

## TWENTY-FIFTH ANNUAL GROTIUS LECTURE

Grotius Lecturer Professor Kim Lane Scheppele of Princeton University and Distinguished Discussant Former Chief Justice Manuel José Cepeda Espinosa of the Constitutional Court of Colombia provided the Twenty-Fifth Annual Grotius Lecture on Wednesday, March 29, 2023, at 5:00 p.m.

### RESTORING DEMOCRACY THROUGH INTERNATIONAL LAW\*

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In what now seems like a different world, Thomas Franck published an article in the *American Journal of International Law* defending an “emerging right to democratic governance.”<sup>1</sup> The year was 1992. The post-Soviet revolutions had startled the world, following equally stunning democratization drives in Latin America and Southern Europe. Democracy seemed the inevitable endpoint of human civilization, the “end of history”<sup>2</sup> as it was called then. If all newly freed peoples demanded democracy as soon as they had a chance to choose their form of government, an emerging right to democratic governance could both reinforce their choices and pull along the laggards with the moral force of international law.<sup>3</sup>

\* This lecture and discussant comment are also forthcoming in the *American University International Law Review* and the citation style used herein is the style used by *AUILR*.

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<sup>1</sup> See generally Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM J. INT’L L. 46, 46, 90–91 (1992) (arguing that the entitlement to democracy in international law had gone through both a normative and a customary evolution).

<sup>2</sup> See Francis Fukuyama, *The End of History?*, 16 NAT’L. INT. 3, 3–4 (Summer 1989) (arguing that the end of the Cold War represented the end of a long historical progression through which Western liberal democracy emerged as the ideal and therefore final form of human government).

<sup>3</sup> Martti Koskenniemi referred to Tom Franck’s project as “an articulation of a utopia turned into a project of freedom.” Martti Koskenniemi, *Legal Cosmopolitanism: Tom Franck’s Messianic World*, 35 N.Y.U. J. INT’L L. & POL. 471, 478 (2003).

Franck's article launched a huge debate that has percolated through international law scholarship ever since. The assertion of a right to democratic governance was praised at the time by advocates of universal human rights and those who argued that international law recognized people rather than only states as sovereign,<sup>4</sup> as well as by those who observed the same hopeful shoots poking through the ground of international law that Franck did.<sup>5</sup> It was attacked by pragmatists who pointed to the long-standing international law principle of non-interference in the domestic politics of states<sup>6</sup> and also by international law pluralists who argued that finding a mandate in international law to free populations from repressive governments carried both an unwarranted whiff of civilizational superiority and an incitement to war.<sup>7</sup>

Fast forward to our present moment and democracy is clearly in trouble world-wide.<sup>8</sup> The argument that there is an emerging global consensus over the value of democracy as an empirical matter therefore seems strained at best.<sup>9</sup> But should we then say that history has solved our academic debate and that the right to democratic governance is dead, now that fewer and fewer governments are robustly democratic? Or should we stand by the fact that the international law resources that Franck and others used to argue for a right to democratic governance are still there, and more have been added since they last wrote?

Of course, the context has shifted so that now even states with long democratic histories are going a bit wobbly on democracy. We are, after all, meeting in Washington, D.C. where the national scars left by the January 6<sup>th</sup> insurrection stand as evidence that electoral losers may not accept their defeats even in democracies that once thought of themselves as stable.<sup>10</sup> But, as I will argue today, the evidence of democratic decay all around us is not a reason to abandon the project of developing and deploying international law to support democratic governments. Instead, the democratic recession gives us an opportunity to reconsider how a growing set of international law resources may be used to restore ill democracies to good health. Grotius himself, for whom democracy was barely imaginable, believed that:

a people can select the form of government which it wishes; and the extent of its legal right in the matter is not to be measured by the superior excellence of this or that form of government, in regard to which different men hold different views, but by its free choice.<sup>11</sup>

<sup>4</sup> See, e.g., W. Michael Riesman, *Sovereignty and Human Rights in Contemporary International Law*, 84 AM. J. INT'L L. 866, 869 (1990) ("International law still protects sovereignty, but—not surprisingly—it is the people's sovereignty rather than the sovereign's sovereignty.").

<sup>5</sup> See JAMES CRAWFORD, *DEMOCRACY IN INTERNATIONAL LAW* 4–5 (1994) (arguing that international law was not neutral as between democracies and non-democracies).

<sup>6</sup> See BRAD R. ROTH, *The Illegality of "Pro-Democratic" Invasion Pacts*, in *DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW* 329 (Gregory H. Fox & Brad R. Roth eds., 2000) ("... adherents of the democratic entitlement thesis may seek to open the door to pro-democratic intervention. . .").

<sup>7</sup> See SUSAN MARKS, *THE RIDDLE OF ALL CONSTITUTIONS: INTERNATIONAL LAW, DEMOCRACY AND CRITIQUE OF IDEOLOGY* 31, 46–47 (2003) (citing concerns expressed by Thomas Carothers, Brad Roth and Martti Koskeniemi that a norm of democratic governance would justify military or imperial interventions in non-democratic states).

<sup>8</sup> See generally *Democracy Report 2023: Defiance in the Face of Autocratization*, V-DEM INST. 9 (2023), [https://www.v-dem.net/documents/29/V-dem\\_democracyreport2023\\_lowres.pdf](https://www.v-dem.net/documents/29/V-dem_democracyreport2023_lowres.pdf) [hereinafter V-Dem Democracy Report 2023] (providing evidence of global democratic decline).

<sup>9</sup> See Amichai Magen, *The Democratic Entitlement in an Era of Democratic Recession*, 4 CAMBRIDGE J. INT'L & COMP. L. 368, 382 (2015) ("... [S]hould post-2006 declines endure and deepen, the democratic entitlement will weaken and erode, though it is highly unlikely to be obliterated.").

<sup>10</sup> See FINAL REPORT BEFORE THE SELECT COMMITTEE TO INVESTIGATE THE JANUARY 6TH ATTACK ON THE UNITED STATES CAPITOL OF THE HOUSE OF REPRESENTATIVES, ONE HUNDRED SEVENTEENTH CONGRESS SECOND SESSION, H.R. REP. NO. 117–663, at 4–5 (2022) ("Election-deniers—those who refuse to accept lawful election results—purposely attack the rule of law and the foundation of our country.").

<sup>11</sup> HUGO GROTIUS, *DE JURE BELLI AC PACIS LIBRI TRES [ON THE LAW OF WAR AND PEACE BOOK THREE]* 104 (Francis W. Kelsey trans., 1925).

As a pioneer of international law, Grotius shows us that forms of governments freely chosen by their people have long had pride of place in international law—and so the emerging right to democratic governance may have even deeper roots than we thought.

Today I will argue that the *right* to democratic governance is now bolstered by the development of many new compatible doctrines, so that international law's support for democratic governance has become even wider and deeper since Franck wrote. In addition, while state *recognition* in international law does not yet depend on the form of government a state presently has, the absence of democratic government bears on the *legitimacy* of the state in question in the eyes of other democratic states and may even now provide a justification for sanctions. These and subsequent developments demonstrate that international law still provides immensely helpful resources for defending democracy in the places where it is under attack and also provides a helpful framework within which those committed to liberal, constitutional and democratic government can reverse democratic backsliding. Perhaps most crucially, international law—both hard and soft—can help democrats within backsliding countries find their way back to constitutional government by providing concrete guidance for how to replace autocratic and abusive law with democracy-honoring law as a way of signaling respect for the rule of law.

In the context of democratic backsliding, then, I will not press the case for the right to democratic governance as a justification for intervention by democratic states into non-democracies, as Franck's critics may have believed him to have implied. Instead, I will argue that international law can be used by those committed to democracy, human rights, and the rule of law *within* states both to prevent their national institutions from falling victim to anti-democratic forces in the first place and to free damaged national institutions from autocratic capture once autocrats have locked in their power by law.

In Part I, I will recall the international law resources available to democratic leaders when the transition in post-communist Europe took place, just before Tom Franck's article was published. In Part II, I will consider how international legal resources expanded to meet Tom Franck's challenge so that his tentative claims turned out in the end to have been vindicated by international law practice. In Part III, I will show how the current wave of democratic backsliding has undermined fundamental principles of constitutionalism, human rights and the rule of law despite the growing international law support for democracy. I will argue that it is precisely because international law practice supports democracies over autocracies that the new autocrats hide their moves behind a veil of democracy.

Even as state practice has undermined the solidity of democracy, however, international law has kept developing in ways that provide additional support. In Part IV, I explore the new international law resources that have been developed over the last several decades to defend democratic institutions, accelerating in just the last few years particularly in the regional human rights courts. In Part V, I build on this new international legal framework, and show how domestic democrats now have a much richer international law environment to use in rebuilding their damaged democracies at home so that they can indeed now restore democracy through international law.

## I. BACK TO THE FUTURE: REVISITING THE POST-COMMUNIST TRANSITIONS

In 1989, the self-appointed political opposition in Eastern Europe called on the communist parties that had dominated their Soviet "satellite states" to negotiate a change in regime. The National Roundtables that started in Poland, spread to Hungary and ultimately included East Germany,

Czechoslovakia and Bulgaria,<sup>12</sup> had modest goals. They sought to establish a framework for multiparty elections by drafting new election laws, protecting free speech rights to allow robust political campaigns, allowing new political parties to form under a newly expanded freedom of association, and restructuring the national parliaments to receive newly elected members who would actually represent constituents.<sup>13</sup> Constitutional change was in the air, but for most of the Roundtables, writing a new constitution was not considered urgent or even legitimate.<sup>14</sup> The goal was to get to elections first, then constitutions would follow when they could be properly constituted by democratic governments exercising their constituent powers. Except in Hungary.<sup>15</sup>

Unbeknownst to the Hungarian opposition that had demanded negotiations with the communist party, the communist justice ministry had in fact been preparing a new constitution since early 1988.<sup>16</sup> The justice ministry team had not convinced the party leadership to go along with constitutional reform, but the establishment of the Roundtable softened the leadership's views. As the Roundtable proceeded, party leaders realized that if change were going to happen, they should guide this change to a soft landing for themselves.

The opposition felt that they were not empowered to agree on a new constitution because they themselves were not politically legitimate. After all, to be a dissident meant either declaring oneself to be in opposition or, worse yet, having the government label you as such. Neither of these processes involved any democratic selection or accountability to a larger public. As the dissidents themselves were acutely aware, they did not represent anyone in particular except themselves and their friends. How could they agree to constitutional transformation?

Of course, getting to everyone's more modest goal of organizing multiparty elections required some constitutional change. The political committee of the Hungarian Roundtable and its various

<sup>12</sup> See JON ELSTER ET AL., *THE ROUNDTABLE TALKS AND THE BREAKDOWN OF COMMUNISM* 21–22, 81–88, 99–101, 135, 178–79 (Jon Elster ed., 1996) (describing the roundtable negotiations that launched democratic change in Eastern Europe).

<sup>13</sup> See *id.* at 11–12, 14, 124, 137, 142 (chronicling how these issues were addressed).

<sup>14</sup> See *id.* at 25–26, 70–72, 152, 186–89 (laying out the priorities of each country, with a new constitution draft notably missing from each list). For more detail on Poland in particular, see Andrzej Rapaczynski, *Constitutional Politics in Poland: A Report on the Constitutional Committee of the Polish Parliament*, 58 U. CHI. L. REV. 595, 601–08 (1991) (constitutional drafting started after the first election but because the lower chamber of the parliament still had reserved seats for the communist party, its draft was not accepted).

<sup>15</sup> The story told in this section was constructed from interviews I did in 1994–1995 with the last communist justice minister Kálmán Kúlsár and his deputy (later a constitutional judge) Géza Kilényi, with then-justice ministry representative to the Roundtable István Somogyvári and with opposition roundtable representative Péter Tölgyessy. These interviews were backed up by the extensive documentation of the Opposition Roundtable, visible in a set of video recordings (the *Fekete Dobos* tapes which I was privileged to watch and that were transcribed in András Bozóki's *A RENDSZERVÁLTÁS FORGATÓKÖNYVE: KERESZTAL-TÁRGYALÁSOK 1989-BEN* [THE SCRIPT OF THE REGIME CHANGE: ROUNDTABLE TALKS IN 1989] (1999–2000), in eight volumes). My first paper documenting these events was Kim Lane Scheppelle, *The Accidental Constitution*, at the University of Pennsylvania Journal of Constitutional Law Symposium on Constitutional Borrowings (unpublished paper on file with the journal) (1997) [hereinafter Scheppelle, *Accidental Constitution*]. Unfortunately, the detailed documentation in the published tapes and transcripts only covered the main Opposition Roundtable meetings, not what was happening in all of the different committees and subcommittees where the constitutional drafting took place and not what was happening backstage inside the government and the communist party. The new constitution was written primarily in the constitutional subcommittee of the political committee of the National Roundtable. Only interviews could get at this, and I had the good fortune that the interviews of the various participants named above converged in large measure on a common narrative which I relay here, even though they were on opposite sides at the Roundtable.

<sup>16</sup> See Scheppelle, *Accidental Constitution*, *supra* note 15, at 1 (explaining the ongoing constitutional drafting process in the justice ministry); see also Zoltan Ripp, *Unity and Division: The Opposition Roundtable and its Relationship to the Communist Party*, in *THE ROUNDTABLE TALKS OF 1989: THE GENESIS OF HUNGARIAN DEMOCRACY* 6–7 (András Bozóki ed., Orsolya Karácsony et al. eds., 2002) [hereinafter Bozóki & Karácsony, 1989 ROUNDTABLE TALKS] (discussing the new constitution that the communist justice ministry was preparing despite Hungarian opposition).

subcommittees were tasked with producing the new legal infrastructure for competitive elections.<sup>17</sup> As they worked on this charge, their task slowly shifted. A member of the justice ministry team—still committed to using the Roundtable as an opportunity for a new constitution—suggested an apparently harmless modification of their mandate. Let’s just cross out all the clauses of the constitution that we know will be eliminated when Soviet rule is over, he suggested.<sup>18</sup> The opposition members of the committee agreed because surely no one could fault them for getting rid of objectionable and clearly undemocratic provisions of the old text. So, out went the clause about the leading role of the communist party. Out went the Council of Ministers, which was the institution through which the party had exercised its control over the government. Out went one clause after another, until the drafting team found that there was precious little left.

What then? A justice ministry representative suggested that the committee add to this denuded old constitution something totally uncontroversial: the texts of the international human rights agreements Hungary had already ratified and were therefore already Hungarian law.<sup>19</sup> Hungary, during the communist period, had signed virtually every human rights agreement on offer.<sup>20</sup> Never mind that it would have been useless to invoke any of these rights as if they were real law during the Soviet time. But at the moment of constitutional drafting in 1989, the human rights treaties became a useful tool for organizing the transition, and the specific language came in handy in filling in the holes in the new constitution.<sup>21</sup> The positivists in the room were convinced they would not be inventing new law by merely elevating these rights into the constitution and the democrats in the room were eager to encourage them to do so.

So the drafting group added to the nearly empty text of the Hungarian constitution language from the International Convention on Civil and Political Rights and the International Convention on Economic, Social and Cultural Rights.<sup>22</sup> The opposition was delighted to have these human rights provisions finally in the constitution and the communist parliament could hardly object, given that these treaties had already been ratified by previous communist parliaments. With these additions, as well as the changes required by the new election law and new law on political parties, the constitution became one that was—as the opposition Roundtable figures said at the time—“worth defending.”<sup>23</sup>

<sup>17</sup> See Scheppelle, *Accidental Constitution*, *supra* note 15, at 3 (explaining the charge to the political subcommittee of the Roundtable); see also John W. Schiemann, *The Negotiated Origins of the Hungarian Electoral System*, in Bozóki & Karácsony, 1989 ROUNDTABLE TALKS, *supra* note 16, 165–68 (explaining the responsibilities of the various committees and subcommittees during the Roundtable process).

<sup>18</sup> See Scheppelle, *Accidental Constitution*, *supra* note 15, at 3–4 (noting that the constitutional drafting process started by first agreeing to eliminate dated clauses).

<sup>19</sup> See *id.* at 4 (on international law sources for the addition of rights).

<sup>20</sup> *Ratification of International Human Rights Treaties – Hungary*, U. MINN. HUM. RTS. LIBR., <http://hrlibrary.umn.edu/research/ratification-hungary.html> (Aug. 13, 2023) (listing the human rights agreements that Hungary ratified).

<sup>21</sup> See MAGYARORSZÁG ALAPTÖRVÉNYE [CONSTITUTION], Act XX of 1949 as amended through 1990 [hereinafter Hungarian Constitution], <https://www2.ohchr.org/english/bodies/cescr/docs/e.c.12.hun.3-annex2.pdf>. Note that because the number of rights in the 1989 constitution greatly exceeded those in the 1949 constitution, many of the new rights were added after Article 70 as Article 70/A, Article 70/B and so on through Article 70/K. Compare with the original Act XX of 1949, <https://lapa.princeton.edu/hosteddocs/hungary/1949%20Hungarian%20constitution.pdf>.

<sup>22</sup> See *id.* arts. 4, 8(1), 8(4), 15–18; International Covenant on Civil and Political Rights arts. 4(1)–(2), 23(2), Dec. 16, 1966, 999 U.N.T.S. 93 (providing language that was added to the new Hungarian constitution); International Covenant on Economic, Social and Cultural Rights arts. 8(1)(a), 9, 12(2)(b), 13(2)(a), Dec. 16, 1966, 993 U.N.T.S. 3 (providing language that was added to the new Hungarian constitution).

<sup>23</sup> See Scheppelle, *Accidental Constitution*, *supra* note 15, at 4. See also *Plenary Session of the National Roundtable Talks*, in Bozóki & Karácsony, 1989 ROUNDTABLE TALKS, *supra* note 16 (describing the committee’s agreement to setting up a Constitutional Court to protect the new Hungarian Constitution).



With a new constitution worth defending and agreed by both sides, the question then arose about how the constitution might actually be defended in practice.<sup>24</sup> The last communist justice minister, Kálmán Kulcsár, suggested a constitutional court.<sup>25</sup> Back in the early 1960s, he had been given rare permission to spend a year at Berkeley, where he had heard the great Hans Kelsen lecture.<sup>26</sup> It was time, said Kulcsár, to bring a constitutional court to Hungary, which for centuries had shared a legal system with Austria where the first constitutional court was created on Kelsen's blueprint.<sup>27</sup> Kulcsár persuaded everyone that a Hungarian constitutional court would enforce the political bargain that the new constitution represented. As a result, a section establishing a constitutional court was added to the draft constitution at the last minute, and the communist parliament, after less than six hours of debate, passed this new constitution with the new constitutional court included.<sup>28</sup>

This new ragtag Hungarian constitution was enacted on October 23, 1989.<sup>29</sup> Two weeks later, on November 9, the world watched as the Berlin Wall fell.<sup>30</sup>

The Hungarian story has a moral. International law—in this case, international human rights law—helped to launch a new democracy when this law was taken off the international rack, so to speak, and used to dress up a new national legal system. The national constitutional drafters, working in a hurry and wanting some international legitimation of their effort, reached out and grabbed what was available—which were treaties that the Hungarian government had already ratified to appear to be better than they were. Virtue signaling is nothing new. But then, the provisions of those treaties were used to move Hungary toward real constitutional democracy.

Hungarians latched onto international law in that small window of transition without a parade of international advisors and with no rule of law consultants hawking their legal wares. No threat of the use of force against Hungary made it take this route. If anything, everyone involved in the process was aware of constant possibility that the Soviet Union would change its mind and crack down as this process moved forward so any outside intervention was likely to come from the forces that opposed democracy rather than those advocating it. But acting on their own and without any assistance from international institutions in the moment, aspirational democrats inside the country used the power of already existing international law to guide the transition to democracy.

As the Constitutional Court began its work on January 1, 1990, it could proudly announce that Hungary had achieved a “revolution under the rule of law”<sup>31</sup> because there had never been a break

<sup>24</sup> See Scheppelle, *Accidental Constitution*, *supra* note 15, at 4–5 (reporting the discussion surrounding the creation of a new constitutional court). See also, *Agreement Concluding the Political Reconciliation Talks June 13th to September 18th, 1989*, in Bozóki & Karácsony, 1989 ROUNDTABLE TALKS, *supra* note 16, at 360–61 (suggesting ways for expert committees to mitigate unresolved issues concerning the new Hungarian Constitution).

<sup>25</sup> See Scheppelle, *Accidental Constitution*, *supra* note 15, at 4; see also Elster et al., *supra* note 12, at 70 (discussing Kálmán Kulcsár's emphasis on the importance of judicial independence and establishing a constitutional court).

<sup>26</sup> See Scheppelle, *Accidental Constitution*, *supra* note 15, at 4.

<sup>27</sup> See Michael Holoubek & Ulrich Wagrandl, *A Model for the World: The Austrian Constitutional Court Turns 100*, 17 VIENNA J. INT'L CONST. L. 251 (2023) (tracing the history of the Austrian Constitutional Court and Kelsen's role in creating it).

<sup>28</sup> See Erzsébet Ripp, *Chronology of the Hungarian Roundtable Talks January 1989 – April 1990*, in Bozóki & Karácsony, 1989 ROUNDTABLE TALKS, *supra* note 16, at 365–83 (providing a detailed timeline of the events of the Hungarian transition talks).

<sup>29</sup> See *id.* at 379; see also ANDRÁS KÖRÖSÉNYI, *GOVERNMENT AND POLITICS IN HUNGARY* 159 (1999) (explaining the history of the Hungarian constitution).

<sup>30</sup> See generally SERGE SCHMEMANN, *NEW YORK TIMES WHEN THE WALL CAME DOWN: THE BERLIN WALL AND THE FALL OF COMMUNISM* (2006) (providing a first-hand account of the events surrounding the fall of the Berlin Wall on November 9, 1989).

<sup>31</sup> See László Sólyom, *Introduction to the Decisions of the Constitutional Court of the Republic of Hungary*, in LÁSZLÓ SÓLYOM & GEORG BRUNNER, *CONSTITUTIONAL JUDICIARY IN A NEW DEMOCRACY: THE HUNGARIAN CONSTITUTIONAL COURT* 38 (1999) (emphasizing the symbolic role that the rule of law played in the system change); see generally Kim Lane

of legality in the transition from authoritarianism to democracy. Springing into quick action, the Constitutional Court used the now-real rights derived from international law to abolish the death penalty, create an expansive right to free expression, strengthen the parliament and the courts against executive usurpation of powers and destroy the system of pervasive surveillance.<sup>32</sup> Relying also on international criminal law because the new constitution committed the post-communist Hungarian government to honoring international law more generally,<sup>33</sup> the Court held that domestic statutes of limitation could not be extended for crimes of the past but that atrocities rising to the level of crimes against humanity could be punished with no time bar.<sup>34</sup> In short, the constitution-making process in Hungary in 1989 and 1990 was guided by international law, both in the insertion of rights into the text during the drafting process and in the enforcement of international criminal law by the Constitutional Court once the new constitution went into effect. What might have been a radical break in legality was smoothed into a rule-of-law transition through leaning on international law to bridge the old and new regimes.

The Hungarian story illustrates my point—which is that national democrats could and should bring the resources supporting democracy, rule of law and human rights provided by international law into their own domestic legal systems to shore up these principles in democratic transitions. Using the language of international agreements as a constitutional resource provided national democrats in Hungary with an external referent that both operated like a North Star guiding the process of transition and also generated credibility in the national process precisely because it was outside the reach of the national players to change. International law stabilized the post-communist transition in Hungary, and I will argue today that it could do the same again when and if Hungarians—and others whose democracies have been battered—get the chance to restore democracy.

This example also shows that international law does not have to work internationally, so to speak, to have a democracy-strengthening effect. Instead of seeing international law primarily as a system of institutions and binding norms that work above the level of the state to press for change as an external force against national governments, international law can provide a supply of ready-to-hand resources that have an international stabilizing effect for the democrats *inside states* to use when a democratic moment comes.

## II. THE RIGHT TO DEMOCRATIC GOVERNANCE 1.0

1989 was a moment of gleeful optimism in the world. The events of that year capped nearly two decades of democratizing change that had swept through Southern Europe and Latin America before it got to Eastern Europe. 1989 was also the beginning of a revitalization of international organizations. The end of the Cold War made possible a functioning UN Security Council, an expansion of the membership and substantive range of both the European Union and the

Scheppele, *Guardians of the Constitution: Constitutional Court Presidents and the Struggle for the Rule of Law in Post-Soviet Europe*, 154 U. PENN. L. REV. 1757, 1772–76 (2006) (explaining Sólyom’s “revolution under the rule of law”). The phrase was first used in Alkotmánybíróság (AB) [Constitutional Court] Judgment 11/1992 (III. 5.) (Hung.): “*jogállami forradalom.*”

<sup>32</sup> For a summary of the Constitutional Court’s accomplishments, see the review written by the first president of the Constitutional Court, László Sólyom, *The Constitutional Court of Hungary*, in THE MAX PLANCK HANDBOOKS IN EUROPEAN PUBLIC LAW: VOLUME III: CONSTITUTIONAL ADJUDICATION: INSTITUTIONS 358, 370–73, 394, 431 (Armin von Bogdandy et al. eds., 2020); see the edited version of these cases in Constitutional Judiciary, *supra* note 31, at 118–19, 139, 159, 229.

<sup>33</sup> See Hungarian Constitution, *supra* note 21, art. 7(1): The legal system of the Republic of Hungary accepts the generally recognized principles of international law and shall harmonize the country’s domestic law with the obligations assumed under international law.

<sup>34</sup> See Alkotmánybíróság (AB) [Constitutional Court] Judgment 53/1993 (X.13.) (Hung.) (establishing that international crimes have no statute of limitations and therefore that Hungarian law should not impose one).

Council of Europe, a strengthening of the Inter-American system, the launch of the African Union and more.<sup>35</sup> From where we stand now, however, it is hard to make the case either that democracy is supported by growing state practice or that international organizations are thriving with increasingly democratic mandates. If Tom Franck's original argument rested on the empirical observation that democracies were ascendant, what should we conclude in our present moment when that trend has reversed?

Unfortunately, the evidence is by now incontrovertible that many democracies are floundering, and some are failing. Whether you follow the Varieties of Democracy project,<sup>36</sup> Freedom House,<sup>37</sup> the World Justice Project,<sup>38</sup> the Economist Intelligence Unit,<sup>39</sup> or the many political scientists who have puzzled over the trend,<sup>40</sup> the number of democracies in the world has declined since the turn of the millennium.<sup>41</sup> For example, Venezuela and Hungary, once thought to be the most stable and exemplary democratic regimes in their regions, collapsed into autocracy after 40 years of democracy in Venezuela and 20 years in Hungary.<sup>42</sup> Russia and Turkey, imagined less than 20 years ago to be on an increasingly democratic path, have both fallen into authoritarianism and overt repression.<sup>43</sup> The remaining democracies are now weaker when measured either by commitment to

<sup>35</sup> See THE UN SECURITY COUNCIL: FROM THE COLD WAR TO THE 21ST CENTURY (David Malone ed., 2004) (describing significant post-Cold War changes); see also Robert O. Keohane & Stanley Hoffman, *Conclusion: Structure, Strategy, and Institutional Roles*, in AFTER THE COLD WAR: INTERNATIONAL INSTITUTIONS AND STATE STRATEGIES IN EUROPE, 1989–1991 (Robert O. Keohane et al. eds., 1993) (elaborating on the expansion of the membership of the European Union and Council of Europe); Alexandra Huneeus & Mikael Rask Madsen, *Between Universalism and Regional Law and Politics: A Comparative History of the American, European, and African Human Rights Systems*, 16 INT'L J. CONST. L. 136, 142, 151, 160 (2018) (arguing that Cold War politics shaped human rights systems during the subsequent period when substantive expansion occurred).

<sup>36</sup> V-Dem Democracy Report 2023, *supra* note 8, at 6–7.

<sup>37</sup> See *Freedom in the World 2023*, FREEDOM HOUSE 1–2 (Mar. 2023), [https://freedomhouse.org/sites/default/files/2023-03/FIW\\_World\\_2023\\_DigitalPDF.pdf](https://freedomhouse.org/sites/default/files/2023-03/FIW_World_2023_DigitalPDF.pdf) (documenting democratic decline); see also *Nations in Transit 2023*, FREEDOM HOUSE 1, [https://freedomhouse.org/sites/default/files/2023-05/NIT\\_2023\\_Digital.pdf](https://freedomhouse.org/sites/default/files/2023-05/NIT_2023_Digital.pdf) (documenting declining democracy in the post-communist world).

<sup>38</sup> See *Rule of Law Index: 2021 Insights*, WORLD JUSTICE PROJECT 2–3, 19–20, 26, 28–29, 39 (2021), <https://worldjusticeproject.org/sites/default/files/documents/Insights-2021.pdf> (reporting on the 2021 indicators that more countries declined than improved in overall rule of law performance for the fourth consecutive year).

<sup>39</sup> See *Global Outlook: Democracy Index 2022*, ECONOMIST INTELLIGENCE (Mar. 2, 2023), <https://www.eiu.com/n/global-outlook-democracy-index-2022> (highlighting the results of the democracy index and noting that the score has not improved after a period of declines).

<sup>40</sup> See, e.g., STEVEN LEVITSKY & DANIEL ZIBLATT, *HOW DEMOCRACIES DIE* 65–71 (2018) [hereinafter LEVITSKY & ZIBLATT, *HOW DEMOCRACIES DIE*] (describing the trend of declining democracies and proposing a diagnosis); DAVID RUNCIMAN, *HOW DEMOCRACY ENDS* 1–9 ((2018) (evaluating the factors relating to the current crisis in democracy); see TOM GINSBURG & AZIZ Z. HUQ, *HOW TO SAVE A CONSTITUTIONAL DEMOCRACY* 73–84 (2018) (analyzing the global diffusion of democratic erosion); Larry Diamond, *Elections without Democracy: Thinking about Hybrid Regimes*, 13 J. DEMOCRACY 21, 27, 33–34 (2002) (exploring the variety of autocratic regimes).

<sup>41</sup> See V-dem Democracy Report, *supra* note 8, at 9 (“More than 35 years of global advances in democracy have been wiped out in the last decade.”); but see Jason Willick, *What if the Crisis of Democracy is (Mostly) in our Heads?*, WASH. POST (Jan. 30, 2023, 8:30 AM), <https://www.washingtonpost.com/opinions/2023/01/30/democratic-more-resilient-than-expected/> (providing evidence challenging the thesis that democracy is in global decline).

<sup>42</sup> See Kim Lane Scheppele, *The Party's Over*, in CONSTITUTIONAL DEMOCRACY IN CRISIS? 498–99, 501–02 (Mark A. Graber et al. eds., 2018) [hereinafter Scheppele, *Party's Over*] (showing how a hollowing out of once-stable party systems brought autocrats to power in Venezuela and Hungary).

<sup>43</sup> See Jeff Kahn, *The Search for the Rule of Law in Russia*, 37 GEORGETOWN J. INT'L L. 353, 395–98, 400–01, 403 (2006) (explaining the changes in Russian law under Putin); Kemal Krisesci & Amanda Sloat, *The Rise and Fall of Democracy in Turkey: Implications for the West*, BROOKINGS INST. (Feb. 2019), at 1–2, [https://www.brookings.edu/wp-content/uploads/2019/02/FP\\_20190226\\_turkey\\_kirisci\\_sloat.pdf](https://www.brookings.edu/wp-content/uploads/2019/02/FP_20190226_turkey_kirisci_sloat.pdf). (identifying internal and external factors that have contributed to democratic backsliding in Turkey).



checks and balances or by guarantees of rights than they were a decade ago.<sup>44</sup> Brexit has unleashed a governance crisis as the UK unmoored itself from the transnational law that once stabilized its own unentrenched constitution.<sup>45</sup> India, the world's largest democracy, is teetering on the brink as its democratic institutions are being undermined by a politically directed intolerant religious fervor.<sup>46</sup> Israel is, as I write, about to throw checks and balances away.<sup>47</sup> The US has experienced a perfect anti-democratic storm, created by decades of Republican attempts to entrench minority government colliding with the rise of Donald Trump whose flouting of constitutional norms meant that those norms could no longer be taken for granted.<sup>48</sup> The intersection of Republican legal engineering to enable minority government combined with the dominance of autocratic aspirations in one of the two major American political parties has shaken the once-unquestioned presumption of democracy in a country not used to thinking of itself as anything else.

I could go on showing how Poland, Ecuador, South Africa, Brazil, Romania, Italy, Peru, Greece, Bolivia, France, Slovakia, the Philippines and more are all one bad election away from (or into) catastrophe, but you get the point. Democracy is not healthy anywhere in the world. It is not healthy in the countries of the Global North that once prided themselves on being invincibly democratic nor in countries of the Global South whose democratic history is shorter, but no less real. When democracy is failing both as a model and in reality in many parts of the world, what is international law to do?

Given 20 years of democratic recession, it is perhaps surprising that international law has not retreated from protecting democracy. Instead, the international law resources that can be mustered to support democracy have grown even as national democracies have faltered. The right to democratic governance no longer rests primarily on an assessment of state practice but instead rests on the way that international organizations and international courts have absorbed once-ascendant democratic practice into the rules that they now enforce. International law now protects and privileges democracy even more than it did in Franck's day. Not only has Franck's Right to Democratic Governance 1.0 has become real, but international institutions have continued to expand their protection of democracy.

When Franck suggested that there was an emerging right to democratic governance, he implied that affected citizens—individually or collectively—could invoke this right against their non-democratic governments. In many ways, at least in some regions of the world, international law has risen to Franck's challenge. Both the European and the Inter-American systems have developed a growing track record of what might be considered “right to democracy” cases backing democratic forces inside countries against those who seek to undermine democratic governance.

In Europe, the Council of Europe (COE) has taken the lead in democracy promotion. Its European Commission for Democracy through Law (better known as the Venice Commission)

<sup>44</sup> See V-Dem Democracy Report 2023, *supra* note 8, at 42–43 (providing evidence of democratic decline).

<sup>45</sup> See Roger Masterman, *Brexit and the United Kingdom's Devolutionary Constitution*, 13 GLOB. POL'Y 58, 59, 66–67 (2022) (discussing that Brexit has centralized governance in the UK, undermining the devolution process and posing significant challenges for parliamentary and constitutional democracy).

<sup>46</sup> See Tarunabh Khaitan, *Killing a Constitution with a Thousand Cuts: Executive Aggrandizement and Party-State Fusion in India*, 14 L. & HUM. RTS. 49, 50–52, 58–59 (2020) (showing how the Modi government has used Hindu nationalism to undercut checks and balances throughout the system).

<sup>47</sup> See Ariel Katz, *Statement by Canadian Jurists on the Proposed Transformation of Israel's Legal System*, U. TORONTO FAC. BLOG (Feb. 9, 2023), <https://www.law.utoronto.ca/blog/faculty/statement-canadian-jurists-proposed-transformation-israels-legal-system> (discussing how “recent proposals to transform Israel's legal system will weaken democratic governance, undermine the rule of law, jeopardize the independence of the judiciary, impair the protection of human rights, and diminish the international respect currently accorded to Israeli legal institutions”).

