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**Restrictions in Freedom of Business Activity and  
Worker Rights. Comparative Analysis of Provisions in  
Force During the 1<sup>st</sup> Wave of COVID-19 Pandemic and  
Constitutional Regulations on the State of Emergency**

**Keywords:** COVID-19, state of emergency, worker rights, labor law, epidemic

**Słowa kluczowe:** COVID-19, stan klęski żywiołowej, prawa pracownicze, prawo pracy, epidemia

**Abstract**

The reaction of the Polish government to the COVID-19 pandemic was the undertaking of numerous actions, which resulted in restrictions in running a business activity. The made decisions gave rise to controversies due to the scale of restrictions despite failure to implement any of the constitutional states of emergency. The article presents an analysis of the scale of restrictions set during the first wave of the pandemic, and an attempt was made to compare their scope with solutions envisioned for the state of emergency.

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## Streszczenie

### **Ograniczenia swobody działalności gospodarczej oraz praw pracowniczych. Analiza porównawcza przepisów obowiązujących podczas I fali pandemii COVID-19 oraz konstytucyjnych regulacji stanu klęski żywiołowej**

Reakcją polskiego rządu na pandemię COVID-19 było podjęcie licznych działań, które spowodowały ograniczenia w prowadzeniu działalności gospodarczej. Podjęte decyzje budziły szereg kontrowersji ze względu na skalę obostrzeń pomimo niewprowadzenia żadnego z konstytucyjnych stanów nadzwyczajnych. W artykule poddano analizie skalę ograniczeń ustanowionych w trakcie pierwszej fali pandemii oraz podjęto próbę porównania ich zakresu z rozwiązaniami przewidzianymi dla stanu klęski żywiołowej.

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## I. Introduction

Immediately after diagnosing the first patient infected with the SARS-CoV-2 virus in Poland, a state of epidemic emergency was implemented<sup>3</sup>. A few days later, it has been changed to the state of epidemic remaining in force until further notice<sup>4</sup>. The restrictions in running a specific type of business activity<sup>5</sup> related to the state of epidemic focused on prevention of threat to citizens life and health, aimed at reducing social contacts to a minimum to mitigate the risk of contracting COVID-19. The implemented restrictions hit the hardest the following sectors: tourist, food catering, culture and entertainment, cos-

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<sup>3</sup> It occurred under the Minister of Health's Regulation of March 13, 2020 on the announcement of the state of epidemic emergency on the territory of the Republic of Poland (Dz.U. item. 433).

<sup>4</sup> It occurred under the Minister of Health's Regulation of March 20, 2020 on the announcement of the state of epidemic on the territory of the Republic of Poland (Dz.U. item. 491).

<sup>5</sup> Established in the Council of Ministers' Regulation of May 6, 2021 on the establishment of specific restrictions, orders, and prohibitions related to the occurrence of the state of epidemic (Dz.U. item. 861).

metic, and sports sectors, which constituted as a severe hazard to the stability of public finances and national economy<sup>6</sup>.

The article analyses restrictions in running the business activity and worker rights during the first wave of the COVID-19 epidemic in Poland. As the turning point defining the end of the so-called first wave was recognized the decision to abolish controls on the internal EU borders, which was in force in Poland since June 13, 2020. The purpose of the article was to verify the research hypothesis, which assumes that the scale of implemented restrictions related to the COVID-19 epidemic in the area of running the business activity and in the area of worker rights corresponded to solutions envisioned for the state of emergency. During the conducted analysis, the following research questions were set: 1) What was the form of implemented restrictions for running a business activity and services provided by workers? 2) How was the decision on implementation of restrictions and their form motivated? 3) In the light of the constitutional principle of finality of states of emergency, is the Act on COVID-19 a sufficient measure to carry out the prevention of effects of the pandemic caused by COVID-19? 4) Is there a scope of approved restriction of worker rights aimed at improving the situation of entrepreneurs toward results of the pandemic caused by COVID-19? If yes, what is its range? 5) Were the indicated boundaries observed in the Act on COVID-19?

