

RULE OF LAW BACKSLIDING DURING THE PANDEMIC

THE CASES OF HUNGARY AND POLAND

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REGROUP

REBUILDING GOVERNANCE AND
RESILIENCE OUT OF THE PANDEMIC



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Culminating more than a decade of crisis in Europe, the Covid-19 pandemic has opened an important window of opportunity for institutional and policy change, not only at the “reactive” level of emergency responses, but also to tackle more broadly the many socio-political challenges caused or exacerbated by Covid-19. Building on this premise, the Horizon Europe project REGROUP (*Rebuilding governance and resilience out of the pandemic*) aims to: 1) provide the European Union with a body of actionable advice on how to rebuild post-pandemic governance and public policies in an effective and democratic way; anchored to 2) a map of the socio-political dynamics and consequences of Covid-19; and 3) an empirically-informed normative evaluation of the pandemic.



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Abstract

Amid the COVID-19 pandemic, Hungary and Poland served as a flagship example of democratic backsliding. The pandemic became a generator of an accelerated retreat from liberal democracy, although this retreat began long before the virus threat occurred. The report focuses on two emblematic issues - restrictions on access to information in Hungary and the organisation of the presidential elections in Poland. Both examples have a common denominator, which is the politicisation of the decision (not) to introduce a state of emergency and lack of respect for state institutions, as well as the lack of response to critical voices coming from both the country and international institutions (EU institutions, Council of Europe, UN). (Non-)introduction of the state of emergency was driven by the political interest of the ruling parties and led to further dismantling of the rule of law and intensified erosion of democracy. The cases investigated, however, demonstrate that the success of illiberal policies depends on how much the liberal democratic system was weakened before the COVID-19 pandemic. The independence of at least part of the institutions, functioning civil society, independent media, and the pressure of transnational organisations can influence the speed and scope of illiberal reforms even in times of emergency.

Keywords: Covid-19, democratic backsliding, rule of law, Poland, Hungary, state of emergency

An opportunity to exploit the crisis? Why the legal responses to COVID-19 in Hungary and Poland constitute hard cases

The well-known legal adage “hard cases make bad law” naturally comes to mind when analysing the legal response to the COVID-19 pandemic in Hungary and Poland. The pandemic posed a novel and unprecedented stress test for liberal democracies already grappling with substantial disruptions, in addition to, as one author observed, exerting “tremendous pressure on constitutionalism”.¹ At least some of the restrictions commonly introduced to prevent the spread of the coronavirus raised serious legal questions even in democratic states with a stable political system based on the rule of law and compliance with human rights standards. In this context, the political and legal situation in Hungary and Poland during this period was unique, as both states were commonly referred to as populist and Eurosceptic semi-autocratic regimes due to the way they were governed. According to a Freedom House report from 2021, the greatest decline in the quality of democracy in Europe was observed in Poland and Hungary,² making them an interesting case study regarding the pandemic’s impact on the rule of law and democratic backsliding.

The Fidesz and Law and Justice (PiS) parties, led by Viktor Orbán and Jarosław Kaczyński respectively, had previously played leading roles in the governments of their states (in 1998-2002 and 2005-2007 respectively). However, it was only in the mid-2000s (Fidesz has been in power since 2010, while PiS governed between 2015 and 2023) that their position and political strategy brought about a full-scale attack on the institutions intended to constitute the system of checks and balances (e.g. courts and tribunals, public prosecution services, public media), combined with the destruction of democratic standards and the use of laws and institutions to fully consolidate power. At the same time, both governments were manifestly hampering a possible democratic transition in the future. In this context, in both the public and the academic discourse, Hungary and Poland became flagship examples of “democratic backsliding”³ and “autocratic legalism”.⁴ Orbán’s regime had begun an illiberal transformation a few years earlier. His “successes” in the field of moving towards autocracy were noticed very quickly by Kaczyński, who, during his famous speech after losing the 2011 elections, said, “I am

1. Martin Belov, “The Role of Fear Politics in Global Constitutional ‘Ernstfall’: Images of Fear under COVID-19 Health Paternalism” in Martin Belov (ed.), *Populist Constitutionalism and Illiberal Democracies. Between Constitutional Imagination, Normative Entrenchment and Political Reality* (Intersentia, 2021) 187.

2. Freedom House, *Nations in Transit 2021: The Antidemocratic Turn* (2021).

3. Michael Bernhard, “Democratic Backsliding in Poland and Hungary” (2021) 80 *Slavic Review* 585.

4. Kim Lane Scheppele, “Autocratic Legalism” (2018) 85 *University of Chicago Law Review* 545.

deeply convinced that the day will come when we have a Budapest in Warsaw”.⁵ The fulfilment of this prediction was neatly described by Kim Lane Scheppele, who noted:

After Orbán’s success at foiling attempts by European institutions to halt the slide into autocracy, the new government in Poland began to travel down the same road using a map drawn by Orbán, starting with an attack on the Polish Constitutional Tribunal that centered on the appointment of judges before moving on to a full-scale assault on the ordinary judiciary.⁶

The similarity of the cases of Hungary and Poland was confirmed by the actions of the European Union institutions mentioned in the above quote, and rightly considered ineffective at the initial stage.⁷ The situation in both states has also often been the subject of joint analyses, pointing to numerous similarities in the departure from rule-of-law standards and the slide towards authoritarianism.⁸ Several excellent analyses focusing mostly on specific problems in only one of these states have also been published.⁹ In this

5. See: TVN24, “Przyjdzie dzień, że w Warszawie będzie Budapeszt”, TVN24 (9 October 2011) <<https://tvn24.pl/polska/przyjdzie-dzien-ze-w-warszawie-bedzie-budapeszt-ra186922-3535336>> accessed 15 February 2024.

6. Kim Lane Scheppele, “Autocratic Legalism” (2018) 85 *University of Chicago Law Review* 545, 552-553.

7. See e.g. Laurent Pech and Kim Lane Scheppele, “The EU and Poland: Giving up on the Rule of Law?” (VerfBlog, 15 November 2016) <https://verfassungsblog.de/the-eu-and-poland-giving-up-on-the-rule-of-law/> accessed: 12 February 2024; Walter Rech, “Some remarks on the EU’s action on the erosion of the rule of law in Poland and Hungary” (2018) 26 *Journal of Contemporary European Studies* 334; Dimitry Kochenov, “Elephants in the Room: The European Commission’s 2019 Communication on the Rule of Law” (2019) 11 *The Hague Journal of the Rule of Law* 423; Tom Theuns, “The Need for an EU Expulsion Mechanism: Democratic Backsliding and the Failure of Article 7” (2022) 28 *Res Publica* 693; Dimitry Kochenov and Barbara Grabowska-Moroz, “Constitutional Populism versus EU Law: A Much More Complex Story than You Imagined” in Martin Krygier, Michał Czarnota, and Wojciech Sadurski (eds), *Anti-Constitutional Populism* (Cambridge University Press, 2022); Laurent Pech and Jakub Jaraczewski, “Systemic Threat to the Rule of Law in Poland: Updated and New Article 7(1) TEU Recommendations” (2023), CEU Democracy Institute Working Papers 2/2023, UCD Working Papers in Law, Criminology & Socio-Legal Studies Research Paper No. 13/2023.

8. See e.g. Aron Kerpel, “Pole and Hungarian Cousins Be? A Comparison of State Media Capture, Ideological Narratives and Political Truth Monopolization in Hungary and Poland” (2017) 29 *SLOVO* 68; Daniel R Kelemen and Laurent Pech, “The Uses and Abuses of Constitutional Pluralism: Undermining the Rule of Law in the Name of Constitutional Identity in Hungary and Poland” (2019) 21 *Cambridge Yearbook of European Legal Studies* 59; Robert Sata and Ireneusz Paweł Karolewski, “Caesarean Politics in Hungary and Poland” (2019) 36 *East European Politics* 206; Tímea Drinóczi and Agnieszka Bień-Kacata, “Illiberal Constitutionalism: The Case of Hungary and Poland” (2019) 20 *German Law Journal* 1140; Robert Csehi and Edit Zgut, “‘We won’t let Brussels dictate us’: Eurosceptic populism in Hungary and Poland”, (2021) 22 *European Politics and Society* 53; Tímea Drinóczi, and Agnieszka Bień-Kacata, *Illiberal Constitutionalism in Poland and Hungary: The Deterioration of Democracy, Misuse of Human Rights and Abuse of the Rule of Law* (Routledge, 2021); Edit Zgut, “Informal Exercise of Power: Undermining Democracy Under the EU’s Radar in Hungary and Poland” (2022) 14 *The Hague Journal on the Rule of Law* 287; Bálint Madlovics and Bálint Magyar, “Kaczyński’s Poland and Orbán’s Hungary. Different Forms of Autocracy with Common Right-Wing Frames in the EU” (2023) 1 *Journal of Right-Wing Studies* 2.

9. See e.g. Kim Lane Scheppele, “The Rule of Law and the Frankenstate: Why Governance Checklists Do Not Work” (2013) 26 *Governance: An International Journal of Policy, Administration, and Institutions* 559; *Special Issue: Gegen die Wand. Konservative Revolution in Polen*, *Osteuropa* 1-2/2016; Ewa Łętowska, “The current dismantling of the rule of law in Poland” (*Rule of Law*, June 5, 2018) <<https://ruleoflaw.pl/the-current-dismantling-of-the-rule-of-law-in-poland/>> accessed: 13 February 2024; Zsolt Enyedi, “Democratic Backsliding and Academic Freedom in Hungary” (2018) 16 *Perspectives on Politics* 1067; Paweł Filipek, “The new National Council of the Judiciary and its impact on the Supreme

context, the description of the political and legal situation in both countries as ‘hard cases’ does not seem exaggerated.

Consequently, it may not be surprising that the COVID-19 pandemic in both countries was treated instrumentally almost from its beginning. This is very well illustrated by the different decisions (and their consequences) to impose a state of emergency in both states. In each case, it seems that the political interests of the ruling parties were more important than public health, not to mention the respect for the rule of law and constitutional norms. However, as we will demonstrate, the success of utilising the pandemic and implementation of the illiberal policies depends on how much the liberal democratic system was weakened before the COVID-19 pandemic. Our analyses focus on two cases - restrictions on access to information in Hungary and the organisation of the presidential elections in Poland. Against this background, the report begins with a focus on the institution of the state of emergency as such, followed by the domestic legislation in Hungary and Poland in this regard (section 2), the context of the introduction of a state of emergency in Hungary and its non-introduction in Poland, and the consequences of these decisions for selected human rights (section 3). The paper closes with the conclusions that can be drawn from the findings (section 4).

State of emergency and COVID-19

A state of emergency is a common term for the variously named extraordinary legal regimes that can be introduced in a country in certain situations (e.g. war, natural disaster) to empower the government to take actions that are not normally legally available

Court in the light of the principle of judicial independence” (2018) XVI Problemy Współczesnego Prawa Międzynarodowego, Europejskiego i Porównawczego 171; András Bozóki and Dániel Hegedűs, “An Externally Constrained Hybrid Regime: Hungary in the European Union” (2018) 25 Democratization 1173; Wojciech Sadurski, *Poland’s Constitutional Breakdown* (Oxford University Press 2019); Mirosław Wyrzykowski, ‘Experiencing the Unimaginable: the Collapse of the Rule of Law in Poland’ (2019) 11 The Hague Journal of the Rule of Law 417; Radosław Markowski, “Creating Authoritarian Clientelism: Poland After 2015” (2019) 11 The Hague Journal of the Rule of Law 111; Marta Bucholc, “Commemorative Lawmaking: Memory Frames of the Democratic Backsliding in Poland After 2015” (2019) 11 The Hague Journal of the Rule of Law 85; Katarzyna Gajda-Roszczyńska and Krystian Markiewicz, “Disciplinary Proceedings as an Instrument for Breaking the Rule of Law in Poland” (2020) 12 The Hague Journal of the Rule of Law 451; Marcin Matczak, “The Clash of Powers in Poland’s Rule of Law Crisis: Tools of Attack and Self-Defence” (2020) 12 The Hague Journal of the Rule of Law 421; Laurent Pech, Patryk Wachowiec and Dariusz Mazur, “Poland’s Rule of Law Breakdown: A Five-Year Assessment of EU’s (In)Action” (2021) 13 The Hague Journal of the Rule of Law 1; Zoltán J. Tóth, “Rule of Law vs. Democracy: With Special Regard to the Case of Hungary” in Martin Belov (ed), *Populist Constitutionalism and Illiberal Democracies. Between Constitutional Imagination, Normative Entrenchment and Political Reality* (Intersentia, 2021); Michał Stambulski, “Constitutional Populism and the Rule of Law in Poland” in Martin Krygier, Michał Czarnota and Wojciech Sadurski (eds), *Anti-Constitutional Populism* (Cambridge University Press, 2022); Eszter Bodnár, “Disarming the Guardians - the Transformation of the Hungarian Constitutional Court After 2010” in Martin Krygier, Michał Czarnota and Wojciech Sadurski (eds), *Anti-Constitutional Populism* (Cambridge University Press 2022); Adam Płoszka, “It Never Rains but it Pours. The Polish Constitutional Tribunal Declares the European Convention on Human Rights Unconstitutional” (2023) 15 The Hague Journal of the Rule of Law 51.

to it.¹⁰ In practice, the introduction of states of emergency provides a legal basis for the suspension of certain human rights. In this context, it may not come as a surprise that the main international human rights treaties (containing general catalogues of human rights) also allow for such a situation, indicating, however, certain conditions that must be met for the temporary suspension (derogation) of selected human rights to be considered compatible with the respective treaty.¹¹

Regulations on states of emergency are present in many states at the constitutional level, including Poland and Hungary. Among EU member states, only three do not have a constitutional emergency clause.¹² Even in such situations, however, the respective constitutions provide for special regulations that “delegate” certain powers to the executive, which, it seems, can also be used in case of emergency.¹³ Based on the “Observatory of situations of emergency” held by the Council of Europe Venice Commission (the European Commission for Democracy through Law), constitutional clauses on states of emergency are present, among others, in Armenia, South Korea, Mexico, Peru, Serbia, and Turkey.¹⁴

The human rights treaties cited above indicate that among the justifications for the

10. The notion of a state of emergency has been, and continues to be, the subject of numerous studies and publications. Among others, the studies of philosophers (e.g. Carl Schmitt, *Political Theology. Four Chapters on the Concept of Sovereignty*, transl. G. Schwab (Chicago University Press, 2005), Giorgio Agamben, *State of Exceptions*, transl. K. Attel (Chicago University Press, 2004), and lawyers. In the latter case, more theoretical and general approaches can be referred to (e.g. Victor Ramraj and Meneka Guruswamy, *Emergency Powers in Mark Tushnet, Thomas Fleiner and Cheryl Saunders (eds), Routledge Handbook of Constitutional Law* (Routledge 2012); John Ferejohn and Pasquale Pasquino, “The Law of the Exception: A Typology of Emergency Powers” (2004) 2 *International Journal of Constitutional Law* 210, as well as studies on legislation within particular states (e.g. Bruce Ackerman, “The Emergency Constitution” (2004) 113 *The Yale Law Journal* 1029; András Jakab, “German Constitutional Law and Doctrine on State of Emergency - Paradigms and Dilemmas of a Traditional (Continental) Discourse” (2006) 7 *German Law Journal* 453; Stéphanie. H. Vauchez, “The State of Emergency in France: Days Without End?” (2018) 14 *European Constitutional Law Review* 700. International lawyers also frequently address this topic (e.g. Jaime Oraá, *Human Rights in States of Emergency in International Law* (Clarendon Press, 1992); Anna-Lena Svensson-McCarthy, *The International Law of Human Rights and States of Exception: With Special Reference to the Travaux Préparatoires and Case-Law of the International Monitoring Organs* (Brill-Nijhoff, 1998); Dominic McGoldrick, “The interface between public emergency powers and international law” (2004) 2 *International Journal of Constitutional Law* 380.

