

Rule of Law Crisis and Democratic Backsliding during the Pandemic – Lasting effects in Hungary and Poland¹

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1. Introduction: An opportunity to exploit the crisis? Why the legal response to COVID-19 in Hungary and Poland constitutes 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 Covid-19 pandemic posed a novel and unprecedented stress test for liberal democracies already grappling with substantial disruptions, in addition to exerting “tremendous pressure on constitutionalism”.² At least some of the restrictions

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² M. Belov, *The Role of Fear Politics in Global Constitutional 'Ernstfall': Images of Fear under COVID-19 Health Paternalism* (in:) M. Belov (ed.), *Populist Constitutionalism and Illiberal*

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. It is known from existing research that populist parties utilised the pandemic to consolidate their power.³ This trend is observed to a higher extent in countries with weak democratic institutions and those already facing challenges in the pre-pandemic period. In this context, it is worth to study the political and legal situation in Hungary and Poland. Characterized by populist governance and Eurosceptic rhetoric, both countries had already exhibited semi-authoritarian tendencies prior to the pandemic. According to Freedom House (2021), Poland and Hungary experienced the greatest decline in the quality of democracy in Europe, making them interesting case studies for examining the pandemic's impact on the rule of law and processes of democratic backsliding.⁴ This article aims to demonstrate how emergency rule can have lasting effects on fundamental rights, even after the immediate crisis has passed. By examining two emblematic cases – restrictions on access to information in Hungary and the organisation of the presidential elections in Poland – it highlights how measures initially justified as temporary responses to the COVID-19 pandemic have led to enduring changes in democratic governance. The article argues that these examples illustrate a broader trend in which emergency powers are used not only to manage crises but also to reshape political and legal frameworks in ways that may lead to the limitation of transparency, accountability, and citizens' rights. The article is based on the analysis of legal developments during the pandemic in both countries in the context of their political background.

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

Democracies: Between Constitutional Imagination, Normative Entrenchment and Political Reality, Intersentia, Cambridge 2021, p. 187.

³ M. M. Vasiljevic, H. Dajč, P. Ehin, S. Hanley, N. Styczyńska, M. Radulović et al., *Populist Politics in the Context of the COVID-19 Crisis: A Comparative Analysis*, POPREBEL Working Paper no. 12, 2023.

⁴ Freedom House, *Nations in Transit 2021: The Antidemocratic Turn*, Freedom House, Washington, DC 2021.

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”⁵ and “autocratic legalism”.⁶ Łukasz Zamecki and Viktor Glied argue that comparing the democratic erosion process in Hungary and Poland reveals a remarkably similar trajectory of de-democratization: 1) A crisis in the country leads to the triumph of a party that fuels discontent against the incumbent parties (socialist-liberal in Hungary, centrist in Poland), 2) A decisive victory in the elections enables the establishment of a one-party government, 3) The government’s narrative emphasizes the necessity of a “new quality” of governance for the country, 4) Violations of the checks and balances system, justified by the claim of popular support, progressively take shape. 5) Key actions by the government target judicial independence, especially concerning the constitutional court and councils responsible for judge nominations, public media, independent NGOs, and the attorney general’s office. In both countries, the securitization of immigration policy plays a significant role in the actions of Fidesz and PiS.⁷ 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.⁸ 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

⁵ M. Bernhard, *Democratic Backsliding in Poland and Hungary*, ‘Slavic Review’ 2021, vol. 80, no. 3, pp. 585–607, p. 585.

⁶ K. L. Scheppele, *Autocratic Legalism*, ‘University of Chicago Law Review’ 2018, vol. 85, no. 2, pp. 545–584, p. 545.

⁷ Ł. Zamecki, V. Glied, *Article 7 Process and Democratic Backsliding of Hungary and Poland: Democracy and the Rule of Law*, ‘Online Journal Modelling the New Europe’ 2020, no. 34, pp. 57–85.

⁸ See e.g. L. Pech, K. L. Scheppele, *The EU and Poland: Giving Up on the Rule of Law?*, ‘Verf-Blog’ 15 Nov. 2016, <https://verfassungsblog.de/the-eu-and-poland-giving-up-on-the-rule-of-law> [accessed 12 Feb. 2024]; W. Rech, *Some Remarks on the EU’s Action on the Erosion of the Rule of Law in Poland and Hungary*, ‘Journal of Contemporary European Studies’ 2018, vol. 26, no. 3, pp. 334–347; D. Kochenov, *Elephants in the Room: The European Commission’s 2019 Communication on the Rule of Law*, ‘The Hague Journal on the Rule of Law’ 2019, vol. 11, no. 2, pp. 423–438; T. Theuns, *The Need for an EU Expulsion Mechanism: Democratic Backsliding and the Failure of Article 7*, ‘Res Publica’ 2022, vol. 28, no. 4, pp. 693–714; D. Kochenov, B. Grabowska-Moroz, *Constitutional Populism versus EU Law: A Much More Complex Story than You Imagined* (in:) M. Krygier, M. Czarnota, W. Sadurski (eds.), *Anti-Constitutional Populism*, Cambridge University Press, Cambridge 2022, pp. 45–74; L. Pech, J. Jaraczewski, *Systemic Threat to the Rule of Law in Poland: Updated and New Article 7(1) TEU Recommendations*, CEU Democracy Institute Working Papers 2/2023.

towards authoritarianism.⁹ Several excellent analyses focusing mostly on specific problems in only one of these states have also been published.¹⁰ In this context, the

⁹ See e.g. A. Kerpel, *Pole and Hungarian Cousins Be? A Comparison of State Media Capture, Ideological Narratives and Political Truth Monopolization in Hungary and Poland*, 'Slovo' 2017, vol. 29, pp. 68–88; D. R. Kelemen, L. Pech, *The Uses and Abuses of Constitutional Pluralism: Undermining the Rule of Law in the Name of Constitutional Identity in Hungary and Poland*, 'Cambridge Yearbook of European Legal Studies' 2019, vol. 21, pp. 59–92; R. Sata, I. P. Karolewski, *Caesarean Politics in Hungary and Poland*, 'East European Politics' 2019, vol. 36, no. 2, pp. 206–230; T. Drinóczi, A. Bień-Kacała, *Illiberal Constitutionalism: The Case of Hungary and Poland*, 'German Law Journal' 2019, vol. 20, no. 9, pp. 1140–1165; R. Csehi, E. Zgut, *'We Won't Let Brussels Dictate Us': Eurosceptic Populism in Hungary and Poland*, 'European Politics and Society' 2021, vol. 22, no. 1, pp. 53–77; T. Drinóczi, A. Bień-Kacała, *Illiberal Constitutionalism in Poland and Hungary: The Deterioration of Democracy, Misuse of Human Rights and Abuse of the Rule of Law*, Routledge, London 2021; B. Madlovics, B. Magyar, *Kaczyński's Poland and Orbán's Hungary. Different Forms of Autocracy with Common Right-Wing Frames in the EU*, 'Journal of Right-Wing Studies' 2023, vol. 1, no. 1, pp. 2–24.

