
“DEMOCRACY CAN BE DISMANTLED MORE QUICKLY THAN IT CAN BE RESTORED”

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Polish voters have spoken: after eight years of government by the Law and Justice party (PiS), Poland wants to stop the dismantling of its constitutional democracy. But how can democracy be restored if the nation’s president and its constitutional court are pursuing a different agenda? Armin von Bogdandy and Dimitri Spieker believe prudence, strategy, and ideas from the people are crucial.

The past years have seen a remarkable decline in constitutional democracy in several EU Member States. The recent Polish elections in October 2023 demonstrate that such illiberal developments are not a one-way street. A majority of the Polish people has tasked the new government with reversing the overhaul pursued by the PiS-led government.

This overhaul has many facets. It affects rights for women and members of the LGBTIQ+ community, free speech, media pluralism, and freedom of the press and academia. To remove possible checks and balances in this process, PiS focused in particular on dismantling the Polish judiciary. In a large-scale upheaval, the government lowered the retirement ages for judges, brought the appointment processes under its control, and sought to fill the vacant positions with loyal supporters. Remaining judges were brought into line through disciplinary measures. The conflict over the highest courts was especially dramatic. While a strong opposition of independent judges formed at some courts, the Polish constitutional tribunal was quickly captured. Today, it is hardly more than a puppet of PiS.

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VIEW POINT

ARMIN VON BOGDANDY AND DIMITRI SPIEKER



Armin von Bogdandy is Director at the Max Planck Institute for Comparative Public Law and International Law in Heidelberg. His research concerns the foundations of public law, including the rule of law in the European Union.

ILLUSTRATIONS: SOPHIE KETTERER FOR MPG



Dimitri Spieker is a senior research fellow at the Max Planck Institute for Comparative Public Law and International Law. His research concentrates, among other things, on the basic values of the European Union.

**A MERE STROKE
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TURE'S PEN WILL
NOT SUFFICE:
POLAND NEEDS A
TRANSITION 2.0.**

These measures disregarded not only the Polish constitution, but also European law. In a series of pioneering judgments, both the Court of Justice of the European Union and the European Court of Human Rights ruled that the respective measures violated the rule of law and judicial independence. Still, the Polish government stayed its course. By 2023, thousands of judges had been appointed through procedures that do not comply with European law.

The erosion of democracy and the rule of law run deep. A mere stroke of the legislator's pen will hardly suffice to restore constitutional democracy and the rule of law in Poland. After eight years of PiS rule, a kind of transition is required that builds on the transformations of the 1990s: a Transition 2.0.

After the fall of the Communist rule, a large-scale political, social, economic, and legal transformation took place that led towards constitutional democracy in many Central and Eastern European countries, culminating in those countries joining the European Union. To become EU members, these states had several conditions to fulfil. These included the "Copenhagen criteria," meaning democracy, the rule of law, and fundamental rights.

Later they were codified as common values of the Union and its Member States in Article 2 of the Treaty on European Union. Despite those requirements, however, the transitions of the early 1990s remained relatively unconstrained by international or EU law: even if naturally seeking inspiration and assistance from abroad, each country had considerable latitude in deciding how to deal with its past and how to shape its constitutional and legal future.

Unlike these processes, a Transition 2.0 will be embedded in a much stronger European context. The respective states are members of the European Union and the Council of Europe. The Member States are part of one European society, one that is characterized by the common values enshrined in Article 2 TEU: democracy, the rule of law, and fundamental rights. If these principles come under pressure in one Member State, the entire European society is affected. Accordingly, the Union's law and institutions have a central role to play.

In this spirit, the EU institutions sought to counter illiberal developments in the Member States. In response to these challenges, the EU's legal toolbox has considerably evolved. Freezing EU funds – unthinkable a few years ago – is now an accepted form of leverage to force national governments to comply with European values. The same is true for the protection of these values before the European Court of Justice.

EUROPEAN LAW
PLAYS A TWO-
FOLD ROLE: IT
SUPPORTS AND
CONSTRAINS
A TRANSITION

However, the EU's mandate is not limited to taking action against a Member States' disregard for common values. It also has a role to play when a Member State decides to change course and restore compliance with these values. This role is twofold: first, EU law limits the new government's room to maneuver. Second, it can support a democratic transition, for instance by weakening the power of the PiS-controlled constitutional tribunal. This uncharted legal territory was explored by the Max Planck Institute for Comparative Public Law and International Law together with a group of predominately Central and Eastern European lawyers, among them Poland's new minister of justice, Adam Bodnar.

To start with, European law places constraints on reform processes. The procedures in which the new majority take action against laws, appointments, and measures that violate European values must themselves respect these values. This requires adherence to the principles of legal

certainty and legality, which are also an inherent part of the rule of law guaranteed as a common value under Article 2 TEU.

