

# THE STATE AND ITS CITIZENS: THE LIMITS ON STATE AUTHORITY



**Prof. Mirosław  
Wyrzykowski**

is a Professor Emeritus of the University of Warsaw. A Professor at the Swiss Institute of Comparative Law (ISDC) in 1990–1995, Dean of the Faculty of Law and Administration, University of Warsaw (1999–2001), a judge at Poland's Constitutional Tribunal (2001–2010), the chairman of the PAS Committee on Legal Sciences (2011–2015), a member of the Council of Europe's European Commission Against Racism and Intolerance (2012–2016). He is a member of the EU's Panel 255 as well as Polish and international legal associations. He has authored publications on administrative law, constitutional law, and human rights.

Human rights provide the rationale behind the functioning of the state, while at the same time imposing certain limits on its actions. How does Poland's Constitution protect the rights of individuals, and what limitations come into play in the state–citizen relationship?

**Mirosław Wyrzykowski**

Faculty of Law and Administration  
University of Warsaw

Let us start these reflections on the state–citizen relationship by recalling the naïve belief I had back in 1989: that the demise of what had been called “socialist democracy” and the related socialist rule of law had ended once and for all the period in which human rights were mostly treated as fictitious facades, whereas the violations of those rights by the state authorities were very real. More than 30 years later, as it turns out, we are today confronted in Poland with political mechanisms, events impacting on the system of government, and practices on the part of the public authorities that many observers associate, to their astonishment and horror, with what once seemed to have been consigned to the dustbin of history.

## Human rights

From its first to its last article, the Constitution of the Republic of Poland is a constitution of human rights. It is a great manifesto of human dignity, freedom, equality, and justice. This is because human rights are the first and foremost reason for the existence, organization, and functioning of the modern-day

state. At the same time, they set forth limits on power – both political power, exercised by the parliament, the central government, and the local governments, and judicial power, exercised by courts and tribunals. Human rights as the rationale for the functioning of the state are simultaneously the rationale behind the limits on its action. This fact is reflected in a number of constitutional principles, and I would like to focus on one of them, namely the principle of legality, or the law as the basis for the actions of the public authorities and the limits on such actions.

Public authorities can only take such actions that are set out in properly enacted primary and secondary legislation, and it is these acts of legislation that define the powers of public authorities. A citizen may do everything that is not prohibited by law. The public authorities, on the other hand, can only take actions for which there is a basis in applicable law. They must be explicitly authorized and required to so act: the powers of public authorities cannot be presumed, nor can a public authority create on its own and for itself an authorization to act or to refrain from acting.

## The state and citizens in Poland's Constitution

The situation of citizens is described in all the chapters of the Constitution, and we should consider it to be a complex system of cogwheels, connected to one



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another in various ways and at various angles. On this view, the Polish constitutional system consists of 13 large cogwheels, formed by the 13 chapters of the Constitution. These large cogwheels are driven by smaller ones, or the provisions of each chapter. Together, they form a very complex machine: the cogwheels of one chapter are connected to the cogwheels of another chapter. Each constitutional body is responsible for the functioning of the corresponding cogwheel. To keep them running smoothly, it is important to constantly lubricate the machine – and not to throw any spanners in the works. In this great apparatus, the cogwheels sometimes start to malfunction, sometimes something gets blocked. In such a case, the backup mechanisms, such as the Constitutional Tribunal, should repair the defective part and adjust it so that the entire mechanism can work flawlessly again.

## Demolishing the Constitution

The provisions and principles of each of the chapters of Poland's Constitution have recently been the target of deliberate, well-planned, and well-implemented demolition, carried out by the constitutional bodies of the state: the Sejm (lower chamber of parliament), the Senate (upper chamber) of the previous parliamentary term, the president, the government, and the prime minister. The Constitutional Tribunal, the first victim of the attack on the constitutional system of the state, became a participant in this destructive practice. In

a modern-day constitutional state, the constitutional court is the most important guarantor of the primacy of the Constitution in the legal system, one that ensures the compliance of the laws being laid down with constitutional norms – as long as it works, it is the first and most effective guardian of the Constitution and therefore the freedoms and rights of individuals. In Poland, efforts to change the system of government without (formally) changing the Constitution began with the process, lasting more than a year, of the Constitutional Tribunal being taken over by the ruling party. Next, with the participation of three judges whose judicial status had been questioned not only by experts on constitutional law, but also by the European Court of Human Rights (ECHR), the Constitutional Tribunal became the final element in a hostile takeover of the broader constitutional order, giving its endorsement to all unconstitutional statutory provisions concerning the system of government.

