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Kormendy Lecture

Democratic Backsliding and the Rule of Law

TOM GINSBURG*

Ours is an era of democratic recession and backsliding. In this essay, I consider some of the causes and consequences of these developments, as well as laying out the modalities of democratic decline. I then focus in more detail on the rule of law and the courts as crucial institutions that can help protect democracy while also showing that they are increasingly a target for democratic backsliding. Finally, I speculate on some of the factors that can lead to the survival of courts in the face of sustained attacks. In doing so, I draw on my recent work, some of it co-authored with my colleague Aziz Z. Huq, in which I explore these issues.[1]

I. THE RISK OF ELECTIVE DESPOTISM

Let us first start with some facts. The number of democracies around the world has declined every year since 2006.[2] There has also been an increase in the number of hardline authoritarian regimes.[3] There have been some notable cases of failure in long-enduring democracies: Venezuela, which was continually democratic for several decades, began to erode under the

* Leo Spitz Professor of International Law, University of Chicago Law School. My thanks to Aziz Huq for extended discussions on these themes, which inform our book, HOW TO SAVE A CONSTITUTIONAL DEMOCRACY (2018).

1. *See e.gs.*, Aziz Huq & Tom Ginsburg, *How to Lose a Constitutional Democracy,* 65 UCLA L. REV. 78, 92-98 (2018); TOM GINSBURG & AZIZ HUQ, HOW TO SAVE A CONSTITUTIONAL DEMOCRACY 35-47 (2018) [hereinafter HOW TO SAVE].

2. Freedom House, FREEDOM IN THE WORLD (2017), https://freedomhouse.org/report/freedom-world/freedom-world-2017.

3. The Bertelsmann Transformation Index notes in its survey of 129 countries that as of 2016, the number of hardline autocracies has risen from 33 to 40, the most in the 11-year history of the biennial survey. *Executive Summary: Increasing Political and Social Tensions*, 2016 BTI 1, 4 (2016), https://www.btiproject.org/fileadmin/files/BTI/Downloads/Zusaetzliche_Downloads/Executive_Summary_BTI_2016.pdf.

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influence of populist strongman Hugo Chavez, who was elected in 1999.[4] In 2017, his self-appointed successor, Nicolas Maduro, completed the process by establishing a new constituent assembly to bypass the democratically elected Congress, which was necessary because the opposition had won an election there.[5]

In other cases, backsliding has occurred in countries whose democracies were relatively new, and dated only to the so-called "Third Wave" of democratization around the world, but were nevertheless considered to be fairly robust.[6] In the literature, a democracy is considered to be consolidated when it is "the only game in town."[7] This term had been applied to countries like Poland and Hungary in the European Union, whose dramatic departure from communism had been a major event in the "Third Wave."[8] But as of 2018, democracy in both countries was in serious trouble. Hungarian Prime Minister Viktor Orbán had presided over a systematic undermining of some aspects of the prior system, even while maintaining elections. He calls his model "illiberal democracy", a scheme in which the "rights of the majority" take precedence over those of minorities, and he has used demagoguery and manipulation of the public sphere to erode Hungarian democracy in practice.[9] Even in established democracies, the rise of populist and right-wing parties suggests that the traditional mechanisms of democratic representation are weakening all around the world. In the United States, President Donald Trump's election has caused a good deal of hand-wringing, with some believing that democracy is under threat.[10] In 2016, the EIU's Democracy Index demoted the United States from "full democracy" to "flawed democracy."[11] The Index is an average of the scores of five categories, which

4. Zeeshawn Aleem, *How Venezuela went from a rich democracy to a dictatorship on the brink of collapse,* VOX.COM, (Sept. 19. 2017, 9:10 AM), https://www.vox.com/world/2017/9/19/16189742/venezuela-maduro-dictator-chavez-collapse.

5. *Id.*

6. *See* SAMUEL HUNTINGTON, THE THIRD WAVE (1991) (describing democracy's third wave).

7. ADAM PRZEWORSKI, DEMOCRACY AND THE MARKET 26 (1991) ("Democracy is consolidated when under given political and economic conditions a particular system of institutions becomes the only game in town, when no one can imagine acting outside the democratic institutions, when all the losers want to do is to try again within the same institutions under which they have just lost.")

8. CHRIS HASSELMANN, POLICY REFORM IN CENTRAL AND EASTERN EUROPE 23 (2017) (describing these countries as consolidated).

9. Gabor Halmai, *A Coup Against Constitutional Democracy: The Case of Hungary, in* CONSTITUTIONAL DEMOCRACIES (Mark Graber et al, eds., 2018); Jan-Werner Müller, *Taking 'Illiberal Democracy' Seriously*, PUBLIC SEMINAR (July 21, 2017), http://www.publicseminar.org/2017/07/taking-illiberal-democracy-seriously/.

10. *See* CAN IT HAPPEN HERE? (Cass R. Sunstein ed., 2018) (collecting essays that consider the proposition); *See also* STEVEN LEVITSKY & DANIEL A. ZIBLATT, HOW DEMOCRACIES DIE (2017) (discussing President Trump's assault on norms that are a part of how democracy works).