11. See Article 15 of the 1950 Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms - ECHR (as amended by Protocols Nos. 11, 14 and 15, ETS No. 5), Article 30 of the European Social Charter - ESC (ETS No. 35), Article 4 of the 1966 International Covenant on Civil and Political Rights - ICCPR (United Nations Treaty Series, 999, 171), Article 27 of the 1969 American Convention on Human Rights - ACHR (OAS Treaty Series No. 36).

12. Austria (N. Atanassov, H. Dalli, C. Dumbrava, G. Eckert, U. Jurviste, A. Radjenovic, S. Voronova, *States of emergency in response to the coronavirus crisis: Situation in certain Member States II*, Briefing, EPRS, European Parliament, May 2020, 2); Belgium (K. Binder, M. D. Crego, G. Eckert, S. Kotanidis, R. Manko and M. Del Monte, *States of emergency in response to the coronavirus crisis: Situation in certain Member States, Briefing*, EPRS, European Parliament, April 2020, 2); Denmark (N. Bentzen, A. Boström, M. Del Monte, I. Odink, M. Prpic, M. Tuominen, *States of emergency in response to the coronavirus crisis: Situation in certain Member States III*, Briefing, EPRS, European Parliament, June 2020, 3).

13. Maria Diaz Crego and Silvia Kotanidis, “States of emergency in response to the coronavirus crisis. Normative response and parliamentary oversight in EU Member States during the first wave of the pandemic” (EPRS, European Parliament, December 2020) 17.

14. Venice Commission, Observatory on emergency situations <<https://www.venice.coe.int/files/EmergencyPowersObservatory//T04-E.htm>> accessed 28 January 2024.

proclamation of states of emergency are “time of war or other public emergency threatening the life of the nation” (Article 30.1 ESC), and “time of war, public danger, or other emergency that threatens the independence or security of a State Party” (Article 27.1 ACHR). The report prepared for the European Parliament analysis of the constitutional clauses on states of emergency in 24 EU member states identified the following threats justifying the introduction of a state of emergency:

- i) external threat in the form of war (also often referred to as state of siege); ii) internal threat consisting of situations that endanger the democratic endurance of the state function, insurrection or internal state of tension; and iii) external natural events, such as natural disasters, catastrophes.¹⁵

Some of these countries provide for different states of emergency at the constitutional level in each of these emergency cases, and others in only selected ones. In the light of the cited report, the possibility of declaring a state of emergency due to a health threat derives from the relevant constitutional clauses of the 17 EU member states. These include both Poland and Hungary.¹⁶

The scale and nature of the threat posed by COVID-19 *prima facie* appears to have justified the declaration of a state of emergency.¹⁷ However, the decision on whether or not to proclaim a state of emergency in relation to COVID-19 was, of course, a result of specific legal circumstances and political decisions taken at the level of individual states. During the first wave of the pandemic, among those 17 member states with constitutional clauses that could apply to a health-related state of emergency, 10 of them decided to do so. Among them was Hungary. Poland, like several other countries, did not do so either in the first wave or during the subsequent course of the pandemic.¹⁸

State of emergency in Hungarian law

The Hungarian Fundamental Law permits the introduction of a *special legal order* in extraordinary situations. At the time of the outbreak of the pandemic, this special legal order included six instances.¹⁹ In Hungary, the COVID-19 pandemic resulted in the intro-

15. Ibid. 18

16. Ibid. 8-21

17. With all its potential risks and dangers (e.g. excessive human rights infringements, the weakening of democratic institutions in favour of the executive, the opportunity for “political self-entrenchment” of the executive) - see e.g. Antonios Kouroutakis, “Abuse of Power and Self-entrenchment as a State Response to the COVID-19 Outbreak: The Role of Parliaments, Courts and the People” in Matthias C. Kettmann and Konrad Lachmayer (eds), *Pandemocracy in Europe. Power, Parliaments and People in Times of COVID-19* (Hart, 2022) 34-35.

18. An overview of the various decisions on COVID-related states of emergency (not only EU countries, as the survey covered 74 countries) was published as part of a symposium hosted by Verfassungblog and Democracy Reporting International - see: Joelle Grogan, “Introduction & List of Country Reports” (VerfBlog, 6 April 2020) < <https://verfassungsblog.de/introduction-list-of-country-reports/> > accessed 28 January 2024.

19. State of exception (in case of international conflict); state of emergency (in the event of internal

duction of a *state of danger* for the entire territory of Hungary. The state of danger was declared throughout Hungary based on the argument that the coronavirus pandemic was a “mass epidemic threatening the safety of life”.²⁰ At the outbreak of the pandemic, the state of danger was defined as follows:

State of danger (Article 53) (*veszélyhelyzet*)

(1) In the event of a natural disaster or industrial accident²¹ endangering life and property, or in order to mitigate its consequences, the Government shall declare a state of danger, and may introduce extraordinary measures laid down in a cardinal Act.

During a state of danger, the government may adopt decrees, suspend the application of certain acts, derogate from the provisions of acts and take other extraordinary measures. Governmental decrees shall remain in force for 15 days.²² Upon the termination of the state of danger, governmental decrees shall cease to have effect. During the pandemic, the definition of state of danger was modified²³ to include “a serious incident endangering life and property” which broadened the scope of application in case of unforeseen events. In response to the full-scale invasion of Ukraine, the state of danger was once again modified to include “the event of an armed conflict, war situation or humanitarian catastrophe in a neighbouring country²⁴”.

There are further provisions of the Fundamental Law that apply to special legal order²⁵:

Article 52 (2) states that during the period of special legal order, the exercise of fundamental rights, except for the fundamental rights provided for in Articles II and III, and Article XXVIII (2) to (6), may be suspended, or may be restricted beyond the extent specified in Article I (3).²⁶

The Hungarian Fundamental Law also states that:

unrest or civil war); state of preventive defence (in the event of a threat of war before the declaration of a state of emergency); terrorist threat, unexpected external attack (which by its nature does not need to be declared); and state of danger (in the event of a natural or industrial disaster).

20. Government Decree 40/2020 (III.11) on the declaration of state of danger.

21. The situations which may fall into these two categories are defined in Article 44 of the Act CXXVIII of 2011.

22. Unless the Government, on the basis of authorisation by the National Assembly, extends those decrees. (Article 53 (3)).

23. The scope of the special legal order was modified by the Ninth and Tenth Amendments of the Fundamental Law. For an overview, see: Marcell Fényes, Lili Gönczi, Natália Velez, János Pribelszki, Milán Tamás Kis-Bakos and Kata Budai, “The Transformation of Special Legal Regimes in Hungary in the Light of Crises” (2023) 70 *Annales Universitatis Mariae Curie-Skłodowska. Sectio G. Ius* 71.

24. Tenth Amendment of the Fundamental Law of Hungary.

25. Further provisions apply to the state of war and the state of emergency, listed under the section of the Fundamental Law “Common rules for state of war and state of emergency”. These include: the National Assembly cannot be dissolved, the operation of the Constitutional Court may not be restricted, no general elections may be held. The Fundamental Law also states that no national referendum may be held on the declaration, extension and termination of state of emergency (Article 8 (h)); however, no such provision is included regarding the state of danger.

26. Article I (3) states that a fundamental right may only be restricted to allow the effective use of another fundamental right or to protect a constitutional value, to the extent absolutely necessary, proportionate to the objective pursued and with full respect for the essential content of that fundamental right.

(1) The functioning of the Hungarian State shall be based on the principle of the division of powers.

(2) No one shall act with the aim of acquiring or exercising power by force, and of exclusively possessing it. Everyone shall have the right and obligation to resist such attempts in a lawful way (Article C, (1); (2)).

State of emergency in Polish law

An entire, detailed chapter of the Polish Constitution (Chapter XI Extraordinary Measures, Articles 228-234) is dedicated to states of emergency. Its comprehensiveness is not accidental. The drafters of the 1997 Constitution largely not only had vivid memories of martial law, introduced in December 1981 in communist Poland, but many were directly affected by this illegal decision.²⁷ There are three different “extraordinary measures” to be declared and introduced “[i]n situations of particular danger, if ordinary constitutional measures are inadequate” (Article 228(1)):

- martial law (Article 229)
- a state of emergency (Article 230), and
- a state of natural disaster (Article 232).

The last of these three measures seems to be the most relevant for health emergencies. Article 232 stipulates that “[i]n order to prevent or remove the consequences of a natural catastrophe or a technological accident exhibiting characteristics of a natural disaster, the Council of Ministers may introduce, for a definite period no longer than 30 days, a state of natural disaster in a part of or upon the whole territory of the State. An extension of a state of natural disaster may be made with the consent of the Sejm”. It is noted that the “essence of a state of emergency as a constitutional institution is a legal, based on the Constitution, limited in time, withdrawal from the normal legal order in the state to save a legally protected good”.²⁸

This provision already contains both the first limitations and references to the relevant procedure that should take place. The full procedural framework, as well as the consequences of the introduction of the various “extraordinary measures”, can be derived from the other provisions of this chapter of the constitution. They differ depending on

27. The illegality of the martial law decree of 12 December 1981 was symbolically confirmed 30 years later by the Constitutional Tribunal (acting at the time in a legal and legitimate formation) - Judgement of 16 March 2011, Case No. K 35/18, Journal of Laws of the Republic of Poland 2011, No. 64, item 342. For the background and the immediate consequences of the 1981 martial law decree, see: Andrzej Paczkowski and Malcolm Byrne, *From Solidarity to Martial Law. The Polish Crisis of 1980-1981* (Central European University Press, 2007).

28. Krzysztof Eckhardt, “Constitutional Grounds for Introducing the State of Emergency. Comments in the Light of Threats Caused by the War in Ukraine, the Polish-Belarusian Border Crisis and the Covid-19 Pandemic” (2022) 4 *Przełąd Prawa Konstytucyjnego* 353.

which measure is introduced. All these measures, however, “may be introduced only by regulation, issued upon the basis of statute, and which shall additionally require to be publicized” (Article 228(2)). How the authorities operate in the case of introduction of these measures, as well as the limitations to the rights and freedoms of persons under their jurisdiction, shall be established by statute (Article 228(3)). Another important limitation derived from these provisions is the explicit reference that all the actions undertaken after the introduction of one of these extraordinary measures “shall be proportionate to the degree of threat and shall be intended to achieve the swiftest restoration of conditions allowing for the normal functioning” (Article 228(5)). Particularly important considering the subject of this paper are these two provisions of Article 228:

6. During a period of introduction of extraordinary measures, the following shall not be subject to change: the Constitution, the Acts on Elections to the Sejm, the Senate and organs of local self-governments, the Act on Elections to the Presidency, as well as statutes on extraordinary measures.

7. During a period of introduction of extraordinary measures, as well as within the period of 90 days following its termination, the term of office of the Sejm may not be shortened, nor may a nationwide referendum, nor elections to the Sejm, Senate, organs of local self-government nor elections for the Presidency be held, and the term of office of such organs shall be appropriately prolonged. Elections to organs of local self-government shall be possible only in those places where the extraordinary measures have not been introduced.

The introduction of any of these “extraordinary measures” therefore prevents the holding of elections, as well as changes to electoral law, during a certain period.

It is also worth citing the provision that sets out the basic legal framework for the possible limitation of individual rights and freedoms, in the event of the introduction of a state of natural disaster (Article 233(3)):

The statute specifying the scope of limitation of the freedoms and rights of persons and citizens during states of natural disasters may limit the freedoms and rights specified in 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).

In the case of a state of natural disaster, the extent of permissible limitations on rights and freedoms, compared with the two other extraordinary measures, is the narrowest. The constitution requires statutory regulation of each state of emergency. For the state of natural disaster, it is the 2002 statute.²⁹ According to its Article 1, this defines “the

29. Ustawa z dnia 18 kwietnia 2002 r. o stanie klęski żywiołowej [The Act of 18 April 2002 on the state of

procedure for the introduction and lifting of the state of natural disaster, as well as the rules of action of public authorities and the scope of restrictions on individual rights and freedoms of man and citizen during the state of natural disaster”, including providing for criminal sanctions for violations of the introduced rules. The statute also defines the term “natural catastrophe”, which is the term used in the constitutional definition, indicating that it is “an event associated with forces of nature, in particular (...) the mass occurrence (...) of infectious diseases of humans (...)” - Article 3(1), para. 1. Considering the above, this would appear to be the optimal legal framework for efforts to combat and prevent the COVID-19 pandemic.

