UNIVERSITY OF BIALYSTOK
FACULTY OF LAW

BIALYSTOK LEGAL STUDIES

BIAŁOSTOCKIE STUDIA PRAWNICZE

BIAŁYSTOK 2022 VOLUME 27 nr 2

BIALYSTOK LEGAL STUDIES

BIAŁOSTOCKIE STUDIA PRAWNICZE

VOLUME 27 nr 2

The original version of the journal is a print one.

ISSN 1689–7404

e-ISSN 2719–9452

Volume Theme Editor: Aldona Domańska

Language Editors: Claire Taylor Jay, Daniel Ross, Bogusława Mancewicz

Statistical Editor: Ewa Glińska

Graphic and Typographic Development: Jerzy Banasiuk

Cover Design: Bogusława Guenther

Publisher: Faculty of Law, University of Białystok; Temida 2

All volumes can be purchased from Wydawnictwo Temida 2. Address: ul. A. Mickiewicza 1, 15-213 Białystok, Poland. E-mail: temida2@uwb.edu.pl, Tel. +48 85 745 71 68

Contents

Bialystok Legal Studies
Białostockie Studia Prawnicze
2022 vol. 27 nr 2

sciendo

DOI: 10.15290/bsp.2022.27.02.01

Received: 30.01.2022
Accepted: 29.04.2022

Bart van Klink
Vrije Universiteit Amsterdam, the Netherlands
b.van.klink@vu.nl
ORCID ID: https://orcid.org/ 0000–0002–7465–9292

Marta Soniewicka
Jagiellonian University, Poland
marta.soniewicka@uj.edu.pl
ORCID ID: https://orcid.org/ 0000–0003–3409–7819

Leon van den Broeke
Vrije Universiteit Amsterdam, the Netherlands
Theologische Universiteit Kampen, the Netherlands
c.vanden.broeke@vu.nl
ORCID ID: https://orcid.org/ 0000–0003–1384–5099

The Utopia of Legality: A Comparison of the Dutch and Polish Approaches to the Regulation of the COVID-19 Pandemic[1]

Abstract: This paper provides a comparison of the regulation of the pandemic in the Netherlands and Poland in order to determine whether a country with a high level of adherence to the rule of law in normal circumstances would also maintain this adherence in exceptional circumstances to a greater degree than a country with an initially lower level of adherence. The central questions posed in the paper are the following: what is the role of the rule of law in regulating the pandemic in the Netherlands and Poland? Is it true that the Dutch government was more successful in preserving legality than its Polish counterpart. By comparing the regulations in the two countries, the paper explores what role the rule of law – in particular, the principle of legality – may play in a crisis situation like this. According to Carl

1 The writing of this chapter was funded by the National Science Centre, Poland, according to Decision no. 2017/27/B/HS5/01053. The description of the pandemic situation in the Netherlands and Poland was updated until 1st of June, 2022.

Schmitt, in a state of emergency, order has to be restored first before a return to the 'normal' legal order is possible. Does the regulation of the COVID-19 pandemic in the two countries confirm Schmitt's claim or not?
Keywords: legality, pandemic regulations, restrictions on fundamental rights and freedoms, the rule of law, utopia

Introduction: The Dystopia of the Pandemic

The COVID-19 pandemic seems to have caused a real-life, global dystopia. It had (and still has) disastrous effects on people's physical and mental health, social relations and the economic situation in many countries. As Sheila Jasanoff and Stephan Hilgartner argue, the pandemic was 'a drama playing out simultaneously in three interlocking arenas: health, economy, politics. The virus seemed to find and target weaknesses not only in vulnerable human bodies but also in the economic and political infrastructures that sustain societies.'[2] In response to it, governments applied miscellaneous, usually very similar policies, yet their efficiency varied from country to country. A country's successful response to the COVID-19 pandemic was shaped by a mixture of overlapping factors, including the presence of a legitimate political system and the given government's capacity.[3] A legitimate political system provides the conditions essential to the effective management of the emergency – legal certainty and stability – and is tightly connected with the rule of law. A government's capacity can be understood as the ability of public institutions to intervene efficiently in people's behaviour through the implementation of norms. This capacity depends to a higher degree on social trust in public institutions and the quality of the institutions than on a country's GDP or political regime.[4]

