Challenges in Restoring the Rule of Law in Poland After the 2023 Elections

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After eight years of rule by the Law and Justice (PiS) party, the Civic Coalition (Koalicja Obywatelska), Third Way (Trzecia Droga) and The Left (Lewica) (hereinafter: democratic parties) together have 248 seats in Polish parliament, which is enough to govern. After eight years of violating the Constitution and the rule of law, the EU-sceptic Law and Justice party lost the majority in the Polish parliament that is necessary to form a government. The process of restoring the rule of law is currently underway. However, it will not be easy, as the democratic parties did not obtain the majority necessary to override the veto of the President, who is a former Law and Justice MP.

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1 Introduction

After eight years of rule by the Law and Justice (PiS) party, the Civic Coalition, Third Way and The Left (democratic parties) together have 248 seats in Polish parliament. After eight years of violating the constitution and the rule of law, the EU-sceptic Law and Justice party lost the majority in the Polish parliament that is necessary to form a government.

The process of restoring the rule of law is currently underway. However, it will not be easy, as the democratic parties did not obtain the majority necessary to override the veto of the President, who is a former Law and Justice MP.

What appears to be the main issue, then? The democratic parties do not have a sufficient majority to reject the President's veto. According to Article 122.3 of the Polish Constitution:

Article 122. 3. If the President of the Republic has not made reference to the Constitutional Tribunal, he may refer the bill, with reasons given, to the Sejm (Polish parliament) for its reconsideration. If the said bill is repassed by the Sejm by a three-fifths majority vote in the presence of at least half of the statutory number of Deputies, then, the President of the Republic shall sign it within 7 days and shall order its promulgation in the Journal of Laws of the Republic of Poland.

The democratic parties hold only 248 seats of 460. However, 276 seats at least are needed to override the veto of the President. Due to this fact, it will not be easy to restore the rule of law in Poland. This would rather be a long-term process which might take longer than until the next presidential elections (probably in May 2025).

This article will present practical problems related to restoring the rule of law, in particular from a legal point of view. Nevertheless, the problems with the rule of law also significantly affect Polish economy as these are behind, among other things, the decrease in investments. According to the data on gross fixed capital formation in relation to GDP published by Eurostat, in 2015 (the last year of the previous ruling coalition), this indicator in Poland was 20.1%, while in 2021 it dropped to 16.6% (while the EU average in 2021 was 21.9% of GDP). Another consequence of the lack of the rule of law was the freezing of approximately EUR 134 billion from the

National Reconstruction Plan and the possibility of losing over EUR 70 billion in European funds. As can be seen, the problems with the rule of law translate directly into the state of the economy.

2 Theoretical Background

The European Union has been struggling for a long time with the problem of Member States abandoning the rule of law and principles of democratic states under the rule of law. Interestingly, this always happens after a given member state has joined the European Union and could not have been possible before, because, in such case, the applicant country would not have met the so-called Copenhagen criteria.

The Treaty on European Union sets out the conditions (Article 49) and principles (Article 6(1)) to which any country wishing to become a member of the European Union (EU) must conform. These criteria (Copenhagen criteria) were established by the Copenhagen European Council in 1993 and strengthened by the Madrid European Council in 1995.

These are the following,

- Stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities;
- A functioning market economy and the ability to cope with competitive pressure and market forces within the EU;
- The ability to take on the obligations of membership, including the capacity to effectively implement the rules, standards and policies that make up the body of EU law (the 'acquis'), and adherence to the aims of political, economic and monetary union (https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3Aaccession_criteria_copenhague – 07.02.2024).

What follows from the above is that it is not the accession criteria that pose a problem, but rather the lack of appropriate legal safeguards to be used in a situation when a country is already a member of the EU. This leads to a paradoxical situation

where some countries that already are EU member states could not count on accession under the current circumstances (e.g. Hungary).

