

UNCHECKING POWER AND CAPTURING COURTS: HOW AUTOCRATIZATION ERODES INDEPENDENT JUDICIAL SYSTEMS

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INTRODUCTION

The world stands at a crossroads for democracy. On the one hand, the United Nations High Commissioner for Human Rights has described 2024 as a “mega election year,” in which people in more than sixty countries—encompassing nearly half the world’s population—will vote.¹ On the other hand, research indicates that the level of democracy enjoyed by the average person today is lower than it was during the Cold War,² with more countries than ever before trending towards autocracy.³

These contrasting data points can be partially reconciled by accounting for election quality: Elections only advance democracy when they meaningfully reflect the will of the people.⁴ Voters must be able to cast ballots without coercion, manipulation, or fear of reprisal; they must be free to exchange information about candidates, form and participate in political organizations, and engage in peaceful rallies and protests.⁵ Today, nearly half of humanity lives in countries where multi-party elections occur but without sufficient safeguards to ensure that they are free and fair.⁶

But the story has another element. Historically, challenges to democracy were overt, generally taking the form of revolutions or coups d’état.⁷ Recently, more subtle challenges to democracy have become

1. *‘Mega Election’ 2024 Could Be a Landmark for Democracy: UN Rights Chief*, UN NEWS (Mar. 4, 2024), <https://news.un.org/en/story/2024/03/1147207>.

2. FABIO ANGIOLILLO ET AL., DEMOCRACY REPORT 2024: DEMOCRACY WINNING AND LOSING AT THE BALLOT 9 (Staffan I Lindberg ed., V-Dem Institute 2024); *see also* WORLD JUST. PROJECT, WORLD JUSTICE PROJECT RULE OF LAW INDEX 2023 INSIGHTS 10 (2023); INT’L IDEA, THE GLOBAL STATE OF DEMOCRACY 2023: THE NEW CHECKS AND BALANCES 8 (2023).

3. VANESSA A. BOESE ET AL., DEMOCRACY REPORT 2022: AUTOCRATIZATION CHANGING NATURE? 9 (V-Dem Institute 2022).

4. *See* TOM GINSBURG & AZIZ HUQ, *Liberal Constitutional Democracy and Its Alternatives*, in HOW TO SAVE A CONSTITUTIONAL DEMOCRACY 1, 10–11 (Univ. of Chi. Press 2018).

5. *See* Anna Lührmann et al., *Regimes of the World (RoW): Opening New Avenues for the Comparative Study of Political Regimes*, 6 POLS. & GOVERNANCE 60, 60–62 (2018).

6. *See id.* at 66–67.

7. *See* Nancy Bermeo, *On Democratic Backsliding*, 27 J. DEMOCRACY 5, 6 (2016).

increasingly prominent,⁸ often involving leaders who are legitimately elected (at least in the first instance) who wield their power to debilitate or eliminate democratic institutions and rights.⁹ As one scholar puts it, “recent successes by autocrats . . . [in] dismantling democracy have occurred not through violent coups but rather through ostensibly legal action that undermines the foundations of democracy.”¹⁰ While some capture is overt,¹¹ in many countries, these changes are characterized by their “stealth”—incremental processes that can be hard to discern due to their gradual nature.¹² Such leaders may even succeed in retaining electoral support—in part by quashing dissent and hamstringing opponents, although this can be difficult to verify since the institutions responsible for election integrity are often first on the chopping block.¹³

This phenomenon underscores the importance of safeguarding the institutions—beyond free and fair elections—that are vital to democracy. This Article focuses on one such institution: an independent, impartial, and effective judicial system. Although autocratic leaders often claim that judicial checks on their power undermine the will of “the people,”¹⁴ independent judiciaries play a bedrock role in democracies by safeguarding free and fair elections, facilitating peaceful transfers of power, upholding human rights, and ensuring that the law is applied equally to all people, including State officials.¹⁵

Autocrats and would-be authoritarians who chafe against such constraints on their power employ a range of strategies.¹⁶ These include

8. *Id.* at 6–7.

9. See STEPHEN HAGGARD & ROBERT KAUFMAN, BACKSLIDING: DEMOCRATIC REGRESS IN THE CONTEMPORARY WORLD 2–13 (David Stasavage ed., 2021). The authors note that rising autocrats are often elected by pluralities, coalitions, or slim majorities. *Id.* at 37–39.

10. Scott L. Cummings, *Lawyers in Backsliding Democracy*, 112 CALIF. L. REV. 513, 518 (2024).

11. See, e.g., Alexander Vashkevich, *Judicial “Independence” in Belarus: Theory and Practice*, 48 GDAŃSKIE STUDIA PRAWNICZE 41, 45 (2020) (describing an abrupt “shift[] from a parliamentary democracy with a strong president to a super-presidential republic without the rule of law, no real separation of powers and the absolute power of the president”).

12. HAGGARD & KAUFMAN, *supra* note 9, at 7, 61.

13. *Id.* at 52–53; see also Berk Esen & Sebnem Gumuscu, *How Erdoğan’s Populism Won Again*, 34 J. DEMOCRACY 21, 23–24 (2023).

14. Nicola Lacey, *Populism and the Rule of Law* 13 (Int’l Inequalities Inst., Working Paper No. 28, 2019); Samuel Issacharoff, *Judicial Intercession*, in DEMOCRACY UNMOORED: POPULISM AND THE CORRUPTION OF POPULAR SOVEREIGNTY 121, 129 (2023).

15. See *infra* Section II.A.

16. These dynamics can also take place in countries where leaders have come to power through means other than elections. In such circumstances, their hallmark remains the same: A slide away from independent judiciaries and toward politically inflected institutions that are at risk of being unable to play their key role in ensuring the rule of law. Margaret Satterthwaite (Special Rapporteur on the Independence of Judges and Lawyers), *Safeguarding the Independence of Judicial Systems in The Face of Contemporary*

conduct that targets individual justice personnel because of their work defending democratic values, systemic legal changes that improperly undermine the independence or capacity of judicial systems and institutions, and the instrumentalization of justice systems and institutions to intimidate or punish justice personnel who might otherwise check authoritarian power.¹⁷ These attacks may lack the dramatic tumult of the coup d'état, but they pose risks to the ability of specific judicial systems to uphold the rule of law that constitutes the foundation of democratic governance.

Evidence indicates that this is precisely what is occurring—on a broad scale. In 2023, most of the world's countries experienced a decrease in the rule of law,¹⁸ and in the same year, the ability of judiciaries to effectively check excesses by other government branches fell in fifty-six percent of countries.¹⁹ This worldwide phenomenon threatens to destabilize and undermine the global commitment to democracy and to inalienable human rights that serve as the foundation for freedom, justice, and peace in the world.

This Article draws from work its lead author has undertaken in her role as United Nations Special Rapporteur on the independence of judges and lawyers to document, analyze, and theorize this global phenomenon.²⁰ Special Rapporteurs are independent experts tasked with monitoring and impartially reporting on specific types of human rights issues around the globe.²¹ This particular mandate was created to monitor issues related to “the independence and impartiality of the judiciary, particularly with regard to judges and lawyers, as well as court officials, and the nature of potential threats to this independence and impartiality.”²² In fulfilling this mandate, the current rapporteur, Margaret Satterthwaite, who was appointed in 2022, has issued more than two hundred communications to governments of UN Member States and non-State actors in regions throughout the world, has undertaken

Challenges to Democracy, ¶ 21, U.N. Doc. A/HRC/56/62 (Apr. 9, 2024) [hereinafter U.N. Doc. A/HRC/56/62].

17. *Id.*

18. WORLD JUST. PROJECT, *supra* note 2, at 10.

19. *Id.* at 4.

20. Note that the analysis presented in this article does not represent the official views of the mandate. See *Margaret Satterthwaite*, U.N. HUM. RTS. OFF. OF THE HIGH COMM'R, <https://www.ohchr.org/en/special-procedures/sr-independence-of-judges-and-lawyers/ms-margaret-satterthwaite> (last visited Oct. 31, 2024).

21. *Special Procedures of the Human Rights Council*, U.N. HUM. RTS. OFF. OF THE HIGH COMM'R, <https://www.ohchr.org/en/special-procedures-human-rights-council> (last visited Oct. 31, 2024).

22. Comm'n on Hum. Rts. Res. 1994/41, U.N. Doc. E/1994/24-E/CN.4/1994/132, at 1 (Mar. 4, 1994).

investigative visits to three countries,²³ and presented three thematic reports, the most recent of which focuses on threats to judicial independence arising from contemporary anti-democratic trends.²⁴

This Article builds upon and advances that report's observational findings, situating them within the wider scholarly literature regarding the role that judicial independence can play in safeguarding democracy and resisting autocratization.²⁵ Specifically, this Article seeks to contribute to that literature by offering a four-part typology of the tactical strategies frequently used today by autocratizing governments to undermine judicial independence.

The first strategy, *capturing*, involves improper increases of executive or legislative control over courts, judges, or bar associations that inhibit their independence. The second, *curbing*, seeks not to increase control of the judiciary but to reduce its overall power and concomitant capacity to effectively check other branches. In the third strategy, *instrumentalizing*, political actors misuse existing legal institutions, procedures, and laws to exert undue political influence on judicial actors. Such misuse may take the form of criminal prosecution, administrative disciplinary processes, or the use of administrative or management decisions that punish and reward judges and prosecutors. The final strategy, *weaponizing*, represents an extreme form of attack on independent justice operators, involving facially unlawful acts such as arbitrary detention, torture, enforced disappearance, physical attack, and assassination.

This Article is structured as follows. Section II outlines international legal standards that enshrine three interlocking principles: the human right to participate in political life, the concomitant principle of the rule of law, and the structural imperative of separated powers, the most important embodiment of which is an independent and effective

23. As of September 2024. *Country Visits*, U.N. HUM. RTS. OFF. OF THE HIGH COMM'R, <https://www.ohchr.org/en/special-procedures/sr-independence-of-judges-and-lawyers/country-visits> (last visited Oct. 31, 2024).

24. U.N. Doc. A/HRC/56/62, *supra* note 16, at 1.

25. The concepts of autocratization and democratic backsliding are widely used by scholars and policy analysts around the world. Alejandro Monsiváis-Carrillo, *Autocratización*, PRONTUARIO DE LA DEMOCRACIA (Mar. 26, 2021), <https://prontuario-democracia.sociales.unam.mx/autocratizacion/>. See generally Héloïse Lhéréte, *Un Monde Moins Démocratique?*, in LA DEMOCRATIE: ENTRE DEFIS ET MENACES 1, 107–16 (Jean-Vincent Holeindre ed., 2020). See also ANGIOLILLO ET AL., *supra* note 2, at 31–37; Julian Huertas, *Protecting Individual Rights to Counteract Democratic Backsliding: Human Rights Law as a Partial Response to Autocratic Populism*, 116 AM. SOC. INT'L L. PROC. 136, 137 (2022). WJP reports that “[a]uthoritarian trends spurred the global rule of law recession starting in 2016.” WORLD JUST. PROJECT, *supra* note 2, at 33.

judiciary.²⁶ This Section then describes the specific roles played by the various legal professionals who comprise a justice system—judges, prosecutors, and lawyers—as well as, increasingly, community justice workers (“CJWs”)²⁷—in realizing these commitments. Section III then describes the four principal strategies that leaders today use to weaken the ability of justice institutions and personnel to fulfill their role in upholding the rule of law and protecting democracy, illustrating each with recent examples of State conduct that appears to advance these ends. A concluding section, Section IV, offers recommendations to justice system actors, States, and international institutions on how they can resist these strategies in order to safeguard democracy.

I. DEMOCRACY, RULE OF LAW, AND JUDICIAL INDEPENDENCE

A. *As Enshrined in International Law*

International law treats participation in political life as an essential human right, as well as a vital tool for protecting and advancing other fundamental human rights. The Universal Declaration of Human Rights (“UDHR”) provides that “[e]veryone has the right to take part in the government of [their] country, directly or through freely chosen representatives.”²⁸ And the International Covenant on Civil and Political Rights (“ICCPR”), currently ratified by 173 States, affirms every citizen’s right “[t]o vote and [have the opportunity] to be elected at genuine periodic elections [that reflect] the free expression of the will of the electors.”²⁹

To ensure this link between electoral results and the people’s will, the ICCPR also requires State parties to safeguard the civil and political rights necessary for meaningful elections, including freedom of opinion,

26. See Kevin E. Davis & Michael J. Trebilcock, *The Relationship between Law and Development: Optimists versus Skeptics*, 56 AM. J. COMP. L. 895, 909 (2008) (“Many scholars assert that constitutional separation of powers is critically predicated on the existence of a credible referee, i.e., an independent judiciary to enforce the prescribed allocation of powers and to command respect for its rulings, often from agencies of the state itself.”).

27. Margaret Satterthwaite (Special Rapporteur on the Independence of Judges and Lawyers), *The Promise of Legal Empowerment in Advancing Access to Justice for All*, ¶ 29, U.N. Doc. A/78/171 (July 13, 2023) [hereinafter U.N. Doc. A/78/171]. See generally H. Abigail Moy, *Kenya’s Community-Based Paralegals*, in COMMUNITY PARALEGALS AND THE PURSUIT OF JUSTICE (Vivek Maru & Varun Gauri eds., 2018).