In our paper we analyse the role that the rule of law – in particular, the principle of legality – played in the pandemic regulations in the Netherlands and Poland. It is interesting to compare the two countries because they show different levels of adherence to the rule of law. According to the World Justice Project Rule of Law Index 2020, adherence to the rule of law in Poland is at a relatively low level in contrast to the Netherlands. When the pandemic began, Poland's rule of law score was ranked 19th (of 24 countries) in the EU and 28th (of 128 countries) globally, while the

2 S. Jasanoff, S. Hilgartner, A Stress Test for Politics: Insights from the Comparative Covid Response Project (CompCoRe) 2020, VerfBlog, 5 November 2021, https://verfassungsblog.de/a-stress-test-for-politics-insights-from-the-comparative-covid-response-project-compcore-2020/ (accessed 15.12.2021).

3 R. Kleinfeld, Do Authoritarian or Democratic Countries Handle Pandemics Better?, CEIP Commentary, 31 March 2020, https://carnegieendowment.org/2020/03/31/do-authoritarian-or-democratic-countries-handle-pandemics-better-pub-81404 (accessed 15.12.2021).

4 R. Kleinfeld, Do Authoritarian…, *op. cit*.

Netherlands ranked 5 both regionally (in the EU) and globally.[5] We want to compare the regulation of the pandemic in the two countries in order to determine whether a country with a high level of adherence to the rule of law in normal circumstances would also maintain this in exceptional circumstances and to a greater extent than a country with an initially lower level of adherence. Our central research question is the following: what role does the rule of law play in the regulation of the pandemic in the Netherlands and Poland? Our initial hypothesis is that the Dutch government has been more successful in preserving legality than the Polish government, given its high level of adherence to the rule of law. By comparing the regulations in the two countries, we aim to explore what role the rule of law – in particular the principle of legality – may play in a crisis situation like this. According to Carl Schmitt, in a state of emergency, the order has to be restored first before a return to the 'normal' legal order is possible.[6] Does the regulation of the COVID-19 pandemic in the two countries confirm Schmitt's claim, or not?

To begin with, we clarify our normative framework below, based on Fuller's principles of legality (section 1). Subsequently, we discuss the Dutch regulation of the pandemic (section 2) and that in Poland (section 3), analysing them from the perspective of legality. A comparison between the two countries will be provided in section 4, followed by a final assessment and answer to our central research question.

1. Normative Framework

In legal and political theory, the problem of a legal response to the external or internal threats to society, such as war, terrorism, epidemics and so on, has been widely discussed.[7] While some thinkers claim that extreme threats to state security require a suspension of the entire legal order (*necessitas non habet legem*), most liberal thinkers argue that even in these exceptional situations the rule of law has to be preserved and emergency powers should be based on constitutional or statutory norms.[8] In fact, many modern liberal constitutions include special provisions for ad-

5 WJP Rule of Law Index 2020, https://worldjusticeproject.org/rule-of-law-index/ (accessed 26.4.2022). In the WJP Rule of Law Index 2021, the ranks of the rule of law in both countries dropped: Poland now ranks 26/31 regionally and 36/139 globally, while the Netherlands ranks 6/31 regionally and 6/139 globally. WJP Rule of Law Index 2021, https://worldjusticeproject.org/sites/default/files/documents/WJP-INDEX–21.pdf (accessed 15.12.2021).

6 C. Schmitt, Politische Theologie: Vier Kapitel zur Lehre von der Souveränität, Berlin 1996, pp. 18–19.

7 J. Ferejohn, P. Pasquino, The Law of Exception: A Typology of Emergency Powers, 'International Journal of Constitutional Law' 2004, vol. 2, no. 2, pp. 210–233; B. Ackerman, The Emergency Constitution, 'Yale Law Journal' 2004, vol. 113, no. 5, pp. 1029–1091; G. Agamben, State of Exception, Chicago 2005; C. Schmitt, Die Diktatur, Berlin 1922.

