
The Parliament in the time of coronavirus

Poland

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Instrumentalizing the pandemic in order to strengthen the grasp on power of the ruling party

Spasimir Domaradzki

Ph.D, University of Warsaw

The Covid-19 pandemic caused unpredictable turbulences across the world. Governments had to adapt to an unexpected and completely new threat. The Chinese reaction to the disease, including all out lockdown and disregard for human rights was consistent with the country's political system, but hardly applicable in democratic states. The severity and swift spread of the disease forced governments worldwide to introduce radical and often irrational decisions based on fear and concern for the unpredictable consequences of the disease.

However, the Covid-19 appeared not only to be a threat for public health, but also an unexpected and tempted opportunity to exploit its uniqueness in order to resolve certain political questions and to turn the public opinion's attention away from burning social, economic and political problems. This commentary will deliberate on the Polish case and its experience in the early days of the pandemic with particular attention on the problem of presidential elections.

1. Poland's state of emergency regulations

Following a pattern present in other European fundamental laws, Poland's constitution contains extensive regulations related to exceptional situations, as provided in Chapter XI "Extraordinary Measures". Apart from the separate provisions on the state of war, the Polish constitution recognizes three possible measures: martial law, state of emergency and state of natural disaster. The constitution provides for a martial law when external threats, armed aggression or a treaty obligation of common defense is present. Hence, the martial law is of little relevance for our deliberations.

The constitutional provisions concerning the state of natural disaster draw a rather narrow competence for the state authorities, since art. 232 explicitly refers to "prevent or remove the consequences of a natural catastrophe or a technological accident exhibiting characteristics of a

natural disaster”.¹ However the law on natural disasters defines national disaster as “consequences that threaten the life and health of many people.”

The Covid-19 pandemic seems to fit also art. 230 acknowledging that among others in the case of threats to the security of the citizenry and the public order to introduce a state of emergency. Importantly, in this case the Council of Ministers must request from the President the introduction of the said state of emergency. The introduction of this kind of extraordinary measure is limited in time. President’s declared state of emergency can last up to 90 days and can be extended only once for additional 60 days with the consent of the Parliament.²

The Polish Constitution is very precise when it comes to the question of limiting human rights in the case of martial law or state of emergency. Art. 233 explicitly forbids the limitation of the following freedoms and rights: Article 30 (the dignity of the person), Article 34 and Article 36 (citizenship), Article 38 (protection of life), Article 39, Article 40 and Article 41, para.4 (humane treatment), Article 42 (ascription of criminal responsibility), Article 45 (access to a court), Article 47 (personal rights), Article 53 (conscience and religion), Article 63 (petitions), as well as Article 48 and Article 72 (family and children). This article also explicitly forbids any discrimination based on race, gender, language, faith or lack of it, social origin, ancestry or property in the extraordinary circumstances. That leaves the authorities with a rather limited arsenal of restrictions concerning Article 22 (freedom of economic activity), Article 41, paras. 1, 3 and 5 (personal freedom), Article 50 (inviolability of the home), Article 52, para. 1 (freedom of movement and sojourn on the territory of the Republic of Poland), Article 59, para. 3 (the right to strike), Article 64 (the right of ownership), Article 65, para. 1 (freedom to work), Article 66, para. 1 (the right to safe and hygienic conditions of work) as well as Article 66, para. 2 (the right to rest).

The law on state of emergency³ stipulates that the government can request to the president the introduction of a state of emergency “in the case of particular threat to the constitutional system of the state, citizens security and public order, including activities of terrorist character or within the cyberspace, that cannot be overcome by the use of ordinary constitutional measures”⁴.

Importantly, the provisions of Chapter XI are explicitly limited by the principles of exceptionality, legality, proportionality, advisability, protection of the legal system and the representative bodies enlisted in art. 228⁵. Each one of these principles constitutes a safeguard for the prompt reestablishment of the “normal” functioning of the political system. The safeguards protect the established political system against the temptations for the centralization of power and possible authoritarian turns by the incumbent political elites.

With regard for the limited space in this analysis, only a handful of aspects of the vast literature

¹ [Art. 232 Constitution of the Republic of Poland](#) from April 2, 1997.

² [Art. 230 Constitution of the Republic of Poland](#) from April 2, 1997.

³ Law on the state of emergency. [Ustawa z dnia 21 czerwca 2002 r. o stanie wyjątkowym](#), Dz.U. 2002Nr 117poz. 985.

⁴ Art. 2, p.1 of the Law on the state of emergency.