¹⁰ See e.g. K. L. Scheppele, *The Rule of Law and the Frankenstate: Why Governance Checklists Do Not Work*, 'Governance' 2013, vol. 26, no. 4, pp. 559–578; *Special Issue: Gegen die Wand. Konservative Revolution in Polen*, Osteuropa 1-2/2016; E. Łętowska, *The Current Dismantling of the Rule of Law in Poland*, 'Rule of Law', 5 Jun. 2018, <https://ruleoflaw.pl/the-current-dismantling-of-the-rule-of-law-in-poland> [accessed 13 Feb. 2024]; Z. Enyedi, *Democratic Backsliding and Academic Freedom in Hungary*, 'Perspectives on Politics' 2018, vol. 16, no. 4, pp. 1067–1083; P. Filipek, *The New National Council of the Judiciary and Its Impact on the Supreme Court in the Light of the Principle of Judicial Independence*, 'Problemy Współczesnego Prawa Międzynarodowego, Europejskiego i Porównawczego' 2018, vol. XVI, pp. 171–195; A. Bozóki, D. Hegedűs, *An Externally Constrained Hybrid Regime: Hungary in the European Union*, 'Democratization' 2018, vol. 25, no. 7, pp. 1173–1190; W. Sadurski, *Poland's Constitutional Breakdown*, Oxford University Press, Oxford 2019; R. Markowski, *Creating Authoritarian Clientelism: Poland after 2015*, 'The Hague Journal on the Rule of Law' 2019, vol. 11, no. 1, pp. 111–135; M. Bucholc, *Commemorative Lawmaking: Memory Frames of the Democratic Backsliding in Poland after 2015*, 'The Hague Journal on the Rule of Law' 2019, vol. 11, no. 1, pp. 85–109; K. Gajda-Roszczyńska, K. Markiewicz, *Disciplinary Proceedings as an Instrument for Breaking the Rule of Law in Poland*, 'The Hague Journal on the Rule of Law' 2020, vol. 12, no. 3, pp. 451–474; M. Matczak, *The Clash of Powers in Poland's Rule of Law Crisis: Tools of Attack and Self-Defence*, 'The Hague Journal on the Rule of Law' 2020, vol. 12, no. 3, pp. 421–450; L. Pech, P. Wachowicz, D. Mazur, *Poland's Rule of Law Breakdown: A Five-Year Assessment of EU's (In)Action*, 'The Hague Journal on the Rule of Law' 2021, vol. 13, no. 1, pp. 1–29; Z. J. Tóth, *Rule of Law vs. Democracy: With Special Regard to the Case of Hungary* (in:) M. Belov (ed.), *Populist Constitutionalism and Illiberal Democracies: Between Constitutional Imagination, Normative Entrenchment and Political Reality*, Intersentia, Cambridge 2021, pp. 135–157; M. Stambulski, *Constitutional Populism and the Rule of Law in Poland* (in:) M. Krygier, M. Czarnota, W. Sadurski (eds.), *Anti-Constitutional Populism*, Cambridge University Press, Cambridge 2022, pp. 201–222; E. Bodnár, *Disarming the Guardians – the Transformation of the Hungarian Constitutional Court after 2010* (in:) M. Krygier, M. Czarnota, W. Sadurski (eds.), *Anti-Constitutional*

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) about whether 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, considerations, 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 symbolic cases - restrictions on access to information in Hungary and the organisation of the presidential elections in Poland. While the cases differ, they both illustrate abuses of power under the guise of emergency governance. Against this background, the article begins with the context of the introduction of a state of emergency in Hungary and its non-introduction in Poland, followed by the consequences of these decisions for selected human rights. The paper closes with the conclusions that can be drawn from the findings.

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

The scale and nature of the threat posed by COVID-19 *prima facie* appears to have justified the declaration of a state of emergency.¹¹ 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 EU 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

Populism, Cambridge University Press, Cambridge 2022, pp. 159–180; A. Ploszka, *It Never Rains but It Pours. The Polish Constitutional Tribunal Declares the European Convention on Human Rights Unconstitutional*, 'The Hague Journal on the Rule of Law' 2023, vol. 15, no. 1, pp. 51–74.

¹¹ 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. A. 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:) M. C. Kettemann, K. Lachmayer (eds.), *Pandemocracy in Europe. Power, Parliaments and People in Times of COVID-19*, Hart, Oxford 2022, pp. 34–35.

several other countries, did not do so either in the first wave or during the subsequent course of the pandemic.¹² Although both countries have been 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 next section overviews both countries' context.

2.1. 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 its two-thirds majority rule. The change to the constitution and the judiciary reforms raised concerns both in Hungary and at the EU level.¹³ Since 2011, the Venice Commission has issued reports about the state of the rule of law in Hungary,¹⁴ 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.¹⁵ 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

¹² 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 Verfassungsblog and Democracy Reporting International – see J. Grogan, *Introduction & List of Country Reports*, 'Verfassungsblog', 6 Apr. 2020, <https://verfassungsblog.de/introduction-list-of-country-reports> [accessed 28 Jan. 2024].

¹³ G. Halmai, *Unconstitutional Constitutional Amendments: Constitutional Courts as Guardians of the Constitution?*, 'Constellations' 2012, vol. 19, no. 2, pp. 182–203; T. Drinóczi, A. Bień-Kacala, *Extra-legal Particularities and Illiberal Constitutionalism – the Case of Hungary and Poland*, 'Hungarian Journal of Legal Studies' 2018, vol. 59, no. 4, pp. 338–354; N. Chronowski, *The Post-2010 'Democratic Rule of Law' Practice of the Hungarian Constitutional Court under a Rule by Law Governance*, 'Hungarian Journal of Legal Studies' 2021, vol. 61, no. 2, pp. 136–158.

¹⁴ Including concerns about the Fundamental Law and its amendments, the restriction of certain rights of the Constitutional Court, and the judiciary reform.

¹⁵ A. Schmidt, *Challenges of the Illiberal Democracy in Hungary: Some Aspects to the 2018 Elections*, 'Polish Political Science Review' 2018, vol. 6, no. 2, pp. 70–90, p. 79.

the elections, votes from Hungarian minorities abroad, the high number of fake parties, government control over media outlets, and unequal financial resources.¹⁶

In a famous speech from 2014, Orbán declared that his model for Hungary was to become an “illiberal democracy”, guided by “national interest”.¹⁷ 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.¹⁸ “National consultations” and billboard campaigns were launched, starting with the referendum on “migration and terrorism”, accompanied by the infamous anti-Soros¹⁹ and “Let’s Stop Brussels” anti-EU billboard campaigns. 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. 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.²⁰ The 2018 elections delivered the third Fidesz-KDNP supermajority²¹, 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).²² Another target was civil society organisations

¹⁶ *Ibidem*. See the same study for the sociological reasons behind Fidesz’s support. See also A. Biró-Nagy, *Illiberal Democracy in Hungary: The Social Background and Practical Steps of Building an Illiberal State*, CIDOB Report 31, Barcelona 2017.

¹⁷ Prime Minister’s Office, *Prime Minister Viktor Orbán’s Speech at the 25th Bálványos Summer Free University and Student Camp*, 30 Jul. 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 15 Mar. 2024].

¹⁸ R. Csehi, E. Zgut, *op. cit.*

¹⁹ 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.

