Justice Institutions in Autocracies: A Framework For Analysis

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ABSTRACT
What role do justice institutions play in autocracies? We bring together the literatures on authoritarian political institutions and on judicial politics to create a framework to answer this question. We start from the premise that autocrats use justice institutions to deal with the fundamental problems of control and power-sharing. Unpacking “justice institutions” we argue that prosecutors and ordinary courts can serve, respectively, as “top-down” and “bottom-up” monitoring and information-gathering mechanisms helping the dictator in the choice between repression and cooptation. We also argue that representation in the Supreme Court and special jurisdictions enables the dictator and his ruling coalition to solve intra-elite conflicts facilitating coordination. We provide several examples from Mexico under the hegemonic system of the PRI and of Spain under Francisco Franco, as well as punctual illustrations from other countries around the world. We conclude by reflecting on some of the potential consequences of this usage of justice institutions under autocracy for democratization.

KEYWORDS Justice institutions; authoritarian regimes; prosecutors; high courts; ordinary courts; special jurisdictions

1. Introduction

Autocratic regimes have dealt with justice institutions in very different ways. In Egypt, the Supreme Court had remarkable autonomy: the executive did not participate in the appointment of the justices, they were recruited by sitting justices, served for life, and no disciplinary procedures were wielded from outside the court. In contrast, in 1982 in Turkey, the military government further restricted the already limited independence and powers of the Constitutional Court. In Chile, Pinochet bragged about respecting the autonomy of the judicial branch that includes judges as well as prosecutors by limiting the executive’s role to appoint only those judges and prosecutors pre-selected by the Supreme and Appellate Courts, but his regime simultaneously grossly expanded the military jurisdiction. By contrast, in Iran the Supreme Leader appoints the Head of the Judiciary who then appoints the Prosecutor General as well as the Chief of the...
Supreme Court, and it was the clerical and revolutionary jurisdictions that were expanded in this autocracy.4

There is a huge variety of designs of justice institutions in authoritarian settings that should be accounted for. Examples of authoritarian empowerment/subordination of justice institutions abound and they are more intricate and intriguing than the well-known pressures to subordinate and/or co-opt the judiciary.5 As Moustafa puts it, “many authoritarian regimes use law and courts as important instruments of governance”. He wisely invites us to move “beyond facile caricatures of telephone justice” and sustains that “courts rarely serve as mere pawns of regimes”.6 Moreover, the role that these institutions played under autocracy is highly likely to impact their performance in case of democratization. Despite the recent boost experienced in comparative judicial politics, and of the existence of excellent small-N studies, the role played by justice institutions in dictatorial regimes has been undertheorized and underdeveloped, with some notable exceptions.7

Looking at a broader set of justice institutions (going beyond High Courts to include ordinary courts, prosecutors, and special jurisdictions such as the military, labour, or ecclesiastical), we start from the premise that they can play the same power-sharing and control roles as other institutions under autocracies.8 Our goal is to provide an analytical framework that includes hypotheses and mechanisms of the role of different justice institutions, and in some cases their interaction, under autocracies. We provide several examples from two long-lived and highly institutionalized dictatorships: Mexico under the hegemonic system of the PRI (Partido Revolucionario Institucional), and of Spain under Francisco Franco, as well as punctual illustrations from other countries around the world.

Let us take a closer look at some intriguing features of the design of the justice system in autocratic Spain and Mexico. In Spain, not only the military jurisdiction underwent great expansion but also more than 20 other special jurisdictions were created. At the same time, ordinary courts preserved a degree of independence, including a thorough and professionalized judicial career.9 In Mexico, whereas the Supreme Court enjoyed some independence,10 the public prosecutor served at the pleasure of the president.11 At the same time, the ordinary lower federal courts grew considerably in number throughout the dictatorial regime to cope with the ever increasing number of suits brought against the government (i.e. amparos) by ordinary people (Caballero 2010; Fix-Fierro and López Ayllón 2010).12 Why were so many special jurisdictions created in Spain? Why subordinate the prosecutors but not, or at least not entirely, the judges in Mexico? Why would an authoritarian regime allow ordinary people to file suits against it? What has been the impact for democratization of this usage of justice institutions under the autocratic period?

