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Rule of law in Poland 2020:

THE RULE OF LAW CRISIS IN THE TIME OF THE COVID-19 PANDEMIC

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ELIZA RUTYNOWSKA
MAREK TATAŁA
PATRYK WACHOWIEC

Authors: Eliza Rutynowska, Marek Tatała and Patryk Wachowiec
Research assistance: Piotr Oliński
Proofreading and editing: Jim Todd
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Civil Development Forum (FOR Foundation) is a non-governmental think tank based in Poland promoting and defending economic freedom, the rule of law, individual liberties, private property, entrepreneurial activities, and ideas of limited government.

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Rule of Law in Poland is an English-language online resource on recent developments concerning all principles which fall within the scope of the rule of law. The website was founded by two distinguished civil society organisations: the Wiktor Osiatyński Archive and the Civil Development Forum (FOR) in cooperation with the Helsinki Foundation for Human Rights.

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LIST OF ABBREVIATIONS:

CJEU – Court of Justice of the European Union
CT – Constitutional Tribunal
SC – Supreme Court
NCJ – National Council of Judiciary
NEC – National Electoral Commission
MP – Member of Parliament

1. INTRODUCTION

The COVID-19 pandemic has led to serious health and economic emergencies all over the world. Moreover, it has also affected democratic institutions and the rule of law. On the one hand, the pandemic has been exploited by local strongmen and authoritarians in many places to consolidate their power and justify human rights' violations.[1] On the other, it has been a test for the resilience of democracy, and there are even some hopes for an upcoming democratic recovery.[2]

These consolidation and abuses of power have been also visible in Poland, where the rule of law has been under attack for almost five years. After taking control of the Constitutional Tribunal and the National Council of Judiciary, the Law and Justice party has managed to include the Supreme Court on the list of judicial institutions controlled by the ruling party's nominees. The pandemic has been also connected with a rapid and large-scale production of new laws, which together with a weakening of transparency have contributed to growing legal chaos in times of huge uncertainty. At the same time, the government has continued to use the captured CT to push through their political agenda in many spheres, and to weaken constraints on its powers.

While extraordinary times such as pandemics usually require emergency measures, Law and Justice decided not to use the emergency laws described in the Constitution. Instead, it introduced numerous restrictions to civil rights and liberties without a proper legal basis. Many of its pandemic-related policies were justified from a medical point of view but their legality was questionable, including some court rulings which favoured people who had been punished and affected by the illegal restrictions. Similar rulings are expected in 2021, and these failures of the government in law-making will do a great deal of harm to the legal system in Poland.

The main reason for avoiding emergency laws was the ruling party's decision to proceed with the presidential elections during the pandemic. According to the Constitution, elections cannot take place during a state of emergency and for up to 90 days after its termination. The elections finally took place at the end of June, seven weeks after they were originally scheduled, and the whole election period was full of controversies related to illegal changes in the electoral law and the push for universal postal voting. The second term for Andrzej Duda, the candidate of Law and Justice who won re-election, signals a future of more illiberal policies, violations of the rule of law and attacks on many individual liberties, similar to what Poland has witnessed since late 2015.[3]

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1 'No vaccine for cruelty', *The Economist*, https://www.economist.com/international/2020/10/17/the-pandemic-has-eroded-democracy-and-respect-for-human-rights.

2 'The resilience of democracy', *The Economist*, https://www.economist.com/leaders/2020/11/26/democracy-contains-the-seeds-of-its-own-recovery.

3 M. Tatała, 'Andrzej Duda wins re-election, subjecting the Polish to a second term of illiberality', *1828*, https://www.1828.org.uk/2020/07/17/andrzej-duda-wins-re-election-subjecting-the-polish-to-a-second-term-of-illiberality/.

The goal of this report is to analyse the key developments related to the rule of law and the legal system in Poland during the COVID-19 pandemic. We discuss the legal context related to the emergency laws from the point of view of the Constitution (Part 2), and explain why they were not used, while describing the preparations for the presidential elections (Part 3). Moreover, we analyse examples of the restrictions to civil rights and liberties which were introduced without a proper legal basis, and show how the Supreme Court was captured by the ruling party during the pandemic and the Constitutional Tribunal was abused to strengthen Law and Justice and its political agenda (Part 4).

This is the third instalment in a series of four reports by the Civil Development Forum (FOR) on the crisis of the rule of law in Poland. In the first part we analysed the current state of the rule of law from domestic and comparative perspectives. We explained the reasons behind Law and Justice's key policies regarding the justice system and described the main changes in the courts and prosecution service since 2015. Moreover, we examined the impact of deterioration of the rule of law in Poland on key indices regarding the rule of law and the quality of democratic institutions.[4]

In the second instalment, FOR analysed the responses of the European Union and other international bodies to the rule of law crisis in Poland. We compared the reactions from various EU institutions and showed what can be done better at the European level in the future.[5]

This and other reports as well as the Rule of Law in Poland project[6] are based on our belief that the rule of law in Poland and other EU member states is important not only for the citizens of these countries, but also for the future of the European project as a club of countries with high-quality democratic institutions safeguarding human rights.

4 M. Tatała, E. Rutynowska, P. Wachowiec, *Rule of Law in Poland 2020: A Diagnosis of the Deterioration of the Rule of Law From a Comparative Perspective,* Warsaw 2020, https://for.org.pl/en/publications/for-reports/rule-of-law-in-poland-2020-a-diagnosis-of-the-deterioration-of-the-rule-of-law-from-a-comparative-perspective.

5 P. Wachowiec, E. Rutynowska, M. Tatała, *Rule of Law in Poland 2020: International and European responses to the crisis,* Warsaw 2020, https://for.org.pl/en/publications/for-reports/rule-of-law-in-poland-2020-international-and-european-responses-to-the-crisis.

6 The Rule of Law in Poland project: https://ruleoflaw.pl/.

2. POLAND'S REGULAR STATE OF EMERGENCY LAWS: THE LEGAL CONTEXT

Most countries have developed a set of regulations for crisis management in times of peril. In particular, liberal democracies tend to focus on what civil liberties can and should be restricted due to the *vis maior* which prevents public authorities from functioning on a regular basis. Illiberal democracies, on the other hand, lean towards either ignoring the existing contingency plans or abusing them and mirroring parts of the emergency provisions. Nowadays, Poland sits well within the second group of such states.

Even though Poland possesses a set of rules and regulations deriving from the Constitution on how public bodies should operate in crisis mode, the government has chosen not to opt for these provisions. Instead, it has continued to broaden its powers arbitrarily, through secondary legislation and the rapid implementation of numerous laws. This has left many rule-of-law experts confused, not only as to the reason for their contempt of the law, but more importantly concerning the legality of the restrictions on civil rights and freedoms.[7]

Before explaining why the government decided not to take advantage of the available constitutional mechanisms, one must take a closer look at these existing provisions and what their consequences are.

The existing constitutional emergency laws in Poland

Chapter XI of the Polish Constitution deals with the extraordinary measures which are meant to be implemented in times of crisis.[8] Article 228 explicitly mentions the option of introducing extraordinary measures when regular constitutional arrangements (along with all the legal grounds and restrictions concerning the activity of the public authorities) are not sufficient to deal with the existing predicament.

There are three different types of additional measures which may be used in times of peril: martial law (Article 229), state of emergency (Article 230) and state of natural disaster (Article 232).

Martial law can be applied in case of external threats to the state, acts of armed aggression against the territory of the republic, or when an obligation of common defence against aggression arises by virtue of international agreement. It should be declared by the President of the

7 M. Małecki, 'Poland's coronavirus restrictions are unconstitutional, unlawful and risk years of legal chaos', *Notes from Poland,* https://notesfrompoland.com/2020/04/18/polands-coronavirus-restrictions-are-unconstitutional-unlawful-and-risk-years-of-legal-chaos/.

8 The Constitution of the Republic of Poland is available in English at: https://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm.

Republic, at the request of the Council of Ministers, to cover a part or the whole territory of the country.

