

Cambridge University Press
978-1-108-48549-4 — Human Rights in a Time of Populism
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HUMAN RIGHTS IN A TIME OF POPULISM

The electoral successes of right-wing populists since 2016 have unsettled world politics. The spread of populism poses dangers for human rights within each country, and also threatens the international system for protecting human rights. *Human Rights in a Time of Populism* examines causes, consequences, and responses to populism in a global context from a human rights perspective. It combines legal analysis with insights from political science, international relations, and political philosophy. Authors make practical recommendations on how the human rights challenges caused by populism should be confronted. This book, with its global scope, international human rights framing, and inclusion of leading experts, will be of great interest to human rights lawyers, political scientists, international relations scholars, actors in the human rights system, and general readers concerned by recent developments.

GERALD L. NEUMAN is the J. Sinclair Armstrong Professor of International, Foreign, and Comparative Law and the Co-Director of the Human Rights Program at Harvard Law School. He teaches human rights, U.S. constitutional law, and immigration and nationality law. From 2011 to 2014, he was a member of the U.N. Human Rights Committee, the treaty body that monitors compliance with the International Covenant on Civil and Political Rights. Among others, he is the author of *Strangers to the Constitution: Immigrants, Borders and Fundamental Law* (1996) and co-editor of *Human Rights, Democracy, and Legitimacy in a World of Disorder* (2018).

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Human Rights in a Time of Populism

CHALLENGES AND RESPONSES

Edited by
GERALD L. NEUMAN
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University Printing House, Cambridge CB2 8BS, United Kingdom
One Liberty Plaza, 20th Floor, New York, NY 10006, USA
477 Williamstown Road, Port Melbourne, VIC 3207, Australia
314–321, 3rd Floor, Plot 3, Splendor Forum, Jasola District Centre, New Delhi – 110025, India
79 Anson Road, #06–04/06, Singapore 079906

Cambridge University Press is part of the University of Cambridge.
It furthers the University's mission by disseminating knowledge in the pursuit of
education, learning, and research at the highest international levels of excellence.

www.cambridge.org
Information on this title: www.cambridge.org/9781108485494
DOI: 10.1017/9781108751551

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First published 2020

Printed in the United Kingdom by TJ International Ltd, Padstow Cornwall
A catalogue record for this publication is available from the British Library.

ISBN 978-1-108-48549-4 Hardback

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Preface

The twin shocks of the Brexit referendum and then Donald Trump have added greater urgency to efforts to understand the effects and trajectory of populism. Although the consequences of these events may be far-reaching in many fields, one important inquiry concerns the impact of populism on human rights and on the international system for their protection. That topic, which has attracted less attention from political scientists, provides the focus for this book.

In March 2018, I convened for the Human Rights Program at Harvard Law School a multidisciplinary conference to explore the relationship between populism and human rights. The questions posed included the nature and causes of populism; whether populism conflicts with internationally recognized human rights or represents a legitimate exercise of such rights; the challenges populism creates for protection of human rights, and how advocates and institutions can respond to these challenges; whether the human rights system has contributed unintentionally to the rise of populism by provoking backlash, and what advocates and institutions should do in the face of backlash; and whether the spread of populism points in other ways to lessons that human rights advocates and institutions should learn. The conference was designed to discuss these questions both generally and in consideration of regional and national variations around the globe.

The chapters in this volume arise from the exchanges at that conference, and provide its main fruits. Not all the participants in the conference wrote for this volume, but their analyses deepened the discussion and are gratefully acknowledged.

Chapter 1, “Populist Threats to the International Human Rights System” (by the editor), frames the discussion that follows by examining the concept of populism, which is debated among political scientists, and the negative effects that populism may produce on internationally recognized human rights. It emphasizes, as several later chapters do, an understanding of populism as a form of politics that employs an exclusionary notion of the people – the “real people,” as opposed to disfavored groups that are unworthy – and that purports to rule on behalf of the “real people,”

whose will should not be constrained. The chapter then describes both internal and external effects of such populists' rise to power. Domestically, populist governance not only threatens the human rights of the excluded group but also poses danger for members of the majority, as leaders seek to entrench themselves in power and undermine checks. Externally, the influence of populism on foreign policy reduces support for the international human rights regime, in a manner that has become increasingly problematic as populists gain power in more countries that previously played key roles in maintaining it.