11. Economist Intelligence Unit, *Democracy Index 2016*, THE ECONOMIST http://felipesahagun.es/wp-content/uploads/2017/01/Democracy-Index-2016.pdf.

are derived from sixty different "indicators."[12] The categories are "electoral process and pluralism;" "civil liberties;" "functioning of government;" "political participation;" and "political culture."[13] Countries with a score of 8-10 are considered "full democracies" while countries with a score of 6-7.99 are considered "flawed democracies."[14] Due to a slight decrease, the United States score fell from 8.05 in 2015 to 7.98 in 2016.[15] Four of the five component scores which make up its Democracy Index remained identical from 2015, while a reduction of 0.36 in its "functioning of government" score led to it slipping below the threshold of "full democracy." This was accompanied by a demotion from twentieth place (the most "flawed" of the "full democracies") to a tie with Italy for twenty-first place (the second highest score for "flawed democracies" after Japan).[16] Other flawed democracies listed in the report include France, South Korea, Israel, India, Brazil, and Senegal.[17]

There are numerous diagnoses for what is causing this wave of democratic erosion. Some scholars emphasize the weakening of political parties, whose hold on the popular imagination has suffered from infighting and lack of responsiveness. In most western democracies, argues Kim Lane Scheppele, parties used to be organized on class-based lines, with a left-right divide that was fairly easy to comprehend and quite stable.[18] With globalization and economic change, the left-right divide is no longer as salient as it once was. The globalization explanation finds resonance with other scholars, such as David Schneiderman, who emphasizes the hollowing out of democratic decision-making, as more and more substantive decisions are made by unaccountable actors in supra-national or international institutions.[19] Globalization is also a cause of economic inequality, which Ganesh Sitaraman locates as the central driver of the current trend.[20]

12. *Id.* at 52.
13. *Id.*
14. *Id.* at 54.
15. *Id.* at 3.
16. Economist Intelligence Unit, *supra* note 11, at 7.
17. *Id.* at 7-9.
18. Kim Lane Scheppele, *The Party's Over, in* CONSTITUTIONAL DEMOCRACIES IN CRISIS 2 (Mark Graber et al. eds., 2018) (parties overwhelmed by "insidious infighting, ideological drift or credibility collapse.")
19. David Schneiderman, *Disabling Constitutional Capacity: Global Economic Law and Democratic Decline*, *in* CONSTITUTIONAL DEMOCRACIES IN CRISIS (Mark Graber et al. eds., 2018) (shrinking of policy space for democratic decision-making).
20. Ganesh Sitaraman, *Economic Inequality and Constitutional Democracy, in* CONSTITUTIONAL DEMOCRACIES IN CRISIS (Mark Graber et al. eds., 2018) (inequality); Ganesh Sitaraman, THE CRISIS OF THE MIDDLE CLASS CONSTITUTION: WHY ECONOMIC INEQUALITY THREATENS OUR REPUBLIC 5 (2017).

Democratic breakdowns can take a number of distinct paths: military coup, incumbent takeover, civil war, or a popular revolt.[21] According to a recent study by Milan Svolik, among ninety authoritarian reversals up to 2008, 61% involved a military coup, 30% involved an incumbent takeover, 7% involved civil war, and only 2% occurred through revolution.[22] But over time the proportions have changed, and incumbent takeovers now outnumber military coups by a good deal.[23]

With my colleague Aziz Huq, I have grappled with some of these issues in a book entitled *How to Save a Constitutional Democracy*, in which we analyze the problem through a constitutional lens and also provide some suggestions for what might be done.[24] One of our points is that the risk in our current moment is not the same as that which has informed the field of comparative constitutional law.[25] For several decades, the primary approach to thinking about constitutional design to defend democracy has been that associated with the German political scientist Karl Lowenstein, who coined the term "militant democracy" in 1937.[26] Under this approach, the preservation of democratic order may require, on occasion, steps that are formally anti-democratic, to undermine political forces that are hostile to democracy itself.[27] These steps may on their own interfere with core freedoms such as those protecting individual expression, freedom of religion, or freedom of association, in order to preserve the democratic system itself.[28] The idea is that democracy, if completely unhindered, can allow an anti-democratic political force to take power through the ballot box, and then cease to continue to hold elections.[29] The paradigm, of course, dates back to the era of Nazi Germany, when this was precisely the dynamic that occurred.[30] Postwar democracies such as Germany allowed the courts to ban undemocratic political parties.[31] A recent example occurred in South Korea, when the country's Constitutional Court banned a party that was associated with the North Korean regime.[32]

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21. Milan Svolik, *Which Democracies Will Last? Coups, Incumbent Takeovers, and the Dynamics of Democratic Consolidation,* 45 BRIT. J. POL. SCI., 715, 730 (2015).

22. *Id.*

23. *Id.* at 735.

24. HOW TO SAVE, *supra* note 1. *See also* CAN IT HAPPEN HERE?, *supra* note 10; LEVITSKY & ZIBLATT, *supra* note 10; YASCHA MOUNK, THE PEOPLE VS. DEMOCRACY (2018).

25. Huq & Ginsburg, *supra* note 1, at 110.

26. Karl Lowenstein, *Militant Democracy and Fundamental Rights, I*, 31 AM. POL. SCI. REV. 417 (1937); *see generally*, Patrick Macklem, *Militant Democracy, Legal Pluralism, and the Paradox of Self-Determination,* 4 INT'L J. CONST. L. 488 (2006).

27. *Id.* at 424.

28. *Id.*

29. *Id.* at 424-25.

30. *Id.* at 426.

31. Lownestein, *supra* note 26, at 427.

32. *South Korea Court Bans Pro-North Party*, BBC (Dec. 19, 2014), https://www.bbc.com/news/

In the modern era, however, the steps in democratic backsliding are much subtler and more incremental, and the militant democracy paradigm is insufficient to prevent it. As Huq and I argue, the present danger today is not so much the sudden collapse of democracy, but instead its erosion in a series of small individual steps that, each on their own, may not appear alarming.[33] Like the proverbial boiling frog, we may only notice the danger when it is too late.[34] For today's potential autocrat does not seek to end elections but to keep them in place, without ever losing them.[35] Democratic forms are preserved, with courts, constitutions, and elections, but the content of the elections is more or less foreordained.[36]

The situation recalls James Madison's warning in Federalist 48 in his justification of the separation of powers:

> An *elective despotism* was not the government we fought for; but one which should not only be founded on free principles, but in which the powers of government should be so divided and balanced among several bodies of magistracy, as that no one could transcend their legal limits, without being effectually checked and restrained by the others.[37]

Elective despotism is the risk we face and, if democracy is to survive, must confront.

