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ARTICLE

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Rights into Structures: Judging in a Time of Democratic Backsliding

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Abstract
This article explores how the new generation of legalistic autocrats consolidates power—not by committing mass human rights violations as a way of consolidating power as authoritarians of the twentieth century did, but instead by attacking checks and balances so that democratic institutions are weakened. Judges at transnational courts, faced with evidence of these attacks, are developing a jurisprudence through which they transform the vindication of individual rights into requirements that states maintain democratic structures. While it is not clear if this jurisprudence prevents backsliding, it may become useful as new democrats attempt to restore constitutional institutions using these decisions as guidelines for democratic reform. In doing so, new democrats would be giving meaning to the *rule of law writ large*.

Keywords: Democratic backsliding; human rights; judicial independence; constitutionalism; ECtHR; IACtHR

By now, the evidence is overwhelming that many democracies are floundering and some are failing. The Varieties of Democracy project,[1] Freedom House,[2] the World Justice Project,[3] the Economist Intelligence Unit,[4] and virtually all of the political scientists who have documented the trends[5] have

[1]*See* V-Dem Institute, *Democracy Reports*, VARIETIES OF DEMOCRACY (last visited Feb. 12, 2025), https://www.v-dem.net/publications/democracy-reports/ (presenting an annual project reporting on the state of democratic health of democracies around the world).

[2]*Freedom in the World*, FREEDOM HOUSE (last visited Feb. 12, 2025), https://freedomhouse.org/report/freedom-world (compiling a number of different rankings including the most general Freedom in the World Reports); Nations in Transit Report, FREEDOM HOUSE (last visited Feb. 12, 2025), https://freedomhouse.org/report/nations-transit (focusing on the countries once dominated by the Soviet Union).

[3]*See Rule of Law Index,* WORLD JUSTICE PROJECT (last visited Feb. 12, 2025), https://worldjusticeproject.org/our-work/research-and-data/wjp-rule-law-index-2021/previous-editions-wjp-rule-law-index (producing an annual, detailed assessment of multiple dimensions of the rule of law in countries around the world).

[4]EIU, *global Outlook: Democracy Index 2022*, ECONOMIST INTELLIGENCE UNIT (last visited Feb. 12, 2025), https://www.eiu.com/n/global-outlook-democracy-index-2022/ (presenting the latest edition of an annual Democracy Index the EIU produces which ranks countries along a number of dimensions related to democratic governance).

[5]This is an enormous group. *See e.g.,* STEVEN LEVITSKY & DANIEL ZIBLATT, HOW DEMOCRACIES DIE (2017); DAVID RUNCIMAN, HOW DEMOCRACY ENDS (2018); TOM GINSBURG & AZIZ HUQ, HOW TO SAVE A CONSTITUTIONAL DEMOCRACY (2018); Larry Diamond, *Elections without Democracy: Thinking about Hybrid Regimes*, 13 J. DEMOCRACY 21 (2002). Additionally, virtually every article in the long run of the Journal of Democracy is among this group.

shown that the number of democracies in the world has declined since the turn of the millennium.[6] For example, Venezuela and Hungary, once thought to be the most stable and exemplary democratic regimes in their regions, collapsed into autocracy after forty years of democracy in Venezuela and twenty years in Hungary.[7] Russia and Turkey, imagined less than twenty years ago to be on an increasingly democratic path, have both fallen into authoritarianism and overt repression.[8] India, the world's largest democracy, is teetering on the brink as its democratic institutions are being undermined by a politically directed intolerant religious fervor,[9] even as its 2024 election slowed the process.[10] The US has experienced a perfect anti-democratic storm, created by decades of Republican attempts to entrench minority government coinciding with the rise of Donald Trump whose flouting of constitutional norms has endangered democracy and the rule of law.[11] Many of the world's remaining democracies are weaker now when measured either by commitment to checks and balances or by guarantees of rights than they were a decade ago.[12]

In addition to these troubled countries, Poland, Ecuador, South Africa, Brazil, Romania, Italy, Peru, Greece, Bolivia, France, the UK, the Philippines and a growing number of others are all one bad election away from catastrophe or they are struggling to bounce back from an autocratic power grab. The point is clear. Democracy is not healthy anywhere in the world. It is not healthy in the countries of the Global North that once prided themselves on being invincibly democratic nor in countries of the Global South whose democratic history is shorter, but no less real.

Faced with this world-wide trend, what can judges do, especially when judicial independence is often the first targets of aspirational autocrats who win elections and then consolidate power so that it never rotates again?[13] I will suggest that many judges are already acting in democratic self-defense by interpreting the rights under their protection to require specific democratic structures. Thus, judges have been converting the individual right to a fair trial into a requirement that states maintain independent judiciaries. They have been converting individual rights to vote and to be elected into a requirement of neutral election administration. We have even seen the voting rights of individuals turned by judges into a requirement that presidents may serve no more than two terms in office in presidential systems. We are also now starting to see gender equality rights translated by judges into the requirement that states create specialized institutions to respond to gender-targeted violence.

Because widespread democratic backsliding is still relatively new, this "rights into structures" approach is a work in progress and is by no means at present a complete judicial defense of constitutionalism. But judicial decisions requiring structures to protect rights are multiplying quickly and may yet provide, if not protection against anti-democratic attacks in the first place, at least a pathway back to democratic health for countries that have experienced autocratic challenges. Perhaps most visible in transnational courts, this approach may also be usefully deployed by

[6]"More than 35 years of global advances in democracy have been wiped out in the last decade." VARIETIES OF DEMOCRACY PROJECT, DEMOCRACY REPORT 2023: DEFIANCE IN THE FACE OF AUTOCRATIZATION 9 (2023) [Hereinafter V-DEM DEMOCRACY REPORT 2023.] For a contrarian view, see Jason Willick, *What if the Crisis of Democracy is Mostly in our Heads?* WASH. POST, Jan. 20, 2023, https://www.washingtonpost.com/opinions/2023/01/30/democratic-more-resilient-than-expected/.

[7]Kim Lane Scheppele, *The Party's Over* in CONSTITUTIONAL DEMOCRACY IN CRISIS? 495 (Mark A. Graber, Sanford Levinson and Mark Tushnet, eds., 2018).

[8]*See* Jeff Kahn, *The Search for the Rule of Law in Russia*, 37 GEORGETOWN J. INT. L. 353 (2006) (regarding Russia); Kemal Kriscsci & Amanda Sloat, *The Rise and Fall of Democracy in Turkey: Implications for the West*, BROOKINGS POLICY PAPER (2019), https://www.brookings.edu/wp-content/uploads/2019/02/FP_20190226_turkey_kirisci_sloat.pdf (regarding Turkey).

[9]Tarunabh Khaitan, *Killing a Constitution with a Thousand Cuts: Executive Aggrandizement and Party-State Fusion in India*, 14(1) L. & HUM. RIGHTS 49 (2020).

[10]Chietigj Baypaee, *India's Shock Election Is a Loss for Modi but a Win for Democracy*, CHATHAM HOUSE (June 4, 2024), https://www.chathamhouse.org/2024/06/indias-shock-election-result-loss-modi-win-democracy.

[11]STEVEN LEVITSKY & DANIEL ZIBLATT, TYRANNY OF THE MINORITY (2023).

[12]V-DEM INSTITUTE, DEMOCRACY REPORT 2023: DEFIANCE IN THE FACE OF AUTOCRATIZATION 42–43, https://www.v-dem.net/documents/29/V-dem_democracyreport2023_lowres.pdf.

[13]Venla Stang & Hannah Van Dijcke, *The Dictators Toolkit: Disguised Judicial Attacks*, HUMAN RIGHTS FOUNDATION (Aug. 24, 2023), https://hrf.org/the-dictators-toolkit-disguised-judicial-attacks/.

national courts facing domestic threats as well as courts in robust democratic systems holding themselves out as models for others. In this Article, I'll explain the background of this judicially created "rights into structures" approach, show how it has quickly developed in the past few years and suggest how this new jurisprudence can be used to defend against democratic backsliding.

