

The Rule of Law in Factionalized Societies

by

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It is not a simple thing to know what the rule of law is or why it is established when and where it is established. This is a highly preliminary effort.

On one view, the rule of law is associated with regularity and predictability, so that it facilitates value-creating behavior by virtue of the stability of expectations it engenders: it is, in the language of game theory, a coordination mechanism (Weingast).^{*} On another view, the rule of law is a system of governance by rules that have content conforming to certain minimal ideals—for example, that they be general, public, promulgated in advance, possible to obey, and so on, that, in other words, they conform to an “inner morality” (Fuller). There are also competing views of the supports for the rule of law where it becomes established. On one side are those who claim that the rule of law becomes established where its products are useful, especially to politicians (Shapiro and Stone Sweet). On the other are those who suggest that law-abiding behavior is the product of a belief in the rightness of obedience (Tyler). Although these reasons do not relate to the same phenomena, still we might say that on one side is a view of the subject that emphasizes utility, while on the other is a view that emphasizes conformity to ideals or embeddedness in culture.

^{*}Lacking time for a full list of references, the parentheticals provide a few authors' names.

Now it is striking that neither view can account easily for the initial growth of the rule of law in a given country. It is very difficult to know *a priori* whether an institution such as the rule of law will have utility, and if the institution is new it is, by definition, not embedded in a local culture. While either of these features is consistent with perpetuation of the rule of law once established, something more is required to explain how it gets established.

This sort of origination puzzle is particularly acute for the rule of law for two reasons. First, insofar as the rule of law demands obedience even when it is inconvenient and insofar as it binds governors as well as the governed it habitually gets in the way of the powerful. So they have every reason to reject it. Second, we know that for most societies the idea of law as embodying purposive human action to create rules that affect behavior—as opposed to law as a series of divine commands or law as simple dispute resolution with only implicit reference to general rules—was alien until a century or two ago. And this may give us a clue to whether we need to choose between the two views with which we began. In most of Asia, Africa, and the Middle East, the rule of law was brought by colonial powers. Is it not plausible to assume that, all else equal, the longer and deeper the colonial imprint the more likely the rule of law was to establish itself in the collective consciousness of those subject to it? Jens Meierhenr that argues that the South African transition from apartheid was facilitated by the existence of law and courts that, outside the area of apartheid, had a long tradition of legality that allowed the contending forces to trust each others' commitments as the process unfolded. And it seems likely that the depth of the colonial legal inheritance in India has facilitated the embeddedness of the rule of law and the practice of judicial review by the Supreme Court of India.

None of this, however, tells us how such a tradition gets started if it is not transplanted and nurtured by a (paradoxically authoritarian) colonial power. Why is it that so many judicial training programs fail to produce independent judiciaries? ** It would take a herculean historical analysis to demonstrate that there is a single path to this destination, but at least one plausible route involves a certain configuration of factional alignments.

In *The Spirit of the Laws*, Montesquieu declares that “there is no liberty if the judiciary power be not separated from the legislative and executive” (I: XI: § 6). Under what conditions is this separation likely to be achieved? If the executive dominates the legislature, as it does in a considerable number of Asian and African states, even states with relatively democratic elections, the judiciary is most unlikely to be able to marshal the resources to create and maintain its own independence. It is, as Hamilton famously says in *Federalist* Number 78, the “least dangerous branch,” possessed of “neither the purse nor the sword,” which is to say it is inherently weak and dependent on external support for its independence. That external support is most likely to be forthcoming when the executive and legislature are divided, when there is a strong minority in the legislature, or when a nominally united ruling party is strongly divided by factional loyalties. At such times, courts can count on support from those who oppose the executive to shield them from reprisals for decisions that affect the executive’s interests.

If this is correct, it suggests that judicial independence in many states must await the development of serious competitive politics in the political branches (Ginsburg; others, too). The courts cannot lead democratic reform; they are the beneficiaries of that reform. No amount

**From this point on, I operationalize the rule of law as judicial independence, even though it undoubtedly involves much more than that.

of judicial training, no normative commitment to the rule, no imported statutes, or new court houses, or computerized case management systems can substitute for the protection that judges can have when political elites are divided.

Even then, judicial independence can be precarious if the executive is willing to incur the political costs of suppressing it. Consider an illustration from Malaysia.

