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Modus Operandi of the Erosion of the Rule of Law in Poland – Experience in 2015–2023

Key words: *Constitutional democracy, constitutional crisis, destruction of the rule of law, neutralisation of institutions, patronal autocracy*

Abstract: *The author of this article attempts to diagnose the changes in Polish constitutional democracy taking place in 2015–2023, and at the same time tries to select and catalogue violations of systemic practice, leading to the erosion of the rule of law, ultimately resulting in the recognition of Polish constitutional democracy as a defective democracy in 2023 (according to the Global Democracy Index). It presents the circumstances and secretive behaviours of the ruling elite of this period, including changes in the area of the judiciary, including the constitutional judiciary, remodelling of the control of the correctness of the electoral process, changes and politicization of the electoral administration and the prosecutor's office, politicization of an independent public broadcaster with the introduction of newspeak and brutalization of the public language, adoption of the facade role of the parliament, as well as violation of the standards of transparency and political corruption leading to the formation of constitutional decision making, detached from – it seemed – the well-established constitutional identity with its fundamental values defining it.*

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Introduction

The erosion of the standards of the rule of law is associated with actions that are, on the one hand, seemingly legal and shaping in parallel by means of laws, and on the other hand, a specific constitutional practice that jointly undermines the foundations of constitutional democracy. It is the stratification of offenses against liberal constitutional democracy that allows to show the synergy effect in terms of systemic change and constitutional crisis. The delineation of the semantic field of the concept of constitutional crisis in Poland under 2015 is not an easy task, because the crisis itself is a symptom of the fact that the old is dying, and the new cannot be born yet (A. Gramsci). The constitutional crisis in the literature on the subject is rightly referred to as "a period of shaking or collapse of the constitution's position in the state"[1]. Its consequence is the loss of the constitutional significance of the Basic Law. This type of crisis distinguishes from other dysfunctional states the duration, the degree of violations of the constitution causing social, political and legal effects in terms of guarantee for the rights and freedoms of the individual. Therefore, it corresponds to a state that goes beyond an incidental violation of the constitution or the operation of the *praeter constitution*. As Wojciech Mojski points out, it arises "solely as a result of these special, qualified unconstitutional actions or omissions, which in effect lead to the crisis constitutional dysfunctions that characterise it"[2]. At the same time, the degree of violations and their consequences determine the possibility of possible sanation and return to fulfilling the assumed systemic roles by the Basic Law or exceed the *point of no return*. Therefore, the erosion of standards of the rule of law goes beyond typical political and legal disputes concerning the functioning of the constitution or the instrumental application of the constitution without taking into account the context (*constitutional hardball*)[3], but leads to its undermining as *ius fundamentalis*, to negating the axiological function of the fundamental law. This dangerous process is also called extinguishing the rule of law (E. Łętowska). Thus, a constitutional crisis occurs when there is a serious danger that the constitution will not fulfill its basic task, which involves maintaining misunderstandings within the framework of ordinary politics, preventing political relations from turning into anarchy, violence or civil war[4].

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1 W. Mojski, *Kryzys konstytucyjny. Zagadnienia teorii konstytucji*, Lublin 2023, p. 21.

2 Ibidem, p. 27.

3 Cf. M. Tushnet, *Constitutional Hardball*, «The John Marshall Law Review» 2004, vol. 37, iss. 2.

4 J.M. Balkin, *Constitutional Crisis and Constitutional Rot*, [in:] M.A. Graber, S. Levinson, M. Tushnet (eds.), *Constitutional Democracy in Crisis?*, Oxford Univeristy Press 2018, p. 14.

In the 21st century, the systems of post-communist countries are located between democracy and dictatorship, occupying a field called "hybrid regimes", the semantics of which include a gray area with illiberal, controlled or defective democracy and semi-dictatorship, elective and competitive authoritarianism. In "hybridological" terms, these systems reduce democratic institutions to a façade[5]. Janusz Reykowski points out that one of the sources of disappointment with democracy, which ultimately leads to its crisis, is the way of solving social and political conflicts, taking into account the needs and perspectives of many parties. It is in systems characterised by adversarial democracy that the principles of politics are based on conducting it from a position of strength, which results in a sense of harm, helplessness and alienation. The response to this phenomenon of lack of identity, rootedness and result in a "conservative turn". This is dangerous because the rise of authoritarian tendencies in connection with the disappointment with democracy leads to power based on violence[6]. The remedy to the progressive populist drift towards authoritarianism is political dialogue (deliberation), greater civic involvement in the political sphere (participation) as a response to the progressive entropy of representation (i.e. the degradation of ties between voters and the elected)[7].

