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**The Problem of the Constitutionality of State of the
Epidemic and the Restrictions on Political Freedoms
and Rights. Legal and Comparative Sketch**

Keywords: The Constitution, state of the epidemic, state of natural disaster, legality, political freedoms and rights

Słowa kluczowe: Konstytucja, stan epidemii, stan klęski żywiołowej, legalność, wolności i prawa polityczne

Abstract

The outbreak of the COVID-19 epidemic in the world made it necessary to take action to minimize the negative consequences for human health and life and the economy. Citizens' political freedoms and rights are among the most important rights in a democratic state. In Poland, the Minister of Health introduced the "state of epidemic" by way of a regulation. The procedure and rank of adopted legal acts raised constitutional doubts from the very beginning. First of all, the failure to introduce one of the constitutionally defined states of emergency, especially a state of natural disaster, which by its nature corresponded the best to the epidemic situation in the country. The author put forward the thesis that the state of the epidemic announced in Poland did not meet the constitutional requirements and that there were no grounds for the introduced restrictions on the freedom and rights of an individual. Legal solutions introduced in selected countries in terms of their constitutionality are also compared.

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Streszczenie**Problem konstytucyjności stanu epidemii i ograniczeń wolności i praw politycznych. Rys prawno-porównawczy**

Wybuch pandemii wirusa COVID-19 na świecie spowodował konieczność podjęcia działań mających na celu zminimalizowanie negatywnych skutków dla zdrowia i życia ludzi oraz gospodarki. Wolności i prawa polityczne obywateli należą do najważniejszych praw w demokratycznym państwie. W Polsce Minister Zdrowia wprowadził w drodze rozporządzenia stan epidemii. Procedura i ranga przyjętych aktów prawnych od początku budziły wątpliwości konstytucyjne. Przede wszystkim niewprowadzenie jednego z konstytucyjnie określonych stanów nadzwyczajnych, w szczególności stanu klęski żywiołowej, który ze swej natury najlepiej odpowiadał sytuacji epidemicznej w kraju. Autorka wysunęła tezę, że stan epidemii ogłoszony w Polsce nie spełniał wymogów konstytucyjnych i brak było podstaw dla wprowadzonych ograniczeń wolności i praw jednostki. Dokonała również porównania rozwiązań prawnych wprowadzonych w wybranych państwach pod kątem ich konstytucyjności.

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I. Introduction

The COVID-19 pandemic has hit all countries around the world. In view of the unprecedented epidemic threat, the governments have taken a number of measures to minimize its negative consequences. Within their constitutional powers states took legislative actions that provided a legal basis for introducing orders, prohibitions or restrictions on the rights and freedom of individuals. In some states, however, a problem has arisen as to whether the solutions introduced under the extraordinary procedure are duly constitutionally based. Initially, the necessity to make immediate decisions by the authorities justified the insufficient support of the adopted legal regulations in constitutions, with time these deficiencies were removed. However, not all countries have fully complied with the constitution in this regard.

In Poland, in order to prevent the consequences of the threat it was passed the Act of 2 March 2020 on special solutions related to the prevention and combating of COVID-19, other infectious diseases and emergencies caused

by them². On 20 March 2020 by way of regulation of the Minister of Health, the state of the epidemic³ was declared. The COVID-19 Act and a number of executive acts were the basis for the introduction of numerous restrictions on the territory of the country. However, the question arose whether the bans, orders and restrictions introduced in the field of the freedoms and rights of individuals were sufficiently constitutionally established.

The justification for the restrictions established by the legislator was “a state of special threat in the conditions of an epidemic” or a situation of “an unprecedented threat to the legal and public safety of citizens, related to the COVID-19 threat”. It seems however, that this was a sufficient premise for the introduction of one of the states of extraordinary provided for in the Constitution⁴. This was of major importance, in particular regarding to human and civil liberties and political rights.

The primary aim of this publication is to show that the state of the epidemic announced in Poland did not meet the constitutional requirements. The Polish constitution provides a state of natural disaster for this type of situation. As a consequence, there was insufficient constitutional authorization to introduce restrictions on the freedoms and rights of individuals.

