How to Rebuild Poland's Rule of Law

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Ahead of the next parliamentary elections, a core question is whether and if so how we can restore Poland's rule of law. While the current effort is understandably focused on resurrecting the Constitutional Court and rebuilding an independent judiciary and prosecution, in this post I argue that a purely institutional approach won't be enough. It obscures that Poland's particular vulnerability to rule of law backsliding is linked to on-going public disengagement and indifference thereto. This is arguably rooted in the top-down nature in which Poland's rule of law was built in the first place, and the persistent failure to build a culture of constitutional fidelity amongst Poland's citizenry since its democratization in 1989. Following the impressive march on 4 of June 2023 to commemorate the anniversary of first democratic elections of 1989, it is thus imperative to continue to mobilize and build lasting defiance on the ground in order to truly work towards a restoration of the rule of law in Poland.

Revisiting 1989

After 1989, Poland's trajectory was defined by the gradual dissociation from its communist past, inter alia, by highlighting the rule of law as the meta-principle of the entire legal system. The achievements in this regard are unquestionable, with membership in the European Union in 2004 considered the culmination of this great "institutional effort". The problem, however, is that the Polish rule of law was built "from top to bottom" through declarations, texts, and institutional solutions, with no attention being paid to the importance of the process that must accompany such rapid and drastic changes in institutional design: the social embeddedness of the rule of law. The life of any institution must go hand in hand with the difficult process of building social legitimacy by the institutions themselves. As Poland's experience shows, even the best-constructed institutions will fall when attacked by the illiberal forces if these institutions fail in garnering social understanding of *why* the institutions exist in the first place, *what* and *how* they do and *how* they matter to and affect the daily lives of the citizens. Because no effort was put into ensuring the latter, Poland's rule of law could be dismantled without much trouble in the name of the unlimited will of the majority. A civic voice in defense of institutions has been almost entirely absent.

A central problem, in this respect, is that Polish people never received the opportunity to learn the principles of liberal democracy and accept their responsibilities to the community. 50 years of communism were not conducive to building participation and trust in the state and the law, not to mention the short 20-year (1918 – 1939) interwar period. The 123 years of partition (1772 – 1918), in turn, put a premium on resistance and disobedience to the law (foreign) and the state (not one's own). Patriotism glorified death at the service of the imaginary motherland, instead of emphasizing the need for organic and less spectacular long – term work in, and for, the society. The culture of "doing little things" was always suppressed by the irresistible pull to play a martyr. Following a brief stint of civic mobilization in 1989, the voice of citizens became limited to the symbolic casting of votes during elections. Subsequent political cycles were dominated by political struggles "at the top" and a technocratic approach to top-down democratic consolidation, without seeking to foster civic education and engagement., including when it came to Poland's accession to the EU. At the same time, Polish citizens had to confront the daily struggle of their new capitalist reality, further distancing them from "politicized Warsaw". Meanwhile, the virtues of liberal democracy in the form of tolerance, respect for difference and pluralism, never became part of the daily life and practice of Poles. In

other words, it is because Poland's democratic consolidation was based on weak civic foundations that the PIS could carry out such a "smooth" and methodical capture of the state, with the tacit approval of public opinion.

Liberal Institutions without Liberal Culture

The Polish experience demonstrates why any attempt to restoring its rule of law cannot be reduced to institutional and procedural reforms but must include a change in socio-legal practice, as this determines the final shape of the law and its reception by citizens. In this respect, after 1989, the government and its citizens pursued two different understandings of "the law". While the citizen saw the law as *a shield* to defend themselves against a dominant and omnipotent state, the courts and administration have lagged behind this civilizational change and stayed true to a vision of "*law as a sword*" resorted to in order to punish and enforce obedience.

