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The Rule of Law Writ Large

The European Union and Its Rogue Member States

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I Introduction

The rule of law has become all things to all people, which is why virtually everyone can agree that the rule of law is a good thing. To some, it stands for rule according to legal standards instead of according to personalistic whim.[1] To others, it stands for purely formal criteria of legality – coherence, noncontradiction, clarity – with the specific content to be sorted out separately.[2] To still others, it stands for predictability and order, a bulwark against the vicissitudes of politics.[3]

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[1] Identifying the rule of law with the reduction of arbitrariness is the hallmark of the work of Martin Krygier. *See, e.g.*, Martin Krygier, *The Rule of Law: Pasts, Presents and Two Possible Futures*, 12 Ann. Rev. L. & Soc. Sci. 199, 204 (2016); Martin Krygier, *The Rule of Law: Legality, Teleology, Sociology*, *in* Relocating the Rule of Law 45, 60 (Gianluigi Palombella & Neil Walker eds., 2009).

[2] Lon L. Fuller, The Morality of Law (rev. ed. 1969).

[3] Judith Shklar identified the rule of law with "freedom from fear." Judith Shklar, *Political Theory and the Rule of Law*, *in* Political Thought and Political Thinkers 21, 24 (Stanley Hoffmann ed., 1998).

Philosophical debates have erupted over whether the rule of law should be defined in a "thin" way through primarily procedural requirements or whether the rule of law should include substantive commitments to legal principles that would make the concept "thick."[4] The variations are very nearly endless, especially when one considers the versions that grow from different national histories and that go by the name of the *Rechtsstaat*, *estado de derecho*, *l'État de droit*, *jogállam*, and more.[5]

What most of these diverse conceptions of the rule of law share, however, is the unstated assumption that the rule of law should be understood within the boundaries of national law. The rule of law analyst typically takes the national legal system as if it were the only system in which rule of law had any real purchase and analyzes it in isolation. I will call this nationally focused conception the *rule of law writ small*.

As this volume makes clear, however, the rule of law is no longer properly analyzed as purely national.[6] Not only can one speak of international law as a rule-of-law system of its own (even if flawed),[7] but increasingly transnational law[8] enters into national law itself and

[4] One influential recent handbook on the rule of law has sparring chapters on this distinction: Jorgen Moller, *The Advantages of a Thin View, in* HANDBOOK ON THE RULE OF LAW 21 (Christopher May & Adam Winchester eds., 2018); Adriaan Bedner, *The Promise of a Thick View*, *in* HANDBOOK ON THE RULE OF LAW, *supra*, at 34.

[5] A useful review of the way that national conceptions of rule of law vary can be found in THE RULE OF LAW: HISTORY, THEORY AND CRITICISM (Pietro Costa, Danilo Zolo & Emilio Santoro eds., 2007).

[6] As Gregory Shaffer and Wayne Sandholtz argue in Chapter 1: "We ... contend that international law is critical for advancing the rule of law in multiple direct and indirect ways that affect individuals and societies." Brian Tamanaha, in Chapter 2, adds that not only individuals but also states themselves are proper subjects of the rule of law.

[7] For an argument that international law is biased in favor of powerful states, see B.S. Chimni, *Legitimating the International Rule of Law, in* CAMBRIDGE COMPANION TO INTERNATIONAL LAW 290 (James Crawford & Martti Koskenniemi eds., 2012). For a critique pulling in the opposite direction, which is that powerful states feel free to ignore international law when it suits them, see JACK GOLDSMITH & ERIC POSNER, THE LIMITS OF INTERNATIONAL LAW (2005).

[8] I use the phrase "transnational law" throughout this chapter to include all law above the level of the state. Some of this supranational law is regional or bilateral affecting some states but not others, while some is fully international in the sense of binding all (or even most) countries. Also in Europe, where much of my work is concentrated, European Union law is typically not referred to as international law, because it has primacy and direct effect within national legal systems and thus constitutes part of domestic law as well. So, throughout the chapter, I use "transnational" as the more inclusive term to include all legal norms that have their origins above the level of the individual state.

modifies (or at least is supposed to modify) the operation of what had been imagined by legal philosophers as a hermetically sealed-off space.[9]

This is particularly true in parts of the world in which national legal systems are embedded in increasingly dense webs of transnational legal commitments. The member states of the European Union (EU) as well as the signatory states to the European Convention on Human Rights (ECHR) or the Inter-American Convention on Human Rights or the African Charter on Human and Peoples' Rights are finding an increasingly large number of transnational law incursions on national law as nonoptional parts of their own domestic legal orders. Even more hard law and soft law emerge from international treaty body recommendations, ICRC protocols, WTO rules, bilateral investment treaties, UN Security Council resolutions, or even the UN Charter itself, and these may also constrain what domestic law should do. The United States and the United Kingdom, from which much of the rule-of-law literature in English originates, may be particularly allergic to being (or to admitting to being) encumbered by binding international legal obligations, but that is an increasingly marginal standpoint among the world's democracies and an even more marginal reality in the world as transnational institutions gain more and more reach and enforcement capacity.

As we elaborate what the rule of law requires for any specific country, then, we should consider the national system as it is embedded in its transnational legal commitments. If the transnational legal order requires one set of actions while the national legal order requires another, it may not matter much to the daily life of the law whether each level is consistent and predictable within its own sphere. Legal certainty – the bare-minimum element of the rule of law – can only be obtained if the transnational and national legal orders do not require contradictory things, because otherwise legal subjects will be left wondering which apparently binding rule applies to them. Harmonizing law across transnational and national levels is required for the rule of law to be fully realized, regardless of whether one has a thin or thick conception in mind. Harmonizing across these levels in any given legal space constitutes what I call the *rule of law writ large*.

Why move from thinking about the rule of law writ small to thinking about the rule of law writ large? Thinking of the rule of law as necessarily embracing national and transnational principles helps us to reimagine

[9] If transnational law did not have such an effect in national legal systems, aspirational autocrats like Vladimir Putin in Russia and Recep Tayyib Erdoğan in Turkey would not have taken such extraordinary steps to ensure that the national legal system remained impervious to the rulings of transnational courts. *See* Chapters 8 (Russia) and 9 (Turkey).

one of the most important issues of our time: the global crisis of the rule of law. Around the world, once-democratic states are increasingly backpedaling on their constitutional commitments, as aspirational autocrats compromise the independence of judiciaries, eliminate constraints on executive power, destroy the independence of "fourth branch" good-government institutions, concentrate control of the media in politically friendly hands, restrict the operation of civil society groups, put a political squeeze on universities, and entrench themselves in power for the foreseeable future.[10] But, as we will see, transnational institutions are quickly developing increasingly hard legal standards that make democratic and rule-of-law backsliding ever more clear violations of transnational law.[11]

As long as one does not take into account transnational law, the activities of aspirational autocrats may appear to be perfectly in compliance with the rule of law in the sense of pure legality within the national legal system. In many backsliding democracies, autocrats remove key democratic protections in ways that are perfectly legal. When an aspirational autocrat comes to power with a parliamentary majority and passes laws that compromise the independence of the judiciary, what is wrong with that, especially if the (packed) constitutional court says that it was all constitutional? What is the problem if the parliament delegates unlimited decree power to the executive during a state of emergency, a power that is endlessly extended by continued parliamentary affirmation? These and other examples make clear that formal legality within a national legal system is not the same thing as the rule of law writ large. It may not even be the same thing as the rule of law writ small, but then one gets into the weeds arguing over precisely which definition one has in mind.

Of course, the vast literature on rule of law writ small was in general designed for just this purpose – to provide a critique of formal legality where it fell short of some normative standards.[12] The question is how one generates those standards and whether they can be effectively deployed beyond an academic publication when real-world problems require answers. For most of the academic writing on the subject, the answer comes through political theory – in definitions of democracy,

[10] Kim Lane Scheppele, *Autocratic Legalism*, 85 U. CHI. L. REV. 545 (2018).

[11] This argument is explained in much greater detail in my 2023 Grotius Lecture: Kim Lane Scheppele, *Restoring Democracy Through International Law*, AM. U. L. REV. (forthcoming).

[12] Of course, the most famous example is the checklist provided by FULLER, *supra* note 2.

constitutionalism, and even rule of law.[13] But do those standards translate into persuasive public arguments at times of democratic crisis?

Using existing off-the-rack philosophical theories to understand what the rule of law requires often fails to address real-world problems. First, these theories often work by requiring their adherents to use familiar vocabulary in unfamiliar ways, which makes the acceptance of the theories by broader publics difficult. If democracy, for example, is only properly so called when those elected agree to be bound by the laws of their predecessors because that is what the rule of law requires, then what do we make of perfectly reasonable democratic demands for change? If the rule of law smuggles in conceptions of social rights unfamiliar in the particular context in which it will be deployed, then are those who think differently necessarily legal scoundrels? We can solve these problems by defining them away, but democratic publics can be forgiven if they think that definitional sleight of hand is too clever by half.