A. The Backstory of Rights

World War II killed an estimated sixty million people of whom forty-five million were civilians.[14] It left many millions more wounded and displaced. In Europe, under cover of war, the Holocaust destroyed much of Europe's Jewish community, and targeted Roma, people with disabilities, gay and bisexual people, Jehovah's witnesses and other disfavored minorities. They were not singled out because of what they had done but because of who they were considered to be.[15] In Asia, the death tolls were also staggering; twenty million Chinese—including seventeen million civilians—were killed in brutal attacks by Japanese soldiers, often including rape, torture, medical experimentation, and targeted famine.[16] The Allied reprisals to end these brutal practices in both theaters of war also killed many civilians and left all warring countries battered.[17] Many of the world's major powers emerged from the war with its manufacturing and agricultural resources destroyed; many of the world's most prosperous cities were reduced to rubble. In short, World War II was a massive shock to the world, proof that brutality could spread unchecked and then be beaten back only with more brutality.

The shock of warfare spurred the creation of a set of post-war international institutions, new constitutions and laws devoted to "never again."[18] The signature post-WWII legal development was a proliferating catalogue of rights. Mirroring the atrocities that had just been carried out both during the war and by the authoritarian regimes that preceded and caused these wars, the new catalogues of rights forbid precisely the horrors that the world had just witnessed. The offending regimes had violated rights to life, liberty, security, speech, opinion, assembly, religion and expression as well as rights to non-discrimination, freedom of movement, recognition as a person before the law, fair trials, and non-arbitrary treatment. The regimes of horror had denied people dignity, nationality, freedom from torture, the presumption of innocence, privacy, the protection of private life, the right to practice religion, and more.[19] They had subjected people to forced labor, displacement, and denial of the right to participate in the democratic determination of their governments. The catalogues of rights that emerged after WWII tracked the horrors that had happened in the period leading up to and including the war—with the goal of erecting a legal barrier to their recurrence. The specific list of rights that made their way into international declarations and national constitutions was not generated by philosophy but by experience.

Over time, these catalogues of rights gained institutional protection.[20] The robust development of regional human rights courts, national constitutional courts, and expanded jurisdiction for

[14]*See Research Starters: Worldwide Deaths in World War II*, National World War II Museum, New Orleans (last visited Feb. 12, 2025), https://www.nationalww2museum.org/students-teachers/student-resources/research-starters/research-starters-worldwide-deaths-world-war.

[15]Robert Jackson, Chief of Counsel for the United States, Opening Statement before the International Military Tribunal (Nov. 21, 1945), https://www.roberthjackson.org/speech-and-writing/opening-statement-before-the-international-military-tribunal/.

[16]*See* Gary Bass, Judgment at Tokyo: World War II on Trial and the Making of Modern Asia (2023).

[17]Randall Hansen, Fire and Fury: The Allied Bombing of Germany 1942–1945 (2008); Toh Boon Kwan, *"The Effects of our Bombing Efforts": Allied Strategic Bombing of the Japanese Occupied Territories during World War II*, 28 Air Power Hist. 41 (2921).

[18]*See* Kim Lane Scheppele, *Aspirational and Aversive Constitutionalism: The Case for Studying Cross-Constitutional Influence through Negative Models*, 1 Int'l J. Const. L. 296 (2003). *See also* Kim Lane Scheppele, *Never Again – and Not Quite*, Verfassungsblog (July 23, 2024), https://verfassungsblog.de/never-again-and-not-quite/.

[19]Kim Lane Scheppele, *Constitutional Interpretation after Regimes of Horror, in* Legal Institutions and Collective Memories 233 (Susanne Karstedt ed., 2009).

[20]Kathryn Sikkink, The Justice Cascade (2011); Karen Alter, The New Terrain of International Law: Courts, Politics, Rights (2014).

domestic supreme courts took decades to realize, but the protection of these rights through judicial enforcement gradually became more reliable as the number of democracies in the world determined to protect such rights expanded. The European Court of Human Rights was established in 1959, though direct access to the Court by petitioners who had exhausted their domestic remedies was permitted only in 1998.[21] The number of cases and their reach has exploded since then. The Inter-American Court of Human Rights was established in 1959 to enforce the American Declaration of the Rights and Duties of Man, expanding to enforce the broader American Convention on Human Rights in 1969.[22] This Court has become increasingly bold in its protection of rights. The European Union, under long-standing pressure to have its own bill of rights, followed suit with a Charter of Fundamental Rights, legally enforceable by both European and national courts.[23] The network of African human rights courts was established later, dividing human rights enforcement across multiple institutions but aspiring to protect rights[24] while the persistent promise to establish regional courts in Asia has yet to be realized.[25] While these transnational courts were being established, many national courts created a jurisprudence that made them front-line defenders of constitutional rights within their own domestic systems,[26] also acting as a model and beacon to the world, much of which was still struggling with dictatorship and its aftermath.

As first Southern Europe, then Latin America, then Eastern Europe, and then parts of Africa and Asia saw the abolition of dictatorships and the establishment of democracies—even if flawed ones—between the 1970s and the turn of the millennium, judicial protection of rights followed. While some academic authors decried the activism of courts,[27] others praised their new powers.[28] Constitutional courts were established throughout the former "second world" and in parts of Asia, Africa, and Latin America, many developing a robust case law to defend rights. A newly energized academic field of comparative constitutional law has sprouted associations, journals, law school textbooks, and an ever-growing set of experts, with the vast majority of attention in this field paid to the realization of rights.[29]

The WWII legacy that atrocities could be blocked by active judicial enforcement of rights, once a distant dream, had developed a relatively robust institutional infrastructure, a set of global constitutional-democratic norms and a set of academic defenders by the time that democracy around the world peaked, and then began to decline at the dawn of the twenty-first century. Since the turn of the new century, however, trends have pulled in the opposite direction as democracies have faltered and powerful courts have come under attack.

[21] Angelika Nussberger, The European Court of Human Rights (2020).

[22] See IACHR, *About the IACHR*, OAS (last visited Feb. 12, 2025), https://www.oas.org/en/IACHR/jsForm/?File=/en/iachr/mandate/basics/intro.asp (providing a brief history of the Inter-American system).

[23] Charter of Fundamental Rights of the European Union, Oct. 26, 2012, 2012 O.J. (C 326) 391–407.

[24] Obiora C. Okafor & Godwin E.K. Dzah, *The African Human Rights System as 'Norm Leader': Three Case Studies*, 21 Afr. Hum. Rts. L.J. 669 (2021).

[25] Tae-Ung Baik, Emerging Regional Human Rights Systems in Asia (2012).

[26] Dongwook Kim & Paul Nolette, *The Institutional Foundations of the Uneven Global Spread of Constitutional Courts*, 22 Perspectives on Pol. 294 (2024).

[27] Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 Yale L.J. 1346 (2006); Ran Hirschl, Toward Juristocracy: The Origins and Consequences of the New Constitutionalism (2007); Wojciech Sadurski, Rights Before Courts (2014).

[28] Ronald Dworkin, Law's Empire (1986); Alec Stone Sweet, Governing with Judges: Constitutional Politics in Europe (2000); Tom Ginsburg, *The Global Spread of Constitutional Review, in* The Oxford Handbook of Law and Politics (Keith E. Whittington, R. Daniel Kelemen and Gregory A. Caldeira, eds., 2008); Peer Zumbansen, *Comparative, Global and Transnational Constitutionalism: The Emergence of a Transnational Legal-Pluralist Order*, 1 Global Constitutionalism 16 (2012); Towering Judges: A Comparative Study of Constitutional Judges (Rehan Abeyratne & Iddo Porat eds., 2021).

[29] Tom Ginsburg, *The State of the Field*, *in* Constitutionalism in Context 23 (David S. Law ed., 2022).

B. Democratic Backsliding Outside the WWII Shadow

While twentieth-century dictators specialized in precisely the sort of conduct that was later condemned by our present human rights conventions and constitutional lists of rights, twenty-first century autocrats do not generally openly and massively violate the human rights norms over which there is now substantial international consensus. The fact that new autocrats rarely lead with massive human rights violations as they amass power is a sign that "never again" has made a difference.

Now, however, the new autocrats deftly operate to lock down their power by law in the technical nooks and crannies of national law by compromising constitutional structures. Given the sheer variety of forms of democratic government and the detailed ways in which the set-up of national democratic institutions differ, substantial consensus on the proper forms of democratic institutions remains elusive. The new autocrats therefore have plenty of room to thwart checks and balances, eliminate veto points, and block opposition power-sharing before they run afoul of any general norms.[30]

The new autocrats therefore aim to win elections—often fair and square the first time—and then hollow out democratic institutions by law, leaving the external shells of these democratic institutions intact.[31] In fact, the most clever autocrats mix and match perfectly reasonable elements from different democratic governments to create a "Frankenstate," in which the individual elements may be found in normal democracies but their combination is monstrous.[32] The point is to mimic democratic government without actually enabling it. Nearly every clever autocrat these days claims to be a democrat and a defender of rights while enacting laws that make it more difficult for these countries to rotate power and to ensure the protection of rights in the long term.