The research was conducted using an institutional and legal analysis, which was necessary to interpret the valid normative acts and explain political phenomena<sup>7</sup>. A method of analogy, which allowed to analyze similarities and differences between undertaken solutions and possibilities envisioned in provisions on the state of emergency<sup>8</sup>, has also been used. Due to the framework of this publication, it does not exhaust the undertaken subject and contributes to a broader scientific discussion.

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<sup>6</sup> J. Węgrzyn, *Realizacja normy programowej wynikającej z art. 68 ust. 4 Konstytucji RP w stanie epidemii COVID-19 (uwagi ogólne)*, "Przegląd Prawa Konstytucyjnego" 2021, No. 3 (61), p. 149.

<sup>7</sup> A. Pięta-Szawara, *Podstawowe metody i techniki w badaniach politologicznych*, [in:] *Podstawowe kategorie badawcze w nauce o polityce*, ed. P. Maj, Rzeszów 2013, p. 145.

<sup>8</sup> W. Łukowski, *O zastosowaniu podejścia jakościowego do badań nad polityką i politycznością*, "Studia Politologiczne" 2009, vol. 14, pp. 39–40.

## II. Restrictions in Running a Business Activity

The state of emergency can cause numerous restrictions for workers and employers. According to Art. 21 of the Act of April 18, 2002 on the state of emergency, when such state of emergency is in force, it is possible to 1) suspend the activity of certain entrepreneurs; 2) order or prohibit running of specific business activity; 3) order an employer a secondment of workers to the disposal of authority managing actions performed in order to prevent or remove results of the state of emergency; 4) regulate in part or in whole the supply with particular goods; 5) impose an obligation to subject to medical examination, treatment, protective vaccination, and use of other preventive measures and treatments necessary to fight contagious diseases and results of chemical and radioactive contamination; 6) prohibit organization or performance of mass events<sup>9</sup>.

The Art. 22 of the Constitution states that restriction in running a business activity can be implemented only by way of Act due to an important public interest<sup>10</sup>. In case of epidemic occurrence, certain restrictions may result from the Act of December 5, 2008 on the prevention and fighting infections and contagious diseases among people<sup>11</sup>. In Art. 46b, the legislator envisions the following possibilities: 1) temporary restriction of particular entrepreneur activities; 2) temporary regulation of supply with particular goods. In pt. 1 of the subject matter article was formulated a reference to Art. 46, pt. 4, which among other things, states that a temporary restriction in the operation of specific institutions or places of employment may occur.

It should be mentioned that Art. 46b has been added with the Act of March 2, 2020 on particular solutions related to prevention, counteracting, and fighting COVID-19, other contagious diseases, and states of emergency caused by them<sup>12</sup>. These provisions were not envisioned in the subject matter Act before the real risk of epidemic appeared.

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<sup>9</sup> K. Prokop, *Stany nadzwyczajne w Konstytucji Rzeczypospolitej Polskiej*, Białystok 2005, pp. 136–137.

<sup>10</sup> The Constitution of the Republic of Poland of April 2, 1997 (Dz.U.No. 78, item. 483 as amended).

<sup>11</sup> Act of December 5, 2008 on the prevention and fighting infections and contagious diseases among people (Dz.U.No. 234, item. 1570).

<sup>12</sup> Dz.U. item. 1842, hereinafter: the Act on COVID-19.

### **III. Pandemic and Restrictions (Method of their Implementation and Scope of Restriction)**

The Parliament of the Republic of Poland reacted to the global increase in COVID-19 cases by adopting the Act on COVID-19, which implemented special solutions to counteract and fight COVID-19. On March 12, 2020, the Minister of Health decided to implement the state of epidemic threat<sup>13</sup>. The next step aimed at undertaking a greater effort to fight the epidemic was implementing the Minister of Health's Regulation of March 20, 2020 on the announcement of the state of the epidemic on the territory of the Republic of Poland. This Regulation restricted the ability to run a business activity consisting of 1) preparing and serving meals; 2) related to organization, promotion, or managing events; 3) creative activity related to any mass forms of culture and entertainment; 4) related to sport, entertainment, and recreation; 5) projection of movies and video records; 6) running casinos; 7) activity of libraries, archives, museums, and other activity related to culture. In reality, the Regulation contributed to the implementation of prohibition to run specific types of activity, which has been highlighted in §7, in which pt. 2 has the wording: pt. 1 and 2 consist of complete prohibition of running activity. The provision deciding about the prohibition to run a business activity was also in force in subsequent regulations of the Council of Ministers. The provisions of the Act on counteracting and fighting infections and contagious diseases among people did not envision a prohibition in running a business activity, but only its restriction<sup>14</sup>.

