

**Crises and democracy:  
The long-term impact of COVID-19 on V4 countries' electoral systems.  
The Case of Poland**

**POLICY BRIEF**

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**1. Political background to the COVID-19 pandemic**

The COVID-19 pandemic emerged in Poland in March 2020<sup>1</sup> at a particular moment, namely after the parliamentary elections that took place in autumn 2019<sup>2</sup> and just before the universal elections for the office of the President of the Republic of Poland, which were ordered in February 2020<sup>3</sup> and were due to take place on 10 May 2020. In addition, the pandemic overlapped with the ongoing constitutional crisis that had been playing out since 2015, compounding the problems associated with it.<sup>4</sup> During the first five years of this crisis, the ruling Law and Justice Party subjugated almost all institutions that, according to the Constitution of the Republic of Poland, should remain independent from the government, namely the Constitutional Tribunal, the National Council of the Judiciary, the National Broadcasting Council, and partially also the common courts, the State Electoral Commission (SEC) and the Supreme Court.

The latter two bodies, which is already worth emphasising at this point, are directly involved in the electoral process, and therefore the changes concerning them must be taken into account when assessing the fairness and integrity of the elections that took place during the pandemic period. The SEC ensures the proper conduct of elections and is

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<sup>1</sup> In Poland, the first case of infection with the COVID-19 virus was found on 4 March 2020.

<sup>2</sup> As a result of these elections, the majority of seats in the lower house of parliament (the Sejm), namely 235 out of 460, were won by the ruling Law and Justice Party and its coalition partners. The opposition and independent candidates won a majority of seats in the upper house of parliament (the Senate).

<sup>3</sup> The election for the office of the President of the Republic was ordered by the Speaker of the Sejm on 5 February 2020 (Journal of Laws of 2020, item 184).

<sup>4</sup> For more on the constitutional crisis see, for example, W. Sadurski, *Poland's Constitutional Breakdown*, Oxford University Press, 2019; A. Kustra, *Poland's Constitutional Crisis: From Court-Packing Agenda to Denial of Constitutional Court's Judgments*, Toruń Polish-Italian Studies No. 12/2016; M. Wyrzykowski, *Experiencing the Unimaginable: The Collapse of the Rule of Law in Poland*, Hague Journal on the Rule of Law No. 11/2019, pp. 417–422.

responsible for their organisation, while the Supreme Court examines election protests and adjudicates on the validity of elections. In 2018, the method of electing members of the SEC was changed and judges appointed by the highest courts were replaced with those appointed by political parties.<sup>5</sup> As a result of this change, in the autumn of 2019 – that is, several months before the presidential elections – a new SEC composition emerged with members having been appointed through the new method, and at the same time the mandates of persons previously serving on this body have been terminated. In 2019, the Supreme Court was also reformed and a new chamber adjudicating on the validity of elections was established (the Chamber of Extraordinary Review and Public Affairs), which included judges appointed in violation of the Constitution. The reform of the Supreme Court was the culmination of changes to the judiciary, which began back in 2017 and ended with the independence of the Polish courts being undermined. The latter was ultimately confirmed both by the case law of the Court of Justice of the European Union<sup>6</sup>, as well as the case law of the European Court of Human Rights.<sup>7</sup>

## **2. Absence of emergency measures and the consequences thereof**

Unlike other Visegrad countries, Poland never declared emergency measures due to the COVID-19 pandemic, despite having constitutional grounds to do so. In fact, the 1997 Constitution of the Republic of Poland provides for three types of emergency measures, two of which, namely, a state of emergency and a state of natural disaster, could have been introduced due to the COVID-19 pandemic. The reason for justifying the introduction of any of the emergency measures is the occurrence of a situation of 'special threats' under which 'ordinary constitutional means are insufficient' (Article 228(1) of the Constitution). The COVID-19 pandemic, for obvious reasons, could be regarded as such a situation.

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<sup>5</sup> The new SEC composition emerged after appointments were made shortly after the parliamentary elections. Until 2019, the SEC consisted of nine judges (three each from the Constitutional Tribunal, the Supreme Court and the Supreme Administrative Court), and after the reform, this body consists of two judges (one each from the Constitutional Tribunal and the Supreme Administrative Court) and seven persons appointed by the Sejm (the lower chamber of parliament). These changes were introduced by the Act of 11 January 2018 on amending certain acts to increase the participation of citizens in the process of electing, functioning and controlling certain public bodies (Journal of Laws of 2018, item 130).

<sup>6</sup> See e.g. Judgments of the CJEU of 24 June 2019, C 619/18, and of 19 November 2019, C-585/18, C-624/18, and C-625/18.

<sup>7</sup> See ECtHR Judgment of 7 May 2021. 4907/18 in *Xero Flor v. Poland*.

A state of emergency may be imposed by the President of the Republic of Poland at the request of the Council of Ministers, *inter alia*, in the event of a threat to public safety – and an epidemic can undoubtedly be regarded as just such a threat. A state of emergency may be introduced for a definite period of time, for no longer than 90 days, with the possibility of its extension once, with the approval of the Sejm, for another 60 days (Article 230 of the Constitution). The decree on the state of emergency would have to be presented by the President of the Republic to the Sejm within 48 hours of its signing, and the Sejm could repeal it, for example, if it found no grounds for the state of emergency. A state of natural disaster, in turn, may be imposed, *inter alia*, in order to prevent the effects of a natural catastrophe bearing the hallmarks of a natural disaster, as well as in order to remove those effects (Article 232 of the Constitution). The COVID-19 pandemic can be qualified as a natural disaster in light of the Act on the State of Natural Disaster<sup>8</sup>, which defines a natural disaster as 'an event associated with the action of natural forces, in particular (...) infectious diseases of humans'. An epidemic is also a 'natural disaster' within the meaning of Article 3, paragraph 1, point 1 of the same Act, as its effects threaten the life or health of a large number of people, and assistance and protection can only be effectively undertaken with the application of emergency measures, with cooperation between various bodies and institutions, as well as specialist services and formations acting under unified direction. A state of natural disaster is introduced by the Council of Ministers for a fixed period, for no longer than 30 days, with the possibility of its extension for subsequent periods with the consent of the Sejm (Article 232 of the Constitution).