So, for example, aspirational autocrats will often compromise judicial independence by changing the system for appointing judges. But because there is such a wide variety of judicial appointment systems on offer, it will often be possible for the aspirational autocrat to pick one that works perfectly well somewhere else but that undermines judicial independence in the local context. For example, when Viktor Orbán set about to destroy the independence of the Constitutional Court in Hungary, his obedient parliament enacted the German rule for selecting constitutional judges, which requires a two-thirds vote of the parliament.[33] Because Hungary's disproportionate election law had given Orbán's party two-thirds of the seats in 2010, and ever since, he has been able to name all of the constitutional judges without needing to compromise with the political opposition while rejecting criticism as based on double standards because the German procedure is generally considered a model. The very rule that worked well in Germany to produce a balanced Constitutional Court was used to undermine that balance in Hungary precisely because the Hungarian election system[34]—which was not, like Germany's structured to produce strict proportionality but which was itself composed of laws borrowed from elsewhere and monstrously combined—was more likely to give one political party the supermajority needed to dominate the process. Once the Constitutional Court in Hungary was captured, however, Orbán had permission to extend his consolidation of power because there was no institution empowered to tell him he couldn't.

[30]Kim Lane Scheppele, *Autocratic Legalism*, 85 Univ. Chi. L. Rev. 545 (2018).

[31]For a good account of "hollowing out" and other similar tactics, see Wojciech Sadurski, A Pandemic of Populists (2022).

[32]Kim Lane Scheppele, *The Rule of Law and the Frankenstate: Why Governance Checklists Do Not Work*, 26 Governance 559, 560 (2013).

[33]Miklós Bánkuti, Gábor Halmai and Kim Lane Scheppele, *Hungary's Illiberal Turn: Disabling the Constitution*, 23 J. Democracy 138 (2012).

[34]Kim Lane Scheppele, *How Viktor Orbán Wins*, 33 J. Democracy 45 (2022).

More generally, the new autocrats have gotten the message that they will be condemned for mass human rights violations if they repeat too literally the evils of the past. Any overtly coercive assault on rights that jails and tortures opponents, stages show trials, censors or shuts down the media, suspends freedom of assembly, closes opposition parties, and otherwise violates well-established civil and political rights is now often within the reach of courts, whether domestic or transnational, with the jurisdiction, history, and motivation to defend rights—until those courts are politically packed. Faced with something that looks like 20th century mass human rights violations, independent courts have not hesitated to spring into action.[35] The protection of rights is so widely accepted that even aspirational autocrats recognize the giant "keep out" signs that courts have erected.

So, the new autocrats don't follow the old authoritarian playbook. Coups have drastically declined since the end of the Cold War and a new pattern of democratic destruction has emerged.[36] Autocrats now begin their march toward the concentration of power through winning elections that are more or less free and fair—at least the first time—often spouting populist messages proclaiming that, if they win, they will ensure *real* democracy.[37] Once in power, the new autocrats don't shut down or suspend the courts; they simply pack the courts full of supporters by legally changing the rules for judicial appointments and adjusting technical rules about jurisdiction, case assignment, forms of appeal, and more.[38] The new autocrats don't jail opposition members, let alone torture them; instead, they put opponents under intrusive surveillance so that the opposition knows that any wrong move will subject them to the public revelation of *kompromat,* leaked from who-knows-where through diffuse social media channels, destroying opposition leaders' credibility in future elections while keeping the autocrat's hands clean.[39] The new autocrats don't muzzle the media; they defund them selectively by threatening their advertisers at a time when media around the world are failing for purely economic reasons anyway.[40] The new autocrats don't suspend or destroy parliaments; they alter the rules through which these parliaments are elected or they change the procedures through which parliaments operate so they become empty shells of representative government.[41] Where are the rights violations in all that?

[35]For example, we are seeing both the International Court of Justice and the International Criminal Court spring into action to address matters within their jurisdictions arising out the wars between Russia and Ukraine and between Israel and Gaza, using the rights-based international law of "never again" created in the wake of World War II.

[36]Nancy Bermeo, *On Democratic Backsliding*, 27(1) J. Democracy 5 (2016). As a multipolar world has started emerging over the last few years, however, coups are again on the rise. *See* Theodore Murphy, *Middle Powers, Big Impact: Africa's 'Coup Belt,' Russia, and the Waning Global Order*, Eur. Council For. Rel. (Sept. 6, 2023), https://ecfr.eu/article/middle-powers-big-impact-africas-coup-belt-russia-and-the-waning-global-order/.

[37]Mike Smeltzer, *Autocrats' Favorite Word? Democracy*, Freedom House (Aug. 10. 2023), https://freedomhouse.org/article/autocrats-favorite-word-democracy.

[38]Kim Lane Scheppele, *The Treaties Without a Guardian: The European Commission and the Rule of Law*, 29 Columbia J. Eur. L. 93 (2023).

[39]For example, Viktor Orbán has created a prodigious surveillance state that has now started to focus on a candidate who has emerged as a real contender for Orbán's position. *See* Kinga Kornányi, *Who is Péter Magyar and Can be Become Hungary's Next Prime Minister?,* The Loop: ECPR Political Science Blog (Dec. 6, 2024), https://theloop.ecpr.eu/who-is-peter-magyar-and-can-he-become-hungarys-next-prime-minister/. Péter Magyar has been accused of violent behavior in secret recordings of both his ex-wife and an ex-lover, and phone conversations have surfaced online of him denigrating his followers. He has responded by accusing the government of recording and manipulating these conversations. *Id.*

[40]Kim Lane Scheppele, *Hungary's Free Media*, N.Y. Times: Paul Krugman's Conscience of a Liberal Blog (Mar. 14, 2012, 5:52 PM), https://archive.nytimes.com/krugman.blogs.nytimes.com/2012/03/14/hungarys-free-media/.

[41]Viktor Zoltán Kazai, *The Instrumentalization of Parliamentary Legislation and its Possible Remedies: Lessons from Hungary*, 23 Jus Politicum 237 (2019), https://juspoliticum.com/article/The-Instrumentalization-of-Parliamentary-Legislation-and-its-Possible-Remedies-Lessons-from-Hungary-1309.html; Catherine M. Conaghan, *Ecuador: Correa's Plebiscitary Presidency*, 19(2) J. Democracy, 46, 51–52 (2008).

First, rights violations are hard to spot when the new autocrats have disabled the institutions like constitutional courts that could certify that rights violations are occurring. But mostly, if these new rules are duly enacted by the newly elected aspirational autocrats working in tandem with newly elected parliaments and certified by the newly restructured courts, what's the problem? This is how democracy is supposed to work! It doesn't look like the obvious onset of dictatorship as the 20th century taught us to recognize.

The structural parts of constitutions determine how power is distributed, and limited, across national constitutional institutions and they provide guarantees of independence so that crucial checking institutions like courts, ombudsmen, election officials, media regulators, audit offices, central banks, and other "fourth branch" institutions[42] can stand apart from politics in order to ensure that someone guards the guardians. Autocrats seek to destroy this institutional complexity to make the exercise of power simple so that there are no pesky institutional or procedural barriers to the instant realization of their wishes. And they typically want to change the rules to make it possible to stay in power for the foreseeable future.[43] As long as autocrats change the rules legally, courts have generally been flummoxed in stopping them,[44] perhaps especially when the courts themselves are under attack. As a result, even though the rights revolution was eagerly supported by judges, national courts have typically been more deferential to the political branches when it comes to the *structural* parts of national constitutions.[45] And, until recently, transnational human rights courts have typically had virtually nothing to say on checks and balances or the institutional integrity of fourth branch institutions because their jurisdictions include only the defense of rights. So the new autocrats have concentrated their dirty deeds in this less constrained legal space where they have had more room for maneuver.

It has been difficult to develop international standards with regard to the proper arrangement of constitutional structures because, given their huge variety, there is simply no general agreement on which ones work better than others.[46] The most robust democracies—Nordic democracies—feature unicameral parliaments, little domestic judicial review, and very few formal checks on executive power,[47] precisely the sort of model that the new aspirational autocrats aim to recreate. In these model Nordic democratic regimes, democratic culture—hard to enforce by law—does much of the work. Eliminating upper chambers of parliaments as Hugo Chávez did in Venezuela or Rafael Correa did in Ecuador doesn't make these countries look dangerous; they simply look more Nordic! Cutting back judicial review, as Viktor Orbán did in Hungary or Jaroslav Kaczynski did in Poland, also brought these states closer to the Nordic norm. What could be the problem, then? When domestic courts have been packed or elections are rigged or autocrats rewrite the rules to keep themselves in power past posted term limits, what can be done? The dangerousness of these developments has started to become clear to judges on international tribunals who, in response, are deploying their jurisdiction over rights to mount a defense of democratic constitutional structures.