On the other hand, we have the suspension clause (see: Article 7 of the Treaty on European Union). Article 7 of the Treaty on European Union allows for the possibility of suspending European Union membership rights (such as voting rights in the Council of the European Union) if a country seriously and persistently breaches the principles on which the EU is founded as defined in Article 2 of the Treaty on European Union (respect for human dignity, freedom, democracy, equality, the rule of law and respect for fundamental rights, including the rights of persons belonging to minorities). This solution, however, is insufficient, especially in a situation where two or more Member States violate the rule of law and cooperate by blocking the introduction of the above procedure.

The above-mentioned problem emerged with full force after the Law and Justice party came to power in 2015. Since then, Poland and Hungary had supported each other in the EU, blocking the possibility of full application of Article 7 of the Treaty on European Union. While Poland is restoring the rule of law after the parliamentary elections of October 15, 2023, disturbing trends in this respect are currently observed in Slovakia and even the Netherlands.

3 Methodology

As the focus of this study are current legal solutions and problems, the dogmatic and legal method, consisting in a juridical analysis of relevant legal provisions, in particular the provisions of the Polish Constitution, has been selected as the basic method for conducting research. This method consists in clarifying the correct meaning of the rule of law encoded in the legal provisions under analysis using various methods of interpretation, in particular with the use of linguistic interpretation. Furthermore, the study of legal texts has been enriched to a relevant scope by presenting the views of the science of law and judicature. In addition, the statistical method analyses specific legal institutions from the numerical point of view. The comparative legal and theoretical legal methods are used to a lesser extent.

4 Results

After 8 years of rule by the Law and Justice party, the democratic parties have to confront, among other things, the problem of politicized police, prosecutors, senior officials and also politically appointed judges. It is estimated that approximately ¼ of judges in Poland were incorrectly appointed, including at least 3 judges of the Constitutional Tribunal. Moreover, several of the judges of the Constitutional Tribunal were previously Law and Justice MPs.

As mentioned before, the basic legal problem in restoring the rule of law is the veto of President Andrzej Duda. On one hand, the President participated in violating the constitution and rule of law during the Law and Justice party rule, he cannot, therefore, be expected to sign laws restoring the rule of law. On the other hand, the democratic parties do not hold a majority sufficient to override the President's veto. Nevertheless, it is primarily by means of laws that changes to Polish law are introduced. It should also be added that is not possible to modify the Polish Constitution due to the fact that the democratic parties do not hold a sufficient majority (see: Chapter XII *Amending The Constitution* of the Polish Constitution)[1]. Moreover, it is not possible to rule by means of regulations issued on the basis, and for the purpose of, implementing the Act (Article 92 of the Polish Constitution).

Article 92.1. Regulations shall be issued on the basis of specific authorization contained in, and for the purpose of implementation of, statutes by the organs specified in the Constitution. The authorization shall specify the organ appropriate to issue a regulation and the scope of matters to be regulated as well as guidelines concerning the provisions of such act.

2. An organ authorized to issue a regulation shall not delegate its competence, referred to in para. 1 above, to another organ.

Unable to introduce changes by means of acts, which is the usual way to do so, the parties have decided on a number of solutions to restore the rule of law. Firstly, resolutions of the Sejm (a lower chamber of the Polish parliament) are issued calling on the executive power to restore the rule of law. These, however, are not a source of universally binding law of the Republic of Poland. Nevertheless, their importance is derived from the fact that 74.38% of eligible citizens took part in the elections of October 15, 2023, the highest turnout since 1989.

[1] The Polish Constitution was amended only twice in 27 years, regarding just two articles.

(https://wybory.gov.pl/sejmsenat2023/pl/frekwencja/Koniec/pl - 07.02.2024). The new authorities, therefore, have strong legitimacy to make changes.

