

Democratic Expeditions

After Victory: Self-Restraint in Democratic Restoration

Zoltan Miklosi

The Problem: The Victors' Dilemma

Democratic challengers in electoral authoritarian regimes often find themselves in a moral-political bind if they win a national election. They are surrounded by autocratic structures that undermine their ability to govern, let alone fully restore democracy. Loyalists of the autocratic regime are installed in supposedly independent institutions, set to sabotage the new government and any attempts at genuine regime change. Lifetime appointments and supermajority rules stand in the way of removing these obstacles to democratic restoration within the bounds of formal legality.

The case of Poland is a paradigmatic example of this situation. After a coalition of pro-democracy parties defeated the PiS-led autocratising government, the new government finds its efforts to fully restore the rule of law undermined by President Andrzej Duda, a PiS ally, and the Constitutional Tribunal, which, according to plausible criticism, was established illegally under the PiS government.

Successful democratic challengers face a dilemma that is both strategic and moral. On the one hand, if they choose to adhere to formal legality, they risk being sabotaged, proving weak, and helping the defeated autocrat return to power in short order, with the chance of democratic restoration slipping away. On the other hand, if they choose to disregard formal legality and engage in procedural transgressions, they risk instability, institutional uncertainty in the face of likely resistance from autocratic loyalists, and, in the worst case, political violence.

Assessing Risks and Opportunities

A full assessment of the risks and possible upsides of the two horns of the dilemma would take into account the approximate probabilities of the different scenarios, which in turn are highly sensitive to particular facts on the ground. But some general observations are warranted:

→ Most of the “benefits” of playing by the rules (Column 2 in the table above) are highly speculative and elusive. For instance, it is unclear whether maintaining the norm of legality has much promise against opponents who have already demonstrated a willingness to dismantle

Playing by the rules		Procedural transgressions	
(1) Risks	(2) Opportunities	(3) Risks	(4) Opportunities
Pro-democracy government sabotaged	Upholding the norm of legality	Uncertainty and institutional instability	Signalling to supporters that pro-democracy forces are serious and determined
Pro-democracy parties appear weak, indecisive	Playing for political advantage, preparing for the next battle: picking political conflicts where their position is popular, and they have a good chance of succeeding, thus increasing their public support.	Setting a risky precedent that can be exploited by bad-faith actors	Showing that pro-democracy forces are committed to democratic transformation and not merely governmental power.
Democratic restoration stalls		Potential for political violence	
Autocracy entrenches			

democracy. The strategy may also fail to resonate with voters, many of whom expect swift steps to restore democracy. At the same time, the international community may prefer this approach.

- The same circumstances that make sabotage and resistance by autocratic loyalists plausible also make it less likely that the pro-democracy government can fight the next election on more favourable terrain (Column 2). This is so because the steps that the pro-democracy government might take to increase its support may also be vulnerable to sabotage.
- The occurrence of a pro-democratic electoral victory under conditions of electoral authoritarianism is rare, and therefore the opportunity for democratic restoration is highly valuable and should not be wasted.
- Most of the downsides of procedural transgressions (Column 3) consist in a continuation of the autocratic status quo, so they do not represent a moral loss compared to the ex ante situation.
- Violence is the worst outcome and should be avoided or minimised if possible. However, it is not clear that the use of violence should be renounced altogether: if the former incumbents threaten with violence, this creates a new dilemma in the form of responding to extortion.

The Solution: Self-Constraining Transgressions

What the best response to this dilemma is may be highly sensitive to particular facts on the ground. It may well be that sometimes the optimal course is to play by the rules and prepare for the next electoral battle on more favourable

political terms, in the expectation that a more decisive victory is within reach that would allow democratic restoration without procedural transgressions. However, such an opportunity may be elusive, and in any case, there are steps that the newly empowered pro-democracy government could take to minimise the risk of instability and violence. Therefore, this policy brief examines only the second horn of the dilemma and makes recommendations on the steps the pro-democracy government can take to mitigate the risks. These steps involve self-imposed constraints on how and what kinds of procedural transgressions can be undertaken.

Principles

Last resort: Procedural transgressions should be undertaken only after reasonable efforts have been made to achieve democratic restoration within the bounds of formal legality.

