

# Judicial Reform under Authoritarianism: The Role of Regime–Judiciary Relations during Periods of Political Competition

---

Jeffrey Adam Sachs



Simons Papers in Security and Development  
No. 46/2015 | October 2015

The **Simons Papers in Security and Development** are edited and published at the School for International Studies, Simon Fraser University. The papers serve to disseminate research work in progress by the School's faculty and associated and visiting scholars. Our aim is to encourage the exchange of ideas and academic debate. Inclusion of a paper in the series should not limit subsequent publication in any other venue. All papers can be downloaded free of charge from our website, [www.sfu.ca/internationalstudies](http://www.sfu.ca/internationalstudies).

The series is supported by the Simons Foundation.

Series editor: Jeffrey T. Checkel

Managing editor: Martha Snodgrass

Sachs, Jeffrey Adam, *Judicial Reform under Authoritarianism: The Role of Regime–Judiciary Relations during Periods of Political Competition*, Simons Papers in Security and Development, No. 46/2015, School for International Studies, Simon Fraser University, Vancouver, October 2015.

ISSN 1922-5725

Copyright remains with the author. Reproduction for other purposes than personal research, whether in hard copy or electronically, requires the consent of the author(s). If cited or quoted, reference should be made to the full name of the author(s), the title, the working paper number and year, and the publisher.

*Copyright for this issue: Jeffrey Adam Sachs, jsachs(at)sfu.ca.*

School for International Studies  
Simon Fraser University  
Suite 7200 - 515 West Hastings Street  
Vancouver, BC Canada V6B 5K3





## Judicial Reform under Authoritarianism: The Role of Regime–Judiciary Relations during Periods of Political Competition

Simons Papers in Security and Development  
No. 46 / 2015 | October 2015

### Abstract:

According to the so-called Insurance Theory of judicial empowerment, incumbent elites create independent and empowered courts in order to protect themselves and their policies after leaving office. In many authoritarian regimes, however, elites have very poor relations with their judiciaries, and therefore will have little reason to expect fair treatment from the courts in the event of their overthrow. Drawing on case studies from Sudan, Egypt, Mexico, and Argentina, this article shows that when regime–judiciary relations are poor, the logic of the Insurance Theory is reversed and increased political competition leads to less judicial independence instead of more. It then presents a revised version of the Insurance Theory better suited to authoritarian cases.

### About the author:

Jeffrey Adam Sachs is a SSHRC Postdoctoral Fellow at the School for International Studies, Simon Fraser University. His research interests are in judicial politics, Islamic law, and the politics of Africa and the Middle East. His current work explores the relationship between autocratic regimes and their judicial institutions during periods of political instability, in particular the role of judges and legal activists in Egypt, Tunisia, and Sudan during the Arab Spring and its aftermath. Sachs received his PhD from McGill University and his MA from the University of Chicago.

### About the publisher:

The School for International Studies (SIS) fosters innovative interdisciplinary research and teaching programs concerned with a range of global issues, but with a particular emphasis on international development, and on global governance and security. The School aims to link theory, practice and engagement with other societies and cultures, while offering students a challenging and multi-faceted learning experience. SIS is located within the Faculty of Arts and Social Sciences at Simon Fraser University. Our website is [www.sfu.ca/internationalstudies](http://www.sfu.ca/internationalstudies).





## Judicial Reform under Authoritarianism: The Role of Regime–Judiciary Relations during Periods of Political Competition

Why do governing elites, who would seemingly prefer free and unfettered control over the policymaking process, create strong and independent judiciaries? Among scholars of judicial politics, one of the most dominant explanations ties the development of strong courts to a competitive electoral market. If incumbents perceive a high likelihood of losing power, they will have an incentive to create independent courts as a check on whoever might replace them. Thus, the judiciary functions as a form of insurance for unstable politicians facing the prospect of electoral defeat (Landes and Posner 1975; Ramseyer 1994; Ginsburg 2003; Hirschl 2004; Erdos 2010).

While initially developed to explain judicial empowerment in consolidated democracies, this so-called Insurance Theory has more recently been extended to authoritarian cases as well (Finkel 2008, 2005; Hirschl 2010; Ginsburg and Veersteg 2014). However, many authoritarian regimes enjoy poor relations with their judiciaries. Years of executive interference in judicial affairs, poor working conditions, and sharp ideological differences can all generate enormous hostility on the part of judges, lawyers, and legal activists toward incumbent elites. If those same elites become threatened with a high likelihood of losing power, they may have little reason to expect that the courts will treat them fairly, preserve their policies, or protect them from unconstitutional punishment. On the contrary, such courts may use the occasion to settle scores or demonstrate their loyalty to the new order by zealously punishing representatives of the old one, as occurred in Argentina following the collapse of military rule in 1983 (Pereira 2005, 165–168; Aguilar 2013). How do incumbent elites in such circumstances respond?

This article presents one possible answer to this question. It shows that when relations between incumbent elites and the judiciary are poor, the threat of losing power can lead to *more* interference in judicial affairs instead of less, reversing the normal logic of the Insurance Theory model. Whereas a regime with a longer time horizon might attempt to win back the judiciary's loyalty through improved treatment or greater independence, such remedial steps are typically

unable to overcome long histories of ill will, particularly when elites are in imminent danger of losing power. As a result, such elites have a strong incentive to circumscribe or bypass hostile judicial institutions altogether and replace them with ones that will be more sympathetic to their interests following regime breakdown. According to the theory proposed in this article, therefore, an authoritarian regime faced with intense political competition during a period of poor regime–judiciary relations will seek to (a) constrain or eliminate the power of hostile judicial institutions; (b) empower or create friendly ones; and (c) entrench these changes so that they survive the regime’s overthrow.

To illustrate this dynamic, I provide a close analysis of judicial politics in Sudan during the Numayri regime (1969–1985), as well as of supporting case studies from Egypt, Argentina, and Mexico. Though rarely studied in the literature, Sudan offers a fascinating case of judicial reform under authoritarian rule, one characterized by the total breakdown of trust between the regime and its judges. This breakdown was the product of deep ideological differences, political disagreement, and a traumatic history of confrontation between executive and judicial actors, all of which left Sudan’s incumbents with little reason to expect fair treatment from the courts in the event of their overthrow. As a result, the regime responded to political competition in the 1970s by aggressively undermining the strength and independence of the judiciary.

This focus on the regime–judiciary relationship offers both a challenge and an opportunity to the Insurance Theory framework. On the one hand, it suggests that if proponents hope to extend the insights of Insurance Theory to authoritarian cases, they must pay far greater attention to ideational and historical factors than they typically do, since these factors are often decisive in determining the level of trust between executive and judicial actors. As one critic of the Insurance Theory framework has phrased it, such an approach would account for the “shared experiences, beliefs, identities, ideologies, and interpretations of events and sequences of events” that might sustain or erode a political actor’s trust in the judiciary’s good intentions (Hilbink 2009, 782). On the other hand, by highlighting the importance of regime–judiciary relations as an intervening variable, proponents of the Insurance Theory will be in a better position to account for why judicial reform does *not* occur in cases where political competition is strong (e.g. Argentina in the early 1980s) or *does* occur in cases where it is weak (e.g. Mexico in the



early 1990s). Thus, adapting the Insurance Theory in the manner outlined here will permit us to apply its logic in a much wider array of circumstances than is currently the case.

This article is divided into four sections. In Section I, I present the theoretical framework that structures my argument. This section builds on the insights of the Insurance Theory, while also showing why it should be revised in order to address situations where regime–judiciary relations are poor. Section II explores the political conditions in Sudan that prompted the Numayri regime to launch its Judicial Revolution. This includes a regime–judiciary relationship locked in a state of permanent hostility, as well as a mounting threat of regime overthrow from powerful opposition groups. Section III analyzes how these conditions incentivized the government to actually interfere *more* in judicial affairs instead of less. In Section IV, I test the generalizability of this argument through the comparative analysis of three shorter case studies from Egypt, Argentina, and Mexico. Finally, I conclude by outlining both the potential and the limitations of this framework for understanding the judicial politics of authoritarian regimes.

## I. Theoretical Overview

The basic logic of the Insurance Theory of judicial empowerment hinges on the role of political competition. As competition from opposition groups grows more intense, incumbents face a greater likelihood of being removed from office. By strengthening judicial institutions and insulating them from political interference, these incumbents calculate that they and their policies will fare better in the event that they lose power. In consolidated democracies, for example, judicial empowerment can serve as a form of “hegemonic preservation” for unpopular elites (Hirschl 2004). By diverting policy-making responsibilities from elected bodies to the courts, incumbent elites reduce the likelihood that future politicians will be able to reverse their policies and replace them with ones they oppose (Landes and Posner 1975; Ramseyer 1994; Erdos 2010). A similar logic operates in new or transitional democracies, where elites typically have to contend with a great deal of uncertainty over their own electoral strength and the trustworthiness of state institutions. In such circumstances, both ruling and opposition elites have a common interest in establishing independent judicial bodies as a means of self-protection (Magalhaes 1999; Ginsburg 2003; Bill Chavez 2007).

