glorious

Revolution placed limits on the Crown's ability to unilaterally change the terms of its financial agreements, which enhanced its credibility. In exchange for purse strings, the king gained a source of revenue at lower cost than was available to any other government in Europe, which allowed England to become the master of the oceans and eventually of international commerce. Strong domestic commercial law was necessary to generate the funds from which parliament could tax. Ironically, when international donors provide bilateral or multilateral funds to present day autocrats, they reduce incentives for the government to provide strong domestic protection for commercial transactions.

In France, the intermediary was not a legislative body, but rather a private body chartered by the King with the privilege of collecting royal taxes. The collectors often advanced their own funds to the Crown knowing they could access the king's courts and army to draw upon the collective resources of the village communities, the guilds, and the provincial estates. The corporations were subject to the jurisdiction of the courts and could therefore offer credible financial commitments. In return for official recognition and privileges, these corporate groups acted as bankers for the King, providing funds at lower rates than the king could find on his own.

Taxing peasants also required that their collective village property be protected, which had corollary political benefits. By granting peasants access to the courts to protect the tax base, the king used the courts to build up constituent support from groups that might otherwise be marginal. His direct political objective was to supplant peasant allegiance from local seigneurs to the agents of the king. Indirectly the subordination of seigniorial authority to royal supervision may have had unintended revolutionary implications, creating a process that would lead towards the revolutionary events of 1789. The law of the king's courts became a venue in which a contest between peasant villages and their traditional seigniorial masters could be waged. The courts fanned the animosity towards seigniorial dues by hearing the grievances of peasant communities against their lords. The contests became more adversarial by virtue of the fact that the seigneurs enjoyed tax exempt status, dating from the days they provided military service to the king. But by the eighteenth century, it was the taxes on the peasantry that financed the king's wars. In Great Britain, by contrast, the lords shouldered the burden of paying local taxes, and their authority grew in proportion to the burdens of national security that they bore for the entire community. Hence, there was more justification of the English lord's economic status and their enterprises gained protection in national law.

Today the heads of government rarely enjoy incentives similar to the monarchs of eighteenth century Europe to protect the enterprises of productive sectors of the population because they can substitute international loans for capital drawn from sources of domestic taxation. This is true for both developed and developing countries. For developing countries, international financing often means an absence of a commitment to protecting the property rights of majorities, in favour of selectively distributed economic privileges that provide a loyalty premium to the head of state. If she is lucky, natural resources such as oil or diamonds may be enough to finance the regime, and the messy business of negotiating tax revenue can be avoided. International financing from the multilateral development banks and donors is another attractive source of funding, allowing the ruler autonomy from society. If the regime does require tax revenue to survive, a unique set of incentives arises that can lay the groundwork for democratic

transitions. This transformation can be seen in the practice of effective government by China's KMT after it lost the mainland.

While the change process occurred at different rates, both France and England's innovations in the institutions of participatory governance were driven by the fiscal necessity of the state. With the advent of the international financial institutions, domestic taxation is not the only option for securing government resources. Foreign debt has caused further rifts between rulers and citizens, as foreign policy concessions made by dictators are often granted by developing countries to donors in exchange for extended credit.

DILEMMA 3: Secrecy, Central Authority, and Administrative Discipline

The secrecy inherent in the extremely hierarchical nature of autocratic regimes generates internal contradictions regarding the use and abuse of information by administrators at lower levels of the regime. Effective authoritarian governance requires that information be passed up and down the ladder of authority; however, there tends to be an overload of information at the top that creates opportunities to hoard information at the lower level, progressively diminishing the authority of the ruler. Low level administrators can strip regime assets to create personal fiefdoms obscured from the purview of central government actors.

Layers of authority exist between the head of state and local administrators, creating ample opportunity for orders to be confused or mishandled. Judicial decisions and censures from senior officials are further confused by protests, excuses and appeals pitched to central authorities. Administrative complexity overlapping responsibilities slows communication and results in the loss of timely information, facilitating the stripping of state assets for private gain.

