I.
Setting the Frame

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

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Abstract
The purpose of this chapter is to sketch the contours of a theory for a successful transition 2.0 in those EU Member States where the process of constitutional regression has been under way over the last decade or so. The argument proceeds in three steps. First, the normative ideal of a constitutional democracy is detailed to serve as a benchmark against which the quality of the actual legal, economic and political practices in a Member State under study is assessed and whose achievement should be the main goal of the transition 2.0. Second, the chapter explains that the transition 2.0 should be conducted in a realist, structural, principled and inclusive constitutional manner. Part three concludes.
Keywords: constitutional democracy, constitutional regression, rule of law, transition 2.0, theory of constitutional reforms

I. Introduction

The purpose of this chapter is to sketch the contours of a theory for a successful transition 2.0 in those EU Member States where the process of constitutional regression has been under way over the last decade or so. We have therefore espoused an abstract approach, seeking to devise

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principles and arguments that could be generalizable and universalizable to all countries facing the need and the challenge of transition had they been affected by the regression of constitutional democracy. In contrast to the strategic approach, which might be driven more by the normative solutions that work, that would be effective and hence 'good' for the stake-holders responsible for transition, the theoretical take adopted here is concerned with what is 'right', so that a transition shall be widely inter-subjectively regarded as legal, legitimate and just. Preferring the theoretical over the strategic approach nevertheless does not mean that the ensuing treatise will be conducted in empirical void.

To the contrary, the discussion that follows will be informed by concrete empirical examples from the contemporary EU state of political affairs. As a result, our theory will hence be contextualized, built against the backdrop of practices in those EU Member States, in particular Hungary and Poland, which have in the last decade or even more witnessed a process of definite, deliberate and systemic regression of constitutional democracy and have even prided themselves for that. In so doing, by effectively dropping the commitment to constitutional democracy, certain EU Member States have made themselves qualitatively different from the rest which are not perfect or ideal constitutional democracies either, but they at least remain genuinely committed to this ideal and continue to live up to it to a reasonable extent.

Before describing briefly, in order to prompt our theoretical debate, the kind of practices which have contributed to a systemic regression of constitutional democracy in select EU Member States, it is still necessary to explain another core concept of this chapter, namely the notion of transition 2.0. Transition, as the chapter by Castiglione and Jiménez Morales in this volume, also attests,[2] not only can be conceived of differently already on the very level of theoretical comprehension, it can also be, and indeed it has been, understood unevenly in different socio-political and historical contexts. Speaking of transition 2.0, to which this volume is dedicated, naturally assumes the existence of transition 1.0. The meaning of the latter is, however, undisputable as it stands for a process taking place in the former communist States after the fall of the Berlin Wall when the countries then controlled by the Soviet bloc or taking part in the unaligned movement

2 See Ch 3 in this volume.

took a conscious decision to break with the communist totalitarian system and transit towards a fully-fledged constitutional democracy.[3]

For the purposes of this chapter, transition 1.0 has thus been a process in which former communist countries were comprehensively transforming themselves into constitutional democracies. While the success of transition 1.0 across the region has varied,[4] the need for transition 2.0 emerged when certain countries not only halted the transition 1.0, but also started rolling its typically not overly robust achievements back. Transition 2.0 is therefore about restoring the state of constitutional democracy in select EU Member States at least to the level constitutional democracy reached in transition 1.0, before the systemic regression kicked in.

The process of systemic regression creating the need for transformation 2.0 has unfolded in several steps. First, constitutional courts have been taken over, packed[5] and hijacked so that they no longer even meet the minimum standard of a tribunal established by the law.[6] The ordinary courts have followed suit. Their presidents have been illegally removed[7] and the tenure of hundreds of judges had been prematurely terminated under the pretext of equalizing the general conditions for retirement.[8] The remaining judges who have opposed this illegal tempering with the independence of the judiciary have been subject to disciplinary proceedings[9] carried out by formally independent bodies, which are de facto packed by the loyalists of the ruling political parties. These same bodies have also played a decisive

3 Wojciech Kostecki, Katarzyna Żukrowska and Bogdan J. Góralczyk, *Transformations of Post-Communist States* (London: Palgrave MacMillan 2000).

4 See, for example, Matej Avbelj, Jernej Letnar Černič and Gorazd Justinek, *The Impact of European Institutions on the Rule of Law and Democracy: Slovenia and Beyond* (Oxford: Hart Publishing 2020).

5 Wojciech Sadurski, *Poland's Constitutional Breakdown* (Oxford: Oxford University Press 2019).

6 ECtHR, *Xero Flor w Polsce sp. z o.o. v. Poland*, judgment of 7 May 2021, no. 4907/18.

7 ECtHR (Grand Chamber), *Baka v. Hungary*, judgment 23 of June 2016, no. 20261/12; Michal Broniatowski, 'Poland's top judge refuses to leave after removal under new law', Politico, https://www.politico.eu/article/polish-president-andrzej-duda-polands-top-judge-supreme-court-refuses-to-leave-after-removal-under-new-law/.

