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RESTORING LIBERAL DEMOCRACY IN POLAND¹

Abstract

When analyzing the specificity of the exercise of power by Law and Justice and the circumstances of its loss, the following questions should be answered: how did PiS try to consolidate power and ensure impunity? Why was PiS removed from power? How does the current government hold PiS accountable? Does the current government have a chance to prevent PiS from returning to power? During the period in power, PiS primarily tried to take control of the media and the justice system, and public support was to be ensured by extensive social programs. However, PiS failed to take full control over these institutions, and by pushing a conservative national-Catholic agenda it alienated moderate voters and lost its coalition ability. The opposition took advantage of this, adapting its tactics to the prevailing social and political climate, which enabled it to regain power. Currently, it is implementing decisive settlements with its predecessors, the main goal of which is to ensure that PiS does not return to power.

Keywords: Law and Justice, liberal democracy, democratic opposition, political responsibility, justice

Introduction

Larry Diamond, an American political sociologist and leading contemporary scholar in the field of democracy studies, contends that the world has grappled with a "deepening democratic recession"² for nearly two decades, affecting both the established democracies of the West and the newer ones in the global South and East. The rise of illiberal tendencies within European Union countries is most pronounced in the central-eastern part of the continent, potentially stemming from the swift politi-

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² L. Diamond, *"We Have Entered a New Historical Era": Larry Diamond on the Future of Democracy*, Stanford University, <https://fsi.stanford.edu>, 11.04.2022 (15.01.2024)

cal transition in the 1990s without a comprehensive shedding of the communist legacy.

Hungary, under Viktor Orbán's Fidesz leadership, has been at the forefront of forsaking liberal democratic principles and the rule of law. Similarly, Poland, during the tenure of Law and Justice (PiS), experienced a dynamic phase of "authoritarian reversal."³ EU institutions endeavored to counter these negative changes, which proved difficult due to the mutual protection through veto by these countries. In December 2017, the European Commission initiated proceedings against Poland under Article 7 of the EU Treaty, followed by a similar move against Hungary by the European Parliament in September 2018.

Despite the rapid decline in the quality of democracy in both nations⁴, determining a "clear risk of a serious breach" of the EU's common values remained unresolved. In response, EU institutions employed budgetary tools to compel these two member states to adhere to the organization's foundational principles. Relief arrived on December 13, 2023, with the swearing-in of Donald Tusk's liberal government, committed to restoring Poland's standing in the EU as a dependable partner dedicated to liberal democracy and the rule of law. However, the enduring illiberal trend in the region persists, exemplified by the formation of Robert Fico's government in Slovakia, leader of the Smer party⁵.

The illiberal agenda of the Law and Justice

While in power from 2005 to 2007, the Law and Justice party initiated its first efforts to compromise the independence of the judiciary and gain control over public media. However, these attempts faced obstacles due to coalition instability, resulting in a minority government and the subsequent calling of new parliamentary elections. The actions of the PiS leadership against coalition partners (including a famous case of botched provocation by the secret services to corrupt the Deputy Prime Minister)⁶ became a distinctive modus operandi that discouraged others from cooperation.

³ L. Cianetti, J. Dawson, S. Hanley, *Rethinking "Democratic Backsliding" in Central and Eastern Europe – Looking beyond Hungary and Poland*, "East European Politics", 2018, No 34(3), pp. 243–256.

⁴ M. Bernhard, *Democratic Backsliding in Poland and Hungary*, "Slavic Review", 2021, No 80(3), pp. 585–607.

⁵ V. Žuborová, *Slovak's 'illiberal' Fico victory boosts Orbán, but faces checks*, EU-Observer, <https://euobserver.com>, 02.10.2023 (20.01.2024).

⁶ *Andrzej Lepper nie żyje. Popelnił samobójstwo*, Dziennik Gazeta Prawna, <https://www.gazetaprawna.pl>, 05.07.2011 (20.01.2024).

In November 2015, after eight years in opposition, PiS seized power in Poland, aided by the "waiter wiretapping"⁷ incident that tarnished the image of representatives from rival political parties. Beata Szydło's government enjoyed unhindered power, as a few months earlier, the PiS-endorsed candidate Andrzej Duda won the presidential elections (the Polish President has the power to veto against parliamentary laws). Shortly after assuming power, Poland transformed into the world's fastest autocratizing country⁸. Kaczyński looked to Orbán and the Fidesz party as a model, aspiring to bring Budapest's illiberal changes to Warsaw⁹.