28. UDHR G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 21 (Dec. 10, 1948).

29. ICCPR G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights, art. 25(b) (Dec. 16, 1966).

expression, information,³⁰ and association.³¹ Other international human rights treaties affirm every person's right to participate equally in public life, free from discrimination on the basis of race, color, national and ethnic origin,³² gender,³³ disability,³⁴ and other axes of discrimination.

International law also affirms the inextricable connection between democracy and the rule of law. Democracy demands more than the election of lawmakers; it also requires that the laws they pass are applied fairly and consistently. The UDHR deems it "essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law"³⁵ This principle insists, *inter alia*, that all people, even State actors, ought to be subject to the same laws,³⁶ so that officials may remain answerable to the people after they are elected, and citizens are governed according to legitimately promulgated Constitutions and laws.³⁷

The rule of law principle also supports democracy by protecting the fundamental rights and diverse interests of everyone living in a State, including marginalized people and communities who may otherwise be overlooked, excluded, or persecuted by the majority. This is reflected in the ICCPR's insistence that "[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law."³⁸ By upholding the rights of all, including minority political parties and civil society groups critical of the government, the rule of law ensures that a plurality of perspectives is given a voice in society.³⁹

30. *Id.* at art. 19.

31. *Id.* at art. 22.

32. See CERD G.A. Res. 2106 (XX), International Convention on the Elimination of All Forms of Racial Discrimination, art 5(c) (Dec. 21, 1965).

33. See CEDAW G.A. Res. 34/180, Convention on the Elimination of All Forms of Discrimination Against Women, art. 7 (Dec. 18, 1979).

34. See CRPD G.A. Res. 61/106, Convention on the Rights of Persons with Disabilities, art. 29 (Dec. 13, 2006).

35. UDHR G.A. Res. 217 (III) A, *supra* note 28, at pmb1.

36. See generally U.N. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, ¶ 6, U.N. Doc. S/2004/616 (Aug. 23, 2004) [hereinafter U.N. Doc. S/2004/616].

37. See generally Afr. Comm'n on Hum. & People's Rts., *Resolution on the Respect and the Strengthening on the Independence of the Judiciary*, ACHPR/Res.21 (XIX) 96 (Apr. 4, 1996); Inter-Am. Democratic Charter, art. 2 (Sept. 11, 2001). See generally U.N. Secretary-General, *New Vision of the Secretary-General for the Rule of Law*, U.N. Doc. A/75/982 (2023) [hereinafter *New Vision*].

38. ICCPR G.A. Res. 2200A (XXI), *supra* note 29, at art. 26.

39. See, e.g., López Lone v. Honduras, Inter-Am. Ct. H.R. (ser. A) No. 12.816, Preliminary Objection, Merits, Reparations, and Costs, Judgment, ¶ 201 (Oct. 5, 2015) ("[J]udicial independence, including within the Judiciary, is closely related not only to the

Realizing the rule of law principle generally requires a structural commitment to separated powers⁴⁰, and in particular, an independent judiciary empowered to enforce the law against the powerful, including State actors, and to uphold the rights of marginalized people and groups.⁴¹ Courts must have the power to adjudicate claims by individuals that State authorities have improperly or unlawfully applied the law.⁴² In many countries, courts are also endowed with the power of judicial review—to interpret the constitution,⁴³ evaluate the constitutionality of laws and executive acts, and strike them down if they exceed such bounds.⁴⁴ Judicial review is especially important—and vulnerable—when executive officials claim that allegedly existential threats, such as terrorism or national security risks, justify the suspension of constitutional rules or individual rights.⁴⁵ Independent judiciaries can thus serve as a bulwark against undemocratic usurpations of power by the executive branch in times of real or perceived emergency.

The complex interrelationship between judicial independence and constitutional democracy is rendered even more starkly by the relatively recent transnational emergence of the “unconstitutional constitutional

consolidation of the democratic system, but also seeks to preserve the human rights and freedoms of every citizen.”).

40. Gabriela Carina Knaul de Albuquerque e Silva (Special Rapporteur on the Independence of Judges and Lawyers), *Report of the Special Rapporteur on the Independence of Judges and Lawyers*, ¶ 17, U.N. Doc. A/HRC/14/26 (Apr. 9, 2010).

41. AMAL CLOONEY & PHILIPPA WEBB, *THE RIGHT TO A FAIR TRIAL IN INTERNATIONAL LAW* 67 (Oxford Univ. Press 2021) (“The right to a competent, independent and impartial tribunal established by law is the essence of the rule of law and crucial to the fairness of any trial. The right . . . is a necessary precondition for the legitimacy of the judicial function in any state. In any country, an independent court system is the best protection against an all-powerful government and the ultimate protector of human rights.”). See generally *López Lone*, *supra* note 39.

42. THE IBA REPORT ON THE SOCIAL AND ECONOMIC IMPACT OF THE LEGAL PROFESSION 6–7 (2024).

43. Brian P. Smentowski & James L. Gibson, *Constitutional Courts*, BRITANNICA, <https://www.britannica.com/topic/court-law/Constitutional-courts> (Oct. 31, 2024). This is of course the role of Constitutional Courts in systems where these exist. It has also been, or become, the role of apex Courts of Justice, as with the Mexican Supreme Court. See Andrea Pozas-Loyo & Julio Ríos-Figueroa, *The Transformations of the Role of the Mexican Supreme Court*, in *JUD. POL. IN MEXICO: THE SUP. CT. & THE TRANSITION TO DEMOCRACY* 1, 8 (2017).

44. Smentowski & Gibson, *supra* note 43. Judicial review may also assess compliance with international human rights law, a requirement referred to by “control of conventionality” in the Inter-American system. See *Almonacid-Arellano v. Chile*, Inter-Am. Ct. H.R. (ser. C) No. 154, Preliminary Objections, Merits, Reparations and Costs, Judgment, para. 124 (Sept. 26, 2006).

45. FERGAL F. DAVIS & FIONA DE LONDRAS, *CRITICAL DEBATES ON COUNTER-TERRORISM JUDICIAL REVIEW* 38–39 (2014); see also Stephen Cody, *Dark Law: Legalistic Autocrats, Judicial Deference, and the Global Transformation of National Security*, 6 U. PA. J. L. & PUB. AFFS. 643, 643–44 (2021).

amendment” doctrine. This doctrine, by which courts countermand even procedurally proper and popularly supported amendments on democratic grounds,⁴⁶ has been used in recent years to thwart voter-stamped efforts to rescind presidential term limits, remove legislative checks on executive power, and weaken basic civil rights.⁴⁷ Although this concept traces back to the 19th century,⁴⁸ its recent proliferation in both courts and scholarship speaks to the increasing pressure that populist dynamics are exerting on democratic institutions.⁴⁹

This structural commitment to an effective and independent judicial branch is deeply embedded in international law. The ICCPR insists that “[a]ll persons shall be equal before the courts and tribunals” and “shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal.”⁵⁰ The Human Rights Committee has clarified that a “tribunal” designates a body that is “independent of the executive and legislative branches of government or [which] enjoys in specific cases judicial independence . . . in proceedings that are judicial in nature.”⁵¹

Judicial independence does not require the complete absence of executive or legislative branch influence on the administration or operation of the judiciary or the justice system. Political branches plainly have the right—and the duty, when systems are not performing well—to make changes to justice systems to ensure their efficacy and improve access to justice.⁵² But these changes must be constitutionally permissible and must not have the effect of infringing the rule of law or fundamental human rights,⁵³ and the “functions and competencies of the judiciary and the executive” must be “clearly distinguishable” with the latter unable “to control or direct the former.”⁵⁴

Giving effect to the rule of law requires not only the independence of courts and judges but of the legal profession as a whole. International

46. See generally Rosalind Dixon & David Landau, *Transnational Constitutionalism and a Limited Doctrine of Unconstitutional Amendment*, 13 INT’L J. CONST. L. 606 (2015).

47. *Id.*

48. See YANIV ROZNAI, UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS: THE LIMITS OF AMENDMENT POWERS 39–42 (2017).

49. See generally SAMUEL ISSACHAROFF, DEMOCRACY UNMOORED: POPULISM AND THE CORRUPTION OF POPULAR SOVEREIGNTY (2023).

50. ICCPR G.A. Res. 2200A (XXI), *supra* note 29, at art. 14.1; see also U.N. H.R.C., General Comment No. 25, ¶ 20, U.N. Doc. C/21/Rev.1/Add.7 (Aug. 27, 1996) [hereinafter General Comment No. 25].

51. U.N. H.R.C., General Comment No. 32, ¶ 18, U.N. Doc. CCPR/C/GC/32 (Aug. 27, 2007) [hereinafter General Comment No. 32].

52. See generally John Ferejohn & Larry D. Kramer, *Judicial Independence in a Democracy: Institutionalizing Judicial Restraint*, in NORMS AND THE LAW 161 (John N. Drobak ed., 2006).

53. *Id.* at 206–07. See generally ISSACHAROFF, *supra* note 49.

54. General Comment No. 32, *supra* note 51, at ¶ 19.

norms recognize the right of lawyers to form and join self-governing professional associations.⁵⁵ Bar associations—professional bodies responsible for regulating the conduct and often licensing of lawyers—function to ensure the legal profession’s independence and quality.⁵⁶ This, in turn, enables lawyers to play their role in protecting the rights of their clients, including by making claims against the State, without fear of interference or intimidation. Autonomous, self-regulating bar associations also protect the capacity of lawyers to discharge their professional duties without fear that they will be identified with their clients or their clients’ causes.⁵⁷ This ensures that lawyers can represent clients without regard to their status or political affiliation, including members of racially, ethnically, nationally, religiously, or otherwise marginalized groups. Finally, international norms increasingly recognize that CJWs should have the freedom to accompany communities in their quest for democratic rights, without fear of intimidation, attack, or improper criminalization.⁵⁸

The fundamental interdependence of democracy, the rule of law, and judicial independence has been recognized on multiple occasions by the United Nations. In 2007, the United Nations General Assembly reaffirmed that “human rights, the rule of law and democracy are interlinked and mutually reinforcing and that they belong to the universal and indivisible core values and principles of the United Nations.”⁵⁹ At least two Secretaries-General have noted the direct link between judicial independence and the rule of law.⁶⁰ These

55. See *Basic Principles on the Role of Lawyers*, U.N. HUM. RTS. OFF. OF THE HIGH COMMR, <https://www.ohchr.org/en/instruments-mechanisms/instruments/basic-principles-role-lawyers> (last visited Oct. 31, 2024); see also Diego García-Sayán (Special Rapporteur on the Independence of Judges and Lawyers), *Report of the Special Rapporteur on the Independence of Judges and Lawyers*, ¶ 12, U.N. Doc. A/73/365 (Sept. 5, 2018) [hereinafter U.N. Doc. A/73/365].

56. U.N. Doc A/73/365, *supra* note 55, at ¶ 12.

57. *Basic Principles on the Role of Lawyers*, *supra* note 55.

58. U.N. Doc. A/78/171, *supra* note 27, at ¶ 35.

59. G.A. Res. 62/7, at 1 (Dec. 13, 2007); see also Mónica Pinto (Special Rapporteur on the Independence of Judges and Lawyers), *Report of the Special Rapporteur on the Independence of Judges and Lawyers*, ¶ 16, U.N. Doc. A/HRC/35/31 (June 9, 2017) (explaining that “respecting the rule of law and fostering the separation of powers and the independence of justice are prerequisites for the protection of human rights and democracy”).

60. See, e.g., U.N. Doc. S/2004/616, *supra* note 36, at 12.

The ‘rule of law’ is a concept at the very heart of the Organization’s mission. It refers to a principle of governance in which all persons, institutions, and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced, and *independently adjudicated*, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law,

interdependencies have also been emphasized in the Sustainable Development Goals, which include targets on promoting the rule of law at the national and international levels, ensuring equal access to justice for all,⁶¹ and ensuring responsive, inclusive, participatory, and representative decision-making at all levels.⁶² Furthermore, the role of independent judges in upholding human rights, the rule of law, and the separation of powers, has been recognized by regional multilateral bodies.⁶³

B. As Effectuated by Judicial Actors

Judicial systems reflect the aggregation of daily work carried out by individuals fulfilling particular roles: judges, prosecutors, lawyers, and, increasingly, CJWs.⁶⁴ Each of these fulfills vital democratic functions, some tied directly to elections, but many others as well. This section briefly describes key democratic contributions made by different categories of judicial actors.

Each role plays a part in ensuring free and fair elections. Judges adjudicate disputes regarding the fairness and lawfulness of electoral proceedings, from voting district boundaries and candidate eligibility to campaign finance rules and electoral procedures and accessibility.⁶⁵ Prosecutors may bring criminal charges for electoral misconduct that rises to the level of crime, such as fraud or voter harassment.⁶⁶ CJWs may educate voters on electoral processes and their voting rights.⁶⁷ CJWs

equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.

Id. at ¶ 6 (emphasis added), quoted in *New Vision*, *supra* note 37, at n.1.

61. *Targets and Indicators*, U.N. DEPT. OF ECON. & SOC. AFF., https://sdgs.un.org/goals/goal16#targets_and_indicators (last visited Oct. 31, 2024).

62. *Id.*

63. See, e.g., *European Charter on the Statute for Judges*, COUNCIL OF EUR. (July 8, 1998), <https://rm.coe.int/16807473ef>; Consultative Council of European Judges, *Magna Carta of Judges (Fundamental Principles)*, COUNCIL OF EUR., (Nov. 17, 2010), <https://rm.coe.int/16807482c6>. See generally *Statute of the Iberoamerican Judge* (2001) (Spain).

