

Bobek | Bodnar | von Bogdandy | Sonnevend [Eds.]

Transition 2.0

Re-establishing Constitutional Democracy
in EU Member States



Nomos

Beiträge zum
ausländischen öffentlichen Recht und Völkerrecht

Edited by
the Max Planck Society
for the Advancement of Science
represented by Prof. Dr. Armin von Bogdandy
and Prof. Dr. Anne Peters

Volume 320

Michał Bobek | Adam Bodnar
Armin von Bogdandy | Pál Sonnevend [Eds.]

Transition 2.0

Re-establishing Constitutional Democracy
in EU Member States



Nomos

Open Access funding provided by Max Planck Society.

The Deutsche Nationalbibliothek lists this publication in the Deutsche Nationalbibliografie; detailed bibliographic data are available on the Internet at <http://dnb.d-nb.de>

ISBN 978-3-7560-0079-1 (Print)
978-3-7489-1493-8 (ePDF)

British Library Cataloguing-in-Publication Data

A catalogue record for this book is available from the British Library.

ISBN 978-3-7560-0079-1 (Print)
978-3-7489-1493-8 (ePDF)

Library of Congress Cataloging-in-Publication Data

Bobek, Michal | Bodnar, Adam | von Bogdandy, Armin | Sonnevend, Pál
Transition 2.0

Michal Bobek | Adam Bodnar | Armin von Bogdandy | Pál Sonnevend (Eds.)
607 pp.

Includes bibliographic references.

ISBN 978-3-7560-0079-1 (Print)
978-3-7489-1493-8 (ePDF)

1st Edition 2023

© The Authors

Published by

Nomos Verlagsgesellschaft mbH & Co. KG
Waldseestraße 3–5 | 76530 Baden-Baden
www.nomos.de

Production of the printed version:

Nomos Verlagsgesellschaft mbH & Co. KG
Waldseestraße 3–5 | 76530 Baden-Baden

ISBN 978-3-7560-0079-1 (Print)
ISBN 978-3-7489-1493-8 (ePDF)
DOI <https://doi.org/10.5771/9783748914938>



Onlineversion
Nomos eLibrary



This work is licensed under the Creative Commons Attribution 4.0 International License.

Preface

In the logic and the counting of this project, Transition 1.0 was the large-scale political, social, economic, and legal transformation that led to the (re)establishment of constitutional democracy in the countries of Central and Eastern Europe after the fall of the Communist rule, culminating in those countries joining the European Union. The would-be members of the European Union had a number of conditions and requirements to meet in order to join first the Council of Europe, and then the European Union. These included the so-called Copenhagen criteria, later transcribed into Article 2 TEU. Those requirements notwithstanding, the moment of constitutional and legal creation in the early 1990s had been unconstrained by international or EU law. Even if naturally seeking inspiration and assistance from abroad, each country exercised a high degree of local choice as to how to deal with its past, how to resolve internal democratic challenges, and how to shape its constitutional and legal future.

The rule of law decay or outright backsliding in some of those Member States meant not only that some of them ceased to comply with their own constitutional requirements. They equally fell short of their commitments under EU law. This has been observed in different statements and opinions by EU institutions and those of the Council of Europe. Even more importantly, it was equally confirmed in a number of judgments of the Court of Justice of the European Union and the European Court of Human Rights. Case law of both of these judicial bodies, together with documents emanating from different EU institutions, and those of the Council of Europe, OSCE and the UN, has put a number of legal constraints in place. It articulated what type of structural, legal, or judicial changes are not permissible in a State that is bound by EU law or by international human rights treaties.

Transition 2.0 is a project about the future. Its central question is as follows: assume that the current governments in those Member States are one day defeated in elections to the benefit of democratically and rule of law oriented political parties. What and how may a new government do in order to re-establish constitutional democracy, as well as repair its membership within the European Union, while respecting the previously imposed European and international constraints as to what changes are permissible within a rule of law governed constitutional democracy? In contrast to Transition 1.0, Transition 2.0 is supposed to happen with the States concerned still members of the European Union and the Council of Europe. In the past years, in the context of backsliding, EU law and other international commitments have mostly played the role of constraints to certain types of systemic changes. They can, however, equally offer tools and assistance for facilitating the way back to full constitutional democracy and repaired EU membership. The various contributions in this volume, reflecting the personal views of their respective authors, explore the constitutional, legal, and social framework of such a Transition 2.0.

Brno, Warsaw, Heidelberg, Budapest
June 2023

Editors

Table of Contents

I. Setting the Frame 11

Matej Avbelj

Approaching Transition 2.0 in a Realist, Structural, Principled and
Inclusive Constitutional Manner 13

Jiří Přibán

The Liberation of Illiberal Democracy: On Limits of
Democratization after the Authoritarian Backlash 33

Maryhen Jiménez and Dario Castiglione

Reversing Authoritarianism in the EU: Transformative Politics and
the Role of Opposition 59

Diego García-Sayán

Authoritarianism, Judicial Independence and Democratic
Transition 91

Armin von Bogdandy and Luke Dimitrios Spieker

EU Values as Constraints and Facilitators in Democratic
Transitions 113

II. Constitutional Issues 143

András Jakab

How to Return from a Hybrid Regime into a Constitutional
Democracy? Hypothetical Constitutional Scenarios for Hungary
and a Few Potential Lessons for Poland* 145

Table of Contents

<i>Mirosław Wyrzykowski</i> The Constitutional Trap	227
<i>Kim Lane Scheppele</i> Asymmetric Rupture: Stabilizing Democratic Transitions 2.0 with Transnational Law	249
<i>Zdeněk Kühn</i> Centralized Judicial Review and the Problem of its ‘Over- Centralization’	277
III. Reestablishing the Judiciary	297
<i>Adam Bodnar</i> Poland After Elections in 2023: Transition 2.0 in the Judiciary	299
<i>David Kosař and Katarína Šipulová</i> Court-Unpacking: A Preliminary Inquiry	323
<i>Michal Bobek</i> What Role for Courts in Transforming a Society? A Central European Cautionary Tale	361
<i>Maciej Taborowski</i> EU Law and Judicial Decisions of National Judges Appointed in Breach of European Standards	383
<i>Paweł Filipek</i> Defective Judicial Appointments and their Rectification under European Standards	425
<i>Sara Iglesias Sánchez</i> The Role of the Court of Justice of the EU in Transition 2.0	471

IV. Deepening the European Dimension 495

Christophe Hillion

Reversing a Member State's Regression and Restoring (its) Union Membership

– EU law as mandatory toolbox of 'Transition 2.0' – 497

Werner Schroeder

Transition 2.0 and Rule of Law-Mainstreaming in the European Union

535

Pál Sonnevend

How to Make Article 10 TEU Operational? The Right to Influence the Exercise of State Power and Cardinal Laws in Hungary

563

Angelika Nußberger

The Venice Commission and Constitutional Dilemmas

585