Many autocrats depend on local notables whose resources constitute an independent power base. They must be co-opted into supporting the regime, but their loyalty can never be counted upon. Imbued with local biases they seek to guard local or regional privileges; their scope for hiding information and action is considerable. The policy decisions that are directed towards them are often construed in ways that fit their own needs. There is no easy way to solve this problem of local non-conformity; creating administrative law and using central courts to watch over local communities risks confrontation. Military force is always an option but it complicates the prospects of future local cooperation. Inevitably when local big men are well entrenched money spent locally will further perpetuate their control over local patronage networks. The leader can demarcate areas of local jurisdiction that fall under central control and slowly erode localised power, but the risks of hidden action and information will persist.

Kenneth Arrow's insights concerning "hidden information" and "hidden action" in corporate structures [Arrow (1979)] offer useful parallels to the information asymmetries in authoritarian governments. As the agent of the stockholders, corporate management may pursue a project it knows to be unprofitable if it produces perks or salary benefits that management can enjoy. Likewise, an agent of the government may distort information (hidden information) about the performance of government policies and avoid passing along information about local economic conditions or the potential for governmental revenue generation. Agents can trade on information about planned

government policies or projects (hidden action), striking black market side deals with other administrators or with private parties. Local officials become adept at stripping the value of the government assets at their disposal to earn private profits.

The autocrat may create or reinvent the courts to address this principal-agent problem to prevent the erosion of power and impose supervision on agents, in order to constrain their ability to conceal information for their private benefit. The administrative discipline administered by the courts helps to build legitimacy for the regime because the visible effects of re-centralising authority are perceived as reducing corruption to the benefit of society, recovering lost economic surpluses, and removing secondary officials who have distorted rule enforcement by distributing opportunities to their own local networks.

A significant literature has emerged that attributes the fall of the Soviet Union to the loss of hierarchical discipline at lower levels [Frye and Shleifer (1996)].[2] The corruption that was unleashed after the end of the Cold War was just the extension of a process that had already been underway. Local officials had been hiding information about the efficacy of policies from the central government and taking hidden actions that enabled them to gain control over government assets. Only the local officials knew about side-deals amongst each other. Today, one of the most trenchant criticisms levelled at Communist Party officials in China is that lower-ranking representatives are using their authority to collect rents such as fees for services at the local level, and then not transferring that revenue upward. Resources are being diverted away from the centre making it difficult for Beijing to provide government services demanded by local populations.

While information asymmetries and corruption have been acknowledged in the literature as a problem for central governments, monitoring is the only recommended solution. While monitoring is a traditional function of court systems, monitoring alone does not contribute to the liberalisation of the regime. Typically, monitoring is a way to exert central authority over the periphery. A side effect may be new avenues of contestation, but that is not the goal of such reforms. An incentive structure based on bureaucratic competition may offer the best hope for a sustainable path to transparency and administrative unity.

Alternatively, the autocrat's utility may not require that administrative discipline be enforced. A weak court system and lack of transparency allow rulers more options for amassing private wealth. Although the surplus or productivity of the economy is compromised, the distributional impact may still be favourable to regime longevity. As mentioned earlier with the Indonesian example, autocrats may overlook opacity and corruption in order to guarantee that the state intervenes on behalf of investors, thus ensuring central economic control. If the autocrat does not need the courts to secure income or reward the winning coalition, resources will be diverted away from the courts and they will suffer from under-funding. When courts are appended to stand-alone legal ministries, they rarely have funding to undertake their core responsibilities and are often prone to bribe-taking, ultimately undermining their legitimacy.

[2]Frye and Shleifer found in a survey of Moscow shop owners that only 50 percent of respondents felt that the courts would "defend their rights if the government grossly violated their property rights" [Frye and Shleifer (1996:5)].

CAUSAL FACTORS TOWARDS ORDERED LIBERTY: LINKAGES BETWEEN POLTICAL DISCIPLINE AND COMMERCIAL LAW ENFORCEMENT

What is the incentive of an autocracy to adequately finance the courts? In some authoritarian regimes such as South Korea during the 1960s and 70s, the courts were under direct supervision and control of security forces, and in fact became an arm of the state security apparatus. Paradoxically leaders that create judicial institutions that improve internal security for defense against enemies of the state can use these same institutions to establish effective courts that enjoy the respect of the population. In weak states legal institutions are viewed as protecting the private interests of the wealthy. Attaching the court system to the security function has a strong effect on the ability of the courts to function effectively. The security apparatus of the state is the most important disciplinary agent of an authoritarian regime. Ironically, a connection with the regime's security function may be the source of funding that allows the courts to do disregard the power of external influence over contract enforcement, and to establish a reputation for professionalism. This relationship explains in large part the reputation for professionalism enjoyed by the judges of South Korea during the martial law period. The courts of Nazi Germany enjoyed the same high status. Court systems that are effective at disciplining political opponents are likely to be well-resourced and efficient at enforcing property rights and commercial legislation. Judges that are directly responsible for the survival of the regime are likely to enjoy greater esteem than judges who are members of stand alone judicial ministries that tend to be under-funded and prone to corruption. If judicial personnel are well-paid, they have little incentive to hoard information and collect rents that divert economic activity.

