

# The Future of Democracy and the Rule of Law

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Headlines warning about the crisis of declining or failing democracy are a constant drumbeat in the news media. This is not all contrived. Democracy has been in decline around the world for at least the past decade.<sup>1</sup> Through my work in the international rule of law arena for the past two decades, I have experienced firsthand the recent backlash against democracies and the phenomenon of incremental democratic erosion resulting in, and reinforced by, judicial backsliding.<sup>2</sup>

It is challenging, however, to cut through the histrionics of the news reports and make sense of what is happening. Plentiful literature diagnoses what ails democracy. A common theme is the decline of the rule of law, an issue particularly close to my heart. In this piece, I discuss why rule of law is fundamental to democracy and why rule of law is under threat across the world, particularly through executive encroachment and internet criminalization and censorship. While I do not have a crystal ball to predict where we are going, I offer a lens to understand these issues.

## I. WHAT IS THE RULE OF LAW?

The “rule of law” is a lofty concept that is bandied about in speeches and conversations, but we often fail to consider its meaning. It is more than a catchy, feel-good phrase—it is the foundation of our democracy and is both the spirit and the reality of a transparent, accessible, and fair justice system. The rule of law reflects some of our core values—democracy, tolerance, fairness, and freedom.<sup>3</sup>

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\* Senior Circuit Judge, United States Court of Appeals for the Ninth Circuit. This essay is adapted from a keynote address delivered on February 16, 2023, for the University of California’s Future of Democracy Initiative. The author thanks Alexandra Willingham (Stanford University, J.D. ’20) and Teresa Morin (University of San Diego, J.D. ’23) for their research assistance.

1. *The Global State of Democracy 2022: Forging Social Contracts in a Time of Discontent*, at 6, International Institute for Democracy and Electoral Assistance, Nov. 24, 2022, <https://www.idea.int/publications/catalogue/global-state-of-democracy-2022>. Some scholars identify a “democratic recession” period beginning in 2006. See, e.g., STEPHEN HAGGARD & ROBERT KAUFMAN, BACKSLIDING: DEMOCRATIC REGRESS IN THE CONTEMPORARY WORLD 11 (2021) [hereinafter BACKSLIDING].

2. See generally Stephan Haggard & Lydia Tiede, *Judicial Backsliding: A Guide to Collapsing the Separation of Powers* (Working Paper, 2021).

3. See generally M. Margaret McKeown, *The ABA Rule of Law Initiative: Celebrating 25 Years of Global Initiatives*, 39 MICH. J. INT’L L. 117 (2018). The author is former chair of the ABA Rule of Law Initiative and a current senior advisor.

Perhaps not surprisingly, there is no uniform definition of rule of law.<sup>4</sup> Still, it is not solely in the eye of the beholder. The phrase was first popularized by British constitutional law scholar A.V. Dicey in the 19th century.<sup>5</sup> Dicey argued that the phrase meant three “kindred” concepts: “a government limited by law; equality under the law for all citizens; and the protection of human and civil rights.”<sup>6</sup>

Importantly, rule *of* law does not mean rule *by* law—simply having a legal system or a set of laws on the books does not guarantee the essence of rule of law.<sup>7</sup> Perhaps the best contemporary example is Russia, which has a beautiful constitution with a well-delineated separation of powers and plenty of follow-on laws but lacks a culture of law.<sup>8</sup> Further, no one has a monopoly on touting or invoking the phrase. Recently, Xi Jinping, President of China, published a manifesto—*Xi Jinping Thought on Rule of Law*.<sup>9</sup> According to China’s state-run media, implementation of President Xi’s plan means “adher[ing] to the socialist rule of law with Chinese characteristics.”<sup>10</sup> This formulation appears to elevate rule by law rather than rule of law and the ambiguity of “Chinese characteristics” leaves a vacuum as to practical implementation.

Over time, scholars have developed a more nuanced definition that includes a theoretical framework for the rule of law and how it serves a critical function in our society. As a benchmark, I use the definition proffered by the World Justice Project (“WJP”), which captures the concept

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4. RACHEL KLEINFELD, ADVANCING THE RULE OF LAW ABROAD: NEXT GENERATION REFORM 7 (2012) [hereinafter KLEINFELD ADVANCING] (“For decades, rule-of-law reform took place without much of a definition at all, based on the idea that ‘you’ll know it when you see it.’”); Symposium, *The History of CEELI, the ABA’s Rule of Law Initiative, and the Rule of Law Movement Going Forward*, 18 MINN. J. INT’L L. 304, 341 (2009) [hereinafter Symposium] (statement of Mark S. Ellis).

5. McKeown, *supra* note 3, at 118.

6. *Id.* (quoting ALBERT V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 175–84 (8th ed. 1915) (1885)).

7. See Josh Chin, ‘Rule of Law’ or ‘Rule by Law’? In China, a Preposition Makes All the Difference, WALL ST. J.: CHINA REAL TIME REP. (Oct. 20, 2014, 2:03 PM HKT), <https://blogs.wsj.com/chinarealtime/2014/10/20/rule-of-law-or-rule-by-law-in-china-a-preposition-makes-all-the-difference/>.

8. For a full discussion about the rule of law in Russia, see Jessica C. Wilson, *Russia’s Cultural Aversion to the Rule of Law*, 2 COLUM. J. E. EUR. L. 195 (2008).

9. During the fourth plenary session of the thirteenth National People’s Congress, Xi Jinping released his “Thought on the Rule of Law,” which “represents the most concrete expression of Xi Jinping’s vision of how the law should be interpreted and applied in China and in the international context.” See MORITZ RUDOLF, XI JINPING THOUGHT ON THE RULE OF LAW: NEW SUBSTANCE IN THE CONFLICT OF SYSTEMS WITH CHINA, Stiftung Wissenschaft und Politik (2021), [https://www.ssoar.info/ssoar/bitstream/handle/document/74046/ssoar-2021-rudolf-Xi\\_Jinping\\_thought\\_on\\_the.pdf?sequence=1&lnkname=ssoar-2021-rudolf-Xi\\_Jinping\\_thought\\_on\\_the.pdf](https://www.ssoar.info/ssoar/bitstream/handle/document/74046/ssoar-2021-rudolf-Xi_Jinping_thought_on_the.pdf?sequence=1&lnkname=ssoar-2021-rudolf-Xi_Jinping_thought_on_the.pdf).

10. Cao Yin, *Xi’s Thought Guarantees Rule of Law*, CHINA DAILY (Dec. 18, 2021), <https://www.chinadaily.com.cn/a/202112/18/WS61bd18b4a310cdd39bc7c191.html>.

through four universal principles: (1) accountability; (2) just law; (3) open government; and (4) accessible and impartial justice.<sup>11</sup>

There is plentiful literature on the judiciary's key role in upholding these principles. The overarching principle is impartiality. Courts are seen as both sources of the recognition that all people should be afforded equal rights and resources for those seeking to enforce rights.<sup>12</sup> They are the forums that are supposed to guarantee an equal right to be heard.<sup>13</sup> Impartiality is central to the judiciary's contribution to the balance of power among the branches of government and recognition of this impartiality is central to public trust in the judiciary. Courts also uphold accountability by determining who has violated civil and criminal laws and how those individuals should be held accountable. Further, in most constitutional democracies, the judiciary is designed to review whether laws are compatible with fundamental legal protections.