This puzzling diversity of design of justice institutions is a characteristic feature of autocracies. Figure 1 shows (upper panel) that, based on the constitutional text of all existing autocracies from 1946 to 2010, the executive appointment powers vary across justice institutions and across autocratic regime types. For instance, in autocratic party regimes (the most populated category per Geddes et al.13), in close to 50% of observations the executive exclusively appoints the attorney general, whereas in personalist regimes this figure is slightly above 10%. Similarly, in military regimes the executive exclusively appoints supreme court judges only in about 10% of observations, and this figure is slightly above 20% in monarchies. It is noteworthy that in most autocracies, the executive appoints the attorney general, supreme, and ordinary judges in conjunction
with other organs of the state such as the legislature, a judicial commission, or the ministry of justice. In the lower panel of Figure 1 it is also clear that the number and the type of special courts vary across autocratic regime types. For instance, while most autocratic party regimes have a tax court stipulated in their constitution, this type of court is practically absent in monarchies, personalist or military autocracies. Military courts are established more often in the constitutions of party and personalist regimes than in monarchies or military regimes.14

Why do autocratic regimes display such diverse designs in their justice institutions? Why do some autocracies empower prosecutors but do not give them autonomy, while simultaneously giving autonomy to ordinary and special jurisdiction courts? What role do these institutions play, alone or in combination? In the next section, we explain and illustrate our proposed framework specifying why and how a dictator would use justice institutions to solve the fundamental problems of control and power-sharing. In the last section, we briefly discuss the implications of our arguments for regimes that experience a transition to democracy under which judicial institutions become a bulwark for the desired rule of law.

2. A framework for analysing justice institutions in autocracies

We build on scholarship on institutions in authoritarian regimes. One strand of this literature has so far focused on the role of political parties, legislatures, and elections in maintaining power and governing by solving information, credibility, coordination and monitoring problems, leaving judicial institutions aside.15 Another strand of this
literature deals with the many relevant functions that institutions such as courts and judges play in authoritarian regimes (see the seminal book by Ginsburg and Moustafa, and also an updated state of the art in Moustafa), highlighting the role of a single salient court, such as the Supreme Court or the Constitutional Tribunal, or that of the Supreme Court and a subset of the lower courts. We look at a broader set of justice institutions including not only courts and judges but also prosecutors and special jurisdictions. More importantly, we both unpack justice institutions by considering each in its own right but also look at their interaction. Finally, we combine both strands of the literature under a single framework.

Specifically, we start from the premise that authoritarian leaders use justice institutions to deal with the problem of control, that is, the relationship between the autocrat and the masses; and the problem of power-sharing, that is, the relationship between the autocrat and his ruling coalition. Then, unpacking justice institutions, we specifically posit that, regarding the problem of control (i) to the extent that prosecutors are directly dependent on the autocrat they can serve as a “top-down” monitoring device to gather information about actual and potential political opponents, and (ii) to the extent that ordinary courts enjoy some independence from the autocrat they can serve as a “bottom-up” monitoring device through which the autocrat can learn about social discontent. The information gathered through these justice institutions would then be used by the autocrat in different ways, such as when reaching decisions on cooption or repression.

Regarding the problem of power-sharing, we argue that providing key groups of the ruling coalition (for example, military, business, or the church) with (iii) representation in the Supreme Court or (iv) control over a special jurisdiction can enable the dictator and elites to solve intra-elite conflicts, and to have a shared understanding of what constitutes a transgression of the power-sharing agreement. This facilitates detection of the dictator’s non-compliance, easing the collective action among elites to respond to it, and prevents misconceptions of the dictator’s actions from escalating into conflict. A summary of our framework is displayed in Figure 1. In the following subsections we further detail the mechanisms through which justice institutions play the aforementioned roles (Table 1).

### 2.1. Information gathering: top-down/bottom-up monitoring

Autocratic regimes and rulers rely on two basic instruments for dealing with external opposition, namely, repression and the mobilization of support through cooptation.

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Table 1. Justice institutions in autocracies.
Concerning repression and social control, certain justice institutions may be another piece of the regime’s security apparatus and therefore be used to deal with politically sensitive cases and to sideline opponents. Specifically, in order to optimize the combination of the main strategies available – sticks and carrots – the autocrat needs information about the real intentions of the opposition, the nature of their demands, their strength, and their capacity to act in a coordinated fashion. Given that repression – even if always available under autocracies – is a rather costly choice, good quality information can help the dictator to be more selective and efficient in the use of force and to avoid turning to paralegal violence.

Our contention is that prosecutors and ordinary judges in dictatorships can help to gather such information so that the autocrat can use it in his choice between the proverbial carrot and stick. Specifically, prosecutors can be a key element in the legal control of the opposition, serving as a “police-patrol” device of monitoring, closely supervising and controlling the other actors’ activities (potential or real opposition, in our case) “with the aim of detecting and remodeling any violations of [the regime’s] goals and, by its surveillance, discouraging such violations”. Prosecutors are in charge of detecting, investigating, and potentially taking cases to court for a trial. In contrast to judges who, in the famous words of Hamilton, “do not have will but merely judgment”, prosecutors have both will and judgment, they can decide whether to go after specific cases to investigate crimes that have been committed (and to prevent others that could be committed). Notice that for the information to be credible and useful for the regime’s ends prosecutors need to be dependent upon the autocrat because they would investigate politically sensitive actors and issues. In autocracies where prosecutors are relatively independent from the autocrat we do not expect them to fulfil this role (it is perhaps delegated to secret police or a special corps with which the prosecutor may collaborate).