The security connection also comes into play after court decisions are made, when enforcement is required to render court decisions credible. Enforcement is easily provided if the courts are attached to the security apparatus, but when courts are stand-alone institutions, their authority can be circumvented because of inadequate policing and funding.

The courts can rarely question if the basis for the regime is legitimate because doing so may lead to questions of the legitimacy of the court itself. Judges are aware that it is best to let others decide politically dangerous cases because in authoritarian systems the courts will generally be the losers in contests with the head of state. Judicial leadership of challenges to the regime can be ended by retiring judicial leaders. Moreover, potential judicial leaders would generally lack authority over subordinate court staff.

Most non-Western legal systems do not base their authority upon universal principles. Without universal principles, the courts are rarely if ever in a position to challenge the final authority of the regime, in spite of judicial independence in other spheres of civil or contract law. For example, when Thaksin was elected prime minister of Thailand, the opposition questioned his eligibility to rule based on accusations of tax evasion. The Constitutional Court ruled in Thaksin's favour, arguing that the electorate already knew of these charges and elected him anyway, and it was not the mandate of the court to contradict the electoral mandate of the population. In the Philippines, Marcos declared martial law, which the courts accepted on the grounds that he had been a

democratically elected president. This initial rubber stamp became a turning point in the loss of independence for the courts, which had previously been perceived as meritocratic and professional. Jensen (1997: 82) explains:

As he expanded the role of the military, Marcos limited the power of the judiciary. To ensure that his policies were implemented as he saw necessary, Marcos needed to curb the independence and review powers of the Supreme Court. Directly or indirectly, Marcos exerted pressure on the Supreme Court to give him a free rein; in turn, the court exercised a great deal of self-regulation to avoid confrontation with Marcos.

Frequently, a dual reality develops in authoritarian regimes in which a separation occurs between the regime's questionable moral legitimacy and its effective performance of routine daily civic functions, further reducing the court's capacity to effectively challenge the moral legitimacy of the regime. But the existence of judicial review may create a space in which the forces for contesting the regime will gather and in which they will learn how to coordinate using tools provided by the regime itself to later challenge the status quo.

THE LAW AND REGIME CHANGE

This section explores how court systems can play the dual role of protecting property rights, ensuring smooth civic processes such as marriage and divorce, as well as sustaining the legitimacy of autocratic rule. When considering how the courts can contribute to political liberalisation, it is not just the institutional framework that matters, but rather that legal reform is part of a broader context of social reform. The courts mirror that larger process, whether they enhance or retard it. The courts can have a dual nature, providing legalistic justification for regime legitimacy and the ruler's arbitrary discipline of political opponents, while remaining more independent when dealing with contract or family law.

The courts can play a stabilising role by providing access to administrative law processes that can release tensions and instabilities before they erupt. The evolution of institutions does not always optimise broad social welfare. Political and economic evolution is a process of adaptation and survival in the face of external pressure and competition, and the result is often policy volatility. In newly emerging states, particularly, weak institutions can cost elites the opportunity to reap the rewards of power. Judicial institutions adjust to an equilibrium strategy, facilitating enough economic activity to optimise resources for the winning coalition, while serving the ruler's political security.

By providing a mechanism for resolving administrative disputes, judicial venues to resolve grievances can release volatility in the system. If the courts support the denial of citizens' right to assemble, mobilise, and organise for political purposes, open and inclusive administrative processes are unlikely to stimulate long term political reform. Alternatively, in the courts' role of reinforcing central authority, the courts may provide a venue to expose contradictions that can lead to disintegration of the regime. In this case the courts rarely initiate change, but rather provide a forum to voice changes already underway.