<sup>48</sup> See STEVEN LEVITSKY & DANIEL ZIBLATT, *TYRANNY OF THE MINORITY* 4 (2023) (demonstrating how minoritarian checks are built into many features of the U.S. constitutional order).

has led the way in developing best practice standards and in calling out laws that undermine constitutional-democratic norms.<sup>49</sup> The European Court of Human Rights (ECtHR) has developed a substantial jurisprudence on political rights, including rights to freedom of speech and assembly, as well as a growing case law on the right to free elections in light of the now-standard practice of election monitoring,<sup>50</sup> something that Gregory Fox advocated in his famous follow-up to the Franck article.<sup>51</sup> In addition, the Strasbourg Court has also elaborated on the phrase embedded in some of the Convention rights that limitations on these rights are confined to those “necessary in a democratic society.”<sup>52</sup> Understanding what is necessary in a democratic society requires exploring what democracy means. With these multiple lines of case law, the ECtHR has come close to developing a conception of democracy as something very close to what Franck advocated—which is a broadly framed right to participate in the formation of one’s own government, which in turn requires a broad range of robustly protected civil and political rights that enable one to do so.<sup>53</sup>

By 2008, Jean-Paul Costa, then the President of the European Court of Human Rights, could announce, “The democratic ideal permeates the Convention in every respect—its historic origins, its spirit and . . . the case law of the Court.”<sup>54</sup> Though he opined that the drafting of the right to free elections in Protocol 1, Article 3 was weaker than he would have liked and therefore the Court was limited in precisely what it could do with that language, he left no doubt that protecting democracy was one of the primary purposes of the Convention.<sup>55</sup>

In the European Union, the European Court of Justice (ECJ) was late coming to the field of basic rights and the protection of democracy given that it assumed—until recently—that all of its Member States were both democratic and rights-respecting once they made it through the accession process. But the ECJ now has its hands full with challenges to judicial independence in some of the democratically backsliding states of the European Union—which will be addressed further in the next section. It has also just started to develop a parallel jurisprudence articulating the meaning of Article 10 of the Treaty on European Union (TEU) which announces, among other things that “The functioning of the Union shall be founded on representative democracy. . . . Member

<sup>49</sup> See Paul Craig, *Transnational Constitution-Making: The Contribution of the Venice Commission on Law and Democracy*, in CONSTITUTION-MAKING AND THE TRANSNATIONAL LEGAL ORDER 159 (Gregory Shaffer et al. eds., 2019) (noting that the Venice Commission was tasked at its founding with “strengthen[ing] the understanding of the legal systems of the participating states, with a view to bringing them closer; promot[ing] the rule of law and democracy; and examin[ing] the problems raised by the working of democratic institutions and their reinforcement and development”).

<sup>50</sup> See Eur. Ct. Hum. Rts., *Guide on Article 3 of Protocol No. 1 to the European Convention on Human Rights: Right to Free Elections*, COUNCIL OF EUR. 5–14 (2022) [hereinafter Guide on Article 3 of Protocol 1], [https://www.echr.coe.int/Documents/Guide\\_Art\\_3\\_Protocol\\_1\\_ENG.pdf](https://www.echr.coe.int/Documents/Guide_Art_3_Protocol_1_ENG.pdf).

<sup>51</sup> See Gregory H. Fox, *The Right to Political Participation in International Law*, 17 YALE J. INT. L. 539, 570–71 (1992) (providing the history of international election monitoring before 1945, the system of election monitoring under the UN system and the mainstreaming of multilateral election monitoring, arguing that international monitoring provides a way to enforce domestic voting rights).

<sup>52</sup> See Joseph Zand, *The Concept of Democracy and the European Convention on Human Rights*, 5 U. BALT. J. INT’L. L. 195, 202 (2017) (“If a restriction on democracy is prescribed by law, the Court then would consider whether the law, or rather the way in which it was applied, is ‘necessary in a democratic society’ for any of the reasons outlined in the Articles”).

<sup>53</sup> See Guide on Article 3 of Protocol 1, *supra* note 50, ¶¶ 59, 92–93 (referring to Article 11 on freedom of association and Article 10 on freedom of expression).

<sup>54</sup> Jean-Paul Costa, *The Links Between Democracy and Human rights under the Case Law of the European Court of Human Rights*, COUNCIL OF EUR. 1 (2008), [https://www.echr.coe.int/Documents/Speech\\_20080605\\_Costa\\_Helsinki\\_ENG.pdf](https://www.echr.coe.int/Documents/Speech_20080605_Costa_Helsinki_ENG.pdf).

<sup>55</sup> *Id.* at 8 (“The role of an international human rights court. . . is to serve the interests of each State’s democratic system by maintaining its openness, integrity and effectiveness.”).

States are represented in the . . . Council by their governments, themselves democratically accountable either to their national Parliaments, or to their citizens.”<sup>56</sup>

TEU’s Article 10 first made its appearance in the jurisprudence of the ECJ in a case involving citizens’ initiatives in the EU in which the Court announced that direct democracy was not a substitute for representative democracy,<sup>57</sup> which seems to rule out government that operates predominantly by plebiscite (a favorite among autocrats). The Court has also blocked the Spanish government’s elaborate attempts to prevent duly elected Catalan MEPs from sitting in the European Parliament.<sup>58</sup> In these cases, the Court announced that the free expression of choice by citizens using their rights to universal direct suffrage will be honored.<sup>59</sup> While this jurisprudence is in its infancy, it appears that the ECJ will defend European citizens against their national governments if the national governments attempt to thwart their democratic choices within the scope of EU law. Whether this principle will be broadened to include democratic rights in national elections that do not involve election to the European Parliament is anyone’s guess at this stage. But Article 10(2) TEU also requires that national governments themselves have a democratic pedigree which authorizes their national leaders to participate in EU institutions, so even the rules of national elections may one day be considered within the scope of EU law.<sup>60</sup>

The Organization of American States (OAS) has also progressively elaborated on the right to democratic governance over its history, accelerating and deepening this right during the 1960s–1980s wave of democratic transformation. When the American Convention on Human Rights finally entered into force in 1978, it included a right of citizens to participate in their government.<sup>61</sup> As constitutions were reformed across Latin America in the 1980s and 1990s, Convention rights were often incorporated directly into those texts, providing yet more evidence of the way that international law can be incorporated domestically to stabilize national constitutions.<sup>62</sup>

As democracy spread across Latin America in the 1980s, the Charter of the Organization of American States was modified in 1985 to establish that the OAS has a central purpose “to promote and consolidate representative democracy . . . with due respect for the principle of non-intervention.”<sup>63</sup> In 1991, a resolution of the OAS General Assembly gave the Secretary General the

<sup>56</sup> Consolidated Version of the Treaty on the European Union (TEU), art. 10(2), Oct. 26, 2012, O.J. 20.

<sup>57</sup> Case C418/18 P, Puppink v. Commission, ECLI:EU:C:2019:1113, ¶¶ 64–65 (Dec. 19, 2019) (“It must be recalled that, as stated in Article 10(1) TEU, the functioning of the Union is to be based on representative democracy.”).

<sup>58</sup> Case C-629/21 P(R), Puigdemont v. Eur. Parliament, ECLI:EU:C:2022:413, ¶¶ 20–23, 29 (May 24, 2022) (detailing the Spanish Government’s attempts to force MEP Puigdemont from his position in the European Parliament and subsequently to arrest him).

<sup>59</sup> Case C-502/19, Junqueras Vies v. Ministerio Fiscal, ECLI:EU:C:2019:1115, ¶¶ 63–68, 71, 75–78, 81, 86–87 (Dec. 19, 2019) (holding that duly elected officials are Members of the European Parliament from the point of their election onwards and therefore enjoy immunity for the purposes of Article 9 of the Protocol on the privileges and immunities of the European Union); see also Puigdemont, ECLI:EU:C:2022:413, ¶¶ 250–52 (“Those immunities are also intended . . . to ensure that the composition of the Parliament reflects . . . the free expression of choices made by the citizens of the European Union.”).

<sup>60</sup> See John Cotter, *The Last Chance Saloon*, VERFASSUNGSBLOG (May 19, 2020), <https://verfassungsblog.de/the-last-chance-saloon> (arguing that ministers from Member States that sit in the Council must themselves be accountable democratically back home under Article 10(2) TEU); see also John Cotter, *To Everything There Is a Season: Instrumentalising Article 10 TEU to Exclude Undemocratic Member State Representatives from the European Council and the Council*, 47 EUR. L. REV. 69 (2022) (“The presence of [an undemocratic EU Member State] government in the EU’s institutions has profound consequences for the EU’s democracy.”).

<sup>61</sup> See Organization of American States, American Convention on Human Rights, art. 23, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S.123 [hereinafter ACHR] (stating every citizen shall enjoy the right to vote).

<sup>62</sup> See Armin von Bogdandy & René Uruña, *International Transformative Constitutionalism in Latin America*, 114 AM. J. INT’L L. 403, 410 (2020) (providing the history of the incorporation of Convention law in constitutions across Latin America).

<sup>63</sup> Rubén Perina, *The Inter-American Democratic Charter: An Assessment and Ways to Strengthen It*, BROOKINGS INST. 77, 78–79 (2016), <https://www.brookings.edu/wp-content/uploads/2016/06/07-inter-american-charter-perina.pdf>.

power to convene the Permanent Council to investigate situations in which democracy was threatened in a Member State.<sup>64</sup> In 1992, the year Tom Franck's article appeared, OAS members approved the Washington Protocol, which permits the suspension of a member "whose democratically constituted government has been overthrown by force."<sup>65</sup> These new powers to investigate threats to democracy and mediate among the various domestic parties were applied in Haiti in 1991 after a military coup,<sup>66</sup> in 1992 after Peruvian President Fujimori's auto-golpe in 1992,<sup>67</sup> in 1993 after a similar auto-golpe in Guatemala<sup>68</sup> and in 1996 to prevent a military coup in Paraguay.<sup>69</sup> In each case, the usurpers were defeated as the OAS worked together with domestic democratic forces to restore democratic governance through diplomatic intervention.<sup>70</sup>

This democratic track record was consolidated in the Inter-American Democratic Charter, adopted in 2001, which announces in Article 1 that "The peoples of the Americas have a right to democracy and their governments have an obligation to promote and defend it."<sup>71</sup> It guarantees that representative democracy is the basis for the constitutional regimes of the Member States (Article 2) and that representative democracy includes respect for human rights, the rule of law, free and fair elections, pluralistic political parties and separation of powers as essential elements (Article 3).<sup>72</sup> It ensures that elections are subject to international observation<sup>73</sup> and that democratic culture is strengthened.<sup>74</sup> The Democratic Charter entrenches the mandate for collective action when a Member State experiences "an unconstitutional alteration of the constitutional regime or an unconstitutional alteration of the constitutional regime that seriously impairs the democratic order in a Member State."<sup>75</sup>

Though the Democratic Charter is not directly enforceable by the Inter-American Court of Human Rights (IACtHR), the Court has used its power to interpret the American Convention on Human Rights through the lens of the Democratic Charter.<sup>76</sup> As democracies have faltered and even failed in Latin America after the miraculous decade of democratic advances, the IACtHR has stepped in on the side of reversing the damage. For example, the IACtHR in

<sup>64</sup> Gen. Assembly of the Org. of Am. States, *Representative Democracy*, AG/RES. 1080 (XXI-O/91) (June 5, 1991), <https://www.oas.org/juridico/spanish/res-1080.htm> (instructing the Secretary General to convene the Permanent Council if events occur disrupting the institutional democratic political process).

<sup>65</sup> Perina, *supra* note 63, at 79.

<sup>66</sup> See Luigi R. Einaudi, *Haiti's Turning Point Challenges the World*, Org. of Am. States Permanent Council, 1, 1 (1992) (describing how OAS Member States swiftly adopted tough measures to press Haiti's illegal regime to return democratic rule to the people of Haiti).

<sup>67</sup> See INTER-AM. COMM'N ON H.R., Report No. 46/97 Case 11.166 (1997) (describing Peru's 1992 "self-coup" and the action taken by the OAS to reverse it).

<sup>68</sup> See Francisco Villagrán de León, *Thwarting the Guatemalan Coup*, 4(4) J. DEMOCRACY 117, 117–18 (1993) (describing efforts to reverse a coup in Guatemala).

<sup>69</sup> See generally Democratic Forum, *The 1996 Institutional Crisis in Paraguay*, ORG. OF AM. STATES 1, 12 (1996), [http://www.oas.org/sap/publications/1996/py\\_crisis/paraguay\\_crisis\\_eng.pdf](http://www.oas.org/sap/publications/1996/py_crisis/paraguay_crisis_eng.pdf) (describing the role of the OAS in reversing the coup).

<sup>70</sup> See Richard A. Barnes, *Constitutionalism and Democratic Government in the Inter-American System*, in DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW 239 (Gregory H. Fox and Brad R. Roth eds., 2000) (explaining that the process of OAS diplomatic intervention was complicated, even if the final result was clear).

<sup>71</sup> See Org. of Am. States, Inter-American Democratic Charter, Sept. 11, 2001, OAS Doc. OEA/SerP/AG/Res.I (2001), art. 1, [https://www.oas.org/charter/docs/resolution1\\_en\\_p4.htm](https://www.oas.org/charter/docs/resolution1_en_p4.htm).

<sup>72</sup> *Id.* arts. 2–3.

<sup>73</sup> *Id.* arts. 23–25.

<sup>74</sup> *Id.* arts. 26–28.

<sup>75</sup> *Id.* art. 19.

<sup>76</sup> The Court has used the Democratic Charter as an "interpretive text" to assist it in understanding both the OAS Charter and the American Convention. See Presidential Reelection Without Term Limits in the Context of the Inter-American Human Rights System, Advisory Opinion OC-28/21, Inter-Am. Ct. H.R. (ser. A) No. 61, ¶ 29 (June 7, 2021) [hereinafter Advisory Opinion OC-28/21]

*Barrios Altos v. Peru*<sup>77</sup> confirmed that the self-amnesty laws drafted by the perpetrators of Peru's 1991 coup in order to exempt themselves from accountability for mass violations of human rights constituted a Convention violation and therefore had no legal effect.<sup>78</sup> Of course, by the time that the case came to the IACtHR, the Peruvian government had changed hands and the new rights-respecting democratic government sought confirmation that the rule of law would not be violated if it now honored the Convention, ignored the statute, and provided reparations for those whose rights had been harmed.<sup>79</sup> Peru welcomed the Court's answer. And as the concurring opinion of Judge A.A. Cançado Trindade noted: "not everything that is lawful in the domestic legal order is so in the international legal order, and even more forcefully when superior values (such as truth and justice) are at stake."<sup>80</sup> The Peruvian case demonstrates that international law can reinstitute and stabilize key constitutional norms within democracies after domestic forces have destroyed them as long as new democratic forces are willing to harness the power of transnational institutions to assist them. The Peruvian democratic successor government found it difficult to legally revoke the domestic amnesty law without violating norms about settled legality, but the IACtHR's decision freed the new democratic government from being bound by the self-dealing laws of its predecessor.

Of course, as my distinguished commentator Manuel Cepeda notes,<sup>81</sup> the history of Latin American democratic transformations resembles a roller coaster more than a straight path. Venezuela is just one of the more extreme cases that demonstrates the ineffectiveness of the Inter-American system at stopping a country's determined slide into autocracy and might even show that such intervention is counterproductive.<sup>82</sup> The precise path to democracy is complicated and success is not guaranteed in each case even where there are regional resources to assist. Unless domestic actors are willing to use the democratic resources made available by international law, democracy is not self-renewing nor can it simply be imposed through external enforcement. That said, mustering democratic resources at the transnational level means that the resources are available when a later democratic government wants to build back better. There is an old expression that you can lead a horse to water, but you cannot make the horse drink. Perhaps we can add a useful modification to this metaphor—that if a horse wants to drink, it helps if one has set out the water.

Franck's original article suggested that a norm of democratic governance could be used as one criterion among others that would determine whether a government's claim to statehood would be recognized by other states.<sup>83</sup> As he argued, democratic legitimacy of states was a matter for international concern, in part because democratic states are more likely to keep the peace and honor human rights.<sup>84</sup> Acknowledging the empirical evidence that democracies rarely initiated wars

<sup>77</sup> *Barrios Altos v. Peru*, Merits, Inter-Am. Ct. H.R. (ser. C) No. 75 (Mar. 14, 2001).

<sup>78</sup> *Id.* ¶ 42 ("[T]he adoption of self-amnesty laws that are incompatible with the Convention meant that Peru failed to comply with the obligation . . . embodied in Article 2").

<sup>79</sup> *Id.* ¶ 35 (informing the Court that Peru would initiate discussions to reach satisfactory settlements in accordance with Convention mandates).

<sup>80</sup> *Id.* ¶ 6 (Cançado Trindade, J., concurring) ("In reality, what came to be called laws of amnesty . . . are not so in the ambit of the International Law of Human Rights").

<sup>81</sup> See Manuel José Cepeda Espinosa, *Kim Scheppelle's Vision for Restoring Democracy – and Why We Must Accept the Challenge*, 39(4) AM. U. INT'L L. REV. 677, 685–87 (2024) (discussing examples of Latin American democratic transitions and international law's impact on guerilla leaders' behavior post-conflict).

<sup>82</sup> See Gonzalo Candia, *Regional Human Rights Institutions Struggling against Populism: The Case of Venezuela*, 20(2) GERMAN L.J. 141, 158–59 (2019) ("[I]nstead of preventing the regime from abusing human rights, supervision conducted by both the IACHR and the IACtHR encouraged populism to mobilize their supporters in favor of Hugo Chávez").

<sup>83</sup> Franck, *supra* note 1, at 46 (1992) ("[A] nation earns separate and equal station in the community of states by demonstrating a decent respect to the opinions of mankind").

<sup>84</sup> *Id.* at 68 (stating that "respect for these rights and freedoms constitutes one of the foundations of the international order").



against other democracies, Susan Marks has since warned that conditioning the recognition of legitimate statehood on a state's democratic *bona fides* could lead democracies into military intervention against non-democracies.<sup>85</sup> In addition, given that the history of colonialism was bursting with similar claims about what the not-yet-called-the-Global-North could do to "civilize" the peoples of the not-yet-called-Global-South, she cautioned against democracy promotion as a rationale for international intervention.<sup>86</sup> The goal of helping to restore democracy in a democratically challenged state has not been generally accepted as a valid reason for military intervention, but we now see the routine use of sanctions against international-law-violating countries for mass abuses of human rights or violations of the law of war.<sup>87</sup>

I could mention many more international law resources that now promote democracy, even though they do not suggest that democracy is a criterion for recognition of statehood or that sanctions can be launched against governments solely for democratic backsliding. Wherever one looks, however, pro-democratic language coming from international organizations is getting stronger, even as their members states have weakened their democratic commitments. For example, the Millennium Declaration of the UN General Assembly proclaims "We will spare no effort to promote democracy and strengthen the rule of law. . ."<sup>88</sup> and vows "[t]o strengthen the capacity of all our countries to implement the principles and practices of democracy and respect for human rights, including minority rights."<sup>89</sup> A UN Focal Point for Electoral Assistance was created in the office of the Under-Secretary for Political and Peacebuilding Affairs<sup>90</sup> and the UN Democracy Fund, established in 2005, has supported democracy promotion projects around the world.<sup>91</sup> The Organization for Security and Cooperation in Europe has provided election monitoring missions to countries far beyond its original European mandate.<sup>92</sup> The Organization of American States is committed to a broad program of electoral observation,<sup>93</sup> as is the African Union.<sup>94</sup>

Therefore, it is not too much of an exaggeration to say that international organizations all over the world have devoted substantial efforts to democracy promotion. This burst of activity in democracy promotion by international organizations may not be simply driven from above but demanded from below. As Paul Poast and Johannes Urpelainen have argued, not only do international organizations provide support for budding democracies, but leaders in democratic states sometimes even form new international organizations devoted to shoring up democracy to fill

<sup>85</sup> Marks, *supra* note 7, at 42–45 (explaining the views of international relations theorists who believe that international recognition of sovereignty of states should depend on whether those states are democracies).

<sup>86</sup> *Id.* at 49 (addressing concerns regarding the problematic character of the 'democratic peace' and anxieties about the interventionist action which a democratic norm might justify).

<sup>87</sup> See *Sanctions*, U.N. SEC. COUNCIL (Sept. 7, 2023), <https://www.un.org/securitycouncil/sanctions/information> (showing that the UN Security Council is administering 15 different sanctions regimes on countries ranging from Haiti to Sudan and from Mali to North Korea).

<sup>88</sup> G.A. Res. 55/2, ¶ 24 (Sept. 8, 2000).

<sup>89</sup> *Id.* ¶ 25.

<sup>90</sup> See *Global Issues: Democracy*, UNITED NATIONS, <https://www.un.org/en/global-issues/democracy> ("The Under-Secretary-General for Political and Peacebuilding Affairs is the UN Focal Point for Electoral Assistance.").

<sup>91</sup> See *Democracy Fund: About UNDEF*, UNITED NATIONS, <https://www.un.org/democracyfund/about-undef> ("UNDEF funds, helps design, manages, mentors, and generates civil society projects for democracy.").

<sup>92</sup> See *Elections*, ORG. FOR SEC. AND COOP. IN EUR., <https://www.osce.org/odihr/elections> ("ODIHR [The Office for Democratic Institutions and Human Rights] carries out election observation in OSCE participating States to assess the extent to which elections respect fundamental freedoms.").

<sup>93</sup> See *Elections*, ORG. OF AM. STATES, <https://www.oas.org/en/topics/elections.asp> ("It is imperative that citizens of every county be able to rely on electoral processes that are free, peaceful and transparent.").

<sup>94</sup> African Union, *African Charter on Democracy, Elections and Governance*, Assembly/AU/Dec.147 (VIII), art. 19, ¶ 1 (Jan. 30, 2007) ("Each State Party shall inform the Commission of scheduled elections and invite it to send an electoral observer mission.").

gaps in the international system.<sup>95</sup> They provocatively suggest that it is not just that international organizations now promote democracy in greater numbers on their own remit, but rather that the increase in the number of international organizations in the last half-century has been *caused* at least in part by the rise of many new democracies that wanted international backup for their new efforts at self-rule.<sup>96</sup> These new democracies sought out and, when they did not find them, *formed* international organizations to provide assistance with everything from security to public infrastructure, and from elections to anti-corruption tools. Having this democratic backup from international organizations may stabilize democratic governance within states precisely because the international norms created by these organizations cannot be changed unilaterally by actors battling within domestic constitutional orders. Democracy is now clearly encouraged by international law.

With this quick survey of the growing support from international law and international organizations for democracy world-wide since Tom Franck wrote his influential paper, one might wonder why the “right to democratic governance” is still controversial. Did Franck not already win that fight?

### III. THE NEW AUTOCRATS

As we have all now learned by living through years of Covid, whatever does not kill you will mutate and try again. And the same can be said about threats to democracy. Democracy is now so widely accepted as the only legitimate form of government and mass violations of human rights are now so clearly prohibited by both international and national law, that a new generation of autocrats has taken a different path to power.

Twentieth-century dictators specialized in precisely the sort of conduct that resulted in our present human rights conventions, because rejection of those dictators’ methods gave rise to the rights that were included in those lists. Twentieth-century dictators smashed democracy with tanks in the streets. But twenty-first century autocrats do not openly trash democracy or violate the human rights norms over which there is substantial international consensus. Instead, the new autocrats deftly operate to lock down their power by law in the nooks and crannies of national law that international law and international condemnation have not yet reached—by thwarting checks and balances and eliminating veto points in national constitutional law. The new autocrats now win elections and then hollow out democratic institutions, leaving the external shells of democratic institutions intact.<sup>97</sup> Every clever autocrat these days claims to be a democrat.

In short, the new autocrats have gotten the message that they will be condemned for violating widely accepted international law principles supporting democracy, the rule of law and human rights if they attempt old-fashioned coups. Moreover, any coercive form of anti-democratic rule that jails and tortures opponents, stages show trials, censors or shuts down the media, suspends freedom of assembly, closes opposition parties and otherwise violates well-established civil and political rights will clearly be criticized and may even be sanctioned. In short, democracy, rule of

<sup>95</sup> See PAUL POAST & JOHANNES URPELAINEN, *ORGANIZING DEMOCRACY: HOW INTERNATIONAL ORGANIZATIONS ASSIST NEW DEMOCRACIES* 99, 160 (2018); see also Cassandra Emmons, *Regional Organizations as Democracy Enforcers: Designing Effective Toolkits* (2019) (Ph.D. dissertation, Princeton University) (exploring the toolkits of regional organizations to be used against democratic backsliding and showing when and how these toolkits are used).

<sup>96</sup> See *id.* at 99 (“[I]n addition to addressing immediate problems, IO formation is a stepping-stone to membership in existing IOs.”).

<sup>97</sup> See generally Kim Lane Scheppele, *Autocratic Legalism*, 85 U. CHI. L. REV. 545 (2018) [hereinafter Scheppele, *Autocratic Legalism*] (explaining how aspirational autocrats win elections and then change the laws to prevent the rotation of power in the future); WOJCIECH SADURSKI, *A PANDEMIC OF POPULISTS* (2022) (explaining the “hollowing out” of judicial independence in Poland).

law and human rights are so widely accepted by international institutions that aspirational autocrats cannot be seen to be disregarding any of these basic international norms. The new autocrats know that the “right to democratic governance” is real and they know that they cannot successfully assault it head on.

Therefore, the new autocrats do not follow the old authoritarian playbook. This may be why coups have drastically declined since the end of the Cold War.<sup>98</sup> Mass human rights violations of the twentieth century sort rarely accompany an autocrat’s rise to power anymore. Instead, autocrats begin their march toward the concentration of power through winning free and fair elections (at least the first time), often with populist messages proclaiming that, if they win, they will ensure *real* democracy. Once in power, these new autocrats do not suspend or destroy parliaments; they alter the rules through which these parliaments are elected or they change the procedures through which parliaments operate so they become empty shells of representative government.<sup>99</sup> The new autocrats do not shut down or suspend the courts; they simply pack the courts full of supporters by legally changing the rules for judicial appointments and adjusting technical rules about jurisdiction, case assignment, forms of appeal and more.<sup>100</sup> The new autocrats do not jail opposition members, let alone torture them; they put them under intrusive surveillance so that opposition members know that any wrong move will subject them to the public revelation of *kompromat*, leaked from who-knows-where but destroying their credibility in future elections.<sup>101</sup> Where are the rights violations in all that? If these new rules are duly enacted by the newly elected aspirational autocrats working in tandem with newly elected parliaments and certified by the newly restructured courts, what’s the problem? This is how democracy is supposed to work! It does not look like the obvious onset of autocracy.

As Steve Levitsky and Daniel Ziblatt have explained, however, “Democratic backsliding begins at the ballot box.”<sup>102</sup> And then, as the title of my forthcoming book announces, the new autocrats proceed to “destroy democracy by law.”<sup>103</sup>

Let us go back to the international law resources that were on offer at the beginning of the “right to democratic governance” debate—in what we might call the Right to Democratic Governance 1.0. Election monitoring was supposed to provide an early warning that democracy is in peril, as Gregory Fox persuasively argued.<sup>104</sup> In the 1990s, some of the optimists assumed that international election monitoring would be able to certify whether those who won elections truly had the backing of their people.<sup>105</sup> The assumption was that this would be enough to certify that the

<sup>98</sup> See Nancy Bermeo, *On Democratic Backsliding*, 27 J. DEMOCRACY 5, 6–7 (2016) (showing that the frequency of coups declined markedly after the end of the Cold War).

<sup>99</sup> See Viktor Zoltán Kazai, *The Instrumentalization of Parliamentary Legislation and its Possible Remedies: Lessons from Hungary*, 23 JUS POLITICUM 237 (2019), <https://juspoliticum.com/article/The-Instrumentalization-of-Parliamentary-Legislation-and-its-Possible-Remedies-Lessons-from-Hungary-1309.html> (showing how autocrats change the procedures through which parliaments operate); Catherine M. Conaghan, *Ecuador: Correa’s Plebiscitary Presidency*, 19 J. DEMOCRACY, 46, 51–52 (2008) (detailing the process of institutional implosion).

<sup>100</sup> See Kim Lane Scheppele, *The Treaties Without a Guardian: The European Commission and the Rule of Law*, 29 COLUM. J. EUR. L. 93, 110 (2023) [hereinafter Scheppele, *Treaties Without a Guardian*] (documenting assaults on judicial independence in Hungary and Poland and the general lack of firm response by the European Commission).

<sup>101</sup> See Monika Nalepa & Konstantin Sonin, *How does Kompromat Affect Politics? A Model of Transparency Regimes*, BECKER FRIEDMAN INST. FOR ECON. AT U. CHI. 4 (2020), [https://bfi.uchicago.edu/wp-content/uploads/BFI\\_WP\\_202029.pdf](https://bfi.uchicago.edu/wp-content/uploads/BFI_WP_202029.pdf) (explaining why politicians may collude in a regime in which compromising information—*kompromat*—is routinely used).

<sup>102</sup> LEVITSKY & ZIBLATT, *HOW DEMOCRACIES DIE*, *supra* note 40, at 5.

<sup>103</sup> KIM LANE SCHEPPELE, *DESTROYING DEMOCRACY BY LAW* (forthcoming 2025).

<sup>104</sup> See generally Fox, *supra* note 51.

<sup>105</sup> See *id.* at 587, n. 271.

resulting government was democratic.<sup>106</sup> But things have worked out rather differently. The Venezuelan election that brought Hugo Chávez to power in 1998 was observed closely by the Carter Center, which reported that the election was well-conducted.<sup>107</sup> The Hungarian election that brought Viktor Orbán into office in 2010 was similarly given a green light by the OSCE Office of Democratic Institutions and Human Rights (ODIHR).<sup>108</sup> Clean bills of health were given by ODIHR to the Polish elections in 2015 that handed the Law and Justice party victories in the presidential and parliamentary elections.<sup>109</sup> The 2006 Ecuadorian election that brought Rafael Correa to power was similarly blessed by OAS election monitors.<sup>110</sup> Multiple teams of election monitors even gave a thumbs up to the 2007 election of members of the Ecuadorian Constituent Assembly that rewrote the constitution to benefit Correa.<sup>111</sup> In the Turkish election that Recep Tayyip Erdoğan's AKP party won in 2002, catapulting him into the Prime Minister's chair for the first time, the playing field was, if anything, tilted slightly against him which meant that his victory against the odds was deemed all the more legitimate by election monitors.<sup>112</sup>

In all of those monitoring reports of the elections that brought aspirational autocrats to power, you will find, at most, small deviations from international norms. And yet each of these leaders set their governments on a course of dramatic democratic devolution after they won these mostly free and mostly fair elections. International election monitoring was part of the emerging right to democratic governance because it could certify the strength of democracy worldwide and it has been broadly accepted, but it has not worked to separate the real from the fake democrats.<sup>113</sup> Autocrats now typically come to power through what look like free and fair elections, blessed by the very election monitors who were supposed to certify to the world that their governments were democratic.

In keeping with the general rule that they should stay out of international law trouble while consolidating power, the new autocrats have also by and large respected human rights at least until very late in the game when the only way to remove them is through pitched resistance that

<sup>106</sup> *Id.*

<sup>107</sup> See Harold Trinkaus & Jennifer McCoy, *Observation of the 1998 Venezuelan Elections*, CARTER CENTER, <https://www.cartercenter.org/documents/1151.pdf> (Feb. 1999) (explaining that the elections were universally viewed as legitimate).

<sup>108</sup> See *Hungary, Parliamentary Elections*, OSCE/ODIHR (Apr. 11, 2010), <https://www.osce.org/odihr/elections/hungary/117819> (“The 2010 parliamentary elections confirmed the democratic principles established over the past 20 years. The elections were conducted in a pluralistic environment characterized by an overall respect for fundamental civil and political rights, and high public confidence in the process. The competition took place on a generally level playing field, under a sophisticated electoral system.”).

<sup>109</sup> See *OSCE/ODIHR Election Assessment Mission Report: Poland Parliamentary Elections*, OSCE (Oct. 25, 2015), [https://www.osce.org/files/f/documents/4/1/217961\\_0.pdf](https://www.osce.org/files/f/documents/4/1/217961_0.pdf) (concluding that the elections were competitive, pluralistic, and confirmed democratic principles).

<sup>110</sup> See *Elections in Ecuador: Progress Report*, OAS (Nov. 27, 2006), [https://www.oas.org/en/media\\_center/press\\_release.asp?sCodigo=EOM-EC-9](https://www.oas.org/en/media_center/press_release.asp?sCodigo=EOM-EC-9) (explaining that 80 international monitors observed the election and found that while there were some difficulties the elections were overall unaffected, and voters were able to vote freely).

<sup>111</sup> See *Ecuador 2007: Final Report*, EUROPEAN UNION ELECTION OBSERVATION (2007), [http://www.eods.eu/library/final\\_report-ecuador-2007\\_en.pdf](http://www.eods.eu/library/final_report-ecuador-2007_en.pdf) (stating that the election campaign was calm and non-violent and that freedom of expression and assembly were respected; see also *Final Report on Ecuador's September 30, 2007 Constituent Assembly Elections*, CARTER CENTER 1, 4–5 (2007), [https://www.cartercenter.org/resources/pdfs/peace/americas/ecuador\\_carter\\_center\\_electoral\\_report\\_final\\_website.pdf](https://www.cartercenter.org/resources/pdfs/peace/americas/ecuador_carter_center_electoral_report_final_website.pdf) (describing the process of election monitoring during the Ecuadorian elections)).

<sup>112</sup> See *Parliamentary Elections*, OSCE 1, 5 (Nov. 3, 2002), <https://www.osce.org/odihr/elections/turkey/115703> (noting that Recep Tayyip Erdoğan was initially banned from running but that, in the end, “[t]he sweeping victory of opposition parties showed the power of the Turkish electorate to institute governmental change”).

<sup>113</sup> See Kim Lane Scheppele, *How Viktor Orbán Wins*, 33 J. DEMOCRACY 45, 57–58 (2022) (describing how the Hungarian government was praised for protecting minority representation when in reality they had used minority rights to install governing party MPs more easily than they would have otherwise been able to).

sometimes generates a brutal state response (as in Turkey,<sup>114</sup> Venezuela,<sup>115</sup> or Russia<sup>116</sup>). But for the first 10–15 years into a backsliding democracy, the opposition is generally not jailed, tortured or publicly persecuted. Free speech is generally not curtailed, so the democratic opposition will be permitted its few small media outlets and transient websites.<sup>117</sup> Never mind that the public media may turn into propaganda outlets, or the most important media may be sold under pressure to oligarchs supporting the regime so that the news that the vast majority of the electorate sees is all on the side of the autocrat.<sup>118</sup> Opposition figures may not be charged with treason, but they will be sued for libeling public officials<sup>119</sup> in a system in which the government may be able to channel the cases it cares about to friendly judges.<sup>120</sup> In fact, these libel actions against government opponents do not even have to result in a victory for the plaintiffs; the suits themselves will absorb the democratic opposition's time and money while simultaneously deterring others from criticizing the government so a criminal conviction becomes superfluous. In these new autocracies, opposition political parties will appear at election time and vigorously contest the elections but the election rules will ensure they will lose.<sup>121</sup> Visitors to the capital cities of these captured democracies may report that people walk freely in the streets in front of newsstands bursting with publications and that small demonstrations against the government are routine.<sup>122</sup> The new autocracies feel like free countries! That is because the new autocracies do not look or act like twentieth-century dictatorships. Instead, they imitate normal democracies. Underneath the surface, however, the fix is in.

How can aspirational autocrats pull this off? In the twentieth-century existential fight between communism and capitalism (often portrayed as a war between communism and democracy, or between freedom and its enemies), civil and political rights were included in legally enforceable international agreements—like regional human rights conventions—while social and economic rights were never so widely entrenched. As a result, the new autocrats know now that they cannot

<sup>114</sup> See Carlotta Gall, *Turkey Jails Hundreds for Life over 2016 Coup Attempt*, N.Y. TIMES (Nov. 26, 2020), <https://www.nytimes.com/2020/11/26/world/europe/turkey-coup-life-sentences.html> (explaining that a Turkish court gave hundreds of those suspected of involvement in the 2016 coup life sentences).

<sup>115</sup> See Press Release, U.N. OHCHR, *Venezuela: New UN Report Details Responsibilities for Crimes Against Humanity to Repress Dissent and Highlights Situation in Remote Mining Areas* (Sept. 20, 2022), <https://www.ohchr.org/en/press-releases/2022/09/venezuela-new-un-report-details-responsibilities-crimes-against-humanity> (explaining how President Maduro suppressed opposition to the government with torture and other crimes against humanity).

<sup>116</sup> See Mariya Omelicheva, *Repression Trap: The Mechanism of Escalating State Violence in Russia*, CENTER FOR STRATEGIC AND INTERNATIONAL STUDIES (CSIS) (July 2021) (detailing how the government responded to nearly 70% of anti-government protests with excessive force and security force interventions).