[42]Mark Tushnet, The New Fourth Branch: Institutions for Protecting Constitutional Democracy (2021).

[43]Javier Corrales & Michael Penfold, *Manipulating Term Limits in Latin America*, 25 J. Dem. 157 (2014).

[44]Mila Versteeg, Timothy Horley, Anne Meng, Mauricio Guim and Marilyn Gurguis, *The Law and Politics of Presidential Term Limit Evasion*, 120 Colum. L. Rev. 173 (2020) (examining 234 incumbents in 106 countries and determining that the most important effective strategy for rejecting term limit extensions involved popular resistance rather than judicial decisions).

[45]For a persuasive argument that the degree of judicial deference should depend on how separation of powers is structured, see Rivka Weill, *On the Nexus Between the Strength of Separation of Powers and the Power of the Judiciary*, 31 Wm. & Mary Bill Rts. J. 705 (2023).

[46]Kim Lane Scheppele, *Autocracy Under Cover of the Transnational Legal Order*, *in* Constitution-Making and the Transnational Legal Order 188 (Tom Ginsburg, Terry Halliday and Greg Shaffer, eds. 2019).

[47]Eric Einhorn & John Logue, *The Scandinavian Democratic Model*, 9 Scandinavian Pol. Stud. 193 (1986), https://tidsskrift.dk/scandinavian_political_studies/article/view/32549/30547.

C. Using Rights to Reinforce Existing Constitutional Structures: Judicial Independence, Neutral Election Administration and Term Limits

While they may be formally limited to adjudicating violations of rights, judges on the transnational human rights courts have started to recognize that democratic backsliding is serious and widespread, endangering the practical realization of individual rights. As a result, these courts are developing legally enforceable principles that can protect democratic institutions, using rights conventions and democratic charters to ground their jurisdiction. In particular, the individual rights to a fair trial and to effective remedies have started to underwrite transnational standards for judicial independence. In addition, the individual rights to vote and stand for office have started to generate emerging norms about the structural preconditions for free and fair elections and are specifying what alternatives should and must not be presented to voters at election time so that autocrats can't use incumbency to tilt elections in their favor. While this process of converting the protection of rights into the requirements for constitutional structures is still very new, it is accelerating in an attempt to limit the rise in democratic backsliding.

Let me give some examples.

Because bringing courts to heel is very often a first goal of aspirational autocrats, the Inter-American Court of Human Rights (IACtHR) has been particularly active in defending judicial independence when national courts within its purview have come under attack. The Inter-American Convention of Human Rights, Article 8.1 guarantees that "every person has the right to a hearing ... by a competent, independent and impartial tribunal."[48] While framed as an individual right, the text obviously assumes the existence of competent, independent and impartial tribunals, which in turn invites an inquiry by the IACtHR as to whether those structural requirements are met. The IACtHR has therefore used this individual right to develop institutional preconditions for its realization, reaching quite far into the terrain of national constitutions.

Constitutional Court v. Peru[49] reviewed the impeachment of justices of the Peruvian Constitutional Court under the then-presidency of aspirational autocrat Alberto Fujimori. Fujimori had disagreed with a key judgment of that national court and initiated the judges' impeachments. The removed judges took their case to the IACtHR along with their abundant evidence that their impeachments had been initiated in order to get the Constitutional Court to bend to political pressure; the IACtHR found that the way that the impeachment process had been conducted violated the fair trial rights of the justices. The Court not only protected individual judges from politically motivated removal proceedings, but it also shored up the Constitutional Court itself by also requiring Congress to ensure that there were enough members on that Court for it to exercise its constitutional functions. In doing so, the Inter-American Court did not hesitate to inquire into the constitutional structure of the national judiciary in order to ensure that Convention rights were upheld.

The Inter-American Court later revisited the topic of judicial independence in cases brought against Ecuador by judges of the Constitutional Court, the Supreme Court, and the Supreme Electoral Tribunal, arising out of what the judges alleged was their arbitrary termination in 2004 through removal proceedings that failed to guarantee either procedural fairness to them specifically or the continued operation of their courts in general. A new president—Ecuador had seven presidents in nine years—wanted to clear the benches to be able to remake the top courts with new judges. Like the Peruvian case, *Constitutional Tribunal v. Ecuador*[50] originated out of a claim about the availability of the right to a hearing before an impartial tribunal for the fired

[48]Organization of American States, Inter-American Convention on Human Rights art. 8(1), Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

[49]Constitutional Court v. Peru, Inter-Am. Ct. H.R. (ser. C) No. 71 (2001) (official translation at https://www.corteidh.or.cr/docs/casos/articulos/seriec_71_ing.pdf).

[50]Constitutional Tribunal (Camba Campos et al.) v. Ecuador, Inter-Am. Ct. H.R. (ser. C) No. 268 (2013) (official translation of the Court at https://www.corteidh.or.cr/docs/casos/articulos/seriec_268_ing.pdf).

constitutional judges even as it raised questions about judicial independence at the institutional level. A parallel case was brought by judges of the Supreme Court and Electoral Tribunal.[51]

In the *Constitutional Tribunal* case, IACtHR found numerous flaws with the procedures through which the judges' appointments had been terminated, which would have been enough for the IACtHR to find in the judges' favor. But the IACtHR went beyond the situation of the particular judges to elaborate in more detail what the *institutional* requirement of judicial independence meant in practical terms. Citing the United Nations Basic Principles on the Independence of the Judiciary,[52] and drawing on a wide range of international law sources from the Human Rights Committee's general comments to the African Principles on the Right to a Fair Trial,[53] the IACtHR found that "[T]he State must guarantee the autonomous exercise of the judicial function in both its institutional aspect, that is in relation to the Judiciary as a system, and also in relation to its individual aspect, that is, as regards the person of the specific judge."[54] The Court held against Ecuador in each of the cases.

Like the IACtHR, the European Court of Human Rights (ECtHR) has been active in using fair trial rights to elaborate what it would mean for a court to be "an independent and impartial tribunal established by law," as Article 6(1) of the European Convention on Human Rights requires.[55] The ECtHR has held that an independent court must be independent not only of the parties, but also of the executive.[56] It has also found that participation by irregularly appointed judges disqualified that tribunal from meeting the Convention requirement of being a "tribunal established by law" and therefore that judgments made by tainted panels must be nullified.[57]

The ECtHR has been particularly active on the topic of judicial independence since the PiS (Law and Justice Party) government in Poland came to power in 2015 and began to attack the country's once-independent judiciary. The government found ways to fire resistant judges, pack the courts with political appointees, establish a new disciplinary chamber within the Supreme Court to punish judges whose rulings were criticized by the government, and transfer the judges who objected to PiS rule to less desirable positions.[58] In *Xero Flor w. Polsce sp. z o.o. v. Poland*, decided in May 2021,[59] the ECtHR addressed the composition of the Constitutional Tribunal, which had been unlawfully—under Polish law—packed with political appointees at the start of PiS rule. The ECtHR found that the petitioner's right to have a case heard by an impartial and independent tribunal established by law had been violated due to the presence of an irregularly appointed judge on the panel and held that the judgment of the Constitutional Tribunal was therefore unlawful. *Reczkowicz v. Poland* decided in July 2021[60] addressed the composition of the Disciplinary Chamber of the Polish Supreme Court, a newly established chamber on which all of the judges had been chosen in an irregular, politically tainted process. Here, too, the ECtHR found that the Disciplinary Chamber was not a tribunal established by law within the meaning of the European Convention so its decisions were null and void. The Court has since gone on to reach

[51]Supreme Court of Justice (Quintana Coello et al.) v. Ecuador, Inter-Am. Ct. H.R. (ser. C) No. 266 (2013) (official translation of the Court at https://www.corteidh.or.cr/docs/casos/articulos/seriec_266_ing.pdf).

[52]Camba Campos et al., *supra* note 50 at para. 188. International law is often important in encouraging democracy-supporting transitions precisely because it cannot be gamed by those who rely on it. It is beyond their reach to change unilaterally, which gives international law a resilience that domestic law does not have.