Particularly grave or intentional breaches of national law can amount to systemic deficiencies in the rule of law which, in turn, can violate the Union's common values. When assessing the overhaul of the Polish judiciary, for instance, the EU institutions took into account that these measures were adopted in open violation of the Polish constitution. In consequence, they constituted an infringement of the rule of law protected by Article 2 TEU.

For the new Polish government this means that the restoration of democracy and the rule of law must take place in a legitimate manner, namely in compliance with national law. As such, the current situation calls for nuanced solutions, which are not only politically and practically feasible, but which also respect national and European requirements. Put differently: Democracies can be dismantled more quickly than they can be restored.

Against this backdrop, it would appear highly problematic if the new majority simply dismissed all judges who were appointed or promoted under the former government. Even if these persons were appointed through unlawful proceedings, this does not automatically mean, as some Polish voices maintain, that they are not judges. It is also necessary to consider that these judges have made thousands of rulings whose validity could then be questioned. Such a radical move is hardly compatible with the principle of legal certainty.



This leads to a further challenge. The new Polish government does not have the necessary majority to amend the constitution. Therefore, any restoration of the democratic rule of law must take place through ordinary laws. These laws require the president's cooperation, who is a supporter of PiS, and could fail before the constitutional tribunal, which is dominated by PiS-friendly judges.

This raises several questions. Can the court not simply be packed with new, independent judges? Unlikely. The number of judges and the duration of their terms of office are enshrined in the Polish constitution. Without a majority to amend the constitution, these rules cannot be changed. As long as these judges were appointed in compliance with the constitution, they cannot simply be dismissed. Instead, they will remain in office until the end of their terms. Additionally, premature substitutions on the bench would contradict the very value the new government seeks to protect—judicial independence. Finally, court packing, i.e., creating additional positions at the respective court and filling them with new judges, as often discussed in relation to the US Supreme Court, harbors considerable risks too. Such measures can further erode the court's neutrality and authority in the eyes of the public. No matter how much it is striven for, the restoration of constitutional democracy does not justify any violations of Polish law. An essential principle of the rule of law is that the ends do not justify the means. Therefore, the democratic transition must be pursued in legal ways.

If there were to be a breach of law, members or supporters of the previous government forces could initiate proceedings in domestic courts. Should they reach the European Court of Justice, it would be forced to concede that they are right, regardless of the fact that the PiS-led government was responsible for the dismantling of the democratic rule of law. The Court's decisions on the overhaul of the Polish judiciary have led the former government to accuse the Luxembourg judges of ruling according to their liberal sympathies. The Commission could find itself in a similarly difficult situation: if it wants to counter accusations of bias and double standards it cannot remain inactive. The Commission would then have to initiate infringement proceedings against the new Polish government on the grounds of violations of the rule of law.

Nonetheless, EU law does not leave the new government in the grip of the previous one. On the contrary, it can even support the transition. The new majority should focus on particularly grave violations. That is because only especially serious, persistent, or intentional violations of democracy, the rule of law, and human rights constitute an infringement of the Union's common values in Article 2 TEU. However, not all decisions, appointments, and measures adopted by the previous government will meet this requirement.

What is the consequence if the government identifies such breaches? EU law – and thus Article 2 TEU – has primacy over the law of the Member States, including their constitutional law. If national law breaches EU law, the respective national provisions must be disapplied. In other words, all state authorities – courts, the executive and the legislature – must disregard such laws. The same applies to decisions rendered by a constitutional court that are in breach of EU law. They must be disregarded as well. Owing to the primacy of EU law, acts that violate the Union's values in Article 2 TEU would not be applicable and would no longer pose an obstacle for the democratic transition.

Again, a highly prudent application of the relevant legal bases, standards, and procedures is required here. To ensure smooth operation, Poland's new government should coordinate with the European Commission for Democracy through Law. This expert committee, better known as the Venice Commission, advises the Council of Europe on issues concerning constitutional law and has great expertise in supporting democratic transitions. Thus, the committee can foster and legitimize the Polish transition through corresponding evaluations, which it can issue at short notice.

**PARTICIPATION OF
THE PEOPLE CAN
BE A DRIVER OF
THE TRANSITION**

At the same time, it is essential to learn from the past. The Transition 2.0 must not repeat the mistakes of the Transition 1.0. Many lament that the transitions of the 1990s were carried out too technocratically. As such, these processes lost sight of promoting a democratic culture in the respective states. This shortcoming could be countered with stronger public participation. There is an appropriate format for doing so: the Conference on the Future of Europe, which was held between 9 May 2021 and 9 May 2022 with astounding success – including in Poland under the PiS-led government. This format allows the people to get involved in the restoration of an independent judiciary. Importantly, it could generate interesting ideas, counter accusations of technocratic decision-making with little democratic accountability, initiate a non-partisan dialogue, and put PiS in a difficult position: either the party boycotts the conference and, by doing so, demonstrates that it is not interested in improving the judiciary, or it participates, thereby endorsing the legitimacy of this process.

