



Polish Legislation during the Pandemic vs. Corruption

Anti-crisis Shields: Completing the Law and Justice State Project?

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All crises – economic, health, military or other – not only create inherent problems but often spawn indirect threats, too. Corruption is usually one such indirect, yet serious, factor that will aggravate a crisis. It tends to accompany less prosperous spells, as people concentrate on the more burning issue of saving their lives or assets, or trying to recover. People are less attentive to standards and procedures, and less prone to be financially transparent or accountable. Moreover, crises require rapid, tough decisions. Policies and procedures tailored to normality may be seen like a burden. While laws and procedures lack relevance during of crisis, discretionary behaviour finds an easy way in, which is always a major factor breeding corruption, as Robert Klitgaard rightly pointed out.

Corruption is a complex phenomenon. For once, it fits the classic Klitgaard 'equation': Corruption = Monopoly of Power + Discretion – Accountability.¹ Accountability is not plausible without transparency, which will be fundamental to our analysis later in this paper. Yet the nature of corruption may be better captured in terms of particularism, when relatively narrow groups (a political party, an interest group or a particular social group) are capable of controlling various public, business and other institutions whose resources should, in principle, be accessible based on openness, equal opportunity or

¹ R. Klitgaard, *Controlling Corruption*, Berkeley 1988.

free competition (such as jobs in the public administration or public contracts) yet are mainly, or even exclusively, available to the group in power or circles that support it.²

Even before the pandemic, the right-wing faction that rules Poland had considerably expanded the room for corruption and abuse of power, leveraging a distinctive style of governing.³ While no complete profiles of the Law and Justice party (PiS) system of government have been developed yet, a look at the analytical and research papers published so far and a set of direct observations point to a handful of basic characteristics. Firstly, the concentration of power: the central government has not only taken over all the instruments of governance, thus weakening local and regional governments (as well as trade associations, civil society organisations and so on), it has also weakened other non-executive branches of government, which in principle should provide the right amount of counterbalance. Prime examples include the politicised Constitutional Tribunal, common courts, the Prosecution Service and other constitutional institutions, including the Supreme Chamber of Audit. The parliament has been stripped of its prerogatives, becoming a voting machine rather than a platform for political debate and part of the democratic system of checks and balances. Meanwhile, the PiS government has diverted the real decision-making mechanism outside formal institutions into its party apparatus, known as “Nowogrodzka Street”, the address of PiS’s headquarters in Warsaw. This leads to decisionism, another characteristic of the PiS style of government, as constantly manifested in statements made by ruling party politicians and in PiS policy documents. It can be briefly described as the belief that the power of the political party that won the elections is the pure emanation of the will of the people, or the sovereign, and that it alone can wield all the instruments of power, including the Constitution. The party can freely use them to pursue its political agenda. Kornel Morawiecki (the father of Polish Prime Minister Mateusz Morawiecki), the senior speaker, formulated this concept in the best way while opening the session of the 8th Sejm in 2015, when he proclaimed: “*The law is there to serve us. Law that does not serve the nation equals lawlessness*”.⁴ In the following years, PiS and its coalition partners consistently bypassed or breached the Constitution while making laws in a way that would enable them to take control of all the key institutions. Besides the concentration and delegalisation of power, party patronage and decisionism, there is another characteristic that will appear less relevant in our further assessment: the conservative Catholic national ideology that underlies the system of government.

The whole construct not only undermines the division of powers and all the institutions that have so far had some degree of autonomy from the executive, but also creates more space for informal, untransparent and unscrutinised decision-making mechanisms. It is therefore inherently more vulnerable to corruption than any other system. The term ‘closing the gaps’ in the PiS government system will be used throughout this paper to mean a conscious endeavour to amplify its major characteristics, as outlined above, and in a sense to amplify corruption as such. ‘In a sense’ because we assume that the ruling coalition must realise that, by weakening the mechanisms of social and institutional scrutiny, it reduces the chances of it being held accountable for misconduct or omissions, gives way to more discretionary decisions and increases the risk of corruption. It must be hoping to keep it under control while using it to strengthen its power.

² See: *Contextual Choices in Fighting Corruption: Lesson Learned*, edited by A. Mungiu-Pippidi, 2011, <http://www.oecd.org/countries/zambia/48912957.pdf>, s. 25–36 [accessed: 30 September 2020].

³ See: G. Makowski, *Laying the groundwork for “grand corruption”: the Polish government’s (anti-)corruption activities in 2015–2019*, Stefan Batory Foundation, Warsaw 2020; G. Makowski, *Koncentracja władzy as a sposób rządzenia obozu Zjednoczonej Prawicy w latach 2015–2019. Diagnoza and konsekwencje*, „Studia z Polityki Publicznej” 2019, Stefan Batory Foundation, 4(24); W. Sadurski, *Poland’s Constitutional Breakdown*, Oxford 2019; Stefan Batory Foundation Debate: “Law and Justice in Power. Democracy, Authoritarianism, Chaos”, <https://www.youtube.com/watch?v=HsqkkqV0i90> [accessed: 28 October 2020].

⁴ Transcript of the second session of the Sejm of the Republic of Poland on 25 November 2015.

Based on these considerations, this paper has two objectives. Firstly, it seeks to demonstrate how the main components of PiS-governed Poland's anti-contagion policy have contributed to a higher risk of corruption and abuse of power that exceeds the very high risk level after several years of right-wing rule. Secondly, we test whether the crisis caused by the COVID-19 virus, and more specifically by the current government's policies to mitigate the impact of the pandemic, has not been taken advantage of to finally 'close all the gaps' in the system of government, one where the right-wing faction will remain beyond control and liability for its decisions, and with decreasing chances of ever being held accountable.

The Anti-crisis Shields: The Pillars of Anti-COVID Policy

Several special-purpose laws with associated secondary legislation, known as anti-crisis shields, form a major part of the ruling party's response to the pandemic. Evaluating the shields, we will focus not only on the provisions specifically linked to the pandemic that foster corruption, but mainly on provisions that were 'added' to these laws on the back of changes to other laws. This analysis does not aspire to be exhaustive, especially because little was known about the real impact of what the authors of this paper believe to be corruption-generating policies adopted under the guise of the fight against the pandemic (new versions of shields have already been drafted) when it was completed. It covers the period from early March until the end of September 2020. It must therefore be interpreted as a prelude to further, in-depth assessments of the links between corruption and the policy response to the pandemic, as well as potential empirical studies.

We assessed four pieces of legislation known as anti-crisis shields and other acts of parliament linked directly to COVID-19 (several different ways of numbering the shields have been used in public discourse; here, we use one of them):

1. *Law on Specific Measures to Prevent, Counteract and Combat COVID-19 and Other Contagious Diseases and Associated Crisis Situations and Certain Other Laws of 2 March 2020* (Journal of Laws 2020, Section 374, as later amended) – **Shield One**.
2. *Law amending the Law on Specific Measures to Prevent, Counteract and Combat COVID-19 and Other Contagious Diseases and Associated Crisis Situations and Certain Other Laws of 31 March 2020* (Journal of Laws 2020, Section 568, as later amended) – **Shield Two**.
3. *Law on Specific Support Instruments in Connection with the Spreading SARS-CoV-2 Virus of 16 April 2020* (Journal of Laws 2020, Section 695, as later amended) – **Shield Three**.
4. *Law on Subsidised Interest on Bank Loans Extended to Enterprises Affected by COVID-19 and Simplified Process of Composition Approval in Connection with the Incidence of COVID-19 of 19 June 2020* (Journal of Laws 2020, Section 1086, as later amended) – **Shield Four**.

This paper will not analyse these provisions individually. Instead, it will use a corruption risk assessment approach to evaluate the impact of some of the language in the legislation. The order in which issues will be addressed reflects the relative weight in terms of a corruption threat, according to the authors. Needless to say, any form or manifestation of corruption should be seen as dangerous and harmful.

