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Political Freedoms and Rights in Relation to the COVID-19 Pandemic in Poland and Hungary in a Comparative Legal Perspective¹

Abstract: The subject of the article are selected political rights and freedoms guaranteed by the Polish and Hungarian constitutions, which are analysed in the context of possible limitations due to the COVID-19 pandemic. The analysis covers the right to vote in elections and referendums, the freedom of expression and opinion, and the freedom of assembly. The main aim of the article is to identify similarities and differences in the legal solutions adopted in Poland and Hungary in the context of restrictions or threats to political freedoms and rights. As a result of the research carried out, the authors positively verified the hypothesis that Poland and Hungary, although they chose different methodologies to implement the specific legal order applicable due to the coronavirus pandemic, namely Hungary has introduced one of the constitutional states of exception, i.e. the state of danger, while Poland did not introduce a state of natural disaster, the formula for sanctioning restrictions on political freedoms and rights with secondary legislation was similar in both countries. The authors express the view that continuous efforts should be made to develop legal institutions that would allow for a balance between the need to preserve

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political rights and freedoms and the need to make quick decisions in relation to the pandemic and citizens' right to health. A pandemic should never be an excuse for those in power to restrict political freedoms and rights for longer periods of time, so as not to make these freedoms and rights the next victims of the SARS-CoV-2 virus.

Keywords: COVID-19 pandemic, Hungary, Poland, political freedoms and rights

Introduction

According to the classical typology, human rights and fundamental freedoms comprise the following rights: personal, political and economic, social and cultural rights. The above division is based on the so-called thematic criterion and refers to the International Covenant on Civil and Political Rights² and the International Covenant on Economic, Social and Cultural Rights.³ This typology is reflected to a greater or lesser extent in the Polish⁴ and Hungarian⁵ constitutions. Political rights are referred to as participatory rights. They are related to certain democratic values, which make it possible to influence the fulfilment of governmental functions in connection with the principle of national sovereignty.⁶ As regards political rights, the Polish and Hungarian constitutions refer to the International Covenant on Civil and Political Rights. According to this act, political rights include rights to vote and be elected, the right of equal access to public services and the right to participate on terms of equality in the democratic shaping of the will of the state (Article 25). Political freedoms include the freedom to hold one's own opinions (Article 19), freedom of association (Article 22) and freedom of assembly (Article 21).⁷ The analysis covers the most symptomatic political rights and freedoms guaranteed by the Polish and Hungarian constitutions, which are analysed in the context of restrictions related to the COVID-19 pandemic. That is why the article covers political rights and freedoms, such as the right to vote in elections and referendums, the freedom of assembly and the freedom to hold views and opinions, which has a 'mixed' character, being both a freedom related to the sphere of personal rights of the individual and a political

2 International Covenant on Civil and Political Rights, New York, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171 and vol. 1057, https://treaties.un.org/doc/Treaties/1976/03/19760323%2006-17%20AM/Ch_IV_04.pdf (accessed 15.12.2022).

3 International Covenant on Economic, Social and Cultural Rights, Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 3 January 1976, in accordance with article 27, <https://www.ohchr.org/Documents/ProfessionalInterest/cescr.pdf> (accessed 15.12.2022).

4 See: Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws 1997, No. 78, item 483, as amended) – Chapter II 'The Freedoms, Rights and Obligations of Persons and Citizens'.

5 Hungary's Fundamental Law on 18 April 2011 – 'Freedom and Responsibility'.

6 See: M. Bożek, M. Karpiuk, J. Kostrubiec and K. Walczuk, *Zasady ustroju politycznego państwa*, Poznań 2012, p. 107.

7 See: K. Orzeszyna, M. Skwarzyński and R. Tabaszewski, *Prawo międzynarodowe praw człowieka*, Warsaw 2020, p. 78.

freedom in the sphere of public life.⁸ The general regulation on the restrictions of human rights, including political rights, has been based both in Poland and in Hungary on the necessity and proportionality tests, which have been amended in Hungary by the constitutional rules on the special legal order.⁹

The issue of political rights is particularly important in times of crisis. The most vivid example of such a situation is the COVID-19 threat. On 4 March 2020, the first cases of the coronavirus infection were confirmed in both Poland and Hungary. The first deaths of patients due to COVID-19 were recorded on 12 March 2020 in Poland and on 15 March 2020 in Hungary.¹⁰ The above-mentioned events and the announcement by the World Health Organization on 11 March 2020 that COVID-19 can be characterized as a pandemic forced the Polish and Hungarian legislatures and governments¹¹ to act.

Certain specific legal situations necessarily entail restrictions on political rights¹². This general observation can be applied for the situation in Hungary and Poland. In our comparative analysis, we will first examine the constitutional framework of the restrictive regulation of political rights in Hungary and Poland in the light of the risk of an epidemic. We then review certain more important political rights legislation and practice that has been the focus of public life and jurisprudence.

Such a structure of the discussion is linked to the purpose of the article, namely to identify similarities and differences in the legal solutions adopted in Poland and Hungary in the context of restrictions or threats to political freedoms and rights, but which are essentially intended to achieve the same goal. This goal was and continues to be to prevent and combat SARS-CoV-2 infection and the spread of the disease. The question is also whether the existing 'special legal regime' linked to the coronavirus pandemic is compatible with constitutional regulations.

The main hypothesis proposed herein is that although Poland and Hungary have formally chosen different original legal bases for a specific legal regime applicable due to the coronavirus pandemic (Hungary has introduced one of the constitutional emergency states, i.e. the state of danger, while Poland did not introduce a state of natural disaster, which is one of the extraordinary measures), the method of sanc-

8 Decision of the Constitutional Tribunal of 4 October 2011, K 9/11, OTK-A 2011, no. 8, item 85.

9 See T. Drinóczy and A. Bień-Kacała, COVID-19 in Hungary and Poland: extraordinary situation and illiberal constitutionalism, 'The Theory and Practice of Legislation' 2020, vol. 8 no. 1–2, pp. 183–185.

10 Worldometer, Coronavirus, <https://www.worldometers.info/coronavirus/country/poland/> (accessed 15.01.2022), <https://www.worldometers.info/coronavirus/country/hungary/> (accessed 15.01.2022).

11 See M. Cox, States of Emergency and Human Rights During a Pandemic: A Hungarian Case Study, 'Human Rights Brief' 2020, vol. 24, no. 1, p. 32.

12 A-L. Sensson-McCarthy, The International Law of Human Rights and States of Exception, The Hague 1998, pp. 2–3.

tioning a special legal order by means of low-tier statutory acts, also aimed at imposing restrictions on the exercise of certain freedoms and political rights, is similar in both countries.

The study uses classical research methods employed in legal sciences (law). The main research method used in the study was the formal-dogmatic method, which we used when analysing the constitutions of Poland and Hungary and the primary and secondary legislation creating a special legal order in force in both countries during the pandemic period. The essence of research in the legal sciences is to determine the meaning of the statements contained in legislation. Therefore, the rules of linguistic interpretation were mostly used. The conclusions regarding the currently applicable law (*de lege lata*) have been confronted with the views expressed by scholars in the field and the relevant case law.