Violations of the Constitution (each of its chapters) have now become an element of almost every meeting of the Sejm. Examples include the adoption of laws on issues such as the surveillance of citizens by the intelligence agencies without adequate supervision by an independent body, the obstruction of the freedom of assembly through the introduction of what are called “cyclic” gatherings (that have priority over all other assemblies), and amendments to the Electoral Code that stripped the National Electoral Commission of its fundamental powers and transferred them to the prime

A protest in Warsaw, with people holding up posters showing the word *Konstytucja* which means “Constitution.” The posters also typographically emphasize the letters *ty* and *ja*, meaning “you” and “me.”

minister. These violations also include acts and omissions of factual nature that constitute constitutional torts, such as the prime minister's failure to publish the Constitutional Tribunal's judgments or the president's refusal to administer the oath of office to three duly elected Constitutional Tribunal judges. Each of those situations concerned, directly or indirectly, the freedoms or rights guaranteed by the Constitution and constituted the unlawful limitation thereof. While it is permissible, under certain circumstances, for the freedoms and rights of individuals to be limited, both at the level of normative regulations and in the practice of their implementation, there nevertheless must be a statutory basis for such limitations.

## Limiting freedoms and rights

Human freedom and dignity are constitutionally recognized as the inviolable foundation of the Republic of Poland. This entails an obligation for positive state action, which means that all public authorities are required to act in such a way as to create to the greatest extent possible conditions for the freedom of individuals and respect for their dignity. Constitutional provisions concerning the possible limitations of freedoms and rights must be understood and interpreted taking into account the precept for the expansion of freedom and the ever fuller exercise of rights. Every action taken by the authorities that is aimed at limiting freedoms and rights must be evaluated from the perspective of the negation of their very essence. In each case, the authorities must therefore demonstrate that such actions are absolutely necessary. The burden of proof lies with the authorities, and extremely serious arguments must be provided to justify any limitations of freedoms and rights and make such limitations constitutionally permissible. The intentions of the authorities must always be confronted with their duty to satisfy the requirement of creating ever greater space for the freedom of individuals. This means that the limits on the freedoms and rights of individuals are not only (and – from the perspective discussed in this article – not primarily) limits on their exercise by individuals, but primarily limits on the actions of the public authorities, which may not be exceeded in any circumstances or under any (false) pretext. And one more thing: respecting and expanding the sphere of freedom is the rule, limiting it is the exception. This means that an expansive interpretation of such norms is not sanctioned. Rather, exceptions should only be interpreted restrictively.

## Questionable legislative procedures

The proper implementation of the rules that guarantee the maintenance of minimum substantive and proce-

dural standards is meant to be ensured by the established legislative procedure for drafting, deliberating on, and finally enacting laws. The sum total of nearly 20 years of the Constitution's application (through 2015), as the foundation for the established rules of law-making, underpinned the principle of appropriate legislation. For almost six years now, however, we have been dealing in Poland with a practice that can be described as its "anti-principle," that of inappropriate legislation. Parliament has practically ceased to function as a place of debate on the laws being made. By the same token, Article 4 of the Constitution, which provides that the nation exercises its power through its representatives or directly, has become an empty platitude. The prevailing system of representation has turned into a farce. The Sejm, and in 2015–2019 also the Senate, have turned into a well-oiled voting machine. The Sejm does not follow the established rules of legislative procedure set forth in its rules of procedure. Rather, laws are adopted and amended with lightning speed. The right of members of parliament to ask questions about legislative work that bears upon constitutional issues, such as the Supreme Court Act and the Act on the National Council of the Judiciary, has been limited to 60 seconds. The Speaker of the Sejm may impose a fine of 3000 zlotys on members who exceed this time by more than 40 seconds. Laws made by parliament often come into force with no accommodative period, or *vacatio legis*. Draft laws frequently fail to provide any information about the reasons behind the proposed changes or any assessment of their effects. Draft laws that were, in fact, prepared by the government are instead submitted to parliament by groups of MPs in order to avoid the obligation of organizing consultations on proposed provisions.