However, during the COVID-19 pandemic, the government decided not to introduce either a state of emergency or a state of natural disaster in Poland. Various arguments were put forward in this regard, including that there was no need to introduce a state of emergency due to the government's effective fight against the pandemic and that there was no need to excessively restrict individual rights and freedoms, which, it was argued, would have to be done if emergency measures were introduced. The first of these arguments was not true, as it quickly became apparent that the fight against the COVID-19 pandemic was beyond the government's normal capacity to act, which gave rise to the need for the Minister of Health to introduce, on 14 March 2020, a state of epidemic threat<sup>9</sup>,

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<sup>8</sup> Act of 18.04.2002 on the State of Natural Disaster (Journal of Laws of 2017, item 1897).

<sup>9</sup> See Ordinances of the Minister of Health of 12.03.2020 on the proclamation of a state of epidemic threat on the territory of the Republic of Poland (Dz.U., item 433) and of 20.03.2020 on the cancellation of a state of epidemic threat on the territory of the Republic of Poland (Dz.U., item 490).

and later, on 20 March 2020, a state of epidemic.<sup>10</sup> Neither of these states of emergency are provided for in the Constitution and do not give rise to such legal effects as a state of emergency or a state of natural disaster would.<sup>11</sup> The second argument regarding the automaticity of far-reaching limitations on the rights of an individual in the event of the introduction of constitutional emergency measures was also erroneous. Such limitations are provided for in the Act on the State of Emergency<sup>12</sup>, as well as in the Act on the State of Natural Disaster<sup>13</sup>, but they are activated only in the case of such a need and on the basis of the decision of the authority introducing those emergency measures.

The decision not to impose any constitutional emergency measures was, in fact, based on entirely different reasons, closely related to the planned presidential elections. The imposition of those measures would have made it impossible to amend the Constitution of the Republic of Poland, the electoral laws and the laws on states of emergency, which follow from Article 228(6) of the Constitution. Additionally, during the period of the introduction of emergency measures, as well as within a period of 90 days following its termination, no universal elections can be held, including elections for the office of the President of the Republic of Poland (Article 228(7) of the Constitution). The imposition of emergency measures would, therefore, have made it impossible for the ruling party to amend the electoral law, which in turn would have resulted in the need to postpone the already ordered elections for the office of the president. It is true that Article 228(7) of the Constitution provides for an extension of the term of office of the incumbent president, who at that time was Andrzej Duda, a supporter of the ruling party, but it was feared that postponing the presidential elections would reduce his chances of re-election. As the pandemic developed, so did the risk of economic problems and social discontent, which could have led to a drop in support for the ruling party and its candidate. Probably for these reasons, and therefore closely related to the electoral strategy of the ruling party, no constitutional state of emergency was introduced. Instead, as previously mentioned, a

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<sup>10</sup> Ordinance of the Minister of Health of 20.03.2020 on the proclamation of a state of epidemic on the territory of the Republic of Poland (Dz.U., item 491).

<sup>11</sup> It is assumed in the literature that the Constitution contains a closed catalogue of emergency measures, which may not be supplemented by the ordinary legislator. Hence, the state of epidemic threat and the state of epidemic cannot be treated as emergency measures within the meaning of the Constitution. Similarly, see E. Łętowska, *Za głupstwa królów płacą ich narody*, at <https://konstytucyjny.pl/za-glupstwa-krolow-placa-ich-narody-indemnizacja-w-czasie-zarazy-cz-i/>

<sup>12</sup> See Chapter 3 of the Act of 21.06.2002 on the State of Emergency, Journal of Laws 2017, item 1928, as amended.

<sup>13</sup> See Chapter 3 of the Act of 18.04.2002 on the State of Natural Disaster, Journal of Laws 2017, item 1897, as amended.

state of epidemic threat was introduced, followed by a state of epidemic, during which the constitutional prohibitions on holding elections and adopting amendments to electoral law did not apply. Some representatives of the constitutional law doctrine claimed that constitutional emergency measures were introduced in Poland 'de facto, although not de iure', or that they were 'material, although not formal'<sup>14</sup>, or even that Poland had a hybrid emergency state<sup>15</sup>, but from the constitutional point of view, no emergency measures provided for in the Constitution of the Republic of Poland were introduced.

### 3. Legal grounds for elections for the President of the Republic of Poland

Similar to Slovakia<sup>16</sup> and contrary to the Czech Republic<sup>17</sup> and Hungary<sup>18</sup>, the President of the Republic of Poland shall be elected by the nation in universal, equal and direct elections conducted by secret ballot (Article 127(1) of the Constitution).<sup>19</sup> The principle of universality provides that the right to vote is vested in each Polish citizen who, not later than on the day of the vote, reaches 18 years of age (Article 62(1) of the Constitution) and was not deprived of this right (Article 62(2) of the Constitution) or did not lose this right (e.g., by renouncing citizenship), and the right to act as a candidate shall be vested in Polish citizens who, not later than on the day of the elections, reach 35 years of age and have full electoral rights to the Sejm (Article 127(3) of the Constitution). A presidential candidate shall be proposed by at least 100,000 citizens who have the right to vote in elections to the Sejm (Article 127(3) (sentence 2) of the Constitution).