8 ECJ, *Commission v. Hungary*, judgment of 6 November 2012, case no. C-286/12, ECLI:EU:C:2012:687; ECJ, *Commission v. Poland*, judgment 5 of November 2019, case no. C-192/18, ECLI:EU:C:2019:924.

9 ECJ, *Commission v. Poland*, judgment of 15 July 2021, case no. C-791/19 R, ECLI:EU:C:2021:596.

role in appointing new judges to the courts, casting thus a heavy shadow of doubt on the independence of the judiciary in the longer run.[10]

Similar measures have been adopted in relation to other independent bodies and institutions, whose statutorily protected terms were also ended abruptly, often *ex lege*,[11] so to be replaced by new appointees, presumably loyal to the ruling regime. They were, typically, appointed for a duration exceeding a single parliamentary mandate, in an apparent attempt to consolidate the power of a currently ruling political regime even if the latter was ousted at the next election.[12] Following a political takeover of the institutions of the State, the political regime won control of the public broadcaster as well as sought control over the private media[13] and the civil society.[14] The universities and the academic freedom at large have not escaped unaffected either, especially not in Hungary where a private university was illegally forced out of the country[15] and where under the pretext of improving governance of the higher education institutions by way of privatisation these have also been brought under the control of the influential circles of the ruling regime.[16] Eventually, the ruling regime also penetrated into the corporate world by winning allegiance of private corporations, establishing

10 Kriszta Kovács and Kim Lane Scheppele, The fragility of an independent judiciary: Lessons from Hungary and Poland – and the European Union, Communist and Post-Communist Studies 51 (2018), 189–200.

11 ECJ, *Commission v. Hungary*, judgment of 8 April 2014, case no. C-288/12, ECLI:EU:C:2014:237.

12 Miklós Bánkuti, Kim Lane Scheppele and Gábor Halmai, 'Hungary's Illiberal Turn: Disabling the Constitution', Journal of Democracy 23 (2012), 138–146.

13 Kim Lane Scheppele, 'How Viktor Orbán Wins', Journal of Democracy 33 (2022), 45–61; Scott Griffen, 'Hungary: a lesson in media control', British Journalism Review 31 (2020), 57–62.

14 Virag Molnar, 'Civil Society in an Illiberal Democracy' in: Kovács and Trenecsenyi (eds), *Brave New Hungary: Mapping the 'System of National Cooperation'* (Lanham: Lexington Books 2020).

15 ECJ, *Commission v. Hungary*, judgment 6 of October, case no. C-66/18, ECLI:EU:C:2020:792.

16 Timea Drinóczi, 'Loyalty, Opportunism and Fear', https://verfassungsblog.de/loyalty-opportunism-and-fear/; as a result 'More than 30 higher education and cultural institutions in Hungary, including 21 universities, have been cut off from Horizon Europe and Erasmus funding over ongoing concerns about rule of law breaches in the country', https://sciencebusiness.net/widening/eu-council-action-over-hungarys-rule-law-breaches-sees-21-universities-cut-erasmus-and; 'Rule of law conditionality mechanism: Council decides to suspend €6.3 billion given only partial remedial action by Hungary', https://www.consilium.europa.eu/en/press/press-releases/2022/12/12/rule-of-law-conditionality-mechanism/.

or reinforcing their own loyal oligarchs and tycoons.[17] In so doing, not only public but also private power has been consolidated in the hands of the ruling political elite and its allies. In this way, the prerequisites for a pluralist society have been either decisively circumscribed or effectively extinguished. What is more, the described overhaul of the pre-existing constitutional democracy has not been disguised, rather it has been openly celebrated as a deliberate rupture with the past, bringing about a new model of government branded as illiberal democracy.[18]

It is important to stress that this regression is objective, rather than politically, a special interest-based motivated partial portrayal of the social construction of reality, because it has been widely inter-subjectively regarded as such by a plethora of different domestic and international laic and expert communities, as well as confirmed by independent judicial authorities external to the affected EU Member State.

Now, this chapter is motivated by an assumption that in the affected Member State it comes to a political change in power. The political regime, which has already – to a greater or lesser extent – entrenched its constitutional regressive achievements – is voted out in the elections which are, again, objectively regarded as sufficiently free and fair. It is at this point that the question driving this contribution is raised: how could and should the newly elected political powers in such a Member State, which is also part of a common European constitutional space, personified by the Council of Europe, effectively in practice restore the material essence of constitutional democracy by not violating either its substantive or formal rules, principles and values, so that the restoration will be legal, just and viable in the long-run, rather than leading several years from now, after this regime change, to yet another transition 3.0?