In the end, however, none of the “constitutional” states of emergency listed above was introduced, which would have opened the way for a temporary “derogation” of selected human rights. It was decided to remain in the statutory regime, and this despite - as it soon became apparent - the introduction of far-reaching restrictions on human rights. This was based on both the laws already in force (*the Act on the prevention and control of human infectious diseases and infections - Infectious Diseases Act*)³⁰ and the one adopted specifically in connection with COVID-19, *the Act on special arrangements for the prevention, counteraction and control of COVID-19, other infectious diseases and emergencies caused by them - COVID-19 Act*.³¹

Interestingly, the 2008 Infectious Diseases Act provides for the possibility of introducing a state of epidemic threat or a state of an epidemic outbreak, which Jakub Jaraczewski has aptly described as “mini-states of emergency”.³² The Act stipulates the terms and procedures for preventing and combating infections and infectious diseases in humans, including the duties of state authorities and the duties of individuals who are in Poland during one of the above-mentioned emergencies. It also contains an authorisation for the health minister to adopt detailed measures in the form of a regulation. On the other hand, the COVID-19 Act, which was already adopted on 2 March 2020, was planned as a form of *lex specialis* to the 2008 Infectious Disease Act. This is confirmed, in fact, by its Article 1(2), indicating that, to the extent not regulated by it, the 2008 act shall apply. The act was amended several times during the COVID pandemic - 17 times in 2020 alone. These two laws, as well as numerous regulations of the minister of health, issued under the authorisation in the Infectious Diseases Act, provided the basic legal

natural disasters], Journal of Laws of the Republic of Poland, 2017, item 1897.

30. Ustawa z dnia 5 grudnia 2008 r. o zapobieganiu oraz zwalczaniu zakażeń i chorób zakaźnych u ludzi [The Act of 5 December 2008 on preventing and combating infections and infectious diseases in humans], Journal of Laws of the Republic of Poland, 2008, No. 234, item 1570, as amended.

31. 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 [The Act on special arrangements for the prevention, counteraction and control of COVID-19, other infectious diseases and emergencies caused by them], Journal of Laws of the Republic of Poland, 2020, item 374, as amended.

32. Jakub Jaraczewski, “An Emergency by Any Other Name? Measures Against the COVID-19 Pandemic in Poland” (VerfBlog, 24 April 2020) <<https://verfassungsblog.de/an-emergency-by-any-other-name-measures-against-the-covid-19-pandemic-in-poland/>> accessed 15 March 2024.

framework for the introduction of special measures, in connection with COVID-19.

The use and non-use of the state of emergency in Hungary and Poland during COVID-19

This part of the report investigates the way the state of emergency was used by ruling parties in Poland and Hungary during the COVID-19 pandemic. As signalised above, although both cases are often compared due to the shape of the political system and the degree of democratic backsliding, the domestic situation at the outbreak of the pandemic varied and strongly influenced the introduction (or not) of the state of emergency.

The political, social, and legal situation in Hungary at the outbreak of the pandemic

Beginning in 2010, the Orbán government introduced steps to restrict the system of checks and balances, which was made possible by their two-thirds majority rule. The change to the constitution and the judiciary reforms raised concerns both in Hungary and at the EU level.³³ Since 2011, the Venice Commission has issued reports about the state of the rule of law in Hungary,³⁴ but they seem to have little impact in practice. As Andrea Schmidt notes, Orbán's tactic was to push the boundaries, wait for a response from EU structures, take a step back, and then push the boundaries again - and thus manage to continue receiving EU subsidies.³⁵ The economic recovery and the inflow of EU funds to Hungary resulted in a rise in living standards and created favourable conditions for Fidesz. In 2014, Fidesz-KDNP once again secured a two-thirds majority (68.83% of seats), despite having only 45% of the votes, a fifth less than in the previous elections. This result was achieved due to a modified electoral law, amended electoral constituencies (gerrymandering), a compensation system favouring the winning party during the elections, votes from Hungarian minorities abroad, the high number of fake parties, government control over media outlets, and unequal financial resources.³⁶

33. Gábor Halmai, "Unconstitutional Constitutional Amendments: Constitutional Courts as Guardians of the Constitution?" (2012) 19 *Constellations* 182; Tímea Drinóczi and Agnieszka Bień-Kacała, "Extra-Legal Particularities and Illiberal Constitutionalism - The Case of Hungary and Poland" (2018) 59 *Hungarian Journal of Legal Studies* 338; Nóra Chronowski, "The Post-2010 'Democratic Rule of Law' Practice of the Hungarian Constitutional Court under a Rule by Law Governance" (2021) 61 *Hungarian Journal of Legal Studies* 136

34. Including concerns about the Fundamental Law and its amendments, the restriction of certain rights of the Constitutional Court, and the judiciary reform.

35. Schmidt Andrea, "Challenges of the Illiberal Democracy in Hungary. Some Aspects to the 2018 Elections" (2018) 6 *Polish Political Science Review* 70, 79.

36. *Ibid.* See the same study for the sociological reasons behind Fidesz's support. See also: András Bíró-Nagy, "Illiberal Democracy in Hungary: The Social Background and Practical Steps of Building an Illiberal

In a famous speech from 2014, Orbán declared that his model for Hungary was to become an “illiberal democracy”, guided by “national interest”.³⁷ The refugee crisis of 2015 brought further worsening of Hungary’s relations with the EU. The Hungarian government strongly opposed the EU proposal on the relocation of asylum seekers, labelling it an “obligatory relocation quota” forced on Hungary by Brussels. The political and media discourse was dominated by anti-EU, anti-NGO, and anti-migration rhetoric.³⁸ “National consultations” and billboard campaigns were launched, starting with the referendum on “migration and terrorism”, accompanied by the infamous anti-Soros³⁹ and “Let’s Stop Brussels” anti-EU billboard campaigns.⁴⁰ The “national consultation” is a commonly utilised tool by the Hungarian government to uphold democratic legitimacy, asking the “will of the people”, which is an important part of their populist strategy.⁴¹ However, the questionnaires operate with biased and manipulative questions, serving rather to spread manipulative messages in line with Fidesz campaigns than to receive feedback from citizens.⁴²

The 2018 elections delivered the third Fidesz-KDNP supermajority,⁴³ further centralisation of the media, and increasing pressure on academic autonomy and freedom (such as the ban of gender studies, stripping the autonomous status of the Hungarian Academy of Sciences, and the expulsion of Central European University).⁴⁴ Another target was civil society organisations (NGOs). The so-called STOP SOROS legislation was adopted, targeting NGOs with foreign funding and authorising the minister of the interior to ban certain NGOs in case of national security risks. The Hungarian government responded

State” (2017) Illiberal democracies in the EU: The Visegrad Group and the risk of disintegration, CIDOB 31.

37. Prime Minister’s Office, “Prime Minister Viktor Orbán’s Speech at the 25th Bálványos Summer Free University and Student Camp” (30 July 2014) <<https://2015-2019.kormany.hu/en/the-prime-minister/the-prime-minister-s-speeches/prime-minister-viktor-orban-s-speech-at-the-25th-balvanyos-summer-free-university-and-student-camp>> accessed 17 February 2023.

38. Robert Csehi and Edit Zgut, “‘We Won’t Let Brussels Dictate Us’: Eurosceptic Populism in Hungary and Poland” (2021) 22 *European Politics and Society* 53

39. George Soros is a Hungarian-born billionaire and the founder of the Open Society Network. From the refugee crisis in 2015 onwards, Soros became the main enemy figure in the Hungarian government’s communications.

40. Ákos Bocskor, “Anti-Immigration Discourses in Hungary during the ‘Crisis’ Year: The Orbán Government’s ‘National Consultation’ Campaign of 2015” (2018) 52 *Sociology* 551.

41. Kriszta Kovács and Gábor Attila Tóth, “The pretence of democratic procedures in Hungary” (Let Law Rule, no date) <<https://letlawrule.org/kompendium/the-pretence-of-democratic-procedures-in-hungary/>> accessed 17 February 2023.

42. Agnes Batory and Sara Svensson, “The Use and Abuse of Participatory Governance by Populist Governments” (2019) 47 *Policy & Politics* 227; Zoltán Tibor Pállinger, “Referendums and ‘National Consultations’ in Hungary” in Ellen Bos and Astrid Lorenz (eds), *Politics and Society in Hungary* (Springer. 2023).

43. International and internal observers both concluded that the system favours the governing party, and that the elections were free, but access to information as well as media freedoms were restricted. E.g. OSCE, ODIHR, “Hungary, Parliamentary Elections, 8 April 2018: Final Report” (27 June 2018) <<https://www.osce.org/odihr/elections/hungary/385959>> accessed 17 February 2024.

44. Zsolt Enyedi, “Democratic Backsliding and Academic Freedom in Hungary” (2018) 16 *Perspectives on Politics* 1067; Gábor Halmai, “The End of Academic Freedom in Hungary” *Droit & Société* (26 March 2019) <<https://ds.hypotheses.org/6368>> accessed 17 February 2024.

that the act on civil society organisations followed the Russian and Israeli examples.⁴⁵

The Fundamental Law was modified (for the seventh time since 2011) to state that persons arriving from a “safe third country” should not be entitled to asylum. Additionally, the Hungarian parliament adopted an amendment to the tax law to create a special tax on migration-related activities. The Venice Commission stated that the legislation was not compliant with international human rights laws. The attacks on academic freedom and civil society resulted in mass protests in Budapest.

Observing the Hungarian developments, the Committee on Civil Liberties, Justice and Home Affairs (LIBE) of the European Parliament (EP) commissioned a report about the state of democracy and rule of law in Hungary. The report, compiled by MEP Judith Sargentini, found non-compliance with EU norms on issues such as the constitutional and electoral system; the independence of the judiciary; corruption; privacy and data protection; freedom of expression; academic independence; freedom of religion and association; the right to equal treatment; the rights of minorities, migrants, asylum seekers and refugees; and the abolition of economic and social rights.⁴⁶ In September 2018, based on the Sargentini Report, the EP voted with a two-thirds majority in favour of triggering Article 7 of the Treaty on European Union.⁴⁷ In 2019, the National Audit Bureau imposed severe fines on the opposition parties.⁴⁸ The municipal elections in November 2019 were the last elections before the pandemic. The success of the opposition in these elections (including the election of Gergely Karácsony as mayor of Budapest) challenged Fidesz’s perceived invincibility. In January 2020, the European Parliament voted to continue the Article 7 proceedings launched against Hungary and Poland, as neither of the countries had taken meaningful steps to improve the state of the rule of law.⁴⁹

As illustrated above, at the onset of the pandemic in January 2020, Hungary was characterised by significantly weakened checks and balances, governmental control over state media, and the ongoing Article 7 procedure. By 2020, Freedom House categorised Hungary as “partly free”,⁵⁰ and the Varieties of Democracy Project (V-DEM) labelled the

45. For details, see: Viktor Glied and Łukasz Zamecki, “Article 7 Process and Democratic Backsliding of Hungary and Poland. Democracy and the Rule of Law” (2020) 34 Online Journal Modelling the New Europe 57.

46. European Parliament, “Rule of law in Hungary: Parliament calls on the EU to act” (12 September 2018) <<https://www.europarl.europa.eu/news/en/press-room/20180906IPR12104/rule-of-law-in-hungary-parliament-calls-on-the-eu-to-act>> accessed 17 February 2023.

47. Article 7 outlines a process that empowers the European Council to suspend specific rights of a member state if it is determined to breach the democratic governance principles and fundamental values, such as democracy, the rule of law or respect for human rights, stated in Article 2.

48. Daniel Kovarek and Levente Littvay, “Greater than the sum of its part(ie)s: opposition comeback in the 2019 Hungarian local elections” (2022) 38 East European Politics 382.

49. In total, 446 MEPs voted for the proposal, 178 rejected it, and 41 were absent.

50. Freedom House, “Freedom in the World 2020 - Hungary” <<https://freedomhouse.org/country/hungary/freedom-world/2020>> accessed 17 February 2023.

country an electoral autocracy.⁵¹ In this context, the following section will analyse the Hungarian government's crisis response to the COVID-19 pandemic.

Introduction of the state of emergency in Hungary

On 11 March 2020, the Hungarian government declared a state of danger in the entire country,⁵² with an automatic sunset provision of 15 days⁵³ based on the special legal order outlined in the Fundamental Law.⁵⁴ The announcement of the state of danger was the first country-wide special legal order in Hungary since 1989. It is important to note, however, that a “quasi-emergency regime”, the “state of crisis due to mass migration”, was already in effect in Hungary before the pandemic.⁵⁵ On 1 March, Hungary suspended access to border transit areas for asylum seekers indefinitely, referring to the risks related to the spread of COVID-19 and aiming at establishing a link between migration and spread of the virus.⁵⁶ Although other countries (Greece, Cyprus) introduced similar measures, they did so with a temporal limit.

In March 2020, the Hungarian government presented the Act on Protecting against the Coronavirus,⁵⁷ which in the public discourse soon became referred to as the Enabling Act. This act enables the government to use emergency powers in order to guarantee “the safety of life and health, personal safety, the safety of assets and legal certainty as well as the stability of the national economy” and also grants it power to “suspend the enforcement of certain laws, depart from statutory regulations and implement additional extraordinary measures by decree” which are not permitted under regular legal order.⁵⁸ The act allowed for an open-ended⁵⁹ state of danger, granting Prime Minister Viktor Orbán the authority to rule by government decrees. Under the Fundamental Law, decrees issued during a state of danger automatically elapse after

51. V-DEM Institute, “Democracy Report 2020” <<https://www.v-dem.net/publications/democracy-reports/>> accessed 17 February 2023.

52. Government Decree 40/2020 (III. 11).

53. If not extended by parliamentary authorisation.

54. While a human pandemic was not specifically listed under the reasons to declare the state of danger, such an event is specified under the Act on Disaster Management (2011).

55. In 2015, the Hungarian government (alone in the EU) declared a so-called “state of crisis due to mass migration”. The state of crisis is not a mode of emergency governance under the special legal order of the Fundamental Law, and allowed, among others, for the unlimited detention of asylum seekers at border camps. It was introduced by the Fidesz government in a governmental decree (41/2016 (III. 9) and extended nine times, currently in effect until 7 September 2024.

