

Vol XV

# THE ELSA LAW REVIEW

LEGACY  
COLLECTION



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LEGACY COLLECTION

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# CONTENTS

<i>THE ELSA LAW REVIEW LEGACY COLLECTION</i>	3
<i>FOREWORD FROM THE FUTURE</i>	4
<i>THE ELSA LAW REVIEW 2/2022</i>	5
THE RIGHT TO RESISTANCE (JUS RESISTENDI) IN THE CONTEXT OF CONTEMPORARY MILITARY AGGRESSION IN UKRAINE	5
ENFORCING HUMAN RIGHTS THROUGH THE ECONOMY: A PERSPECTIVE ON THE EU'S RULE OF LAW CONDITIONALITY MECHANISM	15
<i>Winner of the 2023 LexisNexis x ELSA Rule of Law Essay Competition</i>	33
THE ROLE OF YOUTH AND THEIR STRUGGLES IN BUILDING A RESILIENT RULE OF LAW	33
<i>Winner of the 2024 LexisNexis x ELSA Rule of Law Essay Competition</i>	41
CORRUPTION AND THE RULE OF LAW: TOWARDS AN INTERDISCIPLINARY AND RESOLUTIVE APPROACH	41

## THE ELSA LAW REVIEW LEGACY COLLECTION

This Issue is part of the Legacy Collection, a special edition of the ELSA Law Review comprising of the following issues:

- Volume XII, Issue 2 - written in 2020
- Volume XIII, Issue 1 - written in 2021
- Volume XIII, Issue 2 - written in 2021
- Volume XIV, Issue 1 - written in 2022
- Volume XV - written in 2023
  - containing articles from Volume XIV, Issue 2 - written in 2022

These issues have been collected from 2020 until 2024, but due to publication and internal difficulties not published or reviewed on schedule. They have now been reviewed and compiled, and are presented here, as part of the Legacy Collection.

The Legacy Collection offers special recognition to authors of articles comprising these issues. Their works are preserved and displayed in the context of the Legacy Collection, which is also meant to contextualise their work into the legal landscape of the years during which it was written.

This issue features the two winning essays from the Essay Competition on the Rule of Law, jointly organized by ELSA and LexisNexis in 2023 and 2024. The winning essay is chosen by LexisNexis and ELSA and published in the ELR as part of the prize.

Below is the list of contributors for the publication of the Legacy Collection.

<b>Publication Coordination:</b>	Niko Anzulović Mirošević <i>Vice President in charge of Academic Activities of the International Board of ELSA 2024/2025</i>  Velina Stoyanova <i>Director of Publications, ELSA International Team 2024/2025</i>
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## *FOREWORD FROM THE FUTURE*

Dear Readers,

As we present this long-awaited issue of the ELSA Law Review, we wish to address and sincerely apologise for the significant delay in its release. We know that many of you have been eagerly anticipating this publication, and it is with genuine regret that we acknowledge the impact of this delay on our contributors, readers, and the broader ELSA Network.

This issue reflects the hard work, dedication, and expertise of each contributor who has shared their research and insights. It is a testament to the importance of our mission to promote legal scholarship and cross-border dialogue on human rights issues. Unfortunately, despite the passion and commitment invested by our team, we encountered challenges that led to unforeseen delays. We take full responsibility for this oversight, and we are grateful for your patience.

In response to these setbacks, we have stepped forward to implement crucial improvements to our publication process. We have worked tirelessly to introduce systems and practices that will make our future publications faster and more sustainable. We are confident that our processes are now more robust and equipped to meet the demands of regular, high-quality publication.

With the Legacy Collection, we renew our commitment to providing a platform for meaningful legal discourse and human rights advocacy. We are determined to uphold the standards of excellence that our readers and contributors expect and deserve, and we promise that we will do all we can to ensure that future issues of the ELSA Law Review are published on schedule.

A special thanks goes to all the legal experts in our newly established Academic Board, visible on the ELR website and from ELR XV onwards, who pledge their time and effort to the ELR. Finally, we thank our predecessors and their Publications Teams for identifying flaws with the publication process and giving us the opportunity to remedy them. Thank you all for your support, patience, and trust. We look forward to sharing this and many future issues with you.

Warm regards,

**Niko Anzulović Mirošević**

Vice President in charge of Academic Activities, International Board of ELSA 2024/2025

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**THE RIGHT TO RESISTANCE (JUS RESISTENDI) IN THE  
CONTEXT OF CONTEMPORARY MILITARY AGGRESSION IN  
UKRAINE**

Oleksandr Mykhailichenko<sup>1</sup>, Adil Abduramanov<sup>2</sup>

**Abstract**

The article deals with legal aspects regarding the right of rebellion (or the *right to resistance*, the right to revolt, hereinafter – ‘jus resistendi’) in the context of the full-scale Russian war against Ukraine. The authors argue how Ukrainian organs and civilians are addressing *jus resistendi* by seeking amendments in political, economic and legislative aspects of their lives, and how the Ukrainian resistance directly manifests the natural law thought on human nature. The authors also uncover the legality of human rights restrictions in Ukraine enacted by martial law. They raise the ill-fated issue of whether mechanisms provided by the universal institutions and treaties of international law can still be used against oppressive, authoritarian regimes.

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## 1. Introduction

*Jus resistendi* is mentioned in the works of philosophical and legal thinkers before the time of Aristotle. His philosophical predecessors, like Plato, touched on themes of justice and obedience to law. In Plato's works such as 'The Republic', there are discussions about the duty to obey laws unless they are unjust.<sup>3</sup> During the Medieval period, Thomas Aquinas also wrote about the right to resist tyranny. Nevertheless, these texts do not directly articulate a right to resist authority. The term became more apparent in the works of activists from the Enlightenment era, such as John Locke. It fully manifested as a substantial idea during the American Revolution.

From the United States Declaration of Independence, one can interpret that *jus resistendi* is the people's right to alter or abolish any form of government that becomes destructive of certain inalienable rights: life, liberty, and the pursuit of happiness.<sup>4</sup> The Universal Declaration of Human Rights (UDHR), adopted after the end of World War II, defines *jus resistendi* as 'a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law'.<sup>5</sup> Indeed, the nature of *jus resistendi* is unique and diverse. It may seem vague and unfit for practical use. However, *jus resistendi* is the last possible right a society can exercise in wartime, when other rights such as the rights to healthcare, education or democratic elections either may not exist or may be diminished by military aggression. *Jus resistendi* has been exercised during many crucial historical events: The Glorious Revolution in England, the French Revolution, The American Revolutionary War, the Arab Spring, inter alia.

The Russo-Ukrainian war sheds new light on *jus resistendi*, revealing how vital this right is to the Ukrainian people in defending their homeland.

## 2. Discussion

This law predates modern human rights and natural law doctrines. Although numerous provisions to regulate societal relationships have existed since the Code of Hammurabi, these rules had almost no place for human rights, as most ancient states were despotic. However, oppression and tyranny have always spurred people to fight for their rights and freedom. Since then, ideas have arisen regarding protecting fundamental human rights and freedoms from encroachment by the authorities. Subsequently, the need to develop mechanisms that would make it possible to bring justice for such violations, including its complete reformation, has also arisen.

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<sup>3</sup> Plato, *The Republic* (D Lee tr, Penguin 2nd edn 2007).

<sup>4</sup> Pauline Maier, *The Declaration of Independence and the Constitution of the United States* (1998).

<sup>5</sup> Universal Declaration of Human Rights, UNGA Res 217 A (III) (10 December 1948) art 5.



The discussion about the *jus resistendi* against tyrants is ancient. In 'The Republic', Plato presents a tyrant engrossed by lawless desires, causing him to turn to immoral acts such as murdering and plundering, as he comes closer to complete lawlessness.<sup>6</sup> If, however, a tyrant becomes so excessive as to be intolerable, Christian philosopher Thomas Aquinas argued that it would be an act of virtue to kill them.<sup>7</sup> John Locke writes that self-defence is a part of the law of nature, and, 'if the king sets himself against the body of the commonwealth... and shall, with intolerable ill-usage, cruelly tyrannise over the whole, the people have a right to defend themselves from tyranny.'<sup>8</sup> Finally, Alexander Hamilton states 'that should the representatives of the people betray their constituents, there is no resource left but the exertion of that original right of self-defence, which is paramount to all positive forms of government.'<sup>9</sup>

As the Russo-Ukrainian war ravages the civilian population, these old truths rise anew. People lose reason under constant stress and fear, raw force comes into effect, and the law - written and customary loses its prevalence. Nevertheless, the Ukrainian population has not lost faith in jurisprudence. Even when there is no chance to address legislation or law enforcement authorities, they retain *jus resistendi* - the last remaining right when they face the enemy or live in the occupied territories.

Right for resistance can only be exercised when the people have the necessary tools to do so. A population aspiring to resist the tyrannical regime will not alone stand a chance against a state-armed force. Therefore, the former should be entitled to carry arms for the parity of the people's forces against the government.

Whilst countless works on the right to resist unlawful and totalitarian regimes exist, the Russo-Ukrainian war sheds new light on *jus resistendi*. As the most significant conflict in Europe since World War II, it provokes sensitive issues in law. Ruthless bloodshed, civilian deaths, and arbitrary destruction of residential buildings by the Russian armed forces sow doubts amongst politicians, lawyers, and citizens of developed countries. Therefore, it should be considered whether international law and natural law are effective instruments in combating injustice and inequality worldwide. It stands that the democratic society should continue to build the rule of law, protect human rights, and enshrine democracy no matter how brutal and dishonest the war is. This necessitates an exercise of *jus resistendi*. However, this will not be fruitful unless the right

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<sup>6</sup> Plato, *The Republic* (first published 375 BC, Perseus Digital Library 1935) <<http://www.perseus.tufts.edu/hopper/text?doc=Perseus%3Atext%3A1999.04.0094%3Abook%3D1>> accessed 26 April 2022.

<sup>7</sup> NP Swartz, 'Thomas Aquinas: On Law, Tyranny and Resistance' (2010) 30(1) *Acta Theologica* 145.

<sup>8</sup> John Locke, *Second Treatise of Government* (first published 1690, Hackett Publishing Company 1980) s 233.

<sup>9</sup> Alexander Hamilton, 'The Same Subject Continued: The Idea of Restraining the Legislative Authority in Regard to the Common Defense Considered' (The New York Packet, 25 December 1787).

to bear arms is protected simultaneously. Therefore, gun legislation itself is a significant element of the democratic process.

### **3. A Standalone Case of the Czech Republic in Gun Legislation**

When discussing gun rights and the citizens' rights to bear arms, a European lawyer may quickly move the discussion towards the American viewpoint, and be either a proponent or an opponent of said right in that context. However, gun legislation is not strictly an American phenomenon. It would be prudent when discussing gun rights in Ukraine, to discuss an example of another European country. An example from the Czech Republic provides a strong case for gun legislation reform resulting from a public reaction to tyranny.

With the start of the Hussite revolt in 1419, the militias relied on weapons which could be looted from conquered armouries found in castles or villages. This included the earliest examples of firearms. Hussite militias comprised peasants - men and women alike - with no experience in military combat, and therefore required an effective way for all militia soldiers to fight without extensive training. The answer was firearms, which quickly became the prized asset of the Hussites, due to them being easy to operate regardless of physical strength and experience.<sup>10</sup>

The right to bear arms was codified through the 1517 St. Wenceslaus Agreement. It resulted from an extensive discussion between the Czech nobility and burghers as they tried to reach a compromise regarding each other's privileges. The issue was pressing, as both parties began to fear possible commoners' uprisings. The agreement itself dealt with a plethora of topics, including a statement that all people of all standing have the right to keep firearms at home for protection in case of war. This had several implications.

Firstly, possessing firearms enabled Czech households to protect themselves directly without relying on a regular army or other state protection. This made waging war on Czech territory difficult, as any enemy army could risk botching its manoeuvres by not accounting for the possibility that a village it was passing may be considerably well-armed and ready to fight.

Secondly, although not necessarily an intended result, Czech burghers had obtained more agency in political processes. No longer could the state arbitrarily impose their will on the population. Any disagreement with the state's policies, not reasonably consulted with the public or otherwise resolved, could result in an armed revolt. Therefore, enabling gun legislation improved Czech democracy and provided increased parity for the Czech people. The Agreement enabled every

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<sup>10</sup> Tomáš Gawron, 'Unikátní české výročí: 600 let civilního držení palných zbraní' (zbrojnice.com, 1 January 2021) <<https://zbrojnice.com/2021/01/01/unikatni-ceske-vyroci-600-let-civilniho-drzeni-palnych-zbrani/#:~:text=600%20let%20tradice%20civiln%C3%ADho%20dr%C5%BEen%C3%AD,hradbou%2C%20tvo%C5%99ily%20z%C3%A1klad%20taktick%C3%A9ho%20postupu.>> accessed 26 April 2022.

Czech - regardless of social standing - to own firearms, although a ban on carrying was still in place.<sup>11</sup>

This ban was lifted only in 1852 by Imperial Regulation No 223 of Franz Joseph I, as a reaction to the rise of the public against tyranny in 1848. This Regulation introduced the concept of carrying permits, which are similar to those seen in modern gun legislation.<sup>12</sup> The violence of the 1848 revolution has only enforced the understanding amongst the general public that the state may not necessarily have the public's best interests at heart, yet it possesses the majority of power to impose its will in the country. To balance that, gun legislation proved again to be an effective tool.

#### **4. Influence of Martial Law on Gun Legislation in Ukraine**

The 24<sup>th</sup> of February 2022 was the official date when the Russian armed forces started the invasion. This prompted the Ukrainian authorities to pass legislation adjusting the law to military demands.

For the first time, the President of Ukraine declared full-scale martial law by issuing the President's Decree No 64/2022.<sup>13</sup> Martial law in Ukraine is enacted in case of armed aggression, the threat of attack, or danger to state independence and its territorial integrity.<sup>14</sup>

Under martial law, the Ukrainian state authorities, military command, military administrations, and local self-government authorities are given the powers necessary to defuse the threat, repel armed aggression and protect national security. During such conditions, specific restrictions on rights and freedoms may be established to indicate the period of effectiveness of these restrictions. The rights restricted by the Presidential decree include the freedom of movement, the right to freedom of thought and speech, and the free expression of one's views and beliefs.<sup>15</sup>

Traditionally, a state has to follow strict and exhaustive conditions before imposing martial law. In some cases, the natural law permits harsh measures to protect civil order; Locke states that 'many things there are, which the law can by no means provide for. Those must necessarily be

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<sup>11</sup> Tomáš Gawron, 'Historie civilního držení zbraní: Zřízení o ručnicích – česká zbraňová legislativa v roce 1524'

(zbrojnice.com, 1 November 2019)

<<https://zbrojnice.com/2019/11/01/historie-civilniho-drzeni-zbrani-zrizeni-o-rucnicich-ceska-zbranova-legislativa-v-roce-1524/>> accessed 26 April 2022.