## War against the Constitution

This means that we are no longer dealing with isolated violations of individual constitutional provisions. Rather, the process of devastating the Constitution has come to involve violations of all of its chapters. The first to be violated were those dealing with the principles regarding the system of government, laid down in Chapter I of the Constitution: a democracy based on the rule of law, legality, separation of powers, the obligation to observe international law. The provisions defining the freedom status of individuals have also been violated, and this is especially true for the provisions on the methods and scope of surveillance by the intelligence agencies. The principle of human dignity has been violated by the ruling of the Constitutional Tribunal, which in effect condemns women to torture in situations in which they must carry a pregnancy to term and give birth to a child with a defect that will not allow it to survive. The right to public information will be completely deprived of its essence if the

Constitutional Tribunal grants the request filed by the First President of the Supreme Court regarding the Act on Access to Public Information. The principle of the presumption of innocence will be stricken out if the Sejm passes an amendment to the Petty Offences Law, under which a citizen will not have the ability to refuse to accept a criminal fine and will instead have to prove his or her innocence in court.

Moreover, the constitutional right to informational autonomy has been violated through the provision of data from the PESEL population register to the Polish Postal Service in connection with constitutionally defective preparations that were made for postal presidential elections in 2020 (which were ultimately not held). Similarly, the public authorities violated the constitutional freedom of movement in the territory of the Republic of Poland by unconstitutionally banning people from entering forests managed by the State Forests, closing national parks, and imposing a general ban on movement in the territory of Poland, as specified in regulations of the Minister of Health and the Council of Ministers. Electoral rights have been limited by the organization of presidential elections outside Poland's borders (no establishment of electoral districts, no possibility of effectively casting a vote either by post or in person at a polling station).

## State of emergency

Statutes as the basis and source of the regulation of rights and freedoms, have ceased to perform their role as the guarantor of such rights and freedoms. The most glaring manifestation of this is the entire legislation on the freedoms and rights of individuals during the SARS-CoV-2 pandemic. The government declared a "state of epidemic" throughout Poland, which meant declaring a certain exceptional situation, but a constitutional "state of natural disaster" was not declared for purely party-related and political reasons. Declaring such a state of natural disaster would have created constitutional grounds for the adoption of laws limiting the rights and freedoms of individuals to the necessary extent. Without having grounds to do so and therefore in defiance of the Constitution, the government nevertheless concluded that the legal tools that apply to ordinary situations provided, or would provide through new regulations, the basis for limiting the rights of citizens. The government and the parliamentary majority thus failed to recognize the Constitution as the basis and limit for their own, voluntarist legislative actions.

Legislation adopted during the epidemic imposed unconstitutional limitations on the freedoms and rights of individuals in such important areas as freedom of movement in Poland, personal freedom (including the principles governing quarantine, the

requirement to wear masks in public spaces), the exercise of the freedom of assembly, the freedom to practice and manifest religion, and the freedom to conduct a business. These restrictions on the freedoms and rights of individuals do not have a proper statutory basis, and the status of individuals in the situation of an epidemic is essentially being regulated primarily by means of government regulations, which do not meet the constitutional requirements of appropriate legislation. Administrative courts have been overturning decisions made by administrative bodies to impose penalties for non-compliance with unconstitutional regulations, thus confirming the scale of legislative irregularities on the part of the parliament and the government. It is the courts that are making what are nonetheless belated, *ex-post* decisions delineating the limits on the powers that the authorities would like to be unlimited. And yet it would have been so easy – and therefore less expensive and more effective – for constitutional norms to have been respected while the public authorities' carried out their obvious tasks in the area of public health protection. Public health is one of the constitutionally defined grounds for limiting the freedoms and rights of individuals, but merely invoking the need to protect public health cannot provide a pretext for imposing unconstitutional limitations. The seriousness of the epidemic, its course, and its effects require an equally serious response from the state. A serious response by a serious state cannot be unconstitutional. Moreover, a state in which the actions of its constitutional bodies ultimately lead to the devastation of the Constitution as the basis of the state's legal system becomes a constitutionally fallen state.

The ongoing constitutional nihilism, aversion, and then war against the Constitution as the basis of competences, as well as the framework defining the freedom of action by public authorities (all initiated back in 2015) have had dramatic results in the form of consent to police brutality during peaceful, legal assemblies and attacks on sexual minorities mounted even in the conditions of an epidemic – to recall the comments made by the president during the election campaign or by the incumbent minister of the national education (back then a member of parliament), or the resolutions passed by various local government authorities creating "zones free from LGBT ideology."