In attempting to sketch out the answer to this question, our argument will proceed as follows: First, we are going to detail the normative ideal of constitutional democracy, its formal and substantive predicaments, which

17 Boris Kalnoky, 'Blame Eastern Europe's Oligarchs on EU Cash', https://www.dw.com/en/my-europe-blame-eastern-europes-oligarchs-on-eu-cash/a-49403372; Bálint Magyar, *Post-Communist Mafia State: The Case of Hungary*, (Budapest: CEU Press 2016).

18 Viktor Orbán, Speech at Băile Tuşnad (Tusnádfürdő) of 26 July 2014, https://budapestbeacon.com/full-text-of-viktor-orbans-speech-at-baile-tusnad-tusnadfurdo-of-26-july-2014/; Viktor Orbán, Speech at the 30th Bálványos Summer Open University and Student Camp, https://visegradpost.com/en/2019/07/29/orbans-full-speech-at-tusvanyos-political-philosophy-upcoming-crisis-and-projects-for-the-next-15-years/.

shall serve as a benchmark against which the quality of the actual legal, economic and political practices in a Member State under study will be assessed and whose achievement should be the main goal of the transition 2.0. Second, we are going to claim that the transition 2.0 from the present regressive state of constitutional democracy to a normative ideal sketched out in part one should, after having respected certain clear red lines, be conducted in a realist, structural, principled and inclusive constitutional manner. Part three will conclude.

II. Constitutional Democracy as a Normative Ideal

It is almost a truism to begin by noting that EU Member States are not just ordinary democracies, rather they are constitutional democracies. Democracy stands for a system of legitimation of government, in which all power emanates from, is conducted by, and acts in favour of the people. Or, as Abraham Lincoln famously quipped in his Gettysburg speech, democracy is a government of the people, by the people and for the people.[19] If democracy is merely an 'ordinary' democracy, it satisfies itself with the fact that decisions are adopted by a majority following the procedural rules of decision-making prescribed in advance. Ordinary democracies are thus majoritarian democracies, in which a decision is regarded as democratic legitimate and also legally valid if a majority adopted it in a formally correct way. In short, in an ordinary, e.g. majoritarian democracy, a majority is always right.

This is not the case in a constitutional democracy. In the latter too decisions are taken by a majority following the prescribed procedural rules of decision-making, but these majoritarian decisions are only democratic, legitimate, legally valid and therefore right as long as they comply with the Constitution. In constitutional democracy a popular self-rule is thus limited by normative constraints of constitutionalism expressed through the formal and substantive requirements of the rule of law.[20] The formal requirements of the rule of law entail that a constitutional order consists of non-conflicting hierarchically ordered rules of a general application, which are precise, definite and of prospective validity. The formal requirements of

19 Abraham Lincoln, 'The Gettysburg Address', https://www.abrahamlincolnonline.org/lincoln/speeches/gettysburg.htm.

20 See, in more detail, Matej Avbelj, 'Rule of Law and the Economic Crisis in a Pluralist European Union', Hague Journal on the Rule of Law 8 (2016), 191–203.

the rule of law are thus encapsulated in the principles of constitutionality, legality, generality, certainty, publicity, predictability and non-retroactivity.

In substantive terms, the rule of law demands compliance with the standards of human rights protection. These are derived from equal human dignity and are, in turn, in service of its protection, guaranteeing to each and every individual the rights to freedom and equality, in short, to equal freedom. Based on this right, each individual has an equal right to self-fulfilment within the limits imposed by the same rights of others. Respect for equal human dignity thus requires non-arbitrary treatment of all individuals. This is why the essence of the rule of law is about guaranteeing a non-arbitrary system of government.[21] At the same time, equal human dignity is a license for diversity,[22] that must be effectuated in a society in which pluralism thrives. Finally, shall the formal and substantive predicaments of the rule of law be violated, constitutional democracy requires that these violations need to be sanctioned and remedied by an independent, impartial, lawfully established system of the judiciary, topped by a constitutional court as an ultimate arbiter of constitutionality and human rights protection, which shall adjudicate in all cases and controversies fairly and in a reasonable time.

Constitutional democracy, in contrast to an ordinary democracy, is thus a system of government in which a democratic majoritarian popular self-rule is exercised within the limits of the formal and substantive requirements of the rule of law. As such, it indeed represents, as Habermas correctly noted, '*a paradoxical union of contradictory principles.*'[23] Namely, while in a democracy the will of the people is supreme, constitutionalism simultaneously subordinates it to the requirements of the rule of law. This paradox can only be resolved, if at all,[24] through a special kind of sociological practice relating to the very character of a citizen in a constitutional democracy. According to Tully, a viable constitutional democracy is dependent on the practices of 'citizenisation',[25] in which individuals merry

21 Martin Krygier, 'Inside the Rule of Law', Rivista di filosofia del diritto III (2014), 77–98.

22 James Tully, 'The Unfreedom of the Moderns in Comparison to their Ideals of Constitutional Democracy', The Modern Law Review 65 (2017), 204–228, (210).

