

A Theory of Independent Courts in Illiberal Democracies

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Abstract

Illiberal democracies are on the rise. While such political regimes have eliminated important institutional constraints on executive power, they tend to feature an occasionally defiant judiciary. We provide a novel explanation for this phenomenon by focusing on the judiciary's role as a potential provider of valuable information to the executive about divisions within the regime's elites. The model features an office-motivated executive that balances the conflicting interests of the voters and the elites in determining a redistribution policy and the type of judicial review this policy will be subject to. An independent judiciary is observed in equilibrium only if the resulting revelation on the strength of the elites would be sufficiently informative for the executive to warrant renegeing on its ex ante optimal policy. Intuitively, in the absence of a strong legislative opposition or a free media, a degree of judicial independence helps the survival of the nondemocratic regime by more informatively balancing the interests of the voters and the elites. We conclude by discussing institutional and welfare implications. Our results contribute to the debates on the survival of independent political institutions in authoritarian regimes.

Keywords : Authoritarian regimes; Judicial independence; Rent-seeking.

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1 Introduction

Independent courts are perceived as being intrinsic to democracy. Political scientists, economists and legal scholars have offered theories for why a political group that controls the government at one point in time would delegate power to an independent third party. They generally fall under one of the following three categories: Insurance explanations that rely on the executive's protection motive from some form of political competition; theories of delegation of unpopular and difficult decisions to courts; and arguments that self-imposed restrictions enhance the executive's legitimacy and political credibility.¹ While these theories have been studied in the context of democratic regimes, the survival of independent courts under some authoritarian leaders remains a puzzle.² In this paper, we provide a novel theory of independent courts in nondemocratic regimes by focusing on their role as potential providers of valuable information to the executive branch about the strength of its opposition.

Our theoretical analysis focuses on regimes in which factors such as a muzzled press or submissive civil society organizations together produce a political environment that lacks transparency on the internal divisions within the ruling elites, whom we assume help determine, along with voters, the survival of the political regime. We denote such political regimes in which the executive's re-election is partially determined by the elites through a non-transparent process as illiberal democracies.³ These political regimes are particularly interesting to study as they are positioned on a spectrum in between a totalitarian regime, where all opposition is obliterated, and a liberal democracy, where opposition to government is both transparent and fully protected under the constitution.

Our defining assumption that opposition to the government is non-transparent in illiberal democracies is based on the observation that the ruling elites in a nondemocratic regime are likely to be smaller and a less openly competitive group than in a full democracy. Yet, even within an authoritarian regime's elites, there might exist ideological wings or political cliques that are differentially impacted by public policies, not least because (a basically fixed sum of) rents have to be divided across these groups. This is not a significant concern in a totalitarian regime, since the ruling leader can use full state coercion to obliterate any internal challenges. However, in an authoritarian regime, there might exist certain mechanisms that elites can utilize for disposing of the executive

¹We discuss these different theories in more detail in the following section.

²Chile during the Pinochet regime or Egypt until more recently constitute interesting examples of this phenomenon, as will be discussed in the following section.

³For instance, these ruling elites may be members of the military that can threaten a coup or the members of a business council that finances party operations.

branch, such as an internal challenge for the party leadership, a military coup or a devastating corruption investigation.⁴ The existence of such mechanisms implies that public policies need to cater to the interests of these elites. However, the more fragmented the regime's supporting elites are and the more their capacity to act is constrained by internal divisions, the less pressing is the executive's motivation for satisfying them. In contrast, a strong opposing elite poses a greater challenge to the survival of the political regime and hence commands a greater price for refraining from destabilizing activities.

The enduring existence of opposition forces along with a lack of transparency about their viability introduce the need for governments in illiberal democracies to elicit this information through means that do not compromise the nature of the regime. Specifically, in the absence of a competitively organized opposition or a vibrant media (which protect the regime from outside opposition), the executive branch needs information devices to reveal the balance of power within the regime's elites. We argue that courts are an institutional form that can play this role and they emerge as a salient informational device in our model. Relying on them, rather than on parliamentary opposition or media exposure, could be the appropriate strategy for a particular authoritarian regime. Specifically, independent courts could reinforce the executive's stability in office without risking open opposition or political collapse as alternative institutions might (such as an unconstrained media or free elections).

In order to formalize this intuition about the emergence of independent courts as an informational device for the executive, we provide a simple model of policy-making in which the type of the judiciary that will review public policy is strategically chosen by the political regime. At the beginning of the game, the executive chooses a policy that consists of a tax rate along with a division of the resulting revenues between transfers and rents to the elites, and the type of the judiciary as either "friendly" or "independent". If the judiciary accepts public policy, the game is over and the executive's survival chances are determined according to this policy that will prevail. On the other hand, if the judiciary rejects, the executive has the choice to either defy or comply with the ruling. If the executive defies the ruling, the original policy choice prevails, whereas compliance with the ruling implies that a status-quo policy remains in effect.

The executive branch is purely office-motivated and seeks to maximize its probability of re-election (that is, staying in power). The voters and the regime's supporting elites

⁴The threat the Mexican PRI "old guard" posed to the reforms in the 1990s seeking a transformation of the party, the toppling of Thailand's most recently elected prime minister Yingluck Shinawatra in a military coup, and recordings alleging corruption at the highest levels of Turkey's government disseminated by a clique inside the security forces constitute instances in which the three types of internal mechanisms for challenging the ruling leader were observed.

together determine this probability. The crucial part of the model is that while the executive branch cannot observe the true strength of the ruling elites, which affects its re-election chances, the judiciary is fully informed. We assume that in addition to public policy, the judiciary is motivated by gaining legitimacy with the actors that have the power to determine the future executive. Since this legitimacy payoff is increasing in the elites' strength, the judiciary's ruling can potentially inform the executive branch of its actual re-election chances, allowing it to reverse course by maintaining the status-quo policy in case of a rejection if doing so would serve its survival purpose better than its original policy.

In equilibrium, we find that an independent judiciary is observed only if the revealed information on the true strength of the elite is sufficiently valuable for the executive branch to justify reneging on its original policy and maintaining the status-quo following a rejection. In all other instances, a friendly judiciary is preferred as it guarantees acceptance of any public policy. An independent judiciary requires that there exists sufficient distance between the executive's prior belief on elite strength and its consistent posterior belief upon observing a rejection. Thus, the transparency of the political environment is the main determinant of whether courts will be independent. On the equilibrium path, the executive never defies an independent court, highlighting its purpose as an institution that can help the executive branch increase its chances of survival.

These results imply that independent courts do not necessarily improve voter welfare compared to a friendly court. For instance, if the information revealed by an independent court's rejection leads the executive into reversing course in favor of the elites, then the voters are relatively hurt by this court. Similarly, we show that in order to manipulate an independent court into revealing information on elite strength, the ruling leader may find it optimal to award more rents to the elites than it would under a friendly judiciary. The judiciary's acceptance of this policy due to the underlying state of elite strength would again hurt the voters compared to their equilibrium payoffs under a friendly judiciary. Thus, our results suggest that voters may be better-off under certain parameter conditions with a judiciary that simply rubber-stamps public policies.

By characterizing when an independent judiciary would be observed in equilibrium, our model allows for the co-existence of friendly and independent courts across illiberal democracies. In general, our analysis presents the conditions under which an independent institution would be tolerated due to the value of the information it provides on a variable of interest to the executive branch. However, it is important to recognize that the limit to using an institution to reveal information about possible divisions within the regime is the survival of the regime itself. There are limitations and costs to be

borne, namely, controlling the opposition and other social movements that can threaten the regime. In this paper, we argue that courts are a safer institution through which the regime can elicit such information, as opposed to a free media or opposition parties that can more directly threaten its survival.

The paper is organized as follows: Section 2 provides a review of the related literature. In this section, we address the debate around the question of what an illiberal democracy is. The basic model is described in Section 3. We introduce courts as an institution that generates information that cannot be obtained elsewhere due to the lack of transparency in other institutions. In that respect, illiberal democracy is not an endogenous outcome of our model, but the institutional context to study the possibility of judicial independence. A canonical result is presented in Section 4, where we show that no judicial independence would be tolerated under perfect information on the strength of the elites. Section 5 analyzes the equilibrium under imperfect and asymmetric information. Section 6 concludes. In particular, we emphasize that we neither suggest that all nondemocratic regimes will adopt independent courts nor propose that courts will oppose the ruling leader all the time. Instead, we point out that as long as ruling elites are not strongly homogenous and other political institutions are riskier to the stability of the political regime, a degree of court independence might be tolerated if it plays an important informative function to the executive branch.

2 Related Literature

In their comprehensive report on judicial independence in comparative perspective, Helmke and Rosenbluth (2009) provide an overview of historical path-dependence theories (legal origin), delegation explanations (for unpopular policies, enhancing political payoffs or helping the legislature to monitor the executive branch), and political insurance motives against future losses. An important analytical literature rigorously studies the conditions under which independent courts are expected to emerge and survive.⁵ More recently, Vanberg (2015) suggests that independent courts exist due to the uncertainty associated with the outcome of policies, giving support to the insurance motives theory. However, as he notes, this theory requires certain conditions, including a competitive political process, a sufficiently long time horizon and the responsiveness of judicial rulings to political competition.

