Asymmetric Rupture: Stabilizing Democratic Transitions 2.0 with Transnational Law

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Abstract:
Transitions away from autocratic capture of formerly democratic states in Europe will be different from the transitions of these states to democracy out of 20th century dictatorships. That is because the autocrats of today will still be at the table – backed by their supporters – and will not give up power voluntarily, in contrast to their predecessors. Moreover, today's backsliding democracies are now members of clubs that they only dreamed of entering at the time that the 20th century dictatorships collapsed. But both of these differences can be turned into advantages by deploying as a guide to democratic transformation the hard and soft law of European institutions that now binds these countries. If the new democrats first comply with the directly binding law of the transnational web of institutions that their countries have joined, then consider the *erga omnes* effects of a broader swath of this law and finally take on board supererogatory commitments from the soft law that these transnational bodies offer, newly restored democracies can restore the 'rule of law writ large,' even if it sometimes means violating 'the rule of law writ small.' Deploying external standards like these prevents domestically aspirational autocrats from gaming the rules because they cannot control those rules. As a result, Transitions 2.0 can use European rule of law to stabilize domestic rule of law in formerly rogue states.
Keywords: International law; transnational law; enforcement; international actors; ruptures; discontinuity; values; Hungary; Poland; European Court of Human Rights; Court of Justice of the EU; recovering democracies

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I. The Transnational Law of Democratic Transitions 1.0

Twentieth century dictatorships left such a devastating trail of horror and death in their wake that they provoked the creation of new international organizations and new international law, all dedicated to the proposition of 'never again.' Globally, the United Nations emerged from the rubble of WWII, devoted to the stabilization of international borders and the creation of mechanisms for preventing and punishing transgressions. The great human rights conventions – from the Universal Declaration in 1948 to the twin conventions honouring civil and political rights and then social, economic and cultural rights – were born out of the recognition that the tactics of twentieth century dictators must never be repeated. The rights in those conventions are practically checklists that protect against the specific atrocities that twentieth century dictators had committed. International humanitarian law, already spurred on by the savagery of the First World War, was strengthened after the Second World War, eventually being realized through a set of provisional courts and then a permanent court for trying war crimes. The architecture of international law and international organizations that we see today was shaped by a rejection of these twentieth century dictatorships that shook – and almost destroyed – the world.

The Second World War pushed Europe to develop a set of interlocking institutions to guarantee the peace, rebuild from the catastrophic destruction and to ensure the recognition of democracy and human rights as the core values of the devastated continent. The formation of the North Atlantic Treaty Organization (NATO) was to ensure Europe's security along with the later-formed Organization for Security and Cooperation in Europe (OSCE).[1] The creation of the Coal and Steel Community – which eventually grew up into the European Union (EU) – provided a framework for economic cooperation.[2] The Council of Europe (COE) with its increasingly powerful human rights court was to provide support for democracy and human rights.[3] Slightly different sets of countries joined each club, but the overlap was sufficient to create both the sense and the reality of a Europe knitting itself back together after being torn so violently apart.

1 Jane E. Stromseth, 'The North Atlantic Treaty and European Security After the Cold War', Cornell Int't. L.J. 24 (1991), 479–502 (480–483).
2 Luuk van Middelaar, *The Passage to Europe: How a Continent Became a Union* (New Haven: Yale University Press 2013).
3 Martyn Bond, *The Council of Europe: Structure, History and Issues in European Politics* (New York: Routledge 2012).

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When the last of these twentieth century dictatorships in Europe finally fell, first loosening its grip on its 'satellite' states in 1989 and then falling apart altogether in 1991, the democratically aspirational governments emerging out of the collapse of the Soviet Union found themselves in the midst of the rich tapestry of international and transnational resources which they used freely as they rejected their authoritarian pasts and built a new democratic future in which governments would finally respond to the will of their peoples and guarantee the protection of human rights. International and transnational law – made more accessible through then-new institutions like the Venice Commission[4] – guided transitions from dictatorship to democracy.

The newly independent countries of 'Eastern Europe'[5] eagerly joined the Council of Europe, the first international organization on offer.[6] Becoming a signatory state to the Council of Europe meant these new democracies were subject to the jurisdiction of the European Court of Human Rights (ECtHR) as well as to a number of international agreements designed to protect rights in more specific ways. The new constitutional courts of the region – and almost all of the new democracies growing out of the former Soviet Union established constitutional courts – looked to ECtHR

4 The European Commission for Democracy through Law (the Venice Commission) was founded in 1990 as a Council of Europe body. Its founding charter states in Article 1(1) that the Venice Commission 'shall be a consultative body which co-operates with the member states of the Council of Europe and with non-member states, in particular those of Central and Eastern Europe. Its own specific field of action shall be the guarantees offered by law in the service of democracy. lt shall fulfil the following objectives: a) the knowledge of their legal systems, notably with a view to bringing these systems closer; b) the understanding of their legal culture; c) the examination of the problems raised by the working of democratic institutions and their reinforcement and development.' Committee of Ministers, Council of Europe, Resolution (90) 6 on Partial Agreement Establishing the European Commission for Democracy Through Law (10 May 1990), https://rm.coe.int/on-a-partial-agreement-establishing-the-europe an-commission-for-democr/1680535949.

5 The states that had been under Soviet influence, including those that had constituted the Soviet Union itself, were collectively 'Eastern Europe' and at the start of this transition process, it wasn't clear how many would become integrated into the European trio of NATO, COE and EU. In the end, the states that came to call themselves 'East-Central Europe' were admitted to all three, while the states to the east of them were only integrated into the COE. Through this chapter, I will refer to all state that had been part of the Soviet orbit as Eastern Europe and the states that were integrated into NATO and the EU as East-Central Europe.

