The Polish Presidential Campaign in the Shadow of the Pandemic

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Various types of states of emergency have been, and in all likelihood will be, introduced or at least contemplated in different states of the world to cope with the COVID 19 crisis. Nowhere is this issue more lively than in Poland which is currently in the midst of the presidential election campaign – or rather "a sort of" election campaign of a somewhat bizarre character. It is a one-man campaign, leading up to the election which, by all standards, should *not* take place in a scheduled time. Except that the incumbent and his party seem not to notice it.

Normally, absent the extraordinary situation caused by the pandemic, the election should take place on May 10 and the runoff election, in case no candidate obtains 50 percent or more in the first round, on May 24, according to the Constitution and by the decision of the Speaker of the Sejm Ms Elżbieta Witek of February 5 this year. The incumbent Andrzej Duda, whose first 5-years term of office expires on August 6, is a politician supported by, and one should add, totally subordinated to, the governing right-wing populist PiS party.

He has a big lead in all the opinion polls over the other candidates, but no certainty that he will win in the 1st round: For that, he would need approximately 1 million more votes than his party managed to gain in its victory last October, and these voters would need to come from the political center, which has been reluctant to support, or at least support enthusiastically, PiS and Duda. Against him there are four major democratic opponents from the Left and the liberal center and one radical right-wing candidate. If there is a second round, and if all the democratic opposition parties strongly support an opposition candidate with the highest vote in the first round, there is a slight chance that Duda will lose. Slight, but still a chance: in the last opinion poll published before the virus outbreak, three moderate candidates Małgorzata Kidawa-Błońska (liberal Civic Platform), Władysław Kosiniak-Kamysz (peasant party) and Szymon Hołownia (independent, liberal-Christian) could hope for 46, 45 and 45 percent, respectively, should any of them face Duda in the second round.

These days, with all the new restrictive rules responding to the pandemic such as bans on public assemblies and gatherings of people, mandatory "social distancing", stay-home and quarantine requirements etc., Duda is de facto the only candidate running his campaign – simply by being presidential, touring around the country even more frantically than before, on the theory that he must reassure people that the central authorities are in charge. Even as I am writing these words (on 17 March) I see on the screen the news about the President's visit, properly covered by the state-run TV, to a petroleum manufacturing plant congratulating in person local workers for setting up a production of – yes, indeed – hand sanitizing liquid to be sold in petrol stations belonging to the company. This agitated activity, in contrast to the opponents' de facto inaction prompted by the virus-related restrictions, has already widened the gap between him and the opposition candidates. In recent polls he has attained or even surpassed 50 percent, with his strongest rival, Ms Kidawa-Błońska, languishing in the low 20s or even below.

Supporters of the democratic opposition claim that this is grossly unfair, and that the May 10 vote must be ASAP postponed indefinitely: the unfairness of running a one-man campaign being compounded by the state-run broadcaster TVP which has turned into a de facto electoral propaganda machine for Duda. (I should declare my possible bias here: I am being sued

by TVP in a civil and criminal defamation procedures which are currently pending).

But there are many other reasons which preclude, or at least make extremely implausible, holding proper and fair elections if held in May: restrictions related to social distancing will produce a very low likely turnout of voters, not mentioning the near-impossibility of mobilizing some 200 thousand personnel to run polling stations and count the vote.

The key of the matter is, the only constitutional way of postponing the election is by declaring an emergency under the Constitution: it is a prerequisite. Only then can (indeed, *must*) the elections be postponed to a date no earlier than 90 days after the formal ending of the state of emergency (Art. 228 (7)). Polish Constitution in Chapter 11 lists three categories of states of emergency *sensu largo* (Polish term is an equivalent of the words "extraordinary state" or "*stan nadzwyczajny*"): the state of war, the state of emergency *sensu stricto* (in Polish: "special state" or *stan wyjątkowy*) and the state of natural calamity (*stan klęski żywiołowej*). The first is obviously inapplicable here, but both the second and the third match well the current situation on the ground. There are some differences in terms of who can declare which state, but they are irrelevant for this discussion.

So what would be improper about declaring the state of emergency (sensu stricto), you ask? After all, the Constitution provides that it may be declared inter alia in case of a threat to the safety of citizens (Art. 230). Or even more so, the state of natural calamity (Art. 232)? Well, PiS claims, odd as that may sound, that they do not want a formal declaration of the state of emergency (*any* type of state of emergency) because in such a state certain constitutional rights and liberties can be suspended. The argument is bogus, for three reasons.

First, it is a bit rich to present one's rejection of an otherwise justifiable state of emergency on the basis of rights defense, coming from a government that have had no qualms in massively breaching various rights over the last five years or so, most obviously the right of citizens to fair trial by independent courts (for evidence for this claim, see my book *Poland's Constitutional Breakdown*(OUP 2019)), but also many other rights, including that to peaceful assembly. Second, the Constitution provides that under a state of emergency of whichever category certain rights *may* but do not *need* to be suspended. So while there will be no effective *judicial* review of such measures (mainly to be conducted under proportionality analysis) in that period, surely there will be ex post political types of accountability of a government which would curtail individual rights excessively or unnecessarily, using the state of emergency as a pretext. Third, the Constitution itself immunizes some important constitutional rights from legal possibilities of their limitation under the state of emergency (Art. 233 (1) and (2)) and natural calamity (Art. 233 (3)). The lists of those unrestrictable rights vary between the state of emergency *sensu stricto* and the state of natural calamity. In the case of the latter, the Constitution produces an enumeration of rights which *can* be restricted, so it is less tolerant towards the restrictions than in the other states of emergency. (The technique of a positive enumeration of restrictable rights has been used, however, in a *statute* on the state emergency of 21 June 2002, amended in 2017, which concretizes the Constitution). In this way the Constitution provides a reasonably good shield against excessively enthusiastic governments which would like to exploit such special periods to violate citizens' rights.

As one can therefore see, PiS is caught in an argumentative dilemma, which is a polite way of saying: blatant incoherence. On the one hand, it praises the government for taking quick, decisive and even radical measures in response to the crisis which, as the governmental propaganda maintains, make Poland a role model for many other European states, an envy of many less well-governed nations, and in particular contrast with the alleged inaction of the EU. This prong of the argumentative dilemma needs to emphasize the severity of the crisis and the need for social self-discipline, including various measures of social distancing. On the other hand, PiS is interested in carrying on the electoral campaign and hoping for the holding May 10 elections: it is business as usual, the citizen-voters are being told, and there are no reasons

("*absolutely* no reasons", both the President and Prime Minister Morawiecki sternly emphasize) to postpone the elections and discontinue the campaign now.

For the time being, the pandemic systematically enhances public support for the authorities and in particular to President Duda who exploits his position to present himself almost as the only responsible and serious Statesman from among the pool of candidates. But with the passage of time, the trends may reverse in case of possible future failures in governmental reactions to the tragedy combined with a persistent societal malaise prompted by the ongoing crisis. So it is no wonder that, even despite the incoherence of his position, both the President and his party strongly reject the idea of postponing the elections. Who wouldn't, in his place?

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