II. THE PATHWAYS TO EROSION

In our analysis, Huq and I focus on five distinct modalities of democratic backsliding.[38] The first is constitutional amendments to consolidate power; in some cases, the would-be autocrats will convene a constitutuent assembly to advance their efforts.[39] This is of particular importance to populists, who emphasize the unity of the people in whose name they claim to be speaking. The practice of convening constitutuent assemblies is somewhat controversial, and some scholars argue that they are necessary to break

world-asia-30544469.

33. Huq & Ginsburg, *supra* note 1, at 117.

34. HOW TO SAVE, *supra* note 1, at 78; *See also* Wojciech Sadurski, *How Democracy Dies (in Poland): A Case Study of AntiConstitutional Populist Backsliding* (Sydney Law School Legal Studies Research Paper No. 18/01 Jan. 2018), at 5 at: http://ssrn.com/abstract=3103491 ("it is difficult to identify a tipping point during the events: no single new law, decision or transformation seems sufficient to cry wolf; only ex-post do we realize that the line dividing liberal democracy from a fake one has been crossed: threshold moments are not seen as such when we live in them.")

35. Huq & Ginsburg, *supra* note 1, at 122.

36. *Id.*

37. FEDERALIST NO. 48 (James Madison).

38. Huq & Ginsburg, *supra* note 1; HOW TO SAVE, supra note 1, at 72-73, 91-116 (describing mechanisms).

39. David Landau, *Abusive Constitutionalism*, 47 *U.C. DAVIS L.R.* 189, 193 (2013).

through gridlock and crises of representation.[40] Yet it is not clear in every case that the constituent assembly is truly broad- based, and representative. In some cases, as in Russia, the members were selected by the President himself.[41] In others, such as the Venezuelan assembly refered to above, they are associated with only one side of the political divide.[42]

Second, agents of erosion will sometimes seek to bypass the checks and balances of other political branches, for example by packing the courts or undermining legislatures.[43] Actually, these first two strategies were both in evidence when Nicolas Maduro chose to bypass the legislature by govern through a new constituent assembly, as described above. The Venezuelan regime, however, had earlier packed the Supreme Court and replaced judges who were hostile to its program.[44] Similarly, when the Fidesz party took power in Hungary in the aftermath of the 2008 global financial crisis, it amended the constitution to cement its hold on power.[45] Among other things, reforms reduced the retirement age for justices on the constitutional court, forcing sitting judges to retire and giving Orbán the opportunity to appoint a majority of justices.[46] Later, the Fidesz parliament passed a statute voiding the entire earlier jurisprudence of the constitutional court.[47]

A third modality is to erode the rule of law and the institutions that protect it by consolidating power in the executive.[48] This can mean attacking prosecutors, but also seeking to purge the bureaucracy, whose neutral application of law is an underappreciated feature of democratic governance.[49] Because the rule of law by definition places leaders under constraints, it is a threat to those who wish to consolidate power. Purging bureaucracies and abusing prosecutorial powers are standard fare among would-be autocrats.[50]

Fourth, would-be autocrats seek to degrade the public sphere by manipulating the information environment and attacking or controlling the media and academia.[51] In Hungary, for example, Orbán has systematically used licensing and other requirements to favor media firms aligned with his

40. Joshua Braver, *Constituent Power as Extraordinary Adaptation* 2-3 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3022221.

41. William Partlett, *Elite Transitions in Constitution-Making,* 56 VA. J. INT'L L. 407, 412-14, 433, 447-57 (2016).

42. See text at supra note 5.

43. HOW TO SAVE, *supra* note 1, at 95-101.

44. Aleem, *supra* note 4.

45. Halmai, *supra* note 9, at 4.

46. *Id.* at 6.

47. *Id.*

48. HOW TO SAVE, *supra* note 1, at 101-07.

49. Huq & Ginsburg, *supra* note 1, at 160.

50. *Id.* at 130.

51. *Id.* at 107-13.

political movement.[52] At the same time, he has launched an attack on the Central European University, an institution set up in the early years of the Third Wave by George Soros.[53] Orbán has used demonization of Soros to attack academic freedom, ultimately forcing the university to move its headquarters out of Hungary.[54]

Finally, and most directly, autocrats seek to manipulate elections.[55] As Joseph Stalin is claimed to have remarked, "It is enough that the people know there was an election. The people who cast the votes decide nothing. The people who count the votes decide everything."[56] Controlling the electoral machinery is thus crucial. When autocrats are seeking to cement their rule, they can use the electoral machinery to draw boundaries, screen candidates and count the votes. For example, when President Daniel Ortega was running for his third term of office in 2016, the electoral council ousted the main opposition.[57]

The particular mix of different strategies used will depend on contextual factors: in countries where the legislature is powerful, controlling it becomes central but may also be more difficult to achieve. In such a context, expanding executive decree power may be a channel of erosion. If freedoms of expression are robust, then undermining the very notion of truth through claims of "fake news" becomes a useful strategy. Terrorism and conspiracy laws provide a nice set of opportunities to clamp down on political opponents, and a genuine emergency—such as the failed 2016 coup against Recep Tayip Erdogan in Turkey—can be followed up with severe purges of the bureaucracy and courts, as well as roundups of political opponents.[58]

In the next section I focus especially on legal institutions as targets of backsliding pressure, and then examine whether international institutions and regional organizations can play a role in defending them. The justification for this focus is that courts are lynchpin institutions in our era. Just as judicialization has greatly expanded in recent decades, it has made courts more powerful in many countries, deciding issues of what Ran Hirschl calls

52. Halmai, *supra* note 9, at 19.

53. Yojana Sharma, *CEU President Resists Move to Vienna After Orban Victory*, University World News (April 11, 2018), http://www.universityworldnews.com/article.php?story=20180411141119286.

