Polish Re-Democratisation as "Building Back Better"

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Since the new Polish government took power, it has taken first steps to restore the rule of law. These have been quite different in nature, from the soft appeals to comply with the case law of the CJEU to more uncompromising and confrontational measures, like taking control of the public broadcasting TVP. It is too early to comprehensively understand the overall strategic vision of the Polish government in remedying the situation. However, it is clear that restoring a damaged liberal democracy requires a different mindset than fighting its demise. While the latter aims to strategically delay the anticipated undemocratic endeavours, the former must constructively rebuild. I call this 'Building Back Better', akin to the UN risk-reduction approach employed to avoid future disasters. In the following, I elaborate on the nature of re-democratisation as a new challenge distinctive from confronting backsliding. Moreover, I suggest an approach to Building Back Better in Poland in three steps: sifting (step1), selecting and sequencing (step 2), and swallowing (step 3).

Re-democratisation: the new noble cause

Just a few months ago warriors against Polish rule of law backsliding were united. They called out the national and European legal incompatibilities and devastating societal consequences of the PiS populist playbook. They successfully mobilised cross-border solidarity and European courts. Their noble actions very likely slowed the speed and extent of the damage. But these did not prevent backsliding. The consequences of the PiS-years have been dramatic. The public prosecutor's office was fully politicised, the Constitutional Tribunal and various parts of the Supreme Court were populated by people who according to norms of EU and ECHR law, and according to European apex courts (see also here), are not courts/judges. Public media's independence was killed off. Public resources were consistently misused to intimidate opponents. The Polish President has not stepped up, and still does not act on his sworn duty to uphold the Polish Constitution, which plainly includes compliance with European standards. Illegitimately composed (parts of) the Polish Supreme Court /Constitutional Tribunal continue to issue statements which in turn get overturned in judgments by (another part of the same national) apex court.

One would wish that eggs could be unscrambled. That those who now irregularly occupy positions could simply be removed or demoted with the stroke of a pen, without backlash or new complications causing new work. That winning an election, in short, would come with a time machine and a blank sheet of paper. But the infuriating reality is that entrenchment *has* occurred and often *cannot* be easily undone overnight except through draconian measures that may themselves, according to authoritative Polish human rights actors, be in strong tension with the rule of law that needs saving. The political reality is that *that approach* would effectively write the playbook for day 1 of any future PiS-led government if it were to regain power. More problematically, such actions to roll back backsliding would end up destroying sustainable separation of powers in the future, as any winning political power forming the new legislative and executive would "bring its own judiciary".

If indeed we want to avoid this scenario, as we should, we need to accept that in embarking on our new noble cause, re-democratisation, the consequences of the previous regime cannot be fully eradicated overnight without the real risk of durably damaging something even more profound. We need to accept that anti-backsliding weapons and methods are not necessarily well tailored to approaching the unknown terrain of resuscitating a patient, ensuring

she does not only survive but will also be inoculated against a copy-paste bout of future backsliding.

How to do this is an open question. There is no playbook. I would suggest that it would require (1) sifting the countless problems, particularly taking account of Poland's multi-level European embeddedness, (2) selecting and sequencing what problems to attack (3) swallowing the need of non-action on blatant further problems in a conscious effort to prioritise delayed gratification over instant action.

Step 1: Sifting - mobilising European law and European institutions

Poland's rule of law problems can be put into three buckets.

There are some things that the Government can immediately discontinue. Public resources should no longer be used to sue opponents by way of SLAPP cases. One-sided laws, like the LexTusk, can simply not be applied. Doing nothing is all that is needed. Except, perhaps, drawing attention to the fact that you have stopped suppression (including to make the European Commission conclude that its infringement action can be dropped).

All other issues can be sifted through based on a simple criterium: does this have anything to do with EU(ropean) law? The reason is, as Kim Lane Scheppele has explained, that EU(ropean) law, which has been widely relied upon to slow down and call out backsliding can now also be weaponised to "escape the constitutional prison". It is now a separate, outside source of norms binding on Poland to justify restorative steps. The aforementioned appeal to Polish judges by the Minister of Justice, which respects the separation of powers but shows the way, is an example of it. But it is also conceivable that the Polish government asks EU(ropean) institutions, such as the European Commission or the Venice Commission, for more concrete help. After rightly pointing out all the legal complications following from backsliding, it is now, as Hillion has explained, also *their* responsibility to facilitate Building Back Better in the awareness that the window of opportunity is narrow. One example: the Commission and Court of Justice could fast-track their handling of the infringement action dealing with the Constitutional Tribunal.