64. See, e.g., Moy, *supra* note 27, at 167–68.

65. General Comment No. 25, *supra* note 50, at ¶ 20. In some systems, such disputes are heard in specialized electoral tribunals that resolve disputes concerning electoral outcomes, while in others, they are heard in ordinary courts. See *Legal Framework: Electoral Dispute Resolution*, ACE ELECTORAL KNOWLEDGE NETWORK, <https://aceproject.org/ace-en/topics/lf/lfb12/lfb12a/default> (last visited Oct. 31, 2024).

66. ABDURASHID SOLIJONOV, ELECTORAL JUSTICE REGULATIONS AROUND THE WORLD: KEY FINDINGS FROM INTERNATIONAL IDEA'S GLOBAL RESEARCH ON ELECTORAL DISPUTE-RESOLUTION SYSTEMS 52 (Int'l Inst. for Democracy & Electoral Assistance 2016).

67. See, e.g., Moy, *supra* note 27, at 174.

and lawyers may observe and monitor polling places; and lawyers often represent citizens who contest violations.⁶⁸

Justice actors also fulfill important democratic functions outside the context of elections, acting to ensure that properly promulgated laws are enforced fairly and consistently and that elected officials do not exceed the authority granted to them by the people.⁶⁹ Prosecutors hold State actors accountable when evidence demonstrates that they have committed crimes such as corruption, bribery, or gross human rights violations.⁷⁰ Lawyers may seek redress for clients for breaches of civil and political rights essential to guaranteeing meaningful democracy.⁷¹ CJWs often work with communities to identify avenues and resources to realize these rights and obtain justice for violations. Fulfillment of each of these protective functions requires access to courts staffed by independent judges.⁷²

Justice workers thus play key roles in upholding democracy—and not just during election cycles. Their daily efforts operationalize the rule of law and judicial independence that enables meaningful democracy.⁷³ As a consequence of this work, however, and in confirmation of its potency, justice personnel often face threats to the free and independent exercise of their professional activities.⁷⁴ Such threats are the subject of the next section.

II. CONTEMPORARY THREATS TO JUDICIAL INDEPENDENCE (& DEMOCRACY)

A. *Impacting Justice Institutions*

1. Capturing

The politicization of courts through executive or legislative control poses a systemic threat to participatory governance, undermining the judiciary's capacity to act as a check on the unlawful use of political

68. See, e.g., *Legal Framework: Appeals and Other Challenges*, ACE ELECTORAL KNOWLEDGE NETWORK, <https://aceproject.org/ace-en/topics/lf/lfb12/lfb12b/default> (last visited Oct. 31, 2024).

69. See *id.*

70. See *id.*

71. See *id.*

72. See *id.*

73. See *id.* CJWs often “aim for a deeper version of democracy—one rooted in empowered citizens and more responsive governments where those most affected by an issue can shape decision-making.” POORVI CHITALKAR, HOW LEGAL EMPOWERMENT EFFORTS ARE FIGHTING REPRESSION AND DEEPENING DEMOCRACY 14 (Grassroots Just. Network 2024).

74. See WOJCIECH SADURSKI, A PANDEMIC OF POPULISTS 125 (2022).

power. We characterize this phenomenon as “capture.”⁷⁵ Court capture poses an especially serious risk to democratic values when it occurs in apex and constitutional courts, which often play the most important role in checking State power by reviewing the legality and constitutionality of government acts and adjudicating electoral disputes.⁷⁶ However, court capture can impact courts and rights-holders throughout the justice system.⁷⁷

Capture commonly occurs via two types of ostensible reform.⁷⁸ The first involves altering the rules that govern judicial appointments to increase the influence of politics by increasing the role of the executive and/or legislative branches.⁷⁹ In States where judicial councils⁸⁰ are responsible for appointing judges, capture risks arise when political branches acquire more control over how council members are appointed or removed,⁸¹ when the composition of the council is changed to include representatives or affiliates of the political branches,⁸² or, when the council is dissolved or replaced, as occurred in Tunisia in 2022.⁸³

In an alternative form of capture, laws or practice changes may increase the direct role of the executive or legislative branch in judicial

75. This use of the term “capture” focuses on the increased power of the political branches over an increasingly less independent judiciary. *See generally id.* (arguing that populists capture courts through a variety of specific strategies); Kriszta Kovács & Kim Lane Scheppele, *The Fragility of an Independent Judiciary: Lessons from Hungary and Poland—and the European Union*, 51 COMMUNIST & POST-COMMUNIST STUD. 189 (2018).

76. *See* SADURSKI, *supra* note 74, at 130. *See generally* Diego García-Sayán, Letter dated May 30, 2018 from Special Rapporteur on the Independence of Judges and Lawyers to the Government of the Gabonese Republic, U.N. Doc. AL GAB 1/2018 (May 30, 2018).

77. *See* SADURSKI, *supra* note 74, at 112.

78. *See, e.g., id.* at 113–23.

79. *See id.* at 113.

80. *See generally* Diego García-Sayán (Special Rapporteur on the Independence of Judges and Lawyers), *Report of the Special Rapporteur on the Independence of Judges and Lawyers*, U.N. Doc. A/HRC/38/38 (May 2, 2018) [hereinafter U.N. Doc. A/HRC/38/38].

81. *See generally* Margaret Satterthwaite, Letter dated Sept. 18, 2023 from Special Rapporteur on the Independence of Judges and Lawyers to the Government of Peru, U.N. Doc. AL PER 6/2023 (Sept. 18, 2023) [hereinafter U.N. Doc. AL PER 6/2023]; Gabriela Knaul, Letter dated Feb. 21, 2014 from Special Rapporteur on the Independence of Judges and Lawyers, U.N. Doc. AL TUR 1/2014 (Feb. 21, 2014).

82. *See generally* Margaret Satterthwaite, letter dated Feb. 16, 2023 from Special Rapporteur on the Independence of Judges and Lawyers to the Government of the State of Israel, U.N. Doc. OL ISR 2/2023 (Feb. 16, 2023) [hereinafter U.N. Doc. OL ISR 2/2023].

83. HATEM NAFTI, TUNISIE, VERS UN POPULISME AUTORITAIRE? 160–65 (2022); *Tunisia: Events of 2022*, HUM. RTS. WATCH, <https://www.hrw.org/world-report/2023/country-chapters/tunisia> (last visited Oct. 31, 2024). *See generally* Diego García-Sayán, Letter dated June 9, 2022 from Special Rapporteur on the Independence of Judges and Lawyers to the Government of the Republic of Tunisia, U.N. Doc. AL TUN 5/2022 (June 9, 2022).

appointments.⁸⁴ This may occur overtly, as in Myanmar, where the State Administration Council dismissed several Supreme Court justices and voluntarily replaced them with individuals affiliated with the military.⁸⁵ Or it may happen in more subtle ways, such as when executives refuse to fulfill a ministerial or ceremonial appointment or swearing-in role in respect of particular judges.⁸⁶ Such tactics underscore the need for clarity and transparency regarding the parameters for these duties.⁸⁷ Similarly, capture may arise where there are no new judicial appointments, when the State assumes greater control over methods of appointing certain key figures within the judiciary, such as the Chief Justice or court presidents.⁸⁸ Another form of capture can be expected when Mexico implements its new method of appointing judges—through popular elections—over the next few years. Sweeping constitutional amendments were adopted in September 2024 that dissolve the country’s judicial council, abolish the meritocratic method for selecting judicial candidates, and require that judges be elected through popular suffrage.⁸⁹ The selection of judges through elections threatens to transform what should be a meritocratic process into a political one, severely impacting judicial independence and impartiality.⁹⁰

84. See Diego García-Sayán (Special Rapporteur on the Independence of Judges and Lawyers), *Report of the Special Rapporteur on the Independence of Judges and Lawyers on His Mission to Poland*, ¶¶ 62–72, U.N. Doc. A/HRC/38/38/Add.1 (Apr. 5, 2018) [hereinafter U.N. Doc. A/HRC/38/38/Add.1].

85. See generally Margaret Satterthwaite, Letter dated June 30, 2023 from Special Rapporteur on the Independence of Judges and Lawyers to the Government of the Republic of Tunisia, U.N. Doc. AL TUN 5/2022 (June 30, 2023); “*Our Numbers are Dwindling*”: Myanmar’s Post-Coup Crackdown on Lawyers, HUM. RTS. WATCH (June 8, 2023), <https://www.hrw.org/report/2023/06/08/our-numbers-are-dwindling/myanmars-post-coup-crackdown-lawyers>.

86. See Kovács & Scheppele, *supra* note 75, at 194–95; Press Release, Human Rights Office of the High Commissioner, Mongolia Must Consolidate Transformation Toward Independent Justice System with Human Rights at Its Core, U.N. Press Release (Nov. 15, 2023), <https://www.ohchr.org/en/press-releases/2023/11/mongolia-must-consolidate-transformation-toward-independent-justice-system>.

87. See Mónica Pinto (Special Rapporteur on the Independence of Judges and Lawyers), *Report of the Special Rapporteur on the Independence of Judges and Lawyers on Her Mission to Sri Lanka*, ¶¶ 35, 39, 45, U.N. Doc. A/HRC/35/31/Add.1 (Mar. 23, 2017) [hereinafter U.N. Doc. A/HRC/35/31/Add.1].

88. See *id.*

89. See Margaret Satterthwaite, Letter dated July 29, 2024 from Special Rapporteur on the Independence of Judges and Lawyers to the Government of the United Mexican States, at 4–5, U.N. Doc. OL MEX 11/2024 (July 29, 2024) [hereinafter U.N. Doc. OL MEX 11/2024]. See generally ADRIANA GARCIA, ET AL., A THREAT TO JUDICIAL INDEPENDENCE: CONSTITUTIONAL REFORM PROPOSALS IN MEXICO (Amrit Singh, et al. eds, 2024).

90. U.N. Doc. OL MEX 11/2024, *supra* note 89.

Finally, capture through altering the rules of judicial appointment may occur when political branches are given authority to select judges to hear certain politically sensitive cases, as in the Hong Kong Special Administrative Region, where the Chief Executive is responsible for designating a list of judges to hear national security cases.⁹¹ Whatever a reform's purported objective, the risk of capture obtains when a change in law or policy alters the rules of judicial selection to increase the possibility of appointment on the basis of judges' (perceived) political affiliation and decrease the role of objective, merit-based criteria and processes.⁹²

The second type of reform that increases the risk of capture is the creation of new judicial vacancies, either by expanding the size or number of courts or by removing existing judges, creating opportunities for the political branches to appoint judges more loyal to their aims. Examples of reforms creating judicial vacancies include attempts to remove or impeach sitting judges,⁹³ laws that make it easier for the political branches of power to remove judges,⁹⁴ the refusal of a new administration to recognize judges appointed by a predecessor,⁹⁵ or the implementation of new laws that apply a novel or lowered compulsory retirement age to sitting judges.⁹⁶ In Hungary, legislation that lowered judges' mandatory retirement age from seventy to sixty-two years of age led to the early retirement of more than 200 judges⁹⁷—including the “vast majority” of

91. See MICHAEL C. DAVIS, *FREEDOM UNDONE: THE ASSAULT ON LIBERAL VALUES AND INSTITUTIONS IN HONG KONG* 108–09, 129–30 (2024); see also Hum. Rts. Comm., Rep. on Concluding Observations on the Fourth Periodic Report of Hong Kong, China, ¶ 35(a), U.N. Doc. CCPR/C/CHN-HKG/CO/4 (July 27, 2022); Margaret Satterthwaite, Letter dated Apr. 19, 2023 from Special Rapporteur on the Independence of Judges and Lawyers to the Government of the People's Republic of China, at 2, U.N. Doc. OL CHN 2/2023 (Apr. 19, 2023).

92. See U.N. Doc. A/HRC/38/38, *supra* note 80, at ¶ 49.

93. See *generally* Diego García-Sayán, Letter dated Oct. 14, 2020 from Special Rapporteur on the Independence of Judges and Lawyers to the Government of the Republic of Türkiye, U.N. Doc. AL TUR 18/2020 (Oct. 14, 2020).

94. See *generally* Diego García-Sayán, *supra* note 76.

95. See U.N. Doc. A/HRC/38/38/Add.1, *supra* note 84, at ¶ 23; Diego García-Sayán, Letter dated July 26, 2017 from Special Rapporteur on the Independence of Judges and Lawyers to the Government of the Republic of Poland, at 1–2, U.N. Doc. AL POL 1/2017 (July 26, 2017).

96. See Gráinne de Búrca, *Poland and Hungary's EU Membership: On Not Confronting Authoritarian Governments*, 20 INT'L J. CONST. L. 13, 17 (2022); Diego García-Sayán, Letter dated Sept. 14, 2021 from Special Rapporteur on the Independence of Judges and Lawyers to the Government of the Republic of El Salvador, at 1, U.N. Doc. AL SLV 5/2021 (Sept. 14, 2021); U.N. Doc. A/HRC/38/38/Add.1, *supra* note 84, at ¶ 55.