Political discourse may or may not evolve in an administrative court system that is primarily used to impose supervision on local leaders, as in China. At the base, citizens may perceive a dual court system as one in which grievances can be legitimately aired

and potentially resolved, giving the appearance of inclusivity and effectiveness, which contributes to regime legitimacy.[3] Autocrats that rule inclusively with a combination of strong political security and some access to arbitration to resolve local disputes may be able to cushion their rule from shocks in the economy or external environment.

Dualism and Inclusivity as Steady-state Equilibrium

As noted earlier, today's autocrats have several channels to circumvent reliance on domestic taxation to secure revenues for the regime. By far the most efficient is the possession of resources demanded by world markets that can be controlled by regime leaders, such as oil or diamonds. Without the fiscal incentive to protect taxable assets of regime citizens, the process of political liberalisation will stall. A second opportunity to rule without domestic accountability is made available through bilateral or multilateral bank lending to the sovereign. The loans most frequently benefit the incumbent leadership and the interests they represent, despite lending guidelines established by international law. The possession of revenues that come from sources that enhance an autocrat's independence from accountability to societal groups allows the leadership to shape those groups according to its own interests. The resource curse,[4] like the foreign aid curse, gives rise to large selectorate-small winning coalition systems in which political competition is stifled and some measure of judicial independence is lost.

Regimes that rely on peasants or other marginal groups for legitimacy do have an incentive to provide access to the legal system. The opportunity for poor farmers to appeal to the courts, however, does not imply that the autocracy will disintegrate; in fact it is more likely to contribute to stability by giving rulers ways to supplant the traditional powers of local elites. Thaksin in Thailand became well-known for programmes that benefited the poor. He did this expressly to circumvent local patronage networks that empowered local leaders. Thaksin had centralised political funding, letting big money politics overcome local political influence; once their power base was attenuated local leaders had to support Thaksin or risk losing elections.

In China, the Communist Party has been strengthened by increased growth, but as a result of dynamic economic activity, the coalitional structure shifted toward a new class of financial elites, forcing a formal change in the Party Constitution. China scholar Hongying Wang discussed the CCP's adaptation strategy in a recent interview with Fareed Zakaria [Wang (2006)]:

> …the CCP, the Chinese Communist Party has reinvented itself. That's the key; they're…not the Communist Party that you know about or people idealise about. There's nothing communist about it except that it is a one-party system and it is determined to do everything, including changing its own nature to stay in power. The new principle as it is written in the Party Constitution now—the Party represents the most advanced production force, which means the capitalists or the capital owners; it represents the most advanced culture, which means professionals, intellectuals, and advanced "everybody's interests," which is just … covering every aspect.

[3]Jeane Kirkpatrick subscribed to the notion that the most resilient autocratic regimes are the most totalitarian. This doctrine was clearly discredited after the fall of the Soviet Union.

[4]See Michael Ross's 1999 article "The Political Economy of the Resource Curse" for a review of the inverse relationship between natural resource endowments and growth.

The adaptation of judicial independence within a limited sphere of activity does not imply that political liberalisation will ultimately result. Local dispute resolution may contribute to growth as a strategy to ensure continued centralised authority, but growth may also increase inequality, which works to the advantage of the ruler. Inequality can be exploited by the autocrat to further cement control by increasing the loyalty premium, the ruler can extract from the winning coalition. When being cut off from the winning coalition means mediocre access to resources, the cost of gaining loyalty is reduced. Thus, members of the winning coalition have more to lose when the society is more unequal – loyalty can thus be purchased more inexpensively.

The courts can become effective as vehicles for the activism of opposition only once the regime has already started to weaken. Hongying Wang continues:

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

The Chinese example demonstrates that the granting of limited freedoms can be a strategy for legitimising the regime without sacrificing central authority. As an instrument of that authority, the courts can still rule in favour of local plaintiffs in cases of low-level corruption without jeopardising political security of central leadership. Judgments that favour selectorate members reduce the threat of potential challengers from within to the winning coalition. In China, for example, Jiang Zemin rarely challenged the Shanghai Gang and his allies among the princelings, the children of revolutionary leaders, leaving behind a legacy of high level corruption that his successor Hu Jintao is trying to erase. In effect, by becoming the party of the haves, the capitalists and the bourgeoisie, the Communist party has eliminated any meaningful and serious threats to the Party.