This "European bucket" would contain particularly everything related to judicial independence (composition of courts, separation of the function of Justice Minister and prosecutor general, etc., but perhaps also issues like the manning of agencies with an important role in executing EU law, like the Ombudsman Office and Data Protection Agency). After all, countless judgments by European courts deal with this. It is also these problems that threaten sound financial management of EU funds and have therefore led to suspending large sums.

All other challenges, like political positions occupied by PiS politicians, and their veto powers over legislation, are in the "national bucket". These issues need to be solved by the Polish government on its own. This will require strategic preparation and planning depending on political opportunity and brinkmanship.

Step 2: Selecting and sequencing: developing and planning measures to Build Back Better

There will, of course, be a temptation to fix *everything, all at once* in buckets two and three. Yet given the time restraints the key question is: what *subset* of issues should be acted upon, and in what order? And what topics absolutely need fixing with a view to Building Back Better, including with a view to counter-entrenching measures that would safeguard liberal democracy in the future?

In that regard, it is helpful to formulate the end goal we would want to work towards. Here is a first attempt: four years from now Poland should have a National Council of the Judiciary that appoints qualified independent and impartial persons (aka: judges), and that cannot be re-politicised. It should have apex courts that consist of judges, and district and regional courts with presidents that are judges. It should have a Prosecutor-General Office that is separate from the Minister of Justice and guarantees that that will remain the case. It should have guarantees that management of publicly financed media is chosen based on independence rather than party-affiliation. This would also need to be ascertained for leadership

of independent bodies such as the Ombudsoffice and the Data Protection Agency.

Of course, this is a hopelessly incomplete list of rule of law issues. But realism should trump purism here. Within one electoral cycle you just cannot undo each backsliding step in the reverse order from which they occurred, like play-acting a film projected in reverse. Moreover, with many parts of the Polish constitutional fabric still captured, particularly the Presidency and the Constitutional Tribunal, time plays a role in different ways. First, legislation can only be adopted after the President is gone in 2025. Second, activities by institutional remnants from backsliding that are still active (such as the captured Constitutional Tribunal and parts of the Supreme Court, which will continue issuing statements) will require permanent "managing", meaning time.

Most of this will indeed need to be laid down in legislation and Constitutional changes, which can be pre-prepared and pre-consulted with EU(ropean) partners so that they can be tabled the day *after* a new President takes office. It will all need careful coordination and orchestration. And perhaps strict confidentiality, so as not to radio intentions to anti-democratic forces. But one thing is certain: failing to plan, is planning to fail.

Step 3: Swallowing - the art of self-restraint

Oscar Wilde once wrote: "To do nothing at all is the most difficult in the world, the most difficult and the most intellectual". There are plenty of Polish rule of law problems that are eyesores legally and an affront to a reasonable sense of justice. Yet, many may simply need no legislative or immediate solving for reason that the problems they cause can be mitigated in better ways, because of capacity restraints, or because resistance against any corrective measures would suck away time, energy and political capital better used for Building Back Better within the golden opportunity of this electoral cycle.

One example: thousands of irregularly appointed people now populate Polish lower courts in places where only judges should sit. Rolling back their appointments or promotions, as the judges' umbrella Iustitia has proposed, would be extremely disruptive and time-consuming. In considering whether this disruption would be justified it is important to observe that these individuals are still a minority. So other solutions may work better. Lower court presidents, within their existing discretionary powers, can probably simply isolate these non-judicial individuals in composing chambers while allocating cases, never having them sit without a judge alongside of them. Moreover, on the assumption that national apex courts would soon be fully populated again by judges, what comes out of lower courts could always be double-checked on appeals anyways, so that the right to a fair trial would be guaranteed. Of course, this is hard to stomach. But the prize here is long-term legitimacy and the legal and moral high ground.

There will be many other irregularities and illegalities that will remain deeply annoying yet do not touch the basic, minimal fabric of a Build Back Better-plan. Managing rather than directly confronting them is "the most difficult and the most intellectual". Yet swallowing solutions that are imperfect and incomplete may simply be necessary for re-democratisation efforts.

Re-democratisation as a balancing act between instant and delayed gratification

None of this is easy. Indeed, everything will be infuriatingly hard: the legal aspects, the policy challenges, the politics, the required self-restraint. Executing this will permanently feel like rewarding past criminal behaviour and walking a tightrope between instant and delayed gratification. In the end re-democratisation is about consciously finding a balance between a minimum set of measures that can remedy the biggest problems now, finding a way to deal with, manage and keep in check the imposters that the previous backsliding brought, all while continuously keeping the eyes on the biggest prize: a new and stable Polish liberal democracy inoculated against new takeovers copy-pasted from the past. Rule of law defenders should all refuel, retool, and get ready to help out with this European enterprise.

This is an extended version of a speech given in the European Parliament's Civil Liberties Committee during a rule of law hearing on 15 February 2024.

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