Due to the global scope of the problem, the aim is also to compare legal solutions introduced in selected countries in terms of their compliance with the constitution and statements of constitutional courts in this regard. This will allow to answer the question about the constitutional grounds for the restrictions on the rights and freedoms of individuals in these countries.

II. State of epidemic or state of natural disaster

The introduction of the “state of epidemic threat”⁵ first, and then “state of epidemic” was based on the Regulation of the Minister of Health. However, both

² The Act of March 2, 2020 on special solutions related to the prevention and combating of COVID-19, other infectious diseases and emergencies caused by them (Dz.U. 2020, item 1842).

³ The Regulation of the Minister of Health of March 20, 2020 on the declaration of an epidemic in the territory of the Republic of Poland (Dz.U. 2020, item 491, 522, 531).

⁴ Constitution of the Republic of Poland of April 2, 1997 (Dz.U. 1997, no. 78, item 483).

⁵ The Regulation of the Minister of Health of March 13, 2020 on the declaration of an epidemic threat in the territory of the Republic of Poland (Dz.U. 2020, item 433).

legal acts did not limit themselves to stating a certain fact, which was the occurrence of an infectious disease on the territory of Poland, but introduced restrictions on the functioning of various areas of socio-economic life. From the beginning the problem of the lack of a proper legal basis for the introduced restrictions was raised. All limitations were established by means of regulations by the Council of Ministers or individual ministers. In the light of Art. 31 sec. 3 of the Constitution, any restrictions in terms of exercise of constitutional freedoms and rights may be established only by statute and only when it is necessary in a democratic state ruled by law for, inter alia, the protection of public safety or order, or the protection of health. However, such restrictions may not violate the essence of freedoms and rights.

The scope of the introduced restrictions additionally raised constitutional objections for another reason. The authors of the Constitution of RP in Art. 228 sec. 1 provided three states of extraordinary “in situations of particular threats, if ordinary constitutional measures are insufficient, a relevant state of extraordinary may be introduced”: martial law, a state of emergency and a state of natural disaster. In the event of martial law and a state of emergency, the authors of the Constitution, in Art. 233 sec. 1 indicated what freedoms and human and civil rights cannot be limited. They are inviolable in nature. On the other hand, in the case of a state of natural disaster, the legislator used the opposite technique and used a positive clause. In Art. 233 sec. 3 he pointed exhaustively the types of freedoms and rights that may be restricted⁶. However, due to the fact that this catalog is closed, the introduction of other restrictions not provided for in the constitution constitutes its violation⁷.

The state of extraordinary corresponding to the most existing threats was the state of natural disaster, which pursuant to Art. 232 of the Constitution may be introduced by the Council of Ministers in part or throughout the territory of the state in order to prevent the effects of natural disasters and to remove them. The concept of “natural disaster” has been defined in Art. 3 sec. 1 point 2 of the Act of 18 April 2002 on the state of natural disaster⁸. According of this provi-

⁶ S. Steinborn, *Komentarz do art. 233 Konstytucji RP*, [in:] *Konstytucja RP*, t. II, *Komentarz do art. 87–243*, eds. M. Safjan, L. Bosek, Warszawa 2016, p. 1632.

⁷ K. Działocha, *Komentarz do art. 233*, [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, t. IV, ed. L. Garlicki, Warszawa 2005, p. 7.