The notion of public access to courts is deeply rooted in the English common-law system and even appeared in some of the original colony charters in the 1600s.<sup>14</sup> The United States Constitution built on this tradition when it outlined the right to a "speedy and *public* trial" in the context of the criminally accused.<sup>15</sup> Such public access creates forums that enhance accessible justice and open government.<sup>16</sup> Courts serve as public forums because both public and private litigants resolve disputes in a space open to public scrutiny.<sup>17</sup> Government litigants are equally subject to this scrutiny.<sup>18</sup> Moreover, in open courts, the public is able to observe and form opinions about the law and its impact.<sup>19</sup> Access and transparency are key to the development and reconfiguration of democratic norms, demonstrating how the law "varies by contexts, decision-makers, litigants, and facts" and "that rules can change because of popular input."<sup>20</sup>

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11. WORLD JUSTICE PROJECT, WHAT IS THE RULE OF LAW? (2023) <https://worldjusticeproject.org/about-us/overview/what-rule-law>. The author is a board member of The World Justice Project.

12. Judith Resnik, *Reinventing Courts as Democratic Institutions*, 143 DAEDALUS 9, 12 (2014) [hereinafter *Reinventing Courts*].

13. Judith Resnik, *Courts: In and Out of Sight, Site, and Cite*, 53 VILL. L. REV. 770, 807 (2008) [hereinafter *Sight, Site, and Cite*].

14. *Reinventing Courts*, *supra* note 12, at 11–12.

15. U.S. CONST. VI (emphasis added).

16. *Reinventing Courts*, *supra* note 12, at 12.

17. *Id.*

18. *Sight, Site, and Cite*, *supra* note 3, at 806–07.

19. *Reinventing Courts*, *supra* note 12, at 12.

20. *Sight, Site, and Cite*, *supra* note 13, at 808. While the transparency and accessibility that courts offer through public access has a long history, we should not take it for granted. Resnik highlights the recent trend away from public trials with vast utilization of alternative dispute resolution in civil disputes and plea bargaining in criminal cases. *Reinventing Courts*, *supra* note 12, at 17–19.

## II. POST-WORLD WAR II TIMELINE

An understanding of the rule of law requires stepping back to consider the historical development of rule-of-law principles.



Figure 1

Following World War II, there was a sense of confidence and optimism as democracy expanded across the globe and the opportunities for the rule of law seemed without limit.<sup>21</sup> The Nuremberg trials were seen as a watershed event in international law and a vindication of human rights.<sup>22</sup> That optimism was shattered with the advent of the Cold War and the rise of geopolitical and ideological tension between the world’s two superpowers—the Soviet Union and the United States.<sup>23</sup> This freeze lasted almost forty-four years, until the fall of the Berlin Wall in 1989 and the ensuing Soviet collapse.<sup>24</sup> The 1990s brought peaceful revolutions that overthrew most of the governments of the eastern bloc.<sup>25</sup> Once again, there was a giddiness and euphoria, feeding an optimism about the promises and inevitability of liberal democracy.<sup>26</sup> But decommunization did not lead

21. See McKeown, *supra* note 3, at 120; Peter S. Goodman, *The Post-World War II Order Is Under Assault From the Powers That Built It*, N.Y. TIMES (Mar. 26, 2018), <https://www.nytimes.com/2018/03/26/business/nato-european-union.html> (“In the aftermath of World War II, the victorious Western countries forged institutions — NATO, the European Union, and the World Trade Organization — that aimed to keep the peace through collective military might and shared prosperity. They promoted democratic ideals and international trade while investing in the notion that coalitions were the antidote to destructive nationalism.”); Figure 1 created by author using open-source photographs from the National Archives.

22. For a full discussion of the geopolitical and legal implications of the Nuremberg trials, see Hans Leonhardt, *The Nuremberg Trial: A Legal Analysis*, 11 REV. POLS. 449 (1949).

23. See Cold War Hysteria, PUB. BROAD. SERV. (2023), <https://www.pbs.org/wgbh/americanexperience/features/nash-hysteria/>.

24. McKeown, *supra* note 3, at 120. For a more in-depth discussion about Cold War revolutions, see UNIV. N.C. CTR. FOR EUR. STUD., THE FALL OF THE SOVIET UNION (2023), <https://europe.unc.edu/iron-curtain/history/the-fall-of-the-soviet-union/>.

25. *Id.*

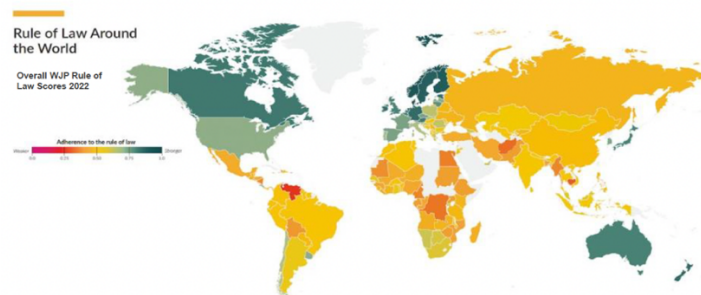
26. McKeown, *supra* note 3, at 149; John J. Mearsheimer, *Imperial by Design*, 111 NAT. INT. 16 (2011). See generally BUILDING THE RULE OF LAW: FIRSTHAND ACCOUNTS FROM A THIRTY-YEAR GLOBAL CAMPAIGN, AM. BAR. ASS’N (James Silkenat & Gerold Libby eds., 2021).

inexorably to democracy. While the number of liberal democracies expanded, some countries became failed states or were seized by authoritarian regimes.<sup>27</sup>

The 21st century is rife with new challenges, including the rise of China, a decidedly authoritarian state,<sup>28</sup> and democratic backsliding.<sup>29</sup> What then is the state of the rule of law today? I wish I could deliver a report card that would make any parent happy, but that is not the case.

In his recent book on international law, *The World Crisis and International Law*, Professor Paul Stephan of the University of Virginia wrote that “[t]he twenty-first century became the place where the hopes of the 1990s went to die.”<sup>30</sup> We are, regrettably, in the midst of a global rule-of-law recession, characterized by closing space for the media and civil society, declining trust in institutions, and the increased prevalence of authoritarian governance, even in established democracies.

To illustrate this reality, I turn to the WJP’s Rule of Law Index, which is an annual quantitative measure of the rule of law covering 140 countries and jurisdictions.<sup>31</sup> The survey not only examines the laws and institutions in place but also measures how they work in people’s everyday lives. Among the factors considered are: (1) constraints on government powers; (2) absence of corruption; (3) open government; (4) fundamental rights; (5) order and security; (6) regulatory enforcement; (7) civil justice; and (8) and criminal justice.<sup>32</sup>



Source: World Justice Project

Figure 2

27. See BRITANNICA, *THE SPREAD OF DEMOCRACY IN THE 20TH CENTURY* (2023), <https://www.britannica.com/topic/democracy/The-spread-of-democracy-in-the-20th-century>; STEVEN LEVITSKY & LUCAN A. WAY, *COMPETITIVE AUTHORITARIANISM: HYBRID REGIMES AFTER THE COLD WAR 183–235* (2010).

28. See John W. Garver, *America’s Debate over the Rise of China*, 226 CHINA Q. 538 (2016).

29. See generally Tom Ginsburg, *Democratic Backsliding and the Rule of Law*, 44 OHIO N. UNIV. L. REV. 351 (2018).

30. PAUL B. STEPHAN, *THE WORLD CRISIS AND INTERNATIONAL LAW: THE KNOWLEDGE ECONOMY AND THE BATTLE FOR THE FUTURE* 4 (2023).

31. WORLD JUSTICE PROJECT, *RULE OF LAW INDEX 2022*, at 8 [hereinafter *RULE OF LAW INDEX*].

32. *Id.* at 14.

