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International Measures to Support the Rule of Law

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I Introduction

The rule of law is a core concept of modern governance, central to discourses of constitutionalism, good governance, and democracy. It is also increasingly the subject of a transnational discourse, and a "transnational legal order" (TLO) has emerged around the issue, promoting it in national discourse as well as supranational contexts.[1] The "international rule of law" transposes the idea to the international legal system.[2] We thus have an ideal, operating at multiple levels of law that interact in complex ways. Enmeshment can take various forms. As regional and international institutions play a greater role in supporting the rule of law on the national plane, the different levels of legal order can be complements to each other toward advancing rule-of-law values. But they might, in some instances, also be institutional substitutes for each other.[3] This might occur when rule-of-law practices at one level undermine those at another level.

In this chapter we examine efforts to uphold the rule of law by transnational authorities tasked with protecting it. This reflects the general orientation of this collective socio-legal project toward institutional instantiations of the rule of law, rather than pure philosophical definitions.[4] How, exactly, is the rule of law defended at the international

[1] Transnational Legal Orders (Terence C. Halliday & Gregory Shaffer eds., 2015).

[2] On the international rule of law, see Chapters 2 and 4; Leander Beinlich & Anne Peters, *An International Rule of Law*, *in* Oxford Bibliographies (2021); The International Rule of Law: Rise or Decline? (Heike Krieger, Georg Nolte, & Andreas Zimmermann eds., 2019.)

[3] *See* Tom Ginsburg, *International Substitutes for Domestic Institutions*, 25 Int'l Rev. L. & Econ. 107 (2005).

[4] *See* Chapter 1.

or transnational level, and are these efforts substitutes for or complementary to domestic efforts?

To answer this question, we examine the practices of regional courts and organizations. Regional trade regimes and human rights systems were initially set up with specific goals in mind, for which the rule of law was an implicit requirement but not explicitly stated. Rule-of-law norms crept in through the back door, as it were. But in the past two decades, regional organizations in Africa, Latin America, and Europe have taken on a thicker set of obligations toward protecting the rule of law (along with democracy and other related concepts.) The result is that supranational and international organizations have institutions – courts, commissions, bureaucracies – confronting real-world threats to the rule of law. It is the institutional work that gives actual content to rule-of-law values, and so an appropriate place to look for data on how the concept operates.

The chapter is organized as follows. We briefly sketch definitions. We then briefly survey the use of the rule of the law in the normative architecture and actual case law of major regional organizations, beginning with Latin America, moving to Europe and then Africa. This sequence is determined by the age of the relevant regional system rather than any sense of ontological priority. (We do not devote a separate section to Asia, which is a region notable for its absence of any kind of enforceable framework outside the level of the nation-state. The Charter of the Association of Southeast Asian Nations does mention strengthening the rule of law as part of its object and purpose,[5] but there has self-consciously been little effort to develop any deeper structure at the regional level.[6])

We conclude with some reflections on what is learned through the exercise. Courts and other bodies outside the state, in following their own rules, will sometimes find themselves butting up against national-level authorities that are following the dictates of the rule of law according to their own conception, whether or not in good faith. Some tension is to be expected, especially when international regimes are powerful. When one level exercises sufficient power to have an impact on others, it can serve as a substitute or complement in buttressing the rule of law, but interactions can create dynamics that can change the relationship. The region with the

[5] ASEAN Charter art. 1(7).

[6] Joel Ng, *Rule of Law as a Framework Within the ASEAN Community*, *in* ASEAN INTERNATIONAL LAW 161 (Eric Yong Joong Lee ed., 2021).

least powerful and effective institutions, Africa, is one in which the tensions between the two levels are also absent. This suggests that while harmonious relations across levels of legal order seems intuitively desirable on the surface, such harmony might actually indicate a situation in which the substantive values underpinning the rule of law are too weakly enforced to generate tension.

II The Rule of Law: Trans-, Supra-, Inter-, and National

Definitions of the rule of law are varied, as it is something of an "essentially contested concept."[7] Definitions tend to be categorized in relatively thinner, procedural versions and thicker substantive versions. We follow Sandholtz and Shaffer in adopting Krygier's general conception of the rule of law, whose purpose is to "oppose the 'arbitrary exercise of power' by setting boundaries on, and channeling, power's exercise through known legal rules and institutions that apply to all."[8] This ideal can be applied to any exercise of power, including by, most obviously, national-level authorities that must abide by the constitution, but also those authorities operating at the supra- and international levels. We can characterize as international or supranational rule of law the idea that authorities above the level of the nation-state must themselves be bound by rule-of-law principles. National rule of law refers to domestic authority; supranational refers to regional institutions; international to international or global ones.

Complicating this framework is the transnational dimension. The "rule of law revival" of the past two decades has created another phenomenon: a transnational movement to promote the rule of law at the national level.[9] This movement is best understood as a TLO in Shaffer and Halliday's terms.[10] It has normative content, institutional manifestations, and is articulated in a decentralized network that involves actors below, inside, and above the state. Examples include "law and

[7] Jeremy Waldron, *The Rule of Law as an Essentially Contested Concept*, *in* THE CAMBRIDGE COMPANION TO THE RULE OF LAW 121 (Jens Meierhenrich & Martin Loughlin eds., 2021).

[8] *See* Chapter 1; Martin Krygier, *The Rule of Law: Legality, Teleology, Sociology*, *in* RELOCATING THE RULE OF LAW 45, 60 (Gianluigi Palombella & Neil Walker eds., 2009).

[9] Thomas Carothers, *The Rule of Law Revival*, 77 FOREIGN AFFS. 95 (1998); Stephen Humphreys, *An "International Rule of Law Movement"?*, *in* THE CAMBRIDGE COMPANION TO THE RULE OF LAW, *supra* note 7, at 474.

[10] Jothie Rajah, *"Rule of Law" as Transnational Legal Order*, *in* TRANSNATIONAL LEGAL ORDERS, *supra* note 1, at 340.

development" work, funded by foreign donors or regional development banks, to build up domestic legal institutions; the World Justice Project's effort to incentivize improvements through ratings; and transnational movements of judges and lawyers, such as the International Commission of Jurists. These projects seek to bolster and improve the rule of law at the domestic level, playing a complementary role.

Yet another transnational manifestation is the way in which international investment arbitration enforces norms of legality and antiarbitrariness against national authorities. International investment regimes also can require the exhaustion of domestic remedies before seeking international relief. Here, we see the logic of complementarity at first glance: the pressure from outside the country is designed to improve local performance, while deferring in the first instance to national authorities. Of course, the empirical effects are not always so straightforward, and scholars have identified a "substitution effect" from bilateral investment treaties, as they can reduce domestic pressure for reform or provoke backlash.[11] A transnational rule of law, in this example, might actually undermine domestic rule of law.

When international legal institutions themselves slip from rule-of-law values, supranational or national institutions may be playing the role of buttressing and complementing. For example, in the *Kadi* line of cases, the European Court of Justice found that fundamental rights in the European Union superseded a Security Council counter-terrorism regime that lacked basic guarantees of due process.[12]

Achieving any vision of the rule of law outside the level of a nation-state requires an institutional architecture. But the design of institutions immediately raises questions of the tension between national-level norms of democracy and the rule of law. The law constrains and orders the will of the demos, and is most necessary when that will is attempting to ride unchecked over minorities. Democracy, as has been suggested elsewhere, requires bureaucracy, in particular an administration that can deliver policies on the basis of politically driven choices, and this bureaucracy must follow principles of legality.[13] So, the rule of law is built into democracy as a concept.

[11] *See* Ginsburg, *supra* note 3; Mark Massoud, *International Arbitration and Judicial Politics in Authoritarian States*, 39 L. & Soc. Inquiry 1 (2014).

[12] Joined Cases C-584/10 P, C-593/10 P & C-595/10 P, Eur. Comm'n v. Kadi, ECLI:EU:C:2013:518 (Mar. 19, 2013).

[13] Tom Ginsburg & Aziz Huq, How to Save a Constitutional Democracy (2018).

