

In Search of Judicial Legitimacy: Criminal Sentencing in Vietnamese Courts

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How do authoritarian courts, conventionally viewed as weak legal actors, build legitimacy? Inspired by Ernst Fraenkel's concept of the "dual state" and building on Richard Fallon's framework of judicial legitimacy that undergirds democratic courts, this Article seeks to operationalize the nebulous concept of legitimacy as related to authoritarian judiciaries. While Fallon's tripartite framework of sociological-moral-legal legitimacy provides an insightful typology on democratic courts' legitimation sources, it does not (and is not meant to) capture the undercurrents of authoritarian courts, many of which lack independence and struggle to build institutional capacity. This Article extends Fallon's framework to courts in authoritarian regimes by proposing a fourth dimension—interbranch legitimacy—that texturizes the relationship between authoritarian courts and the political actors on whom these courts depend for prestige and resources. Using a multi-method empirical inquiry, this Article demonstrates how this extended framework operates in one such authoritarian context—Vietnam. By taking an empirical and comparative approach, this Article seeks to contribute to both the theory and practical discourse on authoritarian legality, rule of law, and comparative law.

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INTRODUCTION

How do authoritarian courts, conventionally viewed as weak legal actors, build legitimacy? Inspired by Ernst Fraenkel's concept of the "dual state"² and building on Richard Fallon's framework of judicial legitimacy³ that undergirds democratic courts, this Article operationalizes the nebulous concept of legitimacy as it relates to authoritarian judiciaries. While Fallon's tripartite framework of sociological-moral-legal legitimacy provides an insightful typology of democratic courts' legitimation sources, his analysis does not extend to authoritarian courts, many of which lack independence and struggle to build institutional capacity. This Article applies and extends Fallon's framework to courts in authoritarian regimes by proposing a fourth dimension—*interbranch legitimacy*—that captures the relationship between authoritarian courts and the political actors on whom these courts depend for prestige and resources. I define interbranch legitimacy broadly as the judiciary's institutional standing in relation to other political actors with which it interacts and upon which it depends. Then, using a multi-method empirical inquiry, this Article demonstrates how this extended framework operates in one such authoritarian context—Vietnam. By taking an empirical and comparative approach, this Article contributes to both the theory and practical discourse on authoritarian legality, rule of law, and comparative law scholarship.

This Article makes a theoretical, empirical, and normative contribution to existing literature. First, on the theoretical front, this Article argues for a need for more nuanced understanding of the logics of judicial actions and motivations in authoritarian contexts. Despite the near-universal embrace of concepts such as legitimacy and judicial independence, little scholarship has focused on courts' jurisprudence in authoritarian regimes—often due to lack of access.⁴ The scholarship on the mechanism of judicial legitimacy has largely centered on courts in democracies,⁵ while the recent burgeoning literature on authoritarian courts mainly focuses on rich descriptions of the

2. The concept of a Dual State was first coined by Ernst Fraenkel in his now iconic book, *THE DUAL STATE, A CONTRIBUTION TO THE THEORY OF DICTATORSHIP* (1941). Written largely from within Hitler's Germany, it explored Fraenkel's theory that authoritarian regimes are not lawless but deploy law in both systematic and selective ways.

3. RICHARD FALLON, JR., *LAW AND LEGITIMACY IN THE SUPREME COURT* (2018). See *infra* Part I (summarizing Fallon's tripartite framework). Written from a legal scholarship perspective, Fallon's tripartite framework combines insights from political science, sociology, and doctrinal discourse to analyze judicial legitimacy through the case study of the U.S. Supreme Court. Fallon, *supra*.

4. See *infra* notes 11–13 and accompanying text.

5. See, e.g., James Gibson & Michael Nelson, *The Legitimacy of the U.S. Supreme Court: Conventional Wisdoms and Recent Challenges Thereto*, 10 ANN. REV. L. SOC. SCI. 201 (2014) (analyzing empirical evidence and finding that the U.S. Supreme Court's legitimacy is "reasonably secure"); Richard Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787 (2005) (analyzing the sociological, moral, and legal legitimacy of the U.S. Supreme Court).

historical evolutions and roles of these courts.⁶ Scholars have detailed how autocrats used law and courts to bolster regime legitimacy,⁷ but have not yet explored how authoritarian courts themselves build legitimacy when lacking traditional legitimation sources such as independence and judicial review. Through the lens of interbranch legitimacy, this Article begins to fill this gap in the literature by proposing a theoretical framework on authoritarian courts' strategies in building up their own institutional legitimation.

Second, on the empirical side, this Article draws on both quantitative and qualitative sources to explore in depth how the judiciary in one such authoritarian context—here, Vietnam—strives to solidify its legitimacy. Vietnam is a particularly fitting case study because it epitomizes the uneasy relationship between authoritarian regimes and law. Steering one of the last surviving socialist states with fierce appetite for economic development, Vietnamese leaders at once use law as a claim to authority, a gateway to international integration, and an instrument of control.⁸ As demonstrated below, Vietnamese courts pursue multiple, at times conflicting, venues of legitimacy: adopting international standards of transparency and rule of law discourse, aggressively monitoring lower courts' exercise of discretion, and implementing the ruling single-party's policy directives. Not all efforts have been successful. Where Vietnam's authoritarian legality manifests as a "bifurcated system" in which a normative, formalistic legal system exists alongside a prerogative one,⁹ the reputation of the judiciary is affected as it crisscrosses these two spheres, searching for a foothold in each.

Understanding how Vietnamese judges make sentencing decisions offers insight into a Dual State-like authoritarian legal system that harshly punishes social activists and dissidents while heralding a decade of progressive legal reforms. English-language news reports on contemporary Vietnam largely focus on the former,¹⁰ and little is yet known about the actual

6. See generally TOM GINSBURG & TAMIR MOUSTAFA, *RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES* (2008) (arguing that courts in authoritarian regimes are not mere puppets but political actors who play various functions to uphold authoritarian legality and, at times, contest it).

7. See Tamir Moustafa, *Law and Courts in Authoritarian Regimes*, 10 ANN. REV. L. SOC. SCI. 281, 281–99 (2014) (detailing authoritarian leaders' use of courts and the rule of law as legitimizing narratives in the Philippines, Brazil, and Egypt).

8. See *infra* Part II (providing background on the Vietnamese judiciary and legal system).

9. Fraenkel's "dual state" concept refers to the dual existence of a "normative" legal system, where the rule of law applies to the majority of the state's citizens, and a "prerogative" system, where a targeted minority is subjected to arbitrary law. See FRAENKEL, *supra* note 2, at 2–10. Building on Fraenkel's dual state concept, contemporary scholars have used the term "dual" or "bifurcated" system in describing authoritarian regimes such as Russia, China, and Singapore. See Kathryn Hendley, "Telephone Law" and the "Rule of Law": *The Russian Case*, 1 HAGUE J. ON RULE OF L. 241, 241–62 (2009); RACHEL STERN, ENVIRONMENTAL LITIGATION IN CHINA: A STUDY IN POLITICAL AMBIVALENCE 229–30 (2013); Rachel Stern, *Activist Lawyers in Post-Tiananmen China*, 42 LAW & SOC. INQUIRY 234, 236 (2017).

10. See, e.g., *Vietnam Dissident's Daughter Calls on Melania Trump for Help*, NBCNEWS (Oct. 27, 2017), <https://www.nbcnews.com/news/asian-america/vietnam-dissident-s-daughter-calls-melania-trump-help-n814986> [<https://perma.cc/3Z3L-JW9Q>]; Bennett Murray, *Vietnam's Harsh Summer: State Launches Largest Crackdown on Dissidents in Years*, GUARDIAN (Sept. 25, 2017), <https://www.theguardian.com>

caseload and activities that make up the bulk of the courts' work. This area was under-researched for good reason: until recent years, judicial judgments of any kind were not publicly available, and criminal judgments were even harder to obtain.¹¹ The last decade, however, has seen incremental improvements in judicial transparency.¹² The research underpinning this Article only became possible in the wake of those changes, and presents the first systematic empirical study of Vietnamese courts' criminal law jurisprudence.¹³

My primary sources are 242 criminal judgments by Vietnam's highest appellate body—the Judicial Council of the Supreme People's Court ("SPC")—for the period 2003 to 2015, supplemented by thirty interviews with Vietnamese judges, court personnel, lawyers, and academics, alongside additional legislative and court documents. Though rich in number, the database of court opinions is likely incomplete and therefore is not representative of all criminal cases.¹⁴ Still, the available judgments provide pertinent insight into how Vietnamese judges weigh competing goals in administering or withholding criminal punishment, and how their sense of justice manifests. Legal scholarship about Vietnam, whether local or abroad, rarely looks carefully at court opinions, likely because, as with earlier scholarship on China, they are seen as largely uninformative.¹⁵ The shortcomings

.com/world/2017/sep/26/vietnams-state-largest-crackdown-on-dissidents-years [https://perma.cc/ML9L-58K8].

11. See *infra* Part IV.D (linking the publication of court cases in the early 2000s to Vietnam's effort to obtain membership to the World Trade Organization); TIM LINDSEY & PIP NICHOLSON, DRUGS LAW AND LEGAL PRACTICE IN SOUTHEAST ASIA: INDONESIA, SINGAPORE, AND VIETNAM 199 n.2 (2016) ("Criminal law judgments are not freely available in Vietnam, having been deemed 'sensitive.'"); Pip Nicholson & Quan Nguyen, *Vietnamese Law: A Guide to Sources and Commentary*, 2 J. COMP. L. 219 (2007) ("Although criminal law has a long history in Vietnam, very little English-language scholarship exists on criminal law in the contemporary period.").

12. See *infra* Part II (summarizing the various reforms that the Vietnamese judiciary underwent).

13. While some previous works on Vietnam utilized judicial opinions, they were collected informally and did not constitute an empirical, systematic study. See, e.g., LINDSEY & NICHOLSON, *supra* note 11, at 199 n.2 (noting that eighteen drug-related judgments were obtained informally for analysis). Scholars within Vietnam were more successful in finding judicial cases. However, these studies lacked the theoretical framework and rigor of empirical research methods. See, e.g., Hoang Pham Thanh Nga, *Tinh tiet giam nhe trach nhem hinh su "Nguoi pham toi tu nguyen sua chua, boi thuong thiet hai, khac phuc hau qua" trong luat hinh su Viet Nam [Mitigating factor of "Offender volunteer to repair, compensate for the damage or overcome the consequences" in Vietnam's Criminal Code]* (2015) (unpublished M.A. thesis, Vietnam National University, Hanoi Faculty of Law) (on file with author) (surveying the use of one particular mitigating factor in three district courts); Chu Thanh Ha, *Cac tinh tiet giam nhe trach nhem hinh su thuoc ve nhan than nguoi pham toi [Mitigating factors relating to offenders' background]* (2015) (unpublished M.A. thesis, Vietnam National University, Hanoi Faculty of Law) (on file with author) (summarizing the mitigating factors considered in 125 trial court judgments).

14. For the official guideline on cases that likely were excluded, see *infra* notes 158, 183, and accompanying text.

15. See Pip Nicholson, *Vietnamese Jurisprudence: Informing Court Reform*, in ASIAN SOCIALISM AND LEGAL CHANGE: THE DYNAMICS OF VIETNAMESE AND CHINESE REFORM 159, 169 (Pip Nicholson & John Gillespie eds., 2005) ("Court judgments have not to date been a great source of normative legal principles. . . . [I]n criminal cases, judgments record the names and background of the parties, the charges and whether they have been found guilty. The evidentiary basis for the conviction is not recorded."). Legal scholarship on China's courts faces similar shortcomings in judicial data but has now

are certainly there: the judgments all follow a rigid template, contain little to no legal reasoning,¹⁶ and do not reveal behind-the-scene dynamics among the legal actors and parties involved—forces which have long been speculated to drive the outcomes of cases.¹⁷ Notwithstanding these flaws, the unprecedented availability and accessibility of these documents makes them a treasure trove for readers interested in comparative criminal justice, authoritarian regimes, and contemporary Asia. This Article demonstrates that, even in their restricted shells, these judgments can still speak volumes about the complex role of the judiciary in a regime that simultaneously uses law as a gateway to international integration and an instrument of control.

Finally, by exploring the concept of interbranch legitimacy and extending the theory of judicial legitimacy to courts in an authoritarian context, this Article also has normative implications for rule-of-law development projects at large. International development work often focuses on empowering courts with features found in democratic regimes such as judicial independence and separation of powers, treating them as essential to the rule of law and economic development.¹⁸ Yet, when courts are without political power, judicial independence and distance from political

embraced the analysis of court opinions despite their limited nature. See, e.g., Benjamin L. Liebman et al., *Mass Digitization of Chinese Court Decisions: How to Use Text as Data in the Field of Chinese Law*, 2–3, 11–12 (21st Century China Ctr. Research Paper No. 2017-10, 2017) (analyzing over a million court documents in Henan and calling attention to biases due to missing data); Benjamin L. Liebman, *Leniency in Chinese Criminal Law? Everyday Justice in Henan*, 33 BERKELEY J. INT'L L. 153 (2015) (analyzing criminal sentencing patterns using a one-year database of judicial judgments in Henan courts); Xin He & Yang Su, *Do the "haves" come out ahead in Shanghai courts?*, 10 J. EMPIRICAL LEGAL STUD. 120 (2013) (analyzing adjudication decisions from Shanghai courts to test Marc Galanter's influential theory of whether and why resource-rich parties prevail (citing Marc Galanter, *Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974))).

16. Interestingly, common law scholars have leveled similar critiques on the classic civil law court—the French *Cours de Cassation*. See MITCHEL LASSER, *JUDICIAL DELIBERATIONS: A COMPARATIVE ANALYSIS OF TRANSPARENCY AND LEGITIMACY* 30–31 (2009) (“[French] decisions are famously short: those of the *Cour de cassation* (the French supreme court in private and criminal law matters), for example, tend to run to less than a single typed page. The decisions also lack any serious description of the facts, almost never refer to past judicial decisions, and contain absolutely nothing that could be described as serious interpretive or policy analysis.”). French judicial decisions, however, are accompanied by robust, lively unofficial discourses—academic case notes and long reports by French magistrates—which expound on policy implications, legal interpretations, and legal reasonings. *Id.* at 38–60. Though Vietnam's legal system, especially its civil law code, is heavily influenced by French law as a result of French colonialism in Indochina, the unofficial discourses that accompany French judicial decisions were not produced for individual Vietnamese cases.

17. See *Luong tham phan 4-5 trieu thi sao liem chinh noi*, (How can judges maintain integrity when their monthly salary is only 4 to 5 million VND), VNEXPRESS (Mar. 24, 2017), <https://vnexpress.net/phap-luat/pgs-tran-van-do-luong-tham-phan-4-5-trieu-thi-sao-liem-chinh-noi-3560279.html> [https://perma.cc/6CFG-5ZXS] (“To have integrity, we must create an environment for integrity, where judges can make a living with their wages.”). For perspective, 5 million VND is about \$250. See also Pip Nicholson, *The Vietnamese Courts and Corruption*, in CORRUPTION IN ASIA: RETHINKING THE GOVERNANCE PARADIGM 202, 207–17 (Tim Lindsey & Howard Dick eds., 2002) (noting the low trust that the public placed in courts in describing two judicial corruption cases).

18. See *infra* note 35 and accompanying text; see also Alvaro Santos, *The World Bank's Uses of the Rule of Law Promise in Economic Development*, in THE NEW LAW AND DEVELOPMENT: A CRITICAL APPRAISAL 253, 277–86 (David Trubek & Alvaro Santos eds., 2006).

apparatus can actually further cripple an already weak judiciary rather than strengthen it.¹⁹ Contrary to prior literature that view politics as an antithesis to judicial integrity, this Article argues that interbranch legitimacy—judicial actions to elevate executive and legislative actors' views of courts—*can* play a symbiotic role to judicial independence by enhancing a court's institutional legitimacy.

This Article proceeds in four parts. Part I situates this project within existing scholarship on judicial legitimacy and proposes a theoretical extension to authoritarian contexts. Part II introduces Vietnam as a case study, including an overview of its political and judicial systems, criminal sentencing frameworks, and ongoing challenges of criminal justice reforms. Parts III and IV delve into the empirical records. I first explain the data and multi-method approach used. Then, drawing on both quantitative and qualitative data, I explore the SPC's construction of judicial legitimacy through various, sometimes conflicting, strategies. In conclusion, Part V discusses the theoretical and normative implications of the project and suggests grounds for further research.

