TWO KINDS OF DUAL STATES: JUDICIAL EMPOWERMENT AND DISEMPOWERMENT IN AUTHORITARIAN POLITICS

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On the pretense of a national emergency, the Reichstag Fire Decree drastically reshaped the Weimar constitutional order in 1933. The legally undefined jurisdiction of martial law conferred on the police unchecked powers to suppress any activities that were claimed to disrupt public order and safety. Until 1945, German courts, notably the Prussian Supreme Court, interpreted the threat of Communism in a broad sense to justify the deprivation of political opponents from legal protection by state and party officials on the grounds of necessity and expediency. Yet the legal order and judicial powers, particularly in non-political spheres, weren't completely swept away in the civil society of Nazi Germany.

Ernst Fraenkel profoundly employed a dual state model to illustrate the coexistence between the Normative State – rule-based lawfulness – and the Prerogative State – arbitrary lawlessness. Decades later, such coexistence between the two states is still deployed to some extent by authoritarian leaders, whether in democratic governments transitioning toward autocracy or in regimes under the mandates of an excessively powerful party for a long period of time. This Article seeks to revisit the dual state model through an interdisciplinary and comparative lens by analyzing political maneuvers of courts and jurisdictions in two kinds of legal systems – which I will refer to as "Inherited" and "Rebuilt." Its findings should assist comparativists and public law researchers in advancing a comprehensive understanding of the judiciary's role in authoritarian governance and the interplay between law and politics in the contemporary world.

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TABLE OF CONTENTS

Introduction **2**

I. The Classic Dual State Model **6**

A. Limited Normative State and Unlimited Prerogative State *8*

B. Economic Orders, State Expediency, and Individual Rights *10*

II. Inherited Legal Systems **17**

A. Specialized Jurisdiction for Prerogative Purposes *18*

B. Capture the "Important Courts" *21*

C. De-Judicialization of Politically Relevant Matters *26*

III. Rebuilt Legal Systems **30**

A. Specialized Jurisdiction for "Non-Political" Cases *31*

B. Judicial Self-Restraint and Selective Interference *37*

IV. Lawfulness and Lawlessness in Authoritarian Governance **42**

Conclusion **51**

INTRODUCTION

In 1933, the Nazi party rose to power and distorted the constitutional order of Germany by declaring a state of national emergency and imposing political decrees.[2] The party leader, Adolf Hitler, abolished legal restraints on executive authorities and established Führerprinzip – a principle that accorded him with an absolute power above all laws.[3] The catastrophic, race-based Holocaust soon ensued.[4] Until the collapse of the Third Reich, many citizens' fundamental rights and legal protection were capriciously denied by the government under the veil of its self-portrayed threat of Communism.[5]

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[2] Karl Loewenstein, *Dictatorship and the German Constitution: 1933-1937*, 4 U. CHI. L. REV 537, 539-48 (1937).

[3] United States Holocaust Memorial Museum, *Third Reich*, HOLOCAUST ENCYCLOPEDIA, https://encyclopedia.ushmm.org/content/en/article/third-reich.

[4] *Id*.

[5] *Id*.

Yet, judicial powers and legal orders in certain spheres, such as entrepreneurial freedom and the sanctity of contracts, were largely spared by the revolution of National-Socialism.[6] Ernst Fraenkel profoundly described this phenomenon as the "Dual State," where the Normative State – rule-based lawfulness – and the Prerogative State – arbitrary lawlessness – coexist.[7]

Instances of such coexistence between the two states can still be observed in the modern world. In Nazi Germany, courts took account of the political status of litigating parties and claimed that disputes between officials and individuals were outside their jurisdiction; Several years ago, a court from Vietnam excused the defendant from a criminal charge by "cit[ing] the fact that the defendant was the chairman of the people's committee of his commune… [C]harging him criminally could influence the politics of the locality."[8] In the Third Reich, politically relevant cases were handled by specialized courts under prerogative control, including the People's Court and courts-martial, on the grounds of necessity and expediency; Despite the rulings of the Constitutional Court and the Supreme Court that declared military prosecutions of civilians unconstitutional, courts martial in Uganda continue to arrest and try ordinary citizens who have voiced opposing opinions against the government.[9] Amidst the controversy, Uganda's President, Yoweri Museveni, publicly defended the work of the General Court Martial.[10] He asserted, "the killers were being arrested, taken to civilian courts and released back to the streets to commit more crimes. The court martial ended that nonsense… it reduce[d] our problems by hastening trials of criminals."[11] The spokesperson of the Third Division of the Uganda Peoples' Defence Forces similarly said at an interview that "[t]he military courts are faster… We don't have time to wait for civilian courts."[12]

Given its relevance with contemporary authoritarian politics, many

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[6] ERNST FRAENKEL, THE DUAL STATE: A CONTRIBUTION TO THE THEORY OF DICTATORSHIP 75-82 & 96-103 (1941)

[7] *See generally id.*

[8] Thi Quang Hong Tran, The Choice of Norms in Courtroom Adjudication in Vietnam: In Search of Legitimacy in a Socialist Regulatory Context, 6 Asian Journal of Law and Society 159, 170 (2019).

[9] JD Mujuzi, The Trial of Civilians Before Courts Martial in Uganda: Analysing the Jurisprudence of Ugandan Courts in the Light of the Drafting History of Articles 129(1)(d) and 120(a) of the Constitution, 25 PER / PELJ 1, 1-32 (2022); HUMAN RIGHTS WATCH, RIGHTING MILITARY INJUSTICE: ADDRESSING UGANDA'S UNLAWFUL PROSECUTIONS OF CIVILIANS IN MILITARY COURTS (2011), at 7-18.

[10] Alfred Wasike, *Museveni Defends Court Martial*, NEW VISION, Nov. 29, 2005, https://www.newvision.co.ug/news/1112073/museveni-defends-court-martial.

[11] *Id.*

[12] HUMAN RIGHTS WATCH, *supra* note 9, at 11.

influential works have applied the dual state model to study the legal and political apparatuses of regimes ruled by illiberal leaders. Among others, Alexei Trochev and Peter H. Solomon Jr. elaborate in their article on how the Russian Constitutional Court has adjusted to President Putin's increasingly authoritarian government.[13] It argues that the Court pragmatically recognizes the dual state reality by making expedient, politically motivated decisions in cases that are important to the regime while resolving other disputes based on the constitution and laws.[14] There has also been academic discussion on whether Fraenkel's dual state model may adequately explain the characteristics of the Chinese legal system.[15] In Europe, "the legacy of institutions not captured by the autocrats" and the transitional politics of PiS-led Poland, as one of the backsliding democracies, were assessed by the concept of legal dualism.[16] This ongoing line of research, while fruitful, mostly focuses on one-country studies.[17] Furthermore, a strict interpretation of the dual state model, which requires "predictably divid[ing] all situations into two mutually exclusive categories that are supported by distinct institutions," may not always be of help to our comprehension of contemporary authoritarianism.[18] This Article, therefore, seeks to revisit the classic dual state model through a comparative and contemporary lens to investigate political maneuvers of legitimate judicial institutions for illegitimate prerogative interests in two kinds of "modern dual states" – "inherited" and "rebuilt" states – where legal orders and arbitrary political

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[13] Alexei Trochev and Peter H. Solomon Jr., *Authoritarian Constitutionalism in Putin's Russia: A Pragmatic Constitutional Court in a Dual State*, 51 COMMUNIST AND POST-COMMUNIST STUDIES 201, 201-14 (2018).

[14] *Id*.

[15] *See* e.g., Eva Pils, *China's Dual State Revival Under Xi Jinping*, 46 Fordham Int'l L.J. 339 (2023); Don C. Clarke, Is China A Dual State?, SSRN, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4317126; Hualing Fu, *Duality and China's Struggle for Legal Autonomy*, 1 CHINA PERSPECTIVES 3 (2019).

[16] Piotr Mikuli, *Transitional Justice, the Dual State, and the Rule of Law*, 2 PRZEGLĄD PRAWA KONSTYTUCYJNEGO 273 (2023).

[17] *See* e.g., Ahmed Ezzat, Law, *Exceptional Courts and Revolution in Modern Egypt*, in ROBERT SPRINGBORG, AMR ADLY, ANTHONY GORMAN, TAMIR MOUSTAFA, AISHA SAAD, NAOMI SAKR, SARAH SMIERCIAK (EDS.), ROUTLEDGE HANDBOOK ON CONTEMPORARY EGYPT (2023), at 296-308; Serdar Tekin, *The Dual State in Turkey*, 34 EUROPEAN JOURNAL OF TURKISH STUDIES 1, 1-20 (2022); Cora Chan, *From Legal Pluralism to Dual State: Evolution of the Relationship between the Chinese and Hong Kong Legal Orders*, 16 THE LAW & ETHICS OF HUMAN RIGHTS 99, 99-135 (2022); Mark Tushnet, *Authoritarian Constitutionalism*, 100 CORNELL L. REV. 391 (2015); Richard Sakwa, *The Dual State in Russia*, 26 POST-SOVIET AFFAIRS 185, 185-206 (2010); JEN MEIERHENRICH, THE LEGACIES OF LAW: LONG-RUN CONSEQUENCES OF LEGAL DEVELOPMENT IN SOUTH AFRICA, 1652-2000 (2008).

[18] Kathryn Hendley, *Legal Dualism as a Framework for Analyzing the Role of Law under Authoritarianism*, 18 ANNU. REV. LAW SOC. SCI. 211, 218 (2022).

measures coexists. In particular, it unpacks autocratic designs of courts and jurisdictions and explains their consequences on the rule of law and fundamental rights.

This research focuses on regimes where changes in law and legal institutions have taken place to serve political priorities of illiberal leaders.[19] While inherited states refer to democracies transitioning toward autocracy, rebuilt states are autocracies making a strategic turn towards law. Depending on the features of the original legal system preceding the dual state, modern autocrats employ various tactics to consolidate their power. In inherited states, where courts held constitutionalism and democratic principles in high regard before political arbitrariness came into play, illiberal leaders did not have faith in their judges' political loyalty and would thus ensure politically relevant matters to be handled in the prerogative state. By contrast, in rebuilt states under long-term authoritarian mandates, no institutions were immune to political interference before the development of a rule-based, normative state. Such governments would allocate politically irrelevant jurisdictions to relatively autonomous benches for the orderly administration of private affairs and economic liberalization because they trusted their judges' political competence to decide on and steer clear of issues important to the ruling party. Notably, in both inherited and rebuilt states, political essence of a jurisdiction can be interpreted and re-interpreted by prerogative power. It is, however, in autocratic leaders' great interests in avoiding the prerogative disturbance of the affairs regularly governed by the normative state, as seen by their continued effort to either construct or preserve the normative state.

[19] This study does not include regimes in which the normative and prerogative states have coexisted since the establishment of the regime. Consider Singapore as an example. On the one hand, the country has well-functioning institutional attributes – laws, courts, and law enforcement apparatus – and Westminster liberal pedigree. The government is, therefore, not so motivated to expand the Normative State to rebuild the confidence of ordinary citizens and international investors in its judiciary. On the other hand, the persistent dominance of the People's Action Party, which is not a product of democratic decay, dates back to the country's founding years. Since the judiciary is under prerogative control, the ruling elites do not need to further curb their courts at the expense of their image abroad, nor do they resort to specialized courts for political or economic purposes. Should the courts ever venture to challenge the regime in certain cases, the government may easily delimit such jurisdiction from the judiciary's purview through legislation. This is precisely what happened in the 1988 case of *Chng Suan Tze*. Singapore, in my view, rather sits in-between, where the coexistence of legal orders and prerogative arbitrariness does not stem from a shift in direction that either erodes democracy or strengthens authoritarian legality. JOTHIE RAJAH, AUTHORITARIAN RULE OF LAW: LEGISLATION, DISCOURSE AND LEGITIMACY IN SINGAPORE (2012), at 39; Gordon Silverstein, *Singapore: The Exception That Proves Rules Matter*, in TOM GINSBURG AND TAMIR MOUSTAFA (EDS.), RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES (2012), at 78-83.

This Article aims to build upon and beyond the classic dual state model by mapping autocratic manipulations of courts and jurisdictions in regimes where the original legal systems, prior to the coexistence between legal orders and political arbitrariness, either respect or reject democratic values and the rule of law. In one kind of modern dual states, illiberal governments are able to attack their "powerful" courts by deploying assorted means in addition to martial laws and the declaration of state emergency. In the other kind, autocrats engage in seemingly self-limiting activities by making a calculated shift towards law and empowering their "not-so-powerful" judiciary, either entirely or in part, to resolve politically irrelevant but socially or economically significant disputes based on legal rules and procedures.

In the contemporary world, democracy is once again under serious threat. As research has demonstrated, for the first time in over twenty years, the number of close autocracies surpassed that of liberal democracies.[20] Making up forty six percent of the world GDP, autocracies are growing less reliant on democracies for their economic growth.[21] More concerningly, autocrats nowadays have demonstrated their ability to maintain their grips of power longer than their predecessors did. Unlike the National-Socialist government, their administration enthusiastically endorses a globalized, liberal economy and erodes the rule of law in the name of the constitution and democracy. In light of a third wave of autocratization across the globe, prominent public law scholars have cautioned us to educate ourselves and others on the "new political technologies designed to accomplish the goals of autocracy without its usual telltale signs" before it is too late.[22] By analyzing the strategic empowerment and disempowerment of the judiciary in both autocracies and decaying democracies, the findings of the Article aim to further our knowledge of the complex relationship between law and politics in countries where legal orders matter, but not always.

I. THE CLASSIC DUAL STATE MODEL

In February 1933, the German parliament housed at Reichstag was set on fire and burned down.[23] The leader of the Nazi party, Adolf Hitler, blamed

[20] V-DEM INSTITUTE, DEMOCRACY REPORT 2023 (DEFIANCE IN THE FACE OF AUTOCRATIZATION), at 6.

[21] *Id*., at 7.

[22] Anna Lührmann and Staffan I. Lindberg, *A Third Wave of Autocratization is Here: What Is New About It?* 26 DEMOCRATIZATION 1095, 1095-1108 (2019); Kim Lane Scheppele, *Autocratic Legalism*, 85 THE UNIVERSITY OF CHICAGO LAW REVIEW 545, 582 (2018).

[23] German History in Documents and Images, *Decree of the Reich President for the Protection of the People and State ("Reichstag Fire Decree") (February 28, 1933)*, 7 NAZI

the fire on the communists who were conspiratorially alleged, by so doing, to overthrow the Weimar government.[24] Exploiting the threat of the Communism as a pretext, Hitler persuaded the then Reich President Paul von Hindenburg to issue the "Decree of the Reich President for the Protection of People and State" (also known as the Reichstag Fire Decree) on 28 February 1933 under Article 48 of the Weimar Constitution, which authorized the President to take necessary measures, with the aid of the armed forces if necessary, to restore public security and order under emergency.[25] The Decree has been described by scholars as "a significant shift,"[26] which "suspend[ed] 'key' articles of the Weimar Constitution"[27] and "put an end to civil liberties."[28] In March 1933, Hitler further cornered parliament members to pass the "Law to Remedy the Distress of the People and the Reich" – the infamous Enabling Act – which granted National-Socialism unlimited powers to promulgate laws, bypassing parliament and the President, including those that would violate the Weimar Constitution.[29] As Loewenstein puts it, "the Constitution of Weimar though not formally repealed has been materially abrogated."[30] In the Third Reich, despite the suppression of many fundamental rights, the National-Socialist government believed that "the state [wasn't] necessarily the best leader in all spheres of life."[31] Indeed, there were no activities or affairs that the regime could not intervene. The orderly administration of the laws and institutions essential for capitalistic privatization without the disturbance of prerogative measures was nonetheless considered a basic principle of National-Socialism.[32] This political view left "economic law in a narrower sense … relatively untouched

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GER., 1933-1945, https://ghdi.ghi-dc.org/pdf/eng/English%203_5.pdf.

[24] Benjamin Carter Hett, *"The Story Is about Something Fundamental": Nazi Criminals, History, Memory, and the Reichstag Fire*, 48 CENT. EUR. HIST. 199, 200-203 (2015).

[25] United States Holocaust Memorial Museum, *Reichstag Fire Decree*, HOLOCAUST ENCYCLOPEDIA, https://encyclopedia.ushmm.org/content/en/article/reichstag-fire-decree; LOUIS L SNYDER, DOCUMENTS OF GERMEN HISTORY 385-92 (1958).

[26] von Julia Hörath, *Diskussionsforum Prostituiertenverfolgung in Bremen 1933 – 1939. Ein maßnahmenstaatliches Experiment*, 45 GESCHICHTE UND GESELLSCHAFT 597, 597 (2019).

[27] Aziz Z. Huq, *Terrorism and Democratic Recession*, 85 U. CHI. L. REV. 457, 469 (2018).

[28] Anson Rabinbach, *Staging Antifascism: "The Brown Book of the Reichstag Fire and Hitler Terror,"* 103 NEW GER. CRITIQUE 97, 99 (2008).

[29] Gilbert Fergusson, A Blueprint for Dictatorship. Hitler's Enabling Law of March 1933, 40 INT'L AFF. 245, 247-48 (1964); United States Holocaust Memorial Museum, *The Enabling Act*, HOLOCAUST ENCYCLOPEDIA, https://encyclopedia.ushmm.org/content/en/article/the-enabling-act.

[30] Loewenstein, *supra* note 2, at 547.

[31] FRAENKEL, *supra* note 6, at 59 (citing Sondergericht Breslau (Dtsch. R. Z. 1935, P. 554).

