RESURGENT AUTHORITARIANISM AND THE INTERNATIONAL RULE OF LAW

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ABSTRACT

Modern rule of law and post-war constitutionalism are both anchored in rights-based limitations on state authority. Rule-of-law norms and principles, at both domestic and international levels, are designed to protect the freedom and dignity of the person. Given this "thick" conception of the rule of law, authoritarian practices that remove constraints on domestic political leaders and weaken mechanisms for holding them accountable necessarily erode both domestic and international rule of law. Drawing on research on authoritarian politics, this study identifies three core elements of authoritarian political strategies: subordination of the judiciary, suppression of independent news media and freedom of expression, and restrictions on the ability of civil society groups to organize and participate in public life. Each of these three practices has become increasingly common in recent years. This study offers a composite measure of the core authoritarian practices and uses it to identify the countries that have shown the most marked increases in authoritarianism. The spread and deepening of these authoritarian practices in diverse regimes around the world diminish international rule of law, as it has developed in the post-Cold War international legal order.

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INTRODUCTION

Would the weakening or destruction of the multilateral institutions that have structured international relations for nearly seventy years amount to a decline in the international rule of law? Or, since states are still primary lawmakers in international relations, would such a turn of events simply mean that states—at least some states—are using their sovereign prerogatives to alter the rules under which they live? Another way of framing these questions is to ask if a return to the international legal order of 1913 or of 1939 would amount to a *weakening* of the international rule of law (IROL) or simply a shift to a *different* international rule of law.

Answers to the questions posed above require a definition of the international rule of law (IROL). A thin conception of IROL defines it as state conformity with existing international legal rules, whatever those happen to be. A thick conception of IROL includes the substance of the rules, particularly human rights-based legal limitations on state authority. Under the thick conception, IROL necessarily includes norms that protect individual freedom and dignity. The erosion of international law-based rights protections would, by definition, constitute a decline in the international rule of law. In this essay, I argue for a thick conception of IROL and suggest that increasing authoritarianism in a growing number of states implies a decline in the international rule of law. This article also concludes that the spread of authoritarianism is likely not only to erode the robustness of international human rights norms, but to also diminish the rule of law in additional domains (security, economics, environment), often seen as components of the post-World War II international rule-of-law system.

Anchoring the rule of law in rights-based limitations on state power enables me to identify a set of domestic practices that, as they spread and deepen, would erode the international rule of law. This article argues that the

resurgent authoritarianism visible in diverse parts of the world and among regimes of varying types—democratic, autocratic, and hybrids—undermines constraints on state power. This resurgent authoritarianism endangers the basic rights and freedoms, both domestic and international, at the heart of modern rule of law.

Scholarship has identified, with a notable degree of consensus, the core of authoritarian political strategies. That core consists of the subordination of the judiciary, suppression of independent news media and freedom of expression, and restrictions on civil society groups (including NGOs).

Finally, this article summarizes available empirical evidence of the extent to which these practices that erode the international rule of law are spreading. The assessment developed here argues that domestic rule of law is directly and integrally connected to international rule of law, through substantive values and norms that are foundational to both domestic and international legal orders. These norms and values aim for the protection of individual dignity, rights, and freedoms and consequently create boundaries to government power. The erosion of the domestic, rights-oriented rule of law therefore directly weakens international rule of law.

INTERNATIONAL RULE OF LAW

Though the terminology varies, three components typically define the rule of law: (1) the powers of government can only be exercised through law; (2) the law applies to the state and its officials; and (3) the law must apply equally to all.[1] There is less consensus in defining international rule of law. Definitions, however, tend to divide into either "thick" or "thin" conceptions.[2]

In the thin perspective, IROL is a political tool or an element of political strategy. For Hurd, "[l]aw is the language that states use to understand and explain their acts, goals, and desires."[3] International rule of law exists to the extent that states engage in the practice of legal justification.[4] This is a thin conception of the rule of law because it emphasizes formal legality and related justificatory practices without tying legality to particular substantive

1. Simon Chesterman, *An International Rule of Law?*, 56 AM. J. COMP. L. 331, 342 (2008); Ian Hurd, *Three Models of the International Rule of Law*, 23 EIDOS: REV. FILOSOFÍA 37 (2015) (Colom.).

2. A similar polarity is visible in concepts of the domestic rule of law. The classic example is the contrast between the approaches of Carl Schmitt (thin) and Hans Kelsen (thick).

3. Ian Hurd, *The International Rule of Law and the Domestic Analogy*, 4 GLOB. CONSTITUTIONALISM 365, 367 (2015).

4. *Id.*

values, like human rights.[5] Hurd argues that IROL cannot consist of limits on the powers of national governments because there is no international government to enforce such limitations and because states can choose which limitations on their powers to accept.[6] But this position immediately runs into difficulties. First, international law itself exists and functions in the absence of an international government to enforce it; thus, an international enforcement power cannot therefore be a prerequisite for international rule of law. Second, some international human rights norms have developed into customary international law, binding on all states.[7] Finally, even in domestic orders, fundamental legal norms—including many constitutional norms — are not and cannot be enforced in the way that Hurd expects of the international rule of law. Thus, Hurd is correct to show that legal justification is a form of power and to affirm that law "shows its power" as states seek to behave in ways that can be justified under international law.[8] However, this is a framework for observing the political use that states (and other actors) make of international law and for assessing the effects of that usage; it is not a theory of the international rule of law.

For theorists advancing thicker notions of international rule of law, international rule of law must be more than a system of rules that allows states to pursue their interests. Palombella argues that rule of law cannot "coincide with the mere existence of a legal order . . . in the absence of any other qualifications."[9] Instead, the rule of law requires democracy "paired with fundamental rights." Rule of law defined in these terms can be implemented "within the municipal constitutional domain or in the international sphere."[10] Nardin similarly argues that the rule of law should not be confused with the existence of laws: "[t]he expression 'rule of law' does no intellectual work if any effective system of enacted rules must be counted as law, no matter what its moral qualities."[11] And the moral qualities of the rule of law must include rights: "[t]he expression 'rule of law' . . . should be used only to designate a kind of legal order in which law both

5. *Id.* at 375.

6. *Id.* at 391.