I. COURTS & LEGITIMACY

Legitimacy is a concept of both prominence and much confusion in legal scholarship and other disciplines.²⁰ The judiciary, whether in authoritarian regimes or elsewhere, typically lacks the power of popular election,²¹ the

19. See John Gillespie, *Rethinking the Role of Judicial Independence in Socialist-Transforming East Asia*, 4 INT'L COMP. L. Q. 837, 837–39 (2007) (“Politics [] threatens judicial independence, but it is also vital for the protection of embryonic courts.”); LISA HILBINK, *JUDGES BEYOND POLITICS IN DEMOCRACY AND DICTATORSHIP: LESSONS FROM CHILE* 10–25 (2007) (tracing the process through which an independent judiciary in Chile nonetheless failed to stand up to Pinochet's regime and cautioning against fostering apolitical, passive judges).

20. See, e.g., John C. Yoo, *In Defense of the Court's Legitimacy*, U. CHI. L. REV. 775, 776 (2001) (“Legitimacy is a word often used in our political debate, but seldom defined precisely.”); Thomas Risse & Eric Stollenwerk, *Legitimacy in Areas of Limited Statehood*, 21 ANN. REV. POL. SCI. 1, 2 (2018) (“Few concepts in the political and social sciences are as prominent and at the same time as contested as the concept of legitimacy.”); Fallon, *supra* note 5, at 1790 (“Although the concept of legitimacy features prominently in constitutional debates, it rarely receives analysis. Those who appeal to legitimacy frequently fail to explain what they mean or the criteria that they employ. Confusion often results . . .”).

21. In the U.S., though federal judges are appointed, about 90 percent of state judges do run for office. JED SHUGERMAN, *THE PEOPLE'S COURTS: PURSUING JUDICIAL INDEPENDENCE IN AMERICA* 3–4 (2012). Ironically, judicial elections have two opposing effects on the perception of legitimacy of state judges. Elections at once boost legitimacy through perception of accountability and decrease it through the negative optics associated with election campaigns. See Benjamin Woodson, *The Two Opposing Effects of Judicial Elections on Legitimacy Perceptions*, 17 ST. POL. & POL'Y Q. 24, 24–46 (2017) (finding through survey experiments that the perceived legitimacy of elected courts is higher than appointed courts only in states with little election activity).

purse,²² or the sword.²³ To what, then, do judges turn to claim their legitimacy? Compared to their counterparts in authoritarian countries, democratic courts appear to bask in legitimacy;²⁴ but what exactly this authority means and how democratic courts come to enjoy it is not simple, obvious, or even uncontested. This Article first considers how judicial legitimacy is conceptualized in democratic traditions before turning to courts in non-democratic settings.²⁵

A. *In Democracies*

Judicial legitimacy, in its most basic form, is a judiciary's claim to legitimate authority capable of altering people's obligations and compelling compliance.²⁶ Scholars have long debated the sources of courts' legitimacy. Most scholarship has focused on a discrete source,²⁷ be it the philosophical underpinnings of judicial opinions,²⁸ sociological acceptance of institutional norms,²⁹ respect for individual jurists and their intellectual rigors,³⁰ or promoting efforts from political branches.³¹ A recent work by legal scholar

22. For a historical account of the U.S. federal courts' efforts to build relationship with Congress to overcome these deficits, see CHARLES GARDNER GEYH, *WHEN COURTS & CONGRESS COLLIDE: THE STRUGGLE FOR CONTROL OF AMERICA'S JUDICIAL SYSTEM* 23–50 (2006). See also Gretchen Helmke & Frances Rosenbluth, *Regimes and the Rule of Law: Judicial Independence in Comparative Perspective*, 12 ANN. REV. POL. SCI. 345, 351 (2009) (noting that even in systems where judges enjoy life tenure, political actors can constrain the judiciary through budget control and other means).

23. See *id.*

24. See, e.g., Gibson & Nelson, *supra* note 5, at 202 (“In a democratic polity, accountability and the consent of the governed form the most common source of institutional legitimacy.”); Moustafa, *supra* note 7, at 286–87.

25. For the purpose of this paper, I adopt and elaborate on the broad definition of judicial legitimacy articulated in FALLON, *supra* note 3, at 20–21.

26. *Id.* For a similar definition, see James L. Gibson, Milton Lodge & Benjamin Woodson, *Losing, but Accepting: Legitimacy, Positivity Theory, and the Symbols of Judicial Authority*, 48 LAW & SOC'Y REV. 837, 839 (2014) (“Judicial legitimacy's power lies in its ability to induce acquiescence to court decisions with which citizens disagree[.]”), and Yoo, *supra* note 20, at 776–77 (defining legitimacy as one's “belief in the binding nature of an institution's decisions, even when one disagrees with them”).

27. An exception is Alain A. Levasseur, *Legitimacy of Judges*, 50 AM. J. COMP. L. 43 (2002), which defines judicial legitimacy as coming from both “above”, i.e. derived from higher legal and moral norms, and “below”, i.e. derived from the institutional process to vest and constitute the judiciary. *Id.* at 44–46. While helpful, this framework does not fully explain how, for example, the U.S. judiciary sustains its authority when the judicial appointment process becomes toxic or when it issues unpopular decisions.

28. See RONALD DWORKIN, *LAW'S EMPIRE* 190–216 (1986) (discussing the U.S. Supreme Court's legitimacy as rooted in the philosophical underpinnings of its opinions); Ken Kress, *Legal Indeterminacy*, 77 CALIF. L. REV. 283, 285–95 (1989) (reviewing scholarship on philosophical legitimacy).

29. See, e.g., Alan Hyde, *The Concept of Legitimation in the Sociology of Law*, 1983 WIS. L. REV. 379, 381–82 (1983) (summarizing Max Weber's analysis of legitimacy); see also notes 33–37 and accompanying text.

30. See, e.g., James M. Boland, *Constitutional Legitimacy and the Culture Wars: Rule of Law or Dictatorship of a Shifting Supreme Court Majority?*, 36 CUMB. L. REV. 245, 246–47 (2006) (attributing the legitimacy of U.S. Supreme Court rulings to the justices and the interpretive modes of analysis they applied).

31. See KEITH E. WHITTINGTON, *POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENT, THE SUPREME COURT & CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY* 5 (2007) (arguing that the U.S. Supreme Court derived its legitimacy, at least in part, through political actors' systematic efforts to cast it as the final arbiter of the U.S. Constitution); Krishanti Vignarajah, *The Political Roots of Judicial Legitimacy: Explaining the Enduring Validity of the Insular Cases*, 77 U. CHI. L. REV. 781,

Richard Fallon usefully synthesized these various sources into three distinct yet interrelated strands of judicial legitimacy: sociological, moral, and legal.³² While Fallon focuses on the judicial legitimacy of the U.S. Supreme Court in constitutional cases, this framework lays out the typology of legitimation sources that can help us understand and analyze courts in democratic regimes in general. Fallon's insight, therefore, provides an important launching point upon which this Article builds to expand the legitimation framework beyond democratic courts, into the autocratic context.

First, consider the three strands of judicial legitimacy as developed by Fallon. Sociological legitimacy, rooted in the work of sociologist Max Weber, is a subjective inquiry: it measures the prevailing public attitudes toward courts.³³ Sociological legitimacy plays a vital role in the success of modern states: it can motivate people to obey the law not because of self-interest or fear of punishment but because they believe they ought to obey.³⁴ An institution might have authority granted by law or government but lacks sociological legitimacy if it does not enjoy popular support. Emblematic features of democratic courts such as judicial independence, judicial review, and separation of powers bolster sociological legitimacy by providing a functional, time-tested framework that invokes respect-worthiness and acceptance.³⁵ Sociological legitimacy is not static. It may ebb or rise depending on a particular time or action of the judiciary.³⁶ It is also not

799–801 (2001) (arguing that the U.S. Supreme Court's decisions in the controversial *Insular Cases* garnered support thanks to the political branches' prior consent).

32. FALLON, *supra* note 3, at 21; *see also* Fallon, *supra* note 5, at 1794–1802. Political scientists Thomas Risse and Eric Stollenwerk used slightly different, though similar, categories in characterizing judicial legitimacy: empirical (deriving from social acceptance), normative (deriving from normative principles), and legal (deriving from existing law). *See* Risse & Stollenwerk, *supra* note 20, at 2.

33. FALLON, *supra* note 3, at 22.

34. *Id.*; *but see* Hyde, *supra* note 29, at 380–87 (questioning the role of law and legal institutions in Weber's concept of legitimacy).

35. *See* U.S. AGENCY FOR INT'L DEV., GUIDANCE FOR PROMOTING JUDICIAL INDEPENDENCE AND IMPARTIALITY 97 (2002) (“[I]n a democratic system the same legitimacy of the judge’s role depends not only on being impartial but also on appearing impartial and independent.”); *id.* at 102 (noting that Latin America’s “sorry history [of judicial dependency] weakened whatever public legitimacy the judiciary might have enjoyed, regardless of its institutional strength”); *see also* WORLD BANK, LEGAL AND JUDICIAL REFORM: STRATEGIC DIRECTIONS 94 (2003) (“[I]t is essential to bolster the legitimacy of law as a means to provide confidence in the security of investments.”).

36. The U.S. Supreme Court, for example, suffered continued attacks on its legitimacy after controversial decisions like *Bush v. Gore*, 531 U.S. 98 (2000), and *Roe v. Wade*, 410 U.S. 113 (1973). *See* Fallon, *supra* note 5, at 1791–92, 1815–38 (analyzing the debates on the Court’s legitimacy surrounding these opinions). Other scholars, however, found that the U.S. Supreme Court enjoyed such ironclad legitimacy that *Bush v. Gore* hardly made a dent in its general reputation. *See* James Gibson et al., *The Supreme Court and the US Presidential Election of 2000: Wounds, Self-Inflicted or Otherwise*, 33 BRITISH J. POL. SCI. 535, 535 (2003) (noting that the Court’s “reservoir of good will” enabled it to weather the storm created by the presidential election and that survey evidence found “little if any diminution of the Court’s legitimacy in the aftermath of *Bush v. Gore*, even among African Americans.”).

uniform: different segments of the public, be it groups or individuals, may hold differing levels of trust in and opinions about courts.³⁷

Legal legitimacy, by contrast, roots its persuasion in law and legal norms, starting with a country's highest legal document—often its constitution.³⁸ Sociological and legal legitimacy share a symbiotic relationship. On the one hand, legal legitimacy is dependent on sociological legitimacy: “The [U.S.] Constitution is law because it is accepted as such.”³⁹ On the other hand, legality gives rise to sociological persuasion. U.S. judges, for example, benefit from what scholars called “the myth of legality”—the belief that “cases are decided by application of legal rules formulated and applied through a politically and philosophically neutral process of legal reasoning.”⁴⁰ The act of writing and publishing judicial opinions, in which judges conduct legal reasoning, interpret the law, and lay out the decision-making process, enhances transparency and, with it, judicial legitimacy.⁴¹ But myth notwithstanding, judicial institutions are far from being politics-proof.⁴² As recent events have shown, politics play an often-determinative role in U.S. Supreme Court nomination, blockage, and appointment.⁴³ Judges on lower courts are either appointed by political leaders or elected—both processes intimately involve politics. Social science researchers have demonstrated

37. See FALLON, *supra* note 3, at 22–23; see also Monica Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 *YALE L. J.* 2054, 2070–72 (2017) (summarizing empirical studies that documented African American communities' deep distrust of courts and the criminal justice system).

38. FALLON, *supra* note 3, at 20–46. Definitions in dictionaries tend to narrowly focus on this aspect of legitimacy. See BLACK'S LAW DICTIONARY 732 (7th ed. 1999) (describing legitimacy as “lawfulness”); OXFORD ENGLISH DICTIONARY (ed. 1961) (describing the concept as “the condition of being in accordance with law or principle”).

39. Fallon, *supra* note 5, at 1848 (attributing the original idea to legal philosopher H.L.A. Hart in *THE CONCEPT OF LAW* (2d ed. 1994)). In this classic work, Hart proposed the concept of “rules of recognition,” which guided society on the validity and hierarchy of other rules. HART, *supra*, at 116 (“[R]ules of recognition specifying the criteria of legal validity and its rules of change and adjudication must be effectively accepted as common public standards of official behaviour by its officials.”). See also Scott J. Shapiro, *What is the Rule of Recognition (And Does it Exist?)*, in *THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION* 235 (Matthew Adler & Kenneth Himma eds., 2009).

40. John M. Scheb II & William Lyons, *The Myth of Legality and Public Evaluation of the Supreme Court*, 81 *SOC. SCI. Q.* 928, 929 (2000).

41. See LASSER, *supra* note 16, at 62–64 (noting that in the American judicial model, judicial opinions act as a single discursive space to integrate both legal formalism and policy).

42. See GEYH, *supra* note 22, at 23–50 (documenting a historical account of how the U.S. federal courts strived to build relationship with Congress to overcome institutional constraints on the judiciary); Stephen B. Burbank, *Judicial Independence, Judicial Accountability, and Interbranch Relations*, 95 *GEO. L. J.* 909, 909 (2006) (“[S]uccessful interbranch relations require the institutional judiciary to avoid the attitudes and techniques of contemporary politics, but not to avoid politics[.]”).

43. See, e.g., Sarah Lyall, *Liberals are Still Angry, but Merrick Garland has Reached Acceptance*, *NYTIMES* (Feb. 19, 2017), <https://www.nytimes.com/2017/02/19/us/politics/merrick-garland-supreme-court-obama-nominee.html> [<https://perma.cc/5FAX-LJQZ>]; *Donald Trump's judicial appointments may prove his most enduring legacy*, *ECONOMIST* (Jan. 13, 2018), <https://www.economist.com/united-states/2018/01/13/donald-trumps-judicial-appointments-may-prove-his-most-enduring-legacy> [<https://perma.cc/F35G-4SH2>].

that judges' political views matter to varying degrees in the decisions they make.⁴⁴

Finally, moral legitimacy requires a normative judgment on rights and wrongs. Instead of asking what people actually think or whether judges correctly interpret the law, it inquires into what people *ought* to think or do, and whether courts are morally justified in coercing compliance.⁴⁵ Critics of *Roe v. Wade*, for example, often condemn the decision as illegitimate in both a legal and moral sense—legally illegitimate on the basis that the U.S. Supreme Court fashioned rights not expressly articulated in the U.S. Constitution, and morally illegitimate because of critics' objections to abortion rights.⁴⁶ Democratic regimes generally base their moral legitimacy of governance on "certain principles of regard for the freedom and equality of citizens."⁴⁷ Democratic decision-making processes—elections—constitute an important source of moral and political legitimacy.⁴⁸ Likewise, substantive justice and procedural fairness both contribute to a regime's moral legitimacy.⁴⁹ While some moral norms arguably have achieved universal status,⁵⁰ moral standards are, for the most part, intensely idiosyncratic.⁵¹ To be clear, acknowledging the idiosyncratic nature of morality—recognition that moral and ethical norms are deeply rooted in their own time, space, and culture—does not necessarily equate to the rejection of universal rights.

The three strands of sociological, legal, and moral judicial legitimacy are interrelated. In fact, it is not always possible to tease them apart.⁵² Some features of democratic courts interlay with multiple strands and could pull in both directions. Judicial elections, for example, can both boost and detract from sociological legitimacy due to conflicting optics associated with judicial campaigns.⁵³ Likewise, landmark decisions such as *Roe v. Wade* and *Bush v. Gore* pushed and pulled all strands of the U.S. Supreme Court's

44. See Jeffrey Rachlinski, Andrew Wistrich & Chris Guthrie, *Judicial Politics and Decisionmaking: A New Approach*, 70 VAND. L. REV. 2051, 2051–56 (2017) (summarizing studies on judicial politics and noting the diverging viewpoints between researchers and judges on the impact of politics on judicial decisionmaking); *but see id.* at 2056–57 (finding, through a multi-state experiment on state and federal judges, that politics has only a modest influence on the day-to-day decisions of trial judges).

45. See FALLON, *supra* note 3, at 22–23.

46. Fallon, *supra* note 5, at 1821 nn.145–47.

47. Frank I. Michelman, *Legitimacy and Autonomy Values of the Speaking State*, 79 BROOK. L. REV. 985, 986 (2014); *see also* ALAN RYAN, *THE MAKING OF MODERN LIBERALISM* 23–38 (2012).

48. See FALLON, *supra* note 3, at 29.

49. *Id.*

50. The Universal Declaration of Human Rights, now seventy years young, epitomizes those values. For a discussion on the moral framework of universal human rights and pushbacks, see generally Eric Blumenson, *Four Challenges Confronting A Moral Conception of Universal Human Rights*, 47 GEO. WASH. INT'L L. REV. 327 (2015).