<sup>117</sup> See Scheppele, *Autocratic Legalism*, *supra* note 97, at 577 (2018) (explaining that modern autocrats act through law to compromise checks and balances and make their governments immune to democratic accountability).

<sup>118</sup> See *id.* (highlighting how autocrats maintain their power by, among other things, monopolizing the media).

<sup>119</sup> See Mike Ticher, *Long Arm of Law and Justice: The Sydney Professor Under Attack from Poland's Ruling Party*, THE GUARDIAN (Oct. 3, 2020), <https://www.theguardian.com/world/2020/oct/04/long-arm-of-law-and-justice-the-sydney-professor-under-attack-from-polands-ruling-party> (noting that Polish and Australian Professor Wojciech Sadurski was sued by the Polish government for defamation after accusing the government through social media of indulging far right nationalists and harassing political opponents).

<sup>120</sup> See *The Hungarian Recipe for Getting a Grip on the Judiciary*, HUNGARIAN HELSINKI COMMITTEE (Oct. 26, 2022), <https://helsinki.hu/en/wp-content/uploads/sites/2/2022/11/Court-Capture-Project-Completed-20221026-.pdf> (explaining that the Hungarian government captured the court presidencies in a system where the court presidents assign cases and thus was able to ensure that cases they cared about were channeled to friendly judges).

<sup>121</sup> See Scheppele, *How Viktor Orbán Wins*, *supra* note 113, at 45–46 (explaining that Orbán's electoral success was the result of an election systems that made it impossible for the opposition to win elections, not least because any division in the opposition generated supermajorities for the ruling party).

<sup>122</sup> See Gábor Halmai, *Legally Sophisticated Authoritarians: The Hungarian Lex CEU*, VERFASSUNGSBLOG (Mar. 31, 2017), <https://blogs.eui.eu/constitutionalism-politics-working-group/legally-sophisticated-authoritarians-hungarian-lex-ceu/> (“[F]rom a distance, many of [the new autocratic regimes] look almost democratic . . .”).



curtail the civil and political rights of their critics because that is where they will run into international trouble; instead, they use economic pressure to put opposition members' livelihoods at risk.<sup>123</sup> After all, in the Cold War between communism and capitalism, capitalism won. The damage that capitalism routinely causes through economic precarity and massive inequality does not register as a general violation of international human rights. However much those economic pressures may harm the people who experience them, these harms are conceptualized as the usual detritus of capitalism. That is the space that attracts the new autocrats.

The new autocrats now ensure that those who oppose them lose their jobs in the public sector when civil service protections are weakened.<sup>124</sup> They ensure that their opponents' businesses become economically unviable when state regulation targets them or access to state contracts is suspended.<sup>125</sup> New autocrats punish advertisers in the independent and opposition media or corporations that speak out against them by ensuring that tax breaks or special benefits are withdrawn from their businesses.<sup>126</sup> They undermine all institutional toeholds that the opposition may use to organize against them by cutting off foreign funds to the civil sector,<sup>127</sup> defunding opposition parties between elections,<sup>128</sup> harassing those who attempt to fund opposition groups,<sup>129</sup> and attacking universities.<sup>130</sup> The new autocrats ensure that their political opponents are deprived of their livelihoods through what looks like the normal operation of market forces (being fired from at-will jobs without official reason, having their small businesses closed by tax or health inspections; finding social benefits have turned into discretionary grants of beneficence rather than support as of

<sup>123</sup> See generally Isabela Mares & Lauren Young, *Varieties of Clientelism in Hungarian Elections*, 51 COMP. POL. 449 (2019) (showing that threats of economic sanctions from employers and informal moneylenders encouraged economically vulnerable people to vote for the governing party).

<sup>124</sup> See Attila Ágh, *The Roller-Coaster Ride of the Hungarian Administrative Elite: Politico-Administrative Relations in East-Central Europe*, 2014/3 (No. 151–152) REV. FRANCAISE D'ADMINISTRATION PUBLIQUE 663, 669 (2014) (explaining that the Orbán government engaged in a "radical politicization of . . . the entire state administration" through the firing of those who were not politically loyal); see also Michał Mozdzen & Marek Oramus, *The Instrumental and Ideological Polarization of Senior Positions in Poland's Civil Service and its Selected Consequences*, 11 NISPACEE J. OF PUB. ADMIN. & POL. 63, 79–80 (2018) (describing the mass dismissal of people in senior civil service in Poland who did not identify with the governing party).

<sup>125</sup> See Jan Puhl & Michael Sauga, *Viktor Orbán Ups the Pressure on German Companies to Leave Hungary*, DER SPIEGEL (Mar. 31, 2023), <https://www.spiegel.de/international/business/mafia-methods-viktor-orban-ups-the-pressure-on-german-companies-to-leave-hungary-a-cf38f4d2-1576-4f55-896a-b65f19542f43> (explaining that Orbán has pressured German businesses by imposing bureaucratic requirements and regulations on them so that they were encouraged to sell to their companies to those in the Hungarian political inner circle).

<sup>126</sup> See Kim Lane Scheppele, *What Donald Trump and Ron DeSantis Are Learning about the Politics of Retribution*, N.Y. TIMES (May 24, 2022), <https://www.nytimes.com/2022/05/24/opinion/trump-desantis-viktor-orban.html> [hereinafter Scheppele, *Retribution*] (describing how Orbán directs state-funded advertising to loyalists and uses state regulatory power to inflict economic hardship on opponents).

<sup>127</sup> See Patricia Bromley et al., *Contentions over World Culture: The Rise of Legal Restrictions on Foreign Funding to NGOs, 1994–2015*, 99 SOC. FORCES 281, 281 (2020) (reporting that some 60 countries had limited foreign funding of NGOs by 2019).

<sup>128</sup> See *Hungary: Auditor Suspends State Funding of Opposition Party*, ASSOCIATED PRESS (May 21, 2020), <https://apnews.com/42084d3b0ada743d9caf5b6884a8a48a> (explaining that Hungary's state audit office suspended disbursement of state funds to a key opposition party).

<sup>129</sup> See Aleksandra Eriksson, *Hungary and Poland Risk Losing €1 Billion in Norway Aid Row*, EUOBSERVER (May 3, 2017), <https://euobserver.com/nordics/137726> (explaining that the Norwegian-funded NGO that provided funds to support Polish civil society was blacklisted by the Polish government for supporting gay rights, women's rights, and secularism).

<sup>130</sup> See Halmai, *supra* note 122 (describing how the Hungarian government drafted a law to force the Central European University, whose founder had been branded a political opponent, to cease operation in Budapest); see also Suzy Hansen, *"The Era of People like You is Over": How Turkey Purged its Intellectuals*, N.Y. TIMES MAG. (July 24, 2019), <https://www.nytimes.com/2019/07/24/magazine/the-era-of-people-like-you-is-over-how-turkey-purged-its-intellectuals.html> (explaining that thousands of Turkish academics were fired from their jobs at universities in an effort by the Turkish government to purge critics).

right).<sup>131</sup> And then the new autocrats blame the markets for the fate of the political opposition.<sup>132</sup> If the political opposition members cannot hold a job or keep their businesses open, what is wrong with them? The new autocracy indeed promises freedom—freedom to fail.

The new autocrats do not commit crimes against humanity; they shorten unemployment benefits and make social assistance discretionary in the hands of party leaders.<sup>133</sup> And then, when the opposition is deprived of its livelihoods, the new autocrats open the doors and encourage those who are critical of the government to seek greener pastures elsewhere instead of imprisoning them for their temerity to challenge the government.<sup>134</sup> The new kinder, gentler autocracy operates not through coups, overt repression and show trials, but by using electoral majorities (real or fake) to change the laws in the parliament so that the economic viability of any potentially successful opposition is undermined.<sup>135</sup> Most crucially, the governing parties change the election laws so that the opposition can no longer win even after majorities swing in their direction.<sup>136</sup> And they often change those election laws in ways that the election monitors do not catch because the new election laws are a mash-up of election rules that all look fine individually because each one is taken from another perfectly functional democracy even though they are put together so that elections now lead to only one result.<sup>137</sup>

Aspirational autocrats fool their international critics by creating a Frankenstate.<sup>138</sup> Like Dr. Frankenstein's monster who was created by connecting a torso from one perfectly normal body to the arms from another and the legs from still another, a Frankenstate does the same with law. The individual legal rules may have come from "normal" democracies but when stitched together by law, they create a monster. The Frankenstate method allows the new autocrats to concentrate political power in the smallest number of hands while incapacitating the grand institutions of state that would otherwise be empowered to constrain them—and to do so while looking like a "normal" constitutional government because the laws they use to do this are all taken from unquestioned democracies.

<sup>131</sup> See Scheppele, *Retribution*, *supra* note 126 (explaining how Orbán and DeSantis used similar techniques to pressure their opponents through financial measures); see also Lucan Ahmad Way & Steven Levitsky, *How Autocrats Can Rig the Game and Damage Democracy*, WASH. POST (Jan. 4, 2019), <https://www.washingtonpost.com/news/monkey-cage/wp/2019/01/04/how-do-you-know-when-a-democracy-has-slipped-over-into-autocracy> (asserting that that lack of visible coercion has allowed the government to portray the closure of opposition and independent news outlets as caused by objective market forces rather than autocratic pressure).

<sup>132</sup> *Id.*

<sup>133</sup> See Dorottya Szikra & Kerem Gabriel Öktem, *An Illiberal Welfare State Emerging? Welfare Efforts and Trajectories under Democratic Backsliding in Hungary and Turkey*, 33 J. OF EUR. SOC. POL'Y 201, 213 (2022) (explaining how the backsliding governments of Turkey and Hungary introduced discretionary and illiberal elements into their existing social welfare systems to maximize political control over program beneficiaries); see also Sára Hungler & Ágnes Kende, *Diverting Welfare Paths: Ethnicisation of Unemployment and Public Work in Hungary*, 35 E-CADERNOS 114, 130 (2021), <https://doi.org/10.4000/eces.6299> (describing how the eligibility for social benefits in Hungary is increasingly determined at the discretion of government offices rather than as a matter of right).

<sup>134</sup> See R. Daniel Kelemen, *The European Union's Autocratic Equilibrium*, 27 J. OF EUR. PUB. POL'Y 481, 491–94 (2020) (arguing that the EU aids autocracy in its midst by allowing the free movement of persons so that those who are persecuted in one country can easily seek refuge elsewhere).

<sup>135</sup> See Lars Pelke, *Why Autocrats Redistribute Income and Wealth*, EUR. CONSORTIUM FOR POL. RES, <https://theloop.ecpr.eu/why-autocrats-redistribute-income-and-wealth> (describing how modern autocrats use their own political parties to coopt potential allies while excluding opposition groups from power).

<sup>136</sup> See Scheppele, *How Viktor Orbán Wins*, *supra* note 113, at 50, 52 (describing how Orbán relies on election laws which he shapes to disadvantage his opponents).

<sup>137</sup> Compare *id.* at 50, 52, with Fox, *supra* note 51, at 84 (outlining a checklist of factors that election monitors look for).

<sup>138</sup> See Kim Lane Scheppele, *The Rule of Law and the Frankenstate: Why Governance Checklists Do Not Work*, 26 GOVERNANCE 559, 560 (2013) [hereinafter Scheppele, *Frankenstate*] (defining a "Frankenstate" as a state composed of various reasonable constitutional components that take on a monstrous quality when combined).

For example, we can now look back on the first signs that Vladimir Putin was no democrat by examining the laws he pushed through the parliament in 2005 responding to the wave of terrorist attacks engulfing Russia at the time.<sup>139</sup> One law altered elections to the Duma, the lower house of the Russian parliament, by changing the election system from first-past-the-post races in individual constituencies (modeled on the US and the UK) to a proportional-representation system in which members of the Duma would be selected only from national party lists (like in the Netherlands and South Africa).<sup>140</sup> Many thought that this would improve Russian politics because it would strengthen the party system and allow for more proportional representation, so few outside the political opposition flagged this as dangerous at the time.<sup>141</sup> Another law more controversially gave Putin the power to replace the popularly elected regional governors with presidential appointees (as in India).<sup>142</sup> Many Russians supported this move since everyone knew that many of the regional governors were corrupt and ran their own indestructible fiefdoms.<sup>143</sup> Plus, the era of presidential appointment of governors did not last long.<sup>144</sup> Soon, the law was changed—with popular approval—back to popular election of the governors.<sup>145</sup>

In retrospect, we can now see that these two moves gave Putin a lock on both houses of parliament that continues to this day. The Duma election reforms required parties to run national election slates with support from the vast majority of Russia's regions, and only a few parties were able to muster wide geographical dispersion of support.<sup>146</sup> All of the small liberal parties failed to meet the criteria for registration as their support was concentrated only in the major cities in European Russia and so they were all ejected from the Duma.<sup>147</sup> After the reforms, the Duma has become a rubber stamp for Putin because his United Russia party has dominated the parliament ever since.<sup>148</sup> Appointing regional governors for a brief period allowed Putin to control the Federation Council, the upper house of the Russian parliament, because regional governors were the ones who appointed the two representatives from each region who sit in

<sup>139</sup> See Kim Lane Scheppele, "We Forgot about the Ditches": Russian Constitutional Impatience and the Challenge of Terrorism, 53 *DRAKE L. REV.* 963, 989–1024 (2005) [hereinafter Scheppele, *Forgot Ditches*] (describing how Putin used the aftermath of a national tragedy to modify election rules and the system for the appointment of governors under the guise of preventing terrorism).

<sup>140</sup> Byron Moraski, *Electoral System Reform in Democracy's Grey Zone: Lessons from Putin's Russia*, 42 *GOV'T & OPPOSITION* 536 (2007) (showing how the electoral reforms of 2005 advantaged Putin's party but also opened the door to better representation of smaller parties).

<sup>141</sup> See Kim Murphy, *Russia Overhauls its Election Laws*, *L.A. TIMES* (July 7, 2005), <https://www.latimes.com/archives/la-xpm-2005-jul-07-fg-reforms7-story.html> (noting that the law was touted as an attempt to strengthen political parties but that the political opposition feared that it would freeze them out).

<sup>142</sup> See Scheppele, *Forgot Ditches*, *supra* note 139, at 1013–15 (explaining how Putin's plan to appoint regional governors was not clearly unconstitutional as the constitution left to statute the procedure through which governors would gain office).

<sup>143</sup> See Robert Coalson, *Russia: Putin Takes Control of the Status Quo Through Gubernatorial Appointments*, *RADIO FREE EUROPE/RADIO LIBERTY* (June 8, 2005), <https://www.rferl.org/a/1059175.html> (explaining the plan to replace gubernatorial election with presidential appointment and including praise for this plan expressed by political officials).

<sup>144</sup> See Elizabeth Teague, *Russia's Return to the Direct Election of Governors: Re-Shaping the Power Vertical?*, 3 *REGION* 37, 39–40 (2014) (explaining that in 2011 Putin reinstated the popular election of governors).

<sup>145</sup> *Id.*

<sup>146</sup> See Ruben Enikolopov et al., *Field Experiment Estimate of Electoral Fraud in Russian Parliamentary Elections*, 110 *PROC. OF THE NAT'L ACAD. OF SCI. (PNAS)* 448 (2012) (explaining that the Russian parliament is elected under a proportional representation system with a 7% threshold that only three opposition parties have been able to pass).

<sup>147</sup> See *id.* (explaining that two of the parties on the ballot received less than 1% of the vote each and therefore did not pass the minimum threshold).

<sup>148</sup> See Robyn Dixon, *Putin's United Russia Party Holds Big Majority in Russia's Three-Day Parliamentary Elections*, *WASH. POST* (Sept. 20, 2021), [https://www.washingtonpost.com/world/europe/russia-election-results/2021/09/20/351973a4-1a05-11ec-bea8-308ea134594f\\_story.html](https://www.washingtonpost.com/world/europe/russia-election-results/2021/09/20/351973a4-1a05-11ec-bea8-308ea134594f_story.html) (explaining the Putin's United Russia party has won all five State Duma elections since 2003, three of them with a supermajority).

that chamber.<sup>149</sup> Even restoring regional elections has not changed the Federation Council's pro-Putin makeup because, once the power of incumbency was shifted to Putin loyalists, they have leveraged that incumbency to hang onto power.<sup>150</sup> Putin gained unwavering support in both houses of the Russian parliament—all by introducing mechanisms that were used in perfectly respectable democracies elsewhere.

I mention this Russian example because few of us—myself included—were critical of these reforms at the time. What could go wrong with choosing a Dutch-style election system or rooting out corruption by getting rid of entrenched local autocrats, especially when India was a democracy that organized the selection of regional governors in the same way? What most observers did not see was that both moves, enacted in parallel, functioned to disable the parliament as a serious check on presidential power given the specific facts on the ground in Russia.<sup>151</sup> After these reforms, the Russian parliament became a virtual rubber stamp for Putin, not by being closed and bombed (as had happened live on television to international horror under his predecessor, the intemperate and often drunk Boris Yeltsin) but by being altered by law in ways that looked like reforms that improved the quality of democracy. It was the perfect Frankenstate move.<sup>152</sup>

But these Frankenstate moves are often hard to spot in advance. Comparative constitutional law scholars know that, however many “models” of constitutional government are on offer, each constitutional order has unique features.<sup>153</sup> Governments that otherwise share a family resemblance—semi-presidential systems, unicameral parliamentary systems, Westminster-style parliamentary-supremacy systems—will always have differences among them when one gets down to the details.<sup>154</sup> Even if the international law of democracy had tried to develop in the direction of ensuring that national constitutional institutions could not be undermined by anti-democratic changes, it would have been very hard to design general rules that would have protected constitutional democracies from the predation of the new autocrats who are expert at undermining idiosyncratic national constitutional defenses with country-specific tactics. The tendency of international monitors—from election monitors to democracy raters—to use checklists and to assess only parts of systems rather than wholes has also made it difficult for outsiders to see precisely how democracies were being dismantled when they were dismantled in this Frankenstate way.<sup>155</sup>

<sup>149</sup> See Jeremy Bransten, *Russia: Putin Signs Bill Eliminating Direct Elections of Governors*, RADIO FREE EUROPE/RADIO LIBERTY (Dec. 13, 2004), <https://www.rferl.org/a/1056377.html> (explaining the reforms and their likely impact in both undercutting local fiefdoms and marginalizing the political opposition).

<sup>150</sup> See Steve Gutterman, *Putin Ally Named Speaker of Russian Upper House*, REUTERS (Sept. 21, 2011), <https://www.reuters.com/article/uk-russia-parliament-idUKL5E7KL0UM20110921> (recalling that Russia's upper house of parliament elected an ally of Putin's as its speaker and describing how both parliament chambers are dominated by Putin's United Russia party).

<sup>151</sup> As soon as the laws were enacted and their results could be seen, their effects were clear. See Johannes F. Linn, *Super-Presidential Risks and Opportunities in Russia*, BROOKINGS INST. (Jan. 26, 2006), <https://www.brookings.edu/articles/super-presidential-risks-and-opportunities-in-russia> (arguing that Russia's political system was becoming a “super-presidential” regime because the president and his administration controlled virtually all political decision making, and the parliament and courts lacked independence).

<sup>152</sup> See Scheppele, *Frankenstate*, *supra* note 138, at 559–60 (describing the “Frankenstate” as a combination of reasonable measures that, when taken together, compromise constitutionalism and result in situations where, for example, the parliament can no longer check the president's powers).

<sup>153</sup> See generally Madhav Khosla, *Is a Science of Comparative Constitutionalism Possible?* 135 HARV. L. REV. 2110 (2022) (arguing for the importance of context in assessing constitutional change).

<sup>154</sup> See Matthew Andrews, *Good Government Means Different Things in Different Countries*, 23 GOVERNANCE 7, 7 (2009) (“Countries reflecting ‘good government’ according to prominent good governance indicators actually look very different.”).

<sup>155</sup> See Kim Lane Scheppele, *Autocracy Under Cover of the Transnational Legal Order*, in CONSTITUTION-MAKING AND THE TRANSNATIONAL LEGAL ORDER 188, 223–25 (Gregory Shaffer, Tom Ginsburg & Terence Halliday eds., 2019)

The most sophisticated new autocrats have become excellent comparative constitutional lawyers who can find rules from good democracies to import into their domestic systems in order to hasten the collapse of democracy while still keeping up appearances.<sup>156</sup> Being members of the exclusive clubs of international organizations may positively assist in this effort. The Council of Europe and the European Union jointly run the European Centre for Parliamentary Research and Documentation which allows all Member States' parliamentary correspondents to request information from all other parliaments in the network about the law and practice of regulation across the whole swath of public law.<sup>157</sup> In this way, autocrats can avail themselves of the benefits of membership to further undermine democracy at home by using the network to gain information about models that might be adapted for autocratic ends in the specific contexts in which the autocrats are working. Because borrowing rules from good democracies to do bad things at home nearly always works to evade criticism, the Hungarian and Polish governments set up a joint institute for comparative constitutional law whose experts adapt these European models for exploitation.<sup>158</sup>

For example, when Hungarian universities were privatized starting in 2019, they changed hands through laws passed by the parliament that first created private foundations controlled by boards of trustees packed with governing-party-affiliated members.<sup>159</sup> Then parliament "donated" the universities—land, buildings, libraries, faculty, staff and students—to these foundations.<sup>160</sup> The effort succeeded in pushing 21 of Hungary's 26 public universities out into the private sector.<sup>161</sup> But the move from public to private institutions destroyed university autonomy. Affected faculty lost the tenure they had as civil servants and their jobs became precarious.<sup>162</sup> The new politically selected boards quickly abolished faculty governance that had existed even in the Soviet time because, as in other democracies, the boards held the legal responsibility for the institution as a whole.<sup>163</sup> The public lost the ability to monitor the universities and ensure that public funds were not being siphoned off into private pockets because, while the public universities were subjected to public audits and freedom of information requests, the private universities were not.<sup>164</sup>

[hereinafter Scheppele, *Autocracy Under Cover*] (explaining that a checklist approach cannot spot bad interaction effects in otherwise reasonable constitutions).

<sup>156</sup> See *Frankenstate*, *supra* note 138, at 561 (explaining how Fidesz vetted each new law so that defenders could claim that there were other laws just like it in Europe, thus making it difficult for critics to identify what Fidesz was doing to suppress democracy).

<sup>157</sup> See *About ECPRD*, THE EUROPEAN CENTRE FOR PARLIAMENTARY RESEARCH AND DOCUMENTATION (ECPRD), <https://ecprd.secure.europarl.europa.eu/ecprd/public/page/about> (noting that the main activity of the ECPRD is managing requests from one parliament to others in the network seeking information that is used to compare legislative activities and parliamentary practices).

<sup>158</sup> See Claudia Ciobanu et al., *Jury's Out on V4 Comparative Law Institute*, BALKAN INSIGHT (Nov. 26, 2020), <https://balkaninsight.com/2020/11/26/jurys-out-on-v4-comparative-law-institute> (outlining the idea of the joint institute); *Mission, Strategy, Vision*, FERENC MADL INSTITUTE OF COMPARATIVE LAW, <https://mfi.gov.hu/en/mission-strategy-vision> (illustrating the public face of the operation for the joint institute).

<sup>159</sup> See Benjamin Novák, *Hungary Transfers 11 Universities to Foundations Led by Orbán Allies*, N.Y. TIMES (Apr. 27, 2021), <https://www.nytimes.com/2021/04/27/world/europe/hungary-universities-orban.html>.

<sup>160</sup> *Id.*

<sup>161</sup> See Kim Lane Scheppele et al., *The EU Commission has to Cut Funding to Hungary: The Legal Case*, GREENS GRP. OF THE EUR. PARL. 11–13 (July 9, 2021), <https://www.greens-efa.eu/en/article/document/the-eu-commission-has-to-cut-funding-to-hungary-the-legal-case> (detailing the legal plan for the privatization of universities).

<sup>162</sup> See Tímea Drinóczi, *Loyalty, Opportunism and Fear: The Forced Privatization of Hungarian Universities*, VERFASSUNGSBLOG (Feb. 5, 2021), <https://verfassungsblog.de/loyalty-opportunism-and-fear/> (discussing the privatization of universities in Hungary).

<sup>163</sup> See Árpád Kocsis, *The Shift in Governance Models for Hungarian Universities*, HEINRICH-BÖLL-STIFTUNG (June 14, 2021), <https://cz.boell.org/en/2021/06/14/shift-governance-models-hungarian-universities>. (analyzing privatization of Hungarian universities and the political composition of the new boards of trustees).

<sup>164</sup> Novák, *supra* note, 159.



Academic freedom, as a result, became severely threatened in Hungary. But when challenged, the Hungarian government claimed it had just done what Finland did a few years earlier to privatize its universities.<sup>165</sup> It took several years for the European Union to figure out that, unlike Finland, Hungary had not privatized universities in order to strengthen academic freedom and permit a broader range of private funding to support universities but instead had appeared to copy Finland in order to undermine the whole university system.<sup>166</sup> At the end of 2022, the European Union froze all funds that would otherwise go to these universities due to the corruption risks from taking substantial amounts of EU funds private and therefore losing all public accountability for those funds.<sup>167</sup>

What does international law have to say about these Frankenstate moves? Given that the tactics of the new autocrats were developed precisely to evade triggering international condemnation when states turned their backs on democracy, it is not surprising that the new autocrats are operating either in spaces where international law has not traditionally dared to go or with the cover of perfectly reasonable international models borrowed from good democracies. International election observers, human rights monitors and international organizations that track democracies have therefore been very slow to recognize the danger to democracy created by the new autocrats.<sup>168</sup> As the dangers have been dawning on them, however, new resources are being developed at record speed to cope with the tactics of the new autocrats.<sup>169</sup>

#### IV. THE RIGHT TO DEMOCRATIC GOVERNANCE 2.0

The new autocrats have attacked democratic institutions precisely where international law has feared to tread—by changing national constitutional law. In most democracies, however, rights in national constitutions have been thoroughly infused with international human rights principles which make them harder to undermine unilaterally in one country.<sup>170</sup> As a result, the new autocrats do not typically attack the civil and political rights embedded in those constitutions but operate where there is less international attention, using economic leverage against their opponents,

<sup>165</sup> See Ádám Horváth, *Completely New Model of Corvinus University of Budapest is Discussed*, DAILY NEWS HUNG. (Feb. 1, 2019), <https://dailynewshungary.com/completely-new-model-of-corvinus-university-of-budapest> (discussing the new model of Hungarian universities).

<sup>166</sup> See Peter Maassen et al., *State of Play of Academic Freedom in the EU Member States: Overview of De Facto Trends and Developments*, EUR. PARLIAMENTARY RES. SERV. SCI. FORESIGHT UNIT (STOA) 93–98 (Mar. 2023), [https://www.europarl.europa.eu/RegData/etudes/STUD/2023/740231/EPRS\\_STU\(2023\)740231\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2023/740231/EPRS_STU(2023)740231_EN.pdf) (discussing the academic freedom in EU Member States).

<sup>167</sup> See *EU Council Excludes 21 Hungarian Universities from Horizon Europe and Erasmus Funding over Hungarian Rule of Law Breaches*, BAVARIAN RES. ALL. (Jan. 12, 2023), <https://www.bayfor.org/en/news/latest-news/news-detail/4373-eu-council-excludes-21-hungarian-universities-from-horizon-europe-and-erasmus-funding-over-hungarian-rule-of-law-breaches.html> (listing the universities that are maintained by Orbán and his foundation).

<sup>168</sup> See Scheppele, *Autocratic Legalism*, *supra* note 97, at 578–79 (2018); Emily Hart, *Backsliding on Freedom of Expression Around the World Needs to End*, THE NEW HUMANITARIAN (Aug. 25, 2022), <https://www.thenewhumanitarian.org/opinion/2022/08/25/World-freedom-of-expression-report> (“The international response to attacks on freedom of expression has been, at best, uneven, consisting of empty words or slaps on the wrist that do little to deter countries from attacking protesters, journalists, and netizens.”).

<sup>169</sup> See, e.g., Laura Gamboa, *How Oppositions Fight Back*, 34 J. OF DEMOCRACY 90, 101–02 (2013) (discussing democratic backsliding and how it can be reversed).

<sup>170</sup> See generally Mary Kathryn Healy, *Constitutional Incorporation of International Human Rights Standards: An Effective Legal Mechanism?*, 2 CHI. J. INT. L. ONLINE 114 (2023), <https://cjl.uchicago.edu/sites/default/files/2023-06/2ChiJIntLOnline114.pdf> (showing how international human rights law has been incorporated either directly or indirectly into national constitutions worldwide); Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT’L & COMP. L. 287, 289, 293–94 (1995) (discussing the influence of the Universal Declaration of Human Rights in domestic constitutions).

particularly in the absence of internationally enforceable social and economic rights.<sup>171</sup> The new autocrats also rearrange the constitutional structure of institutions to consolidate power in fewer and fewer hands.<sup>172</sup>

International law has traditionally had very little to say about the *structural* parts of national constitutions, so the new autocrats have sought to evade international condemnation by focusing on dismantling checks and balances, eliminating veto points, compromising the independence of monitoring and adjudicating institutions and suspending the rules that ensure that they are also bound by law.<sup>173</sup> The structural parts of constitutions determine how power is distributed (and limited) across national constitutional institutions and they provide guarantees of independence so that crucial checking institutions like courts, ombudsmen and central banks can stand apart from politics in order to ensure that someone guards the guardians.<sup>174</sup> Autocrats seek to destroy this institutional complexity to make the exercise of power simple so that there are no pesky institutional or procedural barriers to the instant realization of their wishes.<sup>175</sup> Additionally, they typically want to change the rules to make it possible to stay in power for the foreseeable future.

International law has generally avoided taking positions on the internal structures of governments. In fact, international democracy assistance typically takes the form of informing reforming governments of their options, only to say that international experts cannot choose for the locals but can only advise on alternatives.<sup>176</sup> But as democracies have declined around the world over the last two decades or so, we are now witnessing the fast emergence of international protection for key structural elements of national democratic systems.<sup>177</sup> Regional organizations have tackled questions about judicial independence,<sup>178</sup> term limits in presidential systems,<sup>179</sup> and the autonomy of some “fourth branch” institutions,<sup>180</sup> including election offices,<sup>181</sup> anti-corruption bodies,<sup>182</sup>

<sup>171</sup> See Scheppele, *Autocratic Legalism*, *supra* note 97, at 575–77.

<sup>172</sup> See Scheppele, *Autocracy Under Cover*, *supra* note 155, at 198 (“Under the assumption that local knowledge is always necessary to make constitutionalist practices work, the advisors of the [transnational legal order] present local leaders with a variety of alternatives that they could adopt, all of which are – almost by definition – not normatively equal. . . . Putting together a composite of acceptable alternatives in ways that consolidate power without allowing it to rotate turns out to be quite possible.”).

<sup>173</sup> See Scheppele, *Autocratic Legalism*, *supra* note 97, at 577 (“Legalistic autocrats operate by pitting democracy against constitutionalism to the detriment of liberalism.”)

<sup>174</sup> See David Landau, *Abusive Constitutionalism*, 47 U. CAL. DAVIS L. REV. 189, 211–13 (2013) (discussing the use of constitutional change in a way that erodes democratic order).

<sup>175</sup> *Id.*

<sup>176</sup> See Scheppele, *Autocracy Under Cover*, *supra* note 155, at 192–96 (showing that contemporary international rule of law advising now consists of showing local leaders alternative models and allowing them to make the final choices); DEVAL DESAI, EXPERT IGNORANCE 12–13 (2023) (arguing that rule of law advisors often explicitly claim ignorance of local contexts as part of their expertise).

<sup>177</sup> See Thomas Carothers & Benjamin Press, *Understanding and Responding to Global Democratic Backsliding* 1–2, 4–5, 17–18 (CARNEGIE ENDOWMENT FOR INT’L PEACE WORKING PAPER, 2022) (documenting several different strategies of autocratic takeover of democratic institutions and suggesting that different sorts of protective strategies would be useful for different types of autocratic consolidation).

<sup>178</sup> See Scheppele, *Treaties Without a Guardian*, *supra* note 100, at 108 (showing that the European Court of Justice has actively attempted to protect judicial independence).

<sup>179</sup> VENICE COMMISSION, REPORT ON TERM LIMITS, PART I: PRESIDENTS (2018) (outlining best practices for presidential term limits).

<sup>180</sup> See MARK TUSHNET, THE NEW FOURTH BRANCH: INSTITUTIONS FOR PROTECTING CONSTITUTIONAL DEMOCRACY 25–27 (2021) (discussing “fourth branch” institutions that are designed to protect constitutional democracy).

<sup>181</sup> See Guide on Article 3 of Protocol 1, *supra* note 50, at 28, ¶ 114 (guiding legal practitioners on the judgments and decisions of the Court with regard to the right to free elections).

<sup>182</sup> See LEONARDO S. BORLINI, CODES OF CONDUCT FOR PUBLIC OFFICIALS: GRECO FINDINGS AND RECOMMENDATIONS, GROUP OF STATES AGAINST CORRUPTION 4 (Mar. 20, 2019), <https://rm.coe.int/codes-of-conduct->

national banks,<sup>183</sup> universities,<sup>184</sup> and rights monitors.<sup>185</sup> In short, international law has been responding to the crisis of democratic backsliding by developing standards to protect crucial democratic institutions.

How has international law grown these new powers?<sup>186</sup> Just as the initial “emerging right to democratic governance” grew sideways out of a combination of individual rights to speech, assembly, and voting as well as the collective right of self-determination, the legal resources for defending constitutional-democratic institutions have also grown sideways from a variety of legal sources, most prominently the protection of individual rights through the elaboration of the national constitutional structures that must be ensured in order to guarantee these rights.<sup>187</sup> If Tom Franck spotted the first wave of changes sustaining an emerging right to democratic governance, we are now witnessing the rapid emergence of a second wave of changes that support the right to democratic governance by shoring up national democratic institutions. After documenting the success of Franck’s *Right to Democratic Governance 1.0*, we are in the middle of witnessing an explosion of legal resources that now constitute a new *Right to Democratic Governance 2.0*.

Regional human rights courts are at the forefront of this development. While they may be formally limited to adjudicating violations of rights, judges on these courts have started to recognize that the practical realization of individual rights requires particular configurations of national constitutional institutions.<sup>188</sup> As a result, legally enforceable principles protecting democratic institutions are being derived from rights conventions and democratic charters.<sup>189</sup> In particular, the rights to vote and stand for office have started to ground emerging norms about the structural preconditions for free and fair elections as well as what alternatives should and must not be presented to voters at election time so that autocrats cannot use incumbency to tilt elections in their favor.<sup>190</sup> The rights to a fair trial and to effective remedies have started to ground transnational standards for

[for-public-officials-greco-findings-recommendations-p/168094256b](https://www.greco-eu.org/en/for-public-officials-greco-findings-recommendations-p/168094256b) (providing information about the Group of States against Corruption [GRECO] findings and recommendations for fighting corruption).

<sup>183</sup> See Mario Draghi, President of the Eur. Cent. Bank, First Lamfalussy Lecture at the Banque Nationale de Belgique, Brussels (Oct. 26, 2018), <https://www.ecb.europa.eu/press/key/date/2018/html/ecb.sp181026.en.html> (discussing the challenges of central bank independence).

<sup>184</sup> See *Inter-American Principles on Academic Freedom and University Autonomy*, INTER-AM. COMM’N H.R. (2021), [https://www.oas.org/en/iachr/reports/questionnaires/2021\\_principiosinteramericanos\\_libertadacademica\\_autonomiauniversitaria\\_eng.pdf](https://www.oas.org/en/iachr/reports/questionnaires/2021_principiosinteramericanos_libertadacademica_autonomiauniversitaria_eng.pdf) (laying out general principles of academic freedom).

<sup>185</sup> See *About the European Network of Ombudsmen*, EUROPEAN NETWORK OF OMBUDSMEN, <https://www.ombudsman.europa.eu/en/european-network-of-ombudsmen/about/en> (explaining the role of ombudsmen in European governments); see also *About EFDPO*, EUROPEAN FEDERATION OF DATA PROTECTION OFFICERS, <https://www.efdp.eu> (explaining the role of European data protection officers in protecting fundamental rights).