The election is won on the basis of the principle of the absolute majority, which means that a candidate who receives more than half of the valid votes shall be considered elected President of the Republic of Poland (Article 127(4) (1 sentence) of the Constitution). If none of the candidates receive the required majority of votes, then a repeat ballot shall be held, and voters choose from among the two candidates who received the largest number of votes in the first ballot (Article 127(5) of the Constitution). The candidate who receives the higher number of votes in the repeat ballot shall be

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<sup>14</sup> See P. Kardas, *Konstytucyjne podstawy rozstrzygnięcia kolizji obowiązków i konfliktu dóbr w czasie pandemii*, *Palestra* No 6/2020, p. 9.

<sup>15</sup> M. Krzeminski, *Hybrydowy stan nadzwyczajny*, konstytucyjny.pl.

<sup>16</sup> See Article 101(2) of the Constitution of Slovakia.

<sup>17</sup> See Article 54(2) of the Constitution of the Czech Republic.

<sup>18</sup> See Article 10(1) of the Constitution of Hungary.

<sup>19</sup> See Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws No 78, item 483, corrected: Journal of Laws of 2001, item 319, amended: Journal of Laws of 2006 No 200, item 1471; of 2009 No 114, item 946, hereinafter referred to as 'The Constitution').

elected President of the Republic of Poland (Article 127(6) of the Constitution). The Supreme Court (Article 129(1) of the Constitution) adjudicates on the validity of the election. It first adjudicates upon electoral complaints and then, having heard the complaints, adjudicates upon the validity of the election of the president. Should the election of the president be adjudicated as invalid, a new election shall be held in accordance with rules prescribed for the event of a vacancy in the office of the President of the Republic of Poland (Article 129(3) of the Constitution).

The election (the first ballot) shall be held on a day no sooner than 100 days and no later than 75 days before the expiry of the term of office of the serving President of the Republic of Poland (Article 128(2) of the Constitution). The election must be held before the end of the term of office and within dates that ensure the validity of the adjudication by the Supreme Court. If necessary, a second ballot shall be held on the fourteenth day after the first ballot. In the event of a vacancy in the office of the President of the Republic of Poland, elections must be ordered not later than 14 days after the occurrence of the vacancy and held not later than within 60 days from the day of when the election was ordered. As already stated, only as an exception after introducing one of the three states of emergency can elections be held 90 days after its termination, and in such cases, the term of office of the incumbent president shall be respectively prolonged (Article 228(7) of the Constitution), and the institution for the replacement of the head of the state should not be used (Article 131 of the Constitution).<sup>20</sup>

The organisation of the election is specifically determined by section V of the Electoral Code of 5 January 2011<sup>21</sup> (chapters I–VII), which specifies rules for proposing candidates (chapter II), rules for the preparation of voting cards (chapter III), the manner of voting together with conditions for the vote's validity (chapter IV), rules for determining the voting results and validity of the election (chapter V), and the rules for an electoral campaign and election financing (chapters VI–VIII). There were two reforms that were significant to the course of the presidential election of 2020 – the reform of the Supreme Court and the reform of the SEC. The new act on the Supreme Court<sup>22</sup> (which came into force on 2 January 2018) granted competencies to hear electoral complaints as

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<sup>20</sup> See: M. Florczak-Wątor, *Constitutional grounds for the question of substitution of the President in the Republic of Poland and neighbouring states*, 'Przegląd Prawa Konstytucyjnego' 2010, issue 2–3, pp. 185 and next.

<sup>21</sup> See: the Act of 5 January 2011 Electoral Code (Journal of Laws of 2020, item 1319, as amended).

<sup>22</sup> See: the Act on Supreme Court of 8 December 2017 (Journal of Laws of 2019, item 825, as amended).

well as for the newly established Chamber of Extraordinary Review and Public Affairs to determine the validity of elections, which replaced the Chamber of Labour, Social Insurance and Public Affairs. As to persons who adjudicate in this chamber of the Supreme Court, doubts were raised as regards the rule of judicial independence, which were finally confirmed by judgements of the Polish Supreme Court<sup>23</sup>, the Court of Justice of the European Union<sup>24</sup> as well as the European Court of Human Rights.<sup>25</sup>

Moreover, in 2018, Article 157 of the Electoral Code<sup>26</sup>, which determined the composition and manner of the appointment of the SEC, was amended. The above-mentioned act implemented provisions according to which the SEC shall be composed of one judge of the Constitutional Tribunal appointed by the President of the Constitutional Tribunal, one judge appointed by the President of the Supreme Administrative Court and seven persons who have qualifications to become a judge, appointed by the Sejm, with the reservation that the term of office of the SEC appointed by the Sejm shall align with the term of office of the Sejm, and candidates for the SEC appointed by the Sejm shall be proposed by deputies' clubs. Additionally, the number of these members must proportionally represent the number of particular clubs' members. Although the introduced amendments do not cause doubts regarding their constitutionality, as the SEC is not a constitutional authority, they constitute a withdrawal from the previous standards for appointing the members of the highest electoral authority. It was decided in the 1990s that the SEC would be composed of judges because of their apoliticality and professionalism, as well as their professional practice of acting independently, shaped by laws determining their professional status. The previous system of electoral authorities assumed their independence from both the governmental administration and politicians. It must be stated that it was the significant representation of judges in the composition of those authorities, particularly the SEC, which guaranteed such independence.<sup>27</sup> The introduced amendments made way for appointing the SEC, both procedurally and in terms of a new composition. Finally, on the basis of the amended provisions, on 20 January 2020, the President of the Republic of Poland appointed the new SEC members in line

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<sup>23</sup> See: Judgement of the Supreme Court of 23 January 2020, case file No. BSA I-4110-1/20.