Non-Transparent Legislative Process and Uncontrolled Lobbying

Firstly, we will discuss what seems to be a technical issue, but really touches on the key question of the right-wing faction's efforts to 'close the gaps' in its model or system of exercising power. The legislative process of adopting the shields revealed the classic *modus operandi* of this government, but also unveiled some new ways of 'closing the gaps' in the system. The lack of transparency in the legislative process creates a corruption risk on its own.

	Date of publication RCL website	Total duration of legislative process in the Sejm	# of amended or repealed laws	# of secondary legislation documents	# pages in the 1 st draft of bill (w/o reasoning)
Shield 1	2 March	1–6 March (6 days)	15	33	22
Shield 2	26 March	26–31 March (5 days)	66	3	85 (Paper No. 299) 68 (Paper 299-A) Total: 153
Shield 3	7 April (concurrent private members' bill of 2 April)	2–17 April (15 days)	65	1	139 (Paper No. 330) 64 (Paper No. 324) Total: 203
Shield 4	9 April	22 May–22 June (32 days)	56	0	91 (Paper No. 382) 3 (Paper No. 382-A) Total: 94

Source: Authors' analysis based on information on the Sejm and Government Legislative Centre (RCL) websites

The table above summarises a handful of simple statistics that illustrate the intense and helter-skelter nature of the process of drafting and adopting just four bills. The Shield One bill was even published on the Government Legislative Centre (RCL) website *after* it had been published by the Sejm, website activity analysis suggests. It might only have been a formal mistake, but it still should not have been the case. Most of the amendments are government proposals, but the government processed the drafts in no time at all, without any consultations or even an interdepartmental review filed in the records. In the Sejm, the average time to pass these laws was just 14 days. The first two shields only took a few days to enact – again, without consultations or extensive debate in select committees or sub-committees. Meanwhile, the volume of legislation and the number of amendments forced through in other laws, along with the secondary legislation, was enormous, without mentioning the need to clear them for compliance with the huge body of legislation applicable at the EU level. A thorough analysis of the legislative process in connection with these and other ingredients of the anti-contagion legislation has been a captivating exercise in its own right. This very basic summary illustrates the haste, rashness and unavoidable defectiveness associated with the legislation. There seems to be no reasonable excuse for this conduct, especially in light of how the government could have used existing instruments to mitigate these types of crises. In particular, the government could

have announced a state of natural disaster⁵ at the start of the pandemic, which would have taken some of the pressure off decision-makers and legislators to devise detailed policies with at least minimal dialogue with the public and the parliamentary opposition. That measure was never adopted, simply because the ruling party wanted the presidential election to go ahead as soon as possible, so that President Andrzej Duda would be re-elected for a second term. Declaring a state of natural disaster would automatically postpone the election, even for months, and the ruling camp feared that the evolving crisis would reduce Duda's chances of re-election. As a result, all four shields are filled with unconstitutional changes forced onto other legislation and foster corruption, broadly defined as state capture, to further the ruling party's interests. The presidential election held in late June and early July 2020 breached the Constitution⁶ and was a classic case of state capture.⁷ Again, the ruling party compromised the legitimacy of democratic institutions and processes to push its agenda.

The Ombudsman challenged all four anti-crisis shields by referring them to the Constitutional Tribunal, arguing that the amendments had been made in violation of the Rule of Procedure of the Sejm. Specifically, the Ombudsman questioned the failure to observe a minimum interval between readings and the failure to appoint an Extraordinary Select Committee.⁸ The hurried parliamentary process, lack of public consultations and huge number of amendments to other laws imposed by the shields – all of this is conducive to a process of change that favours narrow interest groups that do not necessarily act in the spirit of public interest or laws and regulations. Furthermore, the way in which the shields were processed by the government and parliament mocked all the standards of adequate legislation. Indeed, this alone may be sufficient to question the laws' constitutionality. In general, how this process was handled would always be a recipe for increased corruption.

The hasty and untransparent legislative process has given rise to another development that is crucial in the context of 'closing the gaps' in the PiS government system. Shield Three adopted on 16 April contained an Article 14 Paragraph 8, which amended the Telecommunication Law.⁹ The amendment allowed the ongoing auctions for frequencies for the construction and development of high-speed Internet (5G) to be cancelled. During the last stage of drafting the shield in the Public Finance Select Committee, a night session, one PiS MP suddenly put forward an amendment containing provisions that allowed the removal of the then-president of the Office of Electronic Communications (OEC) and changed the appointment process in a way that would remove the Senate's input (Article 61).

The latter amendment sparked controversy, not just because it was put forward in those circumstances, but also because it breached the European Electronic Communications Code (Directive 2018/1972

5 Polish law distinguishes between three types of states of emergency. The English concept of "state of natural disaster" does not capture the situation discussed here precisely. However, the concept of "state of emergency" is too general, as it covers all three emergency states defined in Polish law.

6 Statement Regarding Presidential Elections on 28 June, <https://www.batory.org.pl/oswiadczenie/stanowisko-w-sprawie-wyborow-prezydenckich-28-czerwca/> [accessed: 27 October 2020].

7 According to the classic definition used by the World Bank, state capture is a set of actions by individuals, entities (e.g. private companies) or groups of them, both in the public and private sector, with the intention to exert influence to obtain favourable laws, regulations, decrees or government programmes in exchange for the unlawful and secret delivery of private gains to public officials. In addition: "All forms of state capture geared towards obtaining benefits by a small group of individuals, companies or sectors by way of distorting the fundamental principles of law and regulation with a potential to cause massive losses to society as a whole". See: Ł. Afeltowicz, *Zawłaszczony państwa, sieci społeczne and wyobrażenia socjologiczne. Krytyczna analiza koncepcji state capture*, „Studia Socjologiczne” 2010, Issue 1(196), p. 73.

8 J. Łukaszewski, *Adam Bodnar zaskarżył do Trybunału Konstytucyjnego „cztery tarcze antykryzysowe”*, <https://wyborcza.pl/7,75398,26373486,adam-bodnar-zaskarzyno-do-trybunalu-konstytucyjnego-cztery-tarcze.html> [accessed: 27 October 2020].

9 Journal of Laws 2019, Section 2460 (Codification); Journal of Laws 2020, Section 374 and 695.

of the European Parliament and of the Council of 11 December 2018).¹⁰ It was only natural that the European Commission requested answers. In a special letter to the minister of digitisation, the commissioner for internal market expressed concern about Warsaw's decision and reaffirmed that the shield violated the Directive (we had not received any other information about possible further steps by the Commission on the matter or about the Polish authorities' reaction at the time of drafting this paper).¹¹

Besides the abysmal quality of the legislative process, other aspects of this case ought to be addressed, too. It illustrates the process of 'closing the gaps' in the PiS government system as PiS jumped on an opportunity to take full control of one more institution which, in principle and in line with EU law, should have autonomy and neutrality from current politics. PiS and its allies used the anti-contagion legislation as a tool to remove the president of OEC and replace him with their own appointee without involving the opposition-controlled Senate.¹² Moreover, in relation to the previous point – and bearing in mind that these amendments had barely anything to do with combatting the pandemic – what else could have been behind it other than the desire to take total control of another public institution?

One possible and fairly plausible answer is that these amendments may have resulted from US diplomatic lobbying. It has been known a while that the telecommunication services market will become extremely lucrative with the advent of the 5G, especially in relatively large European countries like Poland. It has also been known that the key players with an appetite for this market are US and Chinese companies. The Polish right-wing government is quite susceptible to US influence. It therefore probably wanted to pave the way for the awarding of a 5G frequencies contract favourable to US companies, a hypothesis well substantiated by the fact that the government sent off a bill on amending the Law on the National Cybersecurity System and the Public Procurement Law for public consultations in early September. The draft bill included provisions that allow any vendor to be disqualified from competing for the frequencies if it is found to be a threat to national security.¹³ Experts in the field unequivocally see this bill as an 'anti-Huawei law'. The Chinese group itself speaks openly about it.¹⁴ Whether or not the ruling party acted in good faith to protect national security or in bad faith to thwart competition, it clearly fell short in terms of the transparency of the legislative process and resistance to totally uncontrolled lobbying (suggesting corruption), the latter evidently aggravated by the unhelpful and obsolete Lobbying Law.

