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Restoring the Rule of Law

Politics in the Service of Democracy

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In the last decade, the rule of law in Poland was methodically undermined. This would not have been possible without the parliamentary majority of the United Right coalition formed in late 2015 and the support of President Andrzej Duda, flanked by other opportunistic actors. The effects of judicial reforms beyond domestic politics have led to a long-lasting conflict with the European Commission (EC) over respecting EU law by the Polish government. After the 2023 parliamentary election, power dynamics in the country changed. Remedying the situation faces a fundamental question of how to tackle undemocratic reforms with legitimate, democratic measures.

Poland has become a real-time laboratory of rule of law restoration. One year into the process, it is evident that its success depends on two equally relevant preconditions. First, legal expertise is required to choose a suitable approach in each case (reverse or overwrite). Second, achieving a consensus on the chosen roadmap and securing a political environment enabling its execution is necessary. The expertise must go hand in hand with a political will.

So far, the first condition was met by appointing Professor Adam Bodnar, one of the leading experts on Polish constitutional law and former Ombudsman, as the new Justice Minister. Preparation work was also done by consulting experts as well as relevant stakeholders to include them in the transition. Still, avoiding obstruction by the affiliates of the outgoing regime and suppressing the desire for retribution by the injured parties presents the biggest challenge. The new Polish government has a rare occasion to lead by example on how to solve the rule of law crisis not only by legal, but also political means.

Remedial process underway

The legal and institutional challenges of reversing the erosion of the rule of law in Poland include tackling the consequences of legislative inflation, court-packing, the institutionalised system of disguised sanctions, and other forms of executive interference with judicial functions. A simple return to the *status quo* from 2015 seems impossible.

There are two opposing approaches to overcoming chaos in the judicial system. Possible strategies range from a complete reset to a more flexible period of grace, with a nuanced verification of reforms undertaken and their consequences. The latter seems more feasible, with a depolarising potential in the anyway polarised new political reality.

In March 2024, the Ministry of Justice presented the Healing package for the Constitutional Tribunal, prepared in consultation with legal experts and practitioners. It rests on three pillars: an appeal to the judges of the Constitutional Tribunal to resign to help democratic transition; a draft law on reforming the Constitutional Tribunal; and proposed amendments to the Constitution to secure new guarantees of the Tribunal's independence and impartiality in the future. In October 2024, President Duda sent the two laws adopted by the Parliament to the Constitutional Tribunal, effectively putting them on hold.

Since 2017, the National Council of the Judiciary (KRS) has been operating under political control. In July 2024, a law amending the Act on the National Council of the Judiciary was adopted by the Parliament. The most important changes referred to the election of KRS members in a direct and secret ballot by all judges in Poland, and the introduction of a civic council as an advisory body for assessing candidates

for judicial and assessor positions. In August 2024, the President referred also this Bill to preventive control, freezing it in the Constitutional Tribunal.

Chaos in the judicial system is a consequence of prior unconstitutional reforms of the KRS. Possible ways out see judges appointed after 2018 either facing revocation or undergoing individual verification. This process would refer to ca. 2,500 individuals. Helsinki Foundation for Human Rights provided guidance rejecting a wholesale invalidation of all promotions, favouring a case-by-case evaluation to confirm the validity of prior individual appointments.

The Supreme Court faces multiple crises. Questionable appointments of judges after 2017 are also one of them. Currently, the General Assembly of Judges of the Supreme Court, a self-governing body, cannot convene as 32 "old" Supreme Court judges boycott its meetings. The Chamber of Professional Liability poses another problem. It was created in response to the dissolution of the Disciplinary Chamber in 2022, the root cause of the infringement procedure resulting in a daily penalty payment of €1.000,000 to be paid by Poland.

Finally, the urgency of judicial transformation should not overshadow the need to also depoliticise prosecution service. In July 2024, a draft law was proposed to separate the positions of the Justice Minister and the Prosecutor General. Democratic decline in the form of public media takeover and shrinking spaces for civil society exceeds the scope of rule of law erosion, however, this would not be possible without weakening the institutional and procedural fundaments of the state.

Autocratic champions and copycats

Halting an advancing autocratisation process is uncommon. The change of government opened a window of opportunity for mending the rule of law. Poland has become a laboratory of fixing democracy *in vivo* and in real-time, offering unique learnings to other countries experiencing rule of law erosion, such as Hungary or Slovakia.

The scale of rule of law devastation in Hungary is unprecedented in Europe. Since 2010, when *Fidesz* took over, the basic law was changed, and the independence of the judiciary was attacked by court-packing and institutional reorganisation of the system. Rule of law erosion opened pathways for the democratic decline, best exemplified by media ownership concentration, choking critical CSOs and establishing loyal GONGOS, and curbing academic freedom. Freedom House classified Hungary under Viktor Orbán's leadership as partly free regime.

