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## **The Utopia of Legality: A Comparison of the Dutch and Polish Approaches to the Regulation of the COVID-19 Pandemic<sup>1</sup>**

**Abstract:** This paper provides a comparison of the regulation of the pandemic in the Netherlands and Poland in order to determine whether a country with a high level of adherence to the rule of law in normal circumstances would also maintain this adherence in exceptional circumstances to a greater degree than a country with an initially lower level of adherence. The central questions posed in the paper are the following: what is the role of the rule of law in regulating the pandemic in the Netherlands and Poland? Is it true that the Dutch government was more successful in preserving legality than its Polish counterpart. By comparing the regulations in the two countries, the paper explores what role the rule of law – in particular, the principle of legality – may play in a crisis situation like this. According to Carl

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1 The writing of this chapter was funded by the National Science Centre, Poland, according to Decision no. 2017/27/B/HS5/01053. The description of the pandemic situation in the Netherlands and Poland was updated until 1st of June, 2022.

Schmitt, in a state of emergency, order has to be restored first before a return to the 'normal' legal order is possible. Does the regulation of the COVID-19 pandemic in the two countries confirm Schmitt's claim or not?

**Keywords:** legality, pandemic regulations, restrictions on fundamental rights and freedoms, the rule of law, utopia

## Introduction: The Dystopia of the Pandemic

The COVID-19 pandemic seems to have caused a real-life, global dystopia. It had (and still has) disastrous effects on people's physical and mental health, social relations and the economic situation in many countries. As Sheila Jasanoff and Stephan Hilgartner argue, the pandemic was 'a drama playing out simultaneously in three interlocking arenas: health, economy, politics. The virus seemed to find and target weaknesses not only in vulnerable human bodies but also in the economic and political infrastructures that sustain societies.'<sup>2</sup> In response to it, governments applied miscellaneous, usually very similar policies, yet their efficiency varied from country to country. A country's successful response to the COVID-19 pandemic was shaped by a mixture of overlapping factors, including the presence of a legitimate political system and the given government's capacity.<sup>3</sup> A legitimate political system provides the conditions essential to the effective management of the emergency – legal certainty and stability – and is tightly connected with the rule of law. A government's capacity can be understood as the ability of public institutions to intervene efficiently in people's behaviour through the implementation of norms. This capacity depends to a higher degree on social trust in public institutions and the quality of the institutions than on a country's GDP or political regime.<sup>4</sup>

In our paper we analyse the role that the rule of law – in particular, the principle of legality – played in the pandemic regulations in the Netherlands and Poland. It is interesting to compare the two countries because they show different levels of adherence to the rule of law. According to the World Justice Project Rule of Law Index 2020, adherence to the rule of law in Poland is at a relatively low level in contrast to the Netherlands. When the pandemic began, Poland's rule of law score was ranked 19<sup>th</sup> (of 24 countries) in the EU and 28<sup>th</sup> (of 128 countries) globally, while the

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2 S. Jasanoff, S. Hilgartner, A Stress Test for Politics: Insights from the Comparative Covid Response Project (CompCoRe) 2020, *VerfBlog*, 5 November 2021, <https://verfassungsblog.de/a-stress-test-for-politics-insights-from-the-comparative-covid-response-project-compcore-2020/> (accessed 15.12.2021).

3 R. Kleinfeld, Do Authoritarian or Democratic Countries Handle Pandemics Better?, CEIP Commentary, 31 March 2020, <https://carnegieendowment.org/2020/03/31/do-authoritarian-or-democratic-countries-handle-pandemics-better-pub-81404> (accessed 15.12.2021).

4 R. Kleinfeld, Do Authoritarian..., *op. cit.*

Netherlands ranked 5 both regionally (in the EU) and globally.<sup>5</sup> We want to compare the regulation of the pandemic in the two countries in order to determine whether a country with a high level of adherence to the rule of law in normal circumstances would also maintain this in exceptional circumstances and to a greater extent than a country with an initially lower level of adherence. Our central research question is the following: what role does the rule of law play in the regulation of the pandemic in the Netherlands and Poland? Our initial hypothesis is that the Dutch government has been more successful in preserving legality than the Polish government, given its high level of adherence to the rule of law. By comparing the regulations in the two countries, we aim to explore what role the rule of law – in particular the principle of legality – may play in a crisis situation like this. According to Carl Schmitt, in a state of emergency, the order has to be restored first before a return to the ‘normal’ legal order is possible.<sup>6</sup> Does the regulation of the COVID-19 pandemic in the two countries confirm Schmitt’s claim, or not?

To begin with, we clarify our normative framework below, based on Fuller’s principles of legality (section 1). Subsequently, we discuss the Dutch regulation of the pandemic (section 2) and that in Poland (section 3), analysing them from the perspective of legality. A comparison between the two countries will be provided in section 4, followed by a final assessment and answer to our central research question.

## 1. Normative Framework

In legal and political theory, the problem of a legal response to the external or internal threats to society, such as war, terrorism, epidemics and so on, has been widely discussed.<sup>7</sup> While some thinkers claim that extreme threats to state security require a suspension of the entire legal order (*necessitas non habet legem*), most liberal thinkers argue that even in these exceptional situations the rule of law has to be preserved and emergency powers should be based on constitutional or statutory norms.<sup>8</sup> In fact, many modern liberal constitutions include special provisions for ad-

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5 WJP Rule of Law Index 2020, <https://worldjusticeproject.org/rule-of-law-index/> (accessed 26.4.2022). In the WJP Rule of Law Index 2021, the ranks of the rule of law in both countries dropped: Poland now ranks 26/31 regionally and 36/139 globally, while the Netherlands ranks 6/31 regionally and 6/139 globally. WJP Rule of Law Index 2021, <https://worldjusticeproject.org/sites/default/files/documents/WJP-INDEX-21.pdf> (accessed 15.12.2021).

6 C. Schmitt, *Politische Theologie: Vier Kapitel zur Lehre von der Souveränität*, Berlin 1996, pp. 18–19.

7 J. Ferejohn, P. Pasquino, *The Law of Exception: A Typology of Emergency Powers*, ‘International Journal of Constitutional Law’ 2004, vol. 2, no. 2, pp. 210–233; B. Ackerman, *The Emergency Constitution*, ‘Yale Law Journal’ 2004, vol. 113, no. 5, pp. 1029–1091; G. Agamben, *State of Exception*, Chicago 2005; C. Schmitt, *Die Diktatur*, Berlin 1922.