6 Mary Elise Sarotte, *1989: The Struggle to Create Post-Cold War Europe* (Princeton: Princeton University Press 2009).

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jurisprudence for how to understand the rights newly written into their new constitutions. In fact, many of those rights in the new constitutions were copy-pasted straight from the European Convention or the other international human rights treaties that Soviet-dominated countries had made a practice of signing to look better than they were. The ECtHR provided guidance to the newly formed constitutional courts, which both stabilized their jurisprudence by linking it to an institution that their own governments could not control and also gave their constitutional courts a rich history of case law that they could use to build their own.[7]

NATO membership typically came next for these states in Transition 1.0.[8] Because it worked so invisibly, I think we tend to underestimate the difference NATO made in the development of democracies in the region. NATO took what had been Soviet-trained militaries and embedded them in a transnational alliance devoted to ensuring civilian and constitutional control of the armed forces. Unlike in Latin America, where an international military alliance never developed, the countries of East-Central Europe have not generally had to worry about militaries overthrowing civilian governments or upending delicate constitutional balances. For all of the criticisms one might make of NATO (for example, NATO bombing of Serbia almost immediately after Hungary entered certainly caused Hungary second thoughts),[9] integration of the region's militaries into a transnational alliance has tamped down the threats that these militaries might well have posed to fragile new democracies.

The Conference on Security and Cooperation in Europe (CSCE) was institutionally a latecomer to the European family of transnational organizations, founded only in 1975. But this institution, renamed the Organization for Security and Cooperation in Europe (OSCE) in 1995, was created to provide a human rights framework for the states under Soviet influence and a forum for Eastern and Western Europe to engage. With the end of the Cold War, OSCE has expanded its mandate and its powers to become an

7 At both Constitutional Courts where I worked during this democratic transition (Hungary from 1994–1998 and Russia in 2003), offices within those courts were tasked with summarizing the relevant ECtHR jurisprudence on point for every major case so that the national courts could incorporate this jurisprudence into their decisions.

8 James M. Goldgeier, 'NATO Expansion: The Anatomy of a Decision', Wash. Q. 21 (1998), 83–102.

9 William Drozdiak, 'NATO's Newcomers Shaken by Airstrikes', Wash. Post, 12 April 1999, https://www.washingtonpost.com/wp-srv/inatl/longterm/balkans/stories/nato041299.htm.

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important human rights monitor for its 57 Member States and 11 Partner States. Its influential Office for Democratic Institutions and Human Rights (ODIHR) became perhaps the world's premier election monitor. OSCE was the only one of the transnational institutions whose East European members joined at the time of the organization's founding and as it has grown and deepened its commitments to democracy, the rule of law and human rights, it has brought these countries along with it.[10]

Finally, the EU. While the post-communist states of Eastern Europe may have wanted to join the European Union first, since they saw future economic prosperity as invariably following from membership, EU accession was often the last step in joining the full framework of European institutions on offer. The big bang accession in 2004, fully 15 years after most of the countries that entered in that year emerged from Soviet domination, required a long period of tutelage, during which time the candidate countries not only had to meet the Copenhagen Criteria demonstrating that they had established both democracies and free market economies, but also had to prepare their national law to receive the whole bulk of the *acquis communautaire*.[11] Of the quartet of European institutions, the EU's legal system reaches the deepest into national legal systems through the principles of primacy and direct application of Union law. And the EU has the most wide-ranging set of competencies to ensure Member States abide by their treaty obligations.

If we think of these transitions from communism to capitalism and from dictatorship to democracy as Transition 1.0, then it is clear that the web of European institutions played a vital role in moving these transitional states toward democracy and the rule of law. In fact, if anything, the argument at the time was that these new democracies had been stunted in their growth precisely because they were incorporated into the COE, NATO, OSCE and the EU so quickly that they never had time or experience to decide whether their peoples were really committed to all of the rules of all of those organizations.[12] If law comes ready-made from the international

10 It's worth recalling that Russia, newly liberated from the Soviet Union, proposed that CSCE become the defense cooperation organization for Europe since the end of the Cold War meant (at least to Russia) that there was no longer a need for NATO. Sarotte (n. 6).

11 Christophe Hillion, 'The Copenhagen Criteria and Their Progeny' in: Christophe Hillion (ed.), *EU Enlargement* (Oxford: Hart Publishing 2004).

12 Kristi Raik, 'EU Accession of Central and Eastern European Countries: Democracy and Integration as Conflicting Logics', E. Eur. Pol. & Soc. 18 (2004), 567–594.

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organizations that a country joins, does that country properly learn how to engage in democratic law-making?

As we can now see in hindsight, the oversight provided by the COE, NATO, OSCE and the EU as they guided these transitions did not probe deeply enough inside each country to understand that the transitions were in many ways superficial.[13] Former communist elites grabbed much of what was on offer in the mass privatizations that occurred, generating resentment from those who never had a chance to benefit from the spoils of regime change.[14] Inequality rocketed through what had been relatively equal societies, as publics were told through the Washington Consensus of the day that massive redistribution was not consistent with mandatory capitalism.[15] Societies that had experienced a fair amount of solidarity during the communist time quickly divided into camps dominated by cosmopolitans on the one hand, who welcomed the changes that finally made them global citizens, and nationalists on the other hand, who felt that they finally had the opportunity to recover their countries' pre-communist values but saw that all they had finally clawed back was being abandoned yet again as their countries lurched into transnationalism.[16] Throughout the region, the precise detail of what signing onto these transnational institutions and their laws meant was hardly ever debated. What was common instead was the near-universal desire among East Europeans that their newly independent states would become 'normal countries.'[17] Being fully accepted members of the quartet of European institutions was part of what it meant to be normal.

Fast forward one decade into EU accession and several of these post-communist states are running afoul of the rules of the quartet. Hungary has fallen from being a consolidated democracy in the 1990s through the status of flawed democracy in the 2000s until now it is fully a hybrid regime

13 Dimitry Kochenov, *EU Enlargement and the Failure of Conditionality: Pre-Accession Conditionality in the Fields of Democracy and the Rule of Law* (The Hague: Kluwer 2008).

14 Gábor Scheiring, *The Retreat of Liberal Democracy: Authoritarian Capitalism and the Accumulative State in Hungary* (London: Palgrave 2020).

15 Dani Rodrik, 'Goodbye Washington Consensus, Hello Washington Confusion?', J. Econ. Lit. XLIV (2006), 973–987; Joseph Stiglitz, *The Price of Inequality: How Today's Divided Society Endangers Our Future* (New York: W.W. Norton & Company, 2012).

16 Federico Vegetti, 'The Political Nature of Ideological Polarization: The Case of Hungary', Annals AAPSS 681 (2018), 78–96.