97. See Case C-286/12, *Comm'n v. Hungary*, ECLI:EU:C:2012:687, ¶ 13 (Nov. 6, 2012); *Baka v. Hungary*, App. No. 20261/12, ¶¶ 19–22 (June 23, 2016), <https://hudoc.echr.coe.int/fre#%7B%22itemid%22:%5B%22001-163113%22%7D>; Gabriela Knaul,

the senior judges and judges in leadership positions.⁹⁸ In Kiribati, the executive imposed its novel view of a judicial term limit on a sitting judge.⁹⁹ Judicial councils can also be impacted by the creation of vacancies. The Peruvian Congress removed multiple members of the National Board of Justice (“JNJ”) in 2024, pursuant to an imprecise set of legal provisions that risked violating the JNJ’s independence.¹⁰⁰ In Poland, a 2017 law allowed for the firing of court presidents without justification, clearing the way for a new wave of court presidents.¹⁰¹

Another way to create vacancies—and potentially increase the role of the executive and legislative branches—is to expand the number or size of courts. A particularly concerning practice is the creation of new courts or chambers¹⁰² (often with more politically-inflected appointment methods)¹⁰³ to hear sensitive issues such as counter-terrorism or national security.¹⁰⁴ Judges presiding over national security cases may exhibit greater deference to the executive,¹⁰⁵ and such judges can have high conviction rates, sometimes even reaching one hundred percent.¹⁰⁶

Letter dated Feb. 29, 2012 from Special Rapporteur on the Independence of Judges and Lawyers to the Government of Hungary, at 3, U.N. Doc. UA G/SO 214 (Feb. 29, 2012).

98. See Kovács & Scheppele, *supra* note 75, at 11.

99. See Margaret Satterthwaite, Letter dated Sept. 14, 2023 from Special Rapporteur on the Independence of Judges and Lawyers to the Government of the Republic of Kiribati, 1, U.N. Doc. AL KIR 1/2023 (Sept. 14, 2023); *Statement on the Attempted Deportation and Arbitrary Detention of High Court Judge David Lambourne, the Continued Suspension of the Chief Justice of Kiribati, and the Continued Disregard for Judicial Independence in Kiribati*, COMMONWEALTH LAWS. ASS’N (Aug. 11, 2022), <https://www.commonwealthlawyers.com/statement/statement-on-the-attempted-deportation-and-arbitrary-detention-of-high-court-judge-david-lambourne-the-continued-suspension-of-the-chief-justice-of-kiribati-and-the-continuing-disregard-for-judicial/>.

100. See *Perú: El Congreso Avasalla el Estado de Derecho*, HUM. RTS. WATCH (Mar. 11, 2024, 12:00 AM), www.hrw.org/es/news/2024/03/11/peru-el-congreso-avasalla-el-estado-de-derecho. See generally U.N. Doc. AL PER 6/2023, *supra* note 81.

101. See Kovács & Scheppele, *supra* note 75, at 24–25.

102. See de Búrea, *supra* note 96, at 26.

103. See STEVEN LEVITSKY & DANIEL ZIBLATT, *HOW DEMOCRACIES DIE* 80–81 (2018).

104. See Margaret Satterthwaite, Letter dated July 13, 2023 from Special Rapporteur on the Independence of Judges and Lawyers to the Government of the Republic of Nicaragua, at 2–3, U.N. Doc. OL NIC 1/2023 (July 13, 2023); Fionnuala Ní Aoláin, Letter dated Feb. 28, 2020 from Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism to the Government of the Arab Republic of Egypt, at 1–2, U.N. Doc. OL EGY 4/2020 (Feb. 28, 2020); Fionnuala Ní Aoláin, Letter dated Oct. 2, 2020 from Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism to the Government of the Arab Republic of Egypt, at 1–2, U.N. Doc. AL EGY 13/2020 (Oct. 1, 2020).

105. See Cody, *supra* note 45, at 665.

106. DAVIS, *supra* note 91, at 121; Kelly Ho, *Hong Kong Security Chief Hails 100% Conviction Rate in National Security Cases*, H.K. FREE PRESS (Apr. 14, 2023, 8:00 AM),

New courts may also be granted significant powers in relation to democratic processes or institutions, or control over other actors in the justice system.¹⁰⁷ In Poland, a new Extraordinary Control and Public Affairs Chamber of the Supreme Court was created, with exclusive jurisdiction over electoral disputes, election results, and complaints and questions of law concerning the lack of independence of a court or judge.¹⁰⁸ This new chamber was also given the power to review any final judgment issued by Polish courts in the preceding twenty years¹⁰⁹ upon petition by the Minister of Justice or the Ombudsman.¹¹⁰

Capture can even occur in circumstances where no judicial vacancies are created—by reducing the size or number of courts.¹¹¹ This can occur, for instance, when vacancies are likely to be filled by more independent judges; eliminating these vacancies can concentrate the influence of judges seen to be loyal to the political branches.

Courts are not the only legal institutions vulnerable to capture. Bar associations may be targeted by State actors threatened by the independence of the legal profession.¹¹² Potential capture efforts include attempts to exert control over or appoint bar association leadership,¹¹³ to authorize other bodies to investigate bar associations,¹¹⁴ or to arbitrarily review member qualifications.¹¹⁵ More indirect methods include subtle or overt threats of criminal prosecution against bar leadership.¹¹⁶ Independent lawyers' associations have also been placed under the control of State-led national bars, which may censor and prohibit publications, or wield authority to administer unannounced examinations of lawyers on various subjects, irrespective of lawyers' specialties, resulting in disbarment for failures.¹¹⁷ In the Russian Federation, proposed amendments to the law establishing the bar

<https://hongkongfp.com/2023/04/14/hong-kong-security-chief-hails-100-conviction-rate-in-national-security-cases/>.

107. Diego García-Sayán, Letter dated Dec. 21, 2018 from Special Rapporteur on the Independence of Judges and Lawyers to the Government of Hungary, at 2–3, U.N. Doc. AL HUN 8/2018 (Dec. 21, 2018).

108. Case C-204/21, *Comm'n v. Poland*, ECLI:EU:C:2023:442, ¶ 22 (June 5, 2023).

109. U.N. Doc. A/HRC/38/38/Add.1, *supra* note 84, at ¶¶ 59–62.

110. See Kovács & Scheppele, *supra* note 75, at 27–28.

111. See U.N. Doc. S/2004/616, *supra* note 36, at 15–16.

112. AM. BAR ASS'N CTR. FOR HUM. RTS. ET AL., *LAWYERS UNDER THREAT: INCREASING SUPPRESSION OF THE LEGAL PROFESSION IN BELARUS 20* (2021).

113. *Id.*

114. Diego García-Sayán (Special Rapporteur on the Independence of Judges and Lawyers), *Report of the Special Rapporteur on the Independence of Judges and Lawyers on His Visit to Uzbekistan*, ¶¶ 82–83, U.N. Doc. A/HRC/44/47/Add.1 (Jan. 22, 2024).

115. *Id.*

116. See DAVIS, *supra* note 91, at 132–33.

117. AM. BAR ASS'N CTR. FOR HUM. RTS. ET AL., *supra* note 112, at 16.

association would transfer authority to the Ministry of Justice to request disciplinary sanctions against lawyers, and control lawyers' qualification examinations.¹¹⁸

The State may also seek to take control over only certain aspects of the ordinary functions of bar associations, for example, by creating new disciplinary institutions, or to expand the reach of existing ones to include politically-inflected infractions. For example, in Israel, new regulations proposed to give the Bar Association's disciplinary body the broad ability to suspend lawyers for protected political speech without due process guarantees.¹¹⁹

Such measures create the risk that lawyers will be registered, disciplined, or disbarred for reasons other than their professional qualifications and adherence to ethical and professional standards, and could be used to target lawyers for their political affiliations, or for representing clients in sensitive or politically-charged cases.¹²⁰

Reforms to court size and composition, to the appointment and removal of judges, or to the leadership of bar associations are not necessarily indicative of capture.¹²¹ Such changes can be pursued for legitimate reasons and with appropriate safeguards to preserve independence.¹²² But if such changes increase the influence of political viewpoints or affiliations in the daily work of courts and judges, or undermine the capacity of the legal profession to self-regulate, then they should be treated as increasing the risk of autocratization.

2. Curbing

Another strategy that political branches may embrace, in lieu—or alongside—of increasing their control over the judiciary, is to seek to reduce the branch's overall power, especially its capacity to uphold the rule of law. Such “curbing”¹²³ strategies include removing or restricting

118. See generally Mariana Katzarova, Letter dated Mar. 14, 2024 from Special Rapporteur on the Situation of Human Rights in the Russian Federation, U.N. Doc. OL RUS 1/2024 (Mar. 14, 2024) [hereinafter U.N. Doc. OL RUS 1/2024].

119. Margaret Satterthwaite, Letter dated Mar. 22, 2024 from Special Rapporteur on the Special Rapporteur on the Independence of Judges and Lawyers to the Government of the State of Israel, at 1–3, U.N. Doc. AL ISR 3/2024 (Mar. 22, 2024) [hereinafter U.N. Doc. AL ISR 3/2024]; *Crackdown on Freedom of Speech of Palestinian Citizens of Israel*, ADALAH, <https://www.adalah.org/en/content/view/10925> (Nov. 16, 2023).

120. U.N. Doc. OL RUS 1/2024, *supra* note 118, at 4–5.

121. See *id.*

122. See *id.*

123. While the term “curbing” has been used for some time in the literature concerning the U.S. judiciary, it is less commonly used in internationally focused scholarship. Compare Stuart S. Nagel, *Court-Curbing Periods in American History*, 18 VAND. L. REV. 925, 926 (1965), with Vineeta Yadav, *Authoritarian Institutions and Democratic Lessons*, 76 POL.

courts' jurisdiction to review legislation or executive acts, limiting judicial oversight or review in certain categories of politically sensitive cases (such as those involving terrorism offenses¹²⁴ or immigration and asylum claims)¹²⁵, authorizing executive or legislative branches to override court decisions,¹²⁶ mandating less stringent standards of review,¹²⁷ or passing legislation that requires judges to adopt specific legal interpretations.¹²⁸

Examples of such forms of “curbing” have emerged in many regions in recent years. In Hungary, constitutional amendments passed in 2013 legitimized legislative initiatives that the Constitutional Court had previously held to be unconstitutional, as well as expressly prohibiting the Court from reviewing the content of amendments.¹²⁹ In Israel, a package of major reforms to the judicial system was introduced in 2023, including legislation aimed at curbing the Supreme Court by limiting its power to exercise judicial review.¹³⁰ In January 2024, by a split decision, the Supreme Court itself struck the legislation down.¹³¹ In the United Kingdom, legislation was introduced following a Supreme Court decision on asylum aimed to curb the Court’s ability to apply and interpret principles of domestic human rights law and international law binding on the UK.¹³² Amendments advanced by the Sri Lankan government to

RSCH. Q. 784, 784–800 (2023) (“[C]ourt-curbing is one of the key steps politicians take to enact democratic backsliding.”).

124. *E.g.*, Fionnuala Ní Aoláin, Letter dated Apr. 28, 2023 from Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, at 6–7, U.N. Doc. OL LKA 4/2023 (Apr. 28, 2023) [hereinafter U.N. Doc. OL LKA 4/2023].

125. *E.g.*, Margaret Satterthwaite, Letter dated Feb. 21, 2024 from Special Rapporteur on the Independence of Judges and Lawyers to the Government of the United Kingdom of Great Britain and Northern Ireland, at 1, U.N. Doc. AL GBR 2/2024 (Feb. 21, 2024) [hereinafter U.N. Doc. AL GBR 2/2024].

126. *E.g.*, U.N. Doc. OL ISR 2/2023, *supra* note 82, at 1; *see, e.g.*, U.N. Doc. AL GBR 2/2024, *supra* note 125, at 1–2.

127. *E.g.*, U.N. Doc. OL ISR 2/2023, *supra* note 82, at 4.

128. *E.g.*, U.N. Doc. AL GBR 2/2024, *supra* note 125, at 1.

129. *Wrong Direction on Rights: Assessing the Impact of Hungary’s New Constitution and Laws*, HUM. RTS. WATCH (May 16, 2013), <https://www.hrw.org/report/2013/05/16/wrong-direction-rights/assessing-impact-hungarys-new-constitution-and-laws>; Eur. Consult. Ass., *Opinion on the Fourth Amendment to the Fundamental Law of Hungary*, 95th Sess., ¶ 118, Doc. No. 720/2013 (2013).

130. *See* Josef Federman & Melanie Lidman, *Israel’s Supreme Court Overturns a Key Component of Netanyahu’s Polarizing Judicial Overhaul*, ASSOCIATED PRESS, <https://apnews.com/article/israel-supreme-court-judicial-overhaul-78733a94428b8b9f2c311ee6779eba23> (Jan. 1, 2024, 2:54 PM).

131. *Id.*

132. *See* U.N. Doc AL GBR 2/2024, *supra* note 125, at 1.

counter-terrorism legislation in 2023 and 2024 would limit judicial oversight for certain terrorism-related infringements.¹³³

Efforts to reduce the power and efficacy of the judiciary may also take the form of significant resource reductions, as happened in Mexico in 2023¹³⁴ or workload increases, as those that resulted from the massive increase in gang-related detentions in El Salvador,¹³⁵ or prevention or delay in publishing court decisions so as to limit their influence and impact.¹³⁶ Finally, measures to curb and capture courts may proceed in tandem, such as a State policy of refusing to apply court rulings until steps are taken to change the composition of the court.¹³⁷

Bar associations, too, can be subject to curb efforts. These include, for instance, attempts to restrict a bar organization's ability to defend its members or criticize the government.¹³⁸ Additionally, measures authorizing and even encouraging the creation of competing bar associations, as occurred recently in Türkiye, can fragment lawyers' collective power and undermine quality control.¹³⁹

Curb strategies, such as those outlined above, create the risk that courts will not have the capacity, or the authority, to uphold the rule of law and enforce human rights, and that lawyers who work to defend fundamental democratic rights or represent clients in politically sensitive cases will not be protected by strong, independent bar associations. In these ways, curbing justice institutions smooths the way for autocratizers to take further steps to amass unchecked power.