Between 2015 and 2022, nearly 65% of the countries monitored by the WJP showed a decline.<sup>33</sup> Significantly, 4.4 billion people live in countries where the rule of law is declining.<sup>34</sup> The result is that, today, the vast majority of countries fall in the low end of the scale of adherence to the rule of law.<sup>35</sup>

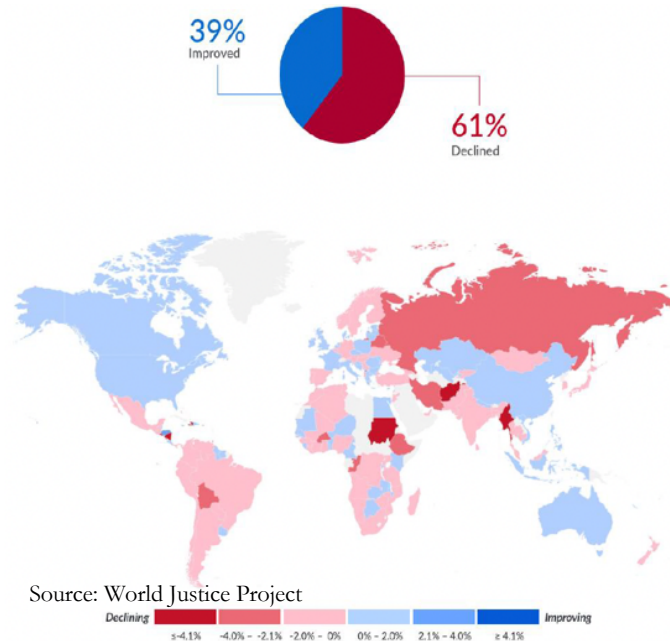


Figure 3

Focusing exclusively on the last year of data, the picture is not markedly different. From 2021 to 2022, 61% of countries experienced a decline in the rule of law, while just under 40% saw an improvement.<sup>36</sup>

The rankings are likely no surprise, with one exception. One might have imagined that the United States would be in the top ten, but it is instead

33. *Rule of Law Index: Insights*, WORLD JUSTICE PROJECT, <https://worldjusticeproject.org/rule-of-law-index/insights> (last visited Apr. 27, 2023).

34. *How Data Drives Justice Around the World: Hear from leaders Who Use the WJP Rule of Law Index*, WORLD JUSTICE PROJECT (Nov. 2, 2022), <https://worldjusticeproject.org/news/how-data-drives-justice-around-world-hear-leaders-who-use-wjp-rule-law-index>.

35. See Figure 2. *Rule of Law Index*, WORLD JUSTICE PROJECT, <https://worldjusticeproject.org/rule-of-law-index/global>, fig. 1 (last visited July 25, 2023). Figure 2 reproduced with permission from the World Justice Project.

36. See Figure 3. *Rule of Law Has Declined Globally for the 5th Year in a Row*, WORLD JUSTICE PROJECT, <https://worldjusticeproject.org/rule-of-law-index/insights>, fig. 1 (last visited July 25, 2023); Press Release, World Justice Project, *Global Rule of Law Recession Enters 5th Year* (Oct. 26, 2022), [https://worldjusticeproject.org/news/wjp-rule-law-index-2022-global-press-release#:~:text=WASHINGTON%20Oct.%2026%2C%202022%29%20%E2%80%93%20For%20the%20fifth,law%20fell%20in%20a%25%20of%20countries%20this%20year](https://worldjusticeproject.org/news/wjp-rule-law-index-2022-global-press-release#:~:text=WASHINGTON%20Oct.%2026%2C%202022%29%20%E2%80%93%20For%20the%20fifth,law%20fell%20in%20a%25%20of%20countries%20this%20year.). Figure 3 reproduced with permission from the World Justice Project.

number twenty-six with a score of 0.71. That lower-than-expected figure reflects numerous issues related to criminal justice, access to civil justice, and perceived discrimination in multiple categories.<sup>37</sup> Those countries ranked lowest are also jurisdictions where the judiciary is the most at risk and the Internet, the primary contemporary means of conveying information, is also restricted.<sup>38</sup>



Source: World Justice Project

Figure 4

Looking ahead, the challenges to the rule of law are countless—migration, discrimination, climate change, nuclear war, poverty, plague, famine, pandemics and more.<sup>39</sup> I will focus on two of the more significant challenges: (1) the heavy hand of the executive and legislature on the judicial branch; and (2) the double-edged sword of the Internet. These challenges are not unrelated. As the executive and legislative branches seek to impose more control over the judiciary and curb its independence, they are simultaneously cracking down on Internet freedom, which represents a threat to their power. Admittedly, judicial systems have often been accused of opaque proceedings and need to be more transparent.<sup>40</sup> The Internet has

37. See RULE OF LAW INDEX, *supra* note 31, at 172.

38. See Figure 4. *Id.* at 22-23. Figure 4 reproduced with permission from the World Justice Project.

39. For a deeper look at speculation on issues affecting the rule of law in America, see Norman Eisen, *Understanding and Addressing the Threats Against the Rule of Law in America Today*, BROOKINGS INST. (Oct. 8, 2018), <https://www.brookings.edu/blog/fixgov/2018/10/08/understanding-and-addressing-the-threats-against-the-rule-of-law-in-america-today/>.

40. “[J]udicial independence depends to some degree on the maintenance of judicial transparency; what judges do—the process and product of adjudication—must be largely open to public scrutiny, else risk giving rise to a threat to judicial independence. Secret proceedings, including unwarranted or excessive sealing of court records, engender suspicion, mistrust and a lack of confidence in the judicial process and, if not rare and well understood as necessary, such proceedings will likely lead to attempts to limit judicial authority and independence.” T.S. Ellis, III, *Sealing, Judicial Transparency and Judicial Independence*, 53 VILL. L. REV. 939, 940 (2008).



the potential to shed light on not just the judiciary but all branches of government.

### III. THE HEAVY HAND OF THE EXECUTIVE AND THE LEGISLATURE



Figure 5

In recent years, the popular sound bite is that the rise of authoritarian governments has led to fissures in the rule of law whereas democratic regimes uphold the rule of law.<sup>41</sup> However, it is a mistake to rest the argument on this dichotomy of authoritarianism versus democracy. Why? Because we have seen both democratic and authoritarian regimes invade the separation of powers and, along with legislatures, place a heavy hand on judicial power.<sup>42</sup>

The judiciary, for good reason, has long played a central role as a check on executive power—upholding human rights, providing oversight against

41. Global Rule of Law Recession Enters 5th Year, *supra* note 36.

42. SARAH REPUCCI & AMY SLIPWITZ, FREEDOM IN THE WORLD 2022: THE GLOBAL EXPANSION OF AUTHORITARIAN RULE 1 (2022) (“Authoritarian regimes have become more effective at co-opting or circumventing the norms and institutions meant to support basic liberties, and at providing aid to others who wish to do the same.”); BACKSLIDING, *supra* note 1, at 4 (“[Democratic] [b]acksliding typically involves what we call a ‘collapse in the separation of powers’ between branches of government as the executive gains control of other branches.” (citing papers)).



corruption, and serving as a buffer against arbitrary and unchecked power.<sup>43</sup> Justice Elena Kagan has highlighted that much of judicial legitimacy comes from being the institution that balances the political branches.<sup>44</sup> But in describing the judiciary as the least powerful branch, Alexander Hamilton once said, “the judiciary . . . has no influence over either the sword or the purse,” but “merely judgment.”<sup>45</sup> That judgment is at grave risk today.

Let me offer some concrete examples of governments putting their fist on the scale of judicial decision-making—characterizing it under the old cliché of “thumb on the scale” would be disingenuous and a fatal understatement. The following are just a few of the vignettes that are taking place across the globe.

### *A. Tunisia*

Following the Arab Spring, Tunisia and its democracy appeared to be a bright spot in the Arab world.<sup>46</sup> But now, ten years later, the Brookings Institution calls Tunisian democracy “a work in progress.”<sup>47</sup> I traveled to Tunisia twice after the revolution to work with judges on the practical fundamentals of judicial independence—exercising their rights under their constitution, giving credence to independence in their rulings, and moderating executive oversight. Their spirits and aspirations were high. Those hopes have been dashed in recent years. Not long ago, democratically elected President Kais Saied announced his intention to dissolve the High Judicial Council and shut down the Supreme Court building, preventing the judges from carrying out their constitutional duties.<sup>48</sup> President Saied then

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43. “When the executive does not control judges, they are not as partial to his wishes. According to Alexander Hamilton, ‘nothing can contribute so much to [the judiciary’s] firmness and independence as permanency in office.’” Rafael La Porta et al., *Judicial Checks and Balances*, 112 U. CHI. J. POL. ECON. 445, 446 (2004) (alteration in original) (quoting THE FEDERALIST NO. 78 (Alexander Hamilton)).