8 J. Ferejohn, P. Pasquino, The Law…, *op. cit.,* pp. 223–229. The idea of the so-called *Ausnahmezustand* in which the sovereign suspends the positive law, including the constitution, and act in a way

dressing the emergency situations, however differently defined. Yet even those modern democracies which have such provisions do not necessarily make use of them when dealing with emergencies; ordinary measures or special statutory provisions are often preferred, employing the so-called legislative model of emergency powers, as Ferejohn and Pasquino call it.[9] This could also be seen during the pandemic. 'Of the 17 EU Member States with a constitutional emergency clause suitable to respond to a pandemic, only 10 chose to activate it in the first wave of the pandemic (Bulgaria, Czechia, Estonia, Finland, Hungary, Luxembourg, Portugal, Romania, Slovakia, Spain) (…). Seven Member States (Croatia, Germany, Lithuania, Malta, the Netherlands, Poland and Slovenia) chose not to declare a state of emergency.'[10] The states which did not enact a constitutional state of emergency either implemented statutory health or civil protection regimes (14 EU Member States including Poland), or, in very rare cases (Denmark, Ireland, the Netherlands, Sweden), governments derived containment measures 'exclusively from ordinary legislation that either existed prior to the current crisis, or that was adopted or even adapted to the exigencies of the pandemic.'[11]

There are many reasons for not declaring a constitutional state of emergency during the pandemic, including: 1) difficulties of legal interpretation, in particular uncertainty about what qualifies as an emergency (Germany, Lithuania, Malta, Slovenia); 2) historical experience with abuse of emergency power (Germany); 3) insufficient degree of threat, i.e. relatively low number of infections (Croatia); 4) efficiency, i.e. ordinary measures were considered a sufficient response to the pandemic (the Netherlands); 5) particular political aims and economic obstacles (Poland, where a state of emergency would have prevented the presidential elections from taking place, and could oblige the state to financial compensation for the suspension of

which would violate the law in normal circumstances, was developed by Carl Schmitt (C. Schmitt, Dyktatura. Od źródeł nowożytnej idei suwerenności do proletariackiej walki klas, Warsaw 2016, p. 167). This idea should be distinguished from the constitutional emergency clause, embedded in the positive law of many liberal countries, which allows governments to temporarily restrict fundamental rights. The constitutional state of emergency provides exceptional measures distinct from the ordinary measures (i.e. allows for exceptions from regular norms), yet it operates within the legal order and must respect all the limits imposed on the emergency power by the law.

9 J. Ferejohn, P. Pasquino, The Law…, *op. cit*., pp. 216–217.

10 M. Diac Crego, S. Kotanidis, State of emergency in response to the coronavirus crisis. Normative response and parliamentary oversight in EU Member States during the first wave of the pandemic, European Parliament Research Service, December 2020, https://www.europarl.europa.eu/RegData/etudes/STUD/2020/659385/EPRS_STU(2020)659385_EN.pdf https://www.europarl.europa.eu/RegData/etudes/STUD/2020/659385/EPRS_STU(2020)659385_EN.pdf (accessed 26.04.2022), p. I.

11 *Ibidem.*

rights and freedoms of the citizens).[12] Moreover, the pandemic could not be easily limited in time and space, which makes it difficult to declare a state of emergency; by definition, there can be no permanent state of emergency. Yet the legislative model has its own weaknesses and creates many risks which were addressed by the pandemic regulations in such countries as the Netherlands and Poland. Firstly, ordinary measures may not be as fast and efficient as it would be required in emergency situations. Secondly, embedding restrictive measures into the ordinary legal system may result in the permanent erosion of certain rights and liberties.[13] Thirdly, legislative emergency powers rely on the people's support and, if that is eroding, populist politicians may take advantage of the popular discontent. Fourthly, imposing ordinary, instead of extraordinary, measures in an emergency situation poses significant risks to the rule of law. In our further considerations we will focus on the latter issue.

