

## The Challenge to the Rule of Law and Democracy in Contemporary West and Central Africa

OLABISI D. AKINKUGBE

### I Introduction

Over the last decade, the democratic wave of the 1990s in sub-Saharan Africa, the accompanying constitutional reforms, and the cautious optimism about the possibility of entrenching the rule of law have come under significant stress.<sup>1</sup> A thriving democracy is characterized by a cycle of electoral process, free and fair elections, respect for the institutional legitimacy and independence of the judiciary, legislature, and executive and is constrained by the primacy of the fundamental rights of the citizens.<sup>2</sup> After a moment that was characterized by

A version of this chapter was presented as part of the late-breaking panel “International Law As a Tool Against Democratic Backsliding” at the 2023 annual conference of the American Society of International Law. As a cautionary note, the heterogeneity of African states requires avoiding tropes that generalize the decline of the rule of law in Africa if the analysis is not backed up by empirical data from all the states concerned. This chapter avoids the temptation to project the experiences of a handful of states across the continent as a whole.

<sup>1</sup> See generally Makau Mutua, *Africa and the Rule of Law*, 13 SUR REVISTA INTERNACIONAL DE DIREITOS HUMAN 159 (2016) (arguing for a conception of the rule of law that accounts for the cultural, geographic, and economic peculiarities of each state and offering seven core values that must be reflected in the rule of law in order to achieve sustainable development across Africa); Tom Ginsburg, *Democracies and International Law: An Update*, 23 CHI. J. INT’L L. 1 (2022); TOM GINSBURG, *DEMOCRACIES AND INTERNATIONAL LAW* (2021).

<sup>2</sup> This definition is akin to Ginsburg’s “relatively minimalist understanding of democracy . . . a system of electoral competition, underpinned by freedoms of speech, association, and other rights closely tied to elections. It is also underpinned by a bureaucracy that administers the elections in a neutral way, bound by the rule of law.” Ginsburg, *supra* note 1. See generally TOM GINSBURG & AZIZ Z. HUQ, *HOW TO SAVE A CONSTITUTIONAL DEMOCRACY* (2018).

a flurry of constitutional reforms and elections, coups have returned to Africa.<sup>3</sup>

The stress that threatens democratic regimes in contemporary Africa is not unique to the region. Globally, there is a decline in the rule of law and democracies.<sup>4</sup> Democracy and the rule of law are under challenge in the Global North and Global South. Imperial Western countries, like the United States and countries in Europe hitherto regarded as the prime examples of *stable* democratic governance are today confronted with the fragility of their claims and democratic experiences.<sup>5</sup> In Latin America, recent democratic elections illustrate the decline and erosion of democratic norms and institutions.<sup>6</sup> In Africa, a confluence of events – colonial legacies<sup>7</sup>, uprisings, regional conflicts, term elongations, challenges to the dynastic style of leadership, and the rising incidence of coups – challenge the entrenchment of the rule of law in contemporary Africa. After six decades of independence in many African countries, the governance outlook is to a lesser degree democratic.

The judicialization of election disputes before national<sup>8</sup> and regional courts<sup>9</sup> in Africa has added a further layer to analysis of the rule of law

<sup>3</sup> See generally AJLabs, *Mapping Africa's Coups d'État Across the Years*, AL JAZEERA (Aug. 30, 2023), [www.aljazeera.com/news/2023/8/30/mapping-africas-coups-detat-across-the-years](http://www.aljazeera.com/news/2023/8/30/mapping-africas-coups-detat-across-the-years) (“Out of the 486 attempted or successful military coups carried globally since 1950, Africa accounts for the largest number with 214, of which at least 106 have been successful.”).

<sup>4</sup> Michelle Bachelet, UN High Comm’r for Hum. Rts., *Crisis and Fragility of Democracy in the World*, Opening Workshop for the International Association of Jesuit Universities, Boston College (Aug. 2, 2022), [www.ohchr.org/en/statements-and-speeches/2022/08/crisis-and-fragility-democracy-world](http://www.ohchr.org/en/statements-and-speeches/2022/08/crisis-and-fragility-democracy-world).

<sup>5</sup> See generally Naja Bentzen, *Democracy in America 2022: Current Challenges to US Democracy and First Lessons for Europe*, EUR. PARLIAMENTARY RES. SERV. (Nov. 2022), [www.europarl.europa.eu/RegData/etudes/BRIE/2022/738199/EPRS\\_BRI\(2022\)738199\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2022/738199/EPRS_BRI(2022)738199_EN.pdf).

<sup>6</sup> See generally Jorge G. Castañeda, *Latin America's Beleaguered Democracies*, PROJECT SYNDICATE (July 12, 2023), <https://tinyurl.com/3cze3v6j>. As Castañeda aptly notes: “For years now, polls have shown diminishing support for democratic rule in Latin America. Fragile economic conditions, new post-pandemic social demands, and polarized, distrustful electorates are fueling a politics of backlash that is likely to intensify threats to democracy in the region in the coming years.”

<sup>7</sup> See generally Salmon A. Shomade, *Colonial Legacies Endure in Africa's Legal Systems – Undermining Rule of Law*, WASH. POST (Mar. 18, 2022), <https://tinyurl.com/4dvbce2d>.

<sup>8</sup> O'Brien Kaaba & Charles M. Fombad, *Adjudication of Disputed Presidential Elections in Africa*, in *DEMOCRACY, ELECTIONS, AND CONSTITUTIONALISM IN AFRICA* 361 (Charles M. Fombad & Nico Steytler eds., 2021).

<sup>9</sup> For analyses of the election disputes before the ECOWAS Community Court of Justice, see Olabisi D. Akinkugbe, *Towards an Analysis of the Mega-Politics Jurisprudence of the ECOWAS Community Court of Justice*, in *THE PERFORMANCE OF AFRICA'S INTERNATIONAL COURTS: USING INTERNATIONAL LITIGATION FOR POLITICAL*,

and its implementation on the continent. The motivations for the pursuit of election disputes before national and regional courts in Africa differ. At the national level, the basis for triggering an election dispute process is circumscribed by the relevant electoral laws as a means of seeking redress. The objective is to overturn the outcome of the election in favor of the election petitioner. The approach is different before regional courts in Africa. Litigants engage the regional courts in Africa as alternative forums to center public debate “about policy choices and as a platform to campaign for desired political, social, and legal change.”<sup>10</sup> Although the disputes before regional courts in Africa are couched in the language of alleged human rights violations, this chapter argues that they are as much about the rule of law, which is often foreclosed in disputes before national courts. Despite increased judicialization of election disputes before regional courts in Africa, the transnational rule-of-law aspect of these cases has received less scholarly inquiry.<sup>11</sup>

This chapter reimagines contemporary Africa as a theatre for the national, regional, and transnational mutation and contestation of the rule of law and democracy. Focusing on the geographical, socio-cultural, economic, legal, and political landscape between 2020 and 2023 in selected states in sub-Saharan Africa, this chapter critically analyzes the challenge of upholding the rule of law and democratic governance in contemporary Africa.<sup>12</sup> Between 2020 and 2023, at least nine military coups have occurred in West Africa, Central Africa, and the Sahel region.<sup>13</sup> The chapter envisions the phenomenon of the rule of law as a continuum, with ruptures occasioned by various factors. The chapter asks: Against the background of recent coups, how should we analyze the

LEGAL, AND SOCIAL CHANGE 149 (James Thuo Gathii ed., 2020); James Thuo Gathii & Olabisi D. Akinkugbe, *Judicialization of Election Disputes in Africa's International Courts*, 84 L. & CONTEMP. PROBS. 181 (2021).

<sup>10</sup> THE PERFORMANCE OF AFRICA'S INTERNATIONAL COURTS: USING INTERNATIONAL LITIGATION FOR POLITICAL, LEGAL, AND SOCIAL CHANGE, *supra* note 9, at 23.

<sup>11</sup> Although Mihreteab Tsighe Taye picks up the rule of law and human rights in his article, he comes at this issue from a different line of inquiry that does not necessarily focus on the possibility of the emergent transnational rule of law in Africa. See Mihreteab Tsighe Taye, *Human Rights, The Rule of Law, and the East African Court of Justice: Lawyers and the Emergence of a Weak Regional Field*, 34 TEMP. INT'L & COMP. L.J. 340 (2020).

<sup>12</sup> In this sense, this chapter undertakes a more granular analysis of the challenges to the rule of law in contemporary Africa and as such both differs from but also complements the contribution by Tom Ginsburg and Christoph Schoppe in Chapter 5.

<sup>13</sup> Mali, Guinea, Sudan, Chad, Burkina Faso, Niger, and Gabon are some of the countries where coups have occurred. Failed coup attempts have also taken place in the Gambia, Guinea-Bissau, and Sao Tome and Principe.

rule of law in contemporary Africa? Is the decline of the rule of law and democratic governance in sub-Saharan Africa as a region overstated, given that the coups are concentrated in Francophone West and Central Africa? How should we think of the role of geopolitical contestations and colonial linkages and legacies in unsettling democratic regimes and eroding the rule of law in Africa?

The chapter argues that the answer to the foregoing is at best murky. In sub-Saharan Africa, the factors that lead to episodes of rupture in the rule of law and democracy have overlapping roots in historical, geopolitical, national, and colonial legacies. Consequently, analyses of the decline of the rule of law and democratic governance in contemporary Africa that omit to center the overlapping contributions of these factors to the rupture we see in the rule of law offer an incomplete narrative. To unpack what the chapter describes as the murky narratives of the challenge of the rule of law in Africa, I focus on three frontiers: first, the rise of military coups, elongation of constitutional terms while in office, and the decline of the rule of law in Africa (2020–23). This section draws on experiences in Gabon, Niger, Burkina Faso, and Guinea. Second, the chapter examines entrenchment of the rule of law in terms of a successful transition of power. This section draws on the 2023 presidential elections in Nigeria and Liberia. Third, the chapter assesses the judicialization of election disputes before national courts and an emerging crisis of legitimacy. The judicialization of election disputes in national courts may have two implications for the entrenchment or weakening of the rule of law. On the one hand, the judicialization of election disputes and emergence of a winner as declared by the courts is an affirmation of a core tenet of the rule of law enshrined in the role of the courts. On the other hand, the incessant judicialization of election disputes risks weakening the authority of the concerned national court. To illustrate the enmeshment or nonenmeshment of the rule of law and the challenges this poses for the legitimacy of the judiciary, I draw on contemporary experiences in Nigeria.