<sup>24</sup> See: Judgements of the Court of Justice of the European Union of 24 June 2019, C 619/18, re: European Commission v. Poland and of 19 November 2019, C-585/18, C-624/18, and C-625/18.

<sup>25</sup> See: Judgement of the European Court of Human Rights of 7 May 2021 4907/18, re: Xero Flor v. Poland.

<sup>26</sup> See: The Electoral Code was amended by the Act of 11 January 2018 on amending some acts with the aim of increasing citizen participation in the process of electing, operating as well as controlling some public authorities (Journal of Laws, item 130).

<sup>27</sup> A. Rakowska-Trela, *Wybory prezydenckie 2020. Kontekst prawny*, Warsaw 2020, p. 2.

with the amendments, which definitively sealed the changes in electoral law that were introduced in 2018.

#### 4. The course of the presidential election in 2020

On 5 February 2020, the presidential elections were ordered to be held on 10 May 2020.<sup>28</sup> At first, the electoral process was in compliance with the provisions of the Electoral Code; however, after the introduction of the state of epidemic threat (14 March 2020), followed by the introduction of the state of epidemic (20 March 2020), the SEC, acting as the supreme electoral authority, stated that in view of the threats posed by COVID-19, conducting elections would face technical as well as organisational difficulties related to the lack of both adequate regulations and consensus between political powers.<sup>29</sup> As a result, on 31 March 2020, an act (called the anti-crisis shield) was passed counteracting the consequences of the epidemic, which allowed for the possibility of postal voting for two groups of voters: persons 'who on the day of vote were subject to obligatory quarantine, isolation or isolation at home' and 'voters who attained 60 years of age'.<sup>30</sup>

On 6 April 2020, the Sejm passed the act on special rules for conducting universal elections for the President of the Republic of Poland<sup>31</sup>, which enabled postal voting as the only form of voting. The above-mentioned act eliminated the possibility of traditional voting; that is, in a polling station. This was incompatible with the standards of universal and direct elections, as the inability to conduct elections in polling stations meant that elections could not be held within the scheduled time, and according to the Constitution, in such a situation, there should be an implemented state of emergency.

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<sup>28</sup> Order of the Marshall of the Sejm of the Republic of Poland of 5 February 2020 on ordering the election of the President of the Republic of Poland (Journal of Laws, item 184), <https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20200000184/O/D20200184.pdf>

<sup>29</sup> See: <https://pkw.gov.pl/aktualnosci/informacje/przewodniczacy-pkw-rzeczpospolita-polska-jest-dobrem-wspolnym-wszystkich-polakow-wywiad>

<sup>30</sup> See: Article 40 of the Act of 31 March 2020 on the amendment of the act on special solutions related to preventing, counteracting and combating COVID-19, other infectious diseases and emergencies caused by them, as well as some other acts (Journal of Laws, item 568).

<sup>31</sup> See: The Act of 6 April 2020 on special rules for conducting universal elections of the President of the Republic of Poland (Journal of Laws, item 827).

Controversies related to this act resulted in its rejection by the Senate. Nevertheless, on 7 May 2020, the Sejm overturned the Senate's veto and passed the law allowing for *all-postal voting* in the presidential elections scheduled for 10 May 2020. At the same time, the SEC was deprived of the right to organise the elections, and instead of the SEC, the minister who was competent for state assets was engaged in the process and ordered voting cards to be printed. Then, the same minister transferred these cards to the postal operator designated for the delivery. Due to numerous questions concerning organisational as well as legal matters, elections scheduled for 10 May 2020 were cancelled, with the official reason being the sudden increase in the number of COVID-19 cases.

This was the first time in Polish history that universal elections ordered on the basis of the Constitution and the Electoral Code were cancelled, and there were neither constitutional nor statutory grounds for this decision.<sup>32</sup> On 7 May 2020, the SEC issued an announcement in which it was stated that the SEC was deprived of instruments indispensable for performing its duties. As a consequence, other provisions of the Electoral Code could not be applied related to voting, including 1) municipal and city mayors, as well as consuls had not prepared a list of voters; 2) there was no electoral silence, that is, the prohibition of an electoral campaign and making public the electoral survey results; 3) and the polling stations remained closed. Moreover, the SEC stated that, as a result of depriving it of the legal possibility of printing voting cards, voting in presidential elections was impossible.<sup>33</sup> Eventually, the SEC passed a resolution stating that, in the elections of the President of the Republic of Poland scheduled for 10 May 2020, there was no possibility of voting for candidates and that this situation should be treated as equivalent to the lack of the possibility to vote due to a lack of candidates, as provided for in Article 293 § 3 of the Electoral Code.<sup>34</sup>

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<sup>32</sup> It is worth mentioning that the order of the Marshall of the Sejm of 5 February 2020 on ordering the election of the President of the Republic of Poland (Journal of Laws, item 184) was issued on the basis of Article 128(2) of the Constitution and Article 289 § 1 and Article 290 of the Act of 5 January 2011 – Electoral Code (Journal of Laws of 2019, items 684 and 1404).