⁸ Dz.U. 2017, item 1897.

sion, a “natural disaster” is, inter alia, the mass occurrence of human infectious diseases. Art. 21 of this Act defines the scope of permissible restrictions on freedoms and rights of individuals, among others: the obligation to undergo quarantine, the obligation to undergo treatment, preventive vaccinations, an order or prohibition to conduct a specific type of business, ordering or prohibition of movement. When making a comparative analysis of the legal acts adopted during the epidemic state, it should be stated that the scope and type of limited freedoms and human rights resulting from the COVID-19 Act, and regulations coincided with the provisions resulting from the Act on the state of natural disaster and Art. 233 sec. 3 of the Constitution. This means, that the Basic Law has been violated for several reasons. Firstly, due to the importance of the legal acts with which restrictions were introduced. In the light of Art. 31 sec. 3 of the Constitution, limitations of the freedoms and rights of individuals may occur in at least a statutory act. Secondly, due to the omission of the authorities, which in situations of special threats, if ordinary constitutional measures are insufficient, pursuant to Art. 228 sec. 1 of the Constitution, should introduce an appropriate state of extraordinary⁹. Thirdly, because the COVID-19 Act and its implementing acts in fact created a fourth, unnamed and extra-constitutional state of extraordinary, which fundamentally changed the functioning of the state.

The provision of Art. 232 shows that it is permissible by law to define other crisis situations which are not a state of natural disaster. However, if these situations disturbed the normal functioning of the state and showed the features of a natural disaster, the introduction by the legislator of other legal institutions materially resembling one of the states of extraordinary would constitute a violation of the Constitution¹⁰. This was the opinion of the Constitutional Court in its judgment of 21 April 2009, file ref. no. K 50/07¹¹ with reference to the crisis situation¹².

⁹ See: M. Haczkowska, *Konstytucja „w czasach zarazy”, czyli o zaniechaniach organów władzy i ich konsekwencjach (skutkach) prawnych*, “Opolskie Studia Administracyjno-Prawne” 2021, no. 1, p. 41.

¹⁰ M. Florczak-Wątor, *Komentarz do art. 232 Konstytucji RP*, [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, ed. P. Tuleja, Warszawa 2019, p. 662.

¹¹ Judgment of the CC of April 21, 2009, file ref. no. K 50/07 (OTK ZU-A 2009 iss. 4 item 51). Similarly judgment of the CC of July 3, 2012, file ref. no. K 22/09 (OTK ZU-A 2012 iss. 7, item 74).

¹² Compare: K. Działocha, *Komentarz do art. 228*, [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, t. IV, ed. L. Garlicki, Warszawa 2005, p. 1.

III. Political freedoms and rights in the state of epidemic

The state of the epidemic coincided with the end of the 5-year term of the incumbent president. According to Art. 228 sec. 7 of the Constitution, during the state of extraordinary and 90 days after its end, elections cannot be held, inter alia, to the Sejm, Senate, President of the Republic of Poland, and the terms of office of these bodies will be extended accordingly. It therefore meant that the introduction of a state of natural disaster would make it impossible to hold presidential elections on time. At the same time, the pandemic prevented holding of elections in the current form. Therefore, the legislator made a number of attempts to adapt the electoral law to this situation. However, these attempts interfered with the already ongoing election process, thereby violating the basic principles of a democratic state ruled of law¹³. The presidential elections, which were carried out on a new date and under the new law¹⁴, interfered while the political rights of citizens¹⁵, in particular the principle of universal suffrage as set out in Art. 62 sec. 1 of the Constitution.

An example of human political freedom that has been particularly limited during the epidemic was freedom of assembly. The Regulation of the Minister of Health, on the basis of which the state of the epidemic was announced and the subsequent ones, introduced restrictions or a total ban on assembly. Each of the acts violated Art. 57 in connection with Art. 33 sec. 3 and art. 228 of the Constitution. Freedom of assembly is one of the subjective rights of individuals which, even in the event of a declaration

¹³ Critical see: P. Uziębło, *Jak nie stanowić prawa, czyli uwagi na marginesie procesu uchwalania ustawy z dnia 6.04.2020 r. o szczególnych zasadach przeprowadzania wyborów powszechnych na Prezydenta Rzeczypospolitej Polskiej zarządzonych w 2020 r.*, "Palestra" 2020, no. 17, <https://palestra.pl/pl/e-palestra/17/2020> (22.05.2022).

¹⁴ The Act of June 2, 2020 on the special rules for the organization of general elections for the President of the Republic of Poland ordered in 2020 with the possibility of voting by correspondence (Dz.U. 2020, item 979).