Methodologically, this chapter engages in socio-legal analysis. The analysis draws on the contemporary practices, debates, and national – and where relevant, international – factors to analyze the interconnectedness and confluence of factors that should underpin analyses of the rule of law and democracy in Africa. Analyses of the rule of law in the African context are laden in the contested discourse of the creation of African states and the continued power relations that they encounter. Put differently, as a form of social thought, without cultural and historical

contexts, Eurocentrism is fully expressed in the rule of law. Consequently, an analysis of the rule of law to be seen as non-Eurocentric, and thus not a mere transplant of ideas, must be narrated through the understanding of the peoples concerned.<sup>14</sup> The chapter foregrounds the understanding of the principles of, and challenges to, the rule of law as they manifest in different African states, in contrast to a universally valid idea of the rule of law. Consequently, the analysis in this chapter sidesteps the critique of “normative incompleteness, cultural blindness, Anglo-Saxon imperial complicity and historical context”<sup>15</sup> by weaving in the unique confluence of social, economic, political, socio-cultural, and geopolitical contexts that overlap in its analysis of the rule of law in Africa.

## II The Rule of Law in Contemporary Africa in Context

Democratic experiences in Africa remain relatively young and fragile.<sup>16</sup> Since the democratic turn of the 1990s and early 2000s that birthed modern constitutionalism and democratic governance in different African states, the challenge of the rule of law has ignited various kinds of debates. But what, exactly, is the rule of law? Undoubtedly, the rule of law and democracy are contested concepts.<sup>17</sup> In their introduction, Gregory Shaffer and Wayne Sandholtz conceptualize the rule of law in terms of ideals and goals. In terms of goals, the rule of law serves to “protect individuals from arbitrary power through legal rules and institutionalized practices, while providing channels for cooperative and coordinative activities.”<sup>18</sup> As an ideal, the rule of law presupposes that “individuals are not to be subject to the arbitrary exercise of power.”<sup>19</sup>

<sup>14</sup> See generally JOTHIE RAJA, *AUTHORITARIAN RULE OF LAW: LEGISLATION, DISCOURSE AND LEGITIMACY IN SINGAPORE* (2012). Nick Cheesman has also called for “ethnographically informed research on the rule of law.” Nick Cheesman, *Rule-of-Law Ethnography*, 14 ANN. REV. L. & SOC. SCI. 167 (2018).

<sup>15</sup> Mutua, *supra* note 1, at 160.

<sup>16</sup> On fragile democracies generally, see MARK FATHI MASSOUD, *LAW’S FRAGILE STATE: COLONIAL, AUTHORITARIAN, AND HUMANITARIAN LEGACIES IN SUDAN* (2013); GRETCHEN CASPER, *FRAGILE DEMOCRACIES: THE LEGACIES OF AUTHORITARIAN RULE* (1995); SAMUEL ISSACHAROFF, *FRAGILE DEMOCRACIES: CONTESTED POWER IN THE ERA OF CONSTITUTIONAL COURTS* (2015).

<sup>17</sup> Martin Krygier, *Democracy and the Rule of Law*, in *THE CAMBRIDGE COMPANION TO THE RULE OF LAW* 406 (Jens Meierhenrich & Martin Loughlin eds., 2021); W.B. Gallie, *Essentially Contested Concepts*, 56 PROC. ARISTOTELIAN SOC’Y 167 (1956).

<sup>18</sup> See Chapter 1.

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

The rule of law, they argue, is “a normative ideal that should be viewed teleologically in terms of its ends.”<sup>20</sup> For Shaffer and Sandholtz therefore, the rule of law is most effectively entrenched in democratic regimes as a result of its becoming “institutionalized . . . a habit or routine.”<sup>21</sup> Their analysis of the rule of law differs from the parochial checklists that some Western scholars develop from their own legal traditions and universalize. In this regard, Shaffer and Sandholtz argue, and I agree, that: “Countries can produce quite different sets of rules for regulating social life in furtherance of rule-of-law principles.”<sup>22</sup>

Across African states, the rule of law is envisioned as a vehicle for the transformation of states into liberal democracies and for the protection of individual rights and the promotion of freedom. Despite contestations with respect to its evolving and pluralized contours, the rule of law remains the cornerstone of any legitimate democratic society.<sup>23</sup> Adherence and fidelity to the rule of law is fundamental to meaningful democracy. At the same time, law constitutes and reconstitutes unequal social relations. As a result, a continent like Africa, uniquely characterized by its contested histories and challenging contemporary realities that differ from state to state, must be placed in context.

The discourse, permutations, and understandings of the rule of law vary and are keenly contested by and among states. A conventional approach to understanding the rule of law is based on the ethos of good governance, accountability, and democracy that are prescribed by Global North countries for their Global South counterparts. Contemporary democratic practices and backsliding of the rule of law differ and do not fit strictly into the conventional framework of top-down diffusion of ideas from the West.<sup>24</sup> In a sense, they are counterintuitive. Hence, metrics – qualitative and quantitative – that have been developed

<sup>20</sup> *Id.* See generally Martin Krygier, *The Rule of Law: Legality, Teleology, Sociology*, in *RELOCATING THE RULE OF LAW* 45, 60 (Gianluigi Palombella & Neil Walker eds., 2009).

<sup>21</sup> See Chapter 1.

<sup>22</sup> See Chapter 1. Cheesman notes that “[c]ounterhegemonic work on the rule of law also involves counterintuitive findings, which go against accepted wisdom about what the rule of law is and why it might or might not matter to people in a particular place. Counterintuitive findings are sometimes anticipated, sometimes not.” Cheesman, *supra* note 14, at 176.

<sup>23</sup> See generally Anne Orford, *A Global Rule of Law*, in *THE CAMBRIDGE COMPANION TO THE RULE OF LAW*, *supra* note 17, at 538.

<sup>24</sup> MAAME EFUA ADDADZI-KOOM, MICHAEL ADDANEY & LYDIA A. NKANSAH, *DEMOCRATIC GOVERNANCE, LAW, AND DEVELOPMENT IN AFRICA: PRAGMATISM, EXPERIMENTS, AND PROSPECTS* (2022).

to measure the rule of law have not been as helpful in the African context, as the spectrum on which various indicators exist differs from state to state.<sup>25</sup>

Postcolonial realities, dictatorships, democratic turns and setbacks, state capture by national elites, rise of populism, coups, and the rising incidence of fake news and disinformation all test the limits of the rule of law in Africa. In historical and contemporary African societies, the legal, social, historical, political, cultural, geographical, and other circumstances differ; consequently, they place a limit not only on a rigid conceptualization of the rule of law but also on its practices.<sup>26</sup> Whether we think of the phenomenon of the rule of law as thick or thin, as procedural or substantive, as modern constitutional law, or as norms of cultural behavior or democratic governance, the manifestations of the rule of law in Africa buttress the assertion that it is an essentially contested concept.<sup>27</sup> Africa is thus a theatre for the national, regional, and transnational mutation and contestation of the rule of law and democracy. Accordingly, the study of Africa and the rule of law must be done on its own terms. In essence, there is no singular idea of the rule of law, nor is it determinate without context. It is in this context that I agree with Shaffer and Sandholtz that, to avoid the temptation of “formulaic checklists based on specified, formal characteristics,” the rule of rule should be defined “in terms of goals and practices.”<sup>28</sup>

Notwithstanding its contested nature, a core function of the rule of law is that it offers an assurance to the citizens about the steps and standards to which electoral processes will be held as well as the remedies that are available in the event of default or noncompliance. The rise of multiparty elections in Africa heralded an era of potential consolidation of democratic governance and the ethos of rule of law. The rule of law is critical

<sup>25</sup> In this regard, I agree with Shaffer and Sandholtz when they note: “How to measure these shifts is a challenge given the variety of institutional means to advance or undermine the rule of law, yet both qualitative and quantitative analyses indicate overall declines in rule-of-law protections transnationally, which are essential for individuals to lead lives not subject to domination.” See Chapter 1.

<sup>26</sup> See generally SALMON A. SHOMADE, *COLONIAL LEGACIES AND THE RULE OF LAW IN AFRICA: GHANA, KENYA, NIGERIA, SOUTH AFRICA, AND ZIMBABWE* (2022).

<sup>27</sup> On the rule of law as an essentially contested concept, see the influential works of Jeremy Waldron, *Is the Rule of Law an Essentially Contested Concept (in Florida)?*, 21 L. & PHIL. 137 (2002); Jeremy Waldron, *The Rule of Law as an Essentially Contested Concept*, in *THE CAMBRIDGE COMPANION TO THE RULE OF LAW*, *supra* note 17, at 121; BRIAN Z. TAMANAHA, *ON THE RULE OF LAW: HISTORY, POLITICS, THEORY* (2004).

<sup>28</sup> See Chapter 1.



for the conduct of elections in democratic regimes.<sup>29</sup> Electoral laws regulate the conduct of elections and the challenging of outcomes and offer general guidance on how political office holders are to be elected across local, state, and federal elections. The consistent conduct of elections in many Africa states has seen growth in opposition candidate victories in many countries.<sup>30</sup> These outcomes are increasingly contested before Africa's national and regional courts.<sup>31</sup> Africans are more aware of their civil and political rights in the context of elections as well as the role courts play in the adjudication of disputes emerging from the conduct of elections. Yet, these gains in election consolidation have not completely dispelled the view relating to the precarity of the rule of law in the region. Elections and the disputes that follow are therefore an important terrain where the practice of the rule of law must be analyzed.

