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## **Restrictions on Human Rights and Freedoms During the Time of Epidemic in Poland**

**Keywords:** human rights, epidemic, restrictions, extraordinary measures, state of natural disaster, proportionality, COVID-19

**Słowa kluczowe:** prawa człowieka, epidemia, ograniczenia, stany nadzwyczajne, stan klęski żywiołowej, proporcjonalność, COVID-19

### **Abstract**

When in 2020 the World Health Organization announced a COVID-19 contagious disease pandemic, it was clear that governments must take actions to limit the consequences of pandemics. Poland was one of the first to introduce far-reaching measures, limiting freedom of movement and closing an increasing number of business and activities. The Polish Constitution contains potential extraordinary measures, including the provision for declaring a “state of natural disaster”, but the Polish government has refrained from enacting it. Instead, it is based on a “state of epidemic”, which is not provided for in the Constitution as the legal ground for limiting human rights. The purpose of this study is to answer the question whether human rights restrictions introduced during the epidemic have a sufficient legal basis from the point of view of the Polish Constitution and the resulting principles.

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## Streszczenie

### Ograniczenia praw i wolności człowieka w czasie stanu epidemii w Polsce

Kiedy w 2020 r. Światowa Organizacja Zdrowia ogłosiła pandemię COVID-19, stało się jasne, że władze państwa muszą podjąć działania w celu ograniczenia jej skutków. Polska była jednym z pierwszych, które wprowadziło daleko idące środki ograniczające swobodę przemieszczania się i ograniczające różnego rodzaju działalność w tym gospodarczą. Polska konstytucja zawiera regulację odnoszącą się do stanów nadzwyczajnych, w tym postanowienia dotyczące możliwości wprowadzenia stanu klęski żywiołowej. Polski rząd nie zdecydował się jednak na jego wprowadzenie. W zamian, opierając się na ustawie, wprowadził „stan epidemii”, który nie jest przewidziany w konstytucji jako podstawa prawna ograniczenia praw człowieka w tym szczególnym czasie. Autorka próbuje odpowiedzieć na pytanie, czy ograniczenia praw człowieka wprowadzone w czasie epidemii mają wystarczającą podstawę prawną z punktu widzenia polskiej konstytucji i wynikających z niej zasad.

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## I.

In 2020, the whole world faced the need to solve the problem of the spreading epidemic. On March 11, 2020, the World Health Organization (WHO) announced a COVID-19 contagious disease pandemic, which meant that SARS-CoV-2 coronavirus had spread worldwide. The countries took various actions. Some of them decided to introduce drastic restrictions, others did not take any special actions. The most popular response to the coronavirus crisis has been a strict restriction on the right to freedom of movement. Some countries have imposed further restrictions under the officially declared “state of emergency”. This provides governments to impose extraordinary, constitutional or statutory measures.

According to WHO data, a total of almost 350000 people died as a result of the pandemic between December 31, 2019 and May 26, 2020 (data as of May 26, 2020). The effects could certainly be much more tragic if states would not have taken the rigorous actions to limit the spread of the threat.

Poland was one of the first to introduce far-reaching measures, limiting freedom of movement, closing an increasing number of business and activities such as the closure of restaurants, bars, universities, schools and kindergartens. The Polish Constitution contains potential extraordinary measures, including the provision for declaring a “state of natural disaster”, but the Polish government has refrained from enacting it<sup>2</sup>. Instead, it is based on a “state of epidemic”, which is not provided for in the Constitution as the legal grounds for limiting human rights. The Polish government decided to introduce the state of epidemic and regulate many specific issues in the act and in the regulations issued on its basis. Among the public, especially lawyers, there are many doubts if there should not be introduced a state of natural disaster. The purpose of this study is to answer the question whether human rights restrictions made during the epidemic have a sufficient legal basis from the point of view of the Polish Constitution and the resulting principles.

## II.

On March 12, 2020 in Poland an epidemic emergency has been introduced according with the Act on preventing and combating infections and infectious diseases in humans<sup>3</sup>. Then, on the basis of this Act, the state of the epidemic was announced on March 20, 2020. The Polish government relied on the Act, which since 2008 has regulated issues related to the epidemiological threat in Poland.