More recently, this logic of political competition and institutional change has been applied to authoritarian regimes as well.<sup>1</sup> Finkel (2008, 2005) has offered perhaps the most complete articulation along these lines. Focusing on the case of Mexico in the early 1990s, she links President Ernesto Zedillo's decision to empower the Supreme Court to the growing likelihood that his long-dominant Partido Revolucionario Institucional (PRI) was facing electoral defeat. Similarly, Hirschl (2010, 67) claims that the attempt by the Palestinian Authority to establish a constitutional court in 2006 was motivated by the growing popularity of Hamas, which had won parliamentary elections in Gaza earlier that year. Since President Mahmoud Abbas of the Fatah Party would have appointed all nine justices to the bench, the court would have been able to block any Hamas initiative damaging to his party's interests.

Other scholars have marshaled quantitative evidence to demonstrate the Insurance Theory's applicability in non-democracies. Ginsburg and Veersteg (2014), for example, assert that there is a strong, linear relationship between the proportion of seats in an authoritarian legislature held by opposition parties (their proxy for political competition) and the establishment of constitutional review. Diaz-Asensio (2012) and Randazzo, Gibler, and Reid (2015) both reach similar conclusions, arguing that as authoritarian legislatures grow more competitive, judicial institutions are more likely to be independent. Finally, Besley, Persson, and Marta Reynal-Querol (2013) claim that following the death of a longtime autocratic ruler, there is a high probability that the regime will adopt "defensive institutional reform" in anticipation of losing power.

A third strand of scholarship extending Insurance Theory to authoritarian regimes comes from the public choice and new institutional economics literature, where there is a strong intuition that independent, empowered courts represent one of the best guarantors of private property rights (North and Weingast 1989; Olson 1993; Moustafa 2007; Besley and Ghatak

---

<sup>1</sup> The application of Insurance Theory to authoritarian regimes represents one area in which the judicial politics scholarship is considerably more developed than that on other authoritarian institutions. Thus, while numerous studies have suggested a relationship between autocratic survival and the existence of political parties or legislatures (Lust-Okar 2004; Gandhi and Przeworski 2007; Magaloni 2008a; Levitsky and Way 2010; Boix and Svolik 2013), relatively few (see for example Wright and Escriba-Folch 2012) have sought to test whether authoritarian leaders also use these institutions as a form of insurance in case they lose power.



2010). Thus, an unstable autocrat may be motivated to establish independent judicial institutions in order to prevent subsequent governments from seizing his assets (Besley, Persson, and Marta Reynal-Querol 2013).<sup>2</sup> Polishchuk and Syunyaev (2014) go further, arguing that the relationship between political competition and judicial independence is actually *stronger* under authoritarian regimes than under democratic ones because authoritarian countries lack a tradition of civic activism and journalistic freedom. In their absence, the judiciary represents one of the few institutions capable of preventing newly empowered opposition parties from confiscating the assets of the former ruler and his supporters.<sup>3</sup>

### ***The Role of Regime–Judiciary Relations***

The extension of Insurance Theory to authoritarian regimes has clearly established itself as a rapidly growing theme in the law and politics scholarship. Doing so, however, introduces new complications that the current literature has yet to address. Chief among these is the role of *trust*: in order for the logic of Insurance Theory to function, the incumbent must believe that the judicial institution she empowers now will give her fair or sympathetic treatment later. But this trust is by no means a foregone conclusion, particularly in authoritarian political systems where governments have a long history of interfering in judicial affairs. Such executive interference, along with low salaries, politicized hiring and firing decisions, and poor working conditions, can all generate enormous hostility on the part of legal professionals toward incumbent elites. Relations may be placed under further strain when members of the regime and judiciary are drawn from different social groups, have opposing ideological commitments, or view one

---

<sup>2</sup> For critiques of this position coming from within the public choice and new institutionism literature, see Svensson (1998) and Campante, Chor, and Do (2009), who argue that unstable autocrats have a strong incentive to “plunder” the state while they still can. More fundamentally, Acemoglu (2003) disputes the ability of incumbents to use institutions as a way of constraining the actions of future governments, thus rendering the logic of Insurance Theory inoperative. Elsewhere, however, Acemoglu and Robinson (2006) claim that the incentive to create efficient economic institutions is greatest in authoritarian regimes where competition is either very high or very low. This non-monotonic relationship suggests that a threatened incumbent may choose to create an independent judiciary even when there is no expectation that it will benefit her after leaving office.

<sup>3</sup> This finding is echoed by Ingram (2013), who despite his overall skepticism of Insurance Theory, argues that political competition in Mexico was more likely to lead to increased government financing for the judiciary when the country was still transitioning from authoritarianism, before decreasing once democracy was consolidated. This is because democratic consolidation is also associated with political gridlock, raising greater obstacles to positive judicial reform.

another as politically or morally illegitimate. The central argument of this article, therefore, is that when incumbent elites believe that a judicial institution is biased against them, they will have much less incentive to expand its power or independence – *especially* during periods of intense political competition, since it is precisely at those moments that the threat of judicial retribution is most concrete.

Put another way, an insurance policy that will not be honored is no insurance at all, and therefore not worth purchasing. As a result, we should expect governments to respond differently to political competition depending on whether or not they enjoy good relations with their judiciary. With those for whom relations are positive and trust is high, the Insurance Theory's logic is more likely to prevail, creating a strong incentive for judicial empowerment and independence.

However, if relations are poor and trust is absent, political competition will have the *opposite* effect. This is because as the likelihood of losing power increases, the opportunity for the regime to repair relations with the judiciary decreases. In such circumstances, elites will be motivated to constrain the power of the judiciary while they still can, in the hopes of reducing its ability to harm them or their interests after leaving office. Incumbent elites may also have a strong incentive to pack courts with friendly personnel, or even create entirely new judicial institutions with no history of anti-regime sentiment. As a solution to the problem of poor regime–judiciary relations, the creation of new courts, bar associations, judicial councils, etc., may offer a more practical regime strategy than trying to repair relations with existing institutions, a costly and time consuming process that a weak regime can ill afford. Though disruptive and likely to further inflame judicial anger, this will be unlikely to dissuade the government when its relationship with the judiciary is already poor.

While this argument bears a superficial similarity to that of Popova (2010), it differs in certain key respects. Under Popova's theory of strategic pressure, political competition leads to less judicial independence instead of more because in a new democracy, any single election could be the last. Without a guarantee that they will be able to compete for office after stepping down from power, Popova argues that incumbent elites will have a strong incentive to interfere with judicial institutions while they still can in the hopes of establishing favorable rules of the



“electoral game”. Thus, the focus of her analysis is on political uncertainty (i.e. whether or not outgoing elites can trust other political actors to allow them to contest future elections). My argument, by contrast, focuses on *judicial uncertainty* – namely, whether or not outgoing elites can trust the judiciary to treat them fairly or sympathetically. Unlike Popova’s, therefore, this critique of the Insurance Theory literature centers on the role of judges as political actors in their own right, and not simply the vehicles through which political parties contest the electoral landscape.

This focus on the regime–judiciary relationship allows us to consider new strategies not anticipated by the Insurance Theory literature. For example, a regime facing political competition may empower some judicial institutions while simultaneously weakening others. Unlike standard Insurance Theory, which predicts a blanket expansion of independence for all politically useful courts during periods of heightened competition, the augmented version presented here suggests that incumbents might selectively empower only those courts with which they have good relations, while constraining those with which they do not. By allowing a regime’s strategy to vary according to its exact relationship with a given court or judge, this model helps the Insurance Theory to better reflect the ideological and political diversity within a country’s judicial branch.<sup>4</sup>

While the importance of regime–judiciary relations to the Insurance Theory has already been noted in the context of consolidated democracies (Stephenson 2003; Hirschl 2004), its role in non-democracies remains largely unexplored. Yet it is precisely with authoritarian regimes that we would expect it to be most decisive. This is the case for two reasons. First, authoritarian judiciaries frequently lack strong professional norms and thick rule of law, thus making it more likely that judges will be able to insert their own personal biases into the judicial decision-making process. Even where the rule of law has historically been present, the occasion of a

---

<sup>4</sup> When paired with the insights of Gretchen Helmke’s theory of “strategic defection”, this model generates an interesting result. According to Helmke (2005), “whenever judges face a threat from future or incoming governments, judges may face incentives to strategically defect against the current government, even though they otherwise share the current government’s preferences” (39). As argued above, however, the regime is likely to view this defection as proof of the judges’ unreliability, and therefore will be less likely to entrust them with greater independence or authority. Thus, if Helmke is correct, the regime will grow more selective at precisely the moment when it has the fewest options from which to select.

political transition or regime breakdown often creates a window of legalistic ambiguity in which judges, if they are so inclined, can decide cases in ways that longstanding institutional and legal norms would not typically permit (e.g. whether to accept as binding authoritarian-era laws, executive orders, or judicial precedents). Second, the costs to authoritarian elites of leaving office at a time of poor regime–judiciary relations are much higher than in a democracy, since they tend to face a greater likelihood of being persecuted by the subsequent government (Debs and Goemans 2010). This is especially true for leaders with a history of violent or repressive rule, for whom losing power without judicial protection could be a catastrophe.

Thus, compared to consolidated and new democracies, authoritarian political systems will feature judges with greater *opportunity* to let regime–judiciary relations influence their decision-making, and incumbents with a stronger *incentive* to plan accordingly.

From this analysis, we can derive a number of testable hypotheses:

**H1.** During periods of poor regime–judiciary relations, political competition raises the costs to incumbents of judicial independence and lowers the benefits.

**H2.** These incumbents will have a strong incentive to replace unfriendly judges or judicial institutions, as opposed to attempting to repair relations with existing ones.