The rhetoric of the protection of the rule of law is consistently weaponized by both democratic and authoritarian governments. For many years in postcolonial Africa, authoritarian regimes characterized the landscape of the continent.<sup>32</sup> The continuum of colonialism, colonial legacies, state capture by national elites, and weaponization of the institutions of liberal democratic states to legitimize elite interests must be viewed in a wholistic way – not in isolation. Likewise, the ongoing effects of geopolitical contestations by powerful Western states with economic and military interests in Africa has a direct connection to the entrenchment or weakening of the rule of law in African states. Yet, it must be noted that “a system governed by the rule of law . . . may not address

<sup>29</sup> See generally Brian Z. Tamanaha, *Functions of the Rule of Law*, in THE CAMBRIDGE COMPANION TO THE RULE OF LAW, *supra* note 17, at 221.

<sup>30</sup> The presidential election in Liberia, in October with runoff in November, which saw the emergence of an opposition candidate and peaceful transfer of power, offers an important example. See Carielle Doe & Alphonso Toweh, *Liberia President George Weah Concedes Election Defeat to Joseph Boakai*, REUTERS (Nov. 18, 2023), <https://tinyurl.com/24ab4nf9>.

<sup>31</sup> Akinkugbe, *supra* note 9; Gathii & Akinkugbe, *supra* note 9; Karen J. Alter & Mikael Rask Madsen, *The International Adjudication of Mega-Politics*, 84 L. & CONTEMP. PROBS. 1 (2022)

<sup>32</sup> As John Mukum Mbaku argues, the threats to the rule of law in Africa include, but are not limited to, “government impunity, military intervention in governance, manipulation of national constitutions by presidents in order to remain in power indefinitely, political interference with the judiciary or lack of judicial independence, failure of the majority of citizens in each African country to understand and appreciate the constitution and its role in their lives, failure to domesticate international human rights instruments, and extreme poverty and political and economic exclusion.” John Mukum Mbaku, *Threats to the Rule of Law in Africa*, 48 GA. J. INT’L & COMPAR. L. 293, 384–85 (2020).



deeply embedded inequities. It may provide procedural justice but deny substantive social justice.”<sup>33</sup>

Shaffer and Sandholtz’s conceptualization acknowledges the plurality of legal orders and traditions that would generate one’s understanding of the rule of law. In the peculiar context of Africa, several legal orders coexist within a state and across the continent. As such, rather than undertake a definition of the rule of law, I agree with Shaffer and Sandholtz’s argument that “any meaningful understanding of the rule of law must be based on cultures of practice embedded in rule-governed institutions.”<sup>34</sup>

Accordingly, the chapter conceives of the rule of law as a bulwark against the arbitrary exercise of power. Attempts by political leaders at any level of government to curtail the rights of the individual can be resisted by seeking redress within the institutions of a democracy. A system of government that denies the existence of such rights would not entrench the rule of law. The rule of law is a means to achieve several public goods and serves to address shortcomings in a society.<sup>35</sup> Analyses of the challenges – strengthening or declining – of the rule of law in Africa must be embedded in the particular socio-cultural, legal, political, and historical contexts in question. At the same time, scholarly analysis that is not enmeshed in the transnational context of the interactions and reinforcing nature of the factors that trigger the breakdown of law and order which aggravate the likelihood of human rights violations would fail to capture the wider factors at play in Africa – particularly as they relate to the role of former colonial metropolises in disrupting democratic governance in African states.

This chapter foregrounds a bottom-up approach to the analysis of the challenges to the rule of law in Africa. It differs from *a priori* measurement standards, often Western-centric, that become the tool for the assessment of the rule of law. The rule of law’s legitimacy crisis has not weakened its importance in every society. The promises of the rule of law, even in its weakened state, trump any authoritarian or military ideal. Authoritarianism, and particularly military dictatorship as many African states have experienced, proscribes the fundamental human rights of peoples, leaving them in a vulnerable state. Likewise, national courts are placed in a precarious position with respect to their capacity to

<sup>33</sup> Mutua, *supra* note 1, at 160.

<sup>34</sup> *Id.*

<sup>35</sup> See generally STEPHEN HUMPHREYS, *THEATRE OF THE RULE OF LAW: TRANSNATIONAL LEGAL INTERVENTION IN THEORY AND PRACTICE* (2010).

adjudicate cases that involve the violation of human rights. My conceptualization of the rule of law in the African context foregrounds the value of historical and socio-cultural practices, and the heterogeneity of states and regions as essential to understanding the rule of law in Africa.<sup>36</sup> Pluralized conceptualizations of the rule of law “lay the conditions for each conception to be enriched by elements that are not initially part of its content.”<sup>37</sup> In Part III, I turn to the three narratives through which I analyze the challenges to the rule of law in contemporary Africa.

### III Murky Narratives of the Strengthening or Decline of the Rule of Law in Africa

Rule of law is a convenient alibi for various actors in the governance of African states.<sup>38</sup> Incumbent and opposition political parties deploy the rule of law to justify different narratives that suit their pursuit of, or entrenchment in, power. In many cases, when the rule of law comes under scrutiny in Africa, it becomes apparent that the interests of the people and the state are not the drivers of actions. With eight presidential and overlapping legislative elections spread across the length and breadth of the continent, 2023 has been described as Africa’s election year.<sup>39</sup>

This section analyzes the contemporary practices and developments of selected African states along three major themes. First, it assesses the rise of military coups, elongation of constitutional terms while in office, and the decline of the rule of law in Africa (2020–23), drawing on experiences in Gabon, Niger, Burkina Faso, and Guinea. Second, it examines cases of the entrenchment of the rule of law in terms of successful and peaceful

<sup>36</sup> As Shaffer and Sandholtz note: “Pragmatically, we know the value of the rule of law through historical and contemporary experiences of the arbitrary exercise of power.” See Chapter 1.

<sup>37</sup> Waldron, *The Rule of Law as an Essentially Contested Concept*, *supra* note 27, at 136.

<sup>38</sup> See generally DEMOCRACY AND THE RULE OF LAW (José María Maravall & Adam Przeworski eds., 2023); John C. Mubangizi, *Democracy and the Rule of Law: Comparative Lessons Between Uganda and South Africa*, 27 L. DEMOCRACY & DEV. 468 (2023).

<sup>39</sup> “From 2011 to 2022, 42 new African leaders took office after an election. Of these, 17 were successors from an incumbent party. The other 25 were opposition politicians, a higher number than in any of the three preceding decades. Such transitions have recently taken place in Kenya, Malawi and Zambia, among other places.” John McDermott, *2023 Will Be a Busy Year for Elections in Africa*, ECONOMIST (Nov. 18, 2022), <https://tinyurl.com/umerta43>; Joseph Siegle & Candace Cook, *Africa’s 2023 Elections: Democratic Resiliency in the Face of Trials*, AFRICAN CTR. FOR STRATEGIC STUD. (Nov. 9, 2023), <https://tinyurl.com/ytfv5fx5>.

transition of power, drawing on the 2023 presidential elections in Nigeria and Liberia. Third, it analyzes the judicialization of electoral disputes before national courts, drawing on Nigeria to illustrate the challenges it poses for the legitimacy of the judiciary, thus implicating broader rule-of-law concerns.

*1 Narrative I: Military Coups, Elongation of Constitutional Terms while in Office, and the Decline of the Rule of Law in West Africa (2020–2023)*

The rise of outright military coups in West Africa (and particularly in Francophone Africa) offers the first case for the decline of the rule of law. Between 2020 and 2023, Africa witnessed seven military coups.<sup>40</sup> As of August 2023, it was reported that of the “486 attempted or successful military coups carried out globally since 1950, Africa accounts for the largest number with 216, of which at least 106 have been successful.”<sup>41</sup> Coups dash the dimmest possibility for the practice of the rule of law and democratization.<sup>42</sup> Coups epitomize the complete failure of the possibility of the nurturing of the rule of law. While they last, coups trump the ethos of constitutional democracy and portend irreparable damage for the rights of citizens. Coups and the ensuing military governments epitomize unbridled and arbitrary exercise of power.

An essential imperative that would ensure that the rule of law thrives is the existence of a democratic or liberal legal order. The nonexistence of a democratic state portends a significant danger not only for the protection and enforcement of the human rights of the citizens but also for the capacity of the of other institutions of the state to function effectively. Thus, on the face of it, the rise of military coups provides preliminary and uncontested evidence of the decline of the rule of law. Although it does not impact the substantive analysis, I draw a distinction between what I call outright military coups in contrast to military interventions that were reportedly motivated by attempts by elected leaders to enlarge their term in office through constitutional amendments.<sup>43</sup> The elongation of constitutional

<sup>40</sup> Gabon (August 2023); Niger (July 2023); Burkina Faso (2022); Chad, Guinea, and Sudan (2021); and Mali (2020).

<sup>41</sup> AJLabs, *supra* note 3.

<sup>42</sup> Clayton L. Thyne & Jonathan M. Powell, *Coup d'État or Coup d'Autocracy? How Coups Impact Democratization, 1950–2008*, 12 *FOREIGN POL'Y ANALYSIS* 192 (2016).

<sup>43</sup> On term limits, see generally Kennedy Kariseb, *State Sovereignty and Presidential Term Limits in Africa*, in *THE PALGRAVE HANDBOOK OF DEMOCRACY, GOVERNANCE AND*

term limits by sitting presidents who seek to entrench themselves in office and the refusal of democratically elected political leaders to cede power and conduct elections is another arena where the decline of the rule of law is manifesting.<sup>44</sup> The repressive and oppressive conduct of the sitting democratically elected president becomes the catalyst for the taking over of power. Often lacking in credibility, the military capitalizes on this as the rationale for its intervention. Between 2020 and 2023, coups in Niger, Gabon, Burkina Faso, and Guinea offer examples.

