

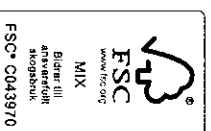
Rule of Law in a Transitional Spectrum

EDITED BY RIGMOR ARGREN


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Preface

It seems as if the rule of law is everywhere these days. The rule of law is called upon to create order in a global order in disarray. The European Commission has taken the principles of the rule of law to heart, as core values of the Union, and has thus taken Poland and Hungary to court for not respecting these values. In Sweden, a country where the phrase rule of law (*rättsstat*) was long absent, since past political and legal discussions preferred the term legal security (*rättsäkerhet*), however, today, few political areas are discussed without the rule of law as *the* framing concept, whether it is migration, environment, criminal law, or national security. Though the past is a foreign country where they “do things differently”, it is not an overstatement to say that there are now more calls for the rule of law than perhaps ever before.

The question is what this popularity means. While being “everywhere”, the rule of law is also most markedly elsewhere for most of the world’s population. Empirically speaking, rule of law democracies are outliers. This is a paradox that is not easily explained, and it is complicated further by the fact that at the global level and in most countries, most of the time, most policy issues are dealt with through law and through the recourse to courts of law. The paradox is that national and international politics are becoming more “legal”, but not necessarily more bound by the rule of law as a principle of governance. A distressing but telling observation is how authoritarian regimes have revamped their classical attributes of power, and traded death squads for legal squads, and extrajudicial repression for parliamentary repression. Thus, the rule of law is at its zenith, but dusk is approaching not far along the orbit.

Observing these stark contrasts sometimes leads to claims that the rule of law means little more than an “honorific amalgam of values”¹ or

¹ Fallon, R. 1997. “‘The Rule of Law’ as a Concept in Constitutional Discourse”. 97 *Columbia Law Review* p. 41.

This chapter examines whether AADs are in compliance with the PoL. The authors first discuss the PoL and its legal force. Secondly, they discuss AAD, its benefits and legal implications in relation to public administration. They study the entangled relationship between the AAD and PoL in the public sector and finally emphatically underline the importance of upholding the PoL in the process of automated decisions made by public authorities.

In chapter 16 **Kateryna Nekit** notes that the ongoing development of information technologies and number of items falling under the concept of “digital assets” is growing at an impressive rate. In this regard, the author finds that the question of the legal nature of such objects has not yet been finally resolved. This leaves digital asset holders vulnerable: their rights have little or no legal protection. The author contends that the situation may be remedied by applying ownership provisions. This would ensure optimum protection for holders of digital assets, since they could obtain all the guarantees established for owners. The author argues for the feasibility and necessity of recognizing a new type of ownership in order to protect the rights to digital assets.

In chapter 17 **Stjepan Gadžo** examines recent tax scholarship and notes that the topic of sustainability has gained wide currency there. The author holds that the concept has provided a new element in the policy framework for assessing the tax behaviour of corporate taxpayers, with the spotlight put on the largest multinational companies (MNCs) and their practice of “aggressive tax planning” or “tax avoidance”. He points out that tax scholars have traditionally relied on policy benchmarks such as “tax fairness” or “tax neutrality” in pleading for the reform of various domestic and international rules that make corporate tax avoidance possible. The author concludes that the 2013 *Anti-tax base erosion and profit shifting project* resulted in multiple legislative changes aimed at curbing such practices, with policymakers largely adopting the “tax fairness discourse” in justifying these developments to the public.

The Rule of Law in Times of Global Transformations: From Conceptualisation to Operationalisation

Julinda Beqiraj

Abstract

To what extent can the rule of law provide guidance in ensuring good governance during core transformations? Is the rule of law challenged by recent developments and does it need to adapt or even evolve? The paper addresses these questions by first providing an overview of the definitions of the rule of law and its constitutive elements in public law and legal theory literature. Secondly, the paper discusses three examples of operationalisation of the concept in the context of the Sustainable Development Agenda (UN), the tools developed by the Council of Europe (CoE), and the European Union (EU) rule of law protection mechanisms. Finally, three examples are presented and discussed to support the claim that the rule of law is topical and has core relevance in the context of global transformations and contributes to overcoming challenges in accordance with constitutional principles of domestic and international orders.

Keywords

Rule of law – Sustainable development – Governance – Rule of law conditionality – COVID-19 – Rule of law backsliding – Artificial Intelligence – Legality – Legal certainty – Access to justice – Prohibition of abuse of power – Non-discrimination

1. Introduction

We live in an age of global transformations: digitalisation, the environmental crisis, and shifts in the world economic and political orders are just a few developments signifying the profound social re-orientation that is taking place worldwide. In an increasingly integrated world, global transformations require coordinated responses at the domestic and international levels. As a fundamental principle of governance, to what extent can the rule of law provide guidance and safeguards and ensure social, political and legal order during such a period of transformation? Is the rule of law challenged by recent developments or are its core ingredients still valid in the face of global transformations?

The paper addresses these questions by first providing an overview of the definition of the rule of law and its constitutive elements in public law and legal theory literature. The gist of this part is that, as a normative principle, the rule of law is recognised extensively in the positive law of many legal orders, including national constitutions, the decisions of law courts and in international law. While there is discussion as to the elements of the concept, there is agreement on the core content that emerges from such domestic and international sources. Such core content comprises legality, legal certainty, the prohibition of abuse of power, equality before the law and non-discrimination; and adequate access to justice. This is a set of qualities that should be present and ensured in all legal orders, not only in domestic legal orders, but also in the international legal order.

Secondly, the paper discusses the efforts made to operationalise the principle, and translate it into concrete operational standards for states and other international actors. Three instances of operationalisation of the rule of law are discussed, namely in the context of the UN, the CoE and the EU. Finally, examples related to challenges to the liberal order, the COVID-19 pandemic and AI are discussed to support the claim that the rule of law has topical relevance in the context of global transformations, and contributes to overcoming challenges in accordance with the core constitutional principles of the domestic and international orders.

2. The Concept of the Rule of Law

2.1 Meaning and Definitions

There is a dynamic scholarly production of theoretical and empirical work on the rule of law that spans across the areas of law, political science, and economics. In the Stanford Encyclopedia of Philosophy, the rule of law is described as “one of the ideals of our political morality and it refers to the ascendancy of law as such and of the institutions of the legal system in a system of governance”.¹ The rule of law is thus a normative ideal specifying how law and legal institutions should operate in any political order.

The rule of law doctrine has been originally developed for and usually applied to domestic legal orders. The concept of the rule of law has different historical roots and traditional perspectives.² In the common law tradition, it is a political ideal, which contains at its core a number of basic principles, aimed at limiting the powers of the government.³ The modern concept of the rule of law was developed in particular by the British constitutional lawyer Dicey in his ‘Introduction to the Study of the Law of the Constitution’, where three aspects are identified: the absolute supremacy of the law over government power; equality before the law; and enforcement before the courts.⁴ As Lord Bingham clearly captures it, the essence of the principle is that:

[A]ll persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of the laws publicly made,

¹ Jeremy Waldron, ‘The Rule of Law’, The Stanford Encyclopedia of Philosophy (2020).

² For a summary and analysis see Simon Chesterman, ‘An International Rule of Law’, *American Journal of Comparative Law* (2008) 56 331ff.; Jeffrey Jowell, ‘The Rule of Law and its Underlying Values’, in J. Jowell and D. Oliver (eds.), *The Changing Constitution*, (Oxford University Press, 2007, 6th edition) 6–7 and references; Kaarlo Tuori, ‘The Rule of Law and the Rechtsstaat’, in K. Tuori, *Ratio and Voluntas: The Tension Between Reason and Will in Law* (Routledge, 2010, 1st ed.), 8ff.