⁵For example, see Vanberg (1998, 2001, 2011), Rogers (2001), Iaryczower, Spiller and Tommasi (2002), Stephenson (2003, 2004), Hanssen (2004), Whittington (2005), Rogers and Vanberg (2007), Carrubba (2009), and Taylor-Robinson and Ura (2012).

Our paper departs from this technical literature in two ways. First, we consider nondemocratic regimes rather than democracies (with a competitive political process and fully contestable elections). Second, we argue that courts reveal information about possible divisions within the ruling elites. This is a fundamentally different theory than either the political insurance theory against future losses (we do not require the actual possibility of regime collapse) or the delegation of unpopular policies explanation (since the purpose of delegation is to minimize electoral or survival losses while shifting blame to the courts).⁶

The following subsections discuss in more detail how our paper relates to the existing literature.

2.1 Defining Authoritarian Regimes

We develop our model in the context of nondemocratic regimes, which begs for a discussion on the defining features of such regimes. Brooker (2009) identifies several features of authoritarianism, including limited political pluralism, distinctive elements within a prevailing ideology, leader within predictable and established limits, importance of a loyal bureaucracy (rather than popular mobilization), and institutions designed to protect the regime (such as a political police or a one-party system). Notwithstanding, the author acknowledges that courts can play an important role for generating external legitimacy or constituting a bulwark against challenges to certain reforms by internal factions. For instance, while the ruler could play a moderating role within the ruling elite, the court could be perceived as the true guardian of the regime, requiring that it is endowed with veto power. During a democratization process, courts can also contextualize negotiated transitions and avoid political disintegration.

Zakaria (1997) introduced the term “illiberal democracies” into the academic literature and the popular discourse. According to him, these political regimes are primarily characterized by two important characteristics: some form of elections to the legislative branch of the government (thus providing ideological legitimacy to the ruling elites) and functioning courts. They combine elements of democracy and traditional authoritarianism by allowing a certain degree of plurality, but only under state regulations that

⁶Stephenson (2003, 2004) provides theories in which the judiciary’s ruling serves as signals to the opposition party or to the voters on the details of the executive’s policy. Similarly, Rogers (2001) studies the emergence of independent judicial review in an environment in which the judiciary has more information on the effects of any given policy than the legislature. In this regard, they are closely related to our model in which the judiciary acts as an information revelation device for the nondemocratic executive branch.

rearrange the political spectrum. In such regimes, the salience of a strong leader also limits the actual degree of political competition. As for the judiciary, they exist as elements of a partial democracy and occasionally overturn government decisions, as discussed in more detail in Davenport (2000). As argued in Isaac (2017), courts intervene often-times to break disputes that arise from the legislative redistribution of property across a changing elite. The literature argues that the existence of courts along with the limited leeway they enjoy in overturning legislation are necessary concessions by the regime to stay in power. Clearly, an illiberal democracy maintains strict control of political rights, but acquiesces to certain improvements in the political life of the country for continued power.⁷

Studies such as Levitsky and Way (2002, 2010) argue that while these regimes were traditionally considered as being in a transition state, they can now be regarded as well-established.⁸ The authors define a democracy as having the following characteristics: open and free elections, universal adult vote, political rights and freedom of the press, freedom of association and to criticize the government, and the freedom of elected authorities to rule without tutelage by military or clerical leaders. In contrast, competitive authoritarianism is a regime that violates these criteria while allowing for some form of elections (mostly plebiscitarian). Therefore, we might observe in these regimes some minor organized opposition having a say in the legislature, a complaint judiciary being allowed to go against the government, or the media enjoying limited freedom. These concessions create inherent tensions between the stability of the regime and (limited) opposition challenges (by favoring legalized persecution).

Legal culture also matters in this context. On one hand, independent courts legitimize the regime, alleviate political tensions, economize on more aggressive and expensive strategies, and enforce cohesion within the ruling elite. However, formalism and bureaucratic judiciaries pose no threat to political transitions, offer little resistance to political orientations, and apply the law with full regard for the interpretation of the legislators, whether democratic or authoritarian. Therefore, courts could play at two goals, enshrining principles dear to the regime while balancing the direct interests of the ruling

⁷More recently, focusing mainly on the examples of contemporary Hungary and Poland but also China to some degree, Puddington (2017) adds a few elements to the characterizations of modern authoritarianism. These regimes do not abandon the rule of law completely. In fact, amendments to constitutional law and legislation follow rule of law patterns. This creates an illusion of pluralism while supporting a functioning oligarchic control. The role of courts is to enforce the rule of law with a mix of order, legitimacy and prosperity imposed by the regime (Takis 2014, Kornai 2015).

⁸The authors argue that more independent courts (and other soft authoritarian institutions) could be the outcome of different paths: a softening of full-blown authoritarianism, new authoritarianism replacing a previous one with co-existence of different ruling elite classes, or the decaying of a more democratic regime.

elite with some operative concessions to the opposition. This role could be achieved by packing the courts, not only with loyal judges, but opposition judges who are socially and culturally close to the regime's elites (Garoupa and Maldonado 2011).

2.2 Independent Courts in Authoritarian Regimes

Authoritarian regimes are now on the rise. However, well before this trend started, there already existed a non-technical literature on theorizing the possibility of independent courts in nondemocratic regimes. For example, Ginsburg and Moustafa (2008), with a few examples in mind such as Egypt in the 1970s, argue that courts in authoritarian regimes play three functions: social control, political and administrative control, and legitimation. Legitimation can be either external (due to possible economic and political expropriation of previous ruling elites or foreign interests) or internal (ruling elite cohesion and delegation of difficult reforms to courts). While the control functions necessarily reduce judicial autonomy, legitimation requires increased judicial autonomy.⁹

Another context that has been analyzed is transitions from authoritarian regimes to democracy.¹⁰ One particularly interesting example of such a transition is Argentina's democratization in the 1980s. Helmke (2002, 2005) has provided theoretical reasoning and empirical evidence to support the idea that once the collapse of the authoritarian regime becomes a possibility, judges engage in strategic defection against the ruling elites, creating the illusion of truly independent courts. However, the author argues that this is in fact a survival strategy that occasionally pays off.¹¹ Another example is provided by African countries, whose experiences vary from strong interference by governments into judicial decision-making to a degree of court independence.¹²

In a recent article, Epperly (2017) argues that a certain degree of political competi-

⁹The authors argue that authoritarian regimes might use different institutional approaches to address this trade-off (judicial self-restraint, a fragmented versus unified court system, constrained court access or standing, or regulation of lawyering and other legal networks.)

¹⁰Chile under Pinochet (1973-1990) also deserves attention in this context. Barros (2002, 2003) explains how constitutional rule by law (as opposed to the rule of law) was developed in Chile to provide an ex ante commitment and ex post control to a ruling collective sovereignty. Rule by law assured stable, consistent and loyal application of laws by enforcement agencies and judges, bound by constitutional law that balanced the interests of the ruling elite. At the same time, rule by law avoided emergency powers (uncertain and discretionary) and extrajudicial acts (arbitrary) that could damage the internal pluralism of the dictatorship.

¹¹On the other hand, no strategic defection is identified for the transitions in Brazil and in the Philippines in the 1980s. See Arlota and Garoupa (2014) and Escresa and Garoupa (2013).

¹²These divergent approaches by African governments to judicial independence have been connected to the insecurities of the ruling elites and the threat posed by the judiciary itself in Von Doepp (2009) and Von Doepp and Ellet (2011).

tion explains the existence of some judicial independence in nondemocracies. The author finds that a greater risk of losing power (a form of contestability) empirically enhances the chance of more independent courts. Overall, such evidence suggests that autocracies also follow patterns that are not very different from democracies, as argued in Aydin (2013): They also care about electoral cycles and react to potential challengers.¹³

2.3 Constraints on Executive Power

Our paper is also related to a broader political economy literature on the institutions that constrain executive decision-making. Among the most closely related studies are Lagunoff (2001) on minority rights, Aghion, Alesina and Trebbi (2004) on voting rules in legislatures, Acemoglu, Robinson and Torvik (2013) on the relationship between voters and check and balances institutions, and Besley, Persson and Reynal-Querol (2016) on the relationship between direct constraints on executive power and political turnover. Karakas (2016, 2017) study why the constraints on executive power respond to political turnover only in nondemocracies by introducing explicit costs of institutional change in the former and introducing a public good as an additional state variable that guides this decision in the latter. This paper aims to contribute to this literature on the determinants of institutions that constrain governments, with a focus on the judiciary.

3 The Model

We analyze an executive branch’s decision on whether to subject its policy-making authority to review by an independent judiciary. The players of the game are the incumbent government (“the executive”), the judiciary, the regime’s elites and the voters. Upon the executive’s institutional choice on the type of the judiciary as either independent or friendly, these players interact in a simple policy-making process followed by an election. We allow for the executive’s re-election chances to be determined simultaneously by the support it receives from the voters and the elites. While the extent of its voter support is common knowledge, the executive cannot perfectly observe the strength of the opposition it faces from the elites.

