

POLAND: Women rights demonstrations wake up the country, in the context of restricted civic space during the pandemic

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Introduction of first anti-pandemic measures and their influence on a civic space

As the SARS-CoV-2 pandemic was developing in Europe officially since the end of February, the Polish government prepared a package of special legislation which was meant to address the key challenges related to the crisis. Already on 2 March 2020, the Lower House of the Parliament (Sejm) adopted the "Act on special solutions related to the prevention, counteracting and combating of COVID-19, other infectious diseases and crisis situation caused by them" (act on Special Solutions).¹ The first officially confirmed case of COVID-19 infection in Poland was announced the day after this law was adopted. In the following weeks, based on provisions in the Act on Special Solutions, and in response to increase in the number of cases detected, the government first announced a so-called 'state of epidemic threat'², which later on was turned into 'the state of epidemic'.³

With the enactment of these legal provisions, several rights and freedoms were suspended or at least limited, including the right to assembly (see below for more details), freedom of movement, freedom of expression and, to some extent, even freedom to practise religion. The adoption of the same Act also allowed the government not to introduce any of the emergency states (for example, the state of natural disaster) provided for in the Constitution. According to many experts, such bypassing of constitutional solutions allowed for further restrictions to human rights than what is provided by the Constitution in the event of the state of emergency. Under this law, the government started enacting lockdown-type control measures between 10 and 12 March, with the closure of schools and university classes, cultural institutions, as well as shopping malls, and the cancelling of mass events. The restrictions were strengthened on 25 March, when non-family gatherings were limited to two people and religious gatherings to six, and non-essential travel around the country and within particular cities were forbidden.

As the pandemic developed, it soon occurred that the lockdown introduced as a response to the health threat leads to dramatic problems for many business entities and workers. In order to counteract these challenges and, above all, to help the entrepreneurs, the government came up with various forms of support. These solutions were included in a new set of legislation, which was referred to as the "anti-crisis shield". The Parliament adopted the first of such acts on 31 March.⁴ In addition to proposing many valuable solutions, these laws also relaxed the rigors of control of public money spending and abolished part of the responsibility of public servants in this area (in relation to purchasing goods and services necessary to combat the epidemic).

As a result of the special legislative provisions introduced, exercising public control over the key decision related to COVID-19 crisis response has also been greatly impeded. Any attempts to control the decisions made by public institutions have been made very difficult by another measure - introduced in the first "anti-crisis shield" (Art. 15zys) - suspending deadlines in administrative

¹ Law of 2 March 2020 on special arrangements for preventing, counteracting and combating COVID-19, other infectious diseases and crisis situations caused by them (Journal of Laws of 2020, item 374).

² See: Ordinance of the Minister of Health of 13 March 2020 on declaring an epidemic threat state on the territory of the Republic of Poland (Journal of Laws of 2020, item 433).

³ See: Ordinance of the Minister of Health of 20 March 2020 on declaring the state of the epidemic on the territory of the Republic of Poland (Journal of Laws of 2020, item 491).

⁴ Act of 31 March 2020 amending the Act on special arrangements for preventing, counteracting and combating COVID-19, other infectious diseases and crisis situations caused by them and certain other acts (Journal of Laws of 2020, item 568).

proceedings. As a result, citizens lost their constitutional right of access to public information (as the 14-day deadline for public authority responding to the request ceased to apply).

Change of the law enforcement authorities' competencies and increasing the severity of penalties

In the first package of laws forming the so-called anti-crisis shield introduced at the end of March, Article 65a was added to the code of offences, which says: *"Anyone who willfully disobeying orders given by a Police or Border Guard officer, on the basis of the law, to behave in a specified manner, prevents or significantly impedes the performance of official duties, shall be subject to arrest, restriction of liberty or a fine"*. This provision was intended to help police and border guards to intervene, especially during an epidemic. But the provision is so general that the police or border guards could give any orders to citizens, and failure to do so is punishable.