Failure to observe any standards of legislation, the inadequate regulation of lobbying and the haste triggered by the pandemic have created an environment in which the ruling party can freely extend its powers in an utterly untransparent fashion, leveraging Poland's relations with other countries in the process.

10 See: U. Zielińska, *Prezes UKE na tarczy? Nocna poprawka do Tarczy 3.0 and może się pakować*, <https://cyfrowa.rp.pl/biznes/46662-prezes-uke-na-tarczy-nocna-poprawka-do-tarczy-3-0-and-moze-sie-pakowac> [accessed: 30 September 2020].

11 *EU concerned with Poland's plan to change telecoms regulator head*, <https://www.reuters.com/article/poland-eu-telecoms/eu-concerned-with-polands-plan-to-change-telecoms-regulator-head-idUKL8N2CW5PF> [accessed: 30 September 2020]; W. Ziomek, *Komisja Europejska broni szefa UKE and domaga się wyjaśnień*, <https://www.money.pl/gospodarka/komisja-europejska-broni-szefa-uke-and-domaga-sie-wyjasnien-6510106822035585a.html> [accessed: 30 September 2020].

12 See: P. Szostak, *„Niesterowny” prezes UKE. Dlaczego PiS chce skrócić kadencję Marcina Cichogo?*, <https://wyborcza.pl/7,156282,25939333,niesterowny-prezes-uke-dlaczego-pis-chce-skrócic-kadencje.html> [accessed: 30 September 2020]; S. Czubkowska, *Prezes UKE przerywa milczenie: I ja, i aukcja 5G padliśmy ofiarami wirusa*, <https://spidersweb.pl/plus/2020/05/marcin-cichy-aukcja-5g> [accessed: 30 September 2020].

13 *Bill on the Amendment of the Law on National Cybersecurity System and the Public Procurement Law*, <https://legislacja.rcl.gov.pl/projekt/12337950/katalog/12716608#12716608> [accessed: 30 September 2020].

14 A. Kozłowski, *Huawei: kryteria w nowelizacji Ustawy o KSC są polityczne, a nie merytoryczne*, <https://www.cyberdefence24.pl/huawei-kryteria-w-nowelizacji-law-ksc-sa-polityczne-a-nie-merytoryczne> [accessed: 30 September 2020].

Thwarting Access to Public Information

Access to information on the performance of public authorities and public sector entities, including state-controlled companies, municipal companies, entities that provide public services, use public subsidies or grants or are otherwise supported by the government is a fundamental civil right enshrined in the Constitution and primary legislation, including the Law of 6 September 2001 on Access to Public Information¹⁵ and the Press Law of 26 January 1984.¹⁶ Underlying this right is the belief that democracy and the rule of law are found where the political process is transparent to citizens because they are the ones who legitimise the process and must therefore be informed. Again, accountability cannot exist without access to information and when civil rights and liberties such as the freedom of speech and media cannot be guaranteed. All measures, legislative or other, that limit access to public information naturally increase the risk of corruption.

Anti-COVID policies give rise to two types of problems. In the purely regulatory dimension, the first shield introduced provisions allowing administrative proceedings, such as granting access to public information, to be suspended – Article 15z of the Act on the Temporary Protection of Citizens (Shield One). Furthermore, the party requesting, but not being granted access to public information by a public entity, could not even initiate these kinds of proceedings. A request could simply be ignored and the client could not object on the grounds of stalling on the part of public authorities. Based on the new provisions, any citizen involved in a dispute with any public entity over not being informed with regard to his or her request for access to public information effectively lost his or her right to obtain this information or to resolve the dispute in court. In addition, as a result of amendments to the legislation that defined the right of access to public information, the right has been denied not only to ‘ordinary’ citizens, but also to journalists, professionals whose work relies on the search for new information. Under the Press Law, their requests would be processed as requests for access to public information. At the peak of the pandemic in the spring, there was massive chaos when it came to the severity of COVID-19 and the government’s strategy for combatting the virus. Journalists were kept waiting for replies to simple questions sent to the Ministry of Health; some mentioned the word ‘censorship’.¹⁷ The ruling party put on hold all requests for access to public information filed under the Law on Sharing Environment and Environmental Protection Information, Public Participation in Environmental Protection and Environmental Impact Assessment of 3 October 2008.¹⁸ Citizens could no longer participate in public processes regarding nature conservation, a cause close to many citizens’ hearts. They could not participate in consultations of decisions before they were finally made, either.

The provisions clearly breached Article 61 of the Constitution, which guarantees free access to public information, defined as a human right according to Polish and international standards. The Ombudsman and Citizens Network Watchdog Poland also pointed out that the parliament deprived citizens of their right to defend their right of access to public information before courts, a clear violation of Article 233 Paragraph 3 of the Constitution (access to justice is a fundamental human and civil right).¹⁹ Following the position of Watchdog Poland, it should be underlined that the right must not be

15 Journal of Laws 2019, Section 1429 (Codification)

16 Journal of Laws 2018, Section 1914 (Codification)

17 Ł. Warzecha, *30 lat później uciekamy z kina „Wolność” – z punktu widzenia Łukasza Warzechy*, 14 April 2020, <https://sdp.pl/30-lat-pozniej-uciekamy-z-kina-wolnosc-z-punktu-widzenia-lukasza-warzechy/> [accessed: 30 September 2020].

18 Journal of Laws 2020, Section 283 t.j.

19 Statement by the Citizens Network Watchdog Poland Association regarding *the Law on Specific Measures to Prevent, Counteract and Combat COVID-19 and Other Contagious Diseases and Associated Crisis Situations and Certain Other Laws of 2 March 2020* (Journal of Laws 2020.374), https://siecobywatelska.pl/wp-content/uploads/2020/04/List_Marszalek_Grodzki.pdf [accessed: 30 September 2020]; Ombudsman letter ref. VII.6060.19.2020.MM, https://www.rpo.gov.pl/sites/default/files/WG_do_MSWiA_ws_dostepu_do_informacji_publicznej.pdf [accessed: 30 September 2020].

withheld, even in a state of emergency. In fact, the shields were a way of avoiding the emergency state legislation in the first place, which adds controversy to these provisions in terms of constitutionality.

The above-mentioned law was repealed in May 2020 by virtue of an amendment that reinstated the deadlines of administrative proceedings.²⁰ However, requests for access to information were not processed for about two months. It is hard to assess the damage caused by the provisions while they were in force. Nobody collected this kind of data. It is certain, however, that they did not speed up the thousands of ongoing requests and barred the new ones. Requests for public information were not being processed efficiently before the pandemic, taking dozens of months or even several years on average. For example, the ePaństwo Foundation filed a question about government plans to respond to the pandemic in the autumn of 2020. The Foundation had caught the Minister of Health make a false statement suggesting that such plans existed.²¹ Unfortunately, the truth that there were no plans of this kind surfaced much later. The public scrutiny mechanism was not working, as access to public information was suspended until May 2020. The case exposed by the ePaństwo Foundation demonstrates the potentially grave social consequences of the government withholding critical information about citizens' health and safety.

In addition, some courts challenged the validity of the provisions, which offers only little consolation. For example, the Provincial Administrative Court in Łódź ruled in favour of a local community member who had demanded that the mayor disclose the level of bonuses and promotions granted during the pandemic in June.²² The Court ruled that complaints about government inaction, leading to failure to disclose information, should be considered urgent, with courts required to hear them within 30 days under the Law on Access to Information, and as such they were not covered by the said Article 15zsz. However, there were very few cases of citizens taking legal action. Notably, the provisions imposed by the ruling party blocked access to information potentially revealing government overspending. Indeed, the government was in a position where it could ignore questions from representatives of the media, withhold all information about the development of the pandemic or related procurement, and withhold information about the response to COVID-19. For weeks, the Polish people had to rely almost exclusively on daily government statements, without being able to corroborate the facts.