Minimisation: The pro-democracy government should limit transgressions to the necessary minimum in scope and time to those that are inevitable to avoid autocratic sabotage, i.e., actions by autocratic loyalist actors to undermine the legitimate efforts of the pro-democracy government. This would leave some loyalists in place, but they would not be able to carry out significant sabotage.

Transparency: The government should publicly announce the kinds of measures it is willing to take and the limits it will impose on itself. This kind of pre-commitment can reduce both the likelihood of instability and the willingness of autocratic loyalists to engage in escalation. These commitments should be widely communicated both domestically and to the international community.

Fidelity to the spirit of the law: All of the above principles can be subsumed under the idea that procedural transgressions (or restorative disobedience) should be viewed as acts that violate the law while being respectful of the rule of law. They are respectful in that they are seen as a last resort and as something to be kept to a minimum in scope and time, and they are transparent in that they maintain generality and predictability, both essential elements of the ideal of the rule of law.

Measures

Examples of these self-imposed constraints in practice can take many different forms, and what constitutes a necessary minimum or a last resort depends on the political and institutional context. Some illustrative examples are given below.

- The pro-democracy government can demonstrate its commitment to the rule of law and the principle of last resort by attempting to **negotiate in good faith** with the autocratic party to complete democratic restoration on mutually acceptable terms. For tactical and strategic reasons, it may also announce a deadline for concluding such negotiations.
- If negotiations fail and transgressions become necessary, the pro-democracy government can announce a **deadline** for such transgressions to demonstrate its commitment to minimisation.
- In the same spirit of minimisation, the removal of loyalists appointed to supposedly independent institutions should prioritise those in a position to block democracy restoration measures in the short term, such as judges of the **Constitutional Court**. Loyalists entrenched in the central bank, the regular judiciary, or even the public broadcaster pose less immediate risk of sabotage. To be sure, these examples are highly sensitive to local circumstances, making different transgressions more urgent in some countries than in others. While the removal of autocratic loyalists is an important component of democratic restoration, the restoration of democratic institutions and norms takes precedence when there is a potential conflict between the two. Loyalists are understood here in terms of partisan loyalty to the autocrat rather than ideology. The primary damage they do to democracy is by directly blocking measures (e.g., legislation) aimed at restoring democracy, but they can also exert indirect undermining effects through the media, for example, by painting a false picture of democratisation efforts and whipping up resistance to them.
- In the spirit of minimisation, the pro-democracy government should announce that any **criminal proceedings** against autocratic loyalists for alleged misconduct in office will remain strictly within the bounds of formal legality. If it becomes necessary to create special prosecutor's offices, for example, to investigate

alleged crimes by the autocrat and his allies, such offices should be sufficiently independent of the government. One example of self-limiting measures is the use of „truth and reconciliation commissions“ rather than criminal trials, as in South Africa and some Latin American countries.

- The pro-democracy government can demonstrate its commitment to the spirit of the rule of law directly by adopting **constraints on its power** that do not require procedural violations. For example, electoral autocracies often build extensive state propaganda machines at public expense. The pro-democracy government can and should announce a self-imposed **ban on state propaganda** and refrain from using the existing apparatus at its disposal except for genuinely nonpartisan purposes such as public health measures, emergencies, and so on. Non-partisan oversight bodies (or oversight mechanisms that include all parliamentary parties) over public broadcasting media have precedents in post-1989 Eastern European transitions and could serve as a useful blueprint here. Most importantly, in replacing loyalists who have been removed from their positions, the pro-democracy government should make extraordinary efforts to fill these positions with highly respected and non-partisan individuals with a proven track record of independent judgment. The government should consult with a wide range of stakeholders, including professional organisations and relevant civil society actors, on the replacements.

Conclusion

The self-imposed constraints outlined here serve two purposes. First, they aim to mitigate the risks of transgressions, both by limiting their use and by providing a measure of reassurance to the public and even allies of the defeated autocrat. Such reassurances can provide incentives for the latter to refrain from escalation. Second, by behaving in the spirit of the rule of law even when they break the law, pro-democracy actors set a worthy precedent of self-restraint for the time when democracy is fully restored.

Further Readings

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