**H3.** As political competition grows more intense, the incumbents will attempt to entrench these institutional changes so that they will survive regime breakdown.

The next two sections of this article evaluate these hypotheses through an historical analysis of Sudan’s so-called “Judicial Revolution” of the late 1970s and early 1980s, carried out under the regime of Ja’far Numayri (1969–1985). By carefully examining the legal, political, and social context of this period, it is possible to establish how rising competition affected the incentives and political strategies of incumbent elites. This effort is aided by the prominent and well-documented discussions that political actors of this period had about the judiciary, furnishing us with extensive records from which to reconstruct the tenor of regime–judiciary relations. It also allows us to capture the relevant historical and ideational contexts that shaped regime–judiciary relations in Sudan. Since the Insurance Theory has been criticized by many scholars precisely on the grounds that it fails to take such contexts seriously (Hilbink 2009;



Inclan Oseguera 2009; Ingram 2012), these sections will address an important problem in the theoretical literature, as well as elucidate a little-understood case study of judicial reform.

## II. Judicial Politics under the Numayri Regime in Sudan

Sudan's modern political history begins in 1898, when a joint Anglo-Egyptian army conquered the country and established a colonial government. Over the next five decades, the British administration developed a highly complex legal and political system characterized by a vibrant civil society, an activist press, and powerful nationalist movements. At the same time, much of the population – particularly in the largely non-Muslim south – was prevented from full participation in Sudanese political life. This basic inequality continued following decolonization in 1956, and many of the country's subsequent conflicts stem from it. After two years of democracy, the civilian government was overthrown in a military coup led by General Ibrahim Abboud, inaugurating Sudan's first post-colonial experience with authoritarian rule (1958–1964). Abboud in turn was overthrown in a popular uprising, leading to the brief return of multi-party democracy under Sadiq al-Mahdi (1965–1969), but this too was soon ended in a second, more sweeping military coup led by Colonel Ja'far Numayri. The following sixteen years were transformative for the country, and by the time of the regime's collapse in 1985, the Sudanese political landscape was virtually unrecognizable.

### *1969–1975: The Breakdown of Regime–Judiciary Relations*

The Numayri regime both began and ended its rule with hugely ambitious programs of judicial reform, separated by more than a decade of judicial neglect. The first phase of reform was launched almost immediately after the military government seized power, and was motivated in large part by its fear that the courts might act as a counter-revolutionary force. This fear was well founded. The judiciary had emerged in the aftermath of decolonization as one of the most powerful and internally coherent institutions of the Sudanese state, one that aggressively resisted any perceived interference from the executive branch.<sup>5</sup> Exercising their

<sup>5</sup> The relative post-colonial strength of the judiciary, especially when compared to the much weaker civil service, was due in large part to the joint efforts of the colonial government and the Sudanese nationalist movement, each of which viewed rule-of-law institutions as essential to their respective political projects. As a means of coordinating

powers of judicial review, which the Supreme Court had established through a pair of landmark rulings in the late 1950s,<sup>6</sup> the courts had acquired a long history of striking down government legislation, whether they be laws passed by the authoritarian regime of General Abboud or by the democratic government of al-Mahdi.

This aggressive posture by the judiciary led to a major showdown with the executive branch in 1965, when the Supreme Court struck down as unconstitutional a law banning the Sudanese Communist Party (SCP).<sup>7</sup> When the legislature refused to recognize the court's decision as binding, the chief justice at the time denounced the government and resigned in protest. This blatant violation of judicial independence greatly undermined Sadiq al-Mahdi's legitimacy and arguably helped to hasten his own overthrow by Numayri. A similar judicial assertiveness can be found outside the courtroom as well, with judges frequently adopting public stances that set them at odds with those of the ruling party. Most famously, the overthrow of the Abboud government in October 1964 was due in no small part to a decision of the Supreme Court to defy the regime and permit a mass protest in the streets of Khartoum to go forward. Lawyers and law students also played a prominent role at the time in mobilizing the population and organizing anti-regime protests (Berridge 2015, 101-103; Massoud 2012, 199-200).

With such an extensive history of challenging executive power both inside and outside the courtroom, it is little wonder that one of Numayri's first orders of business was to implement a widespread judicial purge. All seven Supreme Court judges were forced to retire, and a network of Revolutionary Courts, presided over by military officers with no judicial training, was established to oversee political trials. These attacks on judicial independence were carried out with the enthusiastic backing of the Communist Party, still angry over what it felt to be the judiciary's lackluster attempt to prevent its persecution during the al-Mahdi years. With its

---

political action, reducing government inefficiencies, and minimizing social unrest, Sudan's political elites were more or less unified in their support for powerful and autonomous judicial institutions. See Massoud 2013, 44-85.

<sup>6</sup> *Mohammad Adlan vs. The Government of Sudan*, CA, *Sudan Law Journal & Reports (SLJ&R)* (1956) and *The Building Authority of Khartoum vs. Evangellos Evangellides*, CA, *SLJ&R* (1958).

<sup>7</sup> *Joseph A. Garang & Others vs. The Supreme Commission & Others*, SC, *SLJ&R* (1965).



members now rehabilitated and serving in cabinet, the party eagerly sought to punish those judges it held responsible.

The most dramatic series of attacks, however, began in 1970 when the government announced that henceforth Sudan's legal system would be based on civil instead of common law. It is difficult to exaggerate the significance of this transformation or the alarm it generated among legal professionals. In a single move, the regime rendered obsolete more than seventy years of accumulated judicial training and experience, forcing the country's judges to rebuild from scratch a legal system to which they had dedicated their entire professional lives. The reasoning behind this shift is still the subject of some dispute by scholars, but at least part of the motivation was to bring Sudan's legal system into greater conformity with that of Egypt (whose judiciary follows civil law) as a way of establishing closer political bonds between the two countries (Khalid 1985b; Massoud 2013, 107). Numayri also believed that by adopting the civil law, the judiciary would become more efficient.<sup>8</sup> Regardless of the precise reasoning, over the next two years a series of new legal codes was passed by the legislature, requiring judges to retrain themselves in civil law.

Unsurprisingly, the judiciary's response to these reforms was overwhelmingly negative. Few high-ranking judges were willing to join the government in drafting the new codes, forcing legislators to seek assistance from Egyptian judges instead. By 1971, an unofficial work slowdown had paralyzed the country's legal system, exacerbated by the genuine confusion and miscommunication that accompanies such massive institutional reform. Some judges chose to ignore the new codes all together, and many others refused to act on them until they were better understood. It soon became evident that the situation was unsustainable. By 1972, faced with open judicial revolt and an increasingly skeptical press, the regime abruptly reversed course, repealing the codes and restoring the common law (Mustafa 1973). For the judges, it was a complete victory. For the regime, it was a stark reminder that the executive branch's authority was not without its limits.

---

<sup>8</sup> "Numayri Urges Revolution in Sudanese Laws," *The Sudan News*, January 9, 1970, p. 4.

The deterioration of regime–judiciary relations in this period is also visible in the decisions issued by the Supreme Court and Criminal Court of Appeal. Though Numayri’s purge of the Supreme Court bench had been total, his own appointees were quick to assert their independence. Across a range of rulings, the courts decided against the regime in cases involving the powers of the security sector,<sup>9</sup> executive interference in judicial affairs,<sup>10</sup> and violations of proper trial procedure.<sup>11</sup> Most significantly, the courts issued a series of decisions that called into question both the powers and legal basis of the state security courts, a core component of the regime’s repressive apparatus.<sup>12</sup> It should be noted, however, that from the wording of these decisions, it is clear that the judges were extremely cautious about confronting the government too aggressively over such a sensitive matter, and subsequent decisions placed the security courts on a firmer legal footing.<sup>13</sup>

Based on an appraisal of regime–judiciary interactions both inside and outside the courtroom, there is strong evidence pointing to a mutually hostile and distrustful relationship during the first six years of Numayri’s rule. Neither side had a clear advantage. The regime had shown itself to be far more ambitious and resourceful than any of its predecessors, but the judges had demonstrated that they could mount an effective response when they felt that their traditional powers and privileges were under attack. By the mid-1970s, therefore, the response of each side

---

<sup>9</sup> *Government of Sudan vs. Ahmed Abu Obeida & Others*, CA, *SLJ&R* (1971); *Government of Sudan vs. Ahmed Muhammad Hammad*, CA, *SLJ&R* (1972); *Government of Sudan vs. Ismail Kafi Tutu*, SC, *SLJ&R* (1973); *Government of Sudan vs. Muhammad Ahmed Mussa*, CA, *SLJ&R* (1973); *Government of Sudan vs. Adam Omar Hussein*, SC, *SLJ&R* (1976); *Government of Sudan vs. Abu al-Bashir Abkur Khamis*, CA, *SLJ&R* (1976).

<sup>10</sup> *Government of Sudan vs. Tahir Ahmed Adam*, SC, *SLJ&R* (1972); *Government of Sudan vs. Samir Muhammad Hassan & Others*, SC, *SLJ&R* (1972); *Government of Sudan vs. Sayyid Youssef & Others*, CA, *SLJ&R* (1973); *Popular Executive Council of Khartoum & Others vs. Amina Suleiman & Others*, CA, *SLJ&R* (1975).