44. “Judges create legitimacy problems for themselves . . . when they instead stray into places where it looks like they’re an extension of the political process or when they’re imposing their own personal preferences,” Kagan said at Temple Emanu-El in New York.” Mark Sherman, *Justice Kagan Cautions Supreme Court Can Forfeit Legitimacy*, AP NEWS (Sept. 12, 2022), <https://apnews.com/article/us-supreme-court-elena-kagan-government-and-politics-55227b14975d1c6266eab8712c0dd482>.

45. THE FEDERALIST NO. 78 (Alexander Hamilton).

46. “Ten years after the Arab Spring, Tunisia remains the lone success story. While its neighbors collapsed into civil war or renewed dictatorship, Tunisia has broken the mold, transitioning to democracy in 2011.” Sharan Grewal, *Ten Years In, Tunisian Democracy Remains a Work in Progress*, BROOKINGS INST. (Jan. 22, 2021), <https://www.brookings.edu/blog/order-from-chaos/2021/01/22/ten-years-in-tunisian-democracy-remains-a-work-in-progress/>.

47. *See id.*

48. *Tunisia: President’s Moves to Shut Down High Judicial Council Pose Grave Threat to Human Rights*, AMNESTY INT’L (Feb. 8, 2022), <https://www.amnesty.org/en/latest/news/2022/02/tunisia-presidents-moves-to-shut-down-high-judicial-council-poses-grave-threat-to-human-rights/>.

dismissed fifty-seven judges.<sup>49</sup> Although an administrative court ruled that forty-nine judges had been improperly dismissed, the government ignored the court's order to reinstate them.<sup>50</sup> Two of those judges were arrested this year and were held for weeks without being charged.<sup>51</sup> Once thought of as the “lone success” in the Arab Spring uprisings, Tunisia now suffers from the heavy hand of the executive.

### *B. Hong Kong*

At a time when democracy advocates are flexing their muscles, the Standing Committee of China's National People's Congress in Beijing issued an interpretation of the Hong Kong National Security Law that hands the city's Chief Executive the power to overturn court decisions, ban foreign lawyers, and select judges for trial.<sup>52</sup> The online publication, *The Diplomat*, claimed that “2022 was the year Hong Kong's rule of law died.”<sup>53</sup> Foreign lawyers have discovered GPS tracking devices under their cars, received Chinese “funeral money” at their offices, and been otherwise subjected to anonymous threats.<sup>54</sup> These intimidation tactics have sparked a mass flight of foreign lawyers from Hong Kong.<sup>55</sup> At the same time, forty-seven pro-democracy figures have been charged with “conspiracy to commit subversion” under the national security law.<sup>56</sup> Their crime was participating in an unofficial primary election—something one would think is a basic democratic right.<sup>57</sup> Although many have pled guilty, the lengthy trial continues.<sup>58</sup> This trial is the largest national security proceeding in Hong

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49. *Tunisia President Sacks Dozens of Judges as He Consolidates Rule*, AL JAZEERA (Jun. 2, 2022), <https://www.aljazeera.com/news/2022/6/2/tunisias-president-sacks-dozens-of-judges#:~:text=Kais%20Saied%2C%20whose%20opponents%20accuse,set%20aside%20the%202014%20constitution.&text=Tunisia's%20president%20sacked%2057%20judges,after%20consolidating%20one%2Dman%20rule>.

50. *Tunisia: President Intensifies Attack on Judicial Independence*, HUM. RTS. WATCH (Feb. 27, 2023), <https://www.hrw.org/news/2023/02/27/tunisia-president-intensifies-attacks-judicial-independence>.

51. *Id.*

52. Benedict Rogers, *2022 Was the Year Hong Kong's Rule of Law Died*, THE DIPLOMAT (Jan. 3, 2023) (cleaned up), <https://thediplomat.com/2023/01/2022-was-the-year-hong-kongs-rule-of-law-died/>.

53. *Id.*

54. James Pomfret et al., *Lawyers Exit Hong Kong as they Face Campaign of Intimidation*, REUTERS (Dec. 29, 2022), <https://www.reuters.com/investigates/special-report/china-lawyers-crackdown-exodus/>.

55. *Id.*

56. Helen Davidson et al., *Hong Kong: Landmark National Security Trial of 47 Democracy Advocates Begins*, THE GUARDIAN (Feb. 6, 2023), <https://www.theguardian.com/world/2023/feb/06/hong-kong-landmark-national-security-trial-of-47-democracy-advocates-begins>.

57. *Id.*

58. See Kelly Ho, *Hong Kong 47: Anonymous Witness Grilled at National Security Trial over 'Secretly Recorded' Footage*, HONG KONG FREE PRESS (May 9, 2023), <https://hongkongfp.com/2023/05/09/hong-kong-47-anonymous-witness-grilled-at-national-security-trial-over-secretly-recorded-footage/>.

Kong since anti-government protests in 2019.<sup>59</sup> True to form, the Hong Kong government touted that “Hong Kong prides itself on the rule of law.”<sup>60</sup> Sadly, this irony illustrates how governments can reframe rule *by* law as rule *of* law.

### C. Poland

Although Poland claims to be a democracy, Freedom House stopped classifying the country as a full democracy in 2020.<sup>61</sup> Under the guise of addressing corruption, the government passed laws that have brought the judiciary under political control.<sup>62</sup> The Constitutional Tribunal, which oversees the judiciary, is now considered to be captured by executive appointees who hew to executive whims.<sup>63</sup> Equally alarming, in creating the Supreme Court Disciplinary Chamber, the government made it possible for judges to face disciplinary measures if they make rulings with which the government does not agree.<sup>64</sup> Images taken in Warsaw and Krakow display judges protesting the imposition of disciplinary measures on their colleagues.<sup>65</sup> This remarkable public display of support underscores the gravity of the situation. This change has faced international pushback, as the European Court of Justice struck down portions of these laws and the European Union has withheld approximately 35 billion Euro in funding.<sup>66</sup>

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59. Kathleen Magramo, *Landmark National Security Trial of Hong Kong Democracy Activists Begins*, CNN (Feb. 6, 2023), <https://www.cnn.com/2023/02/06/asia/hong-kong-national-security-law-subversion-trial-explainer-intl-hnk/index.html#:~:text=%22Hong%20Kong%20prides%20itself%20on,political%20background%20of%20the%20suspects>.

60. *Id.*

61. *Nations in Transit 2020: Poland*, Freedom House, <https://freedomhouse.org/country/poland/nations-transit/2020> (last visited July 26, 2023).

62. Luke McGee, *Poland Launches a Fresh Attack on Judges – and There’s Little the EU Can Do About It*, CNN (Jan. 24, 2020), <https://www.cnn.com/2020/01/24/europe/poland-assault-on-judiciary-intl/index.html>; *Poland: Erosion of Judicial Independence Continues*, AM. BAR ASS’N, [https://www.americanbar.org/groups/human\\_rights/reports/poland--erosion-of-judicial-independence-continues/](https://www.americanbar.org/groups/human_rights/reports/poland--erosion-of-judicial-independence-continues/).