Prosecutors in autocracies, to the extent to which they are under the direct control of the executive, will be both willing and able to investigate opposition groups and obtain information about their activities. This information is fed to the autocrat who then uses it to make a choice between stick and carrot. In other words, prosecutors can become the dictator’s arbitrary “legal arm”. The autocrat, and his small security circle, can also deploy prosecutors to investigate and extract information from specific persons, organized actors, or institutions. Prosecutors need not go to court to get information, they have the legal power to request information, they do have the political backing from the autocrat, and they can dig in using all sorts of means. Armed with that information the autocratic regime can approach such persons and actors to get their cooperation and to threaten them to go to court (or to repress them harshly) if they fail to cooperate. Thus, prosecutors help the dictator to coopt some persons/actors and to avoid repression, which is a costlier and riskier strategy. An interactive hypothesis based on our framework is that the threat to go to court is credible when the regime has special courts to deal with political cases (such as the revolutionary courts in Iran), or when low-independence ordinary criminal judges simply rubber-stamp whatever case the prosecutor brings to them and the Supreme Court validates such practices (as in Mexico).

In Mexico, the basic institutional rules that subordinate the public prosecution to the executive branch were set in the constitution of 1917. At the federal level, the Mexican president unilaterally appointed and removed the General Prosecutor who, in turn, freely appointed and removed all lower-level ministerios públicos. There were internal mechanisms of control, such as periodic visits and reviews, that allow officials at
higher levels to monitor their subordinates, but ultimately all ministerios públicos reported to the Procurador General and faced little external accountability. At the same time, the office of the Mexican attorney general enjoyed much discretion investigating and deciding what charges to bring on the defendant.

The combination of political subordination and huge legal power of the prosecutors was the cornerstone of the coercive legal power of the authoritarian PRI regime. The Mexican executive regularly chose the political use of prosecutorial power to exert pressure on friends and enemies alike. The capacity to unleash the force of a legal prosecution on a political enemy served as the proverbial stick wielded by the Mexican executive to coordinate the behaviour of the different actors in the political system, eliciting their cooperation. Successive presidents under the PRI regime used this capacity selectively, even against prominent members of the political and entrepreneurial elite who “stepped out of bounds” informally established by their administrations.

The use of prosecutors in the top-down monitoring function by the PRI regime was not only prevalent for salient political figures whose cooperation was required. The task of the Ministerio Público was not to conduct a professional investigation of a crime but instead to hide customary police arbitrariness in detaining people, obtaining confessions, and producing the legal file of the case to be reviewed by a judge. The judge then merely checked to see if the file contained the legal requisites, declared the defendant guilty, and proceeded to sentencing per the prosecutor’s suggestions. Because the Supreme Court had been successfully incorporated into the dynamics of the hegemonic party, it very rarely served as a check on lower judges and prosecutors. For instance, in one infamous decision, the Mexican Supreme Court decided that confessions extracted by prosecutors through the use of physical force (that is, torture) were acceptable as evidence in a trial as long as there were other pieces of evidence that corroborated the confession.

In a similar fashion, in Spain a crucial judicial mechanism in the hands of the Francoist regime to monitor from the top-down and repress was the Ministerio Fiscal. This was a rigidly hierarchical institution presided over by the prosecutor of the Supreme Court, who was directly dependent on the Ministry of Justice, exerted clear authority over local prosecutors through written instructions, and worked closely with the police (particularly, in cases of a political nature, with the notorious special police Brigada de Investigación Social). The annual reports produced by the Ministerio Fiscal (partially based on provincial reports sent by local prosecutors) served an unquestionable monitoring role of society in general and of the opposition in particular. These prosecutors were, of course, biased in favour of the regime. In fact, a significant number of prosecutors ended up assuming high political positions under the dictatorship. This was certainly a reward for the very useful role they played for the regime in providing accurate information about the activities of the opposition and in prosecuting clandestine or “a-legal” political activities.

The Francoist regime was a long-lasting dictatorship (1939–1975) and its judicial configuration experienced important changes between the post-war period and Franco’s death. Towards the end of the dictatorship the prosecutors of another special court, the Juzgado y Tribunales de Orden Público (1963–1977), served as a top-down monitoring device. Judges and prosecutors of the ordinary judiciary formed the aforementioned Tribunales where their goal became to find and take to court members of the opposition movements and serve them with harsh prison sentences. The practice of bringing ordinary judges and prosecutors into special courts
appears from the beginning of the dictatorship (for example, *Tribunal de Responsabilidades Políticas* and *Tribunal de Represión de la Masonería y el Comunismo*) when the goal was to purge anyone considered loyal to the Republican cause (then the sentences included confiscations, fines, professional depuration, forced labour, exile, and prison; death sentences for political crimes were only passed by the military justice). In the first years of the dictatorship, however, the membership of these special courts included military judges and leaders of the *Falange*.[35] This composition, as will be seen in the next section, also served the purpose of power-sharing.