133. See *Sri Lanka: Reject New Counterterrorism Bill*, HUM. RTS. WATCH (Apr. 7, 2023, 6:30 AM), <https://www.hrw.org/news/2023/04/07/sri-lanka-reject-new-counterterrorism-bill>. See generally U.N. Doc. OL LKA 4/2023, *supra* note 124.

134. See Daniel Bertram & Laura Higuera Sánchez, *The Mexican Standoff: AMLO vs. the Judiciary*, VERFASSUNGSBLOG (Oct. 25, 2023), <https://verfassungsblog.de/the-mexican-standoff/>; Margaret Satterthwaite, Letter dated Nov. 1, 2023 from Special Rapporteur on The Independence of Judges and Lawyers to the Government of the United Mexican States, at 2, U.N. Doc. AL MEX 11/2023 (Nov. 1, 2023) [hereinafter U.N. Doc. AL MEX 11/2023].

135. Margaret Satterthwaite, Letter dated May 17, 2023 from Special Rapporteur on the Independence of Judges and Lawyers to the Government of the Republic of El Salvador, at 4, U.N. Doc. AL SLV 2/2023 (May 17, 2023).

136. U.N. Doc. A/HRC/38/38/Add.1, *supra* note 84, at ¶ 32.

137. Margaret Satterthwaite, Letter dated Aug. 24, 2023 from Special Rapporteur on the Independence of Judges and Lawyers to the Government of Bosnia and Herzegovina, at 2–3, U.N. Doc. AL BIH 2/2023 (Aug. 24, 2023).

138. Elina Steinerte, Letter dated Oct. 22, 2018 from the Vice-Chair of the Working Group on Arbitrary Detention to the Government of the Republic of Türkiye, at 4–5, U.N. Doc. OL TUR 15/2018 (Oct. 22, 2018).

139. *The Reform of Bar Associations in Turkey: Questions and Answers*, HUM. RTS. WATCH (July 7, 2020, 10:59 AM), <https://www.hrw.org/news/2020/07/07/reform-bar-associations-turkey-questions-and-answers>; U.N. Doc. A/HRC/35/31/Add.1, *supra* note 87, at ¶ 64.

B. Impacting Justice Actors

1. Instrumentalization

Capture and curb strategies aim to alter the justice system, but would-be autocratizers can also abuse existing legal institutions, procedures, and laws to exert undue political influence over justice actors. Such misuse may take the form of criminal prosecution, disciplinary actions, or administrative decisions to punish and reward judges, prosecutors, and lawyers. These tactics may adhere to existing procedural rules, but when their primary purposes are political—for example, to punish judges or lawyers who hold State officials to account, or who are perceived to be associated with opposition figures or pro-democracy ideals—this constitutes a significant threat to the rule of law and democracy.

a. Politically Motivated Legal Proceedings

Judges and prosecutors who are perceived as threatening to State authorities may become the target of criminal prosecution solely for political reasons. Such prosecutions may, for example, target justice actors who have handled cases concerning public corruption or government violations of human rights.¹⁴⁰ Sometimes, the charges that are brought are facially unrelated to judges' and prosecutors' professional work, although motivated by improper ends.¹⁴¹ Other times, the charges are directly related to the professional work of these justice professionals, as recently occurred at a broad scale concerning independent judges and prosecutors who worked on corruption or human rights cases in

140. Mary Lawlor, Letter dated Feb. 23, 2023 from Special Rapporteur on the Situation of Human Rights Defenders to the Government of the United Mexican States, at 2, U.N. Doc. AL MEX 2/2023 (Feb. 23, 2023) [hereinafter U.N. Doc. AL MEX 2/2023]; Diego García-Sayán, Letter dated Mar. 31, 2022 from Special Rapporteur on the Independence of Judges and Lawyers to the Government of the Republic of Guatemala, at 1, U.N. Doc. AL GTM 1/2022 (Mar. 31, 2022) [hereinafter U.N. Doc. AL GTM 1/2022]; Margaret Satterthwaite, Letter dated Nov. 22, 2022 from Special Rapporteur on the Independence of Judges and Lawyers to the Government of the Republic of Guatemala, at 9, U.N. Doc. AL GTM 6/2022 (Nov. 22, 2022) [hereinafter U.N. Doc. AL GTM 6/2022].

141. Margaret Satterthwaite, Letter dated May 26, 2023 from Special Rapporteur on the Independence of Judges and Lawyers to the Government of the Republic of Tunisia, at 1–2, U.N. Doc. AL TUN 2/2023 (May 26, 2023); Margaret Satterthwaite, Letter dated July 28, 2023 from Special Rapporteur on the Independence of Judges and Lawyers to the Government of the Republic of Haiti, at 1–3, U.N. Doc. AL HTI 2/2023 (July 28, 2023). See generally U.N. Doc. AL GTM 1/2022, *supra* note 140; U.N. Doc. AL GTM 6/2022, *supra* note 140.

Guatemala.¹⁴² The punishments that result from these prosecutions can be severe.¹⁴³

Captured courts sometimes use repressive prosecution on a broad scale. In Türkiye, thousands of judges and prosecutors were arrested and dismissed in the years after the attempted coup in 2016, as part of what the Office of the United Nations High Commissioner of Human Rights called “collective” and “arbitrary” acts.¹⁴⁴ Those arrested included a judge of the UN Criminal Tribunals Mechanism, who was indicted, convicted, and imprisoned despite his entitlement to diplomatic immunity.¹⁴⁵

Private lawyers can also face repressive prosecution for their professional work.¹⁴⁶ In some cases, lawyers viewed as aligned to the political opposition¹⁴⁷ or representing opposition political figures or human rights defenders¹⁴⁸ may be vulnerable to politically motivated

142. JAIME CHÁVEZ ALOR & MARÍA CRISTINA MARTÍNEZ ARMAS, CRIMINALIZATION OF JUSTICE OPERATORS IN GUATEMALA AS A STRATEGY TO SECURE IMPUNITY 32–34 (2022); UNIVERSIDAD RAFAEL LANDÍVAR, GUATEMALA: ESTADO DE PAÍS Y PERSPECTIVAS 47–53 (2023).

143. Margaret Satterthwaite, Letter dated July 6, 2023 from Special Rapporteur on the Independence of Judges and Lawyers to the Government of the Republic of Guatemala, at 2–7, U.N. Doc. AL GTM 3/2023 (July 6, 2023); Diego García-Sayán, Letter dated Feb. 5, 2021 from Special Rapporteur on the Independence of Judges and Lawyers to the Government of the Republic of Poland, at 7–8, U.N. Doc. AL POL 2/2021 (Feb. 5, 2021); U.N. Doc. AL GTM 6/2022, *supra* note 140, at 2–8.

144. U.N. OFF. OF THE HIGH COMM’R, REPORT ON THE IMPACT OF THE STATE OF EMERGENCY ON HUMAN RIGHTS IN TURKEY, INCLUDING AN UPDATE ON THE SOUTH-EAST ¶¶ 48–55 (2018); *see also* Diego García-Sayán, Letter dated May 23, 2017 from Special Rapporteur on the Independence of Judges and Lawyers to the Government of the Republic of Türkiye, at 1–4, U.N. Doc. AL TUR 5/2017 (May 23, 2017); LEVITSKY & ZIBLATT, *supra* note 103, at 96.

145. Akay v. Türkiye, App. No. 59/17, ¶¶ 57–58, 143–45 (Apr. 23, 2023), <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-233214%22%7D>.

146. Mary Lawlor, Letter dated Dec. 9, 2022 from Special Rapporteur on the Situation of Human Rights Defenders to the Government of the Republic of Zimbabwe, at 1, U.N. Doc. AL ZWE 3/2022 (Dec. 9, 2022); Diego García-Sayán, Letter dated Apr. 28, 2021 from Special Rapporteur on the Independence of Judges and Lawyers to the Government of the Republic of Cabo Verde, at 1, U.N. Doc. AL CPV 1/2021 (Apr. 28, 2021).

147. Irene Khan, Letter dated May 12, 2023 from Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression to the Government of the Republic of Türkiye, at 1–2, U.N. Doc. AL TUR 2/2023 (May 12, 2023) [hereinafter U.N. Doc. AL TUR 2/2023].

148. *See generally* Mary Lawlor, Letter dated July 26, 2022 from Special Rapporteur on the Situation of Human Rights Defenders to the Government of the Republic of Guatemala, U.N. Doc. AL GTM 4/2022 (July 26, 2022); Margaret Satterthwaite, Letter dated Mar. 31, 2023 from Special Rapporteur on the Independence of Judges and Lawyers to the Government of the Socialist Republic of Vietnam, U.N. Doc. AL VNM 1/2023 (Mar. 31, 2023); Margaret Satterthwaite, Letter dated Dec. 18, 2023 from Special Rapporteur on the Independence of Judges and Lawyers to the Government of the Republic of Zimbabwe, U.N. Doc. AL ZWE 3/2023 (Dec. 18, 2023).

criminal prosecution.¹⁴⁹ In a particularly chilling abuse of the criminal justice system, lawyers may be criminalized for representing other justice system actors who have themselves been targeted for prosecution, as in the case of the renowned Guatemalan lawyer Claudia González Orellana, who has defended criminalized judges and prosecutors and has herself faced prosecution.¹⁵⁰ But any improperly politicized criminal actions against justice operators hijack the prosecutorial function, transforming it into a tool of repression.

In other cases, lawyers have been targeted through administrative and civil proceedings for their work on politically sensitive cases, for example, for representing marginalized groups in politicized environments.¹⁵¹ In various countries, lawyers and CJWs have been the subject of defamation charges and SLAPP suits, a practice condemned by the Inter-American Court of Human Rights as an “abusive use of judicial mechanisms” that undermines democratic oversight by society.¹⁵²

Justice actors targeted by the justice system may face particularly harsh or intrusive processes and sanctions. In the People’s Republic of China, “Residential Surveillance at a Designated Location” (“RSDL”) has been used in relation to human rights lawyers prosecuted for their professional activities.¹⁵³ The conditions of detention entailed in RSDL are equivalent to incommunicado detention and place those detained at a heightened risk of torture and other inhuman and degrading

149. Diego García-Sayán, Letter dated Mar. 10, 2022 from Special Rapporteur on the Independence of Judges and Lawyers to the Government of the Republic of Belarus, at 1, U.N. Doc. JAL BLR 1/2022 (Mar. 10, 2022); Press Release, Human Rights Office of the High Commissioner, Russia: UN Experts Call For Accountability For Navalny’s Death And Immediate Release Of All Political Prisoners, U.N. Press Release (Feb. 16, 2024), <https://www.ohchr.org/en/press-releases/2024/02/russia-un-experts-call-accountability-navalnys-death-and-immediate-release>.

150. Margaret Satterthwaite, Letter dated Sept. 5, 2023 from Special Rapporteur on the Independence of Judges and Lawyers to the Government of the Republic of Guatemala, at 1, U.N. Doc. AL GTM 5/2023 (Sept. 5, 2023).

151. Diego García-Sayán, Letter dated Nov. 30, 2021 from Special Rapporteur on the Independence of Judges and Lawyers to the Government of the Russian Federation, at 1–3, U.N. Doc. AL RUS 12/2021 (Nov. 20, 2021).

152. *Baraona Bray v. Chile*, Inter-Am. Ct. H.R. (ser. A) No. 481, Preliminary Objection, Merits, Reparations, and Costs, Judgment, ¶¶ 90–91 (Nov. 24, 2022).