7. MALCOLM N. SHAW, INTERNATIONAL LAW 257 (5th ed., 2003) ("Certain human rights may now be regarded as having entered into the category of customary international law").

8. Hurd, *supra* note 3, at 367 (2015).

9. Gianluigi Palombella, *The Rule of Law Beyond the State: Failures, Promises, and Theory*, 7 INT'L J. CONST. L. 442, 454 (2009).

10. *Id.* at 461.

11. Terry W. Nardin, *Theorising the International Rule of Law*, 34 REV. INT'L STUD. 385, 394 (2008).

constrains decision-making *and protects the moral rights of those who come within its jurisdiction.*"[12]

This essay adopts a substantive, rights-based conception of the international rule of law. Krieger and Nolte likewise employ a thicker conception of IROL, based on the "widely shared assumption that the process of legalization and judicialization which accelerated in the 1990s has transformed classical Charter-based international law with its emphasis on state-oriented principles and underdeveloped human rights obligations towards a more value-based order which is actually capable of protecting and serving individuals."[13] The international rule of law exists in "the recognition and established interpretation of universal value-based legal rules and principles."[14] However, instead of grounding IROL in specific systems of legal rules (the post-1990s international legal order), this essay anchors it in normative commitments that are at once more abstract and more foundational: rights-based limits on government power. The next section justifies that choice.

HUMAN RIGHTS, THE RULE OF LAW, AND CONSTITUTIONALISM

The definition of IROL adopted in this paper privileges human rights. Rights-based limitations on state authority are foundational to the international rule of law. One potential objection to this conception is that it is possible for relations among states to be structured and guided by international legal rules, across diverse domains, regardless of the nature of domestic regimes. Put differently, authoritarian states are capable of conforming to international legal regimes on the use of force, the conduct of war, trade, investment, refugees and migration, and the environment.

It is therefore possible, in principle, for a particular constellation of international legal rules to regulate international affairs even if a significant, or even growing, share of states in the world is authoritarian. Authoritarian governments can, and do, live by WTO rules, refrain from the illegal use of force, adhere to international environmental accords, and so on. Why would international-law-abiding authoritarian states not belong to an international rule-of-law world?

Under a thin conception of IROL, it might. But in the post-1945 world, the thin conception of the rule of law is no longer adequate. Modern theories

12. *Id.* at 397 (emphasis added).

13. Heike Krieger & Georg Nolte, *The International Rule of Law—Rise or Decline?—Approaching Current Foundational Challenges*, *in* THE INTERNATIONAL RULE OF LAW: RISE OR DECLINE? 12 (Heike Krieger et al. eds., 2019).

14. *Id.* at 13.

of the rule of law and of constitutionalism converge in placing human dignity, freedom, and rights at the core of all other state obligations. States should engage in rule-governed trade because it can better the well-being of their people. States should refrain from the use of force because wars destroy the rights and freedoms of people. States should protect the environment in order to safeguard the lives and opportunities of their people.

International rule of law

Domestic rule-of-law concepts cannot be transplanted directly into the international field. As Hurd puts it, "[t]he international rule of law cannot simply be derived from the domestic version, because the two rest on unique historical and political foundations."[15] Many others have noted that it would be inappropriate to analogize the state under international rule of law to the individual under domestic rule of law.[16] At the domestic level, individual rights must be protected from encroachments by the state, but it would be meaningless to theorize IROL based on the need to protect the rights of individual states from a non-existent world government.

Nevertheless, a core purpose of the domestic rule-of-law—to establish limits on the powers of government—is also central to modern international law. Modern international law sets boundaries to state powers, in the form of international human rights. Core international human rights norms have been accepted by virtually all states and seriously rejected by none (though of course, states continue to disagree about the priority to be afforded different rights or about the interpretation of universal rights in specific instances). Indeed, one of the great shifts in international law post-World War II is that sovereign prerogatives are bounded, with the consequence that how states treat people under their jurisdiction is no longer solely a matter of domestic policy. In the era of human rights law, domestic rule of law and international rule of law, thus, share the objective of building legal limits to state power so as to protect individual rights and freedoms.

Waldron has advanced a particularly forceful version of this argument. He argues that "[t]he real purpose of [international law] and, in my view, of the [rule of law] in the international realm is not the protection of sovereign states but the protection of the populations committed to their charge."[17] Waldron makes the case, adopting Kant's terminology, that states "are not

15. Ian Hurd, *The International Rule of Law: Law and the Limit of Politics*, 28 ETHICS & INT'L AFF. 39, 40 (2014); *see generally* Hurd, *supra* note 3.

16. Jeremy Waldron, *The Rule of International Law*, 30 HARV. J. L. & PUB. POL'Y 15, 21 (2006).

17. Jeremy Waldron, *Are Sovereigns Entitled to the Benefit of the International Rule of Law?*, 22 EUR. J. INT'L L. 315, 325 (2011).

ends in themselves, but means for the nurture, protection, and freedom of those who are ends in themselves. This is acknowledged in the philosophy of municipal law, when it is said that the state exists for the sake of its citizens, not the other way around."[18] The well-being of billions of people, including fundamentally their freedom and dignity, "not the well-being of sovereign nation-states, is the ultimate end of [international law]."[19] Waldron's thick version of IROL begins to sound like international constitutionalism. Indeed, he offers a reoriented domestic analogy by likening the relationship of states to international law to the relationship of domestic governing institutions to constitutional law.[20]

Global constitutionalism

The foregoing conception of IROL shares common ground with some theories of global constitutionalism. As McLachlan rightly notes:

[M]uch of the structure of contemporary international law—especially in the great multilateral conventions of near-universal application—has a constitutional character. These conventions provide a general structure for the organization and exercise of public power on the international plane. They were intended by their framers to be virtually immutable, because they establish fundamental principles of the international legal order within which states are to operate.[21]

Other theorists posit a rights-based constitutionalism underlying general international law of a "constitutional character." Post-war constitutionalism sought to remedy a central defect in the traditional domestic constitutional theory, catastrophically demonstrated in the era of fascism, which was that it could accommodate majoritarian repression. Constitutions designed after World War II sought to erect legal barriers to acts of the majority that would trample or destroy the rights, freedoms, and dignity of minorities, whether those minorities are defined along ethnic, racial, religious, linguistic, political, or any other lines. Hans Kelsen provided the theoretical armature for this new generation of constitutionalism. In Kelsen's model, constitutions do not just create and allocate the powers of the state, they also limit the powers of the state.[22] The state, even when backed by the will of a majority, must not act in ways that violate basic rights.