8 J. Ferejohn, P. Pasquino, *The Law...*, *op. cit.*, pp. 223–229. The idea of the so-called *Ausnahmezustand* in which the sovereign suspends the positive law, including the constitution, and act in a way

dressing the emergency situations, however differently defined. Yet even those modern democracies which have such provisions do not necessarily make use of them when dealing with emergencies; ordinary measures or special statutory provisions are often preferred, employing the so-called legislative model of emergency powers, as Ferejohn and Pasquino call it.<sup>9</sup> This could also be seen during the pandemic. 'Of the 17 EU Member States with a constitutional emergency clause suitable to respond to a pandemic, only 10 chose to activate it in the first wave of the pandemic (Bulgaria, Czechia, Estonia, Finland, Hungary, Luxembourg, Portugal, Romania, Slovakia, Spain) (...). Seven Member States (Croatia, Germany, Lithuania, Malta, the Netherlands, Poland and Slovenia) chose not to declare a state of emergency.'<sup>10</sup> The states which did not enact a constitutional state of emergency either implemented statutory health or civil protection regimes (14 EU Member States including Poland), or, in very rare cases (Denmark, Ireland, the Netherlands, Sweden), governments derived containment measures 'exclusively from ordinary legislation that either existed prior to the current crisis, or that was adopted or even adapted to the exigencies of the pandemic.'<sup>11</sup>

There are many reasons for not declaring a constitutional state of emergency during the pandemic, including: 1) difficulties of legal interpretation, in particular uncertainty about what qualifies as an emergency (Germany, Lithuania, Malta, Slovenia); 2) historical experience with abuse of emergency power (Germany); 3) insufficient degree of threat, i.e. relatively low number of infections (Croatia); 4) efficiency, i.e. ordinary measures were considered a sufficient response to the pandemic (the Netherlands); 5) particular political aims and economic obstacles (Poland, where a state of emergency would have prevented the presidential elections from taking place, and could oblige the state to financial compensation for the suspension of

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which would violate the law in normal circumstances, was developed by Carl Schmitt (C. Schmitt, *Dyktatura. Od źródeł nowożytnej idei suwerenności do proletariackiej walki klas*, Warsaw 2016, p. 167). This idea should be distinguished from the constitutional emergency clause, embedded in the positive law of many liberal countries, which allows governments to temporarily restrict fundamental rights. The constitutional state of emergency provides exceptional measures distinct from the ordinary measures (i.e. allows for exceptions from regular norms), yet it operates within the legal order and must respect all the limits imposed on the emergency power by the law.

9 J. Ferejohn, P. Pasquino, *The Law...*, *op. cit.*, pp. 216–217.

10 M. Diac Crego, S. Kotanidis, *State of emergency in response to the coronavirus crisis. Normative response and parliamentary oversight in EU Member States during the first wave of the pandemic*, European Parliament Research Service, December 2020, [https://www.europarl.europa.eu/RegData/etudes/STUD/2020/659385/EPRS\\_STU\(2020\)659385\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2020/659385/EPRS_STU(2020)659385_EN.pdf) [https://www.europarl.europa.eu/RegData/etudes/STUD/2020/659385/EPRS\\_STU\(2020\)659385\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2020/659385/EPRS_STU(2020)659385_EN.pdf) (accessed 26.04.2022), p. I.

11 *Ibidem*.

rights and freedoms of the citizens).<sup>12</sup> Moreover, the pandemic could not be easily limited in time and space, which makes it difficult to declare a state of emergency; by definition, there can be no permanent state of emergency. Yet the legislative model has its own weaknesses and creates many risks which were addressed by the pandemic regulations in such countries as the Netherlands and Poland. Firstly, ordinary measures may not be as fast and efficient as it would be required in emergency situations. Secondly, embedding restrictive measures into the ordinary legal system may result in the permanent erosion of certain rights and liberties.<sup>13</sup> Thirdly, legislative emergency powers rely on the people's support and, if that is eroding, populist politicians may take advantage of the popular discontent. Fourthly, imposing ordinary, instead of extraordinary, measures in an emergency situation poses significant risks to the rule of law. In our further considerations we will focus on the latter issue.

Liberal-democratic societies are based on the rule of law. The rule of law aims to control public power by means of law in order to protect individual freedom. One of its core principles – besides the division of power, judicial independence and fundamental rights – is legality.<sup>14</sup> Legality requires that state actions limiting individual freedom are based on law. Moreover, it prescribes that the law must meet specific conditions to count as 'law'. Fuller distinguishes eight principles or 'laws for law-making' that the legislature has to respect when drafting legislation: (1) there must be rules (the requirement of generality); (2) laws must be made known to the public; (3) laws should, as a matter of principle, be prospective and not be applied retroactively;

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12 *Ibidem*, pp. 29–30. See E. Rutynowska, M. Tatała, P. Wachowiec, *Rule of Law in Poland 2020: The Rule of Law Crisis in the Time of the COVID-19 Pandemic*, Warsaw 2020, <https://for.org.pl/en/publications/for-reports/rule-of-law-in-poland-2020-the-rule-of-law-crisis-in-the-time-of-the-COVID-19-pandemic> (accessed 15.12.2021), p. 4; M. Florczak-Wątor, *Niekonstytucyjność ograniczeń praw i wolności jednostki wprowadzonych w związku z epidemią COVID-19 jako przesłanka odpowiedzialności odszkodowawczej państwa*, *Państwo i Prawo* 2020, no. 12, pp. 5–22.

13 J. Ferejohn, P. Pasquino, *The Law...*, *op. cit.*, p. 219; P. Chmielnicki, D. Minich, R. Rybkowski, M. Stachura, K. Szocik, *The COVID-19 Pandemic as an Opportunity for a Permanent Reduction in Civil Rights*, *Studia Iuridica Lublinsia* 2021, vol. 30, no. 4, pp. 77–109.

14 On the various conceptions of the rule see, for instance, J. Raz, *The Authority of Law: Essays on Law and Morality*, Oxford 1979, pp. 46–91. See also: P. Gowder, *The Rule of Law in the Real World*, New York 2016; M. Cohen, *The Rule of Law as the Rule of Reasons*, *Archiv fuer Rechts- und Sozialphilosophie* 2010, vol. 96, no. 1, pp. 1–16; R. Dworkin, *The Model of Rules*, *University of Chicago Law Review* 1967, vol. 35, no. 1, pp. 14–46; R. Dworkin, *Political Judges and the Rule of Law*, (in:) R. Dworkin (ed.), *A Matter of Principle*, Cambridge 1986, pp. 9–32; F. Hayek, *The Constitution of Liberty*, Chicago 1960; M. Kramer, *Objectivity and the Rule of Law*, New York 2007; A. Marmor, *The Rule of Law and Its Limits*, (in:) A. Marmor (ed.), *Law in the Age of Pluralism*, New York 2007, pp. 3–38; J.N. Shklar, *Political Theory and the Rule of Law*, (in:) S. Hoffman (ed.), *Political Thought and Political Thinkers*, Chicago 1998, pp. 21–37; J. Waldron, *The Concept and the Rule of Law*, *Georgia Law Review* 2008, vol. 43, no. 1, pp. 1–62; J.E. Fleming (ed.), *Nomos L: Getting to the Rule of Law*, New York 2011; J. Malec, *On the Rule of Law*, *Studia Iuridica Lublinsia* 2021, vol. 30, no. 5, pp. 445–459.