Second, theories of the rule of law can themselves be manipulated by those who are supposed to be constrained by them. Many autocratic leaders have their own theorists in chief who provide ready-to-hand political-theory answers to complex questions involving the rule of law.[14] In fact, in one of the most famous twentieth-century debates over the rule of law – the debate between Carl Schmitt and Hans Kelsen in interwar Germany[15] – Schmitt's ideas conveniently dovetailed with the interests of the Nazi regime he defended, so it was not surprising that he became their practical theorist of choice. Of course, most academic theorists write about rule of law precisely to oppose dictatorial and genocidal regimes, but nonetheless it is difficult to find good *democratic* – or, for that matter, *rule-of-law* – reasons to defend one academic theory over another without simply arguing from the practical consequences of adopting a particular view. It is easy to see how autocrats can then just say that the academic theorist is simply smuggling a preferred political position into the standards. Autocrats then feel justified in doing the

[13] For an excellent review of the options, see BRIAN Z. TAMANAHA, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY 96 (2004).

[14] For example, in Hungary, András Lánczi has long provided philosophical cover for the actions of Viktor Orbán. For my analysis of Lánczi's writing, see Kim Lane Scheppele, *The Opportunism of Populists and the Defense of Constitutional Liberalism*, 20 GERMAN L.J. 314 (2019).

[15] A useful review of this debate, emphasizing how Schmitt believed that the executive was the "guardian of the constitution" while Kelsen thought the judiciary was the better guardian, can be found in SARA LAGI, *Democracy and Constitution, in* DEMOCRACY IN ITS ESSENCE: HANS KELSEN AS A POLITICAL THINKER 55 (2020).

same – manipulating the choice of theory while accusing those who oppose them of "looking over a crowd and picking out your friends."[16]

Instead, I suggest a less manipulatable and more comprehensible standard: using transnational law to guide transitions back to democracy in rogue states whose resident autocrats have used the law to consolidate power in their hands and attack the rule of law at home. Of course, transnational law is famously incoherent and siloed into different fields that often conflict; hence the calls for "constitutionalization" that have emerged over the years.[17] But an increasing body of transnational law deals directly with questions of democracy and human rights, the typical subjects of constitutionalism within national legal orders. Transnational standards are rapidly emerging in these fields, particularly in regional human rights courts. This new transnational legal scaffolding can support the rebuilding of democracy while it is under reconstruction from within.

By using transnational law as a framework within which to assess and urge changes to national law in states that are declining in their commitments to democracy and the rule of law, we can accomplish three purposes: (a) to elaborate in practice a common baseline of shared

[16] The quotation as a criticism of the selectivity of legal sources appeared in Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 Iowa L. Rev. 195, 214 (1983) ("It sometimes seems that citing legislative history is still, as my late colleague [Judge] Harold Leventhal once observed, akin to 'looking over a crowd and picking out your friends.'"). Extended to comparative constitutional law by Justice Stephen Breyer in a debate with Antonin Scalia over whether the US Supreme Court should look to foreign law in making its decision, the same point applies. Breyer argued:

> The criticism is you'll look over the party, the cocktail party – remember Judge Leventhal said this about legislative history: Those who use legislative history, well it's like looking at a cocktail party, you look over the cocktail party to identify your friends. (Laughter.) And I say to that, well then you're not doing your job. . . . I would refer to the cases against me that I come across as much as for me. And the fact that somebody's come out the other way in a foreign court doesn't make it any the less interesting. Maybe it's more interesting. But this is not a major thing. It's not some kind of determinative thing in dozens of cases of constitutional law; it's simply from time to time relevant. And if it becomes more than that, I don't know how it's going to work.

Transcript of discussion between US Supreme Court Justices Antonin Scalia and Stephen Breyer, American University's Washington College of Law (Jan. 13, 2005), www.freerepublic.com/focus/news/1352357/posts.

[17] Jan Klabbers, Anne Peters & Geir Ulfstein, The Constitutionalization of International Law (2009).

standards (thereby eliminating the "double standards" problem); (b) to develop methods for assessing the democratic and rule-of-law *bona fides* of backsliding states that are impossible for domestic parties alone to manipulate (which I will call the "North Star" effect); and (c) to provide a legal justification within national legal systems to make sharp breaks, if need be, with existing domestic autocratic law in order to harmonize national law with transnational democratic law (which I will call the principle of "asymmetric rupture").

II Tackling Democratic Backsliding within the Rule of Law Writ Small

To show why we need to reach beyond existing national rule-of-law paradigms for democratic restoration, an example will reveal the state of the art. In late 2021, some Hungarian legal scholars tried to crowd-source proposals for a newly elected government to use in restoring democracy to Hungary.[18] Hungary had experienced one of the most spectacular collapses from being a star performer in the postcommunist transitions of the 1990s to being the leader of the democratic backsliders in the region in the 2010s, falling from democracy to autocracy in the space of one decade.[19] After his election in 2010 with a constitutional majority (that is, a majority capable of amending the constitution without partners), Prime Minister Viktor Orbán rewrote the entire legal system, including a new constitution and thousands of pages of laws, to

[18] Verfassungsblog debate *Restoring Constitutionalism* (Dec. 2021–Mar. 2022), https://verfassungsblog.de/category/debates/restoring-constitutionalism/. The debate eventually produced twenty-two contributions.

[19] By 2020, a decade into Prime Minister Viktor Orbán's reign, the key democracy raters agreed. The Varieties of Democracy project, V-Dem, downgraded Hungary to an "electoral autocracy" in 2020, explaining that "Hungary is no longer a democracy, leaving the EU with its first non-democratic Member State." V-Dem Institute, Autocratization Surges – Resistance Grows: Democracy Report 2020 4 (Mar. 2020), https://v-dem.net/documents/14/dr_2020_dqumD5e.pdf. Hungary has remained in the "electoral autocracy" category since. *See* V-Dem Institute, Autocratization Turns Viral: Democracy Report 2021 (Mar. 2021), www.v-dem.net/media/filer_public/c9/3f/c93f8e74-a3fd-4bac-adfd-ee2cfbc0a375/dr_2021.pdf. Freedom House downgraded Hungary from a democracy to a "transitional/hybrid regime" in 2020, explaining that Hungary's decline has been the most precipitous ever tracked in the *Nations in Transit* reports on postcommunist states. Hungary had been one of the three democratic frontrunners as of 2005, but in 2020 it became the first country to descend by two regime categories and leave the group of democracies entirely. Freedom House, Nations in Transit 2020: Dropping the Democratic Façade 2 (2020), https://freedomhouse.org/sites/default/files/2020-04/05062020_FH_NIT2020_vfinal.pdf.

lock power into his inner circle.[20] The parliamentary election in 2022 looked like it would provide the first real chance to defeat Orbán because all of the opposition parties had agreed to work together despite the tilted electoral playing field and their own internal disagreements. The question for them was how they could govern if they won, given that Orbán's constitutional revolution had created a dense thicket of laws that only a two-thirds parliamentary majority could change, while also ensuring that the opposition would almost surely never win even a simple majority in the parliament.[21] The crowdsourcing request asked what a new government could and should do to restore the rule of law, given that, as long as Orbán's party held a mere one-third of the seats in the parliament, it could block virtually all significant changes to the system he had created. How could the opposition, if elected with a bare majority insufficient to alter the "two-thirds laws," restore democracy within the rule of law, given that the national law would be arrayed against them?

Many of the proposals suggested what you would expect constitutional scholars to say. They suggested various ways to convene a constituent assembly to write a new constitution with multiple suggestions as to how to live with bad law in the meantime.[22] Since the European revolutions of 1848, this has been the dominant script of democratic reform.[23] Come to power by revolution or election, convene a constituent assembly, and write (or rewrite) the constitution!

Constituent assemblies have played an important role in history.[24] But they are not the only way that democratic transitions occur. Some of the

[20] For analyses of the new Orbán constitution of 2011–2012, see Miklós Bánkuti, Gábor Halmai & Kim Lane Scheppele, *From Separation of Powers to Government Without Checks: Hungary's Old and New Constitutions*, *in* CONSTITUTION FOR A DIVIDED NATION: HUNGARY'S FUNDAMENTAL LAW (Gábor Attila Tóth ed., 2012); Miklós Bánkuti, Gábor Halmai & Kim Lane Scheppele, *Hungary's Illiberal Turn: Disabling the Constitution*, 23(3) J. DEMOCRACY 138 (July 2012).

[21] On the rigged election law, see Kim Lane Scheppele, *How Orbán Wins*, 33(3) J. DEMOCRACY 45 (July 2022).

[22] For example, Andrew Arato & Gábor Halmai, *So that the Name Hungarian Regain Its Dignity: Strategy for the Making of a New Constitution,* VERFASSUNGSBLOG (July 2, 2021), https://verfassungsblog.de/so-that-the-name-hungarian-regain-its-dignity/; Mark Tushnet, *Restoring Self-Governance: Constitutional Change and the Charge of Illegality,* VERFASSUNGSBLOG (Dec. 14, 2021), https://verfassungsblog.de/restoring-self-governance/.

[23] JOEL COLÓN-RÍOS, CONSTITUENT POWER AND THE LAW (2020); THE PARADOX OF CONSTITUTIONALISM: CONSTITUENT POWER AND CONSTITUTIONAL FORM (Martin Loughlin & Neil Walker eds., 2018).

