PREFACE

The rule of law has been eroding for more than a decade in every region of the world. This transnational phenomenon is visible "in both established democracies like the United States, and in entrenched autocracies, from Russia to China to Venezuela."[1] In Latin America, observers note "a dire, real challenge to the rule of law."[2] In Africa, "the last decade has seen this commitment [to the rule of law] steadily weaken."[3] More broadly, the globe is undergoing "a rule of law recession characterized by executive overreach, curtailing of human rights, and justice systems that are failing to meet people's needs."[4] In short, "[t]here is a global crisis of the rule of law."[5]

At the international level, events have likewise raised concerns about the continued vigor of rules that have stabilized world politics for decades. Russia's invasion of Ukraine, including the removal of some 19,000 children to Russia and the intense bombardment of Ukrainian cities, is a frontal assault on rules that prohibit the use of force in relations among states. China's establishment of military bases on artificial islands in the western Pacific Ocean, and its claims over the surrounding seas, raise

[1] Ted Piccone, *The Rule of Law Is Under Duress Everywhere*, BROOKINGS (Mar. 17, 2020), www.brookings.edu/articles/the-rule-of-law-is-under-duress-everywhere/. See also Ted Piccone, *The Compounding Rule of Law Crisis*, BROOKINGS (Nov. 10, 2023), www.brookings.edu/articles/the-compounding-rule-of-law-crisis/.

[2] Catalina Botero, *The Rule of Law in Latin America: From Constitutionalism to Political Uncertainty*, DIALOGUE: LEADERSHIP FOR THE AMERICAS (Mar. 4, 2019), https://tinyurl.com/y72vpt5n.

[3] Charles Manga Forbad, *An Overview of the Crisis of the Rule of Law in Africa*, 18 AFR. HUM. RTS. L.J. 213 (2018).

[4] *Over 6 Billion People Live in a Country Where the Rule of Law Is Declining*, WORLD JUST. PROJECT (Oct. 25, 2023), https://worldjusticeproject.org/news/wjp-rule-law-index-2023-global-press-release.

[5] Irene Khan, Director-General of the International Development Law Organization, Statement at the High-Level Meeting on the Rule of Law at the National and International Levels (Sept. 24, 2012), www.un.org/ruleoflaw/wp-content/uploads/2017/05/Statement-by-IDLO.pdf.

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further concern over the status of international rules governing territorial boundaries. When the Permanent Court of Arbitration ruled against China's claims over maritime areas within its so-called nine-dash line, China rejected the decision.[6] The United States, in parallel, undermined the dispute resolution system of the World Trade Organization when it blocked the appointment of judges to fill vacancies on the WTO's Appellate Body. Under the Trump administration, it withdrew from multiple treaties in order to reduce international scrutiny and accountability over its actions.

The rule of law constrains the arbitrary exercise of power. Its decline means that governments become less restrained by legal norms that temper and channel power's exercise. The waning of the rule of law also entails the erosion of democracy and human rights since both depend on respect of legal rules and institutions that support them. In this book, contributors assess rule-of-law trends at the domestic and international levels affecting all the world's regions.

The contributions in Part I provide the conceptual and empirical foundations for the volume. In Chapter 1, which frames the book, we define core concepts, assess the relationship between national and international law and institutions implicating the rule of law transnationally, and show how rule-of-law practices are shifting in parallel at the domestic and international levels. We formulate a teleological conception of the rule of law in terms of the goal of constraining power's arbitrary exercise, which, in turn, calls for an assessment of institutional mechanisms to advance this goal given varying social conditions and contexts. We examine the ways in which international law and institutions are important for rule-of-law ends, as well as their potential pathologies since power also is exercised beyond the state in an interconnected world. The chapter next examines empirical indicators of the decline of the rule of law at the national and international levels. We conclude by assessing what might be done in response to the decline of rule-of-law protections.

Brian Tamanaha, in Chapter 2, addresses why sovereigns are entitled to the benefit of the international rule of law. He critically responds to arguments advanced by Jeremy Waldron in concluding that sovereign states are not entitled to the benefits of the international rule of law. Waldron's conclusion follows from his assertions that the purpose of the rule of law is to protect individual liberty, and the purpose of

[6] South China Sea Arbitration (Phil. v. China), Case No. 2013-19, Award (Perm. Ct. Arb. 2016).

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international law is to protect individuals. Tamanaha argues that legal relations in the international community of states constitute the horizontal dimension of the rule of law, which Waldron overlooked. Focusing on horizontal rule-of-law functions, he provides descriptive, theoretical, and normative reasons why states are, and should be, entitled to the benefits of the rule of law.