³ Jeremy Waldron, ‘The Concept and the Rule of Law’ (2008) 43:3 *Georgia Law Review*; Lon L. Fuller, *The Morality of Law* (Yale University Press, 1969, Revised Edition), 1STOR, 17 May, 2021; Joseph Raz, *The Rule of Law and its Virtue* (1979); John Finnis, *Natural Law and natural rights* (OUP, 1980).

⁴ Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution* (Liberty Classics, Indianapolis, 1885).

taking effect (generally) in the future and publicly administered in the courts.⁵

The civil law tradition generally places less emphasis on the judicial process and more on the nature of the state – in the French tradition ‘*état de droit*’, in the Italian tradition ‘*stato di diritto*’, and in the German Tradition ‘*Rechtsstaat*’.

It has been common to define conceptions of the rule of law as being either formal (‘thin’) or substantive (‘thick’). These ultimately raise the question of how ambitious the rule of law requirements are, and in particular whether the conception comprises the observance of human rights. ‘Thin’ definitions of the rule of law concern how any given law is made and applied. The ‘thin’ conception includes the requirement that States make clear laws, that they do so in a transparent manner, that the law is equally applied, and that States enable fair and impartial dispute resolution and access to justice. Instead, the ‘thick’ conception of the rule of law moves beyond procedural safeguards to also consider the content of the law. In this view, the rule of law also requires state compliance with international law, and adequate protection of fundamental human rights of individuals.

The two conceptions, however, can be complementary rather than competitive. As Nicholas Barber argues, the formal/substantive divide is blurred because ‘substantive’ considerations, and in particular a social dimension related to the rule of law, arise in both categories.⁶ Accordingly, even ‘formal’ or ‘thin’ definitions of the rule of law demanding stable and prospective laws need to consider the ability of citizens to understand laws and to make effective use of them, including by challenging the acts of the powerful before courts to enforce their rights and freedoms.

2.2 Requirements

The rule of law has gained global recognition and is considered the ‘benchmark of political legitimacy’.⁷ The concept is recognised extensively

⁵ Lord Tom Bingham, *The Rule of Law* (Penguin Books, 2010) 8.

⁶ N. Barber, ‘Must legalistic Conceptions of the Rule of Law have a Social Dimension?’ (2004) 17 *Ratio Juris* 474.

⁷ Jeremy Waldron, ‘The Concept and the Rule of Law’ (n. 3).

in the positive law in many legal orders, including constitutions, constitutional customs and practices, law courts’ decisions and in international law. However, despite such wide recognition of the principle, rule of law requirements are seldom detailed as such in the law or constitutions, and it is commonly left to scholars and judges to expand on the meaning and implications of the principle.

Lord Bingham offers a clear and concise functional definition of the rule of law, consisting of eight components⁸ which have been further distilled into four essential elements of the rule of law: legality, legal certainty, equality and access to justice and rights.⁹ These are enshrined in constitutions, laws, jurisprudence and reflected in the main functional definitions endorsed by international organisations.

As argued elsewhere alongside other authors, at the European level, a clear and common set of rule of law requirements emerge among European constitutional traditions, under the common denominator of limitations on the exercise of State power, emphasising the principles of legality, access to judicial protection for the defence of individual rights and legitimate interests, as well as the expected guarantees of the non-retroactivity and certainty of the law.¹⁰ Despite the contextual specificities of each country, such elements are also part of definitions endorsed at the regional and universal levels by international organisations committing themselves to the rule of law,¹¹ hence the universality of the rule of law (see Section 3 below).¹² In the words of Judge Spano:¹³

⁸ Lord Tom Bingham, *The Rule of Law* (n. 5).

⁹ Jeffrey Jowell and Colin O’Cinneide, *The Changing Constitution* (Oxford University Press, Oxford, 2019, Ninth Edition) 16ff.

¹⁰ Laurent Peck, Joelle Grogan et al., ‘Unity and Diversity in National Understandings of the Rule of Law in the EU’, RECONNECT Deliverable 7.1, 17.

¹¹ E.g., Preamble and Article 3 of the Statute of the Council of Europe (5 May 1949) ETS 001; Preamble and Articles 2 and 49 of the Consolidated Version of the Treaty on European Union [2012] OJ C326/13; Preamble and Article 4(m) of the Constitutive Act of the African Union (7 November 2000) 2158 UNTS 3.

¹² On the rule of law as a universal principle see Joseph Raz, ‘The Law’s Own Virtue’ (2019) 39:1 *Oxford Journal of Legal Studies* 4.

¹³ Robert Spano, ‘The rule of law as the lodestar of the European Convention on Human Rights: The Strasbourg Court and the independence of the judiciary’ (2021) *European Law Journal* 5.

[T]he rule of law is not a legal principle which is limited to Western liberal democracies. Quite the contrary, it is a norm and a foundational ideal that transcends borders, traditions and cultures. The rule of law constitutes a core feature of any truly democratic system of communal human life regulated by legally binding norms. (...) Recall in this regard that the United Nations' Universal Declaration of Human Rights, with its direct reference to the rule of law in its Preamble, which lies at the origins of the Convention, is itself a global instrument guiding all 192 Member States of the United Nations.

2.3 The Rule of Law at the Domestic and International Levels

The rule of law doctrine, originally developed for and applied to domestic legal orders, has been increasingly recognised and endorsed in public international law – constitutive documents, conventions, statements of the international organisations and their organs.¹⁴ The implementation of rule of law safeguards within domestic systems aims to constrain the power of the sovereign state, its agents and functions and subject it to the law, thereby protecting individuals from the arbitrary use of power: no one is above the law. Beyond domestic systems, in the words of Nicolas Barber "(...) there is nothing to prevent it from extending its reach to supranational, or sub-national, legal systems. The rule of law can be presented as a set of qualities that ought to be present in all legal orders."¹⁵ Accordingly, despite the specificities of the international legal order, there is growing acknowledgement that the rule of law, as a principle of governance, also applies in international law, to actors and institutions. In an increasingly interconnected world, given the broad spectrum of relations between legal orders, the rule of law is even seen to be 'necessary' internationally.¹⁶

A recent critique by some scholars, most notably Jeremy Waldron, moves away from a formalistic view of the international rule of law

focused on legality, where it is understood as the application of rule of law principles to relations between states and other subjects of international law.¹⁷ The analogy plays a role especially in regard to international law-making processes satisfying the requirements of clarity, publicity, certainty, transparency and fairness. The new approach to the international rule of law, which is focussed on benefiting individuals alongside states, suggests that the requirements which apply to government institutions internally must remain the same externally and protect individuals against the state's actions, at both the domestic and international levels. As such, this approach to the rule of law at the international level implies an understanding that is closely related to the rule of law that applies domestically.¹⁸

Expanding the concept of the rule of law to the international level may not be an easy exercise.¹⁹

However, it is possible to do so by avoiding the well-worn definitional debates on what the rule of law is, and focusing instead on the question of what the rule of law aims to protect and how this can be achieved.²⁰ Accordingly, the core rule of law elements, such as accountability, legality, legal certainty, equality and access to justice and rights, would equally apply to the behaviour of actors at the international level, including in the context of IOs, and would also affect the IOs themselves, and contribute

¹⁷ Jeremy Waldron, 'Are Sovereigns Entitled to the Benefit of the International Rule of Law?' (2011) 22 *European Journal of International Law* 315. See also James Crawford, *Chance, Order, Change: The Course of International Law: General Course on Public International Law* (Hague Academy of International Law 2014) chs XI–XV; Peter Rijpkema, 'The Concept of a Global Rule of Law' (2013) 4 *Transnational Legal Theory* 167; Stéphane Beaudac, 'The Rule of Law in International Law Today' in Gianluigi Palombella and Neil Walker (eds), *Relocating the Rule of Law* (Hart Publishing 2009). For a discussion of the different scholarly approaches see Denise Wohlwend, *The International Rule of Law: Scope, Subjects, Requirements* (Edward Elgar Publishing, 2021), 6 and ch 5.