51. See Torben Spaak, *Moral Relativism and Human Rights*, 13 BUFF. HUM. RTS. L. REV. 73, 73–77 (2007) (reviewing various strands of moral relativism and juxtaposing them with the universality theory of human rights).

52. See Hyde, *supra* note 29, at 382–83.

53. See Woodson, *supra* note 21, at 24–46.

legitimacy, depending on one's political and moral viewpoints.⁵⁴ It is worth noting, as Fallon took pain to emphasize in his book, that legitimacy is not the same as correctness, whether legally or morally.⁵⁵ One can retain respect for the judiciary even when one vehemently disagrees with the court's decisions—as long as certain conditions are met.⁵⁶

The framework of judicial legitimacy above clarifies the dynamics of democratic courts and provides an excellent launching point from which to expand the analytical exercise to courts in authoritarian settings. At the same time, its premises of independent, capable courts do not fully fit with the often-limited capabilities of authoritarian courts, many of which lack the independence and struggle to build institutional capacity. Furthermore, the lack of discussion of politics and its implications for courts likewise does not reflect the situations of many authoritarian courts where politics plays an outsized role in influencing judicial behavior. To remedy these shortcomings, the following section extends Fallon's framework to courts in authoritarian regimes by proposing a fourth dimension, namely *interbranch legitimacy*.

B. *In Authoritarian Settings*

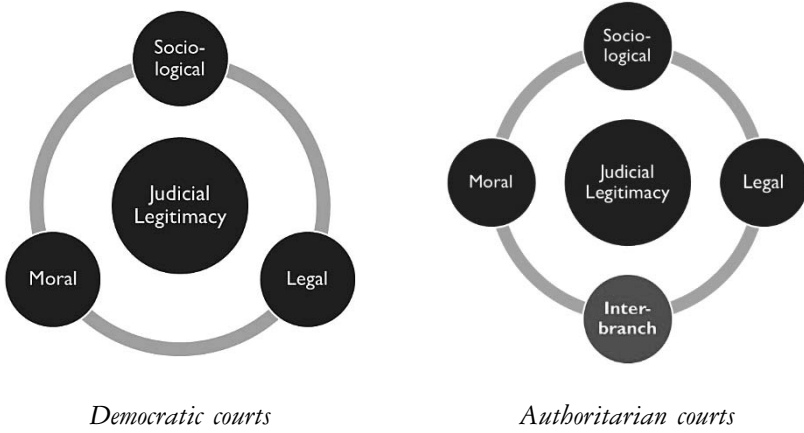
This Part summarizes existing literature on courts in authoritarian regimes and extends the reach of this literature to the question of judicial legitimacy in authoritarian settings. I argue that in addition to the tripartite framework of sociological-moral-legal legitimacy, an important source of judicial legitimacy for courts in authoritarian settings is judicial standing vis-à-vis other political institutions on which courts depend for, among other things, resources and job security. I call this *interbranch legitimacy* and expound this concept below.

54. See *supra* note 36 and accompanying text.

55. FALLON, *supra* note 3, at 10–11, 127–30.

56. These conditions include characteristics of principled decision-making: the court's staying within the bounds of prevailing law, rendering reasonable practical and moral judgments, and supporting such judgments with good-faith arguments. *Id.*

Figure 1: Judicial legitimacy in democratic courts and authoritarian courts



In recent years, during a period that has seen a global resurgence of authoritarianism,⁵⁷ a new wave of scholarship has explored the complex relationships between courts and governments in authoritarian settings.⁵⁸ Moving away from the image of these courts as powerless, passive actors, researchers have showed that the judiciary can be instrumental in sustaining authoritarian legality.⁵⁹ Among other functions, courts can bolster regime legitimacy, facilitate social control, drive economic reforms, monitor fractioning bureaucrats, and win favors from private investors and the international community.⁶⁰ The need for a functioning judiciary and the political desire to control it creates a restrained space, in which courts both facilitate and resist governmental encroachment.⁶¹ Some courts, such as Egypt's Supreme Constitutional Court, succeeded at becoming a forum for rights protection, though it was eventually dismantled by the regime.⁶² Further, as some scholars have argued, courts are pragmatic institutions, and adherence to forces such as politics and populism might well be motivated by institutional self-interest to strengthen long-term status and authority rather than

57. See, e.g., *AUTHORITARIANISM GOES GLOBAL* 4–5 (Larry Diamond et al. eds., 2016).

58. See generally GINSBURG & MOUSTAFA, *supra* note 6; Peter Solomon, *Courts and Judges in Authoritarian Regimes*, 60 *WORLD POLITICS* 122, 122–45 (2007).

59. See GINSBURG & MOUSTAFA, *supra* note 6, at 4–11.

60. See *id.*; Solomon, *supra* note 58, at 128–29.

61. See, e.g., Raul Sanchez Urribarri, *Courts between Democracy and Hybrid Authoritarianism: Evidence from the Venezuelan Supreme Court*, 36 *LAW & SOC. INQUIRY* 854 (2011) (documenting the expansion and contraction of Venezuelan judicial contestation space under Chavez's rule); Tamir Moustafa, *Law versus the State: The Judicialization of Politics in Egypt*, 28 *LAW & SOC. INQUIRY* 883 (2003) (documenting the rise and fall of Egypt's Supreme Constitutional Court); TAMIR MOUSTAFA, *THE STRUGGLE FOR CONSTITUTIONAL POWER: LAW, POLITICS, AND ECONOMIC DEVELOPMENT IN EGYPT* (2007) (same).

62. See Moustafa, *supra* note 61, at 884–86 (arguing that Egypt's Supreme Constitutional Court was able to pursue a progressive agenda by selectively accommodating the regime's core political and economic interests, until judicial constraint on the regime became too great).

either obedience or ideology.⁶³ But as long as these courts operate in a “dualistic” or “bifurcated” system,⁶⁴ where, as one scholar put it, “professional justice serves the vast majority of ordinary cases, while politicized justice caters to a range of exceptional cases,” judicial legitimacy suffers from serving conflicting interests.⁶⁵

While scholars studying authoritarianism have focused on courts and law as legitimation sources for governing regimes,⁶⁶ few have yet explored how authoritarian courts themselves build legitimacy. As with democratic courts, sociological, moral, and legal legitimacy matter.⁶⁷ However, unlike democratic courts, judges in authoritarian regimes often lack institutional protection such as life tenure and depend on regime leaders for their job security, livelihood and resources to run day-to-day court operations.⁶⁸ Fallon’s insightful analytical framework on democratic judicial legitimacy thus needs an additional dimension to capture the complex relationship between courts and authoritarian political actors. I call this *interbranch legitimacy*, defined broadly as the judiciary’s institutional standing in relation to other political actors with which it interacts and upon which it depends.

Put simply, interbranch legitimacy is about judicial actions to elevate executive and legislative actors’ views of courts. The judiciary’s relationship with other governmental branches also matters a great deal in non-authoritarian countries; but there, judicial standing—often well supported by the other three “legs” of legitimacy—has been so ubiquitous that a mutually constructive, if not amicable, relationship is often taken for granted.⁶⁹ But even where the courts generally enjoy a high level of political and popular

63. See Taisu Zhang, *The Pragmatic Court: Reinterpreting the Supreme People’s Court of China*, 25 COLUM. J. ASIAN L. 1 (2012); ALEXEI TROCHEV, JUDGING RUSSIA: THE ROLE OF THE CONSTITUTIONAL COURT IN RUSSIAN POLITICS 1990-2006 285–94 (2008) (terming this strategy “judicial zigzagging”).

64. See Hendley, *supra* note 9, at 241–62 (characterizing Russia); STERN, *supra* note 9, at 229–30 (2013) (characterizing Russia, China, and Singapore); Stern, *supra* note 9, at 236 (characterizing China).

65. Fu Hualing & Jason Buhi, *Diverging Trends in the Socialist Constitutionalism of the People’s Republic of China and the Socialist Republic of Vietnam*, in SOCIALIST LAW IN SOCIALIST EAST ASIA 135, 152 (Fu Hualing et al. eds., 2018); see also Stern, *supra* note 9, at 236.

66. See, e.g., Susan H. Whiting, *Authoritarian Rule of Law and Regime Legitimacy*, 50 COMP. POL. STUD. 1907 (2017) (studying how China’s legal construction project shapes citizens legal consciousness and enhances regime legitimacy); MARK FATHI MASSOUD, LAW’S FRAGILE STATE (2013) (studying how legal orders develop and contribute to authoritarian rule in war-torn Sudan); JOTHIE RAJAH, AUTHORITARIAN RULE OF LAW (2012) (studying how Singapore uses law and legal discourse to dismantle political liberalism and perpetuate an illiberal form of political order).

67. See generally GINSBURG & MOUSTAFA, *supra* note 6 (noting how authoritarian regimes use courts to bolster and entrench regime legitimacy); Whiting, *supra* note 66, at 1907–08 (same).

68. See Solomon, *supra* note 58 (noting institutional features that impede judicial independence in autocratic regimes). It is worth pointing out that courts in democratic settings also depend on political leaders for funding. However, unlike in authoritarian realms, constitutional constraints as well as the optics of budgetary retaliation might prove too damaging. See, e.g., Michael C. Dorf, *Fallback Law*, 107 COLUM. L. REV. 303, 331 (2007) (“For example, Congress probably has the power to cut the federal courts’ budget for paying law clerks and secretaries, but a serious constitutional question (whether or not justiciable) would be raised were Congress to cut such funding in retaliation for an unpopular judicial decision.”).

69. See *supra* notes 22, 42 and accompanying text.

support such as the U.S.,⁷⁰ the construction of positive interbranch relations does not just happen in a vacuum. Rather, it is the fruit of a long, negotiated, and deliberate process.⁷¹ In authoritarian settings, where courts lack strong popular support and institutional capacity, political good will and respect is crucial for judicial survival.⁷² As noted above, courts in authoritarian regimes often depend on the government for resources, budgets, enforcement, and appointments. The more political goodwill and respect—interbranch legitimacy—a court cultivates, the higher political and institutional standing it secures within the bureaucratic machine, thereby enhancing judicial respect-worthiness vis-à-vis other institutions all vying for authority.

But what about judicial independence? How much independence could a court retain when it relies on political actors as much as courts in authoritarian contexts often do? If courts routinely engage in politics, what could prevent judges from holding kangaroo courts and merely deferring to political whims in all adjudications? While it has been widely documented that many courts in authoritarian regimes are not independent,⁷³ it is equally true that not all authoritarian regimes are alike. Just as democratic regimes differ in their operations and institutional logics, authoritarian countries also range from those with little regard for the rule of law to those that have invested considerable resources and political will into professionalizing and modernizing the judiciary.⁷⁴ Judicial independence, as a leading scholar

70. See, e.g., Gibson & Nelson, *supra* note 5, at 204–15 (summarizing social science studies on the level of support enjoyed by the U.S. Supreme Court).

71. See generally Russell R. Wheeler & Robert A. Katzmann, *A Primer on Interbranch Relations*, 95 GEO. L.J. 1155 (2007) (summarizing instances of strained relationship between the federal courts and Congress and the various ways in which the two interacted). For historical accounts of how the U.S. Supreme Court strategically built its standing, see GEYH, *supra* note 22, at 24–51 (documenting how the U.S. federal courts strived to build relationship with Congress to overcome institutional constraints on the judiciary); Vignarajah, *supra* note 31, at 799–801 (documenting the political efforts and processes to garner support for the Court's controversial *Insular Cases*).

72. See, e.g., Moustafa, *supra* note 61, at 884–86, 921–26 (documenting how Egypt's Supreme Constitutional Court, once an active rights-protection forum for petitioners, lost favor with the Mubarak regime and was systematically crippled).

73. See Helmke & Rosenbluth, *supra* note 22, at 355–58 (summarizing the literature documenting the lack of judicial independence and/or accountability in Latin America, Africa, and Asia); see also *supra* note 58 and accompanying text (noting institutional features that impede judicial independence in autocratic regimes).

74. See, e.g., Helmke & Rosenbluth, *supra* note 22, at 355–58 (documenting how various authoritarian regimes differed in their institutional treatment of courts); GINSBURG & MOUSTAFA, *supra* note 6, at 10–20 (same). The judiciary in China, as one example, has long grappled with the issue of independence as China engaged in decades-long legal reforms. See generally Jerome Alan Cohen, *The Chinese Communist Party and "Judicial Independence": 1949–1959*, 82 HARV. L. REV. 967 (1969); Ling Li, *The Chinese Communist Party and People's Courts: Judicial Dependence in China*, 64 AM. J. COMP. L. 37 (2016); see also JUDICIAL INDEPENDENCE IN CHINA: LESSONS FOR GLOBAL RULE OF LAW PROMOTION (Randall Peerenboom ed., 2008). While Chinese and Vietnamese judiciaries appear to share many institutional features at first blush, a comparative analysis of the two is beyond the scope of this Article. Suffice to note that they differ in at least one key institutional feature: the existence of the Party Political-Legal Committees, which supervises Chinese courts. See Li, *supra*, at 51–59 (studying the institution and evolution of China's Political-Legal Committees). Such a centralized, expansive institution does not

aptly noted half a decade ago, is not a binary variable but, rather, a continuum.⁷⁵ It is too simplistic to assume homogeneous consensus of thoughts and ideologies even in the direst dictatorship.⁷⁶ While a hierarchy of power exists, concerns for autocratic instability likely drive a rational court to cultivate relations with more than just the temporal powerholders.⁷⁷

Interbranch legitimacy can either boost or detract from other vectors of judicial legitimacy. It moves in sync with legal legitimacy where political directives, transmitted from political actors to courts, are substantiated by black-letter laws. But it moves against the grain where laws act as a symbol rather than concrete substance—a familiar example is the globalization of rights readily available in autocratic constitutions, ranging from freedom of expression to freedom of association.⁷⁸ Political reality rarely allows manifestation of these rights, and, as a result, autocratic constitutions lose their legality and are often regarded as “aspirational.”⁷⁹ Similarly, interbranch legitimacy can have a symbiotic interplay with moral legitimacy. In his analysis, Fallon distinguishes between “ideal” and “minimalist” moral legitimacy—the former a perfection to strive for, the latter a minimal threshold that an institution must meet to gain sufficient support and be justified in its authority.⁸⁰ Institutional support from more powerful players can help courts achieve the threshold level of moral legitimacy needed. At the same time, as noted above, a characteristic feature of autocratic regimes—the “dual” state—chips away at the judiciary’s moral and legal legitimacy as the law it upholds only “matters sometimes, but not always.”⁸¹ Finally, interbranch legitimacy can likewise pull either way with sociological legitimacy. Political closeness with an unpopular regime can weaken any veneer of judicial independence and the integrity of the adjudication process. Yet, where the courts suffer from weak technical skills, supervision

exist in Vietnam—arguably allowing the judiciary more venues and maneuvering room regarding interbranch relations.

75. Cohen, *supra* note 74, at 972 (“Each country’s political-judicial accommodation must be located along a spectrum that only in theory ranges from a completely unfettered judiciary to one that is completely subservient. The actual situation in all countries lies somewhere in between.”).

76. For an analysis of the pluralistic nature of government even in Nazi Germany, see FRAENKEL, *supra* note 2.

77. At least one study in political science has documented this strategic behavior. See Gretchen Helmke, *The Logic of Strategic Defection: Court-Executive Relations in Argentina Under Dictatorship and Democracy*, 96 AM. POL. SCI. REV. 291, 291–303 (finding that the Argentinian Supreme Court began to “strategically defect” against the fading incumbent regime to avoid punishment from successor regimes).

78. See Mila Versteeg & Benedikt Goderis, *The Diffusion of Constitutional Rights*, 39 INT’L REV. L. & ECON. 1 (2014) (documenting the “diffusion” of constitutional rights).

79. See Tom Ginsburg & Alberto Simpser, *Introduction to CONSTITUTIONS IN AUTHORITARIAN REGIMES* 1, 8 (Tom Ginsburg & Alberto Simpser eds., 2013) (“The mere fact, however, that rights are not observed in practice does not mean that the constitution is playing a window-dressing function. . . . Constitutions are aspirational documents that can serve to motivate people to build a future society.”).

80. See Fallon, *supra* note 5, at 1798–1801.

81. Stern, *supra* note 9, at 236 (quoting Kathryn Hendley, *Resisting Multiple Narratives of Law in Transition Countries: Russia and Beyond: Narratives of Law in Transition Countries*, 40 LAW & SOC. INQUIRY 531, 547 (2015)); see also *supra* notes 64–65 and accompanying text.

and support from the executive branch may be welcomed by the public in order to ameliorate an otherwise inefficient judiciary.