¹⁵ M. Haczkowska, op.cit., p. 41. Moreover A. Rytel-Warzocho, *Postal Voting as an Ultimate Rescue Measure for Presidential Election During the COVID-19 Pandemic in Poland*, "Przegląd Prawa Konstytucyjnego" 2020, no. 5, p. 100. Similarly M. Musiał-Karg, *Głosowanie korespondencyjne podczas pandemii Covid-19. Doświadczenia z polskich wyborów prezydenckich w 2020 r.*, "Przegląd Prawa Konstytucyjnego" 2021, no. 2, p. 32.

of a state of natural disaster in the territory of the country, could not be limited. It would be legally permissible only in the case of a declaration of a state of emergency or martial law, in the light of Art. 232 sec. 1 of the Constitution. Therefore, the introduced restrictions and prohibitions as well as penalties for their violation did not have a proper statutory and constitutional basis¹⁶.

IV. The solutions adopted in selected European countries during pandemic COVID-19

Individual states, within the framework of their constitutional powers, took specific legal measures. However, not all legal regulations, especially in the first phase of the pandemic, were introduced in a manner that did not raise any constitutional doubts.

The Spanish Constitution¹⁷ in Art. 116 provides for three states of extraordinary: state of alert, state of emergency and state of siege¹⁸. During their duration, it is permissible to introduce limitations in the exercise of human rights and freedoms. However, the scope of limited rights is strictly defined in Art. 55 of the Spanish Constitution. The rights and freedoms may be suspended only during a state of emergency or a siege. In the event of an state of alarm general rules apply relating to the guarantee of freedoms and fundamental rights referred to in Art. 54 of the Spanish Constitution. On 14 March 2020, the state of alert was declared in Spain pursuant to Royal Decree no. 463/2020 of March 14 on the state of health crisis caused by COVID-19¹⁹. This decree was subsequently modified several times by Royal Decree no. 465/2020 of March 17, 2020, Royal Decree no. 476/2020 of March 27, 2020, no. 487/2020

¹⁶ For example, the decision of the District Court in Kościan of June 3, 2020, file ref. no. II W 71/20; judgment of the Administrative Court in Gorzów Wlkp. of September 23, 2020, file ref. no. II SA/Go 332/20; judgment of the Administrative Court in Gliwice of July 27, 2020, file ref. no. III SA/GI 319/20; judgment of the Administrative Court in Gliwice of October 20, 2020, file ref. no. III SA/GI 540/20.

¹⁷ Constitution of Spain of 6 December 1978 (BOE no. 311 of 29 December 1978).

¹⁸ States of alert, emergency and sieges were regulated in detail in Organic Law No 4/1981 of 1 June 1981 on Alert, Emergency and Siege (BOE-A 1981–2774 no. 134 of May 6, 1981).

¹⁹ BOE-A 2020-3692 no. 67 of March 14, 2020.

of April 10, 2020 and no. 492/2020 of April 24, 2020²⁰. On the basis of these acts, the state of alert was extended in Spain, as well as the previously introduced restrictions and bans in the field of movement, freedom of assembly and business activity²¹. Due to the raised objections as to the constitutionality of the introduced solutions, the Constitutional Court (CC) commented on this subject in the judgment of July 14, 2021, file ref. act 148/2021²². The CC questioned the legal instrument used. It considered that the suspension of rights, which took place between March and June 2020, could have legal protection only in state of emergency. The CC also emphasized that the Spanish Constitution does not contain a legal solution that could be applied to the situation in which the state found itself. At the same time, it ruled out the possibility of pursuing claims for damages from the state due to introduced restrictions.

The Italian Constitution²³, unlike the Polish Constitution or the Constitution of Spain, does not provide for various degrees of state of extraordinary. In Art. 78 of the Italian Constitution regulates only one state of extraordinary – the state of war²⁴. Both houses of parliament decide on its introduction, while at the same time giving the government the necessary powers. However, in the case of emergency situations, in the light of Art. 77 sec. 2 the government issues ordinance with force of law provisional – Decree-Law provisional (*decreto legge*), which must then submit to both houses on the same day for their conversion into laws.