Should a threat to the constitutional order of the state, to the security of its citizens or to public order arise, then a state of emergency can be declared. As with the previous example of martial law, it should be introduced by the President of the Republic, at the request of the Council of Ministers, for a defined period of no longer than 90 days, either locally or state-wide. The state of emergency can be extended only once, for a period no longer than 60 days. The *Sejm* (the lower chamber of the Polish parliament) must provide its consent for such an action.

Finally, in order to prevent or deal with the consequences of a natural disaster (including an epidemic) or a technological accident exhibiting the characteristics of a natural disaster, the Council of Ministers may, for a defined period of no longer than 30 days, introduce a state of natural disaster to cover a part or the whole territory of the country. An extension of such a state may be administered with the consent of the *Sejm*.

The Constitution also emphasises that the legal basis for the activity of the public authorities, as well as the degree to which the freedoms and rights of individuals may be limited during an extraordinary state, must also be established by law. Moreover, a statute may specify the principles, scope and manner of compensation for any loss of property resulting from the limitation of the rights and freedoms during that period.

The extraordinary measures must also be proportionate to the threat, and be intended to achieve the fastest possible restoration of the previous conditions which allow the regular functioning of the state.

It is essential to note that the following legal acts cannot be amended while extraordinary measures are in operation during times of crisis: the Constitution, laws concerning elections to the parliament, the Presidency of the Republic and local government, as well as the laws on extraordinary measures themselves.

Finally, during this period and for 90 days following its termination, it is not permitted to shorten the term of office of the parliament, or to organise national or local elections and referenda.

Limitations on civil rights and freedoms in times of extraordinary measures

Even though extraordinary times may require extraordinary measures, civil rights and freedoms can only be subject to specific restrictions which will permit a liberal democracy based on the rule of law to continue functioning, even in times which call for quick and sometimes painful decisions.

Laws aimed at limiting rights and freedoms in times of martial law and states of emergency cannot restrict those specified in the Constitution, such as the dignity of the individual, citizenship, protection of life, humane treatment, ascription of criminal responsibility, access to a fair

trial, certain personal rights such as conscience and religion, the right to submit petitions, as well as those which concern the rights of children. Furthermore, any limitation of the rights and freedoms on the basis of race, gender, language, faith or lack thereof, social origin, ancestry or property is prohibited.

It is important in the light of the COVID-19 pandemic to recall that the law specifying the scope of limitations of the rights and freedoms during states of natural disasters may only restrict the freedom of economic activity, selected personal freedoms, the inviolability of the home, freedom of movement and stay on the territory of the Republic of Poland, the right to strike, the right of ownership, freedom to work, the right to safe and hygienic conditions of work, as well as the right to rest.

It is obvious that the natural response of the government to COVID-19 pandemic should have been to declare a state of natural disaster. Epidemic is mentioned as one of the options in the Law on the State of Natural Disaster. A state of emergency refers to a man-made crisis situation.

The COVID-19 pandemic and a *de facto* state of natural disaster

Despite the pandemic, the government decided not to follow the constitutional measures[9], so a state of natural disaster was not declared. Instead the government acted on the basis of the Act for the Prevention and Combat of Infections and Infectious Diseases in Humans from 2008, which (according to Law and Justice) provided a legal basis for only some restrictions, but were insufficient to enable constitutionally-sound limitations of many civil rights and liberties. On 13 March a state of epidemic threat was introduced by a decree from the health minister imposing quarantine on those returning from other countries, and limiting public gatherings and the functioning of workplaces. On 20 March another ruling on the state of epidemic was introduced imposing further restrictions. As a result, citizens cannot rely on the laws specifically designed for such circumstances, such as the Law on the State of Natural Disaster and the Law on Compensation for Losses Resulting from the Limitations of Liberties and Human Rights during the State of Emergency.[10]

The Law on the State of Natural Disaster

In accordance with the provisions of the Law on the State of Natural Disaster, it is only possible for the authorities to introduce specific restrictions, i.e. concerning the freedom of movement and other types

9 E. Rutynowska, 'Hungarian and Polish governments use COVID-19 pandemic in fight for more power', https://for.org.pl/en/a/7689,for-communication-14/2020-hungarian-and-polish-governments-use-covid-19-pandemic-in-fight-for-more-power.

10 M. Wilczek, 'Polish opposition announces plan to delay "illegitimate" presidential elections until 2021', *Notes from Poland,* https://notesfrompoland.com/2020/04/20/polish-opposition-announces-plan-to-delay-illegitimate-presidential-elections-until-2021/.

mentioned explicitly within the Act itself. It should also be emphasised that this Act only creates the legal possibility to introduce such limitations. The authorities are not obliged to use all the tools available in the Act: they should assess and decide what is necessary in the case of a specific disaster.

The following bans, suspensions of rights or obligations can be administered under the Act on the State of Natural Disaster (specified in Article 21 of the Act), and **they already existed in the Polish legal system when the COVID-19 pandemic broke out:**

1. the suspension of the activity of specified entrepreneurs (freedom of economic activity);
2. a ban on specified types of economic activity;
3. an order obliging employers to delegate employees to carry out activities linked to the prevention or removal of the effects of a natural disaster;
4. the absolute or partial regulation of the supply of certain types of goods;
5. prohibition of a temporary increase in prices for goods or services of specific types;
6. an order to apply fixed prices for goods or services that are crucial in regard to the consumers' cost of living;
7. issuing an obligation to undergo medical examinations, treatment, preventive vaccinations and the use of other preventive measures and treatments necessary to combat infectious diseases and the effects of chemical and radioactive contamination;
8. an obligation to submit oneself to quarantine;
9. the obligation to use products for plant protection or other preventive measures necessary to combat organisms harmful to humans, animals or plants;
10. the obligation to apply specific measures to ensure environmental protection;
11. the obligation to apply measures or treatments necessary to combat infectious animal diseases;
12. the obligation to empty or secure residential premises or other areas;
13. the compulsory demolition and demolition of buildings or other structures, or parts thereof;
14. an order to evacuate at a specified time from certain places, areas and facilities;
15. an order or ban on staying in specified places and facilities and in certain areas;

16. a ban on organising or carrying out mass events;
17. an order or ban on specified methods of transportation;
18. the possibility for public authorities to use real estate, vehicles or other movables, without the consent of the owner or other authorised persons;
19. a ban on going on strike regarding specified categories of workers or in specified areas;
20. limiting or relaxing certain principles of occupational health and safety, but not causing direct exposure to the employee's life or health;
21. an obligation to perform activities and deliver material benefits further specified in the Act (related to the delivery of first aid, among others).

It is now obvious that many of these tools could be useful in fighting the pandemic, so in this area Poland's legal system was already prepared for this extraordinary situation. The government should have used what was already specified in the Constitution and other legal acts.

The state of natural disaster may be introduced by the Council of Ministers for a defined period of no longer than 30 days, in a part of or throughout the whole territory of the country. An extension of such a state may be administered for a specified period of time with the consent of the *Sejm*. The Council of Ministers may also declare the end of the state of natural disaster before the expiry of the time for which it was introduced, if the reasons for its introduction cease to exist. Law and Justice and its coalition partners have a majority both in the *Sejm* and the government, and so even if no compromise was possible on the topic of declaring the need for emergency measures, there were no political obstacles to declaring it. Nevertheless, most of the opposition supported the use of the constitutional emergency measures.[11]

Public and private bodies alike are obliged to cooperate once the state of natural disaster is implemented. The army can also be used if needed. It must also be mentioned that in case of a state of natural disaster, any offences amounting to not following the restrictions introduced will be prosecuted using the fast-track of the criminal misdemeanours procedure (in regular times this was introduced to use against those caught 'in the act' of committing a misdemeanour and immediately brought before the court).

11 M. Wilczek, 'Polish opposition announces plan to delay "illegitimate" presidential elections until 2021', *Notes from Poland*, https://notesfrompoland.com/2020/04/20/polish-opposition-announces-plan-to-delay-illegitimate-presidential-elections-until-2021/.

