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On the Road to Electoral Democracy? Erosion of the Free and Fair Elections Standard in the Era of the Polish Constitutional Crisis after 2015

Introduction

Democracy in the most general sense means rule by the people (*demos*), and its guiding idea is the sovereignty of the people. It is a truism that elections are an essential component of democracy, whose boundary conditions, as emphasized by Robert A. Dahl, include equal voting rights and actual participation.¹ The face of democracy is revealed by its procedural approach, in which Charles Tilly includes three necessary components: 1) universal suffrage, 2) fair, competitive and periodic elections, and 3) a free election campaign in which access to the media is provided to interested participants.² Adam Przeworski, in defining democracy, uses a perverse formula, describing it as a form of “institutionalised uncertainty,”³ which means that the outcome of elections must be uncertain. At the same time, the hope of the losers is the opposite of the uncertainty of the winners.⁴ Democracy includes not only procedures and decision-making mechanisms, but also ideals and an axiological system. Giovanni Sartori sees democracy as a system in which “no one can choose himself, no one can entrust himself with the power of governance and, thus, no one can appropriate unconditional and unlimited power.”⁵ He rejects all manifestations of illiberal democracy, denying the democratic value of delegative (or populist) democracy with the primary systemic role attributed to the principle of people’s sovereignty. Moving away from democracy, which for him means liberal democracy, leads to the fact that “we see only glimpses of the word democracy, we only have purely rhetorical democracy, which, thanks to the fiction of some assumed popular support, can sanction the most despotic bonds. To put it bluntly, this means that with the demise of liberal democracy, democracy

¹ See R.A. Dahl, *Demokracja i jej krytycy*, trans. S. Amsterdamski, Warszawa 2012, p. 318.

² C. Tilly, *Demokracja*, trans. M. Szczubiałka, Warszawa 2008, p. 20.

³ See A. Przeworski, *Democracy and the Market*, New York 1991.

⁴ J.-W. Müller, *Demokracja rządu*, trans. T. Sawczuk, Warszawa 2022, p. 130.

⁵ G. Sartori, *Teoria demokracji*, trans. P. Amsterdamski, D. Grinberg, Warszawa 1994, p. 257.

also dies.”⁶ Democracy is therefore a rejection of personalised power, and its concept denotes the temporality of its exercise. The support constituting the antidote against threats to democracy includes not only regular elections, but also a democratic legislative procedure in matters related to elections, neutral judicial bodies and a free media.

Therefore, the very concept of democracy takes on a blurred and multifaceted character. The first research focus is the claim that the overall regulation in the era of the Polish constitutional crisis led to the erosion of the free and fair elections standard, because the features of the system do not harmonise with the essence of democracy, and thus do not implement its ideals and values. The process of the degeneration of standards has led to the formation of the phenomenon of electoral democracy. Of course, the explanation of this process is not monocausal.

In this context, the standard of free and fair elections makes it possible to present the importance and role of elections in a democratic state and to distinguish “electocracy” or “electoral democracy” from liberal democracy.⁷ While in electoral democracy, which is the first step towards (liberal) democracy, i.e. the election of constitutional public authorities in periodic elections based on multiparty electoral competition and the principle of universality, ensuring a formally democratic procedure, does not allow for the recognition of the existence of democracy. Such mechanisms are confidential to authoritarian political regimes, while they have to fulfill different systemic roles. Between a full-fledged democracy and an overt dictatorship, there are electoral democracies, often inefficient and poorly functioning.⁸ As in liberal democracy, they do not play the role of a mechanism related to the responsibility of power and its legitimacy. The formal competitiveness, periodicity and universality of the elections, which make up the procedural dimension of the elections, do not yet determine the existence of democracy. In addition to cyclicity, competitiveness and freedom of participation, no less important are the potential and real alternative of power and the standards of honesty that make up the concept of free and fair elections. As Wojciech Łączkowski points out, free elections conducted “according to the rules that permit honestly and faithfully taking into account the will of voters can be considered one of the foundations of the democratic system.”⁹

In Poland, the timeline for the democratisation of the electoral system was set in 1989, when the elections to the Senate were fully democratic, and the elections to the Sejm (Parliament of Poland) were partially democratic. The adoption on 5 January 2011, of the Electoral Code (hereinafter: KW),¹⁰ which defines the conditions for the validity of elections: to the Sejm of the Republic of Poland and to the Senate of the

⁶ *Ibid.*, p. 481.

⁷ See A. Siaroff, *Comparing Political Regimes. A Thematic Introduction to Comparative Politics*, Toronto 2022.

⁸ See L. Diamond, *Elections Without Democracy: Thinking about Hybrid Regimes*, “Journal of Democracy” 2002, Vol. 13, No. 2, p. 23.

⁹ W. Łączkowski, *Prawo wyborcze a ustrój demokratyczny*, “Ruch Prawniczy, Ekonomiczny i Socjologiczny” 2009, No. 2, p. 51.

¹⁰ Journal of Laws 2022, item 1277, as amended.

Republic of Poland, the President of the Republic of Poland, to the European Parliament in the Republic of Poland, to bodies constituting local government units as well as mayors of towns and cities, is, on the other hand, a timeline for the consolidation of electoral law in Poland.