Let us now turn to “bottom-up” mechanisms of information gathering. As is well known, ordinary courts (sometimes including the Supreme Court or court of final appeal) serve as a “fire-alarm” mechanism,[36] gathering information from the bottom-up. To the extent that these courts enjoy relative autonomy from the executive, regular citizens go to them to deal with everyday issues in which they are not revealing sensitive information that could incriminate them, such as specific conflicts between private parties, the quality of public services, or the performance of local officials.[37] As shown in Figure 1, some autocracies allow ordinary courts some autonomy from the executive, and in those places we argue that through these cases that regular people file the autocratic regime can obtain information on, for instance, what issues are a cause of concern, whether the bureaucracy is performing well or badly, the geographic location of specific issues that bother people, an estimate of the size of the groups that are filing suits and their socio-demographic characteristics, and possibly also an estimate of the strength of these groups (for example, individual versus collective suits such as those filed by a labour union).

Fine-grained evidence on the autocratic regime’s use of information gathered in a decentralized manner through relatively independent ordinary courts is difficult to get. Based on our framework we posit an interactive hypothesis and show some indirect evidence that may explain variation in this regard. According to Toharia,[38] Ginsburg and Moustafa,[39] and Sievert,[40] the dictator is more likely not to encroach upon ordinary courts dealing with innocuous issues for the regime when he has already created special courts to go after his enemies. Building on this insight, we argue that the more independent the ordinary judiciary under a dictatorship, the higher the number of special jurisdictions.[41] Spain is a case in point: it had a large number of special jurisdictions dealing with issues sensitive to the regime and, according to Toharia,[42] the ordinary judges were, at the end of the dictatorship, “fairly independent of the executive with respect to their selection, training, promotion, assignment, and tenure”. Interestingly, these judges were also subjected to a highly biased training system that imbued in them the values of the regime. In issues unrelated to politics these judges served as a conflict-solving mechanism for private matters, but in politically-related issues, they often exercised a significant degree of social control over the population.[43]

### 2.2. Cementing power-sharing deals: focal points and mutual understanding

Most dictators do not directly control enough resources to govern alone and therefore seek the support of notables with whom they promise to share power. This creates, according to Boix and Svolik,[44] “the central dilemma of any dictatorship, which is to establish a mechanism that allows the dictator and his allies to credibly commit to joint rule”. The main question that emerges is: will the dictator continue to be loyal to the supporters who launched him into office after he consolidates his rule? Resolving
this credibility problem is particularly important given that the most serious threat that
dictators face emanates from within their support coalition. Boix and Svolik argue that
“power-sharing is ultimately sustained by the ability of the dictator’s allies to credibly
threaten a rebellion that would replace the dictator should he violate the power-
sharing agreement”.

Other scholars, however, argue that institutions can help the dictator to put and keep
together his ruling coalition. For instance, Magaloni argues that one solution to this
dictator’s dilemma is to allow for the existence of a parallel political organization that
can guarantee its members that their investment in existing autocratic institutions will
pay off in the long term. Specifically, Magaloni posits that autocratic political parties
can play this fundamental role: “if the dictator delegates control to the access-to-power
positions and the state privileges to a parallel political organization, such as a political
party, he can more credibly guarantee a share of power and the spoils of office to the
groups that support him”. We argue that justice institutions in authoritarian
regimes can provide focal points that help elites coordinate against a dictator’s trans-
gression (see an analogous argument for political parties in Gehlbach and Keefer),
and that they can expand ruling coalition members’ horizons by developing mutual
understandings and making them more likely to bargain and invest in the regime
(see an analogous argument for political parties in Brownlee).

Specifically, we identify two possible mechanisms through which justice institutions
can help render credible the autocrat’s power-sharing commitment. First, a High or
Supreme Court that is neutral with regard to the members of the ruling coalition can
be a forum where intra-elite conflicts are solved and where a shared understanding of
what constitutes a transgression of the power-sharing pact is developed. Decisions of
this salient court signalling a violation of the pact can be focal points that facilitate
elite coordination against it, cementing the credibility of the agreement. Supreme or
High Court neutrality can be obtained, for instance, when the relevant groups in the
ruling coalition have some kind of representative in the court, with no single group
having a majority of judges. This would be a guarantee for each group that court
decisions do not systematically affect its interests when cases related to this group
reach the court, and also that a genuinely shared understanding is being developed.