<sup>33</sup> *Announcement of the State Electoral Commission of 7 May 2020*, the State Electoral Commission, <https://pkw.gov.pl/aktualnosci/wyjasnienia-stanowiska-komunikaty/komunikat-panstwowej-komisji-wyborczej-z-dnia-7-maja-2020-roku> [accessed on 10.05.2020].

<sup>34</sup> Resolution No 129/2020 of the State Election Commission of 10 May 2020 on stating the lack of the possibility to vote for candidates in election of the President of the Republic of Poland. [www.pkw.gov.pl](http://www.pkw.gov.pl) [accessed on 2021-01-20].

In this situation, there was no 'come back' to the constitutional procedure for conducting elections, but instead, the Act of 2 June 2020 was passed, which introduced a hybrid method of voting, that is, traditional voting in a polling station together with postal voting. What is more, this act created a specific, as yet unknown, type of election, combining elections scheduled for 10 May 2020 with other elections that were to be ordered, involving all consequences concerning, *inter alia*, procedures for proposing candidates as well as matters related to conducting, financing and settling the electoral campaign.<sup>35</sup> On 3 June 2020, another order was issued regarding ordering the presidential election, scheduling the election for Sunday, 28 June 2020.<sup>36</sup> According to the new provisions, a voter was entitled to vote by post, except if voting abroad in countries where there was no organisational, technical or legal possibility to carry out voting in such a form (Article 2(3)). The intention of voting by post could be declared by an overseas voter up to the fifteenth day before the day of the election, and for a domestic voter, up to the twelfth day before the day of the election, and for a voter who was, on voting day, under obligatory quarantine, isolation or isolation at home, up to the fifth day before the day of the election (Article 3(1) (1)). Should a voter begin their obligatory quarantine, isolation or isolation at home after the above-mentioned deadline, they could notify their intention of wanting to vote by post up to two days before the day of the election.<sup>37</sup>

Candidates who were registered for the cancelled election of 10 May 2020 had the right to stand in new elections, and all voters had the right to vote by post. In the first ballot, 143.5 thousand voters declared such an intention, and in two municipalities – Baranów and Marklowice – elections were held solely in the form of postal voting due to the high rate of COVID-19 infections. Many voters who had remained abroad due to restrictions related to COVID-19 had a limited possibility of voting, and some of them (in North Korea, Afghanistan, Kuwait, Venezuela, Peru and Chile) were deprived of the right to vote in the election.

The electoral campaign was one of the fiercest in the history of the Polish elections since 1989. The governmental administration, together with public media, was engaged in the campaign for the incumbent President Andrzej Duda on an unprecedented scale. As

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<sup>35</sup> A. Rakowska-Trela, *op. cit.*, p. 7.

<sup>36</sup> Order of the Marshall of the Sejm of 3 June 2020 on ordering the election of the President of the Republic of Poland (Journal of Laws, item 988).

<sup>37</sup> An interesting discussion concerning this matter is presented in M. Musiał-Karg, *Correspondence voting during Covid-19 pandemic: Experience of Polish presidential election in 2020*, 'Przegląd Prawa Konstytucyjnego' 2021 vol. 2, p. 31 and next.

support for the incumbent president, 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. The aim of the campaign was to increase the chances of the incumbent president's re-election. This situation was additionally corrupted by a lack of any real debate between the candidates, which would have allowed the voters to shape their views.

In these circumstances, on 28 June 2020, the first ballot for the elections was held. It brought victory to the incumbent President of the Republic of Poland, Andrzej Duda, who received 43.50% of the vote. In second place was Rafał Trzaskowski, who received 30.46% of the vote. As no candidate obtained the required absolute majority of votes, on 12 July 2020, a second ballot was held. Despite the even greater engagement of the government and public media, the final result of the second electoral ballot was not decided until the last moment. Both candidates exceeded the threshold of 10 million votes; however, the incumbent President Andrzej Duda obtained slightly more votes (51.03%) and his opponent, Rafał Trzaskowski, got 48.97% of the vote. The turnout was even higher than in the first electoral ballot, at 68.9%.<sup>38</sup> On 27 July 2020, the SEC published a report concerning the election in which it stated that 'no infringements of electoral law were found which would have impacted on the result of voting and the result of the election of the President of the Republic of Poland'.

## **5. Hearing electoral claims and the declaration of election validity**

As already stated, the validity of the election of the President of the Republic of Poland shall be declared by the Supreme Court (Article 129(1) of the Constitution) and voters are entitled to file electoral claims against the validity of the election of the president (Article 129(2) of the Constitution). The Act of 2 June 2020 shortened this time limit to 3 days (whereas the Electoral Code provides for 14 days for filing claims) and, for declaring the validity of the election, to 21 days (whereas the Electoral Code provided for 30 days). In the Supreme Court, 5847 electoral complaints were filed, which was a significantly higher

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<sup>38</sup> Results of the presidential elections according to the SEC: <https://prezydent20200628.pkw.gov.pl/prezydent20200628/>.

number of complaints compared to the 2015 elections, when only 58 electoral claims were filed. Only 92 filed claims were considered to be justified in whole or in part. The main reasons for not proceeding with the vast majority of these electoral claims were a failure to file the claims within the specified time limit, claims being filed by an unentitled person, phrasing allegations that were not included within the scope of grounds for filing an electoral claim, and failure to provide evidence in favour of a claim.