In the Code of Criminal Procedure, in turn, the government imposed a new obligation on judges and prosecutors. A provision has been introduced that *"if an accused prevents or impedes the execution of a preventive measure taken against him or if he has deliberately violated an obligation or prohibition related to such measure, the court or prosecutor is obliged to take a preventive measure to ensure that its objectives are effectively met"*. In practice, this provision may encourage courts to use arrests more often, instead of free precautionary measures such as financial guarantees, travel bans or police supervision.

In addition, a few law enforcement services got additional powers to use direct coercive measures. At the end of March, Prison Guards were authorised to use stun guns. At the end of April, with 2nd so-called anti-crisis shield package, new regulations expanded the competences of railroad security officers [uniformed service directly subordinate to the state railroad undertaking] allowing them to check identity documents and detain persons with symptoms of infectious diseases, as well as persons who stayed with persons with such symptoms in order to establish their identity. Anyone who fails to comply with orders and prohibitions covering the sphere of railroad transport may be fined.

Moreover, penalties for several offences in the Penal Code were toughened, including for exposing other people to dangerous diseases (including the HIV virus explicit mentioned) and for stalking. The amendment also assumes that violations of the obligation to hospitalise, quarantine or isolate will be decided on the basis of the findings of the police and other state services or authorised entities. In connection with such a violation, the state district sanitary inspector may impose an administrative fine of up to 30,000 PLN-almost 7,000 EUR on persons who *"in a state of epidemic danger or state of epidemic do not comply with orders, prohibitions or restrictions established on the basis of Article 46 or Article 46b of the Act"*. To this end, the first package of the so-called anti-crisis shield introduced changes to the 2008 Act on Preventing and Combating Infections and Infectious Diseases in People. As a result, fines can be imposed either by the state district sanitary inspector and state border sanitary inspector, or by the voivode or the minister of health. The decision on sanctions is delivered immediately and is subject to immediate execution. And there is no need for the relevant services to take evidence. This means that the citizen's right to be tried in court is effectively withdrawn. Especially in the situation of increasing limitations in the functioning of the justice system, citizens could not effectively appeal against the decision on penalties.

The newly established system of sanctions in practice – limitations to the freedom of assembly

All government's reactions to the COVID-19 pandemic presented above was subject of intensive political and public discussion, which was additionally heated by the most important political event of the year - the presidential election, originally scheduled for 10 May. Initially, the government was pushing this election to happen, notwithstanding the pandemic threat. As it failed to do so, causing a profound constitutional crisis in the country, these elections were rescheduled for the end of June/beginning of July. As a result, during nearly six months since the outbreak of the pandemic, the Polish society lived in a constant election campaign, additionally fueling the political emotions.

At the same time, the right to assembly was significantly hindered. Nevertheless, numerous people and social movements exercised this right by organising their manifestations in line with sanitary restrictions, i.e. in socially distanced manner. Many of such attempts protesting various actions of the government or criticising incumbent President were met with reactions from the police. In accordance with the amended law, financial penalties were imposed by the Sanitary Service on the basis of the official notes drawn up by individual police officers. Even people participating in one-man demonstrations were also punished on these grounds. Usually, they received the biggest amount possible in this case (10,000 PLN /ca. 2350 Euro). Such restrictions have also affected people demonstrating in mid-April against the first attempt during the COVID-19 pandemic to tighten the abortion law in Poland. The draft law of the second “anti-crisis shield” had included two provisions that would in practice lead to an almost-total ban of abortion and the suppression of sexuality education teaching. Under the guise of countering the effects of a pandemic this regulation was meant to criminalise abortion in case of serious fetus malformation, 1 out of 3 previously allowed conditions of legal abortion in Poland. However, it has to be noted that this was the reason for 96% of 1116 legal abortions officially reported by the Ministry of Health in 2019. Thus, after removing this conditionality from the Polish law, abortions would become almost totally restricted. And the chilling effect that such a decision could have on many doctors should also be kept in mind.