The primary targets of PiS's attacks were the judiciary and public media, accompanied by other actions undermining democracy, including manipulating the Electoral Code during the COVID-19 pandemic¹⁰. At the same time, PiS promoted a national-Catholic agenda, displaying disdain for progressive-left circles, tightening anti-abortion laws, and launching attacks on the LGBTQ+ community. The justice system underwent degradation under the pretext of combating communist domination, allegedly in defense of ordinary citizens. PiS appointees assumed leadership positions in key judicial bodies, such as the Constitutional Tribunal (TK), the Supreme Court (SN), and the National Council of the Judiciary (KRS), all gradually losing their independence¹¹. The Disciplinary Chamber established in the SN further eroded the autonomy of judges. A higher level of politicization occurred in the prosecutor's office, headed by Minister of Justice and Attorney General Zbigniew Ziobro from Solidarity Poland (SP), a small but essential part of the United Right (ZP) coalition headed by PiS.

The takeover of public media occurred under the guise of repolonizing and enhancing media pluralism. Subsequent media laws, including the creation of the National Media Council (RMN) to determine managerial positions in public media, transformed them into propaganda mouthpieces for the PiS government. The politicized energy concern

⁷ *Afera podsłuchowa*, Wprost, <https://www.wprost.pl>, 14.06.2024 (20.01.2024).

⁸ *Democracy Report 2021. Autocratization Turns Viral*, V-Dem Institute, <https://www.v-dem.net>, (15.01.2024).

⁹ *J. Kaczyński: przyjdzie taki dzień, kiedy nam się uda*, Money.pl, <https://www.money.pl>, 10.10.2011 (20.01.2024).

¹⁰ M. Skrzypek, *Democratic Backsliding in Poland on Example Drafts Amendments in Electoral Code during the COVID-19 Pandemic*, "Polish Political Science Yearbook", 2021, No 50(2), pp. 37–50.

¹¹ D. Bunikowski, *The Constitutional Crisis in Poland, Schmittian Questions and Kaczyński's Political and Legal Philosophy*, "Journal of Contemporary European Studies", 2018, No 26(3), pp. 285–307.

Orlen, led by Daniel Obajtek, took control of regional media, including a network of local newspapers affiliated with the Polska Press Group, previously owned by a foreign company. The ultimately unsuccessful attempt to block TVN and TVN24 television stations¹², owned by the American Discovery Group and critical of the government, symbolized the determined fight of the government against independent media.

Extensive social programs aimed to secure broad social support for PiS, with the flagship 500+ program (800+ in the 2023 election campaign) providing subsidies for each child. These programs were highly popular, especially among the less affluent who did not gain much during the political and economic transformation of the 1990s. In addition, the party established a network of social, political, and business relationships, filling positions in state-owned companies with PiS associates in exchange for loyalty and campaign donations. Over time, the judicial, business, media, and educational elites were replaced, aligning with Kaczyński's long-term objective of state capture to ensure prolonged power for at least several decades.

The reason for the loss of power by the illiberal PiS

PiS experienced electoral success in the parliamentary elections of 2015 (37.58%) and 2019 (43.59%), though not as spectacular as Fidesz in Hungary (54.13% in 2022). Despite occasional support from smaller right-wing parties such as Kukiz'15 and the Confederation of Liberty and Independence, PiS lacked a parliamentary majority to change the constitution. President Duda's support, coupled with a friendly attitude from the President of the Constitutional Tribunal, Julia Przyłębska, and the First President of the Supreme Court, Małgorzata Manowska, enabled significant legal changes, undermining liberal democracy and the rule of law¹³. Eventually, in the 2023 elections, PiS secured the highest result (35.38%), but its inability to form a coalition rendered it unable to establish a government. This outcome resulted from a long-term strategy for independent rule within the United Right camp¹⁴, as

¹² J. Dobrosz-Oracz, *PiS przepycha "lex TVN". Opozycja idzie do prokuratury. Sułki kpi: Dostaniemy dwa lata więcej*, *Gazeta Wyborcza*, <https://wyborcza.pl>, 17.12.2021 (20.01.2024).