54. *Id.*

55. Halmai, *supra* note 9, at 6.

56. See *Joseph Stalin Quotes,* BRAINYQUOTE.COM, https://www.brainyquote.com/quotes/quotes/j/josephstal109571.html. The actual remark seems to have been something like **"**I consider it completely unimportant who in the party will vote, or how; but what is extraordinarily important is this — who will count the votes, and how.**"** *Joseph Stalin, It's Not the People that Vote that Count,*SNOPES.COM https://www.snopes.com/fact-check/stalin-vote-count-quote/.

57. *Nicaragua President Re-Elected in Landslide Amid Claims of Rigged Vote,* THE GUARDIAN (Nov. 7, 2016, 11:52 AM) https://www.theguardian.com/world/2016/nov/07/nicaragua-president-daniel-ortega-reelected-landslide-vote-rigging.

58. HOW TO SAVE, *supra* note 1, at 179.

"Mega-Politics."[59] Any institution that becomes powerful, however, will itself become a target for power-seekers, and judicial power is no exception. As courts have become more important it was only a matter of time before they become a target for political takeover. In addition, courts supervise many other elements in the political system. If the courts are safely in control, a putative authoritarian or illiberal democrat can take over many other aspects of the system.

III. WHY COURTS ARE IMPORTANT

Courts can be critical institutions to protect democracy from backsliding. Indeed, each of the channels of erosion described above invites a particular set of court responses. The judicial power to set aside legislation, the power to serve as a check on majoritarian erosion, and the power of constitutional review has spread all over the world in recent years.[60] Indeed, in 1910, less than a quarter of constitutions provided for any power of judicial review. A century later the figure was roughly 80%.[61] Constitutional judicial review provides an arena in which courts can play a role protecting democracy, though it is not the only one.

Consider first the channel of constitutional amendment. In recent years, a doctrine of unconstitutional constitutional amendments has spread around the world, allowing courts to set aside amendments that have been passed in a procedurally correct manner. Sometimes, courts use explicit language about unamendability to leverage their decisions in these cases.[62] In others, however, the court positions itself as the keeper of the "basic structure" of the constitution, or relies on the unwritten or customary constitutional norms.[63] Using these arguments, courts have struck amendments on topics ranging from to the design of the legislative bodies to the location of the capital city to a ban on headscarves.[64] Clearly, a court that is attuned to the risk of democratic backsliding ought to strongly consider a version of this doctrine, specifically with regard to the consolidation of power in a single individual or a party that seeks to exclude others from competition.

Term limits are a particularly important topic in this regard, given the phenomenon of "incumbent takeover" described above. When an incumbent does not want to leave office, but finds them self-limited by term limits, it is very tempting to try to amend the Constitution to remain in office. In prior

59. Ran Hirschl, *The Judicialization of Mega-Politics,* 11 ANN. REV. POL. SCI 93 (2008).

60. Tom Ginsburg & Mila Versteeg, *Why do Countries Adopt Constitutional Review?*, 30 J. L. ECON. & ORG. 587, 587 (2013).

61. HOW TO SAVE, *supra* note 1, at 187.

62. YANIV ROZNAI, UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS 6 (2017).

63. *Id.*

64. *Id.*

work, I have showed that incumbents who try to do so are typically successful in getting around term limits.[65]

Should courts let them do so? It can be very difficult for a court to stand up to an entrenched executive. But sometimes they do so, and can in some sense help to save constitutional democracy. Consider Colombia under President Alvaro Uribe, who served from 2002-2010. The Constitution of 1991 had a one-term limit for the presidency, which was part of the careful crafting of the document so as to prevent strongman rule.[66] But after his defeat of groups like the Revolutionary Armed Forces of Colombia (FARC), Uribe was wildly popular, and his allies in Congress passed a constitutional amendment to allow him a second term.[67] In 2005, the Colombian Constitutional Court upheld the amendment, but it also said that there was a basic core of the constitutional order, that might in the future allow the court to prohibit amendments even if they were adopted in a procedurally correct manner.[68] Five years later, the still-popular Uribe attempted to pass another constitutional amendment to seek a third term, this time through a referendum.[69] This time, the Constitutional Court (with four out of nine members having been appointed by Uribe) rejected the proposed referendum on procedural grounds, asserting that it would mark an extra-constitutional replacement of the constitutional scheme as a whole.[70]

Professor David Landau notes that this helped to "prevent a significant erosion of democracy by preventing a strong president from holding onto power indefinitely."[71] Writing with Professor Rosalind Dixon, he also notes that a third term would have given Uribe "tremendous power over various institutions of state, including those institutions charged with checking him."[72] Accepting the Court's decision, Uribe did not run, designating his defense minister Juan Manuel Santos as his successor. Santos subsequently served two terms and has now ceded power. Arguably, one can point to the 2010 decision of the Constitutional Court as marking a critical juncture in Colombian democracy.

To be sure, this doctrine of unconstitutional amendments provides a good deal of power to the courts. While courts can prevent leaders from sticking

65. Tom Ginsburg et al, *On the Evasion of Executive Term Limits,* 52 WM. & MARY L. REV. 1807, 1847-48 (2011).

66. COLOMBIAN CONSTITUTIONAL LAW: LEADING CASES, 342 (2017).

67. *Id. at* 342-4.

68. *Id.* at 345.

69. *Id.* at 351-52.

70. Corte Constitucional [C.C.] [Constitutional Court], octubre 19, 2005, Sentencia C-1040/05. *See* David Landau & Manuel Cepeda Espinosa, COLOMBIAN CONSTITUTIONAL LAW: LEADING CASES ch. 11 (2017).