<sup>11</sup> *Government of Sudan vs. Abdul Metaal Muhammad Abdullaah*, SC, *SLJ&R* (1973); *Government of Sudan vs. Muhammad Hassan Muhammad Kaylia*, SC, *SLJ&R* (1973); *Government of Sudan vs. Bashir Ibrahim Ibrahim*, SC, *SLJ&R* (1973); *Government of Sudan vs. Muhammad Mara Bahr*, SC, *SLJ&R* (1973); *Government of Sudan vs. Ali Muhammad Hammad*, CA, *SLJ&R* (1974).

<sup>12</sup> *Nasir Abdel Rahman Muhammad vs. Legislative Authority*, SC, *SLJ&R* (1974); *Government of Sudan vs. Fatima Abdul Samad Abdullah*, CA, *SLJ&R* (1975).

<sup>13</sup> See *Tijani Tayeb Babiker vs. The Government of the Democratic Republic of Sudan*, SC, *SLJ&R* (1980), in which the Supreme Court found that the “right to appeal” a security court’s ruling was a legal right and not a constitutional one. As a result, the State Security Act (1973) did not violate the constitution when it blocked civilians from appealing their conviction to the regular judiciary.



was to adopt a policy of mutual disengagement. The government, in a bid to limit the judiciary's ability to damage its agenda, turned instead to a series of quasi-judicial institutions over which it could exercise more direct control, including state security courts and local tribunals (Salman 1983).

Perhaps surprisingly, most judges supported this approach. So long as this parallel judicial network was in place, the courts were spared any further meddling from the regime. Most politically and economically sensitive cases were channeled into one of the quasi-judicial institutions, leaving the judges to enjoy their traditional rights and privileges unmolested.<sup>14</sup> It is crucial to note, however, that this mutual accommodation fell far short of actual friendship. Judicial opinion toward the regime remained extremely hostile, as evidenced by frequent sniping in the popular press and occasional court rulings against government interests. Thus, the *détente* of the mid-1970s should be understood as a policy of disengagement and not cooperation. However, so long as the government was strong and the opposition in shambles, the Numayri regime had little incentive to repair its relations with the judiciary.

### ***1976–1983: The Reemergence of Political Competition***

Why then was the government forced in the late 1970s to abruptly switch course and not only re-engage with the judiciary, but launch a second round of massive judicial reform? As the Insurance Theory would suggest, this shift in strategy had its origins in the return of political competition, spurred by the conjunction of an economic crisis in the mid-1970s and the resurgence of armed conflict. This included a Libyan-backed invasion by opposition groups in July 1976, a series of mutinies by southern forces in 1976 and 1977, and a failed military coup in September 1983 (Taha 2010, 95; Johnson 2011, 41-42). Together with a worsening economic crisis, these incidents greatly undermined the regime's confidence in its long-term viability.

---

<sup>14</sup> This arrangement is not an uncommon one within authoritarian countries. By directing all important cases into special courts, authoritarian rulers are able to permit judges in the ordinary judiciary to operate more or less independently. This allows the ruler to control the judicial process while still reaping many of the benefits to his or her legitimacy that judicial independence can confer. For further discussions of this tactic, see Toharia 1975; Hilbink 2007; and Pereira 2008. For a contrasting view, see Cheesman 2011.

Unfortunately, the government's response to this crisis made matters considerably worse. In 1977, Numayri announced a period of national reconciliation in which all of the country's opposition leaders were invited to join a government of national unity. The only major party willing to participate, however, was the Islamic Charter Front (ICF), led by the charismatic Hassan al-Turabi. The ICF was the main political vehicle of the Sudanese Muslim Brotherhood, and its stated objective in joining the regime was to push for the implementation of Islamic law. From his newly appointed position as attorney general, Turabi helped draft legislation banning alcohol and mandating the payment of *zakat*, the Islamic tithe.

The party's true goal, however, was to best position itself for the post-Numayri era. As high-ranking members would later admit, the ICF was under no illusions about the long-term viability of the regime. Its primary objective was to insinuate its members into key state institutions, particularly the judiciary and military, so that they and their policies would be protected once Numayri was inevitably overthrown.<sup>15</sup> As one prominent member of the ICF would later recall, the party was in "a race against time to develop into a major political force before the [Numayri] regime collapsed. They were thus committed to preserving the regime until such time as they would be strong enough to inherit it, or at least carve themselves a major power share in the succeeding order" (Effendi 1989, 119).

Thus, the period between 1976 and 1983 brought about a rapid re-evaluation within the government about its long-term prospects and the fate of its elites. According to regime insiders, Numayri had grown increasingly erratic and paranoid, no longer willing to work with the secular leftists and Nasserites who had once formed his base. The ICF supporters who had replaced them bore him little loyalty, and indeed were counting on the imminent collapse of the regime. Increasingly, elites at multiple levels of government were positioning themselves for the post-Numayri era, which amid economic collapse and mounting protests seemed close at hand. Then, in the spring of 1983, the regime was dealt the harshest blow of all when its peace agreement with the South, long in danger of breaking down, finally collapsed. Violating his promise to honor southern autonomy, Numayri had attempted to dissolve the three southern regional

---

<sup>15</sup> The ICF's attempts to control the judiciary will be discussed at length below. For its relationship with the military during this period, see Taha 2010, 97-98.



governments.<sup>16</sup> Almost immediately there were reports of defections from southern battalions, which by June had escalated into a full-blown mutiny. Now forced to re-launch the civil war, the regime found itself domestically unpopular, internationally isolated, and deeply impoverished.

### III. The “Judicial Revolution”

Coming against the background of poor regime–judiciary relations, how did this changing political context affect the regime’s policies toward the courts? According to the theoretical model described in Section I of this article, the rise of political competition in Sudan should have had three implications for the Numayri regime: First, the benefits of its policy of non-interference in judicial affairs should have decreased while the costs should have increased. Second, the regime should have faced strong incentives to create new judicial institutions that it could staff with friendlier, more loyal judicial personnel. Third, the regime should have sought to entrench these new institutions so that in the event of its overthrow, none of the opposition parties would be able to reverse the reforms. The validity of these hypotheses will now be tested one at a time against the historical record.

#### *The Changing Incentives Structure: An End to Judicial Disengagement*

In the summer of 1983, Sudan’s judges went on strike for the first time in nearly three years. The proximate cause was cuts to the judicial budget, which had been declining for some time due to the larger fiscal crisis. Over the course of the previous winter and spring, however, the judges had come under a withering verbal assault from both Numayri and Turabi. In press conferences, newspaper editorials, and government meetings, the regime had signaled its abandonment of a policy of non-confrontation, and began instead to criticize the judges for their corruption, laziness, and inability to deliver prompt justice. In prepared remarks during the opening of a new courthouse in the city of Al-Fasher, Numayri condemned the judiciary for harboring in its ranks “the corrupt, the gamblers, and the drinkers of alcohol” (Khalid 1985a, 385). Most judges, he claimed, had grown so enamored with rules and procedure that justice had

---

<sup>16</sup> By this point, southern politicians formed one of the only major constituencies that remained loyal to Numayri. Their defection was a huge blow and greatly accelerated the process of regime breakdown.

become “deformed and distorted.”<sup>17</sup> In June, he delivered a twenty-eight-point critique of the legal system, laying out in detail all the ways in which he believed the judiciary had failed the country (Zein 1989, 202). These criticisms and others like them, which were far harsher than anything expressed by Numayri since the showdowns of the early 1970s, were enthusiastically echoed in the pro-regime press.<sup>18</sup> Whatever reluctance the regime formerly had about attacking the judiciary was gone.

As the summer continued, the strike gradually expanded in scope. The judges were soon joined by students and law professors, with expressions of sympathy from most other professional unions as well. On June 3, the Bar Association issued a formal memorandum expressing concern over the regime’s behavior, which was “not in accordance with the principles of the fundamental rights of the citizen, not to mention those of the judge, and will lead logically and inevitably to the undermining of judicial independence” (quoted in Khalid 1985a, 386). Demonstrations were held in Khartoum and the other major cities, and judges openly expressed their hope that the collapse of the country’s legal system would force the regime to compromise.

It did not. In mid-August 1983, after firing and ordering the arrest of hundreds of judges (including several sitting members of the Supreme Court),<sup>19</sup> Numayri announced the inauguration of a “comprehensive Judicial Revolution”.<sup>20</sup> Though few details were initially offered, he assured the press that the planned reforms would render the judiciary more efficient, inexpensive, and just. After several days of confusion, the regime officially unveiled a raft of new laws and legal codes designed to bring the nation’s legal system into conformity with *shari’ā*, or Islamic law. Known as the “September Laws” after the month in which they were first introduced, these laws were an enormous shock to the judiciary, which up till this point had

---

<sup>17</sup> “During the Press Conference, the President Announced Decisions about the Judiciary,” *Al-Šahāfa* August 12<sup>th</sup>, 1983, p. 3.

<sup>18</sup> “Too many chiefs and not enough judges,” *Sudanow*, September 1980, p. 11-12; Ali El Mekk, “The Case,” *Sudanow*, July 1978, p. 64-67.

<sup>19</sup> “JANA Notes Deteriorating Situation in Sudan.” FBIS-MEA-83-157 (Foreign Broadcast Information Service), August 11, 1983.

<sup>20</sup> “Comprehensive Judicial Revolution,” *Al-Šahāfa*, August 12, 1983, p. 1.



only been trained in secular law. *Shari'a* courts did exist in Sudan, but they were administered separately and were limited to hearing cases involving family and personal disputes (e.g. marriage, divorce, inheritance). Since the formation of the modern Sudanese legal system in 1898, all constitutional, criminal, and civil disputes had been adjudicated according to secular common law. As a result, what the regime was proposing represented nothing less than a revolution in the way the courts were expected to operate.