Revolution or Evolution

Further research on the nature of court cases in China is needed to determine the extent to which access to administrative courts is giving a voice to a new set of democratic challenges to the legitimacy of the CCP. Even if it is, this discourse is not initially dangerous until the regime starts to weaken due to other inherent contradictions or pressures. It is possible that the growing inequality in China constitutes such a contradiction. The courts could potentially be used to expose underlying instability in the coalitional structure that could lead to dramatic political change. Dualism may serve as an adaptation that provides regime stability, but because the incentives of autocratic rulers may diverge dramatically from the interests of society, courts that were originally designed to facilitate and lengthen authoritarian rule may actually become weapons against the regime [Moustafa (2006)].

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

The White Revolution initiated by the Shah of Iran in 1963 provides a more contemporary example of reforms that highlighted deep-seated inequalities to initiate a revolutionary process. The Shah hoped that economic growth would provide a substitute and ultimately a source of social coherence, but growth created conflict instead [Root (2006)]. Opportunities for capital accumulation were linked to a system of social exclusion. Meaningful policy participation was barred; democratic and meritocratic channels of access within the state were not built. In contrast to the anti-religious sentiment of the Enlightenment in the French Revolution, Khomeini's Iranian revolution in response to the Shah used the banner of organised Islam to provide a framework for the democratic political challenge. While the regime enjoyed early popular support and made social gains in terms of political participation, rules and regulations promoting access to capital for new enterprises not controlled by the government are stiffly opposed by the incumbent leadership. The Revolution's agenda did not emphasise eliminating corruption, or establishing an institutional and legal capacity necessary for a market economy. As a result, Iran's productivity declined after religious rule was established and has stagnated ever since.

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

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

The celebrated case of England's transition to democracy, led by the rise of Parliament, could be described as more of an evolutionary process than a revolutionary one. An often overlooked aspect of this evolution is that for the Parliament to be effective it depended on the ability of the head of state to assert sovereignty over the entire kingdom. In England it was often said that the King was strongest in Parliament because it simplified getting the assent of the entire nation. The French king's rule over a mosaic nation had to employ much more cumbersome procedures to gain cooperation from his subjects. A considerable waste of resources resulted.

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

The Law and Emerging Loyalty to the State

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

Qualitative studies of the origin of the rule of law in Western Europe have shown that the existence of courts does not necessarily lead to the acceptance of the supremacy of law, nor to the emergence of an authority which will enforce the law [Strayer (1970),

p. 7]. Rather change in judicial systems, as an adaptive process like evolution, does not produce an optimal and consistent outcome such as a recognisable liberal regime. The legitimacy of leadership must first be established before the courts will be viewed as upholders of a society based on law. In Western Europe the development of a society of law was an integral part of the political process of state building. The courts emerged as institutions of law that strengthened the political identity of the group; local identity fused with loyalty to the state and ultimately with nationalism. This fundamental aspect of the European tradition—the emphasis on national cohesion embodied by a unifying national symbol—has been surprisingly embraced by the Chinese. In this case, the Communist Party functions as that symbol rather than the monarchy. The Chinese are only now just beginning to create law schools and to train judges, fifty years after the process of building a modern state began, and three decades after pro-market reforms were initiated.

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

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

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

The national leaders of many third world nations have little in common with the citizenry. Local leaders, sometimes members of politically suspect groups who are

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

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

FUTURE RESEARCH DIRECTIONS FOR LINKING LEGAL REFORM WITH POLITICAL LIBERALISATION

Many of today's autocracies have court systems that are better organised than in the past. It remains an open question whether more effective courts will produce greater loyalty to the ruler and to the state or whether they will be a forum for opposition and for the replacement of the existing regime.

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

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

Cultural Considerations

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

Western legal systems are distinguished by a very sharp distinction between private and public law. The expectation of citizens from Western legal traditions is that a neutral framework in which both systems (private and public) of the law can coexist. China and other communist countries may be very rule bound with strong public and civic law. Apparently there was more "civil law" in China than the first generation of Western scholars identified because they assumed that civic law implies a separation from public law.