[32] *Id*. at 71-73.

by the revolution of 1933."[33]

Ernst Fraenkel profoundly illustrated the National-Socialist governance, under which the Normative State and the Prerogative State coexist, through a dual state model.[34] The Normative State, according to Fraenkel, "is by no means identical with a state in which the 'Rule of Law' prevails."[35] The spheres essential for private capitalism, such as entrepreneurs, property rights, and contracts, would generally be governed by the Normative State.[36] Even so, the government retains the power to "occasionally exercise[…] its rights to deal with individual cases in the light of expediency and the special nature of the case at hand."[37] Because the jurisdictional boundary of the Normative State is not legally guaranteed, it can be altered at any time based on political policies and ideologies. The Prerogative State – the political sphere ruled by arbitrary measures – is "a vacuum as far as law is concerned."[38] On the one hand, "[t]he Normative State is a necessary complement to the Prerogative State and can be understood only in that light."[39] The Prerogative State, on the other hand, "does not merely supplement and supersede the Normative State; it also uses it to disguise its political aims under the cloak of the Rule of Law."[40]

A. Limited Normative State and Unlimited Prerogative State

Under the classic dual state model, the Prerogative State has the jurisdiction over all other jurisdictions.[41] The Normative State is thus constrained by not only the existing law but also the Prerogative State's discretionary power. To achieve its political goals – which can be expediency, local control, economic growth, social order, and so on – the Prerogative State may choose to ostensibly limit its unlimited power by indulging in and even promoting the existence of the Normative State.[42] Yet, the boundary of the Normative State is at all times unclear; any matters that normally fall within the domain of the Normative State can be captured by

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[33] *Id*. at 72.
[34] *Id*.
[35] *Id*. at 71.
[36] *Id*. at 73-82.
[37] *Id*. at 73.
[38] *Id*. at 71.
[39] *Id*. at 71.
[40] *Id*. at 41.
[41] *Id*. at 57.
[42] *Id*. at 58 ("Where the Prerogative State does not require jurisdiction, the Normative State is allowed to function. The limits of the Prerogative State are not imposed from the outside; they are imposed by the Prerogative State itself.")

the Prerogative State (*see* Figure 1).

As Mark Tushnet elaborated, "[t]he line dividing the nonarbitrary state from the arbitrary one has to be drawn by the very people who administer both the arbitrary and the nonarbitrary states, and they can provide no guarantees that in doing so they will act pursuant to the rule of law rather than arbitrarily."[43] When determining whether a matter in question is politically relevant, this dividing line can be easily shifted. In Nazi Germany, under any circumstances that the National-Socialist party would deem necessary, affairs concerning economic policy, which the party intended to regulate in the Normative State, could instantaneously turn into a political question. Even a seemingly trivial matter in civil life such as applying for a driver license or renting a property might abruptly become politically relevant because of the ethnicity and political status of the involving parties and the pressing political needs. Courts, on many occasions, managed to safeguard the legal norms of entrepreneurial liberty and fair competition. However, there were exceptions. For instance, a trial court decision, which awarded an injunction against a National-Socialist party officer who spread rumors to damage his competitor's business, was reversed on the ground that the disputes between party officials and individuals were outside the jurisdiction of the courts.[44] Prerogative intervention also diverted judicial interpretations of community interest. In one case, the Prussian Supreme Court upheld the property law and ruled against a local decree which allowed a sheep owner to let the herd graze on another person's farmland for the benefit of the community.[45] In another case, the Probate Court of Berlin, however, rejected the civil law in favor of the party ideology that "public welfare precedes self-interest" and withdrew the adoption of an Aryan child because the foster-parents were Jewish.[46] Indeed, the fact that the Prerogative State is bound by certain self-imposed constraints does not imply that the Prerogative State's power has limitations. Because the Prerogative State is not subject to any constitutional or legal mandates, it may opt to engage in or withdraw from any seemingly self-limiting activities at will. Non-legally defined jurisdiction is thus the core of the unlimited Prerogative power.

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[43] Mark Tushnet, *Authoritarian Constitutionalism*, 100 CORNELL L. REV. 391, 439 (2015).

[44] FRAENKEL, *supra* note 31, at 35-36.

[45] *Id*. at 78.

[46] *Id*. at 87.

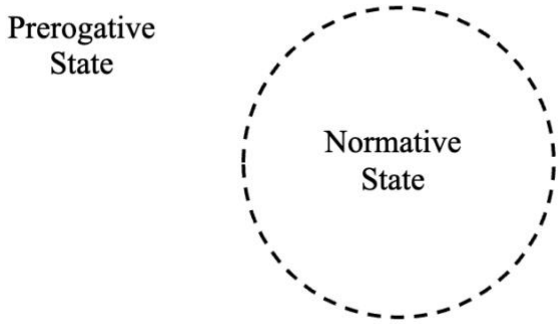

Figure 1: Jurisdictional Space of the Prerogative and Normative States in the Dual State Model[47]

B. Economic Orders, State Expediency, and Individual Rights

The Nazi economy was rather unique: unlike centrally planned socialist economies, the National Socialist government made a swift policy change in the mid-1930s from nationalization to privatization by selling state-owned enterprises to private owners;[48] it is also different from the Western capitalist markets, given the subjection of Reich economic actors to tightened market regulation and race-based treatment differentiation.[49] On the one hand, the Nazi government did not directly own firms to exert political control, even in the most common nationalized-industries like railways, banking, and mining, since the Third Reich retained control over property owners in the market.[50] On the other hand, the Nazis employed expropriation to deprive owners, who were deemed as not "politically reliable, racially sound, [or] imperialistically desirable," of property rights and to punish those who did not efficiently utilize and manage their property.[51] Besides capitalistic privatization, the Third Reich generally respected the freedom of contracts even in war-related spheres.[52] Quoting National-Socialist economic policy, which aimed to

[47] The dash line implies the instability of the Normative State's jurisdictional space, which can be entrenched or eroded by Prerogative discretion at will.

[48] Germà Bel, *Against the Mainstream: Nazi Privatization in the 1930s Germany*, 63 THE ECONOMIC HISTORY REVIEW 34, 34-36 (2010).

[49] Arthur Schweitzer, *Big Business and Private Property Under the Nazis*, 19 THE JOURNAL OF BUSINESS OF THE UNIVERSITY OF CHICAGO 99, 124-25 (1946).

[50] Bel, *supra* note 48, at 46-48.

[51] Schweitzer, *supra* note 49, at 103.

[52] Christoph Buchheim and Jonas Scherner, *The Role of Private Property in the Nazi Economy: The Case of Industry*, 66 THE JOURNAL OF ECONOMIC HISTORY 390, 400-05 (2006).

"maintain the free initiative of industry"[53] and "restrict as little as possible the creative activities of the individual,"[54] Buchheim and Scherner explained the state was convinced that private property would foster efficiency-enhancing economic activities.[55] As such, the Nazi economic order reflects mixed features of both capitalistic and socialist economies – between industrial production and collectivist consumption, between private profits and race-based restrictions on property owners, and between entrepreneurial autonomy within the firms and governmental rationing in the market.[56]

Still, economic incentives alone cannot fully explain the survival of private rights and the capitalistic economic order in a society like Nazi Germany, where the rule of law was drastically devastated by the war and political dogma.[57] In particular, such incentives "did not protect the Jews from being deprived [of] all legal protection, even though many of them were deeply integrated into central parts of the Germany economy."[58] The institutional theory about path dependence may, however, facilitate a more nuanced understanding of the existence of the Normative State in Nazi Germany. Path dependence implies "the constraints on the choice set in the present that are derived from historical experiences of the past."[59] According to North,

> We inherit the artifactual structure – the institutions, beliefs, tools, techniques, external symbols storage systems – from the past. Broadly speaking this is our cultural heritage and we ignore it in decision making at our peril – the peril of failing in our attempt to improve economic freedom…Where fundamentally competing beliefs exist side by side, the problems of creating a viable set of institutional arrangements are increased and may make the establishment of consensual

[53] *Id*. at 408 (quoting BArch R 3101/32.149, Principles of economic policy (not dated)).

[54] *Id*. at 409 (quoting BArch R 3112/169, Speech of Carl Krauch (?) about the execution of the Four Year Plan, c. 1938/39).

[55] *Id*. at 408-10.

[56] Schweitzer, supra note 49; *See* generally, OTTO NATHAN, NAZI WAR FINANCE AND BANKING (1944); *See* also Franz Neumann, BEHEMOTH: THE STRUCTURE AND PRACTICE OF NATIONAL SOCIALISM, 1933-1944 (2009) 261 ("The German economy of today has two broad and striking characteristics. It is a monopolistic economy – *and* a command economy. It is a private capitalistic economy, regimented by the totalitarian state. We suggest as a name best to describe it, 'Totalitarian Monopoly Capitalism.'").

[57] Hans Petter Graver, *Judicial Independence Under Authoritarian Rule: An Institutional Approach to the Legal Tradition of the West*, 10 HAGUE JOURNAL OF RULE OF LAW 317, 335 (2018).

[58] *Id.*

[59] DOUGLASS C NORTH, UNDERSTANDING THE PROCESS OF ECONOMIC CHANGE (2005) 52.

political rules a prescription for short-run disaster.[60]

In a narrower sense, path dependence suggests that "once a country or a region has started down a track, the costs of reversal are very high."[61] Industrial capitalism was introduced to Germany in the 19th century[62] – a path embedded with beliefs, norms, and informal practices that could bring about significant resistance of economic organizations and actors from radical, politicized changes to the markets. When the Nazis rose to power,[63] the state, suffering from the Great Depression and the high unemployment rate, could not afford the costs of a complete reversal of the path where property rights and business autonomy were held in high regard. Consequently, the Nazi party chose to withdraw politically prioritized affairs in the economic life concerning, for instance, certain property owners' rights and rearmament from the Normative State and turned them over to the Prerogative State. Meanwhile, Hitler and his party kept the ultimate power to determine the political nature of any affairs at issue.

Another illustration of path dependence is the maintenance of judicial independence in deciding individual cases.[64] Germany inherits the Western rule of law tradition and habitus that long-standing authoritarian states generally do not have.[65] Absolute deprivation of judicial independence by a new party in power would be difficult to accomplish, if not at all impossible. Indeed, the Nazis introduced new laws, organizations, and values that "purged" the legal profession and abolished constitutional constraints on executive power.[66] Still, "there were more hidden structures in the mind-sets of the legal corps that they could not reach, and power relations in the structure of the way the legal system was organised that served to protect basic elements of the legal tradition."[67] Influential works have illustrated the

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[60] *Id*. at 156-57.

[61] Margaret Levi, *A Model, a Method, and a Map: Rational Choice in Comparative and Historical Analysis*, MARK IRVING LICHBACH & ALAN S ZUCKERMAN (EDS.), COMPARATIVE POLITICS: RATIONALITY, CULTURE, AND STRUCTURE (1997) 28.

[62] Gerhard Wegner, *Capitalist Transformation Without Political Participation: German Capitalism in the First Half of the Nineteenth Century*, 26 CONSTITUTIONAL POLITICAL ECONOMY 61, 64 (2015); Eiji Ohno, *The Historical Stage of German Capitalism – An Analysis of the Bismarck Regime*, 40 KYOTO UNIVERSITY ECONOMIC REVIEW 18, 19 (1970).

[63] Gregori Galofré-Vilà, Christopher M. Meissner, Martin McKee, and David Stuckler, *Austerity and the Rise of the Nazi Party*, 81 The Journal of Economic History 81, 85-87 (2021).

[64] *See generally*, Graver, *supra* note 57.

[65] *Id*. at 331-35.

[66] *See generally* Cynthia Fountaine, *Complicity in the Perversion of Justice: The Role of Lawyers in Eroding the Rule of Law in the Third Reich*, 10 ST. MARY'S JOURNAL ON LEGAL MALPRACTICE & ETHICS 198, 198-242 (2020).

[67] *Id*. at 334.

instances of both "quiet and not-so-quiet" judicial opposition in Nazi Germany. When determining whether entrepreneurial freedom would prevail over the general power held by the inspectorial staff, the Prussian Supreme Administrative Court refused to repudiate the traditional legal principles by asserting that "[f]urther restraints and regulations [on entrepreneurial freedom] may be imposed only through a new law."[68] In another case, the Bavarian Administrative Court declared the sanctity of contracts, as "the foundation of the existing legal order" and "the basis of economic life," could not be repealed by the general National-Socialist principles.[69] In Triberg, a judge ruled in favor of a Jewish doctor who wanted to reassume his practice after jail time and held that "the view of the Party – that Jews were only guests and not citizens – was not yet the law of the land."[70] In 1941, another local judge rescinded the fines imposed by the food authorities on the Jews who registered with local grocers following the distribution of a special coffee ration.[71] In his twenty-page ruling, the judge stated the food authorities' accusation – that the registration of the Jews was a punishable act against the distribution regulations – was "an abstruse interpretation of law."[72] More strikingly, an empirical study suggested the People's Court – a terror court responsible for many judicial murders – "still retained the semblance of legal procedure" when sentencing defendants in treason cases during the pre-war period of Nazi Germany.[73] In Nazi Germany, jurists were obliged to swear their "loyalty to the Führer of the German Reich and people, Adolf Hitler" and to regard "the National Socialist ideology…[as] the basis for interpreting legal sources."[74] Such judicial attempts against unlawful arbitrariness were

[68] Fraenkel, *supra* note 31, at 75-76 (quoting Preussisches Oberverwaltungsgericht, August 10, 1936 (J. W. 1937, p. 1032).

[69] *Id*. at 76-77 (quoting Bayerischer Verwaltungsgerichtshof, June 5, 1936 (R. Verw. Bl. 1938, p. 17).

[70] Hans Petter Graver, *Why Adolf Hilter Spared the Judges: Judicial Opposition Against the Nazi State*, 19 GERMAN LAW JOURNAL 845, 855 (2018) (citing HEIKO MAAS, FURCHTLOSE JURISTEN: RICHTER UND STAATSANWÄLTE GEGEN DAS NS-UNRECHT (2017) at 43-53).

[71] Volume III: The Justice Case, Trials of War Criminals Before the Nuernberg Military Tribunals under Control Council Law No. 10 (2023), at 528-29.

[72] *Id*.

[73] Wayne Geerling, Gary B Magee, and Russell Smyth, Sentencing, Judicial Discretion, and Political Prisoners in Pre-War Nazi Germany, 46 The Journal of Interdisciplinary History 517, 540 (2016); *See* also, Wayne Geerling, Gary B Magee, and Robert Brooks, Faces of Opposition: Juvenile Resistance, High Treason, and the People's Court in Nazi Germany 44 The Journal of Interdisciplinary History 209, 234 (2013) ("The statistical evidence suggests that in sentencing juveniles, People's Court judges, like judges in other courts, took certain mitigating factors into consideration–most importantly, age, prior convictions and behavior, and the involvement and influence of adjust–although pre-war judgments tended to be more lenient than those offered during the war.").

[74] Justice Richard D. Fybel (Ret.), *Judges, Lawyers, Legal Theorists, and the Law in*

indeed bold but, nonetheless, often unavailing.[75] This was not least because that the National-Socialist government preserved the absolute power to intervene in all spheres of the country, including those previously governed in the Normative State, at will. The Nazis' occasional indulgence in judicial resistance and legal orders should not be indicative of the Nazi party's lessening dictatorship but of its self-imposed-and-revokable constraints for the realization of its political goals.

On the pretense of state expediency and necessity, prerogative interference with the Normative State may take different forms in the Third Reich. Among others, most defendants acquitted by courts were taken by Gestapo, the secret police of Nazi Germany, for "protective custody."[76] Furthermore, new courts such as the People's Court (*Volksgerichtshof*), the Special Courts (*Sondergerichte*), and courts-martial were established, which allowed Hilter to "handpick" jurists who would decide politically relevant matters through speedy trials. Take the special courts as an example. If the Special Courts had "come to the conviction that the evidence [was] not necessary for cleaning up the case," the Courts could "refuse any offer of evidence."[77] The Special Courts' judges also must "pass sentences even if the trials result[ed] in showing the act, of which the defendant [was] accused, as not being under the jurisdiction of the Special Court."[78] Defendants brought before these Courts would not have the right to warrant of arrest hearings or to appeal.[79] Since their establishment in 1933, the Special Courts' jurisdiction had been expanded by multiple decrees, so much so that the Reich Ministry of Justice made formal requests for more special courts and staff and for limitations on the jurisdiction of the "overloaded" Special Courts.[80] During

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Nazi Germany (1933–1938); Kristallnacht; and My Parents' Escapes from the Nazis, 70 UCLA L. REV. DISC. 2, 8 & 9 (2022).

[75] One exception is …

[76] Volume III: The Justice Case, *supra* note 71, at 22.

[77] Decree of the Reich Government, 21 March 1933, on the Formation of Special Courts, art. 13 (translation provided in Volume III: The Justice Case, *supra* note 71, at 218-21).

[78] *Id*. art. 14. *See also*, Decree of 21 February concerning Jurisdiction of Criminal Courts, Special Courts, and Additional Provisions of Criminal Procedure, art. 25 ("The Special Court must hand down a decision in a case, even if the trial shows that the act with which the defendant is charged is of such a nature that the Special Court is not competent to deal with it. If, however, the trial shows that the act comes under the jurisdiction of the People's Court, the Special Court will refer the case to the latter court").

[79] *Id*. arts. 9 & 16.

