

# The Constitution as a Bargaining Chip

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Despite the ongoing COVID-19 pandemic, Poland's government is refusing to announce an emergency state, presumably in order to go ahead with the Presidential election on 10 May. Instead, the ruling coalition in Poland has been presenting increasingly controversial proposals aimed at ensuring that the country's PiS-aligned President will remain in office. The most recent one envisages a constitutional amendment which would extend the president's term of office. This proposal is nothing but an attempt to blackmail the opposition: either vote for a constitutional change or be blamed for the consequences of holding a presidential election during the pandemic.

In this brutal political game, the Law and Justice Party (PiS) begins to treat the constitution as a bargaining chip. For the opposition, the extension of incumbent president Andrzej Duda's term of office, combined with the assurance that elections will have to be held in two years' time, may seem like a politically acceptable compromise. However, they should not be deceived by appearances. Such political blackmail means that the adopted amendment will be deprived of democratic legitimacy.

## Dangerous political games in Poland

In connection with the ongoing COVID-19 pandemic and the necessity to restrict fundamental rights and freedoms in Poland, the government decided to announce first of all a state of epidemic threat and then a state of epidemic. Both of these states are covered by the [Act on preventing and combating infections and infectious diseases adopted in 2008](#). Like many other countries, Poland has introduced measures to slow the spread of COVID-19 (e.g. the closure of restaurants and bars, universities, schools and kindergartens, significantly restricted freedom of movement, and the recently introduced obligation to wear masks in public spaces). The Polish authorities have not yet announced a state of natural disaster – one of three states of emergency regulated by constitutional provisions – which would automatically “freeze” the state system for the period of its duration and for 90 days after its termination. The term of office of the incumbent President would be prolonged accordingly (Article 228(7) of the Constitution).

The lack of any formal or constitutional announcement of an emergency state has been linked – [and not without reason](#) – to the upcoming presidential elections scheduled for 10 May. A comparative analysis of individual countries' decisions to announce emergency states in connection with the COVID-19 pandemic shows that there is no single template of what a constitutionally appropriate response may be (see the current [Verfassungsblog debate COVID-19 and States of Emergency](#)). Nevertheless, the Polish case shows that this issue is sometimes considered primarily in terms of political profits and losses rather than legal analysis. Despite the

obvious controversies arising from exposing voters to coronavirus infection and, as a consequence, the worsening of the epidemiological status in Poland, the ruling camp is driving full pelt towards holding the elections at all costs. One of the manifestations of this determination is the [Act on special solutions related to the prevention and combating of COVID-19](#) (meanwhile [amended](#)), which is one element of a package of three acts referred to under the working title of the “anti-crisis shield”. This special law contains a provision introducing changes to the electoral code and enabling general postal voting (Art. 40 of the special law).

The adoption of the bill by the *Sejm* approximately one month before the planned elections [violates several constitutional standards arising from the jurisprudence of the Constitutional Tribunal](#) (established before the hostile takeover of the Constitutional Tribunal and its transformation into a [governmental enabler](#)). This includes, particularly, a prohibition on introducing changes to the electoral law within 6 months before an election and a ban on concealing a new legislative initiative in the form of an amendment to a draft (as was the case with the analysed act). Furthermore, the Act does not comply with numerous constitutional principles regarding elections: the universality (not enough time to prepare lists of voters, no possibility to vote abroad by expats), equality (political campaign is currently impossible) and the secret ballot (the voter would need to write her personal ID on the ballot paper).

Important reservations as to the realistic possibility of holding the presidential election on 10 May have ignited a dispute within the ruling camp that had been thus far fairly united. Deputy Prime Minister Jarosław Gowin – head of the “Agreement” (“*Porozumienie*”) party, which is part of the ruling coalition – resigned in opposition to the 10 May election plan. At the same time, he presented another – no less controversial – proposal, which has recently acquired a formal shape: a draft amendment to the 1997 Constitution providing for the extension of the term of office of the current President by two years.

## **The constitutional amendment bill**

[The draft](#) was formally submitted to the *Sejm* as a parliamentary initiative and scheduled for its first reading at the sitting of the *Sejm*, which has been conducted remotely since 27 March. It provides for a change in the current wording of Art. 127(2) of the Constitution, according to which, the “President of the Republic shall be elected for a 5-year term of office and may be re-elected only for one more term”. The draft changes the President’s term of office to 7 years, while at the same time introducing a prohibition on re-election. Crucially in the context of the elections planned for 10 May, the draft indicates that the proposed change would also apply to the incumbent President. Moreover, the draft provides that elections called before the Act enters into force prior to the end of the term of office of the incumbent President of the Republic of Poland shall be null and void.

The draft elicits many reservations in terms of its compliance with the basic requirements of correct legislation and fundamental constitutional principles. To a generally proficient legal eye, both the possibility of occasional political abuse of the

proposed amendment to the constitution as well as the absurdities arising from a literal interpretation of the draft provisions are glaringly obvious.

Nor can one reject the slightly surreal scenario, in which the captured Constitutional Tribunal will play the main role, which could (referring this word to the realm of facts, not norms) declare the unconstitutionality of the proposed amendment (in the event that it enters into force), in so far as it prohibits the re-election of incumbent president Andrzej Duda (which is also not obvious, as the draft only contains the wording “one term”). This would mean that in 2022, he would have free rein to stand again for presidential elections. Of course, this scenario assumes, *inter alia*, a revolutionary resolution on the admissibility of the Constitutional Tribunal’s review of the constitutionality of acts amending the constitution. The concept of unconstitutional constitutional amendments which is in the focus of attention of contemporary constitutionalism, would in this case be used to further dismantle the political system in Poland.

## **Amending the constitution in times of the COVID-19 pandemic?**

Regardless of the controversy as to whether the constitutional amendment bill meets the standards of proper legislation and serious doubts about the resulting scope of how the proposed amendment may be applied during the president’s term of office, it is worth asking a more general question: Should the constitution should be amended during the COVID-19 pandemic at all?

The fact that Poland has not declared a state of natural disaster means that Art. 228(7) of the Constitution which prohibits constitutional amendments and amendments of most salient political statutes (including the Electoral Code) during an emergency state and 90 days after its termination is not applicable. However, no constitutional amendment should be made without a well-thought-out public debate, which in the case of the bill under consideration – taking into account the date of the forthcoming election – is practically impossible. The proposed amendment is a typical example of creating a law to achieve short-term political goals. Each and every constitutional amendment, even narrowly defined, is a modification of the political foundations of a given political community. Therefore, any such introduction should not be justified so much by the need of the current moment (especially when constitutional provisions may resolve the political problem), but by a democratically legitimate conviction about the legitimacy of a permanent reconstruction of the system (even to a minimal extent).

## **A serious proposal or just an excuse?**

PiS, as the main player in the ruling coalition, is probably aware that the presented constitutional amendment bill has relatively little chance of becoming law (although the scenario in which the opposition “catches the bait” of apparent political gain and decides to vote for it is not completely out of the question). However, if the bill under consideration turns out to be a mere excuse, Poles may face the dilemma of

participating, despite an ongoing pandemic, in a blatantly unconstitutional electoral procedure or boycotting the May elections. In case of the former, participation in the elections may, on the one hand, be perceived as going some way towards legitimising them, but it is also the only (albeit small) chance of winning an uneven game. In the latter scenario, whoever is entitled to vote does not become a pawn necessary in ensuring at least the veneer of the democratic legitimacy of the elections, but is deprived of the possibility to vote in opposition to the current decisions of the incumbent President. Unfortunately, this resembles a [trolley problem](#) in which each choice is associated with negative consequences.

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