1. Delimitation of the free and fair elections standard

Free and fair elections is one of the concepts that make up the electoral axiology in a democratic state governed by the rule of law which allows assessing the correctness of the electoral process. The concept of fair elections in the jurisprudence of the Constitutional Tribunal¹¹ and international documents remains synonymous with the concept of fair elections. In accordance with Article 25b of the International Covenant on Civil and Political Rights, every citizen has the right without any discrimination (based on race, colour, gender, language, religion, political or other views, national or social origin, economic situation, birth or any other circumstance) and without unreasonable restrictions on the use of active and passive electoral law in fair elections, held periodically, based on universal suffrage, equal and secret, guaranteeing voters free expression of will. Aldona Domańska and Magdalena Wrzalik point to the diverse semantic scope of the concept of fairness and reliability of elections. Honesty refers to a sphere that is wider than just the electoral procedure.¹² Krzysztof Skotnicki rightly points out that fair elections are an element of unbiased elections, so elections can be unbiased, but they do not have to be fair at all.¹³

The principle of free elections as a statutory principle appeared in Poland along with the principles of universality, immediacy, equality and secrecy of voting in the 1991 electoral law for the Sejm.¹⁴ The constitutionalisation of this principle took place based on the so-called Small Constitution of 1992¹⁵ only for the elections to the Senate. The 1997 Constitution resigned from including the adjective “free” in relation to the Senate elections. Although the Electoral Code for the European Parliament adopted in connection with Poland’s accession to the European Union indicated the freedom of elections,¹⁶ it was adopted in 2011. The KW failed to place freedom of elections among

¹¹ Judgments of the Constitutional Court: 21 July 2009, K 7/09 and of 20 July 2011, K 9/11.

¹² A. Domańska, M. Wrzalik, *Przejawy zasady (nie)uczciwości wyborów na przykładzie wyborów prezydenckich, RP* [in:] *Dylematy polskiego prawa wyborczego*, eds. J. Ciapała, A. Pyrzyńska, Warszawa 2021.

¹³ K. Skotnicki, *Warunki brzegowe wolnych i uczciwych wyborów w demokratycznym państwie prawnym. Czy potrzebne są zmiany polskiego prawa wyborczego?* [w:] *Wolne i uczciwe wybory. Sądownictwo konstytucyjne – teoria i praktyka. Tom VI*, ed. M. Granat, Warszawa 2023, p. 7.

¹⁴ See the Act of 28 June 1991 *Ordynacja wyborcza do Sejmu Rzeczypospolitej Polskiej* (Electoral Act for the Sejm of the Republic of Poland) (Journal of Laws No. 59, item 252) (Article 1).

¹⁵ The Constitutional Act of 17 October 1992 *o wzajemnych stosunkach między władzą ustawodawczą i wykonawczą Rzeczypospolitej Polskiej oraz samorządzie terytorialnym* (on the mutual relations between the legislature and executive of the Republic of Poland and local and regional government) (Journal of Laws No. 84, item 426) (Article 3(2)).

¹⁶ The Act of 23 January 2004 *Ordynacja Wyborcza do Parlamentu Europejskiego* (Electoral Act for the European Parliament) (Journal of Laws No. 25, item 426) (Article 2(1)).

the electoral rules. It is rightly pointed out by Ferdynand Rymarz that “it is unjustified to treat the principle of free elections as a symbolic issue,” as well as “unfounded are also reservations that its constitutive importance is weaker than other principles.”¹⁷ The constitutionally shaped principle of free elections could constitute a general clause and an interpretative directive in the scope of the entire electoral law regulation. The right to free elections also results from Article 3 of Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms on the organisation of elections within reasonable time limits, based on secret ballot, under conditions ensuring the freedom of expression of the population in the choice of the legislative body. The principle of free elections was the subject of the jurisprudence of the European Court of Human Rights, which, inter alia, in the judgment in *Kwiecień v. Poland* of 9 January 2007¹⁸ pointed to the organic connection between free elections and freedom of expression, and in particular the freedom to conduct political debates, which together form the foundation of the democratic system (para. 48).¹⁹ These two rights are closely related, and coexisting contribute to mutual reinforcement. For these reasons, it is particularly important that in the period preceding the election, information and opinions of all kinds can be freely disseminated.²⁰ These rules apply to both local and national elections.

Free and fair elections are one of the seven institutions that allow distinguishing the political system referred to by Dahl as polyarchy (constituting the highest stage of democratisation).²¹ With the honesty of elections, the functions performed by elections are: legitimising and creative. These are the features that distinguish between fair choices and façade choices. While the principle of free elections has been clearly defined in the literature, and consists of three freedoms: 1) selecting and nominating candidates, 2) competition of election campaigns; 3) expressing electoral preferences,²² the concept of fair elections espoused by Jørgen Elklit and Palle Svensson refers to the multidimensional phenomenon of impartial and reliable organisation of the election procedure, as well as equal, neutral treatment of political competitors, not only in the juridical sphere, but also in electoral practice. The opposite is the unequal treatment of participants in the electoral process, the consequence of which is the achievement of unjustified benefits.²³ The fairness of elections requires due diligence and reliability

¹⁷ F. Rymarz, *Wybrane konstytucyjne problemy prawa wyborczego* [in:] *Minikomentarz dla maksiprofesor. Księga jubileuszowa profesora Leszka Garlickiego*, ed. M. Zubik, Warszawa 2017, p. 491.

¹⁸ No. 51744/99. See also *Tănase v. Moldova*, judgment of the European Court of Human Rights of 27 April 2010 (§ 154), no. 7/08.

¹⁹ See *Mathieu-Mohin and Clerfayt v. Belgium*, no. 27120/95, judgment of the European Court of Human Rights of 2 March 1987 (§ 47).

²⁰ See *Bowman v. the United Kingdom*, judgment of the European Court of Human Rights of 19 February 1998 (§ 42).

²¹ R.A. Dahl, *Demokracja i jej krytycy...*, p. 318.