[53]*Id.* at paras. 191–194.

[54]*Id.* at para. 198.

[55]European Convention on Human Rights, art 6(1).

[56]Gurov v. Republic of Moldova, App. No. 36455/02 (July 11, 2006), http://hudoc.echr.coe.int/eng?i=001-76297.

[57]Guðmundur Andri Ástráðsson v. Iceland (Grand Chamber), App. No. 26374/18 (Dec. 1, 2020), https://hudoc.echr.coe.int/eng?i=001-206582.

[58]Wojciech Sadurski, Poland's Constitutional Breakdown (2019) (recounting the story of the opening salvo attacks on the Polish judiciary).

[59]Xero Flor W Polsce sp. z o.o. V. Poland, App. No. 4907/18, (May 7, 2021), https://hudoc.echr.coe.int/eng?i=001-210065.

[60]Reczkowicz v. Poland, App. No. 43447/19 (July 22, 2021), https://hudoc.echr.coe.int/eng?i=001-211127.

the same conclusion with regard to the Civil Chamber of the Supreme Court in *Advance Pharma sp. z o.o. v. Poland.*[61]

The ECtHR has decided many more cases growing out of the Polish government's attack on its independent judiciary. For example, it held that the improper constitution of the National Judicial Council in *Grzeda v. Poland*, decided in March 2022,[62] and in *Zurek v. Poland*, decided in October 2022, violated the Convention.[63] The ECtHR has also issued a set of interim measures decisions in other pending cases involving the Polish judiciary to freeze the prior situation in place until the Court could decide cases on the merits. Between January 2022 and February 2023, the ECtHR received dozens of interim measures petitions from judges who had been fired or reassigned to new positions without their consent.[64] Three of those cases resulted in the award of interim measures in which the ECtHR ordered that the judges be reinstated in their positions pending the decisions of the Strasbourg Court.[65]

Standing back from the ever-increasing number of judicial independence cases at both the IACtHR and the ECtHR, we can see that these courts have firmly established their jurisdiction and grounded their judgments about the proper structure of an independent judiciary in an individual right to a fair trial. The rights defended may have been the rights of individuals but the remedies that the courts required are of a structural and institutional nature. In short, transnational courts are converting the protection of individual rights into a guarantee of particular constitutional structures.

The same trend is now developing with regard to elections. The European Court of Human Rights (ECtHR) has developed a dense case law interpreting the right to vote and to stand for election guaranteed in ECHR Protocol 1, Article 3.[66] While much of that jurisprudence specifies the contours of the individual right, the case law first went beyond the strictly individual right to bar specific candidates and whole parties who have committed serious constitutional violations from standing for office as reasonable restrictions on democratic rights.[67]

In our era of democratic backsliding, the ECtHR is starting to move past this familiar territory toward examining the institutional structure of election administration that states must guarantee to protect the democratic order. It has opined that those who resolve election disputes must be impartial[68] and has required that election complaints be handled by institutions that possess guarantees against arbitrariness.[69] While these decisions do not yet provide a full picture of how electoral institutions should be structured, the basic principles of independent electoral

[61]Advance Pharma sp. z o.o v. Poland, App. No. 1469/20 (Feb. 3, 2022), https://hudoc.echr.coe.int/eng?i=001-215388.

[62]Grzeda v. Poland [Grand Chamber], App. No. 43572/18 (Mar. 15, 2022), https://hudoc.echr.coe.int/eng?i=001-216400.

[63]Zurek v. Poland, App. No. 39650/18 (Oct. 10, 2022), https://hudoc.echr.coe.int/eng?i=001-217705.

[64]Press Release, European Court of Human Rights, Non-compliance with Interim Measure in Polish Judiciary Cases (Feb. 16, 2023).

[65]While there isn't space to elaborate here, the European Court of Justice has also become active in developing a jurisprudence of judicial independence, though given the special nature of the European Union, judicial independence is grounded not only in the Art. 47 of the Charter of Fundamental Rights guaranteeing the right to a fair trial but also in Article 19(1) TEU, which ensures that violations of EU law will meet with effective remedies in the Member States. *See* Scheppele, *Treaties without a Guardian*, *supra* note 38.

[66]European Convention on Human Right Guide, art. 3, protocol 1.

[67]*See* Paksas v. Lithuania [Grand Chamber], App. No. 34932/04 (Jan. 6, 2011), https://hudoc.echr.coe.int/eng?i=001-102617 (regarding individual disqualification for constitutional infidelity). Refah Partisi (the Welfare Party) and Others v. Turkey [Grand Chamber], App. Nos. 41340/98, 41342/98, 41343/98 and 41344/98 (Feb. 13, 2003), https://hudoc.echr.coe.int/?i=001-60936 (approving party bans); Linkov v. the Czech Republic, App. No. 10504/03 (Dec. 7, 2006), https://hudoc.echr.coe.int/eng?i=001-78389; Parti nationaliste basque – Organisation régionale d'Iparralde v. France, App. No. 71251/01 (June 7, 2007), https://hudoc.echr.coe.int/eng?i=001-80896, but not under Protocol 1, Article 3. Instead, these cases have been decided under the right of assembly in Article 11 of the ECHR.

[68]Mugemangango v. Belgium [Grand Chamber], App. No. 310/15 (July 10, 2020), http://hudoc.echr.coe.int/eng?i=001-203885.

[69]Davydov and Others v. Russia, App. No. 75947/11, paras. 288 and 33 (Nov. 13, 2017), http://hudoc.echr.coe.int/eng?i=001-174203.

management are starting to come into focus in the jurisprudence of the ECtHR. On this point, the African Court of Human Rights is perhaps even farther along toward turning rights into structures by requiring election administration to be politically neutral.[70]

The IACtHR has been even bolder in examining how national constitutions must structure democratic elections. Because almost all Latin American countries have presidential systems of government, one of the biggest challenges to democracy in the region has come from the attempts by aspirational autocrats to stay in power through constitutional changes that allow them to run for more terms in office than the national constitution permitted when they first came to power. In Peru, Argentina, Brazil, Venezuela, Dominican Republic, Colombia, Ecuador, and Bolivia, constitutions were amended in the 1990s and 2000s to allow sitting single-term presidents to stand for reelection.[71] Some have since moved to abolish term limits altogether—for example, Venezuela.

Against this background, in 2019, Colombia requested an Advisory Opinion from the IACtHR on presidential reelection without term limits. Even though this was not a traditional inquiry within the scope of interpretation of a human rights convention, IACtHR found that it had jurisdiction and issued the requested opinion.[72] Linking the right to vote to constitutional-democratic fundamentals, the Court cautioned that "the only way human rights can truly and effectively establish norms is through the recognition that they cannot be subject to majority rule, as it is precisely these rights that have been defined as limitations on the principle of majority rule."[73] The Court identified that the potential danger to electoral minorities from not having term limits emanates from the fact that leaders who are continually reelected will use the power of incumbency to their advantage, repeatedly seek to reward those who have voted for them, and to eventually turn democracy into autocracy by suppressing political competition. Therefore, even if democratic publics want to keep reelecting their leaders, "the prohibition on indefinite terms in office aims to prevent people who hold popularly elected office from keeping themselves in power."[74] As a result, the IACtHR found that "the principles of representative democracy include ... the obligation to prevent a person from remaining in power and to guarantee the rotation of power and the separation of powers."[75] By a five-to-two decision, the Inter-American Court found that setting term limits was not only *not* a violation of the political rights of individuals, but also that term limits were *necessary* for a robust representative democracy.

As these examples reveal, then, transnational judges are elaborating on national obligations to create certain kinds of political structures in order to ensure the guarantee of the rights that

[70]African Court of Human Rights, *In the Matter of Actions Pour la Protection des Droits de l'Homme (APDH) v Côte d'Ivoire*, App. No. 1/2016, https://www.eods.eu/elex/uploads/files/5c38a52a38460-JUDGMENT_APPLICATION%20001%202014%20_%20APDH%20V.%20THE%20REPUBLIC%20OF%20COTE%20DIVOIRE.pdf. In this case, the Court found that an election monitoring body composed of eight representatives of government and four of the opposition out of a total of seventeen representatives was not independent or impartial, or compatible with requirements of equal treatment. For a helpful collection of all international judgments on election rights, see EODS, *Election-Related Case Law Database*, ELECTION OBSERVATION AND DEMOCRACY SUPPORT (last visited Feb. 12, 2025), https://www.eods.eu/elex-table.