<sup>12</sup> Štěpán Kalousek, 'Právní úprava držení zbraní v 18. a 19. století' (2009).

<sup>13</sup> Decree of the President of Ukraine 'On the Introduction of Martial Law in Ukraine' No 64/2022 (Указ Президента України «Про введення воєнного стану в Україні»).

<sup>14</sup> Law of Ukraine on Legal Regime of Martial Law No 389-VIII (Закон України «Про правовий режим воєнного стану»).

<sup>15</sup> Constitution of Ukraine No 254к/96-ВР (Конституція України).

left to the discretion of him that has the executive power in his hands, to be ordered by him as the public good and advantage shall require.<sup>16</sup>

The protection of the rule of law in Ukraine is justified because plain adherence to specific and unalterable laws would only exacerbate the situation.<sup>17</sup> The United States Supreme Court asserted that a state may use its military power to put down an armed insurrection that is too strong to be controlled by civil authority. Power is essential to the existence of every government and the preservation of order and free institutions.<sup>18</sup>

However, in the face of outnumbering the enemy, the Armed Forces of Ukraine cannot protect its borders on their own. As the Ukrainian government has expanded powers to the President and the state organs, it has also empowered the civilians' ability to protect their homeland without directly enlisting in military service. Article 1(2) and Article 3 of The Law of Ukraine 'On the foundations of national resistance' No. 1702-IX establishes that a Ukrainian citizen can join Territorial Defense Forces (TDF) - a paramilitary militia formed voluntarily by citizens of Ukraine. They defend the territory and protect the population in a particular area until the deployment of the Armed Forces of Ukraine.<sup>19</sup>

One right that has not become an international human right is found in the Second Amendment of the United States Constitution. It provides as follows: 'A well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.'<sup>20</sup>

Although the background for the Second Amendment is entirely different, it could be argued that American politicians during the Revolution focused on mitigating corruption and tyranny in the government. The notion of exchanging one tyrannical, monarchical regime for something similar in nature yet different in name could be regarded negatively by the public. In fear of losing to their opponents who accused them of creating an oppressive regime, the Federalists acknowledged the risks of tyranny with utmost caution. In these circumstances, the Constitution Framers regarded the personal right to bear arms as a potential check against tyranny.

Before the war, Ukraine was the only country in Europe that did not have a special law regulating the use and circulation of firearms for the population, as it often provoked fears of unrestricted shootings and violence. It did not have a proper gun statute, relying on the Order of the Ministry

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<sup>16</sup> John Locke, *Second Treatise of Government* (n 8) 159.

<sup>17</sup> John Locke, *Second Treatise of Government* (n 8) 158.

<sup>18</sup> *Luther v Borden* 48 US 1, 99–100 (1849).

<sup>19</sup> Law of Ukraine on Foundations of National Resistance No 1702-IX (Закон України «Про основи національного спротиву»).

<sup>20</sup> US Constitution, Amendment II (ratified 15 December 1791).

of Internal Affairs of Ukraine of the 21st of August 1998 No. 622 instead, with no adequate regulation.

Any act against a person outside of the cases determined by law is arbitrary and tyrannical. The one against whom force is being used, has the right to repel it by force.<sup>21</sup> Furthermore, to ensure that the citizens of Ukraine can deter the enemy, the law of Ukraine, 'On ensuring the participation of civilians in defence of Ukraine' № 3899-IX was enacted on the 3rd of March 2022.<sup>22</sup>

However, when enacting such laws, a state must ensure that protecting an individual's right to liberty and security includes measures to control civilian firearm ownership, as stipulated in Article 9 of the International Covenant on Civil and Political Rights (ICCPR).

One of the arguments used within the anti-gun discourse is that firearms could be used effectively to commit acts of violence and crime; the Human Rights Committee considers that the protection of individuals from foreseeable threats to life or bodily integrity includes the duty of States to protect their populations against the risks posed by excessive availability of firearms.<sup>23</sup> The significant number of small arms and light weapons has also been identified as a risk to the safety of populations, particularly children.<sup>24</sup>

Influential Ukrainian priest Lubomir Huzar emphasises that there are situations where armed resistance is permitted. When the authorities use excessive force, the people have the right to defend themselves with weapons.<sup>25</sup> 'The strength of our people is in peacefulness. The power, which beats purely because it does not love someone, thus shows its weakness', he notes.<sup>26</sup>

Therefore, allowing Ukrainian citizens to carry firearms is justified in the face of Russian aggression. Indeed, Ukraine should determine in its national laws which arms are permitted for civilian possession and the conditions under which they can be used.<sup>27</sup> Currently, these measures

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<sup>21</sup> Leon Duguit, 'Traité de Droit Constitutionnel' (1911) 6(1) *The American Political Science Review* 124-128.

<sup>22</sup> Law of Ukraine on Ensuring the Participation of Civilians in the Defence of Ukraine No 3899-IX (Закон України «Про забезпечення участі цивільних осіб у захисті України»).

<sup>23</sup> United Nations Office on Drugs and Crime, 'Indirect Impacts of Firearms on States or Communities' <<https://sherloc.unodc.org/cld/en/education/tertiary/firearms/module-1/key-issues/indirect-impacts-of-firearms-on-states-or-communities.html>> accessed 8 May 2022.

<sup>24</sup> UN Committee on the Rights of the Child, 'Consideration of Reports Submitted by States Parties under Article 8, Paragraph 1, of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict: Reports of States Parties Due in 2011 : Netherlands' (3 March 2014) UN Doc CRC/C/OPAC/NLD/1

<sup>25</sup> Л Гузар, 'Право на повстання – то є закон природи' (Україна Молода, 10 January 2014) <<http://www.umoloda.kiev.ua/number/2395/180/85201/>> accessed 8 May 2022.

<sup>26</sup> *ibid.*

<sup>27</sup> 'Report of the Panel of Governmental Experts on Small Arms' (27 August 1997) UN Doc A/52/298, para 80.

are temporary<sup>28</sup> and designed for the Russo-Ukrainian war. Nevertheless, such laws benefit the development of new firearm regulations in peaceful times.

## 5. Jus Resistendi and Reparations

There are thoughts that the Russo-Ukrainian war has caused irreparable damage to the Ukrainian infrastructure, resulting in losses of around USD 600 billion.<sup>29</sup> International law provides the general principle that the damage must be compensated according to any event. Compliance with this principle is based on another responsibility principle for causing damage or refusing to reimburse it.<sup>30</sup> The Permanent Chamber of International Justice (PCIJ) stated that one of the principles of international law and the general legal concept is recognising that any breach of obligation entails the obligation to provide reparations in an acceptable form.<sup>31</sup>

Given that the Russian government abhors even the slightest idea of reparations, the democratic states seek to apply sanctions and freeze the Russian property within their jurisdictions.<sup>32</sup> Both international law and domestic states' legislation are somewhat restrictive when it comes to seizing foreign states' assets as reparations.<sup>33</sup> A strong parallel with thoughts envisioned within the Preamble to the UDHR could be therefore invoked: 'it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law.' There have been no previous cases regarding the reparations like the Russo-Ukrainian war, as sanctions tend to be aimed more at disrupting the criminal enterprise by freezing its use for further illicit activity rather than as a funding stream for the injured and changes in the law are required.<sup>34</sup> While the reckoning may be lengthy, there are already signs that the states amend their law to transfer at least some funds from the Russian assets.<sup>35</sup>

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<sup>28</sup> Instruction on Production, Purchase, Storage, Accounting, Transport and Use of Firearms (*Інструкція про порядок виготовлення, придбання, зберігання, обліку, перевезення та використання вогнепальної, пневматичної, холодної і охолощеної зброї, пристроїв вітчизняного виробництва для відстрілу патронів, споряджених гумовими чи аналогічними за своїми властивостями металевими снарядами не смертельної дії, та патронів до них, а також боєприпасів до зброї, основних частин зброї та вибухових матеріалів*) (Ukraine).

<sup>29</sup> Peter Saidel, 'Zelensky Estimates Cost of Rebuilding Ukraine at \$600 Billion' (*The Wall Street Journal*, 3 May 2022) <<https://www.wsj.com/livecoverage/russia-ukraine-latest-news-2022-05-03/card/zelensky-estimates-cost-of-rebuilding-ukraine-at-600-billion-oP04eAen6xsQHqjJK8rE>> accessed 8 May 2022.

<sup>30</sup> Charles Hyde, 'International Law Chiefly as Interpreted and Applied by the United States' [1922] 16(3) *American Journal of International Law* 495-497.

<sup>31</sup> *Judgment No 13* (1928) PCIJ Series A No 17.

<sup>32</sup> Luke Moffett, 'Sanctions for War, Reparations for Peace?' (*Opinio Juris*, 1 May 2022) <<http://opiniojuris.org/2022/04/01/sanctions-for-war-reparations-for-peace/>> accessed 8 May 2022.

<sup>33</sup> Paul Stephan, 'Giving Russian Assets to Ukraine—Freezing Is Not Seizing' (*Lawfare*, 26 April 2022) <<https://www.lawfareblog.com/giving-russian-assets-ukraine-freezing-not-seizing>> accessed 8 May 2022.

<sup>34</sup> Moffett (n 32).

<sup>35</sup> The White House, 'FACT SHEET: President Biden's Comprehensive Proposal to Hold Russian Oligarchs and Elites Accountable' (2022)

<<https://www.whitehouse.gov/briefing-room/statements-releases/2022/04/28/fact-sheet-president-bidens-comprehensive-proposal-to-hold-russian-oligarchs-accountable/>> accessed 8 May 2022.

## 6. Cyberwarfare as a Revolutionary Part of *Jus Resistendi*

The right to resistance should be derived from the *jus resistendi*, which also includes the right of rebellion. This is because in its purest form, the right to resistance is a dispute about the arrangement of pieces on the chessboard and not about a fundamental change in the game itself.<sup>36</sup>

Unlike the right to rebellion, the goal of the right to resistance is the restoration of the constitutional order and not its complete removal, which implies non-violent resistance.<sup>37</sup> Whilst the right to rebellion could be explained as the society's right to dissolve the monopoly of violence possessed by the state, the right to resistance is, a society's right to suspend respect for the state's authority in the administration of public matters. *Jus resistendi* has traditionally been examined in the context of armed rebellion and political resistance against tyrannical regimes. However, in the digital age, cyberwarfare has emerged as a novel tool within this framework, enabling both state and non-state actors to challenge oppressive forces through cyber operations. The use of cyber tactics hacking, data leaks, and digital sabotage can serve as a means of asymmetric resistance, mainly where conventional military engagement is unfeasible. Whilst international law remains unsettled on the legitimacy of cyberwarfare as a form of lawful resistance, specific justifications may arise under the principles of self-defence and necessity, especially where cyber operations are deployed against entities engaged in severe human rights violations or unlawful aggression. The present Ukrainian non-violent resistance is unique, as it has presented significant cases of cyberwarfare. Two cases worth mentioning are Ukraine's 'IT army' - volunteer hacking forces that representatives of the Ukrainian government have called upon to join in the war against Russian networks - and Anonymous - who declared on Twitter to be 'in cyberwar' against Russia.<sup>38</sup> Additionally, several European countries are giving technical support to Ukraine under the initiative of the European Union's Cyber Rapid Response Teams (CRRT) to address cyber attacks efficiently.<sup>39</sup> Therefore, cyber warfare and other non-violent means of resistance may drastically expand the perception of *jus resistendi's* nature.

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<sup>36</sup> Tom Ginsburg and others, 'When to Overthrow Your Government: The Right to Resist in the World's Constitutions' [2013] 60(5) *UCLA Law Review*.

<sup>37</sup> А.Найду, 'Право на спротив як форма реалізації реального народовладдя' [2018] 1(62) *Актуальні проблеми політики* 44-60.

<sup>38</sup> 'How the Eastern Europe Conflict Has Polarized Cyberspace' (Checkpoint, 27 February 2022) <<https://blog.checkpoint.com/2022/02/27/how-the-eastern-europe-conflict-polarized-cyberspace/>> accessed 8 May 2022.

<sup>39</sup> Federica Cristani, 'Cyber Operations as Legitimate Collective Countermeasures in the Current Armed Conflict in Ukraine: An International Law Perspective' (Institute of International Relations Prague, 14 March 2022) <<https://www.iir.cz/en/cyber-operations-as-legitimate-collective-countermeasures-in-the-current-armed-conflict-in-ukraine-an-international-law-perspective-1>> accessed 8 May 2022.

## 7. Conclusions

It should be concluded hereby that *jus resistendi* is the right to alter or abolish any form of government that becomes destructive towards certain inalienable rights. It is a component of natural and public international law, with historical and philosophical origins. One cannot make decisions of international courts compulsory for all United Nations (UN) members or establish a world government to prevent wars and human rights abuse, but one can defend their basic human rights, in particular by exercising the right to resistance. All global problems cannot be solved at once. Nevertheless, a theory proposed by Spektorsky Evgeny – a Ukrainian legal scholar and a former rector of Taras Shevchenko National University of Kyiv, stands as such: the law is a dynamic phenomenon that changes with the development of society.<sup>40</sup> The development of law reflects that of society, and the more conscious the states are about the law and how to protect human rights, the more people will value the principles of natural law, and no one will feel the necessity to revolt.

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<sup>40</sup> Evgen Spektorsky, *Handbook for Lectures on Encyclopedia of Law* (1917) 19.



# ENFORCING HUMAN RIGHTS THROUGH THE ECONOMY: A PERSPECTIVE ON THE EU'S RULE OF LAW CONDITIONALITY MECHANISM

Gonalo Martins de Matos<sup>41</sup>

## Abstract

The Rule of Law is both an essential principle and a fundamental right in democratic and constitutional communities. Therefore, it is natural that it frames the European Union (EU), so much so that the EU regards itself as a Union of Law. It is therefore natural that it actively seeks the enforcement of the fundamental principle. Particularly, addressing the threats posed by constitutional capture and Rule of Law backsliding in some Member States. This state of affairs has prompted the European Institutions to implement Regulation 2020/2092, which creates a sanctioning regime linking the protection of the Union budget to breaches of the principles of the Rule of Law. This opens a path to the enforcement of fundamental principles through economic and financial means. The approval and implementation of this Regulation was not without challenge, arising from questions concerning the EU's oversight legitimacy to the lack of appropriate legal basis to approve such alternatives. This paper aims to find the legitimacy of linking the Union's budget to breaches of the principles of the Rule of Law, given that some of the Regulation's sanctioning measures have been triggered against some Member States in the meantime. By establishing this link, it should be demonstrated that not only does the Regulation have the proper legal basis, but also that it is essential in protecting human rights through the economic enforcement of the Rule of Law within the EU.