The Act of 22 November 2002 on Compensation for Losses resulting from the Limitations of Liberties and Human Rights during the State of Emergency

According to Article 2 (2) of this act, such compensation covers only basic financial losses, without the possible benefits that the aggrieved party could have obtained if the damage had not occurred. The act also excludes the possibility of simultaneous claims for damages from the State Treasury in accordance with the general principles of the Civil Code. This means that the introduction of the state of emergency reduces the scale of possible compensation, the amount of which may be higher due to the failure to introduce this state (since it is not limited to losses incurred by the claimant). Therefore, on the one hand, the state of emergency is beneficial to those who have incurred losses, but at the same time it can be considered favourable towards the State Treasury due to the limitations it provides over the damages adjudicated. Failing to declare a state of natural disaster could therefore mean a higher burden for all taxpayers.[12]

The amount of the compensation is decided by the local authorities (*wojewodowie*) in the province (*województwa*) where the damaged occurred. The compensation itself is paid to the aggrieved party within 30 days of the date of the decision. An entrepreneur who is dissatisfied with the amount awarded to him or her may bring forth an action to a common court within 30 days of receiving the decision (but this does not suspend its execution). Nonetheless it remains important that the claim for compensation expires one year after the date on which the aggrieved party learned of their incurred material losses. However, in each case, the statute of limitations[13] is three years from the date of the end of the extraordinary measures.

To sum up, Poland was prepared in terms of legal arrangements for a crisis situation such as the pandemic. The decision to declare a state of natural disaster as provided for in the Constitution would have guaranteed a strong legal basis for the numerous restrictions on civil rights and freedoms. Moreover, it could have strengthened public trust in the government's policy responses and minimised the legal chaos. So why did Law and Justice decide to ignore the regular emergency laws?

12 E. Rutynowska, 'Niewprowadzenie stanu klęski żywiołowej naraża podatników i przedsiębiorców na wyższe koszty odszkodowań za ograniczenie wolności gospodarczej' [Failure to introduce a state of natural disaster exposes taxpayers and entrepreneurs to higher costs of compensation for restricting economic freedom], https://for.org.pl/pl/a/7802,komunikat-21/2020-niewprowadzenie-stanu-kleski-zywiolowej-naraza-podatnikow-i-przedsiebiorcow-na-wyzsze-koszty-odszkodowan-za-ograniczenie-wolnosci-gospodarczej.

13 Meaning the maximum time within which legal proceedings may be initiated after an event took place.

3. REASONS NOT TO USE THE EMERGENCY LAWS

The legal system was ready to respond to the pandemic within the constitutional framework. But Law and Justice decided to handle this extraordinary situation without introducing a state of natural disaster – the most obvious option of those included in the emergency laws. There were various excuses presented in public as to why the politicians did not use the constitutional tools available – but the true reason was the upcoming presidential elections.

As mentioned above, elections cannot be organised during a state of natural disaster or within 90 days of its termination. The first term of office of President Andrzej Duda, the candidate of the Law and Justice party, was coming to an end; the elections were originally scheduled for 10 May 2020. After COVID-19 led to the mass lockdown and huge uncertainty about how to respond to the virus, it was obvious that electing the president in the traditional way would be extremely risky from a medical point of view. There were also problems related to running the campaign and registering electoral committees due to the limitations on public gatherings and freedom of movement. Therefore, declaring a state of natural disaster would have enabled the government to implement the restrictions on civil rights and freedoms on a strong legal basis, while the elections could have been legally postponed. Instead, the government decided to push for urgent changes to the electoral laws while breaking many existing rules. The desire of the Law and Justice to organize elections why popularity of the government and incumbent president was still high in early phase of pandemic was stronger than legal controversies regarding dealing with the pandemic.

Postal voting for everyone

The ruling majority's initial idea was to organise a postal ballot for people over 60 years of age and those in quarantine or isolation. The legislative changes in the electoral law were approved in late March 2020, appended to the 'anti-crisis shield', a legal act to guarantee support for businesses affected by the lockdown. The *Sejm's* internal procedures were violated, while the laws were passed with almost no time for public debate. Moreover, according to the established case law of the Constitutional Tribunal, significant changes in the electoral law may be implemented no later than six months before the election, in order to ensure a sound campaign and secure the whole electoral process.

However, in April 2020 the new plan for the presidential elections which included universal postal voting was announced. As with the previous proposals, procedural violations took place while the law was pushed through the *Sejm* by the ruling majority, which was enough to make these changes unconstitutional. Moreover, the new plan meant even greater interference in the electoral law which, as already indicated,

could happen no later than six months before the election. To pretend that the electoral law had not been changed, the ruling majority decided to *de facto* deactivate the regular electoral law for the upcoming presidential elections by creating a separate act dedicated to the presidential elections scheduled for 2020. The legal chaos has been growing since then.

Furthermore, the new law included many controversial provisions which go against domestic and international standards of fair and democratic elections. The role of the multi-partisan National Electoral Commission as an organiser of the election was in substantial part transferred to an individual minister and to the Polish Post (*Poczta Polska*), a state-owned postal company led by Law and Justice members and nominees. There were huge problems with connecting the data from the voters' registry with the postal addresses of these voters, which do not have to be the same, as well as doubts about secrecy of the voting process. Moreover, as COVID-19 was spreading around the world it was impossible to guarantee equal access to voting process for Polish citizens living abroad.

The preparations for the elections in the institutions controlled by the government were initiated without a legal basis, as the law was still being deliberated in the parliament. At the same time many local governments where Law and Justice does not have majorities were refusing to participate in these preparations claiming that they were unlawful. The new changes also gave the Speaker of the *Sejm* the right to arbitrarily shift the day of elections if the state institutions were not ready.[14] Finally, all these controversial changes took place against the background of the deliberate weakening of the independence of the judiciary, including the Supreme Court which decides on the legality of elections in Poland (see Part 4b and the first report[15] in this series).

The elections that did and did not happen

In the end, the elections did not take place in May as, due to the previous legislative changes, the NEC was unable to prepare the voting process. The NEC declared that the situation "was the equivalent in effect of there being no candidates standing in the election, which by law necessitates a new election."[16]

In the meantime, the electoral law was changed once again. The candidates had to re-register, but the public endorsements they collected during the previous 'cancelled' elections were accepted. Despite complaints by the opposition about these unfair conditions, this new hybrid model was proposed and many deadlines related to the electoral

14 For more details see E. Rutynowska, M. Tatała, P. Wachowiec, '„Kopertowe" wybory w maju to będą pseudowybory' [The 'envelope' elections in May will be fraudulent elections], https://for.org.pl/pl/a/7723,komunikat-16/2020-kopertowe-wybory-w-maju-to-beda-pseudowybory.

15 M. Tatała, E. Rutynowska, P. Wachowiec, *supra* note 4.

16 M. Wilczek, 'Polish government seeks new changes to presidential election rules, allowing in-person voting', *Notes from Poland,* https://notesfrompoland.com/2020/05/12/polish-government-seeks-new-changes-to-presidential-election-rules-allowing-in-person-voting/.

process were shortened.[17] In the end, the presidential elections – which were the main reason the constitutional emergency law at the outset of the pandemic were not introduced – took place, and were won in the second round by Law and Justice's candidate Andrzej Duda. Since the outbreak a number of emergency measures with a rather poor legal basis have been introduced, while the government keeps claiming that the state of natural disaster does not have to be used to fight with the virus and its consequences. This is harmful from the perspective of the rule of law and the functioning of the legal system.

17 D. Tilles, 'Date set for new Polish presidential election, but opposition complain of unfair conditions', *Notes from Poland,* https://notesfrompoland.com/2020/06/03/date-for-new-polish-presidential-election-confirmed-but-opposition-complain-of-unfair-conditions/.