The second way to restore the rule of law in a situation where it is impossible to issue laws is to interpret the existing regulations very flexibly. These are either interpreted narrowly (*interpretatio restrictiva*) or, in other cases, very broadly (*interpretatio extensiva*), as necessary. Dynamic interpretation is also used, which is aimed at determining the content of the legal text in accordance with its current meaning (in practice: current circumstances). Dynamic interpretation is contrasted with static interpretation, which is focused on determining the meaning at a specific moment in the past – usually the date of adoption or entry into force of a normative act or the amendment thereto.

The third way is to circumvent existing regulations (*in fraudem legis*), bend them or even – as it seems – violate the existing defective regulations regarding the rule of law (*contra legis*). Such actions, however, are justified by the construction of the state of necessity, a legal construction where an actor, confronted with two options, may choose the lesser evil – even if this should be in violation of the law (https://oxcon.ouplaw.com/display/10.1093/law-mpeccol/law-mpeccol-e395 - 07.02.2024).

A similar solution exists in Polish civil and criminal law. According to Article 26 § 1 of the Polish Criminal Code:

> Art. 26 § 1. Anyone whose actions are carried out in order to avert an immediate danger threatening any legally protected interest, if the danger cannot otherwise be avoided and the interest sacrificed is less valuable than the interest saved, is not deemed to have committed an offence.

Additionally, it should be noted that as the terms of office of senior officials expire, independent persons are being appointed, which, however is quite a slow process. Moreover, it is not always possible (e.g. in the case of judges).

Finally, it is possible to refer directly to constitutional provisions, omitting the sources of generally applicable law that are lower in the hierarchy than the Constitution, especially as the Polish constitution provides for such a possibility in Article 8.2. According to this provision:

Article 8.1. The Constitution shall be the supreme law of the Republic of Poland.

2. The provisions of the Constitution shall apply directly, unless the Constitution provides otherwise.

In the current Polish case law it is assumed that 'the right to refuse to follow an applicable secondary provision by a court should be derived from Article 178 section 1 of the Constitution of the Republic of Poland. The lack of subordination of judges to secondary acts issued by executive authorities justifies the admissibility of omitting provisions of such level of importance in the judicial process. Another argument for acknowledging the above may also be a legal provision allowing courts to apply the Constitution directly, i.e. Article 8 section 2 of the Constitution of the Republic of Poland (judgment of the Supreme Administrative Court, I OSK 1735/20, see also: Decision of the Supreme Court, II USK 94/23).

It is also possible to invoke directly applicable EU law and the jurisprudence of the EU Court of Justice has superior force over all national legislation (see: Judgment of the Court of Justice of July 15, 1964, Flaminio Costa v E.N.E.L., case 6-64). The Court of Justice of the EU has repeatedly stated that some Polish provisions are incompatible with EU law.

5 Discussion

Owing to the fact that the democratic parties do not have a sufficient majority to override the president's veto, it is not possible to immediately restore the rule of law. However, the very methods adopted by the democratic ruling parties may raise doubts. This problem essentially boils down to the question of whether the rule of law could be restored using methods that are not entirely lawful. If we decide that this must be carried out in a fully legal manner, but still, the president continues to use his veto and the politicized Constitutional Tribunal operates, laws clearly inconsistent with the Constitution will remain in force in legal affairs for a longer time. This approach is also supported by the presumption of constitutional compliance of applicable legal acts in Poland.

However, the restoration of the rule of law appears to be an urgent matter due to the state interest and protection of citizens' rights. Therefore, the rule of law should be restored as quickly as possible, even if it entails the circumvention or violation of previously adopted defective regulations. We can also recall the Latin paroemia *Quod*

ab initio vitiosum est, non potest tractu temporis convalescere. Therefore, the passage of time itself does not result in the validation (repairing) of defective regulations.

Yet, it should be borne in mind that a defective law that violates the rule of law is, from a formal point of view, still a binding one; violating such provisions may result in legal liability, including criminal liability. However, one could invoke the state of necessity in order to avoid such liability. In the criminal law of many nations, necessity may be either a possible justification or an exculpation for breaking the law. Defendants seeking to rely on this defense argue that they should not be held liable for their actions as a crime because their conduct was necessary to prevent some greater harm (https://en.wikipedia.org/wiki/Necessity_(criminal_law) – 08.02.2024).