How might judicial legitimacy function in practice in an autocratic setting? The next Part introduces Vietnam as a case study and applies this expanded framework of judicial legitimacy to its highest court's jurisprudence. But it first deals with a question that foreign and comparative law scholars often face: why study the laws of a foreign country—even worse, a small, seemingly insignificant one?

II. VIETNAMESE COURTS AS A CASE STUDY

A. *Why Study a “Small”⁸² Country*

This Article echoes the sentiments of comparative law scholars who advocate for the method of legal “ethnography”: like cancer patients, “[t]he scholar, the citizen, and the politician typically care about [legal] orders one at a time, as individuals care about their own life trajectories.”⁸³ While a high-level view of a multivariate cross-country model can and does provide useful information about the state of the world at large, fine-grain case studies excel at detecting “the logics of particular contexts as a way of illuminating complex interrelations among political, legal, historical, social, economic, and cultural elements.”⁸⁴ Features that at first blush look similar can take on wholly different lives in different contexts; and institutions that diverge on the surface can end up producing like results due to shared underlying logics.⁸⁵ In the familiar words of legal and anthropological scholarship, “thick descriptions”⁸⁶—contextualization and detailed narrative in

82. “Small” is a relative term. With a population of over 95 million people, Vietnam is the fifteenth most populous country in the world. WORLD BANK DATA, <https://data.worldbank.org/indicator/SP.POP.TOTL> [<https://perma.cc/F4EB-5V52>] (2017 data). One of the last surviving socialist states and a natural comparative case to the rising power of China, it also posits theoretical, historical, and geopolitical significance. For examples of such comparative work, see SOCIALIST LAW IN SOCIALIST EAST ASIA, *supra* note 65.

83. Kim Lane Scheppele, *Constitutional Ethnography: An Introduction*, 38 LAW & SOC'Y REV. 389, 390 (2004).

84. *Id.*

85. Here are just a few examples: (1) Countries with shared pasts and institutions may develop diverging paths: Hungarian and Russian constitutional courts, though sharing a long history of Communism and drastic post-Communist reforms, took on entirely different processes of internationalization due to not only internal politics but also the judges and judicial staffs' foreign language abilities, willingness to socialize, and interactions with other European judges and institutions. *See id.* at 397–98. (2) Countries with different legal systems may end up sharing a key judicial feature: Japanese judges, though operating in a civil law system with no *stare decisis*, scrupulously follow precedents by higher courts—even more so than their common law judicial counterparts—due to the severe punishment that can be handed down from the Japanese judiciary's bureaucratic system. *See* Frank K. Upham, *Political Lackeys or Faithful Public Servants? Two Views of the Japanese Judiciary*, 30 LAW & SOC. INQUIRY 421, 453 (2005) (noting that “even readers more familiar with the bureaucratic judiciaries of the civil law world will be surprised by the personnel manipulation and unrelenting supervision of the Japanese judicial system”).

86. *See* Clifford Geertz, *Thick Description: Toward an Interpretive Theory of Culture*, in THE INTERPRETATION OF CULTURES 3 (1973); Naomi Mezey, *Law as Culture*, 13 YALE J.L. & HUMAN. 35, 58 (2001)

order to understand the meanings of law—allow us to both “see particularly and think generally.”⁸⁷ By learning a great deal of details about a particular place—here, Vietnam—this Article aims to contribute to a richer and more nuanced understanding of the nebulous concept of judicial legitimacy in authoritarian contexts, both as a legal principle and a practical discourse. Put differently, a case study can shed light on the *logics* of judicial actions as animated by authoritarian contexts and detect patterns and traces that may be visible elsewhere. By adding to a “repertoire of thematization,” this Article contributes to comparative law theory in a way that breaks free of legal nationalism.⁸⁸

The Article next turns to the case study of Vietnam, starting with a background of its judiciary and general legal system. Vietnam is a particularly fitting case to illustrate the analytical framework of courts in authoritarian regimes because, as demonstrated in the following sections, its judiciary epitomizes the uneasy relationship between law and politics. Unlike some regimes which elect to disregard law altogether,⁸⁹ Vietnam belongs to a group of countries for whom law plays both a useful and potentially threatening role.⁹⁰ A manifestation of such duality, the courts at once have heralded a decade of progressive legal reforms and professionalization, while toeing the lines in political cases involving social activists, dissidents, and sensitive economic matters. The unprecedented availability of court documents⁹¹ allows a window into this dynamic through the lens of judicial and interbranch legitimacy.

B. *The Modern Vietnamese Courts: A Brief History & Reform Efforts*

The Vietnamese judiciary has both a long and short history—long because formal adjudication has existed in Vietnam since its feudal dynasties;⁹² short because the courts have gone through several abrupt reincarnations in the last century through colonialism, war, socialism, and

(employing thick descriptions as a method to illustrate “the ways in which specific cultural practices or identities coincide or collide with specific legal rules or conventions, thereby altering the meanings of both.”).

87. Scheppele, *supra* note 83, at 401–02.

88. *Id.* at 391–93.

89. War-torn states, for example, are archetypal of such cases. See MASSOUD, *supra* note 66, at 3. But even a country plagued by destruction such as Sudan can utilize legal orders to entrench authoritarian rule. *Id.* at 1–3.

90. See *supra* notes 64–65 and accompanying text.

91. See *supra* notes 11–13 and accompanying text.

92. For a short overview of Vietnamese courts and feudal apparatus prior to the arrival of French colonialism, see Phan Diem, *Court Organization in Feudal Vietnam During the 10th to 15th Century*, VIET. L. & LEGAL F. (Feb. 25, 2011), <http://vietnamlawmagazine.vn/court-organization-in-feudal-vietnam-during-the-10th-15th-century-period-4346.html> [<https://perma.cc/N8HQ-LYEG>]; Trung Anh, *Legal Thought of Vietnam Feudalist Class*, VIET. L. & LEGAL F. (Feb. 16, 2011), <http://vietnamlawmagazine.vn/legal-thought-of-vietnam-feudalist-class-4389.html> [<https://perma.cc/7JVT-QEXY>].

market-socialist reforms.⁹³ Between 1858 and 1945, Vietnam was divided into three territories under French colonial rule, each with its own governance framework and administration.⁹⁴ Colonial administrators introduced and incorporated French legal systems into each territory at varying pace, resulting in an uneven development of the judicial and legal profession in each area.⁹⁵ Between 1945 and 1975, as World War II came to an end and the colonial era receded, Vietnam was divided into two territories—North and South—each with its own legal and judicial system.⁹⁶ In the South, French colonial courts transitioned to joint French-Vietnamese courts (1945–1954), then to a short-lived American-inspired judicial system (which, in its later years, even included the inception of a Supreme Court composed of nine justices).⁹⁷ In the North, as the young Ho Chi Minh government embarked on a quest of nation-building, judicial independence became a key issue of contention between two competing schools of thought.⁹⁸ The more liberal, Communist-supporting scholars advocated for courts' independence from political directives as part of their vision of law as not only an instrument of state-building but also a key mechanism to protect vulnerable populations and advance justice.⁹⁹ The more conservative, socialist-oriented political cadres, by contrast, saw law as an oppressive tool of colonialism's class warfare and that, to break law's repressive use, it must be subjected to the will of the newly free Vietnamese people as manifested through the policies of the new government.¹⁰⁰

By the mid-1950s, the young Communist-led Democratic Republic of Vietnam had adopted the hardline socialist point of view.¹⁰¹ The court system it constructed closely hewed to Soviet courts' architecture and founda-

93. For a summary, see Pip Nicholson, *Renovating Courts: The Role of Courts in Contemporary Vietnam*, in *ASIAN COURTS IN CONTEXT* 528, 528–65 (Jiunn-rong Yeh ed., 2014); Nicholson, *supra* note 15, at 159–170.

94. For a summary of the diverse and uneven development of the Vietnamese legal system during the colonial period, see Trang (Mae) Nguyen, *From Fragmentation to Partial Cohesion: Vietnam's Developing Legal Profession* 10–15 (Mar. 1, 2019) (unpublished manuscript) (on file with author).

95. *Id.*

96. See Nicholson, *supra* note 93, at 529.

97. See MINISTRY OF JUSTICE, REPUBLIC OF VIETNAM: LEGAL SYSTEM 13–31, 41–67 (1967); Embassy of Vietnam, *Toward representative government: A Supreme Court is Elected*, VIET. BULL. (undated) (“With the court reform of October 1968 the central government became fully constituted in the executive, legislative and judicial branches, giving the Vietnamese their first taste of the democratic concept of checks and balances.”).

98. For a detailed summary of this debate, see Tuong Vu, “It’s Time for the Indochinese Revolution to Show Its True Colors”: *The Radical Turn of Vietnamese Politics in 1948*, 40 J. ASIAN STUD. 519, 519–42 (2009).

99. *Id.* Leaders of this school of thought included Vu Trong Khanh and Vu Dinh Hoe, who served as the first two Ministers of Justice in the Democratic Republic of Vietnam (DRVN) from 1945 to 1960, at which point the Ministry of Justice was effectively disbanded for twenty years. See Nguyen, *supra* note 94, at 20–23.

100. Vu, *supra* note 98. The spokesman for this school of thought was Quang Dam, then editor of the *Su That* [Truth] Gazette—a news outlet that closely reflected DRVN ideologies. *Id.*

101. *Id.*

tion, though the end products differed remarkably from Soviet courts.¹⁰² The defeat of the liberal school of thought was evidenced in all aspects of Vietnam's legal and social life at the time, spanning from the incapacitation of the Ministry of Justice, oppression of the progressive *Nhan Van-Giai Pham* literary movement (a sister movement to China's One Hundred Flowers campaign), and the harsh land reform program.¹⁰³ In the 1960s and early 1970s, as North Vietnam was mired in warfare with the United States, courts in the northern territories were largely rudimentary and mobile, with emphasis on popular justice and moral reasoning.¹⁰⁴ In 1975, as American forces withdrew from Vietnam and the two halves unified, the northern socialist court system engulfed the southern courts.¹⁰⁵

As one scholar astutely observed, the Vietnamese judiciary today is “both [a] legal and political institution.”¹⁰⁶ Both bound by law and accountable to the one-party State, it “must resolve matters in accordance with a complex hierarchy of influences, only one of which is law.”¹⁰⁷ Vietnam's 96 million people today live under a socialist legal system led by a single ruling party, the Communist Party of Vietnam (“CPV”). The CPV's supremacy has been enshrined in Vietnam's constitutions since 1980—a “basic norm” that undergirds the country's political and legal systems.¹⁰⁸ During the latest round of constitutional amendments in 2013, passionate debates centered on this norm, including official proposals to remove this political supremacy clause and, instead, make clear the supremacy of the Constitution over the CPV.¹⁰⁹ These proposals remarkably came from a wide range of actors, including current and former high-ranking officials from the legislative organ—the National Assembly—and socio-political organizations such as the Vietnam Fatherland Front.¹¹⁰ Though these proposals did not succeed, the existence of discursive debates signified a milestone in Vietnam's legal discourse, extending to other fundamental areas such as human rights, land ownership, the economy, and the role of the judiciary.¹¹¹

102. See generally PIP NICHOLSON, *BORROWING COURT SYSTEMS: THE EXPERIENCE OF SOCIALIST VIETNAM* (2007) (detailing the transplant of the Soviet court system to North Vietnam and attributing its divergence in implementation to different legal cultures).

103. For a detailed and well-praised historical account of this period, see CHRISTOPHER GOSCHA, *THE PENGUIN HISTORY OF MODERN VIETNAM* 371–401 (2017); see also Peter Zinoman, *Nhan Van Giai Pham on Trial: The Prosecution of Nguyen Huu Dang and Thuy An*, 11 J. VIET. STUD. 188 (2016) (uncovering a judicial account of the political trial).

104. See Nicholson, *supra* note 93, at 529–30.

105. See Nguyen, *supra* note 94.

106. Nicholson, *supra* note 93, at 528.

107. *Id.* at 562.

108. For a nuanced treatment of the legal discourse on this norm of political supremacy, see generally Bui Hai Thiem, *Constitutionalizing Single Party Leadership in Vietnam: Dilemmas of Reform*, 11 ASIAN J. COMP. L. 219 (2017).

109. *Id.* at 223–30.

110. *Id.*

111. See *id.*; Pham Duy Nghia, *From Marx to Market: The Debates on the Economic System in Vietnam's Revised Constitution*, 11 ASIAN J. COMP. L. 263 (2017) (detailing the constitutional debate on the economy); Giao Cong Vu & Kien Tran, *Constitutional Debate and Development on Human Rights in Vietnam*, 11

Since the turn of the century, the Vietnamese judiciary has undergone several waves of reforms. The official slogan—“right law, right crime, right culprit to prevent miscarriage of justice and to protect the State and the people’s interests”—hints at the wrongful convictions and corruption scandals that have plagued the country’s legal system.¹¹² A law in 2002 overhauled the judicial structure, decoupling it from underneath the Ministry of Justice (reinstated in the 1980s) and from administrative oversight by provincial governments.¹¹³ Motivated at least in part by public fallout from a major corruption scandal,¹¹⁴ the law sought to free courts from the stronghold of local politics by centralizing judicial administration under the Supreme People’s Court.¹¹⁵ The court system, however, remained intertwined with the Supreme People’s Procuracy and the powerful Ministry of Public Security.¹¹⁶ While “judicial independence” was a buzzword during this wave of reform,¹¹⁷ Vietnam watchers cautioned that its meaning should not be conflated with the idea of separation of powers as understood in

ASIAN J. COMP. L. 235 (2017) (human rights); Toan Le, *Interpreting the Constitutional Debate Over Land Ownership in the Socialist Republic of Vietnam* (2012–2013), 11 ASIAN J. COMP. L. 287 (2017) (property rights); Lan Phuong Pham, *The Procuracy as a Subject of Constitutional Debate: Controversial and Unresolved Issues*, 11 ASIAN J. COMP. L. 309 (2017) (the procuracy).

112. For a sample of local and international news coverage on these issues, see *(National Assembly) Debates Wrongful Convictions*, VIETNAMNEWS (June 6, 2015), <https://vietnamnews.vn/politics-laws/271403/na-debates-wrongful-convictions.html#Kcp7LZhUoBFxw17j.97> [<https://perma.cc/DWW4-HDFV>]; Manh Quan, *Miscarriage of Justice in Vietnam Are Serious*, THANH NIEN NEWS (June 6, 2015), <http://www.thanhniennews.com/politics/miscarriages-of-justice-in-vietnam-are-serious-legislators-46321.html> [<https://perma.cc/B9Z8-XDWT>]; Mi Nguyen & Alex Dobuzinskis, *At Vietnam’s Biggest Corruption Trial, Some Skeptical Views*, REUTERS (Jan. 9, 2018), <https://www.reuters.com/article/us-vietnam-security-trial/at-vietnams-biggest-corruption-trial-some-skeptical-views-idUSKBN1EZ0E7> [<https://perma.cc/4TTJ-ZZ7E>].

113. Luat To Chuc Toa An Nhan Dan [2002 Law on the Organization of the People’s Court], Law No. 33/2002/QH10 (Apr. 2, 2002) (Viet.) [hereinafter 2002 Court Organization Law]. Prior to the enactment of this law, the administration of local courts, while formally under the Ministry of Justice, was effectively captured by provincial governments, who controlled judicial appointments. See Nicholson, *supra* note 93, at 531–33 (noting changes to the management of judicial personnel).

114. The scandal concerned the trial of Nam Cam (Truong Van Cam), a crime boss known as the Godfather of Vietnam. In 2003, together with over 150 other associates, he was tried and sentenced to death in the largest criminal prosecution in Vietnam’s history for the assassination of a rival, equally infamous gang boss. Because of Nam Cam’s extensive relationship with various government bodies, the case simultaneously became a high-profile corruption crackdown. Nam Cam’s co-defendants included members of local police and local courts, officials at the Ministry of Public Security, prosecutors, and two ousted members of the coveted Central Committee of Vietnam’s Communist Party. While state media heralded the case as a success in crime control and rooting out corruption, public opinion reflected outrage at the reach of institutional graft unveiled throughout the trial. A national news outlet, Phap Luat [Law] Magazine, published a 40-part detailed coverage of the trial. See, e.g., Hanh trinh tro thanh ong trum giang ho Sai Gon cua Nam Cam [Nam Cam’s rise to become Sai Gon’s mafia boss], PHAP LUAT [LAW MAGAZINE] (May 5, 2015).