Such action triggered a rapid reaction from movements which have been protecting the reproductive rights of women all around the country at least since 2016, including the National Women's Strike. In order to respect the sanitary restrictions, they used creative ways to protest online and in the streets by queuing at the store or riding cars. Despite the activists carefully maintaining safety measures, police issued fines of maximum possible level -, up to 6,900 Euro - to almost 100 protesters due to alleged breaching of traffic laws or social distancing rules. Nevertheless, due to social resistance and criticism in the media, both provisions of the drafted law were finally abandoned.

The pandemicly shaken ruling party returns to the matter of abortion ban,...

Only a few months after the first attempt to tighten up the abortion law, this issues has come back, as the number of newly identified COVID-19 cases started skyrocketing to a previously unknown level in Poland. This time it was not done through the Parliament, but rather bypassing its proceedings through the Constitutional Tribunal that the ruling party controls totally at least since 2016⁵. Already in autumn of 2019, a group of 119 strongly conservative MPs from several parties, including PiS, Konfederacja and PSL-Kukiz'15 coalition, submitted a request to the Tribunal to examine the constitutionality of the provision of the abortion law allowing for the termination of pregnancy due to serious defects of the fetus. The motion referred, among other things, to the lack of conformity of this provision with constitutional requirements concerning the protection of life. The motion reached the Tribunal right after the 2019 parliamentary elections⁶, but the ruling party decided to silence the case in order not to arouse public protest. In result, the case has been pending untouched in the Tribunal for a year. This did not change until the end of October this year, when the Court set the deadline for a ruling on this matter for 22 October.⁷

The resumption of this initiative at this point can be explained by political calculation and the desire to divert public attention away from epidemic and economic problems in the country. The situation for the ruling party Law and Justice has been difficult for some time - due to the rapid and

⁵ To learn more about the course and nature of these changes it is recommended reading opinions on Poland of the [Venice Commission of the Council of Europe](https://www.venice.coe.int/webforms/documents/default.aspx?country=23&year=all), available at <https://www.venice.coe.int/webforms/documents/default.aspx?country=23&year=all>.

⁶ Wniosek o stwierdzenie niezgodności z Konstytucją Rzeczypospolitej Polskiej aktu normatywnego z 19 listopada 2019, K 1/20, available at <https://ipo.trybunal.gov.pl/ipo/view/sprawa.xhtml?&pokaz=dokumenty&sygnatura=K%201/20>.

⁷ See all information regarding this case published on the Constitutional Tribunal website: <https://trybunal.gov.pl/postepowanie-i-orzeczenia/wyroki/art/11300-planowanie-rodziny-ochrona-plodu-ludzkiego-i-warunki-dopuszczalnosci-przerywania-ciazy>.

uncontrolled development of the pandemic, the government's clear lack of preparation of the health service for the next wave of illnesses, internal disputes in the ruling camp ongoing since the end of the presidential elections at the beginning of July, and the worsening of the economic situation. So, even though the party leaders knew this case might incite strong protests – as, according to surveys, the large majority of the Polish society was against tightening of the abortion law already before, they decided to bear this cost in order to distract people's attention from other problems in the country. Additionally, on the one hand, the protesters can become the scapegoat for the increased number of COVID-19 cases; on the other hand, the Law and Justice party may also strengthen the bond with its most conservative group of voters.

...but civil society strikes back!

The first ad hoc protests against the ruling began as early as 22 October, the same day on which the Court issued a so-called ruling on the unconstitutionality of the contested provision of the Abortion Act. They have been met with a violent reaction from the police, including use of tear gas and pepper spray. As of 28 October, the CIVICUS Monitor reported that *“about 200 protesters will face administrative fines for not complying with anti-COVID sanitary laws, and about 125 protesters will face criminal fines for participating in an illegal gathering.”*⁸ On 23 October, Ordinance No 180 of the Prime Minister provided for the use of Military Police soldiers to assist the police in the protection of public safety and order (until the cancellation of the state of the epidemic in the country)⁹. On 29 October, a letter by the national public prosecutor instructed subordinate units on how to deal with the organisers of the protest. According to media reports, the letter states: *“every person organising an illegal demonstration or inciting participation in one should be assessed in the context of the prohibited act...of causing danger to the life and health of many people by causing an epidemiological threat”*. The crime can be sanctioned with imprisonment between six months and eight years. The act of calling for the organisation of demonstrations *“may qualify as incitement to a crime”*, which is punishable with up to two years in prison.¹⁰