17 Andrei Shleifer and Daniel Treisman, 'Normal Countries: The East 25 Years After Communism', Foreign Aff. (2014), https://www.foreignaffairs.com/articles/russia-fsu/2014-10-20/normal-countries.

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with autocratic elements dominating democratic ones.[18] If a consolidated democracy is a country in which democracy is 'the only game in town,'[19] a hybrid regime is one that goes through the motions of democracy (holding elections, convening parliaments) but that offers no hope that the public can get rid of leaders it no longer wants through peaceful means.[20] Poland, which was the first to break through Soviet control but the last in the region to enact its new constitution, has a government that has disabled its Constitutional Tribunal, compromised its independent judiciary and now flaunts its hard-won constitution with openly anti-constitutional behaviour.[21] While it is not hopeless that the opposition can still win elections in Poland, they are playing on a decidedly non-level playing field. Romania has persistent rule-of-law problems[22] but so far has pulled itself back from the autocratic brink several times.[23] Bulgaria remains stuck at the bottom of almost every ranking in the EU that measures democratic health, without ever falling fully into dictatorship.[24]

Lest we think that autocratic threats are unique to the countries that experienced Transition 1.0 on their way to joining the EU, however, some

18 The Varieties of Democracy project, V-Dem, downgraded Hungary to an 'electoral autocracy' in 2020, explaining, 'Hungary is no longer a democracy, leaving the EU with its first non-democratic Member State.' Varieties of Democracy Institute, *Democracy Report 2020: Autocratization Surges – Resistance Grows* (2020) (4), https://v-dem.net/documents/14/dr_2020_dqumD5e.pdf. Freedom House also 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 Report on post-communist 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* (2020), 2, https://freedomhouse.org/sites/default/files/2020-04/05062020_FH_NIT2020_vfinal.pdf.

19 Alfred Stepan and Juan Linz, 'Toward Consolidated Democracies', J. Democracy 7(2) (1996), 14–33 (15).

20 Kim Lane Scheppele, 'How Viktor Orbán Wins', J. Democracy 33(3) (2022), 45–61.

21 Wojciech Sadurski, *Poland's Constitutional Breakdown* (Oxford: Oxford University Press 2019). See also the essay by Miroslaw Wryzykowski in this volume.

22 In ECJ: *Euro Box Promotion e.a.*, judgement of 21 December 2021, Joined cases nos. C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, ECLI:EU:C:2021:1034, the Court of Justice instructed the ordinary courts to disapply decisions of the Constitutional Court where those decisions violated EU law.

23 Vlad Perju, 'The Romanian Double Executive and the 2012 Constitutional Crisis', I.CON 13 (2015), 246–278.

24 Evgenii Dainov, 'How to Dismantle a Democracy: The Case of Bulgaria', Open Democracy, 15 June 2020, https://www.opendemocracy.net/en/can-europe-make-it/how-dismantle-democracy-case-bulgaria/.

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of the stalwarts of the EU – France, Italy, Spain and even now Sweden, Finland and the Netherlands – are just one bad election away from having autocratic parties dictating substantial swaths of public policy and aspiring to move their countries away from their European constitutional-democratic commitments. The UK, which left the EU because it was unwilling to be constrained by EU rules, is now also eyeing departure from the Council of Europe, amid deep instability in its own domestic constitutional order. So while the post-communist states are on the forefront of the European slide from democracy to autocracy, even the established democracies are not rock-solid. It has become harder for the self-confident democracies to lecture the democratic newcomers about the importance of constitutional values when they themselves are not invariably honouring them.

II. The Challenges of Transition 2.0

Transition 2.0 – from autocracy to democracy *within* European institutions – comes at a time when those transnational institutions are being challenged all around. It will be a more difficult transformation in many ways than was Transition 1.0.

Looking back, we can now see that Transition 1.0 was relatively easy despite all of the dislocations and difficulties it posed for those who went through it. The authoritarian party that had monopolized government agreed to put itself up to a vote, and when it lost (and sometimes even before it lost), it voluntarily agreed to give up power.[25] There was no real challenge after those first elections from a party determined to stay in office and there was no significant support in the population for maintaining the previously autocratic status quo. The only way out was forward, and everyone knew that 'forward' meant changes in a constitutional and democratic direction. At the end of the communist period, dictatorship as a set

25 Of course, part of what animates the governments in Hungary and Poland today is their conviction that the 'post-communists' – meaning the successor people and parties to the communist parties – are still pulling the strings behind the scenes and threatening to upend the new people's democracies. Empirically, this accusation has little support. In Hungary, if anything, those who had been openly affiliated with the Hungarian Socialist Workers' Party (MSzMP) are more likely to be found in the ranks of Fidesz (the current governing party) than in the ranks of the technical successor party, the Socialists. In Poland, the 'post-communists' seem to include all those on the left according to those on the right.

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of practices and policies faded away as if it had never been there. And there was only one exit door from communism that came well marked.

In Transition 1.0, therefore, those who had supported the *ancien regime* accepted their defeat as historic and complete. The future of Eastern Europe was inevitably enmeshed in the European quartet of transnational institutions with conditions for membership that the East European states were eager to accept. As a result, these newly independent states committed themselves to democracy, human rights and the rule of law under constitutional government. The realization of these goals may have been bumpy, incomplete and fragile, but there was little disagreement on where the transition was going or about what it would take to get there.

Transition 2.0 is completely different. Those who have tried to destroy a constitutional-democratic order within their states still have substantial support in their publics and these leaders will not simply walk away. In any Transition 2.0, these anti-constitutional powers will be still forces to be reckoned with. If Transition 1.0 started from political competition among parties that were all committed to democracy and human rights, Transition 2.0 doesn't have that advantage. Transition 2.0 will have to be navigated with the autocrats still at the table with their substantial number of supporters behind them.

In addition, states going through Transition 1.0 were still on the outside of European institutions clamouring to get in. Transition 1.0 was therefore guided by conditionalities attached to admission to these exclusive clubs. Because the recently transformed autocracies were outside the institutions and the existing members were solid democracies, Transition 1.0 featured a great deal of unity among the states already in those clubs on what those prices of admission were. Those seeking to get in knew that they were rule-takers in this process and they wanted entry into the exclusive clubs so much that they were willing to accept the rules on offer as the price of admission.