¹⁸ Denise Wohlwend, *The International Rule of Law* (n. 17).

¹⁹ Robert McCorquodale, 'Defining the International Rule of Law: Defying Gravity?' (n. 14); Simon Chesterman, 'An International Rule of Law' (n. 2) 331; Simon Chesterman, 'I'll Take Manhattan': The International Rule of Law and the UN Security Council' 1 (2009) *Hague Journal on the Rule of Law* 67.

²⁰ José E. Alvarez, 'International Organizations and the Rule of Law', *International Law and Justice Working Papers*, IIIJ Working Paper 2016/4 Global Administrative Law Series, NYU School of Law, p. 15; Simon Chesterman, 'An International Rule of Law' (n. 2) 342.

¹⁴ Robert McCorquodale, 'Defining the International Rule of Law: Defying Gravity?' (2016) 65 *International and Comparative Law Quarterly*, 285–287.

¹⁵ Nicolas Barber, 'The Rechtsstaat and the Rule of Law' (2003) 53 *University of Toronto Law Journal* 443–452.

¹⁶ Crawford refers to 'the need for the rule of law as a virtue at the international level'. James Crawford, 'International Law and the Rule of Law' (2003) 24 *Adelphi Law Review* 310.

to their credibility and legitimacy. This is not just an aspirational statement, but reflects the practice of different international organisations. As a quasi-global international organisation, the approach of the UN, for one, is relevant.

The “need for universal adherence to and implementation of the Rule of Law at both the national and international levels” was endorsed by all UN Member States in the 2005 Outcome Document of the World Summit.²¹ Also, following the operational definition developed by the Secretary General²² and the publication of “Rule of Law Indicators”,²³ the UN General Assembly adopted a Declaration on the rule of law at the national and international levels in 2012, which recognises that:

[T]he rule of law applies to all States equally and to international organisations, including the United Nations and its principal organs, and that respect for and promotion of the rule of law and justice should guide all of their activities and accord predictability and legitimacy to their actions.²⁴

²¹ UN General Assembly, *Resolution adopted by the General Assembly on 16 September 2005, World Summit Outcome, (A/RES/60/1)* 24 October 2005, para 134, <www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_60_1.pdf>, accessed 3 September 2023.

²² For the UN Secretary General: “The ‘rule of law’ is a concept at the very heart of the Organization’s mission. It refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.” UN Secretary General, *The rule of law and transitional justice in conflict and post-conflict societies*, (S/2004/6160) 23 August 2004, para 6, <www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4F-F96FE9%7D/P/CSS%20S%202004%20616.pdf>, accessed 3 September 2023.

²³ UN, *Rule of Law Indicators: Implementation Guide and Project Tools*, joint publication of the United Nations Department of Peacekeeping Operations (DPKO) and the Office of the United Nations High Commissioner for Human Rights (OHCHR), <www.un.org/en/events/peacekeepersday/2011/publications/un_rule_of_law_indicators.pdf> accessed 3 September 2023.

²⁴ UN General Assembly, *Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels*, 12 September 2012, para 2, <file:///C:/Users/julin/Downloads/A_67_L-1-EN.pdf> accessed 3 September 2023.

This is reiterated by the EU in its 2014 New Framework to Strengthen the Rule of Law, where the European Commission recalls that “the principle of the Rule of Law has progressively become a dominant organisational model of modern constitutional law and international organisations (including the United Nations and the Council of Europe) to regulate the exercise of public powers”.²⁵

3. The Rule of Law in Practice

Building on the definitional theoretical discussions in academic literature, there are relevant instances at the international level aimed at operationalising the principle, and translating it into concrete functional standards, even enforceable obligations, for states and other international actors. As discussed above, at a time of increased interdependence and sophisticated institutionalised processes through which international law is made and applied, such initiatives are both about how the rule of law should operate in national systems, and also contain more or less articulated acknowledgments that the notion of the rule of law applies equally to the international system and to the activities of the international organisations themselves.²⁶

3.1 The Rule of Law in the UN Sustainable Development Agenda

In 2000, the international community agreed on eight Millennium Development Goals (MDGs), which were intended to meet the needs of the world’s poorest by the end of 2015.²⁷ Progress against the MDGs varied across countries but, importantly, it was widely acknowledged that the development model underpinning those goals did not work

²⁵ Communication from the Commission to the European Parliament and the Council, *A new EU Framework to strengthen the Rule of Law*, COM(2014) 158 final, Brussels, 11 March 2014, pp. 3–4.

²⁶ This section borrows from Julinda Beqiraj and Lucy Moxham, ‘Reconciling the Theory and Practice of the Rule of Law in the European Union: Measuring the Rule of Law’, (2022) 14 *Hague Journal on the Rule of Law* 139–164.

²⁷ United Nations Millennium Declaration, 18 September 2000, A/RES/55/2, <http://www.un.org/millenniumgoals/bkgd.shtml> accessed 2 August 2023.

properly and needed to be replaced by a truly transformative, inclusive and sustainable model.²⁸ In September 2015, the UN agreed on a new set of goals for 2015–2030 as part of the Sustainable Development Agenda (SDA) that came into effect on 1 January 2016.²⁹

The assumptions on which the SDA rests are quite different from those of the MDGs. The Agenda builds on a three-dimensional understanding of sustainable development: economic, social and environmental; its drafting was inclusive of civil society views; and it takes a universal approach by addressing both developed and developing countries.³⁰

The new Agenda is innovative also in its content, as it goes beyond the mere political recognition of the importance of the rule of law: in the aspirational part of the 2000 UN Millennium Declaration states committed to sparing “no effort to promote democracy and strengthen the rule of law”.³¹ Paragraph 9 in the SDA recognises that the rule of law is essential for sustainable development. The compilation of 17 goals and 169 targets on sustainable development incorporates the rule of law and access to justice issues for the first time within a stand-alone goal and several targets. Specifically, Goal 16 sets out to “Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels”. The achievement of the goals, including Goal 16, is assessed against a number of targets, some of which incorporate rule of law components. Notably, Target 16.3 aims to “Promote the rule of law at the national and international levels and ensure equal access to justice for all”. Also, Targets 16.6 and 16.7 set out to “Develop effective, accountable and transparent institutions at all levels” and “Ensure responsive, inclusive, participatory and representative decision making at all levels”; and Target 16.8 aspires to “Broaden and strengthen the participation of developing countries in the institutions of global governance”.

²⁸ J Beqiraj & L McNamara, ‘The Rule of Law and Access to Justice in the Post-2015 Development Agenda: Moving Forward but Stepping Back’ (Bingham Centre Working Paper 2014/04), Bingham Centre for the Rule of Law, BICL, London, August 2014.