56. Lillo Montalto Monella and Rita Palfi, “Orban uses coronavirus as excuse to suspend asylum rights in Hungary” Euronews (3 March 2020) <<https://www.euronews.com/2020/03/03/orban-uses-coronavirus-as-excuse-to-suspend-asylum-rights-in-hungary>> accessed 17 February 2023.

57. 2020. évi XII. Törvény a koronavírus elleni védekezésről.

58. Ibid.

59. The Fundamental Law allows the government to govern by decree, but this is severely limited in time: decrees are only valid beyond 15 days if the parliament authorises the government to extend them before the 15 days expire. The Enabling Act removes these constitutional restrictions. It is up to the government to decide when the state of danger is over.

15 days, unless renewed by the parliament. With the adoption of the Enabling Act (30 March 2020),⁶⁰ the parliament delegated its power to renew decrees to the government, for the duration of the state of danger,⁶¹ hollowing out the role of the parliament and the opposition in overseeing government actions. Although parliament has (had) the authority to annul the legislation, the governing parties' two-thirds majority negate any effective check on executive power. While the Constitutional Court remained operational, given the appointment of judges aligned with the government, the institution fails to offer authentic oversight.⁶²

The Enabling Act met with harsh criticism from the Hungarian opposition and civil society.⁶³ The opposition demanded the implementation of essential constitutional safeguards, such as the inclusion of a sunset clause, a precisely delineated mandate, and easy access to and expedited processing of in-merit decisions by the Constitutional Court. However, parliament ignored these proposed amendments. More than 110,000 people signed a petition protesting the Enabling Act,⁶⁴ and an online demonstration was held one day before the vote. The Enabling Act also encountered severe criticism from several international institutions.⁶⁵ European People's Party (EPP) members urged the group to expel Fidesz. Orbán's response to criticism was "With all due respect, I have no time for this".⁶⁶

The state of danger due to the epidemiological situation was announced on 11 March 2020,⁶⁷ lasting until 18 June 2020. It was introduced for the second time for the same reason on 4 November 2020,⁶⁸ with a planned termination on 8 February 2021.⁶⁹ However, the government considered that the ongoing state of the epidemic prevented its conclusion. Consequently, after multiple extensions, the state of danger due to the epidemiological situation remained in effect until 1 June 2022.⁷⁰ All these periods were

60. The adoption of the legislation was supported by Fidesz, KDNP, and Mi Hazánk (Our Homeland)

61. The original state of danger in the Hungarian legal framework remains effective until the government revokes it, initially relying on decrees that automatically expire after 15 days unless extended by the parliament. The Orbán government proposed a bill to bypass the 15-day limit and implement additional special measures, arguing that this condition might impede the virus-fighting efforts.

62. Zsuzsanna Végh, "No more red lines left to cross: The Hungarian government's emergency measures" *European Power* (2 April 2020) <https://ecfr.eu/article/commentary_no_more_red_lines_left_to_cross_the_hungarian_governments_emerge/> accessed 17 February 2023.

63. See e.g. the reports of the Hungarian Helsinki Committee, available on their website.

64. SzabadaHang, "Tiltakozunk a felhatalmazási törvény elfogadása ellen!" (22 March 2020) <<https://szabadahang.hu/petitions/tiltakozunk-a-felhatalmazasi-torveny-elfogadasa-ellen>> accessed 17 February 2023.

65. The organisations raising concerns about the Enabling Act include: the OSCE-ODIHR, the UNHCHR, and the LIBE of the EP, the European Commission, the Council of Europe, the UN High Commissioner for Human Rights, the US Helsinki Commission, and several EU member states.

66. Euroactiv, "Orban has 'no time' for EU allies' criticism" *Euroactiv* (3 April 2020) <<https://www.euroactiv.com/section/future-eu/news/orban-has-no-time-for-eu-allies-criticism/>> accessed 18 February 2023.

67. Government Decree 40/2020 (III. 11).

68. Government Decree 478/2020 (XI. 3); Government Decree 479/2020 (XI. 3).

69. Government Decree 27/2021.

70. From 25 May 2022, a state of danger was in effect due to the full-scale Russian invasion of Ukraine.

accompanied by governmental decrees, granting the executive extraordinary powers.⁷¹ From June 2022, when the state of danger was no longer in effect, the government introduced a new quasi-emergency situation, “the state of medical emergency”⁷² based on the concept of “medical disaster” laid out in the Health Act and its amendment.⁷³ This state of medical emergency restored the government’s power to rule by decree, with a broader scope of what counts as legitimate emergency use.⁷⁴ As Halmai, Mészáros and Scheppele point out:

With this newly minted “state of medical emergency,” the government extends an unconstitutional practice that started with the “state of migration emergency” in 2015. Never-ending emergency arrangements are now being built into ordinary law so that they can evade the checks and balances that accompany states of emergency regulated under a constitutional rubric.⁷⁵

As the Hungarian Helsinki Committee underlines, since the state of medical emergency is not a special legal order, restrictions outlined in the Fundamental Law do not apply to decrees adopted under the state of medical emergency. Civil rights organisations the Hungarian Helsinki Committee, the Hungarian Civil Liberties Union, and Amnesty International Hungary issued a joint statement voicing their concerns.⁷⁶

During the first year of the pandemic, several hundred decrees were issued by the government. Some were aimed at tackling the pandemic (including the closure of borders, mandatory mask wearing, curfew regulations, limiting mass events). At the same time, several decrees aimed to strengthen the executive power and weaken the political opposition. A governmental decree adopted in April 2020 established two pandemic-related funds, allocating money for different purposes. This resulted in halving the budgetary support for political parties, which impacts the opposition disproportionately compared to Fidesz, whose resources are hard to distinguish from government resources.⁷⁷ Another decree targeted municipalities (after the electoral gains of the opposition

71. The first Enabling Act (Act XII of 2020) granted unlimited decree governance, and was repealed on 18 June 2020. The subsequent laws (Act CIX of 2020; Act I of 2021) imposed time restrictions and provided the government with special powers for 90 days.

72. Not to be confused with the state of emergency as in the Fundamental Law.

73. The new emergency can be proposed by the chief medical officer (appointed directly by the government), who advises the government that a health emergency requires exceptional measures. The government can declare a medical emergency without consultation with the parliament, and the parliament holds no veto power. The state of medical emergency can be declared for six months, but can be renewed by the government. For an analysis of the state of medical emergency, see: Gábor Halmai and Gábor Mészáros, Kim Lane Scheppele, “From Emergency to Disaster: How Hungary’s Second Pandemic Emergency will Further Destroy the Rule of Law” (VerfBlog, 30 May 2020) <<https://verfassungsblog.de/from-emergency-to-disaster/>> accessed 18 February 2023.

74. Ibid.

75. Ibid.

76. Hungarian Helsinki Committee, Hungarian Civil Liberties Union and Amnesty International Hungary. *Never-ending story?* (27 May 2020) <<https://helsinki.hu/en/never-ending-story/>> accessed 18 February 2023.

77. Márta Pardavi and András Kádár, “Hungary Should Not Become Patient Zero: What can be done about indefinite rule-by-decree power-grabs?” (*Just Security*, 22 April 2020) <<https://www.justsecurity.org/69780/hungary-should-not-become-patient-zero/>> accessed 18 February 2024.

in the 2019 municipal elections) by banning parking fees and re-allocating tax revenues. Opposition-led Budapest was once again disproportionately hit. Other decrees also had nothing to do with the pandemic, addressing polarising political issues such as limiting trans persons' access to name change.⁷⁸ A decree banning referendums obstructed planned local referendums on investments with harmful environmental impact, as well as planned national referendums by the opposition on the controversial case of the Fudan University campus in Budapest.⁷⁹

One of the most restrictive measures introduced in November 2020 was the complete ban on assembly. This came at a moment when mass-protests⁸⁰ were being held against the change in the model of higher education, that would place universities under public foundations whose boards are filled with government-close figures.⁸¹ This also limited the ways people could protest against government decrees or emergency measures. It resulted in fines being issued also for demonstrations which did not constitute a health risk, such as people protesting alone in their cars.⁸² The right to protest and scrutinise the government's activity was de facto non-existent. Despite this, then Minister of Justice, Judit Varga, sought to reassure critics that since the Constitutional Court was operating, it could check on the government's power. However, as Scheppele and Halmai point out:

Under the rules since 2012, individuals have to show that they have been concretely harmed by a legal norm, and they have to start in the ordinary courts, only appealing to the Constitutional Court when they have not had their rights vindicated in the lower courts. According to the Act on the Constitutional Court, a successful challenge to the constitutionality of a legal norm requires a "direct involvement" of the complainant claiming the violation of his/her rights by one of the decrees.⁸³

Several analyses have been published on the Enabling Act and its impact on the political system and society.⁸⁴ In the next pages, this report focuses on one of the areas which

78. See e.g. Petra Guasti, "The Impact of the COVID-19 Pandemic in Central and Eastern Europe: The Rise of Autocracy and Democratic Resilience" (2020) 7 *Democratic Theory* 47.

79. Government Decree 438/2021 (VII. 21)

80. Radio Free Europe/ Radio Liberty, "Thousands Rally In Budapest To Protect Arts University" *RFE/RL* (23 October 2020) <<https://www.rferl.org/a/thousands-rally-in-budapest-for-autonomous-arts-university/30909496.html>>

81. See e.g. Josh Satre et al. "Hungary: Demonstrations for Academic Freedom", *Political Disorder in Europe: 10 Cases from Aced's New Expansion*, Elliott Bynum et al. (eds), Armed Conflict Location & Event Data Project (2021).

82. Balázs Cseke, "A Helsinki szerint a rendőrség helytelenül járt el, amikor megbüntette a dudáló tüntetőket" *Index* (10 June 2020) <https://index.hu/belfold/2020/06/10/rendorseg_dudalas_magyar_helsinki_bizottsag_velemenynyilvanitas_kresz/> accessed 18 February 2023.

83. Gábor Halmai and Kim Lane Scheppele, "Orbán is Still the Sole Judge of his Own Law" (*VerfBlog*, 30 April 2020) <<https://verfassungsblog.de/orban-is-still-the-sole-judge-of-his-own-law/>> accessed 18 February 2024.

84. See e.g. Zoltán Ádám, "Ultra-orthodoxy and selective voluntarism: How did the Orbán regime react to the first wave of the pandemic?" (2020) 6 *European Policy Analysis* 277., and other articles cited in this report.

was impacted by the special legal regime during the COVID-19 pandemic, the access to information.

The accessibility and freedom of information during a pandemic is a highly sensitive issue. The situation of freedom of information is specific in that data such as the spread of the epidemic, infection and mortality rates, outbreak hotspots, information about vaccines and credible information on government measures to combat the epidemic are not simply data of public interest, but are in fact prerequisites for public confidence in the fight against the epidemic.⁸⁵ Even before the pandemic, Fidesz had significant control over Hungary's media landscape, via business figures with close ties to the government, controlling the majority of commercial radio stations, numerous daily and weekly newspapers (print and online), and the majority of public billboards.⁸⁶ The state of danger (and governing by decree) however, granted the government further authority to restrict information concerning the handling of the virus.

As concerning news about the COVID-19 pandemic became increasingly frequent, the government set up an Operational Group on 31 January 2020, to monitor the epidemiological situation, coordinate actions related to the pandemic, and inform the public, through daily live transmitted information sessions. Journalists could only ask questions sent by email beforehand, and independent media outlets complained that their questions remained unanswered. Journalists were only allowed to enter hospitals with ministerial permission, and interviews about the state of the pandemic were only given on special occasions (Operational Group and government information sessions). Hospitals banned taking photos and videos, and medical personnel were not available to give interviews to independent media.⁸⁷

The situation was similar during government information sessions which journalists could attend. As a case reported by Index illustrates, when a journalist tried to ask for clarification on the Covid testing protocol, the government representative answered, "You do not need clarification [on the protocol], the experts need to know the protocol, and they act in accordance with the rules given for each case and location". After the reporter complained that journalists were only allowed a single question each and received no answers, he was told to pass on the microphone. The next question was about the suggestions of the Hungarian Medical Chamber, which warned about deficiencies in protective equipment for medical staff and called for stricter restrictions. In his response, Kovács said that the government's coronavirus task force had repeatedly

85. Nóra Bán-Forgács, "Információszabadság és Covid Magyarországon" (2021) MTA Law Working Papers 2021/30.

86. Gábor Polyák, "Media in Hungary: Three pillars of an illiberal democracy" in Eva Polońska and Charlie Beckett (eds), *Public Service Broadcasting and Media Systems in Troubled European Democracies* (Springer 2019).

87. Ádám Magyar, "Fontos járványügyi adatokat titkol el a magyar kormány a lakosság előtt", Euronews) 16 March 2021) <<https://hu.euronews.com/2021/03/16/fontos-jarvanyugyi-adatokat-titkol-el-a-magyar-kormany-a-lakossag-elol>> accessed 18 February 2024.

examined the Chamber's suggestions, but considered them to be a "political stunt", claiming that there was "no need for anybody to try to gain political advantages in the current situation".⁸⁸ The above case illustrates how information concerning pandemic prevention became politicised.

As scholars note, during the pandemic, the government did not exhibit hostility towards medical expertise, and the implemented precautionary measures partially curtailed the spread of the disease.⁸⁹ However, significant lacks in government communication and the availability of pandemic-related data were noted. Bán-Forgács summarises the three most significant problems in the context of COVID-19 and freedom of information in Hungary. First, the lack of available regional and territorial disaggregation of early epidemiological data. The second problem was the credibility of the published mortality data and vaccination coverage: the accuracy of the officially published information has been questioned by scientists (including Katalin Karikó). The third major problem was the inadequate separation of personal and public data in the context of COVID-19 contamination, which has led to personal data breaches.⁹⁰

Simultaneously, those who criticized the government's handling of the crisis were framed as obstructing the fight against the virus. While the Hungarian government refrained from endorsing COVID-related conspiracy theories, and relied on scientific expertise during the pandemic to contain the virus, they employed a crisis discourse juxtaposing the diligent efforts of the Hungarian government in safeguarding the people against the perceived threats of international elites and internal "traitors".⁹¹ Throughout the whole pandemic, the government framed the opposition as hindrances to effective crisis management and jeopardising the safety of the population. Government communication and government-friendly media framed the opposition as anti-vaccination, especially after they expressed criticism over Hungary's untransparent order of non-EU-approved vaccines (the Chinese Sinopharm and the Russian Sputnik). Meanwhile, the government ignored genuine anti-vaccine groups like the alternative health movement and far-right actors, including Mi Hazánk and the anti-vaccination movement of György Gödény.⁹² The government discourse was also characterised by a strong anti-Western and anti-EU rhetoric, according to which the EU does not provide help in a crisis,

88. Zoltán Kovács, "Coronavirus in Hungary: 'You do not need clarification on the protocol', official tells reporters" (15 March 2020) *Index* <https://index.hu/english/2020/03/15/hungary_coronavirus_press_conference_15_march/> accessed 18 February 2024.