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## 1. Rule of Law backsliding in EU Member States and its implications on human rights

An analysis of the recent history of the European Union (EU) demonstrates a growing concern with the issue of the Rule of Law that emerges for different reasons associated with various events and issues, ranging from the case of the ‘Austrian question’<sup>42</sup> and the EU enlargements in Eastern Europe to openly anti-liberal behaviour on the part of parties that enjoy strong parliamentary majorities. However, these issues vary in their severity, distinguishing between problems relating to misuse of the law and abuses of political power, which can be resolved by the Member States' own internal systems, and problems that are so profound that even their political-legal systems cannot cope. The issue of distinguishing the former cases from the latter ones appears to be necessary. Carlos Closa and Dimitry Kochenov propose three distinguishing criteria: the state of ‘constitutional capture’, in the sense of abuse of power carried out through legal means; the ‘general dismantlement or profound undermining of the liberal democratic state’;<sup>43</sup> and systemic corruption. These criteria must be seen beyond specific violations of fundamental rights or specific cases of corruption: they must be seen as being able to represent new phenomena that ‘profoundly undermine the very essence of the modern democratic state’.<sup>44</sup>

Some concepts that have been repeatedly used in literature to describe contemporary threats to the Rule of Law. Among them is the concept of ‘Rule of Law backsliding’, which refers to the process of constitutional capture on the basis of the ‘systemic undermining of the key components of the rule of law’.<sup>45</sup> The concept of ‘constitutional capture’ is provided by Jan-Werner Müller, understood as the systematic weakening of the checks and balances of a State's legal system, even going to the limit of seriously hampering changes in political power, through the control of the entire political system by means of capping

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<sup>42</sup> Following the 1999 elections in Austria, the Austrian centre-right party agreed to form a government with the far-right party, which aroused a reaction from the remaining fourteen EU Member States, which in January 2000 adopted a joint reaction against that government agreement (although it was not a reaction from the EU). At the end of that year, Member States' measures were lifted.

<sup>43</sup> Carlos Closa and Dimitry Kochenov, ‘Part I. The Case for EU Reinforced Oversight in Four Questions’ in Carlos Closa, Dimitry Kochenov and J.H.H. Weiler (eds), *EUI Working Paper RSCAS 2014/25: Reinforcing Rule of Law Oversight in the European Union* (2014) 4

<[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2404260](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2404260)> accessed 7 September 2022.

<sup>44</sup> *ibid* 5.

<sup>45</sup> Laurent Pech and Kim Lane Scheppele, ‘Illiberalism Within: Rule of Law Backsliding in the EU’ [2017] 19 *Cambridge Yearbook of European Legal Studies* 3, 6

<[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3009280](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3009280)> accessed 8 September 2022.

democratic processes and legal guarantees, in some cases through the approval of a new constitution.<sup>46</sup>

These processes of gradual constitutional capture form an almost ‘well-organized script’,<sup>47</sup> through which the Rule of Law backsliding intrudes and consolidates. The origins are well identified: citizens' disenchantment with political party systems lead to the emergence of new, more radical parties, or more extreme leaderships in established parties, all equipped with promises of radical and immediate change. The disaffected citizens elect these parties and these leaders, who soon begin to dismantle the pre-existing constitutional framework, through legalist tricks that aimed at strangling any means of opposition to their consolidation (such as independent courts, and other guarantee institutions of the democratic State), also using means of misleading public opinion, such as commissioned referendums, fake news, and other methods of deception. Once power has been consolidated, it may be too late for citizens to realise the damage caused, with the guarantees they once enjoyed to limit the power of the State no longer being viable or operating.

Bearing in mind these patterns and these processes, Laurent Pech and Kim Lane Scheppele present a definition for Rule of Law backsliding, which has been adopted in literature produced on the subject: Rule of Law backsliding is ‘the process through which elected public authorities deliberately implement governmental blueprints which aim to systematically weaken, annihilate or capture internal checks on power with the view of dismantling the liberal democratic state and entrenching the long-term rule of the dominant party’.<sup>48</sup> As Closa and Kochenov, Pech and Scheppele emphasise the distinction that must be made regarding the dimension of the violation in question, and that Rule of Law backsliding should not be confused with ‘mere’ structural deficiencies in the Rule of Law, such as endemic or the lack of means at the administrative and judicial level: Rule of Law backsliding presents challenges of a significantly different nature, as it represents ‘a deliberate strategy pursued by public authorities with the goals of fundamentally undermining pluralism and creating a de facto one-party state’<sup>49</sup> and to capture the entire legal and social apparatus, from the legislative and executive powers to the judicial structure, the media, and security forces. The paradigmatic examples of the Rule of Law backsliding – Hungary and Poland – reveal why these concerns are raised: backsliding

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<sup>46</sup> Jan-Werner Müller, ‘Should the EU Protect Democracy and the Rule of Law Inside Member States?’ [2015] in 21(2) *European Law Journal* 141, 142.

<sup>47</sup> Pech and Scheppele (n 45) 6.

<sup>48</sup> *ibid* 7.

<sup>49</sup> *ibid* 8.

implies that a country once benefited from a functioning system based on the Rule of Law, and then regressed, being particularly concerning when it is a deliberate strategy of a ruling party. The cases of Hungary and Poland are particularly serious, as they represented the first blatant cases of unprecedented Rule of Law backsliding.

With the coming to power of Fidesz in Hungary and Law and Order in Poland, the institutions and postulates of the democratic Rule of Law have been being dismantled at an unprecedented pace. In the Hungarian case, the ruling party has used the constitution and constitutional amendments in order to reshape the system in line with Viktor Orbán's political ambitions, with an unprecedented attack on the Rule of Law and the checks and balances of the Hungarian system when adopting the constitution currently in force. Between 2011 and 2012, in the years immediately following the election of Fidesz, the Hungarian government passed a ream of laws that undermined guarantees of the Rule of Law, notably the law that reduced the retirement age of judges, which affected 10% of Hungarian magistrates, many of whom were presidents of courts and members of the Hungarian Supreme Court,<sup>50</sup> paving the way for the installation of judges loyal to Orbán.

The case of Poland differs from that of Hungary, insofar as the PiS government did not enjoy a majority capable of promoting constitutional changes, having dedicated itself to reversing the Rule of Law through legal subterfuges, exploiting the 'back door' of the law<sup>51</sup> to dismantle the checks and balances of the Polish system. The paradigmatic example is the interference of the government in Polish higher courts, namely the amendment of the Polish Constitutional Tribunal's majority rules and deadlines for declaring the constitutionality of laws. Although the Constitutional Tribunal ruled that these laws were unconstitutional, the government argued that this decision went against the law that had been declared unconstitutional, refusing to publish the same judgment, an essential criterion for it to become effective under the Polish law.<sup>52</sup> This was followed by a change in the organisation of the Polish Supreme Court,<sup>53</sup> that reduced the retirement age of its members from 70 to 65, with the possibility of having an extension of the exercise of functions, decided by the President of the Republic or the Minister of Justice, entities that

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<sup>50</sup> Gábor Halmai, 'Illiberal Constitutionalism? The Hungarian Constitution in a European Perspective' in Stefan Kadelbach (ed), *Verfassungskrisen in der Europäischen Union* (Nomos 2018) 92.

<sup>51</sup> Dimitry Kochenov and Petra Bárd, 'Rule of Law Crisis in the New Member States of the EU: The Pitfalls of Overemphasising Enforcement' (RECONNECT Working Paper No 1, 2018) 9 <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3221240](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3221240)> accessed 9 September 2022.

<sup>52</sup> Gábor Halmai, 'Second Grade Constitutionalism? Hungary and Poland: How the EU can and Should Cope with Illiberal Member States' in Iulia Motoc, Paulo Pinto de Albuquerque and Krzysztof Wojtyczek (eds), *New Developments in Constitutional Law: Essays in Honour of András Sajó* (Eleven International Publishing 2018) 164.

<sup>53</sup> The Supreme Court is the highest court in the Polish judiciary system.

would also exercise procedural initiative in disciplinary proceedings against their magistrates.

In both cases, at different speeds, but in a consistent and identical way, the parties in power began a general dismantling of their respective guarantee systems, with the aim of installing an illiberal form of State, whether for purely political reasons of concentration of powers, as in the Hungarian case, or for ideological reasons, as in the Polish case.<sup>54</sup> Among these blatant cases of effective backsliding and sporadic distortions to the Rule of Law, a very broad universe of potential similar situations, with greater or lesser intensity, can unfortunately be found.

Rule of Law backsliding is an issue of paramount importance for the EU, as this phenomenon affects the fundamental rights of all European citizens: the citizens of the backsliding Member State, the citizens of other Member States residing in that State and, more indirectly, citizens of Europe residing outside that State. This last case is due to the fact that backsliding Member States participate in EU decision-making processes and in the adoption of acts that bind everyone within the Union. In addition, of equal relevance, the capture of the judiciary by an illiberal government ‘poses a threat to the correct, consistent and effective application of EU law within the affected [...] Member State’,<sup>55</sup> in addition to also contaminating the use of Union mechanisms aimed at guaranteeing the consistent interpretation and application of EU law. It is the very essence of the Union that is at stake with the problem of Rule of Law backsliding, which is why it is urgent that the EU fights for the fundamental values enshrined in Article 2 Treaty on European Union (TEU), especially the Rule of Law. It is this urgency that leads to talk of a ‘crisis of the Rule of Law’.<sup>56</sup>

The Rule of Law is a fundamental human right. The notion that there are certain inherent rights to individuals that are by nature inalienable and inviolable emerged from the achievements brought about by the advent of liberal constitutionalism. Throughout the twentieth century, the protection of fundamental human rights set itself at the centre of most constitutions, conceived as a safeguard against any arbitrary abuse of power by the State. Since the Rule of Law is devised as the limitation of public powers within the confines of the law, it is a vital and integral part of the protection of individual rights. The EU also attaches a central role to fundamental human rights, through the consecration of

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<sup>54</sup> Kochenov and Bárd (n 51) 9.

<sup>55</sup> Pech and Scheppele (n 45) 8.

<sup>56</sup> Dimitry Kochenov, ‘Europe’s Crisis of Values’ (University of Groningen Faculty of Law Research Paper Series, No 15/2014) 3 <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2443363](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2443363)> accessed 9 September 2022.

the values of human dignity, freedom, democracy, equality, the Rule of Law, and respect for human rights in Article 2 TEU, which are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail. The centrality of human rights in the EU's legal order is confirmed by the attribution by Article 6(1) TEU to the Charter of Fundamental Rights of the EU the same legal value as the Treaties.<sup>57</sup> If the EU sets itself the mission to uphold its fundamental values, it needs to arm itself with the adequate tools to do so. And if some Member States fail to uphold these common values, the EU should intervene on the matter.

From what can be seen, the EU has a duty to protect and enforce its fundamental principles. Regarding the Rule of Law, Carlos Closa and Dimitry Kochenov densify this duty with three normative arguments<sup>58</sup> on which to base EU intervention in backsliding Member States. The first concerns an 'all-affected principle', according to which the effects of the illiberal drift of individual Member States affect all other Member States, which occurs at two levels: first, European citizens have an interest in preventing illiberal States from joining the EU, as such States will gain a seat in the Council and the European Council, thereby directly influencing the lives of all citizens. Second, all Member States have an interest in ensuring that none of the others act independently, as this would undermine the nature of the Union and the internal market. The second normative argument concerns the supranational nature of the EU, namely with regard to its role of protecting the very rights it creates for its citizens, a protection that is independent of the Member States.

Finally, the third argument concerns a principle of congruence, which has an external dimension and an internal dimension. In an external dimension, the principle of congruence concerns the type of requirements that the Union normally imposes for cooperation with third parties, especially with regard to the protection of fundamental rights, democracy and the Rule of Law: as a matter of congruence, the EU should impose on Member States, the same high standards of democracy and legality that it sets for candidate countries during the pre-accession phase. On an internal dimension, the principle of congruence dictates that respect for democracy and the Rule of Law should not be seen only as a prerequisite for accession, but as a requirement for continued membership. This principle, 'when taken seriously, enhances EU's credibility in safeguarding and defending its fundamental values',<sup>59</sup> both internally and externally.

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<sup>57</sup> Consolidated Version of the Treaty on European Union [2016] OJ C202/13, art 6(1).

<sup>58</sup> Closa and Kochenov (n 43) 5-7.

<sup>59</sup> *ibid* 7.

## **2. Regulation (EU, Euratom) 2020/2092 on a general regime of conditionality for the protection of the Union budget**

In the context of the discussion of the EU budget for 2021-2027, commonly known as the Multiannual Financial Framework, the European Commission (EC) has commented on the need for ‘a new mechanism to protect the EU budget from financial risks linked to generalised deficiencies as regards the rule of law’,<sup>60</sup> reminding that the EU is a Community based on the Rule of Law, so respect for it constitutes ‘an essential precondition for sound financial management and effective EU funding’.<sup>61</sup> In this regard, the Commission proposes the creation of a new mechanism to protect the EU budget, the measures of which should be ‘proportionate to the nature, gravity and scope of the generalised deficiencies in the rule of law’, without prejudice to the ‘obligations of the Member States concerned with regard to beneficiaries’.<sup>62</sup> This discussion on the protection of the Rule of Law in the Union had already been widely discussed in the European Parliament (EP) and the Council, which was followed by a proposal by the EC for a Regulation on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States. Following an ordinary legislative procedure, the EP and the Council then adopt, in a joint position dated 16 December 2020, Regulation (EU, Euratom) 2020/2092 on a general conditionality regime for the protection of the Union budget, hereinafter referred to as Regulation 2020/2092 or only as the Regulation.

Regulation 2020/2092 begins precisely by framing its object, recalling that the EU is based on the common values of the Member States enshrined in Article 2 TEU, adding, quoting the European Council Conclusions of 21 July 2020, that the Union's financial interests must be protected in accordance with the general principles enshrined in the Treaties, in particular the values of Article 2 TEU.<sup>63</sup> As defined in recital 3 of the Regulation, the Rule of Law requires all public authorities to act within the constraints set out by law, in accordance with the values of democracy and respect for fundamental rights, and under the control of independent and impartial courts. These requirements are densified in the same recital<sup>64</sup>, according to which the Rule of Law requires that the principles of legality. This

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<sup>60</sup> European Commission (EC), ‘A Modern Budget for a Union that Protects, Empowers and Defends The Multiannual Financial Framework for 2021-2027’ (Communication) COM(2018) 321 final, 4.

<sup>61</sup> *ibid.*

<sup>62</sup> *ibid.*

<sup>63</sup> 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] OJ L433/1, recitals 1 and 2.

<sup>64</sup> This recital is based on the list in Annex I of the European Commission, ‘A new EU Framework to strengthen the Rule of Law’ (Communication) COM(2014) 158 final.

includes a transparent, accountable, democratic, and pluralistic law-making process, legal certainty, prohibition of arbitrariness of the executive powers, effective judicial protection, including access to justice by independent and impartial courts, and separation of powers be respected.