The Electoral Code provides for a two-stage mechanism for election validity control, which is conducted by the improperly formed Chamber of Extraordinary Review and Public Affairs. Firstly, single electoral claims are heard by three judges of this Chamber, and thereafter, a resolution concerning the validity of the election is adopted by the whole Chamber. Although the assessment reasons for a resolution concerning the validity of the election are widely determined, as they concern elections as a whole process preceding as well as accompanying the voting itself, the reasons for an electoral protest are strictly determined. This allows the Supreme Court to relativize judgments that can possibly be seen and corrected on the basis of periodic, comparative studies in jurisdiction (concerning both claim and election validity) in numerous electoral cycles. Such studies require research that correlates the assessment of electoral claims with (and based on these claims) the assessment of election validity. Then, a comparative assessment should be undertaken between those correlations in various elections. It is worth indicating that claim allegations may refer solely to 'crimes against elections' (there is a closed catalogue of crimes) and infringements of provisions of the Code (although this is a broad notion, it may refer solely to 'voting, determining the result of voting or the result of elections' – the final element of the whole electoral procedure), and what is more (yet another restriction when it comes to providing evidence) – the claims should 'have an impact' on the result of elections. The latter requirement, in particular, provides a significant margin of judgment to the authority assessing electoral claims.<sup>39</sup>

Secondly, the Supreme Court stated that the filed electoral claims did not have an impact on the election result, which was the grounds for adopting the resolution of 3 August 2020 on the declaration of the validity of the election of Andrzej Duda to the office of the President of the Republic of Poland.<sup>40</sup> The resolution of the Supreme Court did not

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<sup>39</sup> E. Łętowska, *Electoral claims and elections validity: Question matters*, <http://konstytucyjny.pl/protesty-wyborcze-a-waznosc-wyborow-znaki-zapytania/> [accessed on 20.03.2022].

<sup>40</sup> See: Resolution of 3 August 2020, case file No I NSW 5890/20 (Journal of Laws, item 1335).

contain detailed reasoning regarding the character of the presidential election in the context of its conformity with the Constitution and presented a characteristic lack of symmetry in terms of its analysis and assessment. In particular, it did not indicate its methods and analysis, leading to a holistic, final judgment of election validity, and therefore it was perfunctory and not based on the situation. There was no attempt to resume reporting in the public domain nor reporting on electoral claim violations of reliability standards that the Supreme Court would consider adequate and sufficient. Nothing was even written about the allegations present in the claims. Thereby, dissonance occurred between social expectations and the manner of regulation regarding electoral claims, particularly within the scope of the control mechanism of elections as a whole process, which the Supreme Court runs.<sup>41</sup>

## 6. The role of social observers

Various forms of election monitoring were significant from the point of view of the correctness of the conduct of elections. Under the Electoral Code, there are three types of monitoring: 1) political monitoring (a trustee); 2) international monitoring (foreign observer); and 3) social monitoring (social observer). Social monitoring, introduced by means of the Act of 2018<sup>42</sup>, was the most popular in the presidential elections in 2020. Despite the increase in COVID-19 infections, many organisations (associations and foundations) that declare concern for democracy, civic rights and civil society development as their statutory goals delegated social observers to electoral commissions. Observers had the right to be present in all activities of the commission to which they were delegated, including monitoring the preparation of the polling station for voting, works of the commission regarding determining the result of voting and drawing up the voting protocol, the transfer of data from the protocol together with the protocol by a circuit electoral commission to a commission of higher rank, and monitoring data entry into the network for electronic data transfers. Social observers could register all the activities of the circuit electoral commissions using their own tools to record sound or

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<sup>41</sup> E. Łętowska, *Electoral claims and elections validity: Question matters*, <http://konstytucyjny.pl/protesty-wyborcze-a-waznosc-wyborow-znaki-zapytania/> [accessed on 20.03.2022].

<sup>42</sup> See: The Act of 11 January 2018 on amending some other acts in order to increase participation of citizens in the process of elections, operations as well as controlling some public authorities (Journal of Laws, item 130).

vision. These materials could then qualify as electoral documents<sup>43</sup> and could therefore be sent to state archives for at least 5 years and disclosed as archive material.

## **7. Permissible limitations on the right to vote and to stand as a candidate in presidential elections**

The right to vote in presidential elections is guaranteed to all Polish citizens who are over 18 on the day of the vote and are not deprived of public and electoral rights or legal capacity (Article 62 of the Constitution). In turn, the right to stand for election to the office of the President of the Republic of Poland is vested in Polish citizens who, no later than the day of the elections, have reached 35 years of age and have full electoral rights to the Sejm (Article 127(3) of the Constitution). Participation in elections, both as a voter and as a candidate, may involve the exercise of other constitutional rights and freedoms, such as the freedom of assembly, freedom of speech, the right to public information or the right to a fair trial. Any restriction of these rights and freedoms may translate directly into a restriction of electoral rights. On the other hand, however, the restriction of electoral rights may also limit the possibility of exercising the said other rights and freedoms.