63. *See id.*

64. *See id.*

65. Human Rights Watch, *Poland: Events of 2022*, <https://www.hrw.org/world-report/2023/country-chapters/poland>; Christian Davies, *Judges Join Silent Rally to Defend Polish Justice*, THE GUARDIAN (Jan. 12, 2020), <https://www.theguardian.com/world/2020/jan/12/poland-march-judges-europe-protest-lawyers>; Photograph, Omar Marqec, *Krakow Judges in Solidarity with Tuleya*, Getty Images (Apr. 21, 2021), <https://www.gettyimages.com/detail/news-photo/supporters-and-judges-of-krakow-courts-hold-banners-during-news-photo/1313631831?adppopup=true>.

66. Zosia Wanat et al., *EU Gives Poland Route to Pandemic Recovery Cash*, POLITICO (June 1, 2022), <https://www.politico.eu/article/eu-vows-deal-to-unlock-poland-pandemic-cash-hinges-recovery-fund-covid-19-on-reforms/>.

In an ongoing tug-of-war to get the money back, reforms are underway, but whether this is reform in name only remains to be seen.<sup>67</sup>

Poland is not alone in Europe. The situation in neighboring Hungary is no better, as laws now empower bureaucrats to overrule previous constitutional judgments and force judges to retire, and mirrors Poland's fight against the European Union over efforts to withhold funding.<sup>68</sup> Similar concerns about judicial independence have also been raised in the Czech Republic, Latvia, and Malta.<sup>69</sup>

#### D. Guatemala

Guatemala has shifted from an evolving democracy to “a kleptocracy, where the justice system is at the service of a criminal alliance among corrupt politicians, drug traffickers, organized crime, and powerful economic groups.”<sup>70</sup> President Alejandro Giammattei has jailed anti-corruption judges and prosecutors.<sup>71</sup> Judges in the Court for High Risk Crimes, which hears the most sensitive criminal and corruption cases, have been physically intimidated and threatened with a loss of judiciary immunity.<sup>72</sup> As of 2022, at least twenty-two judges, lawyers, and prosecutors have gone into exile, fleeing systematic criminalization of those involved in anti-corruption.<sup>73</sup> Guatemala ranks 110th of 140 countries in the WJP index.<sup>74</sup>

#### E. Israel

In January 2023, the Justice Minister announced reform efforts that would overhaul the judiciary by restricting the power of the Israeli Supreme Court, such as by allowing the legislature to override decisions with a simple

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67. Anna Włodarczak-Semczuk & Paweł Florkiewicz, *Polish Lawmakers Approve Judicial Reform that Could Unlock EU Funds*, REUTERS (Jan. 13, 2023), <https://www.reuters.com/world/europe/polish-lawmakers-approve-judicial-reform-that-could-help-unblock-eu-funds-2023-01-13/>.

68. BACKSLIDING, *supra* note 1, at 54, 67. For a deeper discussion about Poland and insight into the situation in Hungary, see William Schwartz, *Protecting the Rule of Law in Hungary and Poland*, WILSON CTR. (Nov. 7, 2022), <https://www.wilsoncenter.org/article/protecting-rule-law-hungary-and-poland>.

69. See, e.g., Beatrice Monciunskaitė, *The Risks to Judicial Independence in Latvia: A View Eighteen Years Since EU Accession*, 18 CROATIAN YEARBOOK EUR. L. & POLICY, 129 (2022).

70. Claudia Escobar Mejía, *A Guatemalan Judiciary Tailored for the Mafia Needs Reform*, GEORGETOWN J. INT'L AFFS. (July 8, 2022), <https://gjia.georgetown.edu/2022/07/08/a-guatemalan-judiciary-tailored-for-the-mafia-needs-reform/>.

71. Arshad Mohammed, *U.S. Criticizes Moves Against Guatemalan Judges, Prosecutors*, REUTERS (Nov. 8, 2022), <https://www.reuters.com/world/us-alarmed-by-actions-against-guatemalan-judges-prosecutors-2022-11-08/>.

72. Jeff Abbott & Kate Linthicum, *He's One of Guatemala's Last Independent Judges. Will He Be Forced to Flee Too?*, L.A. TIMES (June 17, 2022), <https://www.latimes.com/world-nation/story/2022-06-17/after-sending-soldiers-to-trial-for-civil-war-atrocities-a-guatemalan-judge-faces-threats>.

73. Jonathan Blitzer, *The Exile of Guatemala's Anti-Corruption Efforts*, NEW YORKER (Apr. 29, 2022), <https://www.newyorker.com/news/dispatch/the-exile-of-guatemalas-anti-corruption-efforts>.

74. See RULE OF LAW INDEX, *supra* note 31, at 90.

majority and reconfiguring the appointment power.<sup>75</sup> The appointment power is crucial as it would permit stacking the judiciary with ideological allies.<sup>76</sup> Critics agree that this would be a fatal blow to Israel’s democracy and judicial independence.<sup>77</sup> In the face of months of protests, Israel’s Parliament, the Knesset, passed legislation limiting the Supreme Court’s ability to overrule certain government actions.<sup>78</sup> The legislation would prohibit the use of the legal standard of “reasonableness,” generally defined by Israeli jurists as giving proper consideration and weight to all relevant factors.<sup>79</sup> The Knesset plans to consider more bills related to the judicial overhaul after the summer recess.<sup>80</sup>

#### F. *Venezuela*

I have saved the worst offender for last. The United Nations recently found that in Venezuela “[r]ecurrent due process violations . . . reveal a judiciary lacking independence, which has allowed serious human rights violations against . . . opponents of the government to go unchecked.”<sup>81</sup> Venezuela now ranks 140 out of 140 countries in the WJP Rule of Law Index.<sup>82</sup>

Yet Venezuela is also a reminder that the United States is not exempt from these trends. When Hugo Chavez was president, I was working with the State Department and the American Bar Association Rule of Law Initiative on justice projects in Caracas and Maracaibo. As I left for my trip, Chavez had been labeled the “Crackpot from Caracas”—hardly an auspicious beginning for my presentations. I learned on arrival that I was to be on a call-in radio show. After some softball dialogue with the host, the first question from the audience: how can you tout the rule of law after the Supreme Court’s ruling in *Bush v. Gore*? Nothing had prepared me for that

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75. Daniel Estrin, *Israel’s Far-Right Government Wants the Power to Override its Supreme Court*, NPR (Feb. 4, 2023), <https://www.npr.org/2023/02/04/1151390615/israel-supreme-court-far-right>.

76. *See id.*

77. “This may be the end of a full democracy . . . A democracy means that you have an effective protection on human rights,” said Susie Navot of the Israel Democracy Institute. *Id.*

78. Isabel Kershner et. al, *Protests Intensify Despite Offer to Delay Broader Judicial Overhaul*, NEW YORK TIMES (Jul. 24, 2023), <https://www.nytimes.com/live/2023/07/24/world/israel-protests-vote>.

79. Bethan McKernan, *Israeli Parliament Votes in Netanyahu’s Controversial Supreme Court Changes*, THE GUARDIAN (Jul. 24, 2023), <https://www.theguardian.com/world/2023/jul/24/israeli-parliament-votes-in-netanyahu-controversial-supreme-court-changes>.

80. *Id.*

81. Press Release, United Nations Human Rights Council, *Venezuelan Justice System Plays a Significant Role in the State’s Repression of Government Opponents* (Sept. 16, 2021), <https://www.ohchr.org/en/press-releases/2021/09/venezuelan-justice-system-plays-significant-role-states-repression#:~:text=GENEVA%20%2816%20September%202021%29%20%E2%80%93%20Recurrent%20due%20process,finds%20a%20new%20United%20Nations%20report%20published%20today>.

82. *See* RULE OF LAW INDEX, *supra* note 31, at 175.

question, but I responded that whether one agreed or disagreed with the ruling, certification of the election went forward and the American public got back to school and work without violence, protests, or interruption of the democratic government.