In its recital 5, the Regulation recovers the understanding of the EU as a Union based on the Rule of Law, when it declares that any country that becomes a Member State ‘joins a legal structure that is based on the fundamental premise that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the Union is founded’, premise that ‘implies and justifies the existence of mutual trust between the Member States that those values will be recognised and, therefore, that the law of the Union that implements them will be respected’. Recital 6 adds that respect for the rule of law is essential for the protection of the other fundamental values on which the Union is founded, concluding that ‘[t]here can be no democracy and respect for fundamental rights without respect for the rule of law and vice versa’.

Having made these initial considerations, the Regulation proceeds to link these concepts to the execution of the EU budget. Recitals 7 and 8 establish that whenever the Member States implements the Union's budget, respect for the Rule of Law is an essential precondition for compliance with the principles of sound financial management enshrined in Article 317 Treaty on the Functioning of the European Union (TFEU), since the Member States ‘act in accordance with the law, if cases of fraud [...] or other breaches of the law are effectively pursued by investigative and prosecution services, and if arbitrary or unlawful decisions of public authorities [...] can be subject to effective judicial review by independent courts and by the Court of Justice of the EU’. Recital 9 adds, by way of reinforcement, that the independence and impartiality of the judiciary should always be guaranteed, and investigation and prosecution services should be able to properly execute their functions, having both sufficient financial and human resources and procedures to act effectively and in a manner that fully respects the right to a fair trial, including respect for the rights of defence. Beyond that, final judgments should be implemented effectively. The same recital concludes that ‘[t]hose conditions are required as a minimum guarantee against unlawful and arbitrary decisions of public authorities that could harm the financial interests of the Union’.

As for who benefits from respect for the Rule of Law, recital 11 of the Regulation clarifies that, in addition to EU citizens, business initiatives, innovation, investment, economic, social, and territorial cohesion, as well as the proper functioning of the internal market, all



stand to gain from that respect, flourishing most where a solid legal and institutional framework is in place. Furthermore, recital 12 adds, Article 19 TEU requires Member States to provide effective judicial protection in the fields covered by Union law, including those relating to the implementation of the Union budget, stating further that ‘[t]he very existence of effective judicial review designed to ensure compliance with EU law is of the essence of the rule of law’, as stated in Judgement *Associação Sindical dos Juízes Portugueses*.<sup>65</sup> With all this background, recital 13 of the Regulation states clearly and concisely that it is evident that there is ‘a clear relationship between respect for the rule of law and the efficient implementation of the Union budget in accordance with the principles of sound financial management’.

Articles 1 and 2 of Regulation 2020/2092 relate to the definition of its object. Article 1 stipulates that the Regulation lays down the necessary rules for the protection of the Union budget in the case of breaches of the principles of the Rule of Law in Member States. Pursuant to recital 15 of the same Regulation, these breaches can seriously harm the financial interests of the Union, particularly when they are likely to affect the proper functioning of public authorities and effective judicial review. These situations can result from individual breaches of the principles of the Rule of Law and from breaches that are widespread or due to recurrent practices or omissions by public authorities, or to general measures adopted by such authorities. Article 2(a) of the Regulation offers, then, the definition of the Rule of Law, which recovers the definition already provided in recital 3, regarding the principles that compose it, adding only that the Rule of Law should be understood in the light of the other Union values and principles enshrined in Article 2 TEU. In turn, point (b) of the same Article defines ‘government entity’ as any public authority at any level of government, including national, regional, and local authorities, as well as Member State organisations.

Article 3 of Regulation 2020/2092 establishes which situations may indicate breaches of the principles of the Rule of Law for the purposes of its application. Article 3(a) presents, from the outset, one of the most recurrent concerns throughout the Regulation, which is the concern with the independence of the judiciary. As is set out in Article 3(b) of the same Regulation, failing to prevent, correct or sanction arbitrary or unlawful decisions by public authorities, including by law-enforcement authorities, withholding financial and human resources affecting their proper functioning or failing to ensure the absence of conflicts of interest are also signs of breaches of the principles of the Rule of Law. Under the terms of

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<sup>65</sup> Case C-64/16 *Associação Sindical dos Juízes Portugueses v Tribunal de Contas* [2018] ECLI:EU:C:2018:117, para 36.

point (c) of the same Article, limiting the availability and effectiveness of legal remedies, including through restrictive procedural rules and lack of implementation of judgments, or limiting the effective investigation, prosecution or sanctioning of breaches of law is likely to indicate a breach of the principles in question.

Article 4 of the Regulation sets out the breaches of the principles of the Rule of Law that may be at stake. Under the heading ‘Conditions for the adoption of measures’, Article 4(1) states that the measures of the Regulation shall be taken where it is established, in accordance with the procedure laid out in Article 6 of the same Regulation, that breaches of the principles of the Rule of Law in a Member State affect, or seriously risk affecting, the sound financial management of the Union budget or the protection of the financial interests of the Union in a sufficiently direct way. Article 4(2) lists the aspects to which the breaches of the principles of the Rule of Law concern for the purposes of the Regulation under analysis, which essentially relate to the financial issues that effectively give rise to this legislative document. Among them, we can find issues such as the proper functioning of the authorities implementing the Union budget, including loans and other instruments guaranteed by the it, in particular in the context of public procurement or grant procedures, the proper functioning of investigation and public prosecution services in relation to the investigation and prosecution of fraud, including tax fraud, corruption or other breaches of Union law relating to the implementation of the Union budget or to the protection of the financial interests of the Union, or the effective judicial review by independent courts of actions or omissions by the authorities referred to these financial concerns.

As regards the measures to protect the Union's budget , these are set out in Article 5 of the Regulation. Provided that the conditions set out in Article 4 are fulfilled, the EC may adopt one or more of the appropriate measures laid out in Article 5, which are divided into two groups: one set of measures is applicable where the Commission implements the Union budget in direct or indirect management pursuant to points (a) and (c) of Article 62(1) of the Financial Regulation,<sup>66</sup> and where a government entity is the recipient; the other set of measures is applicable where the Commission implements the Union budget under shared management with Member States pursuant to point (b) of Article 62(1) of the Financial Regulation. Among the measures that can be applied under the first situation we find, for example, the suspension of payments or of the implementation of the legal commitment,

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<sup>66</sup> Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014 and Decision No 541/2014/EU and repealing Regulation (EU, Euratom) No 966/2012 [2018] OJ L193/1.

or even the termination of the legal commitment, the prohibition on entering into new legal commitments or the suspension or reduction of the economic advantage under an instrument guaranteed by the Union budget. The measures that can be applied under the second situation include, among others, suspension of the approval of one or more programmes, the reduction of pre-financing or even the suspension of payments.

Article 5(2) of the Regulation ensures the demand in recital 19 that the ‘legitimate interests of final recipients and beneficiaries are properly safeguarded when measures are adopted’, stipulating that the imposition of appropriate measures by the Commission shall not affect the obligations of government entities or of Member States to implement the programme or fund affected by the measure, particularly the obligations they have towards final recipients or beneficiaries. Implementing another requirement of recital 19, that the Member States concerned by the measures should regularly report to the Commission on compliance with their obligations towards final recipients or beneficiaries, Article 5(2) also establishes a regular quarterly reporting deadline, counting from the adoption of the measures, the purpose of which is to allow the EC to verify that decisions taken under the Regulation do not affect, directly or indirectly, payments to be made to final recipients or beneficiaries. In turn, the Commission shall provide information and guidance for the benefit of final recipients or beneficiaries on the obligations by Member States via a website or an internet portal, where it will also provide adequate tools for them to inform it about any breach of these obligations that directly affects them, pursuant to recital 19 and Article 5(4) of the Regulation.

Article 5(3) establishes a principle of proportionality, prescribing that measures shall be determined considering the actual or potential impact of the breaches of the principles of the Rule of Law on the sound financial management of the Union budget or the financial interests of the Union. The proportionality of the measures must be assessed according to the criteria set out in recital 18 of the Regulation: the seriousness of the situation; the time which has elapsed since the conduct started; the duration and recurrence of the conduct; the intention; the degree of cooperation of the Member State concerned in putting an end to the breaches of the principles of the Rule of Law; and the effects on the sound financial management of the Union budget or the financial interests of the Union. The measures should also specifically target the Union actions affected by the breaches. Additionally, recital 17 warns of the supplementary nature of the measures provided for in this Regulation, which should only be applied in case other procedures set out in Union legislation would not allow the Union budget to be protected more effectively.

Article 6 of Regulation 2020/2092 establishes the procedure to be followed for the adoption of the protective measures. The procedure is initiated by the EC, which, after finding that there are reasonable grounds to consider that the conditions set out in Article 4 are fulfilled, sends a written notification to the Member State concerned, setting out the factual elements and specific grounds on which it based its findings, immediately informing the EP and the Council of such notification and its contents. The Commission must consider relevant information from available sources, including decisions, conclusions and recommendations of Union institutions, other relevant international organisations, and other recognised institutions, both before and after having sent the written notification. The onus to provide the necessary information falls upon the Member State concerned, which may make observations on the findings set out in the notification, within a time limit of at least one month and not more than three months from the date of notification, observations on which it can propose the adoption of remedial measures to address the findings set out in the Commission's notification. Simultaneously, the Member State concerned also has the opportunity to submit, within one month, its observations regarding the proportionality of the proposed measures.

Pursuant to Article 6(9) of the Regulation, having taken into account the information received and any observations made by the Member State concerned, within one month from the date of receipt of any information or observation, the EC, considering that the conditions of Article 4 are fulfilled, and that the remedial measures proposed by the Member State do not adequately address the findings in its notification, shall submit a proposal for an implementing decision on the appropriate measures to the Council, within one month of receiving the Member State's observations or, if none are made, within one month of the deadline set for the Member State's reply. The Council adopts the implementing decision within one month of receiving the proposal from the EC, which may be extended for a maximum period of two months in the event of exceptional circumstances. It is allowed to the Commission, whenever it deems it appropriate, the use of its prerogative to convene the Council, in accordance with Article 237 TFEU, in order to ensure a timely decision. The Council may amend the Commission's proposal and adopt the amended text by means of an implementing decision, acting to that effect by a qualified majority voting, calculated in accordance with Article 16(4) TEU *ex vi* Article 6(11) of Regulation 2020/2092.

Finally, the Regulation establishes a procedure for lifting protective measures in Article 7. At any time, the Member State concerned may adopt new remedial measures and submit to

the Commission a written notification including evidence showing that the conditions of Article 4 are no longer fulfilled. In turn, the EC shall reassess the situation in the Member State concerned, considering any evidence submitted by the Member State concerned, as well as the adequacy of any new remedial measures adopted by it, at the request of the Member State concerned, by its own initiative or, at the latest, one year after the adoption of measures by the Council. Where the Commission considers that the conditions of Article 4 are no longer fulfilled, it shall submit to the Council a proposal for an implementing decision lifting the adopted measures. If the Commission considers that the situation which led to the adoption of the measures has been partially remedied, it shall submit to the Council a proposal for an implementing decision adapting the adopted measures. On the contrary, if the Commission finds that the situation leading to the adoption of measures has not been remedied, it shall address a reasoned decision to the Member State concerned and inform the Council thereof. Where measures concerning the suspension of the approval of one or more programmes, or amendments thereof, or the suspension of commitments are lifted, amounts corresponding to the suspended commitments shall be entered in the Union budget. Throughout the procedure, the Commission must immediately inform the EP of any measures that are proposed, adopted, or lifted. Article 9 of the Regulation prescribes that the EC shall report to the EP and the Council, by 12 January 2024, on the Regulation's application, particularly on the effectiveness of the measures adopted.

### **3. Is the conditionality regime an effective means of protecting the principles of the Rule of Law?**

The need felt by the European institutions to properly protect the Rule of Law led, in the absence of effective political responses, to look for other alternatives to guarantee compliance. The solution of ensuring compliance with the postulates of the Rule of Law through budget management is, without a doubt, innovative. However, doubts regarding its effectiveness, and even legitimacy, emerged. The issue of financially sanctioning backsliding Member States arose in 2016, when two German Members of the EP proposed sanctioning Hungary and Poland.<sup>67</sup> However, it was in 2017 that the EP 'linked the monitoring of EU funds in Hungary with the government's disrespect of EU values and

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<sup>67</sup> Gábor Halmai, 'The Possibility and Desirability of Economic Sanction: Rule of Law Conditionality Requirements Against Illiberal EU Member States' (2018) EUI Department of Law Research Paper No 2018/06, 16 <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3126231](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3126231)> accessed 12 September 2022.

policies’,<sup>68</sup> instigating the EC to strictly monitor the use of EU funds by the Hungarian Government.<sup>69</sup> That same year, the EC stated that ‘[r]espect for the rule of law is important for European citizens, but also for business initiative, innovation and investment, which will flourish most where the legal and institutional framework adheres fully to the common values of the Union’, adding that ‘[t]here is hence a clear relationship between the rule of law and an efficient implementation of the private and public investments supported by the EU budget’.<sup>70</sup>

Cutting off EU funds from backsliding Member States naturally poses some risks: one could argue that cutting off EU funds or other forms of assistance would punish the peoples of the backsliding Member States, instead of their leaders, ‘pushing them [EU citizens] further away from the EU, and into the arms of their illiberal governments’ [emphasis added].<sup>71</sup> Without the proper legal framework, such sanctioning actions would effectively appear to those people as a whim of the European Institutions against their countries. That is why the careful and logical rationalisation of why such mechanisms are needed, explained through media and institutional communications, is of paramount importance. If one looks at the logical explanations provided in the recitals of Regulation 2020/2092, one can easily understand how and why the conditionality regime is necessary. Another argument that could be made against the cutting of EU funds is the usual concern regarding EU oversight and national autonomy, which can also be easily debunked by explaining why, regarding EU budget, the Rule of Law is an essential prerequisite.

As for the Regulation itself, Maria José Rangel de Mesquita has raised doubts as to whether the sanctioning mechanisms provided for by the Regulation were based on the Treaties, seeing that it ‘appears to anticipate the political assessment of the risk or existence’ of breaches of the principles of the Rule of Law provided for in Article 7 TEU, ‘hence undermining the political nature of the special procedure for the infringement of EU values’.<sup>72</sup> Another concern expressed by this author is that the sanctioning mechanism provided for in the Regulation is ‘parallel to the mechanism of sanctions foreseen in Article 7 TEU, therefore also overriding the (strict) procedural rules’<sup>73</sup> within the sanctioning phase provided for in that same Article. These doubts, however, referred to the Commission’s

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<sup>68</sup> Halmai (n 50) 16.

<sup>69</sup> *ibid* 17.

<sup>70</sup> EC, *Reflection Paper on the Future of EU Finances* [2017] Publications Office 22 <<https://data.europa.eu/doi/10.2775/94244>> accessed 12 September 2020.

<sup>71</sup> Halmai (n 50) 18.

<sup>72</sup> Maria José Rangel de Mesquita, ‘European Union values, Rule of Law and the Multiannual Financial Framework 2021-2027’ (2018) 19 *ERA Forum* 287, 292 <<https://link.springer.com/article/10.1007/s12027-018-0523-6>> accessed 13 September 2022.

<sup>73</sup> Mesquita (n 72) 292.