Regardless of this, demonstrations have begun to spill over to the whole country. A one week later, on Friday, 30 October, there was a huge manifestation in Warsaw with more than 100,000 participants that came to the city from different parts of the country, while around 400,000 were reported to manifest all around Poland. Unexpectedly, the police stopped interacting with the protesters, even though the protests were clearly not in line with the new restrictions announced by the government in the second half of October, again practically banning group meetings also in the open air.

In the same week, the President of the ruling party, Jarosław Kaczyński, acting as Deputy Prime Minister for Security Affairs, addressed an official message to the people. He called on people to defend churches - allegedly threatened by protesters - and the Polish tradition. In response to this appeal, groups of right-wing militants and organised groups of hooligans lined up around some churches during the Women's Strike demonstration, leading to some isolated attacks on the protesters. The police seem to detain several dozen of these people.

⁸ CIVICUS Monitor, Thousands protest as constitutional tribunal imposes a near ban on abortion, <https://monitor.civicus.org/updates/2020/10/28/thousands-protest-constitutional-tribunal-imposes-near-ban-abortion/>, (28 Oct. 2020).

⁹ See: Zarządzenie nr 180 Prezesa Rady Ministrów z dnia 23 października 2020 r. w sprawie użycia żołnierzy Żandarmerii Wojskowej do udzielenia pomocy Policji [Ordinance No 180 of the Prime Minister of 23 October 2020 on the use of Military Police soldiers to provide assistance to the Police] (M.P. 2020 pos.. 1003), available at <http://isap.sejm.gov.pl/isap.nsf/download.xsp/WMP20200001003/O/M20201003.pdf>.

¹⁰ Daniel Tilles, Polish prosecutors seek charges against organisers of abortion protests for endangering public, Notes from Poland, <https://notesfrompoland.com/2020/10/29/polish-prosecutors-seeks-charges-against-organisers-of-abortion-protests-for-endangering-public/>, (29 Oct. 2020).

Nevertheless, the demonstrations continue, although their intensity has decreased at the time of writing. Their first success is the government's failure to publish the so-called Constitutional Court ruling. According to Polish law, it is only after its publication in an official gazette that a ruling begins to produce legal effects. Normally, this publication should happen automatically, but it requires an order from the Prime Minister. Moreover, several opinion polls conducted after protests show a decrease in support for the Law and Justice party (PiS) even by 10 % (in comparison with a survey conducted by the same research company). According to the same surveys, the main opposition party, the liberal Civic Platform, has only 2 % less support than PiS. So, the position of the ruling party on the political scene in Poland has been shaken.

However, this party has already proved to have both a large group of strong supporters and the ability to anticipate problems. Among other things, they have currently suspended the deliberations of the lower house of Parliament for two weeks with the pretext of a pandemic threat. In addition, a number of measures have been taken to discourage people from further protesting. The last demonstrations on Monday 9 November were met with a violent reaction from the police, including cases of detention of minors by the police. Additionally, people participating in the demonstrations, especially pupils and students, face harassment from teachers or school management, particularly in smaller towns. But the National Women's Strike, which is trying to coordinate the protests, is not passive either. It has organised professional legal assistance for all those who face restrictions for taking part in demonstrations in different parts of the country with the help of many lawyers offering help on a voluntary basis. Financial donations from people are also collected. It has also started work on collecting demands appearing on the streets in the form of a more coherent programme. There is an attempt to make these activities more participatory, but the whole process is underway. In addition, more protests are planned, especially in response to further steps taken by the authorities.

Thus, it is worth looking with interest to the course of events in Poland this autumn!