[71]Javier Corrales & Michael Penfold, *Manipulating Term Limits in Latin America*, 25(4) J. DEMOCRACY, 157, 160 (2014). The one-term limit extended to two terms in Paraguay, but then set back at one term a decade later. EIU, *Panama: Presidential Term Limits Tested in Latin America*, ECONOMIST INTELLIGENCE UNIT (Jan. 30, 2018), http://country.eiu.com/article.aspx?articleid=1136364497&Country=Panama&topic=Politics.

[72]Advisory Opinion OC-28/21 of June 7, 2021, Presidential Reelection Without Term Limits in the Context of the Inter-American Human Rights System, Inter-Am. Ct. H.R. (ser. A) No. 28 (20210 (official translation at https://www.corteidh.or.cr/docs/opiniones/seriea_28_eng.pdf) (explaining scope of articles 1, 23, 24, and 32 of the American Convention on Human Rights, XX of the American Declaration of the Rights and Duties of Man, 3(d) of the Charter of the Organization of American States and of the Inter-American Democratic Charter).

[73]*Id.* at para. 70.

[74]*Id.* at para. 73.

[75]*Id.* at para. 84.

those political structures are supposed to protect. These decisions now stand as powerful new resources to backstop national courts, or to guide governments in rebuilding damaged democracies.

D. Developing New Structures to Protect Rights: The Prohibition of Gender-Based Violence

The judicial decisions that have transformed rights into structural requirements have opined on the proper structure of institutions that already existed in the constitutional systems at hand. But what happens when the institution that is supposed to protect particular rights is not obvious, but it is clear that the guarantee of rights demands some institutional protector? It is hard for judges to mandate the creation of institutions that are not already authorized by some legal source outside their decision. Though judges might well insist that an already existing ombudsman look more closely at a particular issue, could a judge insist that a state create a national ombudsman if one were not already provided for in relevant domestic law? Even if social rights were given legal protection, could a judge order the construction of a state welfare office to ensure that benefits are properly distributed? The "rights into structures" approach to judging described here may have some important limits when it comes to creating new institutional rights protectors.

That said, judges can go part way toward establishing a legal basis for new institutions. They may find particular egregious violations of rights and demand that something structural be done to prevent further rights infringements even if they cannot specify precisely which structures should handle the solution. Judges can even specify the functions that the missing institutions must perform, to the point where a state can see what institutions it should create or redirect to protect rights in the future. This approach of requiring state action to protect rights from as-yet-unnamed institutions is visible in the area of gender-based violence.

While democratic backsliding has primarily manifested itself in attacks by aspirational autocrats on checks and balances in constitutional systems, attacks on women and gender-non-conforming people often feature prominently in the populist rhetoric that brings aspirational autocrats to power to the point where some analysts have concluded that "autocrats fear women."[76] These autocrats often advance policies to control women's reproductive rights, stigmatize and attack gender non-conforming people, confine women to traditional family roles, roll back gender equality laws, and loosen protections against sexual violence. In such a system, the flames of gender-based violence may be fanned as the courts and prosecutors' offices are packed with regime-loyal judges who are disinclined to intervene. Rights to protection from gender-based violence are often violated in the context of democratic backsliding.[77]

While both the Council of Europe and the Organization of American States now have dedicated treaties to protect women from violence—the Convention on Preventing and Combating Violence Against Women and Domestic Violence at the Council of Europe otherwise known as the Istanbul Convention[78] and the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women at the OAS otherwise known as the

[76]Erica Chenoweth & Zoe Marks, *Revenge of the Patriarchs: Why Autocrats Fear Women*. FOR. AFF., (Feb. 8, 2022), https://www.foreignaffairs.com/articles/china/2022-02-08/women-rights-revenge-patriarchs.

[77]Conny Roggeband & Andrea Kriszán, *Democratic Backsliding and the Backlash against Women's Rights: Understanding the Current Challenges for Feminist Politics*, UN Women Discussion Paper No. 35 (June 2020), https://www.unwomen.org/sites/default/files/Headquarters/Attachments/Sections/Library/Publications/2020/Discussion-paper-Democratic-backsliding-and-the-backlash-against-womens-rights-en.pdf; Ari Shaw, *The Global Assault on LGBTQ Rights Undermines Democracy*, CHATHAM HOUSE: THE WORLD TODAY (Sept. 26, 2023), https://www.chathamhouse.org/publications/the-world-today/2023-06/global-assault-lgbtq-rights-undermines-democracy.

[78]Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, opened for signature May 11, 2011, C.E.T.S. No. 210 [hereinafter Istanbul Convention].

Belém do Pará Convention[79]—those conventions are rather weak in specifying the institutional apparatus that is supposed to guarantee that women's rights are enforced. The Istanbul Convention requires that states parties "designate or establish one or more official bodies responsible for the coordination, implementation, monitoring and evaluation of policies and measures to prevent and combat all forms of violence,"[80] but these mandated institutions only examine whether governments have the requisite policies in place and are not on the front lines of the direct protection of women. The Belém do Pará Convention guarantees that women have "simple and prompt recourse to a competent court"[81] and requires that states parties "apply due diligence to prevent, investigate and impose penalties for violence against women,"[82] but doesn't specify the precise institutions that are supposed to accomplish this. Unlike courts, which are the obvious site for the realization of a right to a fair trial, and election administration bodies, which are an obvious site to ensure that the right to vote is protected, women subjected to gender-based violence have no obvious single-purpose institution that acts as the front-line rights protector. Instead, the Conventions require states to criminalize such violence, ensure that there are adequate reporting mechanisms, pass general laws that protect women from continued threats and guarantee that effective remedies are available through the judicial system. But women are left to rely primarily on multipurpose institutions like courts and prosecutors' offices to guarantee their rights are not violated in the first place because the Conventions make states responsible for creating legal frameworks rather than for creating dedicated protector institutions.

Cases arising under the Belém do Pará Convention are processed through the Inter-American Human Rights system.[83] The landmark case *Maria da Penha v. Brazil*[84] involved a man who had twice tried to murder his wife but whose trial for attempted murder had still not been completed more than 15 years later. Maria da Penha brought a case against Brazil for failing to guarantee her rights under both the American Convention of Human Rights and the Belém do Pará Convention. The Inter-American Commission found that:

> [T]he domestic judicial decisions in this case reveal inefficiency, negligence, and failure to act on the part of the Brazilian judicial authorities and unjustified delay in the prosecution of the accused . . . . They demonstrate that the State has not been capable of organizing its entities in a manner that guarantees those rights.[85]

The Commission held that the state had therefore violated Maria da Penha's rights under ACHR Article 8, Fair Trial, and ACHR Article 25, Judicial Protection.

But Maria da Penha's situation was not an isolated case. As the Commission opinion noted, Brazilian statistics at the time indicated that 70% of the criminal complaints in domestic violence cases were put on hold indefinitely in the process of investigation and trial, and only 2% of these complaints resulted in conviction of the aggressor.[86] Even though Brazil had in fact already created special police stations to deal with women's issues and had put in place shelters for battered women, the Inter-American Commission found that the state had not met its duties under Article

[79]Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women, June 9, 1994, 27 U.S.T. 3301, 1438 U.N.T.S. 63 [hereinafter the Belém do Pará Convention].

[80]Istanbul Convention, art 10.

[81]Belém do Pará Convention, art. 4(g).

[82]*Id.* at Art. 7(b).

[83]There is a controversy over whether the entire Convention can be applied directly by the Inter-American Commission and Court or whether only Article 7, laying out state obligations, can be enforced. *See* González et al. "Cotton Field" v. Mexico, Inter-Am. Ct. H.R. (ser. C) No. 205, ¶¶ 78–80 (2009) (Cases 12.496–12.498), https://www.corteidh.or.cr/docs/casos/articulos/seriec_205_ing.pdf.

[84]Maria da Penha v. Brazil, Case 12.051, Report No. 54/01, OEA/Ser.L/V/II.111 Doc. 20 rev. at 704 (2000) (Braz.).

[85]*Id.* at para. 44.

[86]*Id.* at para. 49

7 of the Belém do Pará Convention. The state was required to "prevent, punish and eradicate such violence,"[87] but the perpetrator in this case had been able to act with impunity.

In deciding this case, the Commission explored the abundant evidence that "tolerance by the State organs is not limited to this case; rather, it is a pattern."[88] With regard to Maria da Penha's specific situation, Brazil was ordered to complete the domestic criminal proceedings in this case, investigate what had happened to cause such delays and compensate her. But in recognition of the pattern that this one case revealed, Brazil was also to establish "mechanisms that serve as alternatives to judicial mechanisms, which resolve domestic conflict in a prompt and effective manner and create awareness regarding its serious nature and associated criminal consequences."[89] Just what those mechanisms would be, however, the Commission did not determine.

