

In the Shadow of Authoritarian Rule:

The Political Antecedents for Judicial Independence in New Democracies

Tommaso Pavone*

tpavone@princeton.edu

November 15, 2014

Abstract

In this article, I probe the antecedent political foundations for the constitutionalization of judicial independence in new democracies. Taking the growing evidence that partisan competition provides strategic incentives for political actors to establish independent judiciaries as a starting-point, I draw from the comparative politics literature on authoritarianism and democratization to ask: What are the political dynamics and institutional structures prior to democratization that are most likely to engender electoral uncertainty and party competition post-transition? I argue that there are compelling theoretical reasons to expect that the degree to which political contestation was institutionalized under authoritarianism is likely to shape the dynamics of democratization, the fate of the emergent democratic regime, and political actors' strategic calculus over whether or not to institutionalize an independent judiciary in the constitution-writing process. I conclude by outlining a proposed research strategy that would enable the empirical testing of the proposed historical institutionalist argument.

*Ph.D. Candidate, Department of Politics, Princeton University.

1 Introduction: Authoritarian Legacies and Judicial Independence

In this article, I probe the antecedent political foundations for the constitutionalization of judicial independence in new democracies. Taking the growing evidence that partisan competition provides strategic incentives for political actors to establish independent judiciaries as a starting-point, I draw from the comparative politics literature on authoritarianism and democratization to ask: What are the political dynamics and institutional structures prior to democratization that are most likely to engender electoral uncertainty and party competition post-transition? I argue that there are compelling theoretical reasons to expect that the degree to which political contestation was institutionalized under authoritarianism is likely to shape the dynamics of democratization, the fate of the emergent democratic regime, and political actors' strategic calculus over whether or not to institutionalize an independent judiciary in the constitution-writing process.

The article is structured as follows. I begin in Section II with a brief review of some proposed theories linking partisan competition with judicial independence. In Section III I build on the comparative politics literature on authoritarianism and democratization to link the prospect of post-democratization electoral uncertainty to the institutional configuration of pre-transition authoritarian rule. Finally, in Section IV I outline a proposed research strategy that would enable the empirical testing of the proposed historical institutionalist argument.

2 Judicial Independence and Party Competition

A growing literature treats judicial independence as the political product of partisan competition within a constitutional democracy. While this literature is united by its focus on political fragmentation - particularly in the form of party competition - as the *independent variable* of interest, there exist some important theoretical differences regarding the *causal mechanism* that links partisan competition to judicial independence. This section provides a brief overview of these commonalities and nuanced divergences.

William Landes and Richard Posner (1975) were the first to propose a theory of the institutional design-implications of partisan actors' incentive to ensure that policymaking bargains produce *credible commitments*. If one adopts an interest-group perspective and conceives of legislation as "sold" by political parties and "bought" by the prospective statutory beneficiaries, it becomes clear that both the parties and the beneficiaries have much to gain by ensuring the durability of the resulting legislation (Ibid: 877). After all,

both actors “may have incurred substantial costs that would not prove worthwhile if the legislation were to be altered unfavorably or repealed within a few months or years” (Ibid). If the political waters turn sour on a given legislative majority, the danger is that the subsequent political coalition will repeal the costly statutory edifice constructed by said majority. As a result, partisan actors have an incentive to establish an independent judiciary to enforce legislative commitments in accordance with the intentions of the parties to the statutory bargain against the potentially recalcitrant preferences of subsequent political forces (Ibid: 882). Correlatively, the fact that courts stand little chance of resisting purse- or sword-driven court-curbing if they “are not valued highly” provides judicial actors with an incentive to adopt an originalist interpretive stance, since only if they “entrench the original understanding of the “contract”” will they serve as a politically valuable institution for the enforcement of credible commitments (Ibid: 885).