115. 2002 Court Organization Law, *supra* note 113. See also Brian J.M. Quinn, *Vietnam’s Continuing Legal Reform: Gaining Control over the Courts*, 4 ASIAN-PAC. L. & POL’Y J. 431, 447–64 (2003) (analyzing the implications of the 2002 reforms on courts and procuracy); MARK SIDEL, *THE CONSTITUTION OF VIETNAM: A CONTEXTUAL ANALYSIS* 162–75 (2009) (same).

116. See SIDEL, *supra* note 115.

117. See Bo Chinh Tri [Politburo], Nghi Quyét 49-NQ/TW ve chien luoc cai cach tu phap den nam 2020 [Resolution 49-NQ/TW on legal reforms roadmap to 2020] (June 20, 2005).

Western legal traditions.¹¹⁸ Legislative debates around this time evinced that the restructuring of the court system was meant to address corruption and interference from local entrenchment, rather than an overhaul towards political liberalism.¹¹⁹

The 2013 constitutional amendment included several positive changes directed towards the judiciary: in particular judges and lay assessors¹²⁰ must remain independent; criminal defendants have the right to the presumption of innocence; and the courts should facilitate adversarial elements in adjudication.¹²¹ Enacted soon after the new constitutional amendment, the 2014 court reorganization law sought to professionalize the judiciary and remove it from local influence.¹²² While the system remains decidedly inquisitorial, the law mandated that courts ensure “parties’ rights to an adversarial system in adjudication,” though it leaves unclear what those elements are.¹²³ In the summer of 2017, the Supreme People’s Court introduced quasi-*stare decisis* status to certain cases, which lower courts are now mandated to cite in analogous situations.¹²⁴ Judges also now enjoy longer reappointments—

118. See Pip Nicholson & Caitor Storr, *Vietnamese Courts and Reform Dynamics*, in ROUTLEDGE HANDBOOK OF ASIAN LAW 94, 106 (Christoph Antons ed., 2014) (“[R]ather than indicating the development of a Western-style rule-of-law system in which the legal and political sphere of the state are independent, the last twenty-five-year period in Vietnamese court history has seen the Party-state endorse reforms for the construction of a ‘self-managing’ court system under Party leadership, while failing to give effect to reforms it has embraced.”).

119. See Nicholson, *supra* note 17. At least to some legal actors within Vietnam, the infringement on “judicial independence” comes not from politics but the court itself. Judicial independence, to them, is directed at both individual judges and the institution: prior to issuing legal opinions, individual judges should be free from case-outcome directives from their own courts, and lower courts should not receive result-oriented directives from higher courts. Interviews with judicial staffs in Hanoi, Vietnam (June 23, 2017).

120. A feature of socialist law, lay assessors (*hoi tham nhan dan*) refer to ordinary citizens selected by the court to participate in trials as lay judges. In socialist legal theory, not unlike in common law, lay participation in the legal system is supposed to increase public support for the law and encourage civic engagement. See John N. Hazard, *Soviet Socialism and Due Process of Law*, 48 MICH. L. REV. 1061, 1065–68 (1950). In practice, courts in Vietnam maintain a list of lay assessors who have worked well with judges in previous trials, and often call on these citizens when casework arises. Interviews with judicial staff in Hanoi, Vietnam (June 23, 2017).

121. HIEN PHAP [CONSTITUTION] 1992, arts. 31, 103 (Viet.) (amended 2013). One should bear in mind that in Vietnam the Constitution is not a self-enforcing document. Courts do not have jurisdiction to interpret the Constitution and rarely cite it. Despite this, legal scholars have argued that vibrant civil society participation in the recent amendment process, while substantially unsuccessful, augmented legal consciousness and the belief in constitutionalism. See Bui Ngoc Son & Pip Nicholson, *Activism and Popular Constitutionalism in Contemporary Vietnam*, 42 LAW & SOC. INQUIRY 677 (2017).

122. Luat To Chuc Toa An Nhan dan [Law on the Organization of the People’s Court], Law No. 62/2014/QH13 (Nov. 11, 2014) (Viet.) [hereinafter 2014 Court Organization Law].

123. 2014 Court Organization Law, art. 13; see also Bui Ngoc Son, *The Law of China and Vietnam in Comparative Law*, 41 FORDHAM INT’L L.J. 135, 179 (2017).

124. *Stare decisis* cases (*an le*) are posted on an SPC-run website, <http://anle.toaan.gov.vn/>. Unlike in the common law system, cases issued by the SPC do not automatically have binding force. Rather, lower courts and SPC judges nominate particularly well written cases to a “consultative council,” who then confer and vote on which cases should have binding force. This council was established by the SPC and is composed of twelve members from the judiciary, Supreme Procuracy, Ministry of Justice, legal academics, and bar associations. See Decision 698/QD-CA (Oct. 17, 2016). As of November 2017, eighteen cases have been declared *stare decisis*.

an increase from five years to ten years after the initial five-year first term.¹²⁵

C. Court Structure & Sentencing Framework

During the period of analysis (2003–2015), the court system in Vietnam consisted of three levels: (1) the Supreme People's Court, headquartered in the country's capital, Hanoi, (2) People's Provincial Courts [*toa an nban dan cap tinh*], one in each of the sixty-three provinces, and (3) People's District Courts [*toa an nban dan cap huyen*], comprised of over 700 courts in districts and towns throughout cities and provinces.¹²⁶ Criminal trials are heard by specialized criminal law divisions of district and provincial courts, whose jurisdictions are based on the severity of applicable punishment.¹²⁷ According to 2012 statistics, the courts processed nearly 70,000 criminal trials concerning over 120,000 criminal defendants.¹²⁸ Of these cases, 40 percent were prosecuted as property crimes, 23 percent drug crimes, 17 percent personal crimes, and about half a percent corruption and national securities crimes.¹²⁹ 21 percent of criminal trials (over 14,000 cases) were appealed to the next level, and just over one percent of these appeals (155 cases) reached a third, and often final, appeal.¹³⁰ The majority of these final appeals, which originated in the district courts, were handled in the superior chambers of the SPC.¹³¹ The Judicial Council heard final appeals from cases generated only in the provincial courts, which concern crimes punishable by at least fifteen years of imprisonment or cases deemed "complicated."¹³²

Vietnamese law allows judges multiple avenues to exercise discretion in sentencing. As a starting point, the statutory sentencing range for each offense is broad. Vietnam's Criminal Code¹³³ classifies offenses into four types:

125. 2014 Court Organization Law, art. 74.

126. Since mid-2015, an additional level, the High Court, was officially instituted. Three High Courts are located in Vietnam's three biggest cities—Hanoi, Ho Chi Minh City, and Da Nang—and have jurisdiction to hear certain appeals. *Id.*, arts. 3, 29–34.

127. *Bo Luat To Tung Hinh Su* [Criminal Procedures Code], Law No. 19/2003/QH11 (Nov. 11, 2003) (Viet.) [hereinafter 2003 Criminal Procedures Code], art. 170, http://moj.gov.vn/vbqp/lists/vn%20bn%20ph%20lut/view_detail.aspx?itemid=19431 [<https://perma.cc/8TRT-FMAY>]. With certain exceptions crimes punishable by up to fifteen years are tried in district courts; cases with more severe punishment or deemed complicated are tried in the provincial courts. *Id.*

128. *Toa An Nhan Dan Toi Cao Viet Nam* [Supreme People's Court of Vietnam], *Bao Cao Tong Ket Cong Tac Nam 2012* [Report on 2012 Work], 05/BC-TA (Jan. 18, 2013) (Viet.) (on file with author).

129. *Id.* at 2.

130. *Id.* Generally, a criminal case can be reviewed by two higher courts. A case tried in the district court is reviewed by the provincial court, then appealable to the superior chambers of the SPC; a case tried in the provincial court is reviewed by the superior chambers of the SPC, then appealable to the SPC's Judicial Council.

131. 2003 Criminal Procedures Code, arts. 241–254, 272–299 (on appeal processes).

132. *Id.*

133. Unless noted, all penal provisions cited in this article refer to the Penal Code of 1999 and its amendment in 2009, as these laws were, in most cases, the applicable codes during the period in analysis. *See Bo Luat Hinh Su* [Criminal Code], Law No. 15/1999/QH10 (Dec. 21, 1999), <http://moj>

minor, serious, very serious, or extremely serious.¹³⁴ Each carries a range of possible punishments that increases corresponding to the crime's seriousness: minor offenses are punishable by a maximum of three years imprisonment; serious offenses by seven years; very serious offenses by fifteen years, and extremely serious offenses may draw punishment "above 15 years, life imprisonment, or death."¹³⁵ The sentencing range for homicide, for example, is seven to fifteen years of imprisonment; if certain aggravating factors apply, the punishment rises to twelve to twenty years, life imprisonment, or death.¹³⁶ In determining sentencing, judges are mandated to "tak[e] into consideration the nature and extent of danger posed to society by the acts of offense, the offender's background, and any circumstances that extenuate or aggravate the penal liability."¹³⁷ The code enumerates a list of mitigating¹³⁸ and aggravating factors¹³⁹ that judges must take into account, while allowing them leeway to "consider other circumstances as mitigating, but must clearly inscribe them in the judgment."¹⁴⁰ Judges may reduce sentencing to below the mandatory minimum: "Where there exist at least two [listed] mitigating factors . . . the court may reduce the penalty to the next penalty bracket stipulated by the law . . . The reasoning must be clearly inscribed in the judgment."¹⁴¹ For minor offenses, judges can impose a suspended sentence instead of imprisonment.¹⁴²

In recent years, the SPC has issued several internal directives to explain the meanings of various mitigating and aggravating factors, harmonize the non-enumerated mitigating factors that lower courts should consider, and provide guidance on suspended sentencing.¹⁴³ Concerns remain that cor-

.gov.vn/vbpq/lists/vn%20bn%20php%20lut/view_detail.aspx?itemid=6163 [https://perma.cc/9JKE-JWCQ] [hereinafter 1999 Criminal Code]; Luat Sua Doi, Bo Sung Mot So Dieu cua Bo Luat Hinh Su [Law to Amend the Criminal Code], Law No. 37/2009/QH12 (June 19, 2009), http://moj.gov.vn/vbpq/lists/vn%20bn%20php%20lut/view_detail.aspx?itemid=11719 [https://perma.cc/M8R9-LDAW] [hereinafter 2009 Amendment to 1999 Criminal Code]. The new 2015 Criminal Code was enacted after the period of analysis. See Decision No. 41/2017/QH14 (June 20, 2017), <http://congbao.chinhphu.vn/noi-dung-van-ban-so-41-2017-qh14-24114?cbid=18229> [https://perma.cc/X3QR-6ALD].

134. 1999 Criminal Code, art. 8.2, 8.3. The division of offenses into these categories is similar to China's Criminal Code. See Liebman, *supra* note 15, at 175; see also John Quigley, *Vietnam at the Legal Crossroads Adopts a Penal Code*, 36 AM. J. COMP. L. 351, 353 (1988) (noting that this distinction was not found in the Soviet codes, though it appeared in the codes of several East European socialist countries).

135. 1999 Criminal Code, art. 8.2, 8.3.

136. 1999 Criminal Code, art. 93 (1), (2). By way of contrast, the U.S. Sentencing Guidelines mandates that the maximum of any range cannot exceed the minimum by more than the greater of twenty-five percent or six months (except where the minimum term is thirty years or more). 28 U.S.C. § 994(b)(2) (2012).

137. 1999 Criminal Code, art. 45.

138. *Id.* art. 46(1).

139. *Id.* art. 48.

140. *Id.* art. 46(2).

141. *Id.* art. 47.

142. *Id.* art. 60 ("If an offense is punishable by no more than 3 years, the court may take into consideration an offender's background and mitigating circumstances, and, if deem that imprisonment is unnecessary, may impose a suspended sentence up to 5 years.").

143. See Hoi Dong Tham Phan Toa An Nhan Dan Toi Cao [Judicial Council of the Supreme People's Court], Nghi Quyet 01/2000/NQ-HDTP [Resolution 01/2000/NQ-HDTP], § 5 (Aug. 4, 2000),

ruptible judges may pile on mitigating factors to reduce a defendant's punishment.¹⁴⁴ Interviewed judges and lawyers noted that the rampant use of suspended sentencing by local courts had been red-flagged as an indicator of corruption.¹⁴⁵ To this end, the SPC noted in a recent annual report to the National Assembly that lower courts' use of suspended sentencing had significantly decreased compared to previous years.¹⁴⁶

III. DATA & METHOD

This Article employs a "nested" analysis of quantitative and qualitative data.¹⁴⁷ The quantitative coding uses two types of documents: first, 242 criminal judgments issued by the SPC for the period 2003–2015, and second, a collection of legal and policy documents during the same period including SPC internal directives, interbranch communiques, executive resolutions, and legislative transcripts. The qualitative data involves conducting and coding thirty semi-structured interviews with judges, attorneys, court personnel, and academics. More detail on each is provided below.

A. *Judicial Opinions*

Until very recently, court documents in Vietnam were not publicly released.¹⁴⁸ The 242 criminal judgements used here were issued by the SPC's highest appellate body, the Judicial Council, and spanned between 2003 and 2015. Each Judicial Council judgment is a *de facto* final appeal.¹⁴⁹ I collected these cases in two ways: in-print booklets obtained through SPC court officials, and online downloads from the SPC's website. In early 2004, the SPC started assembling its judgments into booklets to fulfill a condition under a bilateral agreement with the U.S. and to signify Vietnam's commitment towards WTO membership.¹⁵⁰ The SPC distributed these

<http://vbpl.vn/TW/Pages/vbpbq-toanvan.aspx?ItemID=27062&Keyword=> [<https://perma.cc/7CQG-D7WZ>]; Hoi Dong Tham Phan Toa An Nhan Dan Toi Cao [Judicial Council of the Supreme People's Court], Nghi Quyet 01/2006/NQ-HDTP [Resolution 01/2006/NQ-HDTP], §§ 1, 2, 5 (May 12, 2006), <http://vbpl.vn/TW/Pages/vbpbq-toanvan.aspx?ItemID=16162&Keyword=> [<https://perma.cc/JN4Y-C29H>].

144. Interviews with practicing lawyers in Hanoi, Vietnam (Dec. 20–21, 2017).

145. *Id.*; Interviews with district court judges in Hanoi, Vietnam (Dec. 22, 2017 & Jan. 18, 2018); Interview with a practicing lawyer in Ho Chi Minh City (Dec. 23, 2017).

146. Report on 2012 Work, *supra* note 128, at 5.

147. This design is inspired by the approach described in Liebman, *supra* note 15, at 211–13 (2015) (using qualitative and quantitative analysis to study criminal sentencing patterns in China's Henan courts).

148. See *supra* notes 11–13 and accompanying text.

149. The Constitution, however, allows an executive organ—the Standing Committee of the National Assembly—to revoke court judgments that it deems unconstitutional. HIEN PHAP [CONSTITUTION] 1992, art. 74(4) (Viet.) (amended 2013).

150. See TOA AN NHAN DAN TOI CAO VIET NAM [SUPREME PEOPLE'S COURT OF VIETNAM], Quyét Dinh Giam Doc Tham cua Hoi Dong Tham Phan 2003–2004 [Cassation Judgements of the Judicial

booklets internally to lower courts, legal academics, and a small number of attorneys, but did not disseminate them widely to the public.¹⁵¹ Starting in 2009, a subset of these judgments were posted on the SPC website, where visitors can search for cases based on several basic parameters such as case type, year, and court level.¹⁵² Criminal cases were not posted online until as late as 2015—a signal of the sensitivity towards criminal law in Vietnam.¹⁵³ I obtained booklets from SPC officials for years 2003 through 2012 in a mixture of physical printed copies and PDF proofs. I also downloaded all available cases from the SPC web portal, searched various online legal databases, and obtained books that reprint cases. In total, I collected 242 unique judgments, which undergird the empirical basis of this research. Most of these cases (215) come from the SPC booklets. For the period 2013 to 2015, I could not locate any booklet and therefore rely exclusively on other sources.¹⁵⁴

I manually coded approximately one-hundred variables for each case, resulting in a database of over 25,000 data points. Each judgment, though generally short and formulaic, provides valuable information about each case's criminal sentencing practice. Available information includes (a) defendants' demographics such as name, age, gender, hometown, education level, occupation, ethnicity, family status, prior convictions; (b) offense-related information such as the number of victims, their names, ages and genders, a description of the physical injury or other harms caused, the date and location of the offense, defendants' action to mitigate harms; (c) a summary of the charge, sentencing, applicable mitigating and aggravating factors; (d) a timeline of the case's procedural posture, including how long the defendant was detained prior to trial, dates of appeal, dates of each court's decisions, and (e) the outcome of the case throughout the appeal process. Because each judgment provides a summary of the sentencing determination in the lower courts, it is possible to document how the higher courts evaluated the lower courts' sentencing determination. As the Criminal Code allows judges leeway in applying mitigating and aggravating factors in sen-

Council of The Supreme People's Court] Vol. 1 (2004) [hereinafter 2003–2004 JUDGMENTS], at 10 (“As we know, a condition of membership to the World Trade Organization (WTO) is that the judgments of the highest court must be made publicly available.”); *id.* at 11 (“This publication plays an important role in meeting the international standards on transparency mandated in the U.S.-Vietnam Bilateral Agreement and by the World Trade Organization.”).

