# Undemocratic but Formally Lawful: The Suspension of the Polish Parliament

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While the attention of many constitutional law scholars has been on the UK Government's decision to prorogue Parliament and first judicial responses, the Polish *Sejm's* plenary sitting has been unexpectedly suspended and postponed until after the general elections of 13 October 2019. The decision has a precedential nature. For the first time since the Polish Constitution entered into force, the 'old' *Sejm* is sitting while the 'new' *Sejm* will be waiting for an opening. Although this decision is formally compliant with the Polish Constitution, it is nonetheless undemocratic and raises some serious questions about the motivation behind this move.

1.The President of the Republic ordered the general elections for 13 October 2019. The September sitting was intended to be the last one in the 2015-2019 term of the *Sejm*. It was planned for three days, but unexpectedly, the *Sejm's* Marshall (i.e. its president) – a representative of the PiS (Law and Justice party) majority – announced a decision to suspend the last sitting of the current *Sejm* until 15-16 October 2019. The decision was earlier adopted following a very brief discussion by the Presidium of the Sejm, (an internal body responsible for the schedule of sittings, daily agenda etc.).

The Marshall only later explained that the suspension was intended to give to the MPs necessary time to visit their constituencies given the ongoing electoral campaign. However, opposition MPs and some commentators began speculating the suspension was in fact intended to allow PiS to maintain its authority regardless of the results of new elections. Four scenarios of the suspension period and the post-election *Sejm* sitting have been considered. First, the political majority could adopt statutes protecting Law and Justice officials against constitutional or criminal liability. Second, the political majority could adopt a constitutional amendment taking benefits from the absence of the opposition MPs caused by the campaign and election. Third, the political majority could introduce – controversial during the electoral campaign – tax reforms. Four, the political majority could elect in advance constitutional court judges to replace those whose terms of office expire this Winter and after the general elections.

The scepticism of the commentators may be explained when we take into account the parliamentary majority practises that Poles have been witnessing during the 2015-2019 term of the *Sejm*. The current political majority became well known for its abusive use of legal tools of parliamentary democracy or legislation in order to achieve constitutionally transgressive results. The abusive use of *vacatio legis* or intertemporal provisions, the midnight voting, the voting's repetition until expected results, the reopening of closed voting as well as harsh MPs disciplinary penalties may serve as perfect examples.

The recently announced agenda for the sitting of 15-16 October 2019 admittedly does not contain any controversial matters. But the Marshall and the parliamentary majority may freely modify the agenda even during the sitting. In theory, even an amendment of the Constitution can be proposed. The *Sejm* of the 2015-2019 term proved that it is able to adopt statute in one day or night as well as to elect officials in hasty proceedings (e.g. the case of the midnight constitutional court judges).

## The law

2.The authors of the Polish Constitution consciously rejected the idea of 'legislative sessions' – known to many constitutional systems such as the UK – during

which the parliament can deliberate. There is no formal act of prorogation in Poland. According to their choice, the *Sejm* autonomously decides, during its four-year term of office, when it deliberates, adopts legislation and performs other functions.[1] The plenary sitting is to discuss and vote on all matters included in the daily agenda. Depending on its scope, the sitting may be two or three days or even longer. According to the Standing Orders as well as parliamentary conventions, the sitting may also be suspended for a few days or longer.

The *Sejm's* term of office begins – according to Article 98 of the Constitution – with a new *Sejm's* first sitting following the elections, and lasts four years until the day of the first sitting of the newly elected *Sejm*. The Constitution also gives the President of the Republic exclusive power to call the first sitting of the *Sejm* within 30 days after general elections (Article 109 of the Constitution). In brief, the 'old' *Sejm's* term of office lasts until the first sitting of the newly elected *Sejm* and – until that time – may exercise its constitutional powers. However, according to the well-established interpretation of the Constitution, following the elections, an 'old' *Sejm* should act with restraint.[2]

## The implications

3. One may argue that the suspension was formally based on the Standing Orders' provisions and derives from the constitutional concept of the *Sejm* term. Moreover, such a decision cannot be seen as a violation of the well-established parliamentary principle of discontinuing parliamentary works, as it has been recently suggested. According to this principle (never directly or indirectly expressed by the Constitution) after *Sejm* ends its term, all unfinished matters, including the discussed and unvoted statutes, are discontinued. In case of suspension, the *Sejm* sitting is planned after the election day but before the end of the term (which is formally possible due to the plain meaning of Article 98 and 109(2) of the Constitution). Thus, all matters being unfinished during the last *Sejm* sitting will be discontinued and the newly elected Parliament will start with a 'clean slate'.[3] The decision to suspend the last sitting of the 2015-2019 *Sejm* and postpone this sitting until after the parliamentary elections of 13 October is therefore formally lawful.