After the events of January 6, 2021, I could not give the same answer.<sup>83</sup> This example highlights that the United States is not immune from rule of law challenges. When, as in the United States, executive attacks on the judiciary are political and personal—with judges being labeled “so-called judges”—these attacks undermine the credibility of the institution and threaten the impartiality of the judiciary, and ultimately judicial independence is at risk.<sup>84</sup> When the judiciary is under siege, it strikes at the core of our democracy.

#### IV. THE INTERNET—A DOUBLE-EDGED SWORD

From its humble beginnings in the mid-1990s, when just 18 million Americans were connected to the Internet,<sup>85</sup> the Internet now boasts more than 4.5 billion users, with 3.8 billion of them having social media accounts.<sup>86</sup> Like many new technologies, the Internet was celebrated for its transformational potential—as a democratizing tool, means of community networking, political movement in its own right, and, on the global scale, as a foundation for citizens to join the global democracy agenda.<sup>87</sup> The Washington Post boldly proclaimed that “the Web . . . leaps far beyond all of history’s previous information technologies and holds the potential to change how we interact as human beings.”<sup>88</sup> In a slightly humorous take,

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83. See generally *Capitol Riots Timeline: What Happened on 6 January 2021?*, BBC NEWS (June 10, 2022), <https://www.bbc.com/news/world-us-canada-56004916>.

84. In February 2017, the Honorable James Robart, a United States District Court Judge for the Western District of Washington, was criticized for his ruling on a temporary restraining order concerning the “travel ban,” in a tweet by President Donald Trump. The tweet read: “The opinion of this so-called judge, which essentially takes law-enforcement away from our country, is ridiculous and will be overturned!” Avi Selk, *Meet the Bush-Nominated Federal Judge Who Halted Trump’s Executive Order*, WASH. POST (Feb. 4, 2023), <https://www.washingtonpost.com/news/post-nation/wp/2017/02/04/meet-the-bush-appointed-federal-judge-who-halted-trumps-executive-order/>.

85. *World Wide Web Timeline*, PEW RSCH. CTR. (Mar. 11, 2014), <https://www.pewresearch.org/Internet/2014/03/11/world-wide-web-timeline/>.

86. Simon Kemp, *Digital 2020: Global Digital Overview*, DATA REPORTAL (Jan. 30, 2020), <https://datareportal.com/reports/digital-2020-global-digital-overview>.

87. See Phillip E. Agre, *The New Politics of Technology in the U.S.*, NETWORK OBSERVER (Aug. 1994), <https://pages.gseis.ucla.edu/faculty/agre/tno/august-1994.html#politics> (“[I]t is valuable to investigate the often tacit politics of a wide variety of emergent movements around technology . . . the community networking movement[] has extraordinary potential as both a political movement in its own right and as an infrastructure for democratic activity more generally.”).

88. Elizabeth Corcoran, *On the Internet, a Worldwide Information Explosion Beyond Words*, WASH. POST (June 30, 1996), <https://www.washingtonpost.com/archive/politics/1996/06/30/on-the-internet-a-worldwide-information-explosion-beyond-words/0c04200f-3ee0-456f-bb6a-06c29282085c/>.

one corporate executive wrote that “if the electronic town meetings of the future start pulling better ratings than *Roseanne*, *Seinfeld*, or *Beavis and Butt-head*, watch out!”<sup>89</sup>

I pause, not to debate or celebrate the wonderful things brought about by the Internet, but rather, more than two decades later, to sound a note of caution when it comes to implications for the rule of law. The very properties that quickly made the Internet a global phenomenon carry with them dangers in the hands of repressive and authoritarian regimes. Governments have become as adept as activists in harnessing the power of the Internet. As research scientist Timothy Leffel wrote, “[f]uture historians will observe that, in many ways, the rise of the [I]nternet over the next few decades will have improved the world, but it hasn’t been without its costs that were sometimes severe and disruptive to entire industries and nations.”<sup>90</sup>

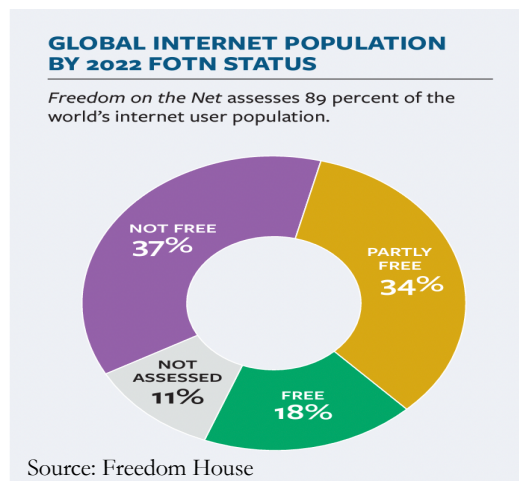


Figure 6

For more than a decade, Freedom House has undertaken a study of global internet freedom and, for the twelfth consecutive year, that freedom has declined.<sup>91</sup> Digital repression has often followed broad campaigns of

89. Evan I. Schwartz, *Direct Democracy: Are You Ready for the Democracy Channel?*, WIRED MAG. (Jan. 1, 1994), <https://www.wired.com/1994/01/e-dem/>.

90. Kathleen Stansbury et al., *The Internet Will Continue to Make Life Better*, PEW RSCH. CTR. (Oct. 28, 2019), <https://www.pewresearch.org/Internet/2019/10/28/4-the-Internet-will-continue-to-make-life-better/>.

91. See Press Release, Freedom House, Repressive Governments Are Fracturing the Internet, Driving a 12th Consecutive Year of Global Decline in Human Rights Online (Oct. 18, 2022), <https://freedomhouse.org/article/new-report-repressive-governments-are-fracturing-Internet-driving-12th-consecutive-year>.



political suppression and crackdowns on human rights.<sup>92</sup> For example, such repression has accompanied territorial aggression by Russia, violent coups in Sudan and Myanmar, and democratic decline in Hungary.<sup>93</sup>

The measurements of internet freedom include factors such as internet shutdowns, which occurred both before and during the pandemic, blocks on foreign websites, blocks on social media, restrictions on technology, new laws restricting foreign websites and content, and criminalization of internet usage.<sup>94</sup>

The statistics alone underscore the risks for the rule of law as they represent government action to restrict and control Internet access. Only 18% of the world is considered “free,” while 71% is categorized as either not free or partly free.<sup>95</sup>

### A. *You Can't Just Google it in China*

China has been tagged as the most repressive online environment.<sup>96</sup> Control has come in the form of restricting access, targeting journalists, activists, religious groups, and ethnic minorities, and harsh regulation of technology companies.<sup>97</sup> China has blocked sites very strategically—popular social media platforms, international communications networks, major news outlets, and websites that publish information critical of the Chinese government, such as the human rights non-governmental organization Amnesty International, are all unavailable to the public.<sup>98</sup>

The situation in Russia is no different. In March 2022, Russia blocked Facebook and Twitter.<sup>99</sup> This was widely seen as retaliation against these platforms for their restrictions on Russian propaganda news outlets.<sup>100</sup> The war in Ukraine has exacerbated the situation. Consider a university student who was arrested for anti-war posts on social media.<sup>101</sup> Charged with

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92. Adrian Shahbaz et al., *Countering an Authoritarian Overhaul of the Internet*, FREEDOM HOUSE (2022), <https://freedomhouse.org/report/freedom-net/2022/countering-authoritarian-overhaul-Internet>.

93. *Id.*

94. *See id.*

95. *See* Figure 6. *Id.*, fig. 2. Figure 6 reproduced under limited use provision for non-commercial purposes.

96. *See id.*

97. *Id.*

98. *Freedom on the Net 2021: China*, FREEDOM HOUSE, <https://freedomhouse.org/country/china/freedom-net/2021> (last visited Apr. 11, 2023).

99. Dan Milmo, *Russia Blocks Access to Facebook and Twitter*, THE GUARDIAN (Mar. 4, 2022), <https://www.theguardian.com/world/2022/mar/04/russia-completely-blocks-access-to-facebook-and-twitter>.