Proposal, and not to the Regulation, because it is expressly mention in recital 17 of the Regulation that the protective measures inscribed in it are supplementary in nature, only being applied ‘where other procedures set out in Union legislation would not allow the Union budget to be protected more effectively’, thereby only being deployed in case other measures, such as the sanctioning mechanisms provided for in Article 7 TEU or in EU financial legislation, fail to produce satisfactory results. As to the first concern, Hungary and Poland, in two separate actions for annulment of Regulation 2020/2092, also claimed that the contested legislation circumvented the procedure laid down in Article 7 TEU, adding that the EU had exceeded its powers, seeing that there was a lack of appropriate legal basis in the Treaties, and that the contested Regulation breached the principle of legal certainty.<sup>74</sup>

On February 16, 2022, the Court of Justice noted, in Press Release No. 28/22, the publication of two judgments<sup>75</sup> delivered in Case C-156/21 *Hungary v. Parliament and Council* and Case C-157/21 *Poland v. Parliament and Council*, which had addressed the above-mentioned issues raised by both Member States. In these judgments we believe we detect the necessary appeasement of the concerns raised, mainly in the remarkable argument that ‘the regulation is intended to protect the Union budget from effects resulting, in a sufficiently direct way, from breaches of the principles of the rule of law and not to penalise those breaches as such’,<sup>76</sup> which clearly defines the scope of application of the Regulation as a complement to Article 7 TEU, and not a substitute, while reinforcing the firm belief in the fundamentality of the Rule of Law as a principle and standard of a Union that claims to be based on that same basic principle.

Recalling the observance of the principles of solidarity and mutual trust between the Member States as essential elements of the implementation of the Union’s budget, namely mutual trust in the responsible use of common resources entered in the Union budget, the Court of Justice argues that the sound financial management of the Union’s budget and financial interests can be seriously jeopardized by breaches of the principles of the Rule of Law practiced in a Member State, which may result in ‘there being no guarantee that expenditure covered by the Union budget satisfies all the financing conditions laid down by

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<sup>74</sup> Court of Justice, Press Release No 28/22 (2022) 1  
<<https://curia.europa.eu/jcms/upload/docs/application/pdf/2022-02/cp220028en.pdf>> accessed 13 September 2022.

<sup>75</sup> Case C-156/21 *Hungary v European Parliament and Council* [2022] ECLI:EU:C:2022:97 and Case C-157/21 *Republic of Poland v European Parliament and Council* [2022] ECLI:EU:C:2022:98, both available at <<https://eur-lex.europa.eu/homepage.html>>.

<sup>76</sup> Press Release No 28/22, 2. See also para 119 of *Hungary v Parliament and Council* and paras 98 and 128 of *Poland v Parliament and Council*.

EU law and therefore meets the objectives pursued by the EU when it finances such expenditure'.<sup>77</sup>

Thus, the Court of Justice concludes, a horizontal conditionality mechanism can fall within the powers conferred by the Treaties on the EU to establish financial rules relating to the implementation of the Union's budget. Furthermore, the Court of Justice also finds that the mechanism established by the Regulation does not circumvent the procedure provided for in Article 7 TEU, invoking the above-identified argument of the purposes of the Regulation, opposing them to the purposes of the Treaty's suspensive procedure.

The Court of Justice concludes with the appeasement of Poland's and Hungary's legal certainty issues, invoking that the States in question are in a position to be able to determine with sufficient precision the concept of the Rule of Law,<sup>78</sup> that the protective measures must be strictly proportionate to the impact of the breach found on the Union budget and that the Commission must comply, subject to review by the EU judicature, with strict procedural requirements involving several consultations with the Member State concerned. Thus, we believe the Court of Justice of the EU settled the concerns expressed above, endorsing the legality and application of Regulation 2020/2092 and reinforcing the centrality of the Rule of Law as a foundational principle of the EU.

#### **4. Conclusion**

On 27 April 2022, the EC formally announced it would be triggering the conditionality mechanism against Hungary. After an intense period of negotiations between Brussels and Budapest, the EC adopted, on 18 September of the same year, a proposal on measures for the protection of the Union budget against breaches of the principles of the rule of law in Hungary,<sup>79</sup> following which the Council of the EU adopted, on 15 December, an implementing decision on the measures proposed by the Commission. The European Commission proposed a prohibition on entering into new legal commitments with any public interest trust and any entity maintained by Hungary under any Union programme under direct and indirect management, pursuant to point (a) of Article 5(2) of Regulation 2020/2092, as well as suspending 65% of the commitments in three operational programmes for the period 2021-2027 financed from several EU cohesion funds and, if the

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<sup>77</sup> Press Release No 28/22, 2. See also para 131 of *Hungary v Parliament and Council* and para 149 of *Poland v Parliament and Council*.

<sup>78</sup> Poland and Hungary had invoked that 'the regulation does not define the concept of "the rule of law" or its principles', in Press Release No 28/22, 2.

<sup>79</sup> EC, 'Proposal for a Council Implementing Decision on Measures for the Protection of the Union Budget Against Breaches of the Principles of the Rule of Law in Hungary', COM(2022) 485 final.



identified programmes have not been approved before the Council's decision, the suspension of their approval in total, in the terms of point (b) of the same. These measures translate into the freezing of 7.5 billion euros in funds from the Union budget and the freezing of 5.8 billion euros from the Covid-19 Recovery Plan, the total amounting to a suspension of roughly 13.3 billion euros in EU funding to Hungary.

Both sides claimed victory, with the EU celebrating sanctioning Viktor Orbán's illiberal agenda, and the Hungarian Prime Minister celebrating his State's influence over the EU. But Orbán does not, in fact, have that much to celebrate: while it is true that he managed to get the EC to lower the initial amount of funds suspended, he still has to implement 27 milestones regarding the independence of the judiciary, the non-discrimination of minorities and the separation of powers and arbitrariness of executive powers, which can result in an effective loss of his grasp on Hungary's state apparatus. And he must reach them indeed, seeing that Hungary 'is grappling with a drastically worsening economic situation: high inflation [...], a fall in the forint exchange rate [...] and rising debt',<sup>80</sup> which means that EU funding is essential for its economic stability. Not only that, EU funds 'are instrumental for maintaining the stability of the power structure', seeing that they are 'an essential tool to serve the interests of party-linked oligarchs, who commonly win public tenders for EU co-financed projects'.<sup>81</sup>

The EC had also intended to deploy the Regulation's sanctioning measures against Poland,<sup>82</sup> but the victory of Donald Tusk's Civic Coalition (KO) over PiS stopped the illiberal backsliding in Poland in its tracks, and the reforms that were being asked of Poland are being implemented, ensuring there is no need to trigger the conditionality mechanism against this Member State.

An important effect that results from triggering the conditionality mechanism is that it sends a message to other illiberal Member States, that the European institutions are on the lookout and on guard when it comes to respect for the Rule of Law, ready to react to any violation of its principles. If political tools such as Article 7 TEU and the Rule of Law Framework have been ignored by these backsliding Member States, the possibility of losing access to EU funding has an immediate and resounding effect on them. Although in

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<sup>80</sup> Andrzej Sadecki, 'Conditionality Mechanism: Hungary Facing the Threat of Withheld EU Funds' (OSW – Centre for Eastern Studies, 20 September 2022) <<https://www.osw.waw.pl/en/publikacje/analyses/2022-09-20/conditionality-mechanism-hungary-facing-threat-withheld-eu-funds>> accessed 20 January 2023.

<sup>81</sup> *ibid.*

<sup>82</sup> Camino Mortera-Martinez and Sander Tordoir, 'Hungary, Poland and the EU: It's the Money, Stupid?' (Centre for European Reform, 8 February 2023) <<https://www.cer.org.uk/insights/hungary-poland-and-eu-its-money-stupid>> accessed 10 February 2025.

appearance Viktor Orbán remains the European illiberal right's mentor and holds practically the same control over his country's state apparatus, the effects of the conditionality regime have created an economic crisis, which has generated dissatisfaction of the Hungarian people against Fidesz, for the first time in decades on the brink of losing a parliamentary election,<sup>83</sup> even with the electoral system unbalanced in favour of Orbán's party. With the legal framework provided by the Conditionality Regulation and the clear communication to the Hungarian people that it is Fidesz's actions, and not the European institutions, that are conditioning the country's economy, Orbán's illiberal grip on Hungary is effectively weakening.

As we have framed in the beginning of this article, the Rule of Law is crucial for the enforcement of human rights. As Member of the EPa José Manuel Fernandes excellently summarizes, the Rule of Law 'is a *sine qua non* condition for the recognition of all other fundamental rights. There is no effective freedom of speech, of association, of conscience, among others, in a community that is not governed by law. Where there is no "rule of law", there is arbitrariness and lack of security. In such conditions, there is no freedom'.<sup>84</sup> We can only agree with that assertion. By linking breaches in the principles of the Rule of Law to the EU's budget, thus linking Member States' economies with that fundamental principle as well, the Court of Justice has just given new breath to the EU's battle against Rule of Law backsliding in Member States and, by extension, to the protection of human rights around the Old Continent, perhaps even setting another ground-breaking example for other regional organisations to implement in their own jurisdictions.

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<sup>83</sup> Politico, 'Hungary', *Poll of Polls* <<https://www.politico.eu/europe-poll-of-polls/hungary/>> accessed 10 February 2025; Andy Heil, 'What The Fall Of Hungary's President Says About Orban's Grip On The Country' (RadioFreeEurope/RadioLiberty, 12 February 2024) <https://www.rferl.org/a/hungary-novak-resignation-orban-grip/32816814.html>> accessed 10 February 2022.

<sup>84</sup> José Manuel Fernandes, 'Note from MEP José Manuel Fernandes regarding European Parliament resolution of 10 March 2022 on the rule of law and the consequences of the ECJ ruling' (Official Blog of UNIO, 18 March 2022) <[https://officialblogofunio.com/2022/03/18/note-from-mep-jose-manuel-fernandes-regarding-european-parliament-resolution-of-10-march-2022-on-the-rule-of-law-and-the-consequences-of-the-ecj-ruling/#\\_ftnref](https://officialblogofunio.com/2022/03/18/note-from-mep-jose-manuel-fernandes-regarding-european-parliament-resolution-of-10-march-2022-on-the-rule-of-law-and-the-consequences-of-the-ecj-ruling/#_ftnref)> accessed 13 September 2022.

## **THE ROLE OF YOUTH AND THEIR STRUGGLES IN BUILDING A RESILIENT RULE OF LAW**

Miel Niemann<sup>85</sup>

### **Abstract**

The Rule of Law is one of the most important principles in building and maintaining a democratic society, which is oriented towards justice, human rights, and the validity of the law. However, a resilient Rule of Law is not a given in many countries. Often, the Rule of Law is threatened by autocratic regimes or hard to uphold due to natural crises such as the Covid 19 pandemic. Therefore, engagement is needed to uphold the idea, value, and practice of the Rule of Law. Young people around the world stand up for laws to be fair, transparent, and accessible. Even though there has been an increase in international and national legal documents that recognise the importance of youth for the Rule of Law over the past twenty years, many young people do not feel adequately supported in advocating for it. This essay focuses on the role of youth in promoting the Rule of Law, and which legal instruments support their recognition as a crucial part in achieving the legal goals of tomorrow by upholding said Rule of Law. Moreover, it addresses the challenges that young people face in this regard, and what could be done to support their engagement.

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## 1. Introduction

The earth has never been home to as many young people as today.<sup>86</sup> According to a 2018 United Nations (UN) report, the number of young people aged 10-24 was 1.8 billion.<sup>87</sup> The Rule of Law is one of the most crucial principles of national and international law in the construction of a society that conforms to human rights. Battered by wars, the climate crisis and the Covid 19 pandemic, the Rule of Law faces challenges that young people try to counteract. Nevertheless, they discover themselves in a double role in society. On the one hand, they are seen as the greatest defenders of the Rule of Law but on the other hand, they are seen as its greatest lawbreakers.<sup>88</sup> However, the role of youth in building a resilient Rule of Law should not be underestimated. We should rather facilitate young people's access to justice and support their commitment to the Rule of Law.

## 2. The legal framework and influence of young people on the Rule of Law

There is no unified accepted definition of the Rule of Law.<sup>89</sup> However, the concept of the Rule of Law is understood by the UN as a principle that binds states, individuals, institutions, public or private bodies, and organisations to independently decided and publicly promulgated law.<sup>90</sup> It should be noted that these laws must be consistent with international human rights standards and norms. In this regard, the concept of the Rule of Law also encompasses concepts such as the avoidance of arbitrariness in judicial decisions, fairness in judicial proceedings, and legal transparency.<sup>91</sup> Consequently, the Rule of Law is an important driver for upholding human rights and building a democratic and secure society. The term 'youth' is also not uniformly defined.<sup>92</sup> Depending on the social,

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<sup>86</sup> United Nations (UN) Human Rights Council, *Report of the United Nations High Commissioner for Human Rights: Youth and Human Rights* (28 June 2018) UN Doc A/HRC/39/33, 3.

<sup>87</sup> *ibid* 3.

<sup>88</sup> UN Office on Drugs and Crime (UNODC), *Act 4 Rule of Law: Youth and the Rule of Law* (2020) <<http://act4ruleoflaw.org/news/youth>> accessed 30 April 2023.

<sup>89</sup> Noora Arajärvi, 'The Core Requirements of the International Rule of Law in the Practice of States' [2021] 13 *Hague Journal on the Rule of Law* <<https://link.springer.com/article/10.1007/s40803-021-00152-8>> accessed 9 May 2023.

<sup>90</sup> UN Security Council, *The Rule of Law and Transnational Justice in Conflict in Post-Conflict Societies* (2004) 4.

<sup>91</sup> UN, *What is the Rule of Law?* <<https://www.un.org/ruleoflaw/what-is-the-rule-of-law-archived/>> accessed 9 May 2023.

<sup>92</sup> UN Human Rights Council (n 86) 4.

economic, or demographic situation, the age range changes. For statistical reasons, the UN defines youth as people between the ages of 15 and 24.<sup>93</sup>

History has shown that legal and political change towards more Rule of Law has often been driven by young people. Examples of this are the Arab Spring Uprisings in North Africa in 2010 which led to the overthrow of authoritarian regimes and resulted in democratic changes, or the Civil Rights Movement in the United States in the 1960s when Black Americans fought for legal equality and the end of racism.<sup>94</sup>

In 2015, the Doha Declaration stated, for the first time in an international declaration, that young people should be actively involved in preventing crime and promoting criminal justice, thus starting a trend towards recognising the importance of youth in achieving legal aims. Further documents followed including the 2030 Agenda with the Sustainable Development Goals (SDGs) and the UN Youth Strategy of 2018. Amongst the 17 SDGs proclaimed by the 2030 Agenda, SDG 16 also includes the goal of establishing a consolidated Rule of Law.<sup>95</sup> The aspiration for a social and sustainable world was accompanied by the recognition of the need for youth to be involved in the realisation of legal goals. Thus, only 2 months after the adoption of the 2030 Agenda in September 2015, the UN recognised the positive contribution of youth to peace in UN Security Council Resolution 2250 in December of that same year.<sup>96</sup>

At the regional level, there is also an increasing number of documents which advocate for young people fighting for their rights and recognising their significant role in building a resilient Rule of Law. Examples of this include the 2008 Ibero-American Convention on the Rights of Youth, which refers to youth as a 'primary subject' in Art. 34 No 1, and the 2009 African Youth Charter, which advocates for youth empowerment through national programmes.<sup>97</sup> In fact, the African Youth Charter goes one step further and recognises not only the importance of youth in strengthening the Rule of Law, but also obliges young people in Art. 26 j) to defend it.