The subject of this article is an attempt to diagnose changes in Polish constitutional democracy and an attempt to answer the question about the delineation of the semantic field of the erosion of the rule of law shaping in 2015–2023, moving away in the sphere of political practice to assumptions of a model nature or, as Wojciech Sadurski puts it, the transition from liberal

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[5] Cf. B. Magyar, B. Madlovics, *Krótki przewodnik po systemach postkomunistycznych. Ludzie, instytucje, dynamika*, transl. S. Kowalski, Warsaw 2023, pp. 9–11. In the context of the conceptual grid for post-communist states, Bálint Magyar and Bálint Mlovics, referring to the catalog of basic ideal types presented by János Kornai, doubled its systemic categorization by distinguishing six types of ideal system: 1) liberal Western-type democracy with pluralistic power and domination of formal institutions (Estonia); 2) patronal democracy – a pluralistic system in which patron-client networks compete (Romania, Ukraine, Moldova); 3) patronal autocracy – the domination of a monopyramidal patronal network with unlimited informal political and economic power resting in the hands of the patron (Hungary, Kazakhstan, Russia); 4) conservative autocracy – the political sphere is governed by patronage, and the economic sphere is free from it (Poland); 5) communist dictatorship, in which the spheres of politics and economy are associated with a bureaucratic network of patronage (the Soviet Union before 1989); 6) market dictatorship – a monoparty system with various forms of private economy (China). Cf. B. Magyar, B. Madlovics, *Krótki przewodnik…*, pp. 21–22.

[6] J. Reykowski, *Rozczarowanie demokracją*, Sopot 2019, pp. 250–251.

[7] P. Rosanvallon, *Kontrdemokracja. Polityka w dobie nieufności*, transl. A. Czarnecka, Wrocław 2011, p. 14.

democracy to "literal democracy"[8]. This led to the formation of constitutional decision making and the fetishization of literal reading of the Fundamental Law, regardless of constitutional identity (fundamental values). Constitutional decisionalism itself refers to Walter F. Murphy's concept of constitutionalism as a denial of the concept of constitutionalism with its basic assumption, which is limiting power through dignity and human rights[9].

Offenses against constitutional democracy, which we dealt with in 2015–2023 in Poland, are a multidimensional phenomenon and include the following spheres: 1) neutralisation of the constitutional judiciary and a new reading of constitutional identity; 2) hostile takeover of the prosecutor's office, the judiciary and the National Council of the Judiciary; 3) degradation of the *free and fair elections* standard; 4) the facade role of the constitutional parliament; 5) violation of the standard of freedom of speech and brutalisation of political language; 6) violation of the standards of transparency and political corruption. Violations in these areas pose a threat to the fulfilment of the conditions that are necessary for the implementation of the minimalist concept of procedural democracy, for which – as Adam Przeworski points out – it is necessary to: maintain *ex ante* uncertainty, irreversibility of *ex post* results and repeatability[10].

Neutralisation of the constitutional judiciary and a new reading of constitutional identity

The process of destruction of the rule of law began with the negation of the procedures related to the election of the members of the Constitutional Tribunal by the Sejm and the suspension of the publication of the judgments of the Constitutional Tribunal with reference number K 34/11 and K 35/15 by Prime Minister Beata Szydlo and the inclusion of the Tribunal in the process of rebuilding the system due to the lack of a majority enabling the adoption of the new Basic Law. The negation of acts of international law and questioning the multicentricity of the contemporary system of sources of law in Poland are associated with the recognition that its source is only acts of internal law. The allegations directed against the Polish constitutional court include not only an unconstitutional reconstruction of its composition, the issue of the legality

8 W. Sadurski, *A pandemic of populists*, Cambridge University Press, 2022, p. 100.

9 Cf. W.F. Murphy, *Constitutional Democracy: Creating and Maintaining a Just Political Order*, Johns Hopkins University Press, 2007, pp. 15 et seq.

10 Cf. A. Przeworski, *Minimalist concepcion of democracy: A defence*, [in:] J. Shapiro, C. Hacker-Cordon (eds.), *Democracy's value*, Cambridge 1999.