4. THE IMPACT OF COVID-19 ON THE RULE OF LAW AND LEGAL SYSTEM

4a. Mass-scale production of new legislation in a malfunctioning system

The pandemic has restricted public activities while requiring state bodies to immediately adjust legislation in many fields. In March the *Sejm* amended its standing orders to allow MPs to speak and cast votes remotely, despite the doubts expressed by constitutional lawyers as to whether a plenary sitting can in fact be conducted outside parliamentary premises.

The new legal environment allowed the ruling majority to legislate more easily, without the need to gather all its MPs in Warsaw, but also created new threats to law-making process. Despite a petition presented to the parliament by liberal civil society organisations, including the Civil Development Forum, which demanded that during the pandemic both chambers should focus only on laws that prevent the outbreak from spreading and not other less relevant issues, the majority in the *Sejm* reinforced the bad practices witnessed before the COVID-19 outbreak. These include:

— the lack of genuine parliamentary debate on legislative proposals,

— passing irrelevant laws not intended to counter the pandemic,

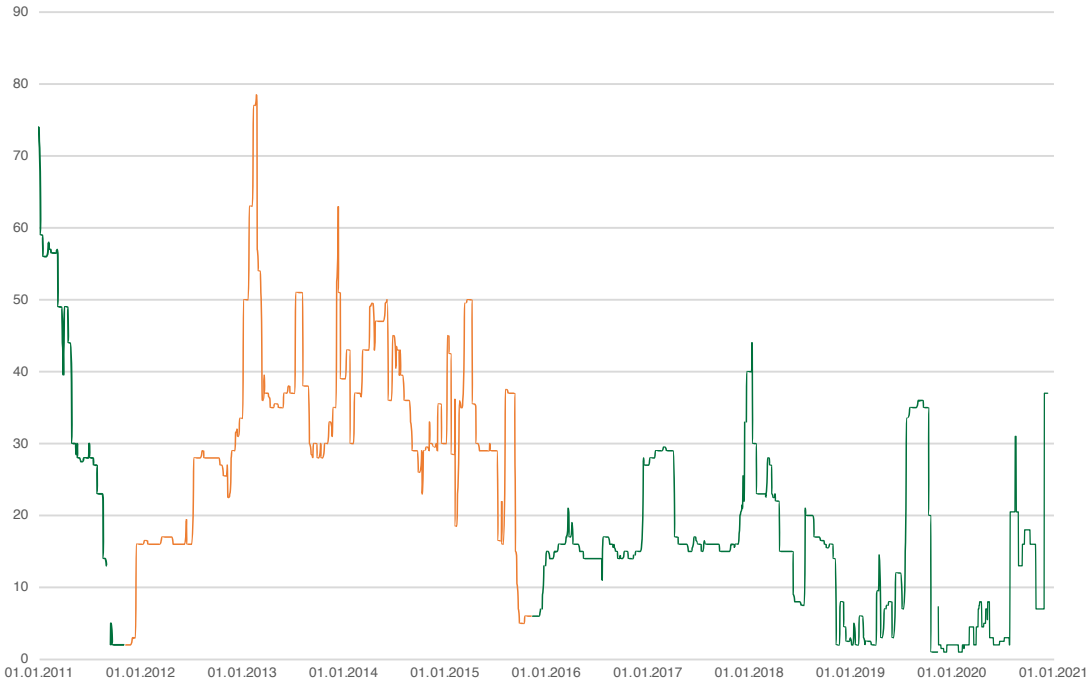
— introducing substantial amendments at the late stages of law-making procedure which were not related to the subject-matter of the proposal and did not meet the requirement for the *Sejm* to consider draft laws in three readings, and

— amending laws already approved by the President before their publication in the official gazette due to errors in legislative procedure.

Since March 2020, apart from passing laws concerning the prevention of COVID-19, the ruling majority has changed legislation on elections, introduced new taxes, given more powers to the executive, tried to limit the criminal responsibility of state authorities for breaches of law during the pandemic, and to restrict agricultural production for the sake of animal protection, among other things. Recently, due to a decision of the Constitutional Tribunal, it is also ready to consider the President's proposal to amend the abortion law which had already been submitted to parliament.

Although the Senate is controlled by the opposition, who can delay the adoption of a statute up to 30 days, the average time a proposal was being dealt with by the *Sejm* has shrunk reaching no more than 8 days during the first wave of the pandemic.

FIG. 1: NUMBER OF DAYS BETWEEN THE FIRST AND THE THIRD READING OF A LEGISLATIVE PROPOSAL IN THE *SEJM* (3-MONTH MOVING MEDIAN; AUTHORS' CALCULATIONS).



At the same time, the parliament failed to promptly address the most pressing issues during the pandemic. The requirement to wear masks in public, which was unlawfully imposed in secondary legislation, was adopted almost nine months after the first case was reported (see also Part 4c), while more complex legislation to deal with the pandemic in the judiciary has not even been drafted.

4b. Electing a new Supreme Court President during the pandemic

The most important change to Poland's justice system which happened during the pandemic was the election of the First President of the SC in April 2020. It was another step in the process of the ruling Law and Justice party's capture of this institution, which was described in the first report of this series.[18] The pandemic took the country by surprise and the chief justice, judge Małgorzata Gersdorf, remained in office until late April 2020, which constituted the end of her term. No actions were taken to arrange for constitutionally-sound elections of a new SC President in these extraordinary circumstances. The main argument behind this reasoning was that the judges were afraid of holding an electoral assembly due to the virus. This in turn triggered the use of Article 13a, previously introduced by the so-called 'Muzzle Law'[19], allowing President

18 M. Tatała, E. Rutynowska, P. Wachowiec, *supra* note 4.

19 The so-called 'Muzzle Law' (*ustawa kagańcowa*) introduced new disciplinary measures intended to stop judges from questioning the judicial nominations of the new NCJ. It also prohibits

Duda to appoint a highly-politicised acting First President to carry out the electoral process.

In order to understand what happened with the electoral process during the pandemic, one must first consider what it would have looked like in normal times. By 'normal' we mean not only the time before the COVID-19 pandemic, but also before the many legal changes implemented in the justice system by Law and Justice in violation of the Constitution and European standards. According to Article 183(3) of the Constitution, the First President of the SC is appointed by the President of the Republic for a six-year term from among a range of candidates elected by the General Assembly of the SC's judges. It must also be mentioned that the chief justice heads and represents the entire Supreme Court, although every chamber has its own head, who is also called the President (of a specific chamber). Each President manages the work of a given unit.

The new electoral system in the SC

The ruling party attempted to get rid of the former First President by lowering the retirement age of SC judges, thus cutting short Gersdorf's constitutionally prescribed term of office. This was effectively blocked by the CJEU, initially by granting interim measures, and finally by a judgment of June 2019. However, as according to the Constitution the President of the Republic is responsible for choosing the new First President from among the candidates presented by the General Assembly, it was only a matter of time before a nominee of the governing party would be elected to take over the post.[20]

Over the course of time, new persons were also appointed to the SC, which significantly changed the proportion between judges and questionable nominees. The latter were appointed with the participation of the new NCJ, which had already been captured by the ruling majority. To provide an example, six persons were newly appointed to the SC just days before the new First President was chosen.[21]

In February 2020 the so-called 'Muzzle Law' came into force. Apart from strengthening the politicized disciplinary system and punishments for judges active in the field of defending the rule of law, it also contained the notorious Article 13a. Under this provision, if candidates for First President of the SC were not elected "in accordance with the principles set out in the Law on the Supreme Court", the President of the Republic is allowed to arbitrarily appoint an interim chief justice. Then, within one week, the commissioner must convene and preside over the General Assembly to elect a candidate to the position of First President.

judicial bodies from adopting opinions "undermining the principles of the functioning of the authorities of the Republic of Poland and its constitutional organs", which in fact was a response to numerous resolutions criticising their changes to the legal system. See also section 4d in M. Tatała, E. Rutynowska, P. Wachowiec, *supra* note 4.