[80] In a letter Roland Freisler wrote to presidents and public prosecutors at courts of appeal, he stressed "because of the great number of proceedings, the necessary rapid handling of such cases should not prove possible… A Special Court is, as a rule, to be considered overloaded if a monthly average of more than 40 new indictments has been filed with it." Volume III: The Justice Case, *supra* note 71, at 226-29.

the wartime, "[p]ractically all somewhat important criminal cases" could be handled by the Special Courts so long as the Courts deemed immediate action necessary in light of "the gravity and the wickedness of the act" and "the excitement aroused in public."[81]

In Nazi Germany, individual rights of certain types, such as private ownership and contractual freedom, were maintained, but the free exercise of rights of all types was swept away by the revolution of 1933. Legal protection and rights of individuals could be deprived of by an overnight political decree, an arbitrary action of government agents, or an overly broad judicial interpretation of collective interests and the threat of Communism. In the Third Reich, the Normative State governed by legal orders existed, but a stable, legally defined scope of the Normative State never occurred. The preservation of some of the individual rights and capitalist economic principles was ostensible restraints self-imposed by the Prerogative State. In a dual state, the Normative State by no means could absorb or replace the Prerogative State; only the Prerogative State could limit the Prerogative State.[82] As such, the maintenance of the Normative State was mainly driven by the following reasons: First, a total reversal of the long-standing legal and economic tradition would overburden the National-Socialist party with excessive resistance against radical changes to the status quo. Even for the most repressive autocratic party, which has the absolute power to interfere with all spheres of society like the Nazis, it might not have sufficient institutional capacity or personnel to do so, especially during the wartime. The ruling class would thus conserve resources for more pressing political matters. To put it in a simple way, if two individuals disputed over the ownership of a chicken, the Nazis would want the dispute to be dealt with in the Normative State and by ordinary courts. The existence of legal orders regarding property rights can even help the individuals settle in private. However, if one of the two individuals is a Jew or a political opponent, then the Prerogative State may suddenly have an interest in intervening regardless of the type of the dispute. Second, to the Nazis, the maintenance of the Normative State could assist the dictatorship in realizing its political priorities. Legal orders in private life and the capitalistic principles could support the war-related industries, strengthen state governance, and pacify societal unrest. Meanwhile, the Nazis could consolidate their control and subvert the rule of law in the name of "necessity and expediency" by

[81] *Id.*

[82] FRAENKEL, *supra* note 31, at 71 ("The Normative State is a necessary complement to the Prerogative State and can be understood only in that light. Since the Prerogative and Normative States constitute an interdependent whole, consideration of the Normative State alone is not permissible.")

arbitrarily re-allocating and delimiting the jurisdiction of ordinary courts and re-defining the political nature of any matters in question.

The collapse of the Third Reich in 1945 brought democratic constitutional order and civil liberties back to the German society. In the contemporary world, there are very few countries, if any, which can be categorized as a dual state based on a narrow interpretation of Fraenkel's scholarship. Still, the coexistence between the Normative State and the Prerogative State continues to be deployed by the ruling class to some extent, whether in states governed under long-standing authoritarian mandates or regimes experiencing democratic backsliding.[83] However, compared to the short-lived dictatorship of the Nazi party, contemporary illiberal rulers are able to maintain and prolong their governance through various tactics. Recognizing the evolved feature of autocratic governance in the 21st century, Alok Sheel called for an update in Fraenkel's dual state model.[84] He illustrated,

> Modern dictatorships solidify their hold on power not through special laws, but by leveraging their executive authority under extant laws to capture legal and other civil society institutions. They appoint minions to key positions, and through them use legitimate institutions to enforce the will of the prerogative state. The normative state functions normally in most cases. But by controlling the outcomes of only a few cases, the prerogative state captures all state power.[85]

The following chapters will illustrate two kinds of modern "dual states" – inherited states and rebuilt states – where the Normative and Prerogative States emerge in a different sequence (*see* Figure II). Through a close examination of autocratic approaches undertaken by political leaders of both inherited and rebuilt legal systems, it will explain how legitimate institutions like courts may be manipulated for prerogative purposes and its implications for the rule of law and fundamental rights in autocratic and autocratizing

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[83] David Waldner and Ellen Lust, *Unwelcome Change: Coming to Terms with Democratic Backsliding*, 21 ANNUAL REVIEW OF POLITICAL SCIENCE 93, 96 (2018) ("Backsliding entails a deterioration of qualities associated with democratic governance, within any regime. In democratic regimes, it is a decline in the quality of democracy; in autocracies, it is a decline in democratic qualities of governance."); Nancy Bermeo, *On Democratic Backsliding*, 27 JOURNAL OF DEMOCRACY 5, 5 (2016) ("At its most basic, [democratic backsliding] denotes the state-led debilitation or elimination of any of the political institutions that sustain an existing democracy.").

[84] Alok Sheel, *Fraenkel's Theory of the Dual State May Need An Update*, MINT, Sept. 23, 2020, https://www.livemint.com/opinion/online-views/fraenkel-s-theory-of-the-dual-state-may-need-an-update-11600873439960.html (last visit Feb. 20, 2024).

[85] *Id.*

states.[86]

Inherited States	Legal orders prevail preceding the dual state	Liberal democracy transitioning toward electoral democracy
		Democracy transitioning toward autocracy
Rebuilt States	Political arbitrariness prevails preceding the dual state	Autocracy making a strategic, ostensible shift toward law

Figure II: Descriptors of Inherited and Rebuilt States

II. INHERITED LEGAL SYSTEMS

Like Nazi Germany, public and private affairs in inherited states were governed by legal orders before political arbitrariness came into play. Unlike Nazi Germany, prerogative measures that could override laws in inherited states were not necessarily carried out based on emergency decrees or martial laws. In modern days, democratic backsliding may occur through various vectors. Before autocratization, inherited states referred to in this Article should satisfy at least the minimal requirement for a democracy – which means, "a country has to meet sufficiently high levels of free and fair elections as well as universal suffrage, freedom of expression and

[86] This Article follows the Regimes of the World classification adopted by the V-Dem based on the Regimes of the World indicator – liberal democracies, electoral democracies, electoral autocracies, and closed autocracies. Autocratization represents "any move away from democracy toward autocracy" and "can occur in a democracy that does not become an autocracy." V-Dem Institute, *supra* note 227, at 12; *see* also Bastian Herre, *The "Regimes of the World" Data: How Do Researchers Measure Democracy?*, Our World In Data, https://ourworldindata.org/regimes-of-the-world-data ("A country is classified as a liberal democracy if the experts consider the country's laws to have been transparent; the men and women there as having had access to the justice system; and the country as having had broad features of a liberal democracy overall. If it does not meet one of these conditions, the country is classified as an electoral democracy. A country is classified as an autocracy if it does not meet the above criteria of meaningful, free and fair, multi-party elections. It is classified as an electoral autocracy if the experts consider the elections for the legislature and chief executive — the most powerful politician — to have been multi-party. It is classified as a closed autocracy if either the legislature or chief executive has not been chosen in multi-party elections.").

association."[87] One may, therefore, reasonably expect that a fairly functioning legal system preexists in an inherited state, which protects fundamental rights including voting and free speech to a satisfactory degree. In addition to rights protection, the independence of the judiciary is another essential element of democracy.[88] In wary of possible political turnover in a free and fair multiparty election, inherited states' leaders might have further insulated and empowered the courts as a form of political insurance before the autocratic transition.[89] As such, dismantling the original court system, if not at all infeasible, would inflict reputational costs for the ruling party that recently rose to power and impose considerable burdens on the government to operate private spheres.

A. Specialized Jurisdiction for Prerogative Purposes

In this case, one of the autocratic approaches that have been deployed by political elites is to withdraw politically relevant jurisdictions from the generalist courts and turn them over to specialized benches under prerogative control. Without excessive disturbance of the work of generalist courts and the administration of civil affairs, King James I and King Charles I used the Court of the Star Chamber to suppress political and religious dissidents and heavily punish antigovernment writings for seditious libel.[90] The jurisdiction of the Star Chamber – a court "consistently comprised of the king's closest advisors" – was extended frequently to match the prerogative needs.[91] Under the direct rule of the monarch, "it stripped the delinquent of [the king's] constitutional defen[s]e, which is to be determined by the judgment of his peers, and left him open to the capricious and tyrannical will and humo[]r of

[87] V-Dem Institute, *Democracy Report 2022: Autocratization Changing Nature?*, at 13.

[88] United Nations, *Global Issues: Democracy*, https://www.un.org/en/global-issues/democracy.

[89] TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES (2003); *see* also RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM (2004).

[90] For example, the Court of the Star Chamber decided a case against William Prynne in 1634, who was the author of "Histrio-Mastrix" – a book which argued the immorality of plays and theaters and condemned actresses. Because its publication was shortly after Queen Henrietta Maria's appearance in a play, the book was seen as a threat to the rule of King Charles I, and Prynne was sentenced to life imprisonment and having his ears cropped off. Mark Kishlansky, A Whipper Whipped: The Sedition of William Prynne, 56 The Historical Journal 603, 606-10 (2005).

[91] Daniel L. Vande Zande, *Coercive Power and the Demise of the Star Chamber*, 50 The American Journal of Legal History 326, 333-35 (2008-2010) ("because the Star Chamber was subject to direct rule by the Sovereign, there was always the potential for the Court to be used coercively to quell constitutional and religious dissent, particularly when political and economic resources of the Sovereign were waning.").

arbitrary judges."[92] In Nazi Germany, dissatisfied with the outcome of the "Reichstag fire trial" which acquitted the accused defendants except Marinus van der Lubbe on the ground of insufficient evidence, Hitler allocated the jurisdiction over treason and high treason to the People's Court (*Volksgerichtshof*) in 1934.[93] The Nazis also set up Special Courts (*Sondergericht*) in each High Court district to render final judgments for political offenses less severe than treason.[94] Not only was the jurisdiction of the Special Courts arbitrarily expanded by political decrees, it could also be claimed solely based on the prosecutor's personal belief that a Special Court's judgment was necessary given "the gravity of the case, public excitation or serious endangerment of public order and safety."[95] In its occupied territories, such as the Netherlands, Dutch citizens who acted against the interests of the Nazi party were brought to the newly established courts, including *Landgericht* and *Obergericht* during the war.[96] Spain was under a multi-party, parliamentary system until the outbreak of the civil war. After Franco rose to power in 1939, his government managed to maintain a parallel set of the judiciary – ordinary courts and special tribunals.[97] While the ordinary judiciary "seem[ed] fairly independent of the Executive with respect to their selection, training, promotion, assignment and tenure," special tribunals "being in charge of all cases with an actual or potential political relevance" were closely supervised by the state.[98] Between the establishment of the Republic of Turkey in 1923 and 2017, "Turkey's state leaders have declared a 'state of siege' (*örfi idare* or *sıkıyönetim*) 11 times, transferring the jurisdiction of the police, gendarmerie, and criminal justice system concerning certain categories of crimes to the armed forces in parts of all of the country for a total of 25 years, 9 months, and 28 days."[99] Through a general election in November 1982, the leader of the 1980 military coup d'état, Kenan Evren, became the President of Turkey. Shortly after, he

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[92] THE COURT OF STAR CHAMBER, OR SEAT OF OPPRESSION (1768), at 9.

[93] Law of 24 April 1934 Amending Regulations of Penal Law and Criminal Procedure (1934), arts. 1 & 5; *see* also Martin Löhnig, *Germany: The Reichsgericht 1933-1945*, in DERK VENEMA (ed.), SUPREME COURTS UNDER NAZI OCCUPATION (2022), at 63.

[94] Decree of the Reich Government, 21 March 1933, on the Formation of Special Courts, *supra* note 77, arts. 1, 2, & 16.

[95] Löhnig, *supra* note 93, at 64.

[96] *Id.*, at 194.

[97] *See* generally José J. Toharia, *Judicial Independence in an Authoritarian Regime: The Case of Contemporary Spain*, 9 L. & SOC'Y REV. 475, 476 & 482 (1975); Nuno Garoupa & Maria A Maldonado, *The Judiciary in Political Transitions: The Critical Role of U.S. Constitutionalism in Latin America*, 19 CARDOZO J. OF INT'L & COMP. LAW 593, 617-18 (2011).

[98] Toharia, *supra* note 97, 476 & 482.

[99] Joakim Parslow, *Theories of Exceptional Executive Powers in Turkey, 1933-1945*, 55 NEW PERSPECTIVES ON TURKEY 29, 31-32 (2017).

declared the state of siege and reinstated the State Security Courts, which were once closed down by the Constitutional Court, to punish political activists and civilians for separatism and sedition.[100] In the following years, Kenan Evren and the succeeding national leaders from ANAP and the True Path Party made use of the State Security Courts to decide cases involving anti-government plots expediently with a three-judge panel, each of which consists of a military judge.[101] In the 2000s, the ruling party – the Justice and Development Party (AK Party) – replaced the State Security Courts with the Specially Authorized Courts (SACs) and granted the SACs extended jurisdiction to further squash political dissent and social movements, "prevent[ing] other possible candidates from obtaining power both within and outside of the power bloc."[102] Portrayed as "pioneers in the fight against coup plotters" by the government, the SACs sent students, unionists, journalists, and many others with opposing voices to jail, bypassing many ordinary procedural rules.[103] In 2014, the AK Party created criminal judgeships of peace to take over matters that were originally handled by the generalist courts, concerning warrant issuance and the review of decisions not to prosecute.[104] These special judgeships also have the power to issue

[100] Turkuler Isiksel, *Between Text and Context: Turkey's Tradition of Authoritarian Constitutionalism*, 11 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 702, 718 (2013).

[101] One of the notorious cases decided by the State Security Courts is the case against Mr Ibrahim Incal, a local leader of the People's Labor Party, for distributing leaflets that criticized the municipal authority's measures. Mr Incal was sentenced by the Izmir National Security Court to six months and twenty days and a fine on account of inciting hatred and hostility under Article 312 of the Criminal Code. In *Incal v. Turkey* (1998), the European Court of Human Rights raised concerns about the imparity of the Izmir National Security Court and stressed that "the applicant could legitimately fear that because one of the judges of the Izmir National Security Court was a military judge it might allow itself to be unduly influenced by considerations which had nothing to do with the nature of his case." *Case of Incal v. Turkey*, 2 THE INTERNATIONAL JOURNAL OF HUMAN RIGHTS 152, 152-54 (1998).

[102] These courts are also referred to as Heavy Penal Courts. Zafer Yılmaz, *The Genesis of the "Exceptional" Republic: The Permanency of the Political Crisis And the Constitution of Legal Emergency Power in Turkey*, 46 BRITISH JOURNAL OF MIDDLE EASTERN STUDIES 714, 731 (2019).

[103] Özgür Korkmaz, *Turkish Government Once Loved the Specially Authorized Courts*, HURRIYET DAILY NEWS, Jan. 29, 2014, https://www.hurriyetdailynews.com/opinion/ozgur-korkmaz/turkish-government-once-loved-the-specially-authorized-courts-61740.

[104] INTERNATIONAL COMMISSION OF JURISTS, THE TURKISH CRIMINAL PEACE JUDGESHIPS AND INTERNATIONAL LAW (2018), at 11-12; Yaman Akdeniz, *Blog: Turkish Internet Censorship During the COVID-19 Pandemic*, Feb. 11, 2022, ARTICLE 19, https://www.article19.org/resources/blog-turkish-internet-censorship-during-the-covid-19-pandemic/; Engelliweb 2020, Fahrenheit 5651: The Scorching Effect of Censorship, https://ifade.org.tr/reports/EngelliWeb_2020_Eng.pdf, at 14-21 ("it was found that a total of 566 separate orders involving content removal and/ or access blocking were issued by the criminal judgeships of peace subject to article 8/A [of Law No. 5651] by the end of 2020… From 29.05.2015 to the end of 2020; access to more than 23.135 Internet addresses, including

orders blocking access to websites and social media content, assisting in silencing criticisms towards the government.[105] These are just a few examples of many that may show how illiberal leaders have resorted to special courts and jurisdiction to deal with politically sensitive cases. As Graver explains the mechanism behind this approach, "[t]he more autonomy the regular courts enjoy, the more likely it is that the regime will establish such courts. And the less compliance the regime receives, the greater will the scope of jurisdiction be for the special courts."[106]

B. Capture the "Important Courts"

Besides the allocation of politically relevant matters to special benches and jurisdiction, another common approach undertaken in inherited states is to capture the "important courts" through political tactics. Previous scholarship has explained various court-curbing techniques that are used to restrain the influence of the judiciary for either legitimate or prerogative purposes, including an alteration of the court size, forced resignations, and a reduction in the mandatory retirement age of judges.[107]

Among others, court packing, a concept that originated from the then U.S. President Franklin D. Roosevelt's administration often refers to "adding additional justices to a court, in order to change its ideological balance."[108]

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approximately 2.200 news websites and domain names, more than 750 news articles, more than 3.150 Twitter accounts, more than 3.400 tweets, more than 600 Facebook content items, and more than 1.850 YouTube videos, was blocked subject to a total of 566 8/A orders issued by 54 different criminal judgeships of peace").

[105] *Id*.

[106] HANS PETTER GRAVER, JUDGES AGAINST JUSTICE. ON JUDGES WHEN THE RULE OF LAW IS UNDER ATTACK (2015), at 151.

[107] David Kosař & Katarína Šipulová, *Comparative Court-Packing*, 21 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 80, 82-83 (2023); Nuno Garoupa, *Purging Disloyal Courts in Democratic Transitions and Judicial Preferences*, THE INTERNATIONAL JOURNAL OF TRANSNATIONAL JUSTICE 1, 6-11 (2024).