<sup>186</sup> In what follows, I will adopt the American convention of discussing European Union law as international law, though of course in the EU itself, EU law is integrated with national law in such a way that it does not seem like a separate regime of law “above” the state. In most European law schools, international law departments do not cover Union law which is instead covered under the relevant subject matter fields (e.g., competition law, environmental law, labor law, etc.). What I will address in this section, however, is the development of European constitutional law that regulates the structures of the Union and also the constitutional structures of institutions within the Member States insofar as they bear on the ability of Member States to enforce EU law.

<sup>187</sup> Scheppele, *The Party’s Over*, *supra* note 42 (examining how the protection and regulation of political parties emerges from the individual right of association).

<sup>188</sup> See, e.g., Guide on Article 3 of Protocol 1, *supra* note 50, at 7, ¶¶ 63, 109 (linking the right to free elections to untainted forms of election administration).

<sup>189</sup> Franck, *supra* note 1, at 57–59 (where he foreshadowed this development).

<sup>190</sup> Guide on Article 3 of Protocol 1, *supra* note 50, at 26, ¶¶ 109–10 (particularly with regard to the resolution of election disputes).

judicial independence.<sup>191</sup> And the growing interdependence of countries underwritten by ever more all-encompassing treaties (in this respect, the European Union is way ahead of the rest) creates a reliance by transnational institutions on national ones that gives the transnational institutions a stake—and therefore a say—in how those national institutions are configured.<sup>192</sup> This means in practice that when democracies come together to accomplish common purposes through treaties, they sometimes rely on the provisions in the national law of all of their other treaty partners to preserve and protect the agreements they have made.<sup>193</sup> This interdependence then becomes the basis not only of common standards for national constitutional institutions but also creates the need for new sanctions regimes against democratic backsliding.

Let us start with the Inter-American system.

### A. *The Inter-American System—and the Infrastructure of Democracy*

The Inter-American Court of Human Rights (IACtHR) has insisted that the courts of signatory states engage in “conventionality review,” which is the direct application of the Inter-American Convention in domestic adjudication.<sup>194</sup> While not all Latin American courts have taken up the invitation to engage in conventionality review, some courts have used the increasingly bold jurisprudence of the IACtHR to shape their understandings of their domestic constitutions and to hold off aspirational autocrats who are trying to consolidate power in their domestic constitutional order.<sup>195</sup> As the IACtHR has begun to transform the rights over which it presides into structural requirements that democratic national constitutions must honor, some national courts have used this opportunity to strengthen their own abilities to withstand anti-democratic pressures by developing the idea of a “constitutional block” that fuses national and international law.

For example, the most internationally visible constitutional court in the region, the Colombian Constitutional Court, has strengthened the Court’s power to keep democracy on track with just such a fusion.<sup>196</sup> In a country whose constitutional system has produced “both a very strong president. . . and at times a weak, dysfunctional and clientelistic Congress,”<sup>197</sup> the Constitutional Court has strengthened itself and its rulings by importing international law ideas directly into its decisions, interpreting the national constitution through the invocation of Article 93 of the constitution.<sup>198</sup> Article 93 requires both that international human rights treaties have priority over domestic statutes and that the constitution itself be interpreted in light of these human rights agreements.<sup>199</sup> The Court has therefore developed a “thick engagement between domestic constitutional law and international law”<sup>200</sup> by understanding the national constitution

<sup>191</sup> VENICE COMMISSION, REPORT ON THE INDEPENDENCE OF THE JUDICIAL SYSTEM, PART I: THE INDEPENDENCE OF JUDGES (2018) (laying out standards by which to assess the independence of judges).

<sup>192</sup> See Kim Lane Scheppele et al., *EU Values Are Law, after All: Enforcing EU Values Through Systemic Infringement Actions by the European Commission and the Member States of the European Union*, 39 Y.B. OF EUR. L. 3, 13–15, (Mar. 29, 2020) [hereinafter Scheppele et al., *EU Values*] (discussing how the values of the European Union have been and should be enforced through European litigation).

<sup>193</sup> See *id.*

<sup>194</sup> See Eduardo Ferrer Mac-Gregor, *Conventionality Control: The New Doctrine of the Inter-American Court of Human Rights*, 109 AJIL UNBOUND 93, 93 (2015) (laying out the origins and development of the conventionality control doctrine).

<sup>195</sup> See *id.* at 97.

<sup>196</sup> See MANUEL JOSÉ CEPEDA ESPINOSA & DAVID LANDAU, *COLOMBIAN CONSTITUTIONAL LAW: LEADING CASES* 42–43 (2017) (explaining the “constitutional block”).

<sup>197</sup> *Id.* at 25.

<sup>198</sup> *Id.* at 43.

<sup>199</sup> *Id.*

<sup>200</sup> *Id.* at 44.

in light of international law principles in a wide-ranging set of cases. The resulting “constitutional block” has been on particularly prominent display when international humanitarian law was relevant to intervening in the long-running civil conflict with the guerilla group FARC, determining the responsibility of the government for internally displaced persons, and setting the limits the government must observe in states of exception.<sup>201</sup> Infusing its own jurisprudence with ideas drawn from international law, the Colombian Constitutional Court has made it harder for the government to attack it by invoking standards that no actor in Colombia can unilaterally change. In fact, seeing the Colombian Constitutional Court doing just this, under the leadership of Manuel Cepeda Espinosa, was what inspired me to write this lecture. It is one of many reasons why I am honored that he was selected as my distinguished commentator.

The IACtHR has tried to strengthen independent institutions necessary for democracy in the region across a number of different fields. It has been particularly active when national courts have come under attack, since bringing courts to heel is very often a first goal of aspirational autocrats. The American Convention of Human Rights, Article 8.1 guarantees that “every person has the right to a hearing . . . by a competent, independent and impartial tribunal.”<sup>202</sup> While framed as an individual right, the text obviously assumes the existence of competent, independent and impartial tribunals, which in turn invites an inquiry by the IACtHR as to whether those structural requirements are met. The IACtHR has therefore used this individual right to develop institutional preconditions for its realization, reaching quite far into the terrain of national constitutions.<sup>203</sup>

*Constitutional Court v. Peru*<sup>204</sup> reviewed the impeachment of justices of the Peruvian Constitutional Court under the then-presidency of aspirational autocrat Alberto Fujimori. Fujimori had disagreed with a key judgment of that national court and sought to have the justices removed.<sup>205</sup> The Inter-American Commission, in referring the case to the Court, argued that Article 8 of the Convention required the judges be guaranteed “independence, autonomy and impartiality in the exercise of their functions” and that “the irremovability of judges is implicitly guaranteed in Article 8(1). . . .”<sup>206</sup> The IACtHR agreed, adding that “the independence of any judge presumes that there is an appropriate appointment process, a fixed term in the position and a guarantee against external pressures.”<sup>207</sup> Even when judges were threatened by the parliament with impeachment, a process provided for in the constitution, the IACtHR reiterated that “any person subject to a proceeding of any nature before an organ of the State must be guaranteed that this organ is competent, independent and impartial and that it acts in accordance with the procedure established by law for hearing and deciding the case submitted to it.”<sup>208</sup>

Amassing abundant evidence that the impeachments of judges had been initiated in order to pressure the Constitutional Court to bend to the will of politicians, the IACtHR found that the conduct of the impeachment process itself violated the fair trial rights of the justices.<sup>209</sup> Addressing what these impeachments did to the Constitutional Court as an institution, the IACtHR held that “The dismissal of the justices and the omission by Congress to appoint substitutes, violated *erga*

<sup>201</sup> *Id.*

<sup>202</sup> ACHR, art. 8.1.

<sup>203</sup> Mac-Gregor, *supra* note 194, at 93.

<sup>204</sup> *Constitutional Court v. Peru, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 71 (Jan. 31, 2001).*

<sup>205</sup> *Id.* ¶¶ 56, 64.

<sup>206</sup> *Id.* ¶ 64.

<sup>207</sup> *Id.* ¶ 75.

<sup>208</sup> *Id.* ¶ 77.

<sup>209</sup> *Id.* ¶ 64.



omnes the possibility of exercising the control of constitutionality and the consequent examination of whether the State's conduct was in harmony with the Constitution."<sup>210</sup> The IACtHR inquired into the constitutional structure of the national judiciary in order to ensure that Convention rights were upheld by protecting individual judges from politically motivated removal proceedings and ensuring that there were enough constitutionally required members on that Court for it to exercise its constitutional functions.

The IACtHR later revisited the topic of judicial independence in two cases brought against Ecuador by judges of the Constitutional Court, the Supreme Court and the Supreme Electoral Tribunal, arising out of what the judges alleged was their arbitrary termination in 2004 through impeachment proceedings that failed to guarantee either procedural fairness to them specifically or to the continued operation of their courts in general. Like the Peruvian case, *Constitutional Tribunal v. Ecuador*<sup>211</sup> originated out of a claim about the availability of the right to a hearing before an impartial tribunal for impeached constitutional judges even as it raised questions about judicial independence at the institutional level. A parallel case was brought by judges of the Supreme Court.<sup>212</sup>

The Ecuadorian constitutional judges had been fired in turbulent political times.<sup>213</sup> Ecuador had had seven presidents in nine years, none of whom had completed their terms, and the courts were frequent targets of reorganization and attacks during this period.<sup>214</sup> A new constitution enacted in 1998 guaranteed judicial independence but, in establishing the new institutions that the constitution created, political disputes arose over how to elect the judges to sit on these new courts.<sup>215</sup> One parliamentary majority elected the judges; the next parliamentary majority impeached the president who had nominated those judges.<sup>216</sup> The new president announced a proposal to reorganize the Constitutional Tribunal, Supreme Court, and Electoral Tribunal by removing the judges already elected to office by the previous parliament.<sup>217</sup> The new parliament then passed resolutions firing all of the judges from all three courts on the grounds that they had been unlawfully appointed.<sup>218</sup> New judges appointed to the Supreme Court promptly issued a series of decisions nullifying prior court decisions against former presidents of the republic, giving a broad hint about why they may have been appointed.<sup>219</sup> Immediately thereafter, the appointments of all of these new judges of the Supreme Court were terminated<sup>220</sup> and Ecuador had no operating Supreme Court for about seven months.<sup>221</sup> The Constitutional Court was also suspended for nearly a

<sup>210</sup> *Id.* ¶ 112.

<sup>211</sup> Case of the Constitutional Tribunal (Camba Campos et al.) v. Ecuador, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 268 (Aug. 28, 2013) [hereinafter *Camba Campos*].

<sup>212</sup> See Case of the Supreme Court of Justice (Quintana Coello et al.) v. Ecuador, Preliminary Objections, Merits, Reparations, and Costs, Judgment of August 23, 2013, Inter-Am. Ct. H.R. (ser. C) No. 266 (Aug. 23, 2013).

<sup>213</sup> *Camba Campos*, No. 268, ¶¶ 40–42.

<sup>214</sup> See *id.* (providing political and historical context surrounding factual background of claims brought by judges).

<sup>215</sup> See *id.* ¶¶ 49–51, 53 (outlining the relevant provisions of the 1998 New Constitution guaranteeing judicial independence and describing the resulting conflict over the election process for judges, which Congress resolved by approving a “single list” election whereby Congress would vote on the list of the first judges named on slates provided by different State authorities).

<sup>216</sup> See *id.* ¶¶ 53, 55–56 (contrasting the 2003 election of judges by Congress with the 2004 presidential impeachment for the offense of embezzlement).

<sup>217</sup> *Id.* ¶ 56.

<sup>218</sup> See *id.* ¶¶ 59–61 (detailing the procedures leading to the termination of appointed judges).

<sup>219</sup> See *id.* ¶ 110 (acknowledging decisions of political significance by new Supreme Court of Justice).

<sup>220</sup> See *id.* ¶ 112 (quoting presidential decree declaring the appointed judges of the Supreme Court of Justice terminated).

<sup>221</sup> *Id.* ¶ 117.

year after its judges were also impeached.<sup>222</sup> New justices elected in 2006 were all removed in 2007.<sup>223</sup> Another new constitution in 2008 shook up the system again, but at least it guaranteed that the Constitutional Court justices should not be subjected to impeachment.<sup>224</sup> By the time that the IACtHR decided this case in 2013, a full nine years and many subsequent reorganizations of the judiciary had passed since the initial firing of the judges who brought the case.

In the *Constitutional Tribunal* case, the IACtHR found numerous flaws with the procedures through which the judges' appointments had been terminated, which would have been enough for the IACtHR to find in the judges' favor.<sup>225</sup> But the IACtHR went beyond the situation of the particular judges to elaborate on what the *institutional* requirement of judicial independence required.<sup>226</sup> Citing the United Nations Basic Principles on the Independence of the Judiciary and therefore itself relying on international law beyond its own reach,<sup>227</sup> the IACtHR declared that "the free removal of judges fosters an objective doubt in the observer about the real possibility of judges to decide specific disputes without fear of reprisal."<sup>228</sup> The IACtHR quoted the Basic Principles, which stated that "[t]he judiciary shall decide matters before them [...] on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason."<sup>229</sup> Drawing on a wide range of international law sources from the Human Rights Committee's general comments to the African Principles on the Right to a Fair Trial,<sup>230</sup> the IACtHR found that

[T]he State must guarantee the autonomous exercise of the judicial function in both its institutional aspect, that is in relation to the Judiciary as a system, and also in relation to its individual aspect, that is, as regards the person of the specific judge. The Court finds it pertinent to clarify that the objective dimension is related to essential aspects of the rule of law, such as the principle of the separation of powers, and the important role played by the judicial function in a democracy. Consequently, this objective dimension transcends the figure of the judge and

<sup>222</sup> See *Camba Campos*, ¶¶ 118–19 (stating that the resolution appointing Constitution Tribunal was annulled in 2005 and the Constitutional Tribunal spent almost a year in recess before new court elected in 2006).

<sup>223</sup> *Id.* ¶ 119.

<sup>224</sup> See ¶ 121 (describing the new Constitution and its incorporation of international human rights instruments as part of Ecuador's legal system).

<sup>225</sup> See ¶¶ 178–79 (finding that the termination of the judges and arguments in support thereof do not show clearly that Congress was competent to review legality of appointment of the judges and further considering that uncertain procedures examining and reversing appointments would increase the risk of undue external pressure on the exercise of judicial functions and undermine the guarantee of stability in office).

<sup>226</sup> See *id.* ¶¶ 188–89 ("[T]he following guarantees are required for judicial independence: an appropriate appointment procedure, tenure, and a guarantee against external pressure.").

<sup>227</sup> See *id.* ¶ 188. International law is often important in encouraging democracy—supporting transitions precisely because it cannot be gamed by those who rely on it. It is beyond their reach to change unilaterally, which gives international law a resilience that domestic law does not have.

<sup>228</sup> *Id.* ¶ 189.

<sup>229</sup> *Id.* ¶ 190 (quoting Principle 2 of the United Nations Basic Principles).

<sup>230</sup> See *id.* ¶¶ 191–94 (citing Human Rights Comm., General Comment No. 32, Article 14: Right to Equality Before Courts and Tribunals and to a Fair Trial, ¶ 20, CCPR/C/CG/32 (Aug. 23, 2007); EUR. PARL. ASSEM., *Recommendation of the Committee of Ministers on the Independence, Efficiency, and Role of Judges*, 58th Sess., principles I, VI, Doc. No. Rec (94) 12 (Oct. 13, 1994); African Comm. on Human & Peoples' Rights, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, at 3, ¶ A(4)(n)(2), Doc. No. DOC/OS(XXX)247 (2003); ACHR art. (23)(1)(c), Nov. 22, 1969, O.A.S.T.S. No. 26, 1144 U.N.T.S. 123; then citing Apitz Barbera et al. ("First Court of Administrative Disputes") v. Venezuela, Preliminary Objection, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 182, ¶ 206 (Aug. 5, 2008); Reverón Trujillo v. Venezuela, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 197, ¶ 138 (Jun. 30, 2009); H. R. Comm., General Comment No. 25: The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service (Art. 25), ¶ 23, CCPR/C/21/Rev.1/Add/ 7 (July 12, 1996); Case of Chocrón Chocrón v. Venezuela, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H. R. (ser. C) No. 227, ¶ 135 (July 1, 2011)).

has a collective impact on society. In addition, a direct relationship exists between the objective dimension of judicial independence and the right of judges to accede to and remain in office under general terms of equality, as an expression of their guarantee of stability.<sup>231</sup>

According to the IACtHR, the state's interference with these broad institutional guarantees, and not just the violation of the fair trial rights of individual judges who were subject to dismissal proceedings, constituted a violation of Article 8(1) of the American Convention.<sup>232</sup>

The Peruvian and Ecuadorian cases were brought by judges openly dismissed for political reasons in the context of a political struggle to control the judiciary.<sup>233</sup> The IACtHR stood up strongly against these glaring violations through judgments that, for all of the general insights they produced, were grounded in local detail. While the IACtHR has risen to the challenge in individual cases, however, it has been reluctant to state general principles in the abstract.<sup>234</sup> In 2018, the Inter-American Commission asked the IACtHR for a more general advisory opinion on judicial independence, as interpreted against the backdrop of the Democratic Charter.<sup>235</sup> But the IACtHR demurred, reluctant to make general pronouncements on a topic when pending cases in the system would raise the issue more concretely.<sup>236</sup> So far, the IACtHR has decided these tricky judicial independence cases only on the basis of concrete facts.

The IACtHR was, however, much less reticent in defining general standards in an advisory judgment about another way that democracies fail, which is through the extension of presidential terms of office. Since almost all Latin American countries have presidential systems of government, one of the biggest challenges to democracy in the region has come from the attempts by aspirational autocrats to stay in power through constitutional amendments that allow them to run for more terms in office than the national constitution permitted when they first took office.<sup>237</sup> In Peru, Argentina, Brazil, Venezuela, Dominican Republic, Colombia, Ecuador and Bolivia, constitutions were amended in the 1990s and 2000s to allow single-term-limited presidents to stand for reelection.<sup>238</sup> After permitting the extension of the presidential term of office from one to two terms, the Colombian Constitutional Court rejected then-President Álvaro Uribe's insistence that he be permitted to run for a third term in a judgment that declared the constitutional amendment that would have extended his term unconstitutional.<sup>239</sup> President Rafael Correa's effort to run for a third term

<sup>231</sup> *Camba Campos*, ¶ 198.

<sup>232</sup> *See id.* ¶ 199 (finding a violation of the American Convention when the permanence of judges is "arbitrarily affected").

<sup>233</sup> *See id.* ¶ 327 (declaring Ecuador responsible for violations of the American Convention based on "arbitrary" termination, impeachment proceedings, and harm to judicial independence to the detriment of dismissed judges.); *Constitutional Court v. Peru, Merits, Reparations, and Costs, Judgment, Inter-Am Ct. H.R. (ser. C) No. 71, 53, ¶ 130 (Jan. 31, 2011)* (finding that Peru violated right to fair trial, right to judicial protection, and other substantive rights of dismissed judges).

<sup>234</sup> *See Rejection of Request for an Advisory Opinion Presented by Inter-Am. Comm'n H.R., Order of the Court, Inter-Am. Ct. H.R. (ser. A), ¶¶ 9–10 (May 29, 2018)* (reiterating that the advisory function of the Inter-American Court of Human Rights should not "be exercised in abstract speculations without any foreseeable application to a specific situation" but should be used as guidance in making a strictly legal analysis).

<sup>235</sup> *Id.* ¶ 1.

<sup>236</sup> *See id.* ¶¶ 17–18 (stating that the Court "would be better placed" to make a "case-by-case analysis" under its contentious jurisdiction and thereby avoid making premature rulings on matters that could instead be considered in context of contentious case).

<sup>237</sup> *See e.g., Javier Corrales & Michael Penfold, Panama: Presidential Term Limits Tested in Latin America*, ECON. INTELL. UNIT (Jan. 30, 2018) (describing various political challenges instigated by standing presidents to presidential term limits in countries across Latin America).

<sup>238</sup> *See id.*; Javier Corrales & Michael Penfold, *Manipulating Term Limits in Latin America*, 25(4) J. DEMOCRACY 157, 160 (2014) (the one-term limit extended to two terms in Paraguay, but then set back at one term a decade later).

<sup>239</sup> The decisions that permitted the first but not the second term extension are translated and excerpted with helpful contextual explanations in Cepeda Espinosa and Landau, *supra* note 196, at 340–60. In rejecting a third presidential term, the

in Ecuador was foiled by a referendum that he lost.<sup>240</sup> But in Venezuela, Nicaragua, Bolivia and Honduras, term limits fell and the associated democracies were either crushed or severely damaged.<sup>241</sup> The Latin American experience has made abundantly clear that term limits are essential for constitutional democracy to survive in presidential systems.

Against this background, in 2019, Colombia requested an Advisory Opinion from the Inter-American Court on the subject of presidential reelection without term limits.<sup>242</sup> The IACtHR issued the requested opinion,<sup>243</sup> even though this was not a traditional inquiry within the scope of interpretation of a human rights convention. The IACtHR reworded the Colombian government's questions so that they fell more precisely within its jurisdiction as a human rights court,<sup>244</sup> and then answered them fully. The IACtHR also extended its usual interpretive remit so that it found relevant not just the American Convention but all of the treaties in the Inter-American system that had a bearing on human rights.<sup>245</sup> The IACtHR deemed the Democratic Charter in particular to be an "interpretive text" that could help in understanding both the OAS Charter and the American Convention and thus determined that all three texts would be considered together in this opinion.<sup>246</sup> In short, the IACtHR went to great lengths to take the case and decide it on the broadest possible reading of its own powers to guarantee the enforcement of individual rights by elaborating the constitutional structures that are necessary for preserving these rights.

The IACtHR declared, "the interdependence between democracy, the rule of law, and the protection of human rights is the basis of the entire system of which the Convention forms part,"<sup>247</sup> before listing the prodigious number of Inter-American treaty provisions, protocols and resolutions that the Inter-American system had produced linking these three values. Taking these on board, the IACtHR proclaimed, "it is clear that the effective exercise of democracy in the States of the Americas constitutes an international legal obligation and they have, in their sovereignty, agreed

Court deployed a new constitutional doctrine that prohibited "substitution of the constitution"—that is such a fundamental change in the basic organizing principles of government that the constitutional amendment had the effect of rewriting the constitution. After President Uribe left office, the Colombian Constitution was amended in 2015 to restore the one-term rule.

<sup>240</sup> Maggy Ayala & Marcelo Rochabrún, *Ecuador Votes to Bring Back Presidential Term Limits*, N.Y. TIMES (Feb. 4, 2018), <https://www.nytimes.com/2018/02/04/world/americas/ecuador-presidential-term-limits.html>.

<sup>241</sup> See Corrales & Penfold, *supra* note 237, at 1–2 (calling decisions easing term limits in Latin American countries a "trend towards democratic erosion").

<sup>242</sup> The Figure of Indefinite Presidential Re-Election in the Context of the Inter-American System of Human Rights, Request for Advisory Opinion by Colombia, Inter-Am. Ct. H.R., ¶¶ 1, 3 (Oct. 2019).

<sup>243</sup> Advisory Opinion OC-28/21, *supra* note 76, ¶ 20. Requested by the Republic of Colombia, Presidential Reelection Without Term Limits in the Context of the Inter-American Human Rights System (Interpretation and scope of articles 1, 23, 24, and 32 of the American Convention on Human Rights, XX of the American Declaration of the Rights and Duties of Man, 3(d) of the Charter of the Organization of American States and of the Inter-American Democratic Charter), official trans. at [https://www.corteidh.or.cr/docs/opiniones/seriea\\_28\\_eng.pdf](https://www.corteidh.or.cr/docs/opiniones/seriea_28_eng.pdf).

<sup>244</sup> See *id.* ¶ 37 (rephrasing the questions to ask "Is presidential reelection without term limits a human right protected by the American Convention on Human Rights?"; "Do regulations that limit or prohibit presidential reelection violate Article 23 of the American Convention on Human Rights, either by restricting the political rights of the individual seeking to be reelected or by restricting the political rights of voters?"; "Is limiting or prohibiting presidential reelection a restriction of political rights that is consistent with the principals of legality, necessity and proportionality, in accordance with the case law of the Inter-American Court of Human Rights in the matter?"; and "[i]s presidential reelection without term limits compatible with representative democracy in the inter-American human rights protection system?").

<sup>245</sup> See *id.* ¶ 14 (relying on Article 64(1) of the American Convention to provide that any member "may consult with the Court regarding the interpretation of this Convention or of other treaties concerning the protection of human rights in the American states [ ]").

<sup>246</sup> See *id.* ¶¶ 28–30 ("Regarding [the Inter-American Democratic Charter], the Court has found that it constitutes an interpretive text of both the OAS Charter and the American Convention . . . [T]he court is empowered to rule in its advisory capacity on the preamble and all the provisions of the American Convention, the OAS Charter, the American Declaration, and the Democratic Charter. . .").

<sup>247</sup> *Id.* ¶ 46.

that such exercise is no longer solely a matter of their domestic, internal, or exclusive jurisdiction.”<sup>248</sup>

(How far the law had come since Franck’s Right to Democratic Governance 1.0!)

The IACtHR went on to argue that the Democratic Charter provided the “guiding criteria” for addressing questions about what democracy required<sup>249</sup> and catalogued the individual political rights in the Convention—the right to vote in “honest, periodic and free” elections,<sup>250</sup> the right to participate in the conduct of public affairs<sup>251</sup> and more—as a basis for arguing that democratic institutions were necessary for the protection of these rights. Linking rights to constitutional-democratic fundamentals, the Court cautioned that “the only way human rights can truly and effectively establish norms is through the recognition that they cannot be subject to majority rule, as it is precisely these rights that have been defined as limitations on the principle of majority rule.”<sup>252</sup> Given their roles in protecting minorities, democratic institutions must be strong enough to set limits on what majorities can do.<sup>253</sup> And to do this, they cannot simply respond to majoritarian demands. The potential danger is that leaders who are continually reelected will cease to represent their constituents by using the power of incumbency to their advantage and to eventually turn democracy into autocracy.<sup>254</sup> Therefore, even if democratic publics want to keep reelecting their leaders, “the prohibition on indefinite terms in office aims to prevent people who hold popularly elected office from keeping themselves in power.”<sup>255</sup>

The IACtHR explained that the Democratic Charter makes reference to the “plural regimen of parties and political organizations” that grounds a fundamental principle of political pluralism,<sup>256</sup> which in turn requires “an obligation to guarantee rotation of power.”<sup>257</sup> As the IACtHR argued, “There must be a real and effective possibility that different political movements and their candidates can win popular support and replace the ruling party.”<sup>258</sup> Among other things, this prohibits leaders from changing the rules of the game to keep themselves in power.<sup>259</sup> The IACtHR found that “the principles of representative democracy include . . . the obligation to prevent a person from remaining in power and to guarantee the rotation of power and the separation of powers.”<sup>260</sup> Bringing the analysis back to individual rights, the IACtHR found that the limitation on the political rights of someone who has already been president to be able to stand for office again was not unreasonably limited by a bar on reelection, just as the political rights of those who might

<sup>248</sup> *Id.* ¶ 55.

<sup>249</sup> See Advisory Opinion OC-28/21, *supra* note 76, ¶ 69 (finding that the Democratic Charter defined the basic characteristics of a representative democracy).

<sup>250</sup> See *id.* ¶ 58.

<sup>251</sup> See *id.* ¶ 59.

<sup>252</sup> *Id.* ¶ 70.

<sup>253</sup> See *id.* ¶ 71 (“[T]o protect minorities, the democratic process requires certain rules that limit the power of the majority as expressed at the polls.”).

<sup>254</sup> See *id.* ¶ 73 (identifying risks to representation and democracy associated with allowing a person to hold public office in perpetuity).

<sup>255</sup> *Advisory Opinion OC-28/21, supra* note 76.

<sup>256</sup> See *id.* ¶¶ 76–77 (linking political pluralism to the right of all citizens to be elected and to have access to public service, freedom of thought and expression, right to assembly, right of association, and obligation to guarantee rights without discrimination).

<sup>257</sup> *Id.* ¶ 78.

<sup>258</sup> *Id.*

<sup>259</sup> See *id.* ¶ 79 (emphasizing the need for parties to respect the limits imposed by law to prevent authoritarian governments from staying in power indefinitely).

<sup>260</sup> *Id.* ¶ 84.



have wanted to reelect such a candidate did not require a limitless field of choice.<sup>261</sup> No right is absolute, according to the IACtHR, so the political rights to vote and stand for office must give way when the preservation of democracy itself would be compromised by the possibility that a particular leader could be continuously reelected.<sup>262</sup>

By a five-to-two decision, the IACtHR found that setting term limits was not only *not* a violation of the political rights of individuals, but also that term limits were *necessary* for a robust representative democracy.<sup>263</sup> The two dissenters argued against the IACtHR taking the case in the first place and, once the admissibility decision was made, asserted that the IACtHR should have limited its opinion to simply interpreting the rights in the Convention without broadening the analysis to include the OAS and Democratic Charters to reach the institutional points.<sup>264</sup> But the majority of judges on the Court used the case to elaborate a far-reaching theory of democratic institutions and what their protection required.<sup>265</sup>

Between the judicial independence cases and the advisory opinion on presidential reelection, the IACtHR has not limited itself to outlining simply what the political and democratic rights require at the individual level but has come much closer to creating a jurisprudence of democratic institutions. According to this jurisprudence, democratic governance requires structural guarantees to keep power from being concentrated in fewer and fewer hands.<sup>266</sup> Limits on presidential terms of office and the maintenance of an independent judiciary are just two of the conditions that democratic governance requires. In reading these two requirements out of a human rights convention, supplemented by the regional Democratic Charter, the IACtHR has used its powers to shore up democratic institutions in its signatory states.

### *B. The European Regional System and the Legal Protection of Democratic Infrastructure*

The European regional system has also become increasingly active in laying down requirements that national constitutional institutions must meet. The European Court of Human Rights (ECtHR) and the Venice Commission within the Council of Europe system have generated principles of democratic governance that reach far into national legal systems to specify how they should (or more precisely, how they should not) be structured. As with the IACtHR's jurisprudence, the European regional system has been particularly focused on elaborating what judicial independence requires. The ECtHR has also begun to elaborate a bit about the institutional structure within which democratic elections must be run. The European Union, whose law supersedes national law on the topics that have been delegated to it, was late to the party, though it has had by far the bigger impact.

First, on the Council of Europe (COE) system. The Venice Commission was founded in 1990 to provide advice to the Eastern European countries that were transitioning from autocracy to democracy at that time.<sup>267</sup> It presently has 61 members, including all 46 of the Council of Europe Member

<sup>261</sup> Advisory Opinion OC-28/21, *supra* note 76, ¶¶ 91–126 (reiterating the Court's findings in the framework of the inter-American system, international human rights law, international treaties, and customary international law).

<sup>262</sup> *Id.* ¶¶ 104, 119.

<sup>263</sup> *Id.* ¶¶ 2–4.

<sup>264</sup> Advisory Opinion OC-28/21 ¶¶ 4–13, 33–34 (Pazmiño Freire, J., dissenting); Advisory Opinion OC-28/21 ¶ 12 (Zaffaoni, J., dissenting).

<sup>265</sup> Advisory Opinion OC-28/21, *supra* note 76, ¶ 149.

<sup>266</sup> *Id.* ¶¶ 71–78.

<sup>267</sup> See Marieta Safta, *The Role of the Venice Commission in Shaping European Constitutionalism*, 11 PERSPS. L. & PUB. ADMIN. 71, 71 (2022) (discussing the Venice Commission's role in encouraging European legal harmonization); Maartje De Visser, *A Critical Assessment of the Role of the Venice Commission in Processes of Domestic Constitutional Reform*, 63 AM. J. COMP. L. 963, 992 (2015) (analyzing the Venice Commission's increasingly important role in assessing constitutional systems and arguing for increased transparency and consistency in its methods of operation).

States (down one country after Russia was expelled in 2022 for its invasion of Ukraine).<sup>268</sup> It now also includes a growing number of countries outside the region.<sup>269</sup> Once a resource for developing democracies to voluntarily consult as they were reforming their laws to become more democratic, the Venice Commission has become a key monitor of democratic backsliding whose expert opinions are increasingly sought by transnational institutions to provide objective assessments of the compatibility of new laws in declining democracies with the requirements of democratic governance.<sup>270</sup> In short, the Venice Commission has been transformed in recent years from primarily being the coach of new democracies to being an important assessor of democracies in trouble.

Article 3(1) of the Statute of the Venice Commission<sup>271</sup> empowers Council of Europe bodies as well as “a state or international organization or body participating in the work of the Commission” to request opinions on particular states’ laws, and increasingly, the work of the Venice Commission has been devoted to applying its best practices and general principles to assessing the laws of backsliding states on the request of both the COE and European Union (EU) institutions. While the Venice Commission’s opinions are not legally binding by themselves, they are now being used by European transnational institutions that have enforcement powers.<sup>272</sup> In particular, the European Union—which has no body equivalent to the Venice Commission—has referred the laws of its backsliding Member States for assessment and has used those assessments in developing enforcement actions.<sup>273</sup>

The Venice Commission has now issued 22 opinions since 2010 on the legal consolidation of autocracy in Hungary, opinions that elaborate basic democratic principles in assessing not only the new 2012 constitution and many of its 12 (to date) amendments, but also the implications for democracy, rule of law, and the protection of human rights that have resulted from the repeated attacks on the judiciary, the reorganization of the public prosecutor’s office, the onerous regulatory framework for the media, and the laws affecting the rights of civil society organizations, students, LGBTIQ+ persons and ethnic and racial minorities.<sup>274</sup> The Venice Commission has produced six opinions on democratic backsliding in Poland since 2015, focusing primarily on the attacks on the

<sup>268</sup> Comm. of Ministers, *Resolution CM/Res (2022)2 on the Cessation of the Membership of the Russian Federation to the Council of Europe*, COUNCIL OF EUROPE (March 16, 2022), <https://rm.coe.int/0900001680a5da51> (taking note of both the procedure to expel Russia from the Council of Europe and also Russia’s notice of withdrawal from the organization); THE VENICE COMMISSION OF THE COUNCIL OF EUROPE, [https://www.venice.coe.int/WebForms/pages/?p=01\\_Presentation](https://www.venice.coe.int/WebForms/pages/?p=01_Presentation) (summarizing the Venice Commission membership).

<sup>269</sup> The Member States outside Europe now include Algeria, Brazil, Canada, Chile, Costa Rica, Israel, Kazakhstan, Korea, Kyrgyzstan, Mexico, Morocco, Peru, Tunisia, and the United States with Argentina, Uruguay and Japan as observers. THE VENICE COMMISSION OF THE COUNCIL OF EUROPE, [https://www.venice.coe.int/WebForms/pages/?p=01\\_Presentation](https://www.venice.coe.int/WebForms/pages/?p=01_Presentation).

<sup>270</sup> See De Visser, *supra* note 267, at 964–65, 967, 1008.

<sup>271</sup> Revised Statute of the European Commission for Democracy Through Law, *adopted by Committee of Ministers on Feb. 21, 2002 at 784th Mtg. of the Ministers’ Deputies*, CM/Res(2002)3E, art. 3(1).

<sup>272</sup> See Laurent Pech, *The Rule of Law as a Well-Established and Well-Defined Principle of EU Law*, 14 HAGUE J. RULE L. 107, 112 (2022) (showing how the European Commission’s initial treatment of the rule of law was inspired by a study previously adopted by the Venice Commission); Wolfgang Hoffman-Reim, *The Venice Commission of the Council of Europe – Standards and Impact*, 25 EUR. J. INT’L L. 579, 580, 585, 588 (2014) (explaining how the European Court of Human Rights has used Venice Commission opinions as a source of information, despite the soft law status of these opinions).