²² See G. Kryszewski, *Standardy prawne wolnych wyborów parlamentarnych*, Białystok 2007, p. 88 *et seq.*

²³ J. Elklit, P. Svensson, *What makes elections free and fair?*, “*Journal of Democracy*” July 1997, Vol. 8, No. 3, p. 35.

in determining their results.²⁴ The declaration adopted by the Inter-Parliamentary Union at its 154th session on 26 March 1994 in Paris indicates that, in order for elections to be considered fair, "States should take the necessary measures to provide parties and candidates with reasonable opportunities to present their political programmes."²⁵

Elklit and Svensson attempt to clarify the concept of free and fair elections in order to consolidate and define strict criteria group elements in relation to the three phases of the electoral process covering the period before election day, on election day and the period after election day.²⁶ Honesty means neutrality, and its antonym is unequal treatment, where individuals (or groups) obtain unjustified benefits.²⁷ The practical difficulty lies in separating the scope of free and fair elections. In the case of the principle of free elections, the emphasis is on the rules of the game. Freedom of elections is a prerequisite for the fairness of elections. From the perspective of fairness, the pre-election phase is essential to assess whether the electoral law and the constitution guarantee the freedom of elections, as well as to verify whether resources are not distributed too unevenly.²⁸ The post-election phase, i.e. the period in which activities related to the verification of election results are undertaken, is also important from the point of view of fairness standards, as this process requires a neutral and impartial decision-making body. Elklit and Svensson present criteria which permit assessing the electoral process from the point of view of the principle of fairness, which before election day include: transparency of the electoral process; the law and the pike system granting no special privileges to any political party or social group; no obstacles to entry in the electoral register; an independent and neutral electoral body; impartial treatment of candidates by the police, the army and the judiciary; equal opportunities for political parties and independent candidates to apply for mandates; impartial educational and electoral programs; a transparent electoral calendar; equal access to public media; impartial allocation of public funds to political parties; prohibition of using administrative facilities for the purposes of the election campaign. The voting stage includes: access to all polling stations for representatives of political parties, election observers and the media; secrecy of voting; not intimidating voters; reliable ballots; appropriate ballot boxes; impartial assistance to voters (if necessary); appropriate procedures for counting votes; proper handling of invalid ballots; ensuring appropriate precautions for the transport of election materials; impartial protection of polling stations. The post-voting phase consists of: official and immediate announcement of election results; impartial consideration of all complaints and election protests; impartial information about election results by the media; acceptance of election results by all

²⁴ G. Kryszewski, *Uczciwość wyborów jako zasada prawa wyborczego*, "Studia Wyborcze" 2016, Vol. 21, p. 23.

²⁵ <https://www.ipu.org/impact/democracy-and-strong-parliaments/ipu-standards/declaration-criteria-free-and-fair-elections> [accessed: 2023.09.17].

²⁶ J. Elklit, P. Svensson, *What makes elections free...*, p. 36.

²⁷ *Ibid.*, p. 35.

²⁸ *Ibid.*, p. 36.

interested parties.²⁹ Larry Diamond emphasizes that elections are fair when administered by a neutral authority and the electoral administration is competent and able to take special precautions against crime when voting and counting votes; when the police, military, and courts treat competition among candidates and parties impartially; when competitors have access to public media; when constituencies and rules do not favour those in power (and harm the opposition); when independent monitoring of voting and counting votes takes place; when the secrecy of voting is protected; when virtually all adults can vote; when the procedures for organising and counting votes are transparent and widely known; when there are clear and impartial procedures for resolving complaints and disputes.³⁰ Thus, the concept of election fairness stretches temporally long before election day.

In Poland, the dismantling of constitutional axiology and practice implemented through ordinary legislation with a mentality inherent in the statutory state is the source of the Polish constitutional crisis that has been ongoing since autumn 2015. This state of affairs, which Wojciech Sadurski refers to as “anti-constitutional populist backsliding,”³¹ is also reflected in electoral practice.³²

The processes related to the erosion of democracy in Poland focus on those that include interrelated elements, among others: 1) a democratic electoral system with periodic, free and fair elections; 2) the right to freedom of expression and association; 3) the rule of law.³³ In Poland, not only is the essence of the democratic rule of law denied, one of the features of it which is institutional “restraint,” i.e. the abandonment of actions that violate its essence, which can literally be considered consistent with its letter,³⁴ but the “game of survival” is notable, consisting in such a way as to conduct a political struggle to defeat party rivals once and for all.³⁵ When the process is shaped in this way and also in relation to electoral practice, it goes beyond “constitutional hardball.”³⁶

The analysis below puts forward the thesis that backsliding in the area of free and fair elections leads to the formation of systemic growth in the form of electoral democracy.

²⁹ *Ibid.*, p. 37.

³⁰ L. Diamond, *Elections Without Democracy: Thinking about Hybrid Regimes*, “Journal of Democracy” 2002, Vol. 13, No. 2, p. 29.

³¹ W. Sadurski, *Poland’s Constitutional Breakdown*, Oxford 2019, pp. 8, 14.

³² On the factors determining contemporary populism, see W. Sadurski, *A pandemic of populists*, Cambridge 2022, pp. 25–45.

³³ Cf. T. Ginsburg, A.A. Huq, *How to Save a Constitutional Democracy*, Chicago–London 2018, pp. 19–24, 90–91.

³⁴ S. Levitsky, D. Ziblatt, *Tak umierają demokracje*, trans. O. Łabendowicz, Łódź 2021, pp. 124–125. See also A.C. Holland, *Forbearance*, “American Political Science Review” 2016, Vol. 110, No. 2.

³⁵ M. Mistygacz, T. Słomka, *Legitimisation of power in Poland*, “Przegląd Konstytucyjny” 2022, No. 1, p. 86.

³⁶ M. Tushnet, *Constitutional Hardball*, “John Marshal Law Review” 2004, Vol. 37, No. 2, pp. 523–553.

