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The Rule of Law in Transnational Context: Introduction to the Symposium

Gregory Shaffer* and Wayne Sandholtz**

The rule of law is under challenge around the world.¹ The World Justice Project found that, in 2021, the rule of law had declined to different degrees in 74% of countries representing 85% of the world's population.² Trends have moved in this direction for a decade. In parallel, governments increasingly challenge international institutions and international law, which too are under stress.

National and international law and institutions are best viewed as part of larger transnational normative processes involving the conveyance of norms and practices, which settle and unsettle over time.³ This transnational framing of law views national and international courts in a multi-dimensional space. Analytic frameworks of viewing national and international law in dynamic relationship with each other help explain rule-of-law challenges today. The interaction of domestic and international factors can give rise to virtuous or vicious cycles for rule-of-law protections. Transnational legal processes provide normative resources to protect human rights, uphold democratic processes, and safeguard the rule of law. But they also can work in reverse. International law, as all law, has its pathologies and challenges. It can accommodate the arbitrary exercise of power, or it can constrain it. It too must be subject to vigilance and critique.

This symposium issue addresses rule-of-law challenges at the international and national levels, and how they are enmeshed. The articles were first presented at a workshop on challenges to the rule of law held at the University of California, Irvine School of Law in September 2021. The workshop papers ranged from conceptual analyses of the rule of law (reflected in Brian Tamanaha's contribution), to rule-of-law challenges at the international level (captured in the articles by Anne Peters,

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1. For a full exposition of our argument, see Gregory Shaffer and Wayne Sandholtz, *The Rule of Law Under Challenge: The Enmeshment of National and International Trends* (on file).

2. World Justice Project, *WJP Rule of Law Index 2021*, WORLD JUSTICE PROJECT, <https://worldjusticeproject.org/our-work/research-and-data/wjp-rule-law-index-2021>.

3. Terence Halliday and Gregory Shaffer, Transnational Legal Orders, *Transnational Legal Orders*, in *TRANSNATIONAL LEGAL ORDERS* 1, 6-14 (Terence Halliday & Gregory Shaffer eds., 2015).

Jeremy Farrall and Terrence Halliday), and national case studies in transnational context (the articles by Dilek Kurban and Ji Li respectively on Turkey and China).

Critically responding to Jeremy Waldron's position on the concept of the international rule of law, **Brian Tamanaha** begins the symposium with his article *Why Sovereigns Are Entitled to (Horizontal) Benefits of the International Rule of Law*.⁴ Tamanaha argues that sovereign states are entitled to certain benefits of the international rule of law. International law is based on the notion that states are autonomous and equal members of the international society ordered through legal relations, he writes, and the legal relations of the international community of states constitute the horizontal dimension of the rule of law, which Waldron overlooked. By focusing on horizontal rule-of-law functions (in complement to vertical ones between the state and individuals), Tamanaha provides descriptive, theoretical, and normative reasons why states are, and should be, entitled to the benefits of the rule of law.

In their article *Transnational Legal Order through Rule of Law? Appraising the United Nations Security Council, 1990-2022*,⁵ **Jeremy Farrall** and **Terence Halliday** examine the limitations of rule-of-law norms in constraining the power of the United Nations Security Council (UNSC). The authors acknowledge the serious challenge of analyzing the UNSC from the perspective of the rule of law, as the UNSC is not subject to effective checks and balances that constrain arbitrary action. Nonetheless, they contend that evaluating the UNSC's adherence to the rule of law is crucial given its influential role in creating law that binds all UN members. By combining UNSC data and Farrall's direct observations of UNSC operations, the authors assess the UNSC's engagement with the rule of law from the early 1990s to the present, focusing on its decision-making regarding peacekeeping, sanctions, and the use of force. The authors assess the rule of law within the UNSC in terms of discourse, procedures, and structures. Although Farrall and Halliday conclude that there are insufficient barriers to check what too easily can be abusive UNSC exercises of power, they cast light on new institutions that help constrain UNSC arbitrariness, such as the Office of the Ombudsperson. Farrall and Halliday likewise consider the potential for elected UNSC members and weaker states within the UN to advocate for rule-of-law norms within the UNSC, thereby affecting UNSC behavior.

Anne Peters, in her article *International Organizations as Constitution-Shapers: Lawful but Illegitimate*,⁶ examines international organizations' efforts to promote the rule of law, human rights, and democracy (referred to as the constitutional trinity) in response to the rise of populism and anti-globalization. The article evaluates the effectiveness, consequences, and counterproductive nature of these promotional

4. Brian Tamanaha, *Why Sovereigns Are Entitled to (Horizontal) Benefits of the International Rule of Law*, 8 U.C. IRVINE J. INT'L, TRANSNAT'L & COMP. L. 5 (2023).