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18. Waldron, *supra* note 16, at 24.

19. Waldron, *supra* note 17, at 325.

20. *Id.* at 328.

21. Campbell McLachlan, *The Dynamic Evolution of International Law: Rise or Decline?*, 49 VICTORIA UNIV. WELLINGTON L. REV. 419, 422-23 (2018).

22. *See generally* HANS KELSEN, GENERAL THEORY OF LAW AND STATE (A. Javier Treviño, ed., Routledge 2005) (1949).

Modern constitutionalism, thus, incorporates supra-constitutional principles and norms, grounded in the rights, freedoms, and dignity of the individual person. These principles cannot be nullified by legislation enacted pursuant to the constitution and not even by amendment of the constitution itself. Thus, modern constitutionalism incorporates substantive norms regarding individual rights and freedoms. It features three core elements: "(1) an entrenched, written constitution, (2) a charter of fundamental rights, and (3) a mode of constitutional judicial review to protect those rights."[23] Moreover, in contemporary constitutions, the charter of rights typically comes first, before the definition of the branches of government and the allocation of powers among them. The new constitutional model appeared first in post-war Western Europe and by the 1990s had spread to most of the world.[24] Stone Sweet observes that all of the 106 constitutions established since 1985 include a charter of rights and 101 of them include a mechanism of judicial rights review.[25]

How is it appropriate to carry notions of modern domestic constitutionalism to the international level? Global constitutionalism necessarily differs from the domestic model in that it does not establish a supreme authority, is not supported by the coercive apparatus of a state, and is not grounded in a particular *demos*.[26] But modern constitutionalism shares with modern IROL an essential core: that individual rights and freedoms set boundaries to the powers of the state. As argued above, modern international rule of law includes universal limitations on the powers of the state, not just vis-à-vis each other but also with respect to individual persons under their jurisdiction. Thus, global constitutionalism is defined by the feature that distinguishes modern domestic constitutionalism: rights-based limits on state powers. Indeed, Gardbaum views the international human rights system as a stage "in the historical development of the idea of constitutionalism."[27]

The term "constitutionalism" thus applies appropriately to the global level in that, as defined here, global constitutionalism serves the same

23. Alec Stone Sweet, *Constitutional Courts*, *in* THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 816 (Michel Rosenfeld & András Sajó eds., 2012).

24. *Id.*; David S. Law & M. Versteeg, *The Evolution and Ideology of Global Constitutionalism*, 99 CALIF. L. REV. 1163 (2011).

25. Sweet, *supra* note 23, at 829 n.2.

26. Mattias Kumm, *The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and Beyond the State*, *in* RULING THE WORLD? CONSTITUTIONALISM, INTERNATIONAL LAW, AND GLOBAL GOVERNANCE 260 (Jeffrey L. Dunoff & Joel P. Trachtman eds., 2009).

27. Stephen Gardbaum, *Human Rights and International Constitutionalism*, *in* RULING THE WORLD? CONSTITUTIONALISM, INTERNATIONAL LAW, AND GLOBAL GOVERNANCE 255 (Jeffrey L. Dunoff and Joel P. Trachtman eds., 2009).

essential purpose as modern domestic constitutionalism: "legal limits [on state power] are now imposed by international law."[28] Furthermore, the international human rights system provides the substance of global constitutionalism by affirming that human rights norms apply to all people "as rights of human beings rather than as rights of citizens."[29] To be sure, modern constitutionalism and the international human rights regime co-evolved in the decades after 1948, the year in which the new U.N. General Assembly approved the Universal Declaration of Human Rights (UDHR). Indeed, international human rights law has had a clear and demonstrable effect on the domestic constitutionalization of rights.[30] The rights enumerated in national constitutions overlap with the rights identified in the UDHR far more after 1948 than before.[31] And, the degree of overlap rose dramatically in the decades after the UDHR: the average number of UDHR rights in constitutions in 1947 was 11.5; by 2005 it reached a peak of 30.6.[32]

In this section, I have sought to establish foundations for the analysis that will follow. The essentials are the following:

1. Modern conceptions of the rule of law, both domestic and international, require that the powers of the state be limited by individual rights.

2. Modern conceptions of the rule of law—domestic and international—overlap substantially with modern constitutionalism, which is also grounded in universal human rights principles and norms that limit the powers of the state.

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28. *Id.*

29. *Id.* at 257.

30. Mila Versteeg, *Law versus Norms: The Impact of Human Rights Treaties on National Bills of Rights*, 171 J. INST. THEORETICAL ECON. 87, 87 (2015) ("the UDHR could protect human rights globally by shaping the behavior of governments nationally").

31. Zachary Elkins et al., *Getting to Rights: Treaty Ratification, Constitutional Convergence, and Human Rights Practice*, 54 HARV. INT'L L. J. 61, 77, 79, 80 (2013); Colin J. Beck, et al., CONSTITUTIONS IN WORLD SOCIETY: A NEW MEASURE OF HUMAN RIGHTS 10 (Cambridge Univ. Press 2017); David Sloss & Wayne Sandholtz, *Universal Human Rights and Constitutional Change*, 27 WILLIAM & MARY BILL OF RIGHTS JOURNAL 1183 (2019). What global, rights-based constitutionalism lacks, as compared with domestic constitutionalism, is a fully developed mechanism for judicial review of government acts to ensure their conformity with individual rights and freedoms. Elsewhere I have argued that a rudimentary and decentralized form of rights review is emerging at the international level in the regional human rights courts and the Human Rights Committee and visible in the judicial dialogue among them; *see* Wayne Sandholtz, *The Trans-Regional Construction of Human Rights*, *in* CONTESTING HUMAN RIGHTS: NORMS, INSTITUTIONS AND PRACTICE (Alison Brysk and Michael Stohl eds., 2019).