[108] Whilst there are differing definitions of court packing, this Article adopts Frye's definition to distinguish court packing from other practices that may weaken the independence and influence of the judiciary undertaken in various regimes. Brian L. Frye, *Court Packing Is a Chimera*, 42 CARDOZO LAW REVIEW 2697, 2698 (2021); Owen M Fiss, *The Right Degree of Independence*, in IRWIN P STOTZKY (ED.), TRANSITION TO DEMOCRACY IN LATIN AMERICA: THE ROLE OF THE JUDICIARY (1993), at 67 ("Unlike impeachment, court-packing accepts the authority of the justices in office, but it dilutes their power by adding new ones."). *Cf.* Joshua Braver, *Court-Packing: An American Tradition?* 61 BOSTON COLLEGE LAW REVIEW 2747, 2749 (2020) ("the manipulation of the Supreme Court's size primarily in order to change the ideological composition of the Court"); Kosař & Šipulová, *supra* note 107, at 82 ("court packing covers not only expanding the size of the court, but also reducing its size and swapping the sitting judges without altering the court's size.").

In the name of relieving the caseload of elderly judges, Roosevelt proposed the Judicial Procedures Reform Bill to Congress, which would allow the President to nominate up to six new judges to the U.S. Supreme Court.[109] Still, many believed Roosevelt's true intention of expanding the size of a conservative-leaning supreme court was to obtain more favorable judgments that would support his programs fighting the Great Depression, especially after the Court had struck down several New Deal laws as unconstitutional between 1935 and 1937.[110] The threats to democracy posed by Roosevelt's court-packing plan, despite being a failed attempt, have been described as "the nuclear constitutional weapon,"[111] "an episode of constitutional hardball,"[112] and "a technique that has been followed by modern-day illiberal democrats."[113] Such claims are not exaggerated. In 2004, Venezuela's then President Hugo Chávez passed the Organic Law of the Supreme Court ("Ley Orgánica del Tribunal Supremo de Justicia, LOTSJ"), increasing the number of judges sitting in the Supreme Tribunal of Justice from twenty to thirty-two – a move that undermined many achievements made by the 1999 Constitution to promote judicial independence.[114] Along with the five existing vacancies on the bench, his party managed to fill seventeen justices who were proven "revolutionaries" and political loyalists in the national highest court and swiftly made the court an "instrument in the service of the revolution."[115]

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[109] Braver, *supra* note 108, at 2752; NCC Staff, *How FDR Lost His Brief War on the Supreme Court*, National Constitutional Center, Feb. 5, 2024, https://constitutioncenter.org/blog/how-fdr-lost-his-brief-war-on-the-supreme-court-2.

[110] Mark Tushnet, *Constitutional Hardball*, 37 J. MARSHALL L. REV. 523, 544 (2004); Lesley Kennedy, *This Is How FDR Tried to Pack the Supreme Court*, HISTORY, Sept. 19, 2020, https://www.history.com/news/franklin-roosevelt-tried-packing-supreme-court ("Over the course of the Depression, Roosevelt was pushing through legislation and, beginning in May 1935, the Supreme Court began to strike down a number of the New Deal laws. 'Over the next 13 months, the court struck down more pieces of legislation than at any other time in U.S. history,' Woolner says.").

[111] Rivka Weill, *Court Packing As An Antidote*, 42 CARDOZO LAW REVIEW 2705, 2707 (2021).

[112] Tushnet, *supra* note 110, at 545.

[113] Aziz Huq & Tom Ginsburg, *How to Lose a Constitutional Democracy?*, 65 UCLA LAW REVIEW 78, 98 (2018).

[114] Matthew M Taylor, *The Limits of Judicial Independence: A Model with Illustration from Venezuela under Chávez*, 46 JOURNAL OF LATIN AMERICAN STUDIES 229, 231, 253 & 254 (2014); HUMAN RIGHTS WATCH, A DECADE UNDER CHÁVEZ: POLITICAL INTOLERANCE AND LOST OPPORTUNITIES FOR ADVANCING HUMAN RIGHTS IN VENEZUELA (2018), at 45.

[115] JAVIER CORRALES & MICHAEL PENFOLD, DRAGON IN THE TROPICS: VENEZUELA AND THE LEGACY OF HUGO CHÁVEZ (2011), at 27; Taylor, *supra* note 114, at 254; Rogelio Pérez-Perdomo & Andrea Santacruz Salaza, *The Chavist Revolution and the Justice System*, 8 Latin American Policy 189, 193 (2017) (citing ANTONIO CANOVA, LUIS ALFONSO HERRERA, ROSA RODRÍGUEZ ORTEGA & GIUSEPPE GRATEROL, EL TSJ AL SERVICIO DE LA REVOLUCIÓN (2014)).

Based on an analysis of 45,474 judgments entered by the Supreme Tribunal of Justice of Venezuela between 2004 and 2013, Antonio Canova and his coauthors did not find any decisions against the government.[116] In another Latin American jurisdiction, the Supreme Court of Justice of Nicaragua was packed to contain 16 seats through a political deal formed by the leaders of two opposing parties - Arnoldo Alemán from the Constitutionalist Liberal Party and Daniel Ortega from the Sandinista National Liberation Front.[117] This change further paved the way for Ortega and his party to secure a grip on the judiciary when Ortega won the election seven years later and transformed the country from an electoral democracy to an electoral autocracy.[118] Functioning as a "Sandinista rubber-stamp," the Supreme Court of Justice consistently delivers judgments aligned with Ortega's political agenda to, for instance, remove the constitutional limit on presidential terms and imprison anti-Sandinista politicians and protestors.[119] In Hungary, the Fidesz government led by Viktor Orbán expanded the size of the Constitutional Court – a powerful institution that "had been constitutional guardian and primary check on the government" for over two decades – from eleven to fifteen judges through a constitutional amendment issued within two years of winning the 2010 elections.[120] According to the analysis conducted by the Eötvös Károly Institute, the Hungarian Civil Liberties Union, and the Hungarian Helsinki Committee, Fidesz managed to appoint eight Constitutional Court judges between 2010 and 2013, forming a new majority on the bench which was more inclined to "correspond[] with the probable interests of the Government."[121]

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[116] Alfredo Meza, *Venezuelan government's winning streak at the Supreme Court*, EL PAÍS, Dec. 12, 2014, https://english.elpais.com/elpais/2014/12/12/inenglish/1418411741_236380.html; *see* generally ANTONIO CANOVA, LUIS ALFONSO HERRERA, ROSA RODRÍGUEZ ORTEGA & GIUSEPPE GRATEROL, EL TSJ AL SERVICIO DE LA REVOLUCIÓN.

[117] Azul A. Aguiar Aguilar, *Courts and the Judicial Erosion of Democracy in Latin America*, 51 POLITICS & POLICY 7, 21 (2023).

[118] *Id.*; *See* Table 2. History of Regimes of the Word by Country-Year, 1972-2022, V-Dem Institute, *supra* note 227, at 40.

[119] Hudson Institute, *Losing Nicaragua*, WEEKLY STANDARD ONLINE: COMMENTARY, Nov. 24, 2009, https://www.hudson.org/node/34321 (last visited May 1, 2024); Ryan C. Berg, *Restoring Democracy: Escalating Efforts against the Ortega-Murillo Regime*, The American Enterprise Institute for Public Policy Research (2020), at 9, https://www.aei.org/wp-content/uploads/2020/07/Restoring-democracy-in-Nicaragua.pdf (last visited May 1, 2024).

[120] Miklós Bánkuti, Gábor Halmai, and Kim Lane Scheppele, *Hungary's Illiberal Turn: Disabling the Constitution*, 23 JOURNAL OF DEMOCRACY 138, 139 (2012); Aylin Aydin-Cakir, *The Varying Effect of Court-Curbing: Evidence from Hungary and Poland*, 31 JOURNAL OF EUROPEAN PUBLIC POLICY 1179, 1188 (2024).

[121] The Eötvös Károly Institute, the Hungarian Civil Liberties Union, and the Hungarian Helsinki Committee, *Analysis of the Performance of Hungary's "one-party elected"*

Along with creating additional seats in courts where politically relevant matters are being adjudicated, some regimes also resort to judicial purges and other court-curbing tactics. After Law and Justice ("PiS") once again became the leading party of Poland in 2015, President Andrzej Duda refused to swear in any of the five judges appointed by the preceding government for the Constitutional Tribunal.[122] Instead, he filled the vacancies with PiS-friendly, "mid-night appointees."[123] Moreover, in hopes of forcing 27 out of the 73 Supreme Court judges into early retirement, President Duda signed a new law in December 2017, which lowered the mandatory retirement age of the Supreme Court judges from 70 to 65.[124] In El Salvador, on the same day – May 1, 2021 – when the party of the newly elected President Nayib Bukele secured a majority in the National Assembly, the Assembly removed all the members of the Constitutional Chamber of the Supreme Court, including five permanent judges and the Attorney General.[125] The year prior to the judicial purge, the Constitutional Chamber issued several rulings, which found the government's detentions of people for violating lockdown regulations unconstitutional.[126] Yet, these judgments were publicly condemned and

Constitutional Court Judges between 2011 and 2014 (2015), at 2, 4 & 5, https://helsinki.hu/wp-content/uploads/EKINT-HCLU-HHC_Analysing_CC_judges_performances_2015.pdf (last visited Apr. 19, 2024).

[122] Allyson Duncan and John Macy, *The Collapse of Judicial Independence in Poland: A Cautionary Tale*, 104 JUDICATURE 41, 42 (2020-21).

[123] *Id.*; Arkadiusz Radwan, *Chess-Boxing Around the Rule of Law: Polish Constitutionalism at Trial*, VERFASSUNGSBLOG, 23 December 2015, https://verfassungsblog.de/chess-boxing-around-the-rule-of-law-polish-constitutionalism-at-trial/ ("the PiS controlled Sejm went unconcernedly on and late in the evening of December 2nd, 2015 selected five new justices – substitutes for the former replacement judges… before dawn on December 3rd, four of the five substitute-replacement judges were sworn in by President Duda).

[124] Duncan and Macy, *supra* note 122, 42-45; Marc Santora, *Poland Purges Supreme Court, and Protesters Take to Streets*, THE NEW YORK TIMES, July 4, 2018, https://www.nytimes.com/2018/07/03/world/europe/poland-supreme-court-protest.html; *see* also *European Commission v Republic of Poland* (2019).

[125] José Miguel Vivanco and Juan Pappier, *The U.S Can Stop EL Salvador's Slide to Authoritarianism. Time to Act*, THE WASHINGTON POST, May 18, 2021, https://www.washingtonpost.com/opinions/2021/05/18/bukele-el-salvador-biden-human-rights-watch-authoritarianism/; United Nations, *El Salvador: Dismissal of Constitutional Chamber and Attorney General Seriously Undermines the Rule of Law – Bachelet*, OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS (PRESS RELEASE), May 4, 2021, https://www.ohchr.org/en/2021/05/el-salvador-dismissal-constitutional-chamber-and-attorney-general-seriously-undermines-rule.

[126] Human Rights Watch, *El Salvador: President Defies Supreme Court: OAS Should Address Disregard for Rights Rulings, Constitution*, Apr. 17, 2020, https://www.hrw.org/news/2020/04/17/el-salvador-president-defies-supreme-court; Due Process of Law Foundation, *Muzzled Justice: The Capture of El Salvador's Justice System*, https://dplf.org/sites/default/files/executive_summary_-_muzzled_justice_-

repeatedly dismissed by President Bukele in 2020.[127] The "new" judges appointed by President Bukele to the captured Constitutional Chamber soon showed their loyalty and subordination to the political power by lifting a constitutional ban on two consecutive presidential terms, which cleared the way for Nayib Bukele to run for re-election in February 2024.[128] These court-curbing activities are also observed in Asia. In 2018, the then Chief Justice of the Supreme Court of the Philippines, Maria Lourdes Sereno, following her criticism about the then President Duterte's anti-drug campaign, was impeached upon a petition filed by Solicitor General Jose Calida, a Duterte's appointee.[129] Before urging the members of parliament to "fast-track the impeachment," Duterte publicly warned Sereno that "I'm putting you on notice that I am now your enemy. And you have to be out of the Supreme Court." [130] Besides the ouster of his vocal critic, Duterte also managed to appoint 13 out of the 15 Supreme Court judges, which to some extent led to the Court's "almost consistently" pro-government rulings under his administration.[131]

It is noteworthy that illiberal rulers oftentimes deploy multiple court-curbing tactics to undermine the power of the judiciary as a whole. As democracy continues to crumble in an inherited state, no courts or judges are impervious to political manipulation. That said, the sudden changes in the

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_capture_justice_el_salvador.pdf, at 10-11.

[127] Human Rights Watch, *supra* note 126.

[128] In the 2024 presidential elections of El Salvador, Nayib Bukele won the reelection with 84.65 percent of the votes. Distribution of Votes Cast in the 2024 Presidential Elections in El Salvador, by Candidate, Statista, https://www.statista.com/statistics/1448778/distribution-votes-cast-presidential-elections-el-salvador/; El Salvador Court Says Presidents Can Serve Two Straight Terms: Ruling Paves the Way for Incumbent Nayib Bukele to Stand for Re-election in 2024, Al Jazeera, Sept. 4, 2021, https://www.aljazeera.com/news/2021/9/4/el-salvador-court-says-presidents-can-serve-2-straight-terms ("In 2014, the same court [, the Constitutional Chamber of the Supreme Court,] ruled that presidents would have to wait 10 years after leaving office to be re-elected.").

[129] *Fear for Democracy After Top Philippine Judge and Government Critic Removed*, THE GUARDIAN, May 11, 2018, https://www.theguardian.com/world/2018/may/12/fear-for-democracy-after-top-philippine-judge-and-government-critic-removed; Kosař & Šipulová, *supra* note 107, at 100.

[130] *Duterte Urges Congress to "Fast-track" Impeachment of Top Judge*, AL JAZEERA, Apr. 9, 2018, https://www.aljazeera.com/news/2018/4/9/duterte-urges-congress-to-fast-track-impeachment-of-top-judge.

[131] Björn Dressel, Tomoo Inoue and Cristina Regina Bonoan, *Justices and Political Loyalties: An Empirical Investigation of the Supreme Court of the Philippines, 1987-2020*, LAW & SOCIAL INQUIRY 1, 15 (2023); Björn Dressel and Cristina Regina Bonoan, *Courts and Authoritarian Populism in Asia: Reflections from Indonesia and the Philippines*, LAW & POLICY 1, 7-8 (2023).

authority and personnel of the "important" courts – either generalist or specialized – which exercise the power to, for instance, conduct judicial review, adjudicate election affairs, and decide on the right to assembly, may reflect some of the early signs of political attacks on the judiciary. Once the courts that handle cases crucial to the ruling party are captured, political leaders can utilize such courts to consolidate their hold on power and legitimize their illegitimate agenda and policies.[132]

C. De-Judicialization of Politically Relevant Matters

For some time, the government may find certain subjects so vital that the courts are prohibited from becoming involved in any way, regardless of whether the judiciary is subordinate to or captured by political power. For the jurisdiction governing these issues, illiberal politicians keep it completely out of the reach of the courts.

In October 2010, the Hungarian Constitutional Court struck down a law that imposed a 98 percent retroactive tax on former state officials.[133] On the same day of the judgment, the government introduced an amendment to the Constitution removing the Court's jurisdiction to review legislation pertaining to fiscal or tax matters for reasons such as retroactivity and infringement on property rights.[134] In addition, the Fidesz government eliminated the judicial power of *actio popularis* – an avenue through which any ordinary citizen could avail themselves to challenge the constitutionality of laws.[135] Under the new constitution that came into effect in January 2012,

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[132] *See* e.g., Aguilar, *supra* note 117, at 12 ("Another step false democrats use in their quest to erode the judiciary is to pack the supreme court… With the court in their pockets, we can expect false democrats to request their court to decide in favor of the constitutionality of their reelection, to drop corruption cases targeting the ruling elite, or to validate restrictions imposed on free speech or freedom of association—in short, to clear their way to legally and successfully aggrandize their power, unleashing democratic erosion.").

[133] Gábor Halmai, The Evolution and Gestalt of the Hungarian Constitution, in ARMIN VON BOGDANDY, PETER M. HUBER, AND SABRINA RAGONE, THE MAX PLANCK HANDBOOKS IN EUROPEAN PUBLIC LAW: VOLUME II: CONSTITUTIONAL FOUNDATIONS (2023), at 236; Miklós Bánkuti, Gábor Halmai, and Kim Lane Scheppele, *Hungary's Illiberal Turn: Disabling the Constitution*, 23 JOURNAL OF DEMOCRACY 138, 139-40 (2012).

[134] Halmai, *supra* note 133; Bánkuti, Halmai, and Scheppele, *supra* note 133 ("Now the Court can no longer review for constitutionality any laws about budgets or taxes unless those laws affect rights that are hard to infringe with budget measures (rights to life, dignity, data privacy, thought, conscience, religion, and citizenship). Conspicuously, the Constitutional Court is not allowed to review budget or tax laws if they infringe other rights that are much easier to limit with fiscal measures, such as the right to property, equality under the law, the prohibition against retroactive legislation, or the guarantee of fair judicial procedure.").