100. *Id.*

101. Valerie Hopkins, *She Posted Online About the War in Ukraine. Then She Faced a Prison Term.*, N.Y. TIMES (Mar. 22, 2023), <https://www.nytimes.com/2023/03/22/world/europe/russia-ukraine-social-media-crackdown.html>.

justifying terrorism and discrediting Russia’s military, she was placed under house arrest with an electronic monitor.<sup>102</sup> Facing an ever-expanding potential sentence, she fled Russia and now is beginning a new life in Lithuania.<sup>103</sup> Hers is but one vignette illustrating the human consequences of internet repression.

Just as in the overall rule of law rankings, the winners in the internet freedom rankings do not come as a surprise—Iceland, Estonia, the United Kingdom, and Costa Rica took top spots with the United States not far behind.<sup>104</sup>



Source: Freedom House

Figure 7

An incredibly troubling phenomenon is what can be referred to as the “Balkanization of the Internet.”<sup>105</sup> As the Internet expanded, it was touted as a global network without national borders.<sup>106</sup> That lofty illusion does not match the technical reality, as individual users, companies, and servers may be physically located in different countries with their own unique regulatory

102. *Id.*

103. *Id.*

104. See Figure 7. *Countries: Internet Freedom Scores*, FREEDOM HOUSE, <https://freedomhouse.org/countries/freedom-net/scores> (last visited Apr. 11, 2023). Figure 7 created by author using internet freedom scores from Freedom House.

105. See A. Michael Spence, *Preventing the Balkanization of the Internet*, COUNCIL FOREIGN RELS. (Mar. 28, 2018), <https://www.cfr.org/blog/preventing-balkanization-Internet>.

106. Owen Thomas, *The Internet Promised Us a World Without Borders. Oops*, S.F. CHRON. (Jul. 24, 2019), <https://www.sfchronicle.com/business/article/The-Internet-promised-us-a-world-without-borders-14118075.php>.

regimes.<sup>107</sup> In the face of efforts to deal with challenges such as privacy and hate speech, there is now increased fracturing along national borders. This is the rise of what is referred to as “cyber sovereignty.”<sup>108</sup>

One of the harshest government controls is the Internet shutdown: including complete blackouts (where online connectivity is fully severed), disruptions of mobile service, throttling or slowing down connections, and selectively blocking certain platforms.<sup>109</sup> These interruptions can last from a few days or weeks to months or even years.<sup>110</sup> Governments worldwide regularly shut down the Internet or otherwise disrupt networks to “quell mass protests, forestall election losses, reinforce military coups, or cut off conflict areas from the outside world.”<sup>111</sup> For example, the Cuban government responded to protests in July 2021 by restricting Internet access and passing laws designed to limit the use of social media in organizing protests.<sup>112</sup>

What does all of this mean for the rule of law? Nothing good. While many countries have free speech clauses in their constitutions or other governing documents, the crackdowns on free expression on the Internet proceed in defiance of those rights. The result is that there are significant limits on access to information, particularly information from foreigners and from non-governmental, civil society organizations.<sup>113</sup> Government surveillance, coupled with the vulnerability of private data, has emboldened leaders to undermine and imprison human rights activists.<sup>114</sup> Repressing information and criticism undermines government transparency and

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107. For an overview of the national Internet regulatory regimes, see Akhilesh Pillalamarri & Cody Stanley, *Online Content Regulation: An International Comparison*, GEO. WASH. INT'L L. & POL'Y BRIEF (Dec. 8, 2021) <https://studentbriefs.law.gwu.edu/ilpb/2021/12/08/online-content-regulation-an-international-comparison/>.

108. See Lev Topor, *Cyber Sovereignty: A Snapshot from a Field in Motion*, COLUM. J. INT'L AFFS. (Mar. 8, 2023), <https://jia.sipa.columbia.edu/online-articles/cyber-sovereignty-case-cyber-borders-and-cyber-blocs>.

109. See Spencer Feingold, *What Happens When the Internet Shuts Down?*, WORLD ECON. F. (Oct. 20, 2022), <https://www.weforum.org/agenda/2022/10/internet-shutdowns-explainer/> (“Internet shutdowns are a common tactic that governments use to suppress dissent and quell unrest.”).

110. Steven Feldstein, *Government Internet Shutdowns Are Changing. How Should Citizens and Democracies Respond?*, CARNEGIE ENDOWMENT FOR INT'L PEACE (Mar. 31, 2022), <https://carnegieendowment.org/2022/03/31/government-Internet-shutdowns-are-changing-how-should-citizens-and-democracies-respond-pub-86687>.

111. *Id.*

112. Kevin Collier, *As Cubans Protest, Government Cracks Down on Internet Access and Messaging Apps*, NBC NEWS, <https://www.nbcnews.com/tech/tech-news/cubans-protest-government-cracks-Internet-access-messaging-apps-rcna1400> (last updated July 14, 2021).

113. *Shabbaz*, *supra* note 92.

114. *See id.*

accountability, two principles that should have been heightened in the digital world.<sup>115</sup>

These restrictions on internet freedom have led to one of the most troubling developments: the criminalization of the Internet. On this point, I am not merely crying wolf. Specific laws targeting internet speech, such as by penalizing criticism of the government or the spreading of misinformation, have landed citizens with long prison sentences.<sup>116</sup> In the last few years, governments in fifty-six countries have investigated, arrested, or convicted individuals for their social media posts.<sup>117</sup> The following examples from 2022 alone demonstrate the seriousness of this threat.

In Turkey, a law passed in October 2022 provides a jail sentence of up to three years for spreading disinformation, which is widely seen as a move to silence government critics and journalists.<sup>118</sup>

In Myanmar, prodemocracy activist Kyaw Min Yu, better known as Ko Jimmy, was executed after he condemned the country's military coup online.<sup>119</sup>

In Rwanda, Idamange Yvonne was sentenced to fifteen years in prison for posting YouTube videos critical of the country's repressive president.<sup>120</sup>

Nicaraguan authorities cited Facebook posts and tweets by journalist Miguel Mendoza Urbina in sentencing him to nine years in prison for reporting on authorities deemed threatening to the integrity of the nation.<sup>121</sup> He has since been released as a political prisoner and deported to the United States.<sup>122</sup>

Siarhei Tsikhanouski, who became the face of the Belarussian opposition for his work running a YouTube channel critical of the

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115. See generally Young Joon Lim & Sarah E. Sexton, *Internet as a Human Right: A Practical Legal Framework to Address the Unique Nature of the Medium and to Promote Development*, 7 WASH. J. L. TECH. & ARTS 295 (2012).

116. See *infra* notes 106–12.

117. Adrian Shahbaz & Allie Funk, *The Global Drive to Control Big Tech*, FREEDOM HOUSE (2021), <https://freedomhouse.org/report/freedom-net/2021/global-drive-control-big-tech>.

118. Kayahan Cantekin, *Turkey: Parliament Adopts "Disinformation Law"*, L. LIBR. CONG. (Nov. 30, 2022), <https://loc.gov/item/global-legal-monitor/2022-11-30/turkey-parliament-adopts-disinformation-law/#:~:text=On%20October%2013%2C%202022%2C%20Turkey%E2%80%99s%20unicameral%20legislature%2C%20the,new%20Article%20217%2FA%20that%20provides%20for%20the%20offense>.

119. Helen Regan & Rhea Mogul, *Myanmar Junta Executes Leading Democracy Activists*, CNN (July 25, 2022), <https://www.cnn.com/2022/07/24/asia/myanmar-executions-pro-democracy-figures-intl-hnk/index.html>.

120. Erasme Rugemintwaza, *Idamange Yvonne Sentenced to 15 Years in Prison*, THE RWANDAN (Oct. 2, 2021), <https://www.therwandan.com/rwanda-idamange-yvonne-sentenced-to-15-years-in-prison/>.