But the reverse is only partly true. For advocates of a thin, procedural definition of the rule of law, there is no requirement that it be democratically legitimated. Authoritarian states might follow principles of legality and procedural order, which might even constitute "an unqualified human good" in E.P. Thompson's famous phrase.[14] Ideals of global administrative law posit a set of stand-alone technocratic principles of legal process that could be applied against international institutions themselves, but also enforced by those institutions against national democratic majorities.[15] In the former case, the "international" rule of law is a complement to the domestic version; in the latter case, it may be a substitute for it, in the sense that it is most necessary when the domestic version is under threat. But it is also possible that, by undermining the zone of democratic will formation, authorities outside the state can contribute to backlash against the rule of law in its thicker formulation. In short, trans-, supra-, and international institutions can be constitutive of the rule of law, or their antithesis. They can buttress the rule of law at the nation-state level, they can substitute for it, and in some cases their actions will spur backlash against it. For this reason, we are starting to see some scholars concerned with national rule of law and related norms reacting against the transnational rule-of-law complex.[16]

We now turn to several regional institutions to examine their role in protecting the rule of law at the national level – an inquiry especially important in our era of democratic backsliding.

III Latin America and the Caribbean

The Organization of American States has a long history grounded in the protection of democracy in a region in which it has historically been fragile. The normative architecture includes the American Declaration of the Rights and Duties of Man, the American Convention on Human Rights, the Inter-American Democratic Charter of 2001, and several other instruments. The primary bodies tasked with implementing these norms are the Inter-American Commission on Human Rights

[14] *Cf.* Jothie Rajah, Authoritarian Rule of Law (2015); E.P. Thompson, Whigs and Hunters (1975); Daniel Cole, *"An Unqualified Human Good": E.P. Thompson and the Rule of Law*, 28 J. L. & Soc'y 177 (2001).

[15] Benedict Kingsbury, Nico Krisch, & Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 L. & Contemp. Probs. 15 (2005).

[16] Martin Loughlin, Against Constitutionalism (2022).

(Commission) and the Inter-American Court of Human Rights (IACtHR).

The rule of law received explicit attention as an overarching goal in the Inter-American Democratic Charter, which identified it as an essential element of representative democracy in multiple articles.[17] Even before that, however, the jurisprudence of the Commission and IACtHR addressed rule-of-law issues, particularly through the lens of threats to judicial independence. In *Castillo Páez v. Peru* (judgment on merits of November 2, 1997), the IACtHR defined the content and scope of Article 25 of the Convention, which covers the right to judicial protection. The Court concluded that recourse to courts "is one of the fundamental pillars not only of the American Convention, but of the very rule of law in a democratic society in the terms of the Convention."[18] The Court has also focused on Article 23, which is on the right to political participation, but includes the right and opportunity "to have access, under general conditions of equality, to the public service of his country."[19] While apparently focused on public employment, the provision has provided a hook for protecting judicial independence, particularly against efforts by leftist Bolivarian governments to pack the courts with their own supporters by dismissing judges appointed by prior regimes.[20] Because the rule of law requires respect for legal authorities, and because populists tend to view courts as "the most dangerous branch" requiring control, protecting the integrity of courts is a central task for rule-of-law defenders.[21] This is a good example of a case in which the regional level serves as a backstop and complement to the national level.

[17] Org. of Am. States, Assembly Res. AG/Res. 1 (XXCIII-E/01), Inter-American Democratic Charter art. 2 (2001), https://tinyurl.com/yrs26fte ("The effective exercise of representative democracy is the basis for the rule of law . . . ."); *id.* art. 4 ("The constitutional subordination of all state institutions to the legally constituted civilian authority and respect for the rule of law on the part of all institutions and sectors of society are equally essential to democracy.").

[18] Castillo Páez v. Peru, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 34, ¶ 82 (Nov. 3, 1997).

[19] Org. of Am. States, American Convention on Human Rights art. 23(1), Nov. 22, 1969, O. A.S.T.S. No. 36, 1144 U.N.T.S. 123.

[20] *See, e.g.*, Apitz Barbera ("First Court of Administrative Disputes") v. Venezuela, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. HR (ser. C) No. 182 (Aug. 5, 2008); Constitutional Court v. Peru, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 71, ¶¶ 56.1–56.5 (Jan. 31, 2001); *see generally* Tom Ginsburg, Democracies and International Law 107–12 (2021).

[21] Wojiech Sadurski, Pandemic of Populists 106 (2022) (describing courts as "most dangerous branch"); Amal Clooney & Philippa Webb, The Right to a Fair Trial in International Law (2021)

There are other cases, however, in which the two levels are in tension. Take, for example, the IACtHR's doctrine of "conventionality control," announced in 2006 when it declared that all courts in the member states were obligated to review domestic actions for conformity with the Convention, as interpreted in the jurisprudence of the Court.[22] Remarkably, this extended to countries in which the domestic constitution did not automatically incorporate international law or give the Convention higher rank. In this sense, the doctrine both advanced regional rule of law (by pushing for uniform application) and undermined domestic rule of law as conceived within autonomous constitutional orders.[23] This ambitious move led to significant backlash. As Alexandra Huneeus has shown, national courts were leaders in pushing back against the doctrine, raising the issue of exactly whose vision of the rule of law was to be followed.[24] Substituting for a national process raises significant questions of efficacy and invites backlash, and the IACtHR has tempered its approach in recent years.[25]

Another regional body, the Caribbean Court of Justice (CCJ), also has confronted the rule of law through the lens of judicial independence. The CCJ has become a kind of regional constitutional court, able to enforce guarantees from national constitutions against the member states. In *Bisram v. Department of Public Prosecutions*, a Guyanese citizen successfully challenged the procedure used in a murder inquiry.[26] The Public Prosecutions Act allowed the Director of Public Prosecutions to order a magistrate to reopen an inquiry after an initial finding that no prima facie case had been made. Rather than simply address the procedural errors in the instant case, the CCJ relied on the guarantee of judicial independence in Guyana's constitution.[27] Judges at all levels should be

[22] Almonacid-Arellano v. Chile, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C.) No. 154 (Sept. 26, 2006).

[23] Ariel E. Dulitzky, *An Inter-American Constitutional Court? The Invention of Conventionality Control by the Inter-American Court of Human Rights*, 50 Tex. Int'l L.J. 45 (2015).

[24] Alexandra Huneeus, *Courts Resisting Courts: Lessons from the Inter-American Court's Struggle to Enforce Human Rights*, 44 Cornell Int'l L.J. 493 (2011).

[25] Alec Stone Sweet & Wayne Sandholtz, *The Law and Politics of Transnational Rights Protection*, 36 Governance 105 (2023); Wayne Sandholtz & Mariana Rangel Padilla, *Law and Politics in the Inter-American System: The Amnesty Cases*, 8 J.L. & Cts. 151 (2020).

[26] Bisram v. Dep't of Pub. Prosecutions, No. GYCR2021/002, Caribbean Court of Justice, [2022] CCJ 7 AJ (GY) (Mar. 15, 2022).

[27] Constitution of the Co-operative Republic of Guyana, Feb. 20, 1980, art. 122A.

free from interference by the executive in their decision-making; the CCJ noted that the constitution "expresses the hallowed, overarching principle of judicial independence, which is described by the Bangalore Principles as a prerequisite to the rule of law and a fundamental guarantee of a fair trial."[28]

Finally, we can turn to the international rule of law proper, the application of the principles before international institutions. In at least one case, the IACtHR has conceptualized the state as having an obligation to respond to and appear before the Court itself, as a requirement of the international rule of law. The case concerned Trinidad and Tobago, which had a practice of corporal punishment that was alleged to violate the American Convention on Human Rights. An applicant, Winston Caesar, challenged his punishment as well as significant trial delays in the 1990s.

In response to adverse decisions on the death penalty, Trinidad and Tobago had denounced the Convention in 1998, and refused to participate in the proceedings. The IACtHR, however, took the view that the withdrawal did not affect prior cases, for which it had continuing obligations. In a concurrence, Judge Jackman noted:

> [Trinidad and Tobago's] contumelious refusal to acknowledge its continuing obligations under a treaty that remained in force for it when the violations in this case took place represents a gratuitous attack on the Rule of Law, all the more astonishing in a State that, like other Commonwealth Caribbean states, prides itself on its Common Law traditions, where respect for human rights and for the Rule of Law are deeply embedded in the legal culture.[29]

In his separate opinion, Judge Antônio Cançado Trindade criticized Trinidad and Tobago for repeatedly failing to respond to or appear before the Court.[30] He then discussed the importance of the international rule of law, nonappearance before an international tribunal, and the duty of compliance with its judgment. He noted:

[28] *Bisram*, [2022] CCJ 7 AJ (GY).