In Mexico, the politically subordinated Supreme Court was also neutral. In this
capacity it contributed, for instance, to cement the so-called civil–military pact that
was one of the pillars of stable hegemonic party rule: In exchange for loyalty to the hege-
monic party the armed forces were given an important degree of autonomy with regard
to the military’s internal functioning, training, and promotions, along with a high level
of discretion regarding expenditure. The Supreme Court helped cement the civil–mili-
tary pact in different ways. First, as a way of power-sharing, from 1940 to 1994 “the
presence of at least one military officer serving as a Supreme Court justice was a con-
stant”. Second, through its jurisprudence, the Supreme Court defended a broad scope
of military jurisdiction where military officers charged with crimes were tried (and
usually absolved or leniently punished) by military courts. This was the case in 1958
when the armed forces were called upon to suppress a railroad workers’ strike, in
1968 when they intervened to suppress a student movement, and indeed throughout
the 1960s when they were ordered to put down guerrilla uprisings, especially in the
southern state of Guerrero.

The Supreme Court’s jurisprudence on military jurisdiction nicely reflects its partici-
pation in holding the civil–military pact together. For instance, from 1940 onwards, in
most of the cases where the military jurisdiction was contested, the Mexican Supreme Court decided the case should be sent to military jurisdiction if the person involved belonged to the armed forces even in cases of rape, robbery, or murder of a civilian. In other words, the Supreme Court helped build a shared understanding of which cases fell under military jurisdiction (for instance, to avoid shaming the institution) when resolving whether a specific case should go to civil or military courts and deciding appeals to military court decisions.

The second mechanism through which justice institutions render credible power-sharing agreements works through the creation of multiple special jurisdictions. Specifically, the autocrat can create different special jurisdictions for the most relevant groups within his ruling coalition in order to reward (and maintain) their loyalty. Members of this group accept the exchange because having a special jurisdiction means that they can deal with internal problems that are particularly relevant to this group. Moreover, these special jurisdictions constrain dictators “to the extent that they preserve the distribution of power that allowed them to be stable in the first place, helping to ensure that the distribution of power remains somewhat equal in the future.” The existence of these special jurisdictions tends to be a clear sign of the regime’s intention to share power with relevant groups of the ruling coalition by allowing them to deal with their own issues, preserving the group’s relevance and status.

A good example is the military jurisdiction: when the military have played a crucial role in bringing about and maintaining the dictatorship they are likely to be rewarded with an impermeable special jurisdiction. This is the dictator’s institutional guarantee that only they will be authorized to judge their own people. Specifically, a military jurisdiction biased in favour of the preferences of the military and ordinary civilian courts with limited scope can guarantee impunity to military personnel, as the civilian jurisdiction will be unable to prosecute and punish their actions. However violent or illegal military actions might be, only military courts would be allowed to deal with these crimes, and, as is typically the case, they will tend to be indulgent with their own people, particularly in cases of repression, but also in cases of corruption, or other kinds of abuse within the military.

Dictatorships that favour repression over cooptation usually rely very heavily on the military to rule, typically because of the existence of a “mass, organized, and potentially violent opposition.” Militarizing the repression of civilian opposition typically entails faster judicial processes (summary trials), considerably fewer formal guarantees, and rather harsher sentences (more lenient on military officials who commit crimes in defence of the regime). One way to give that power to the judiciary while keeping it loyal is through the expansion of the military jurisdiction (given that most regimes have military courts, though not established in the constitution as shown in Figure 1). Arguably, once the main threats coming from the masses have been suppressed, and once the regime enjoys enough stability and confidence, the autocrat may return to civilian justice institutions those parts of their jurisdiction previously removed, while maintaining other military privileges – such as the right to prosecute their own people or certain economic advantages – to avoid military unrest.

After the first months of the Civil War (1936–1939), during which time extralegal repression prevailed on both sides, a more “legal” repression began to be implemented. Once the war was over, and during the first years after Franco’s victory, there was a massive number of prisoners and, according to estimates, between 40,000 and 50,000 executions. The repression was mainly, but not exclusively, undertaken within a
grossly expanded military jurisdiction, the military being the most relevant group of the ruling coalition at that time given its crucial contribution to the war effort, and also due to the fact that Franco was a military man himself and trusted military institutions more than any others.63

Franco’s victory was made possible by the contribution of different groups, but especially the military. Military jurisdiction not only served the purpose of repressing the opposition, but was also designed to allow the armed forces to deal with their own issues with a relative lack of encroachment of executive power. This power-sharing mechanism was both a reward for the war effort and a guarantee that certain agreements would be respected. Franco was determined to keep the greatest amount of power in his own hands, so he always tried to achieve a balance between the different groups of his ruling coalition, preventing each of them from becoming powerful enough to pose a real threat to his personal rule. Accordingly, Franco combined a high level of autonomy given to military justice and important economic privileges, with a budget devoted to military expenses that decreased over time64 and a diminishing presence of military members in his cabinets.65 At the end of the dictatorship, military personnel were very poorly paid and military infrastructure clearly obsolete.66