In 1986 and 1987, in a series of cases, the Malaysian courts had ruled against the government. The cases were politically sensitive. One involved the withdrawal of a foreign journalist's work permit, another the detention of an opposition politician, a third a government contract awarded to an influential firm. On the horizon was an appeal that would determine the lawfulness of a close vote in an internal political party election in which Prime Minister Mahathir Mohamad had narrowly defeated a challenge from a former political ally. The future of the ruling party and of the prime minister himself was at stake. Before the appeal was heard, the lord president of the Supreme Court was suspended, the hearing was postponed, and a tribunal was constituted to decide whether the lord president should be dismissed. When a five member panel of the Supreme Court issued a stay of that tribunal's proceedings, all five judges were suspended, and two of them were ultimately dismissed. When the party case was eventually heard by a reconstituted bench, the prime minister's faction prevailed. The Malaysian judiciary, previously relatively compliant, was taught an unforgettable lesson in subservience.

It may have been accidental that the courts had felt at liberty to thwart the government in the series of cases that brought on the crisis, but it seems likely that the new atmosphere of political competition freed up the space for judicial independence. For the first time in decades, there had been a credible challenge to a ruling party accustomed to winning large majorities at the polls. It

turned out, however, that the prime minister had many more resources than were possessed by his opponents and infinitely more than the courts. Elites interested in the rule of law could murmur their dissatisfaction, and a few, including the dismissed lord president, could publish their critiques, but that was the limit of their ability. It may have seemed that political power was evenly divided between the two factions, but ultimate power was in the hands of one side alone.

Contrast the configuration in Indonesia after the fall of Suharto in 1998. The Indonesian courts have been, for decades, generally corrupt, incompetent, and subservient to political authority, so much so that their deplorable state was one reason for creating a constitutional court: it could be constituted and composed completely from scratch. In the first several years of its existence, the Indonesian constitutional court has shown signs of upholding the rule of law in ways undreamt of in Suharto's time. What, then, are its supports?

To answer this, a look at post-Suharto political alignments is indispensable. Early on, party leaders in the legislature were confronted with crowds in the street—competing crowds, antagonistic to each other and threatening extensive civil violence or warfare—and party leaders agreed to work together to reform the constitution and effectuate the transition to democracy. Their cooperation was facilitated by the fact that, electorally, they were only partially competitive with each other, for Indonesian parties are, in considerable measure, embedded in particular *aliran* or streams: modernist Muslim, traditionalist Muslim, or secular nationalist. Of course, their efforts were only cooperative within limits; notwithstanding the quasi-ascriptive basis of their core support, party fortunes rose and fell at the polls in 1999 and 2004. But, crucially, no party came close to dominating government. After the 2004 elections, the strongest party held fewer than one-quarter of the seats, and the ticket that ran successfully for president

and vice-president came from two different parties, as did all the competing tickets. The result since then has been a factional equilibrium (albeit perhaps increasingly fragile), in which courts—in this case, the Constitutional Court—has room in which to operate with some independence. (Even then, reform of the ordinary courts, which are often corrupt or incompetent, has been agonizingly slow.) There is certainly no equivalent of Mahathir, who can singlehandedly dismiss judges. If anyone tried to use formal powers for this purpose, others would step up to prevent it. Factional balance is the key to creating this space.

But what about factional balance with sharper elbows? Suppose there is violence or even warfare among groups competing to dominate the state. Under these circumstances, the courts can scarcely expect that their rulings in one direction or another will not encounter serious resistance from those who are disadvantaged by those rulings. And, indeed, it is difficult to identify any case of extreme civil violence in which courts were able to create or possibly even to maintain their independence. If this is correct, then, in general, it could be concluded that there is a curvilinear relation between divided power and judicial independence. Where a single party or military regime controls a state, the rule of law is not likely to emerge; where there is a serious division of power in a state, the rule of law is more likely to emerge; but where factional disputes preempt factional cooperation altogether, the rule of law is likely to suffer. Under such conditions, factional protection is no longer available for judicial independence. When warfare breaks out, the rule of law will generally decline, because warfare usually entails substantial deviations from legality, as it has, for example, in Sri Lanka on the government side over the last two decades. On the rebel side, what often emerges to replace the courts are crude, non-professional adjudicators operating arbitrarily within the ambit of the rebels' ideology, favoring

supporters and disfavoring opponents in the territory they control. This is far from the rule of law, and it resembles the single-party situation, only with generally greater brutality.