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<sup>93</sup> UN General Assembly (UNGA), Report of the Secretary-General: International Youth Year: *Participation, Development, Peace* (19 June 1981) UN Doc A/36/21515; UN Human Rights Council (n 86) 3.

<sup>94</sup> Democracy Works Foundation, 'Working Paper 14: African Youth Participation is Crucial to Building Democratic Societies' (2022) <<https://www.democracyworks.org.za/african-youth-participation-is-crucial-to-building-democratic-societies/>> accessed 9 May 2023; Library of Congress, 'Youth in the Civil Rights Movement,' <<https://www.loc.gov/collections/civil-rights-history-project/articles-and-essays/youth-in-the-civil-rights-movement/>> accessed 9 May 2023.

<sup>95</sup> UN and the Rule of Law, 'Sustainable Development Goal 16' <<https://www.un.org/ruleoflaw/sdg-16/>> accessed 1 May 2023.

<sup>96</sup> UN Security Council Res 2250 (9 December 2015) UN Doc S/RES/2250.

<sup>97</sup> African Youth Charter (adopted 2 July 2006, entered into force 08 August 2009) arts 11-13, 28; UN Human Rights Council (n 86) 5.

This growth in international and national documents goes hand in hand with the realisation that implementing legal and social goals such as the 2030 Agenda are projects that can only be realised over time. Ultimately, it will be the youth of today who will as ‘agents of change’<sup>98</sup> have to implement the 2030 Agenda goals of tomorrow. Recognition of the role of youth in political participation, respect for human rights, and adherence to the principles of the Rule of Law should therefore not be underestimated. In fact, ‘investing in young people’s rights and empowering youth can lead to more equal societies and positive social change’, as stated by the High Commissioner for Human Rights.<sup>99</sup>

### **3. Struggles Youth encounter when engaging in the Rule of Law**

Although international and national documents refer to the importance of youth in establishing a resilient Rule of Law, young people still face numerous problems when it comes to the recognition of their role and their engagement in promoting the Rule of Law. A conceptual problem in this regard is that young people find themselves in a dual position as mentioned in the introduction, which consequently leads to a marginalisation of youth from the political decision-making process.<sup>100</sup> Youth are often stigmatised as rebellious criminals even though the protest of most young people is peaceful. As a result, the potential and energy of young people in building and promoting the Rule of Law is misjudged.

Moreover, young people are nowadays confronted with a plethora of threats to the Rule of Law. War, climate change, demographic changes, new technologies and economic crises are just a few keywords for the security challenges of the 21st century.<sup>101</sup> For young people to realise their full potential to address the challenges they face, access to justice must be facilitated.<sup>102</sup> For instance, the Council of Europe reported in 2017 that it is repeatedly informed by young people about their desire to understand more about their own rights and their role in society.<sup>103</sup>

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<sup>98</sup> UNGA Res 70/1 ‘Transformation of our world: the 2030 Agenda for Sustainable Development’ (25 September 2015) UN Doc A/RES/70/1, para 51; UN Human Rights Council (n 86) 6.

<sup>99</sup> UN Human Rights Office of the High Commissioner ‘Empowering Young People to Participate in the Promotion of Their Rights’ (2020) <<https://www2.ohchr.org/english/OHCHRreport2020/empowering-young-people-to-participate-in-the-promotion-of-their-rights.html>> accessed 5 May 2023.

<sup>100</sup> UNODC ‘Act 4 Rule of Law. Youth and the Rule of Law’ (2020) <<http://act4ruleoflaw.org/news/youth>> accessed 30 April 2023.

<sup>101</sup> Council of Europe, *State of Democracy, Human Rights and the Rule of Law: How Strong are Europe’s Checks and Balances* (2017) 117 <<https://edoc.coe.int/en/an-overview/7345-pdf-state-of-democracy-human-rights-and-the-rule-of-law.html>> accessed 6 May 2023.

<sup>102</sup> *ibid* 117.

<sup>103</sup> Council of Europe (n 101) 116.

Another problem, as mentioned above, is that young people still play a marginal role in decision-making processes. The UN conducted a survey in 2012 regarding the participation of youth in decision-making-processes with the result that a majority of 13,000 young people from 186 countries felt that limited opportunities for young people in political decision-making processes were a major challenge to them.<sup>104</sup> Following this observance, in 2018, only 1.65% of parliamentarians worldwide were in their 20s.<sup>105</sup> In the European Parliament, the number of parliamentarians under the age of 30 was just 13, with an average age of 52 in 2022.<sup>106</sup> This shows that young people are generally underrepresented in parliament.<sup>107</sup> An important driver of the Rule of Law is the enactment of fair and transparent laws. Young people are a critical force in bringing about reform for greater Rule of Law. Their views and goals for the future are crucial to ensure that goals such as the 2030 Agenda can be implemented in the future. Parliamentarism that bypasses young people is therefore counterproductive as it excludes the ideas, interests and desires of the generation that will have to live with the law that is shaping their future. We should thus rather make decisions with the youth and not only about the youth. This problem is enhanced by the fact that in most national parliaments, one can only be elected as a member at the age of 25, and that young people are less likely to be found in political leadership positions.<sup>108</sup> Hence, national law often hinders young people from contributing to law-making processes.

#### **4. Solutions to support Youth Empowerment in the Rule of Law**

One conceptual approach to supporting young people in their engagement with the Rule of Law is to perceive them not as a problem but as a solution to strengthen it. Unfortunately, the rule of law is not a matter of course in many countries. The reaction to a weakening of the Rule of Law in states is mainly carried by protests of young people. In fact, a study on youth, peace, and security in 2018 came to the result that young people have a positive effect and remarkable impact on sustaining peace and security nationally and internationally.<sup>109</sup> According to George-Konstantinos Charonis, Policy Officer on Youth

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<sup>104</sup> UN, Report of the United Nations Inter-Agency on Youth Development. (27 November 2013) 6.

<sup>105</sup> UN Human Rights Council (n 86) 3.

<sup>106</sup> European Parliamentary Research Service, European Parliament: Facts and Figures (2022). <<https://epthinktank.eu/2022/03/11/european-parliament-facts-and-figures/>> accessed 7 May 2023.

<sup>107</sup> UN Human Rights Council (n 86) 8.

<sup>108</sup> United Nations Development Programme, Enhancing Youth Political Participation throughout the Electoral Cycle (January 2013), 13.

<sup>109</sup> UNGA and Security Council, Identical Letters Dated 2 March 2018 from the Secretary-General Addressed to the President of the General Assembly and the President of the Security Council, General Assembly 72nd



Rights at the European Youth Forum, ‘young people have never been so politically active’.<sup>110</sup> Amongst others are the current protest movements in Iran, or Sudan where especially young people protest against autocratic regimes.<sup>111</sup> In the United States of America (USA), too, numerous young people were, for instance, amongst the demonstrators of the Black Lives Matter movement. In 2020, Unicef USA reported that children as young as 6 or 9 years old were already speaking out for human rights and more Rule of Law.<sup>112</sup>

Consequently, for young people to have a better understanding of human rights, they need to understand how the Rule of Law works. Improved youth access to the Rule of Law is therefore seen in the field of education. National education systems play a key role in this regard as ‘they can prepare future generations to hold state institutions accountable to these principles and equip learners with the knowledge, values, attitudes and behaviours they need to take constructive and ethically responsible decisions in their daily lives that support justice and human rights’.<sup>113</sup> Hence, through educational programmes in and out of school, and through the training of teachers, young people can learn what the Rule of Law is early on, what threats the Rule of Law faces and how young people can act against them.<sup>114</sup>

There are already examples around the world of the integration of educational programmes to support the Rule of Law in academic institutions. In Africa, for example, the Empowering Children and Youth as Peace Builders (ECaP) programme set up by World Vision in South and East Africa teaches people aged 12-18 years how leaders can be self-reliant and peaceful.<sup>115</sup> Another example is the education programme in Ontario,

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session and Security Council 73rd session (2 March 2018) UN Doc A/72/761-S/2018/86, 8, 13; UN Human Rights Council (n 86) 13.

<sup>110</sup> Organisation Internationale de Droit du Développement, *Human Rights, Democracy and the Rule of Law: The Role of Youth* (2020)

<<https://www.idlo.int/fr/news/highlights/human-rights-democracy-and-rule-law-role-youth>> accessed 9 May 2023.

<sup>111</sup> Stanford News, *Protests in Iran are Part of a ‘long, almost Sisyphean, struggle’ for freedom and equality, Stanford scholar says.* (2022) <<https://news.stanford.edu/2022/09/26/understanding-protests-iran/>> accessed 9 May 2023; Foreign Policy Magazine, *Meet Iran’s Gen Z: the Driving Force behind the protests.* (2022)

<<https://foreignpolicy.com/2022/11/01/iran-protests-gen-z-mahsa-amini-social-media/>> accessed 9 May 2023; The New York Times, *On Sudan’s Streets, Young Professionals Protest against an Autocrat* (2019)

<<https://www.nytimes.com/2019/01/24/world/africa/sudan-protests-omar-hassan-al-bashir.html>> accessed 9 May 2023.

<sup>112</sup> Unicef USA, *Young Activists stand up for Justice and at Black Lives Matter Protests*

(2020) <<https://www.unicefusa.org/stories/young-activists-stand-justice-black-lives-matter-protests>> accessed 9 May 2023.

<sup>113</sup> UNODC *Strengthening the Rule of Law through Education: A Guide for Policymakers* (2019)

<[https://www.unodc.org/documents/e4j/UNESCO/2795\\_18\\_Global\\_Citizenship\\_Education\\_for\\_the\\_Rule\\_of\\_Law\\_gris\\_complet.pdf](https://www.unodc.org/documents/e4j/UNESCO/2795_18_Global_Citizenship_Education_for_the_Rule_of_Law_gris_complet.pdf)> accessed 6 May 2023, 14.

<sup>114</sup> *ibid* 10.

<sup>115</sup> UNODC (n 113) 26.



Canada, which teaches students about human rights.<sup>116</sup> In the Asia-Pacific regions, too, there are various programmes to promote youth participation carried out by United Nations Human Rights for example.<sup>117</sup> A good education in the Rule of Law can help young people develop a sense of the Rule of Law when dealing with problems such as pandemics or wars. However, this requires that young people relate to issues such as transparency of law and justice at an early age.

A second aspect of supporting young people in their commitment to the Rule of Law is to allow them to participate in the democratic process. Young people bring different perspectives, new knowledge and energy to the political decision-making process and can help to ensure that just law is formed and practiced within society. One possibility, therefore, is to establish youth councils or release laws that help young people access their rights and engage in political decision-making processes more easily.<sup>118</sup> Following this approach, the Council of Europe established the Committee of Ministers on youth issues in 2017 which enables young people to understand their human rights, democracy and the dangers of extremism and populism.<sup>119</sup> Another opportunity to empower youth in participating in politics and law-making is that experienced politicians and lawyers mentor young people.<sup>120</sup>

A third aspect in supporting youth empowerment for a more resilient Rule of Law could be in strengthening youth justice and adjusting the eligibility of members of national parliaments by amending the respective law. However, when lowering the voting age, young people must also be properly guided through educational programmes.<sup>121</sup>

## 5. Conclusion

The Rule of Law encompasses a wealth of values and principles that are fundamental pillars of a consolidated and just democracy. Young people around the world are doing their part and are advocating for a resilient Rule of Law through protests and programmes. The establishment of a resilient Rule of Law is not born out of thin air; it needs people to stand up and speak out for it every day. If we do not educate young people about their rights and give them an understanding of the Rule of Law, then we run the risk of moving into the future with a disillusioned, unengaged generation. Documents such as the Doha

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<sup>116</sup> *ibid* 25.

<sup>117</sup> UN Human Rights Office of the High Commissioner (n 99).

<sup>118</sup> Council of Europe, *State of Democracy, Human Rights, and the Rule of Law 2018* (2018) 103.

<sup>119</sup> *ibid* 103.

<sup>120</sup> Organisation Internationale de Droit du Développement (n 110).

<sup>121</sup> UN Human Rights Council (n 86) 8.

Declaration or the African Youth Charter have shown us that the world has recognised that youth are key in achieving a resilient Rule of Law. However, further national, and international efforts are needed to promote youth engagement, because only with an understanding and engaged youth can the Rule of Law thrive in the future.

*Winner of the 2024 LexisNexis x ELSA Rule of Law Essay Competition*

## **CORRUPTION AND THE RULE OF LAW: TOWARDS AN INTERDISCIPLINARY AND RESOLUTIVE APPROACH**

Giovanna Martins Sampaio<sup>122</sup>

### **Abstract**

This paper addresses the issue of corruption and the rule of law, in the context of human rights protection and violations, and incorporates governance and transparency within a transdisciplinary approach. The discussion extends to related themes such as intellectual property and artificial intelligence, emphasizing how they intersect with issues of corruption and legal integrity. Furthermore, the paper highlights the importance of youth resilience in strengthening democratic institutions and promoting accountability. Finally, it examines the critical role of international law in combating corruption and reinforcing the rule of law globally.

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## 1. Introduction

Corruption has long been a detrimental force in societies around the world, undermining the rule of law and eroding trust in public and private institutions. As a result, it has significant implications for economic development, political stability, and social justice. This paper will explore the complex relationship between corruption and the rule of law, examining how corruption undermines legal frameworks and discussing the challenges in combating this pervasive issue. This article will also consider the importance of upholding the rule of law as a critical element in the fight against corruption, and explore potential strategies for strengthening legal systems to tackle corruption effectively.<sup>123</sup>

Corruption poses a significant threat to the rule of law and the stability of society. It undermines the principles of justice, fairness, and equality, eroding trust in the government, companies and the legal system. The impact of corruption can be seen in various aspects of life, from the allocation of resources to the enforcement of regulations and laws.<sup>124</sup>

In order to combat corruption and uphold the rule of law, it is essential for institutions to implement strong anti-corruption measures, promote transparency and accountability, and ensure that the legal framework is robust enough to prosecute and punish those engaged in corrupt practices.<sup>125</sup> It is also important to engage in international cooperation and collaboration to combat corruption effectively. By working together across borders, countries can share best practices, coordinate efforts, and hold individuals and organisations accountable for their corrupt actions. Empowering civil society, media, and other watchdog institutions to monitor and report on instances of corruption can serve as a powerful tool in promoting transparency and holding those in power accountable.<sup>126</sup>

Education and awareness-raising initiatives are vital in shaping a culture that rejects corruption. By educating individuals about the detrimental effects of corruption and promoting ethical values from an early age, societies can foster a sense of responsibility and integrity that permeates all levels of governance and life. The fight against corruption requires a multifaceted approach that addresses legal, institutional, cultural, and societal factors in order to effectively root out this problem.<sup>127</sup>

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<sup>123</sup> World Bank, *World Development Report 2019: The Changing Nature of the World* (World Bank 2019).