¹³In this context, China has attracted attention. For example, Ahl (2018) explains the empowerment of the Chinese Supreme People’s Court as the result of a combination of loyalty to the party in return for a considerable leeway in achieving possible institutional interests. In fact, it seems the Supreme People’s Court is a more convenient and flexible institutional instrument for pursuing party policies than the legislature (Li, 2016).

The basic features of our model can be described as follows: A purely office-motivated executive wants to implement a policy that maximizes its probability of re-election. At the beginning of the period, it decides on a policy and the type of the judiciary that will review this policy. The latter choice consists of deciding between a friendly judiciary with identical policy preferences as the executive and an independent judiciary for which this is not necessarily the case. The policy consists of an income tax rate and a division of the resulting tax revenues between public spending and rents for the elites. Following the executive's choices, the judiciary rules on the rents allocated to the elites. We assume that the judiciary cares both about policy and its legitimacy, which depends on ruling in favor of the actors with the power to determine the future executive. The characteristic of the regime determines the extent to which the judiciary's legitimacy motive weighs the elites' preferences against those of the voters. If the judiciary overturns its policy choice, the executive chooses between complying with or defying this ruling. Defying the judiciary implies that the executive's initial policy choice prevails, while compliance lets a status-quo policy stay in effect. Elections take place at the end of the period that determine whether to return the incumbent to office.

There are three main aspects of our model that together provide a novel conceptualization of the policy-making process when the institutions that constrain it are endogenous. First, the incumbent executive's re-election probability is determined simultaneously by the elites and the voters. Second, the executive faces uncertainty on the strength of the elites (as manifested by, for example, internal divisions) and therefore their ability to affect its re-election. Third, the judiciary cares not only about its own policy preferences but also those of the players that confer its legitimacy. This final feature implies that the judiciary's ruling can potentially provide information to the executive on the strength of the elite opposition it is facing and thus its probability of re-election.

We provide the details of our model in the following subsections.

3.1 Institutional and Policy Choices

The incumbent executive makes both an institutional choice and a policy choice at the beginning of the game. Its institutional choice determines the type of the judiciary as either “friendly” or “independent”.¹⁴ Specifically, the executive chooses $J \in \{F, I\}$,

¹⁴In a democracy, the executive either faces a prohibitively high cost of choosing a friendly judiciary or always finds it optimal to protect itself against political turnover so that the judiciary is always independent from the executive. Therefore, we focus on regimes in which the executive branch has a

where $J = F$ indicates a friendly judiciary with preferences that are aligned with the executive's office motivation (for example, a non-political judiciary primarily engaged in administrative control), and $J = I$ indicates an independent judiciary whose ideal policy may or may not be identical to that chosen by the executive.

A policy consists of an income tax rate $\tau \in [0, 1]$, per-capita transfers $T \geq 0$ and rents $R \geq 0$ to the elites. This implies that the budget constraint given by $T + R \leq \tau y$ must be satisfied, where y denotes the voters' average income.

The executive is purely office-motivated so that its institutional and policy choices maximize its probability of re-election, which depends on support from both the elites and the voters. Thus, our analysis is focused on political regimes in which the strength of the elites matters for the executive's re-election (some form of plebiscitarian election, for example). However, we assume, due to non-transparent institutions and the lack of a vibrant media in such regimes, that the executive cannot perfectly observe this strength. To model this uncertainty, we let $e \in \{e^w, e^s\}$ denote a state of the world, where $e = e^w$ indicates a weak elite (due to, for instance, internal divisions) and $e = e^s$ indicates a strong elite (for instance, a unified one). The executive's prior belief that the state e is given by $e = e^w$ is denoted $\eta_w \in (0, 1)$.

3.2 Judicial Review

Once the executive decides on the type of the judiciary $J \in \{F, I\}$ and the policy triplet (τ, T, R) , the judiciary rules on the division of the tax revenues. If it upholds the division implied by the pair (T, R) for the tax rate τ , then the executive's policy becomes the law and the game moves on to the election stage. However, if it rejects it, then the executive chooses to either comply with or defy this negative ruling. If the executive defies, then its policy choice (τ, T, R) prevails. If it instead complies with the judiciary's decision, then the revenues implied by the executive's tax rate τ are divided according to the status-quo proportion $q \in [0, 1]$ of revenues benefiting the elites so that the per-capita elite rents become $R_q = q\tau y$ and the per-capita transfers become $T_q = (1 - q)\tau y$. The executive bears a fixed cost c of defying the judiciary.¹⁵

The judiciary cares both about policy and its legitimacy.¹⁶ For the judiciary's policy meaningful institutional choice over the type of the judiciary its policy-making authority will be subject to. For example, see Besley, Persson and Reynal-Querol (2016) or Karakas (2016, 2017) for analyses in which the executive branch may choose strong constraints on its authority in equilibrium as insurance against its opponents' policy objectives.

¹⁵For example, this cost may represent a loss of credibility in the eyes of the voters or a backlash from other state institutions for non-compliance.

¹⁶For studies that lend support to this assumption, see McGuire and Stimson (2004) and Clark (2009).

motivation, we assume that the ideal division of tax revenues for a friendly judiciary, hand-picked by the executive, is given by the executive's choice (T, R) , whereas we make no such restrictions on the ideal policy of an independent judiciary. For its legitimacy motive, we assume that the judiciary is averse to ruling against the interests of those from whom it derives its legitimacy. Specifically, we assume that the judiciary derives its legitimacy from the players with the power to determine the incumbent's re-election, i.e. from the elites and the voters. In hard-authoritarian regimes without free elections in which the voters play only a minimal role in determining the future executive, this implies an aversion to ruling against the regime's elites. In soft-authoritarian regimes in which free elections are still an important component of the regime to some degree, this concern for legitimacy would imply that the judiciary cares about its public prestige and prefers ruling in favor of the voters.¹⁷

Consequently, we represent the judiciary's policy payoff as $-|g - j_J|$ for $J \in \{F, I\}$, where $g = \frac{R}{\tau y}$ represents the proportion of tax revenues allocated to the elites in the executive's policy (τ, T, R) and $j_J \in [0, 1]$ represents the type- J judiciary's ideal proportion of elite rents for any given tax rate.¹⁸ We let $j_F = g$ for any given g chosen by the executive. In addition, we model the judiciary's legitimacy payoff as a fixed benefit λeB if the judiciary rules in favor of the elites, where $B > 0$, $\lambda \in (0, 1)$ and $e \in \{e^w, e^s\}$ is such that $e^s > e^w > 0$, and as a fixed benefit $(1 - \lambda)P$ if it rules in favor of the voters, where $P > 0$.¹⁹ Accordingly, λ is a parameter that represents the relative importance of the elites in determining the incumbent's re-election.²⁰

Unlike the executive, we assume that the judiciary can perfectly observe the strength of the elite.²¹ Thus, upon observing the judiciary's ruling, the executive updates its prior belief η_w that the elite is weak before deciding whether to comply with or defy this ruling.

¹⁷According to our dichotomy, a country such as China would constitute an example for the former case of hard authoritarianism, whereas regimes with relatively free elections such as Hungary would constitute an example for the latter case of soft authoritarianism.

¹⁸For simplicity, we assume away the possible dependence of j_J for $J \in \{F, I\}$ on the tax rate τ .

¹⁹Note that for any given tax rate τ , elites and the voters always have opposite preferences. Since the judiciary cares only about the proportion of tax revenues that are allocated to the elites, and not about the tax rate, its ruling will be in favor of either the elites or the voters, but not both.

²⁰The parameter $\lambda \in (0, 1)$ allows us to represent middle regimes in which both the voters and the elites matter in determining an incumbent's re-election. Examples include regimes such as Turkey, Russia and Iran.

²¹For instance, this may be because courts are faced with petitions or challenges from the elites.