Much of the subsequent scholarship exploring the strategic incentives for entrenching countermajoritarian mechanisms within a constitutional framework takes Landes and Posner’s logic as a theoretical point of departure. Douglass North (1990: 35) argues that “impersonal exchange with third-party enforcement” has “been the critical underpinning of modern economies involved in the complex contracting necessary for modern economic growth.” North and Weingast (1989) apply this logic to explicate the political significance and constitutional legacy of the 1688 Glorious Revolution in England. As Englishmen united against arbitrary Stuart rule and deposed James II, they inaugurated an institutional system of “King in Parliament” whereby the diminished power of the crown was counterbalanced by the growth of Parliamentary authority and judicial independence, ensuring the credibility of the government’s promises to protect property rights and to honor its contractual obligations. Similarly, Andrew Moravcsik (2000: 226) explicates the origins of the European Convention of Human Rights regime and member states’ support of its independent European Court of Human Rights by referencing the domestic incentives for ensuring credible commitments: “international institutional commitments, like domestic institutional commitments, are self-interested means of “locking in” particular preferred domestic policies . . . in the face of future political uncertainty.” It thereby follows “that “self-binding” is of most use to newly established democracies, which have the greatest interest in further stabilizing the domestic political status quo against nondemocratic threats (Ibid: 225).

Friendly amendments extending and clarifying the foregoing credible commitment logic have also been made. J. Mark Ramseyer (1994: 722) was the first scholar to explicitly outline how the political delegation of authority to institutional frameworks for promoting credible commitments crucially depends upon the prospect for long-term partisan competition: “Only where [partisan actors] rate (i) the likelihood of con-

tinued electoral government high and (ii) the likelihood of their continued victory low might they provide independent courts.” In this view, stable partisan competition emerges as an important necessary condition for the political construction of judicial independence. To stress the importance of political incentives over formal institutional constraints, Ramseyer highlights the negligible role that the constitutional text plays in explicating variation in judicial independence between the United States and Japan. While post-war Japan possesses a constitutional architecture that substantively mirrors that of the US (as the text was partially imposed upon the Japanese by American occupying forces), the Liberal Democratic Party (LDP)’s four-decade hegemonic rule endowed it with minimal incentives to support judicial independence when compared to the mercurial electoral prospects of its partisan American counterparts (Ibid: 732).

Relatedly, Tom Ginsburg (2003) builds on Ramseyer to explicate why freshly democratized states entrench judicial review within their newly-drafted constitutional texts. Ginsburg conceives judicial review as a form of *political insurance*: “By serving as an alternative forum in which to challenge government action, judicial review provides a form of insurance to prospective electoral losers during the constitutional bargain” (Ibid: 25). If, during the constitution-writing process, a political party emerges as hegemonic and expects to be able to maintain control of the constitutional apparatus of the fledgling democratic regime, its incentive to support judicial review is minimized. Conversely, when political power is more fragmented and long-term electoral prospects are uncertain, the empowerment of a potentially counter-majoritarian force within the political system becomes more lucrative. Stephenson (2003) crystallizes the insurance logic via a formal model: Assuming sufficient partisan competition, judicial moderation, and long-term risk-aversion amongst partisan actors, an independent judiciary emerges as the focal point solution to the problem of institutional design. Stephenson subsequently conducts an ordered probit regression using 1995 data from 153 countries and finds a strong correlation between partisan competition and judicial independence (Ibid: 82).

3 The Political Antecedents for Judicial Independence

Despite promoting different specifications of the underlying causal mechanism that links party competition to judicial independence, all of the foregoing scholars crucially agree that such a positive causal link exists. Taking this relationship as given, this section is structured to serve as a theoretical prelude, or perhaps a complement, to the foregoing literature. I build on two historical institutionalist premises. First, democratization can be conceived as a critical juncture wherein the relaxation of structural constraints upon the

exercise of political agency brings to the fore a repertoire of choices concerning institutional design - including the choice over whether to establish an independent judiciary (Capoccia and Kelemen 2007; Capoccia and Ziblatt 2010). If the democratic transition promises to institutionalize uncertainty via the emergence of a competitive party system, then the prospects for the political construction of judicial independence are notable. But in order for this strategic environment to emerge, the parties to the constitutional bargain must possess some Bayesian priors upon which to base their assessment of future electoral uncertainty. To this end, Ginsburg (2003: 62)'s measurement strategy falls back on the notion that "[t]he political configuration in the first election after the adoption of the court is a reflection, albeit an imperfect one, of the true extent of diffusion before adoption of the constitution." While this is not an unreasonable assumption, clearly the outcome of the first post-transition election cannot affect the strategic calculus of the parties to the antecedent constitution-writing process. This begs the fundamental question of what factors shape "the true extent of diffusion before adoption of the constitution?" Hence the second historical institutionalist premise that motivates this section: Even a crumbling authoritarian regime that is displaced by a democratic transition can condition the post-transition trajectory of political development as well as the institutional design choices of the framers of the new democratic constitution. In short, the political dynamics of authoritarian rule *preceding* the democratic transition should be of clear interest to political scientists studying the variant institutionalization of independent judiciaries in new democracies.