At the local level, these limitations coincided with a law allowing council employees to work and make decisions from home, which included council and regional parliament sessions. In fact, some of the sessions were held by circular.²³ Citizens Network Watchdog Poland pointed out that resolutions were repeatedly adopted as a result of the chair sending out drafts to council members, who then marked their voting choices and sent them on to their colleagues for more signatures. It is virtually impossible to keep track of this decision-making process and it is vulnerable to abuse with serious consequences (for example, modifications of local zoning plans can have a fundamental impact on the community).²⁴ In addition, the suspended access to public information may have meant that they had limited access to records concerning these kinds of decisions, if they had wanted to challenge them.

20 Journal of Laws 2020, Section 875, as later amended.

21 A. Toeplitz, *Ministerstwo Zdrowia nie miało żadnej strategii walki z koronawirusem*, 23 October 2020, <https://epf.org.pl/pl/2020/10/23/ministerstwo-zdrowia-nie-mialo-zadnej-strategii-walki-z-koronawirusem/?fbclid=IwAR3Vqm7ldooaIrJMrijxKY-4xX0ZWUDFkUIyuSxiI8w7nE5TltdGnusWHfyY> [accessed: 28 October 2020].

22 Ref. II SAB/Łd 12/20.

23 H. Izdebski, *Tarcze Antykryzysowe – dokończenie budowy państwa PiS-u? Ustawodawstwo okresu pandemii a funkcjonowanie samorządu*, <https://www.batory.org.pl/wp-content/uploads/2020/11/Tarcze-antykryzysowe-dokończenie-budowy-państwa-PiSu.pdf> [accessed: 10 October 2020].

24 K. Kubicka-Żach, *Sesje rad w czasie COVID – czasem bez transmisji and jawności*, <https://www.prawo.pl/samorząd/sesje-rad-w-czasie-COVID,504478.html> [accessed: 16 November 2020].

In practice, the provisions have had a chilling effect when it comes to the right to access public information. We are unlikely to be able to ever understand the scale of abuse while they were in force or the number of irregularities or cases of corruption that could have been exposed or even prevented if the law had been enforced. With their constitutionally questionable provisions, anti-crisis shields open the door to corruption.

Impunity and Accountability of Politicians and Civil Servants for Public Decisions

Another type of potentially corruption-generating legislation emerged within the framework of the anti-COVID policy, with the shields that reduced liability or fully indemnified individuals for a variety of crimes (including corruption crimes). The first piece of legislation of this type was Shield Two, adopted by the Sejm on 31 March 2020.²⁵ Article 10c of the shield provided that no crime or disciplinary tort shall be committed by *“whoever in the state of epidemic threat or a state of epidemic announced as a result of COVID-19 infringes his or her official duties or the relevant applicable laws and regulations while purchasing essential goods or services to combat the contagious disease if that person acts in the public interest, where the purchase of such goods or services could not have been made or had been considerably at risk without such infringement”*. The same shield contains an almost identical Article 15w. The only difference between Article 10c and 15w is that the latter uses the term *“the state of epidemic”* instead of *“the state of epidemic threat or a state of epidemic”* and uses the word *“this epidemic”* instead of *“the contagious disease”*. This is not just about trivial nitpicking. Again, the lack of logic in this wording suggests the haste and negligence present throughout the legislative process. The wording caused a great deal of perplexity when it came to interpreting the provisions and added uncertainty and chaos to the legal system.²⁶

The legislation being discussed exempts people who manage public funds and who may purchase equipment, services or other resources to fight COVID-19 in breach of the Public Finance Law from criminal and disciplinary liability. In simple terms, nobody would be held liable for squandering taxpayers’ money or otherwise mismanaged the process or failing to stick to procedures while spending the money.²⁷ These types of failures are considered classic examples of corruption.

It must be underlined that both Article 10c and Article 15w applied to civil servants *and* other people; for example, at state-owned company employees, hospitals, schools and all public entities, private companies or civil society organisations that use any public money (such as subsidies). Both provisions include a disclaimer at the end stating that this kind of behaviour would only be justified if the person acted *‘in the public interest’* and if the purchase could not be made without violating the applicable laws and regulations. Law enforcement agencies, the Prosecution Service and possibly courts would be expected to verify these cases if they were ever challenged. However, the use of rather

25 Journal of Laws 2020, Section 568.

26 P. Karlik, *Analiza prawna: wyłączenie przestępności art. 296 k.k. w ramach tarczy antykryzysowej a potencjalne pokrzywdzenie wierzycieli*, Warsaw 2020.

27 Conf. *Statement by the Helsinki Foundation for Human Rights regarding the Law amending the Law on Specific Measures to Prevent, Counteract and Combat COVID-19 and other contagious diseases and associated crisis situations and certain other laws of 28 March 2020 (Paper No. 96)*, https://www.hfhr.pl/wp-content/uploads/2020/05/HFPC-Senat-druk-96_opinia.pdf [accessed: 30 September 2020].

vague terms such as ‘the public interest’ or the lack of possibility to make the purchase otherwise means that the safeguards are quite weak and open to broad interpretation.²⁸

Moreover, Shield One, adopted on 2 March 2020, included an Article 6 that fully exempted any purchase of goods and services from the public procurement law “if there is high probability of rapid and uncontrolled spread of a disease or if this is warranted by the protection of public health”. This opened the door to extremely wide and possibly very discretionary indemnity for anyone who defies the public procurement legislation, thereby shaking the fundamental principles of the enormous market of government contracts: transparency and competitiveness. By doing so, the Polish legislature ignored the recommendation of the European Commission and other international organisations to apply existing measures and ones that are acceptable under the applicable public procurement law; for example, single source procurement or a competitive procedure with negotiation – they allow considerable freedom in public spending, but maintain minimum scrutiny and impose basic transaction reporting standards.²⁹ The provisions in Article 6 allows total freedom, with no minimum requirements to record and report on purchase transactions. Moreover, Shield Two extended the provision even further by adding purchase transactions completed by Bank Gospodarstwa Krajowego and the Polish Development Fund S.A. (PFR), which manages enormous budgets for supporting businesses during the pandemic.

Moreover, these measures were accompanied by provisions that introduced indemnity for other types of abuse. Shield Two contains Article 15s, which provides that failure to collect receivables originating from non-performance or malperformance of a public contract (in connection with COVID-19) does not constitute a violation of public expenditure discipline, just like an amendment of a public contract, provided that the parties notify each other immediately of circumstances linked to COVID-19 that would require that kind of change. Furthermore, note Article 15t in Shield Two which, similarly to Article 15s, indemnifies failure to collect receivables originating from non-performance or malperformance of a contract, but in connection with Article 296 of the Criminal Code, applicable to enterprises and other entities (mainly state-controlled companies) that use public funds and commit economic fraud.

Meanwhile, Shield Three (adopted on 16 April 2020) must have been an attempt to ‘clean up’ the provisions because Article 15w was repealed but the remaining provisions, including the most controversial Article 6 and Article 10c, were retained and were still in force when this paper was being drafted. Moreover, the same shield includes Article 76, very similar to Article 10c, which exempts people representing PFR from liability under Article 231 and 296 of the Criminal Code and violations of public expenditure discipline. PFR was designated by the shields as the operator of the funds earmarked for mitigating the social and economic impact of the pandemic. Incidentally, the same article in Paragraph 2 indemnified people representing PFR under Article 483 of the Code of Commercial Companies. This provision applies to losses attributed to an officer, director or liquidator acting or failing to act according to the law or the company articles of association and/or failing to observe due diligence in performing his or her duties.

A multilevel system has been set up to last many months, as a result of which tens of billions of złoty in taxpayers’ money could leak out of the public procurement system without any control whatsoever,

28 P. Jaźwiński, *Prawne bezpieczniki, które znoszą odpowiedzialność za działania w czasie epidemii. Analiza*, <https://konkret24.tvn24.pl/polityka,112/prawne-bezpieczniki-ktore-znosza-odpowiedzialnosc-za-dzialania-w-czasie-epidemic-analiza,1016003.html> [accessed: 30 September 2020].