153. See Jerome A. Cohen, *Law’s Relation to Political Power in China: A Backward Transition*, 86 SOC. RSCH. 231, 238–42 (2019); CHINESE HUMAN RIGHTS DEFENDERS, THEY TARGET MY HUMAN RIGHTS WORK AS A CRIME: ANNUAL REPORT ON THE SITUATION OF HUMAN RIGHTS DEFENDERS IN CHINA 4–7 (2016).

treatment.¹⁵⁴ Unfortunately, this practice has been codified and tacitly accepted by the national courts as a form of permissible detention.¹⁵⁵

The politicized deployment of criminal law and legal proceedings against judges, prosecutors, and lawyers can have a system-wide impact on the rule of law. Criminalization demonstrates that judges, who are assigned the role of upholding a fair legal system, are personally vulnerable to punishment for carrying out their professional responsibilities. It can have a chilling effect on prosecutors, making them reluctant to bring cases against powerful political figures. And it may induce or enhance a climate of fear among lawyers who defend individuals against the State and may even discourage these individuals from invoking their right to counsel.

b. Discipline, Removal, and Disbarment

Judges, prosecutors, and lawyers are all bound by professional standards enforced by disciplinary proceedings. International norms dictate that disciplinary processes should follow consistent procedures,¹⁵⁶

154. See e.g., Nils Melzer, Letter dated Mar. 22, 2017 from Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to the Government of the People's Republic of China, at 5, U.N. Doc. UA CHN 3/2017 (Mar. 22, 2017). See generally Elina Steinerte, Letter dated Aug. 24, 2018 from Vice-Chair of the Working Group on Arbitrary Detention to the Government of the People's Republic of China, U.N. Doc. OL CHN 15/2018 (Aug. 24, 2018); Elina Steinerte, Letter dated Dec. 4, 2020 from Vice-Chair of the Working Group on Arbitrary Detention to the Government of the People's Republic of China, U.N. Doc. AL CHN 20/2020 (Dec. 4, 2020); Michel Forst, Letter dated Aug. 13, 2020 from Special Rapporteur on the Situation of Human Rights Defenders to the Government of the People's Republic of China, U.N. Doc. AL CHN 16/2020 (Aug. 13, 2020); Mary Lawlor, Letter dated Sept. 23, 2022 from Special Rapporteur on the Situation of Human Rights Defenders to the Government of the People's Republic of China, U.N. Doc. AL CHN 8/2022 (Sept. 23, 2022); Aua Baldé, Letter dated Dec. 1, 2022 from Chair Rapporteur of the Working Group on Enforced or Involuntary Disappearances to the Government of the People's Republic of China, U.N. Doc. AL CHN 10/2022 (Dec. 1, 2022); Matthew Gillett, letter dated May 12, 2023 from Vice-Chair on Communications of the Working Group on Arbitrary Detention to the Government of the People's Republic of China, U.N. Doc. AL CHN 5/2023 (May 12, 2023); *Several Questions About "Residential Surveillance at a Designated Location" (RSDL)*, INT'L SERV. FOR HUM. RTS. (Feb. 23, 2022), <https://ishr.ch/latest-updates/several-questions-about-residential-surveillance-at-a-designated-location-rsdl/> [hereinafter *Several Questions*].

155. See *Several Questions*, *supra* note 154.

156. *Basic Principles on the Independence of the Judiciary*, U.N. HUM. RTS. OFF. OF THE HIGH COMM'R, <https://www.ohchr.org/en/instruments-mechanisms/instruments/basic-principles-independence-judiciary> (last visited Oct. 31, 2024); *Guidelines on the Role of Prosecutors*, U.N. HUM. RTS. OFF. OF THE HIGH COMM'R, <https://www.ohchr.org/en/instruments-mechanisms/instruments/guidelines-role-prosecutors> (last visited Oct. 31, 2024); *Basic Principles on the Role of Lawyers*, *supra* note 55.

be carried out expeditiously, and include a fair hearing before an impartial body;¹⁵⁷ that the resulting decisions should be subject to independent review,¹⁵⁸ including judicial review where the decisions concern lawyers;¹⁵⁹ and that disciplinary proceedings should align with applicable laws, international norms, and established standards of professional conduct.¹⁶⁰

Nevertheless, government officials may seek to instrumentalize existing disciplinary bodies and processes to discourage or punish challenges to State authority or malfeasance.¹⁶¹ For example, judges in Uganda and Lebanon have reportedly been disciplined in apparent reprisal for their opinions in high-profile electoral cases¹⁶² and for criticizing the functioning of the judiciary.¹⁶³ In the United States of America, a judge was subjected to a disciplinary investigation, reportedly for speaking out against racial injustice within the legal system.¹⁶⁴ Similarly, judges in Poland and Costa Rica have reportedly been disciplined for upholding the human rights of groups experiencing social

157. *Basic Principles on the Role of Lawyers*, *supra* note 55 (providing that “disciplinary proceedings against lawyers should be brought before an impartial disciplinary committee established by the legal profession, before an independent statutory authority, or before a court”); *see also* U.N. Doc A/73/365, *supra* note 55, at ¶ 67.

158. *Basic Principles on the Independence of the Judiciary*, *supra* note 156 (with the caveat that this principle may not apply to the decisions of the highest court and those of the legislature in impeachment or similar proceedings); *Guidelines on the Role of Prosecutors*, *supra* note 156.

159. *Basic Principles on the Role of Lawyers*, *supra* note 55.

160. *See id.*; *Basic Principles on the Independence of the Judiciary*, *supra* note 156; *Guidelines on the Role of Prosecutors*, *supra* note 156.

161. *See* Judith A. McMorrow et al., *Lawyer Discipline in an Authoritarian Regime: Empirical Insights from Zhejiang Province, China*, 30 GEO. J. L. ETHICS 267, 297 (2017).

162. *See* Margaret Satterthwaite, Letter dated Mar. 27, 2023 from Special Rapporteur on the Independence of Judges and Lawyers to the Government of the Republic of Uganda, at 1–3, U.N. Doc. AL UGA 1/2023 (Mar. 27, 2023).

163. *See* Margaret Satterthwaite, Letter dated June 26, 2023 from Special Rapporteur on the Independence of Judges and Lawyers to the Government of the Republic of Lebanon, at 1–2, U.N. Doc. OL LBN 3/2023 (June 26, 2023) [hereinafter U.N. Doc. OL LBN 3/2023]; *see also* Clement Nyaletsossi Voule, Letter dated Dec. 4, 2023 from Special Rapporteur on The Rights to Freedom of Peaceful Assembly and of Association to the Government of the Republic of Lebanon, at 1–3, U.N. Doc. JAL LBN 7/2023 (Dec. 4, 2023) [hereinafter U.N. Doc JAL LBN 7/2023].

164. Margaret Satterthwaite, Letter dated Feb. 1, 2024 from Special Rapporteur on the Independence of Judges and Lawyers to the Government of the United States of America, at 1–5, U.N. Doc. AL USA 5/2024 (Feb. 1, 2024); Press Release, Alicia Mercedes & Nidya Sarria-King, Civil Rights Organizations Stand with North Carolina Supreme Court Justice Anita Earls (Sept. 25, 2023), <https://naacp.org/articles/civil-rights-organizations-stand-north-carolina-supreme-court-justice-anita-earls>.

opprobrium.¹⁶⁵ Members of the judiciary may even face disciplinary action for attempting to preserve judicial independence, as in Poland, where judges have been disciplined simply for examining complaints concerning the lack of independence and impartiality of a tribunal or judge.¹⁶⁶

Prosecutors may also be disciplined or removed for improper political reasons, compromising their ability to act impartially, especially in cases involving prominent political figures. In several recent cases, prosecutors involved in anti-corruption work have been subject to discipline, removals, and arbitrary detentions; some were even forced into exile.¹⁶⁷ This dynamic has been especially pronounced in Guatemala.¹⁶⁸

Lawyers, too, are vulnerable to politically motivated disciplinary proceedings and sanctions. Disciplinary processes that can lead to the revocation of a lawyer's license to practice constitute powerful leverage that governments can use to intimidate and influence lawyers, especially "those dealing with cases against the State or representing causes or clients that are unpopular with the existing regime."¹⁶⁹ In Belarus, lawyers have had their licenses removed in reprisal for defending opposition figures,¹⁷⁰ and have also been suspended from practice by executive ministries based only on the *initiation* of disciplinary proceedings.¹⁷¹

165. Diego García-Sayán, Letter dated Apr. 14, 2022 from Special Rapporteur on the Independence of Judges and Lawyers to the Government of the Republic of Costa Rica, at 1–4, U.N. Doc. JAL CRI 1/2022 (Apr. 14, 2022); Diego García-Sayán, Letter dated May 23, 2019 from Special Rapporteur on the Independence of Judges and Lawyers to the Government of the Republic of Poland, at 1–3, U.N. Doc. AL POL 3/2019 (May 23, 2019).

166. Case C-204/21, *Comm'n v. Poland*, ECLI:EU:C:2023:442, ¶ 1 (June 5, 2023);

167. See Diego García-Sayán, Letter dated Apr. 27, 2022 from Special Rapporteur on the Independence of Judges and Lawyers to the Government of the Republic of Argentina, at 1–5, U.N. Doc. AL ARG 1/2022 (Apr. 27, 2022); Diego García-Sayán, Letter dated Aug. 14, 2023 from Special Rapporteur on the Independence of Judges and Lawyers to the Government of the Republic of Ecuador, at 1–2, U.N. Doc. AL ECU 2/2023 (Aug. 14, 2023); U.N. Doc. AL MEX 2/2023, *supra* note 140, at 1–3.

168. See Jonathan Blitzer, *The Exile of Guatemala's Anti-Corruption Efforts*, NEW YORKER (Apr. 29, 2022), <https://www.newyorker.com/news/dispatch/the-exile-of-guatemalas-anti-corruption-efforts>.

169. U.N. Doc A/73/365, *supra* note 55, at ¶ 71.

170. See Diego García-Sayán, Letter dated May 18, 2021 from Special Rapporteur on the Independence of Judges and Lawyers to the Government of the Republic of Belarus, at 1–4, U.N. Doc. AL BLR 5/2021 (May 18, 2021).

171. See Diego García-Sayán, Letter dated Dec. 14, 2021 from Special Rapporteur on the Independence of Judges and Lawyers to the Government of the Republic of Belarus, at 1–2, U.N. Doc. AL BLR 11/2021 (Dec. 14, 2021).

In other cases, lawyers may be targeted for exercising their freedom of expression.¹⁷² Disciplinary proceedings have been initiated¹⁷³—sometimes leading to disbarment or suspension—against lawyers who had recently spoken publicly in support of women’s rights in Iraq,¹⁷⁴ democracy in Hong Kong,¹⁷⁵ the right to self-determination in Morocco,¹⁷⁶ and reform of the monarchy in Thailand.¹⁷⁷ In Equatorial Guinea, a lawyer was suspended from practicing law after sharing a video expressing her views on the country’s judicial system, highlighting its shortcomings and encouraging judges to be more independent.¹⁷⁸ Such punishments risk undermining democracy by reducing the variety of perspectives given voice in civic spaces.

Politically motivated disciplinary actions corrode a justice system’s ability to fulfill its essential democratic role. Other judges may experience a “chilling” or “deterrent effect,” which is “likely to influence the content of their decisions,” reduce judicial independence, and diminish the rule of law.¹⁷⁹ Similarly, prosecutors may balk at pursuing politically sensitive investigations or charges, and lawyers might hesitate to work with individuals disfavored by the Government or pursue cases that challenge State authority and protect fundamental democratic rights.

172. See U.N. Doc. JAL LBN 7/2023, *supra* note 163, at 1–3; Diego García-Sayán, Letter dated Feb. 11, 2021 from Special Rapporteur on the Independence of Judges and Lawyers to the Government of the United Republic of Tanzania, at 1–4, U.N. Doc. AL TZA 2/2021 (Feb. 11, 2021).

173. See U.N. Doc. OL LBN 3/2023, *supra* note 163, at 1–5.

174. See Diego García-Sayán, Letter dated Oct. 31, 2022 from Special Rapporteur on the Independence of Judges and Lawyers to the Government of the Republic of Iraq, at 1–3, U.N. Doc. AL IRQ 4/2022 (Oct. 31, 2022).

175. See Margaret Satterthwaite, Letter dated Aug. 31, 2023 from Special Rapporteur on the Independence of Judges and Lawyers to the Government of the People’s Republic of China, at 1–6, U.N. Doc. AL CHN 16/2023 (Aug. 31, 2023) [hereinafter U.N. Doc. AL CHN 16/2023].

176. See Diego García-Sayán, Letter dated Oct. 4, 2022 from Special Rapporteur on the Independence of Judges and Lawyers to the Government of the Kingdom of Morocco, at 1–3, U.N. Doc. AL MAR 3/2022 (Oct. 4, 2022).

177. See Margaret Satterthwaite, Letter dated Aug. 24, 2023 from Special Rapporteur on the Independence of Judges and Lawyers to the Government of the Kingdom of Thailand, at 1–3, U.N. Doc. AL THA 5/2023 (Aug. 24, 2023).

178. See *Equatorial Guinea: The Observatory Condemns the Intimidation of the Lawyer Gemma Jones for Her Comments on Equatoguinean Judicial System*, INT’L OBSERVATORY OF L., <https://protect-lawyers.org/en/item/gemma-jones/> (July 25, 2024); Margaret Satterthwaite, Letter dated Mar. 8, 2024 from Special Rapporteur on the Independence of Judges and Lawyers to the Government of the Republic of Equatorial Guinea, at 1–3, U.N. Doc. AL GNQ 1/2024 (Mar. 8, 2024).

179. See John Macy & Allyson K. Duncan, *The Collapse of Judicial Independence in Poland: A Cautionary Tale*, 104 JUDICATURE 40, 41 (2021); see, e.g., Case C-791/19, *Comm’n v. Poland*, ECLI:EU:C:2021:366, ¶ 157 (May 6, 2021).

c. Conditions of Service

International norms require States to provide adequate resources to enable public justice officials to carry out their work. The Basic Principles on the Independence of the Judiciary call for States to provide adequate remuneration and conditions of service for judges, secured by law.¹⁸⁰ And the Guidelines on the Role of Prosecutors contains a similar call—for reasonable conditions of service, secured by law, regulations, or published rules.¹⁸¹ These provisions aim in part to ensure that the political branches of government cannot improperly influence judges or prosecutors by degrading the environment and conditions required for their work.