The starting point of my argument draws from Robert Dahl's *Polyarchy* - a seminal contribution to the study of democracy and democratization. Dahl argues that the concept of democracy¹ can be disaggregated into two constitutive dimensions: an *inclusiveness* dimension (how many political actors are involved, directly or indirectly, in decision-making?) and a *contestation* dimension (to what degree is political power fragmented and subject to alternation?). Dahl argues that the most favorable democratization trajectory, as exemplified by British political development, is one where political competition (say, via the alternation of political power amongst a restricted group of elites) precedes inclusiveness (say, via the emergence of mass or populist parties or the extension of suffrage rights). This is because political competition within a restricted franchise can foster norms of deliberation and compromise in which the masses can subsequently be socialized as greater inclusiveness is institutionalized (Dahl 1971: 203). For our purposes, the implication of Dahl's theory is that the foundations of stable electoral competition in new democracies is likely to arise within antecedent

¹Dahl prefers to use the term "polyarchy" to denote regimes that fall short of the ideal-type of democracy but nonetheless possess many of its underlying characteristics.

authoritarian regimes that have already institutionalized a modicum of political contestation - even if said contestation is controlled by, and occurs exclusively amongst, political elites.

Authoritarian regimes come in many (displeasing) flavors - and some do institutionalize a degree of political competition in an attempt to co-opt potentially destabilizing oppositional forces. We see evidence of these dynamics in Serbia under Slobodan Milosevic; in post-1995 Haiti; in Mexico, Albania, and Malaysia throughout the 1990s; and perhaps in Russia under Vladimir Putin and in Hungary under Viktor Orban in the contemporary era. Steven Levitsky and Lucan Way (2002) have devised a label for this diminished subtype of autocratic rule:² *competitive authoritarianism*. Within these regimes, “elections are often bitterly fought. Although the electoral process may be characterized by large-scale abuses of state power, biased media coverage, (often violent) harassment of opposition candidates and activists, and an overall lack of transparency, elections are regularly held, competitive ...and generally free of massive fraud” (Ibid: 55). Further, weak legislatures are allowed to exist and “occasionally become focal points of opposition activity” (Ibid: 56).

Beatriz Magaloni (2006) corroborates Levitsky and Way’s conceptual framework with empirical evidence from Mexico during the seven-decade rule of the *Partido Revolucionario Institucional* (PRI) party. She argues that in such “[h]egemonic party autocracies” the ruling coalition “does not ban the opposition, but rather allow[s] elites to organize into independent political parties to have a place in the legislature” (Ibid: 7). Jennifer Gandhi and Adam Przeworski (2007: 1283) cogently state the autocratic logic for institutionalizing such elite-controlled partisan competition within a weak legislature: “Participation in the legislature absorbs [oppositional] activities into the institutional framework of the regime, according to the rules established by the ruler. Legalized opposition becomes domesticated opposition.” Yet domesticated contestation fulfills more than just a co-optation function - it also serves the crucial role of information diffusion. Milan Svoblik (2012: 87-90) argues that “committees, politburos, or councils that are embedded in authoritarian parties and legislatures” alleviate problems of authoritarian power-sharing by allowing members of the ruling coalition to communicate with one another and monitor transgressions by the dictator. “The key function of institutions like parties and legislatures in dictatorships,” Svoblik concludes, “is therefore distinctly authoritarian” (Ibid).

²Juan Linz (1975: 188-189) provides an influential definition of the “central type” of totalitarianism: “The dimensions that we have to retain as necessary to characterize a system as totalitarian are an ideology, a single mass party, and other mobilizational organizations, and concentrated power in an individual and his collaborators or a small group that is not accountable to any large constituency and cannot be dislodged from power by institutionalized, peaceful means.”