[29] Caesar v. Trinidad and Tobago, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct H.R. (ser. C) No. 123 (Mar. 11, 2005) (concurring judgment of J. Jackman), www.corteidh.or.cr/docs/casos/articulos/seriec_123_ing.pdf; *see also* Grace Kim, *Caesar v. Trinidad and Tobago*, 36 LOYOLA L.A. INT'L & COMP. L. REV. 1077 (2014).

[30] Caesar v. Trinidad and Tobago, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct H. R. (ser. C) No. 123 (Mar. 11, 2005) (separate judgment of J. Trindade), www.corteidh.or.cr/docs/casos/articulos/seriec_123_ing.pdf.

> The precedent – among others – set up by the United States, of "withdrawal" and non-appearance before the ICJ, after a Judgment adverse to it on preliminary objections (in 1984) in the *Nicaragua versus United States* case, would be a very bad example for Trinidad and Tobago to follow. On the occasion, the United States earned much criticism from distinct corners of the international community, including from some of its own most distinguished jurists (like the late Keith Highet), for its disservice to the international rule of law.[31]

This places a duty of good faith appearance at the core of the rule of law, and one that applies to states in their international relations with each other. It is a perfect statement of the demands of the international rule of law, but also illustrates how difficult it is to advance those demands against recalcitrant states.

Together, these IACtHR and CCJ cases focus on several discrete aspects of the rule of law: the duty to provide for independent judicial recourse; the tricky question of impunity; and the duty to comply with commands of international courts, without the possibility of escaping international obligations through denunciation of international instruments. These various discrete applications of the rule of law help us to construct a coherent concept, and to understand the institutional dynamics. In the first, the regional body is a complement or backstop to domestic institutions; in the second, it substitutes for them in its judgment about the rule of law; and in the third, it is implementing a truly international rule of law, directed at the institutions of the regional body itself.

IV Europe

The rule of law is a cornerstone of today's European legal architecture. The European Convention on Human Rights (ECHR), like its counterpart in the Americas, speaks of related values. Article 2(1) of the Treaty on European Union (TEU) cites the rule of law as one of the core values on which the Union is founded. And yet, the rule of law remains one of Europe's most contentious topics, both politically and legally: Poland (for a period of time) and Hungary built what many describe as "illiberal democracies." This has led to a series of responses by various European supranational institutions. These responses show the possibility – and the

[31] *Id.* ¶ 76 (footnote omitted).

limits – of international institutions in backstopping the rule of law in the face of sustained pressure.

The European experience has been central to articulating a core concept of the rule of law. Ideas related to the rule of law emerged in midcentury as something of an overlapping consensus between ordoliberals, who valued transnational protection of property interests, and social democrats, who were concerned with rights more broadly.[32]

At the same time, the European example illustrates why TLO theory emphasizes the networked nature of the legal concepts on the international plane. It is a story of cooperation among supranational actors with different epistemic bases and institutional structures. They include all European Union institutions, as well as the European Court of Human Rights, which is a traditional interstate human rights court. While their respective understandings may differ at the fringes,[33] all the European institutions acknowledge a clear core set of principles, including respect for democratic values, human rights, and an independent judiciary, as part of the rule of law.[34] This understanding emerged as a product of a gradual process that mirrored wider trends: In its early years, the predecessor of what is today the European Union considered itself a trade bloc, without any perceived need or a set of values of its own. But things changed after the Soviet Union fell, when the rule of law became a cornerstone of the legal and political thinking of the time.[35] Equally, the European Union has evolved beyond being a mere trade

[32] Quinn Slobidian, The Globalists (2018).

[33] The Venice Commission's sophisticated rules on corruption and regarding the collection of personal data – Eur. Comm'n for Democracy through L. (Venice Comm'n), *Rule of Law Checklist*, 106th Sess., Study No. 711/2013, CDL-AD(2016) 007-e, at 29–33 (2016) [hereinafter *Rule of Law Checklist*] – feature less prominently elsewhere.

[34] In addition to the *Rule of Law Checklist*, see the definitions in European Commission Communication *Further Strengthening the Rule of Law Within the Union: State of Play and Possible Next Steps*, at 1, COM (2019) 163 final (Apr. 3, 2019), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52019DC0163; Regulation (EU/Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a General Regime of Conditionality for the Protection of the Union Budget, 2020 O.J. (L 433I) 1, recital (3).

[35] For this account, see, for example, Martin Krygier, *The Rule of Law After the Short Twentieth Century: Launching a Global Career*, *in* Law, Society and Community: Socio-Legal Essays in Honour of Roger Cotterrell 327, 336–37 (Richard Nobles & David Schiff eds., 2016); Ronald Janse, *Why Did the Rule of Law Revive?*, 11 Hague J. on Rule Law 341 (2019).

bloc.[36] What it has evolved into (and how it actually protects its values) is less clear. This of course is the underlying question behind many dynamics in today's rule-of law-discussions.

Finally, the European example shows how difficult it is to operationalize even a robust understanding in light of actual threats to the rule of law. While the European Court of Human Rights has far-reaching powers over the signatory states of the European Convention on Human Rights, it has little leverage to enforce its judgments against a government that is unwilling to abide by its international human rights duties. This is different from the European Union and its institutions, which may be better equipped to handle unwilling member states. But it is much less clear to what extent they can police the member states in areas not expressly governed by the European treaties. European Union involvement therefore adds another layer of complexity when evaluating the supranational response to rule-of-law backsliding: Conflicts about the rule of law are now also domestic constitutional conflicts. They touch on the very nature of the European project.

1 *Developing Core Rule-of-Law Principles through the European Courts*

On the EU level, rule-of-law thinking is usually traced to *Les Verts*, a 1987 judgment of the European Court of Justice.[37] The Court explained that the European Community (as it was known as the time) is "based on the rule of law inasmuch as neither its member states nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty." This implicates what we have called the supranational rule of law.

Even earlier, the Court of Justice had established the principle of legal certainty and protections against retroactive laws in what is now European Union law.[38] In addition, it recognized the principle of

[36] From a specific rule-of-law standpoint, see Ronald Janse, *supra* note 35, and, more generally, Matthias Ruffert, *The EU Institutional Framework*, *in* OXFORD ENCYCLOPEDIA OF EU LAW paras. 1–4 (Sacha Garben & Laurence Gormley eds., 2022).

[37] Case C-294/83, Les Verts v. Parliament, 1986 E.C.R. 1339, ¶ 23. Note, however, that some would consider Case C-101/78, Granaria BV v. Hoofdproduktschap voor Akkerbouwprodukten, 1979 E.C.R. 623, the first rule-of-law case. *See* Laurent Pech, *Rule of Law, in* THE EVOLUTION OF EU LAW 307, 312 (Paul Craig & Gráinne De Búrca eds., 3d. ed. 2021).

[38] See the early cases Case C-98/78, Racke v. Hauptzollamt Mainz, 1979 E.C.R. 69; Case C-99/78, Decker v. Hauptzollamt Landau, 1979 E.C.R. 101, ¶ 8; Joined Cases 212 & 217/

legality – that is, the requirement that rules are set in a transparent, accountable, democratic, and pluralistic process: "In a community governed by the rule of law", the Court said, "adherence to legality must be properly ensured."[39] Similar ideas were to be found in the jurisprudence of the European Court of Human Rights.[40] One by one, the European Court of Justice and the European Court of Human Rights acknowledged the principles that constitute the rule of law. When the European institutions developed today's more comprehensive definitions, they only had to aggregate the courts' jurisprudence on those building blocks.[41]

In 1989, for example, the European Court of Justice acknowledged that in all member states any government intervention needs to have a legal basis and needs to be justified on grounds laid down by law:[42] "The need for such protection must be recognized as a general principle of [what is today European Union] law." This prohibits the arbitrary use of government powers. In keeping with TLO theory's emphasis on the networked nature of the legal concepts on the international plane, the Court's argument mirrored the preamble of the ECHR, which refers to the rule of law as part of the "common heritage" of its signatory states. This is, of course, strikingly different from today's rule-of-law discussions: In this early stage, the rule of law was enshrined in national (constitutional) law and then "borrowed" by the supranational level. The idea that supranational, European rule-of-law principles may need to be enforced *against* a nation-state seemed far-fetched at the time.