⁵ L. Garlicki, *Polskie prawo konstytucyjne. Zarys wykładu*, Warszawa 2002, pp. 424–426., Krzysztof Prokop, *Stany nadzwyczajne w Konstytucji Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r.* Temida2, Białystok 2005, pp.17-18

on the role of the safeguarding principles in the state of emergency will be discussed.

i. The principle of proportionality

The principle of proportionality frames the limits of needed state interference in order to handle the threat beyond the means available in ordinary circumstances.⁶ These principles limits the state authorities in their ideas of what means, when and how should be applied in order to resolve the urgent problem. The adequacy of government's reaction to extraordinary situations can be a matter for the State Tribunal, equipped to rule over the questions of political responsibility. Hence, the authorities are limited in their actions not only by the specificity of the extraordinary situation, but also by the nature of their actions subject to political and legal responsibility. Importantly, the principle of proportionality concerns not only the introduction of the state of emergency but applies to the whole period of enforcement.

The limited scope of government's response to such situations is framed by the freezing of any procedures with the potential to change the nature of the democratic political system. Local, parliamentary and presidential elections and referendums cannot be held. At the same time, the terms of all elected bodies are automatically prolonged. The only exception concerns the possibility to hold local elections, but only in areas where extraordinary measures are not introduced.⁷

ii. The principle of advisability

The principle of advisability frames the purpose of the authorities, which is being brought down to the obligation that their actions "*shall be proportionate to the degree of threat and shall be intended to achieve the swiftest restoration of conditions allowing for the normal functioning of the State.*"⁸ A noticeable weakness of this principle lies in the absence of explicit reference to the restoration of the full respect for human rights and political freedoms.⁹ The temporal pressure imposed by this provision imposes additional beacon for the government in the pursuit of solutions for resolving the extraordinary situation.

Last, but not least, particularly important in our context are the provisions of art. 228 p.6 explicitly forbidding the introduction of any changes to "the Constitution, the Acts on Elections to the Sejm, the Senate and organs of local government, the Act on Elections to the Presidency, as well as statutes on extraordinary measures." The aim of this provision is more than obvious – to avoid any changes in the fundamental law and principles of the democratic order and to secure its re-emergence once the extraordinary circumstances are over.

iii. The measures

On March 4, the first case of confirmed Covid-19 case was hospitalized. 10 days later the

⁶ By ordinary circumstances or normality, I will mean the daily functioning of the state when no state of emergency, natural disaster, martial law or state of war is declared.

⁷ Art. 228.p.7

⁸ Art. 228. P.5

⁹ Prokop, op.cit. p. 33, T. Jasudowicz, Granice korzystania z praw człowieka - rozwiązania Konstytucji RP na tle standardów europejskich, [w:] Konstytucja Rzeczypospolitej Polskiej z 1997 roku a członkostwo Polski w Unii Europejskiej, red. C. Mik, Toruń 1999, s. 67

government announced the introduction of the “state of pandemic threat” and after another week a “state of pandemic”. The government decided to ground its approach towards the pandemic in the Law on the prevention and combating of infections and contagious diseases.¹⁰ Interestingly, the administrative unit used in the law is voivodships (provinces) and from its wording it becomes apparent that the primary actors are the Voivods (governors) which can introduce state of epidemic threat or state on pandemic on parts or the whole territory of the voivodship. In case of spread of the pandemic, the Minister of health becomes the person responsible for the management of the crisis. However, unlike the constitutionally enlisted extraordinary situations, the state of pandemic threat and the state of pandemic does not require the freezing of political terms and postponement of decisions.

On March 13, the Minister of health issued the first decree enlisting Covid-19 related restrictions that concerned the freedom of movement, trading with a list of medical supplies, restrictions on the functioning of institutions and workplaces and a ban on the organization of mass activities¹¹. A week later the decree on the state of pandemic threat was revoked and a new one, on the state of pandemic was introduced.¹² The new decree expanded the existing provisions and introduced new requirements related to the acquisition of properties and land in accordance with the pandemic plans. Four days later, further restrictions were introduced limiting the freedom of movement to the workplace, participation in voluntary activities and indispensable for daily existence. Complete ban on public gatherings was introduced (with the exception of family reunions), public transportation restrictions and imposing limits to religious ceremonies and gatherings.¹³ Additionally, the parliament adopted a special Law on the special solutions related to the prevention, counteracting and combatting Covid-19, other contaminating diseases and the conjured crisis situations.¹⁴ Thus, the legal framework for fighting the Covid-19 was shaped, based on the subsequent decrees of the Minister of health.

2. The political context

The challenge to Poland’s constitutionalism that was triggered by the Covid-19 pandemic cannot be understood without a brief summary of the current nature of its internal political situation. Since 2015 the country is ruled by the Law and Justice, allied with two additional junior coalition partners “Solidary Poland” and “Poland Together”. In the 2015 parliamentary elections, the Party

¹⁰ [Law on the prevention and combating of infections and contagious diseases](#), Dz. U. 2008 Nr 234 poz. 1570 Ustawa z dnia 5 grudnia 2008r. o zapobieganiu oraz zwalczaniu zakażeń i chorób zakaźnych u ludzi.