But Transition 2.0 starts with the troublemakers inside the club instead of banging on the doors to enter. As a result, the rogue states can lobby from the inside to lower the standards of club membership even while they are calling the bluffs of their colleagues by breaking the rules of the club in their home states and daring their colleagues to stop them. Any transitional guidance now must attempt to prevent the corruption of transnational rules that backsliding states are eager to undermine, and this guidance will therefore also have to deal with the potential corruption of

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the transnational institutions themselves as they seek to enforce their rules because the rulebreakers have a vote at the table. We saw a preview of this in the attempts by Hungary and Poland to use their veto power on the Multi-Annual Financial Framework (EU budget) in order to block the adoption of the Conditionality Regulation (conditioning the receipt of EU funds on Member State compliance with the rule of law) at the end of 2020.[26] Because the Conditionality Regulation did not require unanimity to pass, the rogue states did not have the power to block its enactment. But the EU budget, going through the legislative process at the same time, did require unanimity so the rogue states used their vetoes over the budget to extract concessions on the Conditionality Regulation. The European Council made a series of unholy bargains to unblock these vetoes, which resulted in the Conditionality Regulation not being used to stop the flow of funds to rogue state Hungary until nearly two years after it came into force which was (conveniently enough for the Hungarian government) after its fourth consecutive re-election. Plus, the European Council violated European law as it did this by inserting itself into the legislative process, even if they did it in order to try to enforce European law in the long run.[27]

Transition 2.0, therefore, starts with very different challenges than Transition 1.0.

All that said, Transition 2.0 starts with an important advantage. Because the rogue states are now Member States of the European Union and signatories to Council of Europe treaties, the binding rules of those two transnational institutions in particular can be used to bring wayward states back into compliance through disciplinary procedures organized from inside the institutions. As a first matter, the rogue states will have to comply with EU and COE law as it applies directly to them. For example, they must honour the decisions of the ECJ and ECtHR that have already been made in cases involving their states, something they have so far been unwilling to do in the spirit of sincere cooperation.[28] They therefore much engage in what

26 Daniel Boffey, 'EU Faces Crisis as Hungary and Poland Veto Seven-Year Budget', Guardian, 16 November 2020, https://www.theguardian.com/world/2020/nov/16/eu-hungary-veto-budget-viktor-orban.

27 Kim Lane Scheppele, Laurent Pech and Sébastien Platon, 'Compromising the Rule of Law while Compromising *on* the Rule of Law', Verfassungsblog, 13 December 2020, https://verfassungsblog.de/compromising-the-rule-of-law-while-compromising-on-the-rule-of-law/.

28 For example, on 17 February 2023, the Polish government notified the ECtHR that it will not honor judgments of that court. 'Poland Informs European Court It Will

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I will call *direct compliance*. Then, as I will argue, Transition 2.0 should build out from there to bring Member States into compliance with Union and ECHR law more generally, not just in the cases that have already been directly brought against them but also in the spirit of the law that applies to all members of these organizations. I call this *erga omnes compliance*. Finally, I will argue that rogue states should accept the transnational principles of the quartet beyond the boundaries strictly required in a binding sense, by applying these principles to domestic arrangements that normally transnational law would not reach. I call this *supererogatory compliance* with European values.

As states go through Transition 2.0 to restore democracy, human rights and the rule of law, they may find that honouring transnational law requires breaking national law. Since the autocrats who are being displaced in Transition 2.0 have broken the letter and/or the spirit of transnational law in order to concentrate power in their hands, 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, just as the democrats once accused the autocrats of having ruptured the legal order by 'careening' into a democratically precarious situation.[29]

As I will argue here, however, rupturing a domestic legal order in order to bring it into line with European principles is not the same rupturing a domestic legal order to move it away from European principles. That is because the rule of law must be understood across multiple levels of legality. The domestic legal order may have its own integrity and rules of the game constituting a coherent rule-of-law-based system, but so does the transnational level. When the domestic and transnational levels embrace contradictory principles, tensions erupt in the rule of law as actors bound by both levels of law are pulled in different directions by contradictory

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Not Comply with Order to Reinstate Judges', Notes from Poland, 17 February 2023, https://notesfrompoland.com/2023/02/17/poland-informs-european-court-it-will-not-comply-with-interim-order-to-reinstate-judges/

29 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', Wld. Pol. 65 (2013), 729–763.

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obligations. When the domestic and transnational levels are guided by principles that are in harmony with each other, then the rule of law operates as it should, by bringing legal certainty to daily life. Domestic legal changes that break with the transnational order in which a state is enmeshed will eventually cause disruption and disorder in the set of legal obligations to which people and institutions are subject. Domestic legal changes that align legal obligations across these levels will restore the rule of law.

As a result, ruptures in legality – changes that may be formally illegal when they are carried out – may be justified when they bring a domestic legal order into compliance with transnational principles. Because these ruptures restore legality at the transnational level, they do not violate the rule of law in a broader sense. Ruptures through which the national legal order broke with transnational legal commitments in the first place in order to enact contrary legal rules are repaired when the state in question moves back into compliance with transnational law. In short, I will be arguing in favour of *asymmetric rupture*. Even though a pro-democratic rupture may look formally similar to an anti-democratic rupture, they can be clearly distinguished by their relationship to the values embedded in transnational law. Pro-democratic national legal ruptures may be justified as compliant with 'the rule of law writ large' if they bring the states in question back into compliance with transnational law even if they violate 'the rule of law writ small' by breaking anti-democratic national law when they do so. Anti-democratic ruptures may have been strictly legal in national law but because they rupture the relationship between national and transnational law as they are being brought into force, breaking the laws that were put in place in this manner should not be considered rule of law violations.

In this volume, we are asked to assume that the democratic opposition has won an election in a democratically backsliding state in the European Union and that it is now confronted with the question of how to restore democracy, human rights and the rule of law in their country. I have my doubts about whether it would be possible to change the government of Hungary through elections, since the election system has been so distorted that it guarantees victory to the governing party almost no matter what its level of public support is.[30] Between being able to change the rules, threaten voters with dire consequences, hand out favours 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. In

30 Scheppele (n. 20).

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Poland, the government has not yet made it impossible for the democratic opposition to win elections, but of course, the essence of autocratic power is its ability to change the rules at any time to accomplish whatever it wants and so it is not beyond imagination that the current Polish government will try to rig the rules to make their own re-election more likely. That said, it is nonetheless a useful exercise to imagine how a new government in a damaged democracy can act to restore democracy, rule of law and human rights, once it is in power. Just how a democratic successor government gets into power through rigged election rules is another topic. For now, let's just assume that they can.