In **Niger**, on July 26, 2023, President Mohamed Bazoum was overthrown by the military. Citing the deteriorating security situation and bad governance in the country as the basis for its intervention, the military declared it had taken over power from the civilian administration in this Francophone West African country.<sup>45</sup> President Bazoum had assumed office amid a historic presidential election runoff on February 21, 2021.<sup>46</sup> Pertinent facts go to the heart of the argument advanced in this section. First, the election that birthed the short-lived tenure of President Bazoum was Niger's first civilian handover between elected leaders since independence in 1960. Second, President Bazoum's assumption of office followed a voluntary stepping down of his predecessor, President Mohamadou Issoufou, who had governed for two five-year terms and oversaw the first civilian to civilian democratic transition since Niger's independence.<sup>47</sup> Rather than entrench himself in power through constitutional changes that would extend his time in office, President Issoufou's democratic credentials and good governance were enhanced by the choice of peace and avoidance of violent protests, leading him, among other reasons, to win the much coveted Mo Ibrahim prize for leading Niger "on a path of progress."<sup>48</sup> Third, despite its

JUSTICE IN AFRICA 61 (Adeola Aderomola & Matua W. Makau eds., 2022). On the murky overlap between "third-termism" and the role of the military in Africa, see Trésor Muhindo Makunya & Kwadwo Appiagyei-Atua, *Soldiers in Civilian Uniforms: The Role of the Military in the Pursuit of Third-Termism*, in THE PALGRAVE HANDBOOK OF DEMOCRACY, GOVERNANCE AND JUSTICE IN AFRICA, *supra*, at 75.

<sup>44</sup> John Mukum Mbaku, *Constitutional Coups as a Threat to Democratic Governance in Africa*, 2 INT'L COMP. POL'Y & ETHICS L. REV. 77, 90 (2018).

<sup>45</sup> See generally Morgane Le Cam, *Niger: Junta is Fueled by Anger Against a "Sick Democracy"*, LE MONDE (Aug. 9, 2023), <https://tinyurl.com/3uhj8z4a>.

<sup>46</sup> *Niger Election Set for February Runoff*, DW (Jan. 2, 2021), [www.dw.com/en/nigers-presidential-election-heads-to-february-runoff/a-56114951](http://www.dw.com/en/nigers-presidential-election-heads-to-february-runoff/a-56114951).

<sup>47</sup> Fred Muvunyi, *Niger Set for First-Ever Peaceful Transition of Power*, DW (Feb. 19, 2021), [www.dw.com/en/niger-set-for-first-ever-peaceful-transition-of-power/a-56627959](http://www.dw.com/en/niger-set-for-first-ever-peaceful-transition-of-power/a-56627959).

<sup>48</sup> See President Mahamadou Issoufou: 2020 Laureate, MO IBRAHIM FOUNDATION, <https://tinyurl.com/mr48uz3c> (last visited Aug. 24, 2024).

significance, the gains of the first peaceful democratic transfer of power in Niger lasted only two years.

One may question whether this is a temporary setback, and perhaps there lies an opportunity for Niger to return to the path of democratic governance in a similar turn of events that brought in President Issoufou.<sup>49</sup> While a possibility, that consideration is beyond this chapter's analysis of the decline or strengthening of the rule of law in Africa. Yet, our understanding of the intricacies of the back and forth of military coups that civilian administrations are sandwiched between in today's Niger is enriched by an analysis of the rule of law that centers important overlapping economic, historical, and geopolitical contexts in Niger.

The military coup in Niger has three important points of confluence that contribute to the rupture of democratic governance and the rule of law: first, economic in the context of uranium mining; second, historical as it relates to the role of France, a former colonizer meddling in the politics of a sovereign state; third, geopolitical in the context of military solidarity within the Francophone West African states and the role of China and Russia. These factors are overlapping and no individual one exclusively explains this coup and consequential decline in democracy. First, economic interest lies at the heart of the postcoup analysis and complicates the path to the return of a democratic regime in Niger given the extraction of uranium by corporations from France.<sup>50</sup> Uranium mined from Niger has been critical to the operation of French nuclear power plants for many years.<sup>51</sup> Second, although mining of uranium by

<sup>49</sup> The circumstances leading to President Issoufou's election in 2011 were linked to the conduct of his predecessor:

President Mamadou Tandja had refused to step down after two terms, as stipulated in the country's constitution. He first took office in 1999 and was re-elected in 2004. Instead of obeying the constitution, he then went on to dissolve parliament and the constitutional court, simultaneously organizing a referendum on the possibility of a third term for himself. But he had not expected the reaction of the civil society and the Nigerien opposition, who boycotted the referendum and parliamentary elections and denounced Tandja's actions as illegal. In the end, the military intervened and ousted Tandja.

Antonio Cascais, *Niger's Chance for a Democratic Change of Power*, DW (Feb. 18, 2020), [www.dw.com/en/nigers-chance-for-a-democratic-transition-of-power/a-52413783](https://www.dw.com/en/nigers-chance-for-a-democratic-transition-of-power/a-52413783).

<sup>50</sup> See Assma Maad, *How Dependent Is France on Niger's Uranium?*, LE MONDE (Aug. 4, 2023), <https://tinyurl.com/byxykb4v>.

<sup>51</sup> Giorgio Leali, *Niger Coup Sparks Concerns About French, EU Uranium Dependency*, POLITICO (July 31, 2023), [www.politico.eu/article/niger-coup-spark-concerns-france-uranium-dependency/](https://www.politico.eu/article/niger-coup-spark-concerns-france-uranium-dependency/).

French corporations has continued, it has raised questions around the neocolonial nature of this relationship. This factor assumes a different undertone because Niger was a colony of France. In turn, this has prompted allegations of the crumbling of a quasi-empire of France, which may open the door to other rich powers like Russia.<sup>52</sup> Third, the geopolitics have both an international and a regional dimension. At the regional level, Mali and Burkina Faso issued a joint statement warning that intervention by the Economic Community of West African States (ECOWAS) could lead to a military response from them.<sup>53</sup> Internationally, the coup has heightened questions around the military presence of Russia, France, and the United States of America in Niger and the Sahel. As an editorial of the *Review of African Political Economy* observes: “The dominant framing of Western media reporting about the recent coups is indeed a geopolitical one, classifying African politics within the current remake of the East–West bloc confrontation.”<sup>54</sup> The geopolitics of military presence in Africa and their contribution to unsettling democratic regimes has been underanalyzed in the discourse of the rule of law. As Jubril Ibrahim rightly observes:

The Nigeriens are screaming at the top of their voices that this historical juncture is for the dismantling of French neo-colonialism in their country, and not democracy. There is a rising campaign, significantly facilitated by the Russian Wagner Group, that opposition to military rule is tantamount to supporting French and American imperialism. The narrative is presenting ECOWAS and Nigeria as the new lap dogs of French and American imperialism.<sup>55</sup>

Niger’s coup therefore exemplifies the confluence of the murky nature of how factors – national, regional, and international – with contested

<sup>52</sup> See generally Michael M. Philips, Benoit Faucon & Drew Hinshaw, *Niger Coup Upends U.S. Security Plans in West Africa, Handing Russia an Opportunity*, WALL ST. J. (July 27, 2023), <https://tinyurl.com/5datc437>; Nabila Ramdani, *The Niger Crisis Shows France’s Quasi-Empire in Africa Is Finally Crumbling*, GUARDIAN (Aug. 5, 2023), <https://tinyurl.com/2kytrk5m>.

<sup>53</sup> *Burkina Faso, Mali Warn Against Military Intervention in Niger*, AL JAZEERA (Aug. 1, 2023), <https://tinyurl.com/4y56w7rc> (“The transitional governments of Burkina Faso and Mali express their fraternal solidarity . . . to the people of Niger, who have decided with full responsibility to take their destiny in hand and assume the fullness of their sovereignty before history,” the military governments of the two countries said. “Any military intervention against Niger would be tantamount to a declaration of war against Burkina Faso and Mali,” they warned, adding that such a move could result in “disastrous consequences” that “could destabilise the entire region.”).

<sup>54</sup> Bettina Engels, Editorial, *Coups and Neo-colonialism*, 50 REV. AFRICAN POL. ECON. 147, 147 (2023).

<sup>55</sup> Jibrin Ibrahim, *Niger Coup: Defending Democracy or Combating French Neo-colonialism*, PREMIUM TIMES NIGERIA (Aug. 11, 2023), <https://tinyurl.com/5x645nbw>.

economic and political dimensions and actors add complexity to contemporary analysis of the rule of law and democratic decline.

**Burkina Faso**, since its independence in 1960, illustrates a deep history of military rule, coups, and social and religious conflict.<sup>56</sup> Accordingly, Burkina Faso is viewed as the epicenter of conflict in the Sahel. More recently, President Blaise Compaoré, who took power in 1983, was ousted in a popular uprising in 2014 after attempting to amend the constitution to extend his rule.<sup>57</sup> In what some describe as a momentous victory for the rule of law and democratic consolidation in Africa, President Compaoré was later tried in absentia and convicted for his part in the assassination of Thomas Sankara.<sup>58</sup> Subsequently, elections were conducted in 2015 and in 2020, when President March Roch Christian Kaboré was returned for a second term.<sup>59</sup> This reelection ended prematurely two years later. In 2022, Burkina Faso experienced two military coups: first, in January 2022, Burkina Faso's army removed President Roch Kaboré, blaming him for failing to contain violence by Islamist militants.<sup>60</sup> Second, in September 2022, there was a second coup by army captain Ibrahim Traoré, who forcibly removed Paul Henri-Damiba.<sup>61</sup> Admittedly, the latest Burkina Faso coups were staged against a background of a preexisting weak democratic institution with a concerning humanitarian crisis. Yet, a noncontextual and historical analysis of the Burkina Faso military coups of 2022 fails to appreciate the limitations of traditional measurement of rule-of-law compliance. Beyond the abhorrent practice of military juntas and the cleavages that characterize the national context for the coups, the coup was also about

<sup>56</sup> Folahanmi Aina, *Jihadism and Military Takeovers in West Africa: Burkina Faso Coup Highlights the Links*, CONVERSATION (Nov. 8, 2022), <https://tinyurl.com/3w7avck4>.