(4) laws should be clear and (5) devoid of contradictions; (6) they should not require impossible things from citizens; (7) the legal system has to provide for stability, so laws should not be changed frequently; and (8) there has to be a congruence between official action and declared rule.<sup>15</sup> He calls these principles ‘the internal morality of law’ and claims that it is a precondition of good law, though it cannot ensure that the law will be good, ethically speaking.

The principles of legality guarantee stability and security for people’s actions by providing a legal framework for social relations in which people can organise their own lives. The COVID-19 pandemic created a situation of instability and uncertainty for both governments and citizens alike.<sup>16</sup> It resulted in the introduction of restrictive extraordinary measures which operated, at least partly, at the border or even outside the confines of the rule of law. As a result, legality threatens to become more and more a utopia. That does not necessarily mean that legality has become fictitious or a free-floating fantasy, as the common usage of the notion ‘utopia’ would suggest. Utopia can present an attractive vision which we aspire to, a regulative idea in the Kantian sense, or a ‘*focus imaginarius* that never can be known and realised fully.’<sup>17</sup> As Gadamer argues, utopia offers a ‘suggestive image from far away.’<sup>18</sup> Its main contribution should not be situated at the level of action – it does not offer a blueprint for a perfect society – but rather at the level of critical reflection: it generates ideas of how to organise the *polis* in a just and rightful manner by presenting an image of what, in a certain moment of time, seems utterly unrealistic and unrealisable.

In a well-functioning liberal-democratic society, Fuller’s principles of legality can be expected to be complied with fully or to a large degree. Some of these principles are part of ‘the morality of duty’ and contain basic obligations (such as the ban on retroactive legislation), whereas other principles are part of the ‘morality of aspiration’ and present ‘a general idea of the perfection we ought to aim at’ (such as the requirement of clarity).<sup>19</sup> However, it may be difficult, if not impossible, to comply with these principles in times of crisis, even to a low degree. As a utopia, however, legality can remain an inspiring ideal for the ordering and stabilisation of society. Moreover, on a practical level, it can help to reinforce people’s trust in public institutions. Ricœur distinguishes three main functions of utopia: escape, critique, and exploration of the possible.<sup>20</sup> Firstly, utopia may offer a way to get out of the present situation by what Ricœur calls the ‘magic of thought.’<sup>21</sup> Secondly, utopia provides a powerful

15 L. Fuller, *The Morality of Law*, New Haven 1964.

16 I. Krastev, *Is It Tomorrow Yet? Paradoxes of the Pandemic*, New York 2020.

17 I. Kant, *Critique of Pure Reason*, Cambridge 1999.

18 H.G. Gadamer, *Platos Staat der Erzieher*, (in:) H.G. Gadamer (ed.), *Gesammelte Werke: Band 5: Griechische Philosophie I*, Tübingen 1985, pp. 249–262, on p. 251 (our translation).

19 L. Fuller, *The Morality...*, *op. cit.* p. 6.

20 P. Ricœur, *Lectures on Ideology and Utopia*, New York 1986, pp. 269–270.

21 *Ibidem*, p. 296.

tool for criticising the present situation. Thirdly, and most fundamentally, utopia may have a transformative power. It exposes the contingency of the current social order and shows that social institutions such as law and politics could be organised differently. Whether the utopia of legality can fulfil these functions in the Netherlands and Poland is a matter that we will discuss below in sections 2 (the Netherlands) and 3 (Poland).

## 2. The Regulation of the Pandemic in the Netherlands

On 27 February 2020, the first COVID-19 infection was reported in the Netherlands. After that, the number of infections increased rapidly and two weeks later a state of pandemic was officially declared.<sup>22</sup> During the first wave of the pandemic, the Dutch government took several measures, including the closing down of schools, restaurants, cafés and childcare services.<sup>23</sup> People were required to work from home as much as possible, to avoid visiting vulnerable people and to keep one and a half metres distance from everybody outside their home. Moreover, they were encouraged to take further hygiene precautions. Churches, mosques, synagogues and other religious centres were put under pressure to limit the number of visitors for worship services and even to close down entirely, while events on a broader scale were cancelled. Finally, parks were closed when they became too crowded. In May 2020, the number of infections decreased, so the Dutch government decided to start lifting or relaxing some measures.

During the summer holidays, at the end of July 2020, a second wave of the pandemic began and this lasted until mid-October before a partial lockdown was declared. A full lockdown came into effect two months later. Schools were closed along with non-essential shops. People were allowed to receive at first two visitors at home and later only one. A person was permitted to walk outside with only one other person (except for people from his or her own household) and at one and a half metres distance.

At the end of January 2021, just before the third wave was announced, a curfew was installed, starting from 9 PM (later extended to 10 PM) until 4:30 the next morn-

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22 A 'coronavirus time line' which lists the declarations and measures taken can be found on the website of the central government: <https://www.rijksoverheid.nl/onderwerpen/coronavirus-tijdlijn/maart-2020-maatregelen-tegen-verspreiding-coronavirus>. Another timeline can be found at: <https://www.rivm.nl/gedragsonderzoek/tijdlijn-maatregelen-covid> (accessed 15.12.2021).

23 For a discussion of these and other measures, see: A.J. Wierenga, *De ongekende ervaring van het noodrecht in de coronacrisis: Over de inzet van noodverordeningen en staatsnoodrecht ter infectieziektebestrijding*, 'Ars Aequi' 2021, pp. 660–670. On the website of Onderzoeksinstituut Veiligheid en openbare orde (Research Institute Safety and Public Order, University of Groningen) blogs were posted regularly in which legal scholars (among whom Wierenga) comment on recent developments in the Dutch regulation, see: <https://www.openbareorde.nl> (accessed 15.12.2021).



ing. The curfew lasted for more than three months. Gradually, when the amount of people vaccinated increased, measures were lifted or relaxed. Under growing social pressure, the Dutch government started to allow more freedoms during the summer season. In October 2021, the number of infections suddenly started to increase dramatically, resulting in the fourth wave of the pandemic. In response, the Dutch government declared a partial or evening lockdown on 13 November 2021. Between 5 PM and 5 AM, non-essential shops, restaurants, cafés, theatres, gyms and so on were closed. The six-foot rule was restored, and people had to wear face masks in public places. People were again required to work from home and only to go to the office when necessary. On 19 December 2021, a full lockdown was declared for a period of four weeks. In the course of 2022, Dutch society has been gradually but slowly reopening despite the spread of the Omicron variant in the first half of the year.