²⁰ Á. Bocskor, *Anti-immigration Discourses in Hungary during the ‘Crisis’ Year: The Orbán Government’s ‘National Consultation’ Campaign of 2015*, ‘Sociology’ 2018, vol. 52, no. 3, pp. 551–568.

²¹ 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*, OSCE Office for Democratic Institutions and Human Rights, Warsaw 2018, <https://www.osce.org/odihr/elections/hungary/385959> [accessed 17 Feb. 2024].

²² Z. Enyedi, *op. cit.*; G. Halmai, *The End of Academic Freedom in Hungary*, ‘Droit & Société’ 2019, <https://ds.hypotheses.org/6368> [accessed 17 Feb. 2024].

(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 that the act on civil society organisations followed the Russian and Israeli examples.²³

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.²⁴ 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.²⁵ In 2019, the National Audit Bureau imposed severe fines on the opposition parties.²⁶ 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.²⁷ 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",²⁸ and the Varieties of Democracy Project (V-DEM) labelled

²³ For details, see Ł. Zamecki, V. Glied, *op. cit.*

²⁴ European Parliament, *Rule of Law in Hungary: Parliament Calls on the EU to Act*, 12 Sep. 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 Feb. 2023].

²⁵ 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.

²⁶ D. Kovarek, L. Littvay, *Greater than the Sum of Its Part(ie)s: Opposition Comeback in the 2019 Hungarian Local Elections*, 'East European Politics' 2022, vol. 38, no. 3, pp. 382–399.

²⁷ In total, 446 MEPs voted for the proposal, 178 rejected it, and 41 were absent.

²⁸ Freedom House, *Freedom in the World 2020 – Hungary*, 2020, <https://freedomhouse.org/country/hungary/freedom-world/2020> [accessed 17 Feb. 2023].

the country an electoral autocracy.²⁹ In this context, the following section will analyse the Hungarian government's crisis response to the COVID-19 pandemic.

2.2. Introduction of the state of emergency in Hungary – the road to decree governance

Several articles and commentaries dealt with the introduction of the state of emergency in Hungary and related legal concerns.³⁰ The introduction of the state of danger on 11 March 2020,³¹ (at that time with an automatic sunset provision of 15 days³²) based on the special legal order outlined in the Fundamental Law³³ marked the beginning of what soon became known as decree governance in Hungary. The health emergency has been utilised for political purposes from its beginning: 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.³⁴ In March 2020, the Hungarian government presented the Act on Protecting against the Coronavirus,³⁵ which in the public discourse soon became referred to as the Enabling Act. This act enabled 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

²⁹ V-Dem Institute, *Democracy Report 2020*, 2020, <https://www.v-dem.net/publications/democracy-reports> [accessed 17 Feb. 2023].

³⁰ E.g. T. Drinóczi, A. Bień-Kacała, *COVID-19 in Hungary and Poland: Extraordinary Situation and Illiberal Constitutionalism*, ‘The Theory and Practice of Legislation’ 2020, vol. 8, no. 1–2, pp. 171–192; C. Györy, N. Weinberg, *Emergency Powers in a Hybrid Regime: The Case of Hungary*, ‘Theory and Practice of Legislation’ 2020, vol. 8, no. 1–2, pp. 329–353; F. Gárdos-Orosz, *The Concentration of Emergency Competencies during the COVID-19 Pandemic in Hungary: A Lack of Effective Control*, ‘Lex Localis: Journal of Local Self-Government’ 2024, vol. 22, no. 2, pp. 120–142.

³¹ Government Decree 40/2020 (III. 11).

³² If not extended by parliamentary authorisation.

³³ 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).

³⁴ L. Montalto Monella, R. Palfi, *Orban Uses Coronavirus as Excuse to Suspend Asylum Rights in Hungary*, ‘Euronews’, 3 Mar. 2020, <https://www.euronews.com/2020/03/03/orban-uses-coronavirus-as-excuse-to-suspend-asylum-rights-in-hungary> [accessed 17 Feb. 2023].

³⁵ 2020. évi XII. Törvény a koronavírus elleni védekezésről (Act XII of 2020 on the Protection Against Coronavirus).

legal order.³⁶ The act allowed for an open-ended³⁷ 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 15 days, unless renewed by the parliament. With the adoption of the Enabling Act (30 March 2020),³⁸ the parliament delegated its power to renew decrees to the government, for the duration of the state of danger,³⁹ 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 failed to offer authentic oversight.⁴⁰ The Enabling Act met with harsh criticism from the Hungarian opposition and civil society.⁴¹ 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,⁴² and an online demonstration was held one day before the vote. The Enabling Act also encountered severe criticism from several international institutions.⁴³ European People's Party (EPP) members

³⁶ *Ibidem*.

³⁷ 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.

³⁸ The adoption of the legislation was supported by the parties Fidesz, KDNP, and Mi Hazánk (Our Homeland).

³⁹ 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.

⁴⁰ Z. Végh, *No More Red Lines Left to Cross: The Hungarian Government's Emergency Measures*, 'European Power', 2 Apr. 2020, https://ecfr.eu/article/commentary_no_more_red_lines_left_to_cross_the_hungarian_governments_emerge [accessed 17 Feb. 2023].

⁴¹ See e.g. the reports of the Hungarian Helsinki Committee, available on their website.

⁴² SzabadaHang, *Tiltakozunk a felhatalmazási törvény elfogadása ellen!*, 22 Mar. 2020, <https://szabadahang.hu/petitions/tiltakozunk-a-felhatalmazasi-torveny-elfogadasa-ellen> [accessed 17 Feb. 2023].

⁴³ 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.

urged the group to expel Fidesz. Orbán's response to criticism was "With all due respect, I have no time for this".⁴⁴

The state of danger due to the epidemiological situation was announced on 11 March 2020,⁴⁵ lasting until 18 June 2020. It was introduced for the second time for the same reason on 4 November 2020,⁴⁶ with a planned termination on 8 February 2021.⁴⁷ 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 2022.⁴⁸ All these periods were accompanied by governmental decrees, granting the executive extraordinary powers.⁴⁹ 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"⁵⁰ based on the concept of "medical disaster" laid out in the Health Act and its amendment.⁵¹ 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.⁵² As Gábor Halmai, Gábor Mészáros and Kim Lane 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

⁴⁴ Euroactiv, *Orban Has 'No Time' for EU Allies' Criticism*, 3 Apr. 2020, <https://www.euractiv.com/section/future-eu/news/orban-has-no-time-for-eu-allies-criticism> [accessed 28 Jan. 2024].

⁴⁵ Government Decree 40/2020 (III. 11).

⁴⁶ Government Decree 478/2020 (XI. 3); Government Decree 479/2020 (XI. 3).

⁴⁷ Government Decree 27/2021.

⁴⁸ From 25 May 2022 until present (as of September 2025), a state of danger has been in effect due to the full-scale Russian invasion of Ukraine.

⁴⁹ 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.

⁵⁰ Not to be confused with the state of emergency as in the Fundamental Law.

⁵¹ 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 G. Halmai, G. Mészáros, K. L. 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 Feb. 2023].