121. Dánae Vilchez, *Nicaragua's Miguel Mendoza on His Bittersweet Deportation From His 'Kidnapped' Country*, COMM. TO PROTECT JOURNALISTS (Feb. 16, 2023), <https://cpj.org/2023/02/nicaraguas-miguel-mendoza-on-his-bittersweet-deportation-from-his-kidnapped-country/>.

122. *Id.*

government, was sentenced to 18 years in a maximum-security prison on charges of inciting unrest.<sup>123</sup>

The list goes on. These examples highlight how internet restrictions undermine and collide with free speech principles.

## V. COVID-19'S IMPACT ON THE RULE OF LAW

In addition to causing 6.8 million deaths, COVID-19 has also accelerated a dramatic decline in the rule of law, contributing to a broader crisis for democracy worldwide.<sup>124</sup> Governments asserted emergency powers in order to restrict rights of assembly and close courts, which exacerbated justice delays.<sup>125</sup> Instead of providing a haven, the pandemic exposed the harshness of government reaction, often as a pretext to limit access to information and justify expanded surveillance powers.<sup>126</sup> Criticism about the vaccine, such as in Cambodia, or about the authorities handling of the pandemic, such as in India, has resulted in arrests and gag orders.<sup>127</sup> The pandemic spread fear enough without having free speech tamped down and criminalized.

With all this bad news, some of my colleagues, my friends, and even my family have wondered why I would spend my limited free time participating in rule-of-law initiatives around the world. It is because I believe that planting the seeds of the rule of law will pay off in the long run. I offer a personal reason and there are many more stories behind this one.

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123. Allegra Goodwin & Joshua Berlinger, *Belarusian Opposition Figure Sentenced to 18 Years at High-Security Penal Colony*, CNN (Dec. 14, 2021), <https://www.cnn.com/2021/12/14/europe/siarhei-tsikhanouski-belarus-opposition-prison-intl/index.html>.

124. *WHO Coronavirus Dashboard*, WORLD HEALTH ORG., <https://covid19.who.int/> (last visited Apr. 11, 2023).

125. See Eric Richardson & Colleen Devine, *Emergencies End Eventually: How to Better Analyze Human Rights Restrictions Sparked by the COVID-19 Pandemic Under the International Covenant on Civil and Political Rights*, 42 MICH. J. INT'L L. 105, 158–70 (2020); Griff Witte & Mark Berman, *Long After the Courts Shut Down for Covid, the Pain of Delayed Justice Lingers*, WASH. POST (Dec. 19, 2021), [https://www.washingtonpost.com/national/covid-court-backlog-justice-delayed/2021/12/18/212c16bc-5948-11ec-a219-9b4ae96da3b7\\_story.html](https://www.washingtonpost.com/national/covid-court-backlog-justice-delayed/2021/12/18/212c16bc-5948-11ec-a219-9b4ae96da3b7_story.html).

126. See Adam Xu, *Report Tracks How Governments Fighting COVID Are Increasing Surveillance*, VOA (Oct. 14, 2020), <https://www.voanews.com/a/covid-19-pandemic-report-tracks-how-governments-fighting-covid-are-increasing-surveillance/6197132.html>.

127. Prak Chan Thul, *Cambodia Uses Coronavirus Crisis to Arrest 17 Critics, Rights Group Says*, REUTERS (Mar. 24, 2020), <https://www.reuters.com/article/us-health-coronavirus-cambodia-arrests/cambodia-uses-coronavirus-crisis-to-arrest-17-critics-rights-group-says-idUSKBN21B0JJ>; Rina Chandran, *India's Removal of Tweets Critical of COVID-19 Response Deemed 'Dangerous'*, REUTERS (Apr. 26, 2021), <https://www.reuters.com/article/india-tech-twitter-idUSL8N2MJ14Y>.

## VI. THE REAL FACES OF THE RULE OF LAW

My long-time friend, Dr. Mehmet Tank, a tax judge in Turkey, was imprisoned for almost seven years because he spoke out in favor of judicial independence. We met through the International Association of Judges, where he was a frequent participant and an eloquent speaker and writer on judicial independence. His tweet in 2016, the last I would see for years, read:

Arrest warrants were issued for 2.745 judges & prosecutors INCLUDING ME who were suspended morning. No more independent judiciary in Turkey.<sup>128</sup>

A year later, Turkey confirmed the number of arrests was 4,000.<sup>129</sup> Dr. Tank was tried in a cursory trial, followed closely by international observers, and sentenced along with the many other judges and prosecutors.

When he was released in 2022, he wrote to me that former lawyers and judges like him could not get a legal job. Instead, former high-level officials were peddling in the streets or driving the equivalent of Uber. The spouses of these officials were also banned from employment and these families were barred from the country's social services programs. You can imagine the thrill when I heard from him in February 2023. He let me know that he had fled the country and landed in Switzerland, where he has applied for asylum.

Mehmet wrote that exile, threats, injustice, and being imprisoned by his own colleagues

has not diminished but rather increased my commitment to the struggle for justice . . . It is no longer possible to ignore the threats around us and turn a deaf ear to the cries of victims . . . The greatest joy of a thinking mind lies in the struggle to elevate human virtues.

Dr. Tank is a testament to hope and perseverance. His hope should inspire us all.

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128. @judgemehmettank, TWITTER (Jul. 16, 2016), <https://twitter.com/judgemehmettank/status/754399793158426624?cxt=HHwWgMCwna2nlfGUAAAA>.

129. Carlotta Gall, *Erdogan's Purges Leave Turkey's Justice System Reeling*, N.Y. TIMES (June 21, 2019), <https://www.nytimes.com/2019/06/21/world/asia/erdogan-turkey-courts-judiciary-justice.html>.

## VII. CONCLUSION

I have no panacea in terms of getting the rule of law back on track. It is no surprise that I leave that research to the scholars.<sup>130</sup> However, I offer a few observations.

The rule of law cannot be delinked from the economy or from the private sector. It is not the exclusive province of governments or non-governmental organizations. In the Internet arena, there are complicated tradeoffs of politics, policies, and free speech. We can't have a hand waving solution. Technology companies and critics need to work together. While we abhor hate speech and misinformation, United States policies to control these phenomena, especially scattershot initiatives that are shortsighted and do not take the long view, could backfire in the long run. Europe has been out ahead of the United States in this arena and how we harmonize the United States' approach will undoubtedly reverberate around the world. We need to be cautious that our policies do not facilitate suppression of speech.

While institution building will remain important, the turn in rule-of-law programs toward people-centered justice promises a paradigm shift that offers a new and refreshing approach that maps people's justice needs. The United States Agency for International Development recently announced its shift to people-centered justice.<sup>131</sup> While organizations like the American Bar Association Rule of Law Initiative and the World Justice Project have long incorporated these principles in their programs, this shifting emphasis will inevitably also affect the emphasis in these and other programs.

The judiciary remains a bulwark against arbitrary and capricious conduct by the executive and legislative branches. Strengthening the judges' personal resolve against corruption and in support of transparent, fair decision making is critical. Making sure judges and judicial networks continue to be cheerleaders, mentors, and sounding boards for other judges around the world serves that purpose. There is no substitute for personal judicial diplomacy.

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130. For more information about the future of democracy and the rule of law, see UNIVERSITY OF CALIFORNIA INSTITUTE ON GLOBAL CONFLICT AND COOPERATION, <https://ucigcc.org/research/future-of-democracy/> (last visited Apr. 11, 2023).

131. Press Release, USAID Announced the Rule of Law Policy, the First-Ever U.S. Government Policy Dedicated to Rule of Law Assistance (Mar. 28, 2023), <https://www.usaid.gov/news-information/press-releases/mar-28-2023-usaid-announces-rule-law-policy-first-ever-us-government-policy-dedicated-rule-law-assistance>.