1. Political Freedoms and Rights and the (Special) Legal Order in Poland during the Coronavirus Pandemic

1.1. Constitutional Background of the Special Legal Order during the Epidemic in Poland

The first legal acts related to the coronavirus pandemic in Poland were issued on the basis of the provisions of the act of 5 December 2008 on the prevention and control of infections and infectious diseases in humans (hereinafter: the PCI Act).¹³ Initially, a state of epidemic threat was introduced¹⁴, followed by a state of epidemic.¹⁵ The state of epidemic threat means a legal situation declared for a given area due to the risk of an epidemic in order to take preventive actions as defined in the act (Article 2(23) of the PCI Act), while the state of epidemic means a legal situation declared for a given area due to the occurrence of an epidemic, in order to take anti-epidemic and preventive measures specified in the act, so as to reduce the effects of the epidemic (Article 2(22) of the PCI Act). The state of epidemic threat and the state of epidemic are introduced by the provincial governor (*wojewoda*) if the epidemic threat or epidemic takes place in the area of the province (voivodship, *województwo*) or its part. The governor declares or lifts a given anti-epidemic state by way of an ordinance, at the request of the state provincial health inspector. Ordinances issued by the provincial governor are acts of local law, which belong to sources of generally appli-

13 Consolidated text, Journal of Laws of 2021, item 2069, as amended.

14 Ordinance of the Minister of Health of 13 March 2020 on the declaration of the state of epidemic threat in the territory of the Republic of Poland (Journal of Laws, item 433, as amended).

15 Ordinance of the Minister of Health of 20 March 2020 on the declaration of the state of epidemic in the territory of the Republic of Poland (Journal of Laws, item 433, as amended).

cable law.¹⁶ Ordinances of the provincial governor contain rules and regulations that may restrict human and civil freedoms and rights.¹⁷ The state of epidemic threat and the state of epidemic must not apply concurrently.¹⁸ If an epidemic threat or epidemic occur in an area of more than one province, the state of epidemic threat or the state of epidemic must be declared and lifted by the minister competent for health matters in agreement with the minister competent for public administration, at the request of the Chief Health Inspector (Article 46(1) and (2) of the PCI Act). Based on this, the minister of health, by ordinance of 20 March 2020, announced the state of epidemic in the area of the Republic of Poland.

During the COVID-19 period, a number of other laws and regulations were issued, along with those listed above. Some of them have been amended several times or are no longer in force. One of the most important legal acts in the context of restricting political rights and freedoms was the act of 2 March 2020 on special arrangements relating to the prevention, countering and combating of COVID-19, other infectious diseases and crisis situations caused by them (hereinafter: the Act on COVID-19)¹⁹, passed already before the declaration of the state of epidemic. The act contained a number of amending provisions. The Act on COVID-19 made significant modifications to the PCI Act. In the case of a state of epidemic or a state of epidemic threat having a nature and magnitude that exceed the capabilities of the local bodies of central administration and units of local government, the Council of Ministers, on the basis of data provided by the competent state authorities, may issue a special regulation, in which it will define not only the area at risk, but also specific restrictions on rights and freedoms. As a result of the amendment, the Council of Ministers was given the authority to determine in an ordinance the endangered area and the type of zone in which the state of epidemic or state of epidemic threat has occurred, as well as the type of solutions to be taken (Article 46a of the PCI Act). In this way, the Council of Ministers has been given the ability to determine by ordinance the relevant restrictions, the catalogue of which, in connection with the amendment by force of the Act on COVID-19, has been significantly expanded. These include such restrictions on rights and freedoms as: the obligation of sick persons and those suspected of being sick to undergo medical examinations, the obligation to apply certain preventive measures and treatments, the obligation to undergo quarantine, the

16 J. Kostrubiec, The Role of Public Order Regulations as Acts of Local Law in the Performance of Tasks in the Field of Public Security by Local Self-government in Poland, 'Lex localis – Journal of Local Self-government' 2021, vol. 19, no. 1, p. 118.

17 M. Karpiuk, Właściwość wojewody w zakresie zapewnienia bezpieczeństwa i porządku publicznego oraz zapobiegania zagrożeniu życia i zdrowia, 'Zeszyty Naukowe KUL' 2018, vol. 61, no. 2, p. 238.

18 M. Karpiuk and J. Kostrubiec, The Voivodeship Governor's Role in Health Safety, 'Studia Iuridica Lublinensia' 2018, vol. 27, no. 2, p. 70.

19 Consolidated text, Journal of Laws of 2021, item 2095, as amended.

obligation or prohibition to stay in certain places and facilities and in certain areas, the obligation to move in a 'certain way', or the obligation to cover the mouth and nose (Article 46b). The above-mentioned regulations formed the legal basis for further actions of the Council of Ministers involving the issuance of ordinances aimed at counteracting the spread of the coronavirus pandemic, including the imposing of a number of restrictions on civil rights and freedoms.²⁰ In the light of the PCI Act, these specific legal regimes may be introduced through ordinances issued by the provincial governor (Article 46(1)), the minister competent for health matters (Article 46(2)) and the Council of Ministers (Article 46a). In each case, certain restrictions on human and civil rights and freedoms may be imposed through an ordinance. The list of possible restrictions is identical in the case of ordinances issued by the provincial governor and the minister of health. The broadest set of possible limitations of rights and freedoms is in the case of ordinances issued by the Council of Ministers. It also covers an additional catalogue of epidemic restrictions in addition to the restrictions, obligations and orders characteristic of ordinances issued by the provincial governor and the minister of health.

The method of law-making adopted in Poland was subject to debate from the very beginning, both in political and scientific circles. It was proposed to introduce a state of natural disaster, which is one of the extraordinary measures (states of exception) provided for in the Polish Constitution.²¹ Doubts were pointed out regarding legislative actions limiting constitutional freedoms and rights in acts of secondary legislation in connection with Article 31(3) of the Polish Constitution, which explicitly reserves the form of an act for such restrictions. Meanwhile, the first restrictions on freedoms or human rights aimed at preventing, counteracting and combating COVID-19 were introduced in Poland based on ordinances. The Polish legislature did not decide to declare a state of natural disaster and consistently followed the legislative method adopted at the beginning of the pandemic. The question arises as to the constitutionality of the solutions adopted, in particular constitutional restrictions on freedoms and rights introduced in Poland due to the coronavirus pandemic. To answer this question, it is necessary to establish what legal status the epidemic has and what makes it different from the state of natural disaster.

The state of epidemic threat and the state of epidemic are counter-epidemic states. As a result of the inflation of epidemiological legislation, the state of epidemic

20 Ordinance of the Council of Ministers of 6 May 2021 on the imposing of specific limitations, orders and prohibitions related to the occurrence of a state of epidemic (Journal of Laws 2021, item 861, as amended).