⁵² *Ibidem*.

can evade the checks and balances that accompany states of emergency regulated under a constitutional rubric.⁵³

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.⁵⁴ Apparently, the rule of various emergency regimes was to maintain the practice of decree governance. 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.⁵⁵ One of the most restrictive measures introduced in November 2020 was the complete ban on assembly. This came at a moment when mass-protests⁵⁶ 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.⁵⁷ 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.⁵⁸ The right to

⁵³ *Ibidem*.

⁵⁴ Hungarian Helsinki Committee, Hungarian Civil Liberties Union, Amnesty International Hungary, 2020. *Never-ending story?* (27 May 2020), <https://helsinki.hu/en/never-ending-story> [accessed 18 September 2025].

⁵⁵ M. Pardavi, A. Kádár, *Hungary Should Not Become Patient Zero: What Can Be Done about Indefinite Rule-by-Decree Power-Grabs?*, 'Just Security', 22 Apr. 2020, <https://www.justsecurity.org/69780/hungary-should-not-become-patient-zero> [accessed 18 Feb. 2024].

⁵⁶ Radio Free Europe/Radio Liberty, *Thousands Rally in Budapest to Protect Arts University*, 'RFE/RL', 23 Oct. 2020, <https://www.rferl.org/a/thousands-rally-in-budapest-for-autonomous-arts-university/30909496.html> [accessed 2 Oct. 2025].

⁵⁷ See e.g. J. Satre, E. Bynum et al., *Hungary: Demonstrations for Academic Freedom* (in:) E. Bynum, L. Fluegel-Carew, S. Jones, R. Kishi, C. Raleigh (eds.), *Political Disorder in Europe: 10 Cases from ACLED's New Expansion*, Armed Conflict Location & Event Data Project 2021.

⁵⁸ B. Cseke, *A Helsinki szerint a rendőrség helytelenül járt el, amikor megbüntette a dudáló tüntetőket*, 'Index', 10 Jun. 2020, https://index.hu/belfold/2020/06/10/rendorseg_dudalas_magyar_helsinki_bizottsag_velemenynyilvanitas_kresz [accessed 18 Feb. 2023].

protest and scrutinise the government's activity at the time 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.⁵⁹ Several analyses have been published on the Enabling Act and its impact on Hungary's legal and political system.⁶⁰ The next section focuses on one of the areas the special legal regime during the COVID-19 pandemic had a lasting effect, the access to information.

2.3. Lasting effects of emergency rule on fundamental rights – The freedom of 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. Moreover, the erosion of freedom of information not only undermines a fundamental right, but also contributes to making state operations less transparent.⁶¹ This lack of transparency weakens public discourse, diminishes oversight of public affairs, and ultimately threatens the very foundations of constitutional rule of law. 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.⁶² The state of danger (and governing by decree) however, granted the

⁵⁹ 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.' G. Halmai, K. L. Scheppele, *Orbán Is Still the Sole Judge of His Own Law*, 'VerfBlog', 30 Apr. 2020, <https://verfassungsblog.de/orban-is-still-the-sole-judge-of-his-own-law> [accessed 2 Oct. 2025].

⁶⁰ See e.g. Z. Ádám, *Ultra-orthodoxy and Selective Voluntarism: How Did the Orbán Regime React to the First Wave of the Pandemic?*, 'European Policy Analysis' 2020, vol. 6, no. 2, pp. 277–292, and other articles cited in this report.

⁶¹ N. Bán-Forgács, *Információszabadság és Covid Magyarországon*, 'MTA Law Working Papers' 2021, no. 30.

⁶² G. Polyák, *Media in Hungary: Three Pillars of an Illiberal Democracy* (in:) E. Połońska, C. Beckett (eds.), *Public Service Broadcasting and Media Systems in Troubled European Democracies*, Springer, Cham 2019.

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.⁶³ The situation was similar during government information sessions which journalists could attend. As a case reported by Index, 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, Zoltán Kovács said that the government’s coronavirus task force had repeatedly 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”.⁶⁴ The above case illustrates how information concerning pandemic prevention became politicised.

During the pandemic, the government did not exhibit hostility towards medical expertise, and the implemented precautionary measures partially curtailed the spread of the disease.⁶⁵ However, significant lacks in government communication and the availability of pandemic-related data were noted. Nóra Bán-Forgács summarises the three most significant problems in the context of COVID-19 and free-

⁶³ Á. Magyar, *Fontos járványügyi adatokat titkol el a magyar kormány a lakosság elől*, ‘Euronews’, 16 Mar. 2021, <https://hu.euronews.com/2021/03/16/fontos-jarvanyugyi-adatokat-titkol-el-a-magyar-kormany-a-lakossag-elol> [accessed 18 Feb. 2024].

⁶⁴ Z. Kovács, *Coronavirus in Hungary: ‘You Do Not Need Clarification on the Protocol’*, *Official Tells Reporters*, ‘Index’, 15 Mar. 2020, https://index.hu/english/2020/03/15/hungary_coronavirus_press_conference_15_march [accessed 18 Feb. 2024].

⁶⁵ M. Bene, Z. Boda, *Hungary: Crisis as Usual: Populist Governance and the Pandemic* (in:) G. Bobba, N. Hubé (eds.), *Populism and the Politicization of the COVID-19 Crisis in Europe*, Palgrave Macmillan, Cham 2021.

dom 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.⁶⁶

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".⁶⁷ 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.⁶⁸ 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, moreover, criticises Hungary's effective defence measures (the Enabling Act).⁶⁹ The government's usual populist rhetoric was also reflected in the national consultation on the rebuilding after the pandemic.⁷⁰

While the government was engaging in conspiratory rhetoric, with the state of emergency, a new law was introduced, modifying the legal category of

⁶⁶ N. Bán-Forgács, *op. cit.*

⁶⁷ L. Turza, *Conspiracy Entrepreneurs, Fringe Movements, and the Pervasive Style of Conspiracy during the Coronavirus Pandemic* (in:) M. Butter, P. Knight (eds.), *Covid Conspiracy Theories in Global Perspective*, Routledge, London-New York, 2023.

⁶⁸ *Ibidem*. G. Gödény in 2022 was charged a fine for personal data security breaches in his online petition.

⁶⁹ Political Capital, *Main Narratives about COVID-19 in the V4 Countries: Takeaways from the First Wave of the Pandemic*, Research Briefing 2020.

⁷⁰ V. Makszimov, *Hungary Launches National Consultation Targeting COVID-19, Soros and 'Debt Slavery'*, 'Euroactiv', 9 Jun. 2020, <https://www.euractiv.com/section/politics/news/hungary-launches-national-consultation-targeting-covid-19-soros-and-debt-slavery> [accessed 18 Feb. 2024].

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.⁷¹

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.⁷² 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.⁷³ A 64-year-old man was held for hours over a message posted online, criticising the government’s lockdown policy.⁷⁴

Other government decrees impacted data protection and the access to public data during the state of danger.⁷⁵ Decree 46/2020 impacts data protection in

⁷¹ Defence Against the Coronavirus Act (Act No. 12 of 2020).

⁷² C. Györy, *Fighting Fake News or Fighting Inconvenient Truths? On the Amended Hungarian Crime of Scaremongering*, ‘VerfBlog’, 11 Apr. 2020, <https://verfassungsblog.de/fighting-fake-news-or-fighting-inconvenient-truths> [accessed 18 Feb. 2024].