3.3 Elections

The executive receives a fixed benefit from re-election. Its re-election probability is determined in part by the elites and in part by the voters to varying degrees. Letting $p^e : [0, 1] \times \mathbb{R}_+^2 \times \{e^w, e^s\} \rightarrow [0, 1]$ and $p^v : [0, 1] \times \mathbb{R}_+^2 \rightarrow [0, 1]$ be such that $p^e(\tau, T, R, e)$ and $p^v(\tau, T, R)$ respectively denote the executive's probability of re-election if the elites or the voters only determined the future executive, we let $p(\tau, T, R, e) \equiv \lambda p^e(\tau, T, R, e) + (1 - \lambda)p^v(\tau, T, R)$ denote the incumbent's probability of re-election for any given prevailing policy $(\tau, T, R) \in [0, 1] \times \mathbb{R}_+^2$ and state of elite strength $e \in \{e^w, e^s\}$.²²

To analyze the voters' behavior, we use a simple model of retrospective voting in which there exists a challenger that is identical to the incumbent. For concreteness, we assume that the voting population consists of poor voters with income y_p and rich voters with income y_r , where $y_r > y_p$. Normalizing the size of the population to 1, we let $\alpha_h \in (0, 1)$ for $h \in \{p, r\}$ denote the size of a group of voters such that $\alpha_p + \alpha_r = 1$. In the absence of any differentiated ideological characteristics between the incumbent and the challenger, the voters effectively only care about their post-tax consumption. In this setting, as analyzed in Persson and Tabellini (2000), we assume that the voters use a punishment strategy such that $p^v(\tau, T, R) = 1$ if $\alpha_p U_p(\tau, T, R) + \alpha_r U_r(\tau, T, R) \geq \bar{U}$ and $p^v(\tau, T, R) = 0$ otherwise, where \bar{U} denotes the voters' reservation utility and U_h for $h \in \{p, r\}$ is an increasing function of a group- h voter's private consumption.²³

We model the elites' participation in the election process in a reduced-form way by letting p^e be increasing in R for any given tax rate τ . Furthermore, we assume that $p^e(\tau, T, R, e^w) > p^e(\tau, T, R, e^s)$ for any given policy (τ, T, R) and that the function p^e exhibits increasing differences in (R, e) so that $p^e(\tau, T', R', e^s) - p^e(\tau, T, R, e^s) \geq p^e(\tau, T', R', e^w) - p^e(\tau, T, R, e^w)$ for any $R' \geq R$ (and thus $T' \leq T$ such that $T' + R' = T + R$). Intuitively, this assumption ensures that the executive receives a greater return in terms of re-election support from the elites from a marginal increase in rents when the elites are strong.

Note that the budget constraint implies that the voters' and the elites' interests are in conflict at the judicial review stage, where the executive's proposed division and the status-quo division of the tax revenues constitute the only two alternatives. Thus, while awarding higher rents to the elites (weakly) hurts the incumbent's re-election chance with the voters, it increases it with the elites.

The following list summarizes the timing of events:

²²We abuse notation here by letting the policy (τ, T, R) denote the final prevailing policy, which may be the executive's initial choice or the status-quo.

²³We assume that the voters' reservation utility \bar{U} is exogenously given.

- Nature determines the state of the elites' strength $e \in \{e^w, e^s\}$;
- The executive chooses the type of the judiciary $J \in \{F, I\}$ and a policy $(\tau, T, R) \in [0, 1] \times \mathbb{R}_+^2$;
- The judiciary rules on the executive's policy;
- If the judiciary rejects (τ, T, R) , the executive chooses to comply with or defy the ruling;
- Voters choose whether to re-elect the executive and elites take actions that contribute to the executive's re-election chances;
- The future executive is realized and payoffs are distributed.

In the following section, we first present a benchmark analysis with no uncertainty on the state of elite strength. This analysis allows us to highlight the role independent courts play in the equilibrium of our model for revealing information to the executive on the strength of its opposition.

4 Benchmark Analysis: Transparent Elites

In order to improve the exposition of our results, we make the following assumption on the judiciary's preferences:

Assumption 1. $\lambda e^w B + |g - q| \geq (1 - \lambda)P \geq \lambda e^s B - |g - q|$ for any given $g \neq q$.

Assumption 1 ensures that a friendly judiciary always upholds the executive's policy. This is due to the fact that we impose $j_F = g$ for any given proportion g of tax revenues benefiting the elites in the executive's policy choice (τ, T, R) . Accordingly, Assumption 1 implies $\lambda e^w B \geq -|g - q| + (1 - \lambda)P$ for any given $g > q$ such that accepting the executive's policy implies ruling in favor of the elites, and $(1 - \lambda)P \geq -|g - q| + \lambda e^s B$ for any given $g < q$ such that upholding the executive's policy implies benefiting the voters.²⁴ Thus, these inequalities together ensure that a friendly judiciary's policy preference alignment with the objective of the executive always outweighs any legitimacy concerns with the elites, whether they are weak or strong, or the voters.

Consider the model described in Section 3 in the absence of any uncertainty on elite

²⁴When $g = q$, the judiciary effectively does not act.

strength so that the executive is able to observe the state $e \in \{e^w, e^s\}$. Then, choosing a friendly court is the executive's dominant strategy, as described in the following lemma.²⁵

Lemma 1. *If the executive observes the state e , then the judiciary is always friendly in equilibrium.*

Lemma 1 indicates that since the executive's chosen policy when e is observable maximizes its probability of re-election under complete information on the judiciary's preferences, the executive prefers to have this policy upheld. The perfect alignment between its office motivation and the friendly judiciary's policy preferences yields an institutional choice for a friendly judiciary in equilibrium, since the alternative would imply either modifying its policy to satisfy the independent judiciary's acceptance constraint, paying a fixed cost of defiance, or acquiescing to a sub-optimal status-quo policy.²⁶

The fact that the executive never allows for an independent review of its policy choice in a complete information environment foreshadows our main results that will be presented in the subsequent section. Starting with introducing the equilibrium concept for our model, the following section characterizes this equilibrium under uncertainty on the state of elite strength and hence on judicial preferences.

5 Equilibrium

Since the executive has imperfect information on the Nature's choice of elite strength and thus incomplete information on the payoffs of the judiciary, the equilibrium concept we employ is Perfect Bayesian Nash equilibrium (PBNE).

A pure strategy for the executive consists of a policy $(\tau, T, R) \in [0, 1] \times \mathbb{R}_+^2$, an institution $J \in \{F, I\}$ and a defiance rule $d : [0, 1] \times \mathbb{R}_+^2 \rightarrow \{0, 1\}$, where $d(\tau, T, R) = 1$ conditional on the judiciary's rejection if and only if the executive defies the judiciary's rejection, thereby letting its policy choice prevail. Otherwise, $d(\tau, T, R) = 0$. A pure strategy for the type- J judiciary for $J \in \{F, I\}$ is an acceptance rule $a_J : [0, 1] \times \{e^w, e^s\} \rightarrow \{0, 1\}$, where $a_J(g, e) = 1$ if and only if the type- J judiciary accepts the executive's policy described by g upon observing the state e , and $a_J(g, e) = 0$ otherwise. Finally, we assume for simplicity that the voters coordinate on the voting strategy described in Section

²⁵All proofs are in the Appendix.

²⁶That a friendly judiciary is always observed in equilibrium when elite strength is completely transparent does not necessarily represent a contradiction to our definition of democracy as a regime with open opposition. Notice that this analysis takes into account neither various possible costs of enacting compliant institutions nor the executive's policy preferences that would introduce insurance motives to its institutional choices.

3.3.²⁷

Equilibrium consists of optimal strategies for all players given the other players' equilibrium strategies and beliefs, and a system of beliefs that is consistent with Bayes' rule and the players' equilibrium strategies. Given its beliefs on elite strength at each stage of the game, the executive's optimal policy, institution and defiance strategies maximize its expected payoff. Since the policy and institution strategies are chosen before the judiciary's ruling, this expected payoff is calculated using the executive's prior belief η_w that $e = e^w$. Upon observing $a_J(g, e)$ for $J \in \{F, I\}$, choosing $d(\tau, T, R) = 1$ implies an expected probability of re-election for the executive with its chosen policy net of the fixed cost of defiance and $d(\tau, T, R) = 0$ implies an expected probability of re-election with the status-quo policy, both calculated using its posterior belief η'_w that $e = e^w$. Similarly, the judiciary's optimal acceptance strategy maximizes its payoff, which consists of a policy and a legitimacy component. Given the division of tax revenues g in the executive's policy and the state e , the type- J judiciary for $J \in \{F, I\}$ chooses $a_J(g, e) = 1$ if and only if $-|g - j_J| + \lambda eB \geq -|q - j_J| + (1 - \lambda)P$ when $g > q$ and $-|g - j_J| + (1 - \lambda)P \geq -|q - j_J| + \lambda eB$ when $g < q$. Note that consistent beliefs require $\eta_w = \eta'_w$ if $J = F$ under Assumption 1.

The following sections characterize the equilibrium. We begin with the judicial review stage.

5.1 Optimal Defiance

Since Assumption 1 implies $a_F(g, e) = 1$ in equilibrium for any given g and $e \in \{e^w, e^s\}$, the analysis of the executive's equilibrium defiance strategy is only relevant for an independent judiciary. In other words, the defiance choice can never be reached on the equilibrium path if $J = F$. Nonetheless, for a complete equilibrium characterization, the following analysis allows for both a friendly and an independent judiciary.

For any given policy and type of judiciary, the executive defies the judiciary's rejection instead of complying with it in equilibrium if and only if its expected re-election probability with the given policy net of the defiance cost is at least as great as its expected re-election probability with the status-quo policy. These expected payoffs are both computed using the executive's consistent posterior belief on elite strength. Clearly, this posterior is equal to the executive's prior belief in a pooling equilibrium.