Important personnel changes soon followed. As previously noted, Turabi had long been eager to install more ICF judges in the judiciary. It was a major victory, therefore, when he succeeded in having appointed as chief justice Sheikh Dafallah al-Haj Youssef, a prominent judge with known Muslim Brotherhood sympathies. Other regime loyalists, including Numayri's personal legal advisor Sheikh Al-Nayal Abu Qurun, were installed in various courts of appeal. Meanwhile, as much judicial power as possible was vested in the Supreme Court and Khartoum Court of Appeals, over which the regime was able to exert more direct control (Zein 1989, 180-183).

Later that winter the regime ordered the application of the so-called *hadd* punishments for certain classes of crimes. These punishments, which included flogging, stoning, and the amputation of hands and feet, were prescribed for those found guilty of theft, adultery, the consumption of alcohol, and other acts considered crimes under the new legal code. Many judges were horrified by these punishments and initially refused to enforce them, but soon came under extreme pressure from both Numayri and the ICF to carry them out. In many cases, floggings were performed either directly in the courtroom or just outside in the lobby (Al-Kabbashi 1986; Khalid 1986a). Though outraged, there was little the judges could do.

This first stage of the Judicial Revolution, from roughly September 1983 to April 1984, reveals a newfound willingness on the part of the regime to criticize, interfere with, and undermine the independence of the courts. This runs counter to the accepted logic of Insurance Theory, where the intensification of political competition incentivizes regimes to strengthen judicial autonomy. But with their hold on power fast deteriorating, both Numayri and Turabi actually *accelerated* their attacks out of the belief that the courts, as currently constituted, represented a potent threat should they ever leave office. Turabi in particular would claim in later

years to be keenly aware of how fragile the regime's hold on power had been, and therefore the need for the ICF to act fast in order to protect its long-term interests. The result was a mad scramble to pass new laws and appoint new personnel, regardless of the howls of protest its actions were generating within the judicial ranks.

### ***Establishing a Durable Alternative: The Creation of “Prompt Justice”***

During the second stage of the Judicial Revolution, which began with the declaration of a state of emergency in May 1984 and ended with Numayri's overthrow one year later, the regime abruptly switched tactics for a second time. Instead of seeking to implement Islamic law through the regular judiciary, it announced the creation of special emergency courts, renamed in June as “Courts of Prompt Justice” (*mahākim al-’adāla al-nājiza*).<sup>21</sup> These courts, which were unfettered by standard judicial procedure and legal protections, had been created ostensibly in response to the bombing of several military sites in Khartoum by the Libyan air force the previous month.<sup>22</sup> In reality, the regime had grown frustrated with the judiciary’s hesitancy about applying the *hadd* penalties in criminal cases. Numayri had also come to distrust his new appointments to the courts, who he feared had “gone native” and were now more loyal to the interests of the judiciary than to himself.

In such a climate, the regime quickly became infatuated with the Courts of Prompt Justice. Initially, nine such courts were formed, all based in Khartoum and each presided over by three judges, though provincial governors were ordered to follow suit as soon as possible. Later, the number of courts in Khartoum was increased to twelve. While it was stipulated that the chief judge of each court was to possess some degree of legal training, the other two members could be drawn from among military officers, the police forces, the intelligence apparatus, and the prisons – and indeed, each of the Khartoum-based courts featured judges drawn from these institutions.<sup>23</sup> A new attorney general’s office was created as well, designed to operate

---

<sup>21</sup> See “Republican Order to Declare a State of Emergency in the Country,” *Al-Ṣahāfa* April 30, 1984, p. 1; and “Mayor Explains the Purpose of the State of Emergency,” *Al-Ṣahāfa* April 30, 1984, p. 1.

<sup>22</sup> “Tragedy in Omdurman” *Sudanow* April, 1984, p. 10.

<sup>23</sup> “Announcement of the Formation of Emergency Courts” *Al-Ṣahāfa* May 2, 1984, p. 1.



autonomously from the regular attorney general and with exclusive control over the Courts of Prompt Justice.

According to an explanatory note distributed by the government, the new courts were given jurisdiction over essentially three different categories of crimes.<sup>24</sup> First, they were empowered to hear all cases relating to crimes against the state and public security. This included “fomenting hatred against the state, spreading false news in order to damage security, stability, or public peace, or inciting sectarian strife between citizens.” Also listed were crimes relating to the armed forces, including incitement to rebellion, desertion, or disobedience. By and large, these were crimes under articles 104 to 114 of the Penal Code. Second, the courts were given jurisdiction over crimes stemming from the passage of the September Laws. These included prostitution and other sexual offences, as well as the sale, purchase, or transport of alcohol. However, the majority of crimes handed to the Prompt Justice Courts fall into the third category, what we might call economic or market-based offenses. Chief among these was smuggling, as well as hoarding and price gouging.

Justice under these courts was, more often than not, swift and spectacular. Sentences were carried out immediately, often in front of large crowds. By the end of the first week, Sudan’s two daily newspapers, *Al-Sahāfa* and *Al-Ayām*, were publishing on their first two pages a summary of the previous day’s most notable trials, replete with the names of the defendants and a description of their sentences. Popular punishments included fines, flogging, and brief prison sentences (e.g. one to three months). Much less common were amputations and cross amputations (the amputation of one hand and the opposite foot), an operation that was carried out in public by a physician. There is no reliable figure on the number of amputations carried out in Sudan during this period, but some estimates put it at upwards of one hundred and twenty-five.<sup>25</sup>

<sup>24</sup> “Explanatory Note for Emergency Order 1984 on the Formation and Procedure of the Emergency Courts” *Al-Sahāfa* May 2, 1984, p. 7.

<sup>25</sup> “Amputees Plea for Help” *The Sudan Times* November 26, 1986, p. 1.

The first death sentence was handed down on June 15, and approved by Numayri two days later.<sup>26</sup>

As for the non-emergency courts, they were left to carry on as before, but with duties limited to clearing their case backlog and presiding over civil matters. Even these responsibilities were gradually transferred to the Prompt Justice courts, which in late June began hearing civil disputes as well.<sup>27</sup> At first, Chief Justice Dafallah attempted to compete with the Prompt Justice courts, both in speed and in zeal to implement *shari'a*. Vowing to undertake a “comprehensive rationalization” (*al-tarshīd al-shāmal*) of the judiciary, he swore that his judges would cancel their vacations, work longer hours, and prioritize moral and economic crimes. However, this promise of procedural “rationalization, simplification, and abbreviation” failed to impress Numayri, and the growth of the Prompt Justice system continued unabated.<sup>28</sup>

The state of emergency was finally lifted in September 1984, but the Courts of Prompt Justice were not abolished. On the contrary, many of the system’s officials were transferred into the regular judiciary, where they replaced judges of more questionable loyalty. Among the first to go was Chief Justice Dafallah, who was replaced by the Prompt Justice judge Fuad Amin Abd al-Rahman. Three more of his colleagues joined him on the high court by the end of the year, with many other Prompt Justice judges being appointed to the benches of important appellate and provincial courts throughout the country. These men brought to their new jobs the same political commitments and sympathies that they had displayed in their old positions. Finally, the distinction between the two court systems was erased entirely with the passage of the Judiciary Act of 1984 later that month, which transformed the Prompt Justice courts into criminal courts and integrated them fully into the judicial hierarchy. Around the same time, a new Criminal Court and Administrative Court system was created to conduct corruption trials of public officials, again staffed largely by former judges of Prompt Justice courts (Zein 1989, 225-231).

<sup>26</sup> “The President Supports the First Death Sentence by Hanging for the Crime of Adultery [*zina*] by an Emergency Court” *Al-Sahāfa* June 17, 1984, p. 1.

<sup>27</sup> “Civil Emergency Courts Begin Their Work” *Al-Sahāfa* June 17, 1984, p. 1.

<sup>28</sup> “The Judiciary Mobilizes Its Agencies for Reform and Comprehensive Rationalization” *Al-Sahāfa* May 3, 1984, p. 1.



Thus the cumulative effect of Sudan's Judicial Revolution was to establish an entirely new judicial system, one staffed with personnel known to be sympathetic either to Numayri, to Turabi, or both. Of course, the government had greatly antagonized most judges in the "regular" judiciary in the process, but their hostility was vitiated by two key facts. First, their relations with the regime were already extremely poor, so there was very little that the government's reforms could do at this point to make things worse. Second, Numayri's decision effectively to combine the regular and Prompt Justice judiciaries injected into the legal system dozens of high-ranking judges deeply loyal to the incumbent elites. This decision by the regime ultimately proved especially important, since it made it much harder for future governments in Sudan to disentangle the regular judges who had risen through the ranks of the common law judiciary from those who had only come to the fore during the Judicial Revolution.

### ***Transitional Justice and the Fate of Former Elites***

The long-term effects of these judicial reforms, however, are more difficult to assess. In March 1985, an alliance of students, professional unions, and opposition parties staged a massive anti-regime demonstration. After several days of scattered violence and escalating tensions, the military decided to intervene decisively on the side of the protesters. On April 6, senior officers announced that they were deposing Numayri and forming a military-led transitional government. Almost immediately afterward, the Prompt Justice courts were abolished, the Chief Justice was forced to resign, and many former regime elites were charged with corruption, systematic torture, and murder. One year later, the transitional government held Sudan's first multiparty elections in more than a decade, returning to power Numayri's old foe, Sadiq al-Mahdi.