[135] Bánkuti, Halmai, and Scheppele, *supra* note 134, at 142; László Sólyom, *The Constitutional Court of Hungary*, in ARMIN VON BOGDANDY, PETER HUBER, CHRISTOPH

an individual may obtain standing only if they can demonstrate their rights have been concretely and adversely affected by the law and that they exhausted all other legal remedies.[136] The heightened requirements for constitutionality review not only restrained the ability of the Constitutional Court to weight in abstract constitutional principles but also shielded the two laws enacted by the Fidesz government – one "reorganize[d] the security services" while the other "g[ave] a government agency the power to issue decrees without parliamentary oversight" – from being challenged in courts.[137] NGOs and rights advocates are now confronted with significant barriers when attempting to utilize public interest lawsuits to combat abuses of prerogative power on a constitutional ground.[138] In 2013, the Constitution was once again altered by Fidesz, which removed the judiciary's authority to conduct substantive review of the Constitution and its amendments.[139]

Sri Lanka – a constitutional, multiparty democracy upon its independence from the United Kingdom – was portrayed as being ruled by authoritarianism "under the guise of emergency powers" following the first declaration of a state of emergency in 1958.[140] The 1978 Constitution accelerated such democratic backsliding by removing the jurisdiction of the courts to question the validity of any enacted laws or emergency regulations.[141] During the

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GRABENWARTER, THE MAX PLANCK HANDBOOK IN EUROPEAN PUBLIC LAW: VOLUME III: CONSTITUTIONAL ADJUDICATION: INSTITUTIONS (2020), at 368-69.

[136] Kim Lane Scheppele, *Understanding Hungary's Constitutional Revolution*, in ARMIN VON BOGDANDY AND PÁL SONNEVEND, CONSTITUTIONAL CRISIS IN THE EUROPEAN CONSTITUTIONAL AREA: THEORY, LAW AND POLITICS IN HUNGARY AND ROMANIA (2015), at 116.

[137] Kim Lane Scheppele, *Constitutional Coups and Judicial Review: How Transnational Institutions Can Strengthen Peak Courts at Times of Crisis (With Special Reference to Hungary)*, 23 TRANSNAT'L L. & CONTEMP. PROBS. 51, 75 (2014).

[138] HUMAN RIGHTS WATCH, WRONG DIRECTION ON RIGHTS ASSESSING THE IMPACT OF HUNGARY'S NEW CONSTITUTION AND LAWS (2013), at 15.

[139] Fourth Amendment to Hungary's Fundamental Law, T/9929, Art. 12 ("The Constitutional Court may only review the Fundamental Law and the amendment thereof for conformity with the procedural requirements laid down in the Fundamental Law with respect to its adoption and promulgation.").

[140] Radhika Coomaraswamy and Charmaine de los Reyes, *Rule by Emergency: Sri Lanka's Postcolonial Constitutional Experience*, 2 INT'L J. CONST. L. 272, 272-73 (2004).

[141] Constitution, Sri Lanka 1978, arts. 80 (3) ("Where a Bill becomes law upon the certificate of the President or the Speaker, as the case may be, being endorsed thereon, no court or tribunal shall inquire into, pronounce upon or in any manner call in question the validity of such Act on any ground whatsoever.") & 154j (2) ("A Proclamation under the Public Security Ordinance or the law for the time being relating to public security, shall be conclusive for all purposes and shall not be questioned in any Court, and no Court or Tribunal shall inquire into, or pronounce on, or in any manner call in question, such Proclamation, the grounds for the making thereof, or the existence of those grounds or any direction given under this Article.").

presidency of Mahinda Rajapaksa, he consolidated his prerogative power through emergency regulations promulgated under the Public Security Ordinance and the Prevention of Terrorism Act.[142] Among others, the Emergency (Miscellaneous Provisions and Powers) Regulations No. 1 of 2005 authorized the Secretary to the Ministry of Defence[143] to order any persons, whose acts deemed detrimental to the public order, national security, or essential services, to be detained for up to a year. [144] To carry out such commands, the military and police may use all necessary force.[145] These detention orders are immune from "be[ing] called in questions in any court on any ground whatsoever."[146] Magistrates also do not have power to release any detainees brought before the court on bail without the written approval of the Attorney General.[147] The 2006 Emergency Regulations broadened the definition of terrorism and granted the government unbridled power to intimidate and criminalize opposition rallies, rights advocates, protestors, and journalists.[148] Shielding emergency powers from judicial checks, the Mahinda Rajapaksa government was actively involved in violent attacks on media critics, arbitrary detention and enforced disappearances of civilians, and a massacre of thousands of Tamils in the name of combating terrorism.[149]

The Partido Revolucionario Institucional (PRI) which ruled Mexico between 1929 and 2000 undertook a similar approach to disempower the

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[142] *Sri Lanka's Judiciary: Politicised Courts*, Compromised Rights, International Crisis Group Asia Report No. 172 (2009), at 7.

[143] Under Mahinda Rajapaksa's administration, his brother Gotabaya Rajapaksa, served as the Secretary to the Ministry of Defense. *"In A Legal Black Hole": Sri Lanka's Failure to Reform the Prevention of Terrorism Act*, Human Rights Watch, Feb. 7, 2022, https://www.hrw.org/report/2022/02/07/legal-black-hole/sri-lankas-failure-reform-prevention-terrorism-act.

[144] The Emergency (Miscellaneous Provisions and Powers) Regulations No. 1 of 2005, art. 19.

[145] *Id.*

[146] *Id.*

[147] *Id.*, art. 21(1).

[148] An editor of the Sunday Leader newspaper, Lasantha Wickrematunge, who was repeatedly referred to by Mahinda Rajapaksa as "terrorist journalist" for his criticisms against the government, was assassinated in 2009 during daytime on the street of Colombo. *Sri Lanka's Assault on Dissent*, AMNESTY INTERNATIONAL (2013), https://amnesty.org/en/documents/ASA37/003/2013/en/, at 18; The Emergency (Prevention and Prohibition of Terrorism and Specific Terrorist Activities) Regulations No. 07 of 2006, art. 20.

[149] Panel of Experts, *Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka, Security Council Report*, Mar. 31, 2011, i-v, https://www.securitycouncilreport.org/un-documents/document/poc-rep-on-account-in-sri-lanka.php; Human Rights Watch, Sri Lanka: Rajapaksa Legacy of Abuse, Assaults on Activities, Resistance to International Investigation in 2014, Jan. 29, 2015, https://www.hrw.org/news/2015/01/29/sri-lanka-rajapaksa-legacy-abuse.

judiciary. Until the final few years of its governance, Mexican courts lacked jurisdiction over review of "virtually all cases with so-called political content."[150] The distinction between political and non-political cases was hazy and, therefore, open to the manipulation by the PRI's leaders. Cases out of the reach of federal courts concerned conventionally political matters, such as the right to vote and free speech, as well as economic affairs, including property rights in rural areas and the nationalization of banks.[151] Until 1994, citizens were only able to challenge specific administrative actions that violated their rights or applied the laws against the Constitution through *amparo* suits.[152] Moreover, amparo claims were resource-consuming and frequently dismissed by the courts. A single judgment of an *amparo* case would also not affect the applicability of a law that was declared unconstitutional by the court.[153] When the matters relevant to the PRI were deprived of the jurisdiction of the courts, judicial power would no longer be excised as a check on the state but in service of it.

Like the case of Nazi Germany demonstrated in Fraenkel's classic dual state model, inherited states are governed by the pre-existing legal orders before political measures become dominant and arbitrary. In response to their ever-changing prerogative priorities, the ruling parties partially upend, and partially preserve, laws and legal institutions. Unlike Nazi Germany, inherited regimes' leaders today do not always resort to martial laws, commit discriminatory purges, or declare states of emergency. Rather, they have employed multi-faceted, autocratic methods to disempower the original courts, particularly those with the jurisdiction over issues of political significance, under the pretense of upholding the constitution, democracy, and the rule of law. As Kim Lane Scheppele perfectly illuminates, "[the new autocrats] take a kinder, gentler, but, in the end, also destructive path. They masquerade as democrats and govern in the name of their democratic mandates. They don't destroy state institutions; they repurpose rather than abolish the institutions they inherited."[154]

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[150] Beatriz Magaloni, *Enforcing the Autocratic Political Order and the Role of Courts: The Case of Mexico*, in TOM GINSBURG AND TAMIR MOUSTAFA, RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES (2012), at 188.

[151] *Id.*, at 188-93.

[152] Mario Alberto Cajas-Sarria and Vicente F. Benítez-R., *Judicial Politics in Mexico: The Supreme Court and the Transition to Democracy*, 15 INT'L J. CONST. L. 552, 552 (2017); *Id.*, at 188-89.

[153] Devin C. McNulty, *Amparo as a Reflection of Mexico's Evolving Society and Judicial System*, 49 INT'L J. LEGAL INFO. 149, 157-58 (2021); Magaloni, *supra* note 150, at 188-90.

[154] Scheppele, *supra* note 22, at 573.

III. REBUILT LEGAL SYSTEMS

Rebuilt regimes referred in this Article are either electoral or closed autocracies where the dominance of political arbitrariness precedes the construction of the law-based Normative State. For decades, these regimes have been administered under authoritarian rules with few or no democratic episodes. Not bound by a path of democratic beliefs and norms derived from the historical experiences of the past, prerogative leaders can swiftly turn a political opponent into a people's enemy and rely on institutions of any type to silence dissenting voices. In rebuilt states, the original courts prior to the coexistence between legal orders and political arbitrariness often exercises instrumental functions and do not enjoy the same level of pedigree or autonomy as those in inherited states. Judges are guided by political ideologies and can be held accountable to the ruling party. Yet, with courts securely in their pockets, the ruling elites may move on to impose ostensible constraints on their unlimited power within the Normative State to further their political agenda. Because the boundary between political and non-political spheres is not legally defined, these self-imposed constraints can be arbitrarily removed by prerogative power when necessary. A common approach undertaken by rebuilt states is a strategic march toward the rule of law or, more accurately speaking, rule by law.

In recent decades, a number of regimes, which are deemed as either "not free" or autocratic by global indexes, have taken steps to promulgate laws and regulations, enhance legal education and enforcement, and reform the judicial system.[155] Morocco, for instance, initiated multiple programs, including the passage of the Right to Information Law and the establishment of an independent judicial training institution and several specialized courts for administrative and commercial disputes.[156] In his public remarks, King Mohammed VI of Morocco stressed the country's strong commitment to "foster[ing] a climate of trust and legal security, which will act as a catalyst for boosting development and investment flows."[157] As influential theories

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[155] Richard Zajac Sannerholm and Lisen Bergquist, *Norms, Legitimacy and Power: Rule of Law Assistance in Authoritarian Countries*, 60 SCANDINAVIAN STUDIES IN LAW 33, 37-44 (2015).

[156] Marwa Shalaby & Sylvia Bergh, *Power to the People? The Right to Information Law in Morocco*, SADA, Sept. 30, 2020, https://carnegieendowment.org/sada/2020/10/power-to-the-people-the-right-to-information-law-in-morocco?lang=en; DPK Consulting, *Morocco Rule of Law Assessment*, USAID, Sept. 2010, https://pdf.usaid.gov/pdf_docs/Pnadt305.pdf, at 2.

[157] Norman L Greene, *Rule of Law in Morocco: A Journey Towards A Better Judiciary Through the Implementation of the 2011 Constitutional Reforms*, 18 ILSA JOURNAL OF INTERNATIONAL & COMPARATIVE LAW 455, 457 (2012) (citing the full text of HM King

of judicial politics suggest, laws and courts may not only provide a means to monitor and rectify power abuse of government branches, but also function as a useful tool for social administration, economic advancement, and power consolidation.[158] In the modern world, authoritarian governments have implemented a variety of changes to the legal systems, including those that firmly reject democratic values and concepts. While maintaining case-by-case discretion through arbitrary measures, ruling elites come to appreciate the advantages of rule-based governance, at least in some domains. Such appreciation frequently fuels the development and maintenance of the Normative State and drives the seemingly counterintuitive efforts made by autocratic rulers to promote legal awareness, professionalize legal workers, and empower courts.

A. Specialized Jurisdiction for "Non-Political" Cases

Given the compliance of the original courts with the regime, rebuilt states are generally inclined to "allow political cases to remain in their jurisdiction."[159] Instead of allocating special jurisdiction for politically relevant matters, these states would create relatively competent, autonomous specialized benches, running alongside their generalist courts, to handle non-political cases. [160] This parallel set of the judiciary could be utilized by the regime to gain reputation for international investment, rein in local power abuse, and maintain social and economic order. Yet, according to Fraenkel's dual state model, arbitrary measures – rather than the Constitution or statutory laws – determine the political significance of subject matters.[161] Depending on the political context, any dispute may be deemed as non-political at one time and political at other times.[162] Such observation can be even more salient in rebuilt states governed by long-standing, authoritarian mandates. The extensive power that the ruling party holds would enable itself either to

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Mohammed VI Speech on 9th Anniversary of Throne Day, MAP (July 30, 2008).

[158] See generally, TOM GINSBURG AND TAMIR MOUSTAFA, RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES (2012); Ratna Rueban Balasubramaniam, *Judicial Politics in Authoritarian Regimes*, 59 U. TORONTO L.J. 405, 405–15 (2009); Tamir Moustafa, *Law and Courts in Authoritarian Regimes*, 10 ANN. REV. L. & SOC. SCI. 281, 283–84 (2014); Gretchen Helmke & Frances Rosenbluth, *Regimes and the Rule of Law: Judicial Independence in Comparative Perspective*, 12 ANN. REV. OF POL. SCI. 345, 355–58 (2009).

[159] Tamir Moustafa and Tom Ginsburg, *Introduction: The Functions of Courts in Authoritarian Politics*, in TOM GINSBURG AND TAMIR MOUSTAFA, RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES (2012), at 18.

[160] *Id*.

[161] Fraenkel, *supra* note 31, at 57-58.

[162] *Id*. ("The so-called 'private sphere' is only relatively private; it is at the same time potentially political.").

intervene in any cases ordinarily governed in the Normative State or to re-allocate certain jurisdiction from the Normative State back to the Prerogative State. Nonetheless, the increased openness and professionalism of the newly established specialized courts could make judicial outcomes that deviate from the law as well as arbitrary withdrawals of special jurisdiction more visible to wide-ranging stakeholders than before. Therefore, in rebuilt states, the establishment of specialized courts primarily leads to two potential effects: first, certain disputes would be resolved by competent judicial elites, and second, there would be more barriers to political meddling in cases under specialized jurisdiction.[163]

Today, there are a number of examples of "non-political" jurisdiction being assigned to competent, specialized benches for prerogative interests. Over the last ten years, Jordan's economy has encountered various challenges, including energy disruptions and the Iraq-Syria conflicts.[164] In October 2017, Jordan established the Central Economic Chamber at the Amman Court of First Instance to handle the increasing number of economic and financial cases amidst the global financial crisis.[165] According to its President, Issa Murad, the Economic Chamber seeks to "promot[e] the Kingdom's investment environment," "positively reflect on capital stability and the country's rating by global economic rating entities," and "diversify and expand business sectors."[166] Judges sitting in the Economic Chamber are not only expected to be experts in their specialized fields, but also have a grasp of global norms and practices. In September 2018, five Jordanian judges of the Economic Chamber made an official visit to judicial institutions in the Netherlands, exchanging opinions with Dutch jurors and professionals and strengthening adjudicatory skills in economic-related areas.[167] Since its establishment, the Economic Chamber has delivered several important rulings, one of which was based on the academic works of Egyptian scholars to set a precedent that extended the effects of an arbitration clause in a

[163] Zhiyu Li, *Specialized Judicial Empowerment*, 32 UNIVERSITY OF FLORIDA JOURNAL OF LAW AND PUBLIC POLICY 491, 545 (2022).

[164] U.S. Department of State, 2023 Investment Climate Statements: Jordan, https://www.state.gov/reports/2023-investment-climate-statements/jordan/.

[165] USAID/Rule of Law Program, *Jordan Rule of Law Program Final Report (November 2015 – July 2021)*, July 14, 2021, https://pdf.usaid.gov/pdf_docs/PA00XRZF.pdf, at 55.

[166] JT, *Decision to Help Settle Economy-Related Cases – Murad*, THE JORDAN TIMES, Nov. 5, 2017, https://jordantimes.com/news/business/decision-help-settle-economy-related-cases-%E2%80%94-murad.

[167] Centre for International Legal Cooperation, *Jordan: Economic Court Judges Share Insights With Dutch Colleagues*, Oct. 17, 2018, https://www.cilc.nl/jordan-judges-of-the-central-economic-chamber-visited-the-netherlands/.

contract to non-signatories.[168] The growth of judicial specialization has been entrenched in other domains, including commerce and tax, to reduce litigation time and enhance the local economic environment for foreign investment.[169] While Jordan is categorized as one of the twenty-one entrenched authoritarian regimes in the world, where "[p]olitical rights have been systematically denied," the country's monetary and investment freedom has been rated well above the global average by the Index of Economic Freedom.[170] Another notable example of specialized judicial empowerment in the Arab world is Qatar. Following Qatar's turn toward an internationalized economy, the country launched the Qatar International Court in 2009 to adjudicate civil and commercial cases involving the onshore jurisdiction of the Qatar Financial Center.[171] Leveraging modern technologies, the Court seeks to "appl[y] international best practices in dispute resolution and bring[] together renowned and experienced judges from around the world."[172] Along with the former Chief Justice of England and Wales, Lord Charlie Wolf, serving as the Court's founding president, the initial cohort of judges were mainly recruited from common law countries.[173] The International Court has been seen to frequently reference English cases in its rulings, even though it is situated inside a jurisdiction under the civil and Islamic law tradition.[174] In 2022, a specialized court focusing on investment and trade matters was established, aiming to "accelerat[e] the pace of commercial dispute resolution and creat[e] a healthy economic environment, in line with Qatar's plans to increase its exports and attract foreign investments."[175] Headquartered in Lusail, the Investment Court

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[168] Wasel & Wasel, *Landmark Judgment on the Extension of Arbitration Agreements to Non-Parties through Indirect Claims in Jordan*, Lexology, Apr. 13, 2023, https://www.lexology.com/library/detail.aspx?g=e138be26-ee07-45e8-82bb-a0d837e0e7a6.