23 Jürgen Habermas, 'Constitutional Democracy: A Paradoxical Union of Contradictory Principles', Political Theory 29 (2001), 766–781.

24 Michel Rosenfeld, 'The Rule of Law and the Legitimacy of Constitutional Democracy', Southern California Law Review 74 (2001), 1307–1352 (1351).

25 Tully (n. 22), 210.

their private and civic autonomy and make it part of their individual and collective self-awareness and self-formation.[26] As Habermas explains, the private autonomy, which is about the individual freedom, and the civic autonomy, which stands for a commitment to the common good, are ends in themselves, as well as the mutual preconditions for each other's existence.[27]

The exercise of civic autonomy in a democratic process is a guarantee for the equal protection of the rights of all individuals, but the use of civic autonomy is only possible if the individual autonomy of citizens is secured. '*Each side is fed by resources it has from the other*.'[28] Eventually, this requires that a constitutional democracy can only exist as an internally inclusive and externally open society, as a continuously negotiated and conciliated order,[29] in which no rule is permanently insulated from disputation.[30] Constitutional democracy is thus '*a self-correcting historical process*,'[31] a process of trial and error, in which citizens as the bearers of private and civic autonomy directly and through their elected representatives in a comprehensive set of legal, economic and political practices try to live up, in a pluralist society, as closely as possible to the above presented formal and substantive predicaments of the rule of law.

III. Conducting Transition 2.0 in a Realist, Structural, Principled and Inclusive Constitutional Manner

Having laid down the normative ideal of constitutional democracy, let us now assume that the elections in a Member State, which has significantly departed from this ideal, turn in favour of a coalition of parties that have campaigned on the promise of restoring constitutional democracy. Comparing the normative ideal of constitutional democracy, sketched in part two of this article, with the means the ruling regimes have employed to depart from it, as these were detailed in the introduction, the restoration of constitutional democracy would entail at least the following ten systemic measures.

26 Ibid.
27 Habermas (n. 23), 780.
28 Ibid.
29 Tully (n. 22), 208.
30 Ibid.
31 Habermas (n. 23), 768.

First, restoring a constitutional court as a tribunal established by the law and remedying the consequences of the rulings handed down in an unlawful composition. Second, re-establishing systemic independence of the judiciary. Third, re-establishing systemic independence of all other (relatively) independent State institutions, bodies and organs. Fourth, restoring a genuinely public broadcaster, committed to the highest professional standards of journalism in the public interest. Fifth, ensuring systemic conditions for a pluralist media space free of undue public or private pressure and interference. Sixth, providing systemic grounds for free and pluralist civil society with equal, fair and non-arbitrary access to public funding. Seventh, systemically restoring full academic freedom and pluralism, in particular in the form of full respect for the institutional and financial autonomy of the universities. Eighth, systemically facilitating a vibrant market economy, free of undue government interference, with zero tolerance for corruption and with guarantees for a level economic playing field, based on fair competition preserving economic pluralism. Ninth, protecting and guaranteeing a thriving pluralist society in a polity based on a comprehensive system of checks and balances that prevents the abuse of power, public and private alike, to ensure non-arbitrary, just and equal treatment of all individuals. Tenth, re-establishing a veritable and profound commitment to a constitutional democracy based on political liberalism.[32]

It is clear that the implementation of these ten systemic measures entails a significant rupture with the contemporary state of affairs in the affected Member States. Transition 2.0 is therefore built on the idea of a political, personnel and legal discontinuity with the past. Political discontinuity results from the electoral victory and should primarily engender a new kind of politics committed to the respect and furtherance of constitutional democracy. Political discontinuity, in turn, also entails personnel change, at least by ending the political mandates of State functionaries appointed by the preceding government. Finally, legal discontinuity also requires establishing legality and enforcing legal accountability of those who have committed criminal acts during the times of the regression of constitutional democracy.

While the transition 2.0 could also consist of many acts of political pragmatism, based on political compromises and 'deals',[33] there are certain

32 John Rawls, *Political Liberalism* (New York: Columbia University Press 1999).

33 This idea is borrowed from Michal Bobek's intervention during the 17 of May 2023 conference in Heidelberg.

red lines that any transition to be conducted in the right way cannot cross. This is foremost criminal accountability. Potential crimes by the members of the previous regime, provided that the statute of limitation has not yet lapsed, must be prosecuted. Impunity is incompatible with the requirements of a lawful and just transition. Other red lines are the rulings of the European courts which must be unexceptionally enforced in full. However, even beyond these red lines the transition 2.0 shall not be completely unconstrained, rather it should be approached in a realist, structural, principled and inclusive constitutional manner. We continue by addressing each of these four requirements in turn, beginning with realism first.