<sup>57</sup> Mathieu Bonkoungou & Joe Penney, *Protests Force Out Burkina President, Soldiers Vie for Power*, REUTERS (Oct. 30, 2014), [www.reuters.com/article/us-burkina-politics-idUSKBN0IJ0NZ20141031](http://www.reuters.com/article/us-burkina-politics-idUSKBN0IJ0NZ20141031).

<sup>58</sup> Ebenezer Obadare, *Blaise Compaore's Conviction Is a Momentous Victory for the Rule of Law and Citizen Power in Africa*, COUNCIL ON FOREIGN RELS. (Apr. 6, 2022), <https://tinyurl.com/bdhknrw5>.

<sup>59</sup> Sam Mednick, *Burkina Faso President Roch March Christian Kabore Re-elected*, TORONTO STAR (Nov. 26, 2020), <https://tinyurl.com/4ym7m4zf>.

<sup>60</sup> *Burkina Faso: Coup Puts Rights at Risk – Uphold Basic Protections, Restore Civilian Democratic Rule*, HUM. RTS. WATCH (Jan. 27, 2022), [www.hrw.org/news/2022/01/27/burkina-faso-coup-puts-rights-risk](http://www.hrw.org/news/2022/01/27/burkina-faso-coup-puts-rights-risk).

<sup>61</sup> *Understanding Burkina Faso's Latest Coup*, AFR. CTR. FOR STRATEGIC STUD. (Oct. 28, 2022), <https://africacenter.org/spotlight/understanding-burkina-faso-latest-coup/>; see also Louisa Brooke-Holland, *Burkina Faso: Second Coup of 2022*, HOUSE OF COMMONS LIBR. (Oct. 19, 2022), <https://commonslibrary.parliament.uk/research-briefings/cbp-9633/>.



geopolitical struggles between powerful Western countries such as France, the United States of America, and Russia. Western influence, though diminished, remains considerable for historical reasons, and because many African countries still look to the West for aid, investment, and sympathy in international lending bodies. In turn, powerful Western governments have been accused of supporting rival factions in states where their economic and military interests exist. Like Niger, Burkina Faso is caught amidst the geopolitical struggle for influence by countries such as France, Russia, and the United States, which have military and transnational economic interests in Burkina Faso's extractive industry. The coup in Burkina Faso is a manifestation of dissatisfaction, schisms, and power struggles at the national level, often linked to questions about the role of external actors with interests.<sup>62</sup> In turn, external support through funding, weapons, and training as part of security and regional conflict management unwittingly lay the groundwork for military coups.<sup>63</sup>

As for **Gabon**, in August 2023, the now ousted president Ali Bongo Ondimba was declared the winner of the national election that would have returned him for a third term. The election was strongly disputed. President Ondimba had ruled the country since 2009 and seemed destined to follow in his father's footsteps. Omar Bongo – Ali Bongo's father – had ruled Gabon between 1967 and 2009. In Ali Bongo's case, the military argued that the elections were rigged and designed to entrench the former president and his close supporters in power. In turn, they promised to return power to civilians through elections at the end of a transition period. This was Gabon's first successful coup. On August 30, 2023, the military announced that the election that returned Ali Bongo as president for the third term lacked credibility and was therefore annulled. If all goes to plan, the military authorities in Gabon have announced elections for August 2025.<sup>64</sup>

Likewise, in **Guinea**, in September 2021, special forces commander Colonel Mamady Doumbouya overthrew President Alpha Conde.<sup>65</sup>

<sup>62</sup> See Emma Heywood et al., *Burkina Faso Coup Raises Questions About Growing Russian Involvement in West Africa*, CONVERSATION (Oct. 11, 2022), <https://tinyurl.com/96jt4kkp>.

<sup>63</sup> Stephanie Savell, *U.S. Security Assistance to Burkina Faso Laid the Groundwork for a Coup*, FOREIGN POL'Y (Feb. 3, 2022), <https://tinyurl.com/42367vsu>.

<sup>64</sup> *Gabon: Military Authorities Announce Elections for August 2025*, AFRICANEWS (Nov. 13, 2023), <https://tinyurl.com/45fswbdj>.

<sup>65</sup> *Guinea Coup: Who Is Col Mamady Doumbouya*, BBC (Oct. 1, 2021), [www.bbc.com/news/world-africa-58461971](http://www.bbc.com/news/world-africa-58461971).

A year earlier, President Conde spearheaded a change of the constitution to circumvent the two-term limit that would have prevented him from standing for a third term. While the constitutional change was described by opposition leaders as an abuse of power and Conde was accused of becoming an authoritarian, he argued that it would modernize the country, and citizens overwhelmingly voted in favour of the amendment in a controversial referendum.<sup>66</sup> Although the constitutional amendment would limit presidential terms to two, its effect would have reset the timetable to allow President Conde to contest for another two terms of six years each. A critical point to highlight is that President Conde, who first assumed office in 2010, was Guinea's first democratically elected president.<sup>67</sup> Conde, a former opposition leader who was sentenced to death by a former authoritarian, has taken on the full character of entrenching himself in office forcefully.

One major implication that arises from the foregoing analysis is the interconnectedness of the rule of law developments with internal and external geopolitical struggles.<sup>68</sup> In an interconnected global order, the decline of regions such as Europe and powerful Western countries like the United States and the negative transnational diffusion to other regions of the world is an important factor. In Africa, this decline empowers would-be authoritarians to undermine the liberal democratic order either through term elongation or other repressive and oppressive measures that limit opposition. Mutua frames this challenge as "Africa's relationship with the international legal, political, and economic order. International institutions, hegemonic states, and the culture of international law have at best been negligent, and destructive at worst."<sup>69</sup>

Mutua centers the challenge on the nature of the African state. According to him: "The African state is reflexively repressive and generally disdainful of civil society. It has trouble performing the basic functions of statehood. Its proclivity for corruption is well known. These problems stand at the centre of the crisis."<sup>70</sup> From the foregoing, the motivation for the resurgence of military interventions between 2020

<sup>66</sup> *Guinea President Alpha Conde Enacts New Constitution*, AL JAZEERA (Apr. 7, 2020), [www.aljazeera.com/news/2020/4/7/guinean-president-alpha-conde-enacts-new-constitution](http://www.aljazeera.com/news/2020/4/7/guinean-president-alpha-conde-enacts-new-constitution).

<sup>67</sup> James André, *Alpha Conde Declared Winner in Guinea Presidential Run-off*, FRANCE 24 (Nov. 16, 2010), <https://tinyurl.com/ytku49tf>.

<sup>68</sup> See Alexis Arieff, *Burkina Faso: Conflict and Military Rule*, CONG. RES. SERV. (Sept. 28, 2023), <https://sgp.fas.org/crs/row/IF10434.pdf>.

<sup>69</sup> Mutua, *supra* note 1, at 165.

<sup>70</sup> *Id.*

and 2023 is attributable in part to the greedy desires of elected leaders. The nature and circumstances of the coups differ from the first generation of coups after many African states attained independence in that more recent coups were precipitated by unpopular and controversial amendments to constitutional term limits, as the cases of Niger, Guinea, and Gabon illustrate. Likewise, it appears that the military juntas are more amenable to setting an agenda for the transition back to civilian administration rather than entrenching themselves in office. Nevertheless, the resurgence of military coups demonstrates a clear decline of democratic values that undermines the possibility of rule-of-law-values becoming entrenched.

Lastly, there is a Francophone and neocolonial resistance pattern that emerges from the incidences of military coups in West, Central, and Sahel regions of Africa.<sup>71</sup> Virtually all of the states that have experienced coups between 2020 and 2023 are former French colonies.<sup>72</sup> As such, the decline of the rule of law, in the context of democratic governance, should not be rendered solely as a product of national struggles. In some cases, coups disrupt the capture of the state by elites that have dominated the rulership of the nation for a long time – even if they are replaced by another elite. For example, in Gabon, while the ousted president Ali Bongo took over power following his father's death in 2009, the military government's new leader is in fact a cousin of the former president Ali Bongo.<sup>73</sup>

<sup>71</sup> In the words of Kent Mensah:

But it is not easy for West Africa and the Sahel to forget France's long history in their regions, say analysts. France has historically prioritised order within the borders of its African partners, supporting leaders who rely on dubious elections and wield the military to prevent challenges to their power. France has also turned a blind eye to the impoverishment of African people by their governments, which have successfully laundered billions of dollars of public funds through European and French institutions. Only in recent years, under pressure from African anticorruption campaigners, has France begun to probe some of the allegations of corruption, such as against Denis Sassou Nguesso, president of the Democratic Republic of the Congo (DRC), in 2015. Kent Mensah, *Africa's Coup Epidemic: Has Democracy Failed the Continent?*, AL JAZEERA (Sept. 22, 2023), <https://tinyurl.com/ye238hrc>.

<sup>72</sup> Folahanmi Aina, *French Mistakes Helped Create Africa's Coup Belt*, ALJAZEERA OPINIONS (Aug. 17, 2023), [www.aljazeera.com/opinions/2023/8/17/french-mistakes-helped-create-africas-coup-belt](https://www.aljazeera.com/opinions/2023/8/17/french-mistakes-helped-create-africas-coup-belt).

<sup>73</sup> Nosmot Gbadamosi, *Has Gabon's "All-Powerful" Bongo Dynasty Really Lost Its 55-Year Grip?*, AL JAZEERA (Sept. 1, 2023), <https://tinyurl.com/2yv4747k>.