<sup>273</sup> See Paul Craig, *Transnational Constitution-Making: The Contribution of the Venice Commission on Law and Democracy*, in CONSTITUTION-MAKING AND THE TRANSNATIONAL LEGAL ORDER 156, 180–81 (Gregory Schaffer et al. eds., 2019) (discussing the EU’s participation in Venice Commission sessions and the EU’s referral of Hungary and Poland to the Commission); see also Safta, *supra* note 267, at 71 (noting that the Venice Commission has multiple avenues, including by reference from the EU, available to evaluate States and contribute to the modernization and standardization of European States).

<sup>274</sup> See the list here: [https://www.venice.coe.int/webforms/documents/by\\_opinion.aspx?country=17](https://www.venice.coe.int/webforms/documents/by_opinion.aspx?country=17).

judiciary.<sup>275</sup> It has also produced many other opinions on other democratic states in trouble, perhaps most notably intervening in the conflict between Ukrainian President Volodymyr Zelenskyy and the Constitutional Court of Ukraine after judges who were themselves suspected of violating anti-corruption rules nullified large parts of his anti-corruption program.<sup>276</sup> In addition, it has issued general reports laying out best practices, including one on presidential term limits that parallels the discussion of the IACtHR in its advisory opinion on that subject.<sup>277</sup>

With the ability to issue binding decisions interpreting the European Convention on Human Rights (ECHR), ECtHR has also thickened the meaning of constitutional democracy in several lines of its jurisprudence. It has developed a dense case law interpreting the right to vote and stand for election guaranteed in ECHR Protocol 1, Article 3.<sup>278</sup> While much of that jurisprudence specifies the contours of the individual right, some of this jurisprudence has started to elaborate what states must guarantee to protect the democratic order. For example, barring candidates who have committed serious constitutional violations from standing for office has been deemed by the ECtHR to be a reasonable restriction on democratic rights as has banning whole parties who are not committed to upholding the democratic order.<sup>279</sup> This will sound familiar to those who have followed the emerging right of democratic governance dispute from its 1990s beginnings.<sup>280</sup> What was once controversial in that dispute has now become law within the Council of Europe system.<sup>281</sup>

The ECtHR is now starting to move past this familiar territory toward examining the broader institutional framework of elections.<sup>282</sup> It has opined that those who resolve the election disputes must be impartial<sup>283</sup> and has required that election complaints be handled by institutions that possess guarantees against arbitrariness.<sup>284</sup> While these decisions do not yet provide a full picture of how electoral institutions should be structured, the basic principles of electoral management are starting to come into focus in the jurisprudence of the ECtHR. On this point, the African Court of

<sup>275</sup> See the list here: [https://www.venice.coe.int/webforms/documents/by\\_opinion.aspx?v=countries](https://www.venice.coe.int/webforms/documents/by_opinion.aspx?v=countries).

<sup>276</sup> Venice Commission, Opinion No. 1012/2020 on the Reform of the Constitutional Court CDL-AD(2020)039, ¶¶ 101–07 (Dec. 11, 2020) (noting that Ukrainian Constitutional Court reform was warranted and providing recommendations); see also Kim Lane Scheppele et al., *The Independence and Integrity of Courts*, in WEIGHING JUDICIAL AUTHORITY VI, V9–V18 (Judith Resnik ed., 2022) (compiling relevant documents which document the Ukrainian anti-corruption campaign and the controversy over the nullification of this program by the Constitutional Court, as well as the Venice Commission reports assessing it).

<sup>277</sup> See, e.g., Venice Commission, Study No. 908/2017, Report on Term Limits Part I – Presidents, CDL-AD(2018)010, ¶¶ 115–27 (March 20, 2018) (determining that there is no distinct right to re-election and arguing that term limits represent a check on power).

<sup>278</sup> See Guide on Article 3 of Protocol 1, *supra* note 50, at 8–24.

<sup>279</sup> *Paksas v. Lithuania*, App. No. 34932/04, ¶¶ 102–03, 107 (Jan. 6, 2011), <https://hudoc.echr.coe.int/eng?i=001-102617>; see also *Partisi (the Welfare Party) and Others v. Turkey*, App. Nos. 41340/98, 41342/98, 41343/98, 41344/98, ¶¶ 68–74, 76–81 (Feb. 13, 2003), <https://hudoc.echr.coe.int/eng?i=001-60936> (concluding that a “pressing social need” justified banning a political party which advocated for legal pluralism and promoted sharia law); *Linkov v. Czech Republic*, App. No. 10504/03, ¶¶ 32–46 (Dec. 7, 2006), <https://hudoc.echr.coe.int/eng?i=001-78389>; *Parti Nationaliste Basque – Organisation Régionale d’Iparralde v. France*, App. No. 71251/01, ¶ 52 (June 7, 2007), <https://hudoc.echr.coe.int/eng?i=001-80897>.

<sup>280</sup> See, e.g., Gregory Fox & Georg Nolte, *Intolerant Democracies*, 36 HARV. INT’L L.J. 1, 21, 39, 69 (1995) (advocating that the compatibility of party bans and rules that restrict the eligibility for office those who would disrupt the free basic democratic order with the emerging right to democratic governance).

<sup>281</sup> See *id.* at 43, 52, 59, 69.

<sup>282</sup> *Mugemangango v. Belgium*, App. No. 310/15, ¶¶ 69–79 (July 10, 2020), <https://hudoc.echr.coe.int/fre?i=001-203885> (holding that Article 3 of Protocol No. 1 imparts on Member States positive procedural obligations, thereby requiring institutional framework review).

<sup>283</sup> *Id.* ¶ 70.

<sup>284</sup> *Davydov and Others v. Russia*, App. No. 75947/11, ¶¶ 272, 288, 335 (Nov. 13, 2017), <https://hudoc.echr.coe.int/fre?i=001-173805>.

Human Rights is perhaps even farther along toward requiring election administration to be politically neutral.<sup>285</sup>

Like the IACtHR, the ECtHR has been perhaps most active in cases using fair trial rights to elaborate on what it would mean for a court to be “an independent and impartial tribunal established by law,” as Article 6(1) of the European Convention on Human Rights requires.<sup>286</sup> The ECtHR has held that an independent court must be independent not only of the parties to the case, but also of the executive.<sup>287</sup> It has also found that participation by irregularly appointed judges disqualifies that tribunal from meeting the Convention requirement of being a “tribunal established by law.”<sup>288</sup>

As is often the case with courts that see trouble coming from a long way off, the ECtHR girded for the upcoming battle with a seriously backsliding state in a December 2020 judgment defining in precise detail what it means to be a “tribunal established by law.”<sup>289</sup> The ECtHR did not act first in one of the most challenging states, but instead issued its landmark opinion in respect of Iceland, a clearly democratic state that formed the backdrop for the Court to put the general rules in place before the Court used them to decide a whole series of blockbuster democratic-backsliding cases involving one of Europe’s most troubled democracies, namely Poland.<sup>290</sup> When the Polish cases started coming fast and furious, the ECtHR had to determine whether a whole series of Polish courts were tribunals established by law within the meaning of Article 6 ECHR.<sup>291</sup>

Since coming to power in 2015, the government of Poland had waged relentless war on the country’s once-independent judiciary, firing judges *en masse*, packing the courts with political appointees, establishing a new disciplinary chamber within the Supreme Court to punish judges whose rulings have been criticized by the government, and transferring judges to less desirable positions when they criticized the judicial reforms.<sup>292</sup> In *Xero Flor w. Polsce sp. z.o.o. v. Poland*, decided in May 2021,<sup>293</sup> the ECtHR addressed the composition of the Constitutional Tribunal, in which the procedure for installing several justices on the Tribunal violated the national law in effect at the time. One of those irregularly appointed judges sat on the panel that declared inadmissible

<sup>285</sup> *Actions Pour la Protection des Droits de l’Homme (APDH) v. Côte d’Ivoire*, App. No. 001/2016, Judgment, African Court on Human and Peoples’ Rights [Aft. Ct. H.P.R.], ¶¶ 150–51 (Nov. 18, 2016). In this case, the Court found that an election monitoring body composed of eight representatives of government and four of the opposition out of a total of 17 representatives was not independent or impartial, or compatible with requirements of equal treatment. A helpful collection of a wide swath of international judgments on election rights can be found at <https://www.eods.eu/elex-table>.

<sup>286</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 6(1), Nov. 4, 1950, 213 U.N.T.S. 221.

<sup>287</sup> *Gurov v. Republic of Moldova*, App. No. 36455/02, ¶¶ 34–39 (July 11, 2006), <https://hudoc.echr.coe.int/?i=001-76297> (laying out the conditions that must be met for a tribunal to be established by law).

<sup>288</sup> *Guðmundur Andri Ástráðsson v. Iceland*, App. No. 26374/18, ¶¶ 287–90 (Dec. 1, 2020), <https://hudoc.echr.coe.int/?i=001-191701>.

<sup>289</sup> *Id.* ¶¶ 218–30.

<sup>290</sup> *See id.*

<sup>291</sup> *See Xero Flor W Polsce Sp. z o.o. v. Poland*, App. No. 4907/18 (May 7, 2021), <https://hudoc.echr.coe.int/?i=001-210065> (Constitutional Tribunal not a tribunal established by law); *Reczkowicz v. Poland*, App. No. 43447/19 (July 22, 2021), <https://hudoc.echr.coe.int/?i=001-211127> (Disciplinary Chamber of the Supreme Court not a tribunal established by law); *Advance Pharma SP. z.o.o. v. Poland*, App. No. 1469/20 (Feb. 3, 2022), <https://hudoc.echr.coe.int/?i=001-215388> (Civil Chamber of the Supreme Court not a tribunal established by law); *Juszczysyn v. Poland*, App. No. 35599/20 (Oct. 6, 2022), <https://hudoc.echr.coe.int/eng/?i=001-21956> (Disciplinary Chamber of the Supreme Court not a tribunal established by law); *Tuleya v. Poland*, App. Nos. 21181/19, 51751/20 (July 6, 2023), <https://hudoc.echr.coe.int/?i=001-225672> (Disciplinary Chamber of the Supreme Court not a tribunal established by law); *Wałęsa v. Poland*, App. No. 50849/21 (Nov. 11, 2023), (Chamber of Extraordinary Review and Public Affairs of the Supreme Court not a tribunal established by law).

<sup>292</sup> *See* WOJCIECH SADURSKI, POLAND’S CONSTITUTIONAL BREAKDOWN 58–88 (2019) (recounting the story of the opening salvo attacks on the Polish judiciary).

<sup>293</sup> *Xero Flor*, App. No. 4907/18, ¶¶ 263, 268, 270, 275.

the petitioner's challenge to the constitutionality of a Polish law.<sup>294</sup> The ECtHR determined that the petitioner's right to have a case heard by an impartial and independent tribunal established by law had been violated due to the presence of the irregularly appointed judge on his panel.<sup>295</sup> The decision has meant, practically speaking, that the whole Constitutional Tribunal now cannot be considered a proper court under European human rights law due to the presence of multiple irregularly appointed judges.

Decided in July 2021, *Reczkowicz v. Poland*<sup>296</sup> addressed the composition of the Disciplinary Chamber of the Polish Supreme Court. All of the judges on that court had been chosen by a newly reconstituted National Judicial Council (NJC).<sup>297</sup> The judges who previously served on the NJC had been fired before the conclusion of their lawful terms and new judges had been appointed to that body in an overtly political process under a law pushed through the parliament on a party-line vote.<sup>298</sup> Those new politically tainted judges on the new NJC then appointed all of the judges on the new Disciplinary Chamber.<sup>299</sup> Holding that this new system for making judicial appointments had been unduly influenced by the political branches, the ECtHR found that the Disciplinary Chamber, too, was not a tribunal established by law within the meaning of the European Convention.<sup>300</sup>

*Advance Pharma sp. z.o.o. v. Poland*<sup>301</sup> reached the same conclusion with regard to the Civil Chamber of the Supreme Court, since many of its judges also had been named by the politically captured NJC. This time, the ECtHR went further than just finding that the Civil Chamber was not competent to provide fair trial rights and insisted that the government of Poland address the more general rule-of-law problems that stemmed from the way that members to the NJC had been appointed so that the "systemic dysfunction" that this politicized judicial-appointments process posed for the Polish judiciary could be remedied.<sup>302</sup>

In *Grzeda v. Poland*, decided in March 2022,<sup>303</sup> and in *Zurek v. Poland*, decided in October 2022,<sup>304</sup> the ECtHR found that judges on the original NJC whose terms had been cut short in order for the government to fill the new NJC with politically tainted judges had both been denied their rights to a fair trial because there was no judicial appeal from their dismissals.<sup>305</sup> In addition, the ECtHR found that the free speech rights of Judge Zurek had been violated because his dismissal from the NJC had occurred for criticizing the judicial reforms.<sup>306</sup>

The ECtHR has also issued a set of interim measures decisions in other pending cases involving the Polish judiciary.<sup>307</sup> Between January 2022 and February 2023, the ECtHR received dozens of interim measures petitions from judges who had been fired or reassigned to new positions without

<sup>294</sup> *Id.* ¶ 106.

<sup>295</sup> *Id.* ¶¶ 290–91.

<sup>296</sup> *Reczkowicz*, App. No. 43447/19, ¶ 1.

<sup>297</sup> *Id.* ¶¶ 26–34.

<sup>298</sup> *Id.* ¶¶ 5, 7.

<sup>299</sup> *Id.* ¶¶ 28–29.

<sup>300</sup> *Id.* ¶¶ 280–82.

<sup>301</sup> *Advance Pharma sp. z.o.o. v. Poland*, App. No. 1469/20 (Mar. 5, 2022), <https://hudoc.echr.coe.int/fre?i=001-215388>.

<sup>302</sup> *Id.* ¶¶ 365–366.

<sup>303</sup> *Grzeda v. Poland*, App. No. 43572/18 (Mar. 15, 2022), <https://hudoc.echr.coe.int/eng?i=001-216400>.

<sup>304</sup> *Zurek v. Poland*, App. No. 39650/18 (Oct. 10, 2022), <https://hudoc.echr.coe.int/fre?i=001-217705>.

<sup>305</sup> *Grzeda*, App. No. 43572/18, at 79, 125; *Zurek*, App. No. 39650/18, at 35, 59.

<sup>306</sup> *Zurek*, App. No. 39650/18, ¶¶ 205–13.

<sup>307</sup> See Press Release, European Court of Human Rights, Interim Measure in Cases Concerning Transfers of Polish Judges (Dec. 7, 2022) [hereinafter ECtHR Polish Interim Measures] (noting that three of the decisions affected three Warsaw Court of Appeal judges who were forced to move from their current positions in the Criminal Division to the Labor and Security Division).



their consent.<sup>308</sup> Three of those cases resulted in the award of interim measures in which the ECtHR ordered that the judges be reinstated in their positions pending the decisions of the Strasbourg Court.<sup>309</sup> But in February 2023, the Polish government notified the ECtHR that it would refuse to comply with these orders.<sup>310</sup> The Polish government has also refused to comply with the final judgments of the ECtHR with regard to the flawed composition of the Constitutional Tribunal, Disciplinary Chamber, Civil Chamber of the Supreme Court, or National Judicial Council.<sup>311</sup> Given the obvious receptivity of the ECtHR to the Polish judges' claims, the remaining independent judges in Poland have been creative in trying to leverage the support from the ECtHR for judicial independence.<sup>312</sup> In January 2023, three judges in the Warsaw Court of Appeals made a criminal referral accusing the president of their court of abuse of power for failing to comply with the ECtHR decisions on the reinstatement of judges on his court.<sup>313</sup> As of this writing [July 2023], the standoff between the Polish government and the ECtHR continues.

What next? The COE Committee of Ministers monitors whether ECtHR decisions are honored, not just in the narrow sense in which the offending government pays the petitioner a fine assessed by the Court, but in the broader sense in instances in which the country in question must modify its laws to prevent repeat violations.<sup>314</sup> But while the Committee can exhort the offending country to comply as well as to name and shame it, its last resort is to suspend the country's participation in COE institutions or to expel the country from the COE altogether.<sup>315</sup> Because these are such draconian sanctions, they are very rarely used. In addition, the COE now has so many democratic backsliders and even outright autocracies in its midst that any sanction that depends on the agreement of a majority of Member States is likely to break in favor of the autocrats unless the violations are truly egregious.<sup>316</sup>

<sup>308</sup> See Press Release, European Court of Human Rights, Non-compliance with Interim Measure in Polish Judiciary Cases (Feb. 16, 2023) [hereinafter ECtHR Polish Non-compliance with Interim Measures] (stating there were sixty requests for temporary measures, all of which can be categorized into three groups: "lifting of immunity; suspension from judicial functions; transfer against will to other posts").

<sup>309</sup> See ECtHR Polish Interim Measures, *supra* note 308 (noting the Court only grants such requests in extreme circumstances where the applicants would otherwise be at serious risk of suffering irreparable injury).

<sup>310</sup> See *id.* (stating this is the first time the Polish Government has refused to honor the interim measures under Rule 39).

<sup>311</sup> See COUNCIL OF EUROPE, REPORT BY THE SECRETARY GENERAL UNDER ARTICLE 52 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS ON THE CONSEQUENCES OF DECISIONS K 6/21 AND K 7/21 OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF POLAND ¶ 29 (Nov. 9, 2022) (noting that Poland is not complying with five ECtHR decisions pertaining to judicial independence, leading the Secretary General to conclude that "[t]he ensuing obligation of Poland to ensure the enjoyment of the right to a fair trial by an independent and impartial tribunal established by law to everyone under its jurisdiction is not, at this stage, fulfilled").

<sup>312</sup> See Alicia Ptak, *Polish Judges Seek Charges Against Court President for Ignoring European Ruling to Reinstatement Them*, NOTES FROM POLAND (Jan. 17, 2023), <https://notesfrompoland.com/2023/01/17/polish-judges-seek-charges-against-court-president-for-ignoring-european-ruling-to-reinstatement-them/> [hereinafter Ptak, *Polish Judges Seek Charges*] (discussing three judges who are seeking criminal charges against a government official for not following the ruling of the European Court of Human Rights); see also Anna Wójcik, *The European Court of Human Rights Will Assess Whether President Duda Broke the Law*, RULE OF LAW (Feb. 17, 2023), <https://ruleoflaw.pl/the-european-court-of-human-rights-will-assess-whether-president-duda-broke-the-law/> (listing the applications waiting for consideration by the Court).

<sup>313</sup> See Ptak, *Polish Judges Seek Charges*, *supra* note 312 (noting this is the first time judges have pursued criminal charges against a government official for disobeying a European Court of Human Rights order).

<sup>314</sup> See Kanstantin Dzetsiarou & Donal K. Coffey, *Suspension and Expulsion of Members of the Council of Europe: Difficult Decisions in Troubled Times*, 68 INT'L. & COMP. L.Q. 453–454 (2019) (discussing the procedure the Committee of Ministers uses to enforce its decisions as well as the procedures that can be used once a country refuses to abide by an ECtHR decision).

<sup>315</sup> See *id.* (noting that there is no consensus on whether or not an international organization should use suspension or expulsion as a last resort).

<sup>316</sup> See generally PACE, *Hungary: PACE Decides Not to Open a Monitoring Procedure* (June 25, 2013) (noting the Parliamentary Assembly of the Council of Europe (PACE) voted NOT to open a monitoring process against Hungary in

The COE has become an important standard setter but it cannot reliably enforce these standards on its own.

Enter the European Union, which has much stronger enforcement powers. The relationship between the COE and the European Union is conceptually difficult and legally fraught, however.<sup>317</sup> On one hand, all EU Member States are members of the COE and all EU institutions are bound to honor the European Convention on Human Rights.<sup>318</sup> On the other hand, the EU itself is not a COE member or a signatory to the ECHR and thus its institutions—including most importantly the European Court of Justice (ECJ)—are not formally bound by either the Convention or the ECtHR interpretation of it until such time as the EU formally accedes.<sup>319</sup> Usually, this formal legal tension between the two systems is invisible because the ECtHR and ECJ tend to reference and honor each other's decisions even when they are not compelled to do so by law.<sup>320</sup> But as democratic backsliding in Europe—otherwise known in the EU as the “rule of law crisis”—has accelerated, the two European transnational organizations have taken different, and in some ways incompatible, courses of action.<sup>321</sup>

When Hungary began its short, sharp descent from democracy to autocracy after Prime Minister Viktor Orbán was elected in 2010 with a constitutional majority,<sup>322</sup> the European Commission did very little.<sup>323</sup> When the Hungarian government fired the most senior 10% of the judiciary by lowering the retirement age for judges, effective immediately, the European Commission brought its first and to date only infringement action against Hungary for assaults on the judiciary, arguing that Hungary had violated EU secondary law against age discrimination.<sup>324</sup> The ECJ agreed, but since the action was brought as an anti-discrimination case rather than as a case about the independence of the judiciary, the remedy was compensation to (but not reinstatement of) the affected judges.<sup>325</sup>

2013 when it first became clear that Hungary's democratic institutions were being destroyed); PACE, *PACE Votes to Begin Monitoring of Hungary Over Rule of Law and Democracy Issues* (Oct. 12, 2022) (stating that PACE did, however, open a monitoring process for Hungary only after the EU froze billions of euros of Hungary's EU funds for violations of judicial independence, by which time the PACE monitoring decision added very little).

<sup>317</sup> While the ECJ and ECtHR are clearly well-educated in each other's case law and in general harmonize their decisions on points of overlap, neither is required to follow the other's lead. As a result, a recent study found few cross-citations between the two courts and, where such cross-citations existed, they were confined to particular legal domains. Amelie Frese & Henrik Palmer Olsen, *Spelling It Out—Convergence and Divergence in the Judicial Dialogue between CJEU and ECtHR*, 88 *NORDIC J. INT'L L.* 429, 458 (2019).

<sup>318</sup> TEU, art. 6.

<sup>319</sup> See Case C-2/13, Opinion 2/13 of the Court (Full Court), ECLI:EU:C:2014:2454, ¶ 37 (Dec. 18, 2014) (rejecting the accession agreement that the EU had negotiated with the Council of Europe because it would have meant subordinating the ECJ's interpretation of EU law to the ECtHR's interpretation of the EU's legal obligations under the Convention). *But see*, TEU, art 6(3) (“Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms . . . shall constitute general principles of the Union's law.”).

<sup>320</sup> See generally NICO KRISCH, *BEYOND CONSTITUTIONALISM: THE PLURALIST STRUCTURE OF POSTNATIONAL LAW* (2010) (noting that the ECJ and the ECtHR tend to harmonize their opinions where possible).

<sup>321</sup> See Scheppele, *Treaties Without a Guardian*, *supra* note 100 (showing how the ECJ's understanding of a tribunal established by law differs markedly from the ECtHR's understanding of a tribunal established by law).

<sup>322</sup> See *id.* at 99–102 (noting that a constitutional majority is the requisite majority in the parliament to amend the constitution).

<sup>323</sup> See *id.* (stating that the “political capture of the prosecutor's office, audit office, procurement process and other institutions responsible for the adequate monitoring of EU funds continued for more than a decade before the Commission finally took steps to cut the flow of EU funds to Hungary”).

<sup>324</sup> See *id.* at 109 (noting that age discrimination was not the core of the problem; judicial independence was).

<sup>325</sup> See Kim Lane Scheppele, *Making Infringement Procedures More Effective: A Comment on Commission v. Hungary*, *VERFASSUNGSBLOG* (Apr. 30, 2014), <https://verfassungsblog.de/making-infringement-procedures-more-effective-a-comment-on-commission-v-hungary/> (noting that the ECJ's ruling did not address whether the judges who were appointed to fill the positions of the unlawfully retired judges should be allowed to keep their jobs).

The Commission's first foray into trying to stop Viktor Orbán's consolidation of power failed miserably since Orbán only had to pay off the judges he fired and, in exchange, he got to keep the judiciary he captured.<sup>326</sup> Because the ECJ decision hinged on interpretation of equality law, the Court said nothing to shore up judicial independence in general.<sup>327</sup> It did not decide this first judicial independence case as a democracy case.<sup>328</sup>

The European Commission was faster to act when Poland started its sprint down the road to autocracy after the election of Law and Justice Party candidates to the presidency and then to majorities in both houses of parliament in 2015.<sup>329</sup> The Polish government began with an illegal assault on the Constitutional Tribunal, followed first by a radical change in the system through which judges were appointed, then by a drop in the judicial retirement age in imitation of Hungary and finally by a new system for disciplining judges who criticized the government (or who brought cases to the ECJ seeking outside assistance in standing up to autocracy).<sup>330</sup> Across many different laws, the Polish government launched a broad-ranging effort to destroy the independence of the judiciary.<sup>331</sup> As we have seen, the Court of Human Rights rose to the challenge and found that both the captured courts and the composition of the body that appointed the judges violated the European Convention and the ECtHR has refused to recognize either of these bodies or their decisions as lawful.<sup>332</sup>

By contrast, the ECJ, the EU's highest court, has been far more circumspect in the way it has handled the situation.<sup>333</sup> Not that the ECJ and the ECtHR disagree over whether the Polish government's actions compromise the independence of the judiciary! Both the ECJ and the ECtHR were clearly alarmed and tried to address the situation.<sup>334</sup> But the powers that the two courts could wield was different for reasons hard-wired into the structure of the transnational organizations whose courts they are. While the ECtHR is a free-standing court reachable by rights-holders who have exhausted remedies in the state that has allegedly infringed their Convention rights, the ECJ may be more powerful in the ways it can enforce its judgments, but it has more limited ways in which its powers can be invoked within the EU treaty framework.<sup>335</sup>

Given these differences, the ECtHR was free to say that Polish courts did not meet the standards of properly constituted tribunals, as indeed they do not.<sup>336</sup> Individuals affected by these dubious Polish courts could still bring cases to the ECtHR which could say again and again that the courts in question were not really courts. But the ECJ cannot be reached directly by individuals whose

<sup>326</sup> See *id.* (pointing out that Hungary waited to comply with the ECJ's ruling until all the judges were fired and replaced, making it impossible to reinstate them without firing the new judges).

<sup>327</sup> See *id.* (explaining that in the end, the Commission certified Hungary as being in compliance with the ECJ's ruling without ever touching the issue of judicial independence).

<sup>328</sup> See *id.* (declaring that the real danger of judicial independence was consequentially not addressed).

<sup>329</sup> See Scheppele, *Treaties Without a Guardian*, *supra* note 100, at 124–25 (stating that the Polish government immediately attacked its judiciary in a much more thorough, overt, and illegal manner than had Hungary).

<sup>330</sup> See *id.* at 124–48 (describing this sequence of events).

<sup>331</sup> See *id.* at 133–34 (noting that the new laws attacking the independence of the judiciary included a sudden lowering of the retirement age combined with the creation of over twenty new judgeships on the Supreme Court as well as the addition of two wholly new chambers to the Supreme Court).

<sup>332</sup> See *supra* notes 290–314.

<sup>333</sup> See Scheppele, *Treaties Without a Guardian*, *supra* note 100, at 141 (noting that Advocate General Tanchev had recommended to the ECJ that the Disciplinary Chamber of the Polish Supreme Court was not a court or tribunal within the meaning of EU law but that the Court did not openly follow his lead).

<sup>334</sup> See generally *id.*

<sup>335</sup> See *id.* at 159–72 (showing how the Court of Justice has been reluctant to declare that any court is unlawfully constituted because doing so would prevent that court from sending future preliminary references cases to the ECJ).

<sup>336</sup> See *id.* at 168–69 (stating that the unconstitutional acts of the Polish government were found constitutional by the Polish courts).

EU-law rights have been violated through Member States' laws, except indirectly.<sup>337</sup> Instead, the ECJ is generally limited to hearing infringement (enforcement) actions brought by the European Commission against rogue Member States and to deciding preliminary reference cases brought by national judges who need a point of EU law clarified before they can decide the cases before them in the national courts.<sup>338</sup> If the ECJ finds that the courts from which some still-independent judges are still sending preliminary references are not properly courts under EU law, then the ECJ cannot take their reference questions any longer because the ECJ is limited to receiving such questions from properly constituted tribunals.<sup>339</sup> Finding that any of Poland's courts were improperly constituted would therefore cut the ECJ off from being able to address the questions sent by any of these courts' judges, including the ones who had resisted the political pressure to conform.<sup>340</sup> Therefore, the ECJ has made the strategic decision not to question whether the compromised courts in Poland are properly constituted judicial bodies.<sup>341</sup>

The most straightforward way for cases challenging the structural features of Member States' institutions to get to the ECJ is for the European Commission or an EU Member State to bring infringement actions challenging what the backsliding states are doing to their courts.<sup>342</sup> But in the last 20 years, as the rule of law crisis was worsening, the Commission radically reduced the infringement actions it has brought to the Court of Justice.<sup>343</sup> Over the seven years during which the attacks on Polish courts have been relentless, the European Commission has brought a grand total of five infringement actions covering, at best, only part of what Poland has done to bring the judiciary to political heel.<sup>344</sup> After that one infringement action against the Hungarian government for lowering the judicial retirement age, the Commission brought no other infringement actions against Hungary for destroying the independence of its judiciary over the next decade.<sup>345</sup> The

<sup>337</sup> See KOEN LENAERTS ET AL., *EU PROCEDURAL LAW*, 253–62 (Janek Tomasz Nowak ed.,) (2014) (laying out the types of actions that can be brought to the Court of Justice of the European Union by individual claimants). These actions are unlikely to reach these institutional independence questions in the Member States because individuals can only challenge the illegality of Union acts and omissions before EU courts and Member States' laws would only be reachable if they were extensions of EU law.

<sup>338</sup> See *id.*

<sup>339</sup> See Koen Lenaerts, *The Rule of Law and the Constitutional Identity of the European Union*, EUR. L REV. (Bulgaria), <https://evropeiskipravenpregled.eu/the-rule-of-law-and-the-constitutional-identity-of-the-european-union> [hereinafter Lenaerts, *Rule of Law*] (explaining that the preliminary reference procedure is open only to independent courts because dialogue with these courts can only be successful if they are independent and dedicated to upholding the rule of law, adding that “[w]ithout judicial independence, judicial remedies become a ‘scrap of paper’ and judges no more than paper tigers. In other words, without independent judges, the rule of law is meaningless in practice.”).

<sup>340</sup> See *id.* (explaining how that the ECJ “established a presumption according to which courts and tribunals belonging to the national judiciary are presumed to satisfy the requirements for having access to the preliminary reference procedure. That is so irrespective of their actual composition. However, that presumption may be rebutted by a final judicial decision handed down by a national or international court or tribunal that leads to the conclusion that the judge or judges constituting the referring court are not an independent and impartial tribunal previously established by law. If that is the case, the referring court in question will no longer have access to the preliminary reference mechanism.”).

<sup>341</sup> *Id.* “. . . the Court of Justice does not want to rashly close the door to judicial dialogue with the courts from a Member State experiencing some trouble with respect to judicial independence.”

<sup>342</sup> For the elaboration of these two different ways of bringing infringement actions in structural cases like these, see Scheppele et al., *EU Values*, *supra* note 192, at 19–20.

<sup>343</sup> See R. Daniel Kelemen & Tommaso Pavone, *Where Have the Guardians Gone? Law Enforcement and the Politics of Supranational Forbearance in the European Union*, 75 *WORLD POL.* 779, 783–87 (2023) (noting the sharply reduced number of infringement actions brought by the Commission over 20 years).

<sup>344</sup> See Scheppele, *Treaties Without a Guardian*, *supra* note 100, at 124–49 (arguing that the five infringement actions brought by the Commission have failed to address all the attacks on the Polish courts).

<sup>345</sup> *Id.* at 124.

other Member States who had the power to launch enforcement actions at the ECJ brought no cases at all to stop democratic backsliding.<sup>346</sup>

That said, in the few cases in which the European Commission has filed an infringement action against a Member State for violating basic rule-of-law principles, the Court of Justice has risen to the occasion and found against the Member State in every infringement action that the Commission has brought to it thus far.<sup>347</sup> With regard to the Polish assaults on the judiciary, first the ECJ found that lowering the judicial retirement age violated judicial independence and not just the principle of age discrimination, both in the Supreme Court<sup>348</sup> and in the lower courts.<sup>349</sup> Then the ECJ found that the law permitting disciplinary procedures to be brought against judges who brought preliminary references to the ECJ violated EU law.<sup>350</sup> Then the ECJ held that the Disciplinary Chamber of the Supreme Court did not provide sufficient procedural guarantees for the judges who were disciplined by that body and so determined it should cease functioning.<sup>351</sup> After a long delay, the Commission brought an infringement action against Poland for trying to prevent its judges from criticizing the judicial reforms, a case it eventually won.<sup>352</sup> In February 2023, the Commission belatedly brought an infringement action against Poland with regard to the Constitutional Tribunal, which had been fully captured by the end of 2016 and found not to be a tribunal properly established by law by the ECtHR in 2021, but which was still

<sup>346</sup> See Scheppelle et al., *EU Values*, note 192, at 95–103 (explaining how Member States have jurisdiction to bring infringement actions under Art. 259 TFEU and showing how no other Member States challenged either Hungary or Poland during the rule of law crisis).

<sup>347</sup> See Case C-619/18, *Comm'n v. Poland (Independence of the Supreme Court)*, ECLI:EU:C:2019:531 (June 24, 2019) (holding that the newly changed judicial retirement age for the Polish Supreme Court violated the principle of judicial irremovability and that the discretionary extension of a judge's term beyond the new retirement age failed to guarantee the external independence of the judiciary); Case C-192/18, *Comm'n v. Poland (Independence of Ordinary Courts)*, ECLI:EU:C:2019:924 (Nov. 5, 2019) (holding that the newly changed judicial retirement ages for lower court judges violated the principle of the irremovability of judges and holding that discretionary extensions of these judges' term beyond the new retirement age limits failed to guarantee the external independence of the judiciary); Case C-791/19, *Comm'n v. Poland (Disciplinary Regime for Judges)*, ECLI:EU:C:2021:596 (July 15, 2021) (holding that the existence of national provisions that enable the disciplinary regime to be used as a system of political control over the content of judicial decisions violates the principle of judicial independence); Case C-204/21, *Comm'n v. Poland (Independence and Data Privacy of Judges)*, ECLI:EU:C:2023:442 (Apr. 21 2023) (holding that national courts must check whether, as composed, a tribunal raises doubts about its independence and the judges who carry out these checks by sending preliminary references to the ECJ may not be subject to disciplinary actions for doing so).

<sup>348</sup> See Case C-619/18, *Comm'n v. Poland (Independence of the Supreme Court)*, ECLI:EU:C:2019:531 (June 24, 2019) (holding that the newly changed judicial retirement age for the Polish Supreme Court violated the principle of judicial independence).

<sup>349</sup> The two judicial retirement age cases were decided separately because they were the results of two different laws at national level. See Case C-192/18, *Comm'n v. Poland (Independence of Ordinary Courts)*, ECLI:EU:C:2019:924 (Nov. 5, 2019) (holding that discretionary extensions of a judge's term beyond the new retirement age violated the principle of judicial independence); see also Case C-619/18, *Comm'n v. Poland (Independence of the Supreme Court)*, ECLI:EU:C:2019:531 (June 24, 2019) (holding that the newly changed judicial retirement age for the Polish Supreme Court violated the principle of judicial independence).

<sup>350</sup> This decision was ignored by Poland. See Case C-791/19 R, *Comm'n v. Poland (Disciplinary Regime for Judges)*, ECLI:EU:C:2020:277 (Apr. 8, 2020) (interim measures order requiring the Disciplinary Chamber to stop functioning).

<sup>351</sup> Because the Disciplinary Chamber was entirely packed with politically loyal judges, it was not likely to bring references to the ECJ, so in this one instance, the ECJ could "afford" to cut it off from the European system. See Case C-791/19, *Comm'n v. Poland (Disciplinary Regime applicable to judges)*, ECLI:EU:C:2021:596 (July 15, 2021) (final judgment finding the Disciplinary Chamber violates EU law).