20 M. Tatała, E. Rutynowska, P. Wachowiec, *supra* note 4.

21 M. Jałoszewski, 'Prezydent Duda nagle powołał nowych sędziów SN. Dwa dni przed wyborem nowego prezesa SN' [President Duda suddenly appointed two new SC judges – two days before the selection of its new chairman], OKO.press, https://oko.press/prezydent-duda-nagle-powolal-nowych-sedziow-sn/.

Before the amendment, at least two-thirds of the judges from each Chamber had to be present in order to adopt a resolution of the General Assembly of the Supreme Court of Judges on the selection of candidates for the position of First President. If it failed to meet the quorum, the presence of at least three-fifths of the SC judges was required to conduct elections at the next session. This would mean 67 and 60 judges respectively, and not just 32 as the figure stands today.

The former chief justice deemed the reduction of the required quorum to 32 judges unacceptable. In a legal opinion on the draft 'Muzzle Law', Gersdorf argued that "all statutory regulations enabling the presentation of candidates in the election of which at least half + 1 Supreme Court judges did not participate are unacceptable, and such a situation is created by reducing the quorum to 32 members of the General Assembly. It is difficult to conclude that the function of the General Assembly is rightfully performed by just 25% of the total number of judges specified in the SC's rules of procedure."[22]

In the same statement, Gersdorf drew attention to the previously non-existent Article 13a, which she directly recognised as an attempt to "subordinate the internal process of selecting candidates for First President to the President of the Republic, despite the fact that the powers of the head of state related to the appointment of this position are limited to the act of appointment from among the candidates presented to him. From a constitutional perspective, as long as there are no candidates, the President cannot appoint any judge to this position, even in a form of a quasi-commissioner."[23]

The goal of the changes included in the 'Muzzle Law' was to circumvent the Constitution by enabling President Andrzej Duda to appoint an interim First President from among the SC nominees he himself had previously appointed in order to conduct the elections in line with the ruling majority's expectations. This was achieved even though the Law on the Supreme Court requires that during the absence of the First President, that person should be replaced by the president of one of the chambers.

Unconstitutional elections in the Supreme Court during the pandemic

Because the former First President of the SC decided not to call the General Assembly and organise the elections during the pandemic, Article 13a of the newly-amended Law on the Supreme Court was put into motion.

President Duda appointed Kamil Zaradkiewicz as interim First President to oversee the process after Małgorzata Gersdorf's departure from office. Zaradkiewicz, a person known for his close connections with the Minister of Justice Zbigniew Ziobro, only chaired three sessions of the

22 Statement by the First President of Supreme Court [in Polish], http://www.sn.pl/aktualnosci/SiteAssets/Lists/Wydarzenia/AllItems/2019.12.10%20-%20Oświadczenie%20PPSN.pdf.

23 *Supra* note 22.

General Assembly. The temporary chief justice faced significant internal criticism. Over 30 SC judges signed a petition to dismiss him from the function. In a letter to President Duda, the judges argued that Zaradkiewicz's conduct of the General Assembly was in violation of acceptable standards. Due to the overwhelming number of protests from the SC judges, Zaradkiewicz resigned from the post. He claimed that he had been bullied by judges who supposedly prevented him from performing the tasks entrusted to him.[24]

As a consequence, President Duda has appointed Aleksander Stępkowski[25] as the new interim First President. Stępkowski is a member of the Extraordinary Chamber, a unit entirely composed of appointees of the new NCJ. Lacking any previous experience as a judge, he was appointed to the SC despite numerous breaches of the nomination proceedings and an injunction issued by the Supreme Administrative Court.[26]

As twelve people were ready to run for the position of First President of the SC, The *Iustitia* Association of Polish Judges, the largest association of judges in Poland, decided to issue a ranking of candidates. "The ranking was based on criteria that were considered important according to the opinion polls. The President's decision may promote either true independence or a service-minded attitude towards politicians. Thanks to our ranking, it will be easy to see what values matter for the President [of Poland]", said *Iustitia's* head, judge Krystian Markiewicz.

The candidates' individual scores were determined on the basis of their previous achievements and attitudes towards crucial issues such as the rule of law. Additionally, *Iustitia* published opinion polls which showed that the public and judges alike expect the First President of the Supreme Court to be a person independent of politicians, supported by the Supreme Court's General Assembly of judges, with many years of professional experience, and a history of respecting the principles of the rule of law.[27]

The judges who scored the highest in the ranking were Marta Romańska, Dariusz Zawistowski and Włodzimierz Wróbel. All of them received 8 points out of a possible 8 points to be gathered before the General Assembly.

The winner came second

The entire election process was constantly questioned by judges, so much so that an official statement was eventually released on 23 May

24 A. Wójcik, 'A power struggle within Poland's Supreme Court as it seeks to nominate new chief justice', *Notes from Poland,* https://notesfrompoland.com/2020/05/20/a-power-struggle-within-polands-supreme-court-as-it-seeks-to-pick-new-chief-justice/.

25 For more on Stępkowski's role, see 'New "commissioner" in the Supreme Court: Aleksander Stępkowski', *Rule of Law in Poland,* https://ruleoflaw.pl/new-commissioner-in-the-supreme-court-aleksander-stepkowski/.

26 Infra note 27.

27 Iustitia, 'Karta Kandydata – wyjątkowy ranking kandydatów na I Prezesa SN' [A unique ranking of the candidates for First President of the Supreme Court], https://www.iustitia.pl/nowa-krs-nowy-sn/3844-karta-kandydata-wyjatkowy-ranking-kandydatow-na-i-prezesa-sn#_ftn1.

2020 by 50 SC judges in order to highlight the irregularities in the election process.[28] They emphasised: "Stępkowski unjustifiedly and illegally rejected a motion for the General Assembly to adopt a resolution to present five candidates to the President, even though the obligation to adopt such a resolution arises under Article 183(3) of the Constitution and has been confirmed by a decision of the Constitutional Tribunal."[29]

At the end of the proceedings full of irregularities, the voting took place. 50 votes were cast for judge Włodzimierz Wróbel from the Criminal Chamber. Wróbel is an experienced and respected judge, esteemed throughout the legal community for his commitment to the rule of law. In second place, with 25 votes, came Małgorzata Manowska; she had been a deputy justice minister in the first Law and Justice government in 2017 and became a Supreme Court member in 2018 following the nomination of the new NCJ.

Despite receiving a clear signal from the majority of judges on who they wished to see as the First President of the Supreme Court, President Duda chose to opt for the runner-up, Małgorzata Manowska. She was therefore announced as First President of the Supreme Court on 25 May 2020.[30]

The election of the First President of the SC was an important step for Law and Justice in the process of taking control over the highest court in the land, which they had been attempting since 2017. It was another violation of the constitutional standards and the rule of law, and Manowska's appointment during the COVID-19 pandemic will remain a contested issue for years to come.

4c. Restrictions on civil rights and freedoms: were they lawful?

It is no surprise that the COVID-19 pandemic has shown the citizens how crucial it is to hold their governments up to democratic standards when implementing legislation that could limit civil rights and freedoms. Whilst understanding the need to self-isolate, avoid public gatherings and wear face masks, the citizens still have the right to inquire into the legal basis of all these restrictions.

What is disturbing from the perspective of the rule of law and human rights is the Polish government's unwillingness to use existing mechanisms, such as declaring a state of natural disaster, which would allow constitutionally-sound limitations of certain freedoms. Instead, the authorities have opted for frequent amendments of existing laws and

28 'Statement by 50 Supreme Court judges regarding irregularities in the selection of candidates for the position of the First President of the Supreme Court', *Rule of Law in Poland*: https://ruleoflaw.pl/statement-by-50-supreme-court-judges-regarding-irregularities-in-the-selection-of-candidates-for-the-position-of-the-first-president-of-the-supreme-court/.

29 *Supra* note 28.

30 M. Jałoszewski, 'Who is Małgorzata Manowska, the new First President of the Supreme Court in Poland?' https://ruleoflaw.pl/who-is-malgorzata-manowska-the-new-first-president-of-the-supreme-court-in-poland/.

rules by secondary legislation. This means that many of the restrictions do not have a proper legal basis and are unconstitutional, and sometimes the fines imposed by certain authorities have been rejected by the courts.