29 J. Hołowińska, P. Trębicki, *Ministra dopadła zemsta zamówień publicznych*, „Rzeczpospolita”, 28 May 2020.

without any scrutiny by the market regulators: the Public Procurement Office and the Office of Competition and Consumer Protection – and decisions made by the PFR president and other people representing this institution. Politicians, civil servants and others who manage public money are fully indemnified for poor decisions that could pose a risk to the country's budget. This includes an exemption from any investigations by law enforcement or the Prosecution Service. The indemnity works only if an individual acted in the public interest and it was not possible to act without infringing the provisions. While this is true, these qualifications are very soft and discretionary; in fact, they discourage law enforcement agencies from taking on these kinds of cases. Ultimately, it would be very difficult to prove the guilt of the perpetrators in court. Public scrutiny is not even an issue in this context because it was simply put on hold for over two months. When public information could be accessed again under the law, there were no records of purchase transactions or decisions to scrutinise. The government masterminded a huge space for the potential abuse of power with practically guaranteed discretion and impunity.

If this were not enough, a bill was sent to the Sejm on 12 August 2020 further extending impunity for crimes if they committed in connection with an intention to contain the pandemic.³⁰ The first version of the bill contained the infamous Article 10c, followed by Article 10d, which read: *"No crime shall be committed by whoever infringes official duties or applicable laws and regulations in order to counteract COVID-19 while acting in the public interest and where such action could not have been possible or had been considerably at risk without such infringement"*. Having guaranteed impunity when it comes to procurement and the spending discipline, the government suggested extending it in terms of the scope of indemnity and coverage. The wording of the provision means that you can do whatever you like under the guise of a true or apparent intention to counteract the pandemic: steal, bribe, batter or inflict bodily harm on someone, e.g. for not wearing a face mask properly. Note that perpetrators are not expected to demonstrate whether or not their actions actually helped contain the pandemic – all they need to do is prove their intention, a subjective qualification of any deed. The scope of torts to be covered by this justification or the category of people subject to indemnity were not defined.³¹ Essentially, Article 10d 'absorbs' Article 10c. That means a replay of the developments several months earlier when indemnity under Article 10c was suddenly amended by adding the almost identical Article 15w. Again, the quality of the legislation leaves very much to be desired. Moreover, legal professionals were quick to point out that the proposed bill indicates that it will apply to acts committed prior to the enactment. It would apply retroactively to any historical abuse. In its assessment, the Helsinki Foundation for Human Rights indicates that, if made into law, victims of these crimes would lose the right to seek compensation for damage.³²

It is hard to tell whether the provision is the result of in-depth deliberations or legislative negligence. Judging by the format in which all the anti-COVID laws were drafted and adopted, the latter seems more likely. Yet the context in which this proposal was made strongly suggests that it was motivated by very specific considerations, as this paper explains.

30 *Private members' Bill Amending the Law on Specific Measures to Prevent, Counteract and Combat COVID-19 and Other Contagious Diseases and Associated Crisis Situations* (Paper 539), <http://sejm.gov.pl/Sejm9.nsf/PrzebiegProc.xsp?id=1E73599B685D1E1AC12585C200369CEC> [accessed: 30 September 2020].

31 G. Makowski, *Bezkarność nie pomoże w walce z pandemią*, https://www.batory.org.pl/blog_wpis/bezkarosc-nie-pomoze-w-walce-z-pandemia/; *Przepis na doskonałą bezkarność za nadużycia władzy: projekt nowelizacji ustawy antyCOVIDowej*, <https://www.dogmatykarnisty.pl/2020/08/przepis-na-doskonala-bezkarosc-za-naduzycia-wladzy/> [accessed: 30 September 2020].

32 *Opinia na temat projektu zmierzającego do zalegalizowania bezprawnych działań popełnionych w celu przeciwdziałania COVID-19*, <https://www.hfhr.pl/wp-content/uploads/2020/08/druk-sejmowy-nr-539-opinia-HFPC.pdf> [accessed: 30 September 2020].

The proposal caused considerable controversy, prompting opposition from experts, civil society organisations – including Transparency International, an international anti-corruption organisation³³ – and the general public. It also created tensions within the ruling coalition, leading to a government crisis. Initially, the Minister of Justice did not make any statements about this initiative. He started criticising it sharply later, but then started sending signals of his readiness to compromise.³⁴ The row within the government and the visible public dissatisfaction in mid-September led to a new version of the provision. This time, it only indemnified those who failed to perform their duties or abused their powers (Article 231 Paragraph 1 and 3 of the Criminal Code) and committed similar economic crimes (Article 296 Paragraph 1, 1a, 3 and 4 of the Criminal Code). Essentially, the scope was narrowed to only apply to public officials and company executives (the intention was mainly to cover state-controlled companies). A rather vague disclaimer was added: *"if the said actions could not have been completed or had been considerably at risk without the said infringements and the sacrificed good has a lower value than the value of the salvaged good"*. The exemption is likely to have been designed as a detailed extension of the concept of necessity stipulated in the Criminal Code. This is how some politicians in the ruling party explained and defended the idea in the media.³⁵ Nevertheless, a narrower indemnity for perpetrators of punishable acts remains an extension of impunity. A legal expert evaluating the bill argued that it tries to replace the concept of necessity with the concept of total impunity.³⁶ Interestingly, the move to narrow down the indemnity indirectly revealed the type of actions the proponents of the bill wanted to cover: the abuse of power and economic crimes (a type of corruption in the private sector). Article 10d was at the second reading stage when this paper was completed.

In terms of the specific impact of these laws, it is genuinely difficult to assess the damage of the law on impunity for specific types of misconduct, just like it is hard to assess the damage of the law suspending the right of access to public information. For example, with regard to the exemption from the public procurement law, oral comments made by the president of the Public Procurement Office, journalists and experts monitoring the enforcement of Article 6 of the anti-crisis shield suggest that cases where this provision was actually applied were extremely rare, at least in June 2020.³⁷ As a result, one could expect the corruption risk to be low, too. However, judging by the most spectacular cases – the controversial failed purchase of ventilators, face masks, face shields and COVID-19 tests by the Ministry of Health (useless equipment from dubious sources was bought or items were paid for but never delivered), which generated losses of hundreds of millions of złoty – the size of the risk is not trivial.³⁸ By the time this paper had been drafted, none of the individuals responsible for the transactions had been brought to account in any way. The Prosecution Service had opened investigations into all these cases in late May and early June 2020, but there had been no news of any major developments until

33 *Condemnation Of Proposed Impunity For Politicians And Officials In Poland*, <https://www.transparency.org/en/press/condemnation-of-proposed-impunity-for-politicians-and-officials-in-poland> [accessed: 30 September 2020].

34 *Fogiel o bezkarności urzędników: przyjęliśmy słowo w słowo to, co zaproponowała Solidarna Polska*, <https://tvn24.pl/polska/kryzys-w-united-right-wing-radoslaw-fogiel-o-sporze-z-solidarna-polska-dot-przepisow-zdejmujących-odpowiedzialnosc-4697557> [accessed: 30 September 2020].

35 *Ustawa COVIDowa. PiS: Nie chodziło o bezkarność lecz o dobro ludzi*, <https://www.rp.pl/Prawo-and-Sprawiedliwosc/200919300-Ustawa-COVIDowa-PiS-Nie-chodzilo-o-bezkarnosc-lecz-o-dobro-ludzi.html> [accessed: 30 September 2020].

36 E. Rutynowska, *Stan wyższej konieczności: jak pandemia konstytuuje bezkarność urzędników*, <https://www.prawo.egospodarka.pl/166046,Stan-wyzszej-koniecznosc-i-jak-pandemia-konstytuuje-bezkarnosc-urzednikow,1,92,1.html> [accessed: 30 September 2020].