<sup>352</sup> *Comm'n v. Poland (Independence and Data Privacy of Judges)*, ECLI:EU:C:2023:442 (Apr. 21 2023) (holding that national courts must check whether, as composed, a tribunal raises doubts about its independence and judges who carry out these checks by sending preliminary references to the ECJ may not be subject to disciplinary actions for doing so).



operating as usual.<sup>353</sup> Instead of challenging the composition or capture of the Court, however, the Commission only challenged two of the Constitutional Tribunal's rulings that refused to follow EU law.<sup>354</sup> Even when the ECJ agrees with the Commission in this case, as it almost surely will, nothing in this ruling will prevent the Constitutional Tribunal from operating in its presently captured state. Obviously, these five infringement cases have not done enough, fast enough, to protect the judiciary.<sup>355</sup>

The ECJ has tried to offer additional protection to the Polish judiciary by using the preliminary references which have been sent, like messages in bottles, from the still-independent judges who write from their shipwrecked courts torn apart on the open sea of autocracy.<sup>356</sup> In preliminary reference cases, judges stop the action in the case before them to refer to the ECJ one or more questions involving the interpretation of EU law and then proceed in the individual case on the basis of the answers they get from that Court.<sup>357</sup> In one case after another, the ECJ has generally admitted these preliminary references and tried to rescue Polish judges by supporting their claims.<sup>358</sup> In *A.K.*,<sup>359</sup> the ECJ opined on the question of how a national court could recognize whether the National Judicial Council had been politically captured and set out a test through which the Disciplinary Chamber filled with judges that the NJC had appointed could be deemed not a lawfully constituted body.<sup>360</sup> In *A.B.*,<sup>361</sup> the ECJ ruled that judges must be guaranteed independent judicial review of decisions that refused their appointments to the Supreme Court. In *W.Z.*,<sup>362</sup> the ECJ found that the secondment of judges to other courts required oversight enforced by an impartial and independent body. In *W.B.*,<sup>363</sup> the ECJ held that involuntary reassignment of judges was a violation of judicial independence guaranteed under EU law. There are too many pending reference cases before the ECJ to count, each challenging one piece or another of the Polish judicial "reforms."<sup>364</sup> In case after case, the ECJ has largely sided with and backed the remaining independent Polish judges.<sup>365</sup>

<sup>353</sup> See European Commission Press Release IP/23/842, The European Commission Decides to Refer Poland to the Court of Justice of the European Union for Violations of EU Law by its Constitutional Tribunal (Feb. 15, 2023) (announcing the Commission's infringement action against Poland in regard to Poland's Constitutional Tribunal).

<sup>354</sup> *Id.* (noting that the Commission was challenging "rulings of the Polish Constitutional Tribunal of 14 July 2021 and 7 October 2021, where it had considered provisions of the EU Treaties incompatible with the Polish Constitution, expressly challenging the primacy of EU law").

<sup>355</sup> See Scheppele, *Treaties Without a Guardian*, *supra* note 100, at 147–49 (arguing that the Commission's infringement actions had not succeeded in changing Poland's behavior).

<sup>356</sup> See *id.* at 160 (stating that still-independent judges have accessed the ECJ by sending preliminary references pointing to rule of law issues in about 40 different cases and that the ECJ has answered 34 of these cases).

<sup>357</sup> *Id.* at 165, 174.

<sup>358</sup> Scheppele, *Treaties Without a Guardian*, *supra* note 100, at 160 n.276; but see Kim Lane Scheppele, *The Law Requires Translation: The Hungarian Preliminary Reference on Preliminary References: IS*, 59 COMMON MARKET L. REV. 1107, 1132–34 (2022) (addressing the exceptions to this generalization and criticizing those exceptions).

<sup>359</sup> Case C-585/18, *A.K. and Others*, ECLI:EU:C:2019:982 (Independence of the Disciplinary Chamber of the Supreme Court) (Nov. 19, 2019).

<sup>360</sup> The Court decided the preliminary reference case first then confirmed it in the slower-moving infringement action, Case C791/19, *Comm'n v. Poland (Disciplinary Regime for Judges)*, ECLI:EU:C:2021:596 (July 15, 2021).

<sup>361</sup> Case C-824/18, *A.B. v. Krajowa Rada Sądownictwa*, ECLI:EU:C:2021:153, ¶ 169 (Mar. 2, 2021).

<sup>362</sup> Case C-487/19, *W.Ż. v. Krajowa Rada Sądownictwa (Appointment of Judges to the Chamber of Extraordinary Control and Public Affairs of the Supreme Court)*, ECLI:EU:C:2021:798, ¶ 162 (Oct. 6, 2021).

<sup>363</sup> Joined Cases C-748/19 to C-754/19, *W.B.*, ECLI:EU:C:2021:931, ¶ 95 (Nov. 16, 2021).

<sup>364</sup> Case C-718/21, *L.G. v. Krajowa Rada Sądownictwa (Concept of an independent and impartial tribunal established by law)* ECLI:EU:C:2023:1015, ¶¶ 3, 31 (Mar. 2, 2023) (noting the many Polish judicial "reforms").

<sup>365</sup> See *supra* note 348.

One can quibble with the details of the way that the ECJ has handled these cases.<sup>366</sup> But there can be no doubt that the Court of Justice has built up a formidable case law defending judicial independence. It has done so without the words “judicial independence” appearing in the EU’s treaties. The ECJ has built this dense jurisprudence out of the Article 2 TEU’s guarantee that all Member States honor the rule of law, bolstered by the Article 19(1) TEU requirement that all Member States to provide effective remedies for violations of EU law, topped off by Article 47 CFR which provides an individual right to a fair trial.<sup>367</sup> The ECJ has built a legal structure that now requires and protects the independence of judges by constraining what states can do within their own national constitutional order to reorganize the judiciary.<sup>368</sup>

Even with this impressive jurisprudence, however, both Poland and Hungary have continued the slide into autocracy. Poland has refused to honor the decisions of the ECJ—just as it is refusing to comply with decisions of the ECtHR—and it has been being fined €1 million/day for refusing to observe the interim measures ordered by the ECJ concerning the Disciplinary Chamber.<sup>369</sup> Hungary’s judiciary has been seriously compromised, without a single new infringement action launched by the European Commission,<sup>370</sup> and the Hungarian government has clearly taken the view that none of the ECJ’s judgments concerning Poland have any relevance for its actions.<sup>371</sup>

Unlike the Council of Europe, however, which got stuck at this stage without a good way to enforce the jurisprudence of its Court on democratic governance or judicial independence, the EU has developed more enforcement powers. For years, momentum had been building up in Union institutions and among European Union Member States for another way to force changes in national law to meet European standards. The focus shifted to making the distribution of EU funds conditional on democratic reforms in the EU Member States that had gone rogue.<sup>372</sup>

The Conditionality Regulation that explicitly permitted the withholding of EU funds allocated to Member States if those funds risked being corrupted went into effect on January 1, 2021 and the process to suspend funds under this legal authorization was initiated against Hungary in April

<sup>366</sup> I have argued elsewhere that the ECJ could and should go farther by finding more of the preliminary reference questions sent to them “relevant” to the issues before the referring judge. See Scheppele, *Law Requires Translation*, *supra* note 360, at 1132–35; see also Scheppele, *Treaties Without a Guardian*, *supra* note 100, at 156–76 (arguing that the ECJ should “take advantage of preliminary reference questions to make clear statements about what judicial independence requires”).

<sup>367</sup> TEU, art. 2: “[t]he Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities,” and, art. 19(1): “Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law..”); Charter of Fundamental Rights of the European Union art. 47, Dec. 18, 2000, 2000 O.J. (C 364) 1, 20 [hereinafter CFR] (declaring, “Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law”).

<sup>368</sup> Poland is also refusing to follow decisions of the ECJ as well as those of the ECtHR. The EU, however, has other tricks up its sleeve for enforcing EU law while the COE institutions can do relatively little once court decisions are flouted.

<sup>369</sup> *EU Fines Poland €1 Million per Day over Judicial Reforms*, DEUTSCHE WELLE (Oct. 27, 2021), <https://www.dw.com/en/eu-fines-poland-1-million-per-day-over-judicial-reforms/a-59635269>. The fines continue as I write (July 2023). See Alicja Ptak, *EU Rejects Poland’s Request to End €1 Million Daily Fines for Ignoring ECJ Ruling*, NOTES FROM POLAND (Apr. 13, 2023).

<sup>370</sup> All of the places where the Commission could and should have brought infringements against Hungary for its destruction of judicial independence are detailed in Scheppele, *Treaties Without a Guardian*, *supra* note 100, at 108–24.

<sup>371</sup> See Kim Lane Scheppele, *Escaping Orbán’s Constitutional Prison: How European Law Can Free a New Hungarian Parliament*, VERFASSUNGSBLOG (Dec. 21, 2021), <https://verfassungsblog.de/escaping-orbans-constitutional-prison> [hereinafter Scheppele, *Constitutional Prison*] (arguing that the Hungarian government could and should apply the ECJ’s judgments regarding Poland to its own actions given the *erga omnes* effects of those decisions).

<sup>372</sup> See Kim Lane Scheppele & John Morijn, *What Price Rule of Law?*, in *THE RULE OF LAW IN THE EU: CRISIS AND SOLUTIONS* 39, 39 (Anna Södersten & Edwin Hercock eds., 2023) (reporting that “in 2022, the Commission and Council launched the most consequential action that they had yet taken against these rogue Member States by freezing substantial swaths of EU funding and making the unfreezing of those funds conditional on substantial rule-of-law reforms”).

2022, culminating in a suspension of €6.3 billion in December 2022.<sup>373</sup> As it turns out, other forms of “conditionality” that make the distribution of EU funds contingent on bringing national institutional arrangements into compliance with EU law were being quietly added to other regulations going through the legislative process at the same time.<sup>374</sup> Conditionality clauses were added to the Recovery and Resilience Fund that was created to enable EU Member States to recover from the economic devastation wrought by Covid<sup>375</sup> and a requirement that EU funds be spent in ways that do not violate the Charter of Fundamental Rights was added to the regulation governing the distribution of all funds allocated under 2021–2027 EU budget.<sup>376</sup>

The conditionality clauses in all three of these regulations were suddenly combined late in 2022 to create something like an enforcement regime applied against EU Member States that had turned their backs on democratic forms of governance.<sup>377</sup> The Conditionality Regulation— after being blessed by a pair of decisions of the Court of Justice<sup>378</sup>—finally permitted the Council on recommendation of the Commission to withhold funds from Member States whose rule of law violations threatened the proper spending of EU funds. Hungary’s funding suspensions under the Conditionality Regulation were authorized in December 2022.<sup>379</sup> In addition, the “Recovery and Resistance Plans” (RRPs) that all Member States were required to submit to receive money from the Recovery and Resilience Fund (RRF) were approved for Poland and for Hungary with strings attached that required both to restore the independence of their judiciaries under the supervision of the EU before they would receive the money.<sup>380</sup>

<sup>373</sup> Parliament and Council Regulation 2020/2092 on a General Regime of Conditionality for the Protection of the Union Budget, arts. 4–5, 10, 2020 O.J. (L 4331) 1, 6–7, 10 (EU) (allowing for the withholding of EU funds if the funds are at risk of not being spent in accordance with principles of sound financial management); *see also* Council of the EU Press Release 1090/22, Rule of Law Conditionality Mechanism: Council Decides to Suspend €6.3 Billion Given Only Partial Remedial Action by Hungary (Dec. 12, 2022) (reporting the freezing of EU funds to Hungary).

<sup>374</sup> *See* Scheppele & Morijn, *supra* note 372, at 41 (reporting that “[w]hile most eyes were focused on the public drama around the Conditionality Regulation, other conditionality mechanisms were being quietly embedded throughout EU law, sometimes written explicitly into other Regulations and sometimes emerging in new interpretations of existing EU law by the Commission”).

<sup>375</sup> Parliament and Council Regulation 2021/241 Establishing the Recovery and Resilience Facility, arts. 8, 17, 22, 2021 O.J. (L 57) 17, 32, 38, 44 (EU) (enabling EU Member States to recover from economic distress caused by the COVID-19 pandemic); *see also* Scheppele & Morijn, *supra* note 372, at 41–42 (discussing the way that conditionality was included in this regulation by requiring Member States to comply with country-specific recommendations issued under European Semester review, which included in some cases rule of law conditions).

<sup>376</sup> Parliament and Council Regulation 2021/1060 (Common Provisions Regulation), art. 9, 2021 O.J. (L 231) 159, 186 (EU) (specifying accounting and accountability conditions that must be met for funds to be distributed under a large set of EU programs; in particular art. 9 specified that all covered funds must be spent in compliance with the Charter of Fundamental Rights).

<sup>377</sup> In upholding the Conditionality Regulation against challenges from both Hungary and Poland, the Court of Justice was at pains to say that funds would not be withheld from affected countries as a punishment. Case C-156/21, Hungary v. Parliament and Council, ECLI:EU:C:2022:97, ¶¶ 128, 133, 187, 293–95 (Feb. 16, 2021); Case C-157/21, Poland v. Parliament and Council, ECLI:EU:C:2022:98, ¶ 189 (Feb. 16, 2021). In the end, both Hungary and Poland have seen substantial funds withheld that they would have otherwise received under all three regulations either because of corruption (Hungary) or failure to comply with decisions of the Court of Justice (Poland) or attacks on judicial independence (Hungary and Poland) or failure to honor Charter rights (Hungary and Poland).

<sup>378</sup> Hungary v. Parliament and Council, Case C-156/21, ¶¶ 128, 133, 187, 293–95; Poland v. Parliament and Council, Case C-157/21, ¶ 189.

<sup>379</sup> Council Implementing Decision 2022/2506 of 15 December 2022 on Measures for the Protection of the Union budget Against Breaches of the Principles of the Rule of Law in Hungary, 2022 O.J. (L 325) 94, 108–09 (EU) (suspending three Cohesion Funds by 55% of allocated monies due to risk of corruption).

<sup>380</sup> *See* Council Implementing Decision 9728/22 on the Approval of the Assessment of the Recovery and Resilience Plan for Poland, Interinstitutional File 2022/1081 (NLE), ¶¶ 2, 19, 45–46 (EU) (laying out conditions to strengthen the independence and impartiality of Polish courts before funds could be distributed.); Council Implementing Decision 9728/22 on the Approval of the Assessment of the Recovery and Resilience Plan for Poland, Interinstitutional File 2022/1081 (NLE),

Once the Council adopted the European Commission's recommendations and withheld funding to Hungary under both the Conditionality Regulation and the Recovery Regulation and to Poland under the Recovery Regulation, the Commission went ahead and froze all Cohesion Funds (funds allocated to a number of projects to enable the poorer EU states to catch up to the wealthier ones) for both Member States, given their violations of the Article 47 of Charter of Fundamental Rights that establishes fair trial rights requiring an independent judiciary, among others.<sup>381</sup>

Under these various legal authorities, the European Union withheld nearly €30 billion from Hungary and more than €110 billion from Poland because of their attacks on independent judiciaries and, in the case of Hungary, also because its institutions guaranteeing transparency and accountability in the spending of public funds are corrupt.<sup>382</sup> Withholding such large sums of money obviously creates a substantial incentive to do what it takes to spring the money loose. Since the Court of Justice emphasized that withholding money from Member States was justified in order to protect the EU budget and not as a punishment of the Member States in question,<sup>383</sup> one cannot discuss the withholding of funds strictly speaking as a "sanction" for destroying democracy. However, the fact that the Commission is withholding the funds conditional on proof of substantial and real democratic reforms on the part of the Member States in question creates substantial and real pressures on them.

The recent suspension of substantial funding streams to two of the worst offenders among backsliding democracies within the EU legal framework creates an important milestone in the history of the right to democratic governance. The EU is now using its funds as leverage for democratic change in Member States.<sup>384</sup>

Considering the legal instruments and the jurisprudence, particularly in the regional human rights courts, against the backdrop of the "emerging right to democratic governance" debate, we can see just how far we have come in the last 30 years since that debate was first triggered. Democracy, human rights, and the rule of law are now the privileged trio of commitments in wide swaths of international law, some of it directly legally enforceable. The Right to

Annex 195 (EU) (specifying conditions attached to the Recovery and Resilience Plan for Poland by setting "milestones" that must be met before the funds could be distributed); Council Implementing Decision 15447/22 on the approval of the assessment of the recovery and resilience plan for Hungary, Interinstitutional File 2022/0414 (NLE), ¶¶ 21, 60 (EU) ("The country-specific recommendation on strengthening judicial independence is addressed by several reforms in the RRP... thus raising the standard of judicial protection and improving the investment climate in Hungary," emphasizing that measures must be effectively implemented before the submission of the first payment request.); Council Implementing Decision 15447/22 on the Approval of the Assessment of the Recovery and Resilience Plan for Hungary, Interinstitutional File 2022/0414 (NLE), Annex 85 (EU) (specifying the conditions that must be met for Hungary to receive funds under this plan, emphasizing a restoration of judicial independence and progress in fighting corruption).

<sup>381</sup> EU Charter of Fundamental Rights, art. 47. See European Commission Press Release IP/22/7801, EU Cohesion Policy 2021–2027: Investing in a Fair Climate and Digital Transition While Strengthening Hungary's Administrative Capacity, Transparency and Prevention of Corruption (Dec. 22, 2022); Partnerségi Megállapodás – Magyarország (Agreement Between the European Commission and Hungary on Funding under the Common Provisions Regulation 2021/1060), C(2022) 10002 (EU); Commission Implementing Decision Approving the Partnership Agreement with Hungary, art. 1, C(2022) 10002, 2 (EU). The updated Polish partnership agreement laying out these conditions has not been published; we have learned about this through insider interviews.

<sup>382</sup> See Scheppele & Morijn, *supra* note 372, at 43–44.

<sup>383</sup> Case C-156/21, Hungary v. Parliament and Council, ECLI:EU:C:2022:97, ¶ 119 (Feb. 16, 2021) ("[I]t must be found that, contrary to Hungary's submission, supported by the Republic of Poland, the purpose of the contested regulation is to protect the Union budget from effects resulting from breaches of the principles of the rule of law in a Member State in a sufficiently direct way, and not to penalise those breaches as such.")

<sup>384</sup> See Scheppele & Morijn, *supra* note 372, at 41–42, 44–45 (noting that the Commission's suspension of large amounts of money traditionally allocated to rogue Member States quickly caused both Poland and Hungary to enact new laws to remedy the targeted issues).

Democratic Governance 2.0 exists when an enforcement regime with real bite pushes countries back to a democratic path.

But international legal principles do not have to be directly legally enforceable to have an important effect. As we saw in the democratic transition of Hungary in 1989, international law can be deployed by democrats *within* political transition processes to promote democratic institutions and values.<sup>385</sup> Armed with this new round of democracy-supporting international law, we can already see how aspirational democrats can restore democracy within backsliding states using this international law as a resource.

## V. RESTORING DEMOCRACY THROUGH INTERNATIONAL LAW: GUIDING THE NEXT DEMOCRATIC TRANSITION

In 2022, six Hungarian democratic-opposition parties joined together to make a concerted effort to defeat Viktor Orbán, who was standing for his fourth consecutive election as Prime Minister of Hungary.<sup>386</sup> Given the details of the Hungarian electoral system,<sup>387</sup> only one path gave them a chance to win. The six parties had to agree on putting only one candidate forward against the Orbán-supported candidate in each electoral district and convince their party supporters to vote not only for those candidates but also for a unified party list that contained candidates from across the political spectrum.<sup>388</sup> It was not an easy sell. At the last minute, seeing that the democratic opposition was disciplined enough to potentially pull off a victory, Orbán changed the election rules again.<sup>389</sup> Suddenly any voter could register to vote in any district in the entire country, a change that permitted Orbán to move his voters out of the few districts that the opposition would surely win into the districts that were close.<sup>390</sup> Orbán won in a landslide.<sup>391</sup>

In thinking about how six parties with such different political views could campaign together before they went down to defeat, however, the democratic opposition agreed to disagree about virtually all matters of policy.<sup>392</sup> They agreed only on a plan for how to restore democracy and the rule of law if they won.<sup>393</sup> As in 1989, they insisted on a “rule of law revolution.”<sup>394</sup> And, as in 1989,

<sup>385</sup> See Kim Lane Scheppele, *Unconstitutional Constituent Power*, in *MODERN CONSTITUTIONS* 154, 174 (Rogers M. Smith & Richard R. Beeman eds., 2020) [hereinafter Scheppele, *Unconstitutional Constituent Power*] (explaining that the Hungarian transition’s Roundtable process brought Hungary into compliance with its international legal commitments by adding the rights the state had committed to defending through ratification of international human rights treaties into the Constitution itself); see also *supra* notes 16–34.

<sup>386</sup> See Scheppele, *How Viktor Orbán Wins*, *supra* note 113, at 45 (emphasizing that United for Hungary was fighting an uphill battle trying to “unpick the lock on power” that Prime Minister Viktor Orbán had installed in the electoral system ten years earlier); Scheppele, *Treaties Without a Guardian*, *supra* note 100, at 155.

<sup>387</sup> See Scheppele, *How Viktor Orbán Wins*, *supra* note 113, at 45–47, 52–58 (detailing how the electoral system is made to ensure that any “division in the opposition” created supermajorities for the ruling party so that the governing party could use these parliamentary majorities to change the law and “neutralize whatever strategy the opposition adopts”).

<sup>388</sup> See *id.* at 45–48 (“By giving up their individual party ambitions to run a single coalition candidate against Fidesz’s candidate in each district, the opposition maximized its chances of winning.”).

<sup>389</sup> See *id.* at 55–58 (explaining how Orbán changed the law to allow counter the opposition strategy in 2022).

<sup>390</sup> See *id.*

<sup>391</sup> See *id.* at 46 (describing Orbán’s win as a blowout).

<sup>392</sup> See Scheppele, *How Viktor Orbán Wins*, *supra* note 113, at 54 (noting that the opposition was plagued by infighting and disagreed on most substantive matters, so they had to agree only on a very thin political platform to move forward together).

<sup>393</sup> See *id.* at 54, 58 (“The united opposition parties shared a commitment to dislodge Orbán and restore Hungary to a constitutional-democratic state.”).

<sup>394</sup> See Scheppele, *Unconstitutional Constituent Power*, *supra* note 385, at 168, 175–76 (“The 1989 constitution made a radical break with the 1949 constitution in substance, even as it was enacted using the amendment rules of that very



this transition would gain some of its legitimacy by maintaining legality throughout the process of moving autocracy to democracy.

The question was how to do it. Unlike in 1989, when the communist party voluntarily agreed to free and fair elections in which they could (and did) lose and cede power, Orbán would almost surely not voluntarily leave the public stage even if he lost an election.<sup>395</sup> Unlike in 1989, when the autocratic party was willing to support a liberal and democratic constitution, Orbán's 2012 autocratic constitution was not up for negotiation with liberals and democrats.<sup>396</sup> Unlike in 1989, when supporters of the autocratic regime were few and far between, Orbán can still generate mass rallies and overwhelming (even if rigged) votes.<sup>397</sup> Unlike in 1989, when very little of the new structure was entrenched because the constitution was new, Orbán's party by 2022 had locked in most of the constitutional institutions (both structures and people) through a decade's worth of laws that required a two-thirds vote to change.<sup>398</sup> Even if the opposition parties, working together, could defeat Orbán, there was no conceivable way under the rigged election rules<sup>399</sup> that they could gain a two-thirds majority to legally alter the heavily entrenched constitutional order that Orbán had created.<sup>400</sup>

But this is where the democratic opposition in 2022 took a page from their 1989 playbook. They turned to international law to provide a North Star to guide them through the transition.

During the campaign, the democratic-opposition leadership appointed a committee of legal experts to draft a plan for restoring both democracy and the rule of law after an election victory.<sup>401</sup> Headed by sociologist of law and constitutional expert Zoltán Fleck, this committee developed a

constitution." The new Constitutional Court established under that new constitution saw itself as enacting "a revolution under the rule of law.")

<sup>395</sup> See Barnabas Racz, *Political Polarization in Hungary: The 1990 Elections*, 43 SOVIET STUD. 107, 107, 110 (1991) (explaining how the Hungarian Socialist Workers' Party surrendered monolithic power, accepted a pluralist system, and helped schedule elections); Zach Beauchamp, *It Happened There: How Democracy Died in Hungary*, VOX (Sept. 13, 2018), <https://www.vox.com/policy-and-politics/2018/9/13/17823488/hungary-democracy-authoritarianism-trump> ("[W]hen Fidesz lost the 2002 elections. . . , though Orbán stepped aside, he and his followers never really accepted the 2002 defeat as legitimate.").

<sup>396</sup> See Scheppele, *Unconstitutional Constituent Power*, *supra* note 385, at 165–70 (describing how in 1989, the outgoing communist party had supported the new constitution); Scheppele, *How Viktor Orbán Wins*, *supra* note 113, at 52 (by contrast, in 2011, "Orbán unveiled a new constitution drafted behind closed doors, debated before parliament for only nine days, and passed on a party-line vote" with provisions designed to keep Orbán and his party in power for the foreseeable future).

<sup>397</sup> See Scheppele, *Unconstitutional Constituent Power*, *supra* note 385, at 170 (stating that the prior and communist Kádár government retained virtually no supporters).

<sup>398</sup> The new constitution that Orbán's party passed on a party-line absolute two-thirds vote in 2011 (Magyarország Alaptörvénye [The Basic Law of Hungary]) contains 66 provisions requiring "cardinal acts" to fill in the details. Cardinal laws require a two-thirds relative parliamentary majority to enact. As long as Orbán retains control of one third of the parliamentary seats, then, his party can veto anything that the opposition would want to change across virtually all crucial topics relating to state structure and even to policy in many fields.

By contrast, the liberal supermajority government in 1995 amended the 1989 constitution to give the opposition the power to veto it, thus ensuring that it could not capture all power. Scheppele, *How Viktor Orbán Wins*, *supra* note 113, at 51–52.

<sup>399</sup> See *id.* at 46.

<sup>400</sup> See Kim Lane Scheppele, *Asymmetric Rupture: Stabilizing Transitions to Democracy with International Law*, in TRANSITION 2.0: RE-ESTABLISHING DEMOCRACY IN AN EU MEMBER STATE 7–9 (Armin von Bogdandy & Pál Sonnevend eds. 2023) (elaborating on the differences between Democratic Transition 1.0 after 1989 and Democratic Transition 2.0 after the autocratic turn in Europe).

<sup>401</sup> See A JOGÁLLAM HELYREÁLLÍTÁSÁNAK KÍSÉRLETE: A CIVIL KÖZJOGI MŰHELY TEVÉKENYSÉGE [AN ATTEMPT TO RESTORE THE RULE OF LAW: ACTIVITIES OF THE CIVIL PUBLIC COMMITTEE] 2 (Zoltán Fleck ed., 2022) [hereinafter FLECK, AN ATTEMPT TO RESTORE THE RULE OF LAW].

program that could be put into effect if the democratic opposition won the election.<sup>402</sup> The program identified what could and should be changed by a simple majority and what could simply be fixed by forbearance in which the democratic opposition, once in government, would simply refrain from doing legally permissible but anti-democratic things.<sup>403</sup> The goal was to create a democratic transition without violating the rule of law.

But what to do with the very large number of two-thirds laws and constitutional provisions that would require a supermajority to change? Given the electoral system, a supermajority was beyond reach. What, therefore, could a new simple-majority government do with this deeply entrenched, detailed system of laws that acted like a prison preventing any new government from changing the rigged structures as long as the Fidesz party that built the prison retained a mere one-third of the parliamentary mandates?

As in 1989, the constitutional experts turned to international law.<sup>404</sup> Half of the pages in the draft plan (all of the elaborate Appendix 2 in fact) were devoted to analyzing the relevant treaties that Hungary had signed and the legal obligations that these treaties imposed.<sup>405</sup> The plan's drafters leaned heavily on these treaty obligations in making lists of laws that needed to be changed and institutions that needed to be rethought because the treaties gave them a rule of law way out of the national legal prison.<sup>406</sup> The constitution—even the Orbán constitution—placed international law hierarchically above national law (though not above the constitution).<sup>407</sup> Even the two-thirds laws, then, should have been voidable when they came into conflict with international legal obligations. Of course, the most far-reaching and all-encompassing legal obligations arose from Hungary's memberships in the European Union and Council of Europe.

The EU obligations were relatively easy, legally speaking. EU has primacy over national law in the subject areas that have been delegated to it, but the Orbán government was not in compliance with many EU law requirements, most notably those pertaining to the independence of the judiciary.<sup>408</sup> While the European Commission had failed to bring infringement actions against Hungary for its attacks on the judiciary, Hungarian democrats could draw from the parallel jurisprudence from Poland and other Member States that elaborated what judicial independence requires.<sup>409</sup> While it

<sup>402</sup> *Id.* at 1, 4. The rest of this section draws on the plan that Fleck and his committee (consisting of Péter Bárándy, Ágota Szentes, Richárd Nagy Szentpéteri, Kinga Szurday, Gábor Attila Tóth and Imre Vörös) drafted and on conversations I had with several of those involved in this project.

<sup>403</sup> *Id.* at 20–23, 27 (listing important statutes that could still be changed by simple majority, and stating that “[t]he primary reason for all public law proposals is to ensure the functionality of the democratic institutional system, to restore parliamentarism, and not to expand the scope of the executive power. For many of these changes, it is not necessary to amend a law or parliamentary procedure, only to ensure that the parliamentary majority exercises political self-restraint”).

<sup>404</sup> I must admit that I had a little something to do with this. See Scheppele, *Constitutional Prison*, *supra* note 371 (proposing that any new Hungarian government embrace European law to guide the country back into compliance with European values).

<sup>405</sup> See Fleck, AN ATTEMPT TO RESTORE THE RULE OF LAW, *supra* note 401, at 49–87.

<sup>406</sup> See *id.* at 4–5, 10–12, 15–16, 18–21 (“Hungary’s membership of the European Union provides an opportunity to restore the rule of law, because our obligations under the Treaty provide a legal basis for this.”).

<sup>407</sup> Hungarian Constitution, *supra* note 21 (“The Constitutional Court . . . may . . . annul any law or any provision of a law which conflicts with an international treaty.”).

<sup>408</sup> See Scheppele, *Constitutional Prison*, *supra* note 371 (demonstrating what the supremacy of EU law could do to remedy Hungarian law); Scheppele, *Treaties Without a Guardian*, *supra* note 100, at 99, 106, 108–10, 115–17 (“While the attacks on constitutional democracy under Prime Minister Viktor Orbán’s government in Hungary have been mounted on many fronts, perhaps the most consequential for the European Union have been the attacks on the independence of the judiciary.”).

<sup>409</sup> See Scheppele, *Treaties Without a Guardian*, *supra* note 100, at 109–12, 114–15 (explaining how the Commission has failed to bring enforcement actions against Hungary); for the Polish cases that Hungarian democrats might learn from, see *supra* note 348.

was still a delicate subject among formalist lawyers about whether one could amend two-thirds laws (as the laws on the judiciary all are) with a simple majority, following EU law could give them a special reason to violate the national procedural rule in the name of the rule of law.<sup>410</sup> Reorganizing the judiciary to ensure its independence would require a serious set of changes that the new majority's strength in the parliament could not reach if the matter were simply conceived of within national law. But if an independent judiciary is required by EU law, then violation of the two-thirds national rule for changing the judiciary could be justified in order to bring Hungary into compliance with its transnational commitments, something also required under Hungarian law.<sup>411</sup> In short, EU law provided a good way to argue that it was justifiable to break the national rules under which a two-thirds majority would be required when such an action would be necessary in order to comply with EU law.<sup>412</sup> This could be distinguished from what the prior government did when it moved Hungary into autocracy because their questionable legal changes moved the country away from increasing harmonization with the European rule of law while the new government's proposals would not. Even if the rule of law writ small (that is, simply considered at national level) would be violated if the new democrats used unconventional legislative procedures to enact the new laws, the rule of law writ large (that is, harmonizing across the various binding levels of law) would be honored if they did so.

While EU law claims primacy over national law, other treaties that Hungary had signed onto did not require primacy in their own terms. For these other treaties, Hungarian law offered a formalist solution about how to proceed. The most important treaties giving rise to human rights and democratic governance obligations, for example the European Convention on Human Rights, had been adopted by two-thirds votes of the parliament.<sup>413</sup> A number of two-thirds laws of the Orbán government therefore conflicted with treaty obligations that had also been adopted by a two-thirds majority, which gave rise to a conflicts of laws problem within the Hungarian legal order.<sup>414</sup> Given the hierarchical superiority of international law under the Fundamental Law, the domestic conflicts problem could be resolved in favor of the international legal obligations.<sup>415</sup> Harmonizing the law in this way could justify exceptions to the usual procedural rule that two-thirds laws could only be changed by supermajorities.<sup>416</sup> In these special cases where national law and European law conflicted, one might argue that a simple majority could eliminate the conflict because the national constitution required it.<sup>417</sup> While normally violating national procedural rules is a sign that the rule of law is being broken, violating national procedural rules in order to bring the national legal system into compliance with its international legal obligations can be seen as honoring a wider view of the rule of law—the rule of law writ large. While the solution is not ideal because the situation is not ideal, justifying a break with national law in order to follow international law is not in itself lawless.

<sup>410</sup> See Scheppele, *Constitutional Prison*, *supra* note 371 (“If the Hungarian Parliament were to say that it cannot change a two-thirds law with its mere majority, the ECJ would no doubt respond . . . that the national rules blocking compliance with EU law must also be changed.”).

<sup>411</sup> See *id.* (noting that maintaining an independent judiciary is a requirement under EU law).

<sup>412</sup> See *id.* (maintaining that EU law provides a proper blueprint to make this distinction).

<sup>413</sup> *Id.*

<sup>414</sup> See *id.* (explaining that ECHR and EU Treaties are two-thirds laws that directly contradicted Orbán's two-thirds laws).

<sup>415</sup> See *id.* (“The current Fundamental Law specifies in Article Q(2) that ‘Hungary shall ensure that Hungarian law is in conformity with international law in order to comply with its obligations under international law.’”).

<sup>416</sup> *Id.*

<sup>417</sup> *Id.* (“With regard to laws that conflict with other sources of international obligations, like the ECHR, the new Parliament could cite Fundamental Law Article Q(2) as the basis for nullifying even cardinal statutes by simple majority, when they are inconsistent with international law.”).

Because Hungary is not in compliance with a number of decisions of the ECtHR, a new democratic parliament could use the Strasbourg Court's decisions to override conflicting national two-thirds laws. This could permit Hungary to dismantle the secret and discretionary surveillance system,<sup>418</sup> to strengthen the protections of the free speech rights of judges,<sup>419</sup> to restore the independence of religious organizations<sup>420</sup> and to strengthen control over and remedies for police abuse.<sup>421</sup> And those were just the decisions already made against Hungary by the ECtHR.<sup>422</sup> Deriving other obligations from the general principles that the ECtHR had developed in cases coming from other signatory states, a new democratic Hungarian parliament could use those cases—for example, the Polish cases from the ECtHR on judicial independence—as additional reason to modify Hungarian law by simple majority.<sup>423</sup> Each of these changes would move the new democratic Hungarian government away from autocracy and toward a robust view of constitutional democracy. Even though bringing Hungarian law into compliance with international legal obligations could require violating national rules about the relevant majorities required for amendment of these laws, a new democratic parliament could argue that harmonizing Hungarian law with international law provided a specific and detailed justification for breaking the procedural rules in those specific cases.

Democratic transitions are delicate moments. In retrospect, the 1989 changes were easy—at least legally speaking—because the forces of autocracy simply gave up and agreed to enter a democratic order in which they stood for elections that they could—and did—lose. The new autocrats we are living with now, however, show no signs of going anywhere. If democratic transition is going to occur in these countries, it is going to happen over pitched resistance of the new autocrats and their supporters. As a result, the national democrats will need to persuade their national publics that restoring democracy by relying on international law to overcome domestic legal barriers is both desirable and justifiable. The new international law that we have reviewed in this article provides a principled and rule-of-law-honoring way to move entrenched autocracies back toward democratic governance. The existence of this new international law provides a basic framework for national democrats to use in arguing that they are honoring and not violating the rule of law when the move their countries along this path. The Right to Democratic Governance 2.0 now provides an increasingly detailed road map to guide aspirational democrats toward restoring democracy.