In the first phase of the regulation – which started on 15 March and lasted until 1 December 2020 and coincided roughly with the first two waves of the pandemic – the competency for taking measures was based on the Public Health Act.<sup>24</sup> According to this Act, emergency measures can be taken in the case of a medical emergency situation, such as the pandemic. The Dutch government refrained from declaring a state of emergency, since it considered it a too drastic and unnecessary measure. An ‘inner cabinet’ was installed, consisting of several ministers, including the Prime Minister and the Minister of Health, Welfare and Sport.

During the first phase of the regulation, the Dutch parliament and the municipal councils remained largely sidelined. The inner cabinet, advised by experts, took the measures it deemed necessary, which were subsequently converted to emergency orders by the Safety Advisory Board (*Veiligheidsberaad*). The chairpersons of the 25 safety regions, comprising the mayors of the biggest city of each region, were responsible for implementing the measures in emergency orders. They convened in the Safety Advisory Board and devised together a model emergency order, which chairpersons could adopt and adjust to the situation in their own region. It was the mayor’s task to enforce the emergency orders applicable in his or her municipality.

This top-down approach was heavily criticised since it was generally considered to be undemocratic. In the second phase of the regulation, when the pandemic entered its third wave, Parliament regained some control when the Corona Emergency Act came into effect on 1 December 2021.<sup>25</sup> The Act was valid for the period of three months, which could be extended by another three months by government’s decision and with parliamentary approval. According to this Act, the Minister of Health,

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24 The Public Health Act (Wet publieke gezondheid) of 9 October 2008, the Dutch Journal of Laws, ‘Staatsblad’ 2008, 460.

25 The Temporary Act Measures COVID-19 (Tijdelijke wet maatregelen COVID-19) of 28 October 2020, the Dutch Journal of Laws, ‘Staatsblad’ 2020, 441, for short: Corona Emergency Act (‘Corona spoedwet’).



Welfare and Sport has the competence to issue emergency decrees after having consulted other ministers in the inner cabinet.<sup>26</sup> Recently, on 17 May 2022, the Dutch first chamber voted against a further extension of the Corona Emergency Act, because it deemed it no longer necessary given the current health situation. That means that, if the Minister wants to take extraordinary measures in the next health crisis, the Public Health Act has to be amended.

During the first phase, the regulation violated some of Fuller's principles of legality. There were rules, certainly, and they were communicated regularly at press conferences and on government websites (in accordance with principles 1 and 2). However, it was not always clear to the citizens what the rules exactly contained since they were changed rather frequently (against principles 4 and 7). For instance, the number of people that one could receive at home or that were allowed to walk together outside changed frequently. Moreover, it was not always clear whether a prescription (such as the one and a half metres rule<sup>27</sup>) was a binding legal rule, backed up with a sanction, or merely an 'urgent recommendation'. As a result, the border between hard (enforceable) law and soft ('educational') law became somewhat blurred. Some legal concepts were not clearly defined in the emergency orders, such as 'gatherings', which could include private dinners at home or not. According to Wierenga and Brouwer, '[s]uch a vague prescription undermines trust in the government and jeopardises legal security for citizens.'<sup>28</sup> On the local level, emergency orders could differ from the model order, as devised by the Safety Advisory Board, which affects the requirement of generality (principle 1). Furthermore, distinctions were drawn in the measures that seemed at times arbitrary, e.g. between essential and non-essential shops (for instance, a liquor store was recognised as essential whereas a bookstore was not). The Temporary Act COVID-19 Justice and Safety, which is more limited in scope than the aforementioned Corona Emergency Act, had to secure that the legislative process, the judiciary and public administration could keep functioning during the pandemic. It entered into force retroactively (against principle 3).<sup>29</sup>

26 For a more extensive overview of the Dutch regulation of the pandemic, see: A.J. Wierenga, *De ongekende...*, *op. cit.*, pp. 660–670.

27 Surprisingly, the prescription to keep a six-foot distance was not a general legal rule in the emergency regulation during the first phase; only some local emergency orders contained this rule. See: A.J. Wierenga, J.G. Brouwer, *Noodverordening en het verbod van samenkomsten: Coronacrisis en het recht (deel 9)*, 20 April 2020, <https://www.openbareorde.nl/tijdschrift/coronacrisis-en-het-recht-deel-9/> (accessed 15.12.2021).

28 *Ibidem* (our translation).

29 The Temporary Act COVID-19 Justice and Safety (Tijdelijke wet COVID-19 Justitie en Veiligheid Wet) of 22 April 2020, the Dutch Journal of Laws, 'Staatsblad' 2020, 123. It is discussed in: A.J. Wierenga, A.E. Schilder, J.G. Brouwer, *Coronacrisis en het recht (deel 13)*, 22 May 2020, <https://www.openbareorde.nl/tijdschrift/coronacrisis-en-het-recht-deel-13/> (accessed 15.12.2021).

In the Dutch legal system, as a matter of principle, fundamental rights cannot be restricted or suspended based on emergency measures without any parliamentary oversight.<sup>30</sup> Only in an event of a major emergency and for a very limited period of time can fundamental rights be restricted or suspended. Some emergency orders even limited basic rights on a larger scale than would have been possible if a state of emergency had been officially declared, for instance by banning visitors in the private sphere.<sup>31</sup> From a democratic point of view, it obviously is highly problematic that, on the central level, Parliament and, on the local level, municipality councils were not involved at all in the process of law-making. This also disturbs the balance of power in the *trias politica*: the administration (in particular the inner cabinet) acquired so much power at the cost of the legislative power that some scholars spoke alarmingly of an 'administrative state'.<sup>32</sup> The emergency orders were enforced differently, in some parts of the country very strictly and other parts barely or not at all, which created an incongruence between official action and declared rule (principle 8).

In the second phase of the regulation, the emergency measures acquired a legal basis in the form of the Corona Emergency Act. The parliament gained more power, as the second chamber was granted the right to veto ministerial decrees. However, from the viewpoint of legality, the regulation met many of the same problems as in the first phase, in particular: the lack of *stability*: the rules continued to be changed regularly; *clarity*: it cannot be determined beforehand whether an emergency decree is necessary and, if so, when it is proportionate to the objective of protecting public health (that remains a matter of political, and not legal, assessment); and *generality*: for instance, exceptions to the general ban on mass events were granted that appeared to be arbitrary (such as in the case of the Dutch Grand Prix 2021 in Zandvoort). Moreover, the justification for the measures taken kept changing. This affects the consistency of the regulation (against principle 5). The Dutch Council of State warned against a 'yo-yo effect'. Every time the number of infections decreased, measures were lifted which had to be reintroduced when the infection rate increased again. According to the Council of State, this was confusing for citizens and could affect their willingness to follow the rules. Moreover, the credibility and efficacy of the measures taken were at stake.