## 2 Narrative II: A Tale of Two Presidential Elections: Entrenchment of the Rule of Law – Successful Transition of Power in West Africa

The transition of power from one civilian administration to another is important for the consolidation of democracy and the ultimate expression of the rule of law.<sup>74</sup> In this second narrative, I examine the situations where elected African states have successfully conducted elections and transitioned from one civilian government to another as an example of the deepening of democracy and the rule of law. Nigeria and Liberia, two countries that conducted their presidential elections in 2023 and transitioned to new administrations, contrast with the experiences in Francophone countries like Gabon and Burkina Faso analyzed in Narrative I. Whereas the election in Nigeria saw the transfer of power from a ruling party to another candidate of the same party, the election in Liberia was more consequential as the transfer of power was to the opposition. In addition, whereas the perception was that the Nigerian election was not free and fair, reports so far have praised the Liberian election as free and fair. Attributes such as transparency, responsiveness, equity and inclusiveness, and democracy are interconnected with the socio-economic development of any nation. Entrenchment of the rule of law enhances the likelihood that the voices of the most vulnerable in society are heard in decision-making.

Whereas the national incumbents in the Democratic Republic of Congo, Zimbabwe, Liberia, Madagascar, and Sierra Leone were seeking a second term, Nigeria was an outright contest for vacancy in the office of the presidency following a two-term presidency. I now turn to the two countries.

The presidential election in **Nigeria** offers a compelling case of the entrenchment of democratic governance in Africa's most populous country. Nigeria returned to democracy in 1999 after three decades of almost uninterrupted military rule.<sup>75</sup> Since its return to democratic governance, accusations of ballot rigging and fraud have followed its electoral cycles.<sup>76</sup> The 2023 contest was well contested between four candidates for the first time in Nigeria's recent history. President Bola Ahmed Tinubu was the candidate of the ruling party, All Progressive

<sup>74</sup> In 2020, the limits of this sacred constitutional practice were tested in the United States of America as well. See Daniel L. Weiner & Tim Lau, *Why the Presidential Transition Process Matters*, BRENNAN CTR. (Nov. 13, 2020), <https://tinyurl.com/e6rhy5xx>.

<sup>75</sup> See generally SALMON A. SHOMADE, *Nigeria: History, Colonial Legacy, and the Rule of Law*, in COLONIAL LEGACIES AND THE RULE OF LAW IN AFRICA (2023)

<sup>76</sup> Mark A. Green & Johnnie Carson, *The Pursuit of Democracy: The Importance of Nigeria's Elections*, WILSON CTR. (Mar. 8, 2023), [www.wilsoncenter.org/article/pursuit-democracy-importance-nigerias-election](https://www.wilsoncenter.org/article/pursuit-democracy-importance-nigerias-election).

Congress (APC); a former vice president, Alhaji Atiku Abubakar, for the People's Democratic Party (PDP); a former governor from the South-Eastern region of Nigeria, Mr. Peter Obi, for Labour Party (LP); and another former governor, senator, and former federal minister of defense, Mr. Rabi'u Musa Kwankwaso, for the New Nigeria Peoples Party (NNPP). Nigeria's presidential election of February 29 returned the APC's candidate as the president-elect.

Unexpectedly, complaints centered around conventional allegations of challenges to the rule of law and newer ones driven by technology. The election was alleged to have been marked by traditional challenges such as voter suppression in some regions, vote buying, violence, and by new challenges posed by developments in technology.<sup>77</sup> The promise of digital technology as a panacea to manual procedural challenges in elections in Africa has generated a different genre of dilemmas for African elections.<sup>78</sup> The challenges raise questions around democratic credibility, conduct of the elections, and the legitimacy of the winning candidate.<sup>79</sup> Undoubtedly, Nigeria's democratic experience with cyclical elections is consolidating. Yet even though Nigeria's presidential elections successfully consolidated the formal aspects of the transfer of power from one civilian administration to another, the electoral process raised many questions that were heard before Nigerian courts. I return to this point in my analysis of Narrative III. Regardless of its weaknesses, Nigeria's 2023 presidential election yielded at least two important lessons that bode well for the consolidation of democracy in Africa's most populous country. First, since Nigeria's independence, it is the first time that a third-party presidential candidate made a serious showing.<sup>80</sup> Second, since the end of military rule in 1999, it was also significant in that the recycling of former military generals as civilian leaders may have halted as there was none on the ballot.

<sup>77</sup> Abiodun Fatai, *Nigeria's Election Was Nearly Derailed by Technology – but Biometric Devices Weren't the Problem*, CONVERSATION (Mar. 2, 2023), <https://tinyurl.com/2nxwr7fs>; see also Marystella Simiyu, *Election Technology as a Means of Enhancing Democratic Legitimacy: A Case of Kenya*, in THE PALGRAVE HANDBOOK OF DEMOCRACY, GOVERNANCE AND JUSTICE IN AFRICA, *supra* note 43, at 114; Rhoda Osei-Affu, *Solutions or Problems? The Increasing Role of Technology in African Elections*, WILSON CTR., AFR. UP CLOSE (Dec. 11, 2017), <https://tinyurl.com/3dfs3cy7>.

<sup>78</sup> Nic Cheeseman, Gabrielle Lynch & Justin Willis, *Digital Dilemmas: The Unintended Consequences of Election Technology*, 25 DEMOCRATIZATION 1397 (2018).

<sup>79</sup> James Rupert, *Nigeria's Vote Signals Risks: How Its Partners Can Support Democracy*, U.S. INST. OF PEACE (Mar. 9, 2023), <https://tinyurl.com/mprs9ree>.

<sup>80</sup> Macdonald Dzirutwe & Temilade Adelaja, *How Nigeria's Presidential Election Is Galvanizing Young Voters*, REUTERS (Feb. 20, 2023), <https://tinyurl.com/ya9zst2z>.

**Liberia**, a small African state unlike Nigeria, is the second example that illustrates the entrenchment and consolidation of democratic regimes in Africa. Under the current leadership of President George Weah, Liberia's presidential election initially held on October 10, 2023,<sup>81</sup> headed for a runoff election between the incumbent and the opposition candidate, a former vice president, Mr. Joseph Boakai. Neither candidate met the threshold to be declared outright winner.<sup>82</sup> As Liberia's fourth postwar presidential election, the trend is again headed toward a consolidation of democratic governance. The significance of the election lies not only in what so far appears to be a free and fair conduct of the elections like in 2019,<sup>83</sup> but also the fact that it is the first presidential election in Liberia without the presence of the United Nations mission that previously supported Liberia's elections commission.<sup>84</sup> The runoff election resulted in the opposition candidate, Mr. Joseph Boakai, as the winner.<sup>85</sup> Unlike the trend in some other African states, outgoing president Weah did not attempt to extend his term in office unconstitutionally, nor has Liberia deteriorated into anarchy on account of the loss by the incumbent, who conceded defeat despite the closeness of the vote.<sup>86</sup>

While the elections in Nigeria and Liberia at least formally entrenched democratic processes, perceptions about them differ. The manipulation of electoral processes and constitutional rules to extend presidential terms undermines citizens' trust in democratic institutions.<sup>87</sup> Whereas Nigeria's election ended up in court, Liberia's incumbent president conceded defeat, dispensing with the likelihood of judicial involvement. Flawed elections engender a democratic backslide.<sup>88</sup> Nigeria and Liberia illustrate two different tales: it is not just about the outcome. The process

<sup>81</sup> *What to Know About Liberia's Presidential Election*, AL JAZEERA (Oct. 10, 2023), [www.aljazeera.com/news/2023/10/10/what-to-know-about-liberias-upcoming-elections](https://www.aljazeera.com/news/2023/10/10/what-to-know-about-liberias-upcoming-elections).

<sup>82</sup> *Liberians Vote for President in Tightly Contested Run-Off Election*, AL JAZEERA (Nov 14, 2023), <https://tinyurl.com/mr2n66hv>.

<sup>83</sup> *Free and Fair Elections "Confirm Liberia's Steady March Towards Lasting Peace," Says UN Chief*, UN PEACEKEEPING (Dec. 29, 2017), <https://tinyurl.com/2s3p5xmt>.

<sup>84</sup> Press Release, ECOWAS Comm'n, ECOWAS Preliminary Declaration: 2023 Run-Off Presidential Election in Liberia (Nov. 16, 2023), <https://tinyurl.com/3dkzth6p>.

<sup>85</sup> Press Release, ECOWAS Comm'n, ECOWAS Congratulates the Republic of Liberia (Nov. 18, 2023), <https://ecowas.int/ecowas-congratulates-the-republic-of-liberia/>.

<sup>86</sup> *Liberia's George Weah Concedes to Joseph Boakai in Presidential Polls*, AL JAZEERA (Nov. 18, 2023), <https://tinyurl.com/uuw9m2x9>.

<sup>87</sup> Oge Onubogu, *African's Reactions to Disputed Elections and Coups Show Discontent with Democracy*, WILSON CTR. (Sept. 5, 2023), <https://tinyurl.com/y8khr8nj>.

<sup>88</sup> Mark Green, Derek Mitchell & Daniel Twining, *Nigeria's Flawed Election Risks a Democratic Backslide*, FOREIGN POL'Y (Mar. 14, 2023), <https://tinyurl.com/57x6x2x3>.

is where accountability, transparency, and fairness that are germane to the rule of law matter: formal consolidation of democracy with procedural challenges that go to the root rule of law is not enough. Consequently, while elections have become more popular and sustained in Africa, citizens increasingly have less faith in their capacity to deliver free and fair outcomes.<sup>89</sup> As I argue in the previous section, the formal consolidation of democracy with procedural challenges that go to the root rule of law portend greater danger when judicialized, especially in the age of disinformation and social media. They risk delegitimizing or weakening the legitimacy of the institutions that uphold the rule of law.

### 3 Narrative III: Judicialization of Disputes before National Courts and Legitimacy Crises

In contemporary Africa, the judicialization of presidential elections between incumbents and challengers in courts is on the rise.<sup>90</sup> The judicialization of election disputes is mostly analyzed because of their potential to influence the trajectory of the concerned state. Nullification of election results as a result of judicialization is not a common phenomenon in Africa. The role of the judiciary is critical in safeguarding the ongoing democratization in Africa by ensuring credibility in the adjudication of electoral disputes. National, regional, and international courts play significant roles in the entrenchment of the rule of law.<sup>91</sup> Although

<sup>89</sup> Fredline M'Cormack-Hale & Mavis Zupork Dome, *Support for Elections Weakens Among Africans; Many See Them as Ineffective in Holding Leaders Accountable*, AFROBAROMETER DISPATCH, No. 551 (Sept. 16, 2022), <https://tinyurl.com/ykt36mnp>.