71. Landau, *supra* note 39, at 203.

72. Rosalind Dixon & David Landau, *Transnational Constitutionalism and a Limited Doctrine of Unconstitutional Constitutional* Amendment, 13 INT'L J. CONST. L. 606, 617 (2015).

around for too long, they can also utilize this power to free leaders who would otherwise be constrained. The saga of term limits in Honduras illustrates the point. In 2009, when the sitting president, Manual Zelaya, proposed a non-binding referendum on the *idea* of constitutional change, the Supreme Court held that he had violated the terms of Article 374 of the Constitution.[73] The decision provided that term limits were unamendable, and that anyone proposing a change would immediately lose office.[74] Zelaya was sent out of the country by the military. But in 2015, Constitutional Chamber of the Supreme Court reversed itself. It not only ruled against the concept of non-amendability, but it also, in a unanimous decision, annulled the very constitutional provisions that constrained presidential reelection, saying that they conflicted with the core values of freedom of speech and thought, as well as electoral choice.[75] As Professor Landau and his co-authors wrote, "what is particularly striking about the case is that these provisions were not later amendments to the constitution, but rather parts of the original 1982 constitution itself."[76]

Consider the next modality of backsliding, namely attempts by an executive to undermine the separation of powers and accountability institutions. Here courts can do a bit more by defending the prerogatives of other branches of government. While it is true that in separation of powers disputes, judges often prefer to allow the elected branches to reach a negotiated solution, they need not do so. For example, they can issue orders in support of legislative investigations. In this sense they can help *other* government actors help to ensure accountability.

A good example of courts stepping up in this regard is provided by the recent role of the South African Constitutional Court in the removal of President Jacob Zuma. Zuma's corruption was notorious, but his allies in the African National Congress, which controlled the parliament, were doing nothing to constrain him. This meant that there was a real risk of the erosion of democracy itself, not because parliament was bypassed but because it was ineffective. In this context, the Constitutional Court played an interesting and important role. It acted several times throughout the Zuma saga to both protect opposition rights within the parliament, to require parliament itself to have mechanisms for accountability. For the first issue, the Court strongly suggested that votes on motions of no confidence in the president had to be

73. David Landau, Rosalind Dixon, & Yaniv Roznai, *From an Unconstitutional Constitutional Amendment to an Unconstitutional Constitution? Lessons From Honduras,* GLOBAL CONSTITUTIONALISM (forthcoming 2019), 8, https://ssrn.com/abstract=3208185.

74. *Id.*

75. *Id.* at 10.

76. *Id.*

secret;[77] it also insisted that minority rights in parliament not be squelched.[78] In another decision, the Court held that the Speaker of the House could not simply ignore motions of no confidence.[79] The Court held that the motion of no confidence acts to "strengthen regular and less 'fatal' accountability and oversight mechanisms".[80] Parliament had a duty to hear such motions, which it considered "a vital tool to advance our democratic hygiene".[81] The Court supported its findings by referring to the practice of executive removal in India, Canada, the United Kingdom, and several other Commonwealth jurisdictions which possess parliamentary democracies.[82]

What about the rule of law? This ideal implicates not just courts and lawyers, but any government agent whose actions must be constrained by legal authority. Again, South Africa illustrates how courts can help to ensure the rule of law in a complex system with multiple institutions. During the South African period of democratic decay, the prosecuting and investigating institutions of the state were not particularly active in seeking to hold Zuma accountable. Only the Public Protector, an ombudsman-like body with relatively weak powers, seemed to be willing to challenge Zuma's behavior.

In a critical decision, the Supreme Court empowered the Public Protector, whose findings were given legal force, resolving an ambiguity in the Constitution.[83] The Public Protector had issued a report that followed an investigation into the use of public funds for the improvement of the President's personal residence.[84] The report concluded that money misspent on portions of the upgrades were to be repaid by the President.[85] The President failed to comply with the findings, claiming that they constituted mere "recommendations". When the Court held that such findings *were* legally binding and that the President was not entitled to disregard them, President Zuma had to follow the Protector's order that he repay state monies

77. *United Democratic Movement v. Speaker of the National Assembly and Others* 2017 ZACC 21 at para. 97 (S. Afr.).

78. *Oriani-Ambrosini, MP v. Sisulu, MP Speaker of the National Assembly* 2012 ZACC 27 at para. 51 (S. Afr.); *Mazibuko v. Sisulu and Another* 2013 ZACC 28 at para. 45 (S. Afr.); *Democratic Alliance v. Speaker of the National Assembly and Others* 2016 ZACC 8 at para. 45 (S. Afr.); *see generally* James Fowkes, *Zuma's South Africa: A Constitutional Post-Mortem*, INT'L J. CONST. L. BLOG, Mar. 28, 2018, at: http://www.iconnectblog.com/
2018/03/zumas-south-africa-a-constitutional-post-mortem-i-connect-column/.

79. *Mazibuko v. Sisulu and Another* 2013 ZACC 28 at para. 45 (S. Afr.).

80. *United Democratic Movement v. Speaker of the National Assembly and Others* 2017 ZACC 21 at d., para. 34 (S. Afr.).

81. *Mazibuo*, *supra* note 44, at para 43.

82. *Id.* at para 46.

83. *Economic Freedom Fighters v. Speaker of the National Assembly and Others; Democratic Alliance v. Speaker of the National Assembly and Others* 2016 ZACC 11 at para. 105 (S. Afr.).

84. *Economic Freedom Fighters v. Speaker of the National Assembly and Others; Democratic Alliance v. Speaker of the National Assembly and Others* 2016 ZACC 11 at paras. 2-3 (S. Afr.).

85. *Economic Freedom Fighters v. Speaker of the National Assembly and Others; Democratic Alliance v. Speaker of the National Assembly and Others* 2016 ZACC 11 at para. 2 (S. Afr.).

spent on his private home. Importantly, the Public Protector's report concluded that in receiving undue benefits from the state, the President had breached his constitutional obligations.[86] Many regarded this statement, now with the force of law, as fulfilling the criteria for impeachment in terms of section 89(1) of the Constitution. This decision was, in its timing, the final blow that led the ANC to jettison Zuma as its leader in favor of Cyril Ramaphosa, who replaced Zuma mid-term as president. In short, the South African Constitutional Court forced the political system to act: it did not directly remove the president but it ensured that the processes of democratic accountability could not be ignored.