III. Enforcing Directly Applicable Transnational Law

Once a new government is in power, how should it begin the transition back to constitutionalist norms? States that are members of the family of European organizations – the EU, Council of Europe, the OSCE and NATO – are already enmeshed in a dense web of legal obligations that were designed to promote democracy, human rights and the rule of law. In the case of 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. With 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.[31]

If new governments were elected in backsliding European democracies, 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 judgments about their states that their prior governments flouted. In the case of Hungary and Poland, the two countries of primary concern, there are backlogs of ECJ judgments that are still not honoured. Complying with those decisions should be an uncontroversial place to start to restore the rule of law in these countries.

31 ECtHR, *Guide on Article 46 of the European Convention on Human Rights: Binding Force and Execution of Judgments,* 31 August 2022, https://www.echr.coe.int/Documents/Guide_Art_46_ENG.pdf.

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In Poland, these judgments primarily concern the structure and independence of the judiciary.[32] For starters, complying with the 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.[33] It should also mean reconfiguring the National Judicial Council so that the political influence in the selection of members of the body that appoints judges is reduced.[34] The procedures under which judges are disciplined for making preliminary references to the ECJ must be reformed.[35] 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 constitutionalism primarily concern the application of EU asylum rules,[36] measures that must be taken to ensure the free operation of civil society and universities,[37] and ensuring the judges can continue to make preliminary references to the ECJ.[38] And of course, a Member State does not

32 I have detailed the set of judgments against Poland brought as the result of infringement actions by the European Commission in Kim Lane Scheppele, 'Treaties without a Guardian: The European Commission and the Rule of Law', Colum. J. Eur. L. 29 (2023), 93–183, https://cjel.law.columbia.edu/files/2023/04/9.-SCHEPPELE-PROOF.pdf.

33 ECJ, *Commission v. Poland (independence of judges),* judgement of 15 July 2021, case no. C-791/19, ECLI:EU:C:2021:596.

34 ECJ, *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)*, judgment of 19 November 2019, case no. C-585/18, ECLI:EU:C:2019:982, para. 140.

35 ECJ, *Miasto Łowicz & Prokurator Generalny*, judgement of 26 March 2020, joined cases nos. C-558/18 & C-563/18, ECLI:EU:C:2020:234, para. 58. 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.

36 ECJ, *Commission v. Hungary (Accueil des demandeurs de protection internationale),* judgement of 17 December 2020, case no. C-808/18, ECLI:EU:C:2020:1029.

37 ECJ, *Commission v Hungary (Incrimination de l'aide aux demandeurs d'asile*), judgement of 16 November 2021, case no. C-821/19, ECLI:EU:C:2021:93; ECJ ; *Commission v Hungary (Enseignement supérieur)*, judgement of 6 October 2020, case no. C-66/18, ECLI:EU:C:2020:792.

38 ECJ, *I.S.*, judgement of 23 November 2021, case no. C-564/19, ECLI:EU:C:2021:949. For a detailed explanation of the judgment and the back story, 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', CML Rev. 59 (2022), 1107–1136.

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have to wait for an ECJ judgment to rectify specific problems that the Commission has identified. 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+ community members[39] and the refusal to relicense *Klúbrádió,* Hungary's last independent radio station, as independent media in Hungary face extinction,[40] among other things.

With the coming into effect of the Conditionality Regulation as well as the fiscal conditionalities attached to the Recovery and Resilience Fund and to all funds covered by the Common Provisions Regulation,[41] Member States against whom 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. To ensure the proper spending of the EU budget, conditions have been attached to the receipt of EU funds that include mandatory measures to fight corruption (in the case of Hungary),[42] detailed requirements for the restoration of the structural independence of the judiciary (in the case of both Hungary and Poland)[43] and specific changes to domestic law and practice to ensure the realization

39 The Commission decided to refer Hungary to the ECJ in July 2022 over its law to prevent children from contact with any media portraying gay couples. European Commission, July Infringement Package: Key Decisions, 15 July 2022, https://ec.europa.eu/commission/presscorner/detail/en/inf_22_3768.

40 The Commission referred Hungary to the ECJ in July 2022 over its denial of a broadcast license to Klubrádió, the last remaining independent radio station. European Commission, Media freedom: the Commission refers Hungary to the Court of Justice of the European Union for failure to comply with EU electronic communications rules, 15 July 2022, https://ec.europa.eu/commission/presscorner/detail/en/IP_22_2688.

41 These three legal bases for funding conditionalities are spelled out in Kim Lane Scheppele and John Morijn, 'What Price Rule of Law?' in: Anna Södersten and Edwin Hercock (eds), *The Rule of Law in the EU: Crisis and Solutions* (Stockholm: SIEPS 2023), 29–35, https://www.sieps.se/globalassets/publikationer/2023/2023_1op_digital.pdf.

42 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, OJ L 325/94, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32022D2506.

43 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.

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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 (in the case of Hungary).[44] Conditionalities that come with this newly passed set of laws are specific to specific backsliding countries, specify in detail what a Member State must do to remedy the problems and come with oversight and enforcement mechanisms to ensure that Member States meet their legal obligations. Surely in thinking through what EU law requires of Member States, these very specific and 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 (ECtHR) 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 Committee of Minister of the COE has been insisting on structural reforms to laws and has opened enhanced supervision procedures against delinquent signatory 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 in regard to their free speech rights,[45] a number

44 Regulation (EU) 2021/1060 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, OJ L 231, 30.06.2021, 159–706. The Partnership Agreements for each EU Member State are published in the national languages (only) from links available here: https://commission.europa.eu/publications/partnership-agreements-eu-funds-2021-2027_en.