Early in this phase, the inner cabinet decided to install a curfew, however not on the basis of the Corona Emergency Act (which was already in force) but on another law – the Act Extraordinary Competencies Civil Authority,<sup>33</sup> article 8 – so it did not

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30 W.J.M. Voermans, *Het land moet bestuurd worden: Machiavelli in de polder*, Amsterdam 2021, p. 188.

31 A.J. Wierenga, A.E. Schilder, J.G. Brouwer, *Coronacrisis...*, *op. cit.*

32 W.J.M. Voermans, *Het...*, *op. cit.*, p. 143 ff.

33 The Act Extraordinary Competencies Civil Authority (Wet buitengewone bevoegdheden burgerlijk gezag) of 3 April 1996, the Dutch Journal of Laws, 'Staatsblad' 1996, 367.

have to consult parliament. This was a rather surprising move, since a curfew is a very drastic measure which was used the last time in the Netherlands during the Nazi occupation. The action group Viruswaarheid (Virus Truth) brought the case before court. The Preliminary Relief Judge of the District Court of The Hague ruled that the curfew lacked an appropriate legal basis, since it was not demonstrated that the situation was so urgent that parliament could not have been consulted.<sup>34</sup> Subsequently, the state lodged an appeal but the government did not wait for the court's decision in appeal and added the curfew to the Corona Emergency Act. So ultimately, after much social, legal and political pressure, the curfew acquired an appropriate legal basis.

The question may be raised, however, as to whether this measure did not ask the impossible from citizens (against principle 6): can it be required that people stay at home between 9 or 10 o'clock in the evening until early morning and to receive only a very limited number of visitors for no less than three months? Many psychologists feared that the curfew would increase psychological problems among young people in particular. In terms of practicability, another point can be made: the enforcement of the measures is now to a large extent privatised: employees of restaurants, cafés, theatres et cetera had to check whether people were allowed to enter. This laid a heavy burden on the organisations involved. More fundamentally, the question is whether private persons are qualified and capable of enforcing legal norms. Finally, while it is true that parliament has more power to interfere in the legislative process, in practice the government has been in charge so far and could pass most of the emergency decrees with minor interference from the second chamber.

### 3. The Regulation of the Pandemic in Poland

According to Polish law, the legal response to the pandemic situation can be introduced in two different ways, either by 1) the constitutional state of a natural disaster (Art. 232 of the Constitution of April 1997 of the Republic of Poland, for short: the Polish Constitution),<sup>35</sup> or 2) a statutory state of epidemic (the Act of 5 December 2008 on preventing and combating infections and infectious diseases, for short: the Act).<sup>36</sup>

The main difference between these two legal ways of combating epidemics is that the constitutional state of natural disaster provides extraordinary measures

34 ECLI:NL:RBDHA:2021:1100. The curfew is discussed in, for instance, J.G. Brouwer, *Avondklok op basis van Wet publieke gezondheid: Parlementaire controle beter geborgd? Coronacrisis en het recht* (deel 21), 19 February 2021, <https://www.openbareorde.nl/tijdschrift/corona-en-het-recht-deel-21/> (accessed 15.12.2021).

35 *Journal of Laws 1997*, item 483 with amendments.

36 *Journal of Laws 2020*, item 1845. See L. Bosek (ed.), *Ustawa o zapobieganiu oraz zwalczaniu zakażeń i chorób zakaźnych u ludzi. Komentarz*, Warsaw 2021; L. Bosek, *Stan epidemii. Konstrukcja prawna*, Warsaw 2021.

which ‘can only be applied in situations in which ‘ordinary constitutional measures are inadequate’ (Article 228 section 1 of the Polish Constitution).<sup>37</sup> These extraordinary measures can be introduced only for a definite period of time, no longer than 30 days.<sup>38</sup> A state of epidemic, on the other hand, can be applied to ordinary situations and is not limited in time. In other words, if the statutory state of epidemic is sufficient to combat an epidemic, the introduction of the constitutional state of a natural disaster is not necessary.<sup>39</sup> Since the statutory state of epidemic is considered the ordinary set of measures to combat a pandemic, the limitation of the constitutional rights and freedoms must be temporary and must meet such necessary conditions as a) the comprehensive statutory basis for the delegation of powers to the executive and b) the proportionality rule (Article 31 section 3 of the Polish Constitution).<sup>40</sup>

The Polish government decided to choose the second option – introducing a statutory state of epidemic. Just like in the Netherlands, the government considered the constitutional extraordinary measures as too drastic and unnecessary.<sup>41</sup> However, the government was strongly criticised for not introducing the state of natural disaster, and it was frequently argued that the political and economic reasons were predominant in this decision.<sup>42</sup>

The state of an epidemic, as well as necessary restrictive measures, can be introduced by executive regulations of the Minister of Health for a nationwide epidemic or by the voivode for the territory of a region. The Amendment of the Act of 2 March 2020 extended the extraordinary powers of the Minister of Health to the Council of Ministers, which resulted in diminishing the role of the former in managing the epidemic crisis.<sup>43</sup> On 13 March 2020 a state of epidemic threat was announced in the

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37 M. Małecki, M. Sławiński, Repressive Nature of Selected COVID-19 Regulations in the Polish Legal System. The Question of Constitutionality, (in:) E. Hondius et al. (eds.), *Coronavirus and the Law in Europe*, Intersentia Online 2020, <https://www.intersentiaonline.com/library/coronavirus-and-the-law-in-europe> (accessed 15.12.2021).

38 An extension of a state of natural disaster requires the consent of the Polish Parliament (Sejm).

39 L. Bosek, Anti-Epidemic Emergency Regimes under Polish Law in Comparative, Historical and Jurisprudential Perspective, *‘European Journal of Health Law’* 2021, no. 28, pp. 113–141, on p. 138.

40 M. Małecki, M. Sławiński, *Repressive...*, *op. cit.*

41 The Supreme Court declared in its decision of 28 July 2020 (I NSW 2849/20) that ‘the Council of Ministers was not obliged to introduce a state of natural disaster in response to the COVID-19 epidemic, in a situation where it was possible to introduce the State of Epidemic Emergency or the State of Epidemic’ (in Bosek 2021, p. 139).

42 E. Rutynowska, M. Tatała, P. Wachowiec, *Rule of Law...*, *op. cit.*, p. 25. Yet, if the government introduced the extraordinary regime, it could also be prone to political criticism due to extraordinary power given to the executive in such a regime which may lead to the abuse of power. For instance, the extraordinary regime allows for the suspension of the freedom of assembly which would prevent anti-governmental mass demonstrations, such as those which took place in the middle of the second wave of the pandemic in response to the restriction on the anti-abortion law.