But, in my view, it is nonetheless essentially transgressive of democratic standards. First, the current political majority departed from a more than twenty-year parliamentary convention according to which an 'old' *Sejm* should refrain from sittings after the election day without important constitutional reasons. The possibility to hold a sitting of the 'old' *Sejm* after the elections should be reserved for the most extreme and exceptional situations in which immediate reaction of the *Sejm* is indispensable (e.g. war or natural disaster). Second, the suspension period and its ending after the election day are contrary to deliberative democratic standards. If a fairly regular matter (a new statute, nomination etc.) was not settled over the period of four years, it should be left to the 'new' *Sejm*. Third, the current suspension is unjustifiably long. Since the early 90s, the *Sejm*'ssittings were suspended occasionally only for short periods An excessive overextension of the suspension period always carries a risk of constitutional tensions in all cases where the Constitution imposes strict terms on the Parliament or other constitutional authorities. Four, the suspension created a precedent on a very unclear scope and consequences. The following question may be raised: would the 'old' *Sejm* sit only on 15-16 October 2019, or would it hastily further extend the sitting until the first sitting day of the 'new' *Sejm* (e.g. 12 November 2019)? That scenario cannot be excluded after taking into account the combination of the election date (13 October 2019), the President of the Republic's power to call the first sitting of the 'new' *Sejm* (between 14 October

[1] See Garlicki Lech, uwagi 7-9 do art. 109 [comments No 7-9 to Article 109], in: Konstytucja Rzeczypospolitej Polskiej. Komentarz [Constitution of the Republic of Poland. The Commentary], ed. by Garlicki Lech, vol. 2, Warsaw 2001, p. 6-7

[2] See Garlicki Lech, uwaga 17 do art. 109 [comment No 17 to Article 109], in: Konstytucja Rzeczypospolitej Polskiej. Komentarz [Constitution of the Republic of Poland. The Commentary], ed. by Garlicki Lech, vol. 2, Warsaw 2001, p. 10.

[3] See more Garlicki Lech, Zasada dyskontynuacji prac parlamentarnych [The principle of discontinuing parliamentary works], Studia Iuridica 1995, vol. XXVIII, p. 45.

and 12 November 2019) and power of the 'old' *Sejm* to decide on dates and length of the sittings.

## The motivation

4. Last but not least, the suspension reminded many observers of events in 1935 when a new Polish Constitution was swiftly adopted following a short disruption of parliamentary sitting caused by the protest of opposition MPs who had left the parliament chamber. At present – according to the plain meaning and aim of Article 235 of the Constitution – the *Sejm* and *Senate* only have the power to amend the current Constitution but not to adopt a new one. In my view, a new constitution would have to be adopted in two steps. The *Sejm* and *Senate* would have to first introduce an amendment clause to explicitly empower themselves to adopt a completely new constitution. Then they would have to use the clause. It is in any case impossible to complete such two-step proceedings before the beginning of the new *Sejm's* term of office.

Nevertheless, much is currently being said in Poland about using the disorder caused by the suspension and the general elections for amending the Constitution. It is in fact relatively easy to adopt a constitutional amendment in the absence of a few opposition MPs. According to the plain meaning of Article 235(3) of the Constitution: 'A bill to amend the Constitution shall be adopted by the Sejm by a majority of at least two-thirds of votes in the presence of at least half of the statutory number of Deputies'.

Generally, such a scenario should also be unlikely due to the scope of the Standing Orders provisions on the constitutional amendment proceeding (Articles 86a-86k). For instance, they provide a 14-day period between the parliamentary committee report on the amendment project and its second reading by the *Sejm*. Moreover, the provisions limited the possibility of using a fast legislative track with the amendment project. They also excluded the *Sejm* or its Marshall powers to strictly limit parliamentary deliberation.[4] In my view, a violation of the mentioned provisions would make a constitutional amendment unlawful. Therefore, the MPs are still given sufficient time and procedural guarantees to protect against the unexpected amendment project, despite the disruptions caused by the suspension and the election.

But what if the political majority will be so determined to bypass or to change the Standing Orders provisions in order to achieve desirable political result? The recent history of the bypassing the Standing Orders provisions (in case of the criminal code changes) shows that almost everything is possible when the political majority and its officials are playing 'constitutional hardball'.

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[4] See Chybalski Piotr, uwaga 2 do art. 86i [comment No 2 to Article 86i], in: Komentarz do Regulaminu Sejmu Rzeczypospolitej Polskiej [The commentary to the Standing Orders of the Sejm of the Republic of Poland], ed. by Szmyt Andrzej, Warsaw 2018, p. 461.