Electoral rights, like any other constitutional rights, are not of an absolute nature and may be subject to limitations under the conditions laid down in Article 31(3) of the Constitution. It follows from this provision that limitations to the exercise of constitutional freedoms and rights may be established only by statute and only when they are necessary in a democratic state for its security or public order, for the protection of the environment, health and public morals, or for the freedoms and rights of other persons, and that such limitations may not infringe upon the essence of freedoms and rights. Article 31(3) of the Constitution sets out the conditions for the restriction of the constitutional rights and freedoms of the individual that are in force during the normal functioning of the state. However, these conditions are formulated in a slightly different way in the event that limitations on the rights and freedoms of the individual are to be introduced during a state of natural disaster or a state of emergency. In accordance with Article 228(5) of the Constitution, all state activities undertaken as a result of the introduction of emergency measures, including activities consisting of restrictions of

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<sup>43</sup> See: Article 8 of the Electoral Code.

individual rights and freedoms, must correspond to the degree of threat and should aim to restore the normal functioning of the state as soon as possible. The fundamental difference between the two regimes of the restriction of individual rights and freedoms under Articles 31(3) and 228(5) of the Constitution lies in the fact that firstly, during the normal functioning of the state, the essence of constitutional rights and freedoms may not be violated, and secondly, from among the various possible restrictions of individual rights and freedoms useful to achieve the intended purpose, those that are the least onerous should be selected, rather than those that are the most effective. In turn, during a period of emergency measures, different principles apply; that is, the prohibition to infringe on the essence of constitutional rights and freedoms applies only to certain rights and freedoms indicated in Article 233 of the Constitution, which, however, do not include electoral rights. The latter may therefore not be restricted during a period of emergency measures, either. The afore-mentioned Article 228(5) of the Constitution, however, allows for the introduction of far-reaching limitations to the rights and freedoms of the individual, including electoral rights, in the event of the introduction of emergency measures, provided that such limitations correspond to the degree of threat and are useful for the quickest possible restoration of the normal functioning of the state.

In conclusion, it should be stated that the electoral rights of citizens in Poland may not be suspended either during the normal functioning of the state (this prohibition follows from Article 31(3) of the Constitution) or during a state of emergency or a state of natural disaster (which follows from Article 233(1) and (3) of the Constitution). Where constitutional emergency measures have not been introduced, these rights may be restricted only under the conditions set out in Article 31(3) of the Constitution. Pursuant to this provision, limitations require to be in statutory form and may be introduced when it is necessary for the protection of the security of the state or its public order, or to protect the environment, health and public morality, or the freedoms and rights of other persons. Any such restriction should be made with due respect to the principle of proportionality and the standards of a democratic state.

## **8. Voting right restrictions under the COVID-19 pandemic**

When assessing the constitutionality of restrictions on electoral rights introduced during the COVID-19 pandemic, one should take into account both those restrictions that

directly concerned electoral rights and those that concerned other rights and freedoms of the individual, indirectly limiting the possibility of exercising an active or passive electoral right. Such restrictions related primarily to the manner in which the presidential elections scheduled for 10 May 2020 were organised, their subsequent cancellation and the holding of those elections in June/July 2020 in two rounds under conditions of the pandemic and the related restrictions on other individual rights and freedoms.

The elections on 10 May 2020, as mentioned earlier, were to be held only by postal vote, which was determined by a law passed a month earlier and which came into force just before the elections. Depriving citizens of the possibility of voting in the traditional way, that is, at the polling station, raised serious constitutional doubts. Although the right to turn up in person at a polling station to cast a vote is not expressly guaranteed by the Constitution of the Republic of Poland, in a democratic state, traditional voting is undoubtedly the basic form of voting, whereas voting by post is a non-traditional and additional form. Leaving the latter form as the only one may discourage many voters who are not convinced about participating in elections through postal voting. Moreover, postal voting was not possible for the majority of voters outside the country, which deprived them of the possibility of exercising their constitutionally guaranteed right to vote. It should also not be overlooked that postal voting was to take place in a situation of restrictive limitations on the ability of voters to exercise many other individual rights and freedoms, which were introduced in connection with the COVID-19 epidemic. The ban on travelling without a legitimate reason and the ban on organising meetings, visits and rallies, which was in force at that time, meant that there was no possibility of running the election campaign in any other way than via the Internet. The only candidate who was able to meet with voters in the then-pandemic reality was the incumbent President Andrzej Duda, who was running for re-election. Due to his office and duties, he had to travel around the country and meet people fighting the epidemic or those affected by its effects. Other candidates were forbidden from organising and attending such electoral meetings. This situation contradicted the principle of equal opportunities for candidates for the office of president, which is one of the three aspects of the principle of the equality of elections.

Serious doubts were also raised by the fact that the law introducing postal voting as the only possible option was adopted at a rapid pace, within one day, without public consultations, and that the new voting rules were to be applied during the ongoing

electoral process.<sup>44</sup> This law entrusted the organisation of elections to the Minister of State Assets, who was also Deputy Prime Minister in the government formed by the political party whose candidate (Andrzej Duda) was running in this election. In other words, the elections were to be organised by those who were most interested in their outcome. In addition, the SEC was deprived of the competence to organise elections and supervise their conduct, that is, the body appointed to oversee the fairness and integrity of the electoral process. This body had previously been politicised as a result of the above-mentioned change in the way its members were selected. The election packages were to be collected by an institution subordinate to the minister, that is, the Polish Post Office, to which the minister made the personal data of all voters available for this purpose. This also raised serious doubts, as Article 51 of the Constitution guarantees citizens the protection of their personal data, and the minister had no legal basis to hand over the voters' personal data in his possession to the Polish Post.<sup>45</sup> The same minister also ordered the printing of ballot papers before parliament had completed the law that would have given him the authority to do so. These ballots were then destroyed after the elections were cancelled, exposing the State Treasury to enormous costs.<sup>46</sup>

This way of organising the presidential elections gave rise to serious doubts about their reliability and fairness, which was repeatedly flagged up by the Ombudsman.<sup>47</sup> Doubts were also raised due to the fact that many issues of importance to citizens concerning the conduct of postal voting, such as the manner and procedure for delivering election packages to electors subject to compulsory quarantine or isolation on voting day, were to be regulated by the minister. Such a solution was incompatible with the requirement of the purely statutory interference of the state in the sphere of individual rights and freedoms.

