

Plague President

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Between the 16th and 19th centuries, city councils appointed plague doctors to assist those suffering from the Black Death. Now, in the 21st century, we are about to appoint a plague president in Poland. The governing Law and Justice (PiS) party is refusing to postpone the presidential election, scheduled for May 10, even though the COVID-19 pandemic is rampant. This is both detrimental to public health and unconstitutional.

That the election constitutes a health hazard should be obvious. The Polish Association of Epidemiologists removed any possible doubt on this point in an open letter to the Polish government. Moreover, the government tacitly concedes this. For example, the most recent governmental instructions to public libraries require returned books to be quarantined for 14 days. However, no similar concerns over the “election package” are even vaguely discernable. The package is to be delivered to 30 million Polish voters by Sunday, May 10, and forwarded to the Electoral Commission on that date in an unprecedented move to hold the presidential election by postal ballot.

That the election will be unconstitutional is obvious to every lawyer in the country, with the possible exception of those directly employed by the government and who wish to remain so. A letter signed by more than 400 professors of law was published in Poland’s most widely circulated daily newspapers last week. The letter calls on the government to postpone the elections in accordance with the Constitution, as holding them at the height of the pandemic violates the constitutional rights of both the voters and the candidates. To this can be added the legal opinions (including that of the author of this post) commissioned by the Polish Senate, which is still debating the amendments to the election laws. These unanimously argue that the planned presidential election is a constitutional catastrophe.

A natural disaster

The appeals are convincing and the legal arguments are irrefutable, as the Polish Constitution clearly allows for postponing the elections. All that is required is a declaration of the least invasive constitutional state of emergency, viz. a natural disaster. Many countries have done so in recent months (Italy declared a state of emergency due to the coronavirus on Jan. 31, and many other jurisdictions have followed suit). All the necessary preconditions are met: the Act on the State of Natural Disaster, provides for having a natural disaster declared in order to prevent or mitigate its effects (Art. 2); and a large proportion of the population infected or likely to become infected by a highly contagious disease qualifies as a natural disaster (Art. 3).

Once a state of natural disaster is declared, Art. 228, Sec. 7 of the Constitution comes into play. This relevantly states: “During a period of introduction of extraordinary measures, as well as within the period of 90 days following its termination [...], nor elections to the Sejm, Senate, organs of local government nor elections for the Presidency be held, and the term of office of such organs shall be appropriately prolonged.”. This article was inscribed in the Constitution of the Republic of Poland 23 years ago in order to manage situations such as the present one. The government, however, persists in refusing to invoke it.

The Polish authorities have been repeatedly reassuring the public that there is no emergency, even though the country has been in lockdown for weeks, many constitutional liberties have been severely restricted, and nothing is functioning normally. In so doing so, they are violating the Constitution by introducing emergency measures without there being any formal state of emergency to legitimize it. In essence, the government is curtailing constitutional liberties without itself being in any way constrained by the Constitution, which was written precisely for that purpose. To take but one example, the constitution limits the period of a declared natural disaster to 30 days. Any extension requires the consent of Parliament (Art. 232 of the Constitution). The regulations recently announced by the Council of Ministers restrict constitutional liberties indefinitely and have circumvented Parliament completely.

Even more objectionable, if not downright repugnant, is that some members and spokespeople of the government have been publicly accusing the opposition and anybody else calling for the election to be postponed of inciting the government to violate the Constitution. Mimicking the chanting familiar from the 2017 public protests in Warsaw, when the government was attempting to remove all the judges from the Polish Supreme Court, one government member turned to the opposition with the words: “Constitution, Constitution!”. In view of the fact that both President Duda and the PiS government stand accused of many constitutional breaches, these words are extremely hypocritical and cynical.

Contrary to the government’s claims, postponing the election is completely compatible with the Constitution. The authorities can and should, pursuant to Art. 228 Sec. 7, in conjunction with Art. 8 Sec. 2 (direct application of the Constitution), call off the election scheduled for May 10, wait for the pandemic to pass, count down 90 days, and hold another election under normal conditions. For its part, the Polish government asserts that postponing the election would be unconstitutional and threaten political instability. Neither claim is true: postponing the election is completely constitutional, as the Constitution provides for it *expressis verbis*; and it allows for the term of office of the President to be extended accordingly (Art. 228 Sec. 7).

At all costs

This raises the question of why the government is so hellbent on holding the election on Sunday. The simple answer is the coronavirus, or at least its likely social and economic consequences. PiS is afraid that President Duda, currently riding high in

the polls, could well see his reelection prospects plummet if the election is postponed and the economy has deteriorated in the meantime.

The Polish authorities are therefore determined to hold the election as planned at all costs, instead of using the proper constitutional mechanism to postpone it. Several amendments have been made to the electoral laws over the past two months, in clear violation of the Constitution. The Constitutional Tribunal has held that no significant amendment to any electoral legislation can be enacted less than 6 months prior to an election. And “significant” and “less than six months” are understatements when describing the amendments introduced by PiS.