<sup>90</sup> The increased judicialization should be understood against a background of a judiciary that is struggling for legitimacy in many African countries. Makau Mutua puts this succinctly:

The Africanisation and indigenization of the judiciary failed to transform the justice sector from a colonially racist, anti-people, and oppressive instrumentality. Judges became extensions of the executive and served at its whim. Instead of becoming fountains of justice, courts were used to instill fear in the populace at the behest of the executive. The courts were used to crush political dissent and curtail civil society . . . Judges were viewed with disdain, contempt, or fear in most African states. This is why today the law, courts, and the legal sector are viewed with suspicion by most Africans. Judiciaries are not perceived to be the guardians of legality or impartiality. To be sure, the illegitimacy of the justice sector extended to all the other arms of the state.

Mutua, *supra* note 1, at 161–62.

<sup>91</sup> THE PERFORMANCE OF AFRICA'S INTERNATIONAL COURTS, *supra* note 9; TOM GINSBURG & TAMIR MOUSTAFA, *RULE OF LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES* (2008).



the decisions are outside the purview of the period that this chapter analyzes, in the recent past courts in Kenya<sup>92</sup> and Malawi<sup>93</sup> have risen to the occasion in standing up for free and fair electoral processes. In nullifying the 2017 presidential election, the Supreme Court of Kenya noted that “[t]he greatness of a nation lies in its fidelity to the Constitution and the strict adherence to the rule of law.”<sup>94</sup> The decisions in Kenya and Malawi offered a potent display of judicial independence where courts often come under intense pressure from political leaders.

Yet, judicialization of **high-profile** elections before national courts has implications for the ongoing legitimacy of the courts. These election disputes include cases relating to good governance and the rule of law, constitutional and electoral law amendments, and regime changes. The disputes attain a higher level of socio-economic and cultural undertone because of the national profile of the wealthy political elites involved in them.<sup>95</sup> For example, in the 2023 Nigerian presidential elections, many Nigerians viewed leading candidates through the lens of national geopolitical divisions with deep-seated histories and complexities. Indeed, a newspaper editorial described the election as one of:

the most divisive electoral contests ever held in the country since the advent of self-governance. They were ethnically-charged and deeply polarising along religious lines. The political elite, their “influencers,” as well as a section of the religious elite pushed Nigeria close to the brink of national collapse yet again through their actions and utterances.<sup>96</sup>

With the foregoing context, the judicialization of the election outcome not only heightened the socio-political division in the country and activated beliefs about the marginalization of a region but also exposed the limits of formal rules and the rule of law in addressing far-reaching social justice issues.

High-profile judicialization of election disputes before national courts weakens the legitimacy of the judiciary. The judicialization of high-profile

<sup>92</sup> Kimiko de Freytas-Tamura, *Kenya Supreme Court Nullifies Presidential Election*, N.Y. TIMES (Sept. 1, 2017), [www.nytimes.com/2017/09/01/world/africa/kenya-election-kenyatta-odinga.html](https://www.nytimes.com/2017/09/01/world/africa/kenya-election-kenyatta-odinga.html).

<sup>93</sup> Michael Wahman, *Will Bold Landmark Election Ruling Improve Malawian Democracy?*, CONVERSATION (Feb. 10, 2020), <https://tinyurl.com/mr224dha>.

<sup>94</sup> Raila Amolo Odinga & Another v. Independent Electoral and Boundaries Commission & 2 Others [2017] EKL.R, ¶ 394.

<sup>95</sup> See Akinkugbe, *supra* note 9.

<sup>96</sup> Editorial, *2023 Elections, Divisive, Politics, and National Reconciliation*, PREMIUM TIMES NIGERIA (Mar. 27, 2023), <https://tinyurl.com/yc5vyppa>.

disputes with complex socio-cultural and geopolitical implications can increase distrust of the adjudication of electoral disputes, leading in turn to a lack of confidence in the national courts.<sup>97</sup> The judicialization of election disputes before national courts when results go against the claims of the opposition in high-profile disputes weakens the trust of citizens in the judiciary. In such situations, allegations of compromise and state capture (among others) are levied against the judiciary. Nigeria's 2023 presidential elections offer a compelling example of this. Both the major opposition (PDP) and third-party (Labour Party) presidential candidates challenged the election of President Tinubu of the APC.<sup>98</sup> The Nigerian Court of Appeal and subsequently the Supreme Court of Nigeria affirmed the victory of the ruling party candidate, leading to polarizing analyses about the courts and their role.<sup>99</sup>

The point is not so much about the technicalities of the courts' analyses and reasoning as it is about the aspersion and shadow of bias that is cast on Nigeria's judiciary because of the judicialization of high-profile election disputes, prompting allegations of judicial capture and co-optation.<sup>100</sup> To illustrate, so great was the pressure on the third arm of the government that there were billboards, rallies, and social media trends with “#All Eyes on The Judiciary” as their hashtag. As one newspaper wrote: “Their purpose was clear – to exert pressure on the esteemed judges of the panel, with a view to ensuring that they do not compromise the integrity of the case at hand.”<sup>101</sup> As another commentator noted:

In Nigeria's history, the judiciary has never been faced with mounting pressure as it is facing currently. Since after the general election when the battle for the validity of the results of the elections shifted to the various Election Petitions Tribunals, many Nigerians have turned their focus on the judiciary, insisting that it should deliver substantial justice without fear and favour.<sup>102</sup>

<sup>97</sup> Gathii & Akinkugbe, *supra* note 9.

<sup>98</sup> Camillus Eboh, *Nigeria's Obi, Atiku Challenge Presidential Election Results*, REUTERS (Mar. 21, 2023), <https://tinyurl.com/3yae8sb5>.

<sup>99</sup> See, e.g., Sonala Olumhense, *Nigeria Court Didn't Want Contested Election Case. It Just Defended the Winner*, OPEN DEMOCRACY (Sept. 15, 2023), <https://tinyurl.com/y79n32mn>; Camillus Eboh, *Nigeria Opposition's Obi Slams Court Ruling Confirming Tinubu Election*, REUTERS (Nov. 6, 2023), <https://tinyurl.com/2vcp9ye8>.

<sup>100</sup> Shaffer and Sandholtz caution that “any institutional means can be co-opted, abused, and subverted in practice.” See Chapter 1.

<sup>101</sup> *Mounting Undue Pressure on the Judiciary*, THIS DAY, [www.thisdaylive.com/index.php/2023/08/20/mounting-undue-pressure-on-the-judiciary](http://www.thisdaylive.com/index.php/2023/08/20/mounting-undue-pressure-on-the-judiciary) (last visited Jan. 4, 2024).

<sup>102</sup> *Id.*

The expectation from these opposition candidates is that they want the Nigerian courts to be brave and annul the election if it is indeed found to be deeply flawed, as their counterparts in Kenya and Malawi did.<sup>103</sup> The view that the judiciary is the last line of defense for the liberal democratic constitutional order therefore leaves two possibilities: while it heralds the possibility of entrenching democratic norms and the rule of law, it simultaneously weakens the trust of the public in the judiciary and its legitimacy. Put differently, given the low level of judicial rejection of election results in Africa, the unabating judicialization of election disputes in national courts may lead to two contrasting developments with direct implications for the strengthening or weakening of the rule of law. On the one hand, the judicialization of election disputes and emergence of a winner as declared by the courts is an affirmation of a core tenet of the rule of law enshrined in the role of the courts. Where there is no distrust in the judiciary, notwithstanding the high-profile nature of the election dispute, such an outcome will enhance citizens' belief in the rule of law. On the other hand, keenly contested election disputes, such as presidential elections, risk delegitimizing the judiciary as they are not viewed as impartial arbiters. For example, Nigeria's 2023 presidential election was conducted against a background of sharp division along geopolitical, religious, and tribal lines. The subsequent judicialization of the election disputes before the tribunal and courts manifested suspicion and mistrust in the judiciary's capacity to arbitrate in an unbiased manner.<sup>104</sup> Consequently, distrust of the independence and impartiality of the judiciary casts a negative shadow on the efficacy of the rule of law.

Furthermore, the overwhelming attitude of African national judiciaries to abstain from overruling presidential elections inadvertently empowers would-be authoritarians who see the courts as tools to support the outcome of flawed elections, or to pursue constitutional change. Particularly, the practice not to overturn presidential elections conversely operates to legitimize "regime actions that helped actors consolidate power, undermine the opposition, and tilt the electoral playing field

<sup>103</sup> See Olabisi D. Akinkugbe & James Thuo Gathii, *Judicial Nullification of Presidential Elections in Africa: Peter Mutharika v. Lazarus Chakera and Saulos Chilima in Context*, AFRONOMICSLAW BLOG (July 3, 2020), <https://tinyurl.com/mtfbn4ma>.

<sup>104</sup> Ahead of the release of the judgments on the election disputes arising from Nigeria's 2023 presidential elections, there was a social media campaign dubbed "All Eyes on the Judiciary." See generally Funmilayo Odude, *What's Wrong with All Eyes on the Judiciary*, FINANCIAL NIGERIA (Sept. 11, 2023), [www.financialnigeria.com/what-s-wrong-with-all-eyes-on-the-judiciary-blog-813.html](http://www.financialnigeria.com/what-s-wrong-with-all-eyes-on-the-judiciary-blog-813.html).

heavily in their favour. *Regimes turn to courts to carry out their dirty work because, in doing so, they benefit from the associations that judicial review has with democratic constitutional traditions and the rule of law.*"<sup>105</sup>

The rising practice of judicializing presidential elections by political actors is thus strategic and not simply about establishing the rule of law. While the finality of the decision of the courts as the source of legitimacy for contested elections remains germane, high-profile election disputes reveal the limits of formal rules of elections in addressing social inequities and the marginalization of candidates, raise allegations of judicial capture, and unwittingly weaken the legitimacy of the courts. This does not bode well for the rule of law.