The external effect of populism is further explored in Chapter 2, specifically with regard to the crucial example of the United States. In "US Human Rights Policy and the Trump Administration," Stephen Pomper and Daniel Levine-Spound explore the unfolding effects of the Trump presidency on human rights foreign policy. Taking into account the mixed character of US foreign policy in previous decades, they consider how the populist rhetoric of "America First" was translated into concrete actions, initially under Secretary of State Rex Tillerson and then increasingly under his successor Mike Pompeo and National Security Advisor John Bolton. The relative disorganization of the new administration left room for career officers to implement a relatively traditional human rights policy in some areas where they did not conflict with strong administration priorities. The Trump administration has departed most significantly from past practice by declining to embrace the core principles on which human rights policy is based, and by openly boosting the prospects of authoritarians, not out of a sense of strategic necessity but out of preference.

Chapter 3 examines some of the internal changes in human rights practice often sought by populists, and evaluates them from a normative perspective. In "Rule-of-Law Rights and Populist Impatience," Jeremy Waldron focuses on populist hostility toward the enforcement of "rule-of-law" rights, which protect procedural values and limit the imposition of swift and strong punishment. Reaction against these rights and their interpretation by "foreign" judges has featured strongly, for example, in attacks in the United Kingdom against the European Court of Human Rights and calls to replace the European Convention with a UK Bill of Rights. Waldron argues that reaffirmation of human rights values, and the principle that criminals do not forfeit all their human rights, may not provide sufficient answers to these objections. It is important also to consider how the structure of the system can adequately protect the rights and interests of ordinary citizens. At the same time, one should resist exaggeration of the need for cultural distinctiveness in the determination of basic procedural rights.

In Chapter 4, "Populism and Human Rights in Poland," Wojciech Sadurski offers a case study of how populism, understood as a form of anti-pluralist political organization that relies on popular support, undermines democracy and human rights. He demonstrates how the electoral victories of the populist Law and Justice Party were followed by legal changes that dismantled institutional checks on

government and eroded a number of individual civil and political rights, including freedom of speech and assembly. This case study tends to show that there is a dynamic built into illiberal populism that eventually renders it antithetical to democratic rules of the game.

Chapter 5 shifts to Latin America, where observers have long recognized both left-wing and right-wing forms of populism. In “The Legal Architecture of Populism: Exploring Antagonists in Venezuela and Colombia,” Helena Alviar García examines populism as a method of exercising power, rather than a specific set of substantive programs. She explores the commonalities between left-populism and right-populism as illustrated by two ideologically opposing figures, Hugo Chávez in Venezuela and Álvaro Uribe in Colombia. Despite their contrasting social and economic policies, there were more similarities than differences in the legal architecture they deployed. In both cases, the preferred tools included the resort to referenda to circumvent and control the legislature, delegitimation of the opposition, and activation of mechanisms allowing the Executive to legislate by decree. These shared methods illustrate how populist leaders use tools to produce arguments of legitimacy for their selection of winners and losers in society.

In Chapter 6, “Representation, Paternalism, and Exclusion: The Divergent Impacts of the AKP’s Populism on Human Rights in Turkey,” Jamie O’Connell shows how Turkish politics illustrates the complex relationships among populism, democracy, and human rights. Throughout the twentieth century, an urban, secularist elite largely monopolized government power and used it to modernize society against the will of much of the population. The Justice and Development Party (AKP) has reversed this pattern since it took power in 2002. Its leader, now-President Recep Tayyip Erdoğan, is a paradigmatic populist: a charismatic leader who portrays politics as a Manichean competition between the virtuous people and a domineering elite, and his policy agenda as embodying a homogeneous popular will. The AKP has neutered the Kemalist military, bureaucracy, and judiciary. It has implemented policies favored by its once-marginalized supporters, especially observant Sunnis. These changes exemplify the inclusionary potential of populism. But Erdoğan’s successive purges of internal rivals have bolstered the critique that he – like many populists – merely uses citizen supporters to legitimate his rule and policy preferences, rather than genuinely representing them. Since 2013, his government has harshly repressed real and perceived opponents, jailing tens of thousands, while portraying them as enemies of the people – another classic antidemocratic populist habit. The AKP’s record in other areas, including gender and minority rights, sheds further light on the ambiguous relationships among populism, democracy, and human rights.