1. Realist Approach to Transition 2.0

Realism builds on Madison's famous insistence that if men were angels, there would be no need for the law.[34] Obviously, men are no angels anywhere in this world, but across cultures and States, including Member States of the EU, the overall degree of integrity of the national stakeholders and the people as such varies. This is important because the (in)existence of personal, institutional and ultimately societal integrity is correlated with the habit of obedience, which is, at least following Hart,[35] a constitutive element of any legal order, but especially of the one that is based on the rule of law. The lower the overall integrity in a polity, the weaker the habit of obedience to the law, the rule of law included.[36]

In the EU, mostly due to the historical differences in State, polity and legal order-building, in which a particularly impactful role over the course of the last century has been played by the three European totalitarian regimes: fascism, Nazism and communism, as a rule, the southern and east-

34 James Madison, 'Federalist No. 51, The Structure of the Government Must Furnish the Proper Checks and Balances Between the Different Departments', New York Packet, Friday, 8 February 1788.

35 H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press 1963).

36 Martin Krygier, 'The Rule of Law: Legality, Teleology, Sociology' in: Palombella/Walker (eds), *Relocating the Rule of Law* (Oxford: Hart Publishing 2008): 'Why people obey laws, who does and when, are large questions, the answers to which vary greatly between societies, and depend only in part on the character of the laws themselves. Apart from obedience, patterns of use and manner of use are other major sources of distinction between societies where law counts and those where it doesn't. I am taken with the Bulgarian saying that law is like a door in the middle of an open field. Of course, you could go through the door, but only a fool would bother. Where the saying has resonance, the rule of law is not likely to.'

ern EU Member States on average score lower on the rule of law index.[37] These differences can be explained by a variety of factors, including, but not limited to the relatively shorter tradition (or even lack) of statehood, democracy, rule of law; the more recent and more damaging influence of the totalitarian regimes, in some cases all three of them, on the character, especially pluralist or not, of the society as a whole, as well as on the political identity and self-perception of individuals of those societies.

As we have argued elsewhere, echoing sociological research in the countries of Central and Eastern Europe,[38] in those States the individuals 'continue to exhibit many features of *homo sovieticus*, of a distorted, strained public and private character of citizens [marked by] the general apathy, a [prevailing] sense of passivity, uninvolvement and infantilism.'[39] As a result these societies exhibit weaker political, legal and overall civic culture, and they lend themselves to higher risks of corruption and arbitrariness.[40] It is these reasons that explain the outbreak of a deep crisis of constitutional democracy in select CEE countries, but they also and simultaneously dictate a high degree of realism when 'the good guys' after their electoral success will be remedying the consequences of the objectively insidious rule of the 'bad guys.' For, in principle, both guys, the bad and the good ones are birds of a feather, for whom it is quite likely to flock together, even if in disparate political families and for heavily conflicting political goals.

This means that in a country with a relatively weaker political and legal culture, there should be – as there are even fewer angels than in general – no room for the idealization of any political side. This conclusion is self-evident as far as the political parties which have caused the constitutional and democratic regression are considered. Their violations are, as we have stated at the beginning, objective in the sense that they have been intersubjectively confirmed by a plethora of credible domestic and international actors. In accordance with the red lines of criminal, political and legal accountability, these violations should be redressed and the responsibility for them appropriately enforced. However, even these political parties, the perpetrators of a crisis of constitutional democracy, should be approached

37 https://worldjusticeproject.org/rule-of-law-index/global/2022.

38 Lev Dimitrievich Gudkov, '"Soviet Man"' in the Sociology of Iurii Levada', Sociological Research 47 (2008), 6–28; Lev Dimitrievich Gudkov, 'Conditions Necessary for the Reproduction of "Soviet Man"', Sociological Research 49 (2010), 50–99.

39 Matej Avbelj, 'The Sociology of (Slovenian) Constitutional Democracy', Hague Journal on the Rule of Law 10 (2018), 35–57.

40 Compare also with A. Jakab in this volume.

in a nuanced manner, differentiating inside them between those who have led and directly contributed to the constitutional decline, and others who have taken part in this enterprise more indirectly, perhaps even under direct or at least indirect pressure of the party leadership that has required full loyalty in exchange for preserving, if not their very livelihood, at least their careers and welfare.

As a viable constitutional democracy, in particular, requires political pluralism, this prevents treating a rogue political party as a criminal organization, which ought to be fully disbanded and its members lustrated in analogy with denazification and decommunization. As there is no doubt that a constitutional crisis in select EU Member States is really profound so that they can no longer be qualified as democracies, rather they function as 'hybrid regimes',[41] there is equally no doubt that they cannot be qualified as totalitarian States whose democratization requires total replacement of political elite and complete removal of the cadres of this political party from State institutions and public life.