37 See: *Debate: Zamówienia publiczne w czasie kryzysu. Nowe zagrożenia, możliwości and wyzwania*, <http://paktuczciwosci.pl/aktualnosc/nagranie-z-debaty-zamowienia-publiczne-w-czasie-kryzysu-nowe-zagrozenia-mozliwosci-and-wyzwania/> [accessed: 30 September 2020].

38 See: inter alia R. Gruca, *Ujawniamy interesy ministra Szumowskiego and jego żony z twórcą wielkiej piramidy finansowej*, <https://oko.press/szumowski-and-tworca-piramidy/>; J. Watoła, W. Czuchnowski, *Afery ministra Szumowskiego zostaną zamiecione pod dywan*, <https://wyborcza.pl/7,75398,26115462,afery-ministra-szumowskiego-zostana-zamiecione-pod-dywan.html> [accessed: 30 September 2020].

October 2020.³⁹ It seems that even if anyone were to be charged in these cases, the criminal and disciplinary indemnity provisions that cover the controversial procurement decisions would help the decision-makers involved escape justice.

The latter of the amendments outlined above, concerning indemnity for failure to comply with obligations or abuse of powers, appears to be designed to ensure security not so much for individuals involved in fighting COVID-19, but those who were involved in organising the presidential election. The ruling party tried to organise a presidential election held exclusively by post in May 2020. Finally, the election was not held, but the decision made by Prime Minister Mateusz Morawiecki and Deputy Prime Minister Jacek Sasin cost the State Treasury and the Polish Post over PLN 70 million.⁴⁰ In August 2020, roughly when the retroactive indemnity legislation was proposed, the Provincial Administrative Court in Warsaw ruled that Prime Minister Morawiecki had not had the legal power to decide to hold the presidential election in May. The court confirmed that he had not only abused his power, but also breached the Constitution. Most legal experts believe that, if the ruling becomes final, the prime minister could be brought before the State Tribunal or even before a criminal court. As a matter of fact, Article 10c of the shield is not enough to indemnify Prime Minister Morawiecki and Deputy Prime Minister Sasin.⁴¹ In all likelihood, this is why a provision was tabled in August proposing that the indemnity be extended to cover actions in connection with the organisation of the May election, which was never actually held. While the Prosecution Service refused to launch proceedings in connection with the possible abuse in this case,⁴² the creation of such a broad justification would have lifted the obligation that law enforcement agencies and the Prosecution Service take any action in similar cases. It would have increased the chances of avoiding any liability in the future, even after a change of government.

Undoubtedly, the ruling party has created 'liability backstops' and room for abuse and corruption that could never be accounted for. This is not just about the purchase of defective face masks from a skiing instructor or the purchase of useless tests and ventilators from an arms dealer that never made it to hospitals. While this paper was being drafted, it was not possible to estimate the number of other, more or less material, cases of abuse of this type that may have happened at the local government level or at individual hospitals. The extent of the problem and the associated cost borne by all of us is unlikely to ever be properly assessed. If only developments at the level Ministry of Health were to serve as a point of reference, it is safe to assume there must have been more of them and it is likely they occurred at other levels of the public administration or at other entities funded using taxpayers' money. This is a dangerous precedent that demonstrates that the government is capable of creating these kinds of legal frameworks not only during times marked by the struggle against COVID-19, but at other times as well. For example, Article 6 in Shield One (exempting people from public procurement legislation) is set to remain in force until the end of January 2021, a fairly long period of time,

39 G. Zawadka, I. Kacprzak, *Sprawa o maseczki: Śledztwo prokuratury się rozszerza*, <https://www.rp.pl/COVID-19/305249949-Sprawa-o-maseczki-Sledztwo-prokuratury-sie-rozszerza.html> [accessed: 30 September 2020]; P. Orlikowski (oprac.), *Maseczki dla ministerstwa. Prokuratura wszczęła śledztwo*, <https://www.money.pl/gospodarka/maseczki-dla-ministerstwa-prokuratura-wszczela-sledztwo-6512073616406657a.html> [accessed: 30 September 2020]; *Respiratory pod okiem prokuratora. Dwa wątki śledztwa w resorcie zdrowia*, <https://www.money.pl/gospodarka/respiratory-pod-okiem-prokuratora-dwa-watki-sledztwa-w-resorcie-zdrowia-6541472437729409a.html> [accessed: 30 September 2020]; M. Stelmach, *Jak wadliwe testy trafiły do polskich szpitali – wyniki poselskiego śledztwa*, <https://www.termia.pl/koronawirus/Jak-wadliwe-testy-trafily-do-polskich-hospitals-wyniki-poselskiego-sledztwa,39543.html> [accessed: 30 September 2020].

40 M. Danielewski, *Sasin na orbicie: chaos nazywa porządkiem, koszt niekompetencji – ceną demokracji*, <https://oko.press/sasin-na-orbicie-chaos-nazywa-porzadkiem-koszt-niekompetencji-cena-demokracji/> [accessed: 30 September 2020].

41 M. Jałoszewski, *Sąd: Premier bezprawnie zlecił wybory and naruszył konstytucję. Ale raczej za to nie odpowie*, <https://oko.press/sad-Prime-Minister-bezprawnie-zlecil-wybory-poczcie-but-za-razace-lamanie-prawa-morawiecki-raczej-nie-odpowie/> [accessed: 30 September 2020].

42 *Kto umorzył śledztwo ws. wyborów prezydenckich po trzech godzinach*, <https://www.rp.pl/Prawo-karne/304249949-Kto-umorzylo-sledztwo-ws-wyborow-prezydenckich-po-trzech-godzinach.html> [accessed: 30 September 2020].

and could still be extended for subsequent months. Similarly, the proposed Article 10d that extends impunity was originally drafted to remain effective even after the pandemic ends.

When this paper was being completed, there was news that the ruling party was thinking about not legislating impunity; instead, it was considering using the Constitutional Tribunal. Having received a petition from a group of PiS MPs, the latter would rule that existing criminal law provisions on necessity are unconstitutional because they do not allow this remedy to be used when a person in breach of the law acts to further 'public health'.⁴³ This trick would give PiS an additional pretext to change the law and regulations, and help it pour oil on troubled waters within the ruling coalition, where there was no unity on the matter. This is yet another manifestation of PiS's attempts to 'close the gaps' in the system of exercising power and another illustration of how this kind of gap closing works. The politicians in power use their leverage over the Tribunal to gain additional legitimacy for measures that are spectacularly unconstitutional and defy rule of law standards.⁴⁴

The Further Weakening of the Public Administration

The provisions regarding redundancies in the public administration are another part of the anti-COVID legislation that creates corruption risks. Shield Three contains Article 15zzzzzo, 15zzzzzp and 15zzzzzq that mandate the prime minister to issue a regulation with detailed terms and conditions of employment reduction in public administration units, as further defined in the provisions. They include the Office of the Prime Minister, departments that serve members of the Council of Ministers, government administration offices in the regions, and units overseen by the prime minister, a minister in charge of government administration or a regional governor. The scale of possible redundancies is potentially high.

It should be underlined that redundancies can affect the civil service, the part of the public administration particularly responsible for ensuring the operation of the government, a somewhat elite group where employees and civil servants should be given a higher degree of protection (especially appointed civil servants). The rather bizarre argument in favour of the provision includes statements explaining that the change seeks to ensure social justice whereby "no privileged status of any professional group, especially in the public sector" ought to be established or sanctioned.⁴⁵ This argument could be considered reasonable if it were not for the fact that salaries in the public sector at large generally fall short of being excessive and have been frozen for nearly a decade following the recession in 2008. It can therefore hardly be argued that civil servants are privileged. Besides, the ruling party put forward a bill to increase the salaries of MPs, senators and other politicians three months after the adoption of the provisions, clearly flouting social solidarity or justice during a crisis.⁴⁶ The justification of redundancies in the public administration by invoking social justice can be seen as utterly immoral in this context.