The strategy of creating special jurisdictions for cementing the ruling coalition was not exclusive to the military. The Catholic Church not only gave legitimacy to the Francoist cause by consecrating the Civil War as a “national crusade”, but also undertook, in exchange for various privileges, to go on supporting the dictatorship. The Church enjoyed a preeminent position in crucial areas for the regime – such as education policy and censorship of cultural productions – and the ecclesiastical jurisdiction was strengthened and extended. Catholicism became the official religion of the Francoist state (all other public religious manifestations were proscribed) and was recognized as a source of inspiration for the entire domestic legal system.67

This power-sharing agreement, together with important economic privileges, was further institutionalized through some crucial pacts. Franco reintroduced the Concordat in 1953, a pact which consecrated the identification of the Spanish State with Catholicism originally signed between Spain and the Holy See in 1851. In exchange for the express recognition of the Francoist regime by the Catholic Church and for granting Franco authority to propose his own candidates for bishops to the Vatican, the Caudillo recognized ecclesiastical jurisdiction and assumed responsibility for fully financing the Church. At the end of the Civil War (in a law passed on 9 November 1939), the regime explicitly recognized the Catholic Church’s “efficient cooperation in the victorious Crusade” and, in exchange for this, reestablished the funding that had been stopped by the Republic.

Finally, one of the obsessions of the Francoist regime was to avoid the very high level of labour unrest during the Republican period to guarantee the business elite a certain level of “social peace”. With this purpose, the regime created a highly regulated and politically subordinated labour system after 1938 (in the midst of the Civil War), the Fuero del Trabajo law, inspired by the Falange.68 Each province had one Magistratura de Trabajo and a Tribunal Central de Trabajo (both dependent of the Ministerio de Trabajo69 that was occupied on several occasions by prominent Falangistas). However, a special “Social Chamber” also existed within the Supreme Court to deal with labour issues, which, between 1949 and 1958, had preeminence over the Tribunal Central de Trabajo.70 This meant that, in contrast with the military and ecclesiastical jurisdictions, the last appeal organ of labour jurisdiction, at least for a decade, was
the Supreme Court (unbiased, in principle, vis-à-vis the different groups of the ruling coalition as shown by Bastida, particularly in politically sensitive cases).

3. Legacies of autocratic justice institutions

It is of course true that “the institutional creatures the authoritarian regimes breed are not meant to grow and flourish in liberty. They are meant to be tame and useful domestic animals”. At the same time, it is also true that as soon as political institutions are granted minimal margins of power and autonomy, they can turn against the dictator (...). Even if institutions make autocracy work, and augment the authoritarian ruler’s probability of surviving in office and governing effectively, they still contain the possibility of eroding authoritarian stability and governance.

Moustafa follows in this same direction when he claims that, even if “authoritarian regimes use law and courts as instruments of political control”, these “serve as dual-use institutions, paradoxically opening new (albeit limited) avenues for activists to challenge the state”.

Our analytical framework unpacks “justice institutions”, highlighting the roles that prosecutors, high and ordinary courts, and special jurisdictions play in solving the problems of power-sharing and control in autocratic regimes. Using these institutions also implies costs for the autocracy and, of course, for the new democratic regime in case of a transition. In this conclusion, we highlight some of the potential legacies of using justice institutions under the authoritarian regime for their performance under democracy.

The political use of justice institutions under autocracies can severely impact their performance under democracies if these are not profoundly reformed. Mexico is a case in point. The gradual melting down of the hegemonic party regime has produced a young democratic regime that in some aspects and places still exhibits traits of the authoritarian past, most notably in the criminal justice system and the prosecutorial organ. At the local level, many governors still use the prosecutor’s office to go after political enemies, and even Vicente Fox who defeated the PRI in the executive electoral race of 2000 did not hesitate to use this resource to try to get rid of the leader of the opposition, Andres Manuel López Obrador.

The role of the Mexican Supreme Court as an organ useful for the authoritarian governing coalition has also cast a long shadow on its performance under democracy. In essence, the reforms to the Supreme Court during the protracted transition to democracy in Mexico have created an effective court for solving political disputes but not for protecting the rights of ordinary citizens. One of the reasons is that access to the Supreme Court for regular citizens is highly restricted. Moreover, the Supreme Court is a slow-moving institution because it concentrates a lot of functions regarding the administration of the human and economic resources of the judiciary, as it did during the authoritarian regime. Attempts to take away from the Supreme Court some administrative functions have been resisted by the Supreme Court and the federal judges themselves.

In Spain, the uneven correlation of forces between the soft-liners of the dictatorship and the moderates of the opposition during the democratizing period did not allow for any public revision of the past. Even if the fragmentation of the justice system was soon avoided, the new democratic regime inherited the justice system almost intact (both actors and crucial institutions, such as the Supreme Court). The same civil judges that had collaborated with the regime’s repressive strategies remained, which explains
their reluctance to apply the new democratic legislation. One of the reasons for creating the Constitutional Court – to which Supreme Court magistrates strongly resisted – was to control that the new norms were correctly applied.

