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RESEARCH ARTICLE

"Quarantine" of Polish Constitutional Standards in the Era of Covid-19

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Abstract

The SARS-CoV-2 virus epidemic causing Covid-19 is a phenomenon that strikes at social relations, economic stability and the possibility of realising fundamental human rights. Due to the scale of the threat to citizens' security and out of concern for the stability of the state's economic system, it has become necessary to introduce legal regulations to counteract the effects of Covid-19 effectively. This paper seeks to answer an important constitutional question. It concerns the issue of assessing the compatibility of measures introduced by public authorities in Poland to prevent, counteract and combat Covid-19 with the standards adopted in the Constitution.

Keywords: Covid-19; Parliament; Government; State of emergency; Democratic standards

Introduction

Examples of European countries where the epidemic started earlier than in Poland – such as Spain or Germany – have demonstrated how vital it is for state institutions to quickly react to the spread of the Covid-19 to contain the epidemic's effects. In accordance with their constitutional frameworks, the governments of these countries decided to introduce extraordinary measures for a limited duration to protect public safety and health. It should be kept in mind, however, that in the light of international standards, these measures may be deployed only to protect values of supreme importance, such as life or health of people. As is well known, restrictions on the enjoyment of fundamental rights have occurred almost worldwide. Governments had to provide immediate answers to the question of how to effectively ensure the protection of public health, while meeting the requirements of guaranteeing the protection of individual rights. Governments' responses to the pandemic often raised many legal questions and raised concerns about their compliance with universal standards for the protection of human rights. In doing so, it must be emphasised that even those states with a reputation as mature democracies have introduced severe restrictions on constitutional freedoms and human rights.

Moreover, restrictions on fundamental rights have been a common denominator for both democratic states and non-democratic regimes. A report on the 2020 Democracy Index, compiled by the Economist Intelligence Unit's research arm for The Economist Weekly, also pointed out that the global Covid-19 pandemic proved to be a serious threat to democracy itself, with the index decreasing at its lowest level since 2006, the year in which the index began to be compiled annually. Deterioration of democratic standards was also seen in some European Union countries: even France and Portugal lost their status of "full

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democracy" to "incomplete democracy" in 2020. According to some observers, this may be evidence that the pandemic did not just signify – as declared by national governments – the need to protect public health at the expense of limiting individual rights.

In some cases, the currently ruling camps in various states have used the situation to expand the constitutionally defined scope of their powers arbitrarily or, at the very least, to achieve ad hoc political gains (Przywora & Dobrzeniecki, 2022). However, contrary to the majority of European countries, the government of Poland has not decided to proclaim an extraordinary state of emergency (Polish: *stan nadzwyczajny*). Regrettably, the epidemic in Poland had become an element of an ongoing political struggle between political parties, including the battle for votes that characterised the presidential elections of May 2020.

Although it would be impossible to exhaustively mention all the common problems faced by the constitutional orders of European states during the pandemic, it is worth noting at the end of this thread that in many states there were also frequent violations of such universal legal principles as legal certainty, consistency and clarity (Bar-Siman-Tov, 2020). Under the influence of the massive and otherwise uncoordinated "production" of legislation introducing restrictions, even uniformed services and state bodies (not to mention citizens) encountered serious difficulties in determining what legal norms applied and required application (Cormacain & Bar-Siman-Tov, 2020). In many countries, finding or tracing the legal norms in force at any given time was difficult (Waismel-Manor et al., 2020).

From the beginning of the epidemic in Poland, the parliamentary majority has been trying to prove that there are no material premises for declaring a state of emergency in the constitutional sense. On the other hand, in the opinion of representatives of the doctrine of constitutional law, the circumstances connected with the SARS-CoV-2 epidemic determine that the prerequisites for declaring a state of emergency in the form of a natural disaster, as provided for in the Constitution of the Republic of Poland, have been fulfilled (Serowaniec, 2021). Therefore, the failure to introduce a state of emergency constitutes a failure to fulfil constitutional obligations by the competent public authorities.

This paper seeks to answer an important constitutional question. It concerns the issue of assessing the compatibility of measures introduced by public authorities in Poland to prevent, counteract and combat Covid-19 with the standards adopted in the Constitution. Were the measures taken based on an appropriate legal basis, necessary and proportionate?