It sets out the principles and mode of preventing and combating infections and infectious diseases in humans, including the principles and mode of recognizing and monitoring the epidemiological situation and taking anti-epidemic and preventive actions to neutralize the sources of infection, cutting the pathways of spreading infections and infectious diseases and immunizing susceptible persons for infection. The tasks of public administration bod-

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<sup>2</sup> M. Radajewski, *The Regulations On Extraordinary Measures In The Constitution Of The Republic Of Poland: Their Content, Legal Nature And The Supervision Of Their Lawfulness*, “Ruch Prawniczy, Ekonomiczny i Socjologiczny” 2018, No. LXXX, pp. 134–137.

<sup>3</sup> Act of 5 December 2008 on the preventing and combating infections and infectious diseases in humans (con. text Dz.U. 2019, item 1239).

ies were also defined in the scope of preventing and combating infections and infectious diseases in humans. This act also contained a legal definition of an epidemic. According with Art. 2 point 9 'epidemic' means the occurrence (in a given area) of infections or contractions of an infectious disease in a significantly greater number than in the previous period or the occurrence of infections or infectious diseases not yet present. This statement made it possible to introduce the state of an epidemic denoting the legal situation introduced in a given area in relation to the outbreak in order to take the anti-epidemic and preventive measures specified in the Act to minimize the effects of the epidemic (Art. 2 point 22). According with the Art. 3.2 of this Act, the competent minister is authorized to announce, in case of danger of spreading an infection or an infectious disease other than those listed in the current list, by regulation, an infection or an infectious disease and, if known, the biological pathogen causing it, and if it is necessary, special treatment for healthcare providers and persons exposed to infection or illness for the time specified in the regulation.

Poland belongs to this category of states, in which the Constitution delineates conditions for extraordinary measures and the acts set out detailed provisions for each of them. For this reason, many representatives of constitutional law began to emphasize that the introduction of the state of the epidemic was not the right solution, and the only appropriate would be to introduce the state of natural disaster.

According to Art. 228.1 of the Polish Constitution<sup>4</sup> in situations of particular danger, if ordinary constitutional measures are inadequate, any of the following appropriate extraordinary measures may be introduced: martial law, a state of emergency or a state of natural disaster. The principles for activity by organs of public authority as well as the degree to which the freedoms and rights of persons and citizens may be subject to limitation for the duration of a period requiring any extraordinary measures shall be established by statute (Art. 228.3). In the further part of the constitution we read that in order to prevent or remove the consequences of a natural catastrophe or a technological accident exhibiting characteristics of a natural disaster, the

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<sup>4</sup> The Constitution of the Republic of Poland adopted on 2 April 1997 (Dz.U. No. 78, item 483).

Council of Ministers may introduce, for a definite period no longer than 30 days, a state of natural disaster in a part of or upon the whole territory of the state. An extension of a state of natural disaster may be made with the consent of the Sejm (Art. 232). Therefore, the Constitution does not define what a state of natural disaster is. According to Art. 233.3 the statute specifying the scope of limitations of the freedoms and rights of persons and citizens during states of natural disasters may limit the freedoms and rights specified in Art. 22 (freedom of economic activity), Art. 41, paras. 1, 3 and 5 (personal freedom), Art. 50 (inviolability of the home), Art. 52, para. 1 (freedom of movement and sojourn on the territory of the Republic of Poland), Art. 59, para. 3 (the right to strike), Art. 64 (the right of ownership), Art. 65, para. 1 (freedom to work), Art. 66, para. 1 (the right to safe and hygienic conditions of work) as well as Art. 66, para. 2 (the right to rest).

Some representatives of the doctrine of the constitutional law claim that, in the light of the constitution, it is permissible to statutory definition of crisis situations not creating a state of natural disaster and to specify ways to prevent and eliminate their effects. However, if crisis situations that could occur in the normal functioning of the state were defined in such a way that they exhibit the characteristics of a natural disaster, this would constitute a violation of the Constitution<sup>5</sup>. In other words, constitutionally unacceptable would be the statutory introduction of institutions that would not formally be one of the states of emergency, but would materially fulfill their features<sup>6</sup>. It is the Council of Ministers which assesses whether the conditions for introducing a state of natural disaster are met.