2. Decent electoral legislation

The standard of fairness of elections remains closely positively correlated with respect for the principles of decent electoral legislation, particularly in the period of appropriate *vacatio legis*. While, of course, the provisions of electoral law are not immutable, exceptions to this principle are permissible and justified, as long as the changes are accepted by the parliamentary majority and the opposition. In its judgment of 3 November 2006, the Constitutional Tribunal (K 31/06) emphasizes that a specific *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. Possible exceptions to such a specified dimension could only result from extraordinary circumstances of an objective nature." In addition, "the need to maintain at least six months from the entry into force of significant changes in the electoral law to the first activity of the electoral calendar is, in principle, an indelible normative component of the content of Article 2 of the Constitution." This line of jurisprudence was confirmed in judgments Kp 3/09³⁷ and K 9/11.³⁸ The Constitutional Tribunal clarified that the minimum period of legislative silence should be counted from the date of taking the first electoral action, i.e. until the decision to order elections is issued. Confirmation of this standard is the position set out in the Code of Good Practice in Electoral Matters:³⁹ "The basic elements of electoral law, especially the electoral system itself, the composition of electoral commissions and the boundaries of electoral districts should not be subject to changes at least one year before the elections, or should be enshrined in the constitution or legal acts of a higher rank than common law" (point II.2.b). An undoubted violation of this standard is the situation related to the great amendment to the KW of 26 January 2023,⁴⁰ because the act does not specify when some of the provisions enter into force. Pursuant to 19 points 2 and 3 of the Act amending a significant part of the provisions, including in particular the regulations regarding the Central Register of Voters, will enter into force on the date indicated in the communication of the Prime Minister. This regulation is not only a violation of the standard above, but also a gross violation resulting from Article 2 of the Constitution of the principle of a democratic state governed by the rule of law. Krzysztof Urbaniak's postulate to prevent the instrumentalisation of electoral law by introducing a regulation according to which "changes to electoral law regarding the essential elements of the electoral system should enter into force from the next term of office of the body to which the elections relate" is entirely correct.⁴¹ This would allow finding a balance between the adequacy

³⁷ Judgment of the Constitutional Tribunal of 28 October 2009.

³⁸ Judgment of the Constitutional Tribunal of 20 July 2011.

³⁹ Adopted by the European Commission for Democracy by Law in 2002 and approved by the Parliamentary Assembly of the Council of Europe in 2003.

⁴⁰ Journal of Laws, item 497.

⁴¹ K. Urbaniak, *Wybory jako demokratyczny sposób kreowania organów władzy publicznej a dobro wspólne*, "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 2018, No. 1, p. 165.

and stability of electoral law, the gradual adaptation to changes taking place not only in communication techniques, increasing mobility or the need to adapt regulations to changes in social life, and, in particular, the aging of the population.

The stability of electoral law manifested in restraint or even “legislative silence” is also called “the rest of electoral law”⁴² in basic electoral matters. In this context, the situation regarding the presidential elections scheduled for 10 May 2020 was unprecedented. Despite the Covid-19 epidemic and the resulting justification for the introduction of a state of emergency, which would have resulted in postponing the election date (Article 229 § 7 of the Constitution of the Republic of Poland), the ruling coalition of the United Right made the decision to organise elections despite the difficult public health situation. Therefore, legislative changes were initiated to conduct elections by correspondence, and the election was to be organised by the Minister of State Assets, together with his subordinate company of the State Treasury – Poczta Polska S.A. However, despite unfinished legislative work to provide a legal basis for these elections, Prime Minister Mateusz Morawiecki undertook factual and legal actions aimed at organising the elections. Finally, the elections scheduled for 10 May 2020 did not take place. Then, regulations were passed to allow elections to be held on 28 June 2020 (the first round of voting) and 12 July 2020 (the second round of voting). Although the role of the National Electoral Commission was restored, problems related to the inability of a significant number of citizens abroad to cast their votes were not eliminated. The Supreme Court failed to consider more than four thousand electoral protests regarding discriminatory treatment by the public media of candidates for the President of the Republic of Poland. This example indicates the destabilisation of electoral law and the erosion of guarantees regarding the reliability of elections.

3. Verification of the electoral process and election results before a neutral judicial authority

An essential element of the free and fair elections standard is the verification of the electoral process itself and of election results through appropriate procedures applied by an independent court.⁴³ In this respect, the assessment of the status of an entity confirming the validity of elections requires taking into account 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 judge at the request of the National Council of the Judiciary, shaped in the manner specified in the provisions of the Act of 8 December 2017 amending the Act on the National Council of the Judiciary and

⁴² See P. Jakubowski, *Cisza legislacyjna – zasada prawa wyborczego w Rzeczypospolitej Polskiej*, “Przełęcz Sejmowy” 2015, No. 3 and M. Zagozdón, *Spoczywanie prawa wyborczego* [in:] *Aktualne wyzwania prawa wyborczego*, eds. M. Zubik, J. Podkowik, Warszawa 2021.

⁴³ See A. Józefowicz, *Przesłanki prawne rozstrzygnięcia o ważności wyborów parlamentarnych*, “Państwo i Prawo” 1999, No. 3, p. 4.

certain other acts (Journal of Laws 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 Article 45 section 1 of the Constitution of the Republic of Poland and Article 47 of the Charter of Fundamental Rights of the European Union and Article 6 item 1 European Convention on Human Rights.⁴⁴ The adjudicating panel formed in this way violates Article 3 of Protocol No. 1 because of the inability to appeal to a competent national authority that can effectively decide on the subject,⁴⁵ because the Chamber of Extraordinary Review and Public Affairs of the Supreme Court, both in terms of the composition of its personnel and the manner of its operation, is deprived of the guarantee of impartial ruling on the validity of elections and electoral protests. It is entirely formed of new members and is an example of the old court-packing mechanism, i.e. an increase in the number of seats (in this case the creation of a new chamber within the Supreme Court) occupied by newly appointed authorities.⁴⁶

4. Electoral distortions

It is a truism to indicate that there is no ideal electoral system that allows for the distribution of seats in proportion to the number of seats. In Poland, in the elections to the Sejm, the factors influencing the deformation of the result are: 1) electoral thresholds (5% for electoral committees and 8% for coalitions of electoral committees); 2) the adoption of the d'Hondt method for allocating seats which is more favourable for larger parties; 3) the distribution of seats on a national scale, not on a constituency scale; 4) the small size of the average constituency (8–10 seats).⁴⁷

In order to conduct elections to the Sejm, multi-mandate electoral districts are created which cover the area of a voivodeship or part of it, while the borders of electoral districts cannot violate the borders of counties or cities with *powiat* rights. At least seven deputies are elected in electoral districts. The maximum number has not been specified (Article 201 § 1–3 KW). The division into constituencies, borders and the number of deputies elected in each constituency is set out in Annex 1 to the KW.