"Quarantine" of Polish constitutional standards

Chapter XI of the Polish Constitution of 2 April 1997 regulates three categories of states of emergency: martial law, a state of emergency and a state of natural disaster. The introduction of any of these may occur "[in] situations of particular danger, if ordinary constitutional means are insufficient" (Art. 228(1) of the Constitution), which is referred to as the principle of the finality of states of emergency, determining the general premise for the admissibility of their establishment. According to the Constitution, enacting a state of emergency is connected with the necessity to observe four important principles. These are the principles of: exceptionality, legality, expediency and proportionality. The principle of exceptionality means that introducing a state of emergency depends on the occurrence of a factual state defined in the Constitution as a "situation of particular threat" in which ordinary constitutional means are insufficient. The principle of legality is connected with the fact that each of the three types mentioned above of states of emergency may only be imposed based on a statute, by way of a regulation which, in accordance with Art. 228(2) is not only published in the Journal of Laws, but is also "subject to additional publicity". The

Constitution does not specify the forms in which this additional publicity is to take place. It is assumed in the literature that these forms may take various forms and depend on local conditions and customs. The principle of proportionality in establishing a state of emergency expressed in Art. 228(5) of the Constitution dictates that actions taken by public authorities during a state of emergency should remain in appropriate relation to the scale of the threat posed. This provision also stems the principle of expediency, according to which state authorities' actions aim at the quickest possible restoration of the state's "normal" functioning. The principle of purposefulness thus protects against, among other things, an excessively long maintenance of a state of emergency. The principles of exceptionality, legality, proportionality and expediency protect the discretionary introduction of states of emergency and the abuse of power in such states of emergency (Eckhardt, 2012). Art. 228(6) and 228(7) are additional safeguards to the core of the existing constitutional order. Art. 228(6) provides that "during a period of introduction of extraordinary measures, the following shall not be subject to change: the Constitution, the Acts on Elections to the Sejm, the Senate and organs of local government, the Act on Elections to the Presidency, as well as statutes on extraordinary measures". Under Art. 228(7), "during a state of emergency and within 90 days after that, the term of office of the Sejm may not be shortened, a national referendum may not be held, elections to the Sejm, the Senate, local government bodies, and elections of the President of the Republic may not be held, and the terms of office of these bodies shall be extended accordingly. Elections to local government bodies shall be possible where a state of emergency has not been declared". Art. 228(7) of the Constitution thus safeguards the foundations of the state system not only during a state of emergency, but also during "convalescence of the state", i.e., the return to a state of efficient functioning of the state apparatus (Kustra-Rogatka, 2021).

In practice, there has most often been a violation of the principle that limitations to the constitutionally guaranteed rights of the individual may only be made by means of sources of law of appropriate rank. Particularly often in Poland, there was a violation of the principle of exclusive statutory matter, which obliges the legislator to use only a normative act with the rank of a statute in a situation where there is a need to introduce limitations to individual rights. The introduced method of limiting constitutional rights is inconsistent with Art. 31(3) of the Constitution and the provisions of Chapter II of the Constitution, which introduce detailed limitation clauses. Art. 31(3) of the Constitution of the Republic of Poland states that restrictions on exercising constitutional freedoms and rights may be imposed "only by statute". In the light of the established case law of the Constitutional Tribunal, the law must independently determine the basic elements of the limitation of a given right and freedom. In this way, the Constitution of the Republic of Poland expresses and implements the fundamental idea that restrictions on constitutional rights and freedoms may be introduced and maintained only if they are provided for by a provision of universal validity contained in a statute. Therefore, it should be a provision adopted by a democratically legitimated Parliament through a legislative procedure provided for by law, which should guarantee openness of parliamentary debate and the possibility of pluralistic consideration of the various types of interests at stake, which is duly published and promulgated, and for which there is – at least potentially – the possibility of its being subject to preventive and subsequent review by the Constitutional Tribunal in respect of its conformity with the Constitution of the Republic of Poland. As rightly pointed out in the literature, the need for a legal basis for the introduction of restrictions on constitutional rights and freedoms is a manifestation of the implementation of the principle of a democratic state (Art. 2 of the Constitution of the Republic of Poland), in which the supreme power belongs to the Nation and in which the Nation exercises this supreme

power directly or through its representatives (Art. 4 of the Constitution), in particular through its representatives in Parliament. The Sejm, composed of representatives of the Nation, is recognised as the body that can most adequately express the Nation's will and translate that into legislation.

Consequently, a law enacted by Parliament is intended to be, in its conception, an expression of the will of the nation and, at the same time, the primary form of implementation of the principle of the sovereignty (supremacy) of the Nation. In this way, it is the Nation, through the laws passed by Parliament, that can decide how to regulate issues relating to individuals' constitutional rights and freedoms. This is therefore a legal solution that is fully in line with the principles of modern democracy.