A more interesting analysis of the executive's defiance decision pertains to the equi-

²⁷We do not formally define the actions the elites take and simply let $p^e(\tau, T, R, e)$ be increasing in R for any given τ and state e .

librium path. As previously noted, the information set that includes the executive's defiance decision nodes following rejection by a friendly judiciary cannot be reached on the equilibrium path. Therefore, focusing on an independent judiciary, there may be only two reasons why the executive may choose to reverse course following the judiciary's rejection and let the status-quo policy prevail instead on the equilibrium path: First, the exogenous cost of defying the judiciary may simply be too high to insist on its original, ex ante optimal policy choice. Second, the executive may have gained information from the judiciary's ruling on the strength of the elite that would justify concluding ex post that the status-quo policy yields a greater re-election probability. The following proposition summarizes this intuition:

Proposition 1. *Given $J = I$, suppose the executive's optimal policy (τ, T, R) is such that $a_I(g, e) = 0$ for all e in equilibrium. Then, $d(\tau, T, R) = 1$ on this equilibrium path if and only if the defiance cost is below a threshold $\bar{c} > 0$.*

Based on Proposition 1, the executive always defies an independent judiciary on an equilibrium path on which it is rejected if $c = 0$. This is due to the fact that the absence of any new information gained from the judiciary's rejection on this equilibrium path means the executive's initial policy choice remains preferred over the status-quo. Accordingly, it is only when defying the judiciary imposes a sufficiently high cost that the executive would comply with the ruling and let the status-quo prevail. Otherwise, it would insist on its policy. Defiance benefits the elites when $g > q$ and the voters in the opposite scenario.

A pooling equilibrium in which $a_I(g, e) = 0$ for all g and e requires $-|q - j_I| + (1 - \lambda)P \geq -|g - j_I| + \lambda e^s B$ for any given policy (τ, T, R) such that $g > q$ and $-|q - j_I| + \lambda e^w B \geq -|g - j_I| + (1 - \lambda)P$ for $g < q$. These conditions ensure that an independent judiciary would always reject any policy, regardless of the strength of the elites. More generally, in equilibrium, rejecting a policy $g > q$ that would benefit the elites requires a sufficient regard for the status-quo together with a legitimacy payoff from the voters, while rejecting a policy $g < q$ that would benefit the voters relative to the status-quo requires again a sufficient regard for the status-quo along with a legitimacy payoff from the elites. In other words, in addition to sufficiently high legitimacy payoffs from the players whom the judiciary's rejection would benefit, the judiciary's policy preferences must be sufficiently pro-voter in the former case and pro-elite in the latter.

Overall, Proposition 1 indicated that a sufficiently high cost of defiance can be the only reason the executive would acquiesce to the judiciary's rejection on an equilibrium path with no learning from the judiciary's action. In contrast, the following proposition

characterizes the conditions under which the executive would comply with a negative ruling by the judiciary on an equilibrium path even in the absence of a prohibitively high cost of defiance:

Proposition 2. *Given $J = I$, suppose the executive's optimal policy (τ, T, R) is such that $a_I(g, e^w) \neq a_I(g, e^s)$ in equilibrium. Then, $d(\tau, T, R) = 0$ in equilibrium for sufficiently large values of $|\eta'_w - \eta_w|$, where the posterior belief η'_w is obtained via Bayes' rule upon observing $a_I(g, e) = 0$.*

In contrast to Proposition 1, Proposition 2 states that the executive may comply with an independent judiciary's rejection on an equilibrium path even if there exists no cost of defiance. When letting the status-quo policy prevail would lead the voters to change their re-election decision, a necessary and sufficient condition for this to happen is a sufficiently large difference between the executive's prior and posterior belief on the strength of the elite. Informally, whenever the judiciary's rejection catches the executive by a sufficiently large surprise, the executive uses this valuable information to reverse course and let the status-quo policy prevail instead of its original choice.

To see how this result is obtained more clearly, suppose the executive's optimal policy g conditional on an independent judiciary is such that $a_I(g, e^s) = 1$ and $a_I(g, e^w) = 0$ in equilibrium, i.e. the judiciary upholds g if and only if the elite is strong. This requires $g > q$ and $-|g - j_I| + \lambda e^s B \geq -|q - j_I| + (1 - \lambda)P \geq -|g - j_I| + \lambda e^w B$.²⁸ Intuitively, this requirement implies ruling in favor of the elite by upholding the executive's policy only when the elite is strong, thus conferring a sufficiently high legitimacy payoff on the judiciary. Upon observing the judiciary's rejection, the only posterior belief consistent with Bayes' rule that the executive may hold is $\eta'_w = 1$, i.e. knowledge that the elite is in fact weak. If the executive's prior belief on a weak elite was sufficiently low that its ex ante optimal policy is no longer preferred to the status-quo, then the executive would not defy the judiciary on this equilibrium path, even if the cost of defiance is negligible. On the other hand, if the executive's prior belief that the elite is weak was already high enough, diminishing the surprise of the revelation, the executive insists on its initial policy for bearable defiance costs. Similarly, on an equilibrium path with $g < q$ such that $a_I(g, e^w) = 1$ and $a_I(g, e^s) = 0$, the executive would comply with the judiciary's rejection in favor of the elites if its prior belief that the elite is weak was too high relative to its consistent posterior belief that the elite is surely strong. Under both scenarios, what makes the executive reverse course on an equilibrium path is its realization due to its newly-acquired knowledge that the status-quo serves its re-election goal better than

²⁸Note that $a_I(g, e^s) = 0$ and $a_I(g, e^w) = 1$ cannot be observed in equilibrium for any $g > q$.

its original policy.

The technical assumption that the function p^e exhibits increasing differences in (R, e) allows us to obtain precisely how learning from the judiciary's rejection could benefit the executive on an equilibrium path. For concreteness, consider the equilibrium path with policy $g < q$, $e = e^s$ and $a_I(g, e^s) = 0$, where $e = e^w$ would yield $a_I(g, e^w) = 1$ in equilibrium. The ex ante optimality of g implies for the voters' strategy that $p^v(\tau, T, R) \equiv p^v(g) = 1$ and $p^v(\tau, T_q, R_q) \equiv p^v(q) = 0$. In this case, the greater marginal re-election probability the executive gains from awarding rents to a strong elite implies that the executive's ex ante preference of its policy over the status-quo may be reversed as it adjusts its prior belief on elite strength. Specifically, letting $p^e(\tau, T, R, e) \equiv p^e(g, e)$ for brevity, whenever the executive's prior belief on elite strength is such that the η_w for which the equality

$$\lambda[\eta_w p^e(g, e^w) + (1 - \eta_w)p^e(g, e^s)] + (1 - \lambda) = \lambda[\eta_w p^e(q, e^w) + (1 - \eta_w)p^e(q, e^s)] \quad (1)$$

holds satisfies $\eta_w > 0$, then the executive's policy preference reverses upon learning the elite's true type, i.e. $e = e^s$. Note that the left-hand side of equation (1) is the executive's ex ante expected payoff from its optimal policy choice, whereas the right-hand side is its ex ante expected payoff from the status-quo policy. As the executive adjusts its prior belief η_w down toward the consistent posterior $\eta'_w = 0$ on this equilibrium path, the assumption of increasing differences on the function p^e ensures that the former expected payoff decreases faster than the latter, allowing for the initial preference for g over q to be eventually reversed. Based on re-arranging equation (1) and the assumption of increasing differences, this requires that $(1 - \lambda) - \lambda[p^e(q, e^s) - p^e(g, e^s)] < 0$ is satisfied, which implies

$$\frac{1 - \lambda}{\lambda} < p^e(q, e^s) - p^e(g, e^s). \quad (2)$$

Note that since $g < q$ on this equilibrium path, the right-hand side of (2) is always positive and takes values less than 1. Accordingly, $\lambda > \frac{1}{2}$ is a necessary condition for it. This is summarized in the following corollary:

Corollary 1. *If the optimal policy g conditional on $J = I$ is such that $g < q$, $a_I(g, e^s) = 0$, $a_I(g, e^w) = 1$ and $d(\tau, T, R) = 0$ in equilibrium, then the elites are relatively more important than the voters in determining the executive's re-election.*

Corollary 1 simply follows from the analysis outlined in the above paragraph and its proof is therefore omitted. It indicates that if the executive chooses not to defy the judiciary and instead reverses course in favor of the elites on an equilibrium path on which

it learns that the elite is strong, then it must be the case that the elites matter relatively more than the voters. This is because letting the status-quo prevail here implies losing the voters' support, for which the executive requires sufficient compensation in the form of elite support.