<sup>124</sup> European Commission, *Ethics Guidelines for Trustworthy AI* (European Commission 2019).

<sup>125</sup> JG Lambsdorff, 'Making Corrupt Deals: Contracting in the Shadow of the Law' (2002) 48 *Journal of Economic Behavior & Organization* 221.

<sup>126</sup> United Nations Office on Drugs and Crime, *Corruption and Integrity Improvement Initiatives in Developing Countries* (UNODC 2013).

<sup>127</sup> JE Méndez, 'Corruption and the Structural Integrity of Courts: A Qualitative Comparative Analysis' (2017) 79 *The Journal of Politics* 62-75.

When individuals in positions of power use their authority for personal gain, it distorts the balance of justice and fairness in society. The impact of corruption is far-reaching, from the unequal treatment of citizens, to the erosion of trust in governments and institutions.<sup>128</sup>

The battle against corruption requires a comprehensive approach that encompasses legal, institutional, and societal dimensions. By addressing the root causes of corruption and championing equality, transparency, and judicial independence, societies can strive towards a future where the rule of law is upheld, and all individuals are treated fairly and equally under the eyes of justice.<sup>129</sup>

In many societies, corruption allows the powerful and wealthy to manipulate the legal system for their benefit, at the expense of the rights and well-being of ordinary citizens. This not only breeds distrust in the government, judiciary and institutions, but also hampers economic development and perpetuates social inequality.<sup>130</sup>

The fight against corruption involves enacting and enforcing anti-corruption laws, promoting transparency and accountability in institutions, and empowering independent judicial bodies to uphold the rule of law without fear of external influence. This necessitates fostering a culture of integrity and ethical behaviour within both public and private sectors. Only through these concerted efforts can societies pave the way for a more just and equitable future for all.<sup>131</sup>

One crucial aspect of fighting corruption and upholding the rule of law is the involvement and engagement of citizens. Empowering people with knowledge about their rights, as well as avenues to report corruption and seek legal recourse, is essential in holding the government and powerful private and public entities accountable.

When corruption infiltrates the judiciary, it erodes public trust and undermines the legitimacy of legal remedies. It is essential to address corruption at all levels of society in order to uphold the rule of law and ensure that legal remedies are accessible and effective for all individuals.<sup>132</sup>

One aspect of combating corruption is to strengthen the rule of law by promoting ethical conduct and accountability amongst public officials. This can be achieved through the implementation of effective anti-corruption measures, such as the establishment of independent anti-corruption agencies and the enforcement of stringent penalties for

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<sup>128</sup> European Commission (n 124).

<sup>129</sup> M Johnson and J Nzelibe, 'Judicial Independence and Political Uncertainty: How the Evidence Illuminates a Classic Puzzle' (2014) 6 *Journal of Legal Analysis* 313-341.

<sup>130</sup> World Bank (n 123).

<sup>131</sup> United Nations Global Compact, *Business and Anti-Corruption: The Critical Role of the Private Sector in Upholding the Rule of Law* (United Nations 2018).

<sup>132</sup> European Commission (n 124).

corrupt behaviour. Promoting transparency in government processes and decision-making can help mitigate opportunities for corrupt practices to thrive.<sup>133</sup>

Empowering the judiciary to act independently and impartially is vital in ensuring that legal remedies remain accessible and effective. Creating a culture of accountability within the judiciary and providing adequate resources for their work can help in combating corruption within the legal system.

## **2. Development**

### **2.1. Human rights violations and protection under the theme of corruption and the rule of law**

Corruption and human rights violations are deeply intertwined, as corrupt practices often lead to human rights abuses. When public officials abuse their power for personal gain, it can result in unfair treatment, discrimination, and the denial of basic rights to citizens. This undermines the rule of law and erodes the foundation of a just and equitable society.<sup>134</sup> To tackle this issue, it is essential to strengthen anti-corruption laws and enforcement mechanisms. Promoting transparency and accountability within government institutions is crucial for upholding the rule of law and protecting human rights. By addressing corruption and promoting good governance, societies can strive towards creating a more just and rights-respecting environment for all individuals. It is crucial to establish independent oversight mechanisms to investigate and prosecute corruption cases. This can help to hold public officials accountable for their actions and deter future corrupt behaviour. Promoting a culture of transparency and integrity within public institutions can help to prevent corrupt practices from taking root.<sup>135</sup>

Engaging civil society and empowering citizens to actively participate in anti-corruption efforts is essential. This can be achieved through awareness campaigns, civic education, and the protection of whistleblowers who come forward to expose corrupt activities. When citizens are equipped with knowledge about their rights and the tools to hold their leaders accountable, it can serve as a powerful deterrent against corruption and human rights violations.<sup>136</sup>

In addition to domestic efforts, international cooperation and collaboration are also crucial in combating transnational corruption, international law infringements and human rights

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<sup>133</sup> Johnson and Nzelibe (n 129).

<sup>134</sup> J Smith, 'Corruption and Human Rights Violations: The Role of Impunity' (2018) 15 *Journal of Human Rights Studies* 123-140.

<sup>135</sup> Méndez (n 127).

<sup>136</sup> Smith (n 134).

abuses. This involves sharing best practices, expertise, and resources to strengthen anti-corruption measures on a global scale.<sup>137</sup>

When corruption infiltrates the rule of law, it can lead to widespread violations of human rights. In many countries, corrupt practices undermine the effectiveness of the justice system, leading to the unequal treatment of individuals based on their wealth, conditions, or connections. This erodes the trust of the citizens in institutions, the government and the legal system, creating an environment where human rights abuses can flourish.<sup>138</sup>

Efforts to promote transparency, accountability, and ethical conduct in both the public and private sectors are essential in combating corruption and upholding human rights. By promoting a culture of liability and responsibility, governments can create a more reliable, just and equitable society where the rights of every individual are respected and protected.<sup>139</sup>

Collaborative efforts amongst countries, organisations, and civil society groups can help to implement effective anti-corruption measures and promote the rule of law. International pressure and advocacy can hold governments accountable for their actions and encourage them to prioritise protecting international law and human rights.<sup>140</sup>

Educational instruction and awareness also play a crucial role in combating corruption and human rights violations. By promoting civic education and raising awareness about the detrimental impact of corruption on human rights, individuals can become empowered to demand accountability and transparency from their leaders. Educating future generations about the importance of integrity, and sustainable and ethical conduct can foster a culture of upholding human rights and resisting corrupt practices.<sup>141</sup>

Empowering independent judiciary systems and law enforcement agencies is fundamental in addressing corruption and human rights violations. Ensuring that these institutions operate free from political and economical interference and are equipped with the necessary resources and training is essential in upholding the rule of law and safeguarding human rights and international law.<sup>142</sup>

The fight against corruption and the protection of human rights are interconnected and require comprehensive strategies at national and international levels. By prioritising

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<sup>137</sup> T Morris, 'Combating Corruption in a Globalized World' (2003) 44 *Journal of Business Ethics* 321-326.

<sup>138</sup> UNODC (n 126).

<sup>139</sup> United Nations Global Compact (n 131).

<sup>140</sup> SY Lee, 'Corruption and Civil Liberties: Challenges to Democracy' (2016) 30 *Journal of Political Science* 89-102.

<sup>141</sup> CD Garcia, 'The Impact of Corruption on Economic, Social, and Cultural Rights' (2017) 44 *Journal of Development Studies* 567-580.

<sup>142</sup> Johnson and Nzelibe (n 129).

transparency, accountability, education and cooperation, governments can work towards creating a society where every individual's human rights are upheld and respected.<sup>143</sup>

When individuals in positions of authority prioritise their own interests over the well-being of citizens, marginalised communities suffer the most. This perpetuates a cycle of injustice and inequality, making it crucial for governments to prioritise anti-corruption efforts and uphold the rule of law.<sup>144</sup> In this sense, the international community and law also play a critical role in addressing corruption and human rights violations. Supporting civil society organisations and human rights defenders in their efforts to combat corruption and promote responsibility and accountability is key to effecting sustainable change.<sup>145</sup>

In many cases, corrupt officials and entities exploit their positions to suppress dissent, manipulate the justice system, and stifle responsibility and accountability. This results in a culture of impunity where human rights abuses go unchecked and victims are left without recourse.<sup>146</sup>

One way to combat corruption and protect human rights is to strengthen anti-corruption and international laws. Promoting sustainability, reliability, and transparency in government and financial operations and transactions can help decrease opportunities for corruption.

In many countries, rampant corruption leads to the denial of basic and fundamental rights such as access to healthcare, education, culture, property, social security, labour, information, democracy, development, technology, plurality, self-determination, free speech, and fair legal representation. This not only perpetuates inequality, but also violates the fundamental human rights of individuals - particularly those in marginalised communities.<sup>147</sup>

Efforts to combat corruption must be accompanied by measures to strengthen institutions, and safeguard the rights of all individuals, regardless of their social or economic status. Only by addressing both corruption, and human rights and international law violations can we aspire to create a world where the rule of law prevails, corruption is prevented, and human rights are upheld.<sup>148</sup>

The most vulnerable populations, such as women, children, elderly, and minority groups, frequently bear the brunt of corruption and human rights violations. They are

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<sup>143</sup> P Alford, 'Judicial Corruption: A Cross-National Examination' (2003) 586 *The Annals of the American Academy of Political and Social Science* 39-51.

<sup>144</sup> AB Doe, 'Judicial Corruption and Access to Justice' (2019) 25 *International Journal of Law and Society* 321-335.

<sup>145</sup> Alford (n 143).

<sup>146</sup> Smith (n 134).

<sup>147</sup> World Bank (n 123).

<sup>148</sup> PR Choudhury (ed), *Corruption, Social Sciences and the Law: Exploration across the Disciplines* (Routledge 2018).



disproportionately affected by the denial of essential services and lack of access to justice, perpetuating a cycle of poverty and marginalisation.<sup>149</sup> Efforts to address this issue must prioritise the protection and empowerment of these vulnerable groups. This includes implementing targeted policies and programs aimed at ensuring their access to essential services, as well as strengthening legal frameworks to protect their rights.<sup>150</sup>

It is relevant for governments and organisations to combat corruption throughout robust legal frameworks, enforcement mechanisms, and transparent governance. By upholding the rule of law and holding perpetrators of corruption liable and accountable, societies can work towards safeguarding human rights, international law and promoting a culture of trustworthiness, auditability, and value.<sup>151</sup>

Efforts to address corruption and human rights violations should also involve engaging and empowering civil society organisations, promoting freedom of the press, and fostering a culture of accessibility and safety at all levels. It is crucial to engage citizens in the fight against corruption and encourage their active participation in holding authorities responsible and accountable for their actions.<sup>152</sup>

Finally, public campaigns, and the integration of anti-corruption education and awareness programs into school curricula can foster a sense of ethics in future generations. By instilling values of transparency, accountability and integrity early on, societies can work towards preventing corruption and upholding international law and human rights in the long term.

## **2.2. Corporate Governance and Transparency under the theme corruption and the rule of law**

Corporate governance and transparency are essential components of maintaining integrity, accountability and ethical behaviour in a capitalist society, especially in the context of addressing corruption and upholding the rule of law. In order to combat corruption effectively, companies must prioritise corporate governance, international company law and transparency in their operations, decision-making processes, and internal controls and functions.<sup>153</sup>

Implementing robust corporate governance practices can significantly contribute to creating a culture of compliance and ethics within an organisation. By adhering to strong

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<sup>149</sup> Doe (n 144).

<sup>150</sup> DW Brinkerhoff, 'Assessing Political Will for Anti-Corruption Efforts: An Analytical Framework' (2000) 20 *Public Administration and Development* 239-252.

<sup>151</sup> European Commission (n 124).

<sup>152</sup> Lee (n 140).

<sup>153</sup> OECD, *OECD Principles of Corporate Governance* (OECD Publishing 2019).

governance principles and directives, enterprises and businesses can mitigate the risks associated with corruption and ensure compliance with laws and regulations.<sup>154</sup>

Fostering transparency in all kinds of reporting (including financial), and disclosing accurate information about business practices are crucial in building trust amongst shareholders and stakeholders such as investors, employees, partners, suppliers, and the public. This transparency not only enhances the image and credibility of a company and its brand, but also demonstrates its commitment to upholding ethical standards and the rule of law.<sup>155</sup>

To address these issues, it is imperative for companies to establish clear policies and procedures that promote transparency, integrity, and accountability at all levels of the organisation. This may involve conducting regular audits, implementing whistleblower mechanisms, and providing comprehensive training on ethical business practices. By prioritising corporate governance and transparency, businesses can play a vital role in combating corruption and promoting a culture of integrity, value, and fairness in the global business environment.

One way to enhance transparency is by adopting clear and comprehensive financial reporting practices. This includes providing detailed information about financial performance, executive compensation, and related party transactions. Companies can establish independent oversight mechanisms such as expert and audit committees and internal controls to ensure compliance with regulatory requirements and ethical standards.<sup>156</sup>

Promoting a culture of transparency and accountability from top management down to every employee can help deter corrupt practices and foster a culture of integrity. This can be achieved through regular training on ethics and compliance, as well as open communication channels for reporting any suspicions of misconduct, whilst respecting confidentiality, protecting individuals and minimising fear of retaliation.<sup>157</sup>

Implementing strong governance practices and ensuring transparency in all operations is not only beneficial for the company itself, but also for society at large. It fosters an environment where trust, equitability, and integrity are valued, and where stakeholders can have confidence in the organisation's behaviour. Companies that prioritise transparency, sustainability, and accountability are better positioned to attract investors, customers,

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<sup>154</sup> Garcia (n 141).

<sup>155</sup> European Commission (n 124).

<sup>156</sup> Johnson and Nzelibe (n 129).

