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BOOK REVIEWS

Abusive Internationalism? On Democracies and International Law. By Tom Ginsburg. Cambridge, UK: Cambridge University Press, 2021. Pp. xvii, 329. Index.
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Tom Ginsburg, the Leo Spitz Professor of International Law at the University of Chicago Law School, is without peer in his combined expertise in comparative constitutional law and international law. In his important new book stemming from the 2019 Hersch Lauterpacht Memorial Lecture at the University of Cambridge, *Democracies and International Law*, Ginsburg brings together these bodies of knowledge to develop new perspectives on the ways in which international law can be used to support or undermine democratic governance on the domestic plane.

The relationship between democracy and international law is familiar to international lawyers in at least two contexts: debates about the internal structure and governance of international organizations, and the claim by Thomas Franck, among others, that international law recognizes a right to democratic self-government.[1] Ginsburg sheds new light on a different, and more empirical, set of questions: the degree to which international law is the product of democratic as opposed to authoritarian governments acting on an international plane, and the degree to which international law can and does serve as an instrument for the protection and promotion of domestic democracy. Broadly speaking, one might call this the international-constitutional law nexus. The book makes several very important contributions to our understanding of this nexus.

Much of *Democracies and International Law*, particularly its first part, focuses on the relationship between regime type and the construction of international law. Ginsburg suggests that there are ultimately three broad forms of international law: "general," "democratic," and "authoritarian." General international law is the product of treaty making and norm creation by both democratic and non-democratic states. Democratic international law is the product of democratic states pursuing their distinctive principles and objectives on the international plane, whereas authoritarian international law is promulgated by authoritarian states for their own ends.

This conceptual argument is rich and provocative in suggesting ways in which a world dominated by authoritarian governments constructing international law could look different from the world over the past several decades where democracies have played the leading role. The rhetorical grounding might shift away from an emphasis on democracy and rights, and toward a grounding on national sovereignty. Delegation to international organizations might decrease, and decision rules might move away from majoritarianism and toward unanimity, with more skepticism of third-party dispute resolution mechanisms. The weight of the collective security system might shift away from a focus on external threats and toward internal threats. Treaty making might shift away from multilateral agreements toward bilateral ones. China's Belt and Road Initiative, for instance, has relied on a hub-and-spoke model of bilateral treaties focused on relatively "soft law" commitments to trade and security, with China of course at the center.

[1] *See* Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AJIL 46 (1992); *see also* DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW (Gregory H. Fox & Brad R. Roth eds., 2010).

Ginsburg discusses how different regime types interact in a strategic way to produce different forms of international law. Interestingly, and perhaps optimistically for the future of the international legal order, he finds that democratic and authoritarian regimes share significant overlapping interests and objectives on the international plane, which means that a considerable amount of international norm generation and enforcement is likely to continue even in a world of democratic retrogression.

Relatedly, Ginsburg undertakes an ambitious empirical study between regime type and the construction of international law. Here, he uses his trademark mix of large-n empirical methods and small-n case studies to paint a thorough and compelling picture of how democracies have in recent times played an outsized role in the development of international law and of the effects—including in human rights treaties, labor agreements, bilateral investment treaties, the International Court of Justice's caseload, and the work of the International Law Commission.

But his findings also suggest increasing engagement with international law, and engagement in norm creation, by authoritarian regimes. One example is the recent effort by China and other authoritarian states to advocate for an international treaty on cybercrime, motivated in large part by a desire for more control over the Internet. These changing patterns, Ginsburg notes, are natural in contexts where many countries are experiencing democratic retrogression, and where some autocratic states are gaining more prominent positions in the international order.

Authoritarian states have indeed recently engaged—as shown in one of the book's final chapters—in many forms of international law, even as they do so to suit their own distinctive purposes. Some of these undertakings may best be seen as akin to mimicry, but other bodies with significant authoritarian influence, such as the Association of Southeast Asian Nations, the Eurasian Economic Union, and the Shanghai Cooperation Organization, show a much more complex degree of institutionalization and cooperation. Authoritarian states have also gained significant influence over some existing international institutions, such as the UN Human Rights Council, have sponsored an increasing percentage of UN General Assembly resolutions, and have created and deployed rivals to traditional "democratic" functions in international law, such as election monitors. The nature of international law, Ginsburg predicts, will continue to shift in the coming years, toward more authoritarian brands of international law.

In much of the second part of the book, Ginsburg asks a related empirical question: how effective are international institutions at promoting or safeguarding democracy? Here, he attempts to unpack the conditions under which different forms of international law are likely to fulfill these objectives. He does so in part by examining paired cases of successful and failed international legal action taken against attempts at anti-democratic constitutional change.