Yet while each of these steps was extensively covered in the press and celebrated by much of the public, their actual impact on the former regime's members and their policies is less clear. The September Laws, for example, were never repealed. This is largely because of pressure from the ICF, but it is also due to the intervention of many judges, lawyers, and military officers who were sympathetic to the Islamic project. Though officially suspended, these laws remained a part of the Sudanese legal system until 1991, when they were replaced with an even more comprehensive set of laws based on *shari'a*. Nor were either the transitional government or al-Mahdi able to reverse Numayri's centralization of administrative control. As a result, the civil

war with the south continued unabated, while tensions between the government and other outlying provinces (e.g. Darfur) grew more acute.

As for the former regime elites themselves, they emerged after the revolution more or less unscathed.<sup>29</sup> Numayri had fled to Egypt following the uprising, and despite enormous pressure from the transitional government, the attorney general refused to try him *in absentia*.<sup>30</sup> Two of his ministers, vice-president Umar Muhammad al-Tayyib and presidential advisor Bahaa al-Din al Idris, received lengthy prison sentences, but most other high-ranking members were either pardoned, given token sentences, or allowed to escape all punishment whatsoever (Khalid 1986b; Berridge 2015). In fact, in the case of al-Tayyib, his trial was nearly derailed altogether when the government's lead investigator attempted to act as defense counsel. While many in the judiciary were frustrated by these half measures, there was little will among senior judges to hold the former regime to account.

Significantly, those members of the regime most involved in the Judicial Revolution were the least likely to be prosecuted. This includes Turabi and his allies in the ICF, who in many respects emerged during the democratic period in stronger condition than they were under Numayri. Personal and ideological relationships appear to have been particularly crucial here – indeed, Turabi himself attributes the judiciary's failure to prosecute him to the fact that he was close friends with the attorney general (Berridge 2015, 191). As a result, he was able to re-enter Sudanese politics almost immediately, served in the al-Mahdi government, and would go on to be the architect of the coup that brought him and Umar al-Bashir to power in 1989.

The Prompt Justice courts themselves left a more ambiguous legacy. Though officially abolished after the revolution, many of those who had served in their ranks continued their judicial careers. Even Makashfi Taha al-Kabbashi, a notorious Supreme Court judge who had presided over some of the most infamous show trials of the Numayri era, had his conviction for professional misconduct overturned on grounds of judicial immunity.<sup>31</sup> In the end, Sudan's

<sup>29</sup> For a collection of court decisions from political trials during this period, see Riyad 1987.

<sup>30</sup> "SPLA Radio Views 'Controversy' Over Numayri Trial." FBIS-MEA-85-131, July 8, 1985.

<sup>31</sup> See *Government of Sudan vs. Al-Makashfi Taha al-Kabbashi*, SC, *SLJ&R* (1989).



judicial institutions remained deeply influenced by the Judicial Revolution, providing crucial cover for former regime elites, particularly members of the ICF. Thus, the regime's interference in judicial affairs, which had so greatly antagonized Sudan's judges during the early 1980s, paid off handsomely following its overthrow – and in the case of Turabi, would benefit him enormously upon his return to power.

#### **IV. Regime–Judiciary Relations in Comparative Perspective**

The Sudan case study presented above strongly corroborates the hypotheses proposed in this article, illustrating the important role that regime–judiciary relations can play in determining the nature, timing, and consequences of judicial reform. To further assess its explanatory power, this framework is extended below to three brief case studies from Egypt (1998–2013), Argentina (1983–1998), and Mexico (1994–2000). As examples of (semi-)authoritarian regimes that all experienced different forms of competition, regime breakdown, and political transition, these countries offer an opportunity to test how the regime–judiciary relations variable can shape political incentives under radically different circumstances. They also allow us to explore how, suitably adapted, the Insurance Theory's explanation for judicial reform can gain purchase in cases where it is typically dismissed as inapplicable.

##### *Egypt*

The case of Egypt under Mubarak (1982–2011) presents an instance in which an unstable autocrat reaped significant benefits from leaving office during a period of relatively friendly regime–judiciary relations. By the time that a popular uprising overthrew the government during the so-called Arab Spring of 2010–2011, Mubarak had just concluded a decade-long campaign to rein in the power and autonomy of the courts. Interestingly, this assault on the judiciary occurred at a time of intense political competition in Egypt, during which labor unions, human rights groups, and opposition parties had all mounted one of their most sustained challenges to the government's rule since the 1970s. Thus, by choosing such a volatile moment to undermine the judiciary's independence, Mubarak was acting counter to what the Insurance Theory would predict.

However, this strategy becomes more understandable once we appreciate how strained regime-judiciary relations had become during this period, particularly between the government and the Supreme Constitutional Court. During the 1990s, the Court had emerged as a key resource to the political opposition and a potential liability for the regime. Thus, as the political environment grew steadily more competitive, the government made reforming the Court a major component of its overall strategy. This included a series of controversial judicial appointments, court packing, and the creation of a new Presidential Elections Committee that effectively blocked the judiciary from monitoring elections or hearing any suits related to electoral fraud (Moustafa 2007, 178-218). Admittedly, this strategy met with mixed success. On the one hand, Mubarak's heavy-handed interference generated resentment among many rank-and-file judges, leading to large-scale judicial protests in the mid-2000s. On the other hand, the government was able to place avowed regime loyalists in key judicial positions, vantage points from which more activist and reform-minded judges could be cajoled, contained, or disciplined as needed (Moustafa 2007, 198-202; Al-Khudayri 2008). The result is that by the late 2000s, the judges occupying the country's highest courts were much more favorably disposed toward the regime, and concomitantly much more skeptical toward reformist voices within their ranks.

This strategy paid immediate dividends following the regime's overthrow in 2011. Over the next two years, the courts intervened at key points during the political transition in order to protect the old regime's policies, shield its members from accountability, and undermine the legitimacy of their replacements. This dynamic is especially apparent in the rulings by the Supreme Constitutional Court and High Administrative Court on electoral law, a series of decisions that drastically limited the ability of President Muhammad Morsi to stabilize his government or implement its policies.<sup>32</sup> In their comments outside of the courtroom, meanwhile, many judges railed against Morsi and the Muslim Brotherhood, both of whom they claimed were puppets of a foreign power and would lead the nation to disaster. Ultimately, these attacks by the

---

<sup>32</sup> In April 2012, the High Administrative Court dissolved the body tasked with drafting the country's new constitution because it improperly included members of the National Assembly, parliament's lower house. Two months later, the Supreme Constitutional Court dissolved the National Assembly itself, this time on the grounds that the new electoral law had given an unfair advantage to candidates running on party lists over those running as independents. Both of these decisions, particularly the dissolution of the National Assembly, were widely viewed as devastating for the Muslim Brotherhood's interests (Brown 2013, 6-8).



judiciary were a crucial factor in returning the country to authoritarian rule in 2013, and, in the months that followed, overturning the convictions of many Mubarak-era elites. By contrast, members of the Morsi government (the new former elites) received long prison terms after trials that were widely condemned by international observers as fatally flawed (IBAHRI 2014).

### *Argentina*

As a point of comparison, the case of Argentina illustrates the dangers to an authoritarian regime of entering into periods of political competition with a hostile judiciary. During the years of the Dirty War (1974–1983), Argentina’s courts played a relatively minor role in the military junta’s coercive apparatus. This reflects the failure of the regime to establish a clear legalistic basis for its rule. Unlike in neighboring Chile, where Pinochet had worked hard to cultivate a close ideological kinship with his judges, the Argentine junta relied on extra-legal means of repressing its enemies, including murder, forced disappearance, and intimidation (Pereira 2005, 119). As a result, it was content to let its relationship with the judiciary deteriorate. Judges were subject to frequent executive interference, purges, and political pressure, but little effort was made on the part of the junta to leave a more lasting judicial legacy (Pereira 2005; Aguilar 2013). Thus, by the time that it became apparent in the early 1980s that the regime was unstable, regime–judiciary relations were extremely poor.

For members of the military junta, the danger of losing power during a period of poor regime–judiciary relations became obvious almost immediately following their overthrow in 1983. Within a week of being sworn in, the new Radicalist government of Raul Alfonsin announced that it was revoking the “Self-Amnesty Law” passed by the junta in the waning days of its rule. Legal proceedings were then begun against high-ranking leaders of the former regime (the so-called Trial of the Juntas), all of whom were eventually convicted. Fearful of triggering an authoritarian relapse, Alfonsin had promised the military that no other members of the junta would be prosecuted. The judiciary, however, proved so eager to initiate more trials that the government was forced to pass a series of amnesty laws in 1986 and 1987. Even then, however, judges and prosecutors accelerated their efforts, canceling their January holiday in a race to secure as many convictions as possible before the laws came into effect (Helmke 2005, 81-82).