5. Jeremy Farrall & Terence Halliday, *Transnational Legal Order through Rule of Law? Appraising the United Nations Security Council, 1990-2022*, 8 U.C. IRVINE J. INT'L, TRANSNAT'L & COMP. L. 27 (2023).

6. Anne Peters, *International Organizations as Constitution-Shapers: Lawful but Sometimes Illegitimate, and Often Futile* 8 U.C. IRVINE J. INT'L, TRANSNAT'L & COMP. L. 61 (2023).

endeavors. Through an analysis of various organizations, Peters concludes that, despite criticism and resistance, the language and practices of international organizations have not changed significantly. Peters finds that the effectiveness of these constitution-shaping efforts have been mixed. She compares the idealistic perception of the European Union as a champion of human rights and democracy with empirical evidence of growing illiberal tendencies in a number of European countries. In the Global South, a significant gap persists between constitutional ideals and their actual implementation, primarily due to the fragility of domestic institutions. Peters soberly observes that “even assuming that the rule of law, human rights, and democracy are globally accepted ideals—these legal principles and related processes and institutions cannot be easily realized everywhere.”⁷ Peters opposes constitution-shaping efforts that rely on intervention, coercion, and economic dependency. She emphasizes that effective and legitimate initiatives must incorporate post-colonial concerns and pursue a more comprehensive social agenda. Transnational engagement to bolster liberal constitutionalism requires a deeper understanding of specific cultural contexts and challenges within countries.

Dilek Kurban’s article *Rethinking Enmeshment and the Rule of Law in Authoritarian Contexts*⁸ analyzes the interaction between international and domestic law in relation to the authoritarian regime of Turkey. Kurban maintains that variation in rule-of-law practices lie along a spectrum from the rule-of-law ideal of non-arbitrariness to lawlessness. In the case of Turkey, its increasingly authoritarian government resorted to law in order to consolidate its power (illustrating rule by law, in contrast to the rule of law), and it has since utterly disregarded law and engaged in state violence to repress civil society (lawlessness). Kurban argues that international institutions have facilitated rather than impeded this shift towards autocracy in Turkey, and themselves undermined rule-of-law principles. She critically evaluates the cases before the European Court of Human Rights against Turkey, including its inadmissibility decisions that most scholars ignore. Kurban concludes that the European court has missed opportunities to address arbitrariness and condemn the role that Turkish courts play in the government’s silencing of dissent. By affording Turkey a wide margin of appreciation in relation to electoral issues, the court has enabled and sustained Erdogan’s single party rule, as the country lacks minimal, procedural, democratic safeguards. Kurban highlights the alarming transformation of Turkey from an authoritarian regime to an autocratic one, taking place under the oversight of European institutions. She underscores the need for a more nuanced understanding of the relationship between international organizations and authoritarian states.

In his article *The Evolving Rule of Law with Chinese Characteristics and Its Impacts on the International Legal Order*,⁹ **Ji Li** recounts the historical development and reform of

7. *Id.* at 86.

8. Dilek Kurban, *Rethinking Enmeshment and the Rule of Law in Authoritarian Contexts*, 8 U.C. IRVINE J. INT’L, TRANSNAT’L & COMP. L. 107 (2023).

9. Ji Li, *The Evolving Rule of Law with Chinese Characteristics and Its Impacts on the International Legal Order*, 8 U.C. IRVINE J. INT’L, TRANSNAT’L & COMP. L. 151 (2023).

the Chinese legal system, addresses the evolution of rule-of-law debates in China, and predicts how China will impact the international legal order. In the first part of the article, Li traces the history of China's legal system and examines the contestations among China's ruling elites and the influence of external normative and geopolitical contexts across different issue areas, tracing how the "rule of man" in the Mao period evolved into today's "rule of law with Chinese Characteristics." Although the Chinese Communist Party has stressed the importance of building a "rule of law country," China has moved away from rule-of-law principles since Xi Jinping assumed leadership, although with variation in light of power dynamics within China and instrumental factors, such as the pursuit of economic development. In the article's second part, Li reverses the inquiry and examines how China will impact the international legal order. He concludes that Chinese nationals will increasingly engage with international law and institutions, and that China will participate in the creation of new international agreements and organizations, and press for incremental reforms of existing ones. Yet, he maintains, while Chinese influence will vary across international legal fields, China overall will exercise only marginal influence on the fundamental norms undergirding the existing international legal order.

Trends at the national and international levels enmesh. They can reinforce a turn toward or away from rule-of-law goals and practices. This symposium issue combines empirical studies with conceptual analyses to assess transnational trends and what they portend. It offers normative appraisals for the conceptualization, reform, and role of international law and institutions to support rule-of-law practices, as well as their limits.