of the appointment of the President and Vice-President of the Constitutional Tribunal, but also doubts as to the independence of adjudicating judges, as confirmed in the judgment of May 7, 2021. European Court of Human Rights in Xero Flor v. Poland[11]. The Constitutional Tribunal has become an institution whose real role places it in the area *of judicialization of politics*[12], with a characteristic feature manifested in constitutional monism, which leads to the adoption of a state-centred attitude, negating constitutional pluralism[13]. The problem of constitutional identity and the related issue of the relationship between national and EU law has been present in the jurisprudence of the Court of Justice since the establishment of the community. The consequence of the new reading of constitutional identity is the negation of the existing respect for the principles of solidarity and loyal cooperation and the primacy of the *acquis communautaire*. Exposing the constitutional identity and sovereignty of the nation served the Constitutional Tribunal to categorically present the supremacy of the Constitution with the simultaneous finding of incompatibility of the Treaty provisions of the European Union and the European Convention on Human Rights[14]. The misinterpretation of national identity in the context of fundamental EU values such as the principle of a democratic state governed by the rule of law, the principle of judicial independence and independence of the courts, the principle of separation of powers, non-discrimination, political pluralism led to the tightening of the institutional collision course and the negation of Poland's treaty obligations, the basis of which was the will of the Nation expressed in the referendum. Therefore, the Constitutional Tribunal takes an active part in the judiciary of illiberal politics, becoming the executive of the political will of the then ruling conservative camp, in particular in politically sensitive matters (e.g. in the issue of women's reproductive rights and the denial of the right to abortion – K 1/20).

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[11] Case No. 4907/18.

[12] Cf. A. Bień-Kacała, *Polski przypadek judicialization of politics. Kilka słów o roli TK po 2015 roku*, [in:] R. Balicki, M. Jabłoński (eds.), *Dookoła Wojtek… Księga pamiątkowa poświęcona Doktorowi Arturowi Wojciechowi Preisnerowi*, Wrocław 2018, p. 60.

[13] Cf. N. Walker, *The Idea of Constitutional Pluralism*, «Modern Law Review» 2002, No. 65, p. 319 et seq.

[14] See the judgments of the Constitutional Tribunal of 20 April 2020. (U 2/20), 14 July 2021. (P 7/20) or of 7 October 2021. (K 3/21). See more: M. Haczkowska, *Tożsamość konstytucyjna państw członkowskich czy wspólne wartości konstytucyjne – w poszukiwaniu kompromisu*, [in:] R. Balicki, M. Jabłoński (eds.), *Materialne zmiany konstytucji RP z 2 kwietnia 1997 r. po 25 latach jej obowiązywania*, Toruń 2022, pp. 151 et seq.

Hostile takeover of the prosecutor's office, the judiciary and the National Council of the Judiciary

While the process related to the subordination of hitherto independent institutions to political power began after the parliamentary elections in 2015 with the submission of the deputy draft of the Act on the Prosecutor's Office (which is in *fact* a government project prepared in the Ministry of Justice), in relation to the "hostile takeover" of the judiciary, 2017 is an *annus horribilis*. One of the violations of the Basic Law was the shaping of the election of judges – members of the National Council of the Judiciary, which is considered to be an authority assigned to the judiciary, protecting the values underlying the operation of the judiciary. The current shape of the National Council of the Judiciary does not guarantee its functioning in accordance with the standard of judicial independence and the independence of judges resulting from art. 6 of the European Convention on Human Rights. While in the judgment of 18 July 2007 The Constitutional Tribunal (K 25/07) expressed the position that judges elected by judges may be members of the National Council of the Judiciary, in the judgment of 25 March 2019. The Constitutional Tribunal (K 12/18) departed from this position, pointing to the possibility of electing judges by the Sejm during the election procedure. The reservations as to the constitutionality of the election of judges-candidates to the National Council of the Judiciary after the entry into force of the amendment are also aggravated by the refusal to disclose the candidates' lists of support. The status of the National Council for the Judiciary was also reviewed by the Court of Justice of the European Union, which in its judgment of 19 November 2019[15] directly indicated that the assessment of the degree of independence of the National Council for the Judiciary must be made in the context of independence from the legislative and executive powers. The Tribunal *expressis verbis* pointed out that the entirety of the provisions, together with the circumstances in which the members of the National Council for the Judiciary were elected, may lead to doubts as to the independence of the body participating in the judicial appointment procedure (among others, due to the creation of a new National Council for the Judiciary by shortening the four-year term of office of the members previously constituting that body, the appointment of judges by the legislative authority from among the candidates who may be nominated by a group of 2000 citizens or 25 judges, which results in an increase in the number of members from the allocation of political forces or elected by them to 23 of the 25 members of which this body counts).

[15] C-585, C-624, C-625, EU: C: 2019:982, paragraphs 138 to 139 and 143 to 144.

The introduction into the Polish legal order of the Disciplinary Chamber of the Supreme Court led to the fact that, despite being formally part of the Supreme Court, the degree of autonomy within it led to a violation of Article 175 paragraph 2 of the Constitution of the Republic of Poland, according to which the appointment of special courts is allowed only during wartime. The organizational separation related to equipping the president of this chamber in relations with the First President of the Supreme Court with competence, organizational, administrative (own law firm) and budgetary autonomy and the special status of these judges with a salary 40% higher than that of other judges of the Supreme Court made it an exceptional institution, the appointment of which was not permissible in peacetime[16], not to mention the close personal relationships newly appointed with the then Minister of Justice – Prosecutor General.