This punishment at the hands of an angry judiciary taught former regime elites a valuable lesson, one they put to work following the election of a Peronist government in 1989. Under pressure from the military, President Carlos Menem pardoned hundreds of officers convicted under Alfonsin, including the entirety of the junta's leadership. Ignoring public outrage, he also moved in his first term to rein in the independence of the judiciary by replacing the Chief Prosecutor and firing all public prosecutors who persisted in investigating authoritarian-era crimes. Simultaneously, the size of the Supreme Court was expanded and packed with *Menemistas* – pro-Menem judges with poor qualifications but unquestionable loyalty to the regime. Similar judges were appointed to the newly created Court of Cassation, the nation's highest criminal court (Gonzalez Ocantes 2014, 485). As a result of these steps, the judiciary grew much less motivated to revisit the military's crimes or hold its former leaders to account (Larkins 1998). Near the end of his second term in office, Menem did implement certain reforms designed to increase judicial independence, including the creation of a judicial council. According to some scholars (e.g. Finkel 2008, 53–58), this policy was a response to the mounting likelihood that Menem's party would lose the upcoming elections. However, it is worth noting once again that the government's shift toward supporting judicial independence only occurred *after* its relations with Argentina's judges had been improved through the strategic appointment of allies and loyalists. Thus, greater executive interference preceded, and may well have been a necessary condition for, the establishment of an independent judiciary.

### ***Mexico***

Finally, a focus on regime–judiciary relations can help us to resolve certain inconsistencies in the way that Insurance Theory has been used to explain judicial policy in Mexico. Following his election in 1994, President Ernesto Zedillo implemented a series of reforms designed to increase the power and independence of the judiciary. This included reducing the president's role in the selection of Supreme Court justices, establishing the courts' powers of constitutional review, and creating the Federal Judicial Council to oversee lower-court appointments and administration (Domingo 2000). Finkel (2008) has argued that these reforms were motivated by the declining political fortunes of the long-ruling PRI. By reducing the role of



the executive branch in judicial affairs, Zedillo was hedging his bets in case his party was forced from power.

As other scholars have pointed out, however, Zedillo implemented his judicial reforms at a moment of relatively *low* political competition (Michel 2009; Kapiszewski 2010; Ansolabehere 2011). In 1994, the PRI had just won re-election by a comfortable margin, extending its sixty-five year domination of Mexican politics. True, the PRI would go on to lose the 2000 election and be replaced by the opposition Partido Acción Nacional (PAN), but Zedillo could not have known this when, flush from his recent victory, he decided to empower the courts. As a result, some have argued that the Insurance Theory is uniquely ill suited to the Mexican case, and that Zedillo's reforms are better understood as a search for increased legitimacy (Inclan Oseguera 2009) or as a way to maintain elite cohesion (Magaloni 2008b).

While these critics may be right to question the Insurance Theory's applicability in this instance, it is worth asking how great a risk Zedillo was actually taking when he chose to empower the courts. Regime–judiciary relations under the PRI were extremely positive. Through its seven decade-long domination of law faculties, bar associations, appointments procedures, and disciplinary boards, it had fashioned a remarkably loyal and ideologically friendly bench. Judicial salaries had also been dramatically increased in the 1980s, further consolidating a positive relationship between the party and the courts (Domingo 2000). As a result, the costs to the PRI of empowering the judiciary are likely to have been far lower than in Argentina or Egypt, where regime–judiciary relations were more fraught.<sup>33</sup> Under the logic of the Insurance Theory, therefore, Mexico's low level of political competition may have been sufficient to prompt what seemed, to Zedillo, a relatively harmless series of judicial reforms.

---

<sup>33</sup> This intuition ended up being confirmed by subsequent events. While the Supreme Court handed Zedillo a series of defeats in the late 1990s, the long-term trend of the Court's decisions was much more favorable toward the PRI. This was true even following the PRI's loss of power in 2000, after which the Court ruled in its favor in the overwhelming number of high-profile cases (Magaloni 2008b, 201–203).

## V. Conclusion

Courts in authoritarian regimes matter. Acknowledgement of this fact has triggered a cascade of research on why autocrats might choose to cultivate strong and independent judiciaries in what would otherwise seem to be unfertile soil (Balasubramaniam 2009; Moustafa 2014). Yet as this article has shown, proponents of the Insurance Theory of judicial empowerment, long the dominant explanatory framework in the law and politics literature, face unique challenges in applying their model to authoritarian regimes. My purpose here has been both to describe those challenges and present a possible solution.

Why then did the Numayri regime, after almost a decade of disengagement and neglect, suddenly embark on an ambitious and highly disruptive program of judicial reform? Using an augmented version of the Insurance Theory, this article has argued that the regime was responding in part to the rise of intense political competition. Under “normal” circumstances, the scholarly literature suggests that this competition should have created strong incentives for the regime to establish independent and powerful judicial institutions, since these would act as a form of political insurance in the event that it ever lost power. But since the relationship between the Numayri regime and the judiciary was already so poor, political competition had the opposite effect, lowering the costs of executive interference in judicial affairs and incentivizing the government to launch the Judicial Revolution. By selectively constraining hostile courts and strengthening friendly ones, the regime was pursuing a long-term strategy designed to maximize its position in the post-authoritarian political landscape.

This model of regime behavior, in which political competition during periods of poor regime–judiciary relations results in *less* judicial independence instead of more, can be applied to other authoritarian countries as well. Authoritarian rulers frequently find themselves at odds with their judiciaries, especially when the judges were appointed prior to the ruler coming to power. Such judges may not share the new government’s values or policy concerns, leading to spiraling relations that render an independent judiciary unattractive as a form of political insurance. A similar process is likely to unfold when the underlying source of the regime’s weakness is also responsible for angering the judiciary, such an economic crisis or a military defeat. These events



can greatly undermine regime strength and raise the incentives for elites to seek out political insurance, while at the same time turning members of the judiciary into implacable foes.

Yet the precise mechanisms by which authoritarian regimes respond to this problem will vary from case to case. Some may attempt to mollify their judges, hoping to repair regime–judiciary relations in time to render them a useful form of political insurance. Others may ignore the judiciary all together and focus their energy on addressing the root causes of regime instability. Here it will be important for scholars to consider how historical and ideational factors have shaped the regime–judiciary relationship. Can it be repaired? Can old traumas be healed and trust restored? Or do the differences run too deep to ever be overcome? These are, perhaps, not the sorts of questions that proponents of Insurance Theory are accustomed to asking, but they will be necessary if its logic is to be extended to authoritarian countries. The framework provided here is meant to show what such an inquiry might look like.

## Bibliography

- Acemoglu, Daron. 2003. “Why Not a Political Coase Theorem? Social Conflict, Commitment, and Politics.” *Journal of Comparative Economics* 31(4): 620-652.
- Acemoglu, Daron, and James A. Robinson. 2006. “Economic Backwardness in Political Perspective.” *American Political Science Review* 100(1): 115-131.
- Aguilar, Paloma. 2013. “Judiciary Involvement in Authoritarian Repression and Transitional Justice: The Spanish Case in Comparative Perspective.” *The International Journal of Transitional Studies* 1: 1-22.
- Ansolabehere, Karina. 2011. Review of *Judicial Reform as Political Insurance: Argentina, Peru, and Mexico in the 1990s*, by Jodi Finkel. *Journal of Latin American Studies* 43(1): 189-191.
- Balasubramaniam, Ratna Reuban. 2009. “Judicial Politics in Authoritarian Regimes.” *University of Toronto Law Journal* 59(3): 405-415.
- Barros, Robert. 2002. *Constitutionalism and Dictatorship: Pinochet, the Junta, and the 1980 Constitution*. Cambridge: Cambridge University Press.
- Berridge, W.J. 2015. *Civil Uprisings in Modern Sudan: The ‘Khartoum Springs’ of 1964 and 1985*. London: Bloomsbury Press.

- Besley, Timothy, and Maitreesh Ghatak. 2010. "Property Rights and Economic Development." In *Handbook of Development Economics: Volume 5*, edited by Kenneth J. Arrow and Michael D. Intriligator, 4525-4595. New York: Elsevier.
- Besley, Timothy, Torsten Persson, and Marta Reynal-Querol. 2013. "Political Instability and Institutional Reform: Theory and Evidence." Working Paper: 1-49.
- Bill Chavez, Rebecca. 2007. "The Appointment and Removal Process for Judges in Argentina: The Role Judicial Councils and Impeachment Juries in Promoting Judicial Independence." *Latin American Politics & Society* 49(2): 33-58.
- Boix, Carles, and Milan W. Svolik. 2013. "The Foundations of Limited Authoritarian Government: Institutions, Commitment, and Power-Sharing in Dictatorships." *Journal of Politics* 75(2): 300-316.
- Brown, Nathan. 2013. "Egypt: A Constitutional Court in an Unconstitutional Setting." Presented at the Constitutional Transitions and Global Comparative Law Colloquium, pp. 1-19. New York University.
- Campante, Filipe R., Davin Chor, and Quoc-Anh Do. 2009. "Instability and the Incentives for Corruption." *Economics & Politics* 21(1): 42-92.
- Cheesman, Nicholas. 2011. "How an Authoritarian Regime in Burma Used Special Courts to Defeat Judicial Independence." *Law & Society Review* 45(4): 801-830.
- Collins, Robert. 2008. *A History of Modern Sudan*. Cambridge: Cambridge University Press.
- Debs, Alexandre, and H.E. Goemans. 2010. "Regime Type, the Fate of Leaders, and War." *American Political Science Review* 104(3): 430-445.
- Diaz-Asensio, Juan Antonio Mayoral. 2012. *¿Por Que Los Autocratas Limitan Judicialmente Su Poder? Un Analisis Comparado Del Establecimiento De Altos Tribunales En Regimenes Autoritarios.*" *Revista de Estudios Políticos* 158: 41-74.
- Domingo, Pilar. 2000. "Judicial Independence: The Politics of the Supreme Court in Mexico." *Journal of Latin American Studies* 32(3): 705-735.
- El-Affendi, Abdelwahab. 1989. *Turabi's Revolution: Islam and Power in Sudan*. London: Grey Seal.
- Erdos, David. 2010. *Delegating Rights Protection: The Rise of Bills of Rights in the Westminster World*. Oxford: Oxford University Press.
- Finkel, Jodi. 2005. "Judicial Reform as Insurance Policy: Mexico in the 1990s." *Latin American Politics & Society* 47(1): 87-113.
- 2008. *Judicial Reform as Political Insurance: Argentina, Peru, and Mexico in the 1990s*. Notre Dame: Notre Dame Press.
- Gandhi, Jennifer, and Adam Przeworski. 2007. "Authoritarian Institutions and the Survival of Autocrats." *Comparative Political Studies* 40(1): 1279-1301.