While it is impossible to discuss all the restrictions the authorities have used during the pandemic, we have decided to select some examples to show how the government has failed to implement them in accordance with the Constitution and the principles of the rule of law. Some of these restrictions were necessary to combat COVID-19, and the vast majority of people observed them voluntarily, despite lacking a proper legal basis. Nevertheless, the way in which the restrictions were enforced has also led to legal uncertainty and unnecessary opposition, and reduced the public's trust in the government's responses to the pandemic.

The freedom of assembly and its limits

Seeing as the pandemic has now stretched out for many months, its impact on multiple spheres of citizens' private and public lives has been immense. Understandably, this also resulted in protests ranging from entrepreneurs contesting the restrictions on their everyday activity, to women going on strike because of a judgment issued by the highly politicised Constitutional Tribunal which led to a nearly total ban on all forms of abortion in Poland.[31]

However, whatever the cause of the public assembly, it must be mentioned that no ban on the right to assembly could have been effectively implemented by the government in light of the fact that it has not formally introduced a state of emergency. Article 57 of the Polish Constitution explicitly states that the freedom of peaceful assembly and participation in such assemblies shall be ensured to everyone. Limitations upon such freedoms may only be imposed via laws (and not by government decrees). The Law on Gatherings foresees only three possibilities when a gathering can be prohibited: 1) when its aim violates the freedom of peaceful gatherings or penal code, or it is organised by a person with no full legal capacity, 2) when the gathering poses a serious threat to the life and health of the people or property, 3) when it is to be organised in the same time and place where a cyclical gathering takes place. Spontaneous gatherings cannot be prohibited.

These constitutional provisions have been abused by the authorities, who issued decrees leading to a general ban on gatherings in public, including any sort of demonstrations. Moreover, due to the overall narrative launched by public authorities concerning the alleged illegality of such assemblies, the police forces have sometimes used brute force to manage the demonstrations.[32]

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31 M. Tatała, 'Poland needs more rule of law and fewer conflicts with Brussels', *Emerging Europe,* https://emerging-europe.com/voices/poland-needs-more-rule-of-law-and-fewer-conflicts-with-brussels/.

32 D. Tilles, 'Clashes at abortion protest in Warsaw as police use tear gas and force against demonstrators', *Notes from Poland,* https://notesfrompoland.com/2020/11/19/clashes-at-abortion-

CASE STUDY #1: THE 'ENTREPRENEURS' STRIKE'

The organisers of 'The Entrepreneurs' Strike' (including people whose businesses were forced to close due to COVID-19 restrictions), notified the Mayor of Warsaw of their intention to hold a public gathering on 16 May 2020. This was done in compliance with the laws on holding public assemblies, which were still in force as no state of emergency had been declared.

The Mayor of Warsaw responded that the assembly could not be registered due to the ban imposed on assemblies by governmental regulations. However, the organisers of the protest took the decision to the Warsaw Regional Court, which dismissed the claim. In doing so, it referred to the decree of the Council of Ministers on the implementation of certain restrictions, orders and bans in relation to the COVID-19 pandemic. In the court's view, the Mayor was entitled not to register an assembly and not apply the Law on Assemblies due to the fact that the provisions of the new regulation excluded the possibility of the application of the Law on Assemblies. In turn, the applicant appealed this decision to the Warsaw Court of Appeals.

The Ombudsman decided to join the proceedings[33], requesting that the mayor's contested decision be cancelled. In the Ombudman's opinion, such a ban could not be implemented on the basis of a decree issued by the Council of Ministers, but only by means of a law. Moreover, the actions taken by the government were outwardly contrary to the principle of proportionality (Article 31 (3) of the Constitution).

Thus, in light of the position adopted by the Ombudsman, the Mayor could have only attempted to prevent the gathering from happening by issuing an administrative decision prohibiting the assembly under Article 14 of the Law on Assemblies.[34]

The appeal was considered invalid because the Court indicated that the failure to register the assembly did not mean its prohibition. The mayor's behaviour could therefore be only considered in terms of inactivity – because it should have either prohibited the gathering or registered it. Furthermore, the assembly itself could not be deemed illegal. The Court agreed that the applicant and the Ombudsman were right to maintain that the ban on assemblies introduced by the regulation of the Council of Ministers raises significant constitutional doubts.

protest-in-warsaw-as-police-use-tear-gas-and-force-against-demonstrators/.

33 Commissioner for Human Rights, 'RPO do sądu: całkowity zakaz zgromadzeń – niekonstytucyjny', https://www.rpo.gov.pl/pl/content/koronawirus-rpo-do-wsa-calkowity-zakaz-zgromadzen-niekonstytucyjny.

34 The provision states that the competent authority must issue a decision banning an assembly no later than 96 hours before the planned date of the assembly, for example if its purpose violates the freedom of peaceful assembly, its organisation violates the rules of organising assemblies or the purpose of the assembly or violates the penal provisions, it may threaten the life or health of people or property to a significant extent, or the assembly is to be held at the place and time where a cyclical assembly is taking place (one that was registered in advance).

CASE STUDY #2: THE 'ARTISTS' PROTEST', AND HOW SANITARY JUSTIFICATIONS LED TO QUASI-CRIMINAL SANCTIONS

On 6 May 2020, a couple of artist-performers carried a 14-metre-long banner around Warsaw, and ended their walk at the parliament building. The event was meant to highlight their protest against postal voting being the only permitted way to participate in the presidential elections.

Along the length of their route, they remained at the health inspectors' suggested distances from one another. The police officers who accompanied the group did not recognise any violations of the law until they arrived at the parliament building, where they attempted to fine the group (the artists did not accept the fines, and therefore the cases were referred to court) and decided to submit motions for additional fines to the State Sanitary Inspection claiming that the sanitary regulations were violated.[35] The artists received fines of 10,000 Polish zloty each (around €2250). Due to the intervention by the Ombudsman's office, the fines were lifted.[36]

This is one of many examples when the State Sanitary Inspection was active in terms of fining citizens disproportionally high amounts for non-compliance with various restrictions without a proper legal basis.

It seems that the provisions and standards contained in the Code of Petty Offences & the Code of Conduct in misdemeanour cases which were previously used in this type of proceedings have been intentionally omitted and abandoned. Instead of opting for the path of criminal procedure, which includes a rather broad scope of procedural guarantees, legislators chose to provide the State Sanitary Inspector's Office with the option of administering very high fines using administrative procedure.

The Ombudsman emphasised that penalties are imposed on the basis of the special legal acts on combatting COVID-19 which have been in force since 1 April 2020, which remain unclear and are very strict. The possible level of administered fines and the order of immediate payment were considered to essentially be a tool for the unjustified repression of citizens.[37]

35 M. Piasecki, 'Po tekście OKO.press w obronie ukaranych artystów interweniuje RPO Adam Bodnar. „To rodzaj nękania"' [After OKO.press published its article defending the artists, Ombudsman Adam Bodnar intervenes], *OKO.press*, https://oko.press/rpo-w-obronie-ukaranych-artystow/.

36 M. Barszczak, '"List": kara 10 tys. zł za happening uchylona. RPO: "Kompletnie bez refleksji"' ['List': fine of 10,000 zloty for happening annulled. Ombudsman: 'Completely thoughtless'], *Radio ZET*, https://wiadomosci.radiozet.pl/Polska/Warszawa/Warszawa.-List-do-Sejmu.-Sanepid-cofa-kary-dla-artystow-po-interwencji-RPO.

37 Commissioner for Human Rights, 'Rzecznik skarży do WSA kary pieniężne sanepidu wobec obywateli', https://www.rpo.gov.pl/pl/content/koronawirus-rpo-skarzy-do-wsa-kary-pieniezne-sanepidu-wobec-obywateli.