### III.

EU countries are not free to shape their emergency measures as they wish. EU treaties and human rights instruments such as the European Convention on Human Rights (ECHR), OSCE commitments, and the United Nations hu-

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<sup>5</sup> Judgement of Constitutional Tribunal of 21 April 2009, case No. K 50/07, OTK ZU 4A/2009, item 51.

<sup>6</sup> P. Tuleja, *Art. 232, [in:] Konstytucja Rzeczypospolitej Polskiej. Komentarz*, ed. P. Tuleja, Wolters Kluwer Polska 2019.

man rights treaty system, continue to apply even during crises<sup>7</sup>. These obligations guarantee human rights and the core elements of the rule of law during emergencies, such as the prohibition of torture, inhuman or cruel treatment and punishment. Other rights and freedoms may be limited, but their essential core must remain intact<sup>8</sup>. National security and public health are primarily the responsibility of each EU country, which means that each state has its own regulations to deal with large scale crises or states of emergency. Some countries have an array of detailed states of emergency to be introduced depending on the nature of the threat outlined in their constitutions. Similarly stated the United Nations High Commissioner for Human Rights: “The situation presented by the COVID-19 pandemic requires many countries worldwide to take extraordinary measures to protect the health and well-being of the population. Even in a public emergency, these steps need to be based on the rule of law”<sup>9</sup>.

Article 5 of the Polish Constitution provides, among others, that human and citizen freedoms and rights, derived from the principle of respect for human dignity. Any limitation upon the exercise of constitutional freedoms and rights may be imposed only by the statute, and only when necessary in a democratic state for the protection of its security, public order, natural environment, health, public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights (Art. 31.3 of the constitution).

Therefore, it seems that in the state of natural disaster, an act (and a regulation issued on its basis) may limit the rights and freedoms set out in Art. 233.3 of the Polish Constitution and may interfere with their essence. As indicated, in this case the default mechanism specified in Art. 31.3 will not be applied. However, since the government has not decided to introduce extraordinary measures, we must apply the general principles resulting from Art. 31.3 of

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<sup>7</sup> Vide: K. Prokop. *Stany nadzwyczajne w konstytucji Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r.*, Białystok 2005, p. 126.

<sup>8</sup> Democracy Reporting International, *Emergency measures and the rule of law in the age of covid-19*, March 31, 2020, [https://democracy-reporting.org/dri\\_publications/emergency-measures-and-the-rule-of-law-in-the-age-of-covid-19](https://democracy-reporting.org/dri_publications/emergency-measures-and-the-rule-of-law-in-the-age-of-covid-19) (28.05.2020).

<sup>9</sup> United Nations Human Rights Office of the High Commissioner, *Topics in Focus Emergency Measures and Covid-19*, April 27, 2020, [https://www.ohchr.org/Documents/Events/EmergencyMeasures\\_COVID19.pdf](https://www.ohchr.org/Documents/Events/EmergencyMeasures_COVID19.pdf) (28.05.2020).

the Constitution. Any restrictions on the constitutional freedoms of the individual should therefore be assessed from the point of view of the principle of proportionality (which means that they must be useful, necessary and appropriate). Analysis of the provision 31.3 leads to the conclusion that it is not enough to be convinced of the need to introduce restrictions because of the need to ensure the protection of other people's health or even the whole of society. Such a restriction must be necessary in a democratic state, and at the same time it cannot violate the essence of any freedoms or rights. It must not lead to total deprivation of the possibility of exercising constitutional freedoms and rights<sup>10</sup>.

The Polish Constitutional Court analyzed the admissibility of restrictions on human rights by answering four questions. First, whether the introduced legislative regulation is able to lead to the intended effects (usefulness). Second, whether this regulation is necessary to protect the public interest (necessity). Third, whether substance or effects of the introduced regulation remain in proportion to the burdens it imposes on the citizen (proportionality in the strict sense)<sup>11</sup>. Fourth, whether it violates the essence of the law (impassable core that can never be violated)<sup>12</sup>.