151. Interviews with judicial staffs in Hanoi, Vietnam (June 23, 2017).

152. *Quyết Định Giám Đốc Tham* [Cassation Judgments], TOA AN NHAN DAN TOI CAO [SUPREME PEOPLE'S COURT] [hereinafter SPC Online Cassation Judgments], <http://hvta.toaan.gov.vn/portal/page/portal/tandtc/545500/3377352> [https://perma.cc/55HU-MTFJ].

153. See LINDSEY & NICHOLSON, *supra* note 11, at 202 (noting that, at the time of the book's publication in 2016, “the Supreme People's Court has commenced limited publication online of economic and civil judgments” but that “[c]riminal judgments are still not publicly available in Vietnam.”).

154. The distribution of cases is as follows: 2003–25, 2004–10, 2005–20, 2006–28, 2007–31, 2008–20, 2009–14, 2010–33, 2011–24, 2012–9, 2013–8, 2014–10, 2015–10.

tencing determinations,¹⁵⁵ sentencing decisions can double as a vehicle to study trends in the exercise of judicial discretion.

I was the only coder and developed an early system of code definitions into a coding manual. I first coded a sample of 25 percent of the cases to identify emergent issues and patterns, and, as elaborated below, used fieldwork to cross-examine those data. Coding this sample set also familiarized me with the cases, and I concurrently revised and finessed the coded categories and definitions. Between July and December 2017, I coded the full set of cases and continued the iterative process of using interview data and content analyses to complement each other. To check coding consistency, I performed spot “audits” of the data to ensure they still conformed to the original codebook.

The biggest limitation of this dataset is what scholars studying Chinese judicial opinions termed “the missing-ness” problem.¹⁵⁶ This refers to the bias of an incomplete dataset. Grappling with incomplete and messy data is part of all data analytics, but can be especially challenging in the context of authoritarian regimes. What can exacerbate “authoritarian big data” is the lack of any codebook; thus, researchers are left to investigate which judgments were withheld, why, whether such reasoning is consistent from year to year, and even whom to ask for clarification.¹⁵⁷ For the sample I collected, court officials confirmed that cases were excluded if they involved minors under eighteen years old (except for extremely serious crimes), contained state secrets, or could have an “adverse effect on cultural norms.”¹⁵⁸ Also, political cases involving dissident or high-profile wrongful convictions were likely excluded.¹⁵⁹ Because judgments were numbered sequentially, it is possible to infer which judgments were missing.¹⁶⁰

Having 242 judgments available out of 276 numbered judgments means that roughly 88 percent of the SPC’s criminal cases were available. Studying an incomplete dataset requires, first and foremost, a lesson in humility: any conclusion drawn needs to be in cognizance of the partial records.¹⁶¹ The data is not representative, but that does not mean that it is unusable. To deal with the missing-ness problem, scholars advocated for a shift from

155. 1999 Criminal Code, arts. 45–60.

156. See Roberts, *supra* note 15, at 2–3, 11–12 (explaining the “missing-ness” problem in studying the mass release of Chinese judicial decisions).

157. See *id.*

158. Interviews with judicial staffs in Hanoi, Vietnam (June 23, 2017); Interview with a district judge in Hanoi, Vietnam (Jan. 18, 2018). This guideline is consistent with a guideline issued by the SPC. See Toa An Nhan Dan Toi Cao [Supreme People’s Court], Nghi Quyet 03/2017/NQ-HDTP [Resolution No. 03/2017/NQ-HDTP] § 3 (Mar. 16, 2017), hvta.toaan.gov.vn/portal/pls/portal/docs/8689207.PDF [https://perma.cc/S5J6-L5H5].

159. Interviews with practicing lawyers in Hanoi, Vietnam (Dec. 20–21, 2017).

160. For example, in 2003, both the booklet and SPC website contain twenty-five criminal judgments, numbered 01 to 26. Case no. 18 was skipped in both sources, so I infer that this case was withheld from publication. It is unclear whether cases beyond no. 26 existed.

161. See Liebman et al., *supra* note 15, at 17.

quantifying totals to describing the textual records.¹⁶² “Distance” analysis, coupled with close reading of the cases, can reveal information and identify unknown trends, while fieldwork plays an essential role in giving context and meaning to content analysis. Other data sources, as described below, compliment the content analysis of the judicial opinions.

B. *Qualitative Fieldwork*

I conducted thirty semi-structured interviews between June 2017 and January 2018 with judges, court officials, lawyers, and academics during field work in Hanoi and Ho Chi Minh City. Interview subjects were identified through purposive and snowball samplings. Because the issues explored here—criminal law, the status of courts, political interactions—are considered sensitive issues in Vietnam,¹⁶³ it was important to establish rapport and trust with the interviewees. I first asked close personal and professional connections for introductions to relevant people, and, depending on the level of openness after each interview, I asked the interview subjects for introduction to additional qualified contacts. All but two persons agreed to meet. Meetings were conducted entirely in Vietnamese and in person. Better-acquainted interviewees usually preferred to meet in local coffee shops, whereas those whom I just got to know usually liked to meet in their offices. Consistent with Vietnamese custom, I did not use a tape recorder but took notes during or immediately following the meetings, which generally lasted between thirty minutes and four hours. Using insights gained from coding a sample set of SPC cases, I asked the interviewees a semi-structured set of questions to solicit their opinions on the SPC and the judiciary, Vietnam’s criminal sentencing practice, the use of suspended sentencing, the use of mitigating and aggravating factors, and, where relevant, their professional experience as participants in the criminal adjudication process. I asked open questions and encouraged conversations whenever possible, in order to let the interviewees teach me about their work. As I continued coding judicial cases, I conducted follow-up meetings with a small group of lawyers and court personnel to elicit more detail on identified patterns. All interviews were conducted on the condition of anonymity given the sensitive nature of criminal law in Vietnam.

I began data analyses concurrently with fieldwork, using multiple phases of coding. Content analyses already identified some key patterns (such as the reduction of suspended sentencing), and I then used interview data to cross-examine and elaborate on these initial patterns. Other patterns (such as the use of suspended sentencing as a mechanism for plea bargaining) were not captured by judicial opinions and emerged only through conversations with practicing criminal defense lawyers.

162. *See id.*

163. *See supra* note 11 and accompanying text.

Purposive and snowball samplings are appropriate because I sought to identify those with expertise to illuminate judicial decision-making, and members of a pre-defined group are often in the best position to identify other qualified members. Because the meetings were conducted in the two biggest cities, there is potential for bias towards the opinions of urban legal practitioners and scholars who live and work in these cities.¹⁶⁴ However, because the goal of the interviews is to explore and deepen understanding of the broad trends identified by court data, the subjects' experiences with judicial decision-making and the criminal justice process are the more useful criteria for this study.

C. *Other primary sources*

Finally, I also draw on other Vietnamese-language primary sources including SPC internal directives;¹⁶⁵ National Assembly's legislative and query sessions transcripts;¹⁶⁶ essays and scholarly materials posted on legal institutions' websites;¹⁶⁷ and state-owned and institution-owned media.¹⁶⁸ These documents span the period 2003 to present and provide a panorama of the institutional context in which the SPC operates.

Of these documents, one primary source—query sessions transcripts—merits elaboration. Vietnam's National Assembly generally meets in two sessions in May and October of each year.¹⁶⁹ During this time, National Assembly members have the opportunity to conduct “query sessions”—a three-day Q&A event during which they can question the heads of various governmental institutions, including the Prime Minister, the President of the SPC, and the President of the Supreme People's Procuracy, on “hot” issues affecting the representatives' constituents.¹⁷⁰ Query sessions, there-

164. For a detailed yet approachable guide on selection bias in qualitative methods, see KRISTIN LUKER, *SALSA DANCING INTO THE SOCIAL SCIENCES RESEARCH IN AN AGE OF INFO-GLUT* 155–70 (2008).

165. I collected these documents from several published collections on SPC training materials, circulars and directives, as well as from the SPC website at www.toaan.gov.vn. The published collections, on file with author, include SO TAY THAM PHAN [JUDICIAL HANDBOOK] (2008), CHUONG TRINH DAO TAO THAM PHAN [TRAINING CURRICULUM FOR JUDGES] (2014), and TONG HOP CAC QUYET DINH, NGHI QUYET CUA TOA AN NHAN DAN TOI CAO 2005-2015 [COLLECTIONS OF SPC CIRCULARS AND DIRECTIVES 2005-2015] (2016).

166. National Assembly's documents are collected from the National Assembly's online portal, available at <http://quochoi.vn/hoatdongcuaquochoi/cackyhophquochoi/quochoikhoaxiv/Pages/kyhophthu/tu/default.aspx>.

167. These legal institutions include the Supreme People's Court (www.toaan.gov.vn), the Supreme People's Procuracy (www.vksndtc.gov.vn/), the Ministry of Justice (www.moj.gov.vn), the Ministry of Public Security (www.mps.gov.vn), and the office of the Prime Minister (www.vpcp.chinhphu.vn).

168. I focus on the most widely circulated in-print and online media, including Tuoi Tre [Youth] (www.tuoiitre.vn), VNExpress (www.vnexpress.net), Nhan Dan [People] (www.nhandan.com.vn), and VietnamNet (www.vietnamnet.vn).

169. For a calendar of the National Assembly's meetings, see the National Assembly's website, available at <http://quochoi.vn>.

170. See Edmund Malesky & Paul Schuler, *Nodding or Needling: Analyzing Delegate Responsiveness in an Authoritarian Parliament*, 104 AM. POL. SCI. REV. 482, 483 (2010).

fore, provide a rare glimpse into the policy discussions and interbranch relationship between the judiciary and other political institutions,¹⁷¹ and provide context for many of the trends observed in the content and qualitative analyses described below.

IV. FINDINGS & ANALYSIS

Using quantitative and qualitative data, this Part applies the theoretical framework developed above to analyze the various, sometimes conflicting, ways in which the SPC strives to bolster its legitimacy. Three trends stood out. First, targeting its international audience, the SPC mandated the release of judicial opinions to increase transparency into judicial decision-making. Second, turning inward, the SPC aggressively monitored lower courts' discretion in criminal sentencing in an effort to address criticism of inconsistencies in case outcomes and suspicion of corruption. And third, turning towards other governmental branches, it zealously implemented the CPV's policy directives. Applying the framework on judicial legitimacy in authoritarian settings developed above, I next discuss how each strategy adopted by the SPC affects its sociological, legal, moral, and interbranch legitimacy.

A. *Increased Judicial Transparency*

The release of judicial opinions—what enables this research in the first place—itself represents an effort by the SPC and the Vietnamese government at large to boost their sociological legitimacy, both at home and abroad. The demands first came from international donors, including the United States, which has been active in rule of law work in Vietnam since the lifting of the trade embargo in 1994.¹⁷² In the early 2000s, as Vietnam intensified its lobbying effort to obtain membership to the World Trade Organization (“WTO”), it became clear that judicial transparency was an important indicator for WTO-worthiness.¹⁷³ The first publication of judicial cases in 2004 acknowledged these incentives: “As we know, a condition of membership to the World Trade Organization (WTO) is that the judgments of the highest court must be made publicly available. . . . This publi-

171. Political scientists studying Vietnam have utilized query sessions transcripts to study the behaviors of National Assembly representatives. See, e.g., Edmund Malesky, Paul Schuler & Anh Tran, *The Adverse Effects of Sunshine: A Field Experiment on Legislative Transparency in an Authoritarian Assembly*, 106 AM. POL. SCI. REV. 762 (2012) (finding that increased transparency of delegates' behaviors, through the publications of query sessions transcripts, may curtail their participation and questions); Malesky & Schuler, *supra* note 170 (testing cooptation theory through National Assembly delegates' questioning behavior using content analyses of query transcripts).

172. See Carol V. Rose, *The “New” Law and Development Movement in the Post-Cold War Era: A Vietnam Case Study*, 32 LAW & SOC'Y REV. 93, 105–20 (1998) (summarizing the various legal assistance projects in Vietnam funded by foreign donors).

173. See 2003–2004 JUDGMENTS, *supra* note 150, at 10–11.

cation plays an important role in meeting the international standards on transparency mandated in the U.S.-Vietnam Bilateral Agreement and by the World Trade Organization.”¹⁷⁴ The release of court opinions received high praises from the U.S. Agency for International Development (“USAID”), which funded several years of the publications: “This event is important evidence of the Vietnamese government’s commitment towards improving transparency and economic development. . . . This will boost confidence from Vietnamese citizens, businesses, foreign investors, and the international community alike . . .”¹⁷⁵ Between 2003 and 2015, the publications of SPC judicial opinions continued to receive funding from various international donors, including Sweden, Denmark, and the European Union.¹⁷⁶

In an even more radical push for transparency, Vietnamese courts at all levels are now mandated to make their judgments public as of July 1, 2017.¹⁷⁷ The judgments are made available online through a centralized website managed by the SPC, searchable by basic criteria such as date, court level, court name, and case type.¹⁷⁸ As of March 2019, nearly a quarter million opinions have been released.¹⁷⁹ The reason for such a policy is complex, but it is perhaps not a coincidence that Vietnam’s mass release of judicial documents occurred in parallel with recent reforms in China, which has released more than 29 million court documents online since 2014.¹⁸⁰ The SPC’s annual report confirmed its desire to keep up with regional progress—an important measure of its sociological legitimacy: “By pushing for the publication of all courts’ opinions, the SPC has achieved a milestone in its reforms, meeting the standards of international and regional courts. . . . Based on our neighbors’ experience, only countries mired in war or suffer[ing] from low level of economic development fail to do so.”¹⁸¹

Such commitment towards judicial transparency, however, is tempered by the SPC’s caution towards cases deemed politically sensitive—another indicator of its efforts to bolster its interbranch legitimacy by looking out for the political branch’s interests. These cases, as noted in its annual reports and during query sessions, “benefited from the close coordination between the SPC and other criminal justice agencies [namely, the Procuracy

174. *Id.*

175. *Id.*

176. *Judgements made public in bid to improve transparency*, VIETNAMNEWS (May 28, 2015), <https://vietnamnews.vn/society/270941/judgements-made-public-in-bid-to-improve-transparency.html#IUiuPjxUhUJgDOP2.97> [<https://perma.cc/PN6U-KKE8>].

177. *See id.*

178. *Trang Thông Tin Dien Tu Cong Bo Ban An, Quyet Dinh cua Toa An (Online Portal on Judicial Opinions)*, TOA AN NHAN DAN TOI CAO [SUPREME PEOPLE’S COURT], <http://congboaban.toaan.gov.vn/> (last visited Mar. 26, 2019).

179. The online portal provides a real-time count of judgments available. *Id.*

180. *See* Liebman et al., *supra* note 15, at 1.

181. TOA AN NHAN DAN TOI CAO [SUPREME PEOPLE’S COURT], BAO CAO TONG KET 2016 [2016 ANNUAL REPORT] 3–4 (on file with author).

and the police] to ensure the correct and efficient implementation of the Party's policies"¹⁸² The official publication guideline simply mandates that cases involving state secrets or deemed "adverse to cultural norms" be withheld, without providing further definitions or explanations.¹⁸³ Cases involving political dissidents, heavily criticized as show trials by both international and domestic audiences,¹⁸⁴ are also likely withheld.¹⁸⁵

A political actor as much as a legal one, the SPC thus has to balance its desires to boost its sociological legitimacy through improving transparency with the priorities of other governmental and executive actors in order to secure its interbranch legitimacy. It is admittedly difficult to determine whether judicial deference to politics is a signal of interbranch legitimacy or simply executive domination. On the one hand, socialist legal theory does not recognize separation of powers,¹⁸⁶ and Vietnam's Constitution has historically enshrined the "leading force" of the ruling party over the government.¹⁸⁷ Viewed in this light, judicial deference to CPV's preference is enshrined in domestic laws. On the other hand, the newly amended Constitution explicitly states, for the first time, that "Judges and Assessors are independent and shall only obey the law; interference with the trials of the Judges and Assessors by bodies, organizations, and individuals is strictly prohibited."¹⁸⁸ Judges and academics have since debated whether trials (and therefore, the space for judicial independence) cover only the actual adjudication or also extend to pre-trial and post-judgment processes.¹⁸⁹

B. *Monitoring Lower Courts' Sentencing Discretion*

1. *General Overview*

Before diving into analysis of Vietnamese courts' sentencing discretion, this section summarizes some key features of the criminal cases that reached the SPC. Most defendants are males (85 percent) between the age of 25 and 55 (65 percent). About 5 percent (twenty defendants) are under the age of eighteen. In Vietnam, the age of criminal responsibility for minor and serious crimes is sixteen; defendants aged fourteen to sixteen are still criminally responsible for very serious and extremely serious crimes.¹⁹⁰ In the available

182. *Id.* at 10.