In carrying out this inquiry, Ginsburg uses a relatively thin—although not wholly procedural or minimalist—definition of democracy. Drawing on previous work with Aziz Huq, Ginsburg defines democracy as consisting of: "(1) government characterized by competitive elections, in which the modal adult can vote and the losers concede; (2) in which a minimal set of rights to speech, association and the ability to run for office are protected for all on an equal basis; and (3) in which the rule of law governs administration" (pp. 20–21).[2] The authors of this review agree that a minimalist approach to democracy is the right one, and indeed Ginsburg's approach has affinities with our own concept of the "democratic minimum core," which consists of: (1) regular, free and fair multi-party elections; (2) minimum political rights and freedoms; and (3) the set of institutional checks and balances necessary to ensure that other aspects of democracy are protected in substance as well as form.[3] We suggest that these

[2] *See* TOM GINSBURG & AZIZ Z HUQ, HOW TO SAVE A CONSTITUTIONAL DEMOCRACY (2018).

[3] *See* Rosalind Dixon & David Landau, *Competitive Democracy and the Constitutional Minimum Core*, *in* ASSESSING CONSTITUTIONAL PERFORMANCE 268 (Tom Ginsburg & Aziz Huq eds., 2016).

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concepts should be applied with attention to the actual practices of democracies worldwide. For instance, if there is a universal or widespread pattern of practice among democracies, this will presumptively be part of the minimum core, whereas if there is greater divergence among democracies in practice, this may suggest the opposite conclusion.[4] The method for determining the content of the minimum core perhaps has some similarities with the approach international lawyers take to identifying the content and significance of state practice in a customary international law context.[5] But it treats these practices as relevant sources of evidence rather than binding sources of obligation.

As Ginsburg recognizes, a minimalist definition does not exhaust what democracy, especially liberal democracy, requires. Thicker definitions of democracy, which emphasize more robust norms of participation and deliberation and protection of a broader range of individual rights, are tempting yardsticks. The advantage of a minimum core approach, however, is that it provides a working definition that almost all political theorists can endorse as necessary if not sufficient for democracy. And it draws off the logic and presumptive legitimacy associated with an overlapping consensus among democracies worldwide.

Ginsburg's analysis eschews easy or categorical answers as to international law's efficacy in defending even this minimalist version of democracy, instead reaching nuanced conclusions. These conclusions are understandably tentative—the purpose of the book is not to reach definitive causal claims—but they are soundly informed by Ginsburg's decades of research working on these questions, and they serve as a valuable jumping off point for subsequent work. He develops a typology of carrots that international actors can use to support democracy: these include providing opportunities for public good production, changing domestic institutions, articulating norms and standards, and incentivizing competition on performance. He likewise lists potential sticks that can be used to advance these goals, including declaring violations in courts, imposing damages, levying sanctions, and intervention. Ginsburg finds that effectiveness depends on the degree of political consensus at the international level, as well as on the ways in which international interventions interact with domestic politics. Drawing on social science research and several case studies, he argues that international actors can do little without muscular domestic constituencies, but they might be able to support to pro-democratic local groups in some circumstances.

More broadly, Ginsburg notes that many of the recent democracy-protection efforts have occurred and are most likely to work at the regional level. He examines the major building blocks of these orders, such as human rights tribunals and democracy clauses,[6] and finds—perhaps surprisingly—that the overlapping systems in Africa have done the most conceptual and institutional work to protect democracy, for example by stopping coups. Meanwhile, the European systems have shown surprising weakness in dealing with threats to democracy in the East, in countries including Hungary and Poland.

One of the most striking observations Ginsburg makes is substantive: rather than constraining anti-democratic change with more or less efficacy, international law can serve to accelerate and legitimate the erosion of democracy. One of the features of the current global legal era, Ginsburg suggests, is the degree to which it involves authoritarian and hybrid regimes seeking to engage with and "repurpose" existing global legal norms to their own ends (p. 252).[7] For instance, China is using the language of co-operation—a familiar international law moniker—to drive projects such as the Belt and Road Initiative—that in turn might help to build

[4] We called this "transnational anchoring." *See* Rosalind Dixon & David Landau, *Transnational Constitutionalism and a Limited Doctrine of Unconstitutional Constitutional Amendment*, 13 INT'L J. CONST. L. 606 (2015).

[5] *See, e.g.*, Anthea Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AJIL 757 (2001).

[6] *See, e.g.*, PROTECTING DEMOCRACY: INTERNATIONAL RESPONSES (Morton H. Halperin & Mirna Galic eds., 2005).