²⁹ UN General Assembly, *Resolution adopted by the General Assembly, Transforming our world: the 2030 Agenda for Sustainable Development* (A/RES/70/1), 25 September 2015.

³⁰ J Beqiraj & L McNamara, *The Rule of Law and Access to Justice in the Post-2015 Development Agenda* (n. 28).

³¹ United Nations Millennium Declaration, 18 September 2000, A/RES/55/2.

The inclusion of a specific goal and targets addressing social and legal issues, such as peace, access to justice, and institutions, within a sustainable development framework, is of great significance. Firstly, because by unanimously adopting the Agenda, governments have committed to prioritising its items in their domestic and foreign policies. Secondly, the inclusion of Goal 16 has prompted a better understanding of the aims set out in the goal and their essential relationship with growth and sustainable development.³² It may not be a coincidence that the rule of law features first (followed by transparency, non-discrimination and inclusiveness) in the list of eight foundational principles that underpin the WTO, put together by G20 members in the Communiqué of the G20 Trade and Investment Ministerial Meeting in 2020.³³ Thirdly, Goal 17 of the Agenda calls for a “global partnership for sustainable development”, which requires a collaborative relationship between organisations of different stakeholder types (governments, private sector, international organisations, civil society), aligning their interests around the realisation of the Agenda.

In conclusion, it should be noted that although the nature of the commitments in the SDA is voluntary and aspirational, and not legally binding as such, the document spells out the steps and procedures for follow-up and review, including the identification of indicators against which progress towards the achievement of the goals and targets will be measured. The indicator framework ‘hardens’, to a certain extent, the ‘soft’ commitments incorporated in the Agenda and introduces a concrete

³² President of the General Assembly’s High-Level Event on the Contributions of Human Rights and the Rule of Law in the Post-2015 Development Agenda, Background Note, 9–10 June 2014:

[I]n regard to the rule of law, there is international consensus that rule of law is critical to sustainable development not only as an essential condition thereof but also as a development outcome in its own right. There is moreover a general acknowledgment that its integration into the post-2015 development agenda can advance inclusive economic growth, reduce inequalities and build well-functioning institutions that ensure participation and the delivery of services, including providing access to justice for all, especially the poor and most vulnerable. In this way, the rule of law, poverty eradication and sustainable development have a mutually reinforcing relationship.

³³ G20 Trade and Investment Ministerial Meeting Communiqué, 22 September 2020, p. 11, <www.g20.utoronto.ca/2020/G20SS_Communique_TIMM_EN.pdf>, accessed 3 September 2023.

mechanism for holding governments and other actors to account, at least through political and civic peer-pressure.

3.2 The CoE Venice Commission Rule of Law Checklist

At a European level, the Council of Europe, which is founded upon the rule of law,³⁴ has provided guidance as to the content of the rule of law, both through the case law of the European Court of Human Rights,³⁵ and through the activities of a number of its bodies and monitoring mechanisms. The work of the Commission for Democracy through Law, known as the Venice Commission, an advisory body of the CoE, is particularly relevant in clarifying and streamlining the meaning of the rule of law as a practical concept of universal validity.³⁶ In particular, the Venice Commission has, for the first time, translated the core elements of the rule of law emerging from legal and constitutional traditions at national and international levels into a set ('checklist') of concrete rule of law requirements that should be present in liberal legal orders. It is worth mentioning that the Venice Commission has 61 member states: the 46 Council of Europe member states and 15 other non-European members.³⁷

The 2011 Venice Commission Report on the Rule of Law proposed a functional non-exhaustive ('thick') definition of the concept,³⁸ drawing on the definition developed by the British Judge, Lord Bingham.³⁹ The Venice Commission's report identified a consensus around six necessary elements of the rule of law. These were further condensed into five elements in the Rule of Law Checklist adopted in March 2016: (1) Legality; (2) Legal certainty; (3) Prevention of abuse (misuse) of powers; (4) Equality before the law and non-discrimination; and (5) Access to justice.⁴⁰ The Checklist makes clear that respect for human rights informs the other elements: "The Rule of Law would just be an empty shell without permitting access to human rights. Vice-versa, the protection and promotion of human rights are realised only through respect for the Rule of Law".⁴¹ Each of the five rule of law elements in the Checklist is detailed into practical benchmarks which are intended to serve as a useful tool for assessing adherence to the rule of law within a given country in a manner that is "objective, thorough, transparent and equal".⁴²

The relevance of the Venice Commission's Checklist rests on its innovative methodological approach to the rule of law. Rather than relying on an abstract, academic approach, it provides a pragmatic and operational tool at the disposal of governments, academics, NGOs and international organisations.⁴³ Moreover, rather than focussing on specific components of the rule of law, it provides a systemic tool, aimed at obtaining a comprehensive assessment of legal systems.⁴⁴ The strength of the functional approach to the rule of law adopted by the Venice Commission is proved by the wide acknowledgement, use of and adherence to this approach by the 61 European and non-European members of the Venice Commission

³⁴ Statute of the Council of Europe, London, 5.V.1949 <<https://rm.coe.int/1680306052>> accessed 3 September 2023.

³⁵ For a summary see Laurent Pech, Joelle Grogan et al., 'Meaning and Scope of the EU Rule of Law', RECONNECT deliverable 7.2, p. 28–35. The Bingham Centre contribution Section 3 on the Council of Europe legal framework.

³⁶ Also relevant in this regard is the work of Council of Europe's European Commission for the Efficiency of Justice (CEPEJ) which, since 2004, has developed and fine-tuned a methodology and tools for collecting, analysing and comparing data on the efficiency, quality and effectiveness of European judicial systems. The CEPEJ tool on the evaluation of judicial systems in Europe is not directed at measuring the Rule of Law as such. However, by providing an accurate and methodologically sound assessment of justice systems in Europe, regarding their efficiency, effectiveness, and quality, it offers insights into the achievement of specific components of the rule of law, in particular the access to the justice component. Julinda Beqiraj and Lucy Moxham, 'Reconciling the Theory and the Practice of the Rule of Law in the European Union' (n. 26).

³⁷ Algeria, Brazil, Canada, Chile, Costa Rica, Israel, Kazakhstan, the Republic of Korea, Kosovo, Kyrgyzstan, Morocco, Mexico, Peru, Tunisia and the USA.

³⁸ Venice Commission, 'Report on the Rule of Law', 25–26 March 2011 <<https://rm.coe.int/1680700a61>> accessed 3 September 2023.

³⁹ Tom Bingham, *The Rule of Law* (n. 5) 84.

⁴⁰ Rule of Law Checklist adopted by the Venice Commission at its 106th Plenary Session (Venice, 11–12 March 2016).

⁴¹ *Ibid.*, para 31.

⁴² See A Drzenczewski, 'The Council of Europe and the Rule of Law: Introductory Remarks regarding the Rule of Law Checklist Established by the Venice Commission' (2018) 37 *Human Rights Law Journal* 179.

⁴³ 'Rule of Law Checklist' (n. 40) para 24 and 27.