45 Shortly after the Orbán government won election in 2010, 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 new qualifications for serving on this 'new' court, namely that all *Kúria* judges 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 17 years as a judge on the European Court of Human Rights did not count under the law, he was disqualified, the only Supreme Court judge who was removed by the new qualification. His case at the European Court of Human Rights challenging his dismissal confirmed that he had been punished, in violation of his Convention rights, for having criticized the government's changes to the judiciary. ECtHR, *Baka v. Hungary*, judgement of 23

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of cases with regard to discrimination against Roma, the abuse of pretrial detention and the creation of an unlimited surveillance system without legal constraints.[46]

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 decisions of that Court.[47] As of that time, the ECtHR had received 60 requests for interim measures against Poland for matters involving the non-independence of the judiciary with 323 cases pending on this issue before the Court.[48] The ECtHR has found, among other things, that the Constitutional Tribunal, the Disciplinary Chamber of the Polish Supreme Court and 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)[49] or by the politically tainted National Judicial Council (in the case of the Supreme Court chambers).[50] Any new Polish government must address these issues by changing the structure and membership of these institutions, guided by decisions of the ECtHR.

June 2016, no. 0261/12, ECLI:CE:ECHR:2016:0623JUD002026112. 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), paras 314–16 (16 Septembre 2021), https://search.coe.int/cm/pages/result_details.aspx?objectid=0900001680a3c123.

46 You can see a list of the major pending cases awaiting execution by Hungary at the Committee of Ministers: https://rm.coe.int/mi-hungary-eng/1680a23c92.

47 European Court of Human Rights, Non-Compliance with Interim Measures in Polish Judiciary Cases, ECHR 053 (2023), 16 February 2023, https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=003-7573075-10409301&filename=Non-compliance%20with%20interim%20measure%20in%20Polish%20judiciary%20cases.pdf.

48 Id.

49 ECtHR, *Xero Flor w Polsce sp. z o.o. v. Poland*, judgement of 7 May 2021, no. 4907/18, ECLI:CE:ECHR:2021:0507JUD000490718.

50 ECtHR, *Advance Pharma v. Poland*, judgement of 3 February 2022, no. 1469/20, ECLI:CE:ECHR:2022:0203JUD000146920; ECtHR, *Reczkowicz v. Poland*, judgement of 22 July 2021, no. 43447/19, ECLI:CU:ECHR:2021:0722JUD004344719; EctHR, *Dolińska-Ficek & Ozimek v. Poland*, judgement of 8 February 2022, nos. 49868/19 and 57511/19, ECLI:CE:ECHR:2021:1108JUD004986819.

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In considering how Hungary and/or Poland might recover its compliance with European values, then complying with these decisions and direct recommendations would be an important place to start.

IV. Erga Omnes Effects of Transnational Law

While complying with the direct decisions of European courts and direct actions taken by the European Commission will begin the process of recovering European values in the rogue Member States, compliance with only the few 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.[51] As a result, new governments in these countries would not have the dense case law from the Court of Justice that would be helpful in specifically guiding particular states back to the path of the rule of law. In some cases, we have ECtHR decisions that fill some of these gaps, but the case-by-case way that the dismantling of constitutional government has been treated in European law means that there is not a complete blueprint of what should be done by these rogue states to come back into compliance with European values, at least not if one looks only at the cases and directions that have the proper name of the particular states attached.

Thus, it will be important for rogue Member States on their way back into the good graces of European law to consider the way that European law – both Union law and human rights law – has been applied in respect of other states and to take on board reforms that would be necessary to comply with this law 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. The *erga omnes* effects of all ECJ decisions are well documented;[52] the

51 I detail the many key issues missed by the Commission in Scheppele (n. 32).

52 *Erga omnes* authority of EU law can be traced to Article 4(3) TEU in which obligates Member States to refrain from any measure that would frustrate the realization of EU objectives. See also ECJ, *SpA International Chemical Corporation v Amministrazione*

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erga omnes effects of ECtHR decisions have been persuasively argued to be implied in the Convention itself.[53]

The Commission largely ignored the consolidation of power in the hands of the governing party over the 13 continuous years that the Orbán government has been in office, and as a result, there are no ECJ judgments directly bearing on the most crucial features of Hungarian autocracy, like the capture of formerly independent institutions like the media authority, election office, data protection office or the central bank.[54] Nor are there cases about three years of emergency rule in which government decrees have had the capacity to overwrite statutes, a period which extends to eight years 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 has never criticized until it imposed some limited conditionalities under the Recovery and Resilience Regulation, nor have ECtHR decisions in Hungarian cases directly challenged many of these moves. Moreover, national courts have been cowed into submission by a domestic constitutional provision that puts certain topics off limits for preliminary reference questions[55] and for which judges have already been

delle finanze dello Stato, judgement of 13 May 1981, case no. 66/80, ECLI:EU:C:1981:102, paras 11–13.

53 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', EJIL 28 (2017), 819–843.

54 The Commission was active in some of these areas in 2011 when the takeovers began and 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 positions of their replacements.

55 Hungary, Fundamental Law, Article 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.*(Emphasis

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disciplined.[56] As a result, much of the damage already done to the Hungarian judiciary has not been the subject of any legal proceeding ordering Hungary to fix it.[57]

For example, in the Omnibus Act of 2019, the newly appointed president of the Hungarian Supreme Court (*Kúria*) was given the power to assign any case to a newly constituted panel of judges selected just for that particular case.[58] Given that the Supreme Court president had himself been elected in a process that bypassed peer review by his fellow judges and installed him in office without the basic qualifications required by law (until an exception was made for him under the same Omnibus Act),[59] his ability to channel individual cases to specific judges represents a threat to judicial independence of the highest order. But we know from the Polish cases that the standard of judicial independence used by the ECJ would surely be violated by this practice. In its account of judicial independence, the ECJ has emphasized both a court's *external* independence from forces outside the court seeking to control the outcome of cases and a court's *internal* independence ensuring that its daily operation is:

> linked to impartiality and seeks to ensure that an equal distance is maintained from the parties to the proceedings and their respective interests with regard to the subject matter of those proceedings. That aspect requires objectivity and the absence of any interest in the outcome of the proceedings apart from the strict application of the rule of law.[60]

Having a politically appointed President of the Court assigning particular cases to particular judges raises at least the appearance even if not the reality of partiality because it would be so easy to abuse this arrangement

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added.)The Hungarian Supreme Court (*Kúria)* has interpreted this italicized clause to mean questions touching on those subjects may not be the subject of preliminary references.

56 For more detail, see Scheppele (n. 38).

57 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 that the Commission requires is not sufficient to restore judicial independence in its entirety.