89. Márton Bene and Zsolt Boda, "Hungary: Crisis as Usual: Populist Governance and the Pandemic" in Giuliano Bobba and Nicolas Hubé (eds), *Populism and the politicization of the COVID-19 crisis in Europe* (Palgrave Macmillan, 2021).

90. Nóra Bán-Forgács, "Információszabadság és Covid Magyarországon" (2021) MTA Law Working Papers 2021/30.

91. Lili Turza, "Conspiracy Entrepreneurs, Fringe Movements, and the Pervasive Style of Conspiracy During the Coronavirus Pandemic", in Michael Butter and Peter Knight (eds), *Covid Conspiracy Theories in Global Perspective* (Routledge, 2023).

92. *Ibid.* Gödény in 2022 was charged a fine for personal data security breaches in his online petition.

moreover, criticises Hungary's effective defence measures (the Enabling Act).⁹³ The government's usual populist rhetoric was also reflected in the national consultation on the rebuilding after the pandemic.⁹⁴

While the government was engaging in conspiratory rhetoric, with the state of emergency, a new law was introduced, modifying the legal category of scaremongering. The Defence Against the Coronavirus Act amended the Criminal Code: it created the new crime of "obstructing epidemic prevention" and amended the already existing crime of scaremongering. The new definition is as follows:

Anyone who, during a special legal regime in front of a large audience, states or spreads a false fact or distorts a true fact in such a way that is suitable for obstructing or preventing the effectiveness of defence, for the offence shall be punishable by imprisonment ranging from one to five years.⁹⁵

While the previous definition had been considered vague, and lacked provisions addressing the dissemination of misinformation during an epidemic, Csaba Györy argues that the adopted modification addresses none of the previously existing problems and makes the crime more susceptible to abuse by the authorities.⁹⁶ The wording "distorts a true fact in such a way that is suitable for obstructing or preventing the effectiveness of defence" is unprecise. Furthermore, under the Act, it is not necessary to prevent or obstruct the effectiveness of the defence; criminal liability already exists if the allegation of a falsehood or distorted truth is merely "capable of" doing so. This may include any criticism of the government and the restriction of freedom of expression. Furthermore, it can only be determined retrospectively whether an act prevented effective defence measures. The measure was seen by the opposition and civil rights organisations as another attempt to incite fear and limit media freedom in Hungary, as well as leading to a chilling effect through self-censorship. A member of the Momentum opposition party was detained for hours on the grounds that he had allegedly "obstructed efforts to combat the pandemic" with a social media post about a controversial government policy of dismissing non-virus patients out of hospitals to make beds available for COVID-19 patients.⁹⁷ The previous day, a 64-year-old man was held for hours over a message posted online, criticising the government's lockdown policy.⁹⁸

93. Political Capital, "Main Narratives About COVID-19 in the V4 Countries: Takeaways from the First Wave of the Pandemic" (2020) Research Briefing.

94. Vlad Makszimov, "Hungary launches national consultation targeting COVID-19, Soros and 'debt slavery'", Euroactiv (9 June 2020) <<https://www.euractiv.com/section/politics/news/hungary-launches-national-consultation-targeting-covid-19-soros-and-debt-slavery/>> accessed 18 February 2024.

95. Defence Against the Coronavirus Act (Act No. 12 of 2020).

96. Csaba Györy, "Fighting Fake News or Fighting Inconvenient Truths? On the Amended Hungarian Crime of Scaremongering" (VerfBlog, 11 April 2020) <<https://verfassungsblog.de/fighting-fake-news-or-fighting-inconvenient-truths/>> accessed 18 February 2024.

97. Alasdair Sandford, "Hungary: 'Critics silenced' in social media arrests as EU debates Orban's powers", Euronews (14 May 2020) <<https://www.euronews.com/my-europe/2020/05/14/hungary-critics-silenced-in-social-media-arrests-as-eu-debates-orban-s-powers>> accessed 18 February 2024.

98. Ibid.

Other government decrees impacted data protection and the access to public data during the state of danger.⁹⁹ Decree 46/2020 impacts data protection in Hungary, permitting the Minister for Innovation to access personal data of anyone in Hungary for the purposes of fighting the pandemic. A government decree from May 2020 suspended certain data protection provisions of the GDPR and the Information Act.¹⁰⁰ Via government decrees, the 15-day deadlines for responding to public data requests, which is the regular rule, were extended to 45 or even 90 days, on the grounds of an emergency. This allows public bodies to delay the release of data inconvenient for the government, and not only related to the epidemic.

But even pandemic related information has been difficult to obtain. Data requests by opposition politicians concerning mortality rates among the vaccinated¹⁰¹, and mortality rates by vaccination type (including Sputnik and Sinopharm) remained unanswered.¹⁰² During the spread of the Omicron variant, in September 2022, independent media representatives tried to ask the government, the National Public Health Centre, and the Office of the Prime Minister which vaccines would be ordered and available in Hungary; however, they did not receive any response. In December 2022 and January 2023, they again wrote to request information about the new vaccines to the Coronavirus press centre, the Prime Minister's Cabinet Office responsible for government communication, the Ministry of the Interior responsible for healthcare, and the National Public Health Centre, but, again, received no response from any of them.¹⁰³

The online media outlet HVG.hu tried to obtain the data on which basis the Operational Group made its decisions during the two years of its operation. Their data request was rejected. The justification for the decision to refuse refers to an article of the Freedom of Information Act (27. § (5)), stating that all data that can be classified as preparatory to a decision is in principle not public for ten years. However, as HVG.hu points out, access to such data may also be authorised by the head of the data controller organ, “weighing the weight of the public interest involved”. Hvg.hu subsequently filed a lawsuit, seeking to obtain the minutes of the Operational Group through the courts.¹⁰⁴ As they explained:

Our newspaper turned to the court to let the public know what data, analyses and criteria were used by the Operational Group responsible for the protection against the coro-

99. Government Decree 179/2020 (V. 4); Government Decree 521/2020 (XI. 25).

100. Ibid.

101. 24.hu, “Szél Bernadett: Merkely Bélának nincsenek meg azok a kórházi adatok, amelyekről maga nyilatkozott” 24.hu (20 December 2021) <<https://24.hu/belfold/2021/12/20/koronavirus-ol-tas-szel-bernadett-adatok-merkely-bela-sote/>> accessed 18 February 2024.

102. Népszava, “Miért titkolja a Covid-betegek oltási adatait a kormány?” Népszava (21 September 2021) <https://nepszava.hu/3132813_miert-titkolja-a-covid-betegek-oltasi-adatait-a-kormany> accessed 18 February 2024.

103. Dániel Bolcsó, “A kormány ügyfélszolgálatára szerint nincs is itthon abból a Covid-vakcinából, amely Müller Cecília szerint a legjobb”, Telex (13 January 2023) <<https://telex.hu/koronavirus/2023/01/13/pfizer-biontech-vakcina-oltas-ba-1-ba-5-omikron-variants-muller-cecilia-nnk>> accessed 18 February 2024.

104. The data requested was from the meetings taking place between 31 January 2020 and 25 November 2021 (minutes from 159 meetings).

navirus epidemic to make decisions and restrictions affecting millions of Hungarians, hundreds of thousands of businesses, as well as the state administration and economic actors during the almost two years of its operation.¹⁰⁵

The ongoing lawsuit, however, was blocked by the government's decree issued on the grounds of the state of danger due to the war in Ukraine, meaning that this data will not be made public for an indefinite period of time.¹⁰⁶ The decree also includes a provision stating that in administrative or judicial proceedings initiated in connection with such data, the data may not be attached to the file, copies may not be made and may be consulted only on the premises of the public body handling the data, except to the extent necessary for the successful conduct of the proceedings. A more stringent provision is the government's decision that the provisions of the current regulation should "also apply to proceedings pending at the date of entry into force of this regulation".¹⁰⁷ The government decree applies not only to the decisions of the operational group responsible for the protection against the coronavirus epidemic, but also to all decisions of any operational group operating in any emergency, including the operational group established in response to the state of danger due to the war in Ukraine.¹⁰⁸

The Hungarian case illustrates how the state of danger due to the pandemic have been instrumentalised to further increase executive power and weaken checks and balances. Moreover, the state of danger facilitated the adoption of measures favouring the government (such as ban of assembly, ban on referendums), and the restriction of access to information inconvenient for the government. The critique of government measures and the Enabling Act were utilized to maintain the polarizing discourse based on the populist rulebook: independent media outlets, opposition actors, and EU institutions were framed as intentionally hindering defence efforts, while increasing government power was explained as necessary in order to protect the people.

The political, social, and legal situation in Poland at the outbreak of the pandemic

It is known from existing research that populist parties utilised the pandemic to consolidate their power.¹⁰⁹ This trend is observed to a higher extent in countries with weak

105. András Domány and Tibor Lengyel, *HVG.hu* (20 September 2022) <[Itthon: A HVG bírósági perének közepén írta át a kormány a szabályokat, hogy eltitkolhassa, miről szóltak az operatív törzs ülései | hvg.hu](#)> accessed 18 February 2024.

106. János Haász, 'Csúcsra járatott titkolózás: bírósági eljáráshoz se adható ki, hogy mi alapján döntött az operatív törzs' *Telex* (20 September 2022) <<https://telex.hu/belfold/2022/09/20/csucsra-jaratott-titkolozas-birosagi-eljarashoz-se-adhato-ki-hogy-mi-alapjan-dontott-az-operativ-torz>> accessed 18 February 2024.

107. *Ibid.*

108. András Domány and Tibor Lengyel, *HVG.hu* (20 September 2022) <[Itthon: A HVG bírósági perének közepén írta át a kormány a szabályokat, hogy eltitkolhassa, miről szóltak az operatív törzs ülései | hvg.hu](#)> accessed 18 February 2024.

109. Maja M. Vasiljevic, Haris Dajč, Piret Ehin, Seán Hanley, Natasza Styczyńska, Mladen Radulović, Liisa

democratic institutions and those already facing challenges in the pre-pandemic period. Poland entered the COVID-19 pandemic with a political system transforming towards soft authoritarianism,¹¹⁰ and the pandemic just opened a window of opportunity for further undermining the basis of liberal democracy - gaining control over the media and limiting civic activities or the prerogatives of certain institutions.

Soon after the Law and Justice party (and its minor coalition partners - Solidarity Poland and Poland Together/Agreement) formed a government in 2015, it became clear that this would mean a turn towards Euroscepticism and consolidation of power. The sequence of changes consistently introduced by the ruling coalition was similar to the reforms introduced by Viktor Orbán in Hungary, arousing similar controversy. Since 2015, both legislative changes and the rhetoric of PiS and its coalition partners have clearly indicated a desire to strengthen executive power and limit the independence of courts, as well as to influence media coverage (changes in public television, but also attempts to influence private media) and civil society organisations. These actions naturally led to confrontation with the institutions of the European Union, which was presented as an oppressive, bureaucratic machine that fails to listen to the voice of member states. The critical position towards the EU, as well as nativist rhetoric and identity politics, did not come as a surprise - similar arguments characterised the PiS government in 2005-2007, but this time the changes introduced transformed the political system and international relations to a far greater extent.

The period of the COVID-19 pandemic in Poland fell in the United Right coalition government's second term in office, having obtained 43.59% of the votes in the 2019 parliamentary elections. This result gave the coalition a majority in the Sejm (lower house), while in the Senate (upper house), PiS obtained 48 out of 100 seats. The elections to the European Parliament in 2019 also confirmed the party's dominant role (27 of 52 seats obtained by its electoral list) and strengthened the European Conservatives and Reformists (ECR) group in the EP. President Andrzej Duda (the PiS candidate) had been in office since 2015, meaning that the presidential elections were scheduled for the first spring of the pandemic (May 2020).

Early on in PiS's first term (2015-2019), international institutions noted deteriorating democratic standards and a rule-of-law crisis. Formal steps were taken by the Council of Europe through the reports of the Venice Commission in 2016 (three reports), 2017 (two) and 2020 (one) pointing to problematic changes introduced in the judiciary (law on Constitutional Tribunal, National Council of Judiciary, Common and Supreme Court,

Talving, Aleksandar Uzelac, and Nikolina Židek, *Populist Politics in the Context of the COVID-19 Crisis: A Comparative Analysis* (2023) POPREBEL Working Paper No. 12.

110. Natasza Styczyńska and Marcin Zubek, "Poland: The 'Cardboard State' Versus the Virus" in Kenneth Lynggaard, Mads Jensen, and Michael Kluth (eds), *Governments' Responses to the Covid-19 Pandemic in Europe* (Palgrave Macmillan, 2023).

as well as the Police Act and prerogatives of the prosecutor general).¹¹¹ Interestingly, until 2022 the Venice Commission issued seven reports on Poland, six of which were published when PiS was in office.¹¹² Changes in the judiciary were also noted by the UN (in 2018 the special rapporteur published a report on the independence of judges and lawyers).¹¹³

The greatest consequences, however, were caused by the European Commission's triggering of the Article 7 procedure against both Poland and Hungary and subsequent judgements of the ECJ in cases concerning the so-called reforms of the judiciary in these countries. The 2019 and 2020 ECJ rulings were not implemented by the Polish government, and the reforms continued. Article 7, launched against Poland in 2017, assumes that the rights of an EU member state can be limited when it breaches the EU's founding values. The European Commission concluded that the reforms introduced in the justice system led to the politicisation of the justice system and resulted in the Polish government having de facto control over the judiciary.

The 2015 refugee crisis was utilised by radical-right political actors to gain support for their majoritarian vision of democracy as well as neo-traditionalist discourse and a "cultural backlash" against progressive social change. At the same time, the constantly growing economy and increased social transfers resulted in stable societal support towards PiS policies visible in the electoral outcomes. Still, contrary to the Hungarian case, significant and long-lasting opposition to the PiS-designed reforms could be observed in Poland, which consequently led to even deeper social polarisation.