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<sup>44</sup> The Act on special rules for conducting general elections for the President of the Republic of Poland, ordered in 2020 (print 328), was submitted to the Sejm on 6 April 2020 and, on that day, it was passed by the Sejm by a government majority and sent to the Senate, in which the opposition had a majority. The Senate, in its position of 5 May 2020, called for a rejection of the law. However, the Sejm, at its session on 7 May 2020, rejected the Senate's resolution. The following day, the law was signed by the president, and was published and entered into force on 9 May 2020, that is, one day before the scheduled election date.

<sup>45</sup> See the Judgment of the Voivodship Administrative Court in Warsaw of 26.02.2021, IV SA/Wa 1817/2020, confirming the illegality of the Minister's actions.

<sup>46</sup> See the Supreme Audit Office report on the so-called envelope elections of April 2021, available at: <https://www.nik.gov.pl/kontrole/D/20/502/>

<sup>47</sup> See, for example, the Ombudsman's address to the Minister of State Assets of 24.04.2020 (VII.602.9.2020): <https://bip.brpo.gov.pl/pl/content/koronawirus-rpo-pyta-jacka-sasina-o-rozporzadzenia-wyborcze>

Eventually, as mentioned earlier, the elections were cancelled following an agreement between the political leaders of the two ruling parties. The decision to cancel the elections had no constitutional or statutory basis. Nor did it find expression in any formal act of cancelling the elections.<sup>48</sup> In other words, the presidential elections were not held, despite the fact that the law does not provide for a procedure for cancelling elections that have already been ordered or for abandoning them. The cancellation of elections by politicians of the ruling party was tantamount to depriving citizens of the possibility of exercising their constitutionally guaranteed electoral rights. Such far-reaching interference in the sphere of electoral rights was not introduced by a statute, which was contrary to Article 31(3) of the Constitution. In fact, the cancellation of the elections meant a ban on participation in the elections that had already been ordered, or – looking at the situation from a different perspective – a failure on the part of the state to fulfil its obligation to hold elections as a precondition for citizens' ability to exercise their electoral rights. It should be added that holding presidential elections under the then-pandemic conditions was very difficult, which should have prompted those in power to introduce emergency measures justifying the postponement of these elections and an extension of the term of office of the incumbent president.

Following the cancellation of the presidential elections, the electoral law was amended, reinstating the possibility of voting by traditional means and preserving the possibility of voting by post. However, the re-run presidential election on 28 June 2020 also saw a number of violations of the electoral rights of both candidates and voters. Public television and the government administration were involved in the election campaign of the ruling party's candidate on an unprecedented scale. As part of this campaign, the prime minister visited more than 80 cities, urging people to vote for the incumbent president and promising municipalities public funds from a programme that had not even been adopted by parliament. In turn, during the election campaign, public television – as the Office for Democratic Institutions and Human Rights (OSCE) stated in its final report on the observation of the presidential election – 'failed to meet its legal obligation to provide balanced and impartial coverage. Instead, the TVP played an instrumental role in the election campaign of the incumbent president, often portraying

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<sup>48</sup> In Resolution No 129/2020, it found that in the election of the President of the Republic, ordered for 10 May 2020, it was not possible to vote for candidates, which is equivalent, in effect, to the failure to vote provided for in the Electoral Code due to the absence of candidates.

his main rival as a threat to Polish values and state interests. At times, the broadcast had xenophobic and anti-Semitic overtones.<sup>49</sup>

For all these reasons, there are serious doubts about whether the 2020 presidential election held during the COVID-19 outbreak was fair and democratic.

## 9. Conclusions

The findings presented above allow for the following conclusions to be drawn:

- a) Constitutional emergency measures were not imposed in Poland during the COVID-19 outbreak due to the desire of those in power to circumvent the ban on holding universal elections during a state of emergency or a state of natural disaster.
- b) The failure to impose constitutional emergency measures allowed those in power to change the electoral law and hold elections for the office of president, which ultimately led to the re-election of the ruling party's candidate for the office, Andrzej Duda.
- c) The presidential election ordered for 10 May 2022 was cancelled (and not postponed), despite the fact that the applicable legislation did not provide for the possibility of cancellation (postponement).
- d) The cancellation of the elections was preceded by the removal of the power to organise them from the SEC and the transfer of this power to the Minister for State Assets, which involved the violation of a number of provisions of electoral law.
- e) The cancellation of the elections that had already been ordered constituted a violation of the electoral rights of voters and candidates for the office of the President of the Republic of Poland.
- f) There were a number of irregularities in the June/July 2020 presidential elections that can be qualified as violations of the electoral rights of candidates and voters.
- g) The adopted model for verifying the correctness of the elections, including the narrow inclusion of grounds for lodging election protests and the broad inclusion of grounds for the validity of the whole election, turned out to be inadequate in regard to the existing factual and legal circumstances.

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<sup>49</sup> See the final report from the ODIHR Special Election Assessment Mission of 23 September 2020, at: <https://www.osce.org/files/f/documents/6/2/464601.pdf>

h) The COVID-19 epidemic was clearly used by those in power to push through the election of their candidate seeking re-election (i.e., Andrzej Duda), which was made possible to some extent by the government's 'reform' of both the SEC and the Supreme Court.