¹³ E. Zgut, *Informal Exercise of Power: Undermining Democracy Under the EU's Radar in Hungary and Poland*, "Hague Journal on the Rule of Law" 2022, No 14, pp. 287–308.

¹⁴ P. Musiałek, *Szkodliwa iluzja. Dlaczego PiS szybko nie odzyska władzy?*, *Tygodnik Powszechny*, <https://www.tygodnikpowszechny.pl>, 08.12.2023 (20.01.2024).

acknowledged by its frustrated leader, Jarosław Kaczyński, who commented on the defeat: "A delusional reality has taken over the minds of a significant number of Poles."¹⁵

President Duda's attempt to task Mateusz Morawiecki with forming a third government was destined to fail from the outset. Efforts to court the Polish People's Party (PSL) were ridiculed by the 'democratic majority,' and even PiS politicians doubted the possibility of forming a coalition government. Despite concerns about the potential use of secret services to prevent the transfer of power, on December 13, Donald Tusk's third government, comprising the Civic Platform (PO), PSL, New Left (NL), Poland 2050, Modern (.N), and Polish Initiative (iPL), was sworn in.

PiS's removal from power was possible thanks to several key factors. Firstly, PiS alienated moderate voters with a mix of political and religious radicalism, especially regarding women's rights. Initiatives such as the 'black marches' demanding the liberalization of the extremely strict abortion ruling of the Constitutional Tribunal in 2020¹⁶. The protests turned anti-government and anticlerical, with public opinion increasingly opposing the interference of the Catholic Church in political and social matters, favoring a truly secular state. Scandals involving pedophile priests and the church's shady finances further fueled resentment among the less conservative PiS electorate.

Secondly, unlike Hungary, Poland maintained media independence, and PiS struggled with online promotional campaigns. This allowed the narrative of the opposition to reach a wide audience, which could easily learn about the scandals involving ruling camp representatives. Free press could inform and antagonize society by presenting the frequent ideologically motivated actions and statements of far-right government officials, such as those by a regional education superintendent Barbara Nowak, who used any occasion to denigrate the LGBTQ+ community¹⁷. Despite the efforts of her superior, controversial Minister of Education and Science, Przemysław Czarnek, educational institutions, including universities, managed to remain relatively independent. The Polish authorities also failed to build a system of dependencies modeled on the one in Hungary, called the 'mafia state'¹⁸.

¹⁵ Jarosław Kaczyński skomentował wynik wyborów. „Urojona rzeczywistość opłania umysły znacznej części Polaków, Rzeczpospolita, <https://www.rp.pl>, 20.10.2023 (20.01.2024).

¹⁶ M. Kolanko, *Czego domaga się Strajk Kobiet? 13 postulatów*, Rzeczpospolita, <https://www.rp.pl>, 03.11.2020 (20.01.2024).

¹⁷ T. Zmijewski, *Barbara Nowak o zagrożeniach LGBT w szkole: Nastolatki przeżywają fazę homofilną*, Wprost, <https://www.wprost.pl>, 20.11.2023 (20.01.2024).

¹⁸ B. Magyar, *Post-Communist Mafia State: The Case of Hungary*, Budapest 2016.

Another reason for PiS's fall was the consolidation of the opposition and the informal leadership of the former Primer Minister Donald Tusk, who returned to Warsaw after serving as the Permanent President of the European Council. The 'democratic opposition' led by Tusk participated in the elections through three electoral committees – Civic Coalition (KO), Third Way (TD), and New Left (NL). Tusk strategically focused on the primary goal of removing PiS from power rather than competing for the highest KO result.

PiS's race to promise social benefits did not yield the expected result, as some citizens voted against their economic interests. The controversial exercise of power and ideologically motivated decisions, including anti-abortion law tightening, motivated PiS opponents to vote in large numbers. The shift away from more moderate voters eroded confidence in the government among traditional PiS supporters, leading them to seek alternatives, including the moderately conservative Third Way.

Holding illiberal PiS governments accountable

In the parliamentary elections of October 15, 2024, KO secured 30.70% of the votes, TD 14.40%, and NL 8.61%, giving them a stable majority in the Sejm and enabling the formation of a government with Prime Minister Tusk. Learning from the mistakes of 2007, when PO took over power from PiS without holding its predecessors accountable, the new government under Tusk is determined to fully address the authoritarian tendencies and legal violations by the PiS leadership. The imperative is not leniency but a commitment to transitional justice¹⁹.