Administrative courts pointed to the unconstitutionality of this solution. An example may be the ruling of the Voivodeship Administrative Court in Opole, which decided that the prohibition to run specific business activity implemented by way of regulations intrudes into the essence of business activity freedom. The Court stressed that the employer's interference in this zone is possible using measures envisioned by the Consti-

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<sup>13</sup> *Od dziś wprowadzimy stan zagrożenia epidemicznego*, <https://www.gov.pl/web/zdrowie/od-dzis-wprowadzimy-stan-zagrozenia-epidemicznego2> (1.06.2021).

<sup>14</sup> Act of December 5, 2008 on the prevention and fighting infections and contagious diseases among people (Dz.U.No. 234, item. 1570).

tution of the Republic of Poland while stating that this can be done with the Act, which results from Art. 233, par. 3 of the Constitution of the Republic of Poland. In the Court's opinion, interference in the business activity zone is possible only using states of emergency envisioned in the Constitution of the Republic of Poland. No state authority should interfere in the matter constituting the essence of business activity freedom in a situation where no state of emergency envisioned in the Basic Law has been implemented<sup>15</sup>.

An interesting position in a similar case was presented by the Voivodeship Administrative Court in Bydgoszcz, which in an issued ruling stated that the occurring situation related to the spread of SARS-CoV-2 virus infections fully justifies the implementation of restrictions concerning constitutional rights and freedoms. The Court stressed that implementing multiple restrictions was necessary due to the scale of hazard. In the Court's opinion, most people suffered the burdens of restriction, while the applicant used legal vacuums to undermine those actions<sup>16</sup>.

In the zone of restricting business activity freedoms, the provisions of the Council of Ministers' Regulation of March 31, 2020, resemble regulations contained in the Act on the state of emergency, which indicate the possibility of prohibiting running a business activity. Even though the Regulation was issued based on the Act of December 5, 2008 on the prevention and fighting infections and contagious diseases among people, the provisions of invoked legal act do not allow such possibility. The phenomenon of implementing solutions envisioned for emergencies in provisions, which are issued without the implementation of a proper state of emergency, is unsettling. Hazards caused by the epidemic justify the undertaking of decisive solutions but do not justify the implementation of provisions contrary to constitutional principles. During the first wave of the COVID-19 epidemic, the prohibition against running a business activity ceased to apply on June 6, 2020.

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<sup>15</sup> II SA/Op 219/20 – Ruling of the Voivodeship Administrative Court in Opole, <https://orzeczenia.nsa.gov.pl/doc/C73366F87D> (1.06.2021).

<sup>16</sup> II SA/Bd 834/20, Ruling of the Voivodeship Administrative Court in Bydgoszcz, <https://orzeczenia.nsa.gov.pl/doc/445D50BE66>. (1.06.2021).

#### **IV. Worker Rights and Freedoms as a Measure of Improving the Situation of Entrepreneurs Affected by Results of the COVID-19 Pandemic**

Restrictions in worker rights as an anti-crisis instrument should be perceived in categories of any activities mentioned in the Act on COVID-19 focused on counteracting social and economic results of the COVID-19 contagious disease. By referring to the Act on the protection of workplaces<sup>17</sup>, the legislator implies that the purpose of adopted solutions dedicated for entrepreneurs affected by results of restrictions in running a business activity during the pandemic is to protect workplaces. Mass worker discharges could lead to civil disturbances caused by economic recession and loss of stability by public finances.