## The limits on the interpretation of law

Importantly, the force of law lies not only in the particular wording of a provision or a norm, but also the meaning that is given to it through its interpretation. Interpretative rules are developed in the historically long process of shaping the principles of the construal,

meaning, and function of specific provisions, as well as their place in the entire legal system. The rules of legal interpretation form the basis for the proper construal of the legal system.

Let us take the example of the amendment to the Supreme Court Act enacted in 2017. This amendment was then used to present a rationale for the removal of the sitting First President of the Supreme Court from office, citing her attainment of retirement age – which had been lowered by the amendment to the Act, in violation of the constitutional guarantee of the irremovability of judges. The perverse argumentation went as follows: the sitting First President of the Supreme Court had already exceeded the newly established retirement age and was therefore automatically retired by virtue of the law, whereas only an active judge could serve as First President; therefore, she could no longer hold this office. This reasoning is only seemingly logical, as its “logic” is based on a deliberate disregard for the essence of the constitutionally guaranteed six-year term of office for the First President of the Supreme Court. It is an abuse of interpretation that only has the semblance of rigorous reasoning and iron-clad logic. In fact, however, it is intended to justify the advancement of a goal that is prohibited by the Constitution. Namely, the Constitution prohibits shortening the six-year term of office of the First President of the Supreme Court – in any form and under any pretext.

Another example is referred to as the “muzzle law” – the act of 22 December 2019 amending the Act on the System of Common Courts, which was a political reaction to the Supreme Court’s judgment of 5 December 2019, implementing the judgment of the Court of Justice of the European Union (CJEU) of 19 November 2019. The CJEU ruling came in response to a reference for a preliminary ruling regarding the independence of the Polish Supreme Court’s Disciplinary Chamber and the status of the National Council of the Judiciary as a body independent of the political authorities. The act violates both the Constitution and European law by: (1) forcing judges not to apply European law within the scope following from the CJEU judgment of 19 November 2019; (2) forcing judges not to apply systemic interpretation of the law; refraining from applying the Constitution directly and from referring to international law; (3) preventing the courts from verifying the legality of the appointment of judges and practically preventing any verification of the decisions made by the National Council of the Judiciary; (4) banning the questioning of the legitimacy of courts and tribunals, constitutional bodies of the state and the bodies responsible for the verification and protection of the law, as well as the legality of judicial appointments – in civil and criminal proceedings, the court will not be authorized to examine the correct appointment of judges.

A newly created disciplinary sanction for judges involves a one-time withholding of their length-of-service, functional, or special allowances from their monthly salary. For disciplinary torts, a judge may be punished either with a transfer to a different workplace or removed from the legal profession. A state mechanism has been created to violate the independence of judges, exercise political control over the content of court rulings, force judges to deliver rulings convenient for the political authorities, and at the same time to refrain from expressing any criticism of the law and the practice of its application.

## Outside the boundaries of law

Repeated violations, by constitutional bodies of the state, of the limits placed upon their competence have produced effects on many levels, and all of these effects are negative. We are losing the sovereignty of our state in the context of not international or European law, but domestic law. A sovereign state acts on the basis of the law and within its confines, and it obeys the rules that the state itself establishes through its citizens. The power of the sovereign nation is unlimited, but it must respect the fundamental freedoms and rights of individuals. What is limited is the ability of the authorities to exercise their powers. The misunderstanding, to put it charitably, that we are dealing with today is that we are identifying the sovereign nation, unlimited in the ability to shape the constitutional order, with the representatives of the sovereign nation, who are limited by the constitutional order imposed by the nation.

We are likewise losing the constitutional identity of our state. In its judgement on the Treaty of Lisbon in 2010, the Constitutional Tribunal identified several characteristics of Poland’s constitutional identity: respect for Polish statehood, democracy, the rule of law, social justice, the basis for the economic system, and the protection of the dignity of human rights. These characteristics were to serve as a limit that no authority in Poland could exceed, which meant that no authority was authorized to transfer these elements of identity to a supranational, European level. Today we are in a situation in which we are losing our constitutional identity because these characteristics, inalienable values, which represent the limits on the possible transfer of competences, have ceased to exist or are ceasing to exist in Poland.