[24] For a recent symposium on this history, see Joel I. Colón-Ríos et al., *Constituent Power and Its Institutions*, 20 CONTEMP. POL. THEORY 926 (2021), https://doi.org/10.1057/s41296-021-00467-z.

constitutions that have been most successful at creating new stable democracies out of dictatorships – e.g., Germany's and Japan's – were written by experts meeting largely in secret while their respective countries were under foreign occupation. Others have been written under less-than-ideal circumstances in situations of nontransparency, including the 1989 Hungarian constitution itself.[25] Even the much-valorized South African constitution, written with an unprecedented amount of public opportunities for input, turns out to have been written without its drafters taking on board most of the suggestions that arrived on their doorsteps.[26] The recent Chilean constituent assembly, which precisely followed the ideal script, was met with a massive electoral rejection of its proposal.[27] So constituent assemblies, when one looks at them close-up, are complicated and not nearly as participatory, democratic, or successful in action as they are in theory.

More crucially, though, this standard recipe for restoring the rule of law to autocratic countries through constituent assemblies is unlikely to work under present circumstances. In the 1970s–1990s, when first Southern Europe, then Latin America, and then Eastern Europe went through democratic transformations, the antidemocratic forces that were swept aside in these democratic revolutions mostly stood down and did not claim a continued right to rule. Their supporters, if they still had any, faded away quickly. Thus, new constitutions could be written without the dictators or their supporters at the table. Or, if they were there, they quickly vanished in the elections that followed.

In what is sometimes being called "Transition 2.0," focusing on how democracy can be restored now after the autocratic governments have damaged the earlier version,[28] the situation is quite different. By and large, those who destroyed democracy this time did not seize power through coups and military occupation, but instead came to power through elections.[29] These leaders still have support – even if not

[25] Kim Lane Scheppele, *Unconstitutional Constituent Power*, *in* MODERN CONSTITUTIONS (Rogers Smith & Ricard Beeman eds., 2020).

[26] HEINZ KLUG, CONSTITUTING DEMOCRACY: LAW, GLOBALIZATION AND SOUTH AFRICA'S POLITICAL RECONSTRUCTION (2000).

[27] Maria Carrasco, *Why We Failed To Approve The New Chilean Constitution: The Need For A Cultural Transformation*, LSE LATIN AM. & CARIBBEAN BLOG (Sept. 15, 2022), https://tinyurl.com/47mttj2k.

[28] TRANSITION 2.0: RE-ESTABLISHING CONSTITUTIONAL DEMOCRACY IN EU MEMBER STATES (Michal Bobek et al. eds., 2023), www.nomos-elibrary.de/10.5771/9783748914938/transition-2-0.

[29] Scheppele, *supra* note 10.

majority support – among their citizens, and they will demand a role in whatever transition occurs. They and their supporters are not going away. Calling a constitutional convention with the autocrats and their followers at the table is therefore a tricky business. One might well risk a failure to make a democratic transition at all, especially given how adept the autocrats are at rigging the rules for constituent assemblies and how well the autocrats know the systems they designed, which gives them an advantage. Hugo Chávez in Venezuela and Rafael Correa in Ecuador provide two cautionary tales when considering how autocrats can rig constituent assemblies to their own benefit.[30]

If one has a purely national idea of the rule of law and the idea of a constituent assembly fails on practical grounds, then one is left with various unsatisfactory methods for getting out from under the laws created by an autocrat to preserve autocratic rule. Many Hungarian lawyers felt compelled to follow Orbán's laws even as they sought to undermine them, because anything other than obedience to the laws laid down would constitute a violation of the rule of law. When the rule of law is used to justify the continuation of an antidemocratic system, something is wrong with the conception of the rule of law. And what is wrong with standard accounts of the rule of law is their national-only focus. Before explaining how the Hungarian opposition developed a plan to escape Orbán's "constitutional prison"[31] if they had managed to win the election, which I will return to at the end of this chapter, we need to first see how transnational law can be useful in generating rule-of-law alternative paths for restoring constitutional democracy.

III Addressing Democratic Backsliding with the Rule of Law Writ Large

Transition 2.0, a move away from democratically damaged governments back to democratic health, starts with an important advantage. Across the world, many of the backsliding states are now members of regional bodies that require their members to remain democracies, uphold the rule of law and honor human rights.

[30] David Landau, *Constitution-Making Gone Wrong*, 64 Ala. L. Rev. 923 (2013).

[31] The solution I elaborate here was first proposed in Kim Lane Scheppele, *Escaping Orbán's Constitutional Prison: How European Law Can Free a New Hungarian Parliament,* Verfassungsblog (Dec. 21, 2021), https://verfassungsblog.de/escaping-orbans-constitutional-prison/.

In Transition 1.0, as democratic waves washed over Southern Europe, then Latin America, and then Eastern Europe, the transnational institutions that might have supported such democratic transitions did not generally include these transitioning states as members, nor did they have robust mechanisms in place to guide a transition to democracy at that time.[32] Southern Europe's last dictatorships democratized in the 1970s mostly outside the Council of Europe (CoE) and what later became the European Union. Latin American dictatorships gave way to democracy in the 1980s, but at the time the regional institutions had not yet developed democratic enforcement tools. For the Eastern Europe states that emerged from the Soviet shadow in the 1990s, joining the CoE was relatively fast but joining the EU took well more than a decade. The EU had never formalized what its membership requirements were until it prepared the "Copenhagen criteria" precisely for the postcommunist states' accession.[33] While in each case full membership in the regional transnational organizations depended on discarding dictatorship, in none of those cases were elaborate democratic and rule-of-law standards well developed to guide these transitions in any detail.

Transition 2.0 starts in a very different place, with many of the problematically backsliding states already inside the tent of the transnational organizations. Before autocrats consolidated power in, for example, Venezuela and Ecuador, Turkey and Russia, or Hungary and Poland, their democratic predecessors had signed onto the jurisdiction of the regional bodies in better times. Now that the aspirational autocrats have come to power and are violating the criteria for admission to the transnational bodies that had membership requirements to get in the door, Transition 2.0 can then start from a different legal foundation. We can take advantage of the fact that many of the now rogue states are still bound by the membership requirements even as their national autocrats have violated these standards through backsliding. The standards of the transnational organizations can now be enforced by restoring the rule of law writ large. Best of all, since the now backsliding states undertook these transnational obligations of their own accord in a not too distant

[32] An excellent recent Princeton dissertation traces the history of democracy-strengthening mechanisms in regional organizations: Cassandra Emmons, Regional Organizations as Democracy Enforcers: Designing Effective Toolkits (Jan. 2020) (Ph.D. dissertation, Princeton University), https://dataspace.princeton.edu/handle/88435/dsp01f4752k70w.

[33] Dimitry Kochenov, EU Enlargement and the Failure of Conditionality: Pre-Accession Conditionality in the Fields of Democracy and the Rule of Law (2008).

past, enforcing the standards of these transnational organizations simply holds the backsliding states to standards they once committed to follow at a more democratically robust moment.

Enforcement of these transnational standards through the rule of law writ large can occur in three stages. First, the rogue states should comply with transnational law as it applies directly to them. For example, they should honor the decisions of the regional courts and enforcement bodies that have already been made in cases that have arisen during the process of backsliding. They therefore should engage in *direct compliance* by starting with the obvious violations that have already been called out by transnational bodies with binding legal force in their specific country.

Then, Transition 2.0 should build out from there to bring rogue states into compliance with transnational law more generally, not just in the specific matters where the transnational bodies have already ruled directly against them but also in the spirit of the law that applies to all members of these organizations. *Erga omnes compliance* involves working out what the rules of these transnational organizations imply for the domestic governance of all signatory states, including the rogue states, and developing the links between these *erga omnes* standards and the specific offending practices of the rogue states so that they can be corrected.

Finally, rogue states should accept the transnational principles beyond the boundaries strictly required in a binding sense by applying general soft law principles to domestic arrangements that transnational law cannot strictly enforce. *Supererogatory compliance* with transnational values using this strategy would move national law even closer to transnational law but would be doing so without being strictly bound to do so by treaty commitments.

Why consider this strategy of using transnational law to supersede national laws as we think about rule-of-law cures for democratic backsliding? As states go through Transition 2.0 to restore democracy, human rights, and the rule of law, they may find that honoring transnational law now requires breaking national law that was enacted and enforced as states were backsliding. Since the autocrats who are being displaced in Transition 2.0 by new democratic governments have broken the letter and/or the spirit of transnational law in order to create dictatorships, these autocrats and their supporters can (and surely will) say that rupturing national law to restore democratic institutions is simply a political tit-for-tat that is no different from what they did. The autocrats will argue that the democrats are violating the domestic legal order simply to insert

their political preferences in order to prioritize transnational standards, just as the democrats once accused the autocrats of having ruptured the legal order by "careening" into a democratically precarious situation in violation of transnational legal standards.[34] Once we accept that the rule of law writ large requires that the national and the transnational be harmonized, the moves of the autocrats and the democrats can be cleanly distinguished. In addition, because it is generally beyond the reach of the national leaders to change the transnational standards, changing national law to create coherence and predictability across all levels of the law no longer looks like just another lawbreaking exercise that could be repeated if the autocratic forces come back into power. Instead, it can be justified as an exercise in honoring the rule of law writ large.

IV Applying the Rule of Law Writ Large within Europe: The Cases of Hungary and Poland

To make this abstract argument more concrete, we will work through the implications of the rule of law writ large by considering the potential transition of rogue states back to democracy inside a particularly dense web of transnational law. Hungary and Poland are among the leading democratic backsliders in the world, but both are member states of the European Union and signatories to Council of Europe treaties, including the European Convention on Human Rights. European law – particularly EU law and the ECHR – creates one of the most highly developed sets of binding transnational norms in the world, providing transnational standards for democracy, the rule of law, and human rights.