Before moving on to the analysis of the executive's optimal policy and institutional choices, also consider for completeness an equilibrium path with policy $g > q$, $e = e^w$ and $a_I(g, e^w) = 0$, where again the independent judiciary accepts g in equilibrium if $e = e^s$. In this case, for the voters, always voting to re-elect, always voting not to re-elect, or to re-elect only if the status-quo prevails are all consistent with the ex ante optimality of $g > q$, depending on their reservation utility \bar{U} . For the first two scenarios, the executive never reverses course to opt for the status-quo unless the defiance cost is too high. This is because even though the executive's acquired knowledge downgrades the importance of the elites vis-a-vis the voters in determining its re-election probability, the voters do not reward the executive for reversing course. On the other hand, if the voters vote to re-elect the executive only with the status-quo, then a similar analysis as above yields the result that the η_w for which the equality

$$\lambda[\eta_w p^e(g, e^w) + (1 - \eta_w)p^e(g, e^s)] = \lambda[\eta_w p^e(q, e^w) + (1 - \eta_w)p^e(q, e^s)] + (1 - \lambda) \quad (3)$$

holds must satisfy $\eta_w < 1$ in order for the executive's preference for g over q to reverse as it adjusts its belief on the weakness of the elite upwards. Based on re-arranging equation (3), we obtain the condition

$$\frac{(1 - \lambda) - \lambda[p^e(g, e^s) - p^e(q, e^s)]}{\lambda[p^e(g, e^w) - p^e(q, e^w)] - \lambda[p^e(g, e^s) - p^e(q, e^s)]} < 1. \quad (4)$$

The assumption of increasing differences on the function p^e implies that the denominator of (4) is negative. Therefore, $1 - \lambda > \lambda(p^e(g, e^w) - p^e(q, e^w))$ becomes a necessary and sufficient condition for (4) to hold. Notice that $(1 - \lambda)$ is the executive's re-election probability gain from the voters as a result of switching to the status-quo, whereas $\lambda(p^e(g, e^w) - p^e(q, e^w))$ is its loss of support from the elites. In contrast to Corollary 1, this condition requires $\lambda < \frac{1}{2}$, which is summarized below:

Corollary 2. *If the optimal policy g conditional on $J = I$ is such that $g > q$, $a_I(g, e^w) = 0$, $a_I(g, e^s) = 1$ and $d(\tau, T, R) = 0$ in equilibrium, then the voters are relatively more important than the elites in determining the executive's re-election.*

The intuition for the above result is similar to that of Corollary 1: If the executive

maintains the status-quo in favor of the voters on the equilibrium path, then the voter support it would gain must be worth losing partial support from the elites. Here, learning that the elite is weak upon the judiciary's rejection of its policy makes the executive re-evaluate whether its original policy choice is still preferred to the status-quo. When condition (4) holds, this re-evaluation results in the executive changing course and opting for the status-quo in favor of the voters. As summarized in Proposition 2, the executive's prior belief on elite strength must be sufficiently different from its consistent posterior in order for this policy adjustment to take place. When this condition is met, the informativeness of the judiciary's action proves valuable and results in the executive changing course in order to increase its probability of re-election.

This section analyzed and discussed the conditions under which the executive would accept the judiciary's rejection in equilibrium and on the equilibrium path instead of openly defying it. The main factor that governed this decision was the extent to which the executive learned from the judiciary's rejection. The following section builds on the results here to characterize the executive's equilibrium institutional choice.

5.2 Optimal Judiciary Selection

At the beginning of the game, the executive chooses a policy $(\tau, T, R) \in [0, 1] \times \mathbb{R}_+^2$ and the type of the judiciary $J \in \{F, I\}$ that will review this policy, under uncertainty on the true strength of the elite. Propositions 1 and 2 in Section 5.1, along with the subsequent analysis, characterized when the judiciary would overturn the executive's policy and when the executive would defy the judiciary's rejection in equilibrium. Based on this analysis of the game's judicial review stage, this section studies via backward induction the executive's optimal policy and institutional choices.

Recall that by Assumption 1, a friendly judiciary always plays a pooling strategy by which it always accepts the executive's policy. Equivalently, a friendly judiciary provides no information to the executive on elite strength and therefore no opportunity for strategically reverting to the status-quo policy. Thus, conditional on having a friendly judiciary, the executive's optimal policy maximizes its expected re-election probability based on its prior belief on elite strength. A description of the executive's optimal policy in the absence of any consideration for learning opportunities is presented in the following lemma:

Lemma 2. *Under a friendly judiciary, there exist threshold parameter values λ^* and η_w^* such that the executive chooses the complete extraction of tax revenues in favor of the elites for all $\lambda > \lambda^*$ and $\eta_w < \eta_w^*$.*

Lemma 2 is obtained by observing that in the absence of any learning opportunities from the judiciary's actions, the executive can set policy so as to either gain the voters' support or forego it. If it chooses the latter option, then the optimal policy is to set the maximum tax rate that is institutionally feasible and divert the entire tax revenues to the elites, i.e. the full-extraction policy. The analysis indicates that the executive opts for this option as opposed to moderating the rents in order to win the voters' support for sufficiently high values of λ , i.e. high relative importance of elites to the voters, and sufficiently low values of η_w , i.e. a large prior belief that the elite is strong.

The possibility of learning from an independent judiciary can change this intuitive calculus for the executive. Specifically, the executive may find it optimal to manipulate an independent judiciary into revealing information about elite strength through its policy choice under some parameter values, while for other parameter values the value of information may not be worth the policy sacrifice. To see how the executive's optimal policy under an independent judiciary may generate both separating and pooling behavior on the equilibrium path based on the model's parameters, suppose the optimal policy g under a friendly judiciary that maximizes the executive's ex ante expected payoff is such that $a_I(g, e) = 0$ for all e in equilibrium. Under an independent judiciary, this policy yields an expected payoff for the executive given by

$$\lambda[\eta_w p^e(g, e^w) + (1 - \eta_w)p^e(g, e^s)] + (1 - \lambda)p^v(g) - c \quad (5)$$

if $d(\tau, T, R) = 1$ in equilibrium, and

$$\lambda[\eta_w p^e(q, e^w) + (1 - \eta_w)p^e(q, e^s)] + (1 - \lambda)p^v(q) \quad (6)$$

if $d(\tau, T, R) = 0$. Based on Proposition 1, we know that (5) dominates (6) for sufficiently small defiance costs c . Suppose this is the case so that $d(\tau, T, R) = 1$ in equilibrium. If, on the other hand, the executive were to propose a manipulated policy \tilde{g} that maximizes its ex ante expected payoff subject to the additional constraint that $a_I(\tilde{g}, e^w) \neq a_I(\tilde{g}, e^s)$, the executive may or may not be better-off as a result of the additional information choosing \tilde{g} would offer. For instance, suppose $\tilde{g} < q$ so that the independent judiciary is manipulated into playing $a_I(\tilde{g}, e^w) = 1$ and $a_I(\tilde{g}, e^s) = 0$. Notice that if $e = e^s$ and $\lambda p^e(q, e^s) + (1 - \lambda)p^v(q) < \lambda p^e(\tilde{g}, e^s) + (1 - \lambda)p^v(\tilde{g}) - c$ so that the executive would defy the judiciary's rejection, the executive would become worse-off compared to its expected payoff in (5). On the other hand, if $e = e^w$, the manipulated policy \tilde{g} would prevail.

Overall, this manipulated policy would yield the ex ante expected payoff

$$\lambda[\eta_w p^e(\tilde{g}, e^w) + (1 - \eta_w)p^e(\tilde{g}, e^s)] + (1 - \lambda)p^v(\tilde{g}) - (1 - \eta_w)c, \quad (7)$$

which may or may not dominate (5), depending on η_w and the parameter values for the judiciary's legitimacy benefits. When it does, the executive's optimal policy for an independent judiciary is the manipulated policy \tilde{g} , and when it doesn't, its optimal policy is the same g that it would have set under a friendly judiciary. Similarly, if $\lambda p^e(q, e^s) + (1 - \lambda)p^v(q) \geq \lambda p^e(\tilde{g}, e^s) + (1 - \lambda)p^v(\tilde{g}) - c$ is true so that $d(\tilde{\tau}, \tilde{T}, \tilde{R}) = 0$ in equilibrium, the executive's ex-ante expected payoff from manipulation would become

$$\eta_w[\lambda p^e(\tilde{g}, e^w) + (1 - \lambda)p^v(\tilde{g})] + (1 - \eta_w)[\lambda p^e(q, e^s) + (1 - \lambda)p^v(q)], \quad (8)$$

which again may or may not dominate (5).

This analysis demonstrates that while the information that an independent judiciary would offer may be valuable, the policy cost of eliciting it may be too high to justify or the status-quo may be too disadvantageous for the executive to consider. This discussion leads to the following result that summarizes the executive's optimal institutional choice between a friendly and an independent judiciary:

Proposition 3. *Suppose the executive's optimal policy g conditional on $J = I$ is such that $a_I(g, e^w) \neq a_I(g, e^s)$ in equilibrium. Then, the executive chooses an independent over a friendly judiciary in equilibrium only if $|\eta'_w - \eta_w|$ is sufficiently large, where η'_w is obtained via Bayes' rule upon observing $a_I(g, e) = 0$.*

First, notice that a friendly judiciary weakly dominates an independent judiciary if the optimal policy g conditional on $J = I$ is such that $a_I(g, e^w) = a_I(g, e^s)$. Therefore, Proposition 3 focuses on all parameter values for which the optimal policy under an independent judiciary would induce separating behavior on the equilibrium path.