In Italian law, emergency situations are regulated in the Legislative Decree (*decreto legislativo*) of January 2, 2018 no. 1/2018 (Civil Protection Code)²⁵.

²⁰ BOE-A 2020–3828 no. 73 of March 17, 2020; BOE-A 2020–4155 no. 86 of March 27, 2020; BOE-A 2020–4413 no. 101 of April 10, 2020; BOE-A 2020–4652 no. 115 of April 24, 2020.

²¹ See A. Vasquez, *Estas son las claves de la sentencia del TC que declara inconstitucional el confinamiento del estado de alarma*, “El Periodico” of July 15, 2020. See A. Vasquez, *El TC declara inconstitucional el confinamiento del Gobierno de Sanchez para combatir el covid*, “El Periodico” of July 14, 2020; T. de la Quadra-Salcedo, *Rompiendo el consenso constitucional*, “El Pais” of July 22, 2021; J. Garcia Roca, *Una controvertida decision*, “El Pais” of July 27, 2021.

²² BOE (Official State Gazette no. 182 of July 31, 2021).

²³ Constitution of the Italian Republic of December 27, 1947 (G.U. 1947, no. 298).

²⁴ See P. Bilancia, *The Italian Constitution Facing the Test of the Covid-19 Pandemic*, “Przeгляд Prawa Konstytucyjnego” 2022, no. 2, p. 109 i n.

²⁵ G.U. no. 17 of January 22, 2018.

On January 31, 2020, the Council of Ministers adopted a Resolution on the state of health emergency, which was initially announced for 6 months²⁶. The first red zones were established, in which specific restrictions were enacted. One of the first legal acts was Decree-Law no. 6/2020 of February 23, 2020²⁷, which was transformed into Act no. 13/2020 of March 5, 2020²⁸. On the basis of the Decree-Law no. 6/2020 which established the decrees of the Chairman of the Council of Ministers (DCCM) were established: decree of February 25, 2020²⁹; decree of March 1, 2020; decree of March 4, 2020; the decree of March 8, 2020; the decree of March 9, 2020; the decree of March 11, 2020 or the decree of March 22, 2020³⁰. These acts were the nature of the executive to decrees – law. It was only by Decree-Law no. 19/2020 of March 25, 2020 that the government unified the regulations on the territory of the country, almost completely repealing the previous Decree-Law no. 6/2020. However, there were doubts as to whether the established provisions had sufficient constitutional power. This is because according to the Italian Constitution, the restriction of freedoms and rights may only be imposed by statute (by the act). The doctrine of Italian law emphasizes that only the entry into force of Decree-Law no. 19/2020 restored compliance with the Constitution in terms of respecting the principle of proportionality³¹. Additionally, there was a problem with Art. 116 and 117 of the Italian Constitution on the division of legislative powers between the state and the regions in fighting a pandemic. The issued decrees of the Prime Minister (DCCM) take precedence over other regulations. Some Regions began to adopt their own legal acts, introducing

²⁶ Delibera del Consiglio dei Ministri of January 31, 2020 – Resolution of the Council of Ministers of January 31, 2020 on the declaration of a state of emergency as a consequence of a health risk related to the occurrence of pathologies caused by infectious viral agents (G.U. no. 26 of February 1, 2020).

²⁷ Decreto legge no 6 of February 23, 2020 on urgent measures to contain and manage the epidemiological crisis related to COVID-19 (G.U. no. 45 of February 23, 2020).

²⁸ Legge no 13/2020 of March 5, 2020 (G.U. no. 61 of March 9, 2020).

²⁹ Decreto del Presidente del Consiglio dei Ministri (DPCM) – Decision of the Chairman of the Council of Ministers (DCCM) of February 25, 2020 – Further implementing provisions for the decree-law February 23, 2020, no. 6, containing urgent measures to contain and manage the epidemiological situation related to COVID-19 (G.U. no. 47 of February 25, 2020).