Freedom of economic activity and its unconstitutional prohibition

Since the government decided to not declare a state of natural disaster, it had to find ways to deal with the crisis at hand as soon as possible. The solutions used were unconstitutional, since the measures laid down in the emergency laws were appended to regular legislation. Hence, the state of epidemic and – before that – the state of epidemic threat (both implemented on the basis of provisions available in the Act on Preventing and Combating Infections and Infectious Diseases in Humans), were introduced in violation of the constitutional guarantees enjoyed by the citizens.

Usually the decrees of the Council of Ministers can only be used to implement regulation of only a technical nature. However, this time decrees have been used to impose restrictions on economic sectors, including bans on selected types of business activity. This turned out to be crucial for those entities that now may demand compensation for the losses they have suffered. The authorities cannot limit constitutional rights and freedoms by decree; this can be solely done by law (Article 31 (3) of the Polish Constitution).

The provisions present in the abovementioned Act on Preventing and Combating Infections and Infectious Diseases in Humans were used to create the first basis for introducing a temporary limitation of the operation of certain entities. An amendment in March added Article 46b, which defined the scope of such restrictions in a very broad and unspecific manner. In short, this meant "a temporary limitation of certain areas of the business activity of entrepreneurs". Furthermore, this opened the door to the total closure of entire branches of the economy. This was done whilst the government was still avoiding the introduction of a state of natural disaster.

This means that the content and *ratio legis* of the Act on a State of Natural Disaster – one of the extraordinary measures – were used and repeated in a regular act of law. Moreover, specific restrictions concerning, for example, the bans on activity of certain sectors of the economy were (and continue to be) made on the basis of decrees. Obviously, this means interference with civil rights and freedoms – which, according to the Constitution, can only take place by means of laws.

To sum up, the regulations created by the government and the amendments introduced to regular laws were initially created to be used during normal, non-pandemic times, but they have resulted in the *de facto* implementation of extraordinary measures into regular laws without respect for constitutional standards.

Unmasking the government's inability to introduce effective obligatory mask-wearing measures

Since the beginning of the pandemic, governments all around the world were confronted with the task of figuring out an effective way to stall the spread of the virus. One of the ways which seemed to work best was the establishment of obligatory mask wearing in public spaces. The same was true for the Polish authorities. However, according to the Polish Constitution, civil rights and freedoms can only be limited on the basis of a statute, not an act of lower legal value. Hence, even though the government continued to issue several regulations concerning the issue of mask wearing in public spaces, varying the scope of restrictions, none of them could have resulted in an effective legal obligation.

Furthermore, a decree (which can be issued by the government) should, according to the Constitution, stem from a provision stated in a law. That law should specify the scope which is to be covered by the decree, a legal act of a technical nature, which serves as an instruction to specific authorities on how to implement a particular provision. The regulations which concerned obligatory mask wearing in public spaces were consistently issued on the basis of the Act on Preventing and Combating Infections and Infectious Diseases in Humans. This introduced the obligation to wear a mask, but without the statutory delegation that would allow the introduction of a general obligation to cover the mouth by means of a decree. The abovementioned legal act only made it possible to force people who were already sick to wear face masks, and not the population as a whole.

For this reason, common courts repeatedly refused to sanction persons who declined to wear a mask, despite the fact that police forces continued to issue fines. The legal, statutory basis for obligatory mask wearing finally came into existence in December 2020, eight months after the pandemic's outbreak. This was introduced on the basis of a new decree, based on the essential legal act amendment published at the end of November 2020.

On one hand, many policies related to the protection of public health have been introduced and promoted. On the other, even regarding an issue as obvious as wearing facemasks, the government failed to create a proper legal basis for over eight months since the beginning of COVID-19 pandemic. This not only weakens the rule of law, but also ruins trust in the public sector's response to the health emergency.

4d. Restrictions on freedom of information

Notwithstanding the rules curtailing various rights and freedoms, the measures adopted due to the pandemic have also resulted in less straightforward restrictions, in particular to freedom of information. It is indisputable that during the outbreak state actions aimed at reducing

its adverse effects must be given priority, but laws and practices that make it excessively difficult to obtain public information should not be tolerated. They may have negative impact on journalists, civil society organisations or academics and their ability to inform citizens on matters of public concern, and further erode the trust in the public authorities which is essential in a democracy.

As a result of a set of amendments adopted in early March 2020 with a view to temporarily halt administrative proceedings due to the pandemic, it was practically impossible to obtain public information for about eight weeks. This was because the legislation in question suspended the application of general provisions of administrative law which also covered freedom of information requests. Until mid-May 2020, a public authority which decided not to reveal public information was legally entitled to remain silent and completely disregard any such request, as no judicial review for such inaction was available. Moreover, this measure applied to situations in which a failure to act (either to disclose, or to formally deny access to public information) had already happened before it went into force and had not been subject to judicial review up to that moment. The instrument which was intended to freeze the operation of public bodies in dealing with citizens' matters for a period – in order to reduce the number of people in public premises – was misused to the detriment of freedom of information, and effectively prevented the public from being fully informed in the early stage of the pandemic.

Recent developments have also revealed unacceptable practices to limit the access to public information about the pandemic. In late November 2020, the Minister of Health decided to centralise the information policy concerning the numbers of daily cases, deaths and tests, among other information. Previously, more than 300 local sanitary-epidemiological stations published the relevant information on their websites every day, which allowed a group of volunteers to create and update a detailed online spreadsheet that was used by media, academics and even the government. This group noticed in early November that the number of cases in some regions was not equal to the sum of cases reported locally. The Minister of Health responded by announcing that from that moment the ministry would be responsible for the information policy, and denied access to local data, which is now no longer being updated. Moreover, the past data was not corrected to include the missing tens of thousands of cases, but instead it was artificially added to the number of cases in one daily report. These practices restricted access to the detailed, dispersed local data, and made it inconsistent and less reliable.

On the other hand, the government has gained more access to information about citizens. During the pandemic it amended the law on the Council of Ministers to allow the government to demand anonymised data from any other state and local authorities which they deem useful for drafting public policies.

4e. The politicised Constitutional Tribunal in action

The rule of law and the developments in the judiciary have not been high on the list of priorities for many people in the times of COVID-19, pandemic-related restrictions and economic crisis. In this atmosphere the politicised Constitutional Tribunal[38] has been used by the ruling majority to gain even more power.

What remains worrying is the eagerness with which governing party MPs, the Speaker of the *Sejm* and the Prime Minister himself have used the Tribunal to provide rulings which could act as justifications for unconstitutional steps taken in order to follow through with Law and Justice's political agenda. These three examples are a clear sign of the continuing weakening of the rule of law and the quality of democratic institutions in Poland.

Outlawing the independent Ombudsman

In September 2020 the five-year constitutional term of the serving Ombudsman, Adam Bodnar, ended.[39] Only one candidate has been so far proposed to succeed him: Zuzanna Rudzińska-Bluszcz, a human rights lawyer and attorney, who has the support of over 1000 NGOs.[40] Rudzińska-Bluszcz has been presented twice to parliament as the candidate of the major opposition parties while Law and Justice neither registered its own candidate nor supported Rudzińska-Bluszcz. To select the Ombudsman majorities in both the *Sejm* and the *Senat* are needed, and the ruling party does not have a majority in the upper chamber of the parliament. Law and Justice has been looking for solutions to capture the Ombudsman's office without needing support from the Senate.

According to the Act on the Ombudsman, the former Ombudsman performs his duties until his successor takes over the position. This provision was used as a basis for Law and Justice's MPs to file a motion for the Constitutional Tribunal to rule on its unconstitutionality. Should the Tribunal rule in their favour, it would become possible for the ruling majority to amend the existing Act on the Ombudsman and include a provision stating what happens when a successor is not elected. This may fill the position in a 'temporary' manner that may prove not be so temporary. Such a move would be similar to the changes made to the Act on the Supreme Court, which led to a politically-appointed commissioner leading the SC while a new First President of the SC was being chosen.