32. *See generally* Sloss & Sandholtz, *supra* note 31.

3. Because rights-based limitations on state power must first and primarily be given effect by domestic institutions and legal orders, IROL necessarily has domestic foundations.[33]

4. International rule of law implies *domestic*, rights-based, constitutional limits on state power.

5. The erosion of domestic, rights-based, constitutional limits on state power therefore implies a decline in the international rule of law.

This conception of IROL provides criteria with which to assess whether the international rule of law is rising or declining. To the extent that the behavior of governments erodes fundamental human rights, the international rule of law declines. The greater the loss of respect for rights, and the larger the number of states in which this occurs, the greater the decline in IROL. Clearly, this conception of a rights-based international rule of law entails a fundamental normative commitment to the primacy and universality of human dignity, liberty, and rights. Such a normative commitment will not be acceptable to everyone. In its defense, I would point out that it avoids the danger inherent in thin conceptions of both domestic and international rule of law, of majoritarian, including populist, repression. The existence of law is no longer sufficient for the rule of law.

POPULISM, AUTHORITARIANISM, AND THE EROSION OF THE RULE OF LAW

The linkages between domestic and international rule of law imply that the decay of domestic rights-based rule of law implies a decline in rights-based international rule of law. It would be impossible to develop and assess that claim across the full panoply of human rights. Instead, I focus on mechanisms that are essential for effective, rights-based limitations on government power. Once these mechanisms are weakened or removed, governments have greater ability to violate the broader array of rights without political or legal consequences. The analysis thus centers on a set of three mechanisms that are crucial to limiting the powers of the state. Students of authoritarianism have identified these three as typical targets of authoritarian political strategies: an independent judiciary, a free press, and a civil society that is free to organize and participate in politics.[34] I will argue that the

33. Waldron, *supra* note 17, at 325, 328 (going further by arguing that states are generally charged with implementing or enforcing international law and are therefore "recognized by IL as trustees for the people committed to their care"). One need not go as far as Waldron in order to accept the point that domestic regimes have primary responsibility under international law for respecting, and ensuring respect for, international rights-based limits on state power.

34. David Beetham, *Authoritarianism and Democracy: Beyond Regime Types*, 13 COMPAR. DEMOCRATIZATION 2 (2015); Marlies Glasius, *What Authoritrianism Is . . . and is Not: A*

resurgence of authoritarianism—assessed in terms of these three core mechanisms for checking government power—undermines international rule of law. My approach thus concords with Kumm's observation that international rule of law can constrain national executives that seek to expand their own powers at the expense of constitutional democracy.[35]

Populism

Social scientists and legal scholars alike have sought to understand the current threat to international rule of law in terms of domestic political shifts driven by "populism." Though definitions of "populism" vary, a few key elements feature in many or most of them.

Populists generally (1) criticize "elites," (2) demand that political power be returned to the authentic people (of whom the populists are the direct representatives), and (3) define the people in homogeneous, often primal, terms.[36]

There is perhaps less consensus on whether populism endangers democracy and the rule of law. Indeed, some earlier theorists argued that populism could invigorate democracy by bringing into the political arena groups and claims that had been previously excluded or marginalized. Recent work tends to reject that view,[37] arguing on the contrary that populism is, by its nature, destructive of democracy and the rule of law. Mudde and Rovira Kaltwasser offer a distinction, writing that although populism is per se neither a threat nor a corrective to democracy, it is fundamentally inimical to *liberal* democracy, which in addition to free and fair elections requires protections for basic individual rights.[38] As argued above, modern constitutional democracy necessarily includes rights-based limits on state power.

Populist leaders and parties identify themselves with the homogeneous, unified, genuine "people." Anyone who opposes the populist leader and his party must therefore represent interests other than those of the true people. Political opposition is therefore, by definition, illegitimate: there cannot be

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Practice Perspective, 94 INT'L AFF. 515 (2018); CRISTÓBAL MUDDE & CAS ROVIRA KALTWASSER, POPULISM: A VERY SHORT INTRODUCTION (2017).

35. Mattias Kumm, *International Law in National Courts: The International Rule of Law and the Limits of the Internationalist Model*, 44 VA. J. INT'L L. 25 (2003).

36. Koen Abts & Stefan Rummens, *Populism Versus Democracy*, 55 POL. STUD. 409 (2007); Jan-Werner Müller, *Parsing Populism: Who Is and Who Is Not a Populist These Days?* 22 JUNCTURE 81, 83 (2015); STEPHAN DE SPIEGELEIRE ET AL., THE RISE OF POPULIST SOVEREIGNISM: WHAT IT IS, WHERE IT COMES FROM, AND WHAT IT MEANS FOR INTERNATIONAL SECURITY AND DEFENSE (2017).

37. Abts & Rummens, *supra* note 36, at 406-407.

38. MUDDE & KALTWASSER, *supra* note 34, at 79-81.

any valid political claims other than those defined by the general will of the real people.[39] "[A] populist regime can, therefore, only survive if it becomes authoritarian and despotic."[40] As Müller argues, populists are not just anti-elitist but also anti-pluralist, and as "principled anti-pluralists, [populists] cannot accept anything like a legitimate opposition. . . . [P]opulists consistently and continuously deny the very legitimacy of their opponents (as opposed to just saying that some of their policies are misguided)."[41] In this view, populists are necessarily authoritarians.[42] As Krieger notes, once populist parties are in power, "their strategies to govern often result in a process of constitutional retrogression implying a gradual transition from democracy to authoritarian regimes."[43]

For the purposes of this essay, the details of theories of populism are not essential. What matters is that the arguments surveyed here link populism to authoritarianism, which in turn directly threatens democracy and the rule of law. We can set aside the question of whether populism is inherently authoritarian or leads to authoritarianism because in the present juncture the two are combined: the populist leaders and parties that have made political gains in various countries are unmistakably authoritarian. Indeed, for Norris, the phenomenon to be explained is "authoritarian populism" or "populist authoritarianism."[44]

Authoritarianism

Political science research on authoritarian regimes is abundant but sometimes suffers from two deficiencies. For one, it tends to focus on the characteristics and processes of authoritarian regimes rather than on the concept of "authoritarianism" itself, leading to checklists of specific institutional features that identify different types of authoritarian regimes (personalist, military, and so on).[45] A second problem is that political science

39. Abts & Rummens, *supra* note 36, at 419.

40. *Id.* at 421; *see also* Nadia Urbinati, *Democracy and Populism*, 5 CONSTELLATIONS 122 (1998).