In the opposite case, if the newly elected political parties engaged in a comprehensive purge of their political opponents, targeting not only those who can be either criminally, legally or directly politically accountable for the existing constitutional crisis but everyone who could be in their political judgment associated with the previous political regime, the restoration of constitutional democracy could turn into a self-defeating process. If the new political regime removed all politically and morally corrupt individuals associated with the previous regime, even if in a profound and sincere belief that this is what the re-establishment of constitutional democracy requires, the eventual outcome would not be a veritable and viable constitutional democracy, but a mass clientelism committed by and aligned with the opposing political side, arrived at in good conscience. A kind of 'ethocracy' in the words of Jan-Werner Müller, understood 'as a rule by and for the morally pure',[42] this time around by all those who are not the members, loyalists or associates of the previous rogue political regime.

Realism thus warns us that in the process of restoration of a veritable constitutional democracy, there is a thin and fragile line between establishing a proper constitutional democracy and failing to do so by taking the

41 Ibid.

42 Jan-Werner Müller, 'The People must be Extracted from within the People: Reflections on Populism', https://www.princeton.edu/~jmueller/Constellations-Populism-JWMueller-March2014-pdf.pdf, 1–32 (22).

State over by the previous opposition. Politics is, also and in countries with weak political cultures especially, about maximizing power. A political elite that has been long in the opposition, that has even been ostracized and subject to political, administrative, perhaps even judicial chicanery, if it really wants to breathe a new life into a particular constitutional democracy, has to be able to exercise self-restraint, staying faithful to internal checks and balances, rather surrender itself to political revanchism, no matter how much the latter would be tempting or even understandable under the given circumstances.

For that matter, the political parties which prevailed in the elections should be equally subject to public scrutiny ensuring that their declaratory commitment to rebuilding a constitutional democracy is lived up to in practice too. This scrutiny should reinforce and preserve the ethos of political accountability, which should be especially accentuated when the political temptations are at their all-time high. That happens precisely at the moment of the political regime change when on the one hand there exists a lawful and legitimate mandate to sanction and replace those accountable for the unconstitutional state of affairs, which, by way of humane and political impulses could spill over into the retaliatory practice of replacing one camp's loyalists with our own. Shall the latter happen, the political state of affairs in an already constitutionally deeply troubled Member State would simply find themselves jumping out of the frying pan into the fire.

For when both sides of the political spectrum turn complicit for hijacking a constitutional democracy, admittedly for different political ends and each with their own loyalists, there in the end remains no one, no credible political movement that could in reality, in a viable manner revitalize the ailing constitutional democracy. Under this scenario, a constitutional democracy is irreversibly transformed into a permanent spoils system. The argument from realism demands from us to be cognizant of this possibility, to warn against it in advance and to contribute to the strengthening of all those public and private mechanisms, which are available in a constitutional democracy, to keep this threat under check.

2. Structural Approach to Transition 2.0

In our pleading in favour of realism when conducting a transition 2.0 we have already alluded to the importance of the sociology of constitutional democracy, by noting that the degree of the actual existence of a constitutional democracy and its quality depends on the integrity of individuals,

institutions and the society at large; on the pluralist character of a polity, which then, in turn, translates into the relative presence or absence of the system of checks and balances, not just in a narrower institutional sense, but in a societal sense in the broadest meaning of the term, so that no political, interest-based or private faction can monopolize politics, economy and the society as a whole. The awareness of the sociological predicaments of a constitutional democracy consequently merits adopting not just a realist approach to transition 2.0 sketched above, but also a structural approach.

The structural approach requires understanding that constitutional regression, even if eventually conducted by and through the law, is not just a legal process, but a comprehensive social phenomenon, which derives from and impacts all the main elements of societal political existence: civic mindset, culture, economy, civil society, politics and the law. Approaching transition 2.0 from the structural perspective requires recognizing that in constitutionally regressive EU Member States not only are not all problems legal problems, let alone they can be – and certainly not all of them – solved through the law.[43] The law, even in a well-ordered society, has its inherent limits.[44] We, as lawyers, should therefore eschew hubris of lawyerly omnipotence, while at the same time nourish the law as one of the most potent institutional normative orders[45] for changing our societies for the better.

This means that the remedial ambitions of treating constitutionally regressive EU Member States should extend beyond the law, to reach into the very fabric of society. It is, accordingly submitted, that a structural approach to transition 2.0 entails that the new political powers should foremost engage in the restoration of social trust, on the vertical and horizontal level, across all the building blocks of their polity. To ensure the longevity of a well-ordered constitutional democracy after transition 2.0, the greatest number in the society of an affected Member State must have an impression that they are in fact free and equal citizens, irrespective of the legitimate comprehensive doctrines to which they adhere.[46] Their sense of democratic belonging should be restored by overcoming the deeply seated polarization.

43 Neil MacCormick, *Institutions of Law, An Essay in Legal Theory* (Oxford: Oxford University Press 2007).

44 Neil MacCormick, *Questioning Sovereignty: Law, State, and Nation in the European Commonwealth* (Oxford: Oxford University Press 1999).