38 M. Tatała, E. Rutynowska, P. Wachowiec, *supra* note 4.

39 To learn more about Adam Bodnar and his work as an Ombudsman see: A. Wądołowska, 'Poland's human rights commissioner on the state of democracy, LGBT protests and "dormant civic energy"', *Notes from Poland,* https://notesfrompoland.com/2020/08/24/polands-human-rights-commissioner-on-the-state-of-democracy-lgbt-protests-and-dormant-civic-energy/.

40 Campaign of NGOs supporting Zuzanna Rudzińska-Bluszcz, https://naszrzecznik.pl.

Impunity rules

According to Article 7 of the Polish Constitution, the government must act on the basis of existing laws and within set boundaries. However, this does not mean the same as having the right to create any new laws in line with the needs of the currently ruling party, or 'maxing out' the said boundaries.

Nonetheless, the governing party has opted to use the pandemic as an excuse to pass laws excluding public servants from criminal responsibility for their actions. The motion, filed on 13 October 2020, asked the Tribunal to decide whether the provisions of the Criminal Code which call for criminal liability of public officials for behaviour aimed at protecting public life or health, undertaken in the event of a justified risk of threat to these goods when at the same time the consecrated good does not present a value obviously higher than the rescued good, are consistent with the Constitution.

A similar additional question was asked in relation to provisions regarding mismanagement, and whether they are compliant with the Constitution to the extent to which these provisions provide for criminal liability of public officials and members of the management boards of companies with State Treasury shareholding for conduct aimed at protecting life or public health, undertaken in situations where there is a justified risk of a threat to these goods, while at the same time the consecrated good does not present a value obviously higher than the rescued good.

Again, should the Tribunal rule in favour of the MPs who filed the motion, it would effectively open a door to introducing laws on impunity regarding public servants, excluding them from criminal responsibility pursuant to their actions.

No liability for careless decisions of the government

The Constitutional Tribunal is also set to rule on two motions concerning the examination of the compliance of a provision of the Civil Code which indicates the terms under which the state is liable for damages incurred by individuals due to illegal legislation passed by the authorities. If the motions succeed at the Constitutional Tribunal, common courts will be banned from assessing the legality of decrees passed by the government and possibly consider them unconstitutional. This will then become the exclusive competence of the Constitutional Tribunal.[41]

From today's perspective it is quite clear what the intentions of the motions are. If the court rules in favour of the Law and Justice politicians, entrepreneurs can be effectively prevented from seeking damages for the period of the economic closure (lockdown), since obtaining a decla-

41 E.Rutynowska, 'Trybunał Konstytucyjny jako ucieczka władzy przed odpowiedzialnością za błędy' [The Constitutional Tribunal as a way for the government to avoid responsibility for its mistakes], https://for.org.pl/pl/a/8010,komunikat-34/2020-trybunal-konstytucyjny-jako-ucieczka-wladzy-przed-odpowiedzialnoscia-za-bledy.

ration on the unlawfulness of actions taken by the state from common courts will become impossible. They will be dependent on the ruling of the Constitutional Tribunal which is dominated by people appointed by the ruling party.

The motions addressed to the Constitutional Tribunal remain an attempt to avoid responsibility for the government's error of not introducing a state of natural disaster, which would have given legal grounds for banning specific economic activities and limited the scope of potential damages that can be demanded in the emergency period.

5. CONCLUSIONS

The COVID-19 pandemic is a serious threat to our health and economy. While the crisis situation might be an opportunity to push for positive reforms, they can also create a favourable environment for politicians willing to weaken constraints on their own power. So far the pandemic has been used in this way by the ruling politicians in Poland.

Despite the health emergency, the special emergency laws that were available in Poland's constitution were not used. It was apparently more important to hold the presidential election in the time of pandemic than to devise a proper legal basis for restricting the civil rights and freedoms in order to reduce the spread of the virus.

The virus helped Law and Justice to capture the Supreme Court without mass public opposition, while the recent use of the Constitutional Tribunal shows why the government needs political control over the judiciary. The rule of law crisis in Poland is not over, and Law and Justice has been promising to continue their judicial 'reforms'.

Therefore, people and institutions in Poland and other member states of the EU who want a union based on common values, including the rule of law, should actively respond to current and upcoming violations of these values. The Civil Development Forum presented some recommendations for the EU institutions in the second report of this series.[42] We should remember that the rule of law matters not only because it is one of the EU's core values, but also because it is important for economic growth and individual freedoms. In other words, the rule of law is in Poland's national interest.[43]

What is also needed is an agenda for future reversal of harmful policies and real justice system reforms. In the meantime it is also important to monitor and emphasise abuses of power and legal chaos created by inadequate responses to COVID-19 pandemic. The future of democratic recovery in Poland depends on civil society involvement in defending and strengthening democracy and the rule of law.

42 P. Wachowiec, E. Rutynowska, M. Tatała, *supra* note 5.

43 M. Tatała, 'The Polish government versus the rule of law', *New Europe*, https://www.neweurope.eu/article/the-polish-government-versus-the-rule-of-law/.

AUTHORS:

Eliza Rutynowska – Lawyer at the FOR Foundation. PhD candidate at the University of Warsaw Faculty of Law. Advocate trainee at the Warsaw Bar Association. Graduate of the Faculty of Law at the University of Warsaw. Graduate (with merit) of the British Law Centre Diploma in English and European Law at the Warsaw University in cooperation with University of Cambridge. Scholarship recipient of the Humanity in Action Foundation – John Lewis Fellowship 2017 in Atlanta, focusing on the problem of restorative justice. Scholarship recipient of the International Visitor's Leadership Program organised by the U.S. Department of State. Graduate of the OSCE LIVE Training on Preventing and countering violent extremism and radicalism. Volunteer lecturer at "Constitutional Week", a Zbigniew Hołda Society conducted project. From 2015 to 2020 a lawyer at the Polish Society of Anti-Discrimination Law.

Twitter: @ElizaRutynowska
e-mail: eliza.rutynowska@for.org.pl

Marek Tatała – Vice President and Economist at the Civil Development Forum (FOR Foundation) in Warsaw, Poland – a think tank founded by Professor Leszek Balcerowicz. He received his BSc in Economics and Politics from the University of Bristol in England and MA in Economics from the Warsaw School of Economics in Poland. He completed the CPPR-ACE Winter School in Public Policy Research Methods in India and the Think Tank MBA program organized by the Atlas Network. He is the graduate of the Atlas Leadership Academy and alumni of the Advancing Democracy program organized by the Friedrich Naumann Foundation and American Jewish Committee. His research interests include rule of law, law and economics, political economy and regulations constraining various individual freedoms.

Twitter: @MarekTatala

Patryk Wachowiec – Legal Analyst at the FOR Foundation. Previously, he was a parliamentary consultant at the Bureau of Research of the Chancellery of the Sejm where he was providing legal assistance for Deputies and Sejm bodies. His tasks included counselling on a range of legal and systemic topics, in particular analysing the quality of drafted legal solutions and consulting with the Petitions Committee of the Sejm. He also cooperated with the European Centre for Parliamentary Research and Documentation (ECPRD). Since 2015, Wachowiec is a founder and CEO at CADR Institute – foundation aiming particularly to track and improve government transparency and support law simplification. His main interests are constitutional and EU law, as well as government openness. He also holds a degree in European studies from Warsaw University.

Twitter: @PatrykWachowiec

FOR CIVIL DEVELOPMENT FORUM
www.for.org.pl

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Civil Development Forum was founded in 2007 by Professor Leszek Balcerowicz, former Deputy Prime Minister and Minister of Finance in the first non-communist government of Poland after the Second World War. FOR Foundation is a member of various networks of pro-liberty think tanks and NGOs – 4Liberty Network, Epicenter Network and Atlas Network. Our experts frequently appear in Polish and international media.

Contact details:

Fundacja Forum Obywatelskiego Rozwoju – FOR
ul. Ignacego Krasickiego 9A
02-628 Warsaw
Poland

tel. +48 22 628 85 11
e-mail: info@for.org.pl

Website: www.for.org.pl
Facebook: www.facebook.com/FundacjaFOR
Twitter: @FundacjaFOR