Nonetheless, at this early stage the European courts also dealt with what would become today's main battleground: judicial independence. In a Union based on the rule of law, the European Court of Justice ruled, effective judicial review, including respect for fundamental rights, is of

80, Amministrazione delle Finanze dello Stato v. Salumi, 1981 E.C.R. 2735, ¶ 10. See also the early case law cited by Thomas von Danwitz, *The Rule of Law in the Recent Jurisprudence of the ECJ*, 37 FORDHAM INT'L L.J. 1311 (2014).

[39] Case C-496/99 P, CAS Succi di Frutta SpA, ECLI:EU:C:2004:236, ¶ 63 (Apr. 29, 2004).

[40] Regarding legality, see, for example, Malone v. United Kingdom, App. No. 8691/79, ¶¶ 67–68 (Aug. 2, 1984), and regarding the requirement to apply the law in a foreseeable and consistent manner, Broniowski v. Poland, App. No. 31443/96, ¶ 184 (June 22, 2004).

[41] In fact, most of the following cases were used by the European Commission's in its first extensive rule-of-law study; *see A New EU Framework to Strengthen the Rule of Law*, annex 1, COM (2014) 158 final (Mar. 11, 2014), https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex:52014DC0158 [hereinafter *New EU Framework*].

[42] Joined Cases C-46/87 & 227/88, Hoechst AG v. Comm'n of the Eur. Cmtys., 1989 E.C.R. 2859, ¶ 19.

central importance.[43] The right to effective judicial protection is again described as "one of the general principles of law stemming from the constitutional traditions common to the Member States."[44] The Court links this idea then to the ECHR and its protection of a fair trial in Article 6 – and to the right to an independent tribunal thereunder.[45] This is yet another example of how the two supranational European courts acted in concert to erect today's rule-of-law edifice.

2 *Entrenching and Defining the Rule of Law in Treaty Texts and through Reports by Supranational Institutions*

By the beginning of the 1990s, the European courts had spelled out most of the core principles that fall within the broader concept of the rule of law. While the Council of Europe institutions, in both the Convention preamble and Article 3 of the Statute of the Council of Europe, specifically mention the rule of law, European Community documents did not do so until 1992.[46] But very much in line with a greater focus on democracy and human rights, this marked the beginning of a legal order in which the rule of law is deeply enshrined in all treaty texts. Not only is it a value on which the Union is founded (see Article 2(1) TEU). Respect for and the willingness to promote the rule of law are required to apply for membership in the European Union under Article 49(1) TEU. Also, in its external relations, under Article 21(1) and (2) TEU, rule-of-law considerations are paramount. But one crucial element continued to be missing: No text offered a clear definition of what is meant by the rule of law, let alone one that is actionable in court. Developing such a definition fell to Europe's supranational institutions.

An important first step in this regard was taken by the Venice Commission of the Council of Europe, which conducted an intensive

[43] Case C-50/00 P, Unión de Pequeños Agricultores v. Council of the Eur. Union., ECLI:EU:C:2002:462 (July 25, 2002), ¶¶ 38–39; Case C-550/09, E. and F., ECLI:EU:C:2010:382, ¶ 44 (June 29, 2010); Case C-583/11 P, Inuit Tapiriit Kanatami v. Eur. Parliament, ECLI:EU:C:2013:625, ¶¶ 91–92 (Oct. 3, 2013).

[44] *Unión de Pequeños Agricultores*, ECLI:EU:C:2002:462, ¶ 39.

[45] Case C-185/95 P, Baustahlgewerbe v. Comm'n, ¶ 20 (Dec. 17, 1998); Joined Cases C-174/98 P & C-189/98 P, Netherlands v. Comm'n of the Eur. Comtys., ECLI:EU:C:2000:1, ¶ 17 (Jan. 11, 2000) (citing De Wilde, Ooms and Versyp v. Belgium, App. No. 2832/66; 2835/66; 2899/66, ¶ 78 (Mar. 10, 1972)).

[46] For potential reasons, see Pech, *supra* note 37, at 310–11.

survey of what the rule of law entails.[47] Later, this merged into a *Rule of Law Checklist*.[48] Their contents mostly mirror what the European Commission now considers its core definition of the rule of law, and what eventually made its way into recent European legislation on the "conditionality mechanism" (see Section 3). All in all, there seems to be a rather robust understanding of what the rule of law entails, legality being a core element.[49] It is worth quoting the definition in full:

> [I]t seems that a *consensus* can now be found for the necessary elements of the rule of law as well as those of the Rechtsstaat which are not only formal but also substantial or material (materieller Rechstsstaatsbegriff). These are:
>
> (1) Legality, including a transparent, accountable, and democratic process for enacting law
> (2) Legal certainty
> (3) Prohibition of arbitrariness
> (4) Access to justice before independent and impartial courts, including judicial review of administrative acts
> (5) Respect for human rights
> (6) Non-discrimination and equality before the law.[50]

Under this definition, there is a strong nexus between democratic values, human rights, and the rule of law.[51] The European Court of Human Rights, for example, considers the rule of law inherent in all the articles of the ECHR.[52] The European Commission is of the opinion that "there can be no democracy and respect for fundamental human rights without the rule of law and vice versa."[53] We note in passing that this formulation, unlike the view laid out at the beginning of this chapter, does not contemplate a rule-of-law system without democracy. But it seems to be one very important feature of how supranational institutions

[47] Eur. Comm'n for Democracy through L. (Venice Comm'n), *Report on the Rule of Law*, 86th Sess., Study No. 512/2009, CDL-AD(2011)003rev, at 10 (2011) [hereinafter *Report on the Rule of Law*]. It should be noted that this report relies more heavily on academic writing than the other reports mentioned here.

[48] *Rule of Law Checklist*, *supra* note 33; Kim Scheppele *The Rule of Law and the Frankenstate: Why Governance Checklists Do Not Work*, 26 GOVERNANCE 559 (2013).

[49] *Rule of Law Checklist*, *supra* note 33, at 7; *Report on the Rule of Law*, *supra* note 47, at 10; Regulation (EU/Euratom) 2020/2092, *supra* note 34, recital (3).

[50] *Report on the Rule of Law*, *supra* note 47, at 10

[51] *See* Chapter 1.

[52] Former King of Greece v. Greece, App. No. 25701/94, ¶ 79 (Nov. 23, 2000); Stafford v. United Kingdom, App. No. 46295/99, ¶ 63 (May 28, 2002); Broniowski v. Poland, App. No. 31443/96, ¶¶ 147, 184 (June 22, 2004).

[53] *New EU Framework*, *supra* note 41, at 4, https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex:52014DC0158.

understand the rule of law today. It is a value-driven approach, developed through the institutional dialogue emphasized by TLO theory. The European Commission, the Venice Commission, and the two European Courts, all relied on each other's work when weaving an ever-stronger understanding of what the rule of law entails. This shared understanding draws strength from the fact that it is anchored in multiple normative systems:[54] the shared traditions of the European nation-states, the ECHR, and the TEU.

3 *Values Put to the Test: The Rule-of-Law Crisis in Hungary and Poland, a Multitude of Supranational Responses, and Constitutional Questions*

At a normative level, then, Europe has a robust understanding of what the rule of law entails. But when confronted by the backsliding countries of (at the time) Poland and Hungary, the institutional structures face a new challenge, which has exposed deep tensions in the project. When the European Union was founded, the rule of law in its member states was taken for granted. The new challenge is for European institutions to enforce the rule of law against its own member states. This is where the rule-of-law conflict goes to the very nature of the European project: even if they are appalled by how Hungary and Poland (before the October 2023 elections that ended the rule of the Law and Justice Party) behaved, defenders of the traditional view of member states' sovereignty might, as a matter of principle, feel uneasy when the European level enforces quasi-constitutional norms such as the rule of law.[55]

[54] Armin von Bogdandy et al., *A Potential Constitutional Moment for the European Rule of Law: The Importance of Red Lines*, *in* DEFENDING CHECKS AND BALANCES IN EU MEMBER STATES: TAKING STOCK OF EUROPE'S ACTIONS 388 (Armin von Bogdandy et al., eds., 2021).