45 MacCormick (n. 43).

46 John Rawls, *Collected Papers* (Cambridge: Harvard University Press 1999), 480, accordingly a comprehensive doctrine stands for a precisely articulated scheme of

Accordingly, the people in an affected Member State should be turned from two adversarial, close-minded, politically exploited tribes, into a sound body of citizens striving together for a common good in a country they have in common.

How this could in practice be done? A short and provisional answer reads: by putting Rawls' idea of political liberalism based on public reason[47] into action. A newly established political democratic regime should begin by openly and publicly recognizing the right of all spectres of the society, of all individuals to continue to stay faithful to their own comprehensive doctrines, ethical worldviews and ideologies, provided they are not incompatible with the respect of equal human dignity. They should all be re-encouraged in their sense of equal belonging, of full acceptance by the political community whose part they form. The new political elite that comes into power should thus actively contribute to the resurrection of an overlapping consensus over the system of justice feeding the substance of constitutional democracy, to which everyone could as much as possible commit despite their often irreconcilable disparate ideological and ethical worldviews. Instead of provoking *Kulturkampf*, rather than pushing and deepening polarization, the newly elected democratic political forces should publicly admit that they have come into power in a polity, divided by deeply seated not just political, but indeed cultural and moral cleavages. These should no longer be abused and instrumentalized for short-term political gains, no matter how politically beneficial that is, and irrespectively of the fact that political craftsmanship is much easier in a politically polarized landscape, finely divided between us and them.

Engaging with differences, turning them into commonalities, in pursuit of the common good, which is a priori hampered by irreconcilable visions of that very good, involves a lot of reason-giving, political dialogue, compromise-seeking, and is politically much more laborious, less efficient and potentially, especially in the eyes of the political allies in a particular political club, much less rewarding than politics of exclusion, division and polarization, where the opposite side is a priori conceived of as illegitimate, an entity that can be tolerated, without any need of constructively engaging with. Therefore, if in structural terms transition 2.0 is to succeed, a new democratic political regime should, once having put in place the formal and

thought, which covers all conceptions of what is of value in human life in its totality, informing our political as well as non-political conduct.

47 Ibid., 573.

substantive pillars of constitutional democracy and enforcing criminal, legal and political accountability along the red lines sketched above, in terms of political narrative, political ethos and practice be as much as possible internally inclusive by striving for consensus, for unity, for collaboration, for acceptance of the other, to turn the public institutions in service of all citizens, ensuring that what dominates the public political life is the topics that unify, that contribute to social cohesion. At the same time a new political regime in power should avoid as much as possible, but certainly not exploit, all those political and societal neuralgic points at which a disagreement is profound, indeed inexhaustible. In this manner, it could indeed be possible even for a deeply split political community to viably travel in the same boat, not just for the sake of a successful transition 2.0, but indeed in the longer run.

3. Principled Approach to Transition 2.0

The required mending of the social fabric in an affected Member State, ensuring its social, value, cultural, economic and political cohesion can only take place as a result of a principled approach. The latter is an antipode to revenge and retaliation, of conquering and irreversibly defeating the opposing political camp, its actual and imagined loyalists, in short, all those who do not belong to 'us'. In other words, and without succumbing here to the idealism avoided above, the new political regime has to lead by example, by applying and enforcing the rules and principles of constitutional democracy as they would consider it fair, were these same rules and principles applied to them, had they been on the side of the constitutionally regressive regime. The more this principled approach will be not just visible, but actually employed in practice, the greater the chance for a structural and therefore successful transition to a veritable and actually existing well-ordered constitutional democracy.

A principled approach, in particular, prevents using the law as a means for exclusively furthering political objectives. As Gianluigi Palombella noted, when it comes to the law, we ought to distinguish between two conceptions of the law. Law as an instrument of power: *gubernaculum*; and law as a limit to power: *jurisdictio*.[48] The principled approach is only compatible with the law conceived of as a limit to power. Ruling in a prin-

48 Gianluigi Palombella, 'The Rule of Law and Its Core' in: Palombella/Walker (eds), *Re-locating the Rule of Law*, (Oxford: Hart Publishing 2008).

cipled manner foremost requires treating equal cases alike; respecting the established administrative and judicial jurisprudence, rather than carving our special exceptions from the general rules for a particular case always whenever an opportunity arises. Principled approach also demands heeding the formal and substantive requirements of the rule of law and not succumbing to the temptation that virtuous political ends, even if constitutionally compliant, can justify any legal means whatsoever.