The general conclusion derived from the foregoing scholarship is that instituting a modicum of partisan competition serves to further regime endurance. In fact, each of these studies finds or posits a positive association between the presence of competitive authoritarianism and regime longevity. Yet the institutionalization of political contestation also permits oppositional forces to develop the necessary organizational infrastructures and linkages with civic associations to exploit openings for regime transition once they do emerge. Indeed, Guillermo O'Donnell and Philippe Schmitter (1986)'s landmark study of democratization posits that the democratic transition often begins with the "resurrection of civil society" (O'Donnell 1989: 66). The first signals of popular dissatisfaction usually come "from journalists, from other intellectuals, and from some leaders in the popular arts" (Ibid). If popular protest becomes substantial, it is possible that regime softliners will break off from the ruling coalition and negotiate with the democratic opposition. Thereafter, a fragile "transition game" begins, often resulting in the softliners and opposition agreeing to hold relatively free elections (ibid: 68-70; see also Rustow 1970). In other words, the same institutional framework that enables the authoritarian regime to co-opt the opposition lays the organizational foundation for the opposition to strike a fatal blow to the regime once an exogenous shock (such as the collapse of the Soviet Union) destabilizes the ruling coalition or domestic discontent reaches its boiling point.

Democratization need not proceed along the backs of an organized opposition with ground-level support from a resurrected civil society. Where political competition was not institutionalized by the authoritarian regime, as in cases of single-party totalitarianism or military dictatorship, the institutional infrastructure for bottom-up democratization is likely to be lacking. In such situations, Samuel Huntington (1991: 591) argues that democratization occurs when regime reformers subdue the loyalist standpatters, co-opt the opposition, and bring about gradual regime change from above (constituting what he terms a *transformation*). For our purposes, what matters is that the structure of authoritarian politics pre-transition is likely to shape the character of the democratization process. Since constitutions are likely to be drafted precisely in such tumultuous times of political flux (Elster 1995: 394), the only empirical indicators available to constitution-drafters regarding the prospects of future electoral competition are likely to be evidence of its past occurrence and partial institutionalization under the *ancien* regime. And if Dahl (1971)'s democratization theory is correct, evidence of political contestation pre-transition is particularly likely to engender democratic entrenchment post-transition. In short, constitution-writing in the wake of competitive authoritarianism's collapse is likely to occur in a strategic environment that incentivizes bargaining parties to establish an independent judiciary to hedge against the prospect of long-term electoral uncertainty.

The foregoing narrative exposes a degree of institutional path-dependence (Pierson 2000; Mahoney 2000) that belies the image of a clean revolutionary break from the past that often accompanies analyses of democratization. Ramseyer (1994), Moravcsik (2000), and Ginsburg (2003) assume such a sharp discontinuity from the institutional politics of the authoritarian past. Political actors in new democracies are modeled as purely forward-looking, driven to lock-in democracy and empower countermajoritarian courts to insure some influence over policymaking outcomes when limited to the politics of opposition. But constitution-making amidst the rough waters of democratic transition is unlikely to be conducive to prescient electoral forecasting. Evidence of past partisan competition, structured by political cleavages and organized by a relatively robust civil society, is therefore likely to shape constitution-makers' assessment that democracy is not only likely to last, but is also likely to institutionalize uncertainty via electoral competition. And this projection of past institutional dynamics onto an uncertain political future is likely to influence the decision regarding whether or not to constitutionally entrench and politically support judicial independence.

4 Conclusion: A Proposed Empirical Agenda

The foregoing section has drawn from the literature on authoritarianism and democratization in comparative politics to theoretically justify the claim that the political dynamics of authoritarianism are likely to shape both the process of democratic transition and its institutional legacy. Yet it remains a theory in search of supportive empirics- a task that regretfully falls outside the scope of the present article. Nevertheless, to conclude I would like to propose a research agenda meant to facilitate an empirical assessment of the antecedent foundations for judicial independence in newly democratic states.

The argument promoted in this paper is fundamentally a historical institutionalist one. It argues that although the critical juncture represented by a democratic transition is likely to fundamentally alter the trajectory of political development within a given jurisdiction, it is short-sighted to assume that the establishment of democracy represents a political *tabula rasa*. The institutional structure preceding said juncture, along with the political dynamics that it shaped and regulated under the aegis of authoritarian rule, is likely to cast a long, path-dependent shadow over the constitution-making process and the fate of the fledgling democratic regime. If this theory has face validity, then we would be well-advised to leverage statistical methods to test whether a positive correlation exists between the presence of competitive authoritarianism at time t and the institutionalization of judicial independence in the wake of the democratic transition at

time $t+n$. We should be able to complement the foregoing quantitative evidence with qualitative case studies to bolster our understanding of the causal mechanisms underlying this association. Specifically, one could probe archival records from the constitution-writing process for evidence that the presence or absence of past partisan competition served as an important empirical referent for the parties drafting the constitutional bargain. Ultimately, this research agenda would provide a valuable contribution to the existing literature by analyzing the potentially important and heretofore unexplored political antecedents for the constitutionalization of independent judiciaries.