[55] For discussions of this sentiment, see Danwitz, *supra* note 38, at 1338–39; M. Bonelli, *From a Community of Law to a Union of Values: Hungary, Poland, and European Constitutionalism*, 13 EUR. CONST. L. REV. 793 (2017); Armin von Bogdandy, *Principles of a Systemic Deficiencies Doctrine: How to Protect Checks and Balances in the Member States*, 57 COMMON MKT. L. REV. 705 (2020); 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. EUR. L. 3 (2021). For a very recent and comprehensive treatment of the issue, arguing in favor of the ECJ's active role, see Armin von Bogdandy & Luke Dimitrios Spieker, Transformative Constitutionalism in Luxembourg: How the Court Can Support Democratic Transitions (MPIL Research Paper No. 2022-14, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4146323.

Against this backdrop, the supranational response to the rule-of-law backsliding in Hungary and Poland consisted of three approaches, both politically and legally, of varying novelty. First, the European actors tried to stay very much within the lines of the treaty text. Second, the European Court of Justice opened the door to infringement actions that address one *general* rule-of-law shortcoming: the lack of an independent judiciary. Third, there is the new conditionality mechanism, through which EU funds are conditioned on the member states maintaining the rule of law, more thickly formulated.

a The Standard Playbook: Specific Infringement Actions and the Process under Article 7 TEU

One way to think about rule-of-law backsliding in the European Union is to consider it a political problem for the member states to solve, with supranational institutions thus playing a limited role. This view seemed to prevail in the European Commission during the first years of the rule-of-law crisis. Under Article 258 of the Treaty on the Functioning of the European Union (TFEU), the European Commission may sue a member state that violates European law. This "infringement action" addresses a specific violation. And in its early response to the developments in Hungary,[56] the Commission did just that: In 2011 and 2012, Viktor Orbán's government lowered the mandatory retirement age for judges, forcing the most senior 10–15 percent of Hungarian judges to leave office.[57] In response, the European Commission brought an infringement action for violations of European law against age discrimination.[58] It did not frame the issue in rule-of-law terms. The same happened when Hungary dismissed its data protection officer despite his independence being guaranteed by European law. The Commission brought an infringement action for violation of this specific provision.[59] Again, the rule of law was not mentioned.[60]

[56] For an overview, see Krista Kovács & Kim Lane Scheppele, *The Fragility of an Independent Judiciary: Lessons from Hungary and Poland – and the European Union*, COMMUNIST & POST-COMMUNIST STUD., Sept. 2018, at 189.

[57] For this part of the Hungarian case, see *id.* at 192.

[58] Case C-268/12, Eur. Comm'n v. Hungary, ECLI:EU:C:2012:687 (Nov. 7, 2012) (retirement age for judges). For a comparison with the ECJ's later cases focused on the rule of law, see Petra Bárd & Anna Sledzinska-Simon, *On the Principle of Irremovability of Judges Beyond Age Discrimination: Commission v. Poland*, 57 COMMON MKT. L. REV. 1555 (2020).

[59] Case C-288/12, Eur. Comm'n v. Hungary, ECLI:EU:C:2014:237 (Apr. 8, 2014) (independence of the data protection "supervisory authority").

[60] Danwitz, *supra* note 38, at 1344, makes it abundantly clear, however, that the ECJconsidered the Hungarian move for what it was – a rule-of-law issue – and that its

It is commonly accepted, however, that the early infringement cases were largely unsuccessful. They failed to restore an independent judiciary, and they failed to deter further backsliding. Acknowledging this, the European Commission introduced a wide range of "soft" devices to tackle rule-of-law issues:[61] Today, the Commission produces a Justice Scoreboard (an annual overview of indicators on the efficiency, quality, and independence of each member state's judiciary), a Rule of Law Framework (a three-step process by which the Commission assesses, addresses, and monitors threats to the rule of law in member states), and an annual Rule of Law Report. In addition, the European Council started its own annual Rule of Law Dialogues.[62] Such "soft" instruments are mirrored by the Venice Commission, which issued "rule-of-law opinions" at almost every step of the Hungarian and Polish cases.

As long as the European Commission limited itself to infringement actions and "soft" instruments, only one tool could address systemic rule-of-law issues: the procedure under Article 7 TEU.[63] Under Article 7(1) TEU, the Council may find by a supermajority that there is a "clear risk" of a "serious breach" of one the Union's core values by one of its member states. Finding the "existence of a serious and persistent breach" requires unanimity in a second vote, reflecting the idea that protecting the European Union's values is for the member states among themselves. And while cases under Article 7 TEU were initiated against both Hungary and Poland,[64] there has been little success, since the two countries can protect each other.[65] (The October 2023 change in power in Poland has changed this dynamic somewhat, but there have not been renewed efforts

technical treatment of the matter should be understood as an attempt to bridge the gap that Hungary would have to overcome in accepting the judgment.

[61] For a detailed description of today's tools and their genesis, see Pech, *supra* note 37, at 318–27, 334–37.

[62] For harsh criticism of the Council's dialogue, see Peter Oliver & Justine Stefanelli, *Strengthening the Rule of Law in the EU: The Council's Inaction*, 54 J. COMMON MKT. STUD. 1075 (2016); Pech, *supra* note 37, at 325–27. For a more general critique of the Council's rule-of-law response, see Laurent Pech et al., *Poland's Rule of Law Breakdown: A Five-Year Assessment of EU's (In)Action*, 13(1) HAGUE J. ON RULE LAW 1 (2021).

[63] On its genesis, see Wojceich Sadurski, *Adding Bite to a Bark: The Story of Article 7, E.U. Enlargement, and Jorg Haider*, 16 COLUM. J. EUR. L. 385 (2010).

[64] Eur. Comm'n, Proposal for a Council Decision on the Determination of a Clear Risk of a Serious Breach by the Republic of Poland of the Rule of Law, COM (2017) 835 (Dec. 20, 2017).

[65] For a detailed overview of Poland's failure to address the points raised by the European Commission, see Pech et al., *supra* note 62, at 5–17.

to confront Hungary as of this writing.) While politicians often referred to Article 7 TEU as "the nuclear option,"[66] in the end it has turned out to be rather toothless. Criticism focuses on the unanimity requirement, on what is perceived a slow process, and one that is overly politicized.[67] Generally, there seems to be little appetite on the part of the member states to judge their peers. Maybe foreshadowing the European Court of Justice's further involvement, one of its judges spoke of "the inadequacy of the procedure foreseen in article 7 TEU which clearly cannot be considered as an operational or even suitable instrument to ensure the rule of law . . . and the observance of the values enshrined in article 2 TEU."[68] As in the Inter-American system, a recalcitrant sovereign is difficult to discipline.

b The ECJ to the Rescue? Article 19(1) TEU and Judicial Independence in Poland.

The legal landscape changed fundamentally in 2018 when the European Court of Justice gave its now famous *Portuguese Judges* judgment.[69] It amounted to a tectonic shift in the European legal landscape. After the global financial crisis, Portugal had mandated pay cuts for all public officials, including judges. Some judges appealed their pay cut, ultimately to the European Court of Justice. By now, the situation in Hungary and Poland was, of course, well known. In its *Portuguese Judges* case, the European Court of Justice ruled that threats to the independent judiciary in a member state were justiciable in the member state's courts, since Article 19(1) TEU requires that member states "provide effective remedies sufficient to ensure effective legal protection in the fields covered by Union law." The European Court of Justice treats this as giving "concrete expression to the value of the rule of law stated in Article 2 TEU."[70] Values suddenly became justiciable: the European Court and the national

[66] Dimitry Kochenov & Laurent Pech, *Better Late than Never? On the European Commission's Rule of Law Framework and its First Activation*, 54 J. COMMON MKT. STUD. 1062 (2016).