⁴⁴ Julinda Beqiraj and Lucy Moxham 'Reconciling the Theory and the Practice of the Rule of Law in the European Union' (n. 26).

as well as by different Council of Europe and EU institutions. In this latter regard, the Checklist document has been referenced in the case law of the Court of Justice of the EU⁴⁵ and the Venice Commission's work has acquired increased relevance in the EU's accession process, especially in the definition of the yardstick of political conditionality for aspiring EU Member States.⁴⁶

3.3 Rule of Law Protection Mechanisms in the EU

3.3.1 *The Legal Framework on the Rule of Law*

Article 2 of the Treaty on the European Union (TEU) is the key legal provision with regard to the rule of law. It describes the rule of law as one of the foundational values on which the EU is based. Far from this being just an abstract statement, a series of prevention and enforcement mechanisms that aim to ensure an effective implementation of the rule of law are included in the Treaties and have been developed through secondary legislation. According to Article 2 TEU:

The 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. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

Although the founding Treaties did not originally contain a direct reference to 'the rule of law', the concept ("without the label") was arguably enshrined in Article 31 of the 1951 European Coal and Steel Community Treaty, describing the function of the Court of Justice of the European Communities, where the English label 'rule of law' was used to translate

a provision originally written in French 'respect du droit'.⁴⁷ Be that as it may, following the 1986 judgment of the Court of Justice, where the then European Community was described as "a Community based on the rule of law",⁴⁸ starting with the Maastricht Treaty in 1992, in the aftermath of the fall of the Berlin wall, multiple references were incorporated into the EU's founding Treaties.⁴⁹

As regards the Treaties currently in force, the provision in Article 2 TEU on the EU being a union based on the rule of law means that "individual parties have the right to challenge before the courts the legality of any decision or other national measure relating to the application to them of an EU act" as "the very existence of effective judicial review designed to ensure compliance with EU law is of the essence of the rule of law".⁵⁰ Here, it is also worth noting paragraph 1 of Article 21 TEU with regard to the external dimension of the rule of law, which establishes that:

The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.

Moreover, with respect to candidate countries, Article 49 TEU sets out that: "Any European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union."

⁴⁵ See for instance, CJEU, Case T-240/16, Judgment of 11 July 2018, § 63; Case T-245/15, Judgment of 8 November 2017, at para 74.

⁴⁶ Francesca Mauri, 'The Contribution of the Venice Commission to the Strengthening of the Rule of Law in Europe', PhD dissertation, Université Côte d'Azur: Università degli studi di Milano—Bicocca, 2021, 140, citing S Bartole, 'International Constitutionalism and Conditionality – The Experience of the Venice Commission' (2014) 4 *Revista AIC*.

⁴⁷ Laurent Peck, 'The Rule of Law in the EU: The Evolution of the Treaty Framework and Rule of Law Toolbox', RECONNECT Working Paper No. 7 (March 2020) <<https://reconnect-europe.eu/wp-content/uploads/2020/03/RECONNECTWP7-2.pdf>>, citing M. Lagrange, 'The Role of the Court of Justice of the European Communities as seen through its case law' (1961) 26 *Law and Contemporary Problems* 400, p. 401. This article was translated from the French language by the ECJ's Legal Translation Service.

⁴⁸ Case 29/83 *Les Verts v Parliament*, ECLI:EU:C:1986:166, para 23.

⁴⁹ For a full review see Laurent Peck, 'The Rule of Law in the EU' (n. 47).

⁵⁰ ECJ, Case 64/16 *Associação Sindical dos Juizes Portugueses*, ECLI:EU:C:2018:117, para 30.

In sum, these provisions aim to ensure that EU Member States (current and future) and the EU institutions abide by and promote the rule of law both internally and externally. Their implementation is in practice secured through a series of assessment, prevention and enforcement mechanisms, which have shown their significance (and limits) as the EU has been confronted with the phenomenon of the gradual erosion of the rule of law in some of its Member States, the so-called 'rule of law backsliding'. A distinction can be made between instruments already existing in the Treaties, and tools developed mainly after 2012, when President Barroso, the then head of the European Commission, explicitly referred to the emergence of new internal threats within the EU and to the need for additional instruments to uphold the rule of law.⁵¹ A further distinction can be made between soft instruments such as dialogues, meetings, reports, and hard ones which may ultimately involve fines and other sanctions.

It has been argued, on the one hand, that the enrichment of the EU's rule of law protection mechanisms over the years may be understood as a sign of an increased consensus on the fundamental importance of the rule of law and on the acknowledgement of the existential nature of the rule of law backsliding threat.⁵² On the other, the proliferation of such instruments is also the result of a failure to effectively confront breaches of the rule of law by EU Member States. The most recent EU conditionality mechanism seems to be giving some first results.

Considering the purpose of this section, i.e. to show that beyond the formal recognitions of the relevance of the rule of law at the supranational level, concrete mechanisms have been put in place to enforce it, the discussion below will mainly focus on the hard instruments at the EU level, and will only briefly mention the soft tools.

⁵¹ José Manuel Durão Barroso, President of the European Commission, 'State of the Union 2012 Address' Plenary session of the European Parliament, Strasbourg, 12 September 2012: "We need a better developed set of instruments – not just the alternative between the "soft power" of political persuasion and the "nuclear option" of article 7 of the Treaty."

⁵² Laurent Peck, 'The Rule of Law in the EU' (n. 47) 32.

3.3.2 Measurement Tools

To help monitor and uphold the rule of law in the Member States, the European Commission has issued an annual EU Justice Scoreboard since 2013,⁵³ which presents survey data on the independence, quality, and efficiency of national justice systems of the Member States. These three components are considered essential parameters of effective justice systems that uphold the rule of law.⁵⁴ Additionally, in April 2019, a Special Eurobarometer survey on the rule of law in all EU Member States was undertaken.⁵⁵ The survey aimed to assess how important the rule of law is for EU citizens, whether there is a perceived need for improvement and what is the citizens' knowledge of EU values.⁵⁶

More recently, as set out in the July 2019 Commission's Blueprint for Action, the existing rule of law toolbox shall be reinforced following three paths: promotion, prevention and (effective common) response.⁵⁷ Under the prevention prong, with the aim of deepening the EU's monitoring of rule of law developments in the Member States, the Commission introduced a rule of law Review Cycle, the results of which are published in annual Rule of Law Reports summarising the situation in the Member States.⁵⁸ The Annual Reports issued by the Commission have been criticised for failing to capture the scale and systemic nature of rule of law breaches, in some instances, and for not foreseeing any remedies, resulting

⁵³ The EU Justice Scoreboard reports are available at <https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/eu-justice-scoreboard_en>.

⁵⁴ See, for example, the 2021 EU Justice Scoreboard report, 1.

⁵⁵ European Commission, Eurobarometer on the Rule of Law, July 2019 <<https://europa.eu/eurobarometer/surveys/detail/2235>> accessed 3 September 2023.

⁵⁶ *Ibid.*, 3–4. The report and its findings are based on interviews conducted with 27,655 respondents from 28 EU Member States (at the time).

⁵⁷ See Communication from the Commission to the European Parliament, The European Council, The Council, The European Economic and Social Committee and the Committee of the Regions, *Strengthening the Rule of Law within the Union: A Blueprint for Action*, Brussels, 17.7.2019 (COM(2019) 343 final); Communication from the Commission to the European Parliament, the European Council and the Council, *Further strengthening the rule of law within the Union – State of play and possible next steps*, Brussels, 3.4.2019 (COM(2019)163 final).