The way these provisions are construed gives the prime minister enormous freedom to structure and manage these redundancies. This is why some trade unions in the civil service decided to challenge

43 Ref. K 23/20.

44 M. Kryszkiewicz, G. Osiecki, *Bezkarność urzędnicza w rękach Trybunału Konstytucyjnego*, <https://prawo.gazetaprawna.pl/artykuly/1493820,bezkarosc-urzednicza-ustawa-trybunal-konstytucyjny.html> [accessed: 22 October 2020].

45 *Projekt ustawy o szczególnych instrumentach wsparcia w związku z rozprzestrzenianiem się wirusa SARS-CoV-2*, [http://orka.sejm.gov.pl/Druki9ka.nsf/Projekty/9-020-141-2020/\\$file/9-020-141-2020.pdf](http://orka.sejm.gov.pl/Druki9ka.nsf/Projekty/9-020-141-2020/$file/9-020-141-2020.pdf) [accessed: 22 October 2020].

46 A. Szcześniak, *Nagły atak wyborców doprowadzi do zmian na opozycji? Polityczna anatomia konfliktu o podwyżki*, <https://oko.press/nagly-atak-wyborcow-doprowadzi-do-zmian-na-opozycji/> [accessed: 22 October 2020].

the shield before the Constitutional Tribunal.⁴⁷ In the expected complaint, civil servants underline that the legislators used a number of vague and unclear terms in the law, such as ‘detrimental economic impact’ and ‘a state of emergency for the budget’, which supposedly triggered the redundancies. The complaint also points out that it is not without reason that employees (civil servants) are hired by appointment in this part of the public administration, which gives the more permanence, stability and autonomy, translating into political neutrality. Meanwhile, the shields do not rule out redundancies among appointed civil servants, which is the main reason behind the complaint to the Tribunal. It is argued that the constitutional principle of legal certainty, the respect for vested rights and the provisions of the Constitution safeguard the political neutrality of the civil service. The complaint seems to make sense because the current situation is similar to that in 2011, when former Prime Minister Donald Tusk tried ‘rationalising employment in public administration’ with the help a special-purpose law that provided for the downsizing of government institutions.⁴⁸ The law was challenged before the Constitutional Tribunal by then-President Bronisław Komorowski, who was close to the parliamentary majority at the time. The Tribunal deemed it unconstitutional, for the same reasons invoked by the civil service trade unions now.⁴⁹ Today, it can be assumed with a high degree of probability that the Tribunal, strongly influenced by the ruling party, will reject the trade unions’ complaint. President Andrzej Duda signed the law immediately after its adoption and he is unlikely to suddenly change his mind and support employees in the government administration; for instance, by filing his own complaint.

Furthermore, the arguments used by the civil service trade unions in their petition to the Tribunal are reasonable in principle. Yet in practice, a complaint to the Tribunal controlled by the ruling party could be a trap. If the Tribunal accepts the case, it could stall until there are new developments that make this kind of ruling convenient for the government. The case of the ruling on abortion of 22 October 2020 suggests that it could to be a relatively long time. While the case remains ‘in the freezer’ at the Tribunal, nothing will stop the redundancies. Dismissed civil servants can take legal action in labour courts. However, the labour courts could suspend these cases, arguing that they are waiting for the Tribunal ruling, which could take years and might not improve the claimants’ predicament. In the end, the Tribunal could rule against current jurisprudence anyway, just to comply with orders from the ruling party. Again, this demonstrates that ‘closing the gaps’ in the PiS government system has an impact on specific personal situations.

In terms of corruption risk, the change has at least two main dimensions. The first is that the planned redundancies that government started announcing intensely in September 2020⁵⁰ will further weaken an administration that is quite weak already. The number of people who want to work in the civil service has been dwindling for years, long-serving appointed civil servants have been leaving and the average age of civil servants has increased. Wages have been low, frozen for nearly a decade after the recession in 2008, only to be increased for a brief moment last year. Governance has been abysmal – and so on. The troubles of the public administration, mainly of the civil service, during the right-wing government and in the broader context, have been described in detail in analytical papers,⁵¹ so we will therefore not provide detailed coverage here. Suffice it to say that a redundancy programme

47 *Stop zwolnieniom w sektorze publicznym. OZZ Inicjatywa Pracownicza*, <https://www.ozzip.pl/informacje/ogolnopolskie/item/2669-skladamy-wniossek-do-trybunalu-konstytucyjnego> [accessed: 22 October 2020].

48 *Law on Rationalising Employment in State-funded Units and Certain Other Public Units in 2011–2013*.

49 Ref. Kp 1/11.

50 *Dworczyk: koniec analiz w sprawie zwolnień w administracji w ciągu 2-3 tygodni*, <https://www.pb.pl/dworczyk-koniec-analiz-w-sprawie-zwolnien-w-administracji-w-ciagu-2-3-tygodni-1001069> [accessed: 22 October 2020].

51 See: G. Makowski, *Dla państwa and obywateli. Diagnoza and propozycje reformy służby cywilnej*, Stefan Batory Foundation, Warsaw 2019; J. Kozłowski, R. Sobiech, *Służba cywilna dziś and jutro. Kluczowe problemy and propozycje rozwiązań*, Stefan Batory Foundation, Warsaw 2020.

implemented during a crisis will reduce the government's potential to respond to the current challenges.⁵²

Meanwhile, it will increase the risk of corruption among civil servants. Civil servants have lost benefits that at least partially compensated for the lack of positive financial incentives (job stability). Overwhelmed by a sense of deprivation caused by low income and mounting political pressure, public administration employees may be compelled to engage in corrupt behaviours over time. The pattern has been known to exist for ages and has been empirically studied and described by many analysts and academics.⁵³ There are current examples of this kind of behaviour, now additionally linked to the pandemic. In mid-October 2020, the Central Anti-corruption Bureau apprehended the director of the Military Institute of Hygiene and Epidemiology in Warsaw who had stolen COVID-19 tests, disinfectant and other resources used for the response to the pandemic. This was a classic case of fraud, a common case of criminal corruption. What is perhaps more intriguing in this specific case is that it the head of a government institution, rather than a mid- or low-level civil servant, is the suspect. The salary is relatively high, for the public sector. In addition, the case concerns the military administration, which is generally quite privileged. With all this in mind, it is somewhat disconcerting to examine scenarios in which the levels of deprivation in the civil service and other parts of administration, which do not have the military's privileged status, become unbearable.

The second dimension is that the ruling party has set up an easy system allowing it to get rid of inconvenient civil servants, especially appointed ones who survived the purges of 2015–2016. Right after coming to power in 2015, the right-wing team adopted an amendment of the Civil Service Law allowing mass redundancies and job transfers within the civil service, which violated the Constitution.⁵⁴ During the first six months after the amendment was adopted, nearly one in three civil servants left the civil service or changed post – around a thousand people in total.⁵⁵ Some of them could not be 'ousted' or fully degraded because they were appointed civil servants or had proven useful in some way. The government had to tread very cautiously to avoid legal action in court (which, in fact, proved impossible).⁵⁶

The pandemic and the announced redundancies in the public administration (when this paper was drafted, the government's specific plans were not yet known) could lead to a second wave of purges in public administration. This theory is plausible enough, as people in senior civil servant posts will be the first to go, a claim made informally by representatives of the ruling party in the media.⁵⁷ Judging

52 J. Itrich-Drabarek, *Rola administracji publicznej w czasie epidemii. Czy konieczne są cięcia kadrowe w służbie cywilnej?*, 2020, Politological Study Centre, <http://oapuw.pl/rola-administracji-publicznej-w-czasie-epidemii-czy-konieczne-sa-cieciska-kadrowe-w-sluzbie-cywilnej-analiza-prof-j-itrich-drabarek-9-04-2020/> [accessed: 22 October 2020].

53 See: *International Handbook on the Economics of Corruption*, edited by Susan Rose-Ackerman, Northampton 2012.

54 See: H. Izdebski, *Opinia w przedmiocie Ustawy z dnia 30 grudnia 2015 r. o zmianie Ustawy o służbie cywilnej and niektórych innych ustaw (Journal of Laws of 2016 Section 34)*, Stefan Batory Foundation, Warsaw 2016, http://www.batory.org.pl/upload/files/Programy%20operacyjne/Odpowiedzialne%20Panstwo/Opinia_Sluzba_cywilna_HIzdebski.pdf [accessed: 22 October 2020].