The views presented above seem to be, to some extent, consistent with the so-called doctrine of necessity. The doctrine of necessity is the basis on which extraordinary actions by administrative authority, which are designed to restore order or uphold fundamental constitutional principles, are considered to be lawful even if such an action contravenes established constitution, laws, norms, or conventions. The maxim on which the doctrine is based originated in the writings of the medieval jurist Henry de Bracton ("that which is otherwise not lawful is made lawful by necessity"), and similar justifications for this kind of extra-legal action have been advanced by more recent legal authorities, including William Blackstone (Wijesinghe, p. 1).

The necessity doctrine provides a justification for otherwise illegal government actions taken during an emergency (Stavsky, p. 342) Consequently, the courts may legitimize even the most extreme measures on the ground that they are necessary to save the state (Stavsky, p. 342).

6 Conclusions

1. It appears there is a need to change EU law in such a way that two or more Member States violating the rule of law would be unable to block the application of Article 7 of the Treaty on European Union[2].
2. After the elections of October 15, 2023 in Poland, Hungary will no longer be able to count on the Polish government blocking the application of Article 7 of the Treaty on European Union. However, it cannot be ruled out that such assistance will be provided by the new Slovak government.
3. There appears to be a fundamental legal difference between the violation of the rule of law in Poland and Hungary. In the case of Hungary, the Fidesz party (Fidesz - Magyar Polgári Szövetség) together with KDNP (Kereszténydemokrata Néppárt), its coalition partner, gained a constitutional majority in the 2010 parliamentary elections, which enabled the adoption of a new constitution in the interests of the ruling party. In the case of Poland, the Law and Justice, the ruling party in the years 2015-2023, did not hold a constitutional majority. However, it modified the Constitution *ipso facto* by adopting laws inconsistent with the Constitution, which was possible due to the fact that the majority of judges of the Constitutional Tribunal had been appointed by the Law and Justice party. Therefore, the origin of the above-mentioned countries' departure from the rule of law is different. While we could argue that in Hungary it was executed 'legally', in Poland a similar procedure was performed in violation of the law, and especially, the Constitution.
4. The process of restoring the rule of law in Poland will be neither quick nor easy. This is due to the fact that the democratic parties do not have a sufficient majority to override the veto of the President, who is a former Law and Justice party MP. Therefore, the ruling parties do not have at their disposal an ordinary legal instrument (law) to introduce changes quickly.
5. It seems that the law adopted by the Law and Justice party that is inconsistent with the Constitution and that makes it difficult to restore the rule of law, and

[2] A surefire way to overcome this problem was adoption of the Regulation 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget (OJ L 433I, 22.12.2020). The Regulation on a general regime of conditionality for the protection of the Union budget aims at protecting the Union budget against breaches of the principles of the rule of law that affect or seriously risk affecting its sound financial management or the protection of the financial interests of the Union in a sufficiently direct way. (https://commission.europa.eu/document/download/0cd06dc0-92be-4802-8637-9b2d4799c3fe_en?filename=c_2022_1382_3_en_act_part1_v7.pdf)

in the circumstances where the Constitutional Tribunal cannot function normally, should not be respected. Such action – formally illegal – could be justified by the construction of the state of necessity. Necessity – in this situation – may be considered as either a justification or an exculpation for breach of law. Restoring the rule of law certainly appears to be a higher good than respecting defective and often obviously unconstitutional regulations.

6. The doctrine of necessity could also serve as an additional justification for the quick restoration of the rule of law. According to this doctrine, extraordinary actions by administrative authority, which are designed to restore order or uphold fundamental constitutional principles, are considered to be lawful even if such an action contravenes established constitution, laws, norms, or conventions.

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