Settlements have already commenced, with the arrest of Mariusz Kamiński and Maciej Wąsik on January 9, sentenced to two years in prison for abuse of power in the years 2005-2007, and granted a controversial presidential pardon in 2015 before their trial was completed. After the final verdict in 2023, their parliamentary mandates were terminated by the new Speaker of the Sejm, and the politicians were arrested shortly after. They were released only after another presidential pardon, preceded by calling them 'political prisoners'²⁰.

The central focus remains on restoring the independence of courts and judges. Minister of Justice Adam Bodnar presented a plan for nine

¹⁹ J. Kuisz, K. Wigura, *How to Dismantle an Illiberal Democracy*, Journal of Democracy, <https://www.journalofdemocracy.org>, 12.2023 (15.01.2024).

²⁰ *Prezydent: Kamiński i Wąsik są więźniami politycznymi*, PAP, <https://www.pap.pl>, 16.01.2024 (20.01.2024).

legislative acts reforming key institutions to restore the rule of law and address EU concerns under Article 7 regarding Poland's violation of European values²¹. The Sejm established investigative commissions to examine the legality of attempted postal voting in the 2020 presidential elections, abuses in issuing visas in 2019-2023, and the Pegasus scandal (including invigilation of opposition politicians and allegedly even the PM Mateusz Morawiecki). Audits are also underway to scrutinize controversial decisions, state-owned companies' dubious operations (the merger of the energy companies Orlen and Lotos), and investments initiated by the previous government (including the immense Central Communication Port, nuclear programs, and hastily signed military contracts).

The new government is committed to restoring impartiality and reliability in public media. Dismissals and appointments in Polskie Radio SA and TVP SA triggered staunch resistance from PiS politicians, leading to liquidation procedures initiated by the Minister of Culture and National Heritage, Bartłomiej Sienkiewicz. Despite legal challenges to these actions²², the new authorities have succeeded in getting rid of individuals who turned the public media into a grotesquely partisan mouthpiece of the right-wing populist government. At the same time, the government is preparing a comprehensive amendment to the Public Media Act.

Purges of PiS nominees extend to state-owned companies, with dismissals in Orlen, Enea, Warsaw Stock Exchange (GPW), PKO Polish Bank, and others. The government aims for thorough changes but faces challenges in finding skilled replacements to prevent political appointments. In the banking sector, dismissals include Poland's representatives in the World Bank, and efforts are underway to remove the President of the National Bank of Poland (NBP), Adam Glapiński, facing accusations of politicizing the bank and providing misleading financial results (a loss of up to PLN 27 billion instead of the reported PLN 6 billion of profit)²³.

The government's plan includes bringing prominent politicians from the previous ruling camp before the State Tribunal. This includes President Duda, Prime Minister Morawiecki, and Minister of State Assets Jacek Sasin for the 'envelope elections,' Minister of Justice Zbigniew Ziobro for using money from the Justice Fund for party purposes, Presi-

²¹ Ł. Woźnicki, "Action Plan" Bodnara. Dziewięć ustaw, które mają przywrócić praworządność, *Gazeta Wyborcza*, <https://wyborcza.pl>, 19.02.2024 (20.02.2024).

²² A. Kappes, T. Siemiątkowski, *Sprawa likwidacji „misyjnych” spółek medialnych nadal otwarta*, *Rzeczpospolita*, 25 January 2024, <https://www.rp.pl>, 25.01.2024 (30.01.2024).

²³ *Dziura w NBP jeszcze większa. Po miliardach dla rządu ani śladu*, *Money.pl*, 18 January 2024, <https://www.money.pl>, 18.01.2024 (20.01.2024).

dent of NBP Glapiński and others. However, achieving majorities for such actions may pose challenges²⁴.

Settlements extend to the realm of science and research, with the government planning to liquidate institutes and foundations used for party purposes and financial abuse. An audit at the National Center for Research and Development (NCBR) examines the granting of multi-million grants to newly established companies with minimal share capital. Additionally, NCBR has returned to the supervision of the Minister of Science.