[169] U.S. Department of State, *supra* note 164; *Amman Court of First Instance Opens Commercial Disputes Branch*, AMMON NEWS, Feb. 1, 2021, https://en.ammonnews.net/article/46502.

[170] Index of Economic Freedom, October 2023, https://www.heritage.org/index/pages/report; Yana Gorokhovskaia and Cathryn Grothe, *Freedom in the World 2024: The Mounting Damage of Flawed Elections and Armed Conflict*, Freedom House, https://freedomhouse.org/sites/default/files/2024-02/FIW_2024_DigitalBooklet.pdf, at 11.

[171] Andrew Dahdal & Francis Botchway, *A Decade of Development: The Civil and Commercial Court of the Qatar Financial Centre*, 34 ARAB L.Q. 59, 61 (2020).

[172]Overview, The Court, Qatar International Court and Dispute Resolution Centre, https://www.qicdrc.gov.qa/courts/court.

[173] Dahdal & Botchway, *supra* note 171, at 62.

[174] *Id*. at 70-71.

[175] Sachin Kumar, *Investment and Trade Court to Begin Work from Tomorrow*, THE PENINSULA, May 9, 2022, https://thepeninsulaqatar.com/article/09/05/2022/investment-and-trade-court-to-begin-work-from-tomorrow.

consists of original and appellate circuits and has jurisdiction over a variety of subject matters, including commercial securities, bankruptcies, commercial contracts, and intellectual property.[176] In an effort to address procedural delays commonly experienced by commercial litigants, the Investment Court not only enforces a short timeline for claims to be docketed and served, but also implements the Taqadi electronic system that streamlines the whole litigation process.[177] Moreover, the Court allows the parties to nominate independent experts at any stage of the litigation.[178] Pamela McDonald, the Head of Doha Office at Pinsent Masons, views the establishment of the Investment Court as "[Qatar's] first step towards a specialized judicial system," which will "provide investors in Qatar with considerable comfort that disputes, should they arise, will be resolved in a just and efficient manner."[179] Driven by these initiatives, Qatar is now among the top 30 nations over the globe for economic freedom, outperforming some of the most reputable democracies, including the United Kingdom and Japan.[180] As astute observers marvel at Qatar's economic successes, they nonetheless note the significant human rights violations that are taking place in the very land. For instance, government authorities failed to investigate and compensate for the deaths of thousands of migrant workers who prepared for the 2022 FIFA World Cup tournament in Qatar.[181] Many others who were

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[176] Law No. (21) of 2021 Establishing the Investment and Trade Court, arts. 7 & 10; Essa Mohammed Al Sulaiti & Mohamed El-Kashash, *Modern Law: Legal Commentary on Law No.21 of 2021 Promulgating the Law Establishing the Investment and Commerce Court*, Feb. 2022, https://eslaa.com/wp-content/uploads/2022/02/ESLF_Establishing-the-Investment-and-Commerce-Court.pdf, at 4-5; Gulf Legal Consultants, *The Establishment of A New Court in Qatar: Investment and Commerce*, LEGAL500, May 4, 2022, https://www.legal500.com/developments/thought-leadership/the-establishment-of-a-new-court-in-qatar-investment-and-commerce/.

[177] Pamela McDonald & Mohamed Adam, How Qatar's Investment and Commerce Court Works in Practice, PINSENT MASONS, Jan. 24, 2023, https://www.pinsentmasons.com/out-law/analysis/how-qatars-investment-and-commerce-court-works-in-practice; QNA, *President of Investment and Trade Court Stresses the Importance of "Taqadi System" in Developing Judicial Process*, QATAR BUSINESS, 3 June 2024, https://thepeninsulaqatar.com/article/03/06/2024/president-of-investment-and-trade-court-stresses-importance-of-taqadi-system-in-developing-judicial-process ; QNA, *President of Investment and Trade Court: New Electronic Project Will Launch in 2024*, GULF TIMES, Dec. 25, 2023, https://www.gulf-times.com/article/674248/qatar/president-of-investment-and-trade-court-new-electronic-project-will-launch-in-2024.

[178] Gulf Legal Consultants, *supra* note 176.

[179] Pamela McDonald, *Qatar Establishes New Specialised Investment and Commerce Court*, PINSENT MASONS, Feb. 4, 2022, https://www.pinsentmasons.com/out-law/analysis/qatar-establishes-new-specialised-investment-and-commerce-court?utm_source=PM+website&utm_medium=feed&utm_campaign=RSS+Outlaw.

[180] Index of Economic Freedom, *supra* note 170.

[181] Qatar, Events of 2022, HUMAN RIGHTS WATCH, https://www.hrw.org/world-report/2023/country-chapters/qatar.

charged illegal recruitment fees and denied their wages have been left in the dark to seek remedies.[182] The state also adopted a new strategy for media censorship, which sought to intimidate Qatari citizens and domestic companies from voicing and disseminating dissents, especially in Arabic, while maintaining a relatively progressive image in the international community.[183]

The empowerment of a specialized judiciary can also be observed on other continents. Modeling on the fruitful experience of the Dubai International Financial Center, Kazakhstan set up a court within the Astana International Financial Centre (AIFC). The government deliberately made the AIFC court separate from the Republic's ordinary judiciary which is "ill-equipped", "non-independent," and "notoriously biased in favor of government entities."[184] Furthermore, the incumbent justices of the AIFC Court, all of whom have years of experience practicing law in the UK, are praised by the Court as judges "with global reputation for absolute independence, impartiality, integrity, unconditional application of the rule of law, and incorruptibility."[185] To boost its cross-border visibility and earn the trust of regional and global investors, the AIFC Court applies the rules and principles of English Law to resolve civil and commercial disputes and issues its judgments in English as the Court's official language.[186] Each of the 122 rulings issued by the AIFC Court is publicly accessible on its official website.[187] One may expect such judicial initiatives to persist in Kazakhstan as the governing party continues to view both domestic and foreign investment as essential to its mission, even during the time of a political crisis

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[182] *Id*.; FIFA: No Remedy for Qatar Migrant Worker Abuses. A Year Later, Lack of Action Still Haunts Abused Workers, HUMAN RIGHTS WATCH, Nov. 20, 2023, https://www.hrw.org/news/2023/11/20/fifa-no-remedy-qatar-migrant-worker-abuses; Human Rights Watch, *Qatar: Six Months Post-World Cup, Migrant Workers Suffer. FIFA/Qatari Authorities Paid No Compensation, Silent on Wage Theft*, HUMAN RIGHTS WATCH, June 16, 2023, https://www.hrw.org/news/2023/06/16/qatar-six-months-post-world-cup-migrant-workers-suffer.

[183] Alainna Liloia, *New Authoritarian Practices in Qatar: Censorship by the State and the Self*, in OZGUN TOPAK, NEW AUTHORITARIAN PRACTICES IN THE MIDDLE EAST AND NORTH AFRICA (2022), at 216-22.

[184] Ilias Bantekas, *The Rise of Transnational Commercial Courts: The Astana International Financial Centre Court*, 33 Pace Int'l L. Rev. 1, 10 & 12 (2020); Nicolás Zambrana-Tévar, *The Court of the Astana International Financial Center in the Wake of Its Predecessors*, ERASMUS LAW REVIEW 122, 123 (2019); CONSTITUTIONAL STATUTE NO. 438-V ZRK OF 7 [AIFC CONST. STATUTE] art. 13(2) ("The AIFC Court is independent in its activities and is not a part of the judicial system of the Republic of Kazakhstan.").

[185] About Us, AIFC Court, https://court.aifc.kz/en/about-the-aifc-court.

[186] *Id*.

[187] Judgments, AIFC Court, https://court.aifc.kz/en/judgments.

and massive social unrest.[188] China – another fast-growing economy in Asia – has established a set of local courts specialized in IP, finance, and the Internet since 2014.[189] For a long time, the lack of sufficient legal education among judges recruited directly from the Army or governmental bodies, together with the influence of grassroots governments that may exert on judicial decision-making, have cast doubt on the capability of the Chinese judiciary to deliver impartial, high-caliber rulings.[190] Empowered with advanced technology and knowledgeable, seasoned judges, China's specialized courts aim to serve as a "judicial window," connecting the country with the world and drawing in global businesses.[191] On the one hand, the subject-matter expertise of these courts may foster an innovative laboratory that crafts and experiments with novel policies in respective fields. On the other hand, their jurisdictional focus on privatization can transform them into skillful but somewhat restricted agents to remedy local power abuses that are particularly detrimental to the nation's economic development without posing a serious threat to the party hegemony.[192] As Mark Jia articulates, "China's turn to special courts is a sobering reminder that some legal-professional virtues can complement authoritarian rule," which may enable these courts "to aid the country's global strategies" in the long run.[193] Endeavors toward judicial specialization have also been made in Africa for privatization. To promote the efficient resolution of business-related disputes, Eswatini, for instance, founded the Commercial Court in 2021.[194] The rationale behind this development has been explained by Pholile Shakantu, the Minister of Justice and Constitutional Affairs: "Investors

[188] *Kazakh President Announces New Initiatives to Address Current Crisis, Support Well-Being of People*, THE ASTANA TIMES, Jan. 12, 2022, https://astanatimes.com/2022/01/kazakh-president-announces-new-initiatives-to-address-current-crisis-support-well-being-of-people/.

[189] Mark Jia, *Special Courts, Global China*, 62 VIRGINIA JOURNAL OF INTERNATIONAL LAW 559, 583-88 (2022); Li, *supra* note163, at 497-507.

[190] Sida Liu, *Beyond the Global Convergence: Conflicts of Legitimacy in a Chinese Lower Court*, 31 L. & SOC. INQUIRY 75, 82 (2006).

[191] Yu Dongming & Huang Haodong, Shanghai Jinrong Fayuan: Dakai Zhongguo Tongwang Shijie de Jinrong Sifa Zhichuang (上海金融法院：打开中国通往世界的"金融司法 之窗") [Shanghai Financial Court: Open China's "Financial Judicial Window" to the World], FAZHI RIBAO (法制日报) [LEGAL DAILY] (Aug. 20, 2019), http://legal.people.com.cn/n1/2019/0820/c42510-31305343.html.

[192] Li, *supra* note163, at 507-28.

[193] Jia, *supra* note 189, at 566.

[194] Mbongiseni Ndzimandze, *Work Begins at Commercial Court*, Times of Eswatini, Oct. 8, 2021, https://www.pressreader.com/eswatini/times-of-eswatini/20211008/281818582004750; Mbongiseni Ndzimandze, *3 Judges Deployed to Commercial Court*, Times of Eswatini, June 3, 2022, https://www.pressreader.com/eswatini/times-of-eswatini/20220603/281728388155315.

evaluate the time, cost and quality of judicial processes, before they invest in any country… Streamlining commercial cases and bringing them under one umbrella will benefit business[es], improve the ease of doing business and attract more investors to Eswatini."[195] Among other initiatives, the Court is dedicated to accelerating commercial dispute resolution through procedural mandates for case management and pre-trial conferences.[196] When experts' reports are filed, the presiding judge will also convene a meeting with the experts and document their agreements and disagreements, as well as the legal basis for disagreements, in a joint minute.[197] Ironically, while Eswatini works to strengthen its courts' capacity through judicial specialization in several underperforming areas identified by the World Bank, the government makes little attempt to respond to international criticisms for using its judiciary to criminalize protestors and worker union leaders.[198] The phenomenon of specialized judicial empowerment exemplifies how rebuilt states may cherry-pick the functions of courts that best serve their political priorities, which, in the case of many rebuilt states for the time being, would be fostering the orderly administration of private affairs and the growth of the economy.

B. Judicial Self-Restraint and Selective Interference

It is frequently observed that, in the contemporary world, autocratic rulers empower the courts to exercise "regime-supporting functions" – upholding social order, legitimizing policy, consolidating centralized power, and stimulating the economy, to mention a few.[199] Yet, judicial empowerment is a double-edged sword, which can in return accord the judiciary autonomy and opportunities to challenge the regime.[200] Many rebuilt states have granted

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[195] Mbongiseni Ndzimandze and Kwanele Dlamini, *LSS Questions Commercial Court Constitutionality*, TIMES OF SWAZILAND, June 20, 2022, http://www.times.co.sz/news/135959-lss-questions-commercial-court-constitutionality.html.

[196] *Id*.

[197] Ndzimandze, *3 Judges Deployed to Commercial Court*, *supra* note 194.

[198] *Eswatini: Authorities Must Stop Using the Courts to Intimidate and Harass Union Leaders*, AMNESTY INTERNATIONAL, June 19, 2023, https://amnesty.org/en/latest/news/2023/06/eswatini-authorities-must-stop-using-the-courts/; World Bank Group, *Economy Profile of Eswatini: Doing Business 2020 Indicator*, at 50 ("The enforcing contracts indicator measures the time and cost for resolving a commercial dispute through a local first-instance court, and the quality of judicial process index, evaluating whether each economy has adopted a series of good practices that promote quality and efficiency in the court system.").

[199] Tamir Moustafa and Tom Ginsburg, *Introduction*, in Ginsburg and Moustafa, *supra* note 150, at 4-14.

[200] *Id*.

their specialized courts a degree of institutional independence and capacity that the generalist courts do not enjoy to carry out tasks in their respective fields. Still, such empowerment does not necessarily lead to political liberalization. Political elites nevertheless find their ways to keep the courts' activities in line with the regime's core interests.

One of the strategies that rebuilt states deploy is to develop and maintain the self-censorship and restraint of individual judges. Take China, for instance. A vast majority of judges serving at IP, financial, and Internet courts were recruited from the judicial corpus of generalist courts. Not only were those judges educated about important political ideologies and socialist concepts, but they also sat for qualification exams consisting of questions that tested their political competence.[201] Although the specialized courts' personnel and budgets are no longer determined by grassroots authorities, higher-level governments retain heavy influence over the appointments and removals of specialized courts' adjudicatory staff.[202] The judicial performance of individual judges from those courts is also reviewed annually

[201] Rachel E. Stern, *Political Reliability and the Chinese Bar Exam*, 43 JOURNAL OF LAW AND SOCIETY 506, 513-32 (2016); Björn Ahl, *The Politicization of the Chinese National Judicial Examination*, 2007-2012, 44 MODERN CHINA 208, 222-35 (2018).

[202] *See* Quanguo Renda Changweihui Guanyu zai Beijing Shanghai Guangzhou Sheli Zhishi Chanquan Fayuan de Jueding (全国人大常委会关于在北京、上海、广州设立知识产权法院的决定) [Decision of the Standing Committee of the National People's Congress on Establishing Intellectual Property Right Courts in Beijing, Shanghai and Guangzhou] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 31, 2014, effective Aug. 31, 2014), art. 6; Quanguo Renmin Daibiao Dahui Changweihui Guanyu Sheli Hainan Ziyou Maoyigang Zhishi Chanquan Fayuan de Jueding (全国人民代表大会常务委员会关于设立海南自由贸易港知识产权法院 的决定) [Decision of the Standing Committee of the National People's Congress on Establishing the Intellectual Property Right Court of the Hainan Free Trade Port] (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 26, 2020, effective Jan. 1, 2021), art. 4; Quanguo Renda Changweihui Guanyu Sheli Shanghai Jinrong Fayuan de Jueding (全国人大常委会关于设立上海金融法院的决定) [Decision of the Standing Committee of the National People's Congress on Establishing the Shanghai Financial Court] (promulgated by the Standing Comm. of the Nat'l People's Cong., Apr. 27, 2018, effective Apr. 28, 2018), art. 4; Quanguo Renmin Daibiao Dahui Changwu Weiyuan Hui Guanyu Sheli Beijing Jinrong Fayuan de Jueding (全国人民代表大会常务委员会关于设立北京金融法院的决定) [Decision of the Standing Committee of the National People's Congress to Form the Beijing Financial Court] (promulgated by the Standing Comm. of the Nat'l People's Cong., Jan. 22, 2021, effective Jan. 23, 2021), art. 4; Zuigao Renmin Fayuan Guanyu Hulianwang Fayuan Shenli Anjian Ruogan Wenti de Guiding (最高人民法院关于互联网法院审理案件若干问题的规定) [Provisions of the Supreme People's Court on Several Issues Concerning the Trials of Cases by Internet Courts] (promulgated by the Sup. People's Ct., Sept. 6, 2018, effective Sept. 7, 2018).

by their court leaders, who have been appointed by either the people's congress or its standing committee in the region.[203] Therefore, specialized judges, even those with "reform-oriented" minds, are like legal professionals in many developing nations – who "are acutely aware of their insecure position in the political system and their attenuated weakness vis-à-vis the executive, as well as the personal and political implications of rulings that impinge on the core interests of the regime."[204] Since its establishment in 2018, the Beijing Internet Court's rulings have twice been selected by the Chinese Supreme People's Court as among the top-ten typical cases promoting the socialist core values.[205] These values are a set of moral ideals extensively emphasized by the Chinese Communist Party as "the soul of cultural soft power" – a key to achieving the Chinese dream.[206] The Vice President of the Beijing IP Court, Judge Song Yushui, also publicly stressed the importance of implementing socialist core values through judicial work and the role that judges could play in integrating morality and law to reflect these values.[207] While judges in the specialized courts further an economically liberal agenda by resolving novel cases and experimenting with innovative policies, they actively learn and support the government's political

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[203] Zhonghua Renmin Gongheguo Faguanfa (2019 Xiuding) (中华人民共和国法官法(2019修订)) [Judges Law of the People's Republic of China (2019 Revision)] (promulgated by the Standing Comm. of the Nat'l People's Cong., Apr. 23, 2019, effective Oct. 1, 2019), arts. 2, 18, 38, 39, & 40.