Since that time, the IACtHR has filled in the institutional blanks a bit by elaborating the requirement of "due diligence" that states must undertake to comply with the Belém do Pará Convention.[90] For example, in *González et al. "Cotton Field" v. Mexico,*[91] the IACtHR examined the state response to the kidnapping and murder of three women in Ciudad Juárez, a place that had become notorious for violence against women. The bodies of the three women had been found in a cotton field in 2001, hence the name of the case. But these three women were not alone. Estimates of the number of women who had been found murdered in that city were numbered in the hundreds, while more than 4,000 women had apparently simply disappeared.[92] The Court took note that:

> Over and above the numbers which, although significant, are not sufficient to understand the seriousness of the problem of violence experienced by some women in Ciudad Juárez, the arguments of the parties, together with the evidence they have provided, indicate a complex phenomenon, accepted by the State . . .[93]

Many of the women whose bodies were eventually found in Ciudad Juárez were found to have been raped, but due to irregularities in the investigations of these crimes, impunity had become the norm.[94] The state response was found to be deficient, not just in this particular case but structurally.

The Court emphasized "the duty of the States to organize the entire government apparatus and, in general, all the structures through which public authority is exercised, so that they are able to ensure by law the free and full exercise of human rights."[95] Moreover, "States should not merely abstain from violating rights, but must adopt positive measures to be determined based on the specific needs of protection of the subject of law, either because of his or her personal situation or because of the specific circumstances in which he or she finds himself."[96] Without being able to name a particular institution that should take responsibility, the Court nonetheless pushed the state to create some institutional structure that would solve the problem of gender-based violence.

Probably in realistic anticipation that it would lose this case, Mexico had already created the Office of the Special Prosecutor for the Investigation of the Murders of Women in Ciudad Juárez,

[87] *Id.* at para. 54.
[88] *Id.* at para. 55.
[89] *Id.* at para. 61(4)(c).
[90] Sabrina Rodriguez, *Violence Against Women: Landmark Cases and Legal Standards in the International System*, GW Law Int Law Review and Policy Brief (Mar. 29, 2022), https://studentbriefs.law.gwu.edu/ilpb/2022/03/29/violence-against-women-landmark-cases-and-legal-standards-in-the-inter-american-system/.
[91] *González et al. "Cotton Field" v.* Mexico, *supra* note 83.
[92] *Id.* at para. 118-119.
[93] *Id.* at para. 121.
[94] *Id.* at para. 149.
[95] *Id.* at para. 236.
[96] *Id.* at para. 243.

within the office of the state attorney general, after which the successful prosecution of offenders rose to nearly 46% from the 2% recorded earlier.[97] And Mexico had established a National Women's Institute to deal with gender discrimination broadly and gender-based violence specifically.[98] The government also carried out wholesale reform of the public prosecutor's office in the state where Ciudad Juárez was located,[99] which also created a commission for the prevention and eradication of violence against women, which came up with a 40-point plan for addressing gender-based violence.[100]

Even with all of the structural changes that had been introduced after the bodies of the three women were found, however, the Court was skeptical. It explained that reforms on paper were not enough; the state had to show that the reforms had made a difference in the prevention of gender-based violence, in the proper investigation of cases, in the arrest and prosecution of perpetrators and in the availability of reparations. While there had been some improvement, Mexico was not yet in the clear. The Court instructed the state to ensure that searches began immediately when missing women were reported and to "allocate the human, financial, logistic, scientific or any other type of resource required for the success of the search."[101] The IACtHR may not have been able to conjure institutions out of thin air, but the Court could demand better performance from institutions that the state created to respond to the Court's rulings.

The Council of Europe has also struggled with the question of how to insure that states create an institutional framework for addressing gender-based violence. The Istanbul Convention only requires domestic legal remedies against gender-based violence without either establishing a court under the treaty or providing a mechanism for cases to reach the ECtHR to enforce the Convention. In the Council of Europe system, of course, all violations of the Istanbul Convention that would also be ECHR rights violations can be brought to the ECtHR. The cases of gender-based violence that come before the ECtHR are typically brought under some combination of Article 2—right to life in the cases where women were killed—or Article 3—in the cases where women were subjected to cruel and degrading treatment, which would include rape, sexual assault and domestic violence—combined with Article 14—non-discrimination.[102] As with the IACtHR, most of the gender-based violence cases at the ECtHR have alleged that there was lack of investigation and prosecution of offenders by authorities and, in most of the cases where the ECtHR has found a violation, the ECtHR has urged the state to strengthen the legal framework to ensure that all forms of gender-based violence are prohibited in the national legal system and ensure that existing laws protecting women are enforced.

For example, in *Opuz v. Turkey*,[103] the applicant had made repeated complaints to the police about her husband who had seriously beaten her at least four times. While these incidents resulted in criminal charges against him, he was always released pending trials that never happened. The violence and threats continued while the applicant and her mother complained to the prosecutor about death threats and sought protection from imminent harm, but the husband was always released after questioning. Eventually, he killed the applicant's mother. He was convicted of her murder, but the applicant brought this action against the Turkish state for having failed to protect her mother from death and her from repeated abuse in the first place. Deciding for the first time that Article 14 ECHR had been breached alongside violations of Articles 2 with regard to the mother and Article 3 with regard to both women, the Court—citing the *Maria da Penha* case of

[97] *Id.* at para. 262–264.
[98] *Id.* at para. 269.
[99] *Id.* at para. 480.
[100] *Id.* at para. 487–488.
[101] *Id.* at operative para. 19.
[102] European Court of Human Rights, Factsheet: Violence Against Women (2024), https://prd-echr.coe.int/documents/d/echr/FS_Violence_Woman_ENG; European Court of Human Rights, Factsheet: Domestic Violence (2023), https://prd-echr.coe.int/documents/d/echr/FS_Domestic_violence_ENG.
[103] Opuz v. Turkey, App. no. 33401/02, (Sept. 9, 2009), https://hudoc.echr.coe.int/eng?i=001-92945.

the IACtHR[104]—looked beyond this particular instance to Turkey's track record on domestic violence. The Court discovered that domestic violence was rampant, particularly in the part of the country where the applicant lived, while state responses were slow and ineffective. The Court concluded that "domestic violence is tolerated by the authorities and that the remedies indicated by the Government do not function effectively."[105]

While the ECtHR itself has not directly ordered rights into structures in these domestic violence cases, the Council of Europe's Committee of Ministers—charged with following up on the ECtHR's decisions to ensure compliance—has done precisely that. The Committee of Ministers considers that a state has complied not only when it has paid compensation to those whose rights have been violated but also when the state has made substantial enough changes in domestic law to minimize the chances of such cases arising in future. Following up on the *Opuz* case, the Department for the Execution of Judgments of the European Court of Human Rights reported that Turkey had ratified the Istanbul Convention and then had created new structures to better handle domestic violence cases. In December 2019, the Turkish Council of Judges and Prosecutors designated specific courts to handle protective and preventive injunctions in cases of domestic violence so that they would develop the requisite experience.[106] In addition, the Turkish Ministry of the Interior established special units within public prosecutors' offices with dedicated staff for handling domestic violence cases.[107] It is impossible to say whether these actions were due to the decisions of the ECtHR or the effects of the Istanbul Convention—or both—but Turkey managed to build dedicated structures to protect the rights of women to be free from violence, with a positive assessment from the Committee of Ministers that supervised this process.

Of course, these steps forward in protecting women from domestic violence in Turkey happened as Prime Minister then President Recep Tayyip Erdogan plunged the country into autocracy after an attempted coup in 2016.[108] At that point, rights violations across the board increased massively with jailing of opponents, sharp restrictions of civil liberties, and a general security crackdown, to the point where the regime looks more like the 20th century dictatorships that rights provisions were designed to prevent than it looks like the 21st century dictatorships that primarily attack checks and balances. Once the mask was off and Erdogan could no longer credibly claim to be governing as a democrat any longer, there was no need to try to keep up the pretense that rights deserved full protection. Turkey withdrew from the Istanbul Convention, with effect on July 1, 2021.[109]

As Erica Chenoweth and Zoe Marks have argued, democratic backsliding is often accompanied by a gender backlash, in which advances in women's rights are reversed.[110] But on my account, in which autocrats first appear to protect rights while they are consolidating power so as to credibly claim to be democrats, one might expect the backlash to come only quite far into the process of democratic backsliding.