Probabilistically, it is likely that the curvilinear relationship just postulated is correct; but, before it is written in stone, a step back into the literature of the rule of law and judicial independence is warranted. That literature suggests there may be more than one path to the rule of law.

An alternative path is suggested by Shapiro and Stone Sweet, who argue that a major route to the legitimacy of judicial review consists of the ability of courts to make themselves useful to political decision makers. They cite judicial review as a way of helping to police boundaries between the central government and the states or provinces in federal countries. This becomes the opening wedge to judicial review more broadly. Their argument is that a federal system requires a neutral umpire, and for this purpose judicial independence is accepted, whereupon judicial review can be extended to other areas. Shapiro and Stone Sweet do not see this as the only path to wide-ranging judicial review, but as a common path. Their main point is that the rule of law often flourishes when the courts make themselves useful to those holding political power.

Similar arguments have been made by others, who suggest that, by adjudicating citizen complaints, courts can provide useful information to rulers about the performance of the bureaucracy (Rosberg, cited in Widner). Jennifer Widner proposes a three-step process of legitimizing judicial independence. First, the courts can make themselves useful by helping politicians root out corruption and by serving as a neutral arbiter between or among factions. Once they have this basic authority, courts can take the second step: building public support by

displaying their neutrality and efficiency to the public. The third step, according to Widner's study of Tanzania, is to encourage the growth of party competition, on the assumption that a competitive landscape furnishes a more secure environment for judicial independence. All of this assumes that first step, concerning corruption and factions, is one that political leaders are happy to have courts take. Often they will not be. Recall the Malaysian case, which involved a factional dispute.

There are other ways for the courts to make themselves useful, such as by providing a neutral forum for foreign investors who might otherwise fear for their capital. Many states that wish to attract foreign capital nevertheless do not see the need for the assistance of an independent judiciary, so the hypothetical existence of this function may not lead to the rule of law, as it has not in China. Alternatively, commercial disputes may be adjudicated fairly, as they are in Singapore, while political disputes are not, as they are not in Singapore. Likewise, even an authoritarian regime may wish to build public support by reassuring its subjects that the worst forms of arbitrariness will receive judicial correction. Widner cites Uganda under Museveni, but this is clearly an exceptional case.

Other writers argue that judicial independence emerges when current leaders are uncertain of their prospects and wish to build in insurance against repression by their opponents (Ginsburg). Although the precise mechanism is different, this points again to the positive role played by factional equilibrium, and indeed Mark Ramseyer argues that judicial independence is a function of party competitiveness, which explains why, in a dominant-party system such as Japan's, the judiciary's independence is quite limited.

The overall (still tentative) conclusions seem clear:

1. In most cases, robust political competition is a precondition to the development of judicial independence, rather than the other way round.
2. In some cases, courts may find alternative ways to make themselves useful to ruling politicians, even absent robust competition, and from this the courts may find ways to expand their mandate, but these paths are unusual and idiosyncratic.
3. Judicial independence in commercial cases can be limited to those cases and may not evolve into independence from ruling politicians even after considerable time has elapsed.
4. Without political support, what appears to be a significant rule-of-law inheritance can be reversed.
5. Severe factionalism or violent conflict is not likely to produce the equilibrium in which courts can find space in which to exercise judgment that is independent of political actors.
6. The most promising course to promote judicial independence lies in promoting democratic competition.

In short, judicial independence is generally an offshoot of moderate pluralism, expressed within rules of a democratic game.

This configuration, however, is not easy to arrange. Worse, democratic pluralism would be facilitated by the prior existence of the rule of law, the very condition we are aiming to achieve. Worse yet, most countries in transition to democracy are divided, many severely divided, among various ethnic, religious, racial, or linguistic groups. When we consider the character of the rule of law as a public good---meaning for present purposes that its benefits are available to regime

supporters and opponents alike---it becomes clear that a regime that does not represent all of the contending groups will be inclined to prefer the distribution of selective goods, those benefits that can be limited to its supporters, to public goods. And that means that such regimes, even if they are electoral democracies, will disfavor development of the rule of law. All in all, a discouraging picture.