The prelude to changes in the judiciary was the reunification of the chief prosecutor's office – the Prosecutor General and the Minister of Justice. Pursuant to the Act of 28 January 2016 The law on the prosecutor's office was abolished by subordinating the institutional independence of the prosecutor's office to a politician acting as a member of the Council of Ministers. The consequence of the introduced changes was the degradation of prosecutors hitherto occupying official positions in the General Prosecutor's Office and appellate prosecutor's offices. The independence of prosecutors was subject to far-reaching restrictions, enabling a materially wide range of influence by superiors on prosecutors' procedural activities. The consequence of this state of affairs was the formation of a servant mentality of prosecutors towards the Prosecutor General.

One of the dimensions of the erosion of the standards of the rule of law was the accumulation of powers of the Minister of Justice-Prosecutor General, whose competences in 2015–2023 included, among others: administrative supervision over the common and military judiciary and the right to appoint and dismiss court presidents; applying for extraordinary means of appeal to the Supreme Court (cassation, cassation appeal, extraordinary appeal), applications to the Constitutional Tribunal, performing the function of the supreme body of the prosecutor's office, whose organization is based on the principle of hierarchical subordination, substitution and devolution, and having creative powers in the field of appointing prosecutors of all levels, exercising supervision, as well as powers, among others, against lawyers and legal advisers, translators, court probation officers, receivers or court bailiffs and notaries.

[16] W. Wróbel, *Izba Dyscyplinarna jako sąd wyjątkowy w rozumieniu art. 175 ust. 2 Konstytucji RP*, «Palestra» 2019, No. 1–2, p. 21.

The powers of the Minister of Justice also include the possibility of appointing disciplinary spokespersons.

Another mechanism that is a manifestation of the erosion of the rule of law was the introduction of a mechanism aimed at combating all attempts to deny the status of judges appointed in violation of the procedure by adopting the so-called muzzle act[17]. In 2019, the laws regulating the judicial system introduced provisions disciplining judges (and prosecutors in parallel), the purpose of which was to create a *chilling effect*. The judge was disciplinarily liable for official misconduct when: he took actions or omissions that could prevent or significantly hinder the functioning of the judicial authority; he took actions that questioned the existence of a judge's service relationship, the effectiveness of the appointment of judges, or the authorization of the constitutional body of the Republic of Poland, and he took public activity incompatible with the principles of judicial independence and independence of judges. In connection with the commission of such a vaguely defined disciplinary offense, sanctions were introduced, almost absolutely marked in the form of transfer to another official place or removal of a judge from office. In its judgment of 5 June 2023 in Case C-204/21, the Court of Justice of the European Union, confirming the essence of the identity of the European Union, confirmed the contradiction with the rule of law of all provisions of the so-called muzzle law that interfered with the independence of the judiciary and undermined the requirement to provide effective judicial protection.

The atrophy of the principle of equality began with the pardon by the President of the Republic of Poland of persons against whom no final judgment was passed, and later there was a whole range of cases related to the omission of criminal prosecution of his supporters and prosecution of political opponents (judges or prosecutors issuing procedural decisions unfavourable to the interests of the ruling coalition).

Degradation of the *free and fair elections* standard

One of the dimensions of the erosion of the standards of the rule of law are changes in the area of *free and fair elections*, which led to the formation of electoral democracy. Its manifestation was a violation of the principles of decent electoral legislation, which includes, in particular, ensuring an appro-

[17] Act of 20 December 2019 amending the Act – Law on the Ordinary Courts Organisation, the Act on the Supreme Court and certain other acts (Official Journal of Laws of 2020, item 190).

priate period of *vacatio legis*. In its jurisprudence, the Constitutional Tribunal emphasized that a kind of *minimum minimorum* "should be the adoption of significant changes in electoral law, at least six months before the next elections, understood not only as the act of voting itself, but as the entirety of activities covered by the so-called electoral calendar"[18]. The situation related to the amendment to the Electoral Code of 26 January 2023 was a violation of this standard[19], as the amending act did not specify when some of the provisions would enter into force (e.g. the regulations regarding the Central Register of Voters will enter into force on the date indicated in the communication of the Prime Minister). The unprecedented situation occurred during the presidential election scheduled for May 10, 2020. Despite the COVID-19 epidemic justifying the introduction of a state of emergency, which would lead, in accordance with art. 229 paragraph 7 of the Constitution to postpone the elections, the ruling camp decided to organize the elections despite the difficult sanitary situation. The initiated legislative changes were aimed at conducting elections by correspondence entrusted with the organization of elections to the Minister of State Assets and the Polish Post subordinate to him. Despite the lack of legal grounds (unfinished legislative work) to conduct elections in such a manner, the Prime Minister took factual and legal actions aimed at organizing elections. In the end, the elections scheduled for 10 May 2020 did not take place. The attempt to conduct elections in this way actually excluded the role of the National Electoral Commission in the electoral process.