In Slovakia, the parliamentary election in September 2023 gave victory to the populist SMER, which formed a coalition with the social-democratic catch-all *Hlas* party and the nationalist SNS. Robert Fico has been Prime Minister for only a year. Yet, long enough for the concerns over the rule of law in Slovakia to emerge, turning the spotlight on the amendments to the Criminal Code, the dismantling of the Special Prosecutor's Office, personnel changes in the Judicial Council and police, and the takeover of public media. Slovakia's other challenge is the insufficient capacity to address high-level corruption.

Although autocratic playbooks offer to-go scenarios for effective state capture, not all leaders make full use of them. Their strategies depend on country specifics, political circumstances, and long-term objectives. Hungary has by far overtaken other countries on the spectrum of autocratisation. It has advanced to the point of no return, whereas Slovakia can still change its trajectory. In Poland, the road to full recovery is long and winding, but "do's" and "don'ts" slowly crystallise.

Lessons learnt from Poland

Rapid institutional and personnel changes in prosecution and the judiciary in Hungary and Slovakia resemble the politically driven *modus operandi* of the past Polish government. Repairing unconstitutionally changed institutions and the revision of unlawful appointments is a laborious process. The appointees of previous regime remain firmly anchored in the system. Next to identifying legal pathways to restitution, striking a balance between the interests of specific professional groups, the neutrality of restored checks and balances, and the transparency of decision-making

processes presents another challenge. Civility and mutual toleration must remain guiding principles.

The implemented remedial measures must also be free from suspicion of partisanship or retaliation. The strategy of the new Justice Minister to request the opinion of the Venice Commission on European standards regulating the status of judges in ordinary courts or fixing the KRS precisely according to the ECHR and CJEU rulings is a smart move. Relying on the formal opinions of international courts will not only pave the way for further reforms compliant with the ECHR and EU law but also legitimise them in the eyes of involved stakeholders and the general public.

The Polish case also illustrates the dangers of resting the legislative and executive powers in one hand. Without the hegemony of Law and Justice in both chambers of the Polish parliament, strengthened by the loyal President, the total power grab would not be possible. Although in all discussed countries the president is more a ceremonial office, (s)he still signs bills into law or vetoes draft laws, and in Poland and Slovakia appoints members of the Judicial Council and the president and vice-president of the Constitutional Court. SMER produced the Prime Minister, and President Peter Pellegrini is non-partisan, yet the founder of *Hlas*, both coalition parties. In Hungary, the president is indirectly elected by *Fidesz*-dominated Parliament. Hence, checks and balances are potentially compromised by partisan proximity and political interests. Partisanship and political competition can also become a hurdle in the remedial process. President Duda notoriously sabotages bills passed by the *Sejm* by referring them to the highjacked and dysfunctional Constitutional Tribunal, technically precluding all reform attempts.

The final lesson learnt from Poland at this stage refers to the public media. Although not an element of the rule of law but part of a broader democratic framework, as a public service they rely on state funding and are managed by impartial officials, yet nominated by elected bodies, like parliaments. Hence, reestablishing an apolitical, independent, and trusted broadcaster demands a healthy rule of law and principled not partisan decision-makers. In Poland, the public media were the first pawn in the political game, broadcasting biased content from the early days of the PiS government. Yet, their takeover in December 2023 by the new Minister of Culture who circumvented the legislative process by using commercial law was by many deemed a foul play, even if well-intended. Does the end justify the means in such sensitive matters?

A European conclusion

Rule of law erosion in Member States also affects the European Union, which by the actions of the Commission and the Parliament has become a key stakeholder in these battles, testing diverse carrot-and-stick policy approaches. A robust rule of law toolbox has been developed in the last decade, embracing both monitoring measures to prevent rule of law erosion and corrective tools to curb and reverse it. Up to date, it has delivered mixed results. On the one hand, the first von der Leyen Commission waited too long before triggering disciplinary measures against Hungary, reacting only when the Polish governments followed Orban and rule of law erosion became a systemic problem for the EU, not a single country issue. On the other hand, the successful mission of Donald Tusk in Brussels resulted in unlocking funds for Poland from the Recovery and Resilience Facility (RRF). Yet, based merely on a power shift in the country and presenting a roadmap to reforms, this decision did not go unnoticed by the Eurosceptics who raised accusations of politicising the rule of law conditionality. In the opposite corner, watchdog organisations and the European Parliament denounced the decision to partially release funds to Hungary as unfounded. Funds were also nearly blocked for Slovakia.

Meanwhile, the autocratic virus is spreading. The European Union must build up preparedness to react quickly and effectively. It is best achieved by using measures developed to tackle the very problem of rule of law erosion consequently, not selectively. The political dimension of defending the rule of law at the European level is as relevant as the legal actions and procedures. Peer pressure and the commitment to democratic principles of the Member States can create circumstances to contain leaders with autocratic aspi-

rations. Again, the expertise must go hand in hand with a friendly environment for democracy.

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