21 P. Chmielnicki, D. Minich, R. Rybkowski, M. Stachura and K. Szocik, 'The COVID-19 Pandemic as an Opportunity for a Permanent Reduction in Civil Rights', *Studia Iuridica Lublinensia* 2021, vol. 31, no. 4, p. 102; M. Karpiuk, *Kształowanie się instytucji stanów nadzwyczajnych w Polsce*, Warsaw 2013, pp. 97–102.

is sometimes referred to by scholars in the field as a '*sui generis* state of exception'²², a '*de facto* state of natural disaster' as well as a 'hybrid state of exception'.²³ It shows many similarities to the state of natural disaster, which is one of the three states of exception provided for by the Constitution of the Republic of Poland, apart from martial law and the state of emergency. The catalogue of states of exception may not be extended by the ordinary legislature. The state of natural disaster may also be declared in the situation of mass occurrence of infectious diseases among people, since it fits the term of natural disaster, which is also confirmed by the majority of scholarly opinion.²⁴ However, states of exception, including the state of natural disaster, may be declared only when the ordinary constitutional means are insufficient in the face of a given threat (Article 228(1) of the Polish Constitution). In the situation being analysed, the 'state of epidemic' should be considered an ordinary constitutional measure. It serves to implement the constitutional obligation of the public authorities to combat epidemic diseases referred to in Article 68(4) of the Polish Constitution. If the declaration of a state of epidemic were to prove sufficient in terms of combating and preventing the effects of the SARS-CoV-2 infection, there would be no basis for the introduction of a state of natural disaster. It should be noted, however, that in light of the PCI Act, amended in connection with the pandemic, and the Act on COVID-19, the list of restrictions, orders and prohibitions that may be introduced by the Council of Ministers by means of an ordinance in connection with an epidemic has become not only analogous, but even broader in comparison with the list of measures provided for in the act on the state of natural disaster.²⁵ The state of epidemic was in fact equated with the state of natural disaster provided for in the Constitution of the Republic of Poland and became a kind of state of exception. In this way, a legal dualism was formally created in Poland related to the institution of the state of epidemic and the state of natural disaster, and consequently, the catalogue of limitations on human and civil rights and freedoms was duplicated. The fundamental difference between them, however, is that declaring a state of epidemic does not create any restrictions on the political functioning of the state²⁶, as in the case of a state of natural disaster,

22 J. Pańnik, Kilka refleksji o regulacji stanu epidemii jako *sui generis* pozakonstytucyjnego stanu nadzwyczajnego, 'Przegląd Prawa Publicznego' 2020, no. 11, p. 69.

23 P. Kardas, Konstytucyjne podstawy rozstrzygania kolizji obowiązków i konfliktu dóbr w czasie pandemii, 'Palestra' 2020, no. 6, p. 9.

24 M. Radajewski, Stan zagrożenia epidemicznego oraz stan epidemii jako formy prawne ochrony zdrowia publicznego, 'Przegląd Legislacyjny' 2021, no. 4(118), p. 61; E. Kurzępa, Stan epidemii a stan klęski żywiołowej rozważania w kontekście bezpieczeństwa państwa, 'Przegląd Prawa Publicznego' 2021, no. 5, p. 8; M. Czuryk, Activities of the Local Government During a State of Natural Disaster, 'Studia Iuridica Lublinensia' 2021, vol. 30, no. 4, p. 116.

25 Article 21 of the Act of 18 April 2002 on the state of natural disaster (consolidated text Journal of Laws 2017, item 1897). See also: J. Pańnik, Kilka refleksji, *op. cit.*, pp. 82–83.

26 According to Article 228(6) to (7) of the Polish Constitution, during a state of exception, the constitution and electoral laws may not be changed, and the term of office of the Sejm may not be

and its extension does not require the consent of the Sejm (Parliament). The form of imposing restrictions on rights and freedoms in a situation in which the 'ordinary constitutional measures' are in force, namely the special legal regime of the 'state of epidemic', raises doubts of a constitutional nature. The purpose of declaring a state of epidemic is to introduce such limitations on rights and freedoms as necessary to prevent or combat the spread of pathogenic agents. Nevertheless, in such a situation, rights and freedoms may not be limited under the rules typical of the state of natural disaster (Article 233(3) of the Polish Constitution). Only the declaration of a state of natural disaster allows for the introduction of restrictions by way of an ordinance issued under statutory provisions generally defining the permissible scope of possible restrictions on the exercise of rights and freedoms. It is a 'privilege' that can only be used when a state of emergency is declared. However, in the case of a state of epidemic, which is an ordinary constitutional measure and not a state of exception, the requirements set out in Article 31(3) of the Constitution must be fulfilled, namely: 1) adherence to the statutory form (the form of an act)²⁷; 2) compliance with the principle of proportionality; 3) non-infringement of the essence of human freedoms and rights. A catalogue of limitations of rights and freedoms is admittedly found in the PCI Act. However, the fulfilment of the condition of the statutory character of the regulation does not consist only in the enumeration of possible limitations, but requires detailed specification of situations in which these limitations are applied (principle of specificity of statutory interference in the sphere of constitutional freedoms and rights of the individual).²⁸ Not all the limitations set forth in the cited act meet this condition, because they contain blanket authorisations to issue an ordinance. An act of secondary (lower-tier) legislation may only implement the statutory authorisation.²⁹ It may not supplement the act with contents that are not included therein, nor

shortened and elections and referendums may not be held within 90 days of the termination of extraordinary measures.

27 The position of scholars in the field and the case law of the Constitutional Tribunal regarding the possibility of 'specifying' statutory restrictions on rights and freedoms in the form of secondary legislation is not uniform. It is pointed out that restrictions on rights and freedoms may be partially defined, under certain conditions, by means of secondary legislation (M. Radajewski, *Stan zagrożenia*, *op. cit.*, p. 74; Judgment of the Constitutional Tribunal of 19 June 2008, P 23/07, OTK-A 2008, no. 5, item 82). There are also views that the requirement of the form of an act for the sphere of human rights and freedoms should be interpreted literally (M. Florczak-Wątor, *Niekonstytucyjność ograniczeń praw i wolności jednostki wprowadzonych w związku z epidemią COVID-19 jako przesłanka odpowiedzialności odszkodowawczej państwa*, *'Państwo i Prawo'* 2020, no. 12, p. 11; Judgment of the Constitutional Tribunal of 6 March 2000, P 10/99, OTK 2000, no. 2, item 56).

28 G. Koksanowicz, *Zasada określoności przepisów w procesie stanowienia prawa*, *'Studia Iuridica Lublinensia'* 2014, no. 22, p. 476.