The fourth modality is the manipulation of the public sphere, including attacking or controlling the media and academia. A particular threat in our era is to undermine the very notion of an objective truth, instead promoting the idea of "fake news" and creating false narratives. Courts can play several roles here. First, courts can demand that information be disclosed, under Freedom of Information laws and other statutes, helping to ensure transparency. This can facilitate accountability by the media. (Of course, this does not mean that courts actually do play these roles. Analysis of Freedom of Information Act cases in the United States, shows a good deal of deference by the courts when the government invokes the national security exemption from disclosure.)[87] Courts can protect the media by ensuring robust freedoms of the press and speech, as well as by preventing government from restricting them.

Courts can also serve to preserve evidence from being destroyed. An interesting recent case in this regard arose in Wisconsin, where an advocacy group accused of an illegal campaign contribution had its electronic records seized.[88] The case stemmed from alleged collusion between the groups and Governor Scott Walker's recall campaign in 2011. State courts eventually found that there had been no legal violations, and ordered the documents returned, but also asked that a copy of some documents be filed under seal at the Wisconsin Supreme Court. The advocacy group then sued. Concerned about retaliatory proceedings, the defendants filed a copy of the documents with the federal District Court as well, asking that they be kept until the case against them was finally resolved. Clearly the defendants were worried about the risk of destruction of evidence, including by government actors.

A third role courts can play in protecting the public sphere is by finding facts. When reality is contested, fact-finding by judges—one of the core

86. PUBLIC PROTECTOR, SECURE IN COMFORT 439 (March 2014).

87. Susan Nevelow Mart and Tom Ginsburg, *[Dis] Informing The People's Discretion: Judicial Deference Under The National Security Exemption of the Freedom of Information Act*, 66 ADMIN. L. REV. 725 (2014) (demonstrating rarity of finding against government.)

88. *John K. MacIver Institute For Pub. Policy Inc. v. Schmitz,* 885 F.3d 1004, 1008 (7th Cir. 2018).

functions of the judicial process—can serve to provide authoritative determinations of contested issues. When courts are trusted, (as they generally are in the United States), they can serve as arbiters of truth, even though of course legal determinations are made under conditions of incomplete information and limited time.

Finally, courts can and do play a role of supervising elections in many countries. Countries with special constitutional courts will not infrequently position those courts as the final arbiters of elections disputes.[89] And scholars focused on the "Law of Democracy" explain how it is that courts can play a role in regulating the democratic process.[90]

In short, modern constitutional democracy involves the subjection of democratic will to the rule of law. This is in part historically determined. For most Western democracies, the rule of law was in place well before the establishment of mass democracy. But it is also conceptual, rooted in the basics of constitutional theory going back to the ancient Greeks, who distrusted direct and unmediated popular power. By requiring that the people act *through* law, the tule of law subjects the state to certain processes of orderly change, which helps to make democracy effective. Democratic choice is underpinned by legal guarantees of the rights to organize, speak, and protest.

It is precisely this harmonious vision of the rule of law and democracy that has come under severe attack from illiberal democrats in recent years. The problem is not so much with the rule of law in the abstract but in its concrete manifestation in the decisions of judicial bodies, who have been empowered in the last decades as liberal democracy has spread around the globe. Partly the process is dialectic: as courts have become more important, they have become targets. As Huq and I put it, "the central role played by the courts perversely raises the stakes in political battles over who controls the courts."[91] The judicialization of politics has led to the politicization of the judiciary.

The most complete articulation of the new theory has come from Polish figures in the Law and Justice Party (PiS,) who have systematically portrayed the law as subordinate to popular will. As PiS leader Kaczyński himself said "the state based on the rule of law does not have to be a democratic state. In a democracy, the only sovereign is the nation. The parliament and, in the

89. *See, e.g.*, 1998 CONST. OF THE REP. OF ALBANIA, art. 131(e) (court verification of election results); *See generally* Tom Ginsburg and Zachary Elkins, *Ancillary Powers of Constitutional Courts,* 87 Texas Law Review 1431, 1443 (2008) (providing data).

90. Nathaniel Persily, *The Law of Democracy,* 143 U. PENN. L. REV. 1 (2004) (introducing symposium); Samuel Issacharoff, et al., THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS 2 (2nd ed. 2002); Pamela S. Karlan, *New Beginning and Dead Ends in the Law of Democracy,* 68 OHIO ST. L. J. 743 (2007) (anti-entrenchment vs. anti-discrimination rationales).

91. HOW TO SAVE, *supra* note 1, at 174.

Polish conditions, the President are its representatives. These two state organs are responsible for the creation of law. To these bodies belongs the control over our lives."[92] Notice that the courts are not mentioned. It is this simplistic privileging of democracy over liberalism, while at the same time ignoring democracy's legal foundation, that leads to subvesion of the law and turn it into an instrument for partisan struggle. As the honorary speaker of the Polish parliament said, "it is the will of the people, not the law that matters, and the will of the people always tramples the law."[93]

IV. CRISIS AND REGIONAL RESPONSE IN POLAND

A. The backsliding

To understand the playbook for attacking courts, let us examine the situation in Poland in more depth. In 2015, the PiS candidate, Alexander Duda, won the presidential election in Poland. The next year, the party won a parliamentary majority under the leadership of former Prime Minister Jaroslaw Kacynzski. Kacynzski is the de facto leader of the party, and has engineered a remarkable turnaround in Polish politics.

