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Book Reviews

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Helmke, Gretchen (2005) Courts under Constraints: Judges, Generals, and Presidents in Argentina. Cambridge University Press (Cambridge, UK), xv þ 221 pp. £40 hbk, US$60 hbk.

In a provocative account of court–executive relations, this book presents an original model of judicial strategic behaviour supported by substantive empirical data. It also contributes to the debate on presidentialism in Latin America. The question addressed is: What makes dependent judges 'rule against the rulers', and challenge the executive's preferences? Against the assumption that only an independent judiciary can constrain the executive, Gretchen Helmke suggests that it is precisely their lack of independence, in the form of insecure tenure and vulnerability to political pressure, that creates incentives for judges to oppose presidents. To make her case, the author considers over 11,000 court decisions in Argentina during four consecutive governments since 1976: the military dictatorship, the Rau´l Alfonsi´n administration, and the two Carlos Menem presidencies.

In Argentina, judges have for decades been forced to resign at the arrival of every new president. At the same time, court decisions frequently challenge the executive, often in political controversies and issues of public interest. Helmke's explanation for this apparent contradiction is that judges switch sides strategically, in order to legitimise themselves with the next government and avoid sanctions in the future.

Her findings suggest that judicial opposition to presidential preferences sharply increased in the last two years of the military, Alfonsi´n and second Menem term, while decreasing at the end of the first Menem presidency.

To explain the presence of contestation in the first three cases, and its absence in the fourth, the author suggests a model of 'strategic defection' where dependent judges vote against the government in a future-oriented strategy to gain the favour of the opposition. Judges are more constrained by the threat of sanctions than by the loyalty due to those who appointed them. Their behaviour will thus change according to changes in their beliefs and expectations about the threats they face. In a 'reverse legal-political cycle', courts challenge politically weak governments. Because there are no policy differences between the first and the second Menem administration, courts have no incentive to challenge the government in that period.

A historical account of strategic defection shows that courts did not process habeas corpus writs under the dictatorship, in an attitude towards human rights that shifted only in 1981, when the military began to lose power. This change was a self-conscious attempt to improve judges' image before the democratic opposition to the military. Similarly, the Supreme Court did not support granting a third presidential term to Menem, whose popularity was in decline. In an epilogue, the behaviour of courts after the 2001 crisis is briefly addressed. In this case, defection seems no longer a response to presidential weakness, but an attempt to cause it.

The logic of strategic defection, Helmke claims, challenges two commonly held assumptions: that dependent courts avoid controversial political decisions, and that 'political insulation is a necessary condition for checks and balances to emerge' (p. 4). She provides good evidence to sustain the first point, but is less clear with regard to the second.

Courts, she states, strategically defect in politically salient cases. Against the usual checks-and-balances approach, in this account judges under attack do not avoid controversy, but choose instead the more important cases to defect from weak incumbents. The issue of defection as a form of checks and balances seems more problematic. Although 'strategic defection is no substitute for judicial independence' (p. 157), it does limit the president. But this is not the same as acting as an institutional mechanism by which the powers of the state limit and check one another. As Helmke points out, strategic judges check the government on grounds of their 'calculations about politics, not on their considered judgments about the legality or illegality of the government's actions' (p. 158). By the same token, 'although the dynamics of defection can inadvertently lead to normatively desired outcomes, they may also lead in the opposite direction' (p. 158).

Thus, if incumbents retain their power, as did Menem in 1994, courts will not check the government. Moreover, even defection is no compensation for the lack of judicial independence. Treating strategic defection as a check on the executive contradicts the very notion of institutional checks and balances. The fact that courts anticipate compliance with an executive that is not yet in power reflects an 'inter-temporal conflict of interest' (p. 13), but does not mean that judicial dependence is compatible with checks and balances, as Helmke suggests. The book shows that courts will have a higher tendency to defect from weakening executives in institutionally unstable settings, such as hyper-presidential Argentina, than in systems that protect judges' tenures from political pressure. But this is not the same as considering strategic defection as a checking and balancing mechanism.

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