[7] *See, e.g.*, Kim Lane Scheppele, *Autocratic Legalism*, 85 U. CHI. L. REV. 545 (2018).

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support for authoritarian rather than democratic regimes (pp. 275–80). It has also used recent attempts by liberal democratic states to assert extraterritorial jurisdiction—for instance, for the purposes of ensuring accountability for human rights abuses or war crimes—as precedent to assert greater control over autonomous self-governing regions such as Hong Kong (pp. 256–59).

Would-be authoritarian regimes have also relied on international *human rights* norms as justification for anti-democratic maneuvers. A leading example cited by Ginsburg is the use of international and regional international human rights norms to invalidate constitutional term limits. Across Latin America, for instance, populist incumbents with authoritarian tendencies have developed the idea of a right to re-election to support moves to loosen or eliminate presidential term limits. Courts—usually dominated by allies of the incumbent—have in turn issued a series of decisions either allowing leaders to seek constitutional changes to term limits, or even by holding their own constitution's term limits to be unconstitutional. In so doing, they have relied heavily on international human rights law, claiming that instruments like the American Convention on Human Rights created a right for elected officials to seek indefinite re-election, and a right for voters to vote for incumbents without restrictions. Domestic courts have thus attempted to reframe the elimination of term limits as a pro-democratic rather than an anti-democratic act, and have also argued that their actions are compelled by international human rights law. As Ginsburg notes, "[t]hese innovative decisions, while appearing to be directed toward the preservation of democracy, in fact pose a threat to it, as they are being used to facilitate executive entrenchment by particular individuals" (p. 141).

In Ecuador and Venezuela, courts issued decisions allowing presidents to use relatively undemanding mechanisms of constitutional change to eliminate presidential term limits, despite the existence of what we have called tiered constitutional designs, which require more demanding methods of change for sensitive kinds of amendments that, for example, reduce fundamental rights or impact the basic structure of the constitution. In Costa Rica, Nicaragua, and El Salvador, courts have used the unconstitutional constitutional amendment doctrine, which holds that some amendments can be invalidated by the judiciary because they work changes that are effectively replacements rather than amendments of the existing constitution, to strike down constitutional amendments containing presidential term limits. The effect of these decisions was to allow presidents to run for re-election where the constitution otherwise would have prevented them from doing so. And in Honduras and Bolivia, courts have gone furthest of all, using international legal norms, in conjunction with the facially pro-internationalist argument that international human rights must prevail over even the domestic constitutional order, to remove presidential term limits that were part of the original constitutional text, rather than contained in a subsequent amendment to that text.[8]

Ginsburg's observations are consistent with our parallel work on this topic. In a recent monograph, we argue that liberal democratic constitutional doctrines can serve as a bulwark against democratic erosion but increasingly are used both to *inspire* and to *justify* anti-democratic or abusive constitutional change.[9] Borrowing of this kind trades off the presumptive legitimacy associated with liberal democratic constitutional norms and ideas. But it decouples the formal, outward manifestations of those ideas from their substance. That is, it involves the use or borrowing of liberal democratic ideas in ways that are radically superficial, selective, acontextual, and anti-purposive in nature.

Borrowing by authoritarians frequently targets both constitutional and international law

[8] *See* David E Landau, Yaniv Roznai & Rosalind Dixon, *From an Unconstitutional Constitutional Amendment to an Unconstitutional Constitution? Lessons from Honduras*, 8 GLOB. CONST. 40 (2019).

[9] *See* ROSALIND DIXON & DAVID LANDAU, ABUSIVE CONSTITUTIONAL BORROWING: LEGAL GLOBALIZATION AND THE SUBVERSION OF LIBERAL DEMOCRACY (2021) [hereinafter DIXON & LANDAU, ABUSIVE CONSTITUTIONAL BORROWING].

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concepts associated with liberal democracy. The term limits example is a striking manifestation: incumbents and courts relied heavily on the concept of the unconstitutional constitutional amendment doctrine, a gloss on constituent power that has become one of the most successful exports in comparative constitutional law. But they also leaned on two concepts that lie at the intersection of international human rights law and comparative constitutional law. The first is the set of human rights governing political participation, which were warped into a fictitious right to indefinite re-election. The second concept is the set of ideas, prevalent in Latin America and associated with doctrines like conventionality control, that give international human rights law increasingly high status in the domestic constitutional order. One manifestation of this is the idea that national authorities must interpret domestic law in accordance with the law of the Inter-American system. Another is the "constitutional block" doctrine, where domestic judges must consider international human rights norms when interpreting constitutional rights. These doctrines elevate the status of international law, such that it both stands above and helps to shape the domestic legal order.[10]