58 Hungarian Act CXXVII of 2019, Article 45.

59 Hungarian Helsinki Committee, 'The New President of the Kúria: A Potential Transmission Belt of the Executive Within the Hungarian Judiciary', 22 October 2020, https://helsinki.hu/wp-content/uploads/The_New_President_of_the_Kuria_20201022.pdf.

60 ECJ, *Commission v. Poland (irremovability of judges*), judgement of 24 June 2019, case no. C-619/18, ECLI:EU:C:2019:531, para. 73.

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if the President sought to achieve particular outcomes of judgments. As a result, even though the Commission has not yet directed a specific recommendation to Hungary with regard to this aspect of judicial independence, nor has an ECJ decision issued on this subject in regards to Hungary, one might expect a new government in Hungary to change this practice as it creates the appearance of partiality forbidden as part of the *erga omnes* effects of EU law.

With regard to Poland, the Commission and ECJ have focused primarily on judicial independence where there have been many specific binding instructions. But there are signs that Poland is also in breach of other important legal obligations, particularly with regard to non-transparent and unjustifiable surveillance of the political opposition using stealthy software that infiltrates cell phones.[61] 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 legal control so that the right to private life under Article 8 ECHR is respected.[62] If Poland is committing the same violation – using technical tools to spy on the political opposition outside meaningful legal constraints

61 'Polish Leader Admits Government Bought Spyware', DW, 1 July 2022, https://www.dw.com/en/poland-top-leader-admits-government-bought-pegasus-spyware/a-60361211.

62 The cases decided by the ECtHR so far predate the discovery of the cellphone-infiltration software Pegasus in Hungary, but the legal authorizations under which Pegasus was used do not meet ECtHR standards. For the standards, see ECtHR, *Szabó & Vissy v. Hungary*, judgement of 12 January 2016, no. 37138/14, 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 surveillance, ECtHR, *Hüttl v. Hungary*, judgment of 29 September 2022, no. 58032/16, CE:ECHR:2022:0929JUD005803216. More recently, the Hungarian government admitted to using 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://www.naih.hu/data-protection/data-protection-reports/file/492-findings-of-the-investigation-of-the-nemzeti-adatvedelmi-es-informacioszabadsag-hatosag-hungarian-national-authority-for-data-protection-and-freedom-of-information-launched-ex-officio-concerning-the-application-of-the-pegasus-spyware-in-hungary. 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, 13 October 2022, https://bal

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that honour Convention rights – then it too should modify its laws to comply with the ECtHR standards, even absent a direct judgment about its own particular practices.

Of course, establishing the *erga omnes* effects of the huge body of law that constitutes 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 law-making of a restored democratic government. But the principle is still worth defending. As new democrats try to recover constitutional democracy in their countries, they should be guided by what it would take to bring their governments into line with the law that already binds them.

V. 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 a Transition 2.0. Within the OSCE, for example, the web of human rights rapporteurs and election monitors make recommendations and assessments that may not be binding on governments in the strict legal sense but that assess the particular country conditions in a nuanced way and provide recommendations for how to improve national law on particular subjects. The Venice Commission of the Council of Europe also assesses particular laws of particular states and makes specific 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.[63] Bringing a state into compliance with these reports and recommendations would not be strictly legally required but such compliance would be a sign that a state was eager to demonstrate its commitment to European values.

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kaninsight.com/2022/10/13/boosting-of-spying-capabilities-stokes-fear-hungary-is-building-a-surveillance-state/.

63 As of this writing, the Venice Commission has issued 22 opinions with regard to Hungary since Viktor Orbán came to power in 2010 and began his constitutional revolution and it has issued six opinions with regard to Poland since the PiS government came to power in 2015. See https://www.venice.coe.int/webforms/documents/by_opinion.aspx?v=countries.

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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 European values is robust, but that neither the EU nor the ECHR 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 non-discrimination principles with regard to citizenship).[64] And while there is a growing body of case law at the ECtHR interpreting Protocol 1, Article 3 on the right to vote,[65] that jurisprudence has not yet reached the point of giving legally binding guidance on technical questions like the proper constitution of the electoral administration bodies,[66] the rules for campaign spending, how to draw legislative districts, what method 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[67] and the Office of National Institutions and Democratic Rights of the OSCE (ODIHR) has compiled

64 That said, arguments are now being made that Article 10(2) TEU requires Member States of the EU to remain democracies. See, for example, 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', EL Rev. 46 (2022), 69–84 and Luke Dimitry Spieker, 'Beyond the Rule of Law How the Court of Justice can Protect Conditions for Democratic Change' in: Södersten and Hercock (n. 41.), 72–78, https://www.sieps.se/globalassets/publikationer/2023/2023_1op_digital.pdf.

65 ECtHR, *Guide on Article 3 of Protocol No. 1 to the European Convention on Human Rights*, 31 August 2022, https://www.echr.coe.int/Documents/Guide_Art_3_Protocol_1_ENG.pdf.

66 The African Court of Human Rights is out ahead on this question. See ACtHR, *The Matter of Actions Pour la Protection des Droits de l'Home (APDH) v Côte d'Ivoire*, judgement of 18 November 2016, app. 1/2016, https://www.eods.eu/elex/uploads/files/5c38a52a38460-JUDGMENT_APPLICATION%20001%202014%20_%20APDH%20V.%20THE%20REPUBLIC%20OF%20COTE%20DIVOIRE.pdf. In this case, Court found that an election monitoring body composed of eight representatives of government and four of the opposition out of a total of 17 representatives was not independent or impartial, or compatible with requirements of equal treatment.

67 For a list of the various standards that the Venice Commission has developed in the field of election law, see https://www.venice.coe.int/WebForms/pages/?p=01_01_Coe_electoral_standards.

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elaborate international standards for elections[68] which it uses as the basis for monitoring elections and issuing recommendations to the specific states it has observed.[69] Taking on board these recommendations would be a good way to move election law from being tilted toward the former governing party to creating a more level playing field.