During the pandemic, however, it was extremely common for fundamental rights to be restricted by means of acts belonging to administrative legislation, i.e. by means of normative acts emanating from the executive, rather than using laws issued in the ordinary legislative procedure by Parliament, and acts emanating from the executive did not have statutory rank. This refers to several acts of the executive which were used to introduce particular restrictions and were only executive to laws (i.e. those which, in "normal circumstances", serve to implement and execute the law). In Poland, this was done through regulations of the Council of Ministers and the Minister of Health. Each of the Covid-19 pandemic regulations contained solutions that interfered very deeply with individual rights, far beyond the limits applicable to the normal functioning of the state. For example, the freedom of economic activity concerning the types of activity enumerated in the subsequent regulations was suspended indefinitely. It further follows that the services may establish, among other things: a temporary restriction of a particular mode of movement, a temporary restriction or prohibition of the marketing and use of certain objects or food products, a temporary restriction of the operation of certain institutions or workplaces, a prohibition on organising spectacles and other gatherings of the population, and an order to make real estate, premises, land and the provision of means of transport available for anti-epidemic activities provided for in anti-epidemic plans. This entailed several problems related to the application of the law. The finale of many cases related to the validity of the restriction of individual rights sometimes (at least in Poland) took place in the courtroom, where the judge decided that the legislator had introduced the given prohibition without a proper legal basis (Dobrzeniecki & Przywora, 2021).

As is also well known, the executive and not the Parliament becomes the "main player" in managing a given threat during emergencies and crises. Indeed, emergencies are the "hour of government". It is worth pointing out that this regularity was confirmed. At the same time, it should be noted that during the first month of the pandemic in Poland, the Polish Parliament managed to *de facto* perform only one of its functions – the legislative one – albeit to a limited extent, as the remote sittings and the related technical problems limited the already modest deliberation under the Polish political conditions. Moreover, the focus at this time was only on legislation related to the coronavirus pandemic. Under the influence of the massive and otherwise uncoordinated "production" of legislation introducing strictures, even uniformed services or state bodies (not to mention citizens) encountered serious difficulties in determining what legal norms applied and required application.

(Over)ordinary state of epidemics in Poland

The detailed premises for introducing particular categories of states of emergency are formulated in other provisions of the Constitution. Martial law may be imposed in the event of "an external threat to the state, an armed attack on the territory of the Republic

of Poland, or when an international agreement imposes an obligation of joint defence against aggression" (Art. 229). A state of emergency, in turn, may be introduced in the event of a "threat to the constitutional system of the state, the safety of citizens or public order" (Art. 230(1)). Both martial law and a state of emergency are imposed by the President of the Republic of Poland, but not on his initiative, but only at the request of the Council of Ministers. A state of natural disaster is imposed by the Council of Ministers "in order to prevent the consequences of natural disasters or technical failures bearing the hallmarks of a natural disaster and to remove them" (Art. 232(1)). As follows, moreover, from Art. 233(3) of the Constitution, during the state of natural disaster, based on the law, freedoms and rights specified in Art. 22 (freedom of economic activity), Art. 41(1, 3) and 41(5) (personal freedom), Art. 50 (inviolability of the dwelling), Art. 52(1) (freedom of movement and residence in the territory of the Republic of Poland), Art. 59(3) (right to strike), Art. 64 (right to property), Art. 65(1) (freedom of work), Art. 66(1) (right to safe and hygienic working conditions) and Art. 66(2) (right to rest) may be limited (Florczak-Wątor, 2020).

The Council of Ministers resigned from the formal introduction of a state of emergency, as provided in the Constitution of the Republic of Poland. Therefore, to introduce restrictions on freedoms and human rights, one cannot invoke extraordinary circumstances justifying specific legal solutions, and such circumstances cannot justify far-reaching limitations on civil liberties introduced in the form of regulations (Kardas, 2020). The epidemic should be fought within the framework of the constitutional order, which public authorities are obliged to respect. Without introducing a state of emergency, these bodies may operate only within the framework of ordinary constitutional limitation clauses appropriate for situations with no special threat. The failure to introduce a state of emergency, where there are extraordinary threats, may therefore be treated as a violation by a public authority body of the injunction to act on the basis and within the limits of the law, as formulated in Art. 7 of the Constitution.