There are other recent and prominent examples of the abuse of international law strongly associated with liberal democratic governance, as our own work shows.[11] Key human rights treaties require states to criminalize hate speech; yet as Rwanda under Kagame demonstrates, those laws can be turned into a powerful weapon to target political opponents. Kagame has also enthusiastically embraced gender rights, and particularly gender quotas, in ways that bolster support for his authoritarian regime. Likewise, European legal instruments push states to enact "memory laws" that criminalize Holocaust denial, but in Poland and Russia, those laws have been transformed to take on a nationalist tinge used to repress regime opponents.[12] In Venezuela, the regime-controlled court distorted principles limiting amnesties for the worst human rights violations in order to invalidate an amnesty passed by the opposition and that applied to political prisoners.

Abusive internationalism extends beyond human rights to encompass other aspects of the international order. Ruling parties in Hungary and Poland deployed the EU concept of "constitutional identity," and the related idea of "constitutional pluralism," to attack European policies on migration (Hungary) and judicial independence (Poland).[13] Even the concept of an unconstitutional government, which as Ginsburg observes has become essential to the "democracy clauses" found in state constitutions in regions like Latin America and Africa, has been subject to abuse. After Bainimarama's coup in Fiji, for instance, the country's Human Rights Commission justified the coup in part by arguing that the prior democratic government had come to power through unconstitutional means.

These many examples should serve as a warning to scholars and policymakers engaged in the promotion of international law. As Ginsburg shows, efforts to support and defend democracy are facing different kinds of threats. Frontally, there is the effort to construct a more authoritarian-friendly mode of international law, one which privileges state sovereignty and order over other values like human rights. But more subtly, there are also attempts to subvert liberal democratic norms and values in international law by turning them into powerful tools to attack democratic orders. Both of these dimensions are part of the erosion of democracy in recent years, and they are intertwined, with the same authoritarian actors using different tools at different times.

In *Democracy and International Law*, Ginsburg provides a broader context for

[10] *See, e.g.*, Jorge Contesse, *The Final Word? Constitutional Dialogue and the Inter-American Court of Human Rights*, 15 INT'L J. CONST. L. 414 (2017).

[11] The examples in this paragraph and the next are drawn from DIXON & LANDAU, ABUSIVE CONSTITUTIONAL BORROWING, *supra* note 9.

[12] *See* NIKOLAY KOPOSOV, MEMORY LAWS, MEMORY WARS: THE POLITICS OF THE PAST IN EUROPE AND RUSSIA (2017).

[13] *See* R. Daniel Keleman & Laurent Pech, *The Uses and Abuses of Constitutional Pluralism: Undermining the Rule of Law in the Name of Constitutional Identity in Hungary and Poland*, 23 CAMB. Y.B. EUR. L. STUDS. 59 (2019).

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understanding the abusive borrowing of international human rights law. On a "liberal internationalist" view of international law, the examples discussed in the book represent a clear subversion of the liberal teleology of international human rights law, which itself is a key part of the liberal international order. But on another view, as Ginsburg emphasizes, the relationship between liberalism and internationalism is more contingent and contested. Given this contestation, in many cases the best way to understand these examples may be to frame them as abuses of a narrower set of political rights and freedoms guaranteed by international human rights law, and in some cases, regional human rights regimes.

How equipped is the international system to deal with these threats? Ginsburg astutely suggests a mixed picture, a "noble middle path" between extreme optimism and pessimism (p. 305). He argues that it is likely too ambitious for democratic actors to return to the heady (reckless?) optimism of the 1990s, and seek to use international law as an offensive tool to promote democracy. But he still argues that employed judiciously, international legal institutions can play a defensive role in protecting democracy where it already exists, thus creating what we have called a "speed bump" against further efforts at erosion.