CONCLUSION

The links between the judicial institutions and liberalisation is ambiguous at best. Even when the courts enforce property rights, contract and family law, judicial power may block innovation and competition by selectively promoting rights of established firms and technologies they control. Underneath the rules and procedures of formal constitutions and codes of conduct, the courts can be used to protect incumbent wealth. Governments may employ courts to improve contract enforcement, loan repayment and bureaucratic discipline and still not allow citizens the right to assemble, mobilise and organise for political purposes. As already noted, in autocracy the inclusiveness of legal rights and protection does not need to be any larger than the coalition that the leader cultivates to elevate her political power. Leaders who do not depend on broad coalitions have numerous ways to extend their tenure in office by manipulating judicial institutions. For this reason it is necessary for future analysis to distinguish between those functions of the court that advance or retard democratic change. It is not just the institutional framework that matters, but rather that legal reform is part of a broader context of social reform. The judicial system will lack legitimacy until the other instruments of national sovereignty win citizen acceptance.

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

Turkey provides an example of the judiciary working closely with the military to modernised the country, and the implication is clearly that judicial power conflicts directly with the emergence of democratic forces which contain strong anti-modern elements. In Pakistan and Israel, migrants displaced indigenous populations and introduced national judicial systems where none had previously existed. In both of these cases, the national judicial system was used to undermine the democratic will of the indigenous population.

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

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

APPENDIX I

The Centre for Public Integrity, Global Integrity Project

Future research is needed to judicial institutionalisation with political outcomes such as democracy. Some measures can be found in Freedom House or Polity IV, which distinguishes democracies from authoritarian regimes. The relationships between these outcomes can be tested against institutional variables that are quantifiable, such as whether judges have lifetime tenure, how they are selected, what legal systems they employ, and how long cases remain in the dockets before being resolved. What are the mechanisms available to the head of state to circumvent the courts and reserve rights in the ruler or the state's prerogative? How does the efficiency of regulatory and enforcement agencies limit the efficacy of the law? What measures can be developed that illustrate the understaffing of the courts?

The Centre for Public Integrity is developing a framework to begin to answer these questions. The "Public Integrity Index" [The Centre (2004)] assesses the institutional mechanisms that safeguard against corruption, breaking the data down into three categories that measure the existence of anti-corruption mechanisms such as laws and courts, the effectiveness of those mechanisms, and the access that citizens have to public information to hold their government accountable. Peer reviewed scorecards assess both formal laws and procedures as well as informal "in practice" measures for each subject area.[5] Researchers still lack data to investigate the empirical link between the judicial

[5]A complete list of indicators as well as the full methodology for the reports is available at http://www.globalintegrity.org/default.aspx?act=10**.** Appendix I for this paper lists the questions related to the judiciary.

system and democratisation. Once quantitative cross country data are available, policy-makers will have better tools to engineer more accountable governance through legal reforms.

"Public Integrity Index"

One such tool is given below.

(Indicators related to judiciary; full list of indicators and methodology available at http://www.globalintegrity.org/default.aspx?act=10#4)

III-3	Judiciary
36	In law, is the independence of the judiciary guaranteed?
37	Is the appointment process for high court judges effective?
37a	In practice, there is a transparent procedure for selecting high court judges.
37b	In practice, there are certain professional criteria required for the selection of high court judges.
37c	In law, there is a confirmation process for high court judges (i.e. conducted by the legislature or an independent body).
37d	In law, high court judges are protected from removal without relevant justification.
37e	In practice, high court judges are protected from political interference.
38	Can members of the judiciary be held accountable for their actions?
38a	In law, members of the judiciary are obliged to give reasons for their decisions.
38b	In practice, members of the judiciary give reasons for their decisions.
38c	In law, there is an ombudsman (or equivalent agency) for the judicial system.
38d	In law, the judicial ombudsman (or equivalent agency) is protected from political interference.
38e	In practice, when necessary, the judicial ombudsman (or equivalent agency) initiates investigations.
38f	In practice, when necessary, the judicial ombudsman (or equivalent agency) imposes penalties on offenders.
39	Can citizens access the judicial system?
39a	In practice, citizens earning the median yearly income can afford to bring a legal suit.
39b	In practice, a typical small retail business can afford to bring a legal suit.
39c	In practice, the state provides legal counsel for defendants in criminal cases who cannot afford it.
39d	In practice, all citizens have access to a court of law, regardless of geographic location.
40	In law, is there a program to protect witnesses in corruption cases?
41	Are judges safe when adjudicating corruption cases?
41a	In practice, in the last year, no high court judges have been physically harmed because of adjudicating corruption cases.
41b	In practice, in the last year, no high court judges have been killed because of adjudicating corruption cases.

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