Ana María Montoya and Alejandro Ponce, in Chapter 3 on rule-of-law backsliding, present quantitative evidence from the World Justice Project on the deterioration of the rule of law at the transnational level and on how this phenomenon has transpired. They find that the rule of law has deteriorated in recent years around the world. They differentiate three groups of countries. The first group is composed of countries that have experienced a deterioration in all indicators, but most notably as regards limits to state power, open government, and respect for human rights. The second group is composed of countries where overall rule-of-law trends have declined slightly. The third group is composed of countries where most indicators have experienced slight improvements. As limits on the exercise of state power have weakened, rule-of-law protections have declined. Montoya and Ponce find that retrogressions in the rule of law appear to be associated, in part, with an increase in authoritarian tendencies in existing authoritarian regimes and, in part, with the rise of anti-pluralist and populist leaders.

In Part II, contributors evaluate the role of international institutions in interacting with national ones in supporting the rule of law. Anne Peters, in Chapter 4 on international organizations as constitution-shapers, evaluates the efforts of international organizations in issuing recommendations and prescriptions for constitution-making and reform. She finds that such constitution-shaping activities by European and universal organizations, notably the United Nations (UN), have generally not led to improvements in the rule of law on the ground. Peters maintains that international organizations' constitution-shaping efforts should address postcolonial concerns, which include respect for local rule-of-law cultures flowing from non-European constitutional thought and the inclusion of a much deeper social agenda. Thus revamped, international organizations' constitution-shaping role could be reinvigorated to support rule-of-law protections at the domestic level, thereby contributing to more legitimate and effective transnational legal ordering and global constitutionalism.

In Chapter 5 on international measures to support the rule of law, Tom Ginsburg and Christoph Schoppe assess efforts by regional courts and

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organizations to uphold the rule of law. While not originally the primary focus of regional human rights and trade systems, these institutions have provided a thicker set of obligations toward protecting the rule of law, along with democracy and other related goals. Supranational and international organizations, as a result, have become important actors confronting real-world threats to the rule of law. The chapter compares developments in Europe, Africa, and Latin America.

Jeremy Farrall and Terence Halliday, in Chapter 6 entitled *Transnational Legal Order through Rule of Law?*, deploy the book's framework to address two central questions in global governance. First, what are the prospects and limits of the power of the UN Security Council (UNSC) in promoting rule-of-law goals? And second, can rule-of-law norms constrain UNSC powers? The chapter sketches an interpretive narrative of UNSC engagement with the rule of law from the early 1990s to the present in three areas of UNSC action: peacekeeping, sanctions, and use of force. Conceptually, Farrall and Halliday propose that the rule of law in the UNSC manifests itself in three dimensions: discourse, procedure (or rules), and structures. These dimensions play out internally, within the UNSC itself, and externally, with respect to rule-of-law institution-building in and between states, as well as in post-conflict zones, with a rather gray area between (such as when UN peacekeeping missions are themselves subject to rule-of-law oversight for the behavior of their personnel). They examine the emergence of micro transnational legal orders under construction within the UNSC itself. The chapter concludes by considering the potential for elected members of the UNSC and weaker states in the UN to press for rule-of-law constraints on the UNSC.

Part III of the book evaluates rule-of-law developments in national and regional contexts, with chapters that address each region of the world. Chapter 7, *The Rule of Law Writ Large: The European Union and Its Rogue Member States* by Kim Lane Scheppele, assesses the rule of law in transnational context. Virtually all philosophical discussions of the rule of law's meaning, she notes, assume that the proper horizon of the concept is the national legal system, or what she calls "the rule of law writ small." But governments are bound by a web of transnational legal obligations that should also be considered part of the rule of law's scope. Analyzing whether the rule of law is honored against the backdrop of both national and transnational law gives us "the rule of law writ large." This concept has force in the context of both backsliding and democracy-restoring governments – that is, both when autocrats first

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pull their governments away from transnational rule-of-law norms and when newly elected democrats seek to restore compliance with those norms. While both sorts of governments may change domestic law, pack political institutions with those who share their values, and fire those who get in their way, only the democracy restorers can be said to be honoring the rule of law writ large. Scheppele applies her analysis to developments in Hungary and Poland.

In Chapter 8, Jeffrey Kahn examines how the Council of Europe sought to promote the rule of law in Russia after the collapse of the Soviet Union. Soviet president Mikhail Gorbachev called for the construction of "a Common European Home" that included Russia, which would be pursued in concert with European states and international organizations.[7] Russian president Boris Yeltsin and, initially, his successor Vladimir Putin appeared to pursue this ambition. But after roughly a decade of reforms, that effort foundered, reversed, and then collapsed. Russia descended again into authoritarianism and, shortly after its full-scale invasion of Ukraine, Russia was expelled from the Council of Europe. The chapter shows how the dynamics of Russia's pursuit and rocky course of membership of the Council of Europe affected both the Russian state and the Council of Europe itself.