41. Müller, *supra* note 36, at 85-86 (2015).

42. *But see* MUDDE & KALTWASSER, *supra* note 34, at 79-91 (analyzing populism as not inherently a threat to democracy, but a threat to *liberal* democracy, which is the only kind of democracy in play in this essay).

43. Hieke Krieger, *Populist Governments and International Law*, 30 EUR. J. INT'L L. 971, 975 (2019).

44. Pippa Norris, *It's Not Just Trump. Authoritarian Populism Is Rising Across the West. Here's Why.* WASH. POST (March 11, 2016), https://www.washingtonpost.com/news/monkey-cage/wp/2016/03/11/its-not-just-trump-authoritarian-populism-is-rising-across-the-west-heres-why/.

45. Beetham, *supra* note 34; Glasius, *supra* note 34.

scholarship often defines "authoritarian" as a residual category: an authoritarian regime is one lacking free and fair elections. "Authoritarian" becomes synonymous with "non-democratic."[46] A more useful set of conceptual tools for my purposes would focus not on the institutional features of authoritarian governments but on the strategies and practices of authoritarian leaders and groups.[47]

Beetham convincingly argues for seeing authoritarianism as a "mode of governing which is intolerant of public opposition and dissent." Authoritarian governance occurs when "rulers see public opposition as a major threat to the extent or continuation of their power and believe that they can work to undermine it with relative impunity."[48] Such an approach allows the analyst to evaluate authoritarian conduct within democracies, of particular, present importance given widespread concern about authoritarian shifts in countries that are formally and functionally democratic. Frantz and Kendall-Taylor point out that in earlier periods authoritarians often came to power through "sudden and decisive" means, often involving the suspension of democratic rules or coups d'état.[49] In contrast,

> Contemporary autocrats are coming to power through a process of "authoritarianisation," or the gradual erosion of democratic norms and practices. Democratic leaders, elected at the ballot box through reasonably free and fair elections, are slowly undermining institutional constraints on their power . . . in ways that make it difficult to pinpoint the moment at which the break with democratic politics occurs.[50]

The key point is that authoritarianism involves measures designed to remove constraints on the exercise of state power.

In other words, authoritarianism is identified by practices that aim to eliminate, or in Glasius's terms, "sabotage," accountability.[51] Bovens offers a useful definition of accountability as "a relationship between an actor and a forum, in which the actor has an obligation to explain and to justify his or her conduct, the forum can pose questions and pass judgement, and the actor may face consequences."[52] Beetham employs different terminology but the idea is the same, authoritarianism seeks to "render dissenters impotent by denying them access to any influence on the political process; it even goes

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46. *See generally* Beetham, *supra* note 34.

47. *See generally Id.*; *see also* Glasius, *supra* note 34.

48. Beetham, *supra* note 34, at 12.

49. Erica Frantz & Andrea Kendall-Taylor, *The Evolution of Autocracy: Why Authoritarianism Is Becoming More Formidable*, 59 SURVIVAL 57, 60 (2017).

50. *Id.* at 60.

51. Glasius, *supra* note 34, at 517.

52. Mark Bovens, *Analysing and Assessing Accountability: A Conceptual Framework*, 13 EUR. L.J. 447, 450 (2007).

so far as to define them as nonlegitimate players in the country's affairs."[53] When suppression of opposition is institutionalized, an "authoritarian mode of governing" turns into "an authoritarian regime."[54] I now turn to the kind of measures that authoritarian leaders and groups employ to suppress opposition and eliminate accountability.

Authoritarianism and the erosion of the rule of law

Analysts identify three key institutions that authoritarians tend to target in order to consolidate unaccountable power: (1) judicial independence, which entails the institutional authority to review government acts for their consistency with basic rights and other constitutional rules; (2) freedom of expression, especially freedom of the press; and (3) freedom to assemble and organize, not just to contest elections, but to influence government and hold it accountable through civil society organizations.

The convergence of the rule of law on these three elements is noteworthy. Beetham, for example, declares that authoritarians can institutionalize the suppression of opposition by restricting freedom of expression (including that of the press) and freedom of association (within civil society), and by subordinating the courts to the executive.[55] As examples of sabotaging accountability, Glasius refers to restraints placed on journalists and NGOs.[56] Müller notes that populist authoritarians remake the state to enlarge and entrench their power, by exerting control over courts, intimidating or silencing critical press, and condemning or suppressing NGOs and other civil society groups that criticize the regime.[57] Mudde and Rovira Kaltwasser similarly point out that "[a]mong the most targeted institutions are the judiciary and the media."[58]

Krieger argues along the same lines, that populist governments often seek to shrink the power of the courts to act as an independent check, try to limit the freedom of the press, and "oppose civil society and tend to reject participatory processes of decision-making."[59] Scheppele assesses a particular kind of authoritarian, the "autocratic legalist," who uses democratic processes and legal forms to dismantle or remove the rules, institutions, or actors that "check his actions" or "hold him to account." She

53. Beetham, *supra* note 34, at 13.

54. *Id.*

55. *Id.*

56. Glasius, *supra* note 34, at 528.

57. JAN-WERNER MÜLLER, IN THE AGE OF PERPLEXITY: RETHINKING THE WORLD WE KNEW. THE RISE AND RISE OF POPULISM? (OpenMind 2017).

58. MUDDE & KALTWASSER, *supra* note 34, at 81.

59. Krieger, *supra* note 43, at 976.

highlights as common elements of autocratic "reforms" the assertion of political control over the judiciary, the modification of electoral rules to guarantee legislative majorities or supermajorities, and reduction or elimination of independent media.[60] Huq and Ginsburg see "constitutional retrogression" as having eroded democracy and the rule of law in Latin America, Eastern Europe, and Asia. Prominent pathways to constitutional retrogression include the following: elimination of institutional checks, especially through independent courts; control of information and communication, including restrictions on journalists; and curtailing the activities of lawyers, NGOs, and private foundations.[61] In line with this striking consensus on the key targets of authoritarian policies, the analysis below focuses on recent trends in suppressing judicial independence, freedom of the press and expression, and the freedom of civil society to organize and participate in public life.