The legal basis for combating epidemics in Poland became the Act of 2 March 2020 on specific solutions for preventing, counteracting and combating Covid-19, other infectious diseases and crises caused by them. Art. 25 of the Covid-19 Act introduced many changes to the December 5, 2008 Act on preventing and combating human infections and infectious diseases. First of all, Art. 46a, introduced into the Act, authorises the Council of Ministers to issue an ordinance specifying the area where the epidemic threat or epidemic occurs and introducing solutions through which such a state is to be combated, deserves particular attention. Initially, the legislation combating the epidemic was based on Art. 46 of the Act on preventing and combating infections and infectious diseases in humans. However, the provision expressing a blanket legislative delegation became the basis for the Minister of Health to issue several regulations that defined the rules of action during an epidemic and drastically restricted constitutional freedoms and rights. Using the authority granted in Art. 46 on preventing and combating infections and infectious diseases in humans, the minister issued regulations that independently regulated a range of issues reserved for the law and made drastic limitations of constitutional freedoms and rights. These limitations often encroach upon the essence of constitutional freedoms and rights.

Only then did the Council of Ministers turn to Art. 46a on preventing and combating human infections and infectious diseases. The mechanism of action was similar here. The determination of the state of emergency, and then of the epidemic, the principles of activity of state bodies and finally the limitation of constitutional rights was included not in a law, but in a regulation. The introduced method of limiting constitutional rights is inconsistent with Art. 31(3) of the Constitution and those provisions of Chapter II, which

introduce detailed limitation clauses (Tuleja, 2020). Art. 31(3) of the Constitution determines that limitations to the enjoyment of constitutional freedoms and rights may be established "only by statute". In light of the established jurisprudence of the Constitutional Tribunal, the statute must independently determine the basic elements of the limitation of a given right and freedom. In this way, the Constitution of the Republic of Poland expresses and implements the fundamental idea that limitations of constitutional rights and freedoms may be introduced and upheld only when they are provided for by a provision of universally binding law contained in a statute, i.e. a provision which a democratically legitimised parliament adopts by way of a legislative procedure provided for by law, which should guarantee the openness of parliamentary debate and the possibility of a pluralistic consideration of the various interests at stake, appropriately promulgated and promulgated, and in the case of which there exists – at least potentially – the possibility of subjecting it to preventive and subsequent control by the Constitutional Tribunal in terms of its compliance with the Constitution of the Republic of Poland. As rightly pointed out in the literature, the requirement of a statutory legal basis for the introduction of limitations to constitutional rights and freedoms is a manifestation of the principle of a democratic state (Art. 2 of the Constitution), in which supreme authority belongs to the Nation and in which the Nation exercises this supreme authority directly or through its representatives (Art. 4 of the Constitution), particularly through its representatives in Parliament. The Parliament, consisting of the representatives of the Nation, is recognised as the body which most adequately expresses the will of the Nation and can express that will in its laws. As a result, the laws passed by Parliament are intended to express the popular will, simultaneously the primary form of implementing the Nation's principle of sovereignty (supremacy). In this way, through laws passed by Parliament, the Nation can decide on regulating issues related to constitutional rights and freedoms of individuals. This is a legal solution that is fully consistent with the principles of modern democracy.

It is also worth noting that each of the analysed regulations contains solutions that interfere very deeply with the individual's rights, far exceeding the limits applicable during the normal functioning of the state. For example, freedom of economic activity within the scope of the types of activity listed in subsequent regulations has been suspended indefinitely. It also follows that the services may establish, among other things, temporary restrictions on a particular mode of movement, temporary restriction or prohibition of marketing and use of certain objects or food products, temporary restriction of the functioning of certain institutions or workplaces, prohibition of organisation of shows and other gatherings of the public, and an order to make real estate, premises, land and means of transport available for anti-epidemic activities provided for in anti-epidemic plans. In this way, a quasi-emergency state was de facto introduced in Poland.

As rightly pointed out in the doctrine of constitutional law, to recognise a given situation as fulfilling the criteria of a state of emergency, not all limitations provided for in the law on states of emergency must be introduced. Firstly – due to the principle of the autonomy of constitutional notions, and secondly – even in the case of a formal introduction of a state of emergency, emergency measures are not introduced automatically, but by the size and type of threat. There is no doubt that the formal prerequisites for the legal introduction of a state of emergency have not been fulfilled (Krzemiński, 2020). In particular, the competent authority has not issued, based on the existing acts on states of emergency, a regulation proclaiming a particular state of emergency in an appropriate procedure, and thus – a specific form of this state has not been indicated: martial law, state of emergency or state of natural disaster. Although from the formal point of view, the characteristic feature of a state of emergency is interference with the constitutional rights

and freedoms of an individual by means of sub-statutory acts, such an act is certainly not the abovementioned regulation of the Minister of Health of 20 March 2020, because it was not issued after the formal introduction of a state of emergency, and not based on the act determining the consequences of the introduction of such a state.