A fundamental element of the *free and fair elections* standard is the verification of the electoral process itself and the election result by means of an appropriate procedure by an independent court[20]. The status of the entity confirming the validity of elections in the context of the resolution of the Supreme Court of 23 January 2020, imposing each time the obligation to examine whether a person appointed to the office of a judge takes part in the adjudicating panel of the court at the request of the National Council of the Judiciary shaped in the manner specified by the provisions of the Act of 8 December 2017 amending the Act on the National Council of the Judiciary and certain other acts (Journal of Laws of 2018, item 3), if the defectiveness of the appointment process leads, in specific circumstances, to a violation of the standard of independence and impartiality within the meaning of art. 45 sec-

[18] Judgments of the Constitutional Tribunal: 3 November 2006. (K 31/06), of October 28, 2009. (Kp 3/09), of July 20, 2011. (K 9/11).

[19] Official Journal of Laws item 497.

[20] Cf. A. Józefowicz, *Przesłanki prawne rozstrzygania o ważności wyborów parlamentarnych*, «Państwo i Prawo» 1999, No. 3, p. 4.

tion 1 of the Constitution of the Republic of Poland and art. 47 of the Charter of Fundamental Rights of the European Union and Art. 6 section 1 of European Convention on Human Rights[21]. The composition of a panel formed in this way violates Art. 3 of Protocol No. 1 due to the inability to appeal to the competent national authority that can effectively decide on their subject[22], because the Chamber of Extraordinary Review and Public Affairs of the Supreme Court both in terms of the composition of the staff as well as the manner of operation will deprive it of the guarantee of impartial ruling on the validity of elections as well as electoral protests.

After 2015, a new model of electoral administration in Poland was shaped. While the judicial model of electoral administration was shaped after 1989[23], the personal structure of the National Electoral Commission was changed by the Act of 11 January 2018 amending the Electoral Code (the Act amending certain acts in order to increase the participation of citizens in the process of electing, operating and controlling certain public bodies[24]). When the previous judicial model predicted that the National Electoral Commission consisted of 9 judges: 3 appointed by the President of the Constitutional Tribunal, 3 appointed by the First President of the Supreme Court and 3 appointed by the President of the Supreme Administrative Court, the new composition of the National Electoral Commission took on a political majority form. Currently, the National Electoral Commission consists of: 1 judge appointed by the President of the Constitutional Tribunal and 1 judge appointed by the President of the Supreme Administrative Court elected for a nine-year term of office and 7 persons qualified to hold the position of judge appointed by the Sejm for the period of his term of office. The change in the personal composition of the National Electoral Commission has therefore led to this politicization of the process of selecting the majority of its members, which may undermine trust not only in the electoral authority itself, but also in the electoral process.

The facade systemic role of the parliament

The loss of political importance of the parliament in Poland has been taking place with varying intensity for two decades, and since 2015 its position

[21] BSA I-4110-1/20.
[22] Cf. the ECtHR judgment of 8 April 2010., Alieyev v. Azerbaijan, no. 18705/06.
[23] Cf. D. Sześciło, *Models of electoral administration in selected countries*, «Studia Wyborcze» 2013, No. 13, pp. 93 et seq.
[24] Official Journal of Laws item 130.

and functioning have become the main problems for the analysis of political transformations in Poland. The central problem turned out to be the growing discrepancy between the formal powers of the Sejm of the Republic of Poland and the actual state power, located in governmental and party bodies. The increase in extra-parliamentary influence on state power and the whole of political relations allows to claim that Polish parliamentarism becomes only a shadow of its constitutionally determined model, leading – referring to George Williams Keeton – to its "withering away"[25]. The determinants of the eroding position of the Sejm of the Republic of Poland include: the facade of the legislative procedure with hidden legislative initiatives of the government and the undemocratic nature of the legislative procedure itself, the depreciation of the incompatibility of the parliamentary mandate and the atrophy of the control function of the Sejm of the Republic of Poland. The decline in prestige and political importance of the parliament in Poland has been taking place with varying intensity for two decades, and since 2015 its position and functioning have become the main problems for the analysis of political transformations in Poland. The symptoms and conditions of simulated parliamentarism result from the formation of political decision-making centres competing with the parliament. Undoubtedly, the period of the last two terms does not allow to define the parliament as a "debating body" or a forum for exchanging opinions.