Proposition 3 states that while an independent judiciary would be chosen in equilibrium only if the optimal policy under it induces separating behavior for the judiciary and the executive reverts to the status-quo following a rejection on the equilibrium path, the converse is not necessarily true. In other words, if the optimal policy conditional on an independent judiciary induces separation and compliance in case of rejection by the judiciary in equilibrium, then either a friendly or an independent judiciary could be optimal for the executive.

To better understand the executive's incentives in choosing $J = I$ over $J = F$, note that Proposition 3 would hold as an "if and only if" statement whenever a) the execu-

tive's optimal policy conditional on either type of judiciary is identical, or b) the optimal policy g conditional on $J = F$ would imply $a_I(g, e) = 1$ in equilibrium for all e , and the manipulated policy \tilde{g} such that $a_I(\tilde{g}, e^w) \neq a_I(\tilde{g}, e^s)$ is optimal conditional on $J = I$. For the former case, note that both institutions yield the same payoff if $J = I$ accepts the executive's policy. On the other hand, $J = F$ is strictly preferred in case of a rejection that would be optimally followed by defiance, while $J = I$ is strictly preferred if the executive would comply with the rejection due to the value of the revealed information. For the latter case, $J = I$ must be optimal if the executive would reverse course following a rejection on the equilibrium path induced by the manipulated policy \tilde{g} , because this indicates a preference over another path on which $J = I$ would always accept the executive's policy, which is identical to the path that would be observed under $J = F$. Since $J = F$ is strictly better for the executive in case of acceptance by $J = I$, the fact that the optimal policy conditional on $J = I$ is manipulated implies that it must receive a sufficiently large payoff in the case $J = I$ rejects, which requires that the executive would reverse course following a rejection on the equilibrium path.

However, the converse of the statement in Proposition 3 fails to hold in general due to the possibility that the optimal policy conditional on $J = I$ manipulates this judiciary out of always rejecting the rents that were optimal pre-manipulation. Specifically, while the executive prefers $J = I$ if $d(\tilde{\tau}, \tilde{T}, \tilde{R}) = 0$ on the equilibrium path, $J = F$ is strictly better if the defiance decision node would not be reached on this path. Thus, whether $J = I$ would be chosen in this scenario depends on whether the value to the executive of reverting back to the status-quo ex post dominates the expected payoff from having a friendly judiciary always accept its policy.

Recall that Proposition 2 characterized the necessary and sufficient condition in order for the executive to comply with the judiciary's rejection in equilibrium: a large difference between its prior and posterior belief on elite strength upon observing the rejection. Accordingly, Proposition 3 states that the executive chooses an independent judiciary in equilibrium only if its prior and this posterior belief on elite strength are sufficiently distant. This result allows us to emphasize the role that learning plays on the executive's equilibrium institutional choice. Specifically, an independent judiciary is observed in equilibrium only if the executive would learn sufficiently from its rejection. However, a large possibility of learning is not by itself sufficient to ensure the choice of an independent judiciary. As summarized underneath Proposition 3, this depends on the extent to which the executive has to make sacrifices on the policy that ex ante maximizes its expected re-election probability in order to elicit information on the true strength of the elite.

The following section discusses the welfare consequences of equilibrium.

5.3 Welfare Implications

Based on the analysis in the previous section, information revelation by an independent judiciary *can* mitigate rent extraction by the elites and therefore improve voter welfare. When learning the true strength of the elites as a result of the independent judiciary's rejection leads the executive to revert to a status-quo that favors the voters compared to the executive's original policy, then the voters become unambiguously better-off with this information.

For intuition, compare two sets of parameters such that one yields an independent judiciary and the other yields a friendly judiciary as the equilibrium outcome. For the former, the fact that an independent judiciary was chosen on the equilibrium path implies the executive must comply with the judiciary's rejection and revert to the status-quo, should the judiciary reject. This is unambiguously welfare-improving for the voters whenever the elite rents implied by the status-quo division q of the tax revenues are less than those implied by the executive's original policy g , where g maximizes the executive's ex ante re-election probability. Similarly, the independent judiciary's equilibrium outcome yields greater welfare for the voters in case of the judiciary's acceptance if the optimal policy conditional on an independent judiciary includes less elite rents than the optimal policy conditional on a friendly judiciary. Of course, the reverse cases indicate that an independent judiciary does not necessarily improve the voters' equilibrium pay-offs.

Corollaries 1 and 2 allow us to extend our discussion of voter welfare based on the regime parameter λ . In regimes with high λ , i.e. with high importance of elites relative to the voters, Corollary 2 implies that $d(\tau, T, R) = 1$ in equilibrium under an independent judiciary for sufficiently low defiance costs if $g > q$. In other words, when the elites matter more than the voters, the executive would defy the judiciary for bearable defiance costs when doing so would benefit the elites, even if they are weak. This implies that the executive's institutional choice would be for a friendly judiciary over an independent judiciary. However, the welfare consequences of this equilibrium for the voters is ambiguous as it depends on whether the rents that induce the independent judiciary to separate are indeed higher or lower than those that are optimal conditional on a friendly judiciary. Similarly, Corollary 1 implies that when the voters matter more than the elites in determining the executive's re-election, the executive would choose $d(\tau, T, R) = 1$ in equilibrium for sufficiently low defiance costs if $g < q$, thus defying the

judiciary in favor of the voters, even though the elites are revealed as strong. While this implies a preference for a friendly judiciary based on Proposition 3, its implications for voter welfare are again ambiguous and depend on a comparison between the equilibrium outcome policy under both types of judiciaries.

Section 5 characterized and discussed the conditions under which an office-motivated executive would delegate review authority to an independent judiciary as opposed to having its policy choices automatically approved. In particular, this section emphasized the importance that the possibility of learning from an independent judiciary plays on this decision. While we do not formally offer a model that incorporates other institutions through which information that is valuable for the executive's re-election goal could be obtained, such as formal opposition parties in the legislature or a free media, we argue that the relative resilience of independent judiciaries observed across illiberal democracies compared to other institutions related to checks and balances lends support to the idea that alternative institutions are potentially riskier for the executive's survival. For instance, if the mere presence of an institution such as a free media would ensure $p^v(g) = 0$ for any policy choice g whereas an independent judiciary has no such effect, then it is reasonable to expect that the latter institution would be an autocratic executive's preferred channel through which to balance the competing interests of the various actors within the regime.

6 Conclusion

Nondemocratic regimes are a reality. In particular, illiberal democracies have been spreading in Europe, Asia, Latin America and Africa. One aspect that distinguishes these regimes from totalitarian ones is a certain degree of judicial independence in an environment of functioning courts and minimal political opposition. In this paper, we developed a theory of courts as information revelation mechanisms to explain why illiberal democracies benefit from such institutional arrangements.

The building aspects of our theory are elite heterogeneity and asymmetric information. The survival of the political regime relies on the influence of the ruling elites to varying extents. These elites can have conflicting interests that the executive branch needs to take into account and balance with the interests of the voters in order to avoid political collapse. This implies that some sacrifices are called for in order to please the ruling coalition and keep the regime in place. At the same time, the executive faces

uncertainty on the internal divisions within this elite, an uncertainty that an institution such as the judiciary does not necessarily face. Due to a lack of institutional transparency and limited institutional veins to express opposition, the regime can benefit from a degree of court opposition.

Independent courts are clearly not the only institution that can reveal information to the executive branch about opposition to legislation or public policy. In fact, there exist numerous such institutions in a liberal democracy, for example, free press or civil society organizations. However, for an illiberal democracy, we argue that a judiciary that can oppose public policies could be a less costly institution to express opposition. Unconstrained media, free elections, strong party opposition in the legislative chambers, or local governments controlled by dissatisfied political groups could pose more danger to the survival of the political regime. Not surprisingly, such regimes are observed to tolerate a certain degree of judicial independence as long as it is useful. On the other hand, if the ruling leader is able to observe the strength of the ruling elites, if there are no conflicts within these elites, or if the position of the ruling leader is not affected by power swings among them, then judicial independence serves no purpose and we should expect friendly courts.

Our paper offers a testable hypothesis for future empirical work. Specifically, in non-democratic regimes, we should observe that measures of judicial independence should vary with homogeneity of the ruling elites or the political strength of the leader. For example, we should expect to see less tolerance with court opposition during more personalized political regimes such as the totalitarian experiences in Nazi Germany or Fascist Italy, and also in some illiberal democracies such as Turkey, Hungary or Russia. Conversely, in regimes where the leader emerges as a first-among-equals member of the ruling elite composed, for instance, of party bureaucrats or the military, we expect to observe courts showing greater opposition to the executive branch. We believe that non-democratic regimes ranging from Singapore or Hong-Kong to Chile under Pinochet or Egypt under Sadat and Mubarak constitute supporting examples for the theory that we propose.