First, these amendments deprive the independent National Electoral Commission of its role in supervising the election, and vest deputy prime minister Jacek Sasin, (a PiS politician) with the authority to organize it. Second, they render the 2011 Electoral Code inoperative for the 2020 presidential election, and substitute an ad hoc code for this one poll. This new bill was passed by the Sejm (lower house) on April 6, 2020. It is currently before the Senate, and will come into force 4 days before the election at the earliest (this point is discussed below). The bill introduces a universal postal ballot for the first time in Polish history. Postal votes have only ever been allowed for registered voters who are out of the country, the disabled and the elderly. For the 2015 presidential election, approx. 45,000 Polish citizens abroad voted by post and 12,000 resident in Poland did so. This year, the government is planning for approx. 30 million postal votes.

This postal ballot bill also lowers the safety measures that normally apply to postal votes. With 57,000 voters last time, the election package was sent by registered post and the identity of the addressee was verified by the postman. With 30 million voters this year, the election package is to be sent by regular post, with no identity check. This will make the election vulnerable to any kind of irregularities, including theft of the packages and double voting.

Another charge of unconstitutionality is connected with the fact that these last-minute changes to the electoral laws deprive Polish citizens living abroad of their voting rights. The bill, which will probably come into force on May 6, requires that Poles living abroad inform their respective consulates of their intention to vote by post no later than 14 days before the election, i.e. April 26. Unfortunately, the bill does not provide any time machine to comply with this requirement. Deputy PM Sasin, when questioned on this absurd regulation, which clearly excludes voters resident abroad, responded: “Who said that voting was compulsory?” No comment.

There are many more infringements of the Constitution in the new bill, as the constitutional opinions commissioned by the Senate make abundantly clear. For example, they give the Marshal of the Sejm the authority to arbitrarily shift the election date to May 17 or May 24, if need be. Moreover, the PiS party refuses to acknowledge that holding the presidential election in the middle of the pandemic makes it impossible for any opposition candidate to compete on equal terms with the incumbent president. As the restrictions prohibit any meetings with the electorate, the presidential campaign is virtually non-existent. There are, however, no restrictions on the public media, illegally transmogrified into a taxpayer-funded

PiS propaganda machine since PiS came to power, showing President Duda fighting COVID-19 with courage and wisdom day in day out while either ridiculing or simply ignoring all rival candidates. Not surprisingly, this has made his poll numbers soar.

A set of tools for achieving selfish ends

The obvious unconstitutionality of this bill, written especially for this one presidential election, has even made some of Jarosław Kaczyński's (the PiS party leader) supporters balk. Jarosław Gowin, another deputy-prime minister, recently announced that he and his faction will refuse to support the bill, as holding the election on May 10 constitutes a threat to public health. This triggered tense negotiations, including discussions on amending the Constitution to extend President Duda's term of office by two years. As there is almost no chance that the opposition will agree to this, other scenarios have been considered, including an instrumental use of the Constitutional Tribunal to strike down some of the recent amendments to the electoral laws, and even to request the resignation of President Duda, so as to restart the election calendar, and postpone the election to June or July. However idiosyncratic these scenarios are, the fact that they are even being considered shows that the Constitution is now perceived by Polish politicians as a set of tools for achieving selfish, political ends rather than the conditions – stipulated by the Polish people – under which they are to govern.

The decision to hold the presidential election in the middle of the coronavirus pandemic is also morally reprehensible. The Polish authorities should not be spending their time on electioneering during a national emergency. To do so is simply criminal – people are dying and the economy is in free fall. The parliament and the government do not have an extensible working day. Every minute spent on amending the electoral law, on political horse trading, and on organizing the election is a minute not spent on people's lives and health, their life achievements, and their workplaces. There is simply no time for anything else. However, the Polish Post Office, which has been burdened with delivering the election packages, has also been obliged by law to stop delivering ordinary parcels, even those crucial to people's lives and health. This is absurd. Declaring a natural disaster would enable political disputes to be pushed aside, instead of being the government's center of attention. That way, everyone could focus on saving lives and health instead of securing the president's reelection.

However, the government is using its obeisant “public” media to convince the public that “state of emergency” is tantamount to martial law, i.e. soldiers on the streets, media outlets closed, etc. The Constitution (Art. 228 para. 5), however, states: “Actions undertaken as a result of the introduction of any extraordinary measure shall be proportionate to the degree of threat and shall be intended to achieve the swiftest restoration of conditions allowing for the normal functioning of the State.” In the event of a natural disaster, the army does not patrol the streets in tanks, but assists medical staff, the elderly, etc. Nor do the authorities shut down media outlets, but use them to communicate more effectively with the public.

The bottom line is that we are only 5 days out from the presidential election and nobody knows what is going to happen. If the election is not held, this may detrimentally impact political stability, as the Polish authorities are reluctant to declare a state of emergency, which would automatically extend President Duda's term of office.

If the president is elected in the middle of the pandemic, his or her legitimacy is certain to be impugned. The turnout will be a record low, with many candidates and voters boycotting the election, and many electoral protests will be filed. In the past, the plague doctors wore beak-like masks filled with aromatic items to protect themselves from putrid air. Whoever wins this election may well cover his/her face with a mask out of shame, as the office of president will have been obtained unconstitutionally and immorally.