AUTHORITARIAN ASSAULTS ON THE RULE OF LAW

Before turning to the specific institutions and freedoms targeted by authoritarians, it might be useful to paint a broad picture of global trends in democracy and the rule of law. The most recent Freedom House report, Freedom in the World 2021, raises numerous alarms. The report warns that in 2020, "democracy's defenders sustained heavy new losses in their struggle against authoritarian foes, shifting the international balance in favor of tyranny."[62] The report notes that 2020 "marked the fifteenth consecutive year of decline in global freedom and that countries experiencing deterioration outnumbered those with improvements by the largest margin recorded since the negative trend began in 2006."[63]

Directly relevant for this essay's purposes, the global average for Freedom House's rule of law score has also steadily declined over the past dozen years, as shown in Figure 1.[64] The figure reports the global average of

60. Kim L. Scheppele, *Autocratic Legalism*, 85 U. CHI. L. REV. 545, 549 (2018).

61. Aziz Z. Huq & Tom Ginsburg, *How to Lose a Constitutional Democracy*, 65 UCLA L. REV. 78, 130-35 (2018).

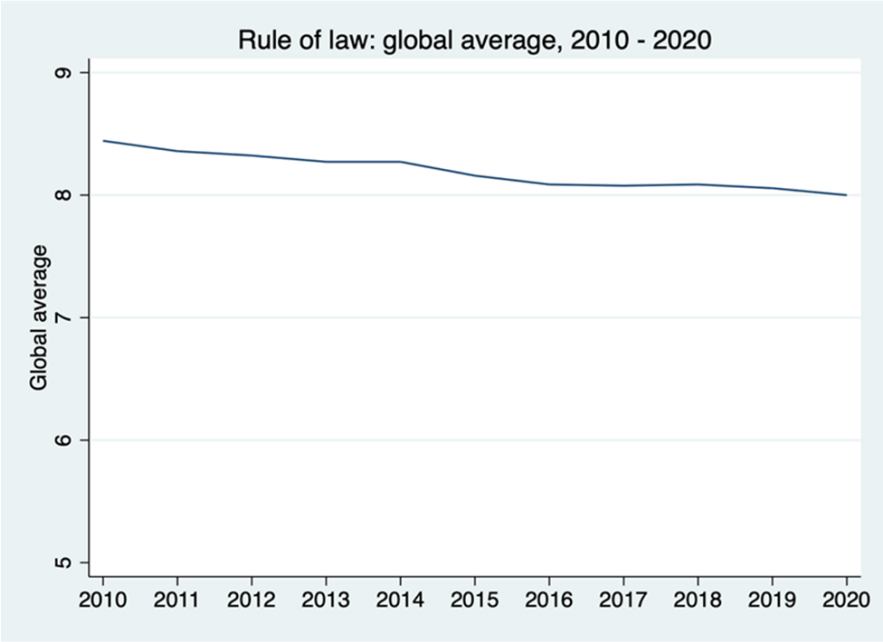
62. Sarah Repucci & Amy Slipowitz, *Freedom in the World 2021: Democracy Under Siege*, FREEDOM HOUSE, https://freedomhouse.org/report/freedom-world/2021/democracy-under-siege (last visited Mar. 29, 2022).

63. *Id.*

64. The Freedom House "Rule of Law" measure is a 16-point scale derived from questions about judicial independence; due process; protection from illegitimate use of force, including war and insurgencies; and equal treatment for all members of society. MICHAEL J. ABRAMOWITZ, FREEDOM HOUSE, FREEDOM IN THE WORLD 2018: DEMOCRACY IN CRISIS 3 (2018), https://freedomhouse.org/sites/default/files/2020-02/FH_FIW_Report_2018_Final.pdf.

national rule of law scores. Given that some countries have maintained high levels of the rule of law and others have shown low levels for many years, the decline in the global average is striking. The rule of law indicator assesses the domestic rule of law, but as I argued above, domestic rule of law and international rule of law are directly linked by common limits on government power. The following sections address the more specific components of the rule of law.

Figure 1



Judicial independence

Authoritarians seek to weaken or eliminate institutions and mechanisms that could check their power or hold them accountable. As discussed above, students of authoritarian politics consistently identify the courts as one of the first institutions targeted by authoritarians and would-be authoritarians. Independent courts can check executive power, especially in the post-war period when judicial review has diffused globally. Judicial review entails the authority to evaluate state acts for their compatibility with a constitution or a charter of rights and to nullify acts that are found incompatible. By about

2010, the number of countries with formal judicial review had reached 160.[65] Authoritarians seek to subordinate and control the courts. Authoritarian leaders can pursue various means of diminishing judicial independence, from court packing (appointing loyalists to the bench), to purging judges, or intimidating judges through public denunciations.

Freedoms of the press and of expression

The capacity of the public to hold government accountable depends on its ability to know what government actors are doing, which in turn requires that societal actors are able to report on, discuss, and criticize what political officials do. Citizens must be free to share what they know and to express disapproval. For that, the press, including broadcast and digital media, must be able to investigate and report on government policies, as well as on misdeeds or abuse of authority by officials. Freedom of expression and freedom of the press are therefore crucial bulwarks of democracy. And, as reported above, this is why students of authoritarianism have identified suppression of those freedoms as hallmarks of authoritarian politics.

Freedom House monitors restrictions on press freedoms around the world. In its 2017 report on press freedom, Freedom House declared, "[g]lobal press freedom declined to its lowest point in thirteen years in 2016 amid unprecedented threats to journalists and media outlets in major democracies and new moves by authoritarian states to control the media, including beyond their borders."[66] In its latest assessment, Freedom House concludes that "media freedom has been deteriorating around the world over the past decade, with new forms of repression taking hold in open societies and authoritarian states alike."[67]

Finally, for democracy to function, ordinary citizens must have the freedom to express their views, even, or especially, when these views are critical of the government. Over the past decade, freedom of expression has also suffered in an expanding list of countries. According to Freedom House data, erosion of freedom of expression and belief has been significant enough

65. Table compiled from Coppedge et al., V-DEM VARIETIES OF DEMOCRACY, CODEBOOK 44 (March 2021) [hereinafter CODEBOOK]; *see also* Coppedge et al., V-DEM COUNTRY-YEAR/COUNTRY-DATE DATA (2021) [hereinafter DATE DATA].