To ensure an appropriate representative standard, Article 203 § 1 of the Constitutional Tribunal entrusts the National Electoral Commission with the right to submit proposals to the Sejm on changing the limits of electoral terms and the number of deputies elected in them if such a necessity results from changes in the basic territorial division of the state or from a change in the number of residents in an electoral

⁴⁴ BSA I-4110-1/20.

⁴⁵ Cf. case of *Namat Aliyev v. Azerbaijan*, no. 18705/06, judgment of the European Court of Human Rights of 8 April 2010.

⁴⁶ M. Naím, *Zemsta władzy. Jak autokraci na nowo tworzą politykę XXI wieku*, trans. V. Dobosz, D. Kaczor, Katowice 2022, p. 64.

⁴⁷ M. Chmaj, *Prawo wyborcze w Polsce*, Warszawa 2023, p. 85.

district or in the country. Making changes to the boundaries of counties that involve changes to the boundaries of electoral terms is unacceptable during the 12 months preceding the expiry of the term of office of the Sejm, as well as in the period from the election management in the event of shortening the term of office of the Sejm or until the date of determining the validity of the elections (Article 203 § 2 KW). The Sejm makes changes in the division into electoral determinations for the above-mentioned reasons not later than three months before the date on which the deadline for the election to the Sejm expires (Article 203 § 2 KW).

On 21 October 2022, the National Electoral Commission presented a proposal to change the boundaries of constituencies and the number of deputies elected in them. As of 30 September 2022, the country's population was 36,075,160. The representative norm in the elections to the Sejm is 78,424 inhabitants per mandate. The resulting number of seats (created by rounding the ratio of the number of inhabitants of the district and the representative standard) is 461, and the emerging surplus mandate in accordance with Article 202 § 1 point 2 sentence 1 KW should be subtracted in the constituency where the representative norm calculated for the constituency is the smallest, i.e. in district No. 40 (Koszalin). Compared to the number of seats set out in Annex 1 to the KW, the allocation of seats to individual electoral districts requires changes.⁴⁸

5. Independence and transparency of the electoral administration

In the context of the free and fair elections standard, it is necessary to pay attention to the shaping of the model of electoral administration in Poland. After 1989, a judicial model of electoral administration⁴⁹ (*iudices electionis custodes*) was formed. Participation in electoral bodies of judicial authorities, with guarantees of independence and apoliticality, was to be one of the guarantees of the fair conduct of elections, as well as reliability in determining the results of the elections.⁵⁰ The judicial model of electoral

⁴⁸ In districts No. 3 (Wrocław), No. 13 (Kraków II), No. 19 (Warsaw I), No. 23 (Rzeszów), No. 25 (Gdańsk), No. 26 (Słupsk), No. 37 (Konin), No. 38 (Piła) and No. 39 (Poznań), the number of elected deputies should be increased by one, while in district No. 20 (Warsaw II) the number of elected deputies should be increased by two, and in districts No. 1 (Legnica), No. 2 (Wałbrzych), No. 5 (Toruń), No. 6 (Lublin), No. 7 (Chełm), No. 9 (Łódź), No. 31 (Katowice I), No. 32 (Katowice II), No. 33 (Kielce), No. 34 (Elbląg) and No. 40 (Koszalin) the number of elected deputies should be reduced by one. Changes in the division into electoral districts should have been made no later than three months before the deadline for ordering elections to the Sejm (14 August 2023). Therefore, the deadline for making changes in the division into constituencies expired on 14 May 2023. See the motion of the National Electoral Commission on changing the boundaries of electoral districts and the number of deputies elected in them of 21 October 2022 – <https://pkw.gov.pl/aktualnosci/informacje/wniosek-panstwowej-komisji-wyborczej-w-sprawie-zmiany-granic-okregow-wyborczych-i-liczby-poslow-w-ni> [accessed: 2023.09.25].

⁴⁹ See D. Sześciło, *Modele administracji wyborczej w wybranych państwach*, "Studia Wyborcze" 2013, No. 13, p. 93 *et seq.*

⁵⁰ F. Rymarz, *Udział sędziów w organach wyborczych [in:] 10 lat demokratycznego prawa wyborczego Rzeczypospolitej Polskiej (1990–2000)*, ed. *idem*, Warszawa 2000, p. 44.

administration did not raise doubts in the main political parties and was also positively assessed in the doctrine.⁵¹ Due to the lack of the anchoring of the National Electoral Commission in the Constitution of the Republic of Poland of 1997, it does not have constitutional guarantees ensuring its independent nature. 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 bodies⁵²) changed the personnel structure of the National Electoral Commission. The previous judicial model provided that the National Electoral Commission consisted of nine judges: three appointed by the President of the Constitutional Tribunal, three by the First President of the Supreme Court and three by the President of the Supreme Administrative Court. The newly formed composition of the National Electoral Commission took a mostly political form. Amended Article 157 § 2 points 1–3 of the KW provides that the National Electoral Commission is composed of one judge appointed by the President of the Constitutional Tribunal and one judge appointed by the President of the Supreme Administrative Court elected for a nine-year term of office and seven persons qualified to hold the position of judge appointed by the Sejm for the period of its term of office (Article 157 § 2c KW). It should be stipulated that persons qualified to hold a judicial position are those who have at least three years of experience as prosecutors; those who have served as the President of the General Counsel to the Republic of Poland, its vice-president or counsel; those who have practiced the profession of lawyer, legal advisor or notary in Poland, and persons who have worked at a Polish university, at the Polish Academy of Sciences, at a research institute or other scientific institution, having the academic title of professor or the academic degree of habilitated doctor of legal sciences (Article 157 § 2a points 1–2 KW). Finally, the change in the personnel composition of the National Electoral Commission has led to the politicisation of the process of selecting the majority of its members, which affects public trust not only in the electoral authority itself, but also in the electoral process. In accordance with Article 157 § 4a of the KW, candidates for members of the National Electoral Commission are nominated by one or more parliamentary groups, except that the number of these members must proportionally reflect the representation of one or more parliamentary groups in the Sejm. The number of members appointed to the National Electoral Commission, from among those nominated by one or more parliamentary groups, may not be greater than three (Article 157 § 4b KW). Guarantees of independence are weakened or even illusory by the possibility of dismissing a member of the National Electoral Commission by the President of the Republic of Poland upon a justified request of the appointing entity (Article 158 § 1 point 5 KW). The changes also included electoral commissioners appointed for a period of five years by the National Electoral Commission at the request of the minister competent for inter-