We have already noted that the major democracy-rating organizations now consider Hungary to no longer be a democracy, having fallen from being rated a consolidated democracy when Viktor Orbán first came to power in 2010 to being ranked a "hybrid regime" by 2020.[35] It is almost surely not possible to change the government of Hungary through elections, since the election system has been so distorted that it

[34] Dan Slater has usefully developed the concept of "democratic careening" to cover the situation in which governments engage in "a variety of unpredictable and alarming sudden movements, such as lurching, swerving, swaying, and threatening to tip over. It suggests a bandying back and forth from side to side, with no clear prospect for steadying in sight. It thus captures rather well the sense of endemic unsettledness and rapid ricocheting that characterizes democracies that are struggling but not collapsing." Dan Slater, *Democratic Careening*, 65 WORLD POL. 729 (2013).

[35] *See supra* note 19.

guarantees victory to the governing party almost no matter what its level of public support is.[36] Between being able to change the rules, threaten voters with dire consequences, hand out favors, and generate fake votes through an election machinery that it controls, the governing party in Hungary will almost surely never allow itself to lose an election. The 2022 Hungarian elections, rigged by the Orbán government, certainly confirmed that analysis – and the rule-of-law situation in Hungary deteriorated subsequently with the introduction of a "sovereignty protection law" that cut off all international support (including, by the way, EU support) to the civil sector, independent press, and Hungarian political parties.[37] Nonetheless, given that the Orbán government will have to fall sometime, or at least be suspended from European institutions in the meantime,[38] it is worth considering what compliance with the rule of law writ large would require in order to return Hungary to European good graces.

When the Law and Justice Party (PiS in Polish acronym) captured the presidency and both houses of the Polish parliament in 2015, the new government immediately attacked judicial independence in a particularly brutal and lawless way.[39] Refusing to abide by many European Court of Justice (ECJ) and European Court of Human Rights (ECtHR) decisions, the government simply stonewalled European institutions that were trying to restore the rule of law. Because the PiS government had not completely captured the election law, though it had tilted the playing field in its direction, the 2023 Polish national election was still able to produce a new government in Warsaw, one that had the theoretical possibility of

[36] Scheppele, *supra* note 21.

[37] Lili Bayer, *Orbán Accused of Trying to Silence All Critics in Hungary with New Law,* Guardian (Nov. 23, 2023), https://tinyurl.com/2y2esumb.

[38] The Council of Europe can suspend membership of a signatory state. Nonetheless, it has rarely used this power, not least because, with the rapid expansion of the CoE in the 1990s, many of its states never met the basic standards of the organization and so votes in the Parliamentary Assembly to suspend members are invariably close or fail. It took the Russian invasion of Ukraine in 2022 to cause it to be expelled, despite years of noncompliance with CoE values. For the basic framework, see Kanstantsin Dzehtsiarou & Donal K Coffey, *Suspension and Expulsion of Members of the Council of Europe: Difficult Decisions in Troubled Times*, 68 Int'l & Comp. L.Q. 443 (2019). The EU simply has no way to expel a member state. The most it can do to sideline a member state is to remove its vote in the Council and strip it of its other EU privileges through the invocation of Article 7 TEU, which has such a high threshold for activation that it is for all intents and purposes a dead letter. Dimitry Kochenov, *Article 7: A Commentary on a Much Talked-About "Dead" Provision*, *in* Defending Checks and Balances in EU Member States (Armin von Bogdandy et al. eds., 2021).

[39] Kim Lane Scheppele, *The Treaties Without a Guardian: The European Commission and the Rule of Law*, 29 Colum. J. Eur. L. 93, 124–48 (2023).

actually carrying out a Transition 2.0 to restore the rule of law. How could the new democratic government use transnational law to bring its own legal system back to democratic health?

In this part, then, I will elaborate on how the Hungarian and Polish governments could use the law of the transnational organizations they joined before their episodes of democratic backsliding as a blueprint for democratic reform. In the Polish case, this can even be seen as a practical road map for how to organize a democratic transition.

1 Enforcing Directly Applicable Transnational Law

In the EU, the principles of direct effect and primacy mean that Union law is already binding inside the national legal orders of its member states so that EU law takes precedence over national law and is directly applicable by national courts.[40] Within the CoE, decisions of the ECtHR are binding, in the narrow sense that the just satisfaction awarded to the petitioners who brought the cases must be paid, and in the broader sense that general measures must be taken by the offending state within its domestic legal order to put an end to the continuing violations found by the Court.[41]

For a new rule-of-law-minded government, the first order of business should be to bring national legal systems into compliance with the law that is already directly binding on their states through court judgments directly applicable to their states that their backsliding governments flouted. Court judgments have already matched the law to the facts, and have produced rulings that explain what it would take to comply given the specific situation. Complying with these decisions should be low-hanging fruit if a new government wants to act quickly, because no further investigation is needed to figure out how national law infringes the transnational standard and what can be done to meet it.

In the cases of Hungary and Poland, there are backlogs of ECJ judgments that are still not honored. Complying with those decisions should be an uncontroversial place to start to restore the rule of law in these countries.

[40] Bruno de Witte, *Direct Effect, Primacy, and the Nature of the Legal Order*, *in* THE EVOLUTION OF EU LAW (Paul Craig & Gráinne de Búrca eds., 3d ed. 2021), https://doi.org/10.1093/oso/9780192846556.003.0007.

[41] EUROPEAN COURT OF HUMAN RIGHTS, GUIDE ON ARTICLE 46 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS: BINDING FORCE AND EXECUTION OF JUDGMENTS (Aug. 31, 2022), www.echr.coe.int/Documents/Guide_Art_46_ENG.pdf.

In Poland, these judgments primarily concern the structure and independence of the judiciary.[42] For starters, complying with the ECJ judgments would mean replacing the Disciplinary Chamber of the Supreme Court with a truly independent body and reinstating the judges who have been inappropriately disciplined.[43] It should also mean reconfiguring the National Judicial Council, the allegedly self-governing body of the national judiciary that – among other things – selects judges, so that the political influence in the selection of members of this body is reduced.[44] The procedures under which judges are disciplined for making preliminary references to the ECJ must be reformed.[45] And so on, through the growing set of judicial independence cases of the ECJ, comprising both the infringement decisions and the judgments based on preliminary references.

In Hungary, the unenforced ECJ judgments affecting the restoration of the rule of law primarily concern the application of EU asylum rules,[46] measures that must be taken to ensure the free operation of civil society and universities,[47] and ensuring that judges can continue to make preliminary references to the ECJ.[48] And of course, a member state does not have to wait for an ECJ final judgment to rectify specific problems that the Commission has identified through initiating infringement actions. Hungary could get out ahead of the ECJ rulings by addressing the Commission's complaints with regard to the enactment of a discriminatory law against LGBTIQ+

[42] For details about the set of judgments against Poland brought as the result of infringement actions by the European Commission, see Scheppele, *supra* note 39.

[43] Case C-791/19, Comm'n v. Poland (Independence of Judges), ECLI:EU:C:2021:596 (July 15, 2021).

[44] Case C-585/18, A.K. and Others (Independence of the Disciplinary Chamber of the Supreme Court), ECLI:EU:C:2019:982, ¶ 140 (Nov. 19, 2019).

[45] Joined Cases C-558/18 & C-563/18, Miasto Łowicz & Prokurator Generalny, ECLI:EU:C:2020:234, ¶ 58 (Mar. 26, 2020). Because the underlying legal issue before the judge referring the case did not directly invoke EU law, the Court held that the questions sent by the referring judge were inadmissible. But in dicta, the Court made it abundantly clear that threats to punish judges for referring questions to the ECJ were unlawful.

[46] Case C-808/18, Comm'n v. Hungary (Accueil des demandeurs de protection internationale), ECLI:EU:C:2020:1029 (Dec. 17, 2020).

[47] Case C-821/19, Comm'n v. Hungary (Incrimination de l'aide aux demandeurs d'asile), ECLI:EU:C:2021:93 (Nov. 16, 2021); Case C-66/18, Comm'n v. Hungary (Enseignement supérieur), ECLI:EU:C:2020:792 (Oct. 6, 2020).

[48] Case C-564/19, I.S., ECLI:EU:C:2021:949 (Nov. 23, 2021). For a detailed explanation of the judgment and the backstory, see Kim Lane Scheppele, *The Law Requires Translation: The Hungarian Reference Case on Reference Cases, Case C-564/19, I.S., Judgment of the Court of Justice (Grand Chamber), 23 November 2021*, 59 Common Mkt. L. Rev. 1107 (2022).

community members[49] and the refusal to relicense *Klúbrádió,* Hungary's last independent radio station, as independent media in Hungary face extinction,[50] among other infringement actions already in play.