It is the latter conception that has therefore dominated institutional practice in the modern Polish state. The State has remained ruthless in asserting "its own" from its citizens, while being overly formalistic and impervious when it comes to the protective function of the law. This disappointed the expectations of citizens, who after dark decades of communism expected the law to protect them from arbitrary governmental power. Yet, in Polish institutional practice, their conception of "law as a shield" remained an aberration. Thus, when citizens sought protection against the state, the courts and administration were not ready to defend him with the same feeling of urgency with which they enforced the law as a sword against the same citizen. Of course, nothing alienates a citizen more than the belief that the law is just a façade, full of promises and ornaments. As a result, the on-going public indifference to the rampant manipulation and instrumentalization of the law by the ruling elite should be of no surprise. Citizens may rightly ask "why should I bother to defend the very law and the institutions that were never there to protect me when I badly needed such a protection?"

Central to counteracting this indifference and resentment towards the law is a reconceptualization of the rule of judges within Poland. After 1989, we have never had an honest discussion about why people need a court and how judges themselves perceive and understand their role in society. The pent-up resentment and the growing gap between the performance of the courts on the one hand, and the citizenry yearning for the "law as shield" on the other, was used and abused to prop up the unconstitutional capture with the argument that now "our judicial reform" will address these issues. While the ruthless attack by PIS on the judiciary has already forced judges to recognize the importance of their profession's social function and the necessity to better communicate with citizens, much more is needed to restore the rule of law in Poland. In particular, an honest discussion must be fostered of what it means to be a judge in a democratic rule of law – based state, zeroing in on the ethos of judging. It is judges themselves who must change the way they think about their vocation and power so that people can finally see the law and its institutions as an ally, and not just a dark and misunderstood force. The rule of law must work, and it must work in a way that is visible to and felt by the ordinary citizens.

At the same time, any attempt to restore the rule of law must abandon the myth of the "institutional wand" and the misguided narrative of "and now we will fix things top – down". In a state whose institutions have been captured, it must be the citizens themselves who undertake to uphold the democratic system, who demonstrate that they want to be citizens and not just passive witnesses of the politics of the day. "Civic activism" and vigilance are necessary components of a consolidated democracy. This is the challenge of civil society, who must be active, responsive and ready to step out of the comfort of their own private space to defend the legal order. Therefore, when we want to seriously discuss yet another chance for the rule of law in Poland, we need to understand that real "change for the good" always starts *around* and *in* me, at the level of family, friends, neighbors, my community, municipality. Each of us must ask himself: how can I defend the rule of law? In my own case, I certainly not only

write, but also listen, speak, and go when I get invited to speak, regardless of where it is. I have no expectations of those who invite me but rather I am grateful that after 30 years of passivity by Poland's legal elites, someone still wants to listen to me at all.

To Rebuild the Rule of Law, We Must Start with Ourselves

The last 8 years have come as a shock to all those who, in a spirit of complacency, believed that Polish democracy was a consolidated one and that Poles have become fully-fledged citizens. We have also seen that our rule of law, built top-down, resembled an unstable structure that collapsed at the slightest shock because there was no substantive commitment or constitutional fidelity amongst either the citizenry or its political elite. Building this commitment is much more difficult than creating new and allegedly perfect institutions and takes infinitely longer than a few parliamentary sessions. With each parliamentary election, we as citizens are given another chance to show our commitment to the constitutional foundations of our political community. We must offer a voice that persists and makes itself heard and does not flame out after one, even a spectacular, march.

The citizen's willingness to speak up and resist is the best weapon against arrogance and impunity, cheating and manipulation. It yields positive results when it is practiced and nurtured day in day out. Instead of sentimental looking back, us lawyers, too, must talk honestly and openly in a spirit of self-criticism about indisputable mistakes committed, we must sensitize fellow citizens to wickedness and strengthen the need for participation, and finally, explain the importance of respect for institutions and the law. All this is what should make up our "civic hearts". The upcoming elections provide a chance for a new opening only if we understand that a well-ordered and decent state is so much more than a set of shiny new institutions residing in Warsaw. Instead, we must realize that it is about "We, the Citizens" and our own commitment to these institutions and a certain way of life defined by tolerance for the Other, mutual respect and consent to live side by side in a constitutional regime based on the rule of law.

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