⁷³ A. 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 Feb. 2024].

⁷⁴ *Ibidem*.

⁷⁵ Government Decree 179/2020 (V. 4); Government Decree 521/2020 (XI. 25).

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.⁷⁶ 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 vaccinated⁷⁷, and mortality rates by vaccination type (including Sputnik and Sinopharm) remained unanswered.⁷⁸ 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.⁷⁹

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.⁸⁰ As they explained:

⁷⁶ *Ibidem*.

⁷⁷ 24.hu, *Szél Bernadett: Merkely Bélának nincsenek meg azok a kórházi adatok, amelyekről maga nyilatkozott*, 20 Dec. 2021, <https://24.hu/belfold/2021/12/20/koronavirus-oltas-szel-bernadett-adatok-merkely-bela-sote> [accessed 18 Feb. 2024].

⁷⁸ Népszava, *Miért titkolja a Covid-betegek oltási adatait a kormány?*, 21 Sep. 2021, https://nepszava.hu/3132813_miert-titkolja-a-covid-betegek-oltasi-adatait-a-kormany [accessed 18 Feb. 2024].

⁷⁹ D. Bolcsó, *A kormány ügyfélszolgálatára szerint nincs is itthon abból a Covid-vakcinából, amely Müller Cecília szerint a legjobb*, 'Telex', 13 Jan. 2023, <https://telex.hu/koronavirus/2023/01/13/pfizer-biontech-vakcina-oltas-ba-1-ba-5-omikron-varians-muller-cecilia-nnk> [accessed 18 Feb. 2024].

⁸⁰ The data requested was from the meetings taking place between 31 January 2020 and 25 November 2021 (minutes from 159 meetings).

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 coronavirus 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.⁸¹

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.⁸² 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."⁸³ 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.⁸⁴

The Hungarian case illustrates how the state of danger due to the pandemic has been instrumentalised to further increase executive power and weaken checks and balances. As noted above, transparency of the operations of public authorities is a key feature of good governance and an indicator of a democratic and pluralist system. Hungary, under current practice fails to meet these standards (including the Council of Europe standards on Access to Official Documents (2009, in force in 2020)), as the government limits access to data of public interest. Moreover, the state of danger facilitated the adoption of measures favouring the government (such as the temporary ban of assembly, ban on referendums), and the restriction of access to information inconvenient for the government. These changes have lasting effect in the Hungarian legal framework.

⁸¹ A. Domány, T. Lengyel, *Itthon: A HVG bírósági perének közepén írta át a kormány a szabályokat, hogy eltitkolhassa, miről szóltak az operatív törzs ülésai*, 'HVG.hu', 20 Sep. 2022, https://hvg.hu/itthon/20220920_HVG_birosagi_per_operativ_torzs [accessed 18 Feb. 2024].

⁸² J. Haász, *Csúcsra járatott titkolózás: bírósági eljáráshoz se adható ki, hogy mi alapján döntött az operatív törzs*, 'Telex', 20 Sep. 2022, <https://telex.hu/belfold/2022/09/20/csucsra-jaratott-titolozas-birosagi-eljarashoz-se-adhato-ki-hogy-mi-alapjan-dontott-az-operativ-torzs> [accessed 18 Feb. 2024].

⁸³ *Ibidem*.

⁸⁴ A. Domány, T. Lengyel, *op. cit.*

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

As previous research showed, Poland entered the COVID-19 pandemic with a political system transforming towards soft authoritarianism,⁸⁵ 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.⁸⁶ 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

⁸⁵ N. Styczyńska, M. Zubek, *Poland: The 'Cardboard State' Versus the Virus* (in:) K. Lynggaard, M. Jensen, M. Kluth (eds.), *Governments' Responses to the Covid-19 Pandemic in Europe*, Palgrave Macmillan, London 2023.

⁸⁶ 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.

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, as well as the Police Act and prerogatives of the prosecutor general).⁸⁷ Interestingly, until 2022 the Venice Commission issued seven reports on Poland, six of which were published when PiS was in office. 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).⁸⁸ 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. 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.⁸⁹ A further wave of protests followed in 2021,

⁸⁷ Council of Europe, Venice Commission, *Opinions for Poland*, 2020, <https://www.venice.coe.int/webforms/documents/?country=23&year=all> [accessed 21 Mar. 2024].

⁸⁸ United Nations, *Report of the Special Rapporteur on the Independence of Judges and Lawyers on His Mission to Poland*, 2018, <https://digitallibrary.un.org/record/1484929?v=pdf> [accessed 15 Mar. 2024].

⁸⁹ Free Courts Initiative, <https://wolnesady.org/en> [accessed 15 Mar. 2024].

this time against changes to the Broadcasting Act in Poland (also known as the anti-lex-TVN protests).⁹⁰ 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.⁹¹

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

The COVID-19 pandemic initially silenced the protests and forced the government to focus on healthcare issues. Soon however, the ruling party decided to use it as a tool to generate support for PiS during the 2020 presidential election campaign. 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".⁹² 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 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; and 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

⁹⁰ According to the planned amendment to the law, television stations in which the share of foreign capital does not 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.

⁹¹ Reporters Without Borders, *RSF Asks Polish President Not to Sign Draconian 'Lex TVN' Bill into Law*, 24 Dec. 2021, <https://rsf.org/en/rsf-asks-polish-president-not-sign-draconian-lex-tvn-bill-law> [accessed 15 Mar. 2024].

⁹² 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), the timeline of the most important legal and factual events that took place will be presented.

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.⁹³ 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,⁹⁴ 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.⁹⁵
- 5 March 2020. The first officially detected case of coronavirus in Poland.⁹⁶
- 13 March 2020. Regulation of the minister of health on the declaration of an epidemiological emergency,⁹⁷ 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.

⁹³ 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.

⁹⁴ 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.

⁹⁵ 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.

⁹⁶ Ministerstwo Zdrowia, *Pierwszy przypadek koronawirusa w Polsce*, 'gov.pl', 4 Mar. 2020, <https://www.gov.pl/web/zdrowie/pierwszy-przypadek-koronawirusa-w-polsce> [accessed 15 Mar. 2024].

⁹⁷ Rozporządzenie Ministra Zdrowia z dnia 13 marca 2020 r., item 433.

- 20 March 2020. Regulation of the minister of health on the declaration of an epidemic state in the territory of the Republic of Poland⁹⁸ – the second of the options derived from the Infectious Diseases Act.
- 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”.⁹⁹ 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”).¹⁰⁰
- 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).¹⁰¹ The relevant amendment was adopted at 4.25 a.m.¹⁰²
- 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*).¹⁰³ 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

⁹⁸ Rozporządzenie Ministra Zdrowia z dnia 20 marca 2020 r., item 491.

⁹⁹ K. Skotnicki, J. Kielin-Maziarz, *Guarantees of Universal Suffrage in the Era of Elections Held during the Pandemic* (in:) M. Musiał-Karg, I. Kapsa (eds.), *Elections in Times of a Pandemic – Dilemmas and Challenges. Experiences of the European Countries*, Brill, Leiden–Boston 2024, pp. 309–327, p. 312.