⁵⁸ European Commission Communication 'A Blueprint for Action' (n. 57) 9–13.

in the assessment of the rule of law situation in the Member States.⁵⁹ The Blueprint also sets to further develop the EU Justice Scoreboard to improve its coverage of rule of law related areas.⁶⁰

3.3.3 *Soft Dialogue-based Instruments*

The Council's Annual Rule of Law Dialogue is a soft mechanism introduced at the General Affairs Council meeting in December 2014.⁶¹ Several dialogues on different topics have taken place since 2014 but the related reports were criticised for being short, vague and lacking tangible results.⁶² Therefore, an evaluation of the Rule of Law Dialogue was undertaken in the second semester of 2019, which concluded (arguably without evidence)⁶³ that the tool "has proved to be a useful mechanism". The evaluation proposed to undertake "a yearly stocktaking exercise concerning the state of play and key developments as regards the rule of law"⁶⁴ based on the Commission's Annual Reports on the rule of law, mentioned above, to be issued first in 2020. A second evaluation of the tool is set to be completed by 2023,⁶⁵ and in the coming months, the Council (including those governments usually targeted for breaches of the rule of law) will need to reach a consensus on a set of Council conclusions on the evaluation.

Another mechanism based on the "soft power" of political persuasion⁶⁶ is the European Commission's Rule of Law Framework, introduced in 2014. See P. Baird, B. Grabowska-Moroz et al., "The Strategies and Mechanisms Used by National Authorities to Systematically Undermine the Rule of Law and Possible EU Responses", RECONNECT Work Package 8 – Deliverable 2, 31 December 2020, 49 <<https://reconnect-europe.eu/wp-content/uploads/2021/01/D8.2.pdf>> accessed 3 September 2023.

⁶⁰ European Commission Communication, *A Blueprint for Action* (n. 57) 9–13.

⁶¹ Council of the EU, Press Release No. 16936/14, 3362nd Council meeting, General Affairs, Brussels, 16 December 2014, pp. 20–21.

⁶² Among others see Laurent Pech, "The Rule of Law in the EU" (n. 47) 24.

⁶³ *Ibid.*

⁶⁴ Council of the EU 'Presidency conclusions: evaluation of the annual rule of law dialogue' 14173/19, 19 November 2019.

⁶⁵ *Ibid.* para 16, p. 2.

⁶⁶ Words of President Barroso, see quote above (n. 51).

2014, also known as the 'pre-Article 7 procedure'.⁶⁷ The mechanism allows the Commission to provide a quick response to systemic threats to the rule of law in a Member State (before triggering the hard responses) and foresees a three-stage dialogue process initiated by the Commission. It consists of a structured dialogue between the Commission and the Member State concerned, eventually followed by a formal Opinion issued by the Commission, then formal recommendations where the country provides no satisfactory answers, and finally the possible activation of one of the Article 7 TEU mechanisms by the Commission (see next section).

The Commission has clarified that the Framework ought to be activated when national "rule of law safeguards" are no longer capable of effectively addressing threats of a systemic nature.⁶⁸ The Commission set in motion the Framework for the first time in January 2016 against Poland, with regard to the introduction of legislative measures undermining the functioning of the Polish Constitutional Tribunal and affecting the entire structure of the justice system.⁶⁹ Eventually the Commission triggered Article 7(1) TEU for the very first time against Poland in December 2017.

3.3.4 *Hard Response Mechanisms to Breaches of the Rule of Law*

The dialogue-based instruments presented in the previous section were introduced as quick response tools to threats to the rule of law in a Member State, as additional mechanisms to those already provided in the Treaties. These are the infringement proceedings against Member States suspected of breaching the law according to Article 258 of the Treaty on the Functioning of the European Union (TFEU), the preliminary ruling proceedings under Article 267 TFEU, and the two Article 7 TEU mechanisms to enforce EU values in cases of systematic violations. Additionally, a new instrument, the 'conditional mechanism', was introduced in 2021. These will be explained in turn.

Where an EU Member State has failed to fulfil an obligation under the Treaties, Article 258 TFEU, enables the Commission to file a case before

⁶⁷ European Commission Communication, *A new EU Framework to strengthen the Rule of Law*, COM(2014) 158 final/2, 19 March 2014.

⁶⁸ Laurent Pech, "The Rule of Law in the EU" (n. 47) 22.

⁶⁹ *Ibid.*, 23.

the Court of Justice of the European Union, after failing to ensure that the state concerned complies with the reasoned opinion of the Commission on the matter. The mechanism has been used in several cases against Poland for its legislation on the early retirement of ordinary judges and Supreme Court judges,⁷⁰ and against Hungary, also with regard to laws on the early retirement of judges.⁷¹ Following the “Portuguese judges case”,⁷² it was clarified that national measures which undermine the independence of national courts that hear questions of EU law, can be directly challenged before the European Court on the basis of Article 19 TEU (effective legal protection in the areas covered by EU law). Shortly after, Poland was found in breach of its Treaty obligations under Article 19(1) TEU, for violating the principle of judicial independence, in particular with regard to the irremovability of judges. Since then, there has been a surge of requests for preliminary rulings ex-Article 267 TFEU raising judicial independence issues, originating from the national Courts of Poland, Hungary, Romania, and Malta.⁷³

As regards Article 7 TEU, a preventive mechanism (paragraph 1) and a sanctioning mechanism (paragraphs 2–4) are foreseen. In a nutshell, the preventive mechanism can be triggered by three actors – one third of the Member States, the European Parliament, or the European Commission – who make a proposal to the Council to determine that there is “a clear risk of a serious breach” by a Member State of the values in Article 2. On that basis, the Council, acting by a majority of four fifths of the Member States, having obtained the Parliament’s consent, may make such an assessment and address appropriate recommendations to the Member State concerned. The sanctioning mechanism in Article 7(2), is instead directed at determining “the existence of a serious and persistent breach” of Article 2 values. Upon a proposal submitted by one third of the Member States or by the Commission, it is the European Council that can make such a determination, acting by unanimity, and after obtaining the consent of the European Parliament. Where a determination of the

existence of a breach has been made, the Council then, acting by a qualified majority, may decide to suspend some of the rights including the voting rights of the country concerned. Affected Member States can file an action against each step in the Article 7 procedures before the CJEU. The procedures could thus take (and have taken) years, making Article 7 TEU not a particularly effective instrument to address pressing issues of systematic breaches of the rule of law in the EU.

The European Commission activated Article 7(1) TEU for the first time against Poland in December 2017, and in September 2018, the European Parliament initiated the same mechanism in respect of Hungary.⁷⁴ To date, the Council of the EU has, however, not yet made “meaningful progress in the ongoing Article 7(1) TEU procedures in line with its obligations under the Treaties” and has not addressed “concrete recommendations to the Member States in question”.⁷⁵ Accordingly, it has been put forward that we are long past the stage where there is a clear risk of a serious breach of Article 2 TEU values, and yet only the “preventive arm” of Article 7 has been activated so far.⁷⁶ Considering the lack of tangible results in relation to the two ongoing Article 7 proceedings, the infringement procedure ex-Article 258 TFEU and the preliminary ruling procedure ex-Article 267 TFEU are being increasingly used by the Commission and national courts, as noted above. The two types of instruments – Article 7 TEU and Article 258 TFEU (and Article 267 TFEU) – are separate procedures that may be invoked at the same time regarding the same issue.⁷⁷

⁷⁴ European Commission, Reasoned proposal in accordance with Article 7(1) of the Treaty on European Union regarding the rule of law in Poland. 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 final, 20 December 2017; European Parliament resolution of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) TEU, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded, P8_TA(2018)0340.