In the end, as some democracy promoters have only learned recently,<sup>424</sup> democracy cannot be imposed from the outside. It must be embraced by those within a country who believe that only

<sup>418</sup> See *Szabó v. Hungary*, App. No. 37138/14, ¶¶ 17, 65–66 (Jan. 12, 2016), <https://hudoc.echr.coe.int/fre?i=001-160020> (finding unlimited surveillance powers to be a violation of Article 8, right to private life); *Hüttl v. Hungary*, App. No. 8032/16, ¶¶ 1, 4 (Sept. 29, 2022), <https://hudoc.echr.coe.int/fre?i=001-219501> (finding continued unlimited surveillance powers to be a further violation of Article 8, right to private life).

<sup>419</sup> See *Baka v. Hungary*, App. No. 20261/12, ¶¶ 83, 124–25 (June 23, 2016), <https://hudoc.echr.coe.int/fre?i=001-163113> (finding that the early termination of the term of the President of the Supreme Court was retaliation for the criticisms he expressed publicly, thus interfering with his Article 10 right to freedom of expression).

<sup>420</sup> See *Hungarian Christian Mennonite Church v. Hungary*, App. Nos. 70945/11, 23611/12, 26998/12, 41150/12, 41155/12, 41463/12, 41553/12, 54977/12 and 56581/12, ¶¶ 34, 46, 75 (Apr. 8, 2014), <https://hudoc.echr.coe.int/eng?i=001-142196> (finding that the 2011 law on churches violated religious freedom read in light of the freedom of association because it had cancelled the official status of multiple religious organizations).

<sup>421</sup> See *Mata v. Hungary*, App. No. 7329/16, ¶¶ 16–17 (July 7, 2022), <https://hudoc.echr.coe.int/eng?i=001-218135> (finding that a Roma man who was severely injured due to his treatment in police custody had his Article 3 rights prohibiting cruel, inhuman and degrading treatment violated).

<sup>422</sup> *Szabó*, App. No. 37138/14, at 45; *Hüttl*, App. No. 8032/16, at 4; *Baka*, App. No. 20261/12, at 45; *Hungarian Christian Mennonite Church*, App. Nos. 70945/11, 23611/12, 26998/12, 41150/12, 41155/12, 41463/12, 41553/12, 54977/12 and 56581/12, ¶¶ 34, 76; *Mata*, App. No. 7329/16, at 4.

<sup>423</sup> See *supra* note 292 for examples of the Polish cases.

<sup>424</sup> See, e.g., Max Boot, *What the Neocons Got Wrong*, FOR. AFF. (Mar. 10, 2023), <https://www.foreignaffairs.com/iraq/what-neocons-got-wrong> (“In retrospect, I was wildly overoptimistic about the prospects of exporting democracy by force, underestimating both the difficulties and the costs of such a massive undertaking. I am a neocon no more . . .”).

democratic governments can preserve peace, human rights, and the rule of law in order to make life better for their citizens. But international legal resources can help aspirational democrats distinguish themselves from the aspirational autocrats who also won elections and then changed the law. Changing the law to bring a country into compliance with international law is fundamentally different from changing the law to move a country away from those principles. The aspirational democrats' efforts to reform the constitutional system that they inherited can therefore be easily distinguished from autocratic capture.

International law has the advantage of acting like a North Star for those involved in democratic transitions—showing the way while being outside the reach of any of the parties to a national transition to modify or bargain away. International law principles become rules of the game closed to domestic players to change and therefore they can become a stabilizing force in democratic transitions. International organizations and international courts have already laid down some clearly helpful principles about judicial independence, term limits for executives, and even the independence and impartiality of election officials. This is not a complete blueprint for democracy, but these rules establish crucial elements of any democracy worthy of the name. The resources for restoring democracy through international law are growing by the day, as you can see from the dates on the cases and other international law instruments cited in this lecture. This lecture is current as of June 2023, but who knows how many new resources will be available by the time you read this.

For those of us who care about the future of democracy and about building the resilience of international law in an era of democratic backsliding, the best thing we can do is to continue to develop new international resources that would define and sustain the institutional building blocks of democratic government. It has been painful to watch democracies slip into autocracy during this democratic recession. As we have learned from long experience, however, democracy can only be built from the inside. Now that we can see how aspirational democrats inside damaged democracies can use the resources of international law to guide their transitions back to democracy, the most constructive thing we can do from the outside is to construct even more resources within international law for them to use so that these resources are available when the aspirational democrats need them.

### **KIM SCHEPPELE'S VISION FOR RESTORING DEMOCRACY – AND WHY WE MUST ACCEPT THE CHALLENGE**

*By Manuel José Cepeda Espinosa\**

I am honored to discuss Professor Kim Lane Scheppele's Grotius Lecture. I convey my gratitude to Gregory Shaffer, President of the American Society of International Law, and Padideh Ala'i,

\* Manuel José Cepeda Espinosa was President of the Constitutional Court of Colombia from 2005 to 2006 and Justice of said Court from 2001 to 2009. Since then, he has combined legal practice as an attorney, mainly in constitutional law and in arbitration, with academic activities in Colombia and abroad. Manuel Cepeda is a member of the Board (Consejo Superior) of Universidad de los Andes (Bogotá), where he was Dean of the Law School (1997–2000). From 2013 to 2022, he was Co-Agent of the Republic of Colombia at the International Court of Justice in two cases initiated by Nicaragua against Colombia that ended in judgments favorable to Colombia. In 2015, he was part of the negotiating team on transitional justice during the peace process in Colombia that culminated in a Peace Agreement in 2016 and the demobilization of the FARC guerrilla. Between 1987 and 1993, he was Presidential Advisor for two Presidents of the Republic for the creation of the Constituent Assembly, the drafting of the New Constitution and then for the development of the 1991 Constitution. I am honored to comment on Professor Kim Scheppele's Lecture after having learned for many years so much about Europe and the U.S. from her.



Director of the International Legal Studies Program of American University's Washington College of Law, for inviting me to comment on the lecture of an intellectual that I have admired since I first met her at a seminar on the hardest issues coming to the chambers of constitutional judges.

In her superb lecture, Professor Scheppele raised an immense challenge to international law and to all of us lawyers.<sup>1</sup> I further argue that we must take up the challenge and prepare to endure frequent setbacks. As Winston Churchill reminded us, "success consists of going from failure to failure without loss of enthusiasm."<sup>2</sup>

Professor Scheppele is aware of the vicissitudes in any transformative endeavor worth the struggle,<sup>3</sup> as was Hugo Grotius.<sup>4</sup> Both decided to confront intolerant arbitrary power, a salient feature of authoritarian governments.<sup>5</sup> Grotius defied a prince in Holland who sided with the strict Calvinists, the so-called Gomarists.<sup>6</sup> Professor Scheppele has an impeccable record in defense of pluralism, tolerance, and liberal democracy, notably in Hungary and Poland.<sup>7</sup>

The parallel goes beyond opposing arbitrary power. Both Grotius and Professor Scheppele believe in the transformative power of innovative legal arguments that may become the law in the future, just as Grotius, though at the time unsuccessful, advocated for freedom of the seas against the English.<sup>8</sup>

Will history also favor Professor Scheppele? I hope it does. And soon. It depends partly on us lawyers. Who would have imagined that in Latin America, international law would play a democratization role? Yet, it has. I would like to share the broad lines of this story in support of her vision.

Professor Scheppele rightly highlights the use of innovative economic sanctions in Europe by introducing conditionalities that tie to the basic principles of the rule of law and democracy.<sup>9</sup> Hopefully, the economic sanctions are successful there. However, in Latin America, they have not worked.<sup>10</sup> The paradigmatic examples are Cuba and Venezuela, each in two very different historical contexts.<sup>11</sup> Two common factors help explain their failure: (i) the political manipulation of economic sanctions at the internal level to stoke nationalism; and (ii) the help of a great external power that eases the impact of sanctions and offers political and military support in case of

<sup>1</sup> See generally Kim Lane Scheppele, *25th Annual Grotius Lecture Series: Restoring Democracy Through International Law*, 39 AM. U. INT'L L. REV. 585 (2024) [hereinafter *Restoring Democracy*] (Challenging lawyers to use international law to defend and strengthen democracy and the rule of law).

<sup>2</sup> WINSTON CHURCHILL, CHURCHILL BY HIMSELF: IN HIS OWN WORDS app. I (Richard M. Langworth ed., 2013).

<sup>3</sup> See generally *Restoring Democracy*, supra note 1 (referring to tone of the Grotius Lecture speech).

<sup>4</sup> See generally HUGO GROTIUS, HUGO GROTIUS ON THE LAW OF WAR AND PEACE: STUDENT EDITION (Stephen C. Neff ed., 2012) (referencing the tone of Grotius' body of work).

<sup>5</sup> WILLIAM STANLEY MACBEAN KNIGHT, THE LIFE AND WORKS OF HUGO GROTIUS 150–64 (1925); RESEARCHGATE, Kim Lane Scheppele's Research While Affiliated with Princeton University and Other Places, <https://www.researchgate.net/scientific-contributions/Kim-Lane-Scheppele-20434090> [hereinafter Kim Scheppele's Research].

<sup>6</sup> KNIGHT, supra note 5, at 150–64.

<sup>7</sup> See generally Kim Scheppele's Research, supra note 5 (detailing her decades of contributions to academia in defense of the rule of law and democracy, recently focusing on Hungary and Poland).

<sup>8</sup> RENÉE JEFFERY, HUGO GROTIUS IN INTERNATIONAL THOUGHT 6 (2006). He had also advocated for the freedom of the seas in previous disputes and had published a pamphlet on *mare liberum*.

<sup>9</sup> *Restoring Democracy*, supra note 1, at 616 (explaining that economic benefits have now been tied to reducing corruption and adhering to the rulings of legitimate judicial authorities).

<sup>10</sup> Chase Harrison, *Explainer: U.S. Sanctions in Latin America*, AMS. SOC'Y/COUNCIL AMS. (Mar. 17, 2022); Louis A. Pérez, Jr., *More Than Six Decades of Sanctions on Cuba*, N. AM. CONG. ON LAT. AM. (Oct. 24, 2022).

<sup>11</sup> Pérez, Jr., supra note 10; Diana Roy, *Do U.S. Sanctions on Venezuela Work?*, COUNCIL ON FOR. RELS. (Nov. 4, 2022) (describing the roots of Cuban and Venezuelan sanctions in cold-war era thinking and modern antidemocratic and terrorist fears, respectively).

geopolitical conflict.<sup>12</sup> Two other factors that can be included are the selective use of corruption of internal actors to elicit their support to the anti-democratic regime and the expulsion or imprisonment of political opponents.<sup>13</sup>

Apart from economic sanctions, the experience of Latin America has a lot to contribute. Thus, I will focus on the work of judges, especially from the Inter-American Court of Human Rights,<sup>14</sup> and on international human rights law.

How can international law contribute to democracy? Professor Scheppelle proposes three ways: “to prevent [their] domestic institutions from falling victim to anti-democratic forces . . . to free damaged domestic institutions from autocratic capture once autocrats have locked in their power by law,” and to “help democrats within backsliding countries to replace autocratic and abusive law with democracy-honoring law as a way of signaling respect for the rule of law.”<sup>15</sup>

The Latin American experience offers interesting examples of these functions of international law. The region where I come from is not an admirable example of democracy and respect for the rule of law.<sup>16</sup> Latin America has been fertile ground for dictatorships, populisms, guerrilla movements, criminal organizations, terrorist actors, and all kinds of corruption.<sup>17</sup> Furthermore, it is marked by structural problems of social exclusion, extreme inequality, weak domestic institutions, as well as hyper presidentialism and attacks on judicial independence.<sup>18</sup>

There lies its appeal. It is a region with great experience in something bad: in threats and attacks on democracy. The threats and attacks have been ongoing since the first wave of democratization in the 1980s.<sup>19</sup>

<sup>12</sup> Dursun Peksen & A. Cooper Drury, *Coercive or Corrosive: The Negative Impact of Economic Sanctions on Democracy*, 36 INT’L INTERACTIONS 240, 242–48 (2010); Moises Rendon & Claudia Fernandez, *The Fabulous Five: How Foreign Actors Prop up the Maduro Regime in Venezuela*, CTR. FOR STRATEGIC & INT’L STUD. (Oct. 19, 2020), <https://www.csis.org/analysis/fabulous-five-how-foreign-actors-prop-maduro-regime-venezuela>.

<sup>13</sup> See generally Ted Piccone, *Latin America’s Struggle with Democratic Backsliding*, BROOKINGS INST. (Feb. 26, 2019) (illustrating the selective use of internal actors to support anti-democratic regimes and expulsion or imprisonment of political opponents).

<sup>14</sup> Agreement Between the U.N. and the State of Guatemala on the Establishment of an International Commission Against Impunity in Guatemala (“CICIG”) (Dec. 12, 2016); *Fact Sheet: the CICIG’s Legacy in Fighting Corruption in Guatemala*, WASH. OFF. LAT. AM. (Aug. 27, 2019), <https://www.wola.org/analysis/cicigs-legacy-fighting-corruption-guatemala/>. Other international organs have had a deep impact in restoring democracy in Latin America. The United Nations promoted an investigative commission to fight impunity for corruption, a threat to democracy in the region. The International Commission against Impunity in Guatemala (CICIG) was created on December 12, 2006, and dissolved on September 3, 2019. It was created through the agreement signed between the United Nations and the government of Guatemala, following consultation of the Constitutional Court in May 2007. It was subsequently approved by the Congress of the Republic of Guatemala on August 1, 2007.

<sup>15</sup> *Restoring Democracy*, *supra* note 1.

<sup>16</sup> *The Global State of Democracy 2019*, INT’L INST. FOR DEMOCRACY & ELECTORAL ASSISTANCE 116, 116–49 (Nov. 9, 2019) [hereinafter IDEA Report] (noting that while democracies are common in Latin America, the region as a whole has seen an erosion of democratic norms in recent years).

<sup>17</sup> See Erica Frantz & Barbara Geddes, *The Legacy of Dictatorship for Democratic Parties in Latin America*, 8 J. POL. LAT. AM. 3, 4–10 (2016) (noting, “All Latin American countries have had at least some experience with dictatorial government since World War II”); Stephen D. Morris & Charles H. Blake, *Introduction: Political and Analytical Challenges of Corruption in Latin America*, in CORRUPTION AND DEMOCRACY IN LATIN AMERICA 1, 1–22 (2009) (describing the depth and persistence of corruption in Latin America, noting, “corruption stubbornly thrives in Latin America”).

<sup>18</sup> MANUEL JOSÉ CEPEDA ESPINOSA & DAVID LANDAU, COLOMBIAN CONSTITUTIONAL LAW: LEADING CASES 2–5 (2017); Armin von Bogdandy et al., *Ius Constitutionale Commune en América Latina: A Regional Approach to Transformative Constitutionalism*, in MPIL RESEARCH PAPER SERIES, at 1, 4–5, 7–15 (Max Planck Inst. for Compar. Pub. L. & Int’l L. No. 2016-21, 2016); IDEA Report, *supra* note 16, at 116–49.

<sup>19</sup> HOWARD J. WIARDA, THE DEMOCRATIC REVOLUTION IN LATIN AMERICA: HISTORY, POLITICS, AND U.S. POLICY 75–85 (1990). But populism has continued, and abuses have threatened democracy in the region. Steven Levitsky & James Loxton, *Populism and Competitive Authoritarianism in the Andes*, 20 DEMOCRATIZATION 107, 107–10 (2013); see, e.g.,

International human rights law has played a constructive role in Latin America in resolving the most serious structural problems.<sup>20</sup> The experience in each country has been different with both progress and setbacks.<sup>21</sup> However, an overview offers a surprising picture.

In this discussion, I will first outline the distinctive characteristics of the Inter-American Court's approach towards democratization in Latin America that has prompted the Court's unanticipated role in the region. Second, I will review four areas in which the decisions of the Court have contributed to democratic restoration in Latin America. Third, I will highlight factors that have enhanced the Court's impact. Finally, I will endorse Professor Scheppele's invitation to us lawyers.

I will not dwell on the details of the legal arguments, but on elements of the context and on the impact of international law beyond the specific case. In my experience, paradoxically, giving weight to these extra-legal elements is essential to enhance the role of law and its ability to constructively influence the restoration of democracy. I distance myself from those who look at the political context and conclude that the law must stay out of extremely complex problems. But I also distance myself from those who consider that taking the context into account implies sacrificing legal principles. The great difficulty lies in finding the balance so that reading the context leads to enhancing the role of law.

## I. THE COURT'S APPROACH

As I know that we, Latin Americans, tend to fall into the naïve belief that the solution to a problem is to adopt a new legal rule, I quote the opinion of Armin von Bogdandy, Director of the Max Planck Institute for Comparative Public Law and International Law, in Heidelberg, Germany. He has developed several research projects on transformative constitutionalism in Latin America,<sup>22</sup> a phenomenon that started several years before the well-known case of South Africa<sup>23</sup> but had not been conceptualized as such in the region.<sup>24</sup>

On 18 July 1978 the American Convention on Human Rights entered into force. Forty years later, it has become the cornerstone of Latin American transformative constitutionalism. Worldwide, the Convention is perhaps the most important international instrument of

David Landau, *Abusive Constitutionalism*, 47 U.C. DAVIS L. REV. 189, 200–07 (2013) (providing examples of threats and attacks since the first wave of democratization).

<sup>20</sup> Landau *supra* note 19, at 247–55 (illustrating the positive correlation between the inclusion of a “democracy clause” in the OAS charter and the decline in Latin American coups following its adoption).

<sup>21</sup> Ellen L. Lutz & Kathryn Sikkink, *International Human Rights Law and Practice in Latin America*, 54 INT'L ORG. 633, 651–53 (2000) (describing how international human rights law supported stronger and more effective responses to threats to Guatemalan democracy than to Argentinian democracy as an example of the diverse outcomes of these trends).

<sup>22</sup> Prof. Dr. Armin Von Bogdandy - *Biographical Note*, MAX PLANCK INST. FOR COMPAR. PUB. L. & INT'L L. (July 26, 2023), <https://www.mpil.de/en/pub/institute/personnel/institute-management/directors/bogdandy.cfm> (detailing his varied publications on both Transformative Constitutionalism in Latin America as well as the development of “constitutional common law” in the region).

<sup>23</sup> See generally Karl E. Klare, *Legal Culture and Transformative Constitutionalism*, 14 S. AFR. J. ON HUM. RTS. 146, 146–88 (1998) (illustrating transformative constitutionalism in South Africa).

<sup>24</sup> The Colombian Constitution of 1991 was adopted as a transformative instrument and the Constitutional Court was created with the mandate to ensure that the Constitution did “bite” and “generate change,” unlike the previous 1886 Constitution, which kept Colombia as a “blocked society.” Because it was promoted by two governments with this purpose, the political word used to refer to the message of the coming upheaval was “el revolcón,” a less glamorous term than transformative constitutionalism. See generally MANUEL JOSÉ CEPEDA ESPINOSA, *LA CONSTITUCIÓN DE 1991: VIVIENTE Y TRANSFORMADORA* (2022). The Brazilian Constitution of 1988 had elements of transformative constitutionalism. Before, the Mexican Constitution of 1917, still in force, aimed at radical transformation since it was adopted at a revolutionary moment at Querétaro. Rainer Grote, *The Mexican Constitution of 1917: An Early Example of Radical Transformative Constitutionalism*, in TRANSFORMATIVE CONSTITUTIONALISM IN LATIN AMERICA: THE EMERGENCE OF A NEW IUS COMMUNE 615, 615–44 (Armin von Bogdandy et al. eds., 2017).

this nature, which begs the questions of how such an extraordinary development became possible.<sup>25</sup>

The Convention became an important international instrument of transformative constitutionalism due to a mix of very diverse factors.<sup>26</sup> One of the factors is that the judicial interventions of the Inter-American Court have distinctive characteristics.

First, the judges of the Inter-American Court take context very seriously. The individual facts of the case are considered an expression of that context.<sup>27</sup> Second, the context is analyzed as a reflection of systemic failures.<sup>28</sup> Third, the remedies adopted by the Court seek an impact beyond the specific case<sup>29</sup> and may require legal and constitutional reforms.<sup>30</sup> Fourth, the Court seeks, in the words of Professor Scheppele, to maintain democracy restored and discourage anyone from succumbing to authoritarian temptations again.<sup>31</sup> This fourth characteristic was eloquently synthesized in the Argentine expression “*Nunca Más*” (“never again”), which was the name of the final report of the truth commission chaired by the writer Ernesto Sábato.<sup>32</sup>

## II. IMPORTANT PRO-DEMOCRATIC INTERVENTIONS OF THE COURT

I will briefly refer to four areas in which the Inter-American Court has intervened to restore democracy: impunity of agents of authoritarianism, assault on judicial independence, restrictions to media freedom and barriers to competitive elections. I will conclude with a few reflections on the impact of its judgments.

### A. *Against the Impunity of Authoritarianism*

As is well known, most Latin American countries have been governed for prolonged periods by military dictatorships.<sup>33</sup> During the transitions to democracy in the mid-1980s, laws were adopted

<sup>25</sup> Armin von Bogdandy, *The Transformative Mandate of the Inter-American System: Legality and Legitimacy of an Extraordinary Jurisgenerative Process*, in 2019-16 MPIL RESEARCH PAPER SERIES 1, 1 (2019).

<sup>26</sup> *Id.* at 1–2 (describing the regional emergence of democratic institutions, domestic adherence to treaty obligations, and the role of the Inter-American Court as factors in the Convention’s central role in Latin American legal evolution).

<sup>27</sup> JO M. PASQUALUCCI, *THE PRACTICE AND PROCEDURE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS* 224–25 (2012).

<sup>28</sup> Victor Abramovich, *De Las Violaciones Masivas a Los Patrones Estructurales: Nuevos Enfoques y Clásicas Tensiones En El Sistema Interamericano de Derechos Humanos*, 6 SUR INT’L J. HUM. RTS. 7, 7–39, 17 (2009).

<sup>29</sup> *E.g.*, Radilla-Pacheco v. Mexico, Merits, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 209, ¶¶ 329–34 (Nov. 23, 2009) (orders aimed at changing the manner in which prosecutors conduct investigations); González v. Mexico, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 205, ¶¶ 541–43 (Nov. 16, 2009) (orders aimed at changing the way in which police officers are trained); Barbera v. Venezuela, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 182, ¶ 253 (Aug. 5, 2008) (orders aimed at changing the way courts hire and fire judges). *See also* González, Inter-Am. Ct. H.R. (ser. C) No. 205, ¶ 512 (orders including requiring the state to instruct officials regarding the human rights of women, creating a database of the women who have disappeared in Ciudad de Juárez, and restructuring the military jurisdiction).

<sup>30</sup> Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123, art. 2 [hereinafter ACHR]. Article 2 of the American Convention on Human Rights states: “Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.”

<sup>31</sup> *Restoring Democracy*, *supra* note 1.

<sup>32</sup> NAT’L COMM’N ON DISAPPEARANCE OF PERSONS (CONADEP), INFORME NUNCA MÁS [Never Again Report] (Sept. 1984) (Arg.), <http://www.derechoshumanos.net/lesahumanidad/informes/argentina/informe-de-la-CONADEP-Nunca-mas-Indice.htm#C1>.

<sup>33</sup> *See generally* Gordon Richards, *The Rise and Decline of Military Authoritarianism in Latin America: The Role of Stabilization Policy*, 5 SAIS REV. 155, 155 (1985) (outlining governance by military dictatorships in Latin America).

in different countries to prevent dictators or members of military juntas from being tried and condemned.<sup>34</sup> The Inter-American Court has consistently held that these types of laws are contrary to the American Convention of Human Rights.<sup>35</sup> In 2001, this belief was made clear in the *Barrios Altos* judgment by the Inter-American Court.<sup>36</sup> The judgment prevented President Alberto Fujimori's Administration from implementing a new self-amnesty law in Peru.

How seriously has the Inter-American Court taken the "Never Again" admonition? Very seriously. In 2011, in *Gelman v. Uruguay*,<sup>37</sup> the Court declared an amnesty law contrary to the American Convention. The peculiarity in this case resides not in its authoritarian origin but in the opposite: the law had been endorsed in a referendum (in 1989 that aimed but failed to derogate the law) and a plebiscite (in 2009 that aimed but failed to approve a constitutional amendment that would have deprived retroactively the law of any effect).<sup>38</sup> The amnesty law had been endorsed in two 1988 rulings of the Supreme Court of Uruguay as an amnesty law after the transition to democracy,<sup>39</sup> but it was then unapplied in three cases.<sup>40</sup> The democratic pedigree of the law was unquestionable.<sup>41</sup> However, for the Court, never again meant never again.

The staunch defense of the principle that human rights violations by authoritarian governments cannot be forgiven fulfills a democratic function: it not only prevents key actors of dictatorships from remaining unpunished, but also sends a clear message to those who in the future ponder falling into authoritarian temptations.<sup>42</sup>

<sup>34</sup> Lisa J. Laplante, *Outlawing Amnesty: The Return of Criminal Justice in Transitional Justice Schemes*, 50 VA. J. INT'L L. 915, 922–25 (2009).

<sup>35</sup> Douglass Cassel, *Lessons from the Americas: Guidelines for International Response to Amnesties for Atrocities*, 59 L. & CONTEMP. PROBS. 197, 211–12 (1996) (noting rulings finding El Salvador's complete amnesty law, Argentina's impunity laws, and Uruguay's criminal amnesty law all violative of the American Conventions for failing to ensure human rights under Article 1(1)).

<sup>36</sup> *Barrios Altos v. Peru*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 75, ¶¶ 41–44 (Mar. 14, 2001); *La Cantuta v. Peru*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 162, ¶¶ 162–89 (Nov. 29, 2006).

<sup>37</sup> *Gelman v. Uruguay*, Merits and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 221, ¶¶ 195–97 (Feb. 24, 2011); Roberto Gargarella, *Democracy and Rights in Gelman v. Uruguay*, 109 AM. J. INT'L L. UNBOUND 115, 115–16 (2015).

<sup>38</sup> Gargarella *supra* note 37, at 117.

<sup>39</sup> *Gelman*, Inter-Am. Ct. H.R. (ser. C) No. 221, ¶ 146 (citing to Suprema Corte de Justicia [SCJ] [Supreme Court of Justice] May 2, 1988, Judgment No. 112/87 (Uru.); Suprema Corte de Justicia [SCJ] [Supreme Court of Justice] June 15, 1988, No. 224/1988 (Uru.)); Martín Risso Ferrand et al., *Cumplimiento de la sentencia Gelman vs. Uruguay de la Corte Interamericana de Derechos Humanos [Compliance with the Uruguay to Uruguay Judgment of the Inter-American Court of Human Rights]*, 27 REVISTA DE DERECHO 1, 5 (2023).

<sup>40</sup> The three cases had *inter partes* effects and were decided in 2009, 2010, and 2011. After the decision of the Inter-American Court, a ruling of the Supreme Court declared articles of the Law 18.831 of 2011 unconstitutional, but struck down with *inter partes* effects precisely those articles that declared the crimes perpetrated during the dictatorship as crimes against humanity (article 3) and not subject to the ordinary statute of limitations (article 2). Then, in a decision of May 10, 2022, the Supreme Court changed its position and applied international human rights instruments to allow the continuation of criminal procedures that have ended in sentences condemning those responsible of crimes during the dictatorship, notably forced disappearances. Risso Ferrand et al., *supra* note 39, at 19.

<sup>41</sup> Armin von Bogdandy & Rene Urueña, *International Transformative Constitutionalism in Latin America*, 114 AM. J. INT'L L. 403, 434 (2020) (stating that the Expiry Law was adopted by a democratically elected Congress, thrice reviewed by a relatively independent Supreme Court, and twice subject to a free national referendum).

<sup>42</sup> *Radilla-Pacheco v. Mexico*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 209, ¶¶ 337–42 (Nov. 23, 2009); *García v. Mexico*, Preliminary Objections, Merits, Reparations, and Legal Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 220, ¶¶ 194–201 (Nov. 26, 2010); *Cantú v. Mexico*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 216, ¶¶ 156–67 (Aug. 31, 2010) (demonstrating that the court ordered changes in distribution of competences between martial and civilian courts so that military crimes against civilians fall into the jurisdiction of the civilian courts).



Inter-American jurisprudence in this matter has had an impact beyond democratic transitions. It has been decisive in establishing the minimums that must be respected in peace processes, that is, in transitions from armed conflicts to national reconciliation. In Colombia, establishing minimums was crucial, as was the Rome Statute and the International Criminal Court. In a peace agreement signed in 2016 with the Fuerzas Armadas Revolucionarias de Colombia (“Revolutionary Armed Forces of Colombia” or “FARC”), which for the last half a century was the largest and most powerful guerrilla group in Colombia,<sup>43</sup> the parties established that serious crimes involving violations of international law could not be granted amnesty.<sup>44</sup> The heads of the guerrilla group agreed to create a transitional justice system that would try and sentence them for crimes against humanity and war crimes.<sup>45</sup> Said agreement on transitional justice begins by citing the concurring opinion in the decision of the Inter-American Court on the Massacres of El Mozote, in El Salvador.<sup>46</sup> In this ruling, amnesty for the crimes committed during the massacres was declared contrary to the American Convention, many years after the armed conflict had ended through a peace agreement.

Let us pause to appreciate what this agreement reflects about the impact of international law within transitions to peace: guerrilla leaders accept that international rules must be respected as a prior step to be able to rejoin civilian life and consequently agree not to receive amnesty for international crimes. It is also significant that the same transitional justice applies to the military who face judicial proceedings related to war crimes and crimes against humanity. I can attest that this was not an imposition of the civilian government.<sup>47</sup> It was a conclusion that was reached after long hours of analysis with the high military command on the importance of taking seriously the jurisprudence on “Nunca Más,” even if it was not strictly applicable. In Colombia, the soldiers acted under democratically elected governments and have accepted to be subject to civilian power since the late 1950s.

All the rules of implementation and development of the peace agreement have been judged by the Constitutional Court.<sup>48</sup> The judgments of the Inter-American Court, like the pronouncements of the International Criminal Court, were widely cited by the Constitutional Court.<sup>49</sup> This gives greater strength to transitional justice in Colombia because it has passed through a denser and stricter filter.<sup>50</sup>

<sup>43</sup> Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace, Colom.-FARC, Nov. 24, 2016 [hereinafter *Colom.-FARC Peace Treaty*]; Mapping Militant Project, *Revolutionary Armed Forces of Colombia (FARC)*, STAN. CTR. FOR INT’L SEC. & COOP. (July 2019), [https://cisac.fsi.stanford.edu/mappingmilitants/profiles/revolutionary-armed-forces-colombia-farc#text\\_block\\_17686](https://cisac.fsi.stanford.edu/mappingmilitants/profiles/revolutionary-armed-forces-colombia-farc#text_block_17686).

<sup>44</sup> Colom.-FARC Peace Treaty, *supra* note 43, arts. 40–41.

<sup>45</sup> L. 01/17, abril 4, 2017, DIARIO OFICIAL [D.O.] (Colom.); Corte Constitucional [C.C.] [Constitutional Court], noviembre 13, 2017, Sentencia C-674 (Colom.) A Special Jurisdiction for Peace (Jurisdicción Especial para la Paz, JEP) was later created by a constitutional amendment (Acto Legislativo 1 de 2017). The Constitutional Court upheld the amendment quoting extensively international norms Decision C-674 of 2017.

<sup>46</sup> Colom.-FARC Peace Treaty, *supra* note 43, § 5.1.2, ¶ 1 (citing the concurrence in the El Mozote Massacre judgment issued by the IACHR); *Masacres del Mozote v. El Salvador, Merits, Reparations, and Costs*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 252 (Oct. 25, 2012).

<sup>47</sup> See generally Julie Turkewitz & Sofia Villamil, *Colombian General and 10 Others Admit to Crimes Against Humanity*, N.Y. TIMES (Apr. 27, 2022) (stating that according to the Colombian court officials, this was the first time that perpetrators have admitted to committing war crimes).

<sup>48</sup> Each decision can be accessed the Constitutional Court’s web site. *Acuerdo de Paz Cases*, CORTE CONSTITUCIONAL DE COLOMBIA [CONSTITUTIONAL COURT OF COLOMBIA], <https://www.corteconstitucional.gov.co/relatoria/> (search in search bar for “Acuerdo de Paz”; then follow link to the list of cases).

<sup>49</sup> Corte Constitucional [C.C.] [Constitutional Court], enero 27, 2022, Sentencia SU020/22 (p. 5.5.178, 8.2.157) (Colom.); C.C., diciembre 7, 2017, Sentencia T-713/17 (p. 7.1, 7.6) (Colom.); C.C., noviembre 3, 2020, Sentencia T-469/20 (p. 164, n. 175) (Colom.); C.C., septiembre 26, 2018, Sentencia T-399/18 (p. 9) (Colom.); C.C., diciembre 11, 2019, Sentencia SU599/19 (p. 2.6, 2.11) (Colom.).

<sup>50</sup> See Ted Piccone, *Peace with Justice: The Colombian Experience with Transitional Justice*, BROOKINGS INST. 14–15 (July 2019) (noting that the ICC prosecutor issued a series of warnings reminding the Colombian government to prosecute war crimes and other grave violations).

It is pertinent to emphasize that in October 2021, the prosecutor of the International Criminal Court decided to close the cases against Colombia due to the proper functioning of the transitional justice system, which has already charged former guerrilla chiefs and some military commanders of committing crimes against humanity and war crimes.<sup>51</sup>

The United Nations (“U.N.”) Security Council has played a key role with respect to the Peace Agreement: it gave unanimous support to the agreement soon after it was signed.<sup>52</sup> Then, the U.N. sent a verification mission and received periodical reports concerning the implementation of the agreement.<sup>53</sup> The Council also approved that the U.N. would assume the responsibility of verifying on the ground compliance with the sanctions imposed by the Special Jurisdiction for Peace.<sup>54</sup> International law is gradually cementing peace without impunity in Colombia.

Professor Scheppele stresses that in our times autocrats are more subtle and strategic.<sup>55</sup> Gradually, they are suppressing judicial independence and media freedom, closing the political process, and changing electoral rules to perpetuate themselves in power.<sup>56</sup> This gradual detriment to a country’s democracy is happening without affecting the appearance of liberty, as citizens can continue walking down the street enjoying an ice cream.<sup>57</sup>

### *B. Guaranteeing Judicial Independence*

In Latin America, we have witnessed numerous attacks on judicial independence, but the Inter-American Court has intervened to try to stop them.<sup>58</sup> Professor Scheppele has rightly referred to the cases of Peru and Ecuador.<sup>59</sup> I limit myself to adding that in Peru the intervention of the Inter-American Court in 2001 led to the return of the three justices of the Constitutional Court who had been illegally expelled from their position for having dared to take decisions contrary to President Fujimori’s plan for a third re-election.<sup>60</sup>

<sup>51</sup> Press Release, ICC, ICC Prosecutor, Mr. Karim A. A. Khan QC, Concludes the Preliminary Examination of the Situation in Colombia with a Cooperation Agreement with the Government Charting the Next Stage in Support of Domestic Efforts to Advance Transitional Justice (Oct. 28, 2021); *Caso 01 [Case 1]*, JURISDICCIÓN ESPECIAL PARA LA PAZ [SPECIAL JURISDICTION FOR PEACE] (July 27, 2023), <https://www.jep.gov.co/macrocasos/caso01.html#container>; *Caso 03 [Case 3]*, JURISDICCIÓN ESPECIAL PARA LA PAZ [SPECIAL JURISDICTION FOR PEACE] (Aug. 30, 2023), <https://www.jep.gov.co/macrocasos/caso03.html>.

<sup>52</sup> See, e.g., Press Release, Security Council, Security Council Press Statement on Colombia, U.N. Press Release SC/15361 (July 20, 2023) (emphasizing the importance of comprehensive implementation of the Final Peace Agreement in Colombia).

<sup>53</sup> U.N. Secretary-General, *Report of the Secretary-General to the Security Council on the United Nations Mission in Colombia*, ¶ 1, U.N. Doc. S/2016/729 (Aug. 18, 2016).