<sup>157</sup> A Doig and R Theobald (eds), *Corruption and Misconduct in Contemporary Britain: Concepts, Challenges and Controversies* (Palgrave Macmillan 2017).

partners and top talent employees who increasingly value ethical principles and good corporate citizenship.<sup>158</sup>

Companies can also demonstrate their commitment to transparency by engaging in external reporting and voluntary disclosure of non-financial and financial information, such as environmental and social impact assessments towards ESG. This not only provides valuable information to shareholders and stakeholders, but also encourages greater accountability and responsibility in other businesses and competition.<sup>159</sup>

Maintaining a strong system of checks and balances, including external audits and regular assessments of governance practices, is essential for upholding the principles of corporate governance and transparency. This ongoing commitment sends a powerful message that the company is dedicated to ethical conduct and culture, and is willing to be held accountable for all its actions.<sup>160</sup> By establishing transparent and accountable decision-making processes, companies can demonstrate their commitment to ethics and wider society. This commitment not only enhances their reputation, but also ensures that they contribute positively to the overall business ecosystem.<sup>161</sup>

Adhering to regulatory requirements and boundaries, and ethical standards is paramount in promoting corporate governance and transparency. Companies should regularly review and update their policies to align with evolving regulations and ethics guidelines. By doing so, they can mitigate the risk of engaging in illegitimate and corrupt activities and demonstrate a genuine commitment to upholding the rule of law.

Engaging with stakeholders, including employees, customers and shareholders, is crucial in fostering a culture of transparency and accountability. By actively involving stakeholders in decision-making processes and seeking their input on governance matters, companies can demonstrate a commitment to ethical conduct, and reinforce their dedication to upholding the highest standards of corporate governance.

In today's global business environment, companies are increasingly recognising the importance of corporate governance and transparency as essential components of sustained business success and societal well-being. As such, a commitment to upholding these principles can serve as a significant competitive differentiator for organisations seeking to operate with integrity and contribute positively to the communities.<sup>162</sup>

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<sup>158</sup> Méndez (n 127).

<sup>159</sup> Choudhury (n 148).

<sup>160</sup> OECD (n 153).

<sup>161</sup> European Commission (n 124).

<sup>162</sup> Morris (n 137).

Incorporating the principles of corporate governance and transparency can also result in long-term financial benefits and impacts for companies. Studies have shown that businesses with strong governance practices tend to have better financial performance and are more attractive to investors, talents, and stakeholders.<sup>163</sup> Transparency in business operations can help companies build, maintain and engage strong relationships with their stakeholders, including customers, employees, and the local community. This can lead to increased brand loyalty, improved employee morale, and a positive reputation - all of which are critical for long-term sustainability in businesses.<sup>164</sup>

As the global business landscape continues to evolve, companies that prioritise corporate governance and transparency are better positioned to navigate complex regulatory environments and mitigate risks effectively. By demonstrating a commitment to these principles, businesses can foster a culture of integrity and ethical behaviour, setting a positive impact and example for the industry as a whole.<sup>165</sup>

To achieve all of this, organisations can establish clear codes of conduct that outline expectations for behaviour and decision-making within the organisation, as well as whistleblowing mechanisms, transparent reporting processes, and open internal controls and procedures to ensure that all activities are conducted in a lawful and ethical manner.<sup>166</sup>

Also, companies can engage with external stakeholders such as government authorities, regulatory bodies, agencies and civil society organisations, to demonstrate their commitment to transparency and good governance. This collaboration can help prevent corrupt practices and contribute to a more robust and healthy business environment.<sup>167</sup>

Embracing transparency in decision-making processes and reporting not only builds trust, but also serves as a deterrent to potential corrupt activities. This openness additionally fosters a culture of accountability and ethical behaviour at all levels of the organisation, from the boardroom to the frontline employees.<sup>168</sup>

A steadfast commitment to corporate governance and transparency is vital in combating corruption and upholding the rule of law. By integrating these principles into the core of their operations and values, companies can foster a positive culture, contributing towards a more diverse, inclusive, wealthy and growing business landscape.<sup>169</sup> Transparency involves

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<sup>163</sup> *ibid.*

<sup>164</sup> MC Jensen and WH Meckling, 'Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure' (1976) 3 *Journal of Financial Economics* 305-360.

<sup>165</sup> OECD (n 153).

<sup>166</sup> Lambsdorff (n 125).

<sup>167</sup> Lee (n 140).

<sup>168</sup> European Commission (n 124).

<sup>169</sup> Garcia (n 141).

openness, communication, and disclosure of relevant information to stakeholders and shareholders. This can include, inter alia, financials, non-financials, ESG, regular reporting, processes, procedures, controls and potential conflicts of interest. By being transparent, organisations can build trust and credibility, and deter unethical behaviour.

Further, leveraging technology and digital tools can also contribute to transparency efforts by providing real-time access to information and enhancing data integrity. By embracing digital transparency, organisations can strengthen their governance practices and demonstrate a willingness to operate with integrity and openness.<sup>170</sup>

By ensuring that businesses and organisations are governed in a transparent and ethical manner, we can work towards creating a more just, equitable and fair society. Transparency is key in holding corporations and individuals accountable and liable for their actions, and it fosters trust amongst stakeholders. A strong corporate governance framework can help prevent corrupt practices and promote a culture of integrity within an organisation.<sup>171</sup>

Moreover, fostering a culture of transparency and ethical behaviour requires continuous training, communication, and commitment from leadership. By integrating these practices into the organisation's values and operations, companies can contribute to a more just and equitable society, thereby strengthening the fight against corruption and upholding the rule of law.<sup>172</sup>

Collaboration with regulatory authorities and industry peers can contribute to a more robust and transparent corporate governance framework. By sharing best practices and collectively addressing governance challenges, companies can demonstrate their commitment to upholding the rule of law and combating corruption.

Companies should also consider incorporating independent and expert oversight mechanisms, such as internal audit functions and external auditors, to ensure the effectiveness of their corporate governance practices. These independent bodies can provide impartial assessments of the company's operations, financials, reporting, and compliance with regulations, further reinforcing transparency and accountability.<sup>173</sup>

Additionally, companies can benefit from engaging with stakeholders and shareholders. Seeking input and feedback from these groups can help identify areas for improvement and build greater trust and confidence in the company's governance processes.<sup>174</sup>

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<sup>170</sup> Méndez (n 127).

<sup>171</sup> OECD (n 153).

<sup>172</sup> Jensen and Meckling (n 164).

<sup>173</sup> Johnson and Nzelibe (n 129).

<sup>174</sup> European Commission (n 124).

Adopting technology and data-driven solutions can play a significant role in enhancing transparency and accountability. Implementing robust reporting systems and utilising data analytics can enable companies to detect and prevent corrupt practices, ultimately strengthening their commitment to upholding the rule of law.

By integrating these measures into their corporate governance framework, companies can not only mitigate the risks associated with corruption, but also foster a culture of transparency, accountability, integrity and ethical conduct, aligning with their societal and environmental positive responsibilities.

### **3. Conclusion**

Corruption under the rule of law and compliance is a complex issue with widespread implications. Corruption erodes the foundations of the rule of law and undermines trust in institutions. It distorts economic development, hampers investment, and perpetuates inequality.<sup>175</sup> To address these challenges, it is essential to strengthen legal and regulatory frameworks, enhance transparency and accountability, and promote a culture of integrity. This requires not only robust anti-corruption laws and enforcement mechanisms, but also a commitment from government, officials, businesses, organisations and civil society to adhere to ethical standards and promote compliance inclusively with regulations.<sup>176</sup>

Measures such as public sector reform considering legislations and public policies, whistleblower protection, and anti-corruption education can play a vital role in combating corruption and promoting a culture of compliance with the rule of law. International law, and cooperation and support for anti-corruption efforts are crucial in addressing cross-border corruption, illegalities, and flows.<sup>177</sup>

One key aspect of addressing corruption and promoting compliance is the incorporation of technology and innovation. Leveraging digital platforms and data analytics can help enhance transparency, streamline processes, and reduce opportunities for corruption. Promoting open data initiatives and digital governance can empower citizens to hold governments and institutions accountable and liable, and participate in decision-making processes that definitely affect the society as a whole.<sup>178</sup>

Fostering a culture of ethical leadership and integrity within both the public and private sectors is essential. This involves promoting ethical awareness, providing training and

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<sup>175</sup> World Bank (n 123).

<sup>176</sup> Lee (n 140).

<sup>177</sup> Garcia (n 141).

<sup>178</sup> World Intellectual Property Organization, *Global Innovation Index 2021* (WIPO 2021).

development on ethical decision-making, and holding leaders accountable for their actions. Instilling ethical values in future generations through education and citizenship campaigns is crucial for long-term change.<sup>179</sup>

It is imperative for businesses to adopt robust compliance programs that align with international standards, and directives, and regulations and best practices. This includes implementing due diligence processes, establishing clear anti-corruption policies, and conducting regular assessments to ensure adherence to regulatory and law-abiding requirements.<sup>180</sup>

Addressing corruption and promoting compliance with the rule of law requires a multi-faceted approach that involves various stakeholders working together to cultivate culture, integrity, transparency, and accountability. Through concerted efforts at the local, regional, national, transnational, multinational and international levels, progress can be made towards combating corruption and fostering a more just, fair and equitable society.<sup>181</sup>

Also, the theme of compliance within corporate governance and transparency is crucial for businesses in today's fast-paced and interconnected world. Compliance ensures that companies adhere to laws and regulations, as well as ethical standards, in all aspects of their operations. It encompasses various areas such as financials, reporting, data privacy and protection, ESG, and environmental regulations.<sup>182</sup>

To achieve transparency in compliance, companies must establish clear policies and procedures that are consistently enforced throughout the organisation. This includes regular monitoring and reporting, and ensuring that governance practices are effective and aligned with the company's objectives, vision and mission.

This open communication fosters trust and confidence in the company's operations, transactions, and decision-making processes. It is essential for companies to disclose relevant information in a clear and timely manner, allowing stakeholders to make informed decisions and holding the company accountable for its acts.<sup>183</sup>

Embracing transparency in compliance not only enhances the reputation of the company but also mitigates risks associated with non-compliance. Through transparent practices, businesses can proactively identify and address any potential issues, thereby demonstrating a commitment to ethical conduct and responsible corporate citizenship.<sup>184</sup>

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<sup>179</sup> United Nations Global Compact (n 131).

<sup>180</sup> Alford (n 143).

<sup>181</sup> Garcia (n 141).

<sup>182</sup> OECD (n 153).

<sup>183</sup> European Commission (n 124).

<sup>184</sup> Jensen and Meckling (n 164).

Corruption and the rule of law have a significant impact on the business environment and economic growth. Countries with high levels of corruption often struggle with ineffective legal systems, high standards of social inequality, lack of transparency, and difficulty in enforcing agreements and negotiations.<sup>185</sup>

This can create significant challenges for businesses looking to operate in these environments, as the risk of corruption and lack of rule of law can lead to increased uncertainty at all levels, having an impact on investments, resources, purchases, decisions, powers, and costs.<sup>186</sup>

Contracts, personal security, and capital growth are closely linked to the rule of law and corruption. In countries with strong legal frameworks and low levels of corruption, businesses can more effectively enter into contracts and secure their assets, improving personal security for all. This stability and predictability is essential for capital growth and long-term business success.<sup>187</sup>

Understanding these issues and their impact on business operations is crucial for companies making informed decisions about where to invest and how to mitigate risks. By staying informed and seeking out opportunities in countries with strong rule of law and low levels of corruption, businesses can better position themselves for sustainable growth and success, also considering corruption control and rule of law enforcement have far-reaching effects on overall societal well-being.<sup>188</sup>

Even considering and coming to youth and resilience, young people have shown incredible strength and adaptability in the face of numerous challenges. Their resilience in the midst of adversity is a testament to their potential to drive positive change and shape the future. Empowering and supporting youth in their endeavors can lead to the emergence of innovative solutions and new opportunities for growth and development, mitigating corrupt practices.<sup>189</sup>

It is imperative for policymakers and stakeholders to recognise the interconnectedness of these issues and work towards creating an environment where corruption is minimised, the rule of law is upheld and reinforced, and youth are given the necessary support to thrive and contribute meaningfully to society, labour, economy and wealth.<sup>190</sup>

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<sup>185</sup> UNODC (n 126).

<sup>186</sup> Johnson and Nzelibe (n 129).

<sup>187</sup> Lambsdorff (n 125).

<sup>188</sup> *ibid.*

<sup>189</sup> World Intellectual Property Organization (n 178).

<sup>190</sup> United Nations Office on Drugs and Crime, *Youth and Corruption: Youth Voices for Transparency* (UNODC 2020).



The impact of corruption and the rule of law on a society affects everything from the economy to society and justice. Addressing these issues requires a multidisciplinary approach, including implementing transparent governance, strengthening legal frameworks, and holding accountable those who engage in corrupt practices.<sup>191</sup>

Continuously, it is important to provide youth with further opportunities for education, skill development, and meaningful engagement in decision-making processes. By investing in youth empowerment programs and creating avenues for their participation in civic activities, we can harness their potential as drivers of positive changes, and innovative businesses and solutions.<sup>192</sup>

Integrating anti-corruption and rule of law education into youth development initiatives can instill a sense of responsibility, liability, ethics, and integrity in the younger generation. This, in turn, contributes to building a sustainable and valuable society where ethical principles and fundamental human rights are upheld, promoting more opportunities accessible to all.<sup>193</sup>

By addressing corruption, strengthening the rule of law, and empowering youth, we can lay the groundwork for a more just and prosperous society. It is through these concerted efforts that we can create a future where the potential of every individual, particularly the youth, is realised, valued, and positively explored.<sup>194</sup>

Finally, considering innovative business solutions and possibilities, artificial intelligence (AI) and intellectual property rights (IP) is becoming increasingly important as technology continues to advance. As we move into a world where AI plays a larger role in various industries, questions about who owns the creations of AI and how to protect those creations become more complex. The intersection of corruption and mainly the rule of law further complicates these issues, as ensuring fair and equitable treatment under the law is essential for protecting international law and intellectual property rights.<sup>195</sup>

One possibility under corruption and the absence of the rule of law is the potential for IP theft, infringement, and/or counterfeit to go unchecked. In environments where corruption is prevalent, companies and individuals may struggle to protect their IP innovations and inventions. This can stifle innovation and investment in technology, AI, and research and development (R&D), ultimately hindering progress in these rapidly growing fields of IP and AI.

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<sup>191</sup> Doe (n 144).

<sup>192</sup> World Intellectual Property Organization (n 178).

<sup>193</sup> World Bank (n 123).

<sup>194</sup> Choudhury (n 148).

<sup>195</sup> Morris (n 137).

On the other hand, there are also opportunities for the rule of law to provide a framework for enforcing intellectual property rights and human-centred AI uses and applications. By establishing clear legal standards and protections for IP-related goods and assets, countries can create an environment that fosters innovation and growth in this sector. Strong legal systems can help prevent corruption from undermining the protection of intellectual property, allowing for fair competition, the enforcement of international and competition law, and collaboration in the development of AI and useful technologies.<sup>196</sup>

In conclusion, the interactions between corruption and the rule of law, human rights, corporate governance and transparency, and intellectual property in the contemporary digitalised context of artificial intelligence present both challenges and opportunities. It is crucial for policymakers, legal experts, stakeholders, businesses, and industry leaders to navigate these complexities in order to ensure a proper and favorable landscape for continued development and growth for all.

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<sup>196</sup> World Intellectual Property Organization (n 178).





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