⁵¹ See A. Sokala, M. Świąćki, *Administracja wyborcza w III Rzeczypospolitej Polskiej (struktura organizacyjna i charakter prawny)* [in:] *Ludices electionis custodes (Sędziowie kustoszami wyborów)*. Księga pamiątkowa Państwowej Komisji Wyborczej, ed. F. Rymarz, Warszawa 2007, p. 172.

⁵² Journal of Laws 2022, item 130.

nal affairs, from among persons with higher legal education and giving a guarantee of the proper performance of this function, i.e. by officials, and not by judges thus far. While the current judicial model guaranteed transparency and fairness of elections, the changes introduced pose a threat that election commissioners may be associates of political parties or even former members of them.⁵³ The changes introduced have a negative impact on impartiality and public trust in electoral procedures.

6. Access to public media

In its judgment of 3 November 2006 (K 31/06), the Constitutional Tribunal pointed out that the essential elements of the principle of freedom of elections are “authentic freedom of expression and assembly, media order in the state in general, accessibility to local media markets, transparent procedures for obtaining the necessary funds for campaigning, appropriate real guarantees for the protection of electoral rights.” The principle of freedom of elections requires “that a fair and reliable election campaign provide citizens with access to truthful information about public affairs, candidates and their political programs.”⁵⁴

One of the elements related to the regression of democracy is the criminalisation of political rivals and the related treatment of political opponents not as citizens, but as lawbreakers, who can be imprisoned (incriminations for diplomatic treason, corruption).⁵⁵

In the context of the fairness of elections, attention should be paid to the blatant disparities in the possibility of presenting the positions of political parties in the public media. One example is the disproportionate time devoted to presenting the positions of those in power and those in opposition on public television. The report for the second quarter of 2023 on the implementation of the obligations to present the positions of political parties, professional associations⁵⁶ and employer associations in the programmes of public broadcasting units shows that a total of 80.37% of the time devoted to politicians of all parties was devoted to the presentation of the positions of the ruling coalition parties, as well as the positions of the chancellery of the President, the Prime Minister and the Marshal of the Sejm (originating from the same political environment). Civic Platform and the Marshal of the Senate were given 2.95%, and the remaining opposition parties – 16.67%. These data remain in similar proportions in relation to the reports resulting from previous quarters. The glaring disproportion of time devoted to those in power and those of the opposition leads to a violation of

⁵³ K. Urbaniak, *Wybory...*, p. 159.

⁵⁴ Judgment of the Constitutional Tribunal of 20 July 2011.

⁵⁵ Cf. M. Naím, *Zemsta władzy...*, pp. 19–20.

⁵⁶ The obligation to present reports of results from § 4a (1) Regulation of the National Broadcasting Council of 24 April 2003 on the procedure for presenting the positions of political parties, trade unions and employers' associations on key public issues in public radio and television programs (consolidated text: Journal of Laws 2014, item 309).

the principle of pluralism in the presentation of positions and honesty during election campaigns.

Also significant with regard to access to media, is influencing the functioning of private media related to the ruling coalition, including: commissioning advertisements to friendly private media by state-owned companies, implementing joint projects (sponsored galas, patronages, conferences) and supporting social organizations associated with the ruling coalition in the implementation of projects coinciding with government policy (e.g. financing from the Justice Fund).⁵⁷

Conclusions

The atrophy of liberal democracy standards in the electoral process leads to democratic deconsolidation, resulting in the limitation of the ingrained rules of liberal democracy, including the undermining of the neutrality of independent state institutions, including taking control and politicising the Constitutional Tribunal, taking control of public media, taking control of the Supreme Court, and limiting the ability of private broadcasters to carry out their missions.⁵⁸

Electoral democracy can be described as a binomial – democracy minus the rule of law. It is therefore a consequence of depriving democracy of liberal values. The consequence of this state of affairs is a transformation towards a systemic restriction of freedoms and autocracy. The difference between democracy and authoritarianism is captured accurately by Norberto Bobbio using the category of questions and answers: “in a democracy it is easy to ask a question and difficult to answer, while an autocracy makes the question difficult, but it always has an easy answer.”⁵⁹

The analysis presented in this article indicates there is a full-blown systemic crisis paving the way for electoral democracy. The clinical picture of this disease heralds a direction – pragmatic authoritarianism⁶⁰ (and the associated clientelism, corruption and party favouritism⁶¹) underpinned by electoral democracy. The changes presented above can be described as the cancel culture of principles, roots of democratic electoral systems, rule of law, and violation of the democratic cultural code. The sum of factors leading to the erosion of guarantees and the culture of democratic elections leads

⁵⁷ Cf. A. Bodnar, *System polityczny Rzeczypospolitej Polskiej w świetle teorii konkurencyjnego autorytaryzmu* [in:] *Wokół kryzysu praworządności, demokracji i praw człowieka. Księga jubileuszowa Profesora Mirosława Wyrzykowskiego*, eds. *idem*, A. Płoszka, Warszawa 2020, pp. 140–144.