Notwithstanding these norms, judicial resources and security arrangements have been changed in circumstances that suggest attempts to influence the behavior of judges or prosecutors. In some States, security arrangements have been withdrawn from individual judges hearing high-profile or politically sensitive cases.¹⁸² Governments may also reduce the overall resources available to the judiciary for benefits and security amid rhetorical attacks on judges and the judiciary as a whole.¹⁸³ Attempts have also been made to lower judicial wages and cancel pensions, as in Romania in 2009-2010 and 2019.¹⁸⁴

Undue influence may also take the form of transferring disfavored prosecutors and judges to locations viewed as under-resourced, dangerous, or otherwise undesirable. For example, a Colombian prosecutor was notified shortly after lodging key accusations in a case concerning well-connected individuals that she would be transferred to another jurisdiction against her wishes.¹⁸⁵ Undue influence may also arise, as has been reported to occur in India, from manipulating case allocation to ensure that cases of political import are assigned to judges

180. See *Basic Principles on the Independence of the Judiciary*, *supra* note 156.

181. See *id.*; *Guidelines on the Role of Prosecutors*, *supra* note 156.

182. See, e.g., Chief Justice Martha K. Koome, Statement on the Intimidation and Withdrawal of the Security Detail of Justice Lawrence Mugambi (Sept. 16, 2024), <https://judiciary.go.ke/statement-on-the-intimidation-and-withdrawal-of-the-security-detail-of-justice-lawrence-mugambi/>.

183. See U.N. Doc. AL MEX 11/2023, *supra* note 134, at 1–3; Adriana Garcia & Javier Martin-Reyes, *Guardians of Democracy: Battling for the Rule of Law in Mexico*, SLS BLOGS (Oct. 24, 2023), <https://law.stanford.edu/2023/10/24/guardians-of-democracy-battling-for-the-rule-of-law-in-mexico/>.

184. See Cristi Danilet, *Justice Versus Politics: From Inability to Independence*, in 900 DAYS OF UNINTERRUPTED SIEGE UPON THE ROMANIAN MAGISTRACY 107, 119–20 (Alina Gioroceanu & Dragoş Călin eds., 2020).

185. See Margaret Satterthwaite, Letter dated Aug. 29, 2023 from Special Rapporteur on the Independence of Judges and Lawyers to the Government of the Republic of Colombia, at 1–4, U.N. Doc. AL COL 7/2023 (Aug. 29, 2023).

seen as sympathetic to the government's interest (or the converse).¹⁸⁶ The changes to conditions of service described in this section may be used to punish or retaliate against individuals, but the impact of such actions extends beyond individual cases, serving to warn or intimidate other justice actors.

2. Weaponization

The above section described actions that could be appropriate uses of criminal, disciplinary or administrative systems, if not for their improper purposes.¹⁸⁷ This section, in contrast, describes facially improper incursions on judicial independence and the free exercise of the legal profession. Specifically, this section considers circumstances in which attacks and interference against justice operators, or the failure to protect them from such acts, may constitute politically motivated reprisal for their work to uphold human rights and the rule of law, or intimidation aimed at discouraging them from taking such action in the future.

a. Government Disparagement and Harmful Labeling

International norms affirm that States must actively and affirmatively protect the security of justice actors.¹⁸⁸ This obviously mandates that States must not attack justice personnel, but it also implies a duty to refrain from disparaging or harmfully labeling such individuals in a way that could induce attacks by non-State actors. Disagreement is essential to democratic governance, and vigorous critiques of reasoning, disagreement with a decision, or expressions of dismay concerning a case outcome by members of the public are generally appropriate. However, when government officials launch ad hominem attacks, disparage personal characteristics or identities, describe justice workers using degrading or humiliating terms, or refer to them as "enemies," such comments cross the line, often constituting targeted interference.¹⁸⁹

186. See Arghya Sengupta, *The Moment the Judiciary Came Out*, in INDEPENDENCE & ACCOUNTABILITY OF THE INDIAN HIGHER JUDICIARY 264, 264–65 (2019); Aakar Patel, *Their Lordships*, in PRICE OF THE MODI YEARS 266, 266–74 (2021).

187. See Diego García-Sayán (Special Rapporteur on the Independence of Judges and Lawyers), *Fourth Rep. on the Independence of Judges and Lawyers*, ¶ 2, U.N. Doc. A/75/172 (July 17, 2020) (regarding "disguised sanctions" against judges).

188. See *Basic Principles on the Independence of the Judiciary*, supra note 156; *Guidelines on the Role of Prosecutors*, supra note 156; *Basic Principles on the Role of Lawyers*, supra note 55.

189. See, e.g., Jan-Werner Müller, *Enemies of the People: Populism's Threat to Independent Judiciaries*, in JUDICIAL INDEPENDENCE UNDER THREAT 27, 29 (Dimitrios

Repeated and unsupported disparagement can suggest calculated attempts to intimidate or influence judges. In the Philippines, derogatory statements and threats towards the judiciary by government officials have been televised, broadcast on radio, and published in newspapers.¹⁹⁰ In Poland, the 2017 “Fair Courts” campaign, led by a foundation created by the ruling party and a State-owned corporation, used billboards, advertisements on television and social media, and a dedicated portal to depict judges as “the enemy” of Polish people and evil in Polish society.¹⁹¹

Disparagement may also be directed towards particular judges, such as when the President of Mexico described judges he disagrees with as “corrupt” during daily press conferences,¹⁹² or when high-ranking Israeli government officials publicly labeled a specific judge as a “domestic enemy” and an “enemy from within” following a decision to release defendants who oppose the government.¹⁹³ In the United States, Donald Trump’s attacks on individual judges when he was president have been widely reported.¹⁹⁴ These statements may constitute direct judicial intimidation and may also have a chilling effect on other judges. In some cases, disparagement by public officials has reportedly been followed by investigations of judges¹⁹⁵ or online harassment against them.¹⁹⁶ The Inter-American Court of Human Rights has warned that such verbal attacks may amount to interference with judicial independence,

Giannouloupoulos & Yvonne McDermott eds., 2022); Julian Petley, *Enemies of the People: Article 50, the Press and Anti-Judicialism*, in JUDICIAL INDEPENDENCE UNDER THREAT 88, 91 (Dimitrios Giannouloupoulos & Yvonne McDermott eds., 2022).

190. Diego García-Sayán, Letter dated May 23, 2018 from Special Rapporteur on the Independence of Judges and Lawyers to the Government of the Republic of the Philippines, at 1–5, U.N. Doc. AL PHL 6/2018 (May 23, 2018).

191. Case C-204/21, Comm’n v. Poland, ECLI:EU:C:2023:442, (June 5, 2023); U.N. Doc. A/HRC/38/38/Add. 1 (Jun. 5, 2023).

192. See Margaret Satterthwaite, Letter dated Apr. 16, 2024 from Special Rapporteur on the Independence of Judges and Lawyers to the Government of the United States of Mexico, at 1, U.N. Doc. AL MEX 5/2024 (Apr. 16, 2024) [hereinafter U.N. Doc. AL MEX 5/2024].

193. U.N. Doc. AL ISR 3/2024, *supra* note 119, at 2–3.

194. See Michael J. Nelson & James L. Gibson, *Has Trump Trumped the Courts?*, 93 N.Y.U. L. REV. ONLINE 32, 32–40 (2018); Christopher D. Kromphardt & Michael F. Salamone, *“Unpresidential!” Or: What Happens When the President Attacks the Federal Judiciary on Twitter*, 18 J. INFO. TECH. & POL. 84, 89 (2021); LEVITSKY & ZIBLATT, *supra* note 103, at 176–77.

195. See U.N. Doc. AL MEX 5/2024, at 2.

196. Peter Eisler, et al., *Trump Blasts His Trial Judges. Then His Fans Call For Violence.*, REUTERS (May 14, 2024, 11:00 AM), <https://www.reuters.com/investigates/special-report/usa-election-threats-courts>.

particularly when coupled with threats of legal proceedings or disciplinary proceedings.¹⁹⁷

Some governments also disparage lawyers who represent politically sensitive clients or bring human rights cases, sometimes stigmatizing such individuals as terrorists or communists. In the Philippines, for example, lawyers and CJWs who work with clients who are members of marginalized communities have been subjected to an ongoing policy of “red-tagging.”¹⁹⁸ And Bar Associations in the UK have called attention to government officials labeling immigration and other human rights lawyers as “lefty” or “abetting criminal gangs,” with some lawyers reporting death threats after the widespread publication of these comments.¹⁹⁹ Recognizing the important role of human rights defenders in strengthening democracy, the Inter-American Court of Human Rights recently imposed on States a “special duty of protection” to defenders, including a reinforced obligation to prevent attacks or intimidation against them, mitigate existing risks, and adopt and provide adequate and effective protection measures in such risk situations.²⁰⁰

b. Harassment and Threats

Beyond public disparagement by State officials, judges, prosecutors, and lawyers may also be subjected to government threats and harassment. In Peru, judges who sit on the independent body overseeing electoral disputes have been harassed by members of Congress and other

197. *Seguimiento a los Ataques a la Independencia Judicial en México*, CYRUS R. VANCE CTR. FOR INT’L JUST. & FUNDACIÓN BARRA MEXICANA JOINT COMM., <https://www.vancecenter.org/initiatives/latin-america-policy-program/vcfbm/> (last visited Oct. 31, 2024); *Apitz Barbera v. Venezuela*, Inter-Am. Ct. of H.R. (ser. C) No. 182, Judgment, ¶ 131 (Aug. 5, 2008).

198. Margaret Satterthwaite, Letter dated June 15, 2023 from Special Rapporteur on the Independence of Judges and Lawyers to the Government of the Republic of the Philippines, at 1–5, U.N. Doc. AL PHL 2/2023 (June 15, 2023) [hereinafter U.N. Doc. AL PHL 2/2023]. Regarding the use of red-tagging, see generally Irene Khan (Special Rapporteur on Freedom of Opinion and Expression), *Preliminary Observations by the UN Special Rapporteur on Freedom of Opinion and Expression, Ms. Irene Khan, at the End of Her Visit to the Philippines: Mission Program*, U.N. OFF. OF THE HIGH COMM’R (Feb. 2, 2024), <https://www.ohchr.org/sites/default/files/documents/issues/expression/statements/20240202-com-philippines-sr-freedex.pdf>; Human Rights Council Res. 42/19, U.N. Doc. A/HRC/45/22 (July 14, 2020).

199. Anne McMillan, *The Global Assault on the Rule of Law*, INT’L BAR ASS’N (Sept. 14, 2022), <https://www.ibanet.org/The-global-assault-on-rule-of-law>.

200. *Members of the José Alvear Restrepo Laws. Collective v. Colombia*, Inter-Am. Ct. H.R. (ser. C) No. 506, Preliminary Objections, Merits, Reparations, and Costs, Judgment, ¶¶ 972–81 (Oct. 18, 2023).

politicians.²⁰¹ Physical, legal, and digital threats and harassment may also be targeted toward lawyers who are upholding democratic values and human rights. In Bangladesh, a lawyer reportedly was threatened and harassed by the government, apparently for defending the rights of ethnic, religious, and LGBTIQ+ minorities and opposition politicians.²⁰² In the Russian Federation, lawyers defending anti-war protesters experienced harassment and intimidation from law enforcement.²⁰³ Lawyers in Lebanon,²⁰⁴ Pakistan,²⁰⁵ and Venezuela²⁰⁶ have also encountered similar threats and harassment—either directly from government personnel or in circumstances where the government has allegedly provided inadequate security measures to protect against non-State actors.

The harassment of lawyers sometimes extends into the digital realm. Governments have reportedly made use of surveillance software against lawyers and tapped communication networks in order to access information regarding clients perceived to be enemies of the regime, or to

201. *See generally* U.N. Doc. AL PER 6/2023, *supra* note 81.

202. *See generally* Panagiotis Perakis, Letter dated July 7, 2023 from President, Council of Bars and L. Soc'ys of Eur. to Sheikh Hasina, Prime Minister of the People's Republic of Bangladesh,

https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/HUMAN_RIGHTS_LETTERS/Bangladesh_-_Bangladesh/2023/EN_HRL_20230707_Bangladesh_Continuous-threats-and-harassment-against-lawyer-Shahanur-Islam-and-his-family.pdf (July 7, 2023); Margaret Satterthwaite, Letter dated Jan. 17, 2023 from Special Rapporteur on the Independence of Judges and Lawyers to the Government of the People's Republic of Bangladesh, U.N. Doc. UA BGD 1/2023 (Jan. 17, 2023).

203. *See* Diego García-Sayán, Letter dated Nov. 30 2021 from Special Rapporteur on the Independence of Judges and Lawyers to the Government of the Russian Federation, at 1–3, U.N. Doc. AL RUS 12/2021 (Nov. 30, 2021); INT'L COMM'N OF JURISTS, ACCESS TO LAWYERS FOR ANTI-WAR PROTESTERS IN THE RUSSIAN FEDERATION 8–12 (2022).

204. *See* Mary Lawlor, Letter dated Nov. 16, 2021 from Special Rapporteur on the Situation of Human Rights Defenders to the Government of the Republic of Lebanon, at 1–4, U.N. Doc. JAL LBN 8/2021 (Nov. 16, 2021); Philippe Cottier, Letter dated Nov. 10, 2021 from Chairman, Geneva Bar Ass'n, to Prosecution Office of the Military Court, Lebanon, at 1–2 (Nov. 10, 2021).

205. *See* Nazila Ghanea, Letter dated Aug. 11, 2023 from Special Rapporteur on Freedom of Religion or Belief to the Government of the Islamic Republic of Pakistan, at 1–4, U.N. Doc. AL PAK 4/2023 (Aug. 11, 2023); *IBAHRI Concerned About the Discrimination of Ahmadiyya Lawyers in Pakistan*, INT'L BAR ASS'N (Aug. 10, 2023), <https://www.ibanet.org/IBAHRI-concerned-about-the-discrimination-of-Ahmadiyya-lawyers-in-Pakistan>.