Due to the purpose of adopted solutions, their recipient is an entrepreneur, who: (1) experienced a fall in economic turnover understood as the sale of goods or services according to principles determined in Art. 15g, par. 9, pt. 1 and 2 of the Act on COVID-19, or (2) experienced a fall in economic turnover understood as the sale of goods or services as a consequence of COVID-19 and in relation to which occurred a significant increase in burdening of wage fund mentioned in Art. 15g, par. 2 of the Act on COVID-19. Regarding employers classified in both categories, the support instruments in the scope that is interesting us consist of the right to: reduce the remuneration, reduce working time, reduce the amount of briefing, compensation, or other cash consideration paid out in relation to the termination of an employment agreement, suspension of the obligation to create or operate a social benefit fund in a plant, making a basic write-off, or paying out a leave benefit. In addition, the employer classified in the first category can reduce the uninterrupted daily rest, implement a balanced working time system that allows extending daily working time, and use less favorable worker employment conditions than conditions resulting from employment agreements concluded with the said workers.

Despite the similarities between the state of the epidemic and the state of emergency, the indicated provisions of the Act on COVID-19 have a broader material scope in the field of restricting worker rights. It results from the

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<sup>17</sup> Act of November 11, 2013 on particular solutions related to protection of work places (Dz.U. 2019, item. 669).

fact that the Act on COVID-19 is not subject to assessment in the plane of clause enclosed in Art. 233, par. 3 of the Constitution of the Republic of Poland. Therefore, it is possible to express a concern regarding whether stopping at measure counteracting the state of epidemic hazards, which is recognized as “normal” in the wording of Art. 228, par. 1 of the Constitution of the Republic of Poland leads to the omission of guaranteed control of restricting worker rights at the constitutional level that is applicable in the state of exception – state of emergency.

From the point of view of boundaries, which allow to restrict worker rights, enclosed in the Act on COVID-19, the assessment of adopted legal solutions should be done in the plane of Labor Law and its protective function, as well as in the plane of the constitutional right and resulting principles of restricting constitutional human freedoms and rights. The protective nature of Labor Law control consists of granting workers a minimum of rights, which could be stripped from the worker if the employment conditions agreement would be left to free action of market mechanism based on the principle of freedom of contract and principle of (formal) equality of parties<sup>18</sup>. A common mistake is the omission of the employer’s point of view in the discourse on the protective function of the Labor Law. The situation caused by the COVID-19 pandemic proves that the warranty of unchangeability of worker rights granted to workers in the Labor Law provisions might not suffice to ensure its effective protection. The connection (balance) between the interests of the employer and the worker in pandemic conditions requires taking a look at the protection of the worker’s interest from a broader perspective. In this case, this interest consists of maintaining employment based on a worker’s economic and social existence. In cases determined in the Act on COVID-19, a timely degradation of employment conditions does not lead to resignation from the protective function but rather to applying it to an emergency at the workplace. The participation of worker representatives constitutes a warranty of protecting the interest of workers<sup>19</sup>.

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<sup>18</sup> Z. Salwa, *Funkcje prawa pracy (Labour Law functions)*, [in:] *Zarys systemu prawa pracy. Tom I. Część ogólna prawa pracy (Overview of the Labour Law system. Volume 1. General part of the Labour Law)*, ed. K.W. Baran, Warsaw 2010, p. 179.

<sup>19</sup> Such view at the background of Labor Code regulations, which allow to degrade employment conditions by the way of collective agreements, has been expressed by a.o. Ł. Pisarczyk,



In the scope of the provision concerning the restriction of worker rights, the Act on COVID-19 does not contain a reference to the principle of proportionality as it is done by the Constitution of the Republic of Poland in the context of actions undertaken as a result of imposing a state of emergency (Art. 228, par. 5). However, the obligation to maintain the principle of proportionality has the nature of general principle and results from Art. 31, par. 3 of the Constitution of the Republic of Poland<sup>20</sup>. In general, the implementation of the restrictions caused by the COVID-19 pandemic serves the purpose of carrying out the public interest in a broad sense, which is expressed in ensuring civil peace and safety and ensuring national safety and its democratic development in the broader perspective<sup>21</sup>. However, in the context of the previous remark, one can have reservations whether the material scope of worker right restriction, which is broader than the scope of state of emergency, in the Act on COVID-19 that is a “normal” measure to restrict the said rights allows to positively evaluate solutions adopted in this Act from the point of view of the principle of proportionality.