Judges may be trying to find ways to turn rights into structures where they can, but backsliding democracies may be more likely to comply with the decisions of transnational courts when the

[104] *Id.* at para. 86.

[105] *Id.* at para. 197.

[106] Department for the Execution of Judgments of the European Court of Human Rights, Thematic Factsheet: Domestic Violence 12 (2022), https://rm.coe.int/thematic-factsheet-domestic-violence-eng/1680a5f249 (providing the March report).

[107] *Id.*

[108] Ertug Tombus, *Autocracy behind a Democratic Façade: The Political Regime in Turkey*, Civicus (Oct. 03, 2018), https://www.civicus.org/index.php/re-imagining-democracy/stories-from-the-frontlines/3529-autocracy-behind-a-democratic-facade-the-political-regime-in-turkey.

[109] Council of Europe, *Istanbul Convention Against Violence Against Women and Domestic Violence, Country Monitoring: Türkiye**, WWW.COE.INT (July 1, 2021), https://www.coe.int/en/web/istanbul-convention/turkey (noting Turkey's withdrawal from the convention).

[110] Erica Chenoweth & Zoe Marks, *Revenge of the Patriarchs: Why Autocrats Fear Women*, For. Aff. (Feb. 8, 2022), https://www.foreignaffairs.com/articles/china/2022-02-08/women-rights-revenge-patriarchs.

decisions do not affect the ability of aspirational autocrats to ensure control over the major institutions of state in the early phases of autocratic consolidation. Instead, when backsliding states nonetheless comply with decisions that encourage them to create institutions to better handle domestic violence, it may confirm our backstory about rights—which is that they represent the sorts of "never again" violations that the new aspirational autocrats are eager to avoid, lest they be interrupted in their stealth consolidation of power by other means. Once they have fully consolidated autocracy, however, the need to appear to abide by an international consensus drops away. Autocrats may be willing to appear to protect a targeted group within their societies under orders from courts, but they may not be willing to stop their autocratic consolidation of power in the core institutions of state. And once their control of the state is assured, rights may suffer next.

E. The Rule of Law Writ Large and the Role of Judges

By the time that transnational courts opine on the actions of the aspirational autocrats, damage has usually been done. National judiciaries have already been brought to heel; elections are already being rigged; some presidents have managed to abolish term limits altogether. Gender violence may well have increased in an atmosphere in which women and gender-nonconforming people have been scapegoated. That is why transnational courts may not be able to stop an autocrat from harming institutions crucial to democratic governance in the first place. Doing justice takes time—often more time than autocrats take to consolidate power.

But the decisions of these transnational courts may matter on the other side of autocracy, becoming more powerful as autocracy wanes. Once the autocrats are weakened and removed from power, hopefully following a free and fair election rather than through political violence—though autocrats so often tilt the election rules in their favor that this is by no means assured—the standards set by transnational courts can be used as guidance by new democrats eager to restore constitutional government. New democrats will often find themselves saddled with compromised courts, election administration still in the autocrat's hands, gender being used as a political weapon and other signs that autocracy has dug in and wasn't planning to go anywhere. How can new democrats break out of the prisons that the prior autocrats built?[111]

This is where we might distinguish the rule of law writ large from the rule of law writ small.[112] The *rule of law writ small* considers only the national level, so that a domestic legal system can be coherent, consistent and effective, but nonetheless exist in tension with other legal obligations beyond the state. Autocracy can maintain some highly formal version of the rule of law inside a state as long as the domestic legal system is not required to justify itself beyond itself.[113] When autocracy becomes entrenched through law, however, it may become necessary—and justifiable—to break the autocratically created domestic law to restore both a principled rule of law and democracy again. But how can breaking domestic law be justified? If one considers only the rule of law writ small, it is difficult.

But there is another way to conceptualize the rule of law—as the *rule of law writ large*. This version of the rule of law assesses coherence of legal norms across multiple legal levels at the same time—both national and transnational—by examining the way that the levels complement and reinforce each other. The rule of law writ large exists when the law is coherent and consistent, taking into account local, national, transnational, and international law so that obligations from the different levels do not pull in different directions. Otherwise, when the different levels conflict, those who are subject to all of the jurisdictions find themselves caught in a legal bind. The rule of

[111]Kim Lane Scheppele, *Escaping Orbán's Constitutional Prison: How European Law Can Free a New Hungarian Parliament,* VERFASSUNGSBLOG (Dec. 21, 2021), https://verfassungsblog.de/escaping-orbans-constitutional-prison/.

[112]Kim Lane Scheppele, *The Rule of Law Writ Large*, *in* THE RULE OF LAW UNDER PRESSURE: A TRANSNATIONAL CHALLENGE 251 (Gregory Shaffer & Wayne Sandholtz, eds., 2025).

[113]Scheppele, *Autocratic Legalism*, *supra* note 30.

law writ large exists when common values thread through all of the levels at once without contradiction. New democrats can thus lean on the rights-into-structures law that the transnational courts have created to justify breaking domestic law in particular, authorized places in order to achieve the rule of law writ large.

Using transnational law to guide strategic lawbreaking by a new democratic government breaks the legitimacy dilemma that is created when new leaders respond in a tit-for-tat way. From a distance, moves that may be taken by a democracy-restoring government could look just like the moves that were already taken by a democracy-crashing government. After all, didn't the rulers who installed rogue government win elections, change the laws comprehensively, fire incumbents who got in their way, and generally restructure the constitutional system so that the independence of all political and judicial institutions was subordinated to the political ideology of the governing party? A new democratizing government might just appear to be repeating that script, winning elections, changing the laws comprehensively, firing incumbents who get in the way, and restructuring independent institutions to match their democratic ideology. It may be tit for tat, but that doesn't make it right.

But this is where transnational law is crucial to distinguishing the two scenarios. Reconfiguring a legal order, even if following national rules for doing so, breaks the rule of law writ large when it is done by those who are destroying democracy when transnational law requires adherence to democratic values. By contrast, those same activities of legal reconfiguration, even if it requires breaking national rules for doing so, can restore the rule of law writ large when it is done by those who are committed to bringing the national legal system back into harmony with the transnational values that the state adopted when it ratified the relevant treaties. In short, while both kinds of moves produce ruptures in the domestic constitutional order, they do not have the same objective justifications or the same relationship to the rule of law when the rule of law is writ large instead of writ small. The legitimacy of the two ruptures is *asymmetric* in that one direction brings *more* rule of law across different levels of legality over the long term and the other one brings *less*. Asymmetric ruptures to restore the rule of law writ large can therefore be justified in ways that symmetric ruptures to bring about a new rule of law writ small cannot.

Judging after backsliding in this rights-into-structures mode has an important role to play in this. New democrats can use the transnational standards that transnational courts have developed to allow a new government to restore legal commitments to these transnational values.

Take, for example, the judicial independence cases out of Latin America, where autocrats first in Peru and then in Ecuador used the constitutionally available impeachment process to get rid of apex court judges who were standing in the way of the consolidation of autocracy. No, said the IACtHR, these impeachments were politically motivated and violated judicial independence as protected by the Convention. But imagine the very same scenario, except that this time the impeachments are brought by a new democratic government trying to remove judges who stand in the way of restoring democracy to make room for judges who will honor the constitution and the Convention by defending judicial independence. Should a transnational court also find these impeachments politically motivated and a violation of the Convention? Or should transnational judges instead distinguish the two cases and say that impeachments of apex court judges that are aimed at restoring judicial independence do not constitute a Convention violation in the same way that the impeachments of peak court judges that were violating these transnational values did? Ditto with distinguishing firing election officials who were trying to protect democracy from firing election officials were determined to protect an autocrat, even if in general firing election officials runs counter to domestic law. If the rule of law writ large excuses violations of domestic law to bring domestic law into accord with transnational standards, then that's the standard that both national and transnational judges should use in assessing the efforts of new democrats to restore the rule of law.

The rights-into-structures framework provides a path for renewing democracy by ensuring that elections are not rigged, courts are not captured, and the rights of all to democratic inclusion are

not marred by violence. Fixing broken democracies is not an easy matter. But now that transnational courts have developed important standards as backsliding democracies were on the way down, those standards can be used by new democrats to fix their democracies on the way back up. Judging during backsliding and judging after backsliding may require thinking of the two processes as not symmetrical. Instead, the new democrats and the judges who supervise this process can use the idea of the *rule of law writ large* to help democracies get back on track.

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