¹⁰⁰ Rozporządzenie Ministra Zdrowia z dnia 24 marca 2020 r., item 522.

¹⁰¹ Journal of Laws of the Republic of Poland, 2020, item 568, Art. 40(5).

¹⁰² R. Balicki, *The Course of the Election Process in Poland during the COVID-19 Pandemic* (in:) M. Musiał-Karg and I. Kapsa (eds.), *Elections in Times of a Pandemic – Dilemmas and Challenges. Experiences of the European Countries*, Brill, Leiden-Boston 2024, p. 347

¹⁰³ 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.

“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 instruments in connection with the spread of the SARS-CoV-2 virus*),¹⁰⁴ 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.¹⁰⁵ 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.¹⁰⁶ 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

¹⁰⁴ 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.

¹⁰⁵ T. Skory, *Kto, kiedy i jak uniemożliwił przeprowadzenie wyborów? Znamy odpowiedź*, ‘RMF24’, 8 May 2020, https://www.rmf24.pl/raporty/raport-wybory-prezydenckie2020/najnowsze-fakty/news-kto-kiedy-i-jak-uniemozliwil-przeprowadzenie-wyborow-znamy-o,nId,4483946#crp_state=1 [accessed 15 Mar. 2024].

¹⁰⁶ 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, *Posłowie KO dotarli do decyzji premiera o druku kart do głosowania*, 30 Apr. 2020, <https://tvn24.pl/wybory-prezydenckie-2020/wybory-prezydenckie-2020-poslowie-ko-dotarli-do-decyzji-premier-a-o-druku-kart-do-glosowania-st4570840> [accessed 15 Mar. 2024].

municipal authorities, who justified their refusal by the lack of a legal basis for Poczta Polska to receive the data.¹⁰⁷

- 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,¹⁰⁸ 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 issue of the single nature of the speaker's order on the date of the presidential elections and the deadline 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.¹⁰⁹ 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”.¹¹⁰ 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)¹¹¹

¹⁰⁷ A. Matłacz, *Samorządy nie chciały udostępnić Poczcie danych wyborców, zrobiło to Ministerstwo Cyfryzacji*, Prawo.pl, 28 Apr. 2020, <https://www.prawo.pl/samorzad/dane-wyborcow-przekazane-poczcie-polskiej,499855.html> [accessed 15 Mar. 2024].

¹⁰⁸ See *Wniosek Marszałka Sejmu dotyczący przesunięcia terminu zarządzonych wyborów Prezydenta Rzeczypospolitej*, 26 Aug. 2020, <https://trybunal.gov.pl/postepowanie-i-orzeczenia/postanowienia/art/11235-wniosek-marszalka-sejmu-dotyczacy-przesuniecie-terminu-zarzadzonych-wyborow-prezydenta-republiki> [accessed 15 Mar. 2024].

¹⁰⁹ A. Rakowska-Trela, *Wybory prezydenckie 2020. Kontekst prawny*, Fundacja im. S. Batorego, Warsaw 2020.

¹¹⁰ See e.g. K. Skotnicki, *Państwo prawa a tryb uchwalania w 2020 r. ustaw regulujących wybory Prezydenta RP* (in: J. Ciapała, A. Pyrzyńska (eds.), *Dylematy polskiego prawa wyborczego*, C.H. Beck, Warsaw 2021, pp. 139–157, p. 155.

¹¹¹ This has been confirmed by the courts. As early as in February 2021, the Wojewódzki Sąd Administracyjny [Provincial Administrative Court] issued its judgement (case file no.: IV

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.¹¹² 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 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).¹¹³ 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 the addressee.¹¹⁴ 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

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).

¹¹² 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 Najwyższa Izba Kontroli, *Działania wybranych podmiotów w związku z przygotowaniem wyborów powszechnych na Prezydenta Rzeczypospolitej Polskiej zarządzonych na dzień 10 maja 2020 r. z wykorzystaniem głosowania korespondencyjnego*, 2021, <https://www.nik.gov.pl/kontrola/D/20/502/KAP> [accessed 19 Mar. 2024].

¹¹³ 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*, 2023, <https://www.mfrr.eu/wp-content/uploads/2023/10/Poland-media-freedom-at-a-crossroads.pdf> [accessed 19 Mar. 2024].

¹¹⁴ A. Rakowska-Trela, *op. cit.*, pp. 5–6.

elections. However, the law on exclusive postal voting came into force one day before the scheduled elections.¹¹⁵

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.¹¹⁶ In the vast majority of cases, acts processed in this way were (sometimes with equal speed) signed into law by the president.¹¹⁷

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. In recent years, doubts about the legality of this chamber have been confirmed by numerous judgements of international courts, which have indicated that it is not an independent and impartial court of law.¹¹⁸ During the events in question, the Constitutional Tribunal has ceased to perform a control

¹¹⁵ For a summary of most of the doubts concerning the principle of universal elections, see K. Skotnicki, J. Kielin-Maziarz, *op. cit.*, pp. 315–317.

¹¹⁶ 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. T. T. Konciewicz, *Constitutional Capture in Poland 2016 and Beyond: What Is Next?*, ‘VerfBlog’, 19 Dec. 2016, <https://verfassungsblog.de/constitutional-capture-in-poland-2016-and-beyond-what-is-next> [accessed 15 Mar. 2024]; C. Davies, *Hostile Takeover: How Law and Justice Captured Poland’s Courts*, Freedom House, Nations in Transit – Brief, May 2018.

¹¹⁷ 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].

¹¹⁸ See e.g. European Court of Human Rights (ECtHR), *Dolińska-Ficek and Ozimek v. Poland*, Applications nos. 49868/19 and 57511/19, Judgement of 8 Nov. 2021; European Court of Human Rights (ECtHR), *Wałęsa v. Poland*, Application no. 50849/21, Judgement of 23 Nov. 2023; European Court of Justice (ECJ), *L.G. v. Krajowa Rada Sądownicza*, C-718/21, Judgement of 21 Dec. 2023.

function, becoming an instrument in the hands of the executive power. It can be assumed that the very existence of genuinely independent public authorities at the time of the elections 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 presidential vote on 10 May 2020. As Aleksandra Kustra-Rogatka observed: “[t]he absurdity of the fact that two politicians who hold no public office decided not to run elections 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”.¹¹⁹

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”.¹²⁰
- 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).¹²¹ 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 2020.¹²²

¹¹⁹ A. 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 Mar. 2024].

¹²⁰ Uchwała Nr 129/2020 Państwowej Komisji Wyborczej.

¹²¹ Journal of Laws of the Republic of Poland, 2020, item 979.

¹²² *Ibidem*, item 988.

- 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.¹²³
- 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 election of Andrzej Duda as president of the Republic of Poland to be valid.¹²⁴

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’.¹²⁵

The above-mentioned resolution of the State Electoral Commission (on the determination of the impossibility of voting for candidates in the election of the President of the Republic of Poland) was assessed as contradictory to the facts that occurred and to the provision of the Act on Electoral Code it refers to.¹²⁶ 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

¹²³ While high, these figures still account for only around 2.5% of all votes cast. For details, see M. Musiał-Karg, *Postal Voting in the 2020 Presidential Election – How Did Electoral Participation Evolve during the COVID-19 Pandemic?*, ‘Political Science Review’ 2022, no. 4, pp. 22–23.