7 Appendix: Proofs

Proof of Lemma 1. Observing the state e , the executive chooses a policy $(\tau, T, R) \in [0, 1] \times \mathbb{R}_+^2$ in order to maximize its probability of re-election $p(\tau, T, R, e)$. If $J = F$, the only constraint on this problem is the executive's budget constraint $T + R \leq \tau y$. On the other hand, if $J = I$, then, in addition to the budget constraint, the executive either has to satisfy the independent judiciary's acceptance constraint or if it doesn't, either pay the fixed cost c of defiance or acquiesce to the status-quo policy. Whenever the independent judiciary's preferences are such that its acceptance constraint is not binding, then the executive is indifferent between an independent and a friendly judiciary. In contrast, the friendly judiciary is strictly preferred if the constraint is binding. Therefore, in an equilibrium in which the executive does not play weakly dominated strategies, it always chooses $J = F$ if it can observe the state e . \square

Proof of Proposition 1. Suppose the executive's optimal policy (τ, T, R) conditional on $J = I$ is such that $a_I(g, e) = 0$ for $e \in \{e^w, e^s\}$ in equilibrium. On this equilibrium path, $\eta'_w = \eta_w$. For brevity, let $p^e(\tau, T, R, e) \equiv p^e(g, e)$ and $p^v(\tau, T, R) \equiv p^v(g)$ for any given state e . Then, the executive defies the independent judiciary if and only if

$$\begin{aligned} & \lambda[\eta_w p^e(g, e^w) + (1 - \eta_w)p^e(g, e^s)] + (1 - \lambda)p^v(g) - c \\ & \geq \\ & \lambda[\eta_w p^e(q, e^w) + (1 - \eta_w)p^e(q, e^s)] + (1 - \lambda)p^v(q). \end{aligned} \tag{9}$$

The optimality of (τ, T, R) here implies condition (9) always holds when $c = 0$. This implies $\bar{c} > 0$ on this equilibrium path. \square

Proof of Proposition 2. First, suppose the executive's optimal policy (τ, T, R) conditional on $J = I$ is such that $g > q$, and $a_I(g, e^s) = 1$ and $a_I(g, e^w) = 0$ in equilibrium. Note that $a_I(g, e^s) = 0$ and $a_I(g, e^w) = 1$ cannot be optimal for any given $g > q$, since this would imply $-|g - j_J| + \lambda e^w B \geq -|q - j_J| + (1 - \lambda)P \geq -|g - j_J| + \lambda e^s B$, contradicting the assumption that $e^s > e^w$.

Upon observing the judiciary's rejection, consistent beliefs require that $\eta'_w = 1$ on this equilibrium path. Then, the executive defies the ruling if and only if

$$\lambda p^e(g, e^w) + (1 - \lambda)p^v(g) - c \geq \lambda p^e(q, e^w) + (1 - \lambda)p^v(q), \tag{10}$$

which always holds for sufficiently small c whenever $p^v(g) = p^v(q)$. On the other hand, if \bar{U} is such that $p^v(g) = 0$ and $p^v(q) = 1$, then (10) reduces to $\lambda p^e(g, e^w) - c \geq \lambda p^e(q, e^w) + (1 - \lambda)$.²⁹ The ex ante optimality of (τ, T, R) on this equilibrium path implies

$$\lambda[\eta_w p^e(g, e^w) + (1 - \eta_w)p^e(g, e^s)] \geq \lambda[\eta_w p^e(q, e^w) + (1 - \eta_w)p^e(q, e^s)] + (1 - \lambda). \quad (11)$$

Even when $c = 0$, condition (11) and $\lambda p^e(g, e^w) - c < \lambda p^e(q, e^w) + (1 - \lambda)$ may simultaneously hold for sufficiently low priors η_w so that $d(\tau, T, R) = 0$. To see this, note that as η_w increases, the left-hand side of (11) increases by a magnitude equal to $\lambda[p^e(g, e^w) - p^e(g, e^s)]$ while its right-hand side increases by $\lambda[p^e(q, e^w) - p^e(q, e^s)]$. Since $p^e(g, e)$ has increasing differences in (g, e) , the inequality (11) reverses for $\eta'_w = 1$ for sufficiently low prior beliefs η_w .

A similar analysis applies for an optimal policy $g < q$ such that $a_I(g, e^s) = 0$ and $a_I(g, e^w) = 1$. In this case, consistent beliefs on $e = e^w$ upon observing the judiciary's rejection of g require $\eta'_w = 0$ on this equilibrium path. Based on the assumption that $p^e(g, e)$ exhibits increasing differences in (g, e) , we obtain the result that $d(\tau, T, R) = 0$ on this equilibrium path for sufficiently high prior beliefs η_w . \square

Proof of Lemma 2. Given that a friendly judiciary always plays a pooling strategy in equilibrium in which $a_F(g, e) = 1$ for any policy g and state e , the executive maximizes its expected probability of re-election based on its prior belief η_w that the elite is weak.

If the executive wants to win the voters' support so that $p^v(g) = 1$, it chooses (τ, T, R) in order to maximize its expected re-election probability given by

$$\lambda[\eta_w p^e(g, e^w) + (1 - \eta_w)p^e(g, e^s)] + (1 - \lambda) \quad (12)$$

subject to the voters' re-election constraint $\alpha_p U_p(\tau, T, R) + \alpha_r U_r(\tau, T, R) \geq \bar{U}$, the budget constraint $T + R \leq \tau y$, and the feasibility constraint $\tau \leq \bar{\tau}$, where $\bar{\tau}$ denotes some maximum institutionally feasible tax rate. Using the fact that the budget constraint always holds with equality and that the executive would never award more utility to the voters than is necessary to ensure $p^v(g) = 1$, the problem can be re-written as maximizing the elite rents R subject to the constraints that $\alpha_p U_p(T, R) + \alpha_r U_r(T, R) = \bar{U}$ and $T + R \leq \bar{\tau} y$. Denote the elite rents that are part of the solution to this problem as $R^* \geq 0$.

On the other hand, if the executive chooses to renounce the voters' support, then

²⁹Note that the probabilities $p^v(g) = 1$ and $p^v(q) = 0$ are not consistent with the voters' strategy.

the optimal policy becomes $\tau = \bar{\tau}$, $T = 0$ and $R = \bar{\tau}y$. Let $\bar{R} \equiv \bar{\tau}y$, i.e. the amount of rents under complete extraction of tax revenues from the voters in favor of the elites. Then, under a friendly judiciary, the executive prefers the rents R^* (or, equivalently, the policy represented by g^*) that ensure $p^v(g^*) = 1$ over complete extraction with rents \bar{R} (or, equivalently, the policy represented by \bar{g}) whenever

$$\lambda[\eta_w p^e(g^*, e^w) + (1 - \eta_w)p^e(g^*, e^s)] + (1 - \lambda) \geq \lambda[\eta_w p^e(\bar{g}, e^w) + (1 - \eta_w)p^e(\bar{g}, e^s)], \quad (13)$$

which can be written as

$$\begin{aligned} [p^e(\bar{g}, e^s) - p^e(g^*, e^s)] + \eta_w[(p^e(\bar{g}, e^w) - p^e(g^*, e^w)) - (p^e(\bar{g}, e^s) - p^e(g^*, e^s))] \\ \leq \frac{1 - \lambda}{\lambda}. \end{aligned} \quad (14)$$

Lemma 2 is obtained by observing that $(p^e(\bar{g}, e^w) - p^e(g^*, e^w)) - (p^e(\bar{g}, e^s) - p^e(g^*, e^s)) \leq 0$ due to $\bar{g} \geq g^*$ and the increasing differences assumption on p^e , and that $\lambda \in (0, 1)$. \square

Proof of Proposition 3. Proposition 3 states that if an independent judiciary is optimal, then the optimal policy g conditional on $J = I$ is such that $a_I(g, e^w) \neq a_I(g, e^s)$ and $d(\tau, T, R) = 0$ in equilibrium. This is due to Proposition 2, according to which $d(\tau, T, R) = 0$ in equilibrium for sufficiently large values of $|\eta'_w - \eta_w|$, where η'_w is the posterior belief upon observing a rejection. To prove this, we show that if the optimal policy g conditional on $J = I$ is such that either $a_I(g, e^w) = a_I(g, e^s)$ or $a_I(g, e^w) \neq a_I(g, e^s)$ and $d(\tau, T, R) = 1$ in equilibrium, then $J = F$ is the optimal institutional choice.

First, suppose the optimal policy g conditional on $J = I$ is such that $a_I(g, e) = 1$ for all e . If this policy g is equal to the optimal policy conditional on $J = F$, then the executive is indifferent between the two types of judiciaries. Otherwise, $J = F$ is strictly preferred.

Second, suppose the optimal policy g conditional on $J = I$ is such that $a_I(g, e) = 0$ for all e . Then, $J = F$ strictly dominates $J = I$ due to a) the inferiority of g compared to the optimal policy conditional on $J = F$ if $d(\tau, T, R) = 0$ in equilibrium, and b) the defiance cost if $d(\tau, T, R) = 1$ in equilibrium.

Third, suppose the optimal policy g conditional on $J = I$ is such that $a_I(g, e^w) \neq a_I(g, e^s)$ in equilibrium. If $d(\tau, T, R) = 1$ in equilibrium, then $J = F$ is strictly preferred, because while both types of judiciaries yield at most the same payoff in case the independent judiciary accepts g , the executive pays a defiance cost to defend g in case of rejection by $J = I$. \square

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