43 L. Bosek, *Anti-Epidemic...*, *op. cit.*, p. 132.

decree by the Polish Minister of Health.<sup>44</sup> It resulted in the imposition of the first restrictions, such as quarantine for people returning from other countries, limiting public gatherings (in March 2020, any gatherings of more than 50 people were prohibited, on 10 April 2020 all kinds of gatherings were prohibited for a very short time) and the functioning of workplaces. A week later, on 20 March 2020, the Minister of Health announced a state of epidemic.<sup>45</sup> It resulted in further restrictions being imposed such as limiting freedom of movement, limiting access to public green and leisure areas, obligation to keep distance, obligation to wear face masks, and a further prohibition on gatherings (on 21 December 2020 gatherings of more than five persons were prohibited).

The most restrictive measures such as lockdowns, similar to a certain degree to the aforementioned Dutch ones, were only introduced in the early stage of the pandemic when Poland actually had a relatively small number of infections (March–April 2020). During the second and third waves of the pandemic, in which the number of infections rose drastically, partial lockdowns, restrictions on gatherings, obligation to wear facemask etc. were continued. Yet measures were never as strict as in the Netherlands, except those introduced in March–April 2020, and became less and less intrusive.

In Poland, just like in the Netherlands, rights and freedoms cannot be limited by decree, but only by statute. Since the state of natural disaster was not introduced, any limitation on constitutional rights and freedoms required a comprehensive statutory basis and the application in accordance with the proportionality rule. Although the Act gave a very broad scope of authorisation to the executive powers, most of the aforementioned, highly intrusive restrictions did not have a direct and comprehensive statutory authorisation of the parliament. For instance, the government introduced a prohibition on movement in public space except for conducting professional affairs, volunteering in affairs related to combating the epidemic, conducting religious affairs, or 'satisfying the necessary needs associated with current matters of everyday life'.<sup>46</sup> According to the Act, in the state of an epidemic the executive powers

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44 The state of epidemic threat is defined in Article 2 point 23 of the Act as: a legal situation introduced in a given area with respect to the risk of an epidemic outbreak and in order to undertake preventive measures specified in the Act.

45 The state of epidemic is defined in Article 2 point 22 of the Act as: a legal situation introduced in a given area with respect to an epidemic and in order to undertake counter-epidemic and preventive measures specified in the Act to minimise the effects of the epidemic. The difference between the state of epidemic threat and the state of epidemic is that the former is introduced when a risk of the outbreak of an epidemic occurs, while the latter concerns combating the pandemic which has already occurred.

46 §5 of Council of Minister's Regulation of 31 March 2020 on establishing certain limits, orders and prohibitions in relation to the state of epidemic (Journal of Laws 2020, item 566), changed by the Council of Minister's regulations of 10, 19 and 26 April 2020, on establishing certain limits, orders and prohibitions in relation to the state of epidemic.

may temporarily limit specific methods or manners of movement, yet they cannot impose on the entire population a general ban on movement.<sup>47</sup> Besides, the phrase which was used in the regulation concerning the prohibition of movement except for 'satisfying the necessary needs' of everyday life was very ambiguous and left too much discretion to the interpretation of the police and healthcare officials.<sup>48</sup> The same refers to the introduction of a curfew on the New Year's Eve of 2020,<sup>49</sup> which belongs to extraordinary measures and could not be introduced by a decree in the state of epidemic. What is more, the restrictions on movement addressed at specific age populations, such as minors or seniors, could be considered as discriminatory policies.<sup>50</sup> In the case of minors, they were prohibited from travelling without a legal guardian, and in the case of seniors they could only travel for conducting professional affairs, satisfying the necessary needs associated with current matters of everyday life, or conducting religious affairs.<sup>51</sup>

The prohibition on the access to green and leisure areas, including parks and even forests, in the early stage of the pandemic, was also questionable from a legal point of view, since the executive power could only impose temporary restrictions of the use of sites or areas, and not prohibit access to parks and forests as such.

The general obligation to wear face masks in public spaces was also introduced without the specific statutory delegation. According to the Act, the executive powers could order wearing face masks to sick people or to those who have contact with them, yet they could not extend the obligation to cover the nose and mouth to the entire population, which would require a separate statutory basis.<sup>52</sup> The statutory obligation to wear face masks was introduced much later, in December 2020.

For those who violated the aforementioned restrictions, fines were imposed by the police or administrative fines by healthcare inspectors. Yet ordinary and administrative courts reviewed these sanctions and considered them not binding since they

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47 Z. Ganczewska, P. Kubaszewski, *Prawa człowieka w dobie pandemii*, Warsaw 2021, p. 13.

48 *Ibidem*, pp. 13–14.

49 Council of Minister's Regulation of 21 December 2020 on establishing certain limits, orders and prohibitions in relation to the state of epidemic (*Journal of Laws* 2020, item 2316).

50 Z. Ganczewska, P. Kubaszewski, *Prawa...*, *op. cit.*, p. 14.

51 Council of Minister's Regulation of 31 March 2020, *op. cit.*; Council of Minister's Regulation of October 2020 on establishing certain limits, orders and prohibitions in relation to the state of epidemic, *Journal of Laws* 2020, item 1758.

52 E. Rutynowska, M. Tatała, P. Wachowiec, *Rule of Law...*, *op. cit.*, p. 25. For further discussion of other controversial legal issues during the pandemic see for instance: E.M. Guzik-Makaruk, Some Remarks on the Changes in the Polish Penal Code During the Pandemic, 'Białostockie Studia Prawnicze' (2021), vol. 26, no. 6 (Special Issue), pp. 27–37; G.B. Szczygieł, Prisoners During the Pandemic, 'Białostockie Studia Prawnicze' (2021), vol. 26, no. 6 (Special Issue), pp. 39–54; P. Chmielnicki, D. Minich, R. Rybkowski, M. Stachura, K. Szocik, *The COVID-19...*, *op. cit.*, pp. 77–109.



were imposed for violating the restrictions which were introduced without comprehensive and direct statutory delegation.