206. *See* Mary Lawlor, Letter Dated Jan. 14, 2022 from Special Rapporteur on the Situation of Human Rights Defenders to the Government of the Bolivarian Republic of Venezuela, at 1–5, U.N. Doc. JAL VEN 9/2021 (Jan. 14, 2022).

keep tabs on the lawyers who represent them.²⁰⁷ Such surveillance should be of particular concern to the legal profession due to its potential implications for lawyer-client confidentiality.²⁰⁸

c. Arbitrary Detention, Torture, Enforced Disappearance, Physical Attack and Assassination

The most egregious forms of attacks on justice actors are all too common. Judges, prosecutors, and lawyers have been assaulted, tortured, and killed in circumstances that have been inadequately investigated. Such cases have occurred on numerous occasions in Türkiye.²⁰⁹ In Guinea-Bissau, lawyer Marcelino Intupé was subjected to violence and attacks after being appointed to represent various defendants accused of participating in a coup attempt.²¹⁰ In the Philippines, one human rights lawyer, Juan Macababba, was killed, while another, Angelo Karlo Guillen, survived an attempt on his life.²¹¹ In Eswatini, lawyer and pro-democracy advocate Thulani Maseko was assassinated at his home and in front of his family only weeks after another lawyer survived such an attempt.²¹²

207. See, e.g., JOHN SCOTT-RAILTON ET AL., RECKLESS IV: LAWYERS FOR MURDERED MEXICAN WOMEN'S FAMILIES TARGETED WITH NSO SPYWARE 7–12 (2017); John Scott-Railton et al., *GeckoSpy: Pegasus Spyware Used Against Thailand's Pro-Democracy Movement*, CITIZEN LAB (July 17, 2022), <https://citizenlab.ca/2022/07/geckospy-pegasus-spyware-used-against-thailands-pro-democracy-movement/>.

208. See, e.g., Evan Light & Jonathan A. Obar, *Surveillance Reform: Revealing Surveillance Harms and Engaging Reform Tactics*, in RESEARCH HANDBOOK ON HUMAN RIGHTS AND DIGITAL TECHNOLOGY: GLOBAL POLITICS, LAW AND INTERNATIONAL RELATIONS 195, 199–200 (Ben Wagner et al. eds., 2019).

209. See Panagiotis Perakis, Letter dated June 5, 2023 from President, Council of Bars and L. Soc'ys of Eur. to Recep Tayyip Erdoğan, President of the Republic of Turkey, at 1 (June 5, 2023); Irene Khan, Letter dated Oct. 25, 2023 from Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression to the Government of the Republic of Türkiye, at 1–2, U.N. Doc. AL TUR 8/2023 (Oct. 25, 2023).

210. Margaret Satterthwaite, Letter dated Dec. 21, 2022 from Special Rapporteur on the Independence of Judges and Lawyers to the Government of the United Kingdom of Great Britain and Northern Ireland, at 2, U.N. Doc. UA GNB 3/2022 (Dec. 21, 2022).

211. U.N. Doc. AL PHL 2/2023, *supra* note 198, at 2; World Report 2022, *Philippines: Events of 2021*, HUM. RTS. WATCH, <https://www.hrw.org/world-report/2022/country-chapters/philippines> (last visited Oct. 31, 2024); Press Release, Amnesty Int'l, Philippines: Surge in Killings of Lawyers and Judges Shows Justice System "In Deadly Danger" (Mar. 26, 2021), <https://www.amnesty.org/en/latest/press-release/2021/03/philippines-surge-killings-lawyers/>.

212. Mary Lawlor, Letter dated Jan. 24, 2023 from Special Rapporteur on the Situation of Human Rights Defenders to the Government of the Kingdom of Eswatini, at 1, U.N. Doc. AL SWZ 1/2023 (Jan. 24, 2023); Press Release, Off. of the High Comm'r for Hum. Rts., Türk. Condemns Killing of Eswatini Human Rights Lawyer, Urges Accountability (Jan. 23, 2023), <https://www.ohchr.org/en/press-releases/2023/01/turk-condemns-killing-eswatini-human->

Judges and prosecutors have also been arbitrarily detained and sometimes subjected to temporary disappearance when their actions displeased other branches of the State. This was the case for Judge Angelica Sanchez, who was arbitrarily detained in apparent retaliation for her decision in a high-profile case in Mexico.²¹³ Similarly, the prosecutions of lawyers discussed earlier in this Article are sometimes initiated with acts of arbitrary detention or enforced disappearance, as in the use of RSDL against human rights lawyers in the People's Republic of China.²¹⁴ In Egypt, the human rights lawyer Youssef Mansour has allegedly been a victim of disappearance and arbitrary detention.²¹⁵ In other cases, lawyers may be held without charge, or may face charges related to national security.²¹⁶

The corrosive impacts of such attacks on a justice system need hardly be explained. Justice actors who fear for their own physical safety or that of their families may understandably balk at holding powerful actors accountable to the law. This is the steepest of paths from rule of law to rule by force.

rights-lawyer-urges-accountability; *Eswatini: Activist, Rights Lawyers Brutally Killed*, HUM. RTS. WATCH (Jan. 25, 2023, 4:29 PM), <https://www.hrw.org/news/2023/01/25/eswatini-activist-rights-lawyer-brutally-killed>; Zweli Martin Dlamini, *Eswatini Unrest: Lawyer Maxwell Nkambule Who Is Representing Freedom Fighters Survives Assassination Attempt*, SWAZILAND NEWS (Dec. 7, 2022), <https://www.swazilandnews.co.za/fundza.php?nguyiphi=3488>.

213. Margaret Satterthwaite, Letter dated July 5, 2023 from Special Rapporteur on the Independence of Judges and Lawyers to the Government of the United Mexican States, at 1–2, U.N. Doc. AL MEX 4/2023 (July 5, 2023).

214. Margaret Satterthwaite, Letter dated Feb. 14, 2024 from Special Rapporteur on the Independence of Judges and Lawyers to the Government of the People's Republic of China, at 1, U.N. Doc. AL CHN 1/2024 (Feb. 14, 2024).

215. Mary Lawlor, Letter dated May 25, 2022 from Special Rapporteur on the Situation of Human Rights Defenders to the Government of the Arab Republic of Egypt, at 1–2, U.N. Doc. UA EGY 3/2022 (May 25, 2022).

216. U.N. Doc. AL TUR 2/2023, *supra* note 147, at 1–2 (May 12, 2023); Fionnuala Ní Aoláin, Letter dated Aug. 13, 2021 from Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism to the Government of the Arab Republic of Egypt, at 1–2, U.N. Doc. AL EGY 8/2021 (Aug. 13, 2021); Mary Lawlor, Letter dated July 21, 2023 from Special Rapporteur on the Situation of Human Rights Defenders to the Government of the People's Republic of China, at 1, U.N. Doc. AL CHN 11/2023 (July 21, 2023); U.N. Doc. AL CHN 16/2023, *supra* note 175, at 1–7; Margaret Satterthwaite, Letter dated Jan. 18, 2023 from Special Rapporteur on the Independence of Judges and Lawyers to the Islamic Republic of Iran, at 1, U.N. Doc. AL IRN 30/2022, at 1 (Jan. 18, 2023).

CONCLUSION

In recent years, justice system institutions and personnel have come under attack from political actors who claim that judicial checks and balances undermine the capacity of governments to enact the popular will. These claims portray judges, prosecutors, and lawyers as part of a remote “elite” or even, in the most extreme examples, as “enemies” of the people.

Yet a properly functioning judiciary does not undermine democracy—it fortifies it. Courts ensure that political actors do not exceed the authority granted to them by law; prosecutors hold egregious violators accountable; defense attorneys hold courts and prosecutors accountable to constitutions and the law; private lawyers bring cases to vindicate rights and arbitrary misapplications of the law; and community justice workers place the law into the hands of communities seeking remedies.

But for human beings to effectively fulfill these roles, they must be protected, both by law and in practice. This Article has described the myriad ways in which States across the globe are capturing, curbing, instrumentalizing, and weaponizing legal systems. What it has not done is to explain how this trend can be reversed, a subject we intend to take up in a future article. For now, however, this Article will conclude by offering two preliminary observations on this subject.

The first is to note an obvious conundrum. The report that gave rise to this Article offered a number of recommended steps that States could take to protect justice institutions and actors.²¹⁷ The conundrum is that the States that most need to take these steps are the least likely to do so. Moreover, in these States, the traditional methods by which people can persuade their governments to alter their conduct are decreasingly available. Political change becomes harder and harder as civic freedoms—of expression, association, and participation in public life²¹⁸—degrade.²¹⁹ Legal change strategies also become increasingly difficult as justice institutions are captured or curbed, and as the number and quality of justice actors willing to advance such strategies dries up in the face of instrumental or weaponized intimidation.

Instead, change agents will need to explore different (and often riskier) tactics., tactics like systematic evidence documentation and

217. *See generally* U.N. Doc. A/HRC/56/62, *supra* note 16.

218. OECD, THE PROTECTION AND PROMOTION OF CIVIC SPACE: STRENGTHENING ALIGNMENT WITH INTERNATIONAL STANDARDS AND GUIDANCE 11 (2022).

219. *See generally* ICNL, LEGAL FRAMEWORKS FOR CIVIC SPACE: A PRACTICAL TOOLKIT 3 (UNDP 2021) (“The growing trend of closing civic space around the world is well researched and documented through the work of multiple multilateral institutions as well as governments and civil society itself.”).

aggregation, storytelling and narrative shifting (especially via international media), and mobilization of international support and intervention.²²⁰ These tactics are, usually, less the domain of lawyers than they are of community organizers and community justice workers.²²¹ While lawyers can be and often are vital to such efforts—supplying critical technical expertise, clarifying existing rights, helping to identify potential points of leverage, enabling strategic litigation where possible, and providing protection in legally dangerous moments²²²—they are often not the central agents driving these changes.

Lawyers will need to carefully consider how to support such efforts. While a robust literature explores this issue (whether labeled as movement lawyering,²²³ law and organizing, rebellious lawyering, or community-led lawyering²²⁴), the particular challenge of advancing these approaches in autocratic contexts remains underexplored (although valuable country-specific accounts exist).²²⁵

The second observation regards the link between autocracy and the scapegoating of marginalized groups. As one scholar put it, today's dictators typically "pursue a two-step strategy for undermining democracy: first, scapegoat and demonize vulnerable minorities to build popular support; then, weaken the checks and balances on government power needed to preserve human rights and the rule of law, such as an independent judiciary, a free media, and vigorous civic groups."²²⁶ This distressing formula may offer an important insight for strengthening societies against backsliding: A populace's vulnerability to the erosion of democratic protections likely decreases the more it includes and protects its most marginalized members.

220. See NAOMI HOSSAIN & NALINI KHURANA, DONOR RESPONSES AND TOOLS FOR RESPONDING TO SHRINKING SPACE FOR CIVIL SOCIETY: A DESK STUDY 15–18 (Swiss Agency for Dev. and Coop. 2019) (Table 4.1).

221. See generally Sukti Dhital et al., *Forward: Critical Legal Empowerment*, 97 N.Y.U. L. REV. 1547, 1552–54 (2022); CHITALKAR, *supra* note 73.

222. See Ramzi Kassem & Diala Shamas, *Rebellious Lawyering in the Security State*, 23 CLINICAL L. REV. 671, 671–05 (2017).

223. See generally Scott L. Cummings, *Movement Lawyering*, 2017 U. ILL. L. REV. 1645; Anna A. Akbar et al., *Movement Law*, 73 STAN. L. REV. 821 (2021).

224. For canonical pieces in this literature, see generally GERALD LÓPEZ, REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE (1992); Lucie E. White, *To Learn and Teach: Lessons from Driefontein on Lawyering and Power*, 1988 WIS. L. REV. 699.

225. See, e.g., Rachel E. Stern, *Activist Lawyers in Post-Tiananmen China*, 42 LAW & SOC. INQUIRY 234, 234–51 (2017); Mizanur Rahman, *CLR*, "Rebellious Lawyering", and *Justice Education: A Few Lessons from Bangladesh*, 11 JINDAL GLOB. L. REV. 289, 289–08 (2020).

226. Kenneth Roth, *World's Autocrats Face Rising Resistance*, in HUMAN RIGHTS WATCH: WORLD REPORT 1, 1 (2019).

This is specifically relevant to justice institutions and actors. Enhancing the extent to which courts reflect—and engage—the communities they serve can improve the capacity of such institutions to protect those communities, and thereby resist autocratization. In turn, such inclusiveness can also make justice systems more resilient, especially to populist attacks. Increasing diversity on the bench, in the prosecutorial service, and among lawyers may assist in combating the framing of these professions as elitist or out of touch. States and justice personnel can go even further to democratize justice by ensuring that democratic principles are more thoroughly embodied in justice systems. Increasing the accessibility of courtrooms and procedures, improving the transparency of formal justice processes, and explaining the outcome of these processes in clear, comprehensible language illuminates the importance of rule of law in a society, stressing its relevance to ordinary people's lives. When citizens feel seen by and connected to their justice systems, these systems are in turn recognized as central to democracy and human rights, and become worthy of protection.