#### IV.

The act on the prevention and control of human infectious diseases and infection in humans, does not pass the requirements of the Art. 31.3 of the Polish Constitution. It is claimed that the law limiting human rights and freedoms

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<sup>10</sup> J. Kwaśniewski, T. Zych, M. Olszówka, K. Dyda, *Analiza wprowadzonych w związku z przeciwdziałaniem epidemii koronawirusa ograniczeń wolności religii i swobody przemieszczania się w świetle standardów Konstytucji RP i prawa międzynarodowego z 16.04.2020*, <https://ordoiuris.pl/wolnosci-obywatelskie/analiza-wprowadzonych-w-zwiazku-z-przeciwdzialaniem-epidemii-koronawirusa> (28.05.2020).

<sup>11</sup> Judgements of Constitutional Tribunal of: 26 April 1995, case No. K 11/94, OTK ZU 1995, item. 12; 28 June 2017, case No. P 63/14, OTK ZU A/2017, item 55; 26 June 2019, case No. K 16/17, OTK ZU A/2019, item 49; 19 December 2002, case No. K 33/02, OTK ZU 7A/2002, item. 9.

<sup>12</sup> A. Śledzińska-Simon, *Analiza proporcjonalności ograniczeń konstytucyjnych praw i wolności. Teoria i praktyka*, Wrocław 2019, p. 53; P. Tuleja, *Art. 31...*

should outline the scope of the limitations, indicating what exact elements of a right or freedom can be limited and leaving as little as possible, preferably just the technical details, to lower-level legislation – a regulation introduced by the executive. Certainly, these claims are not wrong. But the Act on the state of natural disaster also does not meet such conditions. It also refers to acts of lower rank than statutes, like regulations. Constitutional doubts are raised by compliance with some of the restrictions introduced during the epidemic from the point of view of the principle of proportionality. As an example, the restrictions on the exercise of freedom of religion can be indicated. According to the Art. 53 of Polish Constitution, freedom of conscience and religion shall be ensured to everyone. Freedom of religion shall include the freedom to profess or to accept a religion of personal choice, as well as to manifest such a religion, either individually or collectively, publicly or privately, by worshipping, praying, participating in ceremonies, performing rites or teaching. Freedom of religion shall also include possession of sanctuaries and other places of worship for the satisfaction of the needs of believers, as well as the right of individuals, wherever they may be, to benefit from religious services. The freedom to publicly express religion may be limited only by means of statute and only if it is necessary for the defense of state security, public order, health, morals or the freedoms and rights of others<sup>13</sup>.

In the regulation of March 13, 2020<sup>14</sup>, and then of March 20, 2020<sup>15</sup>, the Polish Minister of Health introduced a restriction on the exercise of religious worship in public places, including buildings and other religious facilities, by introducing a limit of 50 participants. In the period from March 24 to April 11, 2020, the limit was 5 participants. In practice, this meant preventing lay people from participating in the celebration of the liturgy during the celebration of Easter. These restrictions were extended to April 20, 2020. It should be particularly emphasized that no provision of the Act on the prevention and con-

<sup>13</sup> Vide: W. Papis, K. Kijowski, *Wolność sumienia i wyznania w polskim prawie konstytucyjnym a konstytucyjna neutralność*, "Roczniki Administracji i Prawa" 2018, No. XVIII, pp. 32–33.

<sup>14</sup> Regulation of the Minister of Health of 13 March 2020 regarding the announcement of an epidemic emergency in the territory of the Republic of Poland (Dz.U. item 433) (§ 5.1 pt. 4 and § 6.1. pt. 3).

<sup>15</sup> Regulation of the Minister of Health of 20 March 2020 regarding the announcement of the state of the epidemic in the territory of the Republic of Poland (Dz.U. item 491) (§ 6.1 pt. 4 and § 7.1 pt. 3).



trol of human infectious diseases and infection authorized the introduction of restrictions on the exercise of freedom of religion in connection with the announcement of emergency epidemic or epidemic, and even the complete deprivation of believers from the possibility of participating in religious practices. It is a fact that the spread of SARS-CoV-2 can only be limited by introducing far-reaching restrictions on direct contact between people because the pathogen is transmitted via the droplet pathway. The introduction of quantitative limits for the faithful who simultaneously participate in exercising religious worship is necessary to achieve the goal intended by the legislator. In the Polish case, however, this happened without a proper legal basis and the government did not justify why it was necessary to set a limit on the number of participants in religious worship first to 50 and then to 5 people<sup>16</sup>.