References

- [1] Capoccia, Giovanni, and R. Daniel Kelemen. 2007. "The Study of Critical Junctures: Theory, narrative, and counterfactuals in historical institutionalism." *World Politics* 59 (3): 341-369.
- [2] Capoccia, Giovanni, and Daniel Ziblatt. 2010. "The historical turn in democratization studies: A new research agenda for Europe and beyond." *Comparative Political Studies*, 43 (8-9): 931-968.
- [3] Dahl, Robert A. 1971. *Polyarchy*. New Haven, CT: Yale University Press.
- [4] Elster, Jon. 1995. "Forces and Mechanisms in the Constitution-Making Process." *Duke Law Journal* 45 (2): 364-396.
- [5] Gandhi, Jennifer, and Adam Przeworski. 2007. "Authoritarian Institutions and the Survival of Autocrats." *Comparative Political Studies* 40 (11): 1279-1301.
- [6] Ginsburg, Tom. 2003. *Judicial Review in New Democracies: Constitutional Courts in Asian Cases*. New York, NY: Cambridge University Press.
- [7] Huntington, Samuel P. 1991. "How Countries Democratize." *Political Science Quarterly* 106 (4): 579-616.
- [8] Landes, William E., and Richard A. Posner. 1975. "The Independent Judiciary in An Interest-Group Perspective." *The Journal of Law and Economics* 18: 875-902.
- [9] Levitsky, Steven, and Lucan A. Way. 2002. "The Rise of Competitive Authoritarianism." *The Journal of Democracy* 13 (2): 51-65.
- [10] Linz, Juan. 1975. "Totalitarian Systems." In Greenstein and Polsby, eds., *Macropolitical Theory*. New York, NY: Addison-Wesley.
- [11] Magaloni, Beatriz. 2006. *Voting for Autocracy: Hegemonic Party Survival and its Demise in Mexico..* New York, NY: Cambridge University Press.
- [12] Mahoney, James. 2000. "Path Dependence in Historical Sociology." *Theory and Society* 29 (4): 507-548.
- [13] Moravcsik, Andrew. 2000. "The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe." *International Organization* 54 (2): 217-252.

- [14] North, Douglass, and Barry Weingast. 1989. "Constitutions and Commitment: the Evolution of Institutions Governing Public Choice in Seventeenth Century England." *The Journal of Economic History* 49 (4): 803-832.
- [15] North, Douglass. 1990. *Institutions, Institutional Change and Economic Performance*. New York, NY: Cambridge University Press.
- [16] O'Donnell, Guillermo, and Philippe Schmitter. 1986. *Transitions from Authoritarian Rule, Vol. 4: Tentative Conclusions about Uncertain Democracies*. Baltimore, MD: The Johns Hopkins University Press.
- [17] O'Donnell, Guillermo. 1989. "Transitions to Democracy: Some Navigation Instruments." In Pastor, ed., *Democracy in the Americas: Stopping the Pendulum*. New York, NY: Holmes & Meier.
- [18] Pierson, Paul. 2000. "Increasing Returns, Path Dependence, and the Study of Politics." *The American Political Science Review* 94 (2): 251-267.
- [19] Ramseyer, J. Mark. 1994. "The Puzzling (In)Dependence of Courts: A Comparative Approach." *The Journal of Legal Studies* 23 (2): 721-747.
- [20] Rustow, Dankwart A. 1970. "Transitions to Democracy: Toward a Dynamic Model." *Comparative Politics* 2 (3): 337-363.
- [21] Stephenson, Matthew C. 2003. "'When the Devil Turns . . .': The Political Foundations of Independent Judicial Review." *The Journal of Legal Studies* 32 (1): 59-89.
- [22] Svobik, Milan W. 2012. *The Politics of Authoritarian Rule*. New York, NY: Cambridge University Press.