A new set of EU legal regulations that came into effect in 2021 now allows the EU to freeze funds to member states that violate the rule of law. The Conditionality Regulation[51] has been invoked against Hungary because its high levels of corruption mean that the country cannot be counted on to spend EU funds properly. The regulation establishing the Recovery and Resilience Fund[52] has allowed the EU institutions to freeze funds to states that do not heed EU warnings about high levels of corruption and weakening judicial independence. As a result of changes to the Common Provisions Regulation,[53] the EU can also now make the flow of funds allocated under a myriad of other programs conditional on member states honoring the Charter of Fundamental Rights. Now, member states against which these conditionalities have been triggered have an additional set of requirements specifically addressed to them that they must meet before they can receive EU funds.[54] To date, the conditions attached to the receipt of EU funds have included mandatory measures to

[49] The Commission decided to refer Hungary to the ECJ in July 2022 over its law to prevent children from having contact with any media portraying gay couples. *July Infringement Package: Key Decisions*, EUR. COMM'N (July 15, 2022), https://ec.europa.eu/commission/presscorner/detail/en/inf_22_3768.

[50] The Commission referred Hungary to the ECJ in July 2022 over its denial of a broadcast license to Klubrádió, the country's last remaining independent radio station. *Media Freedom: The Commission Refers Hungary to the Court of Justice of the European Union for Failure to Comply with EU Electronic Communications Rules*, EUR. COMM'N (July 15, 2022), https://ec.europa.eu/commission/presscorner/detail/en/IP_22_2688.

[51] Regulation (EU/Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a General Regime of Conditionality for the Protection of the Union Budget, 2020 O.J. (L 433I) 1.

[52] Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 Establishing the Recovery and Resilience Facility, 2021 O.J. (L 57) 17.

[53] Regulation (EU) 2021/1060 of the European Parliament and of the Council of 24 June 2021 Laying Down Common Provisions on the European Regional Development Fund, the European Social Fund Plus, the Cohesion Fund, the Just Transition Fund and the European Maritime, Fisheries and Aquaculture Fund and Financial Rules for Those and for the Asylum, Migration and Integration Fund, the Internal Security Fund and the Instrument for Financial Support for Border Management and Visa Policy, 2021 O.J. (L 231) 159.

[54] On three legal bases for funding conditionalities and how they were invoked against Hungary and Poland in 2022, see Kim Lane Scheppele & John Morijn, *What Price Rule of Law?*, *in* THE RULE OF LAW IN THE EU: CRISIS AND SOLUTIONS 29 (Anna Södersten & Edwin Hercock, eds., 2013), www.sieps.se/globalassets/publikationer/2023/2023_1op_digital.pdf.

fight corruption (in the case of Hungary),[55] detailed requirements for the restoration of the structural independence of the judiciary (in the case of both Hungary and Poland)[56] and specific changes to domestic law and practice to ensure the realization of rights protected by the Charter of Fundamental Rights, which include gender equality rights (in the case of both Hungary and Poland) as well as asylum rights and academic freedom (in the case of Hungary).[57]

Conditionalities that come with this newly passed set of regulations at EU level are specific to each backsliding country, identify in detail what a member state must do to fix the problems, and come with oversight and enforcement mechanisms to ensure that member states meet their legal obligations. Surely, given the specificity of these diagnoses and remedies, these nationally targeted requirements must also be included among the changes that any new democratic government in a formerly rogue state must enact.

While the Council of Europe has much weaker enforcement powers than does the EU, the decisions of the European Court of Human Rights are binding on signatories to the European Convention on Human Rights. Increasingly, particularly in regard to violations that are likely to produce repeated cases, the CoE Committee of Minister (which is charged with enforcing ECtHR judgments) has been insisting on structural reforms in countries where violations form a pattern. They have opened enhanced supervision procedures against delinquent signatory

[55] Council Implementing Decision (EU) 2022/2506 of 15 December 2022 on Measures for the Protection of the Union Budget against Breaches of the Principles of the Rule of Law in Hungary, 2022 O.J. (L 325) 94, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32022D2506.

[56] Council Implementing Decision of 5 December 2022 on the Approval of the Assessment of the Recovery and Resilience Plan for Hungary, Interinstitutional File 2022/0414 (NLE), https://data.consilium.europa.eu/doc/document/ST-15447-2022-INIT/en/pdf; Council Implementing Decision of 14 June 2022 on the Approval of the Assessment of the Recovery and Resilience Plan for Poland, Interinstitutional File 2022/0181 (NLE), https://data.consilium.europa.eu/doc/document/ST-9728-2022-INIT/en/pdf. In the case of Hungary, these requirements for restoring judicial independence go well beyond anything that the ECJ has specified for Hungary, while in the case of Poland the ECJ decisions go beyond what the Commission has required Poland to change to receive EU funds.

[57] Press Release, EU Cohesion Policy 2021–2027: Investing in a Fair Climate and Digital Transition While Strengthening Hungary's Administrative Capacity, Transparency and Prevention of Corruption (2022), https://tinyurl.com/mm6k4xah; Press Release, European Commission, EU Cohesion Policy: Commission Adopts €76.5 Billion Partnership Agreement with Poland for 2021–2027 (June 30, 2022), https://ec.europa.eu/commission/presscorner/detail/en/ip_22_4223.

states to ensure that they do more than simply pay just satisfaction awards to the applicants.

Here, the so far unheeded major ECtHR decisions with regard to Hungary include an open case requiring the protection of judges both from arbitrary dismissal and from violation of their free speech rights,[58] as well as a number of cases with regard to discrimination against Roma, the abuse of pretrial detention, violations of asylum rights, and the creation of an unlimited surveillance system without legal constraints,[59] among others.

Poland has an even worse track record at the ECtHR, compounded by the fact that it gave formal notice in February 2023 that it would refuse to comply with any interim measures ordered by that Court.[60] As of that time, the ECtHR had received 60 requests for interim measures (that is, injunctions) against Poland for matters involving the nonindependence of the judiciary, with 323 cases pending on this issue before the Court.[61]

[58] Shortly after the Orbán government was elected in 2010, the then Supreme Court president András Baka was removed from office, three years before the end of his lawful term. His removal occurred through the operation of a new law, which renamed the Supreme Court the Kúria and created a new qualification for serving on this "new" court – namely, that all Kúria judges should have at least five years of judicial experience on the ordinary courts in Hungary. Because President Baka had only three years of judicial experience in Hungary and his seventeen years as a judge on the ECtHR did not count under the law, he was disqualified – the only Supreme Court judge who was removed on the basis of the new qualification. His case at the ECtHR challenging his dismissal confirmed that he had been punished, in violation of his ECHR rights, for having criticized the Hungarian government's changes to the judiciary. Baka v. Hungary, App. No. 0261/12, ECLI:CE:ECHR:2016:0623JUD002026112 (June 23, 2016). This decision has still not been honored by Hungary, which remains under enhanced supervision on the matter. In a hearing in September 2021, the Council of Europe's Committee of Ministers noted "a continuing absence of safeguards in connection with *ad hominem* constitutional-level measures terminating a judicial mandate" and pressed the Hungarian government to adopt "effective and adequate safeguards against abuse when it comes to restrictions on judges' freedom of expression." Committee of Ministers Decision CM/Del/Dec(2021)1411/H46-16, Supervision of the Execution of the European Court's Judgments, H46-16 Baka v. Hungary (App. No. 20261/12), ¶¶ 314–16 (Sept. 16, 2021), https://tinyurl.com/yc4p4xuf.

[59] For a list of the major pending cases awaiting execution by Hungary at the Committee of Ministers, see https://rm.coe.int/mi-hungary-eng/1680a23c92.

[60] Press Release, European Court of Human Rights, Non-Compliance with Interim Measures in Polish Judiciary Cases, ECHR 053 (2023) (Feb. 16, 2023), https://tinyurl.com/32afd63c.The new government elected in 2023 withdrew this notice to the Court, but cannot easily comply with the decisions given that the national president and the Constitutional Tribunal can block new legislation and both institutions are filled with partisans of the last government.

[61] *Id.*

The ECtHR has found, among other things, that the Constitutional Tribunal, the Disciplinary Chamber of the Polish Supreme Court and the Extraordinary Chamber of the Polish Supreme Court are not independent and impartial tribunals established by law due to the presence of judges appointed irregularly either by the parliament (in the case of the Constitutional Tribunal)[62] or by the politically tainted National Judicial Council (in the case of the Supreme Court chambers).[63] Any new Polish government should address these issues by changing the structure and membership of these institutions, guided by decisions of the ECtHR.

Both Poland and Hungary are also now subject to monitoring by the Parliamentary Assembly of the Council of Europe (PACE). In January 2020, PACE voted to put Poland under a monitoring regime, calling for Poland to separate the functions of justice minister and public prosecutor, to reduce the discretionary powers of the justice minister, to reverse political appointments to two new chambers of the Supreme Court, and to establish an independent public inquiry into smear campaigns against judges and prosecutors.[64] In October 2022, PACE voted similarly to put Hungary under monitoring, calling upon the government to reduce the number of laws requiring supermajority votes, to restore a level playing field for elections, to cancel the ongoing state of emergency that had been in effect since 2020, and to carry out a list of seventeen other changes for improve the functioning of democratic institutions.[65]

In considering how Hungary and/or Poland might now bring their domestic legal systems into line with transnational values, compliance with these ECJ and ECtHR decisions as well as the direct requirements under both the conditionality decisions of the EU institutions and the direct recommendations of the PACE would be an important place to start.

[62] Xero Flor w Polsce sp. z o.o. v. Poland, App. No. 4907/18 (May 7, 2021), ECLI:CE:ECHR:2021:0507JUD000490718.