The unjustified haste of parliamentary legislative work and the related apparent mode of public consultation, the introduction of last-minute amendments to the bill (the so-called legislative contributions), as well as the nightly parliamentary deliberations with the limitation of the opportunity for representatives of the opposition to speak, make up the depreciation of the constitutional position of the parliament.

Violation of the freedom of speech standard and brutalization of political language

One of the elements of the erosion of constitutional democracy after 2015 is language that refers to newspeak[26] characterised by a propaganda goal, taking on an institutional dimension (party, official). The most important feature of Newspeak is monovalence "the imposition of a mark of value

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25 G.W. Keeton, *The Passing of Parliament*, London 1952, p. 202.

26 The name Newspeak was taken by Michał Głowiński from George Orwell. Cf. M. Głowiński, *Nowomowa (Rekonesans)*, [in:] M. Głowiński, *Nowomowa i ciągi dalsze. Szkice dawne i nowe*, Kraków 2009, p. 11.

that cannot be questioned is not the subject of discussion"[27], with the aim of harmonizing parts of society. An inherent feature is labelling with periphrases related to the determination of political opponents (betrayal, pacting), relying on the idea of the enemy, which does not lose its persuasive capacity. The enemy figure is a consequence of the dichotomous view of the world with the personification of oneself as good, with the only correct program, which positions oneself on the opposite side of anyone who does not agree with the adopted and proclaimed direction. Anyone who does not submit is discredited in the eyes of the public, with the equivalents of the canonical version of the Newspeak from the period of the Polish People's Republic (Zionist – migrant, agent of imperialism – representative of the European Union). A derivative of the dichotomous division and the enemy figure is a conspiratorial view of the world, which results in labeling opponents as acting to the detriment of the nation, the state and militarisation, intensifying the aggression of language[28]. The consequence of the "drama of language", its totalitarianisation and brutalisation, as well as anti-intellectual expression ("education", "caste", "lies-elites", "lumpen-elites") is the "loss of coalition abilities"[29]. A characteristic feature is the rejection of the adjective "civil" or the formula "civil society". The brutalisation of language is complemented by defamatory rhetoric officially used by the Minister of Education and Higher Education and education curators. The purpose of using a specific rhetorical measure, which is the label, is to create stigmatisation of opponents, to create a sense of strangeness and an atmosphere of disapproval[30]. On the other hand, there was an affirmation publicly and officially expressed by the Minister of Justice in relation to the printer's refusal to provide services to representatives of the LGBT community. Another measure is the institutional use, in accordance with the *Oderint dum metuant* principle (let them hate, as long as they are afraid), of measures – lawsuits brought by public authorities and entities related to it, e.g. State Treasury Companies (SLAPP) aimed at suppressing criticism of people acting in defence of the public interest (e.g. against prosecutors, judges representing associations or TVP S.A. against Wojciech Sadurski). Another form was the action referred to as *legal* harassment (harassment by the law) related to the apparent legality of the action, e.g. through prolonged legitimation of participants in legal

[27] M. Głowiński, *Nowomowa (Rekonesans)…*, pp. 14–15.

[28] Cf. M. Głowiński, *Dramat języka*, [in:] M. Głowiński, *Nowomowa i ciągi dalsze. Szkice dawne i nowe*, Kraków 2009, pp. 212–213.

[29] Cf. J. Paradowska, *Państwo to ja, prawda to ja*, «Polityka» 7 October 2006, No. 40.

[30] Cf. M. Karwat, *O złośliwej dyskredytacji. Manipulowanie wizerunkiem przeciwnika*, Warsaw 2006, p. 185.

assemblies, which was associated with many hours of restriction of freedom of movement, constituting in essence an unjustified coercive measure, i.e. detention.