Preventing the return of the illiberal PiS to power

Restoring liberal democracy in Poland presents a more formidable challenge than its initial establishment in 1989 due to the current internal conflict, contrasting the political consensus prevailing during the earlier transition²⁵. The lingering presence of PiS nominees in key positions poses a significant hurdle to any attempts to hold the previous government accountable. President Duda is anticipated to play a pivotal role in defending his political camp, evident in actions such as sending the budget bill to the Constitutional Tribunal and pledging to subject every bill to tribunal scrutiny until MPs Kamiński and Wąsik are reinstated to the Sejm. This conflicting stance suggests his participation in the competition for leadership within the United Right, with the primary objective of regaining power.

Obstructionist measures are expected from judges of the Constitutional Tribunal, led by President Przyłębska, and other justice institutions with politically involved judges aligned with the previous government. PiS might also seek to escalate social unrest, exemplified by recent farmer blockades opposing food imports from Ukraine, to hinder the government's exercise of power.

For Donald Tusk's government to secure long-term power, it must address various expectations from its voters, including:

- Depoliticizing the justice system and eliminating dualism in legal interpretation, addressing issues like the presence of “double judges” and judges appointed by PiS in violation of the law.
- Convincing EU institutions of the restoration of democracy and the rule of law in Poland, leading to the conclusion of Article 7 proceed-

²⁴ G. Osiecki, T. Żółciak, *Trybunał Stanu wybrany. Kto przed nim stanie?*, *Dziennik Gazeta Prawna*, <https://www.gazetaprawna.pl>, 21.11.2023 (20.01.2024).

²⁵ L. Hockstader, *Poland is a test case for reviving a corrupted democracy*, *The Washington Post*, <https://www.washingtonpost.com>, 18.01.2024 (20.01.2024).

ings and the release of frozen EU funds, including those under the National Reconstruction Plan.

- Skillfully utilizing EU funds for balanced development and meeting current social needs.
- Depoliticizing the media and ensuring genuine pluralism to present diverse political positions.
- Vigorously prosecuting PiS and its associates for law-breaking and corruption, prioritizing a timely settlement to prevent the fatigue of its electorate.
- Ensuring comprehensive security measures in military, economic, energy, and food domains through active domestic and international policies.
- Demonstrating the government's commitment to the interests of all citizens by increasing wages in the public sector and maintaining socially beneficial programs.
- Fostering coalition cohesion through compromise and working towards reducing social divisions.
- Establishing mechanisms that prevent prolonged populist takeover even if they return to power; solidifying the political, social, and economic system.

Throughout these endeavors, the government must adhere to the law, resisting the temptation of revenge. Restrictive measures against the opposition and the curtailment of their rights may lead to the displeasure of less politically engaged supporters of the ruling camp. The politicization of various sectors of the state and economy, and the appointment of party nominees to lucrative positions without adequate preparation, could prove counterproductive in the long run. Similarly, corruption scandals, likely to be exploited by the opposition, should be handled judiciously. Finally, all citizens, especially those supporting the opposition, should not feel excluded or persecuted for their beliefs or worldview.

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Przywrócenie w Polsce liberalnej demokracji

Streszczenie

Analizując specyfikę sprawowania władzy przez Prawo i Sprawiedliwość oraz okoliczności jej utraty, należy odpowiedzieć sobie na następujące pytania: w jaki sposób PiS próbował ugruntować władzę i zapewnić sobie bezkarność? Dlaczego PiS został odsunięty od władzy? W jaki sposób obecny rząd rozlicza PiS? Czy obecny rząd ma szansę nie dopuścić do powrotu PiS do władzy? W okresie sprawowania władzy PiS przede wszystkim próbował przejąć kontrolę nad mediami i wymiarem sprawiedliwości, a poparcie społeczne miały mu zapewnić szerokie programy socjalne. Nie udało mu się jednak przejąć pełnej kontroli nad tymi instytucjami, a forsując konserwatywną agendę narodowo-katolicką zraził do siebie umiarkowanych wyborców, jak również utracił zdolność koalicyjną. Wykorzystała to opozycja, dostosowując taktykę działania do panującego klimatu społecznego i politycznego, co umożliwiło jej odzyskanie władzy. Obecnie stosuje ona z poprzednikami zdecydowane rozliczenia, których głównym celem jest upewnienie się, że PiS już nie wróci do władzy.

Słowa kluczowe: Prawo i Sprawiedliwość, liberalna demokracja, demokratyczna opozycja, odpowiedzialność polityczna, wymiar sprawiedliwości