[63] Advance Pharma v. Poland, App. No. 1469/20 (Feb. 3, 2022), ECLI:CE:ECHR:2022:0203JUD000146920; Reczkowicz v. Poland, App. No. 43447/19 (July 22, 2021), ECLI:CU:ECHR:2021:0722JUD004344719; Dolińska-Ficek & Ozimek v. Poland, App. Nos. 49868/19 & 57511/19 (Feb. 8, 2022), ECLI:CE:ECHR:2021:1108JUD004986819; Wałęsa v. Poland, App. No. 50849/21 (Nov. 23, 2023).

[64] *PACE Decides to Open Monitoring of Poland over Rule of Law*, Parliamentary Assembly of the Council of Eur. (Jan. 28, 2020), https://tinyurl.com/3sebc5mf.

[65] *PACE Votes to Begin Monitoring of Hungary over Rule of Law and Democracy Issues*, Parliamentary Assembly of the Council of Eur. (Oct. 12, 2022), https://tinyurl.com/2s3jyjrc.

2 Erga Omnes *Effects of Transnational Law*

While compliance with the direct decisions of European courts and direct actions taken by the European Commission will begin the process of recovering transnational values in the rogue member states, compliance with only the concrete decisions issued against any particular member state will not be enough for these states to fully restore the rule of law in the domestic legal order. The Commission, in particular, has been very slow to recognize the damage that these rogue governments have done to their constitutional institutions and has therefore not flagged even the major issues that have been responsible for the most serious backsliding.[66] As a result, new governments in these countries do not have a dense and specific case law from the ECJ that would be helpful in precisely guiding them back to the path to harmonizing national law with EU law. In some cases, we have ECtHR decisions that fill some of these gaps in EU law,[67] but the case-by-case way in which the dismantling of constitutional government has been treated in European law means that there is not a complete blueprint of what these rogue states should do to come back into compliance with transnational values, at least not if one looks only at the cases and directions that have the proper names of the particular states attached.

Thus, it will be important for rogue member states that are determined to work their way back into the good graces of European law to consider the way in which European law – both EU law and broader ECHR human rights law – has been applied in respect of other states and to take on board reforms that compliance with this law would necessitate even when the rogue state in question has never been singled out for its violations. Any new government in a formerly rogue state should assess all of its laws against this thick background of European law to see what must be changed to bring the national law into compliance with transnational law. The *erga omnes* effects of all ECJ decisions are well

[66] On the many key issues missed by the Commission just with regard to judicial independence in Hungary and Poland, see Scheppele, *supra* note 39. Of course, the EU does not have jurisdiction over many issues that have contributed to the worsening of the rule of law in Hungary and Poland, but the Commission has been very slow to bring cases against the rogue states even in areas that are squarely within EU law.

[67] The ECtHR can rule on all matters that violate ECHR rights; the EU is limited to considering violations of the Charter of Fundamental Rights only insofar as those violations occur when the member state is acting within the scope of EU law.

documented;[68] the *erga omnes* effects of ECtHR decisions have been persuasively argued to be implied in the ECHR itself.[69]

Of course, this is a huge task because it requires working out not only how the rules should apply within a particular country across the whole range of European law, but also specifically what it is about the rogue country's law that violates transnational law. In this regard, direct compliance with decisions carrying the proper name of the country is much easier because the tough job of fitting rules to facts to see whether compliance has been achieved has already been done in those cases.

Moreover, since the Commission largely ignored the consolidation of power in the hands of the Fidesz governing party over the decade-plus that the Orbán government has been in office, there are as a result no ECJ judgments directly bearing on the most crucial features of Hungarian autocracy, like the capture of formerly independent institutions including the media authority, prosecutor's office, state audit office, election office, data protection office, or the central bank.[70] Nor are there cases about the years of emergency rule that started in 2020, during which the parliament gave the government the power to issue decrees that overwrite statutes. This period extends far longer if one counts the more targeted "migration emergency" that began in 2015. Nor are there cases challenging the way in which markets have been manipulated to reduce pluralism in the media and to stifle competition in state contracts for matters of "strategic national importance." And, perhaps most shockingly, Hungary has compromised the independence of its judiciary in a myriad of ways that the Commission had never criticized until it imposed some limited conditionalities under the Recovery and Resilience Regulation and the Common Provisions Regulation. Moreover, national courts have been cowed into submission by a domestic constitutional provision that puts certain topics off-limits for

[68] *Erga omnes* authority of EU law can be traced to Article 4(3) TEU, which obligates member states to refrain from any measure that would frustrate the realization of EU objectives. *See also* Case 66/80, SpA International Chemical Corporation v. Amministrazione delle finanze dello Stato, ECLI:EU:C:1981:102, ¶¶ 11–13 (May 13, 1981).

[69] Oddný Mjöll Arnardóttir, *Res Interpretata, Erga Omnes Effect and the Role of the Margin of Appreciation in Giving Domestic Effect to the Judgments of the European Court of Human Rights*, 28 Eur. J. Int'l L. 819 (2017).

[70] The Commission was active in some of these areas in 2011 when the takeovers began. Ultimately, the Commission initiated infringement procedures over the independence of the data protection officer who was fired in 2011 and over the independence of the central bank when the Orbán government tried to fire the sitting central bank governor. But in both cases the Commission only challenged treatment of the incumbent occupants of those offices and not the qualifications and structural guarantees of independence of the new occupants of those offices.

preliminary reference questions,[71] and under which judges have already been disciplined.[72] As a result, much of the damage already done to the Hungarian judiciary has not been the subject of any legal proceeding at EU level ordering Hungary to fix it.[73] ECtHR decisions in Hungarian cases fill in some of the gaps, but even they do not even begin to identify all of the ways in which the Hungarian government no longer complies with European standards. Extrapolating requirements for judicial independence that have been established in cases involving other CoE signatory states – particularly Poland – to the Hungarian context would go a long way toward undoing the compromises of judicial independence that have already taken place. But it would take patient work to develop the application of this law to Hungary.

With regard to Poland, the Commission and the ECJ have focused primarily on judicial independence, issuing specific, binding instructions to Poland on how judicial independence can be restored. But there are signs that Poland is also in breach of other important legal obligations, particularly with regard to nontransparent and unjustifiable surveillance of the political opposition using stealthy software that infiltrates cell phones.[74] Pegasus software has been in documented use in both Hungary and Poland, but so far only Hungary is under direct decisions of the ECtHR to bring its legally unlimited surveillance program under

[71] Fundamental Law (Hung.) art. E(2):

> With a view to participating in the European Union as a Member State and on the basis of an international treaty, Hungary may, to the extent necessary to exercise the rights and fulfil the obligations deriving from the Founding Treaties, exercise some of its competences arising from the Fundamental Law jointly with other Member States, through the institutions of the European Union. Exercise of competences under this paragraph shall comply with the fundamental rights and freedoms provided for in the Fundamental Law and *shall not limit the inalienable right of Hungary to determine its territorial unity, population, form of government and state structure*.

English translation issued by Hungarian Ministry of Justice (emphasis added), https://njt.hu/jogszabaly/en/2011-4301-02-00 (last visited Aug. 23, 2024).

The Kúria has interpreted this italicized clause to mean questions touching on those subjects may not be the subject of preliminary references.

[72] For more detail, see Scheppele, *supra* note 48.

[73] The "super milestones" built into the Recovery Plan in order for Hungary to receive the relevant EU funds require judicial reforms, but the list of specific items listed there is not sufficient to restore judicial independence in its entirety.

[74] *Polish Leader Admits Government Bought Spyware*, DW (July 1, 2022), https://tinyurl.com/bdf62wmp.

legal control so that the rights to private life under Article 8 ECHR are respected.[75] If Poland is committing the same violation – using technical tools to spy on the political opposition outside meaningful legal constraints that honor ECHR rights – then it too should modify its laws to comply with the ECtHR's standards, even absent a direct judgment about its own particular practices.

Of course, establishing the *erga omnes* effects of the huge body of EU and ECHR law will not be easy or quick. Among other things, it first involves an analysis of what EU and ECHR law requires with enough specificity to guide lawmaking within a restored democratic government. But requiring changes to domestic law to meet the standards required of other countries by transnational courts would certainly not violate the rule of law and, in my view, would honor the rule of law writ large.

3 *Supererogatory Effects of Transnational Law*

Beyond directly applicable binding law exists a web of best practices and general standards – soft law – that could also provide useful guidance for Transition 2.0. Within the Organization for Security and Co-operation in Europe (OSCE), for example, human rights rapporteurs and election monitors make recommendations and assessments that are not binding on governments they examine in the strict legal sense. But since these expert assessments examine the particular track record of particular countries in a nuanced way and provide recommendations for how to

[75] The cases so far decided by the ECtHR predate the discovery of Pegasus in Hungary, but the legal authorizations under which Pegasus was used were already held to have not met ECtHR standards. For the standards, see Szabó & Vissy v. Hungary, App. No. 37138/14 (Jan. 12, 2016), ECLI:CE:ECHR:2016:0112JUD003713814. The European Court of Human Rights again confirmed in September 2022 its finding that the Hungarian government has no meaningful checks on domestic police surveillance, Hüttl v. Hungary, App. No. 58032/16 (Sept. 29, 2022), ECLI:CE:ECHR:2022:0929JUD005803216. More recently, the Hungarian government admitted to using the cellphone infiltration software Pegasus against journalists and government critics, but the data protection officer determined that the use of Pegasus was legal under Hungarian law. Nemzeti Adatvédelmi és Információszabadság Hatóság (Hungarian National Authority for Data Protection and Freedom of Information), Findings of the Investigation Launched Ex Officio Concerning the Application of the "Pegasus" Spyware in Hungary (2022), https://tinyurl.com/ywh4cxm3y. Since the initial exposé of the Pegasus surveillance, new investigative reporting has uncovered evidence that the Hungarian government has purchased from foreign sellers a whole range of deep surveillance tools beyond Pegasus. Szabolcs Pányi, *Boosting of Spying Capabilities Stokes Fear Hungary is Building a Surveillance State*, Balkan Insight (Oct. 13, 2022), https://tinyurl.com/mpdfhhnf.

improve national law on particular subjects, these opinions could also be used as guides for democratic reconstitution.