Violation of the standard of transparency and political corruption

One of the elements of the march towards illiberal democracy is the creation of *GONGO* (*government-organised NGO*), i.e. organizations *de facto* dependent on state funds or de jure associated with the state. Although formally these institutions present themselves as NGOs, they actually have a privileged legal and financial status. Therefore, there is a process of "domestication" of social organizations. Institutions such as TRANSBO (transmission-belt *organisations*), established by government bodies or related to them, such as cultural or sports institutions, also play a significant role, which, on the one hand, are the basis of symbolic politics and ideological legitimacy associated with it, and, on the other hand, enable the shaping of resources in the form of sinecures for the beneficiaries of the system[31]. An exemplification of this type of activities is the creation of funds constituting a financial base for a political patron, e.g. The Justice Fund, which became a fund for political promotion of the Minister of Justice and related clientelism, or the Polish National Foundation, whose activity was aimed at destroying the civic consciousness of the idea of independence of the judiciary with the falsification of the standards of the rule of law and the promotion of simplified concepts of national identity and appealing to resentments, prejudices that were to shape a sense of anger towards representatives of the judiciary. Examples of activities violating the transparency of action were commissioning advertisements to the private media by state-owned companies favoring the government, implementing joint projects (e.g. sponsored galas or patronages) and supporting social organizations closely related to the ruling camp related to the implementation of projects coinciding with the government's policy[32]. The institutional dimension was the conduct of hate activities within the Ministry of Justice against judges by the closest associates of the former Minister of Justice Zbigniew Ziobro.

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[31] B. Magyar, B. Madlovics, *Krótki przewodnik…*, pp. 75–76.

[32] Cf. A. Bodnar, *System polityczny Rzeczypospolitej Polskiej w świetle teorii konkurencyjnego autorytaryzmu*, [in:] A. Bodnar, A. Ploszka (eds.), *Wokół kryzysu praworządności, demokracji i praw człowieka. Księga jubileuszowa Profesora Mirosława Wyrzykowskiego*, Warszawa 2020, pp. 140–144.

He accurately diagnoses the correction of the Jan-Werner Müller system, *which points to three features characterising* populist governments. These include: attempts to take over the state apparatus, corruption and "mass clientelism" (including "trading in material benefits or bureaucratic favours in exchange for the political support of citizens"), as well as "systematic efforts to suppress civil society"[33].

Summary

The question of the validity of the rule of law appears to be rhetorical. The monopolisation of political power leads to the transformation of goals, program bases and redefinition of activities in the implementation of the common good, and finally to the replacement of the social interest with party ideology or the identification of these goals. The interests of the state and the party become isomorphic. In a democracy, unlike totalitarian systems, there is no place for full unity represented by the rulers.

The state authorities become the guardian of the interests of the elites, and not, as in the case of the state based on the rule of law, the public interest. In the system of patronal autocracy, the centre of power is created by the chief patron (oligarch), who is surrounded by the court, and his word is the law in politics and economy. *In fact*, there is a colonization of state institutions. The ruling party becomes the "transmission belt of the informal patronage network, the adoptive political family", and its members follow the party line each time, while the civil service turns into the service of the chief patron. While in a liberal democracy a bureaucrat is removed from office when he commits a crime, in a patron autocracy he is dismissed when he does not commit the crime he was supposed to commit. In fact, refusal makes it impossible to cover it with infamy in the event of disloyalty. The category of "adoptive political family" is a characteristic phenomenon, a *sui generis* phenomenon in Poland. It is not a class or a category of nomenclature. In the cultural dimension, the head of an adoptive political family is assigned a role, which is described by the concept of Roman *pater familias*[34]. In the patronal autocracy, the understanding and meaning of the concept of the common good in the populist spirit is appropriated, where the categories of "nation" and "enemies of the nation" are contrasted. In constitutional democracy, the basis is respect for human dignity and the concept of citizenship, as well as the related search

33 J.W. Müller, *Co to jest populizm?*, transl. M. Sutowski, Warsaw 2017, p. 8.
34 B. Magyar, B. Madlovics, *Krótki przewodnik…*, pp. 30–33, 50–57.

for the concept of the common good through cyclical deliberation, which promotes accountability and which is pointed out by Adam Przeworski related to democratic rivalry institutionalized uncertainty[35].

The process that characterizes autocracy is the process of neutralizing institutions through their formal functioning and facade fulfilment of systemic roles. This thesis is confirmed by the new role of the Constitutional Tribunal as a body certifying the legality of laws.

The neutralization of the prosecutor's office or, more broadly, the judiciary was aimed at ensuring impunity for members of the new elite. Subordination of the prosecutor's office to the informal interests of the adoptive political family means that the case does not reach the level of jurisdictional proceedings. It aims at selective, arbitrary enforcement. It also allows the use of materials of preparatory proceedings for their discretionary launching. Finally, the principle of the rule of law is refuted by replacing it with the actual arbitrariness of state power.

The sources of the constitutional crisis are not mono-causal. They range from the crisis of legitimacy of power, the deficit of civic political culture to the facade of constitutional responsibility of the elites with the decorative constitutional role of the Tribunal of State[36]. New forms of social interaction and, consequently, the transformation of *homo sapiens* into *homo videns* and *homo numericus*, whose identity is determined by algorithms, are not without significance[37]. The actual negation of the principle of separation of powers means that institutions do not cease to exist, but their thorough transformations make them façade. They are moving away from the adopted boundary conditions determining that democracy is constitutional.