These three narratives of the rule of law in contemporary Africa illustrate deeply contradictory practices. The concept is equally deployed by liberal and illiberal regimes to defend and legitimize their actions. The rule of law falls short of addressing any of the deep-seated hierarchies that characterize the African continent. As such, the extent to which a consistent appeal to the virtues of the rule of law alleviates the challenges facing African states remains murky.

#### IV In Lieu of Conclusion: Emerging Transnational Rule of Law and Good Governance in Africa?

This chapter would be incomplete without some reflection on the evolving transnational practice of the rule of law as championed by Africa's regional and subregional courts. The transnational context of the rule of law is equally gaining ground in Africa. In Africa, where national courts have struggled, as the previous section on judicialization illustrates, Africa's international – regional and subregional – courts increasingly provide an alternative forum for litigation to advance protections against alleged arbitrary exercises of power by the national ruling party. The emerging jurisprudence and legal order that Africa's regional courts offer is transnational in nature.

The concept of Transnational Legal Orders (TLOs) advanced by Terrence C. Halliday and Gregory Shaffer "provide[s] new theoretical tools to integrate transnational, national, and local lawmaking and

<sup>105</sup> See David Landau & Rosalind Dixon, *Abusive Judicial Review: Courts Against Democracy*, 53 U.C. DAVIS L. REV. 1315 (2020) (emphasis added).

practice into a coherent framework to capture the dynamic changes in legal ordering taking place today.”<sup>106</sup> The allure of coherence in the transnational legal order, however, belies the fluidity, complexity, and ambivalence of the rule of law practices before Africa’s regional courts. The disputes that are judicialized before Africa’s regional courts emerge from different legal regimes, contexts, and facts, and the motives for their judicialization differ. As such, the case for coherence in the rules of the legal order that Africa’s regional courts are developing is less persuasive. In engaging the rule of law as a transnational legal order, Jothie Rajah makes a similar observation. For Rajah, “the regulatory precision implied by the order is paradoxically undermined by the shifting meanings of the rule of law.”<sup>107</sup>

Most importantly, as Shaffer and Sandholtz note in their contribution to this book, TLOs “are normative orders that implicate law and legal practice across and within multiple national boundaries.”<sup>108</sup> For them, “transnational legal processes provide normative resources to protect human rights, uphold democratic processes, and safeguard the rule of law.”<sup>109</sup> Shaffer and Sandholtz also assess the role of international law and institutions in entrenching the rule of law from a transnational perspective.<sup>110</sup> Still, the emerging transnational rule of law in Africa, as

<sup>106</sup> TRANSNATIONAL LEGAL ORDERS 63–64 (Terrence C. Halliday & Gregory Shaffer eds., 2015). According to the authors, the project on TLOs comprises three aspects:

First, it seeks to explain the origins, formation, and change of TLOs through different facilitating and precipitating conditions and through the dynamic, recursive, processes between law formation and implementation of the transnational, national, and subnational levels. Second, it aims to observe and theorize the development of different configurations of TLOs in terms of the settlement of transnational legal norms and variations in the alignment of one or more TLOs with an issue. Third, it aims to understand the variable impacts of different TLOs on international organizations and nation-states, national policy-makers and officials, private-markets and occupations, civil society, and individuals.

<sup>107</sup> Jothie Rajah, “Rule of Law” as *Transnational Legal Order*, in TRANSNATIONAL LEGAL ORDERS, *supra* note 106, at 340, 342.

<sup>108</sup> See Chapter 1.

<sup>109</sup> Gregory Shaffer & Wayne Sandholtz, *The Rule of Law in Transnational Context: Introduction to the Symposium*, 8 U.C. IRVINE J. INT’L TRANSNAT’L & COMP. L. 1 (2023).

<sup>110</sup> *Id.* at 16 (“From a transnational perspective, we contend that international norms and institutions are important for protecting individuals from the arbitrary exercise of power. In practice, international law and institutions can contribute to the rule of law, although (as we will see) they also can advance the rule of the powerful by and through law.”).

opined by Africa's regional courts, does not presuppose a coherent and single narrative about legal principles and legal orders.

Africa's regional courts have been at the forefront of mega-political disputes. The impact of Africa's regional and subregional courts as actors in transnational normative processes, in the context of high-profile elections, and how they contribute to the strengthening of transnational public discourse have been documented by scholars. While transnational judicial dialogue<sup>111</sup> between African, European, and Latin-American regional judicial legal orders is trending upward, the extent to which the transnational judicial dialogue is happening between regional and national legal orders in Africa remains very low.

The strategic litigation of the rule of law in Africa's regional courts, which foregrounds the socio-political, legal, economic, and cultural contexts of the disputes, bypasses national challenges and pushes back on "elite agreement at transnational level."<sup>112</sup> In turn, the growing judicialization before Africa's regional courts opens the door for a more transnational articulation of the rule of law in Africa. Increasingly, Africa's regional courts monitor states' "behind the border adherence to international commitments such as human rights treaties, . . . [and] rule of law."<sup>113</sup> Africa's regional and subregional legal orders that guarantee rights for individuals and civil societies (as norm developers to access their courts) have transnational effect.<sup>114</sup> Strategic human rights litigation, with express overlap on the rule of law, has been judicialized before Africa's regional and subregional courts. These disputes, arising from various national contexts, are anchored on the importance of the rule of law and consolidation of democratic governance in Africa.<sup>115</sup>

<sup>111</sup> See Knut Traisbach, *A Transnational Judicial Public Sphere as an Idea and Ideology: Critical Reflections on Judicial Dialogue and its Legitimizing Potential*, 10 *GLOB. CONSTITUTIONALISM* 186 (2021).

<sup>112</sup> STEPHEN HUMPHREYS, *THEATRE OF THE RULE OF LAW: TRANSNATIONAL LEGAL INTERVENTION IN THEORY AND PRACTICE* 224 (2010).

<sup>113</sup> Alter & Madsen, *supra* note 31.

<sup>114</sup> See generally Theresa Squatrito, *The Democratizing Effects of Transnational Actors' Access to International Courts*, 24 *GLOB. GOVERNANCE* 595 (2018).

<sup>115</sup> As Shaffer and Sandholtz observe in Chapter 1:

International law and institutions implicate rule-of-law protections for individuals in the following three ways. First, from a minimalist perspective, international law and institutions can help to secure international peace, which ultimately affects individuals and societies. Second, international law and institutions can indirectly affect domestic rule-of-law

Litigants before regional courts frame disputes in a transnational way.<sup>116</sup> Africa's regional courts are in essence invited by litigants to adjudicate over processes and outcomes that in many cases have been the subject of votes by the citizens. If, as Shaffer and Sandholtz argue, "in an interconnected world, the rule of law should be viewed as a normative social order that involves the horizontal, vertical, and transversal interaction of domestic and international law, which, in turn, reciprocally affect each other,"<sup>117</sup> there is more to be thought about and written on the transnational rule of law aspects of the disputes before Africa's regional courts.

Africa's regional courts are transnational venues that welcome litigants – individuals, civil society, multinational corporations – as transnational entrepreneurs.<sup>118</sup> Africa's regional courts are nonstatic in the generation, affirmation, and protection of the rule of law. Normatively, then, the courts are agents for the generation, affirmation, and protection of a transnational rule of law in Africa. Under their watch, transnational litigation, naming and shaming, and cases initiated for the purpose of accountability and for social engineering are accepted to push back on the decline of the transnational rule of law in Africa. Notably, there are lingering signs of a decline of the rule of law where member states limit the opportunities for individuals and civil society to pursue cases against them in the regional courts. In the context of the African Court on Human and Peoples' Rights, some states have tried to shield themselves from scrutiny by withdrawing the declaration that allows citizens and relevant nongovernmental organizations direct access to the African Court. In a similar vein, other subregional courts also have faced backlash from their member states.<sup>119</sup> The emergent body of

practices in relation to individuals. National law often incorporates international law; national courts and other bodies may reference it; and national actors may otherwise harness it, including to protect rule-of-law concerns. Third, international law and institutions can directly provide rights to individuals and impose duties on national governments, international institutions, and private actors.

<sup>116</sup> Olabisi D. Akinkugbe, *Houngue Éric Noudehouenou v. Republic of Benin*, 115 AM. J. INT'L L. 281 (2021).

<sup>117</sup> See Chapter 1.

<sup>118</sup> As Shaffer and Sandholtz note: "Private actors, such as multinational companies, also harness rule-of-law rhetoric to advance their material interests." See Chapter 1.

<sup>119</sup> Karen J. Alter, James T. Gathii & Laurence R. Helfer, *Backlash Against International Courts in West, East and Southern Africa: Causes and Consequences*, 27 EUR. J. INT'L L. 293 (2016).



transnational rule of law from Africa's regional and subregional courts should not be restricted to judicialization of high-profile election disputes alone. Future research can explore the evolving transnational legal ordering of environmental law,<sup>120</sup> climate policies, and multinational corporations before regional courts, among other issues.

<sup>120</sup> See generally Yusra Suedi & Marie Fall, *Climate Change Litigation Before the African Human Rights System: Prospects and Pitfalls*, J. HUM. RTS. PRAC. (2023); Sonja Kahl, *Environmental Litigation Before Regional Economic Courts in Africa and Latin America*, in THE FUTURE OF ENVIRONMENTAL LAW (Stefan E. Weishaar & Kars J. de Graaf eds., 2023); James Thuo Gathii, *Saving the Serengeti: Africa's New International Judicial Environmentalism*, 16 CHI. J. INT'L L. 386 (2016); Eghosa O. Ekhatior, *International Environmental Governance: A Case for Sub-regional Judiciaries in Africa*, in HUMAN RIGHTS AND THE ENVIRONMENT UNDER AFRICAN UNION LAW 209 (Michael Addaney & Ademola Oluborode Jegede eds., 2020).