³⁰ All legal acts: <https://www.gazzettaufficiale.it/atti/Associati/1/?areaNode=13> (20.05.2022). In total, 61 legal acts had been issued by June 2021.

³¹ See L. Lorencio, *DPCM e Costituzione*, “Altalex” of May 11, 2020.

regulations stricter than national ones. The legal conflict was resolved by the Constitutional Court in judgment no. 37 of February 24, 2021³². The CC stated that the Region cannot use its legislative power to invalidate in its territory the law of a state which it considers unconstitutional. Consequently, Valle d'Aosta could not adopt the law under the exclusive competence of the State as it considered the national legislation to be unlawful. However, it should be emphasized that the Constitutional Court in the judgment referred to above did not consider the issue of the constitutionality of the Prime Minister's decrees (DCCM). He emphasized and recalled that they are subject to control by the Regional Administrative Tribunals (TAR)³³.

V. Conclusion

The unique situation required speed decision-making. To overcome the crisis associated with the pandemic, some governments have imposed restrictions on freedoms and rights that could not be reconciled with democratic systems and the provisions of the constitution³⁴. In some countries the adopted legal solutions have been questioned by constitutional courts, which led to the restoration of the state of conformity with the constitution (for example, in Spain). In others as in Italy, after the initial legal chaos, the subsequent legal solutions adopted were already duly constitutionally established. On the other hand, in Poland due to the failure to introduce one of the constitutionally

³² <https://www.cortecostituzionale.it/actionPronuncia.do> (22.05.2022).

³³ See: B. Caravita, *La sentenza della Corte sulla Valle d'Aosta: come un bisturi nel burro delle competenze (legislative) regionali*, "Rivista di Diritto Pubblico Italiano, Comparato, Europeo" of April 21, 2021 "Federalismi.it"; M. Ferrari, *La Corte costituzionale si è pronunciata sui DPCM?*, "Altalex" of March 24, 2021; F. Laviola, *La decisione politica science – based e il ruolo del Comitato tecnico – scientifico nella gestione dell'emergenza Covid-19 tra arbitrarie pretese di segretezza e riaffermazione del diritto alla trasparenza*, "Rivista di Diritto Pubblico Italiano, Comparato, Europeo" 2021, no. 20, p. 134; R. Cabazzi, E. Costanzo, *La pandemia e i suoi lasciti. Tensioni e sfide del costituzionalismo democratico sociale nell'ordinamento europeo*, "Rivista di Diritto Pubblico Italiano, Comparato, Europeo" 2021, no. 14, p. 1.

³⁴ See A. de Guttry, *Diritto di voto e pandemia: le norme internazionali e gli interventi degli organismi sovranazionali*, "Rivista di Diritto Pubblico Italiano, Comparato, Europeo" 2020, 24 Juny, "Federalismi.it".

defined states of extraordinary, the problem of unconstitutionality of the introduced restrictions has not been resolved.

Summing up, the state of the epidemic violated the Constitution for several reasons. Firstly, it was introduced on the basis of a regulation of the Minister of Health. Secondly, the state of the epidemic was functionally identical to the state of extraordinary, in particular the state of natural disaster defined in Art. 232 of the Polish Constitution. Thirdly, the COVID-19 Act and its implementing acts in fact created a fourth, unknown to the Polish Constitution and extra-constitutional state of extraordinary, which fundamentally changed the functioning of the state. Fourthly, the epidemic introduced numerous restrictions on the freedoms and rights of individuals, which were not authorized by Art. 233 of the Constitution. Fifthly, due to the fact that restrictions, prohibitions and orders were introduced on the basis of ordinances of individual ministers, they were inconsistent with Art. 31 sec. 3 of the Constitution.

A comparison of the legal solutions introduced in Italy and Spain shows that despite the initial doubts as to their constitutionality, the state of compliance with the constitution has been restored. The constitutional courts of both countries also commented on this. Even if in their judgments they referred to the allegations presented in an “evasive” manner, they were a clear signal to the legislator about the need to respect constitutional norms.

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