As a formerly rogue state attempts to restore the rule of law, guidance from the European quartet 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 a *Rule of Law Checklist* that could guide just such an effort.[70] 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',[71] can provide overarching guidance to what a domestic legal system must strive to accomplish and 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 enters its third year under 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 and scope and that any delegations of lawmaking power to the executive are explicitly defined.[72] 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

68 For a list of the international standards for elections of the ODIHR, see https://www.osce.org/odihr/elections/66040.

69 ODIHR has monitored elections in Hungary for decades, see https://www.osce.org/odihr/elections/hungary. It has also monitored elections in Poland for decades, see https://www.osce.org/odihr/elections/poland. The specific recommendations in each report could be used to improve on the democratic responsiveness of each electoral system.

70 Venice Commission, *Rule of Law Checklist* (2016), https://www.venice.coe.int/images/SITE%20IMAGES/Publications/Rule_of_Law_Check_List.pdf.

71 Id. at 10.

72 Id. at 20.

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has been built against such systems and therefore ensures supremacy of the legislature.[73]

Rule by decree would have to be abolished if these guidelines were followed. And so on through the very helpful checklist.

Supererogatory compliance with European standards does not mean that a new government would be simply making up good things to do on its own remit. 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 law-making. 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 bargains 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.

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

The standards used to guide countries in Transition 1.0 put newly democratizing states in the role of rule-takers, which did not always seem consistent with the restoration of democratic self-governance. But as we have seen by elaborating what new democratic governments would have to do to restore democracy, human rights and the rule of law in Transition 2.0, external standards may be even more important in guiding democratic transitions now. These recovering democratic governments would still be operating within the institutional framework established by the outgoing rogue government, a framework that was put in place to limit the scope of robust democratic decision-making. Moreover, the rogue leaders are likely to have seats at the table (or at least in the parliament) after they have already

73 Id.

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shown themselves to be willing to compromise key democratic principles in exchange for maintaining power.

When the ordinary law-making process has been corrupted by an all-controlling party that is not democratic to its core, enforcing principles external to the system may be crucial in preventing those who are losing power from using whatever leverage they still have to prevent a full restoration of democracy. This would include, for example, deploying the supermajority rules that they themselves put into place to ensure that they could block change with a minority vote after they have lost elections. With a seat at the table and a track-record of undermining democracy, the rogue governing parties must be bound by these external standards without the opportunity to undermine them by dangling unseemly benefits to others at the table that may tempt the new democrats to sell out. In short, Transition 2.0 crucially needs European standards to guide the restoration of democracy and to hold these rogue parties in check precisely because those standards cannot be gamed by rogue domestic actors.

Depending on how far the rogue governments have compromised the formerly democratic institutions, restoring democracy may require breaking the domestic law in order to ensure European legality. This is where it is worth recalling that the rule of law in its formal sense may exist at multiple levels simultaneously. What I have called the 'rule of law writ large' assesses rule of law compliance across multiple levels at the same time – domestic, European, transnational, international – by examining the way that the levels complement and reinforce each other. The rule of law writ large exists when different levels do not pull in different directions, putting those who are simultaneously bound by those different layers of law into a bind of conflicting legal obligations. By contrast, the 'rule of law writ small' considers only one level at a time ignoring the others, so that a domestic legal system can be coherent, consistent and engaged in explicit legal-rule-following but nonetheless in tension with other levels that remain outside the scope of examination. Autocracy can maintain some version of the rule of law as long as the domestic legal system is not required to justify itself at an international level.

Sometimes rogue governments in non-democratic states create what I have elsewhere called 'autocratic legalism'.[74] Autocratic legalism is a species of constitutional malice in which liberal legal institutions are deliberately undermined by illiberal reforms designed to ensure control of government

74 Kim Lane Scheppele, 'Autocratic Legalism', U. Chicago L. Rev. 85 (2018), 545–583.

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by a particular governing party off into an indefinite future without substantial checks on its power. When autocratic legalism becomes entrenched, legal forms are instituted to maintain the entrenchment of the current rulers; when people and institutions follow this autocratic law, this law maintains their power. For example, election law designed to unfailingly return the governing party to power will reinforce the governing party's hold on power precisely when it is followed. Breaking with that law by enacting new election laws that permit free and fair elections would break the stranglehold of the governing party. It would also nominally break the rule of law writ small, considering national law alone. When autocracy becomes entrenched through law in this way, it may become necessary – and justifiable – to break that law to restore democracy again by considering the rule of law writ large.

From a distance, moves that may be taken by a democracy-restoring government may look just like the moves that were already taken by a democracy-crashing government. After all, didn't the rulers who brought in rogue government change the laws rapidly, fire incumbents who got in their way and in general 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 changes the laws rapidly, fires incumbents who get in the way and restructures independent institutions to their liking may appear to be doing the same thing. Tit for tat.

But this is where transnational law makes all the difference. Changing the law rapidly, firing incumbents and reconfiguring independent institutions breaks the rule of law writ large when it is done by those who are destroying democracy while those same activities restore the rule of law writ large when it is done by those who are committed to bringing the national legal system into harmony with the transnational one. In short, while both kinds of moves can produce ruptures in the domestic constitutional order – and some of those ruptures may even be accomplished illegally under domestic law – they do not have the same objective justifications. The ruptures are *asymmetric* in that one direction brings *more* rule of law across levels of legality and the other one brings *less*. Asymmetric ruptures can be justified in ways that symmetric ruptures cannot.

If a new democratic government is going to break domestic law in order to restore transnational law within the jurisdiction, then it 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

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the way. The restoration of democracy should not be done furtively, so to speak. Law-breaking in the service of the rule of law writ large should be used sparingly as a last resort when there is no legal way to harmonize domestic and European values. But if necessary, then it should be done overtly, with an 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 of their approach.

New democratic governments may want to start with bringing their systems into compliance with directly applicable law first, as this will pose the fewest challenges to basic legality given that the results are already binding law. Then, the new democratic governments may want to move to *erga omnes* compliance, all of the while making public why they are changing the domestic rules, on what basis and to what end. Finally, the new democratic governments may want to tackle supererogatory compliance as that would involve adopting soft law measures as binding domestic law. All the while, however, newly democratic governments may have to break with the law created by the past rogue governments, even while the rogues are still players in the domestic political system.

One cannot foreclose the possibility short of party bans or other political disqualifications that the rogues will one day come back. If and when that happens, however, one might hope that a public educated in how a transparent, accountable and democratic government actually works will soon tire of the rogues and realize that in the long run, a government that respects European values and respects its own citizens is a government that they should want to fight to keep.

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