¹²⁴ Journal of Laws of the Republic of Poland, 2020, item 1335.

¹²⁵ R. Piotrowski, *Ważność wyborów prezydenckich w świetle Konstytucji RP* (in:) J. Ciapała, A. Pyrzyńska (eds.), *Dylematy polskiego prawa wyborczego*, C.H. Beck, Warsaw 2021, pp. 159–176, p. 175.

¹²⁶ See M. Małecki, *Brak podstawy prawnej głosowania przesądza o nieważności wyboru Prezydenta*, ‘Dogmaty Karnisty’, 1 Aug. 2020, <https://www.dogmatykarnisty.pl/2020/08/niewaznosc-wyboru-prezydenta> [accessed 15 Mar. 2024]; Rakowska-Trela indicated that many experts had reasonable doubts about the legality of the resolution – see A. Rakowska-Trela, *op. cit.*, p. 7.

days.¹²⁷ 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.¹²⁸

The proceedings of the act which was the factual basis for the holding of elections were also subject to the same flaws as in the case of the acts adopted prior to the elections scheduled for 10 May.¹²⁹ 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 principle of stability of law’.¹³⁰ ODIHR 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.¹³¹ 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.¹³² 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.¹³³ In some countries, there was no opportunity to vote at all.¹³⁴

¹²⁷ M. Florczak-Wątor, G. Kuca, *The Long-Term Impact of COVID-19 on V4 Countries' Electoral Systems. The Case of Poland*, Policy Brief 2023, no. 10, https://jog.tk.hu/uploads/files/Policy_Brief_Poland_Florczak-Wator_Kuca.pdf [accessed 15 Mar. 2024], pp. 11–13.

¹²⁸ E. Łętowska, *Protesty wyborcza a ważność wyborów. Znaki zapytania*, ‘Konstytucyjny.pl’, 15 Aug. 2021, <http://konstytucyjny.pl/protesty-wyborcze-a-waznosc-wyborow-znaki-zapytania> [accessed 15 Mar. 2024].

¹²⁹ K. Skotnicki, *op. cit.*, p. 155.

¹³⁰ ODIHR, *Presidential Election 28 June and 12 July 2020*, Special Election Assessment Mission Final Report, 23 Sep. 2020, p. 6.

¹³¹ See R. Balicki, *op. cit.*, pp. 350–351.

¹³² A. Rakowska-Trela, *op. cit.*, pp. 7–8.

¹³³ See I. Kapsa, M. Musiał-Karg, *Postal Voting of Poles Abroad – The Case of the 2020 Presidential Election* (in: M. Musiał-Karg, I. Kapsa (eds.), *Elections in Times of a Pandemic – Dilemmas and Challenges. Experiences of the European Countries*, Brill, Leiden-Boston 2024, pp. 366–367; M. Florczak-Wątor, G. Kuca, *op. cit.*, p. 10.

¹³⁴ *Ibidem*, p. 10; Rzecznik Praw Obywatelskich, *Następni obywatele, głównie z zagranicy, skarżą się, że nie mogli głosować na Prezydenta RP – choć chcieli*, Biuletyn Informacji Publicznej RPO, 16 Jul. 2020, <https://bip.brpo.gov.pl/pl/content/nastepni-obywatele-glownie-zagranicy-skarza-sie-rpo-ze-nie%C2%A0mogli-glosowac> [accessed 15 Mar. 2024].

Regarding the actual possibility of campaigning by candidates competing with the incumbent president, doubts were raised about the unequal access to the public media. This was also noted by the ODIHR inter alia, the involvement of public officials in the campaign and numerous usages of public resources for this purpose,¹³⁵ 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’. ODIHR also mention the examples of the ‘xenophobic and anti-Semitic undertones’.¹³⁶ 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 Andrzej Duda.¹³⁷ 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,¹³⁸ 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.¹³⁹

The Polish case illustrates how intentional non-implementation of one of the constitutional states of emergency has been used by the PiS government 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, which has had a lasting impact. The non-introduction

¹³⁵ ODIHR, *op. cit.*, p. 14.

¹³⁶ *Ibidem*, p. 20.

¹³⁷ M. Florczak-Wątor, G. Kuca, *op. cit.*, pp. 10–11. 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’.

¹³⁸ See e.g. M. Meyer Resende, A. Hennig, *Polish Catholic Bishops, Nationalism and Liberal Democracy*, ‘Religions’ 2021, vol. 12; P. Żuk, P. Żuk, *Dangerous Liaisons between the Catholic Church and State: The Religious and Political Alliance of the Nationalist Right with the Conservative Church in Poland*, ‘Journal of Contemporary Central and Eastern Europe’ 2019, vol. 27, p. 191.

¹³⁹ One of the more extreme cases, for example, was the information about the behaviour of a priest in south-eastern Poland – see J. Pasterczyk, “Boże, spraw, aby wszyscy głosowali na Andrzeja Dudę”. Słowa księdza podczas mszy oburzyły parafiankę. Teraz spadł na nią hejt, ‘Gazeta Wyborcza’ (Rzeszów), 15 Jun. 2020.

of a state of emergency had a direct impact on electoral rights and led to a situation where the elections that finally were held had no legal basis.

3. 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 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).¹⁴⁰ 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. Crises and the feeling of threat are used by populists to consolidate power. 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 concluded 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.¹⁴¹

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” to facilitate decree governance. 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,

¹⁴⁰ G. Ekiert, *Kilka uwag o demokracji i autorytaryzmie w XXI w.* (in:) J. Żakowski (ed.), *Almanach Concilium Civitas 2022/2023*, Fundacja Collegium Civitas, Warszawa 2022.

¹⁴¹ Freedom House, *Democracy in Retreat 2019*, 2019, <https://freedomhouse.org/report/freedom-world/2019/democracy-retreat> [accessed 20 Mar. 2024].

leading to the removal of fundamental safeguards. The pandemic was utilised to introduce the Enabling Act, and the new “state of medical emergency”, allowing the prolongation of the rule by decree powers to the government. The subsequent decrees were also used for political purposes such as to limit opposition finances, ban referendums, or limit access to information, which have nothing to do with the pandemic. The pandemic was also used by Viktor Orbán to utilise crisis rhetoric to consolidate his power and portray the opposition and independent media as hindering defence measures, aiming to undermine public trust. Communication about the pandemic and respective decisions were not transparent, and 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 Russian invasion of Ukraine) remained, and Hungary continues to operate 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. On March 5, 2025, a new decree has been issued on the declaration of a state of emergency due to mass immigration throughout the territory of Hungary and on the rules related to the declaration, existence, and termination of the state of emergency.¹⁴² It appears that emergency rule and decree governance became a permanent tool in Fidesz’s political toolkit. The limitation of fundamental rights, however, now goes beyond the scope of decrees and is also reflected in the Fundamental Law. In April 2025 the 15th Amendment to Hungary’s Fundamental Law was adopted without public debate and signed by the president on the same day, posing serious threats to LGBT rights, to freedom of assembly, and to rights of Hungarians with dual citizenship.¹⁴³

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

¹⁴² KNP Law, *State of Emergency Is Extended until September 7, 2025 Due to Impending Mass Migration Threat*, 2025, <https://www.knplaw.com/en/state-of-emergency-is-extended-until-september-7-2025-due-to-impending-mass-migration-threat> [accessed 2 Oct. 2025].