[67] *Id.*; Oliver & Stefanelli, *supra* note 62, at 1081. For an overview of political science criticism, see also the works cited by Tom Theuns, *The Need for an EU Expulsion Mechanism: Democratic Backsliding and the Failure of Article 7*, 28 RES PUBLICA 1 (2022).

[68] Danwitz, *supra* note 38, at 1337.

[69] Case C–64/16, Associação Sindical dos Juízes Portugueses v. Tribunal de Contas, ECLI: EU:C:2018:117 (Feb. 27, 2018).

[70] *Id.* ¶¶ 31–32.

courts have a shared duty to ensure that the law is observed. This is then linked to the rule of law: "It follows that every Member State must ensure that the bodies which, as 'courts or tribunals' within the meaning of EU law, come within its judicial system in the fields covered by that law, meet the requirements of effective judicial protection."[71] As all national judges potentially rule on EU law, this last sentence operationalized Article 19(1) TEU to protect an overall independent judiciary in each country. The dynamics of complementarity were in full effect.

This development illustrates a specifically transnational conception of the rule of law, different from the international rule of law that examines procedures before international institutions. The rule of law must be preserved, not for the integrity of the international courts, but because the member states have a system of mutual reliance that European law will be uniformly and fairly applied among them all. The horizontal trust among states is what justifies the international level's scrutiny.

Now, the European Commission could do what it had felt unable to do earlier: it brought a case against Poland for its *systemic* violation of the rule of law by undermining the independence of its judiciary.[72] Essentially, the Polish government had subdued the Constitutional Tribunal, had captured the judicial appointment process, and had established a new "disciplinary regime" to police its judges.[73] The European Commission won all of its infringement cases.[74] And over time the European Court of Justice developed a comprehensive view of an independent judiciary. Under its jurisprudence, Articles 2(1) and 19(1) TEU are invoked if:[75]

> the objective circumstances in which that body was created, the characteristics of that body, and the way in which its members have been appointed are capable of giving rise to reasonable doubts in the minds

[71] *Id.* ¶ 37.

[72] For a critique of its piecemeal approach, see Pech et al., *supra* note 62, at 21–23.

[73] SADURSKI, *supra* note 21.

[74] Case C-619/18 R, Eur. Comm'n v. Poland, ECLI:EU:C:2019:531 (June 24, 2019) (independence of the supreme court); Case C-192/18, Eur. Comm'n v. Poland, ECLI:EU:C:2019:924 (Nov. 5, 2019) (independence of the ordinary courts); Case C-791/19, Eur. Comm'n v. Poland, ECLI:EU:C:2021:596 (July 15, 2021) (disciplinary chamber); Case C-204/21, Eur. Comm'n v. Poland, ECLI:EU:C:2023:442 (June 5, 2023) ("muzzle law"). On the criticism that the Commission brings only "hundred per cent winnable cases," see Pech et al., *supra* note 62.

[75] Case C-791/19, Eur. Comm'n v. Poland, ECLI:EU:C:2021:596, ¶ 86 (July 15, 2021) (disciplinary chamber); *see also* Joined Cases C-585/18, C-624/18 & C-625/18, A. K. v. Najwyższy, ECLI:EU:C:2019:982, ¶ 171 (Nov. 19, 2019); .

> of individuals as to the imperviousness of that body to external factors, in particular, as to the direct or indirect influence of the legislature and the executive, and its neutrality with respect to the interests before it.

By relying on Article 19(1) TEU and the rule of law concept, the infringement cases against Poland differed significantly from those brought earlier against Hungary, even though they dealt with similar topics. Both countries, for example, forced large parts of their judiciary to retire.[76] Unlike in the Hungarian case, there has been some early success with such infringement actions against Poland under Article 19(1) TEU. An interim order, for example, after the European Commission's first infringement action, restored some Polish judges to their previous posts.[77]

Operationalizing Article 19(1) TEU, however, opened another avenue for the European Court of Justice to make itself heard: Under Article 267 TFEU, national judges can ask for a preliminary ruling on the interpretation of European law. This deputized national judges to address rule-of-law backsliding. By making a preliminary reference, Polish judges can ask whether they were dealt with in accordance with Article 19(1) TEU.[78] Judges from other member states could ask whether they should treat their Polish colleagues as independent. While Polish judges, for example, asked about the so-called disciplinary chamber,[79] an Irish judge famously asked whether she could still send a detainee to Poland under the European Arrest Warrant scheme.[80] The answer in both cases was similar: the European Court of Justice (ECJ) gave guidance as to what to consider, but the ultimate decision rested with the national court.[81] The ECJ stopped short of declaring the Polish judiciary completely nonindependent.

Polish judges were not the only ones to challenge the Disciplinary Chamber before the ECJ.[82] In addition, the European Commission

[76] *Eur. Comm'n v. Poland*, ECLI:EU:C:2019:531, ¶¶ 71–97; *Eur. Comm'n v. Poland*, ECLI:EU:C:2019:924, ¶¶ 108–35 . On these cases, see Bárd & Sledzinska-Simon, *supra* note 58, at 1564–67, 1569–72; Pech et al., *supra* note 62, at 29–31.

[77] Case C-619/18, Eur. Comm'n v. Poland, ECLI:EU:C:2018:1021 (Dec. 17, 2018) (independence of the supreme court). On this significant point, see Pech et al., *supra* note 62.

[78] For an overview of the many cases brought by Polish judges, see Pech et al., *supra* note 62, at 33.

[79] *A.K. v. Najwyższy*, ECLI:EU:C:2019:982, (Nov. 19, 2019).

[80] On this case, see also Bogdandy et al., *supra* note 54, at 394–99.

[81] For a critique of the ECJ's record in these cases, see Pech et al., *supra* note 62, at 32–38; for a defense of its approach, see Bogdandy et al., *supra* note 54, at 396.

[82] For a timeline of the various cases and the Polish reactions, see Luke Dimitrios Spieker, *The Conflict over the Polish Disciplinary Regime for Judges – an Acid Test for Judicial Independence, Union Values and the Primacy of EU Law: Commission v. Poland*, 59 COMMON MKT. L. REV. 777, 811 (2022).

brought an infringement action. As discussed, Poland lost both cases.[83] But this time, its government did not change course. It chose noncompliance and escalation instead. The Polish Constitutional Tribunal, which had been captured early on,[84] issued a judgment saying that compliance with Article 19(1) TEU violated the Polish constitution. In addition, the Polish government introduced a "muzzle law," which prohibits Polish judges from reviewing whether other judges have been legally appointed (under European law, one might add).[85] In response, the Commission brought yet another infringement case. It also applied for an interim order, which the ECJ granted. When the government refused to comply, Poland was ordered to pay a record-high sum of one million euros for each day it continued to defy the European Court rulings.[86]

At the end of the day, though, a sanction is a price: noncompliance will simply affect the amount of money transferred to Poland, not its ultimate membership of the EU. Poland's reaction to the latest string of rule-of-law cases laid an axe on the foundation of the European Union as a community based on law. In some areas, Poland refused to accept all European law and its supremacy, and Poland had thereby left, at least partially, the European legal space.[87]

Under the logic of *Portuguese Judges* and the European Court of Justice's rule-of-law cases, European values may reign over the member states' constitutions. This might truly be a "constitutional moment" that changes the legal structure of the European Union.[88] It also tells us something about international norms as complementing national law, as substituting for national law, and how the former may turn into the latter. At first, European rule-of-law discourses were clearly aimed to complement and strengthen national constitutional law. This is still true for the *Portuguese Judges* ruling, which Portugal duly

[83] Case C-791/19, Eur. Comm'n v. Poland, ECLI:EU:C:2021:596 (July 15, 2021) (disciplinary chamber).

[84] On the capture, see SADURSKI, *supra* note 21; Oskar Polański, *Poland: Another Episode of "Rule of Law Backsliding" – Judgment P 7/20 and a Threat to the Integrity of the EU Legal Order,* 2022 PUB. L. 153; Oskar Polański, *Poland: Constitutional Tribunal Judgment K 3/21 – a Continued Assault on the Integrity of the EU Legal Order,* 2022 PUB. L. 344; for a broader discussion, see Spieker, *supra* note 82, at 797–805.