⁵⁸ For example, in 2016, during public protests against the ruling party, the prime minister banned private broadcasters from entering the building.

⁵⁹ N. Bobbio, *Liberalizm i demokracja*, trans. P. Bravo, Kraków 1998, p. 64.

⁶⁰ Sometimes such a system is referred to as “competitive authoritarianism” – see S. Levitsky, L.A. Way, *Competitive Authoritarianism: Hybrid Regimes after the Cold War (Problems of International Politics)*, Cambridge 2010.

⁶¹ It is the ability of new forms of authoritarianism to learn from mistakes that captures David Runciman’s concept of pragmatic authoritarianism. See D. Runciman, *Jak kończy się demokracja*, trans. S. Żuchowski, Warszawa 2019.

to the formation of electoral democracy *à la polonaise*. It seems that the changes in the entire environment of electoral law make it possible to consider Polish democracy a “democracy deliberately damaged,”⁶² because, although the changes related to the destruction of the system of guarantees and honesty are deliberate actions of the rulers, a change of power is not completely excluded. In the ranking of democratic countries in 2023,⁶³ Poland obtained 6.85 on a 10-point scale, which results in it not being included among full democracies (above eight points), and included in the group of “flawed democracies”⁶⁴ or even countries that are characterised by “soft authoritarianism” (below seven points).⁶⁵ Activities with the appearance of constitutional legalism, consolidated by a parliamentary majority, led – referring to what Bojan Bugarič puts as “a new kind of semi-authoritarian regime, which is located halfway between ‘diminished democracy’ and ‘competitive authoritarianism’.”⁶⁶

The circumstances presented are microevidence that allows for a generalising statement that in Poland, in the era of constitutional crisis, processes are taking place that strengthen electoral democracy. This is accompanied by secretive practices including changes in the judiciary in the field of verifying the correctness of the electoral process, changes in and the politicisation of the electoral administration and the prosecutor’s office, as well as the politicisation of independent public broadcasters. In addition to the sovereignty of the people, the rule of law (law-abidingness), which secures the political position of a minority contesting power. Electoral power is an essential guarantee of democracy, and from there, the road leads to representative democracy.⁶⁷ However, it requires the existence of unwritten norms of mutual tolerance and restraint, which Steven Levitsky and Daniel Ziblatt point out, are “the soft guardrails of democracy”⁶⁸ preventing the transformation of competition into a total fight “to the death.” One of the elements of fair elections is institutional restraint (forbearance), referring to refraining from exercising powers.⁶⁹ Where the culture of restraint is strong, politicians do not use their formal powers to their limits. This concept permits maintaining the rules of fair play in the electoral process, while maintaining institutional restraint entails recognising each other as rivals, not enemies.

The process of falling into electoral authoritarianism occurs when the violation of the “minimum criteria of democracy” results in unequal opportunities between the government and the opposition. The standard of fair elections is related to the concept of the quality of the electoral process in the *largo sense*, which allows it to be

⁶² J.-W. Müller, *Strach i wolność. O inny liberalizm*, trans. P. Masłowski, Warszawa 2020, pp. 197–198.

⁶³ Global Democracy Index.

⁶⁴ The Economist, 2023.

⁶⁵ Cf. P. Sztompka, *Wiarygodność. Sekret dobrych relacji*, Kraków 2023, p. 296.

⁶⁶ B. Bugarič, *Central Europe’s descent into autocracy: A constitutional analysis of authoritarian populism*, “International Journal of Constitutional Law” 2019, Vol. 17, Issue 2, p. 599.

⁶⁷ G. Sartori, *Teoria demokracji...*, p. 115.

⁶⁸ See S. Levitsky, D. Ziblatt, *The Crisis of American Democracy*, “American Educator” Fall 2020, Vol. 44, No. 3.

⁶⁹ See A. Holland, *Forbearance...*, pp. 232–246.

understood in three dimensions.⁷⁰ The first, of a formal character, includes quality in a strictly procedural dimension, i.e. ensuring compliance with formal procedures. The second is of a material dimension, in which quality refers to the possession by the product of a specific content and proper functioning. The third is the quality of the results of the electoral process which results indirectly from the satisfaction expressed by voters and affects the legitimacy of the power. The lack of an institutionalised response of public authorities to the shortcomings of the standard of fair elections, in particular related to preventing access to reliable information, which is the basis for making political choices, can lead to a decrease in trust in democratic procedures. The assessment related to the disturbance or manipulation of access to reliable information by the public broadcaster or the financing of election campaigns makes it possible to show the degree of these violations. Finally, it allows for the assessment of meeting the standard of fair elections. The Polish constitutional crisis is manifest in the transition from the rule of law to the rule of law, which apparently expresses a form of people's rule, but actually constitutes an erosion in the field of legal protection. The impoverishment of the free and fair elections standard leads to the transformation of democracy into an electoral democracy, which is purely rhetorical, based on sanctioning axiologically murky elections with the adoption of assumed popular support, and as Paul Blokker points out – “legal skepticism.”⁷¹ It leads to putting an equal sign between majority governments and governments in the interest of the majority, when it should unite them.

According to the Code of Good Practice in Electoral Matters, one of the dimensions of fairness is equal opportunities, which requires “the neutral approach of state authorities especially in relation to: 1. election campaigns, 2. reporting in the media and especially in the public media, 3. public financing of political parties and election campaigns.”⁷² Equal opportunities refer in particular to airtime on radio and television, public funds and other forms of support (point 2.3.b). Ryszard Piotrowski rightly points out that ignoring the allegations relating to the financing of election campaigns, the presentation of candidates in the public media, the course of the legislative process allow for “legitimising electoral lawlessness.”⁷³ The foundation of democracy is public opinion (*doxa*) that is formed in an honest and free manner. “Governance of opinion” together with electoral (electorate) democracy make up democracy in a horizontal dimension.⁷⁴ The standard free and fair elections is therefore a guarantee of the demo-

⁷⁰ Cf. L. Morlino, *¿Cómo analizar las calidades democráticas?*, “Revista Latinoamericana de Política Comparada” Julio 2015, No. 10, pp. 15–19, 21–24.