29 M. Karpiuk, J. Kostrubiec, M. Paździor, K. Popik-Chorąży and K. Sikora, *Legislacja administracyjna*, Warsaw 2013, p. 94.

may it interfere with the essence of constitutional rights and freedoms.³⁰ The amendment of the PCI Act³¹ consisted mainly in authorising the Council of Ministers to introduce, by means of ordinances, certain limitations on human and civil rights and freedoms without a sufficiently detailed statutory authorisation.³² Therefore, it can be concluded that some of the restrictions on the human rights and freedoms provided for by the PCI Act do not have an appropriate legal basis for issuing relevant ordinances, which makes them unconstitutional. Further discussion in this regard covers only selected political freedoms and rights, due to the limitations on the volume of the article and the purpose of our research.

1.2. Right to Vote during the Pandemic in Poland

After the outbreak of the coronavirus epidemic, there were numerous opinions in political discussion that one of the reasons for the failure to introduce a state of natural disaster in Poland, despite the fulfilment of the conditions in this regard, was the fact that it was the year in which the presidential election was to be held.³³ If a state of natural disaster had been declared in Poland, a nationwide referendum and elections to the Sejm, the Senate, local government bodies and the President of the Republic would not have been able to be held during this time and within 90 days after its end.³⁴ In such a situation, the terms of office of the said authorities shall be extended accordingly (Article 228(7) of the Polish Constitution). Moreover, during a state of exception, the electoral regulations for the election to the Sejm, the Senate and local

30 For example, the minister of health was not authorised by the ordinance of 13 March 2020 on the declaration of the state of epidemic in the territory of the Republic of Poland to introduce compulsory quarantine after crossing the national border pursuant to Article 46(4)(1) of the PCI Act. The scope of the statutory authorisation covered only the possibility of regulating, under an ordinance, the 'temporary restriction of a particular manner of movement', which is not equivalent to the obligation to undergo quarantine, which consequently implies a total travel ban. The regulation in this respect violated the freedom of movement guaranteed by Article 52 of the Polish Constitution. See: Judgment of the Regional Administrative Court in Gliwice of 20 October 2020, III SA/GI 540/20, LEX no. 3080997.

31 The Act on COVID-19.

32 See: Judgment of the Supreme Administrative Court of 8 September 2021, II GSK 1010/21, LEX no. 3241105.

33 P. Chmielnicki, D. Minich, R. Rybkowski, M. Stachura and K. Szocik, The COVID-19, *op. cit.*, p. 103; P. Dąbrowska-Kłosińska, The Protection of Human Rights in Pandemics – Reflections on the Past, Present, and Future, 'German Law Journal' 2021, no. 22, p. 1032.

34 Scholars in the field have expressed the view that the difficulties in carrying out a presidential election during the pandemic period in accordance with the constitutional calendar of the elections of the President of the Republic of Poland, who constitutionally guarantees the continuity of the state authority, can be considered a threat to the constitutional system of the state. This may therefore be a condition for introducing a state of emergency so that the term of office of the incumbent President of the Republic of Poland can be extended in accordance with the Constitution. See: B. Szmulik and J. Szymanek, Niemożność przeprowadzenia wyborów jako przesłanka wprowadzenia stanu wyjątkowego, 'Przegląd Legislacyjny' 2020, no. 3, p. 36.

authorities, as well as the act on the election of the President of the Republic (Article 228(6) of the Polish Constitution), may not be amended. The prolongation of the term of the state bodies is intended to protect citizens from electoral manipulation due to the declaration of a state of exception. The election of public authorities only makes sense in conditions that ensure full freedom of expression of the will by the electorate, as has been pointed out in the case law of the Constitutional Tribunal.³⁵

A special regulation during the pandemic period related to the right to participate in the elections was the act of 6 April 2020 on special rules for holding a general election for the President of the Republic of Poland ordered in 2020, under which the election was to be conducted only by correspondence vote (Article 2).³⁶ The legislation adopted was severely criticised, mainly due to the lack of sufficient guarantees of control over the conduct of the vote. As a result, the act was repealed after less than a month. It was replaced by a regulation under which the voter could, but no longer had to, vote by correspondence.³⁷

Due to the failure to introduce a state of exception, the election in Poland could be held in accordance with the generally applicable rules set out in the Electoral Code³⁸, in compliance with the applicable sanitary regulations. Nevertheless, the COVID-19 period restrictions on the exercise of freedom of assembly, which is an essential element of any election campaign, could raise some doubts.

1.3. Freedom of Expression during the Pandemic in Poland

In the light of Article 54(1) of the Polish Constitution, the freedom to express opinions and to acquire and to disseminate information shall be ensured to everyone. So far, acts of disinformation concerning COVID-19 have not been penalised, which would be a far-reaching restriction of the freedom to express one's views. Nevertheless, the relevant draft act amending the PCI Act is currently at the stage of parliamentary work. The bill was filed with the Parliament on 21 October 2020 by a group of 23 MPs from the Coalition Parliamentary Club of the Left and sent in November 2020 for first reading to the Justice and Human Rights Committee and the Health Committee, where it has been awaiting consideration for over a year.³⁹ The bill provides for the introduction of Article 49a, according to which: 'Whoever, during the state of epidemic, contrary to current medical knowledge, publicly denies a threat to

35 Judgment of the Constitutional Tribunal of 26 May 1998, K 17/98, OTK 1998, no. 4, item 48.

36 Journal of Laws 2020, item 827.

37 Act of 2 June 2020 on special rules for holding election for the President of the Republic of Poland ordered in 2020 with the option of correspondence vote (Journal of Laws 2020, item 979).

38 Act of 5 January 2011 Electoral Code (consolidated text Journal of Laws 2020, item 1319, as amended).

39 MPs' draft act amending the act on the prevention and control of infections and infectious diseases in humans, Parliament of the 9th term, Parliament Papers no. 746, <https://www.sejm.gov.pl/Sejm9.nsf/druk.xsp?nr=746> (accessed 17.01.2022).

public health or questions its existence, encourages or incites not to implement or not to apply procedures ensuring protection against infections and infectious diseases, shall be subject to a fine or the penalty of restriction of liberty.' However, the applicant submitted a self-amendment removing the penalty of restriction of liberty. The explanatory memorandum to the bill stressed that although the act establishes restrictions mainly in the sphere of freedom of speech and freedom of expression, the activity of circles that deny the existence of the epidemic poses a threat to the right to health, which is one of the fundamental constitutional rights.⁴⁰

In the context of freedom of expression, attention should also be paid to the restrictions introduced at the beginning of the pandemic on health professionals who have reported irregularities, in particular as regards the preparation of hospitals for the combating of COVID-19.⁴¹ Such people are referred to as whistle-blowers.⁴² Directors of medical establishments and the Ministry of Health prohibited their employees from speaking without the consent of the management or press officer of the unit concerned about the epidemiological situation or problems with access to medical equipment or personal protective equipment. Banning the health staff from expressing their views and the cases where employees were held accountable have been met with negative reactions from both the Polish Ombudsman and the Chief Medical Council.⁴³

Scholars also express the view that restricting freedom of religion in its external aspect during the pandemic is also a restriction on freedom of expression.⁴⁴ Such a restriction took place as regards the direct expression and dissemination of religious content by priests and as regards the direct reception of religious content by believers in the context of public religious practices.⁴⁵ Freedom of religion can also be analysed in the context of freedom of assembly.