In the wake of the election victory, the outgoing party sought to pack the Constitutional Tribunal by appointing five new justices to the fifteen-member tribunal.[94] The incoming PiS majority refused to seat the incoming justices and then engineered a clever series of steps to take control of the constitutional tribunal.[95] To do so, it had to first force the Constitutional Tribunal to seat its own judges, and not those that had been elected by the lame duck session of the outgoing parliament. It did so by passing a new appointments law, and then refusing to publish the Constitutional Tribunal decision which held that law unconstitutional.[96] With the personnel of the Court in crisis, there was a stalemate for several months. But in late 2016, as the outgoing Tribunal President's term expired, the PiS passed a statute establishing a position of "interim president" of the Tribunal. Its appointee, Julia Przyłebska, convened a meeting with some of the controversial appointees, and then forced the Tribunal's Vice President to retire. Finally, after several months, in October 2017, the Constitutional Tribunal handed down a judgment "cleansing" the improperly elected "duplicate" judges, and

92. Adam Balcer *Beneath the surface of illiberalism: the recurring temptation of 'national democracy' in Poland and Hungary*, WISEEUROPA 6, 47 (2017) https://pl.boell.org/sites/default/files/beneath_the_surface_illiberalism_national_democracy_poland_hungary.pdf.

93. Tamas Gyorfi, AGAINST THE NEW CONSTITUTIONALISM 62-63 (2016).

94. *See* Sadurski, *supra* note 34.

95. Tomasz Tadeusz Koncewicz, *The Capture of the Polish Constitutional Tribunal and Beyond: Of Institution(S), Fidelities and the Rule of Law in Flux*, 43 REV. CENTRAL & E. EUR. L 116 (2018).

96. *Id.* at 121.

finding several laws passed by Parliament but declared unconstitutional by the prior Constitutional Tribunal to now be constitutional.[97]

With the Constitutional Court in hand, the PiS moved against the ordinary judiciary. It first passed laws to take control of the National Council of the Judiciary, which has a role in both appointing and managing judges. [98] As in Hungary, age restrictions were an attractive option, as the most senior judges were precisely those with the most interest in and capacity for upholding the rule of law. By lowering the maximum age from 70 to 65, PiS decapitated the judiciary in a single stroke, forcing out 40% of the Supreme Court.[99]

In reaction, some scholars have called for extraordinary measures. For example, Professor Koncewicz has asserted that ordinary courts could have tried to resort to emergency judicial review, temporarily claiming jurisdiction over constitutional issues that would otherwise be exclusively within the Tribunal's purview, on the grounds that the Tribunal is incapacitated.[100] He argues that in a situation where the alternative is the complete destruction of the system, the courts would be justified in taking that liberty as a matter of self-defense.[101] But in any case, the argument was academic, in that there was no concrete reaction or mobilization.

Indeed, the PiS initiated a series of reforms targeting the ordinary judiciary that would bring the courts under heel. As this was happening, the rest of the European community took notice, but didn't take much action.[102] The PiS Party capitalized on the lack of reaction from the international community and the strategic gridlock it created domestically to continue expanding its power and reducing constitutional oversight.[103] Scholars, however, called on Europe to act.[104]

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97. *Id.* at 122.

98. Sadurski, *supra* note 34.

99. Sadurski, *Polish Chief Justice of the Supreme Court Under Pressure: What Now?*, VerfBlog (May 7, 2018), https://verfassungsblog.de/polish-chief-justice-of-the-supreme-court-under-pressure-what-now/, DOI: https://doi.org/10.17176/20180705-161545-0; *see also* Monika Nalepa, *The Attack on Polands Judicial Independence goes Deeper than you Think,* MONKEY CAGE, July 23, 2017, https://www.washingtonpost.com/news/monkey-cage/wp/2017/07/23/the-attack-on-polands-judicial-independence-goes-deeper-than-you-think-here-are-5-things-to-know/?utm_term=.e79098de9e78.

100. Koncewicz, *supra* note 95, at 147.

101. *Id.* at 143.

102. *Id.* at 135.

103. *Id.*

104. Kim Lane Scheppele and Laurent Pech, *Was the Commission Right to Activate pre-Article 7 and Article 7(1) Procedures Against Poland?, VerfBlog,* (July 3, 2018), https://verfassungsblog.de/was-the-commission-right-to-activate-pre-article-7-and-art-71-procedures-against-poland/, DOI: https://dx.doi.org/10.17176/20180307-091937.

B. The European response

The tools of the European Union for protecting democracy are relatively limited. Article 2 of the Lisbon Treaty on the European Community states a set of core values, including democracy and the rule of law.[105] But the remedy for imposing costs on a Member State are relatively limited. Article 7 of the Treaty allows for the suspension of the rights of a Member State on a unanimous vote (excluding the state concerned) but there is no mechanism for expelling a state entirely.[106] The procedure requires a proposal, approved by a two-thirds majority in the European Parliament, which in turn leads to a vote by the Council to declare a "clear risk of serious breach".[107] In the event of a serious and persistent breach, [108] the country can be declared to be in breach by the European Council, and can vote by qualified majority to suspend rights.[109] This has never happened, and there is skepticism that it could, given the fact that Hungary, a fellow traveler regime, would be able to exercise a veto over the final stage under Art. 7.3.

The European Commission began an inquiry into the rule of law in Poland in January 2016. This led to a back and forth with the government. But in December 2016, the European Commission issued a Rule of Law Opinion on the situation in Poland, expressing concern with (1) appointment of judges to the Constitutional Tribunal and the non-implementation of judgments, (2) Law amending Law on Constitutional Tribunal and implementation of judgment on and since 9 Mar 2016, and (3) Effectiveness of constitutional review of new legislation enacted in 2016.[110]

In July 2016, the Commission proceeded to the second stage of pre-Article 7 procedure and issued a Recommendation on the Rule of Law. It noted that the amendments flagrantly flouted the Commission's Opinion, by including provisions that were previously found to be unconstitutional by the Constitutional Tribunal and had been criticized by the Venice Commission. The Commission's eariler opinion had explicitly asked that the law respect the findings of the Constitutional Tribunal and take the Venice Commission's

105. The Treaty of Lisbon, art. 2, May 9, 2008, 51 O.J. (C 115) ("The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.").