¹¹ [Rozporządzenie Ministra Zdrowia z dnia 13 marca 2020 r. w sprawie ogłoszenia na obszarze Rzeczypospolitej Polskiej stanu zagrożenia epidemicznego](#), Warszawa, dnia 13 marca 2020r. Poz. 433.

¹² [Rozporządzenie Ministra Zdrowia z dnia 20 marca 2020r. w sprawie odwołania na obszarze Rzeczypospolitej Polskiej stanu zagrożenia epidemicznego](#), Dz.U. Warszawa, 20.03.2020, Poz.490.

¹³ [Rozporządzenie Ministra Zdrowia z dnia 20 marca 2020r. w sprawie ogłoszenia na obszarze Rzeczypospolitej Polskiej stanu epidemii](#), Warszawa, dnia 20 marca 2020r. Poz. 491.

¹⁴ [Rozporządzenie Ministra Zdrowia z dnia 24 marca 2020r. zmieniające rozporządzenie w sprawie ogłoszenia na obszarze Rzeczypospolitej Polskiej stanu epidemii](#), Dziennik Ustaw 2020 r. poz. 522.

¹⁵ [Law on the special solutions related to the prevention, counteracting and combatting Covid-19, other contaminating diseases and the conjured crisis situations](#). Ustawa z dnia 2 marca 2020 r. o szczególnych rozwiązaniach związanych z zapobieganiem, przeciwdziałaniem i zwalczaniem COVID-19, innych chorób zakaźnych oraz wywołanych nimi sytuacji kryzysowych.

won, for the first time in Poland's post-communist history, a landslide victory in the elections, obtaining more than 50% of the seats in the both chambers of the Polish parliament.¹⁵ In May 2015 the Law and Justice candidate also won the Presidential race, thus securing complete control over the two institutions of the Polish executive.

The landslide victory came with a promise for revolutionary changes against the uneven redistribution of wealth during the quarter of a century of post-communist democracy. The former ruling coalition's political sins were taken as an excuse for an all-out seizure of state control. This process, epitomized by the clash over the Constitutional Tribunal that led to a conflict over the rule of law in Poland with the EU, became the most tangible aspect of the Law and Justice revolution. Being pushed at the margins of the political decision-making, the opposition declared itself "total".¹⁶ In the meantime, the Law and Justice led coalition, kicked off a process of interception of all possible positions in the state structures, regardless of the logic of cadencies and professionalization of the state apparatus. This deep political polarization substantially increased the importance of political participation at the 2019 parliamentary elections and the 2020 presidential elections that reached among the highest turnouts in the recent history of Poland.¹⁷

As long as the 2019 parliamentary elections confirmed the attractiveness of the Law and Justice political platform and methods of its implementation, the close race between the presidential candidates appeared to be of particular importance for two reasons. Firstly, a potential loss of control over the Presidents' office by Law and Justice would have significantly undermined its efforts for furthering political reforms. Within a cohabitation framework for Law and Justice would be much more difficult to continue introducing its reforms with the same pace. Secondly, it would be not only a first defeat of the Law and Justice since 2015 but would have undermined the logic of deep systemic changes that its mastermind Jarosław Kaczyński promotes. Hence, the presidential elections appeared to be of particular significance for the political status quo in the country.

3. Covid-19 and the Presidential elections

In accordance with the constitutional provisions, in early February the speaker of the Sejm announced that the elections will be held on May 10, thus officially starting the election campaign. With the formal registration of the candidates it became apparent that the Civic Platform candidate Małgorzata Kidawa-Błońska, claiming to be the most serious competitor, performed poorly, thus increasing the chances of other candidates, but also significantly dividing the votes of the opposition.

The Covid-19 pandemic and its media coverage had a direct impact on the presidential elections campaign. Many of the candidates, hurried to mitigate the potential negative consequences of public

¹⁵ The lower chamber – Sejm (460 seats) and the higher chamber – Senat (100 seats).

¹⁶ Polska Times, Grzegorz Schetyna: [Będziemy opozycją totalną. Będziemy przeszkadzać w niszczeniu państwa](#). 26.2.2016.

¹⁷ During the 2019 parliamentary elections the turnout was 61,74% and during the 2020 presidential elections 64,51% during the first round and 68,18% during the second round. The second highest turnout in parliamentary elections in Poland were the first semi-free elections in 1989 with 62,70% voted in the first round. Presidential elections are much more contested and the 1995 second round was the most contested ever in Poland's post-communist history with 68,23%.

gatherings and suspended their campaigns. However, the perspective of postponement of the elections was against Law and Justice interests, since election polls were indicating an easy win for Andrzej Duda against his main competitors. The Law and Justice rush for elections was understandable, since any postponement of elections brought the risk of increased disappointment with the government's actions during the pandemic. The positive exit polls and the weak performance of the main competitor Kidawa-Błońska were all favorable conditions for the party in power.