40 Explanatory Memorandum, MPs' draft act ..., *op.cit.*, p. 2.

41 M. Romańczuk-Grącka, Conflicts of Doctor's Duties in the Case of an Extreme Shortage of Intensive Care Beds and the Good Samaritan Clause from the Perspective of Criminal Law, 'Białostockie Studia Prawnicze' 2021, vol. 26, no. 6, p. 164.

42 G. Maroń, Ograniczenia wolności słowa w Polsce w okresie pandemii COVID-19, 'Przegląd Prawa Publicznego' 2021, no. 12, p. 34.

43 Informacja o działalności Rzecznika Praw Obywatelskich oraz o stanie przestrzegania wolności i praw człowieka i obywatela w roku 2020, Warsaw 2021, p. 191, https://bip.brpo.gov.pl/sites/default/files/Informacja_RPO_za_2020.pdf (accessed 17.01.2022).

44 L.K. Jaskuła, Wolność słowa realizowana w ramach wolności religii w Kościele Katolickim w Polsce a prawne ograniczenia dotyczące epidemii SARS-CoV-2, 'Studia z Prawa Wyznaniowego' 2021, no. 24, p. 297.

45 Restrictions on religious worship in public places were introduced mainly by ordinances of the Council of Ministers, which were issued under Articles 46a and 46b of the PCI Act. See: G. Maroń, Polskie prawodawstwo ograniczające wolność religijną w okresie pandemii koronawirusa SARS-CoV-2 a standardy państwa prawa – wybrane zagadnienia, 'Przegląd Prawa Publicznego' 2021, no. 1, pp. 34–36.

1.4. Freedom of Assembly during the Pandemic in Poland

The legal basis for the restrictions on the freedom of assembly in the context of the pandemic, like for other political rights and freedoms, was set out in the PCI Act. Pursuant to the above-mentioned regulation, the Council of Ministers (Article 46b(1)), the minister competent for health matters or the provincial governor may introduce by means of ordinances declaring a state of epidemic threat or a state of epidemic 'a ban on organising shows and other gatherings' (Article 46(4)(4)). The wording 'shows' and 'other gatherings' used by the legislature gave rise to interpretation doubts. Scholars in the field pointed out that it was not clear from the content of this provision whether such a ban could also cover the organisation of public and religious gatherings, which are guaranteed by the constitution, or whether it rather referred to assemblies of a different type, such as staff meetings.⁴⁶ If it were public or religious assemblies, the freedom of which is guaranteed by Articles 57 and 53 of the Constitution of the Republic of Poland, the requirement of the form of an act had to be fulfilled for introducing restrictions of this scope.⁴⁷ Meanwhile, the provisions of the PCI Act provide for the possibility of prohibiting the organisation of assemblies by means of an ordinance. The problem has been solved by practice, which does not change the fact that constitutional doubts have remained. Even the first ordinances on the declaration of a state of epidemic threat, and then a state of epidemic, introduced a ban on the organisation of assemblies with more than 50 people⁴⁸, and from 25 March 2020 a total ban on assemblies.⁴⁹ Only the possibility to organise meetings and assemblies with relatives and those related with the performance of professional activities or duties, or non-agricultural economic activity, or agricultural activity or work on a farm is left. As a result, the protests of entrepreneurs and protests against the tightening of abortion laws used to be dissolved and administrative penalties were imposed on the participants of the gatherings. In subsequent ordinances of the Council of Ministers on the establishment of certain restrictions, orders and bans in

46 M. Radajewski, Stan zagrożenia epidemicznego..., *op. cit.*, p. 76; M. Florczak-Wątor, Niekonstytucyjność ograniczeń..., *op. cit.*, p. 15.

47 In accordance with Article 3 of the Act of 24 July 2015 the law on assemblies (consolidated text Journal of Laws 2019, item 631), a gathering is an assembly of people in an open space accessible to unnamed persons in a particular place for joint deliberations or for the common expression of their views on public matters.

48 § 9 of the Regulation of the Minister of Health on 13 March 2020 on the declaration of the state of epidemic threat in the territory of the Republic of Poland (Journal of Laws 2020, item 433); § 11 of the Ordinance of the Minister of Health of 20 March 2020 on the declaration of the state of epidemic in the territory of the Republic of Poland (Journal of Laws 2020, item 491).

49 § 11a Regulation of the Minister of Health of 24 March 2020 amending the ordinance on the declaration of the state of epidemic in the territory of the Republic of Poland (Journal of Laws 2020, item 522); § 14 of the Ordinance of Council of Ministers of 31 March 2020 on the imposing of specific limitations, orders and prohibitions related to the occurrence of a state of epidemic (Journal of Laws 2020, item 566).

connection with the occurrence of the state of epidemic, the changes in the law concerning public gatherings were very numerous. Restrictions on freedom of assembly have been relaxed or tightened, depending on the current epidemic situation. Frequently evolving epidemic rules have either introduced a total ban on gatherings or imposed limits on the number of participants and the permitted distances between them. The regulations provided for a detailed list of exceptions to the general ban on assembly, which used to be amended with the changes in the number of COVID-19 cases. The Ordinance of the Council of Ministers of 6 May 2021 on the imposing of specific limitations, orders and prohibitions related to the occurrence of a state of epidemic continued to provide for restrictions on the organisation of meetings.⁵⁰ Until 28 February 2022, organising or participating in gatherings was possible, provided that the maximum number of participants did not exceed 100. This limit did not include people vaccinated against COVID-19. Gathering participants were obliged to keep a distance of at least 1.5 m between themselves and to cover their mouths and noses, unless the gathering was held in the open air. The distance between gatherings could not be less than 100 metres (§ 26 (1b) points 1–2 and § 26 (3) of the Ordinance). Until 28 February 2022, other gatherings, including events and meetings of any kind, were prohibited altogether. However, the ordinance provided for more than 40 exceptions to that prohibition (§ 26 (15) of the Ordinance). As can be seen, the method of regulation has not been changed from the start of the pandemic. In each case, restrictions were consistently introduced on the basis of secondary legislation provisions.

2. Political Freedoms and Rights and the (Special) Legal Order in Hungary during the Coronavirus Pandemic

2.1. Constitutional Background of the Special Legal Order during the Epidemic in Hungary

The promulgation of a special legal order can be interpreted as a *lex specialis* for the operation of public bodies: the ‘peacetime’ regulation is significantly transformed. In Hungary the current regulation of the Fundamental Law of Hungary (25 April 2011) (hereinafter: Fundamental Law) introduced a differentiated system for emergency situations, cases of which are defined by the Fundamental Law as a ‘special legal order’. Two major groups of the constitutional special legal order can be distinguished. The cases of the first group are basically situations threatening the state order from within or from outside, typically by armed violence. Following the Sixth Amendment to the Fundamental Law, this group includes states of emergency and preventive defence situations (which could be interpreted as a ‘precursor’ situation)

50 Journal of Laws 2021, item 861, as amended.

– so-called unexpected attacks and terrorist threats. At the time of their introduction, the scope of measures applicable in the public administration was regulated by Act CXIII of 2011. The state of danger as a special legal order can be considered as a tool of disaster management, therefore it is regulated by a cardinal law (which should be passed by two-third majority), by the Act CXXVIII of 2011 on Disaster Management and the Amendment of Certain Related Acts (hereinafter: DMA).