In order to see the changes taking place in 2015–2023, it is not enough to have a vision of a single provision, but it is also necessary to pay attention to practice, which has led to the recognition that the rule of law in Poland has been systematically undermined. The constitutional crisis in Poland is accompanied by the lack of a formal constitutional amendment, which has led to a reduction in the level of effective legal protection. Its manifestations are "dummy laws, dummy institutions", as well as "the functioning of derailed law-guarantee institutions, taking legal measures for the sake of appearances

35 See more: A. Przeworski, *Democracy and the Market. Political and Economic Reforms in Eastern Europe and Latin America*, Cambrigde University Press, 1991.

36 Cf. T. Słomka, *Stan demokracji konstytucyjna w Polsce na tle modelu transformacji systemowej*, [in:] T Słomka (ed.), *Demokracja konstytucyjna w Polsce*, Warszawa 2019, pp. 19, 39.

37 R. Piotrowski, *„Na zawsze…". Zagadnienie aktualności Konstytucji 3 Maja*, [in:] J. Kuisz, A. Rosner (eds.), *Prawo i kultura. Księga dedykowana Profesorowi Markowi Wąsowiczowi*, Warszawa 2022, pp. 366–367.

to create the impression of the last word in the dispute on the grounds"[38]. The introduced changes led – using the terminology stabbed by Adam Czarnota – to the transition from legal constitutionalism to political constitutionalism[39].

The presented circumstances and secretive practices, including changes in the judiciary, in the control of the correctness of the electoral process, changes and politicization of the electoral administration and the prosecutor's office, as well as the politicization of an independent public broadcaster, give rise to the recognition that Polish constitutional democracy can be described as "democracy deliberately damaged"[40]. In the ranking of democratic countries in 2023[41]. Poland obtained a score of 6.85 on a ten-point scale, which eliminates it from the group of full democracies (above 8 points) and classifies it as a "*flawed democracies*"[42]. It was the appearance of constitutional legalism, perpetuated by a parliamentary majority, that led to the erosion of the standards of the rule of law, to "surreptitious authoritarianism"[43]. The transition from constitutional democracy to electoral democracy is associated with a departure from the recognised rules axiologically functional towards democracy to arbitrary rules, which are the precursor to shaping constitutional proto-authoritarianism with the falsification of communitarian values (nation, family) and "legal resentment" with reference to the expression of the national interest superior to the law[44] and in the implementation of changes covering the three pillars of liberal constitutionalism: democracy, the rule of law and the protection of human rights[45] (for example in the field of the social role of women and the phenomenon of exclusion of people from the LGBTQAI+ environment). The remedy to this state of affairs is a return to constitutional practice determined by the rule of law. The concept of the Polish constitutional crisis is not just hyperbole. Its prelude was constitutional degradation (*constitutional rot*), taking place over a longer period of time and constituting the "*slow-motion*" of the constitutional crisis[46]. Constitutional democracy does not only include obedience to the law, but depends on institutions that balance and control each other, trust in the

38 E. Łętowska, *Prawo i gra pozorów*, [in:] E. Łętowska, J. Zajadło, *O wygaszaniu państwa prawa*, Sopot 2020, p. 223.

39 Cf. A. Czarnota, *Constitutional Correction as a Third Democratic Revolutionary Moment in Central Eastern Europe*, «Hague Journal on the Rule of Law» 2019, vol. 11, p. 404.

40 J.-W. Müller, *Fear and Freedom. O inne liberalizm*, Warszawa 2020, pp. 197–198.

41 Global Democracy Index.

42 The Economist, 2023.

43 Cf. O. Varol, *Stealth Autoritarianism*, «Iowa Law Review» 2015, No. 100, pp. 409–410.

44 A. Bień-Kacała, *Konstytucjonalizm nieliberalny w Polsce po 2015 roku*, Warszawa 2024, p. 33.

45 Cf. T. Drinóczi, A. Bień-Kacała, *Illiberal Constitutionalism: The Case of Hungary and Poland*, «German Law Journal» 2019, vol. 20 (8), pp. 1140–1166.

46 J.M. Balkin, *Constitutional Crisis…*, pp. 17, 21.

state, restraint of power holders and fairness of political competition. Just as the erosion of the standards of the rule of law is a process stagnated in time, so the return to the constitutional practice of a democratic rule of law and its restitution require the construction of social trust, a constitutionally loyal political opposition and the reduction of political polarisation. Temporally, it is a generation perspective.

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