183. Other more clear-cut criteria include the withholding of non-serious cases involving juveniles and redaction of the parties' private information. *See supra* note 158 and accompany text.

184. *See supra* note 10 and accompanying text.

185. *See supra* note 159 and accompanying text.

186. *See Gillespie, supra* note 19, at 838.

187. HIEN PHAP [CONSTITUTION] 1992, art. 4 (Viet.) (amended 2013); *see also supra* note 108 and accompanying text.

188. HIEN PHAP [CONSTITUTION] 1992, art. 103(2) (Viet.) (amended 2013).

189. *See, e.g.*, Truong Dai Hoc Kiem Sat Ha Noi [Ha Noi Procuracy Academy], *Mot so van de ly luan chung ve cac giai doan to tung hinh su* [Issues on the general theory of the process of criminal procedures] (on file with author).

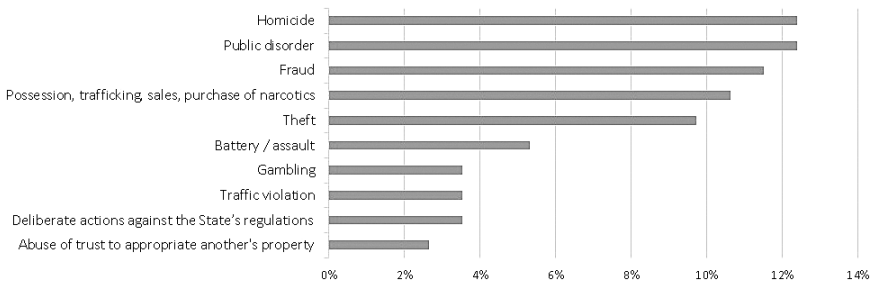
190. 1999 Criminal Code, art. 12.

cases, six defendants were under the age of sixteen, all of whom were prosecuted for homicide.

About one-fifth of the crimes were committed in urban areas (Hanoi, Ho Chi Minh City, and Da Nang). The rest occurred in the provinces and countryside. Where employment information was available, about half of the defendants worked blue collar jobs, including farmers, fishermen, and laborers. These defendants were generally involved in personal, property, or drug crimes, including homicide, assault, theft, public disorder, gambling, and drug trafficking.¹⁹¹ About 25 percent of the defendants were businessmen and women, though it is difficult to distinguish whether they worked in the private sector or were part of state-owned or government-affiliated enterprises. Another 10 percent held jobs in official capacities with district, town, or provincial governments. Defendants with business and official occupations were generally involved in corruption and economic crimes such as fraud, manufacturing and trafficking counterfeit papers, abuse of trust, misuse of property, or economic mismanagement.¹⁹² Most defendants (78 percent) were charged with just one offense.

Because of the small numbers of cases adjudicated by the Judicial Council each year, it is difficult to track trends over time. Official statistics reported an increasing trend in criminal prosecution, which almost doubled between 1997 (around 32,000 first-instance trials) and 2006 (over 60,000).¹⁹³ The chart below shows the ten offenses most frequently appealed to the Judicial Council, which accounted for 75 percent of all appeals:

Figure 2: Criminal appeals by type, 2003-2015



191. See 1999 Criminal Code, arts. 93, 104, 138–39, 194, 245, 248.

192. See 1999 Criminal Code, arts. 138–39, 142, 144, 165.

193. *Bao cáo của Chánh án Tòa án Nhân dân tối cao (1992-1997)* [Report of the Supreme People's Court President (1992-1997)], in VAN KIEN QUOC HOI TOAN TAP VIII [OFFICIAL DOCUMENTS OF VIETNAM'S NATIONAL ASSEMBLY VOL. VIII] (reporting caseload statistics between 1992 and 1997); *Thống kê số lượng án (Caseload statistics)*, TOA AN NHAN DAN TOI CAO [SUPREME PEOPLE'S COURT], <http://toaan.gov.vn/portal/page/portal/tandtc/5901712> [<https://perma.cc/VCX9-HNKK>].

Homicide and public disorder were the two most frequently charged offenses in a criminal case (11–12 percent) and were often prosecuted together. The high frequency of homicide charges was driven in part by several multi-defendant appeals, generally involving altercations between two or more groups.¹⁹⁴ Even where a homicide had not occurred, a defendant could still be charged for homicide under the “complete actions, failed result” theory.¹⁹⁵ Inchoate crimes are generally given lesser punishment, though the court can impose life imprisonment or the death penalty for crimes classified as extremely dangerous (including homicide with certain aggravating factors, fraud involving large amounts of money, or drug trafficking involving large quantities).¹⁹⁶

Other appeals concern convictions for the manufacturing and sale of fake food products or medicine (Article 157), failure to report crimes (Article 314), neglecting one’s professional responsibilities (Article 285), possession and trafficking of counterfeit papers (Article 181), robbery (Article 133), illegal detention of others (Article 123), human trafficking (Articles 119 and 120), and bribery (Article 311). These cases exemplify the provincial courts’ jurisdiction over more serious offenses compared to the district courts’.

2. *Use and Abuse of Suspended Sentencing*

Lower courts’ undisciplined use of suspended sentencing has long plagued the SPC. The Criminal Code allows judges discretion to impose a suspended sentence in lieu of imprisonment for defendants convicted of non-serious offenses¹⁹⁷—a measure akin to probation in the U.S. Seen as a

194. See, e.g., Hoi Dong Tham Phan Toa An Nhan Dan Toi Cao [Judicial Council of the Supreme People’s Court], Cases 07/2003/HS-GDT (2003), 04/2006/HS-GDT (2006), 13/2011/HS-GDT (2011) (Viet.). For the purpose of this Article, the unit of analysis is each charge rather than each case. In other words, if two defendants were both prosecuted for homicide in one criminal case, I counted two homicide charges.

195. Under Vietnamese law, there are no separate penal codes for attempted offenses. Rather, one penal provision makes a general distinction on two kinds of inchoate crimes: “complete actions, failed result” and “incomplete actions, failed result.” 1999 Criminal Code, art. 52. Both situations can still be prosecuted as an actual crime under the legal theory that both still cause harm to society and punishment can inspire deterrence. See Trinh Tien Viet, *Ve pham toi chua dat va mot so binh thuc pham toi khac trong qua trinh thuc hien toi pham* [Inchoate crimes and other offenses], 25 TAP CHI KHOA HOC DAI HOC QUOC GIA HA NOI LUAT HOC [JOURNAL OF SCIENCE & LAW] 125, 127–29 (2009).

196. 1999 Criminal Code, art. 52. “Incomplete actions, failed result” crimes are punishable up to twenty years if the regular offense carries a maximum sentence of life imprisonment or death; otherwise punishable up to one-half of the regular crime’s maximum term imprisonment. *Id.* at art. 52.2. “Complete actions, failed result” crimes merit more severe punishment because the unsuccessful perpetrator is as culpable as a successful one. See Trinh, *supra* note 195. The maximum sentence of life imprisonment or death can be sought only for extremely serious offenses; otherwise they are punishable up to three-quarters of the regular crime’s maximum term imprisonment. 1999 Criminal Code, art. 52(3). One scholar has argued that the sentencing scheme for “complete actions, failed result” crimes is too harsh. See Le Thi Son, *Ve trach nhiem binh su cua hanh vi chuan bi pham toi va pham toi chua dat* (Criminal liability for attempted crimes and incomplete crimes), 4 TAP CHI LUAT HOC [JOURNAL OF LAW] (2002) (arguing that the lack of a death in an attempted homicide reduces societal harm and should merit more leniency).

197. 1999 Criminal Code, art. 60.

leniency measure to promote reentry and rehabilitation, suspended sentencing has become a red flag for corruption.¹⁹⁸ As one attorney explained,

The judge called me and asked me to “cooperate.” It is not just him, he said, but also the people assessors and other people in the process who need to be taken care of. He asked for 20 million Vietnamese *dong* [about \$1000] per year of reduction in imprisonment, or a lump sum of 100 million for a suspended sentence. A bad judge would insist on a fixed price; a ‘good’ judge would consider their [the defendants’] household situation and income levels in determining the price¹⁹⁹

Another defense attorney described the systematic entrenchment of corruption:

Judges are people too. Look at their salary scale . . . how do you think they live and put their children through school? There are good and bad corruption. Bad corruption is extortion; ‘good’ corruption is to get the people in the process to do their jobs.²⁰⁰

Another attorney elaborated:

To obtain a lighter sentence or a suspended sentence is an investment. To obtain an acquittal is a lifetime investment. I morally oppose [bribery], I am vehemently against it, but I have to do it in order to do my job. I try to not think about it as justice for sale [*chay an*] but as an investment for my clients’ future. While others put cash into envelopes to do the exchange, I instead use a nice card, to show that it is not just a transaction.²⁰¹

The rampant abuse of suspended sentencing caused damage to the judiciary’s reputation. As an article in a popular news outlet chided, “[e]ven a judge who received bribery for abusing suspended sentencing received a suspended sentence.”²⁰²

As a result, the SPC has turned a critical eye towards appeals involving suspended sentences. The chart below tracks sentencing determinations before the Judicial Council, Intermediate Court, and Trial Court:

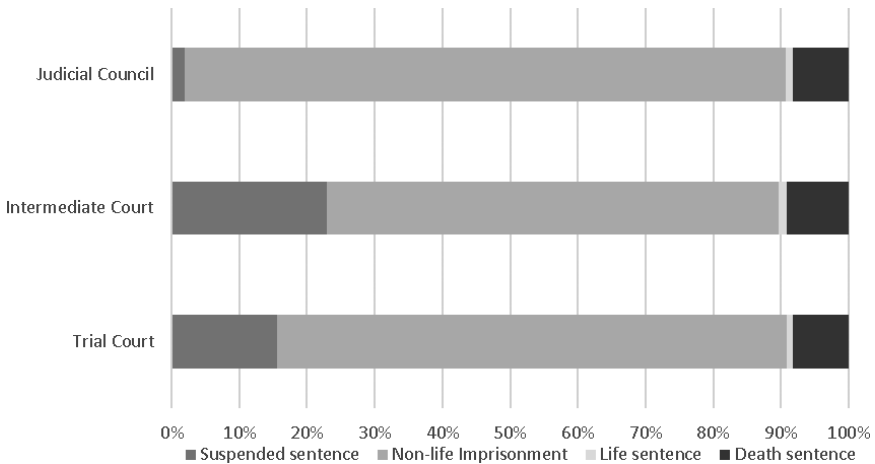
198. Interviews with district court judges in Hanoi, Vietnam (Dec. 22, 2017 & Jan. 18, 2018); Interview with a practicing lawyer in Ho Chi Minh City (Dec. 23, 2017).

199. Interview with a practicing lawyer in Hanoi, Vietnam (Dec. 20, 2017).

200. Interview with a practicing lawyer in Hanoi, Vietnam (June 25, 2017).

201. Interview with a practicing lawyer in Hanoi, Vietnam (Dec. 21, 2017).

202. *Chay an khong thanh, nguyen Chanh Toa dan su chi bi an treo* [Corruption uncovered, former Chief Judge only received suspended sentence], DAN TRI (Mar. 24, 2018), <http://dantri.com.vn/phap-luat/chay-an-khong-thanh-nguyen-chanh-toa-dan-su-hau-toa-20180324085048968.htm> [https://perma.cc/G38X-HZRG].

Figure 3: Sentencing determinations by court levels, 2003-2015

The data illuminates a clear trend on the reversal of suspended sentences: the Judicial Council aggressively monitored lower courts' leniency. It also issued two directives to tighten lower courts' discretion and heighten the eligibility for suspended sentencing.²⁰³ Most suspended sentences involve fraud (Article 139)—an economic crime more indicative of corruption due to the availability of funds.²⁰⁴ A typical pattern involved the lower courts glossing over a disqualifying fact to nonetheless grant the defendant leniency. For example, in one case, the Council reversed a suspended sentence given to an exporter convicted of tax fraud, citing his prior convictions as a disqualifying factor and chiding lower courts for failing to recognize this error.²⁰⁵ Other instances of the Council reversing suspended sentences, however, arguably have involved legitimate rulings that are nonetheless steamrolled. In one eminent domain case, a group of laborers was prosecuted for claiming compensation for repossessed land that provincial governments deemed they did not own. A sympathetic trial court gave each defendant a hefty fine and a suspended sentence, citing a host of mitigating factors such as the defendants' low levels of education, blue collar backgrounds, lack of ill will, and family hardship. The intermediate court affirmed, but the Council reversed, finding that lower courts too liberally

203. Toa An Nhan Dan Toi Cao [Supreme People's Court], Chi Thi 2003-05/BC [Directive 2003-05/BC]; Toa An Nhan Dan Toi Cao [Supreme People's Court], Chi Thi 2007-01/BC [Directive 2007-01/BC] (on file with author).

204. Interview with a practicing lawyer in Hanoi, Vietnam (June 24, 2017).

205. Hoi Dong Tham Phan Toa An Nhan Dan Toi Cao [Judicial Council of the Supreme People's Court], Case 01/HS-GDT (2010) (Viet.).

interpreted its directive of “considering mitigating circumstances” in handing out the suspended sentences.²⁰⁶

Legal practitioners interviewed also cautioned that the use of suspended sentencing could signify another issue: a plea bargaining-like mechanism.²⁰⁷ Though data on the conviction rate in criminal cases is scarce, practitioners suspected that it is high, and judges and prosecutors are generally under pressure to secure convictions.²⁰⁸ A promise for a suspended sentence is an easy way to bargain with criminal defendants, especially in cases with weak evidence.²⁰⁹ As one lawyer put it:

I told my client that I have negotiated a suspended sentence for him if he would express remorse in court and offer to compensate the victim [in a battery case]. The chance for acquittal is basically zero, so it is better to accept this deal.²¹⁰

Cases analysed support a portrait of Vietnamese courts as a forum to determine sentencing, rather than to contest guilt. As one lawyer explains:

Getting clients a good sentence is the game here. As a lawyer, I'd consider it a lifetime achievement if I get even one client acquitted. It rarely happens.²¹¹

Of over two-hundred cases in the database, the Judicial Council returned a non-guilty verdict in only two instances—a contract dispute it deemed to belong in civil courts, and a corruption case in which the procuracy indicted several low-level employees but failed to prosecute the responsible leadership.²¹² In two other instances where defendants obtained non-guilty verdicts in lower courts,²¹³ the Council reversed those determinations, noted the holes in the evidence collected, and remanded the cases to the procuracy offices for re-investigation. Remanding a non-guilty verdict so the prosecution can build a better case may seem perverse, but is an accepted practice in Vietnam's inquisitorial tradition.²¹⁴ One lawyer noted that judges rarely, in her experience, went beyond the sentence that the procurator recommended, likely because they had come to an agreement at pre-trial “inter-

206. Hoi Dong Tham Phan Toa An Nhan Dan Toi Cao [Judicial Council of the Supreme People's Court], Case 03/2011/HS-GDT (2011) (Viet.).

207. Interviews with practicing lawyers in Hanoi, Vietnam (Dec. 20–21, 2017).

208. *Id.*; interview with a practicing attorney in Hochiminh City (Jul. 4, 2017).

209. Interviews with practicing lawyers in Hanoi, Vietnam (Dec. 20–21, 2017).

210. Interview with a practicing lawyer in Hanoi, Vietnam (June 25, 2017).

211. Interview with a practicing lawyer in Hanoi, Vietnam (Dec. 21, 2017).

212. Hoi Dong Tham Phan Toa An Nhan Dan Toi Cao [Judicial Council of the Supreme People's Court], Cases 03/2005/HS-GDT (2005), 02/2011/HS-GDT (2011) (Viet.).