In the constitutional regulation there is a closed-ended enumeration of the reasons which justify the state of danger. Article 53(1) of the Fundamental Law states that the state of danger (*veszélyhelyzet*) can be declared ‘In the event of a natural disaster or industrial accident endangering life and property.’ Thus, an epidemic situation was not one of the justifiable reasons for the declaration of a special legal order. The rules of the Fundamental Law are interpreted broadly by Article 44c of the DMA. The regulation states, ‘human epidemic disease causing mass illness and animal epidemic’ is a justifiable reason for the declaration of the state of danger.⁵¹ Hungary was unexpectedly affected by the COVID-19 pandemic at the level of constitutional rules.⁵² At the beginning of the pandemic – when Hungary was not yet affected by it – the institution of ‘health crisis’ (defined by Act CLIV of 1997 on Health Care, hereinafter HCA) was used (by which the provision of the healthcare services can be transformed).⁵³ The Hungarian system – which has been typically modelled for the treatment of industrial and elemental disasters⁵⁴ – did not contain detailed provisions for an emergency situation related to the management of a pandemic.

Within the above-mentioned framework, the state of danger – due to the COVID-19 human epidemic – was declared by Government Decree No. 40/2020 (11 March 2020). Based on the constitutional regulation and the provisions of the DMA, the government had the opportunity to suspend the application of acts of par-

51 According to other views, this regulation of the DMA ‘goes beyond the provisions of the Fundamental Law, i.e. it is contrary to the text of the Fundamental Law. The provisions of the Fundamental Law could not be overwritten by an Act of Parliament.’ According to this view, it is not an expanding interpretation, but a covert, statutory amendment to the constitution that can be considered unconstitutional. See Z. Szente, A 2020. március 11-én kihirdetett veszélyhelyzet alkotmányossági problémái, ‘Állam- és Jogtudomány’ 2020, vol. 61, no. 3, pp. 137–138; I. Vörös, A felhatalmazási törvénytől az egészségügyi válsághelyzetig és tovább, (in:) F. Gárdos-Orosz and V.O. Lőrincz (eds.), Jogi diagnózisok. A COVID-19 világjárvány hatásai a jogrendszerre, Budapest 2020, pp. 23–24.

52 See: I. Hoffman and I. Balázs, Administrative Law in the Time of Corona(virus): Resiliency of the Hungarian Administrative Law? ‘Studia Iuridica Lublinensia’ 2021, vol. 30, no. 1, pp. 106–108.

53 See M. D. Asbóth, M. Fazekas and J. Koncz, Egészségügyi igazgatás és jog, Budapest 2020, p. 39.

54 In Hungary, after the democratic transition, a state of danger has been declared several times, although typically not the whole territory of the country was covered by this emergency. Thus, for example, the government declared a state of emergency during the Danube floods in 2002 (Government Decree No. 176/2002, 15 August 2002) and after the red mud (industrial) disaster in Deceser (Government Decree No. 245/2010, 6 October 2010).

liament in its (emergency) decrees, to deviate from certain statutory provisions, and to take other (otherwise statutory, parliamentary) extraordinary measures. Even fundamental rights can be restricted by these emergency decrees. In the field of political rights, the freedom of assembly, the freedom of speech and even the right to elections can be restricted. The restrictions of these fundamental rights have been intensively discussed in the Hungarian public discourse, and of course it has been analysed by legal scholars as well.

After the first wave of the pandemic, the legal regulations on the epidemic situation were amended. The transformation was similar to the pattern of other Visegrád countries. Similarly to another special situations (for example the shortage of oil and natural gas etc.), a so-called sub-constitutional, quasi-emergency situation was introduced in 2020. The legal basis for imposing specific restrictions was created by Act LVIII of 2020 on transitional rules related to the termination of the emergency and on epidemiological emergency (hereinafter: Transitional Act), by which a new institution, the epidemiological emergency, was introduced by the amendment of the HCA. The regulations on the health crisis were reshaped significantly by that act. Different restrictions – based on the epidemiological emergency, which is defined by the act as a special type of health crisis – can be introduced by the government. These restrictive measures can be special rules relating to fundamental rights, especially the right to do business (special regulation on the operation and opening hours of shops and restrictions on sale and consumption can be introduced), right to free movement (travel, transport and freight restrictions can be introduced) and right to education (special regulation on public education can be passed, e.g. the introduction of digital learning).

This solution fits into the trend in the Hungarian legislation that several quasi-emergencies have been institutionalised by the acts of parliament, because a similar, quasi-emergency situation is regulated by the DMA during natural and industrial disasters that are not so serious that the declaration of the state of danger could be justified.

The regulation on epidemiological emergency was a transitional regime between the two waves of COVID-19 in Hungary. Because of the serious epidemiological situation, the (second) state of danger was declared on 3 November 2021 (the state of danger entered into force on 4 November). The new Act CIX of 2020 was passed. The scope of the emergency government decrees has been extended by this act. But in contrast to the regime of the Act XII of 2020, the extension has not been indefinite. The act originally declared a 90-day deadline for the authorisation (and for the scope of itself), but new acts were passed, and the state of danger has been extended. Thus, the major criticism⁵⁵ of the former regulation has been corrected by the par-

55 See T. Drinóczi and A. Bień-Kacała, COVID-19 in Hungary and Poland: extraordinary situation and illiberal constitutionalism..., *op. cit.*, p. 184; F. Gárdos-Orosz, COVID-19 and the Respon-

liament. The government of Hungary has not received indefinite authorisation for passing emergency decrees. Even the constitutional regulations were amended at the end of 2020. The Fundamental Law was amended by the 9th Amendment by which the legal regulation on the state of emergencies has been transformed. The system of the special legal order has been simplified by the 9th Amendment: the preventive situations have been terminated; they were transformed into sub-constitutional situations, which will be regulated by an act passed by two-third majority of the parliament ('cardinal act/law').