⁷⁵ European Parliament resolution of 5 May 2022 on ongoing hearings under Article 7(1) of the TEU regarding Poland and Hungary; P9_TA(2022)0204, paras 2 and 6.

⁷⁶ Laurent Pech and Jakub Jaraczewski ‘Systemic Threat to the Rule of Law in Poland: Updated and New Article 7(1) TEU Recommendations’, CEU DI Working Papers 2023/02, 5.

⁷⁷ Laurent Pech, ‘The Rule of Law in the EU’ (n. 47) 30.

⁷⁰ Case C-192/18, *Commission v Poland*; Case 619/18, *Commission v Poland* (Independence of the Supreme Court), ECLI:EU:C:2018:910.

⁷¹ Case C-286/12, *Commission v Hungary*, ECLI:EU:C:2012:687.

⁷² Case 64/16 *Associação Sindical dos Juizes Portugueses*, FCLI:EU:C:2018:117.

⁷³ Laurent Pech, ‘The Rule of Law in the EU’ (n. 47) 29.

The challenges discussed above together with the existing tools prompted the adoption of another instrument, the “Regulation on a general regime of conditionality for the protection of the Union budget”,⁷⁸ which aims to protect the EU’s financial interests when rule of law breaches take place in a Member State. When breaches of the rule of law directly affect or seriously risk affecting the EU’s financial budget, the instrument allows for a series of measures to be imposed which may consist of the suspension or termination of EU payments, the reduction of economic advantages under EU financial instruments, a prohibition to enter into new agreements, etc. (Article 5). In a nutshell, the procedure is initiated by the Commission, and following the exchange of information with the EU Member concerned, the Commission decides whether to submit a proposal to the Council for an implementing decision on the appropriate measures to be taken. The Council should take such decision (usually) within one month and may amend the Commission’s proposal acting by a qualified majority.

The Commission set in motion this instrument sending a first notification to Hungary on 27 April 2022, and later submitting a proposal for a Council decision on 18 September 2022. The Council adopted the implementing decision in December 2022, imposing measures for the protection of the Union budget against the consequences of breaches of the principles of the rule of law in Hungary (regarding public procurement, the effectiveness of prosecutorial action and the fight against corruption) consisting of the suspension of €6.3 billion in budgetary commitments.

4. The Rule of Law in the Framework of Global Transformations

After providing an overview of the theoretical discussions on the meaning and core elements of the rule of law (Section 2) and on the practical tools developed to uphold and enforce it (Section 3), some examples are discussed here to support the claim that the rule of law and its core elements have concrete and topical relevance in the context of global transformations, and contribute to overcoming challenges in accordance with the core constitutional principles of the domestic and international orders.

4.1 Challenges to the Liberal Democratic Order and Rule of Law Measurements

The gradual decline of the democratic order in countries across the world in recent years has been evidenced through different indices and has been broadly acknowledged and commented in literature.⁷⁹ A common thread in such literature is that the rule of law is one of the essential pillars upon which democratic orders rest. A rule of law that ensures the political rights and civil liberties of all citizens, mechanisms of accountability and limitations to potential abuses of state power is a core ingredient of high-quality democracy.⁸⁰ This requires an independent judiciary that strongly defends the rule of law and ensures that electoral, societal and horizontal accountability mechanisms function effectively without obstruction and intimidation from powerful state actors.⁸¹ In this regard, rule of law measurement tools become essential in empirically capturing

⁷⁹ von Bogdandy, A. and Ioanidis, M. (2014) ‘Systemic deficiency in the rule of law: What it is, what has been done, what can be done’, *Common Market Law Review*, 51(1), pp. 59–96; O’Donnell, G. ‘The Quality of Democracy: Why the Rule of Law Matters’, (2004) 15(4) *Journal of Democracy* 32–46; Larry Diamond, ‘Facing Up to the Democratic Recession’ *Journal of Democracy* 26, no. 1 (January 2015): 141–155; Paul Blokker ‘Constitutional Resistance in Populist Times’ (2020) 48(4) *Federal Law Review* 511–528; Julinda Beqiraj and Lucy Moxham ‘Reconciling the Theory and the Practice of the Rule of Law in the European Union’ (n. 26); Carothers, T. and Press, B. (2022) ‘Understanding and Responding to Global Democratic Backsliding’, *Carnegie Endowment for International Peace*, Working Paper.

⁸⁰ O’Donnell, G. ‘The Quality of Democracy: Why the Rule of Law Matters’ (n. 79).

⁸¹ *Ibid.*

⁷⁸ Regulation of the European Parliament and of the Council on a General Regime of Conditionality for the Protection of the Union Budget, Brussels, 16 December 2020. For a summary see Julinda Beqiraj, ‘The “Regulation on a general regime of conditionality for the protection of the Union budget” and its contested implementation’, RECONNECT blog, 19 January 2021.

and monitoring trends within and across jurisdictions, in revealing positive developments and examples of best practice, and in warning against negative shifts and upcoming crises.⁸² Such analyses can then be used by those working in the rule of law field, because as the saying goes, 'you cannot improve what you cannot measure'.

In 2011, for example, the UN developed a set of 'Rule of Law Indicators' focusing on criminal justice institutions in conflict and post-conflict situations.⁸³ These aimed to provide information which 'the United Nations, donors and development partners will be able to use to plan and monitor the impact of their efforts to build the capacity of criminal justice institutions and, more generally, strengthen the rule of law' and which national governments can use 'for monitoring their own progress in developing their criminal justice institutions and strengthening the rule of law'.⁸⁴ Similarly, in the context of the UN Sustainable Development Goals, it has been commented that '[w]ithout relevant data on social, economic and environmental challenges, countries cannot design and implement effective evidence-based policies and accurately measure, monitor and report on sustainable development, ensuring that no one is left behind'.⁸⁵ Also, at the European level, the work of the CoE CEPEJ and the EU Justice Scoreboard mentioned above, provide essential tools in this respect. Despite possible limitations and pitfalls associated with measuring the rule of law and related aspects of governance,⁸⁶ the importance of measurement tools remains valid as they provide the basis of evidence for further soft-dialogue and enforcement tools where necessary.

⁸² S Merry, K Davis and B Kingsbury (Eds), 'The Quiet Power of Indicators: Measuring Governance, Corruption, and Rule of Law' (Cambridge Studies in Law and Society) (Cambridge University Press 2015). See also, the special issue and the editorial by J Boreto, R Nelson and C Pratt, 'Indices and indicators of justice, governance and the rule of law: an overview', *Hague Journal on the Rule of Law* 2011, Vol. 3 No. 2, 153–169; and T Ginsburg, 'Pitfalls of measuring the rule of law', *Hague Journal on the Rule of Law* 2011, Vol. 3 No. 2, 269–280.

⁸³ DPPKO and OHCHR, 'The UN Rule of Law Indicators: Implementation Guide and Project Tools', 2011.

⁸⁴ *Ibid.*, at page v.

⁸⁵ See UN Statistics Division website <<https://unstats.un.org/home/faq/>>.

⁸⁶ See Julinda Beqiraj and Lucy Moxham, 'Reconciling the Theory and the Practice of the Rule of Law in the European Union' (n. 26).