The scope of the movement ban contained in the regulation of the Minister of Health of March 24, 2020 also raised considerable doubts<sup>17</sup>. There were 4 exceptions to this prohibition: performing professional activities or business tasks, or non-agricultural economic activity, or conducting agricultural activity or work on a farm; satisfying the necessary needs related to current matters of everyday life, including obtaining health or psychological care and the purchase of goods and services related thereto; providing voluntary and unpaid services to counteract the effects of COVID-19, including volunteering; exercising or participating in the exercise of religious worship, including religious activities or rites. The act on the prevention and control of human infectious diseases and infection empowers the government to limit the freedom of movement in Poland through “temporarily limiting a particular means of movement” (Art. 46 par. 4 pt. 1) and “prescribing a particular mode of movement” (Art. 46b pt. 12). These provisions are very unclear. The resolution of the Council of Ministers from March 31<sup>18</sup> established a blanket prohibition of any personal movement within Poland with exceptions related to some essential needs. The government was simply not empowered to prohibit move-

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<sup>16</sup> J. Kwaśniewski, T. Zych, M. Olszówka, K. Dyda, *op.cit.*

<sup>17</sup> Regulation of the Minister of Health of 24 March 2020 amending the ordinance on announcing the status of the epidemic in the territory of the Republic of Poland (Dz.U. item 522).

<sup>18</sup> Regulation of the Council of Ministers of 31 March 2020 on establishing certain restrictions, orders and bans in relation to the occurrence of the epidemic (Dz.U. item 566).

ment in general. Article 92 of the Polish Constitution states that resolutions may be introduced by the relevant bodies only based upon a clear authorization in the statute<sup>19</sup>. There is not such an authorization for the government “to flat out prevent any form of movement in the country, even if exceptions to this ban are rather broad and allow exercising some of the most important daily activities, such as moving between one’s residence and workplace”<sup>20</sup>.

The restrictions introduced were criticized for their lack of rationality. It is difficult to justify the rationality of the obligation to maintain a minimum distance of two meters even between spouses, family members living under one roof or other persons residing in the same household on a daily basis, a ban on entering the forest, or an order to move a person under the age of 18 only under the care of a person exercising parental authority, legal guardian or other adult.

## V.

In conclusion it must be emphasized that the COVID-19 pandemic has reached enormous proportions and has affected the whole world. It was an extraordinary and unexpected situation. There was no country ready to fight the pandemic. The knowledge about the measures limiting the spread of the virus was primarily derived from the experience of countries that had previously suffered the pandemic. Many countries have made various decisions on the ongoing basis or passed laws due to sudden circumstance. The ongoing pandemic requires a number of restrictions on the use of constitutionally guaranteed human freedoms and rights. In any case, however, they must be genuinely necessary to achieve the objectives set by the legislator, while at the same time, if possible, interfering with these rights as little as possible.

SARS-CoV-2 coronavirus pandemic determines in Poland and many other countries quite extraordinary actions of state authorities. Experiences es-

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<sup>19</sup> *Vide*: H. Zięba-Zalucka, *Wolność przemieszczania się w ustawodawstwie międzynarodowym i polskim*, “Przeгляд Prawa Konstytucyjnego” 2013, No. 2, pp. 42–48.

<sup>20</sup> J. Jaraczewski, *An Emergency By Any Other Name? Measures Against the COVID-19 Pandemic in Poland*, <https://verfassungsblog.de/an-emergency-by-any-other-name-measures-against-the-covid-19-pandemic-in-poland> (28.05.2020).

pecially of Italy or Spain prove that neglect in counteracting the development of the epidemic leads to its uncontrolled expansion, and thus exceeds the potential of simultaneous provision of health services and the collapse of the healthcare system. However, in a democratic state ruled by law – that is the Republic of Poland (Art. 2 of the Polish Constitution) – any restrictions that interfere with human rights and freedoms must meet material and formal criteria, and be proportionate. The government has not decided yet to introduce a state of natural disaster that would allow to introduce more restrictive restrictions on human rights. Therefore, the government should use those which are admissible without announcing the extraordinary measures. Each restriction should have a clearly indicated basis in the Act and should comply with Art. 31.3 of the Constitution but also agree with the terms of those specific constitutional provisions in which it is regulated.

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