As early as 2015, the changes in the judicial system, media law and reproduction rights led to a series of protests all over Poland. On 3 October 2016, in 147 Polish cities, towns and villages, the "Polish Women's Strike" was organised as a protest against the proceedings in parliament of a bill limiting the possibilities of abortion. This grassroots organisation remained active in the next years, playing a key role in the organisation of the 2020 "black protests" that followed the de facto complete abortion ban ruling of the politicised Constitutional Court. Summer 2017 brought a series of demonstrations against the changes in the judiciary and created a "free courts" initiative aiming to raise awareness about the role of the independent judiciary, but also to represent the repressed judges and prosecutors before national courts and European tribunals.¹¹⁴ A further wave of protests followed in 2021, this time against changes to the Broadcasting Act in Poland (also known as the anti-lex-TVN protests). According to the planned amendment to the law, television stations in which the share of foreign capital does not

111. Council of Europe, Venice Commission, *Opinions for Poland* <<https://www.venice.coe.int/web-forms/documents/?country=23&year=all>> accessed 21 March 2024.

112. Ibid.

113. United Nations, *Report of the Special Rapporteur on the Independence of Judges and Lawyers on his mission to Poland* (United Nations Digital Library, 2018) <<https://digitallibrary.un.org/record/1484929?v=pdf>> accessed 15 March 2024.

114. Free Courts Initiative <<https://wolnesady.org/en/>> accessed 15 March 2024.

exceed 49% could receive a broadcasting licence. This provision directly affected the TVN24 television station, which was owned by a Dutch company with American capital. As a result of the politicisation of public media, which became the government's de facto propaganda mouthpiece, TVN was considered an inconvenient source of criticism towards the Law and Justice government. As in the case of demonstrations surrounding changes in the judiciary or reproductive rights, the protests took place not only in Poland, but were organised in other countries and discussed extensively via social media. In the case of the anti-TVN legislation, both domestic and international journalists' associations (including Reporters Without Borders) successfully appealed to President Duda to veto the bill.¹¹⁵

The COVID-19 pandemic initially silenced the protests and forced the government to focus on healthcare issues. Not for long, however, because the ruling camp decided to use it as a tool to generate support for PiS during the 2020 presidential election campaign.

The non-introduction of a state of emergency in Poland and its consequences for electoral rights

According to Article 128(2) of the Constitution, “[t]he election of the President of the Republic shall be ordered by the Marshal [speaker] of the Sejm to be held on a day no sooner than 100 days and no later than 75 days before expiry of the term of office of the serving President of the Republic (...). The detailed rules for the conduct of these and other elections are regulated by the Act on Electoral Code”.¹¹⁶ President Duda's first term was due to end on 6 August 2020. Accordingly, the presidential election should have taken place on a date between 28 April and 13 May. Only the implementation of one of the constitutional states of emergency could modify these dates, as, according to the previously invoked Article 228(7), no elections, including presidential elections, may be held during their duration and for 90 days after their termination, and the term of office of the incumbent president is automatically and appropriately prolonged in such situations. However, a state of natural disaster was not introduced.

The political and legal events surrounding this election can be divided into two obvious phases: 1) the last-minute abandoned attempt to organise the presidential elections on their constitutional date; 2) the holding of the elections on an unconstitutional date. In both cases, before outlining the consequences of the subsequent events on electoral rights (the right to vote and to stand for elections), the timeline of the most important legal and factual events that took place will be presented.

115. Reporters Without Borders, “RSF asks Polish president not to sign draconian ‘Lex TVN’ bill into law” Reporters Without Borders (24 December 2021) <<https://rsf.org/en/rsf-asks-polish-president-not-sign-draconian-lex-tvn-bill-law>> accessed 15 March 2024.

116. Ustawa z dnia 5 stycznia 2011 r. - Kodeks wyborczy [Act of 5 January 2011 - Election Code], Journal of Laws of the Republic of Poland, 2011, No. 21, item 112, as amended.

Elections scheduled for 10 May 2020

For the sake of clarity and better understanding, this section will start with a summary of the most important events:

- 5 February 2020. The speaker of the Sejm announced the decision to hold the presidential election on 10 May 2020, i.e. within the date based on the above-mentioned provision of the Constitution.¹¹⁷ The election campaign also formally began on this date.
- 2 March 2020. The COVID-19 Act was adopted. This occurred within 24 hours of the government's submission of the draft, thus without commissioning any legal opinions, with extremely limited time for discussion and possible amendments in parliament. However, despite some concerns regarding the proceedings raised,¹¹⁸ an overwhelming majority of the Sejm supported the Act (400 out of 460 MPs voted in favour), and it was subsequently passed without amendments by the Senate in an equally fast manner.¹¹⁹
- 5 March 2020. The first officially detected case of coronavirus in Poland.¹²⁰
- 13 March 2020. Regulation of the minister of health on the declaration of an epidemiological emergency,¹²¹ the first of two “mini-states of emergency” from the Infectious Diseases Act. The regulation introduced the first set of restrictions aimed at curbing the spread of COVID-19. The adoption of this regulation confirmed the political decision to opt out of enacting “constitutional” states of emergency.
- 20 March 2020. Regulation of the minister of health on the declaration of an epidemic state in the territory of the Republic of Poland¹²² - the second of the options derived from the Infectious Diseases Act.

117. Postanowienie Marszałka Sejmu Rzeczypospolitej Polskiej z dnia 5 lutego 2020 r. w sprawie zarządzenia wyborów Prezydenta Rzeczypospolitej Polskiej [Decision of the speaker of the Sejm of the Republic of Poland of 5 February 2020 on the ordering of elections for the president of the Republic of Poland], Journal of Laws of the Republic of Poland, 2020, item 184.

118. E.g. MP Robert Kropiwnicki of the opposition Civic Coalition argued during work on the draft that it does not meet the rigours of Article 228 of the constitution, - See: Posiedzenie Komisji Zdrowia (nr 13) z dnia 2 marca 2020 r., p. 5 - available at <<https://orka.sejm.gov.pl/zapisy9.nsf/0/EDE74821CF48D471C12585310044E23D/%24File/0029809.pdf>> accessed 15 March 2024.

119. The parliamentary majority successfully pushed the opposition to support the controversial measures for quite some time, suggesting that a lack of support would hold them responsible for the consequences of the government's failure to respond to the pandemic.

120. Ministerstwo Zdrowia, “Pierwszy przypadek koronawirusa w Polsce” gov.pl (4 March 2020) <<https://www.gov.pl/web/zdrowie/pierwszy-przypadek-koronawirusa-w-polsce>> accessed 15 March 2024.

121. Rozporządzenie Ministra Zdrowia z dnia 13 marca 2020 r. w sprawie ogłoszenia na obszarze Rzeczypospolitej Polskiej stanu zagrożenia epidemicznego [Regulation of the minister of health of 13 March 2020 on the declaration of an epidemic emergency in the territory of the Republic of Poland], Journal of Laws of the Republic of Poland, 2020, item 433.

122. Rozporządzenie Ministra Zdrowia z dnia 20 marca 2020 r. w sprawie ogłoszenia na obszarze Rzeczypospolitej Polskiej stanu epidemii [Regulation of the minister of health of 20 March 2020 on the declaration of an epidemic state in the territory of the Republic of Poland], Journal of Laws of the Republic of Poland, 2020, item 491.

- 22 March 2020. Local by-elections in several municipalities (election of members of local councils and/or mayors). It seems that these elections were “treated as an experiment before the presidential election and a test of turnout in a situation of fear of infection”.¹²³ And, indeed the test failed, as the turnout was very low, compared with previous election cycles.
- 24 March 2020. Through an amendment to the 20 March regulation, the health minister introduced (from 25 March to 11 April 2020) further restrictions on the movement of people, with a few narrow exceptions (among them “performing or participating in religious worship, including religious acts or rituals”).¹²⁴
- 31 March 2020. Adoption by the Sejm of the amendments to the COVID-19 Act, by which the previously very narrowly defined group of people entitled to vote by post (voters residing abroad and those with listed disabilities) was extended to include persons in compulsory quarantine or isolation and those over 60 years old (Article 53§ 1a newly added to the Act on Electoral Code).¹²⁵ The relevant amendment was adopted at 4.25 a.m.¹²⁶
- 6 April 2020. Adoption by the Sejm of a special law on the 2020 presidential election (*Act on special rules for the conduct of general elections for the President of the Republic of Poland ordered in 2020*).¹²⁷ The Act provided for postal elections only. The minister for state assets (from the party whose candidate - the incumbent president - was running in the election) was to be primarily responsible for conducting them, along with Poczta Polska, the state-owned national postal operator. The designated minister was to order the printing of the relevant “election packages”, which Poczta Polska was to deliver by seven days before the election. For voters abroad, an obligation was introduced for them to declare their desire to receive an “election package” at least 14 days before the planned election date. Due to some doubts within the electoral coalition forming the government, as well as the rejection by the Senate, the act entered into force one day before the planned election, i.e. on 9 May 2020.
- 16 April 2020. In a subsequent specific act on COVID-19 (*Act on specific support*

123. Krzysztof Skotnicki and Joanna Kielin-Maziarz, “Guarantees of Universal Suffrage in the Era of Elections Held during the Pandemic” in Magdalena Musiał-Karg and Izabela Kapsa (eds), *Elections in Times of a Pandemic - Dilemmas and Challenges. Experiences of the European Countries* (Brill, 2024) 312.

124. Rozporządzenie Ministra Zdrowia z dnia 24 marca 2020 r. zmieniające rozporządzenie w sprawie ogłoszenia na obszarze Rzeczypospolitej Polskiej stanu epidemii [Regulation of the minister of health of 24 March 2020 amending the Regulation on the declaration of an epidemic state in the territory of the Republic of Poland], Journal of Laws of the Republic of Poland, 2020, item 522.

125. Journal of Laws of the Republic of Poland, 2020, item 568, Article 40(5).

126. Ryszard Balicki, “The Course of the Election Process in Poland during the COVID-19 Pandemic” in Magdalena Musiał-Karg and Izabela Kapsa (eds), *Elections in Times of a Pandemic - Dilemmas and Challenges. Experiences of the European Countries* (Brill, 2024) 347.

127. Ustawa z dnia 6 kwietnia 2020 r. o szczególnych zasadach przeprowadzania wyborów powszechnych na Prezydenta Rzeczypospolitej Polskiej zarządzonych w 2020 r. [Act of 6 April 2020 on special rules for the conduct of general elections for the President of the Republic of Poland ordered in 2020], Journal of Laws of the Republic of Poland, 2020, item 827.

instruments in connection with the spread of the SARS-CoV-2 virus),¹²⁸ further amendments were made to the Electoral Code. This time, several provisions were suspended, including the powers of the National Electoral Commission to determine the ballot form and to order and supervise its printing. The amendment was submitted at the last minute, presented as “technical” and on completely different matters, and then voted through without any discussion.¹²⁹ The act entered into force on 18 April 2020.

- 16 April 2020. The prime minister’s decision to order the printing of ballot papers by a state-owned company - the Polish Security Printing Works.¹³⁰ A very general provision from the COVID-19 Act (Article 11) authorising the prime minister to issue orders to various entities was cited as the legal basis. This decision was issued before both the 6 April Act on postal election in 2020 and the amendment to the Act on Electoral Code came into force (which identified the National Electoral Commission as the only authority empowered to determine the design and to order the printing of ballot papers).
- 22 April 2020. The minister of digitisation forwarded the national identification (PESEL) numbers and addresses of all persons entitled to vote to Poczta Polska, which were to be the basis for directing the dispatch of “election packages”. This decision was the result of previous refusals to provide this data by some municipal authorities, who justified their refusal by the lack of a legal basis for Poczta Polska to receive the data.¹³¹
- 6 May 2020. Referral of the speaker of the Sejm to the Constitutional Tribunal regarding the postponement of the ordered elections of the president of the Republic of Poland,¹³² in which the alleged unconstitutionality of a provision of the Electoral Code Act was raised to the extent that it did not allow the speaker’s order on the election date to be amended. The claim was unfounded, as the

128. Ustawa z dnia 16 kwietnia 2020 r. o szczególnych instrumentach wsparcia w związku z rozprzestrzenianiem się wirusa SARS-CoV-2 [Act of 16 April 2020 on specific support instruments in connection with the spread of the SARS-CoV-2 virus], Journal of Laws of the Republic of Poland, 2020, item 695, Article 102.

129. Tomasz Skory, “Kto, kiedy i jak uniemożliwił przeprowadzenie wyborów? Znamy odpowiedź” [Who prevented the elections from taking place, when and how? We know the answer] RMF24 (8 May 2020) <https://www.rmf24.pl/raporty/raport-wybory-prezydenckie2020/najnowsze-fakty/news-kto-kiedy-i-jak-uniemozliwil-przeprowadzenie-wyborow-znamy-o,nld,4483946#crp_state=1> accessed 15 March 2024.

130. The decision was initially not officially published. The text of the decision was revealed and forwarded to the media by opposition MPs, as a result of so-called parliamentary intervention. It was reproduced in a number of places, including TVN24: <https://tvn24.pl/wybory-prezydenckie-2020/wybory-prezydenckie-2020-poslowie-ko-dotarli-do-decyzji-premiera-o-druku-kart-do-glosowania-st4570840> accessed 15 March 2024.

131. Agnieszka Matłacz, “Samorzady nie chciały udostępnić Poczcie danych wyborców, zrobiło to Ministerstwo Cyfryzacji” Prawo.pl (28 April 2020) <<https://www.prawo.pl/samorzad/dane-wyborcow-przekazane-poczcie-polskiej,499855.html>> accessed 15 March 2024.

132. See: “Wniosek Marszałka Sejmu dotyczący przesunięcia terminu zarządzonych wyborów Prezydenta Rzeczypospolitej” (26 August 2020) <<https://trybunal.gov.pl/postepowanie-i-orzeczenia/postanowienia/art/11235-wniosek-marszalka-sejmu-dotyczacy-przesuniecie-terminu-zarzadzonych-wyborow-prezydenta-rzeczypospolitej>> accessed 15 March 2024.

issue of the single nature of the speaker's order on the date of the presidential elections and the deadlines for this action derives directly from Article 128(2) of the Constitution.