From the perspective of Fuller's 'internal morality of law', it is worth stressing that most of the formal principles of law-making were violated or undermined. As Fuller argues, 'infringements of legal morality tend to become cumulative'<sup>53</sup> and the pandemic legislation seems to be a very good example of this. The extraordinary restrictions implemented in the first phase of the pandemic lacked a proper legal basis, which violated the principle of congruence between the law as declared in the constitution and statutes and the law as actually administered by the public officials according to the decrees (principle 8). The rapid and mass-scale production of new laws and amendments violated the principle of stability (principle 7) and resulted in legal chaos and uncertainty.<sup>54</sup> New measures were published with little or no notice, undermining the principle of publicity (principle 2) and prospectivity (principle 3), which resulted in leaving people no time for preparation or adjustment to new legal requirements even though some of them were very intrusive in the functioning of workplaces or the organisation of people's everyday life. Moreover, the legislation was often inconsistent and full of exceptions and provided absurd solutions,<sup>55</sup> which violated the principle of consistency and clarity (principles 4 and 5). The governance was chaotic, uncoordinated, unpredictable and not transparent. The communication of the public officials was unclear, ambiguous and contradictory – contradictory information was provided by public officials during press conferences, on government websites and in the regulations themselves. There were also measures which violated the principle of practicability (principle 6) by requiring the impossible, for example keeping distance in places with not enough space and so on.

#### 4. The Utopia of the Pandemic

When we compare the Polish and the Dutch approaches to the pandemic, there are some differences. For instance, at the start of the pandemic the Polish government declared a state of epidemic, whereas the Dutch government took measures that were implemented in emergency orders in the various safety regions. It is the task of these public bodies to oversee regional cooperation in areas such as firefighting, disaster management, crisis management and healthcare. The Safety Regions Act, which dates

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53 L. Fuller, *The Morality...*, *op. cit.*, p. 92.

54 E. Rutynowska, M. Tatała, P. Wachowiec, *Rule...*, *op. cit.*, p. 4, 15 and 21.

55 The number of exceptions to each rule, their inconsistency, unclarity and absurdity were often mocked. For example, an electronic 'Generator of COVID-19 restrictions' was created where you can 'check what is allowed and what is not today' (<https://koronawirus.lol>, accessed 15.12.2021). Computer-generated restrictions include for instance: 'Hotels are available only for ex-miners, ex-husbands, fencers and Greta Thunberg'; 'All persons arriving to Poland by train from polar circles of Norway, Sweden and Finland are exempted from quarantine' and so on (our translation).

from 2010, regulates this type of regional cooperation in a high-quality and efficient way.<sup>56</sup> A geographical Coronavirus Dashboard of the 25 safety regions in the Netherlands was created.<sup>57</sup> The dashboard includes data information on vaccinations, hospitals, infections, behaviour, vulnerable groups and early indicators. However, in our view, the above-mentioned differences between the Netherlands and Poland are not fundamental. Ultimately, both countries seem to end up in chaos and improvisation and have difficulties preserving legality in these exceptional times. Taking the considerable difference of the initial ranking in the Rule of Law Index 2020 into account, this may seem surprising. In the report on the governance of the COVID-19 crisis in 29 countries, we can read that in terms of resilience of governance (including executive accountability) the Netherlands takes a middle position, whereas Poland ended up in the lower ranks.<sup>58</sup> This can be interpreted as a result of general differences in the state's capacity of the two countries, which was tested by the crisis. Yet the comparison of the pandemic regulations in the two countries reveals that Fuller's principles of legality were violated to a similar extent. Moreover, in later stages of the pandemic, the governments in both countries tried to bring the legislation more in accordance with the requirements of the rule of law. In both countries, the infringements on the legality principles had a similar effect on the people's trust in public institutions: in a recent report, it is argued that the Netherlands degraded from a high-trust to a low-trust society,<sup>59</sup> whereas in Poland the level of institutional distrust was further deepened.

Both the Dutch and Polish governments refrained from declaring a state of emergency. By declaring a state of epidemic, the Polish government decided to act in accordance with ordinary measures specified in the Act. The Polish government was strongly criticised for not introducing the extraordinary measures, but in fact the restrictions implemented by the executive powers, especially in the early stage of the epidemic, were of an extraordinary character.<sup>60</sup> These laws were questioned due to the lack of specific statutory delegation, unspecified timing and the disproportionality of the sanctions and restrictions. The overruling by the ordinary courts of the fines imposed by public officials for violating the restrictions proved that the division of

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56 Safety Regions Act (Wet Veiligheidsregio's) of 11 February 2010, <https://wetten.overheid.nl/BWBR0027466/2017-06-10#> (accessed 29.04.2022).

57 See: Level of risk per safety region | Coronavirus Dashboard | Government.nl (accessed 29.04.2022).

58 C. Schiller et al., Just How Resilient are OECD and EU Countries? Sustainable Governance in the Context of the COVID-19 Crisis, Bertelsmann Stiftung 2021, <https://www.bertelsmann-stiftung.de/de/publikationen/publikation/did/just-how-resilient-are-the-oecd-and-eu-countries-all> (accessed 15.12.2021), pp. 130–132.

59 G. Engbersen et al., De laag-vertrouwensamenleving: De maatschappelijke impact van COVID-19 in Amsterdam, Den Haag, Rotterdam & Nederland (vijfde meting), Rotterdam 2021, <https://www.impactcorona.nl/laag-vertrouwen-samenleving/> (accessed 15.12.2021).

60 E. Rutynowska, M. Tatała, P. Wachowiec, Rule..., *op. cit.*, p. 8.

powers worked properly. At the same time, the judgments increased the tension between the government and the judiciary and contributed to the further deterioration of trust in law and public institutions in Poland. The unjustified fines on a mass scale during the pandemic elucidate the limitations of a legal system in which the courts are solely playing the role of 'a bulwark against lawless administration of the law', as Fuller points out, since 'it makes the correction of abuses dependent upon the willingness and financial ability of the affected party to take his case to litigation'.<sup>61</sup>

The measures taken by the Polish government not only created a chaotic situation from a legal point of view; it also caused uncertainty among the people. This had a negative effect on the public's attitude towards the government and its willingness to comply with the measures. Although the initial level of social and institutional trust was relatively low in Poland, in the early stages of the pandemic people demonstrated an unexpected willingness to accept constraints on their rights and freedoms even when they lacked a proper legal basis. It can be argued that, as an exceptional situation, pandemics allow for the temporal 'suspension' of the rule of law for the sake of safety.<sup>62</sup> However, when an exceptional situation threatens to become permanent, the 'suspension' of the rule of law undermines the social contract and results in disobedience. In fact, in later stages of the pandemic, due to the governmental disregard for the rule of law, the trust in public institutions decreased and the authority of law was undermined, encouraging citizens to disobey the rules. From the second wave of the pandemic, the governmental restrictive measures in Poland were based mainly on voluntary compliance. Despite its ineffectiveness – the number of infections and the pandemic death toll were well above average – the government did 'not want to provoke the anger of its citizens and resign[ed] from acting or only pretend[ed] to act'.<sup>63</sup> At the same time, citizens pretended to obey the law and the government pretended not to see that they were pretending, which created a rather Kafkaesque situation. Furthermore, the state's inability to effectively coordinate social behaviour by imposing legal norms, as well as its inability to guarantee access to basic social goods, such as healthcare resources, resulted in the creation of parallel social norms and institutions based on social capital.<sup>64</sup> On 16 May 2022 the state of epidemic was cancelled in Poland,<sup>65</sup> almost all restrictions had been lifted by spring 2022 and the healthcare system has started to treat COVID-19 as a normal disease.