[85] *See* Spieker, *supra* note 82.

[86] Case C-204/21 R, Eur. Comm'n v. Poland, Order of the Vice-President of the Court, ECLI:EU:C:2021:878 (Oct. 27, 2021). The sum was later reduced to 500,000 euros; *see* Case C-204/21 R-RAP, Order of the Vice-President of the Court, ECLI:EU:C:2023:334 (Apr. 21, 2023).

[87] Bogdandy et al., *supra* note 54, at 398.

[88] *Id.* at 386–87.

implemented. The picture changed, however, once the Polish government and the Constitutional Tribunal openly defied European law. The European level is substituting its understanding of what the rule entails for what the Polish constitution allegedly says. This is significant. Analyzing this shift as (attempted) substitution rather than as a complementing normative order helps to explain the extraordinary nature of what has happened in *Portuguese Judges*. It helps to conceptualize why the ECJ is so careful to reiterate that it will exercise judicial restraint when asked to apply its new powers.[89] And it explains why, so far, the Court (and the European Commission) have stuck to the now well-trodden paths of judicial independence, rather than using Article 2(1) TEU and the rule of law more broadly to address other shortcomings in certain member states.[90]

In defense of their approach, at least regarding judicial independence, the European actors may point toward a fact that already shaped the genesis of today's rule-of-law definition: Its arguments are tied not only to European Union law. Especially in its cases related to judicial independence, the court relies on the concurrent case law of the European Court of Human Rights[91] and, by extension, the work of the Venice Commission. Of course, this multilayered approach strengthens the argument for substituting for national law. It makes the rule-of-law cases under Article 19(1) TEU look less like overreach by European Union institutions and more like a part of broader development of shared European values. (It is worth noting that Polish voters seemed to agree.[92])

[89] *See generally* Danwitz, *supra* note 38, at 1315, 1340. In the context of the Polish rule-of-law cases, see Bogdandy & Spieker, *supra* note 55, at 12–14; Spieker, *supra* note 82, at 801–03.

[90] This may change, however. In its case against Hungary's "anti LGBTQ law," the Commission, for the first time, relies on Article 2(1) TEU as a stand-alone provision; *see* Lena Kaiser, *A New Chapter in the European Rule of Law Saga*, VERFASSUNGSBLOG (Mar. 4, 2023), https://verfassungsblog.de/a-new-chapter-in-the-european-rule-of-law-saga/. Equally, in its case against Poland's "Lex Tusk," the Commission cites Article 19(1) TEU more broadly, not limiting its scope to cases regarding (the lack of) judicial independence; *see* Nora Visser, *Enforcing Democracy*, VERFASSUNGSBLOG (June 13, 2023), https://verfassungsblog.de/enforcing-democracy/.

[91] *See, e.g.*, Joined Cases C-585/18, C-624/18 & C-625/18, A.K. v. Najwyższy, ECLI:EU:C:2019:982, ¶ 171 (Nov. 19, 2019).

[92] The Polish people, after all, seem to view the interventions of the ECJ as legitimate; see the studies cited by Spieker, *supra* note 82, at 796.

c The Recent Conditionality Mechanisms

Disobeying the European Court of Justice might come at the hefty price of one million euros a day. But there is a (potentially) even more powerful tool that couples the rule of law and financial pressure: the so-called conditionality mechanism. It makes payments from the general budget as well as payments under the European Union's COVID relief package contingent on abiding by the European rule-of-law standards.[93] The numbers at stake are significant: Poland's share of the COVID recovery fund, for example, is 35.4 billion euros. There is one additional prerequisite, however: the breaches of the rule of law must "affect the sound financial management of the Union budget or the protection of the financial interests of the Union in a sufficiently direct way." In this regard, the final design of the conditionality mechanism marks a notable deviation from earlier ideas by the European Commission (and, in fact, the vision of the European Parliament).[94] The conditionality mechanism is now budget-centered; the rule of law is the means to an end. Not every rule-of-law issue leads to financial consequences, but some nexus between the rule-of-law situation and the EU budget is required.

The conditionality mechanism in its final form marks a compromise. Such an instrument is introduced to protect the rule of law on the European level, but its scope is limited.[95] The conditionality mechanism marks the highly politicized nature of European rule-of-law tools. As in 2014, regarding the first Rule of Law Framework, it was the Council's legal service that considered a more general conditionality unlawful.[96] This time it was heard. The underlying power struggle is, again, as much about protecting the rule of law as it is about the power balance between the European level and its member states.[97] And the lines of conflict are similar to those that have emerged in relation to the jurisprudence of the

[93] *See* Regulation (EU/Euratom) 2020/2092, *supra* note 34, recital (3), arts. 2(a), 3, 4(2).

[94] For an overview of the genesis of today's conditionality mechanism, see Antonia Baraggia & Matteo Bonelli, *Linking Money to Values: The New Rule of Law Conditionality Regulation and Its Constitutional Challenges*, 23 GERMAN L.J. 131 (2022).

[95] For defense of this approach, see *id.* at 146–50; Marco Fisicaro, *Protection of the Rule of Law and "Competence Creep" via the Budget: The Court of Justice on the Legality of the Conditionality Regulation*, 18 EUR. CONST. L. REV. 334, 342–43 (2022).

[96] Opinion of the Legal Service of the Council, *Proposal for a Regulation of the European Parliament and of the Council on the Protection of the Union's Budget in Case of Generalised Deficiencies as Regards the Rule of Law in the Member States: Compatibility with the EU Treaties*, 13593/18 (Oct. 25, 2018).

[97] Fisicaro, *supra* note 95.

European Court of Justice under Articles 2 and 19(1) TEU. Far-reaching conditionality mechanisms have a constitutionalizing and federalizing effect.[98] They confer great power on the upper level of government. Of course, the US experience with conditional spending immediately springs to mind.[99] Ultimately, such conditionality mechanisms are yet another tool to incentivize a national legal system to adopt supranational value judgments as substitutes for local ones.

At the same time, for present purposes, the mechanism is rather open about the background against which it was drafted: An independent judiciary features heavily in the legal text.[100] And, as a consequence, the European institutions, initially, approved neither Poland's nor Hungary's application for COVID relief funds. Instead, they set certain "milestones" to be met before any payment would be made. The year 2022 was a story of back-and-forth that highlighted the strengths and weaknesses of the conditionality mechanism and its ultimately political nature:[101] At least on paper, Poland and Hungary seemed willing to compromise. A financial lever and withholding hefty sums proved strong tools. But wielding them requires political will – especially in times of war. Poland – after all, the notorious rule-of-law culprit – came out as one of Ukraine's most reliable allies, while Hungary took a very pro-Russia stance. All this led to initially quite lenient milestones for Poland (many would argue they were too lenient), a later U-turn by the European Commission, and very strict milestones for Hungary. For now, it remains uncertain whether the new conditionality mechanism will restore the rule of law, at least partially. It may well end up as nothing more than an additional bargaining chip on the political table when the next crisis needs addressing.

In terms of substitutes and complements, the European framework is clearly designed to complement local systems in advancing the rule of law. Indeed, the entire European project has depended for decades on national judges as the first line of defense in enforcing European law. Yet, in recent decades populist leaders have leveraged the alleged remoteness

[98] Baraggia & Bonelli, *supra* note 94, at 144–45, 154; Fisicaro, *supra* note 95, at 338.

[99] South Dakota v. Dole, 483 U.S. 203 (1987); see the discussions by Baraggia & Bonelli, *supra* note 94, at 144–45.

[100] *See* Regulation (EU/Euratom) 2020/2092, *supra* note 34, recitals (8)–(10), arts. 2(a), 3(a), 4(d).

[101] For the most recent developments, see Jakub Jaraczewski, *Unexpected Complications: The Impact of the Russian Invasion of Ukraine on the Rule of Law Crisis in the EU*, VERFASSUNGSBLOG (Dec. 23, 2022), https://tinyurl.com/2n589ept.

of European institutions to advance their own nationalist projects, many of which seem to undermine the rule of law. One wonders, then, whether the European experience has not been one of substitution rather than complementarity.