- 6 May 2020. A joint statement by two MPs (not holding any other office at the time) - Jarosław Kaczyński (leader of PiS) and Jarosław Gowin (head of the Agreement party, its partner in the electoral coalition) about the cancellation of the election scheduled for 10 May and the plans to organise it on different date.

First, serious doubts should be raised regarding the legislative process itself, concerning the planned presidential election legislation. Chaotic changes, lack of justification for the new proposals, instrumental treatment of the parliament and, above all, the introduction of major changes just before the planned election date are only some of the allegations concerning this.¹³³ The unlawful course of the legislative process was confirmed by many authors, including Krzysztof Skotnicki, who concluded his assessment with the opinion that there had been “a violation of the law in force and of certain democratic standards of legislative procedure, parliamentary custom and ordinary political culture”.¹³⁴ In addition, the state authorities repeatedly acted clearly without legal basis (e.g. the transfer of PESEL and addresses data to Poczta Polska with a clear infringement of the duty to protect personal data)¹³⁵ or with at least a questionable legal basis (the prime minister's decision to commission the printing of “election packages” based on a very general authorisation in the COVID-19 Act and before the entry into force of the amendments to the Act on Electoral Code, in which the State Election Commission had such exclusive competence), which was later confirmed as invalid.¹³⁶ The restrictions in place at the time (including restrictions on movement and assembly) hampered several election-related activities. On the candidates' side (the right to stand for election), they hindered, for example, the collection of legally required voters' support lists for candidates or the conducting of election campaigns. Such a

133. Anna Rakowska-Trela, *Wybory prezydenckie 2020. Kontekst prawny* [The 2020 presidential election: the legal context] (Fundacja im. S. Batorego, 2020) 4.

134. See e.g. Krzysztof Skotnicki, “Państwo prawa a tryb uchwalania w 2020 r. ustaw regulujących wybory Prezydenta RP” [The rule of law and the procedure for enacting the laws governing the election of the president of the Republic of Poland in 2020] in Jerzy Ciapała and Agata Pyrzyńska (eds), *Dylematy polskiego prawa wyborczego* (C.H. Beck, 2021) 155.

135. This has been confirmed by the courts. As early as in February 2021, the *Wojewódzki Sąd Administracyjny* in its judgement (case file no.: IV SA/Wa 1817/20). This judgement became final in March 2024 in connection with the ruling of the Supreme Appellate Court (case file no.: II OSK 1630/21).

136. Serious doubts were raised in this respect by the ombudsman, who decided to challenge this decision in the administrative courts. The Provincial Administrative Court shared these doubts in its judgement of September 2020 (case file no.: VII SA/Wa 992/20). This doubt was also confirmed by the Supreme Audit Office - see: *Działania wybranych podmiotów w związku z przygotowaniem wyborów powszechnych na Prezydenta Rzeczypospolitej Polskiej zarządzonych na dzień 10 maja 2020 r. z wykorzystaniem głosowania korespondencyjnego* [Activities of selected entities in connection with the preparation of the general election for the president of the Republic of Poland ordered for 10 May 2020 using postal voting] Najwyższa Izba Kontroli (23 April 2021) <<https://www.nik.gov.pl/kontrole/D/20/502/KAP/>> accessed 19 March 2024.

circumstance clearly favoured the incumbent president, hailing from the ruling party, who was seeking re-election - particularly given the biased, one-sided coverage in the public media, taken over and subordinated to the government, together with the National Broadcasting Council, which “shall safeguard the freedom of speech, the right to information, and the public interest in radio and television broadcasting” (Article 213(1) of the Constitution).¹³⁷ On the voters’ side (the right to vote), the situation not only brought about an obvious state of uncertainty due to the succession of changes in the organisation of the elections but objectively the proposed solutions were contrary to the principles of electoral law.

In this context, it is worth pointing out doubts about the universality of the elections. For example, in the context of the Act from 6 April 2020, Anna Rakowska-Trela noted that there was no guarantee that everyone would cast only one vote and that everyone entitled to vote would have the opportunity to do so, as the election packages were to be left in mailboxes, with no guarantee that they would reach and be used by the addressee.¹³⁸ Similar doubts were also raised concerning the regulation that persons voting abroad were to report their wish to receive an “election package” to the territorially competent consul 14 days before the planned elections. However, the law on exclusive postal voting came into force one day before the scheduled elections.¹³⁹

The scale of violations of the law and democratic principles is striking. It took place with the active participation and/or passivity of many state authorities. The latitude of the violations that took place may seem outwardly surprising. However, to place it in its proper context, it is worth pointing out some of the circumstances preceding the course of events.

Since the 2015 parliamentary elections, the ruling majority had already repeatedly demonstrated its disregard for the legislative process and democratic standards, including through: (a) frequent use of so-called “parliamentary drafts”, i.e. exempted from the requirement to hold public consultations; (b) proceeding at an exponential pace (e.g. within less than 24 hours of the submission of the draft), often in the late hours of the night; (c) adoption of laws without or with disregard for legal analyses; (d) use of “revotes” when, due to the mobilisation of the opposition, the desired result could not be achieved.¹⁴⁰ In the vast majority of cases, acts processed in this way were (some-

137. See e.g. Media Freedom Rapid Response, *Media freedom at a crossroads - Journalism in Poland faces uncertain future ahead of election: Mission report on media capture and vexatious lawsuits in Poland* (October 2023), <<https://www.mfrr.eu/wp-content/uploads/2023/10/Poland-media-freedom-at-a-crossroads.pdf>> accessed 19 March 2024.

138. Anna Rakowska-Trela, *Wybory prezydenckie 2020. Kontekst prawny* [The 2020 presidential election: the legal context] (Fundacja im. S. Batorego, 2020) 5-6. She observed, i.a., that

139. For a summary of most of the doubts concerning the principle of universal elections, see: Krzysztof Skotnicki and Joanna Kielin-Maziarz, “Guarantees of Universal Suffrage in the Era of Elections Held during the Pandemic” in Magdalena Musiał-Karg and Izabela Kapsa (eds), *Elections in Times of a Pandemic - Dilemmas and Challenges. Experiences of the European Countries* (Brill, 2024) 315-317.

140. A striking illustration of the above is the history of the legislative proceedings related to the seizure of control of the Constitutional Tribunal - see e.g. Tomasz Tadeusz Koncewicz, “Constitutional Capture

times with equal speed) signed into law by the president.¹⁴¹

In 2018, the amendments to the Act on Electoral Code were adopted, which changed the composition of the National Electoral Commission and lowered the required qualifications for electoral commissioners, who also play an important role during the electoral process. While the amendments themselves were not unconstitutional, they were rightly assessed as resulting in the politicisation of electoral organs,¹⁴² as for example “judges appointed by the highest courts were replaced with those appointed by political parties”.¹⁴³

In 2017, a new law on the Supreme Court was adopted, under which the competence to assess the validity of elections (including the handling of possible election protests) was given to the newly established Chamber of Extraordinary Control and Public Affairs, entirely made up of “judges” appointed in a constitutionally questionable procedure. Numerous doubts about the legality of this chamber and the “judges” sitting in it were raised as soon as it was established. In recent years, they have been confirmed by numerous judgements of international courts, which have indicated that it is not an independent and impartial court of law.¹⁴⁴

During the events in question, the Constitutional Tribunal has ceased to perform a control function, becoming an instrument in the hands of the executive power, ready to take actions beneficial to that power at any given moment. It seems that only with the above in mind one can understand the motives and circumstances behind the decisions taken. It can be assumed that the very existence of genuinely independent public authorities at the time would have reduced the scale of abuses and the sense of impunity of those responsible. The symbolic culmination of unlawful actions, in clear violation of the constitution and the principles of a democratic rule of law, was the strictly political decision taken by the two leaders of the governmental coalition to finally cancel the vote on 10 May 2020. Aleksandra Kustra-Rogatka titled her commentary on this decision “Between Constitutional Tragedy and Political Farce”, observing that: “[t]he absurdity of the fact that two politicians who hold no public office decided not to run elections in Poland 2016 and Beyond: What is Next?” (VerfBlog, 19 December 2016) <<https://verfassungsblog.de/constitutional-capture-in-poland-2016-and-beyond-what-is-next/>> accessed 15 March 2024; Christian Davies, “Hostile Takeover: How Law and Justice Captured Poland’s Courts” (Freedom House. Nations in Transit - Brief, May 2018).

141. President Duda’s first veto came nearly two years after the Law and Justice government was formed. In total, during the eight years of this government, the president vetoed only nine acts - see: Ustawy zawetowane <<https://www.prezydent.pl/prawo/zawetowane>> accessed 15 March 2024.

142. Wojciech Hermeliński, “Najnowsze zmiany kodeksu wyborczego - czyżby odwrót od ostatniej reformy?” [The latest changes to the Electoral Code - retreat from the last reform?] (Palestra 4/2019) 24-34.

143. Monika Florczak-Wątor, Grzegorz Kuca, “The long-term impact of COVID-19 on V4 countries’ electoral systems. The Case of Poland”, POLICY BRIEF 2023 <https://jog.tk.hu/uploads/files/Policy_Brief_Poland_Florczak-Wator_Kuca.pdf> accessed 15 March 2024.

144. See e.g. the European Court of Human Rights (ECtHR) judgements: *Dolińska-Ficek and Ozimek v. Poland* - Applications Nos. 49868/19 and 57511/19, Judgement of 8 November 2021, *Wałęsa v. Poland* - Application 50849/2021, Judgement of 23 November 2023. The European Court of Justice (ECJ) judgement: *L.G. v. Krajowa Rada Sądownicza*, C-718/21, Judgement of 21 December 2023.

on a date fixed in accordance with the Constitution requires no explanation. This is the best evidence that the ongoing rule of law crisis in Poland has deteriorated dramatically'.¹⁴⁵

The election scheduled for 28 June 2020 (second round on 12 July 2020)

As before, this section will begin with a brief timeline of events:

- 10 May 2020. Resolution by the State Electoral Commission, determining the impossibility of voting for candidates in the election of the President of the Republic of Poland “equivalent in effect to that provided for in Article 293 § 3 of the [Act on Electoral Code] - the impossibility of voting due to a lack of candidates”.¹⁴⁶
- 2 June 2020. Adoption of the *Act on special arrangements for the organisation of general elections for the President of the Republic of Poland ordered in 2020 with the possibility of postal voting* (Special Arrangements Act).¹⁴⁷ The first draft of this act was submitted (again as a “parliamentary draft already” on 11 May 2020, so one day after the initial (constitutional) date of elections. The draft was again processed at an exceptional speed. It was adopted the very next day, and after the amendments passed by the Senate were rejected, the act was adopted and signed by the president on the same day. It did not provide for a *vacatio legis*. The law provided (with some exceptions in favour of compulsory postal voting) for a hybrid solution - in-person voting at polling stations or, upon prior request and receipt of an “election package” - postal voting.
- 3 June 2020. The decision of the speaker of the Sejm to hold the presidential election on 28 June 2020.¹⁴⁸
- 28 June 2020 and 12 July 2020. The first and second rounds of elections were held, with a record number of voters opting for a postal vote (around 536,000 and 704,000 electoral packages requested respectively), compared with previous elections, when this possibility was only partially available.¹⁴⁹
- 3 August 2020. The unlawful (in the light of, inter alia, judgements of the ECtHR and the ECJ) Chamber of the Supreme Court (Chamber of Extraordinary Control and Public Affairs), after rejecting most of the election protest, declared the

145. Aleksandra Kustra-Rogatka, “Between Constitutional Tragedy and Political Farce: On the Postponement of the Presidential Elections in Poland” (VerfBlog, 15 May 2020) <<https://verfassungsblog.de/between-constitutional-tragedy-and-political-farce/>> accessed 15 March 2024.

146. Uchwała Nr 129/2020 Państwowej Komisji Wyborczej z dnia 10 maja 2020 r. w sprawie stwierdzenia braku możliwości głosowania na kandydatów w wyborach Prezydenta Rzeczypospolitej Polskiej [Resolution No. 129/2020 of the State Electoral Commission of 10 May 2020 on the determination of the impossibility of voting for candidates in the election of the President of the Republic of Poland].

147. Journal of Laws of the Republic of Poland, 2020, item 979.

148. Journal of Laws of the Republic of Poland, 2020, item 988.

149. While high, these figures still account for only around 2.5% of all votes cast. For details, see: Magdalena Musiał-Karg, “Postal Voting in the 2020 Presidential Election - How Did Electoral Participation Evolved During the COVID-19 Pandemic?” (2022) 4 Political Science Review 17, 22-23.

election of Andrzej Duda as president of the Republic of Poland to be valid.¹⁵⁰

In the light of the earlier assessment of the cancelled elections, which were scheduled for 10 May 2020, it must be assessed first and foremost that the elections finally held had no legal basis. They were not held within the time limit set by the Constitution. In this context, Ryszard Piotrowski used the term ‘deconstitutionalisation’ of the presidential elections, and pointed out to the disregard for constitutional principles of lawmaking (enactment of episodic laws, during the elections, as such contrary to the European standards), and ‘the failure to impose a state of natural disaster to exclude the possibility of holding the elections within the initially set deadline’.¹⁵¹

The above-mentioned resolution of the State Electoral Commission was assessed as contradictory to the facts that occurred and to the provision of the Act on Electoral Code it refers to.¹⁵² In addition, they were confirmed by the Supreme Court Chamber, which is not a lawful court, and which rejected most of the election protests, the filing of which was drastically reduced anyway (from 14 days to 3 days). Of 5,847 election protests, only 92 were accepted, declared as not having a negative impact on the result. Many of the protests were rejected on the grounds of being submitted after the deadline of three days.¹⁵³ Some doubts were also raised both as to the manner in which the electoral protests were handled by the unlawful Chamber of the Supreme Court and the succinct nature of the resolution itself confirming their validity.¹⁵⁴

The proceedings of the act which was the factual basis for their holding were also subject to the same flaws as in the case of the acts adopted prior to the elections scheduled for 10 May.¹⁵⁵ In this context, for example, the OSCE Office for Democratic Institutions and Human Rights (ODIHR) noted that any changes to the electoral legislation ‘should be formulated and adopted as much in advance of the elections as possible, as a result of an open process allowing sufficient time for a meaningful public debate and ensuring the prin-

150. Journal of Laws of the Republic of Poland, 2020, item 1335.

151. Ryszard Piotrowski, “Ważność wyborów prezydenckich w świetle Konstytucji RP” [Validity of the presidential election in the light of the Polish Constitution] in Jerzy Ciapała and Agata Pyrzyńska (eds), *Dylematy polskiego prawa wyborczego*, (C.H. Beck, 2021) 175.