For example, the Office of Democratic Institutions and Human Rights (ODIHR) at the OSCE routinely engages in election monitoring, writing detailed reports about national election health and recommending specific changes. The report from the 2022 national election in Hungary listed a total of thirty recommended changes to Hungary's election system, eleven of which were priority recommendations to remedy the lack of a level playing field, the weaknesses in the legal framework, the lack of adequate judicial review of election disputes, and unequal access to the media, and to ensure improved election observation and equal treatment of non-resident voters, among other things.[76] In the Polish election of 2023, which the opposition won, the report was more positive, but still identified a number of specific weaknesses in the electoral system, including the undue influence by the governing party over state resources and public media during the campaign as well as the failure to achieve a separation of state and party.[77] These, and the other recommendations made by the ODIHR should be a top priority for changes before the next general election.

The Venice Commission of the Council of Europe, while having no enforcement capacity or even binding force behind its recommendations, assesses particular laws of specific states and makes recommendations grounded in its understanding of transnational legal requirements. Rogue states have already been evaluated under these various rubrics and transnational bodies of neutral experts have found fault with the laws and/or practices of the states in question.[78] Bringing a state into

[76] Office for Democratic Insts. & Human Rights [ODIHR], OSCE, Hungary: Parliamentary Elections and Referendum, 3 April 2022; ODIHR Election Observation Mission Final Report (July 29, 2022), www.osce.org/files/f/documents/2/6/523568.pdf.

[77] Office for Democratic Insts. & Human Rights [ODIHR], OSCE, Poland: Parliamentary Elections, 15 October 2023; Statement of Preliminary Findings and Conclusions (Oct. 15, 2023), www.osce.org/files/f/documents/2/4/555048.pdf. The final report was issued subsequent to this writing; see Office for Democratic Insts. & Human Rights [ODIHR], OSCE, Poland: Parliamentary Elections, 15 October 2023; ODIHR Limited Election Observation Mission Final Report (Mar. 27, 2024), www.osce.org/files/f/documents/b/8/565423_1.pdf.

[78] As of this writing, the Venice Commission has issued twenty-two opinions with regard to Hungary since Viktor Orbán came to power in 2010 and began his constitutional revolution, covering matters from the new constitution to judicial reform, attempts to restrict the civil sector, the election laws, the media laws, educational reform, the

compliance with these reports and recommendations would not strictly be legally required, but such compliance would be a sign that a state was eager to demonstrate its commitment to transnational values.

This *supererogatory* effect of transnational law – supererogatory because the standards so elaborated are the authoritative opinions of bodies that have the power to counsel but not to enforce – would be particularly useful in areas of law that must be changed to ensure that the return to transnational values is robust, but that neither the EU nor the CoE have within their remit to insist upon in a strict legal sense. Election law, for example, is not clearly under the jurisdiction of the EU, save with regard to some general parameters of European parliamentary elections (for example, proportional representation) and with regard to some rules that apply in national elections at local level in which EU citizens have the right to vote (for example, European nondiscrimination principles with regard to citizenship).[79] And while there is a growing body of case law at the ECtHR interpreting ECHR Protocol 1, Article 3, on the right to vote,[80] that jurisprudence has not yet reached the point of giving legally binding guidance on technical questions like the proper constitution of electoral administration bodies,[81] the rules for campaign spending, how

organization of the public prosecutor's office, and various constitutional amendments. The Venice Commission has issued six opinions with regard to Poland since the PiS government came to power in 2015, on topics ranging from attacks on the judiciary to alarming changes in the election law. *See Documents by Opinions and Studies*, COUNCIL OF EUR. (VENICE COMM'N), www.venice.coe.int/webforms/documents/by_opinion.aspx?v=countries.

[79] That said, scholars are now starting to argue that Article 10 TEU requires member states of the EU to be democratic across all of its elections rather than just at the time of elections to the European Parliament or in which European citizens can participate outside their countries of citizenship. *See, e.g.*, John Cotter, *To Everything There is a Season: Instrumentalising Article 10 TEU to Exclude Undemocratic Member State Representatives from the European Council and the Council*, 47 EUR. L. REV. 69 (2022); Luke Dimitry Spieker, *Beyond the Rule of Law How the Court of Justice can Protect Conditions for Democratic Change*, *in* THE RULE OF LAW IN THE EU: CRISIS AND SOLUTIONS, *supra* note 54, at 72.

[80] EUROPEAN COURT OF HUMAN RIGHTS, GUIDE ON ARTICLE 3 OF PROTOCOL NO. 1 TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS (Aug. 31, 2022), www.echr.coe.int/Documents/Guide_Art_3_Protocol_1_ENG.pdf.

[81] The African Court on Human and Peoples' Rights is out ahead on this question. *See* Actions pour la Protection des Droits de l'Homme (APDH) v. Côte d'Ivoire, No. 001/2014, Judgment, African Court on Human and Peoples' Rights (Nov. 18, 2016), https://tinyurl.com/3pn458z3. In this case, the Court found that an election monitoring body composed of eight representatives of government and four of the opposition out of a total of seventeen representatives was not independent or impartial, or compatible with requirements of equal treatment.

to draw legislative districts, what methods are acceptable for counting "lost votes" in proportional representation schemes, and other such issues. By contrast, however, the Venice Commission has elaborated detailed standards for elections[82] and the ODIHR has compiled international standards[83] that it uses as the basis for monitoring elections and issuing recommendations to the specific states it has observed.[84] Taking on board these recommendations would be a good way to move election law away from being tilted in favor of the former governing party and toward a more level playing field.

As a formerly rogue state attempts to restore the rule of law, guidance from transnational institutions on the rule of law itself may be particularly useful in marking out the important parameters of domestic legal change. In particular, the Venice Commission has developed *The Rule of Law Checklist*, which could guide just such an effort.[85] Its definition of the rule of law as "a system of certain and foreseeable law, where everyone has the right to be treated by all decision-makers with dignity, equality and rationality and in accordance with the laws, and to have the opportunity to challenge decisions before independent and impartial courts through fair procedures,"[86] can provide overarching guidance on what a domestic legal system must strive to accomplish. Its more specific benchmarks identify achievable steps on the way to producing such a system. For example – to take one problem that has arisen in a particularly vivid way in Hungary as the country prolongs a series of states of emergency in which the prime minister has the power to override any law by decree – the Venice Commission standards ensure that exceptions to the supremacy of legislation remain limited in time

[82] For a list of the various standards that the Venice Commission has developed in the field of election law, see *Council of Europe Standards in the Electoral Field*, COUNCIL OF EUR. (VENICE COMM'N), www.venice.coe.int/WebForms/pages/?p=01_01_Coe_electoral_standards.

[83] For a list of the international standards for elections of the ODIHR, see *International Standards for Elections*, ORG. FOR SEC. & COOP. IN EUR., www.osce.org/odihr/elections/66040.

[84] The ODIHR has monitored elections in Hungary for decades; *see Elections in Hungary*, ORG. FOR SEC. & COOP. IN EUR., www.osce.org/odihr/elections/hungary. It has also monitored elections in Poland for decades; *see Elections in Poland*, ORG. FOR SEC. & COOP. IN EUR., www.osce.org/odihr/elections/poland. The specific recommendations in each report could be used to improve on the democratic responsiveness of the electoral system.

[85] COUNCIL OF EUR. (VENICE COMM'N), THE RULE OF LAW CHECKLIST (2016), www.venice.coe.int/images/SITE%20IMAGES/Publications/Rule_of_Law_Check_List.pdf.

[86] *Id.* at 10.

and scope and that any delegations of lawmaking power to the executive are explicitly defined.[87] As the Venice Commission says directly: "Unlimited powers of the executive are, de jure or de facto, a central feature of absolutist and dictatorial systems. Modern constitutionalism has been built against such systems and therefore ensures supremacy of the legislature."[88] Extended rule by decree would have to be abolished if these guidelines were followed. And the checklist would help to spot many more offending laws and practices that would have to be changed to restore democratic health.

Supererogatory compliance with transnational standards does not mean that a new government would be simply making up good things to do on its own remit or that a new government is installing its political preferences on a whim. As the examples of election law and the rule-of-law checklist make clear, standards already exist to ensure that democratic, human-rights-respecting, rule-of-law governments can be created and maintained, and they have a definite content that is precise enough to guide domestic lawmaking in very specific directions. These standards gain strength in the process of restoring democratic government precisely because they stand outside the domestic constitutional order and therefore cannot be changed, gamed, or bargained by the parties to the domestic transition.