¹⁴³ Human Rights Watch, *Hungary: Fundamental Law Changes Attack Rule of Law, Rights*, 17 Apr. 2025, <https://www.hrw.org/news/2025/04/17/hungary-fundamental-law-changes-attack-rule-law-rights> [accessed 2 Oct. 2025].

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.¹⁴⁴ Furthermore, the rights and freedoms were restricted anyway, but without a clear legal basis. The real motivation has been political.

Both examples analysed in this paper demonstrate that the pandemic was used to further dismantle the rule-of-law system and was utilized to limit fundamental rights. In states of emergency, the principles of necessity and proportionality must guide the limitation of fundamental rights, adapted to the crisis context. Measures modifying fundamental rights must be essential and proportionate to the crisis, even if rights may be more broadly restricted than under normal legal order.¹⁴⁵ Importantly, however, the success of non-democratic measures 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. Independent courts, opposition forces, strong civil sector, and free media are essential to ensure that authorities justify their actions and remain subject to political and legislative accountability.

The change of government in Poland at the end of 2023 has so far failed to result in even a symbolic punishment for the unlawful acts that took place during the events in question. Efforts in this direction are being sabotaged by state institutions still loyal to the former ruling party. Examples of this include a series of so-called "judgements" issued by the Constitutional Tribunal (composed unlawfully and involving judges whose conduct blatantly contradicts the principle of judicial

¹⁴⁴ M. Florczak-Wątor, G. Kuca, *op. cit.*, pp. 3–4.

¹⁴⁵ Z. Szente, *How to Assess Rule-of-Law Violations in a State of Emergency? Towards a General Analytical Framework*, 'The Hague Journal on the Rule of Law' 2025, vol. 17, pp. 117–138.

independence). In May 2024,¹⁴⁶ the Tribunal ruled that the decisions of then-Prime Minister Mateusz Morawiecki aimed at organizing the postal presidential election were constitutional. Later, in November 2024,¹⁴⁷ it declared the establishment of a special parliamentary inquiry committee concerning the postal elections to be allegedly unconstitutional. Moreover, the failure to reverse the unconstitutional changes in the judiciary meant that the resolution confirming the validity of the 2025 presidential election was issued by the same chamber of the Supreme Court – one that remains legally defective. For that reason alone (alongside numerous reports of errors – or even fraud? – in vote counting), the presidential election once again gave rise to widespread controversy, conflicting opinions, and further eroded public trust in the state and its institutions.¹⁴⁸ This appears to be a lasting consequence of nearly a decade of democratic backsliding and the dismantling of the rule of law, including decisions made in the spring of 2020 during that year's presidential election.

In Hungary, the new TISZA party will challenge the ruling Fidesz in 2026. However, as the above cases illustrate, authoritarian governments use legal and constitutional frameworks in order to consolidate power, and without checks and balances (such as the Constitutional Court and the President) may even to the limitation of fundamental rights and freedoms. Recently, Orbán's government has extended Hungary's state of danger until September 7, 2025, citing an impending mass migration threat, then once again, due to the Russian invasion of Ukraine, till May 2026 (Parliamentary elections are expected to be held in April 2026). This extension grants the government exceptional powers under the Fundamental Law, including the suspension of certain laws, deviation from statutory provisions, and the implementation of other emergency measures.¹⁴⁹ Governing by decree became the default and erased any meaningful role for the parliament and the opposition. Continuous calls by civic rights organizations and the opposition to return to regular legal order remain unanswered. Government emergency decrees 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. According to Zsuzsanna Szélényi of the CEU Democracy Institute, Orbán has employed three primary strategies

¹⁴⁶ Judgement of the Constitutional Tribunal of 21 May 2024, case no. K 27/23.

¹⁴⁷ Judgement of the Constitutional Tribunal of 6 November 2024, case no. U 2/24.

¹⁴⁸ See, i.a., Notes From Poland, *Disputed Supreme Court Chamber Confirms Polish Presidential Election Result*, 1 Jul. 2025, <https://notesfrompoland.com/2025/07/01/disputed-supreme-court-chamber-confirms-polish-presidential-election-result> [accessed 15 Jul. 2025].

¹⁴⁹ Telex, *Ujabb meghosszabbítás a kormány részéről: a háborús veszélyhelyzet Magyarországon*, 1 Oct. 2025, <https://telex.hu/belfold/2025/10/01/ujbol-meghosszabbitana-a-kormany-a-haborus-veszelyhelyzetet-magyarorszagon> [accessed 2 Oct. 2025].

to maintain political dominance in previous elections: altering electoral laws and districts, redistributing state resources, and engaging in fearmongering campaigns. However, recent public sentiment indicates a shift, with 65% of Hungarians believing the country is on the wrong track and 60% desiring political change, driven by economic challenges and high inflation.¹⁵⁰

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 article 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, state of emergency, Poland, Hungary

Kryzys praworządności i regres demokratyczny podczas pandemii – trwałe skutki na Węgrzech i w Polsce

Streszczenie

W czasie pandemii COVID-19 Węgry i Polska stały się sztandarowym przykładem regresu demokratycznego. Pandemia stała się czynnikiem przyspieszającym odwrót od liberalnej demokracji, choć proces ten rozpoczął się na długo przed pojawieniem się zagrożenia wirusem. Artykuł koncentruje się na dwóch emblematycznych kwestiach, tj. ograniczeniach dostępu do informacji na Węgrzech oraz organizacji wyborów prezydenckich w Polsce. Oba przykłady mają wspólny mianownik, którym jest upolitycznienie decyzji o (nie)wprowadzeniu

¹⁵⁰ Z. Szélényi, *Orbán's Three Tools for Maintaining Political Dominance in Hungary*, Democracy Institute CEU, 2024, <https://democracyinstitute.ceu.edu/articles/szelenyi-sme> [accessed 2 Oct. 2025].

stanu nadzwyczajnego oraz brak poszanowania dla instytucji państwowych, a także brak reakcji na krytyczne głosy płynące zarówno z kraju, jak i od instytucji międzynarodowych (instytucji UE, Rady Europy, ONZ). (Nie)wprowadzenie stanu nadzwyczajnego było podyktowane interesem politycznym partii rządzących i doprowadziło do dalszego demon-tażu państwa prawa oraz pogłębienia erozji demokracji. Analizowane przypadki pokazują jednak, że sukces polityk nieliberalnych zależy od tego, w jakim stopniu system liberalno-demokratyczny został osłabiony jeszcze przed pandemią COVID-19.

Niezależność przynajmniej części instytucji, funkcjonujące społeczeństwo obywatelskie, niezależne media oraz presja organizacji ponadnarodowych mogą wpływać na tempo i zakres nieliberalnych reform nawet w czasach stanu nadzwyczajnego.

Słowa kluczowe: COVID-19, regres demokratyczny, praworządność, stan nadzwyczajny, Polska, Węgry