This coexistence between an inherited authoritarian judiciary and the new democratic reality created sound dissonances for several years. In Spain and Mexico the justice system has not experienced a profound reform and many consider this one of the most important pending tasks for their democratic consolidation. Probably, the most obvious legacies of the authoritarian period in both countries are a Prosecutor General’s Office highly dependent on the executive power, and a judiciary that blocks any initiative aimed at judging human rights violations committed under the dictatorship, and also during the recent “war on drugs” in Mexico.

We believe that our theoretical framework helps explain why some authoritarian regimes empower certain justice institutions and weaken others, what role they can play under authoritarian regimes, and what are some possible effects of their use in their performance under democracy. Case studies on the part played by justice institutions in Venezuela,77 Chile,78 and Russia and Ukraine79 also show justice institutions used by dictators in ways consistent with our arguments. Further case studies and empirical analyses on a larger sample of countries are needed to corroborate that this is the case.

Questions such as how the justice institutions interact with other political (for example, parties and legislatures), paralegal (for example, investigatory agencies, secret police), and paramilitary (for example, praetorian guards) institutions are beyond the scope of this article, but worth pursuing in the light of its framework. Differences across autocratic regime types (monarchies and personalist, party, and military regimes) on the previous questions are also worth pursuing. Finally, a key question in several new democracies is how the performance of justice institutions in the new regime is affected by the legacies and practices of those same institutions under the autocratic period.

Notes

8. The bulk of social science research on justice institutions focuses on courts and judges, but we believe it is important to also highlight the role of prosecutorial organs and special jurisdictions that are an essential part of any justice system (see Tonry, Prosecutors and Politics).
10. See González Casanova, La Democracia en México; Domingo, “Judicial independence”; and Cossio, “La Suprema Corte.”
14. These data are based on constitutions so, for instance, it may be the case that a regime has military courts but they are established in an organic law or another ordinance. See the Comparative Constitutions Project for coding rules. Of course, practice and actual behaviour in autocracies may differ from what the constitution stipulates, so we include detailed examples of the justice institutions we analyse in the article.
20. Svolik, The Politics of Authoritarian Rule. The need to solve coordination problems among regime elites and to maintain the cohesion of the authoritarian ruling coalition has also been pointed out, among others, by Barros (Constitutionalism and Dictatorship), and by Ginsburg and Moustafa (“Introduction,” 1–20).
22. Ibid., 270–80.
24. McCubbins and Schwartz, "Congressional Oversight Overlooked,” 166; Sievert (Incentives for Independence, 19) claims that autocracies “can have an incentive to create an independent court to learn information about the public regarding their willingness to challenge the status quo; information they would not otherwise have, or may have to pay a higher cost to obtain”. We believe that, under dictatorships, people would not freely give up this kind of information in a court of law. We would therefore argue that prosecutors are better suited to extracting such information in autocracies.
25. In common law, and in some civil law, systems, litigants can bring criminal cases of their own accord, instead of through prosecutorial agencies (though this generally works in democratic times). Moreover, some courts in South Asia such as the Pakistani Supreme Court have so-called suo motu jurisdiction (this jurisdiction is restricted to matters of “public importance” that involve the enforcement of fundamental rights, see for example, Kalhan, “Grey Zone Constitutionalism and the Dilemma of Judicial Independence in Pakistan,” 3–96).
26. Interestingly, there is variation in autocracies (as well as in democracies) regarding the location of the prosecutorial office (under the executive or judicial branch, or as an autonomous organ in democracies) and thus regarding its degree of proximity to the autocrat (see Tonry, Prosecutors and Politics; Aacken, Feld, and Voigt, "Do Independent Prosecutors Deter Political Corruption?," 204–44).
27. Dictators often invite would-be opponents to participate in “illegal” activities (for example, corrupt business, access to sensitive information). These activities are recorded by prosecutors in a file as “legal leverage” to be used by the regime in negotiations with them.
30. An early example of the collaboration of the prosecutors with Francoist repression is the Causa General (Aguilar, "Judiciary Involvement in Authoritarian Repression and Transitional Justice,” 251).
31. The police were dependent on the Ministerio de la Gobernación, which was usually occupied by high-ranking military. Other police corps involved in the repression of the opposition were the militarized Policía Armada and the also militarized Guardia Civil.
32. According to Giménez (*El Estado franquista*, 336), the lack of neutrality of the *Ministerio Fiscal* can be demonstrated by the fact that “5% of the 258 existing prosecutors in 1970 have been freely appointed by the government (by decree) to occupy posts in other institutions”.

33. For a general account of the justice system under the first stage of Francoism (1936–1945) see Lanero (*Una milicia de la justicia* (1936–1945)). The functioning of the military justice in the war and post-war periods is addressed by Gil, Pablo. “Derecho y ficción.” For a recent account of the collaboration of the justice system under Francoism, see Aguilar (“Judiciary Involvement in Authoritarian Repression and Transitional Justice,” 245–66).