Another element that we are losing is the democratic order, with parliamentarism as a mechanism of exercising legal and morally legitimate power. The most recent example may be seen as symbolic of this demise: when reporting to the Sejm on his activities in 2020, the Commissioner for Human Rights (or “ombudsman”) was given five minutes to present the situation regarding observance of the freedoms and rights of individuals in Poland – and this was a re-

port dealing with the exceptional situation faced by the state and its citizens during the time of the pandemic. The parliament, whose most important source of legitimacy is the making of laws on behalf of citizens and bearing their interests firmly in mind, and whose function within the system of government is to verify the implementation of statutory law, showed itself to be uninterested in the effect of the validity and application of the very laws it adopts. When the Commissioner was presenting his report, the benches occupied by the government and the ruling majority in parliament were empty, which offered the most glaring proof of contempt for citizens, for their freedoms and rights.

Moreover, we are losing legal security at the national and international level. The importance of Poland's law-making process for the legal security of its citizens at the international level is demonstrated by the case of Artur Celmer, a Polish national whose surrender to Poland under a European Arrest Warrant was questioned by an Irish court. It referred a question to the CJEU, and the case gave rise to a number of European Arrest Warrant trials in which Poland came under scrupulous scrutiny in terms of the condition of the rule of law and independence of the judiciary. In many cases, EU courts have refused to surrender persons accused of crimes to Poland, arguing that there was a risk for defendants that proceedings before a Polish court would not guarantee a fair criminal trial. Poland is the only member state of the EU that is confronted with such fundamental consequences of violations of its own laws. Mistrust in Poland's implementation of the concept of the rule of law has a fundamental impact on legal security. This, in turn, is the essence of the rule of law, which does not allow any authority to take arbitrary actions – this holds true not only for the Sejm and the government, but also for the prosecution service and department heads at tax offices.

The Constitution has ceased to fulfill the task of limiting public authority and guaranteeing the freedom of individuals. The failure of the public authorities to respect the binding nature of legal norms and established procedures results in growing unpredictability and uncertainty in the making of laws and their application. The Constitution is losing its function as a fundamental norm, if it has become so easy to change the constitutional order of the state by means of ordinary legislation, which is then not subject to effective verification of its compliance with the Constitution. This results in growing chaos and anarchy in all dimensions and aspects of public life. Politics ceases to be an endeavor pursued within the limits of the law, and instead becomes a battering ram shattering the legal order. The juridification of politics turns the ideal of a well-organized and properly functioning state into its opposite, namely the pure politicization of law and by the same token its unrestrained instrumentalization.

Describing Poland's Constitution as a guarantee of the freedom and self-determination of individuals is beginning to sound like a mockery. Personal and political rights are being systematically limited, and the same holds true for social and economic laws, which are limited in an equally illegal way, based on regulations, not statutes, without proper compensation from the public authorities, and under the pretext of fighting the pandemic. Moreover, the abuse of powers by public authorities takes on the appearance of legality: one of many examples is the request referred by the Speaker of the Sejm to the Constitutional Tribunal to block the possibility of pursuing compensation claims as long as the unconstitutionality of the basis for compensation (a regulation) is not established by the Constitutional Tribunal.

The Constitution is losing its political function, which assumes the actual existence of constitutional principles that legitimize the constitutional order. Moreover, if the constitutional principles express certain values and ideals, then the erosion of these principles as a result of conscious and deliberate actions on the part of the constitutional bodies of the state detracts from the worth of what constitutes the very essence of the law.

## The scale of wrongdoing

The scale will continue to grow because of the domino effect – the impact of violations of one function of the Constitution via its links to other functions, or the impact of violations of a provision in one chapter of the Constitution, via its links to the provisions of other chapters. First, we see the violation of isolated provisions of the Constitution, but the next step is a violation that changes the very essence of the government institutions.

The process of devastating the Constitution has reached such a level that there is no chapter whose provisions have not been violated. This not only renders the entire Constitution merely a shred of noble intent – the will of the nation, expressed in the constitutional referendum, has also been torn to pieces. And yet it is the will of the nation, embodied in the Constitution, that legitimizes in the fundamental way the actions of politicians. By casting their votes in parliamentary elections, people create legitimacy that is derivative and secondary to the Constitution.

The constitutional reality in Poland can no longer be defined as a constitutional crisis. Instead, it must be called a war against the Constitution, planned by an extra-constitutional, central political power center and waged by the constitutional bodies of the state.

War pushes all boundaries. But every war comes to an end. Boundaries are reset. The open question is, what boundaries will Poland's citizens set for the new authorities? ■