- Ginsburg, Tom. (2003). *Judicial Review in New Democracies: Constitutional Courts in Asian Cases*. Cambridge: Cambridge University Press.
- Ginsburg, Tom, and Mila Veersteg. 2014. "Why Do Countries Adopt Constitutional Review?" *Journal of Law, Economics, and Organization* 30(3): 587-622.
- Gonzalez Ocantes, Ezequiel. 2014. "Persuade Them or Oust Them: Crafting Judicial Change and Transitional Justice in Argentina." *Comparative Politics* 46(4): 479-498.
- Helmke, Gretchen. 2005. *Courts under Constraints: Judges, Generals, and Presidents in Argentina*. Cambridge: Cambridge University Press.
- Hilbink, Lisa. 2007. *Judges Beyond Politics in Democracy and Dictatorship: Lessons from Chile*. Cambridge: Cambridge University Press.
- 2009. "The Constituted Nature of Constituents' Interests: Historical and Ideational Factors in Judicial Empowerment." *Political Research Quarterly* 62(4): 781-797.
- Hirschl, Ran. 2004. *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism*. Cambridge: Harvard University Press.
- 2010. *Constitutional Theocracy*. Cambridge: Harvard University Press.
- Inclan Oseguera, Silvia. 2009. "Judicial Reform in Mexico: Political Insurance or the Search for Political Legitimacy?" *Political Research Quarterly* 62(4): 753-766.
- Ingram, Matthew. 2012. "Crafting Courts in New Democracies: Ideology and Judicial Council Reforms in Three Mexican States." *Comparative Politics* 44(4): 439-458.
- 2013. "Elections, Ideology, or Opposition? Assessing Competing Explanations of Judicial Spending in the Mexican States." *Journal of Law, Economics, and Organization* 29(1): 178-209.
- International Bar Association Human Rights Institute (IBAHRI). 2014. "Separating Law and Politics: Challenges to the Independence of Judges and Prosecutors in Egypt." London: International Bar Association.
- Johnson, Douglas. 2011. *The Root Causes of Sudan's Civil Wars: Peace or Truce*. Suffolk: James Currey.
- Al-Kabbashi, Al-Makashfi Taha. 1986. *Taṭbīq al-Shari'a al-Islāliyya fī al-Sūdān bayna al-Haqīqa wa al-Ithāra*. Cairo, Al-Zahra li'l-Ilām al-Arabi.
- Kapiszewski, Diana. 2010. Review of *Judicial Reform as Political Insurance: Argentina, Peru, and Mexico in the 1990s*, by Jodi Finkel. *Bulletin of Latin American Research* 29(3): 394-396.
- Khalid, Mansour. 1985a. *Al-Sudan wa al-naqf al-mazlim: qisa al-fasad wa al-istibdad*. London: Adeam Publishing House.
- 1985b. *Nimeiri and the Revolution of Dis-May*. London: Kegan Paul International.

- 1986a. *Al-Fajr al-Kādhib: Numayrī wa Tahrif al-Shari'a*. Cairo: Dar al-Hilal.
- 1986b. *The Government They Deserve: The Role of the Elite in Sudan's Political Evolution*. London: Kegan Paul International.
- Al-Khudayri, Mahmud. 2008. "The Law of Judicial Authority and Judicial Independence." In *Judges and Political Reform in Egypt*, edited by Nathalie Bernard-Maugiron, 45-58. Cairo: The American University of Cairo Press.
- Landes, William and Richard Posner. 1975. "The Independent Judiciary in an Interest-Group Perspective." *Journal of Law and Economics* 18(3): 875-901.
- Larkins, Christopher. 1998. "The Judiciary and Delegative Democracy in Argentina." *Comparative Politics* 30(4): 423-442.
- Levitsky, Steven, and Lucan Way. 2010. *Competitive Authoritarianism: Hybrid Regimes after the Cold War*. Cambridge: Cambridge University Press.
- Lust-Okar, Ellen. 2004. "Divided They Rule: The Management and Manipulation of Political Opposition." *Comparative Politics* 36(2): 159-179.
- Magalhaes, Pedro. 1999. "The Politics of Judicial Reform in Eastern Europe." *Comparative Politics* 32(1): 43-62.
- Magaloni, Beatriz. 2008a. "Credible Power-Sharing and the Longevity of Authoritarian Rule." *Comparative Political Studies* 41(4-5): 715-741.
- 2008b. "Enforcing the Autocratic Political Order and the Role of Courts: The Case of Mexico." In *Rule by Law: The Politics of Courts in Authoritarian Regimes*, edited by Tom Ginsburg and Tamir Moustafa, 180-208. Cambridge: Cambridge University Press.
- Massoud, Mark Fathi. 2012. "Lawyers and the Disintegration of the Legal Complex in Sudan." In *Fates of Political Liberalism in the British Post-Colony: The Politics of the Legal Complex*, edited by Terrence C. Halliday, Lucien Karpik, and Malcolm M. Feeley, 193-218. Cambridge: Cambridge University Press.
- 2013. *Law's Fragile State: Colonial, Authoritarian, and Humanitarian Legacies in Sudan*. Cambridge: Cambridge University Press.
- Michel, Veronica. 2009. Review of *Judicial Reform as Political Insurance: Argentina, Peru, and Mexico in the 1990s*, by Jodi Finkel. *Political Science Quarterly* 124(2): 379-380.
- Moustafa, Tamir. 2007. *The Struggle for Constitutional Power: Law, Politics, and Economic Development in Egypt*. Cambridge: Cambridge University Press.
- 2014. "Law and Courts in Authoritarian Regimes." *The Annual Review of Law and Social Science* 10: 281-299.
- Mustafa, Zaki. 1973. "Opting Out of the Common Law: Recent Developments in the Legal System of the Sudan." *Journal of African Law* 17(2): 133-148.



- North, Douglass C., and Barry R. 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.
- Olson, Mancur. 1993. "Dictatorship, Democracy, and Development." *American Political Science Review* 87(3): 567-576.
- Pereira, Anthony. 2005. *Political (In)Justice: Authoritarianism and the Rule of Law in Brazil, Chile, and Argentina*. Pittsburgh: University of Pittsburgh Press.
- Polishchuk, Leonid, and Georgiy Syunyaev. 2014. "Ruling Elites' Rotation and Asset Ownership: Implications for Property Rights." *Public Choice* 162(1-2): 159-182.
- Popova, Maria. 2010. "Political Competition as an Obstacle to Judicial Independence: Evidence from Russia and Ukraine." *Comparative Political Studies* 43(10): 1202-1229.
- Ramseyer, J. Mark. 1994. "The Puzzling (In)Dependence of the Courts: A Comparative Approach." *The Journal of Legal Studies* 23(2): 721-747.
- Randazzo, Kirk, Douglas M. Gibler, and Rebecca Reid. 2015. "Examining the Development of Judicial Independence." Working Paper: 1-25.
- Riyad, Henri. ed. 1987. *Ashar al-Muḥākamāt al-Siyāsiyya fī al-Sūdān: Istaglāl al-Nufuth, Tahrīb al-Falāsha, al-Igtiyāl al-Siyāsī, al-I'tiqāl al-Tahafuzī*. Beirut: Dar al-Jil.
- Salman, Salman. 1983. "Lay Tribunals in the Sudan: An Historical and Socio-Legal Analysis." *Journal of Legal Studies* 21: 61-128.
- Stephenson, Matthew. 2003. "'When the Devil Turns...': The Political Foundations of Independent Judicial Review." *The Journal of Legal Studies* 32(1): 58-89.
- Svensson, Jakob. 1998. "Investment, Property Rights, and Political Instability: Theory and Evidence." *European Economic Review* 42: 1317-1341.
- Taha, Haidar. 2010. *Al-Ikhwan wa al-jaish: qisa al-jabha al-islamiyya wa al-sulta fi al-Sudan*. Cairo: Dar al-Madarik.
- Toharia, Jose. 1975. "Judicial Independence in an Authoritarian Regime: The Case of Contemporary Spain." *Law & Society Review* 9(3): 475-496.
- Wright, Joseph, and Abel Escriba-Folch. 2012. "Authoritarian Institutions and Regime Survival: Transitions to Democracy and Subsequent Autocracy." *British Journal of Political Science* 42(2): 283-309.
- Zein, Ibrahim. 1989. "Religion, Legality, and the State: The 1983 Sudanese Penal Code." (PhD diss., Temple University).