34. For this special court, see Del Águila, *El TOP: La represión de la libertad.*

35. *Falange Española Tradicionalista y de las Juntas de Ofensiva Nacional Sindicalista* (FET y de las JONS) was the only political organization that was allowed in Spain during the dictatorship.


37. Moustafa, *The Struggle for Constitutional Power*; However, in dictatorships, people may sometimes file suits that offer sensitive information about the regime, for example, a lawsuit in a court against a torturer or a habeas corpus while searching for a missing person. When ordinary judges outstep their often implicit and nebulous bounds they can be punished by the dictatorship.


41. Moustafa (“Law and Courts in Authoritarian Regimes,” 290) has explained that dictatorships “often contain judicial activism by further engineering judicial systems wherein one or more exceptional courts run alongside the ordinary courts (…). Politically sensitive cases are channeled into these auxiliary institutions when necessary.”

42. Toharia, “Judicial Independence in an Authoritarian Regime, the Case of Contemporary Spain,” 495.


49. Ibid., 716.


53. In general terms, justice institutions and actors under authoritarian regimes would share the broader goal of wanting the regime and their own benefits to survive. However, these institutions do not necessarily share the interests of a particular dictator or a particular group within the ruling coalition. In this way, they are dependent on the regime but can be neutral regarding a specific dictator and members of the ruling coalition.


55. Caballero, “Amparos y Abogástars,” 157–158; Military officers have also held several seats in Congress since 1940 (Díez, “Legislative Oversight of the Armed Forces in Mexico,” 113–1145).


57. Similar deferential jurisprudential patterns towards other members of the ruling coalition, such as organized labour, can be traced at the Mexican Supreme Court.

58. Ríos-Figueroa, *Constitutional Courts as Mediators*, Ch. 5.

59. Moustafa (*The Struggle for Constitutional Power*) and Moustafa and Ginsburg (*Rule by Law*) posit a different logic: specialized courts that are relatively independent from the autocrat but with a very narrow scope (for example, economic or commercial courts) are created to send a signal to investors. Such signals are more efficacious when complemented by institutions
that allow coordination against a dictatorship’s broken promise (Gehlbach and Keefer, “Private Investment and the Institutionalization of Collective Action in Autocracies,” 313–331).

60. Lagacé and Gandhi, “Authoritarian Institutions,” 285. See also Slater, Ordering Power.

61. Note too that this strategy can be accompanied – though this is not always the case – by other empowering measures, such as providing the military with economic privileges (as in Egypt with Mubarak) and/or with increasing budgets (as in Cuba with Macedo). Sometimes (as in Franco’s Spain) the dictatorship empowers certain aspects of the military while weakening others in order to obtain the benefits of a powerful repressive power without running the risks of creating too independent and influential an actor.

62. Svolik, The Politics of Authoritarian Rule. By contrast, according to Gandhi and Przeworski (“Authoritarian Institutions and the Survival of Autocrats,” 1279–301), the intensity of the threat posed by the opposition is a good predictor of autocracies’ level of institutionalization.

63. Interestingly, as in Mexico, whenever a conflict of jurisdictions took place, military justice normally took precedence. In contrast to Mexico, however, the decisions of the Consejo Supremo de Justicia Militar could not be appealed to the Supreme Court. Brazil offers an interesting comparison regarding the use of the military courts for political repression, see Pereira, Political (In)Justice.

64. Whereas in 1941 the budget devoted to military expenses was 35.20% of total public expenditure, in 1965 it was only 17.16% (Instituto de Estudios Fiscales, Datos básicos para la historia financiera de España, 744–53).

65. Álvarez, Burocracia y Poder Político en el Régimen Franquista.

66. Cardona, El poder militar en el franquismo.

67. The Catholic doctrine as a source of legal inspiration has been abundantly shown in Supreme Court rulings (Bastida, Jueces y Franquismo).

68. The 1940 Ley Orgánica de la Magistratura de Trabajo was one of the most important legal regulations of the first period.

69. This Ministry discretionally elected the magistrates of this special jurisdiction from the ordinary jurisdiction, and they became professionally dependent, to an important degree, on that institution (Lanero, Una milicia de la justicia (1936–1945), 344).

70. Martínez Girón et al., Derecho del Trabajo, 76.

71. Bastida, Jueces y Franquismo.


73. Ibid., 331, 337 (author’s emphasis).


75. See essays in Vázquez, Corte, jueces y política; see also Sánchez et. al. “Legalists vs Interpretativist”).


78. Barros, Constitutionalism and Dictatorship; Hilbink, Judges beyond Politics in Democracy and Dictatorship.

79. Popova, Politicized Justice in Emerging Democracies.

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