55 G. Kopińska, *Stanowiska publiczne jako a łup polityczny. Polityka personalna w okresie od 16 listopada 2015 do 31 października 2017 roku*, Stefan Batory Foundation, Warsaw 2018, http://www.batory.org.pl/upload/files/Programy%20operacyjne/Odpowiedzialne%20Panstwo/Stanowiska_publiczne_as_a_lup_polityczny.pdf [accessed: 22 October 2020].

56 M. Rzemek, *SN: zredukowany z administracji skarbowej urzędnik podczas reformy w 2017 r. ma prawo wrócić na swoje stanowisko*, <https://www.rp.pl/Urzednicy/309309969-SN-zredukowany-z-administracji-skarbowej-urzednik-podczas-reformy-w-2017-r-ma-prawo-wrocic-na-swoje-stanowisko.html> [accessed: 22 October 2020].

57 M. Miłoś, G. Osiecki, T. Żółciak, *Urzędnik będzie za chwilę szukał pracy. Zwolnienia w ministerstwach jeszcze w tym tygodniu*, <https://serwisy.gazetaprawna.pl/praca-and-kariera/artykuly/1493288,urzednicy-zwolnienia-koronakryzys-ministerstwa-rekonstrukcja-rzadu.html> [accessed: 22 October 2020].

by the experience so far,⁵⁸ it is unlikely that they will be people who were hired or promoted after the competence criteria were lowered, with no open contests, based on party recommendation. They are more likely to be civil servants without these credentials. Another exercise in ‘closing the gaps’ in the PiS government system may be approaching as the spoils system in the public administration becomes even more established, surpassing the ruling party’s initial successful efforts during its first term in office.

Moreover, the announced redundancies in the civil service are not a good signal for other public sector employees, especially people working at institutions responsible for fighting the pandemic. For example, the State Sanitary Inspectorate’s human resources are far from optimal, given the task they face today. The government’s HR policy seems more like an exercise in intimidation than a management measure to support the most overburdened healthcare institutions, which include the health-care administration, hospitals and paramedic services.

Conclusions. Has anti-COVID legislation increased the risk of corruption and is it helping Law and Justice ‘close the gaps’ in its system of power?

This paper can only provide a partial response to these two fundamental questions. Have the changes brought about by the ‘anti-corruption shields’ increased the risk of corruption? Undoubtedly – a number of safeguards against discretionary government decisions have been relaxed or temporarily suspended, public institutions have become less transparent, watchdogging mechanisms have been shut down, and liability for errors or fraud and public officials’ accountability have been fully suspended in vital areas such as public spending and public procurement. We have not heard the last of it from the ruling party as it continues to expand the impunity zone under the guise of pandemic responses and individuals acting ‘out of necessity’. The extent of abuse resulting from the changes is unknown. Nonetheless, the hundreds of millions of zloty spent by the Ministry of Health and state-controlled companies on buying useless face masks, virtual ventilators and COVID-19 tests may suggest the overall cost and volume of misconduct.

Have the amendments in the shields, or those associated with them, helped the ruling right-wing coalition consolidate its power and close the gaps in the system it has created? There is no clear-cut answer to this question. On the one hand, if one agrees with the description of the PiS government system presented in the introduction to this paper, one will find more or less distinctive manifestations of ‘gap closing’ in its anti-COVID policy.

This observation can be supported by the capture of the Office of Electronic Communications and cutting off the opposition from the appointment of its chief executive. The government team has gained undivided control over another resource (not only financial, but also political): the unlimited power to manage frequencies to build the 5G network. Redundancies in the public administration are also likely to strengthen the PiS system of government. It is in the civil service that the ruling majority will be able to promote partisanship and a spoils system by ‘culling’ the remaining civil servants appointed in the regular way, rather than by the ruling party. With no public scrutiny of government actions and with impunity with regard to measures relating to COVID-19, the ruling majority may actually be in

58 *Raport SAKSAP – cz. 2. Jak przebiega ocena czy kandydaci na dyrektorów spełniają ustawowe wymagania?*, National School of Public Administration Fellows Society, Warsaw 2020, <http://www.saksap.pl/wp-content/uploads/2020/10/Jak-przebiega-ocena-czy-kandydaci-na-dyrektor%C3%B3w-spe%C5%82niaj%C4%85-ustawowe-wymagania.pdf> [accessed: 22 October 2020].

the process of 'closing the gaps' in the power system. After all, the system relies on the concentration of all instruments of power and resources in one hand and on political particularism. The system dislikes external institutional or civil society scrutiny, liability and accountability. Furthermore, there are indications suggesting that securing impunity for abuse of power, misconduct and economic crimes are efforts only somewhat associated with the policy of fighting the pandemic. First and foremost, this may be designed to provide the members of the ruling party responsible for the poorly-organised election in May – and, later, in late June and early July – with impunity: Prime Minister Morawiecki and Deputy Prime Minister Sasin. As a result, the name of the game is to stick to power and shed accountability. In addition, this demonstrates that the government is consciously creating measures that foster corruption to further its party-political agenda in order to strengthen its hold on power, keep its people in senior posts and avoid liability.

On the other hand, there is the question of whether closing the gaps in the system or the consolidation of PiS's system of government are really as effective as the PiS government expected. During its first term in office and during preparations for the second one, PiS promised an efficient government. If that was meant to be achieved by the formal and informal concentration of power, decisionism and 'controlled' corruption at time, then it has not been very effective. Even before the pandemic, PiS could be seen falling victim to what could be described as the 'illusion of control'. By gradually removing all the checks and balances that protect the state against abuse and relying solely on partisan and ideological loyalty, it has masterminded a system that is hardly controllable and predictable. The prime example, among many others, is the appointment of Marian Banaś as head of Supreme Audit Office (SAO) in 2019. The Polish SAO is one of the most important state institutions regulated directly by provisions in the Constitution. One might have thought that a tested longstanding friend of Jarosław Kaczyński and his late brother was an ideal candidate to take control of yet another key state institution to further narrow the accountability margin. Yet apparently, a party recommendation reinforced by informal initiatives and social networking was not enough. Banaś turned out to be a costly failure for the ruling party: after he was appointed, it turned out that he may have been involved in criminal activity. However, it was too late to remove him from office, as the constitution gives the head of the SAO very strong immunity.⁵⁹ The pandemic fully unveiled the inefficiency of the PiS system of government, a state 'without procedure', woven almost exclusively out of partisan and crony networks, rather than real institutions operating with procedures and guided by civil servants' professionalism. However, PiS continues to 'close the gaps' in its system against the odds. It has spawned more and more policies designed to consolidate its grip on power on the back of legislation relating to the pandemic. Apparently, these measure have had opposite effects.

How sustainable is this change and what are the long-term implications? Some of them may turn out to be quite lasting, if not permanent; for instance, control of the OEC, political patronage of the civil service or some of the provisions indemnifying public decision-makers. Some may be more or less provisional, such as the exclusion from access to public information. However, even a provisional measure likely to be phased out as the pandemic ends will leave a permanent mark. Any purchase of goods and services without control will mean an irreversible waste of taxpayer money, compromised public safety, and so on. The damage will be lasting, even if the underlying provisions were in force for a limited amount of time. Material damage will be coupled with lower confidence in institutions and government as a whole.

59 See: G. Makowski, Laying the groundwork for "grand corruption"...

In the end, the benefits for the ruling coalition of 'closing the gaps' in the system may not make up for the cost. PiS might consolidate its power during the pandemic, but for how long? The state it will capture will be a state in disarray with no efficient administration and other institutions responsible for providing citizens with public services, non-transparent, vulnerable to all forms of corruption, stripped of confidence and one that does not guarantee respect for human and civil rights.

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