In other words, a principled approach binds the newly elected government when conducting transition 2.0 and restoring the fundamentals of constitutional democracy to do so in a way that lives up fully to the procedural and substantive principles of constitutional democracy. The new political regime, again, has to feel, act and appear as being fully bound by the law, which is not just an instrument to rule with, but also an inherent and necessary limit on that rule. All concrete actions and reforms to be carried out by the new government would thus need to comply with the principle of proportionality. Statutory reforms have to be thoroughly reasoned and justified by universalizable arguments, meaning that their validity and persuasive quality do not hinge on the particular instances, rather they can be used, as they have ideally also been applied in the past, in all similar situations in the future. Eventually, the principled approach thus boils down to the golden rule, requiring the new political regime not to do to others, what they would not like to see the others do to them.

4. Inclusive Approach to Transition 2.0

Finally, the approach taken should be inclusive. While internal inclusivity in form of acceptance of the other, of the political adversaries, has already been discussed as part of the requirement of a structural approach identified above, inclusivity discussed here is conceived of in an external sense. That is in a sense that the new political powers do not act in isolation, in a solipsistic, parochial, exclusively national way rather that they take fully into account and full advantage of the institutions, both hard and soft, of the European constitutional space. The latter is conceived of here as a set of three concentric circles consisting of national constitutional orders, the legal order of the Council of Europe and the constitutional order of the European Union. These three legal orders, taken together, with a totality of their interactions, constitute the European constitutional space, which is more than the sum of its three constitutive parts, replete with constitutional standards that equal at least the common minimum formal and substantive

constitutional denominator below which no European jurisdiction is permitted to fall.

An inclusive approach to transition 2.0 requires that all adopted restorative measures, in particular the more radical ones, which will be doubtlessly necessary and simultaneously extremely politically and socially contested, should be justified with a persuasive reference to the common standards of the European constitutional space and the binding law of the European Union. The active involvement of the actors external to the affected Member State, either the institutions of the Council of Europe[49] or the EU or both, is an essential part of the inclusive approach advocated for here. The inclusion of the external actors namely reinforces the credibility of the principled approach by undergirding, in particular, its claim towards universalizability.

It is obvious that the European constitutional space boasts a plethora of formal and persuasive institutional authorities that can be relied upon to stimulate the environment of reason-giving, deliberation, and sincere engagement in institutional and legal reform following not just the minimum common European constitutional standards, but indeed the best practices in the respective fields. Conducting transition 2.0 in response to the rulings of the CEJU and ECtHR, under the formal supervision of the European Commission within the ambit of its rule of law framework, as well under the advisory oversight by the Venice Commission reinforces the credibility of the measures adopted and strengthens trust not just among the political allies, but more importantly among the adversaries. For them, most importantly, the inclusion of external actors in the management of the process of transition 2.0 adds another element to the domestic system of checks and balances, limiting further the probability of restoration of constitutional democracy spilling over into a spoils system.

In short, the active involvement of the external rule of law enhancing institutions increases the legitimacy of the transition and bolsters the overall integrity of the process of restoration of constitutional democracy, provided, however, that the external actors strictly act in a principled manner too. In the opposite case, the apparent or real double-standards controversy will break out, which will be (ab)used to portray transformation 2.0 as just another narrowly politically motivated attempt, to make it worse: even backed up by foreign political allies, to take over the State and cement in it

49 See Angelika Nussberger in this volume on the special role the Venice Commission can play in this.

a competing political ideology catering to an adversarial political class, their loyalists and cronies.

IV. Conclusion

This chapter has examined in an abstract manner, albeit informed by concrete case studies, how to conduct, after the political change achieved at the ballot box, a transition to a full and actually existing constitutional democracy in an EU Member State, which has been for almost a decade subject to a systematic constitutional and democratic regression. The arguments arrived at should ideally be generalizable and universalizable across contexts, so to be relied upon in all future similar cases, irrespectively of a Member State in which they occur.

Consequently, we have identified ten systemic measures that ought to be adopted as part of the transition 2.0. The first three relate to the re-establishment of de facto independence and supervisory operationality of the constitutional court, the overall system of judiciary and all other (semi)-independent organs and institutions of the State. The next six measures are directed at the re-establishment of a viable, actually existing pluralism in the comprehensive market of ideas, including the media, both public and private, education, civil society and the economy at large. The last, but certainly not the least important measure, requires rebuilding a veritable and profound commitment to a constitutional democracy based on political liberalism.[50]

We have insisted that the transition towards these ten crucial objectives, once the red lines of criminal accountability and full compliance with the jurisprudence of European courts have been respected, to be conducted in the right, e.g. legal, legitimate and just way, should be performed in a realist, structural, principled and inclusive constitutional manner. In the opposite case, the outcome of a transition will not be a veritable, viable and enduring constitutional democracy, but just another round of the proto-schmittian desperate struggle by one side of the political spectrum, which has so far been in opposition, to capture the State, eliminate or at least subordinate the political enemy. This will, inevitably, soon spur the need for transition

50 John Rawls (n. 46), 461.

3.0, to be followed by transition 4.0, turning transition in an affected Member State into a permanent part of the new (ab)normal.