Chapter 7 considers the different dynamics of populism in Asia, and particularly in the Philippines. In “Penal Populism in Emerging Markets: Human Rights and Democracy in the Age of Strongmen,” Richard Javad Heydarian explores the mutually constitutive relationship between the rise of “penal populism” in fledgling

democracies, on the one hand, and the erosion of democratic values and respect for human rights, on the other. Heydarian contextualizes this phenomenon within the broader landscape of democratic retreat across “emerging market democracies.” In these rapidly growing economies with a relatively robust democratic tradition, dissatisfaction with unresponsive democratic institutions has gone hand in hand with the resurgence of so-called Asian values, which is gradually giving birth to illiberal democracies. He argues that the rise of Filipino strongman Rodrigo Duterte reflects a systemic deadlock within Philippine democracy as well as a more widespread backlash against enlightenment values. The way forward requires structural reforms in the penal system, so as to ensure the proper dispensation of justice and to revive public support for due process and human rights.

Chapter 8 considers how populist agitation can derail democracy at the outset. In “The Populist Threat to Democracy in Myanmar,” Yee Mon Htun examines the causes and effects of current populist tensions in Myanmar. Despite the election of a civilian government in 2015, the transition from military rule to human-rights-respecting democratic governance is fragile. Persistent military offensives against ethnic and religious minorities, most acutely against the Muslim Rohingya population, are supported by a populist culture of intolerance, linked to radical Buddhist organizations, that not only threatens persecuted communities but places the future of democracy in Myanmar at risk. The chapter closes by examining how the international community and human rights systems can still contribute to developing an inclusive, human-rights-based culture in Myanmar.

The last three chapters return from the examination of specific situations to general reflection on the challenges for human rights adherents posed by current developments. In contrast to the primarily negative account of populism expressed in the preceding chapters, Chapter 9 by Douglas A. Johnson, “In Defense of Democratic Populism,” questions the proposition that populism is antithetical to human rights. In a constitutional democracy with checks and balances, he argues, populism is a form of popular mobilization on moral grounds, and provides an arena for countering the status quo bias. There may indeed be dangers from authoritarian populists, perhaps better described as authoritarians masquerading as populists. But it is necessary to distinguish between liberal and illiberal populists. In either case, populism offers lessons that the human rights community should learn, including the importance of social movements, the need for clear narrative that encompasses both majorities and minorities, and the use of emotion as the language of values.

Chapter 10 discusses strategies that a broad range of international human rights institutions may adopt to address, or at least withstand, the current wave of populist governments. In “Populism and International Human Rights Law Institutions: A Survival Guide,” Laurence R. Helfer assesses the distinctive challenges that populism poses to international human rights law institutions. Turning from diagnosis to prescription, he then reviews a range of legal and political tools that might be deployed to address those challenges and explores their potential efficacy and

risks. The chapter's final section argues that international human rights law institutions should adopt four survival strategies in a period of populism – playing a long game, circumspection in interpretation, publicity and outreach, and creating windows of opportunity for supporters to mobilize.

Chapter 11 similarly offers the editor's own conclusions on how the human rights system – in this case, monitoring bodies such as courts and treaty bodies – should deal with the dilemmas presently posed by exclusionary populism. In “Human Rights Responses to the Populist Challenge,” it is inferred from the varied accounts of populist governance that one size does not fit all. Human rights monitoring bodies should not address populism as such, but should rather continue to focus on the specific human rights violations that populism leads to, and on the violations that have contributed to the rise of populism. Meanwhile, monitoring bodies should also be attentive to the criticisms that populists have directed against the international human rights system, some of which (as examples show) may be meritorious even within a human rights analysis. These recommendations would not “solve” the problem that the spread of populism creates, but they would enable monitoring bodies to contribute positively toward particular solutions.

The title of this volume refers to a “Time of Populism,” not an “Age of Populism.” I do not expect the current wave of populism to last an Age. May the chapters here assist in making the duration of the wave shorter, and what follows, better.

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Acknowledgments

I would like to express gratitude for the help of all the colleagues who made this book, and the conference that preceded it, possible – including my friends at the Human Rights Program, and especially Emily Nagisa Keehn and Dana Walters; the ever-patient and dedicated Ellen Keng; and the participants and commenters on various chapters. Deep thanks also to Rita and Gustave Hauser for sustaining the Human Rights Program’s academic projects, and to the Asia Center at Harvard University for its support of the conference. And as always, to Carol.

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