⁷¹ See more: P. Blokker, *New democracies in crisis? A comparative constitutional study of the Czech Republic, Hungary, Poland, Romania and Slovakia*, Abingdon 2013 and *idem*, *Populist constitutionalism* [in:] *Routledge Handbook of Global Populism*, ed. Carlos de la Torre, London–New York 2019.

⁷² Code of Good Practice in Electoral Matters – Guidelines and explanatory report taken over by the European Commission for Democracy by Law (Venice Commission), 52nd session (Venice, 18–19 October, 2002), point 2.3.

⁷³ R. Piotrowski, *Ważność wyborów prezydenckich w świetle Konstytucji RP* [in:] *Dylematy polskiego prawa wyborczego...*

⁷⁴ G. Sartori, *Democracia en treinta lecciones*, trans. A. Pradera, México 2009, pp. 33, 43.

cratic electoral process and a support of representative democracy. However, it must not be forgotten that, as Juan J. Linz and Alfred C. Stepan put it, "for the political order to be democratic, it is not enough that the power comes from free and fair elections, but no less important that it has a democratic pedigree and mandate, as well as a democratic way of exercising power,"⁷⁵ and the moral convictions of the custodians of power are not synonymous with public morality. The mechanisms described confirm that the erosion of the free and fair elections standard in Poland paves the way to electoral democracy, which is essentially a stopover from consolidated democracy to its crisis. Subsequent stages include electoral autocracy and closed autocracy. In addition to institutions that remain seemingly unchanged, unwritten norms that give correct meaning and values are eroded. Failure to meet these criteria results in remaining in the space between liberal democracy and closed authoritarianism, which is characterised by electoral democracy with restrictions on freedom of association, freedom of speech and academic freedom, electoral deformations, unequal access of representative political parties to the public media and judicial guarantees related to the electoral process.⁷⁶

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⁷⁵ "No regime should be called a democracy unless its rulers govern democratically. If freely elected executives (no matter what the magnitude of their majority) infringe the constitution, violate the rights of individuals and minorities, impinge upon the legitimate functions of the legislature, and thus fail to rule within the bounds of a state of law, their regimes are not democracies." See J.J. Linz, A.C. Stepan, *Toward consolidated democracies*, "Journal of Democracy" 1996, Vol. 7, No. 2, p. 14.

⁷⁶ Cf. *V-DEM electoral democracy index* [in:] *Democracy report 2023. Defiance in the Face of Autocratization*, V-Dem Institute, pp. 19–23, 26, 37, 39.

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Summary

Michał Mistygacz

On the Road to Electoral Democracy? Erosion of the Free and Fair Elections Standard in the Era of the Polish Constitutional Crisis after 2015

This article attempts to diagnose the state of democracy in Poland, remaining in the era of constitutional crisis and following the erosion of the free and fair elections standard, which determines the criteria for distinguishing an electoral democracy from a liberal democracy. For this purpose, the individual elements constituting this concept are analyzed, both having a procedural dimension and referring to the course of the three phases of the electoral process itself (the period before election day, on election day and after election day), as well as referring to the standards of honesty, reliability, the real possibility of alternative power or equal opportunities. The conclusions drawn at individual stages of the deliberations, including an indication of the destabilisation of electoral law, the erosion of guarantees regarding the reliability of elections, disproportion in the access of political party representatives to public media, lead to a thesis on the formation of electoral democracy in Poland, which can be described as a democratic system devoid of liberal values. It is characterised by restrictions on freedom of association, freedom of speech and academic freedom, electoral distortions, unequal access of representative political parties to the public media and judicial guarantees related to the electoral process.

Keywords: electoral democracy, liberal democracy, free and fair elections, electoral administration.

Streszczenie

Michał Mistygacz

Na drodze do demokracji wyborczej? Erozja standardu wolnych i uczciwych wyborów w dobie polskiego kryzysu konstytucyjnego po 2015 r.

W niniejszym artykule podjęto próbę zdiagnozowania stanu demokracji w Polsce, pozostającej w dobie kryzysu konstytucyjnego i podążającej drogą erozji standardu *free and fair elections*, determinującego kryteria pozwalające na odróżnienie demokracji wyborczej od demokracji

liberalnej. W tym celu dokonano analizy poszczególnych elementów składających się na to pojęcie, zarówno mających wymiar proceduralny i odnoszący się do przebiegu trzech faz samego procesu wyborczego (okres przed dniem wyborów, w dniu wyborów i po dniu wyborów), jak i odwołujących się do standardów uczciwości, rzetelności, realnej możliwości alternacji władzy czy równości szans. Wnioski wyciągnięte na poszczególnych etapach rozważań, w tym wskazanie na destabilizację prawa wyborczego, erozję gwarancji w zakresie rzetelności wyborów, dysproporcję w dostępie przedstawicieli partii politycznych do mediów publicznych, prowadzą do postawienia tezy o kształtowaniu się w Polsce demokracji wyborczej, którą można określić jako ustrój demokratyczny pozbawiony wartości liberalnych. Cechują go ograniczenie wolności zrzeszania, wolności słowa i wolności akademickiej, deformacje wyborcze, nierówny dostęp reprezentatywnych partii politycznych do mediów publicznych oraz gwarancji sądowych związanych z procesem wyborczym.

Słowa kluczowe: demokracja wyborcza, demokracja liberalna, *free and fair elections*, administracja wyborcza.