Dilek Kurban evaluates the experience of Turkey in Chapter 9. She argues that under President Recep Tayyip Erdoğan Turkey has become an autocratic regime. The Turkish case raises questions about how international organizations tasked with upholding the rule of law are able not only to permit illiberal states to violate rule-of-law norms but also to undermine those principles themselves. Conceptually, she argues, the rule-of-law/rule-by-law binary fails to account fully for authoritarian contexts. If the rule of law constitutes one end of the analytical spectrum, the other end is "lawless rule," not rule by law, with the "dual state" lying somewhere between. Her chapter analyzes the case law of the European Court of Human Rights (ECtHR) concerning Erdoğan's resort to the law to consolidate his power ("rule by law") and his utter disregard of legal rules in repressing democratic dissent and engaging in state violence ("lawlessness"). Her analysis assesses not only ECtHR judgments but also inadmissibility decisions and strike-out rulings that have enabled lawlessness in Turkey.

In Chapter 10, Francisca Pou Giménez asks whether the institutional solutions typically embraced by contemporary Latin American constitutions

[7] Speech by Mr. Mikhail Gorbachev Before the Parliamentary Assembly of the Council of Europe (July 6, 1989), Council of Europe Information Department, D(89)36.

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make a difference in fighting contemporary patterns of rule-of-law violations. She advances the preliminary hypothesis that Latin American last-wave constitutions have made a positive difference. After recalling historic trends with regard to democracy and the rule of law in Latin America and providing an overview of the standard institutional tools contained in Latin American constitutions, she assesses patterns that undermine the rule of law in Mexico. Although actors have used the Mexican constitution successfully to resist erosion of the rule of law, she finds that these efforts excessively rely on *ex post* responses to executive actions and overburden the courts.

Chapter 11, by Olabisi D. Akinkugbe, examines how military coups have returned in a number of states in the western, central, and Sahel regions of Africa. The rule of law and democratic governance correspondingly are under significant stress. A confluence of events – colonial legacies, uprisings, regional conflicts, term elongation, challenges to the dynastic style of leadership, and the rising incidence of coups – challenge the entrenchment of the rule of law in contemporary Africa. Focusing on the period between 2020 and 2023, the chapter assesses whether the decline of the rule of law and democratic governance in sub-Saharan Africa as a region is overstated, given that the coups are concentrated in francophone West and the Central Africa. Akinkugbe asks how we should think of the role of geopolitical contestations and colonial linkages in unsettling democratic regimes and eroding the rule of law in Africa.

Tyrell Haberkorn, in Chapter 12 on the criminalization of dissent, examines the largest democracy movement in a generation that emerged in Thailand in June 2020. The movement began with three demands: the current prime minister must resign, a new constitution must be drafted, and the state must stop threatening dissidents. In August 2020, activists added a fourth demand: the monarchy must be reformed. This demand was potentially transformative, but it triggered a swift crackdown involving police violence and prosecutions. The government wielded law to criminalize peaceful dissent. Haberkorn shows how the Thai regime deploys repressive power to dominate the polity and the use of law within it.

In Chapter 13, Ji Li evaluates the evolving rule of law with Chinese characteristics and its impacts on the international legal order. He notes that Chairman Xi Jinping and the leaders of the Chinese Communist Party have pledged to build a "rule of law" country. But when the ruling elites of a one-party authoritarian state allege commitment to the rule of law, what do they mean? Li assesses how the current model in China differs from Western concepts of the rule of law, especially "thick"

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versions of it that have been closely tied to liberal democratic values. The chapter investigates the key features of the "rule of law with Chinese characteristics." Li traces the development of the Chinese legal system and evolving rule-of-law debates in China, and then examines how China might impact the international legal order.

In conclusion, Chapter 14 by Martin Krygier reflects upon the book's findings from the perspective of the book's two central distinguishing themes. First, he endorses and explores the implications of understanding the rule of law in terms of a central aspiration or goal – reduction of the possibilities of the arbitrary exercise of power – rather than any purported checklist of legal instruments said to embody it. Second, he discusses the distinctive implications of examining the rule of law in a transnational, and not merely a national, context. The chapter examines the geopolitical sources of transnational enthusiasms for the rule of law, and the implications of geopolitical changes that might lead to the exhaustion or extinction of such enthusiasms. Krygier suggests that optimists might curb their constructivist enthusiasms, and pessimists might acknowledge that speed bumps are not necessarily the end of the road, if both were to reflect on how long securing the rule of law has taken and can be expected to take.

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