66. Michael J. Abramowitz, *Freedom of the Press 2017: Press Freedom's Dark Horizon,* FREEDOM HOUSE, https://freedomhouse.org/report/freedom-press/2017/press-freedoms-dark-horizon (last visited Mar. 29, 2022).

67. Sarah Repucci, *Freedom and the Media 2019: Media Freedom: A Downward Spiral,* FREEDOM HOUSE, https://freedomhouse.org/report/freedom-and-media/2019/media-freedom-downward-spiral (last visited Mar. 29, 2022).

in some states to reduce the global average during the period 2012 to 2020.[68] Moreover, about half of the states in the world experienced a decline in Freedom of expression and belief during that period.[69]

Civil society and NGOs

Authoritarians employ various means of stifling dissent and suppressing groups that might expose their abuses and thus motivate opposition. At the broader level, they restrict the ability of civil society actors to organize and engage in political activity. The number of states in which government has expanded its control over the ability of CSOs to participate in public life has risen dramatically in recent years. Krieger has analyzed this trend as a potential erosion of international legal norms: "On the bases of their antagonistic anti-establishment stance and their holistic identity politics, populist governments share the goal of restricting NGO activity as well as the tendency to resist the spread of global norms through civil society."[70] More specifically, the authoritarian effort to reduce or eliminate the ability of civil society groups to hold government accountable has taken the form of policies that choke off international sources of financial support for NGOs, especially human rights NGOs.[71] Restrictions on foreign funding of pro-democracy NGOs started in Russia and China in the early 2000s.[72] This practice then spread. One study identified 39 out of 98 countries that had enacted restrictions on foreign funding of NGOs and 12 that prohibited it.[73]

MEASURING THE UPTURN IN AUTHORITARIANISM

The individual indicators explored so far paint a picture of the breadth and diversity of the authoritarian resurgence. States of all types, and from all regions of the world, have enacted at least some parts of the authoritarian script. That script involves suppressing or eliminating potential means of exposing, criticizing, or opposing government actions. Of course, some countries might experience a decline in one or two of the indicators of authoritarian practices but hold steady or even improve in others. Have some

68. *See generally* Michael J. Abramowitz, *Freedom in the World*, FREEDOM HOUSE, https://freedomhouse.org/report/freedom-world (last visited Mar. 29, 2022).

69. *Id.*

70. Krieger, *supra* note 43, at 990.

71. Krieger, *supra* note 43, at 976; Huq & Ginsburg, *supra* note 61, at 50.

72. Thomas Carothers, *The Backlash Against Democracy Promotion*, 85 FOREIGN AFF. 55, 57 (2006).

73. Darin Christensen & Jeremy Weinstein, *Defunding Dissent: Restrictions on Aid to NGOs*, 24 J. DEMOCRACY 77, 80 (2013).

states, in contrast, adopted the authoritarian playbook more completely? The preceding sections explored multiple indicators. This section seeks to offer a comprehensive measure of the spread of authoritarian practices. The indicators are produced by the Varieties of Democracy project.[74]

Table 1: Authoritarian strategies, V-Dem indicators

Authoritarian strategy	Indicator
Undermine judicial independence	Government attacks on the judiciary (v2jupoatck) Court packing (v2jupack)
Curtail freedom of expression	Freedom of discussion (average of v2cldiscm (men) and v2cldiscw (women)) Government censorship (v2mecenefm)
Constrain civil society	CSO entry and exit (v2cseeorgs) CSO repression (v2csreprss)

Note: V-Dem variable names in parentheses.

The following table lists the states that showed increases in at least five of the six indicators of authoritarianism. The table also indicates the direction of change in each specific indicator. To be clear, the table does not display a measure of the level of authoritarianism; it indicates movement toward increasing authoritarian practices. Some established democracies appear on the list (Brazil, India, the United States) not because they have become authoritarian or autocratic like other states on the list (like Burundi or Nicaragua). The table simply displays the worrisome indicators of shifts in an authoritarian direction.

74. CODEBOOK, *supra* note 65; *see also* DATE DATA, *supra* note 65.

Table 2: Countries showing an increase in at least 5 of the 6 indicators of authoritarianism, 2010 – 2020

18 countries		Individual indicators					
	Number of indicators showing increased authoritarianism	Attacks on the judiciary	Court pack-ing	Restrictions on freedom of discussion	Media censor-ship	Restrictions on CSO entry	CSO repres -sion
Bangladesh	6	↑	↑	↑	↑	↑	↑
Brazil	6	↑	↑	↑	↑	↑	↑
Burundi	6	↑	↑	↑	↑	↑	↑
Czech Republic	6	↑	↑	↑	↑	↑	↑
Hungary	6	↑	↑	↑	↑	↑	↑
Mauritius	6	↑	↑	↑	↑	↑	↑
Poland	6	↑	↑	↑	↑	↑	↑
Turkey	6	↑	↑	↑	↑	↑	↑
Yemen	6	↑	↑	↑	↑	↑	↑
Benin	5	↓	↑	↑	↑	↑	↑
India	5	↓	↑	↑	↑	↑	↑
Lithuania	5	↓	↑	↑	↑	↑	↑
Nicaragua	5	↓	↓	↑	↑	↑	↑
South Africa	5	↓	↑	↑	↑	↑	↑
Suriname	5	↑	↑	↑	↑	↓	↑
Tanzania	5	↑	↓	↑	↑	↑	↑
United States of America	5	↑	↑	↑	↑	↓	↑
Zambia	5	↑	↓	↑	↑	↑	↑
Total countries with increase in specific authoritarian practice:		13	15	18	18	16	18

CSO = civil society organizations

Table 3, on the other hand, reports (in the middle column) declines in the Liberal Democracy Index over the period 2010-2020. The Liberal Democracy Index measures "the extent to which the ideal of liberal democracy is achieved."[75] In other words, declines indicate the *extent* of the shift away from liberal democracy. The scale runs from 0 to 1; the scores at the top of the list therefore represent substantial moves away from democracy. The table also displays the direction of change in the six

75. CODEBOOK, supra note 65.

indicators of authoritarianism. Not surprisingly, the countries listed (except Mali) show shifts toward authoritarian practices in more than half of the indicators, that is, in at least four of them. Near the top of the list are two European countries that have steadily slipped toward authoritarian one-party rule (Poland and Hungary). Another pair of countries, Brazil and the United States, show the effects of elected presidents with strong authoritarian tendencies (Bolsonaro and Trump). India, long seen as an established democracy, has also moved toward increased authoritarianism. Some of the countries near the bottom of the list (for instance, Yemen and Albania) show a decline in their democracy scores from already low levels, as well as increasing authoritarian practices.