2.2. Right to Vote during the Pandemic in Hungary

The Hungarian constitutional regulation on the right to vote during the pandemic can be considered a permissive one. As we have mentioned earlier, the state of danger has been applied during natural disasters (mainly floods) and industrial accidents, and the former states of danger had a limited territorial scope. Therefore, Article 48(7) of the Fundamental Law has a general ban on elections only in the defence type emergency situations. The Fundamental Law does not ban elections during a state of danger. This regulation was only partially adapted to a pandemic situation. Elections, as mass events, could pose a significant risk of infection during epidemics, so restrictions may be justified.⁵⁶ There haven't been any constitutional restrictions on elections, but restrictions to the fundamental rights were permitted for the emergency decrees of the government by the regulation of the Fundamental Law and the DMA. Even the regulations on elections can be amended by the decrees. An interesting regulation evolved during 2021. The general parliamentary elections – held every four years (the last one was held on April 3rd, 2022) – were not banned by Act I of 2021, which regulated the second state of danger. However, the local and national referendums and by-elections were originally banned by Article 4(5) of Act I of 2021. This Act I of 2021 can be considered an authorisation regulation for the emergency decrees of the second state of danger. But this regulation – which was passed by the qualified (two-third) majority of the parliament – was originally partially amended by an emergency decree ((Emergency) Government Decree No. 438/2021 (dated 21 July). The national referendums were allowed by these new rules. It can be justified, but this regulation has been disputed. Even the legislators found this solution problematic, which can be observed by Act CXXX of 2021: the regulation of Act I of

siveness of the Hungarian Constitutional System, (in:) J.M. Serna de la Garza (ed.), *COVID-19 and Constitutional Law*, Ciudad de México 2020, pp. 159–161; Gy. Hajnal, I. Jeziorska and É.M. Kovács, *Understanding drivers of illiberal entrenchment at critical junctures: institutional responses to COVID-19 in Hungary and Poland*, 'International Review of Administrative Sciences' 2021, vol. 87, no. 3, pp. 616–619.

56 See C. Fazekas, K. Kálmán, B. Szentgáli-Tóth, K. Szerencsés and J. Takács, *Demokrácia a pandémiáárnyékában: választások a világjárványidején a környezőországokban*, 'MTA Law Working Papers' 2021, no. 31, pp. 2–4.

2021 was amended by Article 86a of Act CXXX of 2021. Now we have a strange regulation on elections: local referendums and local by-elections are banned but national referendums and – without rules on banning them – general elections can be held. If the restrictions on elections can be justified by the risk of infections, these rules can be disputed, because of the proportionality of the local restrictions.

2.3. Freedom of Expression during the Pandemic in Hungary – the Case of Fearmongering

Freedom of expression can be restricted during the state of danger, based on the general authorisation of the constitutional rules. However, there has been one major debate: the new regulation of scaremongering. During communist times, scaremongering was a legally not well and detailed defined crime, which allowed the Hungarian communist regime to prosecute its opposition. During the democratic transition, this crime was amended, but this amended crime was partly annulled by the Hungarian Constitutional Court in 2000 (Decision No. 18/2000 (dated 6 June) of the Hungarian Constitutional Court), because the Constitutional Court stated that it can be interpreted as a non-proportional restriction of the freedom of speech. However, the annulment was only partial: scaremongering remained a crime in the special legal order, because this decision recognised that the restrictions of the freedom of speech can be wider during emergency situations.⁵⁷ The crime was amended by the new Hungarian Criminal Code (Act C of 2012), but in 2020 a new, special element was added, which was linked to the epidemic control.⁵⁸ This new regulation was sued at the Hungarian Constitutional Court again. It was stated by Decision No. 15/2020 (dated 8 August) of the Constitutional Court that on the whole the new regulation is constitutional, but it has established a constitutional requirement for its application. It was emphasised by the justification of the decision, that the necessity and proportionality test should be applied differently by the Constitutional Court during the state of danger. In emergency situations the significance of the proportionality test is decreased.⁵⁹

57 See I. Ambrus and F. Gárdos-Orosz, 15/2020. (VIII. 8.) AB határozat – rémhírterjesztés, (in:) F. Gárdos-Orosz and K. Zakariás (eds.), *Az Alkotmánybírósági gyakorlat. Az Alkotmánybíróság 100 elvi jelentőségű határozata 1990–2020*, Budapest 2021, p. 1014; M. Bencze and Cs. Győri, *Hírek szárnyán: a rémhírterjesztés bűncselekménye és a jogbiztonság*, 'Magyar Tudomány' 2021, vol. 182, no. 5, pp. 614–624.

58 The new regulation is Section 337 (2) of Act C of 2012 on the Criminal Code: 'A person who, during the period of a special legal order and in front of a large audience, states or disseminates any untrue fact or any misrepresented true fact that is capable of hindering or preventing the efficiency of protection is guilty of a felony and shall be punished by imprisonment for one to five years.'

59 See I. Ambrus and F. Gárdos-Orosz, 15/2020. (VIII. 8.) AB határozat – rémhírterjesztés, *op. cit.*, pp. 1026–1028.

2.4. Right to Assembly – Demonstrations during the Pandemic

The right to assembly is a major political fundamental right, but it is one of those rights which can be restricted.⁶⁰ As we have mentioned earlier, the Hungarian constitutional regulation does not contain a general restriction of this right, but during the pandemic the restrictions of the freedom of assembly can be justified because of the risk of infections during a mass event, like a demonstration. Therefore, based on the authorisation of the DMA, curfews (in 2020 a broad one and from autumn 2020 to spring 2021 a night curfew) was introduced by emergency government decrees. Similarly, a ban on assemblies was introduced. During the second state of danger, the ban on assemblies and demonstrations was introduced by Section 5 (1 and 2) of (Emergency) Government Decree No. 484/2020. (dated 10 November). These regulations were followed by Hungarian society and opposition to them was slight. However, there was one debate on behalf of freedom of assembly. There were demonstrations against the epidemiological control activities of the government, but the organisers wanted to express their protest by respecting the ban. Therefore, opposition members of parliament organised demonstrations with the use of car horns in the government quarter. It was debated whether the police should fine the participants, because the unjustified and unnecessary use of car horns is prohibited by traffic rules. The organisers were fined because this event was considered a banned demonstration by the police. The administrative decisions of the police were sued at the courts. The court agreed that it was an unlawful assembly, but the fine was reduced because the demonstration was held without major personal contact. This court decision was sued at the Constitutional Court, where the lawfulness of the court decision was stated. It was emphasised by the Constitutional Court that the honking of a car horn can be considered to be an assembly, and therefore it is a breach of the prohibition. Here again, the Constitutional Court stressed that the scope of the restriction is primarily to examine its necessity; the applicability of the proportionality test is narrower.⁶¹ The limited emergency constitutional review of the Hungarian Constitutional Court was confirmed by this decision. However, these restrictions were upheld in summer 2021: (Emergency) Government Decree No. 264/2021 (dated 21 May) allowed from 15 June the organisation of assemblies. They were originally limited, but the limitations were terminated because of the mass vaccination in Hungary.

60 See: the possibility of the derogations of the International Covenant on Civil and Political Rights. See: S. Joseph and M. Castan, *The International Covenant of Civil and Political Rights. Cases, Materials and Commentary*, Oxford, 2013, p. 912.