Consider again the example of term limits in Latin America. After the Bolivian constitutional court decision, which cleared Evo Morales to seek indefinite re-election despite having lost a popular referendum on that very issue, the Organization of American States asked the Venice Commission to issue a report on whether there was a right to unlimited presidential re-election under international law. Later, the Colombian government requested an advisory opinion from the Inter-American Court of Human Rights on similar issues. Both institutions provided analyses that thoroughly debunked the claim that human rights law guaranteed an indefinite right to re-election. The Venice Commission noted that term limits were common in presidential democracies, and that they were reasonable limits on rights to political participation.[14] The Inter-American Court went further and found that *indefinite re-election* in a presidential democracy was a violation of the American Convention of Human Rights.[15]

This episode shows how defenders of democracy can use international institutions to try and fight back against abuses of international law for anti-democratic ends. But the jury is still out on whether these interventions will prove effective at stopping future decisions ousting term limits in Latin America. There are risks, of course, that these kinds of interventions may themselves provoke backlash, for example by galvanizing domestic constituencies around charges of hypocrisy or imperialism. Perhaps for this reason too, pro-democracy efforts are often best led at the regional level. There are also risks to the international community being too sensitive toward these kinds of charges, such that sensible efforts at limiting democratic erosion or the abuse of international law are not undertaken. Sensitive and sensible legal efforts, like those following the term limits cases, may make some difference.

One set of questions that might be worth more attention within the international human rights system, and to which Ginsburg devotes relatively little space, concerns the way that international law norms are constructed. Scholars, policymakers, judges, and others should be more fully aware of the many instances in which international human rights law and other aspects of international law with a democratic or liberal teleology are being used to advance authoritarian goals. This awareness may have some implications for the ways in which norms and doctrines are developed and disseminated. Ideas particularly prone to use for authoritarian ends—perhaps such as the constitutional identity

[14] *See* European Commission for Democracy Through Law (Venice Commission), Study No. 908/2017, Report on Term Limits Part I – Presidents, CDL-AD(2018)010.

[15] Advisory Opinion OC-28/21, Presidential Reelection Without Term Limits in the Context of the Inter-American Human Rights System (Inter-Am. Ct. Hum. Rts. June 7, 2021), *available at* https://www.corteidh.or.cr/docs/opiniones/seriea_28_eng.pdf.

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principle in Europe—may be worth rethinking, or perhaps in an extreme case even scrapping entirely. Others, like the promotion of hate speech and memory law legislation, should be constructed in a way that is warier of the risks of redeployment for ultranationalist ends or as a weapon wielded against political opponents. The ways in which norms are constructed and discussed likely has at least some impact on their likelihood of abuse. Norms can never be fully "abuse-proofed," but they might at least be made more robust against the risk of abuse.[16]

Ginsburg has written an important and wide-ranging treatment of the international-constitutional law relationship. He suggests that democracy is relevant for international law not just as a value governing the organization of international institutions, much less as a claimed right under international law. These claims might, indeed, go too far in the direction of conflating democratic international law with general international law and, in doing so, undermine its stabilizing benefits. They might also reflect a hegemonic Global North perspective on international law, challenged by scholars who use "Third World Approaches to International Law" (TWAIL).[17] But for many states, democracy remains a key animating value behind efforts at both national and global governance. One of the contributions Ginsburg makes is to refocus our attention on this dimension of international law.

Alas, the picture painted by his book and other recent work is not entirely optimistic for those committed to global legalism: international law, not just constitutional law, may be abused by would-by authoritarian actors in ways that do real damage to democracy and the democratic minimum core. But to understand this pathology is the beginning of the kind of global legal politics that can address it. In marking the publication of Ginsburg's important new book, we cannot but help note that it coincides with what may well be a new age of both democratic and abusive internationalism.

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[16] *See* DIXON & LANDAU, ABUSIVE CONSTITUTIONAL BORROWING, *supra* note 9, at 193.

[17] *See, e.g.*, Makua W. Mutua, *What Is TWAIL?*, 94 ASIL PROC. 31 (2000).

International Law and the Politics of History. By Anne Orford. Cambridge, UK: Cambridge University Press, 2021. Pp. xii, 382. Index.

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> And the pensive Spirit of Pity whispered, "Why?"
> Men had not paused to answer. Foes distraught
> Pierced the thinned peoples in a brute-like blindness,
> Philosophies that sages long had taught,
> And Selflessness, were as an unknown thought,
> And "Hell!" and "Shell!" were yapped at Lovingkindness. . . .
> Some could, some could not, shake off misery:
> The Sinister Spirit sneered: "It had to be!"
> And again the Spirit of Pity whispered, "Why?"
>
> —Thomas Hardy, "And There Was a Great Calm" (1918)

In her new book, theorist of international law Anne Orford embarks on an aggressive intellectual war against professional historians, cheekily insisting that these rowdy upstarts required a massive show of writerly force. There may, as is common in such cases, have been some border skirmishing before Orford's breathtaking escalation, the kind of low-level if petty sniping across lines that occurs in a world composed of disciplines and fields, each guarding its turf and waving its flag. But as with most such interventions in "self-defense" that misrepresent the prior state of play (and their own offensive purposes), the rationales for Orford's action turn out to be