213. Hoi Dong Tham Phan Toa An Nhan Dan Toi Cao [Judicial Council of the Supreme People's Court], Cases 14/2003/HS-GDT (2003), 20/2003/HS-GDT (2003) (Viet.).

214. See Nguyen Quang Hien, *Adversarial process in criminal proceedings: Shortcomings and solutions*, VIET. L. & LEGAL F. (Apr. 22, 2014), <http://vietnamlawmagazine.vn/adversarial-process-in-criminal-proceedings-shortcomings-and-solutions-3994.html> [<https://perma.cc/XV7S-TESH>].

branch coordination” meetings [*bop lien nganh*]²¹⁵ to which lawyers had no access. Given such an uneven footing in trial practice and the rarity of acquittals, a plea bargain in the form of a suspended sentence might be the most strategic choice for defendants.

The SPC’s tightening of lower courts’ sentencing discretion is directly tied to several facets of the Court’s legitimacy. Seen as a remedy for judicial corruption and as a means of clarification for vague laws, it boosts moral and legal legitimacy. It also reinforces the SPC’s interbranch legitimacy as the Court was able to coordinate with and support the government’s overarching crackdown campaign on corruption. However, as acquittal remains rare and suspended sentencing continues to be used as a proxy for plea bargaining in undeserving cases, citizens are unlikely to trust that they would get a fair day in court, detracting from this crackdown’s effectiveness as a means of increasing sociological legitimacy.

C. Implementing CPV’s Policy Directives

1. Harsh Sentencing in Drug and Homicide Cases

Though the SPC actively evaluates lower courts’ sentencing determinations, life and death sentences are generally affirmed on appeal.²¹⁶ A large share of death sentences involves homicide and drug trafficking cases, echoing legislative denouncement of the social detriments attributed to those crimes.²¹⁷ The Judicial Council has even proactively upped two life imprisonment sentences to the death penalty, both in homicide cases. In the first case—a gang fight resulting in two deaths—the Council found that a co-defendant should be sentenced with equal severity to the main perpetrator due to his critical role in rounding up the gang.²¹⁸ In the second case—an infamous slaying and mutilation by a teenage son of his father—the intermediate court commuted the son’s death sentence, but the Judicial Council reversed. The Council acknowledged the plea of the defendant’s mother and sister but found that the crime was so heinous that it deserved the most severe punishment in accordance with Confucian-influenced morality codes—as highlighted in several policy directives.²¹⁹

215. Interview with a practicing lawyer in Hanoi, Vietnam (Dec. 20, 2017). This refers to the practice of meetings (*bop lien nganh*) among the troika—court, procuracy, police—to review the dossier. *Id.*

216. See Figure 3.

217. See, e.g., Quoc Hoi [National Assembly], Nghi Quyet 111/2015/QH13 [Resolution 111/2015/QH13] (Nov. 27, 2015), <https://luatvietnam.vn/an-ninh-trat-tu/ngghi-quyet-111-2015-gh13-quoc-hoi-107011-d1.html#noidung> [<https://perma.cc/6RNG-5G7C>]; Report on 2012 Work, *supra* note 128, at 2–3.

218. Hoi Dong Tham Phan Toa An Nhan Dan Toi Cao [Judicial Council of the Supreme People’s Court], Case 08/2010/HS-GDT (2010) (Viet.).

219. Hoi Dong Tham Phan Toa An Nhan Dan Toi Cao [Judicial Council of the Supreme People’s Court], Case 07/2011/HS-GDT (2011) (Viet.).

Of all the appeals reviewed, the Council commuted the death sentence only twice, in two rather extraordinary cases. The first involved a conviction for the rape and murder of the accused's neighbor.²²⁰ The defendant made a confession during interrogation but claimed innocence at trial. The case underwent a lengthy appeal process for the next seven years, with the defendant's family playing an active role in various campaigns to lobby legislators for clemency. A retrial, however, was denied in favor of a more palatable route. Noting the extreme importance of the defendant's confession to an otherwise witness-less crime, the Judicial Council reasoned that such a confession merited a high degree of mitigation, thereby reducing the death penalty to a life sentence. In the sentencing portion of the judgment, the Council further noted "the current policy on leniency [to reduce] the use of the death penalty" as part of its consideration—consistent with research pointing to Vietnam as a death penalty-reductionist state.²²¹

The second death sentence commutation involved a case that should not have been in the criminal courts.²²² In that case, a businessman had failed to honor several high-stakes real estate transactions. Lower courts sentenced him to death under Article 139 based on the large amount of money involved. The Judicial Council reversed, finding that the evidence did not amount to fraudulent conduct and that the disputes should have been resolved through a civil action. The case highlights another trend: the criminalization of civil disputes. Through the long arm of the criminal justice system, contracts gone wrong were often prosecuted as fraud; property disputes became illegal use of land; traffic accidents became public disorder.²²³ This issue was well-debated in legal circles and academia, where many blamed the vague nature of the criminal code and lack of clear guidelines for local procuracy offices.²²⁴ Several lawyers, however, noted that in some prosecutions, contractual parties strategically lobbied for criminaliza-

220. Hoi Dong Tham Phan Toa An Nhan Dan Toi Cao [Judicial Council of the Supreme People's Court], Case 05/2004/HS-GDT (2004) (Viet.).

221. See DAVID JOHNSON & FRANK ZIMRING, *THE NEXT FRONTIER, NATIONAL DEVELOPMENT, POLITICAL CHANGE, AND THE DEATH PENALTY IN ASIA* 388–89 (2009); Daniel Pascoe, *The Functions of Death Penalty Clemency in Southeast Asia: Comparative Lessons for Vietnam* (Asian Law Ctr., Briefing Papers 7, 2017), <https://law.unimelb.edu.au/centres/alc/research/publications/alc-briefing-paper-series/the-functions-of-death-penalty-clemency-in-southeast-asia-comparative-lessons-for-vietnam> [<https://perma.cc/7YUS-MRRT>].

222. Hoi Dong Tham Phan Toa An Nhan Dan Toi Cao [Judicial Council of the Supreme People's Court], Case 03/2005/HS-GDT (2005) (Viet.).

223. See, e.g., Hoi Dong Tham Phan Toa An Nhan Dan Toi Cao [Judicial Council of the Supreme People's Court], Cases 02/2003/HS-GDT (2003), 21/2003/HS-GDT (2003), 03/2005/HS-GDT (2005) (Viet.).

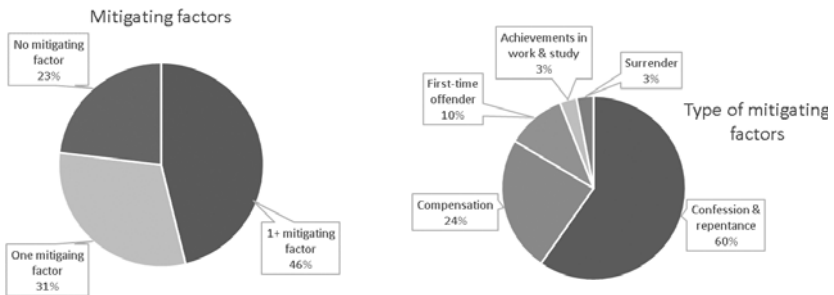
224. See *Vo Van Tai, Van de binh su boa trong cac vu an lua dao chiem doat tai san, lam dung chiem doat tai san* [Criminalization, civilization of fraud cases]; *Ho Trong Ngu, Mot so van de ve binh su boa, phi binh su boa cac hanh vi pham phap* [Criminalization and decriminalization of conducts], VIEN NGHIEN CUU VA PHAT TRIEN [INSTITUTE OF RESEARCH & DEVELOPMENT] (on file with author).

tion of civil disputes as a way to bypass the civil system, where judgments are notoriously difficult to enforce even after a court victory.²²⁵

2. *Reforms to Reduce Wrongful Convictions*

In recent years, Vietnam's lawmakers have struggled to deal with a series of high-profile wrongful conviction cases.²²⁶ One root cause traces to the prominent use of mitigating factors in criminal sentencing—confession being the most ubiquitous. Nearly 80 percent of the defendants in the dataset were credited for at least one mitigating factor; nearly half had more than one. About 20 percent received a reduction in sentencing below the mandatory minimum of the crime charged thanks to mitigation. The most frequently applied mitigating factor is making a confession (60 percent), followed by voluntary compensation (24 percent). These figures are even higher in homicide cases, representing 82 percent and 36 percent, respectively.

Figure 4: *Mitigating factors in criminal trials by frequency and type*



It is perhaps unsurprising that confessions are so ubiquitous in Vietnam's criminal justice system. After all, it has a long tradition of both Confucian morality and Communist self-criticism [*tu kiem diem*].²²⁷ Confession is considered a lynchpin of the prosecution's case, and, in practice, some lawyers believe that obtaining a confession allows investigators, who have a limited

225. Interviews with practicing lawyers in Hanoi, Vietnam (Dec. 19–20, 2017) and in Ho Chi Minh City (Dec. 23, 2017).

226. See *supra* note 112 and accompanying text.

227. Several classic works reflect on the influence of Confucius thought on Vietnam's legal system. See generally PHAM DUY NGHIA, *PHAP LUAT VA NHUNG DIEM TICH CUC CUA NHO GIAO* [LAW AND POSITIVE THOUGHTS FROM CONFUCIANISM] (2014); NGUYEN, KHAC VIEN, *BAN VE NHO GIAO* [THOUGHTS ON CONFUCIANISM] (1998). For a narrative on how a self-criticism session was conducted during postwar Vietnam, see NGUYEN VAN CANH, *VIETNAM UNDER COMMUNISM 1975-1982*, at 19–21 (2017).

budget, to forgo collecting other costly evidence.²²⁸ That said, Vietnam is not the only country that places high value on confessional speech; scholars have reported the same phenomenon in China, Japan, and the United States.²²⁹ In recent years, Vietnamese news outlets have called attention to several high-profile wrongful conviction cases,²³⁰ all of which reportedly involved the extraction of confessions through torture. An exonerated death row prisoner, Mr. Nguyen Thanh Chan, described the coercion he faced during his detention:

One officer asked me to draw the knife [the murder weapon]. I said I didn't know what type of knife, and he said he would hit me with a hammer unless I draw. Another officer carried with him a knife at all time and used it to intimidate me. Another officer read a confession and made me inscribe it. For over six days, they did not let me sleep, my head was spinning. Then I had to practice stabbing. They gave me a comb, a spoon, to pretend as the weapon. I had to practice over and over again so I could do it as they directed. Then they rented a house and brought me there to videotape the scene.²³¹

Mr. Chan's confession, together with the videotape of him at the mock crime scene, constituted the key pieces of evidence leading to his conviction. A compensation statute has since been enacted, and the SPC has recently instituted a policy to review all cases with sentences of twenty years' imprisonment and above.²³² A defense lawyer applauded these changes but did not think they were adequate safeguards:

The compensation statute was a symbolic step, but it is very hard to claim in practice. When my client said in court that his confession was coerced, the judge and lay assessors demanded evidence of coercion. My client could not produce that.²³³

Other defense attorneys shared this frustration and lamented the difficulty in accessing clients during detention.²³⁴ The power imbalance be-

228. Interviews with practicing lawyers in Hanoi, Vietnam (Dec. 19, 2018 & Jan. 18, 2018). The criminal code does require corroborating evidence in addition to a confession in order to secure a conviction. See 2003 Criminal Procedures Code, art. 72.

229. See Liebman, *supra* note 15; DAVID T. JOHNSON, THE JAPANESE WAY OF JUSTICE 245–53 (2001). See generally Rocksheng Zhong et al., *So You're Sorry? The Role of Remorse in Criminal Law*, 42 J. AM. ACAD. PSYCHIATRY L. 39, 39–48 (2014).

230. See *supra* note 112 and accompanying text.

231. *Ong Nguyen Thanh Chan mo ta viec bi ep cung* {Mr. Nguyen Thanh Chan described his coerced confession}, VNEXPRESS (June 11, 2013), <https://vnexpress.net/tin-tuc/phap-luat/ong-nguyen-thanh-chan-mo-ta-viec-bi-ep-cung-2906391.html> [<https://perma.cc/HM6J-GW2R>]

232. Toa An Nhan Dan Toi Cao Viet Nam [Supreme People's Court of Vietnam], Bao Cao Tong Ket Cong Tac Nam 2015 [Report on 2015 Work], 05/BC-TA, Jan. 13, 2016 (Viet.) (on file with author).

233. Interview with a practicing lawyer in Hanoi, Vietnam (Dec. 20, 2017).

234. Interviews with practicing lawyers in Hanoi, Vietnam (June 25, 2017, Dec. 19–20, 2017).

tween defense attorneys on the one hand and the state-led “troika”—procuracy, police, and court—on the other has been well documented.²³⁵ To that end, many interlocutors expressed positive feelings towards the new policy directive to bring more adversarial elements to the courtroom, starting with allowing defense lawyers to sit at the same level as the procurators.²³⁶

V. CONCLUSION

In *Dual State*, Fraenkel argues that the “political sphere” is not governed by legal rules but rather is “regulated by arbitrary measures in which the dominant officials exercise their discretionary prerogatives. Hence the expression ‘Prerogative State.’”²³⁷ The duality in Fraenkel’s account refers to the co-existence of law and lawlessness, of legal and arbitrary actions that live side by side in a normative legal system and a prerogative one.²³⁸ To study courts in authoritarian contexts is to confront a question looming large in this duality concept: can a court straddle both the normative and prerogative states without losing its integrity and legitimacy? This Article takes a first step at answering this question by developing a framework of judicial legitimacy that takes into account authoritarian courts’ complex relationships with political regimes. Building on Fallon’s tripartite socio-legal-moral-legal legitimacy framework, I propose a fourth dimension—interbranch legitimacy—to underscore authoritarian courts’ efforts to bolster their standing within the political and bureaucratic systems within which they operate. Viewed through the lens of interbranch legitimacy, courts’ jurisprudence that pays homage to political directives, while symptomatic of judicial capture, is not simply a blanket surrender. Rather, and perhaps more to authoritarian judges’ credit, they signify deliberate efforts to navigate political winds and cement institutional support. Yet, where political will contravenes values embedded in laws, human rights standards, or the popular will—in other words, where it acts on behalf of the Prerogative State—interbranch legitimacy is at the starkest opposite from other vectors of judicial legitimacy. As long as the Dual State exists and the court continues to search for a foothold in each half, judicial legitimacy remains on precarious ground.

Thanks to novel data and new access, we can now begin to explore the rich source of judicial opinions in authoritarian regimes to study these courts’ jurisprudence. As this case study shows, the Vietnamese judiciary strives to solidify its legitimacy by pursuing a multi-prong approach de-

235. See Nicholson, *supra* note 93, at 556–57.

236. Interviews with practicing lawyers in Hanoi, Vietnam (June 25, 2017, Dec. 19–20, 2017) and in Ho Chi Minh City (Jul. 4, 2017 & Dec. 23, 2017)

237. FRAENKEL, *supra* note 2, at 3.

238. *Id.* at 24, 38.

signed to please various audiences: international donors, lower courts, and the CPV in particular. The experience of Vietnamese courts, while shaped by the country's own historical, cultural, and sociological contexts, is also indicative of the predicament of courts elsewhere, which have to balance their quiddities as both legal and political actors.

Recent developments in the United States and worldwide caution us that the threats of authoritarian advances can affect non-liberal and liberal democratic systems alike.²³⁹ To be able to recognize the patterns and detect these stealth threats, especially as they are shrouded by familiar forms of legality, legal scholars need to critically engage with the normative theories that underpin authoritarian logics.²⁴⁰ This Article takes a small step towards laying the theoretical and empirical groundwork for additional research questions: how does interbranch legitimacy manifest to each of the many actors affecting courts in authoritarian contexts, including not just executive offices but also legislators, prosecutors, police, and the legal profession? As the global rise of authoritarianism emerges alongside democratic backsliding trends, how does the experience of democratic and authoritarian courts compare? In the face of these political developments, will democratic courts' interbranch legitimacy—seemingly secured in marble—start to shift and adapt? To echo the call of legal ethnographers, more work is still needed to build the “repertoire of thematization” that will enable us to make sense of the judicial logics in authoritarian contexts and elsewhere.

239. See generally Aziz Huq & Tom Ginsburg, *How to Lose a Constitutional Democracy*, 65 UCLA L. REV. 78, 80–86 (2018) (arguing that, over the past quarter-century, the risk of incremental erosion of democratic institutions has spiked around the world, and that U.S. constitutional safeguards are inadequate against this slow form of democratic backsliding).

240. For an example of such critical engagement, see Kim Lane Scheppele, *Autocratic Legalism*, 85 U. CHI. L. REV. 545 (2018).