152. See: Mikołaj Małecki, “Brak podstawy prawnej głosowania przesądza o nieważności wyboru Prezydenta” [The absence of a legal basis for the vote determines the invalidity of the election of the president], *Dogmaty Karnisty*, 1 August 2020) <<https://www.dogmatykarnisty.pl/2020/08/niewaznosc-wyboru-prezyden-ta/>> accessed 15 March 2024; Anna Rakowska-Trela indicated that many experts had reasonable doubts about the legality of the resolution - see: Anna Rakowska-Trela, *Wybory prezydenckie 2020. Kontekst prawny* [The 2020 presidential election: the legal context] (Fundacja im. S. Batorego, 2020) 7.

153. Monika Florczak-Wątor, Grzegorz Kuca, “The long-term impact of COVID-19 on V4 countries’ electoral systems. The Case of Poland”, POLICY BRIEF 2023, 11-13 <https://jog.tk.hu/uploads/files/Policy_Brief_Poland_Florczak-Wator_Kuca.pdf> accessed 15 March 2024.

154. Ewa Łętowska, ‘Protesty wyborcza a ważność wyborów. Znaki zapytania’ [Election protests and the validity of elections. Question marks] (Konstytucyjny.pl, 15 August 2021) <<http://konstytucyjny.pl/protesty-wyborcze-a-waznosc-wyborow-znaki-zapytania/>> accessed 15 March 2024.

155. Krzysztof Skotnicki, “Państwo prawa a tryb uchwalania w 2020 r. ustaw regulujących wybory Prezydenta RP” [The rule of law and the procedure for enacting the laws governing the election of the President of the Republic of Poland in 2020] in Jerzy Ciapała and Agata Pyrzyńska (eds), *Dylematy polskiego prawa wyborczego* (C.H. Beck, 2021) 155.

ciple of stability of law'.¹⁵⁶

ODHIR refers here to the Council of Europe standards, confirmed also in the established case-law of the Polish Constitutional Tribunal, that any changes to the electoral laws should be introduced well in advance before the planned elections.¹⁵⁷ There are also serious doubts about the voting process itself, referring, inter alia, to the already quoted report by Anna Rakowska-Trela: no guarantee of receiving an “election package”, no safeguards against voting, e.g. for a member of the same household, reduced composition of election commissions, shortened deadlines for election protests.¹⁵⁸ Another problem observed concerned some of the voters abroad who were unable to vote, due to problems reaching the election commission or difficulties with receiving and/or returning the “electoral package” on time.¹⁵⁹ In some countries, there was no opportunity to vote at all.¹⁶⁰ In addition, having shortened the deadline for an election protest to three days (Article 15(2) of the Special Arrangements Act), combined in their case with the need to indicate an proxy residing in Poland, made it very difficult for them to use this option.¹⁶¹

The situation regarding the actual possibility of campaigning by candidates competing with the incumbent president, including the situation of unequal access to the public media, also remained unchanged during the elections, which took place. This was also brought to the attention of the ODIHR, which noted, inter alia, the involvement of public officials in the campaign and numerous usages of public resources for this purpose,¹⁶² as well as favourable treatment of the incumbent president by the public media, observing that during the whole campaign period, the state media provided unbalanced and impartial coverage, and acted ‘a campaign vehicle for the incumbent and frequently portrayed his main challenger as a threat to Polish values and national interests’.

156. ODIHR, *Presidential election 28 June and 12 July 2020. Special Election Assessment Mission Final Report*, (23 September 2020) 6.

157. See: Ryszard Balicki, “The Course of the Election Process in Poland during the COVID-19 Pandemic” in Magdalena Musiał-Karg and Izabela Kapsa (eds), *Elections in Times of a Pandemic - Dilemmas and Challenges. Experiences of the European Countries* (Brill, 2024) 350-351.

158. Anna Rakowska-Trela, *Wybory prezydenckie 2020. Kontekst prawny* [The 2020 presidential election: the legal context] (Fundacja im. S. Batorego, 2020) 7-8.

159. See: Izabela Kapsa and Magdalena Musiał-Karg, “Postal Voting of Poles abroad - The Case of the 2020 Presidential Election” in Magdalena Musiał-Karg and Izabela Kapsa (eds), *Elections in Times of a Pandemic - Dilemmas and Challenges. Experiences of the European Countries* (Brill, 2024) 366-367; Monika Florczak-Wątor, Grzegorz Kuca, “The long-term impact of COVID-19 on V4 countries’ electoral systems. The Case of Poland”, POLICY BRIEF 2023, 10 <https://jog.tk.hu/uploads/files/Policy_Brief_Poland_Florczak-Wator_Kuca.pdf> accessed 15 March 2024.

160. See: *ibid.* 10; Information from the Ombudsman’s Office: “Następnicy obywatele, głównie z zagranicy, skarżą się, że nie mogli głosować na Prezydenta RP - choć chcieli” Biuletyn Informacji Publicznej RPO (16 July 2020) <<https://bip.brpo.gov.pl/pl/content/nastepni-obywatele-glownie-zagranicy-skarza-sie-rpo-ze-nie%2%A0mogli-glosowac>> accessed 15 March 2024.

161. See: Katarzyna Kubicka-Żach, “Tylko trzy dni na zgłoszenie protestów wyborczych” [Only three days to lodge election protests], Prawo.pl (29 June 2020) <<https://www.prawo.pl/samorzad/protesty-wyborcze-w-2020-roku-skladane-na-szczegolnych-zasadach,501297.html>> accessed 15 March 2024.

162. ODIHR, *Presidential election 28 June and 12 July 2020. Special Election Assessment Mission Final Report*, (23 September 2020) 14.

ODIHR also mention the examples of the ‘xenophobic and anti-Semitic undertones’.¹⁶³ Monika Florczak-Wątor and Grzegorz Kuca also point at the great scale of involvement of the state administration and public media on the part of President Duda.¹⁶⁴

Furthermore, as presented earlier, starting with the first major restrictions on movement and assembly, the government used exemptions for “performing or participating in religious worship, including religious acts or rituals”. Given that the support of the Polish Catholic Church for the Law and Justice party has been well documented in research,¹⁶⁵ it is reasonable to assume that the planned presidential election may have influenced the decision to make such an exception to the restrictions. In fact, media reports reveal that there were many instances of open support for President Duda in Catholic churches during the period in question.¹⁶⁶

The Polish case illustrates how intentional non-implementation of one of the constitutional states of emergency has been used to consolidate power and how the series of events that followed this decision influenced the further weakening of the rule of law and led to ‘deconstitutionalisation’ of the presidential elections. The not introducing of the state of emergency had a direct impact on electoral rights (the right to vote and to stand for elections). It also led to a situation where the elections that finally were held had no legal basis.

Conclusions - lessons learned from the “hard cases”

For some time now, researchers have been observing a process they call the “return of dictatorships”, whose characteristic features are the progressive consolidation of

163. Ibid. 20.

164. Monika Florczak-Wątor, Grzegorz Kuca, “The long-term impact of COVID-19 on V4 countries’ electoral systems. The Case of Poland”, POLICY BRIEF 2023, 10-11 <https://jog.tk.hu/uploads/files/Policy_Brief_Poland_Florczak-Wator_Kuca.pdf> accessed 15 March 2024. The authors refer i.a., to the facts that ‘the prime minister visited municipalities, announcing the allocation of public sources from a programme that had not then even been adopted by the parliament. The Ministry of the Interior prepared a campaign in favour of electoral attendance designed for small municipalities that offered new fire engines as prizes’.

165. See e.g. Madalena Meyer Resende and Anja Hennig, “Polish Catholic Bishops, Nationalism and Liberal Democracy” (2021) 12 Religions <https://research.unl.pt/ws/portalfiles/portal/34278130/religions_12_00094_v2.pdf> accessed 20 March 2024; Piotr Żuk and Paweł Żuk, “Dangerous Liaisons between the Catholic Church and State: the religious and political alliance of the nationalist right with the conservative Church in Poland” (2019) 27 Journal of Contemporary Central And Eastern Europe 191.

166. One of the more extreme cases, for example, was the information about the behaviour of a priest in south-eastern Poland - see: Joanna Pasterczyk, “Boże, spraw, aby wszyscy głosowali na Andrzeja Dudę”. Słowa księdza podczas mszy oburzyły parafiankę. Teraz spadł niania hejt [“Lord, make everyone vote for Andrzej Duda”. Priest’s words during mass outraged a parishioner. Now she is the victim of hate], *Gazeta Wyborcza* (Rzeszów, 15 June 2020).

executive power and the erosion of democratic standards (independent judiciary, free media, rule of law and limitation of the activities of independent civil society organisations).¹⁶⁷

The negative impact of the ruling Fidesz party in Hungary and Law and Justice party in Poland on the standards of the rule of law, democracy and human rights in these countries has for years been the subject of interest and concern of not only many lawyers, analysts and academics, but also international institutions. During the pandemic, corruption and clientelism flourished (e.g. lack of compliance with public procurement procedures), allowing autocrats to spread their wings. Crises and the feeling of threat are used by populists to consolidate power. In this sense, the pandemic situation increased both the supply and demand for the centralisation of power and autocratic reforms under the guise of protecting citizens.

It can be said that the COVID-19 pandemic became a generator of an accelerated retreat from liberal democracy, although it is worth remembering that this retreat began long before the virus threat was discovered. Protection of public health became a convenient argument for changing the political system, limiting civil liberties (especially the right to information or assembly) and the independence of the media. The implementation of these restrictions would not have been possible were it not for the earlier erosion of the democratic system. In 2019, Freedom House published a report entitled *Democracy in Retreat*, in which the regime in Hungary was assessed as partially free, and in Poland as free, although with serious reservations as to the direction of reforms.¹⁶⁸

In the report, attention was paid to two issues - restrictions on access to information in Hungary and the organisation of the presidential elections in Poland. Both examples have a common denominator, which is the politicisation of the decision (not) to introduce a state of emergency and lack of respect for state institutions, as well as the lack of response to critical voices coming from both the country and international institutions (EU institutions, Council of Europe, UN).

(Non-)introduction of the state of emergency was driven by the political interest of the ruling parties. Hungary introduced a special legal order, the “state of danger”. While the act adhered to Hungarian legal statutes, being in accordance with the Fundamental Law and procedural requirements, nevertheless, it substantially reconfigured the original constitutional framework, leading to the removal of fundamental safeguards. The pandemic was utilised to introduce the Enabling Act, and the new “state of medical emergency”, allowing rule by decree powers to the government. The Fundamental Law was modified, broadening the scope in which the special legal order of a state of danger

167. Grzegorz Ekiert, “Kilka uwag o demokracji i autorytaryzmie w XXI w.” In Jacek Żakowski (ed), *Almanach Concilium Civitas 2022/2023* (Fundacja Collegium Civitas, 2022).

168. Freedom House, *Democracy in Retreat 2019* (2019) <<https://freedomhouse.org/report/free-dom-world/2019/democracy-retreat>> accessed 20 March 2024.

can be declared.

The pandemic was used by Viktor Orbán to utilise crisis rhetoric to consolidate his power. The Fidesz government continued to wage a war, not only against the COVID-19 pandemic, but also against the opposition and independent media, who were continuously portrayed as hindering defence measures. Communication about the pandemic and respective decisions were not transparent. The government did not respond to independent media enquiries or engage in dialogue with civil society organisations. Moreover, it made access to public data more difficult, including data not related to the pandemic.

After the pandemic, while European countries returned to normal legal orders, in Hungary, the special legal order (now due to the war in Ukraine) remained, and Hungary found itself in a state of permanent crisis. Governing by decrees became the default and erased any meaningful role for the parliament and the opposition. Government emergency decrees, issued by constitutional mandate, have had an impact throughout the country and in several branches of the legal system, in some cases bringing about long-term or permanent changes.

The Polish case, while in many aspects similar, evolved slightly differently. The main reason was the starting position - although the PiS-led coalition had a majority in the Sejm, and the independence of several institutions (courts, public media, etc.) was undermined, the party's dominance was not as overwhelming as in the Hungarian case. The Senate was controlled by the opposition majority. As well as the public media, which became the PiS government's propaganda mouthpiece, there are also independent media, and civil society has greater freedom of action. This may have led to the ruling coalition's decision not to introduce a state of emergency, but to act on the basis of ad hoc regulations and strive to hold presidential elections at all costs.

In the pandemic situation, introducing one of the constitutional states of emergency seemed to be the obvious solution. Not only because of the need to counteract the pandemic effectively and legally, but also because it was de facto the only way to legally postpone the upcoming presidential elections. The government side raised two arguments against such a decision: the lack of a real need for their introduction, in view of the effectiveness of the government's actions, and reluctance to unduly restrict rights and freedoms. Both arguments were not true. The first one contradicted the actual course of the pandemic in Poland and the second one was false, as possible restrictions are activated only in the case of such a need, and not automatically.¹⁶⁹ Furthermore, the rights and freedoms were restricted anyway, but without a clear legal basis. The real reason, of course, was different.

Both examples analysed in this paper demonstrate that the pandemic was used to fur-

169. Monika Florczak-Wątor, Grzegorz Kuca, "The long-term impact of COVID-19 on V4 countries' electoral systems. The Case of Poland", POLICY BRIEF 2023, 3-4 <https://jog.tk.hu/uploads/files/Policy_Brief_Poland_Florczak-Wator_Kuca.pdf> accessed 15 March 2024.

ther dismantle the rule-of-law system and introduce illiberal democracy. Importantly, however, the success of intensifying activities depends on how much the liberal democratic system was weakened before the COVID-19 pandemic. The independence of at least some institutions, the activities of civil society, independent media, and the pressure of transnational organisations can only bring results if the political system is not dominated by one actor.