<sup>54</sup> S.C. Res. 2574, ¶ 1 (May 11, 2021) (supporting the comprehensive implementation of the Final Peace Agreement in Colombia).

<sup>55</sup> See Kim Lane Scheppele, *How Viktor Orbán Wins*, 33(3) J. DEMOCRACY 45, 46 (2022) [hereinafter *How Orbán Wins*] (discussing how autocrats like Orbán can use their parliamentary majorities to change the law, neutralize the opposition’s adopted strategy, and rig elections legally).

<sup>56</sup> Kim Lane Scheppele, *The Treaties Without a Guardian: The European Commission and the Rule of Law*, 29 COLUM. J. EUR. L. 93, 99–103 (2023).

<sup>57</sup> *How Orbán Wins*, *supra* note 55, at 46 (describing how Viktor Orbán’s regime utilizes subsidies and legal changes that normalize and obfuscate the erosion of democratic norms).

<sup>58</sup> *Coello v. Ecuador*, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 266, ¶ 104 (Aug. 23, 2013); *Const. Tribunal v. Ecuador*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 268, ¶¶ 165, 188, 208 (Aug. 28, 2013).

<sup>59</sup> *Const. Ct. v. Peru*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 71, ¶¶ 165–88, 6 (Jan. 31, 2001); *Coello*, Inter-Am. Ct. H.R. (ser. C) No. 266, ¶ 104.

<sup>60</sup> *Const. Ct. v. Peru*, Inter-Am. Ct. H.R. (ser. C) No. 71, ¶¶ 2, 42, 120, 130 (stating that the Interpretation Law was declared unconstitutional, therefore rendering President Fujimori unable to run for a third term).

When President Fujimori attempted a third re-election, the Constitutional Court prevented him from doing so.<sup>61</sup> At the request of the bar association, the Peruvian Court declared inapplicable the so-called law of “authentic interpretation” of the Constitution, through which Congress considered that Fujimori’s first term, between 1990 and 1995, should not be counted to apply the rule according to which only one re-election was admissible.<sup>62</sup> The three magistrates responsible for the decision were dismissed in a kind of impeachment.<sup>63</sup> The other four members of the Court were not dismissed because they did not participate in the decision after they had recused themselves for having taken a public position on the validity of the law.<sup>64</sup> The Inter-American Commission ordered their reinstatement,<sup>65</sup> but the government did not comply.<sup>66</sup> The Inter-American Court protected the independence of the Peruvian Constitutional Court and ordered the payment of compensation to the expelled justices and their reinstatement to the Constitutional Court.<sup>67</sup>

In Ecuador, after enormous political controversies and partial compliance with the judgments of the Inter-American Court, the evolution of the democratic process led to the formation of a new National Court of Justice and a new Constitutional Court.<sup>68</sup> In a referendum, the Ecuadorian people decided that a special commission should appoint new magistrates for a new stage of democracy.<sup>69</sup> Both Courts have preserved their independence after the referendum.

In other countries, the interventions of the Inter-American Court have not been sufficient to protect judicial independence.<sup>70</sup> In Venezuela, provisionally appointed judges were arbitrarily removed from office.<sup>71</sup> In 2011, the Court ordered their reinstatement and developed important principles to protect judicial independence.<sup>72</sup> However, the general deterioration of the situation in Venezuela has swept away judicial independence and democratic liberties.<sup>73</sup> In the case of Venezuela, the Inter-American Court, as well as other powerful actors, were unable to stop the erosion of democracy.<sup>74</sup> By this point, Venezuela could not continue being part of the American

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> Const. Ct. v. Peru, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 71, ¶¶ 10, 13 (Jan. 31, 2001).

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* ¶ 119 (stating that the reparation of the damage included full restitution which consists of reestablishing the previous situation, repairing the consequences of the violation, and paying compensatory damages).

<sup>68</sup> Coello v. Ecuador, Preliminary Objection, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 266, ¶¶ 54–60 (Aug. 23, 2013) (stating that the new Constitution adopted in 1998 had provisions to guarantee judicial independence).

<sup>69</sup> Daniela Salazar Marín, *The Transitory Letter for Judicial Renovation*, YALE L. SCH. GLOB. CONST. SEMINAR 2022, at V23–24 (stating that a new court was designated in February 2019 through a merits process that included a partial renovation of three judges every three years).

<sup>70</sup> Gonzalo Candia, *Regional Human Rights Institutions Struggling Against Populism: The Case of Venezuela*, 20 GERMAN L.J. 141, 141, 152–53 (2019) (stating that the Inter-American Court of Human Rights has been unsuccessful in preventing human rights abuses in Venezuela’s populist Chavista regime).

<sup>71</sup> *Id.* at 152–53 (discussing the Inter-American Court of Human Rights’ condemnation of Venezuela for its arbitrary removal of five Supreme Court judges).

<sup>72</sup> Chocrón v. Venezuela, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 227, ¶ 205 (July 1, 2011).

<sup>73</sup> Candia, *supra* note 70, at 160.

<sup>74</sup> *Id.* at 141, 153 (discussing that the IACHR was unable to deter the Chavista regime from human rights abuses because the Supreme Court of Venezuela found IACHR’s decisions unconstitutional and the judicial process slow).

Convention on Human Rights.<sup>75</sup> In 2012, Venezuela denounced the Convention and withdrew from the jurisdiction of the Court.<sup>76</sup> It could not even keep up appearances.

### C. *Protecting Freedom of the Press and the Media*

The other indispensable check on power in a democracy is the free media. It has been attacked in Latin America and continues to be.<sup>77</sup> But the Inter-American Court made it clear early on that it would defend this pillar of democracy.<sup>78</sup> In *Advisory Opinion OC-05/85*, the Court held that journalists could not be subjected to a prior licensing process in any form. The advisory opinion has been applied in several countries.<sup>79</sup>

On several occasions, the Inter-American Court has held that contempt laws (“*leyes de desacato*”) are contrary to freedom of the press and expression.<sup>80</sup> These laws, inherited from authoritarian times, penalized disrespect for public officials.<sup>81</sup> They were extensively interpreted by national authorities to censor criticism of officials in different branches of government.<sup>82</sup> National courts, notably Brazil’s Superior Tribunal of Justice, have applied the American Convention to strike down contempt laws that restricted freedom of expression.<sup>83</sup>

Then, the Inter-American Court went further. It ruled against the use of criminal law to intimidate journalists or hide facts that citizens have the right to know.<sup>84</sup> In two cases involving Presidents of the Republic, Menem in Argentina and Correa in Ecuador, the Court gave more weight to freedom of the press than to the right supposedly affected by the disclosure of uncomfortable information or by the use of harsh words in a newspaper.<sup>85</sup>

In the Ecuador case, some nongovernmental organizations (“NGOs”) argued that criminal law cannot be weaponized by public officials to prevent the disclosure of information on matters of

<sup>75</sup> Gabriel Ortiz, *Overcoming the Westphalian Notion of “Absolute Sovereignty”: The Venezuelan Case with the Inter-American Convention of Human Rights*, 26 HUM. RTS. BRIEF 39, 39 (2022).

<sup>76</sup> *Id.* at 39 (stating that because then President Hugo Chávez withdrew from the ACHR, no one could petition before the Inter-American Commission or the Inter-American Court (IACHR) to hold Venezuela accountable for human rights violations).

<sup>77</sup> Natalie Southwick & Carlos Martínez de la Serna, *A Press Freedom Crisis Unfolds in Latin America*, COMM. TO PROTECT JOURNALISTS (Dec. 8, 2021) (stating that the number of journalists killed in relation to their work in Latin America has surpassed the number of those in jail at the time of CPJ’s 2021 prison census).

<sup>78</sup> Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights), *Advisory Opinion OC-5/85*, Inter-Am. Ct. H.R. (ser. A) No. 5, ¶¶ 38, 85 (Nov. 13, 1985) (stating that Article 13(2) of the ACHR specifies that any preventative measure beyond the scope of subparagraph 4 inevitably amounts to an infringement of the freedom of press as guaranteed by the convention).

<sup>79</sup> *Id.* ¶¶ 38, 85 (stating that compulsory licensing of journalists is incompatible with Article 13 of the ACHR).

<sup>80</sup> The special report of the Inter American Commission of Human Rights on contempt laws was paramount. *See INTER-AM. COMM. ON HUM. RTS., REPORT ON THE COMPATIBILITY OF “DESACATO” LAWS WITH THE AMERICAN CONVENTION ON HUMAN RIGHTS*, 1, 6–7 (1994) [hereinafter *Desacato Report*] (assessing the individual’s free speech rights in relation to state censorship).

<sup>81</sup> *See id.* at 2 (providing background on the purpose of contempt laws).

<sup>82</sup> *See id.*

<sup>83</sup> *See generally* S.T.J.J., *Recurso Especial No. 1.640.084*, Relator: Ministro Ribeiro Dantas, 13.04.2021, *Diário da Justiça Eletrônico* [D.J.e], 16.04.2021 (Braz.).

<sup>84</sup> *Urrutia v. Ecuador*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 446, ¶¶ 1, 177, 210 (Nov. 24, 2021).

<sup>85</sup> *Id.*; *Fontecchia v. Argentina*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 238, ¶¶ 2, 16, 137 (Nov. 29, 2011); *see* Manuel José Cepeda Espinosa & Dario Milo, *The Beginning of the End for Criminal Defamation in the Americas? The El Universo Case*, JUST SEC. (May 3, 2022) (explaining the effects of the *El Universo* Case in relation to jurisprudence on media freedom in the Americas).

public interest or silence democratic debate on such issues.<sup>86</sup> The Court took a step in that direction but emphasized anti-slap measures.<sup>87</sup> Last year, the Court analyzed not the use, but the very existence and scope of the crime of defamation.<sup>88</sup> In November 2022, in *Baranoa Bray v. Chile*, it considered that defamation can never be applied to information or opinions on matters of public interest.<sup>89</sup> The Court held that “states must establish alternative mechanisms to criminal law so that public officials can obtain ratification . . . whenever their good name and honor has been affected.”<sup>90</sup>

In the Ecuador case, the High-Level Panel of Legal Experts of the Media Freedom Coalition of States filed an amicus curiae and welcomed the decision.<sup>91</sup> The holding in the *Baranoa Bray* case embraces fully the argument made by the Panel.<sup>92</sup>

In addition to presenting amicus curiae, the Panel has begun to perform Venice Commission-style functions by rendering opinions on bills related to freedom of the press at the request of the respective state,<sup>93</sup> as was the case recently in Zimbabwe.<sup>94</sup> The Panel has advised states on international law,<sup>95</sup> both in relation to existing framework for protection and addressing material gaps.<sup>96</sup> The Panel has issued four reports which have started to have an impact.<sup>97</sup> For example, the Panel issued a report on the creation of an emergency visa for journalists at risk – a recommendation that has now been taken up by numerous states, including Czech Republic, Germany, Canada, Latvia, Lithuania, Estonia, and Kosovo.<sup>98</sup> Nearly 1,500 emergency visas have been granted to journalists and human rights activists between 2022 and 2023.<sup>99</sup>

As such, the Panel, alongside the Inter-American Court, have protected the freedom of the press and media in tandem, and thus furthering democratization within Latin America. The Inter-American Court has also handed down rulings that keep the political process open and competitive. It is a fourth way of restoring democracy.

<sup>86</sup> *Urrutia*, Inter-Am. Ct. H.R. (ser. C) No. 446, ¶¶ 12, 84.

<sup>87</sup> *Id.* ¶¶ 95–96.

<sup>88</sup> *Bray v. Chile*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 481, ¶ 109 (Nov. 24, 2022).

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* ¶ 115.

<sup>91</sup> *High Level Panel of Legal Experts on Media Freedom - Who We Are*, INT’L BAR ASS’N, <https://www.ibanet.org/HRI-Secretariat/Who-we-are#Members>.

<sup>92</sup> Special thanks to the work of the High-Level Panel, established in 2019, to which I have the honor to be a part of along with Catherine Amirfar, former President of ASIL, and Can Yeginsu, current member of ASIL’s Executive Council. Both are deputy chairs of the Panel, chaired by Baron David Neuberger, former President of the Supreme Court of the United Kingdom. It is composed by lawyers from all continents, some of them well-known to the ASIL Community: Professor Sarah Cleveland, Baroness Helena Kennedy, Professor Irwin Cotler, Judge Chile Eboe-Osuji, and Mrs. Amal Clooney, former deputy chair.

<sup>93</sup> *See High Level Panel of Legal Experts on Media Freedom - Opinions to States on Legislation*, INT’L BAR ASS’N, <https://www.ibanet.org/HRI-Secretariat/Opinions-to-States-on-Legislation> (describing the function of the High-Level Panel of Legal Experts on Media Freedom).

<sup>94</sup> *See id.* (providing Zimbabwean legislation reviewed by the Panel).

<sup>95</sup> *See High Level Panel of Legal Experts on Media Freedom - Our Reports*, INT’L BAR ASS’N, <https://www.ibanet.org/HRI-Secretariat/Reports#Advisory> (describing the Panel’s research on international human rights standards).

<sup>96</sup> *See id.* (identifying the Panel’s practice for bolstering legislation which fails to meet fundamental human rights standards).

<sup>97</sup> *See id.* (identifying the Panel’s four advisory reports).

<sup>98</sup> *See Rhodri Davies, “They Gave me Freedom”: Journalists on the Importance of Safe Refuge from MFC Countries*, MEDIA FREEDOM COAL. (June 26, 2023) (detailing the countries that have provided refuge for journalists as members of the Media Freedom Coalition).

<sup>99</sup> *See id.* (referencing the Media Freedom Coalition’s 2022 Activity Report).



#### *D. Keeping the Electoral Process Open and Competitive*

Professor Scheppele alluded to presidential re-election without term limits—the most sensitive issue. In a 2021 advisory opinion, the Inter-American Court stated that “enabling presidential reelection without term limits is contrary to the principles of representative democracy.”<sup>100</sup>

In addition to the perpetuation in power of the same government, there are other consequences that can limit electoral competition.<sup>101</sup>

Can a candidate independent of the traditional dominant parties compete in the presidential elections? Can a leader who has exercised opposition to the political system be disqualified from being a candidate by the imposition of a non-judicial sanction? The first question was addressed in *Gutman v. Mexico*,<sup>102</sup> and the second was addressed in *Lopez Mendoza v. Venezuela*,<sup>103</sup> but in neither of the two respective countries did the two judgments of the Inter-American Court produce as profound of an impact as they eventually did in Colombia.<sup>104</sup>

In Colombia, both sentences were decisive for the triumph of the current president, Gustavo Petro. Since the enactment of the current constitution in 1991,<sup>105</sup> adopted by a popularly elected and very pluralistic Constituent Assembly,<sup>106</sup> the political system has opened up to such an extent that the two traditional political parties lost a significant amount of power. The two parties went from controlling ninety-two percent of the seats in the senate in 1990, to merely twenty-five percent in 2018.<sup>107</sup> However, Petro generated intense controversies not only for having been a member of a guerrilla group that signed peace in 1990,<sup>108</sup> but also for his political positions.<sup>109</sup> When he was mayor of Bogotá, a disciplinary sanction disqualified him from being a candidate in future popular election for fifteen years. The Inter-American Commission, first through a precautionary measure and then later through a final judgment in the Inter-American Court,<sup>110</sup> intervened to protect his

<sup>100</sup> Presidential Reelection Without Term Limits in the Context of the Inter-American Human Rights System (Interpretation and Scope of Arts. 1, 23, 24, and 32 and 29 American Convention on Human Rights, XX of the American Declaration of the Rights and Duties of Man, 3(d) of the Charter of the Organization of American States and of the Inter-American Democratic Charter), Advisory Opinion OC-28/21, Inter-Am. Ct. H.R. (ser. A) No. 28, ¶ 144 (June 7, 2021).

<sup>101</sup> See *id.* (detailing further the necessary and fundamental elements of representative democracy).

<sup>102</sup> See *Gutman v. Mexico*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 184, ¶¶ 81–82, 251 (Aug. 6, 2008) (assessing Gutman’s right to run for the United Mexican States’ presidential office in accordance with the American Convention on Human Rights).

<sup>103</sup> See *Mendoza v. Venezuela*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 233, ¶ 249 (Sept. 1, 2011) (declaring that Venezuela violated Mendoza’s right to run for office under the American Convention on Human Rights).

<sup>104</sup> See Cepeda Espinosa, *supra* note 24 (assessing Gustavo Petro’s cases before the Inter-American Court of Human Rights and their impact on Colombian society).

<sup>105</sup> See *id.* (identifying enacted legislation in Colombia).

<sup>106</sup> See Donald T. Fox & Anne Stetson, *The 1991 Constitutional Reform: Prospects for Democracy and the Rule of Law in Colombia*, 24 CASE W. RESRV. J. INT’L L. 139, 145 (1992) (describing the 1991 Colombian Constitutional Assembly framework and objectives).

<sup>107</sup> Juan Jaramillo & Beatriz Franco-Cuervo, *Colombia*, in 2 ELECTIONS IN THE AMERICAS: A DATA HANDBOOK 295, 295, 311, 331, 333 (Dieter Nohlen ed., 2005); Election for Colombian Senate 2018 Results, INT’L FOUND. FOR ELECTORAL SYS. (Aug. 8, 2023) [hereinafter IFES].

<sup>108</sup> See Oliver Stuenkel, *The Greatest Risk Facing Colombia and Its New Leftist President*, CARNEGIE ENDOW. FOR INT’L PEACE (Aug. 11, 2022) (commenting on Gustavo Petro Urrego’s military history and political affiliation).

<sup>109</sup> See *id.* (highlighting Gustavo Petro’s political stance on military operations).

<sup>110</sup> See Inter-Am. Ct. H.R., Res. 5/2014, *Matter Gustavo Petro Urrego concerning Colombia*, Precautionary Measures No. 374-13, at ¶¶ 3, 4D, 14, 20 (Mar. 18, 2014) (considering the risk to Gustavo Petro Urrego’s political rights); *Urrego v. Colombia*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 406, ¶¶ 95, 135 (July 8, 2020) (concluding that the Colombian government impaired Gustavo Petro Urrego’s rights).

right to be elected, invoking, inter alia, the decision in the *Lopez* case against Venezuela. Colombian judges respected and applied the Inter-American decisions.<sup>111</sup> For this reason, Petro was able to run for election in 2018.<sup>112</sup> Although he lost, he made it to the second round of the presidential election.<sup>113</sup> But his party obtained very few votes in the congressional election, thus falling below the threshold required to stay in the political game and receive state funding.<sup>114</sup> However, in 2021 the Constitutional Court, invoking the principles established in the case of Castañeda against Mexico, restored the legal status of his party.<sup>115</sup> With this judicial intervention, Petro's party was able to compete in following elections, organize a coalition, receive state funding, and finally win the presidency of Colombia in August 2022.<sup>116</sup>

In sum, the current president of Colombia has benefited from two judgments of the Inter-American Court, one regarding Venezuela and the other regarding Mexico as Colombian judges have applied the doctrines established by the Inter-American Court by virtue of the constitutional block.

### III. FACTORS THAT HAVE ENHANCED THE COURT'S IMPACT.

#### A. *The Role of Institutional Design*

The constitutional block is a national doctrine applied in several Latin American countries.<sup>117</sup> According to the doctrine, human rights treaties are incorporated in the national legal system at the same level as a state's constitution.<sup>118</sup> Therefore, statutes and administrative acts must respect not only the national constitution but also the treaties that belong to the constitutional block.<sup>119</sup> The doctrine has been adopted in several Latin American Constitutions: Colombia in 1991,<sup>120</sup> Argentina in 1994,<sup>121</sup>

<sup>111</sup> See Consejo de Estado [C.E.] [State Council], Sala Plena de lo Contencioso Administrativo, noviembre 15, 2017, César Palomino Cortés, rad. 110010325000201400360 00, Gustavo Francisco Petro Urrego contra Procuraduría General de la Nación (1131-2014) (Colom.).

<sup>112</sup> See June S. Beittel, *Colombia: Background and U.S. Relations*, CONG. RSCH. SERVS. 7 (2021) (reviewing the results of the 2018 Colombian presidential elections).

<sup>113</sup> *Id.*

<sup>114</sup> See June S. Beittel & Edward Y. Garcia, *Colombia's 2018 Elections*, CONG. RES. SERV. (2018) (explaining the results of Colombia's 2018 elections).

<sup>115</sup> See Corte Constitucional [C.C.] [Constitutional Court], septiembre 16, 2021, Sentencia SU-316/21 (Colom.).

<sup>116</sup> See *Gustavo Petro*, ENCYCLOPEDIA BRITANNICA (Sept. 11, 2023) (detailing Petro's political history).

<sup>117</sup> See Alexandra Huneeus, *Constitutional Lawyers and the Inter-American Court's Varied Authority*, 79 L. & CONTEMP. PROBS. 179, 184, 186–87 (2016) (explaining Latin American neoconstitutionalism stemming from the Inter-American Court of Human Rights).

<sup>118</sup> See *id.* at 186 (defining the elements of neoconstitutionalism with respect to interpreting constitutional rights).

<sup>119</sup> See *id.* (explaining the international human rights declarations, norms, and treaties judicial bodies must interpret into the scope and meaning of a state's constitution under the "constitutional block" doctrine).

<sup>120</sup> In Colombia, the use of human rights treaties to interpret constitutional fundamental rights was promoted by the Executive which in turn led to the creation of the Constituent Assembly that adopted the 1991 Constitution. A book containing the relevant treaties was published and distributed to all the judges in the country. *Los derechos fundamentales: fuentes internacionales para su interpretación*. Consejería Presidencial para el Desarrollo de la Constitución. Presidencia de la República, 1992. The leading decision of the Constitutional Court was C-225 of 1995 MP: Alejandro Martínez Caballero (upholding Protocol II to the Geneva Conventions of August 12, 1949 and stating that international humanitarian law was part of the constitutional block). See CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] [Constitution], art. 93 (Colom.).

<sup>121</sup> In Argentina, the first step was taken by the Argentine Supreme Court. It declared in 1992 that human rights treaties were directly applicable domestically even though, at that time, the Argentine Constitution had no such provision (*Ekmedjian v. Sofovich y Carranza Latrubesse*, Corte Suprema de Justicia de la Nación, July 7, 1992). The leading case

Mexico in 2011,<sup>122</sup> and many others.<sup>123</sup> In Brazil, the Constitution is open to the reception of international human rights treaties but has not a strict doctrine of constitutional block.<sup>124</sup>

The constitutional block is the highway that allows international law to enter the domestic sphere at the same hierarchical level as a state's constitution.<sup>125</sup> The block includes numerous international human rights treaties that can be directly applied by national judges in concrete cases.<sup>126</sup> The American Convention on Human Rights belongs to the constitutional block of all the states that have adopted this doctrine.<sup>127</sup>

What happens with the judgments of the Inter-American Court in countries in which the doctrine of the constitutional block does not exist? The Inter-American Court considers that the American Convention is directly applicable regardless of whether the block doctrine exists in a country.<sup>128</sup> Since *Almonacid Arellano and Others v. Chile* in 2006,<sup>129</sup> the Court has held that all the judges of the States party to the Convention must review the conventionality of any act relevant to decide a specific case, that is, they can determine if the national legal act is compatible with the American Convention and refuse to apply it if it is incompatible.<sup>130</sup> Conventionality review or control ("*control de convencionalidad*") has been a powerful tool to open a new entry for international human rights law.<sup>131</sup> Since each country has different systems of judicial review and distinctive judicial structures, the Court has acknowledged that conventionality review may be applied differently in each state.<sup>132</sup>

of the Supreme Court after the constitutional amendment of 1994, is the case *Giroldi, Horacio David y Otro s/Recurso de casación*, April 7, 1995). See Art. 75.22, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.).

<sup>122</sup> See Constitución Política de los Estados Unidos Mexicanos, CPEUM, art. 1, Diario Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 10-02-2014.

<sup>123</sup> See Manuel Gongora Mera, *The Block of Constitutionality as the Doctrinal Pivot of a Ius Commune*, in TRANSFORMATIVE CONSTITUTIONALISM IN LATIN AMERICA, *supra* note 24 THE EMERGENCE OF A NEW IUS COMMUNE (Armin von Bogdandy et al., eds. 2017) (explaining which Latin American countries adhere to the constitutional block doctrine).

<sup>124</sup> In 2004, Amendment 45 added a third paragraph to article 5 of the Constitution regarding express receipt of international human rights treaties. Only those approved by the same 3/5 majority required by constitutional amendments in two rounds have constitutional hierarchy. The others have *infra* constitutional but *supra* legal status. See Rodrigo Uprimny, *Las Transformaciones Constitucionales Recientes en América Latina: Tendencias y Desafíos [Recent Constitutional Transformations in Latin America: Tendencies and Challenges]*, in EL DERECHO EN AMÉRICA LATINA: UN MAPA PARA EL PENSAMIENTO JURÍDICO DEL SIGLO XXI at 109, 114 (César Rodríguez Garavito ed., 2011) (detailing the transformation of Brazil's constitutional interpretation).

<sup>125</sup> See *Huneus*, *supra* note 117, at 186 (explaining the framework and effects of neoconstitutionalism adoption).

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> See *Almonacid-Arellano v. Chile*, Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 154, ¶¶ 124–125 (Sept. 6, 2006) (providing the framework for interpreting laws in accordance with the Inter-American Court's interpretation).

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> See generally PABLO GONZALEZ-DOMINGUEZ, THE DOCTRINE OF CONVENTIONALITY CONTROL: BETWEEN UNIFORMITY AND LEGAL PLURALISM IN THE INTER-AMERICAN HUMAN RIGHTS SYSTEM (2018) (explaining how conventionality control is a recent effort to make different legal sources more effective in Inter-America); see also Eduardo Ferrer Mac-Gregor, *Conventionality Control the New Doctrine of the Inter-American Court of Human Rights*, 109 AJIL UNBOUND 93, 98–99 (explaining the main objectives of conventionality control, including to create an "integrated system" of human rights protection); Myriam Hernandez & Mariela Morales, *El Control de Convencionalidad: Un Balance Comparado a 10 años de Almonacid-Arellano v. Chile* [Conventionality Control: A Balance Comparing ten years of *Almonacid-Arellano v. Chile*] (2017) (explaining different perspectives from officials on conventionality control).

<sup>132</sup> The court held that while judges must exercise the doctrine of conventionality review, they must do so only "in the context of their respective spheres of competence and the corresponding procedural regulations. Thus, the doctrine does not "imply that this control must always be exercised, without considering other procedural and substantive criteria regarding the admissibility and legitimacy of these types of actions" (para. 128). The highest national courts have taken diverse paths to incorporate conventionality control to their respective systems, but they coincide in giving significant weight in the resolution of a case to the

In turn, each country has adopted different rules to apply it.<sup>133</sup> These have evolved in key aspects. For example, in Mexico the federal Supreme Court held in 1999 that only federal judges could review the constitutionality of norms and that the control of general norms by all judges was prohibited.<sup>134</sup> But, in 2011, the Mexican Supreme Court changed course and expressly opened the door to state judges in a diffuse system to apply conventionality control and judicial review of the constitutionality of general norms.<sup>135</sup> If the system of judicial review is concentrated in one court but ordinary judges have competence to protect constitutional rights, the competence of both constitutional judges and ordinary judges as well as the procedures to apply it in concrete cases becomes a hard and structural issue,<sup>136</sup> as has happened in Chile.<sup>137</sup> In Colombia, where a mixed system of judicial review exists and the Constitutional Court applies the doctrine of the constitutional block,<sup>138</sup> there has been a creative dialogue of judges in the application of conventionality control;<sup>139</sup> although the Constitutional Court has said that conventionality control should be done simultaneously with the application of judicial review based on the constitutional block,<sup>140</sup> as has been accepted by the Inter-American Court.<sup>141</sup>

Monitoring compliance<sup>142</sup> with its own judgments (47 Judgments in the 2022 Report) is another one of the powerful tools that the Inter-American system exercises every year by holding hearings and issuing resolutions on whether a state has complied with a specific decision.<sup>143</sup>

American Convention and its authoritative interpretation by the Inter-American Court. *Aguado-Alfaro v. Peru*, Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 159, ¶ 128 (Nov. 24, 2006).

<sup>133</sup> Laurence Burgogue-Larsen, *Conventionality Control: Inter-American Court of Human Rights*, in OXFORD PUB. INT'L L. ¶¶ 31–32, 34–42 (Max Planck Encyclopedias Int'l L. ed., 2018) (explaining how conventionality control has evolved over time and has generally been inconsistent despite its evolution).

<sup>134</sup> Xochitl Garmendía Cedillo, CONTROL DIFUSO Y CONTROL CONVENCIONAL DE CONSTITUCIONALIDAD [DECONCENTRATED CONTROL AND CONSTITUTIONAL CONVENTIONAL CONTROL], Tribunal Federal de Justicia Administrativa 1, 10–11.

<sup>135</sup> The leading case applying conventionality control came after the decision of the Inter-American Court in the case of *Pacheco v. Mexico* which condemned Mexico for disappearances and limiting the jurisdiction of military courts. Suprema Corte de Justicia de la Nación (2011).

<sup>136</sup> See Miriam Henríquez Vinas, *Control de Convencionalidad en Chile* (2017) (explaining a general approach to conventionality control).

<sup>137</sup> Several Latin American countries have a concentrated system of judicial review, such as Bolivia, Uruguay, Paraguay and the states of Central America. Some authors argue that this should not be an obstacle to applying conventionality control by all the judges of the respective country. *Id.*

<sup>138</sup> Uprimny, *supra* note 124, at 109, 114.

<sup>139</sup> Enrique Gil Botero, *Control de Convencionalidad en Colombia: Una Experiencia de Diálogo Judicial* (Tirant lo Blanch ed., 2019) (explaining that law should be more jurisprudential than legislative and the many associated benefits of that approach); see also Jamie Orlando Santogimio, *El Concepto de Convencionalidad* (2017).

<sup>140</sup> Corte Constitucional de Colombia [C.C.] [Constitutional Court], abril 3, 2002, Sentencia C-228/02 (Colom.).

<sup>141</sup> *García v. Mexico*, Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C), No. 165, ¶ 26 (Nov. 26, 2006).

<sup>142</sup> The Court considers that its mandate includes monitoring of the implementation of its orders. Although the American Convention provides that the OAS General Assembly should review cases of non-compliance with the Court judgments, it has failed to do so. The Court has adopted a system of supervision that includes requesting compliance reports from the parties to the case (which include not only the complainant and the defendant state, but also the Inter-American Commission), issuing its own compliance report, and holding closed compliance conferences in which judges work with the parties toward overcoming the causes for non-compliance. The Court secretariat has established a unit dedicated to supervision of compliance. The Court also holds public compliance hearings *in situ*, an innovation that allows stakeholders from civil society to take part in the process of implementing its judgments. Further, if a structural change is required, the Court may issue a specific report concerning the non-complying State. Compliance varies according to the right infringed, the type of remedy, and the obliged country. See *Learn More about the Monitoring Compliance with Judgement*, INTER-AM. Ct. H.R., [https://www.corteidh.or.cr/conozca\\_la\\_supervision.cfm?lang=en](https://www.corteidh.or.cr/conozca_la_supervision.cfm?lang=en) (Aug. 11, 2023) (explaining that monitoring is done in order to protect fundamental human rights).

<sup>143</sup> In the *Gelman* case, the Inter-American Court carefully monitored and issued two resolutions (in 2013 and 2020) highlighting the lack of compliance until in 2022 the Supreme Court changed course. ANNUAL REPORT 2022, INTER-AM. Ct. H.R. 35, 79 (2022) (explaining the lack of compliance happening in the inter-Americas).

These aspects of the institutional design of the Inter-American system have been paramount to enhance the impact of international law in the region.

### *B. A Context of Dissatisfaction with How the System Works*

I argue that alongside the pre-mentioned aspects of institutional design of the Inter-American system that have increased the effect of international law in the democratization of the Latin American region, we must add political and cultural context. The following are important considerations that affect the impact of international law within the region:

First, the idea that there are structural problems and systemic dysfunctions in each state has predominated in the region.<sup>144</sup>

Second, the distrust in politics and the discredit of politicians in the region has been a constant since the mid-twentieth century and has become more acute during the twenty-first century.<sup>145</sup> These two elements of the context combined have given the judiciary space to act.

Third, a substantive, not just procedural, vision of democracy has gained strength precisely because of skepticism regarding electoral processes.<sup>146</sup>

Fourth, in several countries of the region there is a bicentennial legal tradition.<sup>147</sup> It should not be forgotten that Latin American states are much older than many European states. During decolonization, lawyers alongside generals played a leading role in the fight from independence,<sup>148</sup> with different incidence in the respective nascent state.<sup>149</sup> There is a community of jurists in the region dedicated to ensuring that democracy is consolidated, deepened, or protected through law, especially human rights law.<sup>150</sup>

## IV. CONCLUDING REMARKS

Further research could explore which of these contextual elements help to explain the differences in the impact of international law between the European cases and the Latin America cases. Perhaps the Latin American examples deserved more weight in Professor Scheppele's brilliant lecture.

Ultimately, the challenge she raised is not for international law, but for the role of lawyers in the restoration of democracy. It is synthesized in the following dilemma: Do we consider it legitimate that the law acquires a greater voice and role in the restoration of democracy? Or would that inevitably give too much power to the judges and, therefore, it is preferable to trust the political processes and give political actors the time they require? But is this not a false dilemma? The experience of Latin America shows that there can be judicial interventions that are legally rigorous

<sup>144</sup> See LATINOBARÓMETRO, INFORME 2021 38 (2021) (explaining that seventy percent of people in Latin America are not satisfied with how democracy is working).

<sup>145</sup> See *id.* (explaining that only twenty-nine percent of people feel close to a political party in their respective country).

<sup>146</sup> See generally ROBERTO GARGARELLA, LATIN AMERICAN CONSTITUTIONALISM 1810–2010: THE ENGINE ROOM OF THE CONSTITUTION (2013) (explaining the evolution of the relationship between constitutionalism and democracy in Latin America and how rights impacted a substantive conception of democracy).

<sup>147</sup> Victor M. Uribe, *Kill All the Lawyers!: Lawyers and the Independence Movement in New Granada, 1809–1820*, 52(2) AMERICAS 175, 177–81 (1995) (noting that New Granada had an active legal community and tradition as early as the early 1810s).

<sup>148</sup> *Id.* (explaining that lawyers and other members of the social elite were extensively involved in the struggle for independence).

<sup>149</sup> *Id.*

<sup>150</sup> For an analysis of the crucial role of this community of legal practitioners in the expansion of a *ius constitutionale commune* concerning constitutional law and human rights in Latin America. See generally Armin von Bogdandy & Rene Uruña, *International Transformative Constitutionalism in Latin America*, 114 AM. J. INT'L. L. 403 (2020).



and, at the same time, energizing pro-democratic political processes instead of demobilizing political actors.<sup>151</sup>

Shakespeare once said: “Let’s kill all the lawyers” without nuances.<sup>152</sup> Professor Scheppele tells us today: “Let’s call all the lawyers,” mainly those engaged in the defense of liberal democracy.<sup>153</sup> I join in her invitation, with the enthusiasm needed to keep going from failure to failure.

<sup>151</sup> Alexandra Huneeus argues that the Court is limited by the disposition of national actors to implement its judgments: “the Court’s institutional constraints ensure that, despite the Court’s innovative construction of self-aggrandizing judicial doctrines, it remains dependent on the support of state actors exactly on the terms many of its critics would prefer.” See Alexandra Huneeus, *The Institutional Limits of Inter-American Constitutionalism*, in *COMPARATIVE CONSTITUTIONAL LAW IN LATIN AMERICA* 303 (Rosalind Dixon & Tom Ginsburg, eds., 2017).

<sup>152</sup> WILLIAM SHAKESPEARE, *HENRY VI* act 4, sc. 2, l. 2379.

<sup>153</sup> American Society of International Law, *25th Annual Grotius Lecture on International Law*, YOUTUBE (Mar. 23, 2023), <https://www.youtube.com/watch?v=kD-ne1MTqOw> (explaining that lawyers will play a key role in maintaining democracy).