61 See Decision No. IV/1055/2021 of the Hungarian Constitutional Court.

Conclusions

The regulations in Poland and Hungary have several differences. First of all, the Polish regulation on emergency situations is more restrictive. The Polish authorities did not decide to declare one of the constitutional states of exception even though the pandemic situation in Poland met the conditions for declaring a state of natural disaster. Without referring to the actual intentions of the political authorities in Poland, it must be stressed that the imposition of a state of exception would firstly mean the introduction of a number of restrictions in the political sphere, in particular the inability to hold elections for the President of Poland, who is the guardian of the state's security. Unlike in Hungary, in Poland during a state of exception and for 90 days thereafter, elections and referendums cannot be held. If a state of exception is declared, citizens could seek compensation for property damage resulting from restrictions to their rights and freedoms⁶², which could prove to be a significant burden on the state budget. Whereas the use of ordinary constitutional measures by political authorities, which include the institutions of state of epidemic threat and state of epidemic, do not cause political restrictions, in particular they do not require parliamentary approval for their extension. Ordinary constitutional measures, such as a state of epidemic do not also cause compensatory liability of the state on the rules that would be applicable if a state of natural disaster was imposed.⁶³ Another issue is the basis and scope of possible restrictions on rights and freedoms that may be introduced during a state of emergency and a state of epidemic, as well as the issue of the constitutionality of the restrictions introduced. Unfortunately, some of the restrictions on human and civil rights and freedoms which, due to the failure to introduce a state of natural disaster in Poland, were defined by the PCI, do not have a sufficient legal basis for issuing ordinances, which proves their unconstitutionality.

Unlike in Poland, in Hungary one of the states of exception was introduced, namely the state of danger. The constitutional regulation on the state of danger is more flexible; restrictions can be introduced by the government. This regulatory model is the subject of scholarly debate. Several scholars argue that the adaptation and resilience of the Hungarian administration has been strengthened by this mod-

62 See: Act of 22 November 2002 on compensation for property losses resulting from restriction of freedom and rights of man and citizen during a state of exception (Journal of Laws 2002, No. 233, item 1955).

63 Another issue is the question of the state's liability for damages, which may be enforced by citizens on the basis of Article 77(1) of the Constitution of the Republic of Poland, according to which everyone has the right to compensation for damage caused by the unlawful activity of a public authority. The unlawful imposition of restrictions on human rights and freedoms in connection with the COVID-19 pandemic, without any declaration of a state of natural disaster, would be a condition for such liability of the state. See: M. Florczak-Wątor, *Niekonstytucyjność ograniczeń...*, *op. cit.*, p. 20.

el.⁶⁴ It is emphasised by other scholars that this model gives extensive power to the government and the guarantees against abuses of emergency legislation are only partial. They argue that the threats can be considered as serious because of the limited control of the Hungarian Constitutional Court.⁶⁵

The result of these differences was mirrored by the legislation. In Hungary the state of danger is widely used – actually the two states of danger, as an emergency situation is a defining element of the Hungarian epidemiological protection. Because the regulations are flexible, the content of the restrictions can be amended easily. However, the Hungarian regulations were based on the introduction of an emergency situation (state of danger). A sub-constitutional, quasi-emergency situation – an epidemiological emergency – was institutionalised in Hungary. This fits the trend of the Visegrád countries.

The authorities in Poland and Hungary, like most other countries, responded to the COVID-19 pandemic using extraordinary legal measures. At the beginning of the pandemic, the formal legal bases for the special legal orders in Poland and Hungary were different. Hungary used the state of danger provided for in the constitution, which in fact did not provide for an epidemiological emergency but compensated for the lack of this feature by applying an extensive interpretation of Article 53 of the Constitution in connection with the law on natural disasters. Poland, on the other hand, despite the legal possibility to declare a state of natural disaster, did not introduce a state of exception, consistently using to this day the legal regime of anti-epidemic states, which does not belong to the catalogue of states of exception provided for by the Constitution. After the first wave of the pandemic, Hungary, in a sense, followed the Polish legislative model. The state of epidemiological danger, not provided for in the Constitution, was introduced into the Hungarian legal system. As in Poland, this quasi-state of exception allowed for the introduction of restrictions on civil rights and freedoms and was in force in Hungary between the individual waves of the pandemic. Due to the worsening epidemiological situation, Hungary once again decided to introduce a constitutional state of danger, which was complemented by a statutory regulation allowing the government to restrict civil rights and freedoms by means of decrees.

This discussion analyses three categories of political rights and freedoms in relation to the pandemic: the right to vote in elections and referendums, freedom of expression and opinion, and freedom of assembly. The right to vote in elections was

64 See for example A. Horváth, A 2020-as Covid-veszélyhelyzet alkotmányjogi szemmel, (in:) Z. Nagy and A. Horváth (eds.), A különleges jogrend és nemzeti szabályozási modelljei, Budapest 2021, pp. 157–158; L. Csink, Constitutional Rights in the Time of Pandemic – The Experience of Hungary, 'Hungarian Yearbook of International Law and European Law' 2021, vol. 9, no. 1, pp. 45–46.

65 See for example I. Vörös, A felhatalmazási törvénytől az egészségügyi válsághelyzetig és tovább..., *op. cit.*, pp. 41–42.

not restricted in either Poland or Hungary. This is because no state of emergency was introduced in Poland, while Hungarian regulations allowed general elections to be held despite the introduction of a state of danger. In the sphere of freedom of expression in Poland, there was no criminalisation of acts of disinformation in connection with COVID-19. In Hungary, on the other hand, acts of fearmongering during a state of danger were criminalised by amending the provisions of criminal law. Criminal liability was imposed for deliberately false or distorted facts, but no penalisation was given to acts that involve the expression of critical opinions. The legal evolution of restrictions on freedom of assembly during the pandemic in Poland and Hungary was similar. Under ordinances of the Council of Ministers, freedom of assembly was restricted or completely suspended depending on the state of the epidemic threat.

As a result of the analysis, showing the evolution of legal regulations related to the pandemic in the context of political rights and freedoms, the hypothesis put forward in the introduction, that although Poland and Hungary chose different legislative forms in order to introduce a specific legal order due to the coronavirus pandemic, the method of sanctioning restrictions on political rights and freedoms by means of governmental sub-statutory acts in both countries was similar, should be positively verified.

The authors of this article are of the view that the search for instruments to balance freedom and security, political rights and the need to make quick decisions in relation to a pandemic should always be pursued. A pandemic should not be a pretext for political authorities to restrict political freedoms and rights for long periods of time, lest these freedoms and rights become the next victim of the SARS-CoV-2 virus. Crisis situations – as history has shown – can lead to the weakening of democratic principles. Every effort must be made to ensure that the prolonged ‘provisional nature’ of restrictions on political rights and freedoms introduced under pandemic conditions do not become a permanent practice of governments forcing citizens to live in a ‘state of emergency’.⁶⁶

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66 A. Cioffi, M. Ruggiero, R. Rinaldi, COVID-19 Pandemic and Balance of Constitutional Rights, ‘ClinicaTerapeutica’ 2021, vol. 172, no. 2, p. 119.

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