External standards ensure that there can be no domestically dirty trade-offs in these transitions, in which one side gets to maintain control of the courts in exchange for the other side being able to control the media, for example. Standards must all be met in their entirety and not gamed in the transitions back to democracy. As guidelines external to the process of democratic transition, they maintain their ability to serve as rules of the game that cannot become part of the game itself.

V Asymmetric Rupture: Breaking the Law to Establish the Rule of Law in Recovering Democracies

As we have seen, the rule of law writ large assesses rule-of-law compliance across multiple legal levels at the same time – both national and transnational – by examining the way that the levels complement and reinforce each other. The rule of law writ large exists when different levels of law do not pull in different directions, putting those who are

[87] *Id.* at 20.
[88] *Id.*

simultaneously bound by those different levels of law into a bind of conflicting legal obligations. The rule of law writ large exists when common values thread through all of the levels at once without contradiction. By contrast, the rule of law writ small considers only the national level, so a domestic legal system can be coherent, consistent, and enforcing rules as written, but nonetheless exist in tension with other levels that remain outside the scope of examination. Autocracy can maintain some highly formal version of the rule of law inside a state as long as the domestic legal system is not required to justify itself externally.[89] When autocracy becomes entrenched through law in this way, however, it may become necessary – and justifiable – to break domestic law to restore democracy again.

Break the law to legitimate a new democratic government? Surely this sounds rather dangerous. From a distance, moves that may be taken by a democracy-restoring government could look just like the moves that were already taken by a democracy-crushing government. After all, didn't the rulers who installed rogue government win elections, change the laws comprehensively, fire incumbents who got in their way, and generally restructure the constitutional system so that the independence of all political and judicial institutions was subordinated to the political ideology of the governing party? A new democratizing government that is winning elections, changing the laws comprehensively, firing incumbents who get in the way, and restructuring independent institutions to match their democratic ideology may appear to be doing the same thing. It may be tit-for-tat, but that doesn't make it right.

But this is where transnational law is crucial to distinguishing the two scenarios. Reconfiguring a legal order, even if done in a formally legal manner, breaks the rule of law writ large when it is done by those who are destroying democracy, when transnational law requires adherence to democratic values. By contrast, those same activities of legal reconfiguration can restore the rule of law writ large when they are done by those who are committed to bringing the national legal system back into harmony with the transnational one. In short, while both kinds of moves produce ruptures in the domestic constitutional order – including sometimes breaking domestic law to achieve change – they do not have the same objective justifications or the same relationship to the rule of law when the rule of law is writ large instead of writ small. The legitimacy of the two ruptures is *asymmetric* in that one direction brings *more* rule of

[89] Scheppele, *supra* note 10.

law across different levels of legality and the other one brings *less*. Asymmetric ruptures to restore the rule of law writ large can therefore be justified in ways that symmetric ruptures to bring about a new rule of law writ small cannot.

But what about the *democratic* legitimation of such a course of action? All of this would be done over the heads of the democratic publics in whose name the new democrats govern, because the principles that would be taking priority – the transnational ones – would not have been voted for in the most recent election that brought the new government to power.

There are two important responses to this objection. First, the transnational obligations that are the sources of direct and *erga omnes* effects were in fact undertaken by previous democratic governments when they ratified treaties and joined the international organizations whose values they are. These principles were not imposed from outside but were undertaken as voluntary commitments to bind the signatory state into the future, much as a domestic constitution commits a government to basic principles beyond the term of a specific government. In fact, both the European Union and Council of Europe have provisions through which their members can quit and therefore bring themselves out from under the legal obligations that would otherwise attach to membership. Honoring international treaties is in many ways like honoring a national constitution. Treaties may not have been adopted by the current government, but they are also a solemn and long-term commitment meant to be carried forward by current and future governments. And, like constitutional revision or amendment, the legal obligations undertaken through treaties can be modified only by a solemn undertaking more complicated than ordinary legal enactments. The tensions between democracy and constitutionalism are well known, and the same tension exists between democracy and treaty commitments. This does not necessarily mean that honoring treaties is antidemocratic, particularly not as long as there is an exit option if a democratic state wants to move in a different direction.

Second, a new democratic government that feels it must break the laws of its predecessor in order to arrive at the rule of law writ large should not destroy more of the domestic rule of law than is absolutely necessary in order to harmonize across levels. A new government with the democratic wind in its sails needs to be both careful and public about what it is doing, maintaining a democratic spirit throughout the process even if it tramples on formal legality along the way. In this regard, parties that joined in a united Hungarian opposition in 2022 can serve as a model for how to do

this. They actually put forward their plans to restore democracy by pledging to honor Hungary's European legal commitments and built these plans into their election platform.[90] If they had been elected, they would have taken the election result as a democratic ratification of their approach, including in the specific areas where they noted that they might have to break domestic law to come into compliance with European law.

After the Polish opposition won the 2023 parliamentary election, many of these same questions have arisen there. The Polish opposition did not agree on how to handle these transitional questions before the election, as the Hungarian opposition had, and so an agreement across the three coalition parties in the new government was struck only after the election. The coalition agreement vowed to reverse the damage to the judiciary inflicted by the PiS government and to nullify some decisions of the Polish Constitutional Tribunal holding that the Polish constitution is superior to EU law – a position at odds with EU legal doctrine.[91] That said, the coalition agreement did not say precisely how the parties would fix the damage to the judiciary, and from the start, fissures opened up in the new government's ranks over this. Some advocated that the new government fire all of the judges illegally appointed under the past government, while others advocated that only the unlawfully appointed court presidents, who have the power to control judges in their courts and assign specific cases to specific judges, be replaced. Their disagreements showed that even if, as

[90] The opposition legal transition committee consisted of Zoltán Fleck as chair with Péter Bárándy, Ágota Szentes, Richárd Nagy Szent Péteri, Kinga Surday, Gábor Attila Tóth, and Imre Vörös as members. They produced a nearly 100-page document called the *A jogállam helyreállításának kísérlete* [An Attempt to Restore the Rule of Law] in advance of the election, explaining in detail how the opposition would make changes to the law left behind by the Orbán government if they won. Many of these changes – nearly half of the document – consisted in precisely what I am suggesting here, which is to use EU and ECHR law to guide the transition. I am honored to have played a bit role in this development. *See* Scheppele, *supra* note 31. This was the first proposal along these lines, leaning on the technical fact within Hungarian law that the EU and ECHR treaties were themselves ratified by two-thirds votes of the Hungarian parliament in a system in which many of Orbán's offending laws were buffered from future change by also requiring a two-thirds vote. Because the Hungarian constitution specifies that treaties take precedence over ordinary statutes, the problem of conflicting EU and ECHR norms, on the one hand, and purely domestic norms, on the other, can be treated as a conflict-of-laws problem within Hungarian law and solved in a constitutional fashion, minimizing domestic rule-of-law violations.

[91] Piotr Müller, *Polish Opposition Groups Sign Agreement Setting Out Programme for Future Coalition Government*, NOTES FROM POLAND (Nov. 10, 2023), https://tinyurl.com/2ujrjcxp.

this chapter suggests, it may be possible work out legally what the democratic end-state should look like, there may be many controversies over the methods used to get there. This is not an easy problem, but the rule of law writ large provides a framework for the debate.

If a new government is going to engage in conduct that appears to violate the rule of law writ small in order to achieve the rule of law writ large, then the restoration of democracy should not be done furtively but should remain democratically accountable throughout the process. Lawbreaking in the service of the rule of law writ large should be done openly, with clear explanation to democratic publics about why irregular procedures or other legal violations may be required in order to comply with basic principles of democracy, human rights, and the rule of law in the long run. Of course, the new democrats must put themselves before their publics in free, fair, and regular elections to get periodic endorsements (or rejections!) of their approach when their lawful terms end.

The legitimacy of this rule of law writ large strategy for restoring national rule of law is further enhanced by the "North Star" effect of transnational legal standards. Before the days of GPS, and even now among purists, sailors were guided on the open sea by reference to a fixed point of navigation that neither moved as they did nor was within their power to change. The North Star gained its strength as a navigation tool precisely by being fixed and outside the sailors' control, just the way that transnational law operates as a strong point of reference that is (relatively) fixed and outside the reach of change by any of the parties to any particular domestic transition. When democratic transitions are negotiated in constituent assemblies or in pacted transitional bodies, the superior bargaining power of current autocratic incumbents (or even of previous autocratic incumbents who used their incumbency to erect roadblocks to change) means that the new democrats may have to compromise on crucial issues that limit the sort of democracy that they can restore. Tying the debate to transnational standards honoring democracy, the rule of law, and human rights would reduce the power of rogue incumbents in the negotiations while simultaneously not licensing newly elected democrats to do to the prior autocratic incumbents what those aspirational autocrats did to them. When the standard to be achieved is set outside the range of either party's control, it acts like a North Star placing the steady point of navigation back to a safe democratic port outside the reach of those being guided.

By expanding our conception of the rule of law beyond national boundaries to encompass transnational law, particularly in an era when

human rights courts and many transnational bodies are busily elaborating standards for democracy, human rights, and rule of law, we can develop a framework for encouraging the restoration of democracy in those places where it has been challenged. The conception of the rule of law writ large provides guidance for new democrats to use in bringing rogue states back into the democratic fold.