The question also arises whether ordinary laws may supplement the matters regulated in states of emergency. The answer does not follow directly from Art. 228 and subsequent provisions of Chapter XI of the Constitution. As rightly pointed out in the literature, considering the numerus clauses of states of emergency, it should be assumed that each state of emergency should be regulated by a separate act or by one act defining these states separately. It is also permissible for three states of emergency to be regulated by more than three laws. These laws must indicate that they have been enacted to concretise Art. 228 clause 1 of the Constitution.

Furthermore, the laws should specify within the scope of which state of emergency they are enacted. Considering the principles of legislative technique, the current legal state and three laws defining three constitutional states of emergency should be deemed optimal. The subject matter regulated by these laws may be supplemented or modified by ordinary laws. It should be borne in mind, however, that the special constitutional regime resulting from Art. 228 does not apply to these statutes. For example, the law on epidemics may not specify special principles for action by state organs and special limitations on human rights indicated in Art. 228(3) of the Constitution. Such special rules can only be determined by a specific act on the state of emergency and the regulation introducing this state. In this connection, it is possible to indicate a general relationship between the normal legislation and the legislation of states of emergency. Introducing one of the states of emergency does not suspend the binding force of normative acts indicated in Art. 87 of the Constitution. Nor does it cause all legislative activity to pass into the state of emergency specified in Art. 228 of the Constitution. The conduct of this activity may be carried out on normal principles. However, it should be borne in mind that counteracting the threats indicated in Art. 228(1) of the Constitution, which requires special rules for the functioning of the state and special limitations on human rights, should be carried out through emergency legislation.

Conclusions

In the Polish case, the government became the leader in managing the pandemic. This resulted in an avalanche of executive acts issued by various government administration bodies, which contradicted the principle of legal certainty and undermined citizens' trust in the state authorities and the laws it made. Moreover, the regulations issued during the pandemic were often incomprehensible due to their inconsistency and imprecision, and there were numerous references to other acts (including fragments of normative acts, some of which were upheld and the rest repealed). Thus, at least part of the lex coronavirus did not provide the individual with legal security because citizen could not be sure of the legal consequences of the acts undertaken. One has to agree with the statement that "if hard cases create bad law, emergencies create even worse law" (Carr, 1940). The cited quotation could summarise the Polish lex coronavirus, starting with coordinating legislative activities, which has become the proverbial Achilles' heel, and ending with the quality of created law. Another common problem of both constitutional orders was the numerous violations of the principle of division and balance of powers. As is well known, in emergency and crisis situations, the executive and not the Parliament become the "main player" in managing a given emergency. Situations of emergency are the "hour of the executive". This regularity has been confirmed by the fact that during the first month of the pandemic, the Polish Parliament *de facto* performed only one of its functions

– i.e the legislative one – albeit to a limited extent, as the remote meetings and the associated technical problems limited the already modest amount of discussion in the Polish political context. Furthermore, only legislation related to the coronavirus pandemic was in focus at the time.

From the material and legal point of view, *de facto* since the beginning of March 2020 there existed a legal state of emergency in Poland, which the Constitution defines. From the formal point of view, however, it has not been proclaimed, and even less a specific type of state of emergency has not been indicated (war, emergency, natural disaster). Thus, we are dealing with a hybrid state of emergency, implemented through the introduction of the norms constituting it into the legal system, but with the omission of the formal rigours set out in the Constitution, and not specified in terms of its type. We have, therefore, a situation in which the organs of public authority act under the rules provided for by the Constitution for a state of emergency, but without formally introducing this state, in this way trying to avoid the limitations that the Constitution introduces in this circumstance – in the form of a ban on holding elections (including presidential), referendum and prohibitions on amending the law (including the electoral code). It follows from the above that the analysed normative acts introduced a legal regime, which contains all the constitutive features of a state of emergency, including solutions provided for in the acts on particular states of emergency, such as binding orders of public administration bodies, restriction of rights and freedoms by executive order, restriction (and sometimes even abolition) of the freedom of movement, economic freedom, freedom of assembly and worship, restrictions on transport and trade in goods, orders to undergo medical procedures. The existence of a legal regime defined by Art. 228 of the Constitution as a state of emergency is indicated by the regulations violating the essence of constitutionally protected rights (economic freedom, freedom of movement, freedom of assembly), and violating the constitutional principle of self-government independence. While the analysed bans, orders and restrictions were substantively justified, the manner of their introduction led to a violation of fundamental rights and freedoms of the individual under the provisions of the Constitution of the Republic of Poland.

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