V Africa

African regional institutions have undergone a "good governance" turn in recent decades, in which democracy and the rule of law have been elevated to a high normative position. The African Union (AU), successor to the Organisation of African Unity, has been playing a major role here, and a major first step was the Constitutive Act of the Union, adopted in 2000 at Lomé, Togo, which enshrines the rule of law in its preamble and in the listing of principles in Article 4.[102] Further developing these norms, the AU adopted the African Charter on Democracy, Elections and Governance (ACDEG) in 2007, which at this writing has been signed by forty-six out of fifty-five member states and ratified by thirty-one.[103] The ACDEG mentions the rule of law seven times, as part of its preamble, principles, and as part of the content of good governance. These and other AU norms are enforced in several ways, including monitoring and reports by the African Commission on Human and Peoples' Rights; the African Peer Review Mechanism, a continent-wide mechanism looking at rule of law; and the African Court on Human and Peoples' Rights. In extreme cases, the Peace and Security Council (PSC), an AU organ, can impose sanctions, including suspension, for failure to abide by the policies.

Only a handful of cases of these institutions have referred to the rule of law. In one case, the African Commission found that Cameroon's judicial council, which had the president as chair and the minister of justice as vice-chair, violated judicial independence.[104] This case goes directly to the threat to the rule of law posed by political interference with the

[102] Lome Declaration of July 2000 on the Framework for an OAU Response to Unconstitutional Changes of Government, AHG/Decl.5 (XXXVI), July 12, 2000.

[103] *See generally* Micha Wiebusch et al., *The African Charter on Democracy Elections and Governance*, 63 J. AFR. L. 9, 10 (2019); Christina Murray, Eric Alston & Micha Wiebusch, Presidential Term Limits and the International Community 9 (Inst. of Developmental Pol'y, Working Paper 2018.9, 2018).

[104] Kevin Mgwanga Gunme v. Cameroon, Communication 266/03, African Commission on Human and Peoples' Rts. [Afr. Comm'n H.P.R.] (May 2009). The Commission arrived at similar conclusions in a recent case against the Democratic Republic of Congo (DRC) in which it found that the African Charter guarantees the separation of powers. Jose Alidor

judiciary, and is consistent with standards articulated by the Venice Commission and others. The *appearance* of judicial independence is a common requirement now.

Other cases before the African Court of Human and Peoples' Rights occasionally invoke the rule of law as a kind of freestanding principle that supports particular procedural requirements. For example, in *Kennedy Owino Onyachi v. United Republic of Tanzania*, the Court held that "it is a fundamental rule of law that anyone who alleges a fact must provide evidence to prove it."[105]

There are also important cases in which the rule of law is not specifically mentioned, but is implicitly at issue. In a decision on the extraordinary measures undertaken by President Kais Saeed in 2022, in which he issued emergency decrees suspending the parliament and terminating the government, the Court found the measures to be disproportionate and in violation of the right to be heard, among other norms. It called on the country to establish a constitutional court as well as to repeal the decrees in question.[106]

Subregional trade blocs have also been forceful in dealing with rule of law issues, perhaps because of their explicit mandate to do so. The Treaty for the Establishment of the East African Community entered into force in 2000. Article 6(d) outlines the guiding principles of the Treaty, which include "good governance including adherence to the principles of democracy, the rule of law, accountability, transparency, social justice, equal opportunities, gender equality, as well as the recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights."[107] Article 3.3(c) includes democracy and the rule of law as criteria for states to take into account in considering new applicants for member-state status. Similarly, the Economic Community of West African States (ECOWAS), founded in 1975, is a regional economic union of fifteen countries.[108]

Kabambi v. DRC, Communication 408/11, Afr. Comm'n H.P.R., ¶¶ 81–90 (Nov. 15, 2016).

[105] Kennedy Owino Onyachi v. Tanzania, No. 003/2015, Judgment, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.], ¶ 142 (Sept. 28, 2017), https://tinyurl.com/yvvm2fr6.

[106] Ben Mohamed Ben Ibrahim Belguith v. Tunisia, No. 017/2021, Judgment, Afr. Ct. H.P.R. (Sept. 22, 2022), https://tinyurl.com/yc5cp5hu.

[107] Treaty for the Establishment of the East African Community art. 6(d), Nov. 30, 1999, 2144 U.N.T.S. 255.

[108] Member states include Benin, Burkina Faso, Cape Verde, Côte d'Ivoire, Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mali, Niger, Nigeria, Sierra Leone, Senegal, and Togo.

A Community Court of Justice gives private litigants direct access to the courts and there is no specified catalogue of human rights, although it regularly refers to the African Charter of Human and Peoples' Rights and other such instruments.

A review of the jurisprudence of these bodies shows that the concept of the rule of law arises most often in the context of protecting judicial independence and ensuring the right to a remedy. For example, in a 2004 case, fourteen Ugandan defendants who had been granted bail by the courts were rearrested by security personnel. When national authorities did not intervene, the Uganda Law Society appealed to the East African Court of Justice, which found a violation of the East African Community Treaty.[109] It went on to note that "[a]biding by the court decision is the corner stone of the independence of the judiciary which is one of the principles of the observation of the rule of law."[110]

Africa, as a region, seems like the one in which the dynamic of complementarity is most apparent. National-level judiciaries are relatively weak. Rule-of-law norms are subject to pressure from autocratic governments. In such a context, the regional courts and human rights bodies can restate norms and speak truth to power. How much these interventions achieve in practice is an open question, but they surely do not undermine the efforts of local lawyers and judges.

VI Conclusion

What does the rule of law look like outside the state? There are multiple institutional settings in which it manifests itself, including on the international plane among states and in the practice of regional supranational institutions; in regional courts and tribunals that seek to discipline the state and provide substitutes or complements to backstop the domestic rule of law; and, in some cases, among states themselves in a directly transnational process. These settings generate various tensions between democratic ideals and those involving the rule of law. Supranational demands for rule of law have been most notable in helping to strengthen judicial independence in the national sphere, providing a kind of complement to domestic principles. In other cases, the rule of law is

ECOWAS has made little progress toward its self-professed goal of regional economic integration.

[109] Katabazi v. Sec'y Gen. of the East African Cmty., Ref. No. 1 of 2007, East African Court of Justice (Nov. 1, 2007).

[110] *Id.* at 23.

a free-floating principle, used in a procedural manner, largely ensuring consistency across levels.

There are, however, two ways in which there are tensions among levels. First, the insistence of regional bodies that there is only one authoritative interpretation of regional law, and that it is superior to local constitutional orders, has generated some pushback in both Latin America and Europe. Here, the rule of law as pushed from outside comes into direct conflict with the rule of law as locally understood, in a way that has invoked both scholarly criticism and popular backlash. The regional institutions have themselves adjusted, and have not gone away.[111]

A second tension has arisen in the European context. A central characteristic of international law qua international law is that states will ultimately determine the rulings, norms, and requirements with which they will comply. By joining the European Union, however, its member states have accepted the superiority of EU law – as far as the treaties confer power to the European level. Here lies the core problem: The national-level authorities in backsliding states invoke the former rule in their resistance to EU-level efforts to reinforce the rule of law. The European institutions insist on the latter rule. In both Latin America and Europe, rule of law is invoked by both levels of legal order, leading to some confusion and plenty of tension.

Tension, to some extent, is to be expected, especially when international regimes are powerful. The African institutions we looked at have played a part in articulating the rule of law at a normative level, but their decisions have by and large not had a huge impact on the ground. In Europe and Latin America, by contrast, tensions between the two levels are present: the framing of the two levels as complementary has given way to a more tense relationship, in which each seeks to substitute for the other. A harmonious set of interactions sounds appealing in the abstract, but might indicate a situation in which one or the other level is not taking its duties seriously. The tensions we observe may thus be productive ones in terms of protection of rule-of-law values.

The interstate politics at the core of the international order suggest that a true international rule of law, operating on the level of the UN and other interstate bodies, is a distant dream. Nevertheless, much can be done through transnational and supranational processes that advance and complement domestic systems to promote rule-of-law values. Perhaps in our era, transnational rule of law is thus an "unqualified human good."

[111] Stone Sweet & Sandholtz, *supra* note 25.