The restrictive nature can also be attributed to other general principles of restricting freedom and rights available to workers and employers<sup>22</sup>: protection of human dignity, common good, solidarity, social justice, and subsidiarity. The obligation of solidarity in fights against the social and economic results of COVID-19 can justify the restriction of worker rights to carry out a common good (achieving civil peace). In the context of the principle, the care for the employer’s well-being as an entity providing employment allows recognizing restriction of certain worker rights to fight social and economic results of COVID-19 for the duration necessary to carry out this goal as justified<sup>23</sup>. In general, the timely restriction of certain worker rights will not also

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*Przeobrażenia prawa pracy a jego funkcja ochronna*, [in:] *Studia prawnicze. Rozprawy i materiały. „Proaktywna” funkcja prawa pracy?*, eds. B. Wagner, E. Hofmańska, Krakow 2010, pp. 35–36.

<sup>20</sup> P. Tuleja, *Komentarz do artykułu 31*, [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, eds. P. Czarny, M. Florczak-Wątor, B. Naleziński, P. Radziejewicz, P. Tuleja, Warsaw 2021.

<sup>21</sup> L. Garlicki, K. Wojtyczek, *Komentarz do artykułu 31, teza 34 i 35*, [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, vol. II, eds. L. Garlicki, M. Zubik, Warsaw 2016.

<sup>22</sup> T. Liszcz, *Praca i kapitał w Konstytucji Rzeczypospolitej Polskiej*, “*Studia Iuridica Lublensia*” 2014, No. 22, p. 259.

<sup>23</sup> A. Sobczyk, *Solidarność horyzontalna a ograniczenie praw pracownika*, “*Praca i Zabezpieczenie Społeczne*” 2013, No. 2, p. 11.

pose a threat to worker's dignity provided it will not lead to degradation of worker's economic situation to a situation close to social exclusion<sup>24</sup>. The discussed statutory solutions will also not lead to depletion of the role of social partners if the decision on implementation and determination of the scope of restrictions will remain under the control of social partners.

## V. Conclusion

The conducted research analysis allows to formulate a few detailed thoughts and acquire answers to the set research questions. Firstly, the restrictions were implemented using statutory regulations and decrees, which detailed the scope and method of carrying out the restrictions. Secondly, it is possible to deduct that the adopted method of implementing restrictions resulted from the lack of political will to impose a state of exception. The leading politicians from the government environment also stressed the lack of fulfillment of premises and the creation of a series of possibilities to react to the crisis using regulations and amendments to acts. Thirdly, the lack of imposing the state of emergency and stopping at "normal" protective measures might indicate in the zone of worker rights to bypass the constitutional restriction of worker rights in force during the state of exception. Fourthly, the restrictions of worker rights enclosed in the Act on COVID-19 are subject to evaluation in the plane of Labor Law and its functions, as well as in the plane of constitutional rights and general principles resulting from it. Fifthly, the restriction of worker rights enclosed in the Act on COVID-19 remains pursuant to the protective function of Labor Law. Sixthly, the Regulation of the Act on COVID-19 raises doubts from the point of view of the principle of proportionality.

The research hypothesis about the restrictions in running the business activity has been verified positively. The actions undertaken by the government aimed at restricting the development of epidemic only in this scope resembled in their shape solutions envisioned for the state of emergency. The prohibition to run a business activity enclosed in regulations issued during the first wave of the COVID-19 epidemic has been taken from the Act on the state of emergency. The Act on counteracting and fighting infections and contagious dis-

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<sup>24</sup> Ibidem, p. 12.

eases among people does not envision such a prohibition. However, the Regulation of the Act on COVID-19 in worker rights has a broader material scope in relation to allowed restrictions of these rights in the state of emergency.

The lack of decision determining the imposing of the state of emergency has resulted in the adopted solution in both fields, raising numerous controversies. There is no doubt that their purpose was to restrict negative results of possible crisis and quick dismissal of threat. Despite the relevant premises, the execution of necessary actions should be done with respect to provisions of the Basic Law, especially because constitutional legislator has envisioned the possibility of occurrence of such situation and has included appropriate provisions dedicated to states of exception in the Constitution of the Republic of Poland.

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