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61 L. Fuller, *The Morality...*, *op. cit.*, p. 81.

62 B. Biga et al., *Folk Improvisations: How the Pandemic Changes Social Norms*, Cracow 2021, [https://politykipubliczne.pl/wp-content/uploads/2021/07/22-Folk-Improvisations\\_EN-raport.pdf](https://politykipubliczne.pl/wp-content/uploads/2021/07/22-Folk-Improvisations_EN-raport.pdf) (accessed 15.12.2021), p. 7.

63 *Ibidem*, p. 8.

64 *Ibidem*.

65 Council of Minister's Regulation of 12 May 2022 on renouncing the state of epidemic on the area of the Republic of Poland (*Journal of Laws* 2022, item 1027). Currently, the state of epidemic

The Dutch approach to the pandemic shows similar elements of chaos and improvisation. As Schiller et al. note, ‘the government’s crisis management remained preoccupied with short-term objectives, with no signs of future-oriented learning or adaptation’.<sup>66</sup> Moreover, it can be questioned whether the approach is really based on consensus as Jasanoff and Hilgartner claim.<sup>67</sup> It is true that the government, before taking new measures, usually asks advice from the Outbreak Management Team (OMT), a group of medical and other experts, and it also regularly consults other people, for instance from trade unions and business and teachers’ organisations.<sup>68</sup> However, it occasionally deviates from the advice given by appealing to the demands of ‘society’. After the first wave of the pandemic, the rift between the government and the opposition in parliament deepened.<sup>69</sup> Dutch society became more and more divided on the question of how to deal with the crisis. Many citizens in the Netherlands no longer supported the government’s seemingly erratic approach. The COVID-19 pandemic enhanced distrust of public institutions (government, medical science and the mainstream media): people in particular on the left and right extremes of the political spectrum rejected the restrictions on freedom made for the sake of public health. Regularly, groups of people demonstrated in the streets against the measures. In protest against the government’s vaccination campaign, some opponents were even considering establishing a ‘parallel society’ outside the Netherlands (possibly somewhere in South America), a ‘New Batavian Republic’.<sup>70</sup> In the Netherlands, as in Poland, most restrictions have recently been lifted. For example, as of 23 March 2022, the Dutch do not have to wear face masks any more, except in airplanes and at airports. The Dutch are no longer required to work from home, unless in the case that a person does not feel well. Since 23 March 2022 it is much easier to travel than earlier in the pandemic.<sup>71</sup>

With regard to the rule of law, the Dutch approach is problematic too. As said above, in later phases of the regulation, both the Polish and the Dutch government did strengthen the legal basis of the measures taken. However, since the measures kept on changing constantly and a clear rationale behind the approach taken was lacking, the situation was – legally speaking – far from ideal. In terms of generality,

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threat has replaced the state of epidemic in Poland which justifies certain sanitary measures (see footnote 44).

66 C. Schiller et al., *Just..., op. cit.*, p. 130.

67 S. Jasanoff, S. Hilgartner, *A Stress..., op. cit.*

68 C. Schiller et al., *Just..., op. cit.*, p. 130.

69 *Ibidem*, p. 27.

70 A. Kouwenhoven, W. Heck, *Coronaprik jaagt ‘wakkere burger’ naar een eigen, parallele samenleving*, ‘NRC Handelsblad’, 22 June 2021.

71 See: *Coronavirus measures and advice in brief | Coronavirus COVID-19 | Government.nl and Verdere versoepelingen coronamaatregelen | Nieuwsbericht | Rijksoverheid.nl* (accessed 29.04.2022).

clarity and stability of the regulations there remains much to be desired. And so, the search for legality continues.

### **Conclusion: In Search of Legality**

As we have seen, the Netherlands and Poland had serious problems in preserving legality in these exceptional times. Against our initial hypothesis, the difference between the two countries in terms of the rule of law was not as large as one would have expected from their respective rankings in the Rule of Law Index 2020. The situation in the two countries seemed rather dystopian, both from the viewpoint of public health and the rule of law. Returning to our central research question, we have to conclude that the rule of law – in particular, the principle of legality – played a very limited role in regulating the pandemic in Poland as well as in the Netherlands.

However, this does not mean that legality was just a utopia in the conventional sense of a fantasy or illusion. Following Ricoeur, we claim that the utopia of legality may fulfil an important critical function in criticising the current approach and may offer useful suggestions for improving the legal basis of the measures taken. In contrast to Schmitt, we do not believe that the order must be restored first before the legal order can be established. In exceptional situations it may be necessary to limit or suspend fundamental rights temporarily. This constitutes, as Agamben argues, the ‘paradox of sovereignty’: the sovereign is both inside and outside the legal order, since it has the *legal* power to suspend the law.<sup>72</sup> Although it is true that Fuller’s requirements of law-making were violated, particularly in the early stage of the pandemic regulation but also later on, legality remained an important background notion on the basis of which the current approach was criticised in parliament and in society at large. Moreover, it incited legislative amendments; in due course, the legal basis of the measures was strengthened in both Poland and the Netherlands. A clear sign of this development was the decision by the Dutch First Chamber to no longer extend the Corona Emergency Act.

Building on Fuller’s principles of legality, several useful recommendations can be given for how to handle crisis situations in the future, in particular:

1. The normative regime enacted to confront the emergencies must be fitting for the situation and adopted restrictive measures should be proportionate to the threat and take into account far-reaching social, economic and psychological consequences, keeping balance between ad-hoc regulations responding to current urgent problems and long-standing policies aimed at stability and welfare;

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72 G. Agamben, *Homo Sacer: Sovereign Power and Bare Life*, Redwood City 1998, p. 15.

2. Both the laws and their communication must be as clear as possible, unambiguous and consistent;
3. The laws must be applied prospectively and must provide adequate time for adjusting to drastic changes required by the law;
4. The laws should be reflexive – they should take into account human capacities, pre-existing social norms and practices;
5. The inflation of laws and their rapid changes must be avoided;
6. The laws should not contain unjustifiable exceptions;
7. The laws should be enforceable;
8. The laws should be applied with the same force in all parts of the territory under which they are binding and to all people to which they are addressed without unjustified exceptions for the privileged individuals or groups;
9. It should be clear whether the prescriptions given constitute binding rules (hard law) or ‘strong’ recommendations (soft law);
10. The justification of the measures should be consistent.

The utopia of legality serves as a constant reminder that this is an exceptional and undesirable state of affairs and that a return to some kind of legal normality has to be ensured as soon as possible.

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