[204] Moustafa and Ginsburg, *supra* note 199, at 14; *See* also, TAMIR MOUSTAFA, THE STRUGGLE FOR CONSTITUTIONAL POWER: LAW, POLITICS, AND ECONOMIC DEVELOPMENT IN EGYPT (2009), at 44-45.

[205] Zhao Yan and Ren Huiying, *Yi Gaozhiliang Hulianwang Sifa Huhang Zhongguoshi Xiandaihua – Beijing Hulianwang Fayuan Chengli Wunian Gongzuo Zhongsu* (以高质量互联网司法护航中国式现代化 — 北京互联网法院成立五年工作综述) [Safeguarding Chinese-style Modernization with High-Quality Internet Justice — A Work Summary of the Beijing Internet Court in the Five Years Since Its Establishment], ZHONGGUO FAYUAN WANG (中国法院网) [China Court], Oct. 29, 2023, https://www.chinacourt.org/article/detail/2023/10/id/7600832.shtml.

[206] *Core Socialist Values*, China Daily, Oct. 12, 2017, https://www.chinadaily.com.cn/china/19thcpcnationalcongress/2017-10/12/content_33160115.htm; Michael Gow, *The Core Socialist Values of the Chinese Dream: Towards A Chinese Integral State*, 49 CRITICAL ASIAN STUDIES 92, 96-99 (2017).

[207] Beijing IP Court, *Shehui Zhuyi Hexin Jiazhiguan Xia De Zhishi Chanquan Baohu|BRTV Minfadian Tongjie Tongdu* (社会主义核心价值观下的知识产权保护丨BRTV《民法典通解通读》) [Intellectual Property Protection under the Core Socialist Values | BRTV Comprehensive Reading of the Civil Code], BRTV, Dec. 15, 2022, https://m.thepaper.cn/newsDetail_forward_21176358; Song Yushui, *Ruhe Lijie Hexin Jiazhiguan Dui Faguan Suzhi de Zhiyin* (如何理解核心价值观对法官素质的指引) [How to Understand the Guidance of the Core Values on the Quality of Judges], ZHONGGUO FAYUAN WANG (中国法院网) [China Court], Dec. 22, 2014, https://www.chinacourt.org/article/detail/2014/12/id/1521316.shtml.

ideologies through their day-to-day work, or at least they profess to. The strategic "within-system recruitments" for the specialized judiciaries enable rebuilt states to hand-pick jurists who are well capable of handling disputes of certain kinds and, more importantly, who are politically embedded to ensure the compliance of their judgments with the ruling party's rhetoric and leadership.

Moreover, even specialized courts, which are set to be independent from the judiciary of the home jurisdiction, are not fully immune to political containment. For instance, the Courts of Dubai International Financial Center, striving to become "an accessible Western-style judicial system within this Arab-Gulf monarchy," recruit globally respected legal professionals to serve on their benches and follow common-law norms and principles.[208] However, as astute observers point out, cases where financial matters are concerned can still be handled through "shadowy processes" in Dubai. [209] Because the Prerogative State has jurisdiction over the jurisdiction of the Normative State, the nature of a dispute – either civil or commercial – and the westernized judicial recruitments can barely guarantee that justice will be administered adhering to the international standards in every case.[210] Shortly after GFH – a Bahrain-based investment bank – brought a claim before DIFC Courts against David Haigh, a British businessman, for committing financial fraud with fabricated invoices, Haigh was under arrest and detained in a prison for criminal investigation on breach of employer trust and Twitter slander.[211] Praying to be heard by the well-respected UK's retired judges serving at DIFC Courts, Haigh wrote repeatedly to the Courts describing the abuses he suffered during the incarceration – including the details of him being tasered, beaten, and raped – but his letters "fell on deaf ears."[212] DIFC Courts only responded a year after Haigh's release, "in the light of media interest," by simply outlining the completed and ongoing judicial proceedings and stating that the criminal proceedings and Haigh's

[208] JAYANTH K. KRISHNAN, THE STORY OF THE DUBAI INTERNATIONAL FINANCIAL CENTER COURTS: A RETROSPECTIVE (2018), at 2.

[209] David Conn, *How Prospective Leeds Buyer Ended in Dubai Prison Over Fraud Allegations*, THE GUARDIAN, Feb. 4, 2015, https://www.theguardian.com/football/2015/feb/04/leeds-united-david-haigh-dubai-prison-fraud-allegations.

[210] Fraenkel, *supra* note 31, at 57.

[211] David Haigh, *I Asked for Help from British Judges When I was Detained in Dubai – They Ignored Me. Is It Because Many of Them Work in the UAE?*, INDEPENDENT, Nov. 15, 2017, https://www.independent.co.uk/voices/dubai-court-system-prison-jail-jamie-harron-difc-uk-british-judges-help-a8056531.html.

[212] *Id*.

arrest did not come under their jurisdiction.[213] Upon a hearing where the DIFC Court of First Instance acknowledged the temporary release of Haigh from custody to attend court "ha[d] not proved possible," the DIFC Court of First Instance denied Haigh's application to vary a freezing order in 2015.[214] The Court also entered into a final ruling in favor of the claimant without Haigh appearing nor being represented in 2018.[215] Lucas Clover Alcolea, a scholar from the University of Otago, portrays the function of the self-proclaimed independent judiciary, like DIFC Courts, AIFC Courts, and Qatar International Court, as "whitewashing."[216] He further elaborates,

> Such courts are used to attract international investors by pretending that if they litigate before X court they will have all the legal rights they are used to in litigation before their courts, but in reality if, as is easily possible in cases involving allegations of corporate misdoing, civil fraud and so on, they fall into the hands of the general justice system they will be sucked into a noxious quagmire of corruption and abuse and the international commercial court which eagerly sought their business will wash its hands of them.[217]

The irony in judicial politics, as Moustafa and Ginsburg carefully illustrated, is that an authoritarian regime is likely to grant a court more institutional autonomy the more deference the court shows to the executive branch.[218] Oftentimes, prerogative leaders came to suppress their specialized courts, which once delivered liberal judgments and received official endorsement but had become too powerful.[219] In rebuilt states, despite their seemingly strong commitment to building the Normative State governed by legal orders, prerogatives can later revoke their self-imposed restraints by either removing specialized jurisdiction or intervening only in selective cases. Still, the enhanced transparency and visibility of the empowered specialized courts may nonetheless reveal to broader audiences any external interference

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[213] *Id*.

[214] GFH Capital Limited v David Lawrence Haigh [2014] DIFC CFI 020, March 25, 2015, Court of First Instance.

[215] GFH Capital Limited v David Lawrence Haigh [2014] DIFC CFI 020, July 04, 2018, Court of First Instance.

[216] Lucas Clover Alcolea, *The Rise of the International Commercial Court: A Threat to the Rule of Law*, 13 JOURNAL OF INTERNATIONAL DISPUTE SETTLEMENT 413, 432-36 (2022).

[217] *Id*., at 434.

[218] Moustafa and Ginsburg, *supra* note 199; *see* also, Aung Phone Myint, Legal Hybridity: Rule of Law under Authoritarianism (2014) (B.A. Thesis, Bates College), at 63-64.

[219] *See* e.g., Tamir Moustafa, The Struggle for Constitutional Power: Law, Politics, and Economic Development in Egypt (2007), at 178-218; *see* also Christian von Luebke, *The Politics of Reform: Political Scandals, Elite Resistance, and Presidential Leadership in Indonesia*, 29 J. CURRENT SE. ASIAN AFFS. 79, 85-89 (2010).

with those courts' operations. To prevent public backlash and a decline in investment, the governing elites are likely to keep their hands off the Normative State on most occasions. Because a strong economy may assist autocrats in securing continued support from elites and reducing the occurrences of pro-democracy protests,[220] the ruling class has an incentive to maintain the Normative State, once it is built, and avoid meddling in the Normative State's affairs.

IV. LAWFULNESS AND LAWLESSNESS IN AUTHORITARIAN GOVERNANCE

Today, democracy is under threat across the globe. This trend concerns even the world's most reputable, consolidated liberal continents. In 2023, the United Kingdom passed the Public Order Act, which granted the police greater power to stop and search protesters and to punish protest acts of "locking on" and tunneling.[221] Courts, when deeming necessary, may also enter an order to prohibit individuals from, for instance, "being in or entering a particular place or area between particular times on any day" and "being with particular persons."[222] Despite the strong demands of the United Nations for a reversal of this "deeply troubling" act to safeguard the rights to freedom of speech and assembly, the Act remains effective to date.[223] The incidents resulting from the presidential elections of the United States, including the Capitol attack of 2021, brought down the US global ranking in the Electoral Integrity Index, making the country the lowest ranked among liberal democracies.[224] More alarmingly, empirical research found "only a small fraction of Americans prioritize democratic principles in their electoral choices when doing so goes against their partisan identification or favorite policies."[225] A similar phenomenon of democratic vulnerabilities has also

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[220] Dawn Brancati, *Pocketbook Protests: Explaining the Emergence of Pro-Democracy Protests Worldwide*, 47 COMPARATIVE POLITICAL STUDIES 1503, 1503-25 (2014); Dawn Brancati, *Democractic Authoritarianism: Origins and Effects*, 17 ANNUAL REVIEW OF POLITICAL SCIENCE 313, 319-20 (2014).

[221] Public Order Act, arts. 1-5.

[222] *Id*., art. 22 (4).

[223] Office of the High Commissioner for Human Rights, *UN Human Rights Chief Urges UK to Reverse 'Deeply Troubling' Public Order Bill*, UNITED NATIONS (Apr. 27, 2023), https://www.ohchr.org/en/press-releases/2023/04/un-human-rights-chief-urges-uk-reverse-deeply-troubling-public-order-bill (last visit Feb. 20, 2024).

[224] Toby James, Elections: A Global Ranking Rates US Weakest Among Liberal Democracies, Electoral Integrity Project (June 13, 2022), https://www.electoralintegrityproject.com/eip-blog/2022/6/13/plxw8zwd4m7thgurqvyqdj6qjhyhjw (last visit Feb. 20, 2024).

[225] Matthew H Graham & Milan W Svolik, *Democracy in America? Partisanship, Polarization, and Robustness of Support for Democracy in the United States*, 114 AMERICAN POLITICAL SCIENCE REVIEW 392, 406 (2020).

been shown in the candidate-choice experiments fielded to European voters, where the respondents were willing to tolerate illiberal rights for partisan loyalty.[226] According to the latest V-Dem report, "[t]he world has more closed autocracies than liberal democracies – for the first time in more than two decades."[227] More than seventy percent of the people in the world live under autocratic governments.[228] Meanwhile, driven by a shift in the global balance of trade power, the economies of autocracies have become less dependent on the imports and exports of democracies.[229] Countries including Turkey and Nigeria also managed to boost their shares of the world economy despite their transition into an autocracy.[230] As of 2022, electoral and closed autocracies together produced 46 percent of global GDP, nearly twice as much as it was in 1992.[231] Over the past three decades, China has emerged as a world's economic powerhouse, while Vietnam's share of global GDP nearly quadrupled.[232] Electoral autocracies such as Egypt, Malaysia, and Pakistan also experienced substantial economic growth.[233] Indeed, authoritarian governance in the modern era has evolved from its radical, destructive path into something more covert and sustainable. Illiberal rulers have now proven they are capable of upholding and entrenching their control for a longer period than the Nazis did. Instead of propagandizing for the Führer principle and committing the holocaust, political leaders in eroded democracies remove the constitutional constraints on the executives and attack human rights in the name of safeguarding the constitution and democracy;[234] Rather than growing the economy for rearmament and

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[226] Milan W Svolik, Elena Avramovska, Johanna Lutz, & Filip Milačić, *In Europe, Democracy Erodes from the Right*, 34 JOURNAL OF DEMOCRACY 5, 5-20 (2023).

[227] V-DEM INSTITUTE, *supra* note 20, at 6.

[228] *Id*.

[229] *Id*. at 33-35.

[230] *Id*. at 34.

[231] Felix Wiebrecht, Yuko Sato, Marina Nord, Martin Lundstedt, Fabio Angiolillo, and Staffan I Lindberg, *State of the World 2022: Defiance in the Face of Autocratization*, 30 DEMOCRATIZATION 769, 775 (2023).

[232] *Id*.

[233] *Id*.

[234] Kim Lane Scheppele refers to such political leaders as "legalist autocrats," who "come to power and justify their actions through elections and then use legal methods to remove the liberal content from constitutionalism." Scheppele carefully compares "legalist autocrats" with stick-figure-stereotyped authoritarian leaders of the older generation, who "justify what they are doing in the name of a strong authoritarian ideology." Scheppele, *supra* note 154, at 556 & 572; Other scholars also label this phenomenon under the term of "abusive legalism," which "allow legitimately elected governments using procedures provided by the democratic framework itself and consistent with a nominal respect for the rule of law to undermine the integrity of democratic institutions." Lise Esther Herman and Russell Muirhead, *Resisting Abusive Legalism: Electoral Fairness and the Partisan Commitment to Political Pluralism*, 57 REPRESENTATION 363, 363 (2021); *see* also Alvin Y.H. Cheung, *An*

domestic privatization, modern autocrats openly support economic liberalization and globalization. Through political maneuvers of courts and jurisdictions, among other tactics, autocratizing and autocratic regimes in the present day foster the coexistence between the Normative State and the Prerogative State – and between non-arbitrary lawfulness and arbitrary lawlessness – in a more subtle, incremental way.

In inherited states, where legal orders prevail before political arbitrariness emerges, the ruling elites are likely to have little faith in the political loyalty of their courts built from a legal system that has placed a high value on constitutionalism and democracy. Because of their mistrust in the judiciary, the leaders are likely to make sure that politically relevant matters will be dealt with by the prerogative hands, which in many inherited states would mean, of political officials from governmental bodies as well as of justices serving at either newly established, "rubber stamped" specialized benches or captured national high courts. The matters vital to a ruling party can be anything that may affect its political dominance and grip on power, such as election laws and procedure, the right to assembly, judicial review of executive acts, and so on. Dismantling an original legal system derived from a democratic path can be catastrophic and politically unviable, especially for a populist government, which has recently risen to power. For this reason, although judicial disempowerment has been observed in a number of backsliding democracies, certain legal spheres and segments of the judiciary have largely remained unaffected by arbitrary measures. The jurisdictions and institutions that have been targeted and closely monitored by the prerogative power are those that determine what matters most to the regime's core interests (*see* Figure III). As shown in the examples illustrated by Chapter II, Spain under Francisco Franco and the Republic of Turkey led by Kenan Evren utilized specialized tribunals and the State Security Courts, respectively, to handle cases of political importance and suppress dissenting voices. These specialized benches operated alongside the generalist courts, closely monitored by the government, and their de facto jurisdictions were determined by prerogative will. There are also plenty of politicians around the world who have captured the courts that hear and adjudicate crucial issues through various tactics following their electoral victories. These courts can be either generalist ones at a high level like a national supreme court or tribunals with specialized jurisdictions over matters such as constitutional law, elections, and human rights. In Latin America, Hugo Chávez of Venezuela and Daniel Ortega of Nicaraguan packed the country's highest court with political loyalists; in Europe, the PiS-led Polish government made

Introduction to Abusive Legalism, OSF PREPRINTS, LAW ARCHIVE, https://osf.io/preprints/lawarchive/w9a6r.

"mid-night," party-friendly appointees to its constitutional tribunal and signed a law that would force Supreme Court judges into early retirement; in Central America, Nayib Bukele purged the Constitutional Chamber the Supreme Court of El Salvador on the same day that his party secured a majority in the National Assembly; in Asia, Rodrigo Duterte removed the former Chief Justice of the Philippine Supreme Court from her office, who had spoken out against Duterte's crackdown on drugs, and filled most seats of the Court with pro-government justices. Furthermore, the ruling elites of inherited states may deem certain issues to be so important that the courts should not be allowed to become involved at all, regardless of whether they are subordinate to or captured by political power. Sri Lanka removed the jurisdiction to question the validity of laws and emergency regulations from its judiciary. Mexican courts were also stripped of a variety of politically relevant jurisdictions, ranging from voting rights to property rights in rural areas, during most of the PRI's administration.