4.2 The Rule of Law and the COVID-19 Pandemic

Following the spread of COVID-19, governments across the world took drastic measures to control the spread and impact of the pandemic, with many declaring a state of emergency. These measures have had significant consequences for the functioning of states, including the operation of the courts and parliaments; and an impact on human rights and freedoms. The COVID-19 pandemic prompted broad discussions on the governance principles that should frame emergency responses, the rule of law being central to these. While being developed in relation to the COVID-19 pandemic, most of the considerations made regarding the importance of the rule of law and possible lessons learned, can be applied to health emergencies in general, and even to other types of emergencies or crises. During a period of crisis or emergency, when the powers available to governments shift to enable them to deal with that emergency, it is essential to look back at what good law is about and why the rule of law is so important.⁸⁷

The relationship between rule of law principles and public emergencies is set out in both international instruments and national legal frameworks.⁸⁸ On the one hand, in the vision of the 2030 Sustainable Development Agenda, the rule of law constitutes an important enabling factor of development when dealing with a range of challenges, such as health, food or education, including when these are the result of an emergency. On the other, the rule of law provides a perimeter of legitimacy (both procedural and substantive) regarding the restrictive measures taken in response to a crisis. Government interventions in the context of health (and other) emergencies impact the rule of law by inter-

⁸⁷ Nyasha Weinberg, Joelle Grogan 'Effective Pandemic Management Requires the Rule of Law and Good Governance' (Verfassungsblog, 04 November 2020) <<https://verfassungsblog.de/effective-pandemic-management-requires-the-rule-of-law-and-good-governance/>>, accessed 20 August 2023.

⁸⁸ World Health Organization, 2016, International Health Regulations (2005), Third edition, Geneva; United Nations Human Rights Committee, 2001, 'CCPR General Comment No. 29: Article 4: Derogations during a State of Emergency' 31 August 2001; American Association for the International Commission of Jurists (1985), 'Siracusa Principles: on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights', April 1985; United Nations General Assembly, 'Transforming our World' (n. 29); Venice Commission Rule of Law Checklist (n. 40).

fering with the ordinary functioning of institutions as well as individual rights and freedoms. Threats to institutions include a concentration of power in the executive branch of government and disruptions to parliamentary activities, elections and courts. At the same time, the specific measures taken to control the crisis pose a threat to rights and freedoms, for instance, through expanded surveillance, new powers of detention, migration and movement controls, the increased risk of disinformation and restrictions to freedom of expression, discrimination, the impact on vulnerable groups, and disruptions to economic rights, food security, education and healthcare. In the face of such risks, upholding the rule of law during emergencies contributes to effective responses by promoting transparency, clarity, participation, engagement and representation, international cooperation, equality, accountability and anti-corruption, among other principles.

Thus, the rule of law and its core elements discussed above, have the potential to make an important contribution to the empowerment of societies to respond to health crises (and other types of crises as well, such as migration, climate, food, energy). While the occurrence of crises is an issue of 'when' rather than 'if', strong rule of law safeguards have shown to correlate with best responses and best resilience.⁸⁹

4.3 The Rule of Law and AI Technologies

The rapid advancements in AI technologies have brought unprecedented benefits, from healthcare and transportation to education and communication. Inherent in the introduction of any new technology is the potential for conflicts, as they may not necessarily be in everybody's best interests. For instance, in relation to the introduction of AI technologies for the management of COVID-19, in particular contact tracing apps, concerns were raised about the negative impact on fundamental freedoms, including the freedom of association, privacy and use of data. Contact tracing apps are just one example, but similar concerns may

apply to other technological tools such as the use of surveillance cameras, facial recognition technologies, digital contracts, the use of AI technology in courts, etc.

So, the framework of principles and values that governs the development and introduction of new AI technologies is essential, and there are important reasons for advancing the rule of law as an ancillary regulatory approach to ethical principles. The development, introduction and use of AI in a manner that respects and upholds human rights and the rule of law, has the potential to contribute to the empowerment of broader sections of society. As argued elsewhere,⁹⁰ a first argument for requiring governments to enact and comply with rule of law safeguards when introducing AI technologies, is related to the universal consensus on the core meaning of the rule of law and on the elements constituting it, as discussed above. As such, a rule of law regulatory paradigm presents the advantage of being universally accepted. Outcome-oriented conceptions, such as those developed by the Venice Commission, offer the advantage of considering aspects such as human rights, popular consent, and compliance with international legal obligations in law making. Thus, applying a rule of law frame in the context of digitisation demands that governments provide legal justification for any measures that risk encroaching on rights and fundamental freedoms. Secondly, the rule of law and its components operate as legitimators of government responses, thus potentially enhancing confidence, and trust in relation to the introduction of the technology. Thirdly, the rule of law notably offers institutional and process potential for enforceability, actionability and remedy if ethics are breached or fail, as discussed in Section 3 on the rule of law in practice above.

More specifically, for instance, the principle of legality, as a key tenet of the rule of law, when put into practice vis-à-vis tech development would result in transparency in data collection and processing practices. The principle of legal certainty, along with the prohibition of arbitrariness, introduce constraints on the discretionary power over collected data and prevent function creep. Access to justice would require effective redress

⁸⁹ See results of the 2020 'Covid-19 and States of Emergency' Symposium and the 2021 'Power and the COVID-19 Pandemic' Symposium hosted by the *Verfassungsblog*: J. Grogan & J. Beqiraj, 'The Rule of Law as the Perimeter of Legitimacy for COVID-19 Responses', in: J. Grogan and A. Donald (eds) *Routledge Handbook of Law and the COVID-19 Pandemic*, 2022, 201–213.

⁹⁰ Julinda Beqiraj, Rowan Stennert, and Nyasha Weinberg, 'The Rule of Law and COVID-19 Related Technologies', Bingham Centre for the Rule of Law working paper, May 2021.

as well as institutional access to formal judicial recourse. Finally, the principle of equality and respect for human rights would prevent discriminatory treatment based on the data collected and would safeguard the right to privacy. Such tenets should apply at different levels, such as data collection and use, technology design, development, and the deployment of automatic systems for analysis.

5. Conclusions

In an age of profound social re-orientation through digital transformation, environmental concerns, and shifts in economic and political orders across the world, it is essential to refer to a framework of common values. The centrality of the rule of law as a principle of governance is recognised in many current policy prescriptions, and there is global consensus that the respect for and promotion of the rule of law and justice should guide the activities of states and international organisations, thus affording predictability and legitimacy to their actions.⁹¹ This makes the rule of law an essential ingredient in all responses to global transformations in an increasingly integrated world, where coordinated responses at the domestic and international levels are necessary.

Arguments have been put forward in Section 3 stating that far from being just an abstract principle, the rule of law has been given concrete operational relevance and has been translated into specific functional standards, even enforceable obligations, for states and other international actors. By posing limits to the arbitrary exercise of power, the rule of law creates the legitimacy frame around governments' and IO's actions and ensures that they adhere to their obligations under national and international law; act in transparent, accountable, non-arbitrary ways; consider issues such as inequality and poverty and are restricted from disproportionate interference with rights and liberties. As a legitimacy marker and a critical enabler of trust, at both the national and international levels, the

rule of law is suitable to provide guidance and offer safeguards ensuring social, political and legal order during global transformations.

Although the nature of global challenges and transformations may be unpredictable (the COVID-19 pandemic is a perfect example) the rule of law as a principle of global relevance, and its core components of legality, legal certainty, equality and access to justice and rights, do not lose their validity. On the contrary it is especially in times of emergencies, and other major transformations that it is essential to refer to a clearly defined and concrete set of principles to guide governance.

⁹¹ UN General Assembly, *Resolution adopted by the General Assembly, Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels* (n. 24).