106. *Id.* at art. 7.

107. *Id.* at art. 7.1.

108. *Id.* at art. 7.2.

109. *Id.* at art. 7.3.

110. Koncewicz, *supra* note 95, at 134-35.

Opinion into account.[111] In July 2017, the Third Rule of Law Recommendation was issued by the European Court of Justice.[112]

In October 2017, the European Parliament adopted a resolution concluding that the current situation in Poland presented a clear risk of a serious breach of the values referred to in Article 2.[113] This was followed by the European Commission (EC) proposing to adopt a decision against Poland under Article 7(1) TEU, for presenting a risk of a serious breach of the rule of law.[114] Meanwhile, on 2 July 2018, the EC initiated infringement procedure and sent a Letter of Formal Notice to Poland regarding its Law on the Supreme Court.[115]

All in all, however, there does not seem to be many tools for applying formal sanctions to a country that violates the provisions of Article 2. There are shame sanctions, and it is notable that the Venice Commission on Democracy through Law, an organ of the Council of Europe, issued several opinions criticizing the Polish judicial reforms.[116] But these were not binding in any legal sense.

However, the European judicial system provides one mechanism that has recently emerged. In *Minister for Justice and Equality v. LM* ("the Celmer case"), the European Court of Justice has been tasked with determining whether or not Ireland can refuse to execute a Polish European Arrest Warrant (EAW) for alleged drug trafficker Artur Celmer.[117] The reason given for a possible refusal to execute is that recent judicial reforms in Poland – in the opinion of the Irish High Court – have undermined the rule of law and challenged the presumption of "mutual trust" under which EAWs operate.[118] The Irish High Court cites several statements by the Venice Commission and the initiation of Article 7 TEU proceedings against Poland as evidence of its claim.[119] As far as judicial independence is concerned, the Celmer case seeks to answer two questions: which legal test should be used to make a decision regarding Celmer's surrender, in light of the lack of judicial independence

111. *Id.*
112. *Id.* at 136.
113. *Id.* at 165 n.107.
114. *Id.* at 166.
115. European Commission Press Release IP/18/4341, *Rule of Law: Commission launches infringement procedure to protect the independence of the Polish Supreme Court* (Jul. 2, 2018), http://europa.eu/rapid/press-release_MEX-18-4343_en.htm.
116. *Venice Commission: Poland's recent reforms constitute "grave threat" to judiciary*, HUMAN RIGHTS EUROPE (Dec. 8, 2017), http://www.humanrightseurope.org/2017/12/venice-commission-polands-recent-reforms-constitute-grave-threat-to-judiciary/.
117. Minister for Justice and Equality v. LM [2018] (Ir.), http://curia.europa.eu/juris/document/document.jsf?docid=204384&mode=req&pageIndex=1&dir=&occ=first&part=1&text=&doclang=EN&cid=1212288.
118. *Id.*
119. *Id.*

that the Irish High Court has observed in Poland? And, how the Article 7 TEU proceedings and Venice Commission statements should factor into EAW surrender assessments (if at all)?

The standard, as argued by the Advocate General (AG) Evgeni Tanchev is based on earlier cases. Ireland must apply the double test established in when making a determination on Celmer's surrender. That is, the Irish High Court must not only consider whether the judicial system as a whole allows for a fair trial, but also whether Celmer's individual case is likely to face a "flagrant denial" of justice. The AG argued that Ireland could take into account the Article 7 proceedings and the Venice Commission reports.

In short, the European response to the attack on Poland's courts has been halting and limited, but may be picking up steam. It will, however, likely be too late to completely reverse the degradation of the Polish courts and the rule of law. This then suggests that, if democratic backsliding is to be avoided, the main dynamics will be domestic. Democracy must, in some sense, save itself, and this is the challenge we confront today in many countries around the world.

V. CONCLUSION: WHAT CAN BE DONE?

To reiterate the argument so far, democracies are under threat all over the world, and courts have a potential role to play in helping prevent backsliding. But they are not foolproof. Indeed, as courts have become more powerful and prominent, through the global trend of the judicialization of politics, they have themselves become targets for political actors' intent on capturing power. This has led to a rash of attacks on judicial independence.

How can one ensure that the courts remain capable of playing their role in protecting democratic channels? There is a large literature on the causes and consequences of judicial independence, but there is no foolproof mechanism. One trend has been to empower a special institution, called a judicial council, to manage and oversee the judiciary, sometimes being involved in the appointment process and other times working on appointments, promotions, removal, and budget. In many cases, judicial councils have themselves become targets for politicization.[120] In other work, my co-authors and I have found that *only* the combination of insulated constitutional appointment processes *and* protection against removal enhanced judicial independence in fact.[121]

One of the lessons of the backsliding literature is that courts need allies. Sometimes these can be inside the country. The stories described above about

120. DAVID KOSAR, PERILS OF JUDICIAL SELF-GOVERNMENT IN TRANSITIONAL SOCIETIES (2016).

121. James Melton & Tom Ginsburg, *Does De Jure Judicial Independence Really Matter? A Reevaluation of Explanations for Judicial Independence?* 2 J.L. COURTS 187 (2014).

the way the South African court interacted and supported the parliamentary opposition and the Public Protector are suggestive: together they formed a network of institutions that was able, ultimately, to prevent Jacob Zuma from taking over the political system entirely. In other cases international legal institutions, including international courts, can play an important role.[122] They can do so through outside pressure, as in the Polish case recounted above, or through providing resources for domestic courts to leverage. The bottom line, then, is that the rule of law cannot survive without democratic support, even as democracy cannot survive without the rule of law.

122. Alejandro Chehtman, *International law and Constitutional Law in Latin America, in* THE OXFORD HANDBOOK OF CONSTITUTIONAL LAW IN LATIN AMERICA (Conrado Hübner Mendes & Roberto Gargarella eds., Forthcoming, 2019), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3207795.