Moreover, the vastly growing restrictions, had an immediate impact on the daily functioning of the people. The mounting restrictions made it more and more difficult to organize and conduct elections. By the end of March, the Ombudsman wrote letters to the Prime Minister and the National Election Commission, insisting on postponing elections and the introduction of a “state of natural disaster”. The Ombudsman argued that the “human rights limitations introduced by the decrees and the relevant adopted acts, go way beyond the legal boundaries of these acts and have no legal basis. For this reason, a state of emergency is indispensable”¹⁸

The determination of the government to hold the elections, become visible in the arguments of Jarosław Kaczyński, the head of Law and Justice and true powerholder in Polish politics. While claiming that there are no conditions that justify the introduction of a state of emergency, he suggested that the opposition forces him to violate the constitution.¹⁹

Against the widely shared opinion that the elections should be postponed²⁰, the government continued the preparations for the May 10 elections to the extent that the voting cards were printed. The pandemic related legislation was further expanded by the Anti-crisis shields – laws aiming to assist the government in handling the consequences of the crisis. The Law and Justice smuggled in this law the provision expanding the distant voting for people over the age of 60. Notwithstanding that this age group are among the core electorate of Law and Justice, it becomes apparent that the ultimate purpose of the government was to hold the elections at any price. The government's solution was the organization of “envelop” elections for all citizens. This idea led to a fraction between Law and Justice and its junior partner “Poland Together” that led ultimately to the resignation of Jarosław Gowin from his vice-prime minister post. Under pressure from the coalition partner, the National Election Commission and a procedural obstruction in the Senate, controlled by the opposition with a thin margin since 2019, the government agreed to postpone the elections that were eventually held on June 28 and July 12.

The government's failure to organise the elections in the legally binding term, provided the opposition with the unexpected opportunity to replace its poorly performing candidate with the mayor of Warsaw Rafał Trzaskowski. This change, of great concern for the Law and Justice party, provided for a much more dynamic and contested campaign. Although the incumbent president Andrzej Duda won his second term by a thin margin winning 51,03% it confirmed the Law and Justice concerns

¹⁸ RPO: Już dawno powinien zostać wprowadzony stan klęski żywiołowej, *Gazeta Prawna*, 29.3.2020.

¹⁹ Kacper Rogacin, Dlaczego rząd nie wprowadza stanu nadzwyczajnego? Są podstawy? "Stan klęski żywiołowej zmienilby termin wyborów prezydenckich" ; Monika Płatek, Liczy się treść, nie nazwa. Rząd ogłosił i wprowadził nadzwyczajny stan klęski żywiołowej, *Gazeta Wyborcza*, 23.3.2020.

²⁰ Tomasz Dereszyński, Wybory prezydenckie 2020: Koronawirus szaleje i trzeba wprowadzić stan wyjątkowy. Głosowanie musi być przesunięte. Kiedy wybory?, 26.3.2020, *Polska Times*.

that any further prolongation of the elections will have negatively impact its presidential campaign. The 2020 elections raised new questions about the elections' legality.

Since 2015 Poland's political system is exposed to the "total war" between the ruling and opposition parties. Victims of this clash has become the Constitutional Tribunal, the Supreme Court, the National Judicial Council, public media, public servants and state-owned companies. Even if the Covid-19 pandemic came as a surprise to Poland its consequences could have been milder and more predictable in a census based political regime. Instead, the specificities of the new reality were promptly incorporated to the daily political struggle. It is the government that makes the ultimate decisions including the legal framework, the means and consequences of dealing with the pandemic. The Polish constitution is explicit as to the fact that in times of extraordinary circumstances the power is concentrated in the hands of the executive with the Parliament playing a secondary role. However, notwithstanding the fact that the government did not introduced any of the extraordinary situations envisioned in the constitution, it becomes even more apparent that when the political system is completely controlled by one political option, the Parliament turns into a rubber-stamping body of the government's will.

It is too early to recognize the practical consequences of the 2020 presidential elections experience for Poland's legal tradition and political culture, but it seems obvious that the attempt to conduct elections at any price and with disregard for the existing extraordinary circumstances added another precedence in the newest Poland's legal experience. The instrumentalization of the legal provisions and the adjustment of the legal framework to the needs of the party in power, are practices that match more to the authoritarian, than democratic forms of government.

The paradox of Polish politics is that while having well developed legal framework capable of handling the extraordinary circumstances caused by the pandemic, the government refused to apply them for the sake of short-term political benefits. Whether the Covid-19 pandemic would have been better handled, if a state of emergency was introduced is not obvious, but there is little doubt that the pandemic was treated instrumentally in order to further strengthen the grasp on power of the ruling party.