Table 3: 25 countries showing the greatest decline in the Liberal Democracy Index, 2010 - 2020

Country	Decline in Liberal Democracy Index	Number of indicators showing increased authoritarianism
Poland	-0.341	6
South Africa	-0.321	5
Hungary	-0.316	6
Turkey	-0.286	6
Brazil	-0.275	6
Serbia	-0.267	4
Benin	-0.257	5
India	-0.228	5
Mauritius	-0.226	6
Bolivia	-0.181	4
Zambia	-0.161	5
Nicaragua	-0.151	5
Comoros	-0.147	4
United States of America	-0.127	5
Mali	-0.109	3
Czech Republic	-0.107	6
Burundi	-0.107	6
Croatia	-0.089	4
Yemen	-0.088	6
Bulgaria	-0.088	4
Tanzania	-0.087	5
Bangladesh	-0.086	6
Greece	-0.077	4
Suriname	-0.064	5
Albania	-0.041	4

The data on increasing authoritarian practices and shifts away from democratic governance reinforce the need for active resistance to authoritarianism, not just in countries already affected by it, but also in historically democratic states.

CONCLUSIONS

I argued for a thick conception of international rule of law, grounded in legal limits on the powers of the state. This conception of the rule of law ties together both the domestic and international levels because it is both domestic constitutions and international treaties that establish limitations on state power, limitations derived from the dignity and freedom of each person. Authoritarian politics target such limitations as authoritarians seek to weaken or eliminate independent mechanisms for holding them accountable. Research on authoritarianism converges on three such mechanisms that are regularly suppressed or destroyed by authoritarian regimes: judicial independence, freedom of expression and of the press, and the freedom of association and organization in civil society.

The data—with two indicators for each accountability mechanism—demonstrates that the number of states that show erosion has increased dramatically in recent years. The undermining of accountability mechanisms has occurred in the well-known "backsliders" (Hungary, Poland, Turkey, India, Philippines, Brazil), but also in some more established democracies (the United States). Entrenched authoritarians have also strengthened their hold (Azerbaijan, Burundi, Cambodia, Egypt, Iran). In itself, the authoritarian dismantling of limitations on state power constitutes an erosion of modern international rule of law.

But authoritarian resurgence should also be seen as a threat to a more narrowly defined international rule of law. For example, Krieger and Nolte conceptualize international rule of law as the interconnected set of international legal rules regulating international affairs in the decades after 1990.[76] They ask whether "contemporary forms of violations [of international law] are unusual in the sense that they call basic rules, or even the functioning of the system itself, into question."[77] Even on the basis of this more specific, thin definition of IROL, in the post-1990 international legal order, the implications of authoritarian resurgence are worrisome.

National support for, and compliance with, international legal rules depend on domestic compliance constituencies, whether in trade, investment, the environment, or with respect to threats to peace and to human rights.

76. Krieger & Nolte, *supra* note 13, at 5-6.

77. *Id.* at 9.

Compliance constituencies are actors and groups that support a state's continued participation in and general compliance with international legal regimes. Such constituencies include firms that engage in international trade or investment and their workers. They include civil society organizations that favor international environmental protections, as well as firms that invest in "green" technologies and markets. They include NGOs that lobby and litigate on behalf of human rights.

Authoritarian practices degrade the ability of domestic compliance constituencies to seek to change government policies. As political accountability erodes, authoritarian governments have more leeway to disregard or undermine international legal structures without facing domestic political consequences.

In addition, authoritarian regimes are less likely than democracies to fully participate in, and comply with, the rules of international institutions. At the most fundamental level, authoritarian resurgence raises concerns about international peace and stability. One of the clearest and most stable research findings that concerns the "democratic peace" finds that democracies do not fight each other.[78] As the proportion of democracies in the world declines, the potential for armed conflict between other types of dyads (democracy-autocracy, autocracy-autocracy) increases. Research also shows international organizations composed mostly of democracies contribute significantly more to peaceful conflict resolution than do organizations composed of fewer democracies.[79] Rising authoritarianism implies a declining proportion of democracies in international organizations, which may diminish the capacity of these organizations to promote conflict resolution. Finally, there is also evidence that authoritarian regimes are generally less inclined than democracies to participate in international institutions which they are both more likely to withdraw from and less likely to join.[80] Along multiple dimensions, resurgent authoritarianism will erode international rule of law.

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78. J. O'Neal & B. Russett, *The Kantian Peace: The Pacific Benefits of Democracy, Interdependence, and International Organizations, 1885-1992*, 52 WORLD POL. 1 (1999); D.S. BENNETT & A.C. STAM, THE BEHAVIORAL ORIGINS OF WAR, ch. 5 (2004).

79. Jon Pevehouse & Bruce Russett, *Democratic International Governmental Organizations Promote Peace*, 60 INT'L ORG. 969 (2006); Andreas Hasenclever & Brigitte Weiffen, *International Institutions Are the Key: A New Perspective on the Democratic Peace*, 32 REV. INT'L STUD. 563 (2006).

80. Edward D. Mansfield & Jon C. Pevehouse, *Democratization and International Organizations*, 60 INT'L ORG. 137 (2006); Edward D. Mansfield & Jon C. Pevehouse, *Democratization and the Varieties of International Organizations*, 52 J. CONFLICT RESOL. 269 (2008).