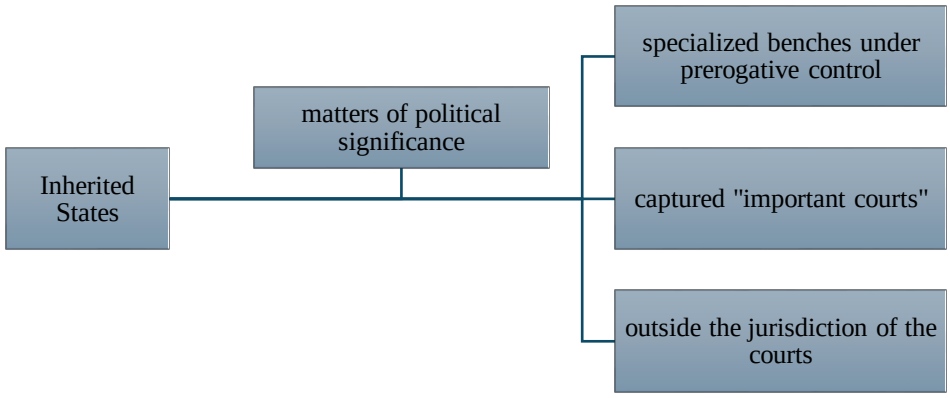

Figure III: Political Maneuvers of Courts and Jurisdictions in Inherited States

It is noteworthy that illiberal leaders often resort to multiple avenues to disempower the courts. The Fidesz government of Hungary, for instance, packed the Constitutional Court while simultaneously eliminating the Court's jurisdiction of *actio popularis* that used to allow any ordinary citizens to challenge laws on constitutional grounds. The AK Party of the Republic of Turkey not only established a specialized judiciary – the SACs – to intimidate and punish political opponents, but also managed to capture the Constitutional Court that played a role in shaping Turkish politics over six decades through constitutional amendments.[235] The allocation and

[235] Bertil Emrah Oder, *The Turkish Constitutional Court and Turkey's Democratic Breakdown: Judicial Politics Under Pressure*, 18 ICL JOURNAL 127, 127-33 (2024); Cem Tecimer, *Recognizing Court-Packing: Perception and Reality in the Case of the Turkish*

demolition of politically relevant jurisdictions, however, depends on various factors. Assume that inherited states' leaders are rational decisionmakers, they would be unlikely to purge the jurists of a court that enjoys a high level of public trust and international reputation on a large scale in order to avoid widespread criticisms. Rather, they would opt to undermine the authority of the court by other means, such as expanding the number of judges and reallocating some of their jurisdictions to a "puppet" specialized judiciary. In the same vein, a crisis of public confidence facing a court may pave the way for illiberal rulers to engage in judicial curbing activities under the pretense of seemingly "good government" reasons. [236] Such activities may include packing the court to minimize procedural backlogs and purging against judicial corruption. Allocating more jurisdiction to a national apex court could lead to heavier caseload, which would lend the regime justifications for packing the court further or establishing a new specialized court under prerogative control.[237] Factors including a history of court packing and a lack of constitutional restraints on the maximum size of the target court could also incentivize the government to expand a politically relevant bench.[238] In addition, a court with jurisdictions of political importance that has challenged the legitimacy of government actions would be particularly vulnerable to political pressure at the early stages of democratic backsliding, since its declaration of unconstitutionality could make other autocratic attempts futile. For instance, Law No. 1773, which established the State Security Courts – a legal tool that the government employed to impede free speech – was struck down by the Turkish Constitutional Court within a few years of its enactment.[239] Such bold judicial attempts to confront the hegemony have, however, been rarely seen over the last ten years, as the Court has been

Constitutional Court, VERFASSUNGSBLOG, 11 September 2019, https://verfassungsblog.de/recognizing-court-packing/.

[236] Mark Tushnet, *Court-Packing on the Table in the United States*, VERFASSUNGSLOG, Apr. 3, 2019, https://verfassungsblog.de/court-packing-on-the-table-in-the-united-states/; *See* also Aguilar, *supra* note 117, at 12.

[237] *See* e.g., Scheppele, *supra* note 154, at 551-52 ("Orbán … expanded the number of judges on the Constitutional Court of Hungary to give his party control over the court, but, at the same time, gave the court jurisdiction over constitutional complaints, individual petitions from those who claim that their individual rights are violated. This move was anticipated to flood the court with many politically insignificant cases, which would require more judges in order for the court to function properly.")

[238] *See* e.g., Aguilar, *supra* note 117, at 12 ("In some cases, however, court-packing might be preferred to purging the court, especially in countries where the Constitution does not stipulate the maximum number of justices that shall sit at the Constitutional Court, so its size can be easily increased.").

[239] William Hale, *Turkish Democracy in Travail: The Case of the State Security Courts*, 33 THE WORLD TODAY 186, 187-90 (1977); ÖZTÜRK TÜRKDOĞAN, HUMAN RIGHTS DEFENDERS IN AN IRON CAGE: THE ANTI-TERRORISM LAW IN TURKEY (2022), at 21.

stacked with judges of President Erdoğan's own pick and mired in a "resistance-deference" paradox.[240] Thus, in decayed democracies, it is common to see illiberal politicians seeking to consolidate their power first attack the courts that have placed constitutional constraints on executive authority.[241]

Rebuilt states, on the other hand, lack a democratic path from the historical past. These states have long been ruled by autocratic governments, where laws and legal institutions, even if they do exist, are not imperative to the disturbance of arbitrary political measures. While enjoying their prerogative power, political leaders have nonetheless come to realize and appreciate the regime supporting functions that courts may undertake for societal administration and economic growth. Such appreciation has driven many rebuilt states to embark on a strategic turn toward law and impose ostensible limitations on their unbridled power in non-political domains. Because the boundary between political and non-political matters is not legally defined, prerogative power can still remove these limitations whenever it deems appropriate. As prior research has indicated, authoritarian governments with robust economies are less vulnerable to pro-democracy protests.[242] Domestically, a government's credible commitment to preventing the expropriation of assets, at least by private entities, would keep political and financial elites' support in place.[243] Internationally, a reliable legal system may also strengthen the regime's ability to draw in foreign investment and grow its market share worldwide. As such, it is in the ruling party's long-term interest not to interfere with the affairs governed by the Normative State.

Unlike inherited states, since the original judiciary is in their grasp, rebuilt states may comfortably rely on the judges – who are educated and influenced by political discourse – to decide contentious issues and marginalize their opponents. However, the political subordination of their courts and the predominance of arbitrary measures frequently give rise to issues with social and economic order, casting doubt on the judiciary's capacity to resolve disputes, be they commercial or non-commercial. These regimes, therefore, support a specialized judiciary "less politici[z]ed, reform-oriented, and semiautonomous…to evolve toward maturity and grow in

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[240] *See* generally, Bertil Emrah Oder, *The Turkish Constitutional Court and Turkey's Democratic Breakdown: Judicial Politics Under Pressure*, 18 ICL JOURNAL 127, 134-63 (2024).

[241] Scheppele, *supra* note 154, at 549 & 563.

[242] Dawn Brancati, *Pocketbook Protests: Explaining the Emergence of Pro-Democracy Protests Worldwide*, 47 COMPARATIVE POLITICAL STUDIES 1503, 1503-25 (2014).

[243] Dawn Brancati, *Democractic Authoritarianism: Origins and Effects*, 17 ANNUAL REVIEW OF POLITICAL SCIENCE 313, 319-20 (2014).

institutionali[z]ation and sophistication by offering rules-based solutions to a wide range of social conflicts."[244] Not only would such specialized judicial empowerment facilitate the ruling class to maintain private affairs in order, but it would also help to rebuild and boost the confidence of both home and foreign investors. As illustrated in Chapter III, regimes that are characterized as "not free" and "autocratic" have instituted relatively capable, autonomous specialized courts to handle cases for privatization, such as the Investment Court in Qatar, the Astana International Financial Centre in Kazakhstan, and the Commercial Court in Eswatini. Autocrats have endowed these courts with a certain level of institutional independence to carry out their tasks and with judges who are supposed to be well-versed in their respective areas and cognizant of global norms and principles. Economic liberalization is, however, rarely followed by political liberalization, especially in rebuilt states. Ruling elites may exert de facto control for the specialized judiciary through ex ante and ex post mechanisms, despite its de jure autonomy (*see* Figure IV). One approach is to maintain the self-restraint of individual judges by recruiting adjudicatory staff directly from generalist courts to sit on the specialized benches. Because these judges have grown acquainted with party rhetoric and "have learned how to read the signals and pick their battles" from years of experience, they can engage in "pragmatic self-censorship" in the absence of political interference.[245] Indeed, some regimes have resorted to westernized rather than "within-system" judicial recruitments to set their specialized courts apart from the general judiciary and showcase their adjudicatory capacities to the international community. The appointment of reputable common law jurists, however, does not shield the courts from political sway. Because of the blurry line separating the normative and prerogative states, any seemingly routine cases are potentially political at the same time.[246] When a subject matter or jurisdiction suddenly becomes relevant to the regime, autocrats can reverse their self-imposed, ostensible restraints ex post by either intervening in the outcomes of selective cases or withdrawing certain jurisdiction from the rule-based specialized judiciary back to the Prerogative State governed by arbitrary measures. While pursuing an economic liberal agenda, the empowered specialized courts confront both jurisdictional limitations and political vulnerability. After all, their independence is relative "in an absolute monarchy or dictatorship where the ruler can abolish the court with a click of his finger."[247] President Putin, for instance, eliminated the "stand-alone" status of the arbitrazh courts, which

[244] Fu, *supra* note 15, at 3.

[245] Hendley, *supra* note 18, at 215; Trochev and Solomon Jr., *supra* note **Error! Bookmark not defined.**, 207.

[246] Fraenkel, *supra* note 31, at 58.

[247] Alcolea, *supra* note 216, at 434.

had been set up to mainly handle business disputes, without much hassle.[248] So long as the prerogative power is absolute, specialized courts can function as a skillful, autonomous dispute resolution avenue for many ordinary citizens and international investors, but they also fulfill a hollow promise to consolidate the rule of law and put an end to autocratic mandates.

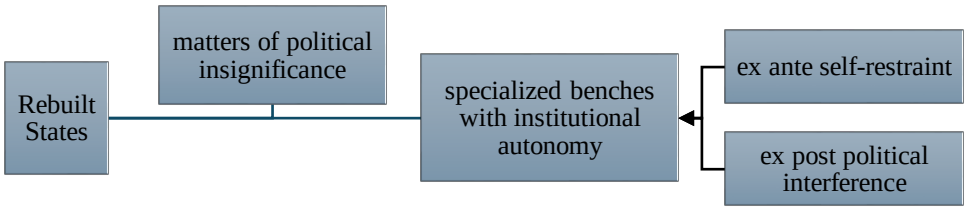

Figure IV: Political Maneuvers of Courts and Jurisdictions in Rebuilt States

Nevertheless, even while autocrats have the authority to tamper with the Normative State, they are usually reluctant to do so. First, autocratic leaders of rebuilt states have demonstrated their desire to benefit from rule-based governance in politically insignificant domains by working to create and preserve a normative state. For a state to be considered normative, it must adhere to its own rules unless they are superseded.[249] Its "relative autonomy must be real, or at least appear to be real, in order to yield the favo[]rable outcomes."[250] In the Third Reich, the Nazis supported the essence and self-administration of economic life by establishing the estate system – "a protective ideological coloring adopted by business-men to protect themselves from the interference of the Prerogative State."[251] Rarely did national-socialist programs meddle in matters pertaining to entrepreneurial liberty, sanctity of contracts, private and non-tangible property, competition, and labor law.[252] Given that the original legal systems of rebuilt regimes borne out of a non-democratic path are generally not as competent and reputable as the one under the Third Reich, the effort to construct a normative state may show an even stronger commitment of their ruling elites to

[248] Kathryn Hendley and Peter H. Solomon, Jr., *Arbitrazh* Courts and Business Disputes, in KATHRYN HENDLEY AND PETER H. SOLOMON, JR. (EDS.), THE JUDICIAL SYSTEM OF RUSSIA (2023), at 165-66.

[249] HÅVARD BÆKKEN, LAW AND POWER IN RUSSIA. MAKING SENSE OF QUASI-LEGAL PRACTICES (2018), at 97-98.

[250] *Id*. at 98.

[251] Fraenkel, *supra* note 31, at 97.

[252] *Id*. at 75-82.

managing politically minor concerns by legal orders. Thus, one should not be surprised to witness the ruling party of a rebuilt state suddenly becoming involved in what seems to be a routine matter, nor is it unusual for the very state to indulge in specialized courts' judgments that may offend certain but not fundamental political interests. Even an absolute dictatorship would require a relatively autonomous space where mundane cases are handled through non-arbitrary, predictable legal proceedings for order maintenance and economic growth so that the government can concentrate its institutional resources on prerogative priorities. It is important to note that ordinary citizens of rebuilt states might not be so disturbed by the existence of political arbitrariness – nor the uncertainty in the normative state – because they "can pick up on signals that are imperceptible to outsiders."[253] As previous scholarship elucidates present-day Russia, since civilians "are able to discern between cases of high politics and everyday matters," extra-legal intervention in a high-profile case will not always change their opinions of judicial fairness and how their own disputes will turn out in local courts.[254] Furthermore, businesses care about profit maximization as much as a regime's true commitment to the rule of law, if not more. To pursue private gains, multinational corporations were found exploiting local politics, inadequate human rights protection, and untransparent regulatory policies in their non-democratic, developing host economies.[255] Some of them even formed strategic partnerships with "regime insiders," such as state-owned enterprises in an authoritarian host-regime, to obtain more favorable judgments from courts.[256] Whether on purpose or not, the Normative State that rebuilt regimes' autocratic leaders have created may meet both the needs of citizens for day-to-day living and the expectations of businesses for efficient and effective dispute resolution. Yet, the openness and reputation of specialized courts that resulted from their empowerment may draw the attention of a wider audience to a verdict that deviates from earlier rulings and an arbitrary withdrawal of jurisdiction. Even if the "internal

[253] Hendley, *supra* note 245, at 222.

[254] BÆKKEN, *supra* note 249, at 57; *See* also, KATHRYN HENDLEY, EVERYDAY LAW IN RUSSIA (2017).

[255] Drusilla K. Brown, Alan V. Deardorff, and Robert M. Stern, *The Effects of Multinational Production on Wages and Working Conditions in Developing Countries*, in ROBERT E. BALDWIN AND L. ALAN WINTERS (EDS.), CHALLENGES TO GLOBALIZATION: ANALYZING THE ECONOMICS (2004), at 279-326; Emma Aisbett, Ann E. Harrison, David I. Levine, Jason Scorse, and Jed Silver, *Do Multinational Corporations Exploit Foreign Workers?*, in C. FRITZ FOLEY, JAMES R. HINES, AND DAVID WESSEL, GLOBAL GOLIATHS: MULTINATIONAL CORPORATIONS IN THE 21ST CENTURY ECONOMY (2021), at 257-98.

[256] *See* e.g., Frederick R Chen and Jian Xu, *Partners with Benefits: When Multinational Corporations Succeed in Authoritarian Courts*, 77 INTERNATIONAL ORGANIZATION 144, 144-78 (2023).

'orderliness'" of a normative state is unlikely to overthrow an authoritarian leadership, such orderliness can nonetheless "make the abusive use of state power more difficult over time" in the fields ordinarily governed by the normative state.[257] In modern autocratizing and autocratic regimes, what the Normative State conveys to citizens and investors is not genuine but rather perceived dominance of legal orders in politically inconsequential domains, be they civil, economic, and so on. The ruling party will uphold its self-imposed restraints by not disturbing any Normative State's affairs to the degree that average civilians and investors alike feel confident about judicial protection of their rights and interests in disputes with no self-perceived political ramifications.

CONCLUSION

A third wave of autocratization is sweeping the globe.[258] Not only are democracies under attack by illiberal leaders in the name of the constitution and the people, but autocratic rulers have also been consolidating their powers under the pretense of law and justice. More alarmingly, the powerful governments in both autocratizing and autocratic regimes are cheered on by the public for their seemingly positive changes to laws and legal institutions and their showcase of a steadily growing economy. However, when widespread speech restrictions and official massacres of civilians take place in the very country, people begin to recognize that the prerogative leaders, whether from an electoral or non-electoral country, cannot be contested or overthrown. Thus, for scholars, legislators, and many others, a thorough grasp of the interaction between laws and politics in autocratic governance has become imperative.

Decades ago, Ernst Fraenkel profoundly put forward a dual state model to explain the coexistence between the Normative State – where legal orders govern – and the Prerogative State – where political arbitrariness prevails – in Nazi Germany. This Article revisits the model from a comparative perspective to analyze the interplay between lawfulness and lawlessness in modern authoritarian governance. By examining "inherited" states – democracies transitioning toward autocracy – and "rebuilt" states – autocracies making a strategic turn towards law – across continents, it unpacks political maneuvers of courts and jurisdictions and their effects on the constitutional order and fundamental rights. In particular, the Article maps how present-day ruling elites undermine and entrench the authority of

[257] Sida Liu, *Cage for the Birds: On the Social Transformation of Chinese Law, 1999-2019*, 5 China Law and Society Review 66, 81 (2020).

[258] Lührmann and I. Lindberg, *supra* note 22.

their judiciary – either as a whole or in part – to serve their political interests. Indeed, the empowerment and disempowerment of courts as well as the allocation and demolition of politically relevant or irrelevant jurisdictions can be seen in a genuine liberal democracy. Yet, autocratizing and autocratic governments do so arbitrarily and retain the power to interfere with any judicial affairs when deemed necessary. Without being fixated on the label and the strict notion of legal dualism, as Kathryn Hendley called for, this Article proposes a framework that may assist comparativists and public law scholars in understanding the role that courts play in countries where "law can, but does not always, matter."[259]

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[259] Hendley, *supra* note 245, at 218; Kathryn Hendley, *supra* note 254, at 17.