Liberal-democratic societies are based on the rule of law. The rule of law aims to control public power by means of law in order to protect individual freedom. One of its core principles – besides the division of power, judicial independence and fundamental rights – is legality.[14] Legality requires that state actions limiting individual freedom are based on law. Moreover, it prescribes that the law must meet specific conditions to count as 'law'. Fuller distinguishes eight principles or 'laws for law-making' that the legislature has to respect when drafting legislation: (1) there must be rules (the requirement of generality); (2) laws must be made known to the public; (3) laws should, as a matter of principle, be prospective and not be applied retroactively;

12 *Ibidem*, pp. 29–30. See E. Rutynowska, M. Tatała, P. Wachowiec, Rule of Law in Poland 2020: The Rule of Law Crisis in the Time of the COVID-19 Pandemic, Warsaw 2020, https://for.org.pl/en/publications/for-reports/rule-of-law-in-poland-2020-the-rule-of-law-crisis-in-the-time-of-the-COVID-19-pandemic (accessed 15.12.2021), p. 4; 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, pp. 5–22.

13 J. Ferejohn, P. Pasquino, The Law…, *op. cit*., p. 219; P. Chmielnicki, D. Minich, R. Rybkowski, M. Stachura, K. Szocik, The COVID-19 Pandemic as an Opportunity for a Permanent Reduction in Civil Rights, 'Studia Iuridica Lublinesia' 2021, vol. 30, no. 4, pp. 77–109.

14 On the various conceptions of the rule see, for instance, J. Raz, The Authority of Law: Essays on Law and Morality, Oxford 1979, pp. 46–91. See also: P. Gowder, The Rule of Law in the Real World, New York 2016; M. Cohen, The Rule of Law as the Rule of Reasons, 'Archiv fuer Rechts- und Sozialphilosphie' 2010, vol. 96, no. 1, pp. 1–16; R. Dworkin, The Model of Rules, 'University of Chicago Law Review' 1967, vol. 35, no. 1, pp. 14–46; R. Dworkin, Political Judges and the Rule of Law, (in:) R. Dworkin (ed.), A Matter of Principle, Cambridge 1986, pp. 9–32; F. Hayek, The Constitution of Liberty, Chicago 1960; M. Kramer, Objectivity and the Rule of Law, New York 2007; A. Marmor, The Rule of Law and Its Limits, (in:) A. Marmor (ed.), Law in the Age of Pluralism, New York 2007, pp. 3–38; J.N. Shklar, Political Theory and the Rule of Law, (in:) S. Hoffman (ed.), Political Thought and Political Thinkers, Chicago 1998, pp. 21–37; J. Waldron, The Concept and the Rule of Law, 'Georgia Law Review' 2008, vol. 43, no. 1, pp. 1–62; J.E. Fleming (ed.), Nomos L: Getting to the Rule of Law, New York 2011; J. Malec, On the Rule of Law, 'Studia Iuridica Lublinesia' 2021, vol. 30, no. 5, pp. 445–459.

(4) laws should be clear and (5) devoid of contradictions; (6) they should not require impossible things from citizens; (7) the legal system has to provide for stability, so laws should not be changed frequently; and (8) there has to be a congruence between official action and declared rule.[15] He calls these principles 'the internal morality of law' and claims that it is a precondition of good law, though it cannot ensure that the law will be good, ethically speaking.

The principles of legality guarantee stability and security for people's actions by providing a legal framework for social relations in which people can organise their own lives. The COVID-19 pandemic created a situation of instability and uncertainty for both governments and citizens alike.[16] It resulted in the introduction of restrictive extraordinary measures which operated, at least partly, at the border or even outside the confines of the rule of law. As a result, legality threatens to become more and more a utopia. That does not necessarily mean that legality has become fictitious or a free-floating fantasy, as the common usage of the notion 'utopia' would suggest. Utopia can present an attractive vision which we aspire to, a regulative idea in the Kantian sense, or a '*focus imaginarius* that never can be known and realised fully'.[17] As Gadamer argues, utopia offers a 'suggestive image from far away'.[18] Its main contribution should not be situated at the level of action – it does not offer a blueprint for a perfect society – but rather at the level of critical reflection: it generates ideas of how to organise the *polis* in a just and rightful manner by presenting an image of what, in a certain moment of time, seems utterly unrealistic and unrealisable.

In a well-functioning liberal-democratic society, Fuller's principles of legality can be expected to be complied with fully or to a large degree. Some of these principles are part of 'the morality of duty' and contain basic obligations (such as the ban on retroactive legislation), whereas other principles are part of the 'morality of aspiration' and present 'a general idea of the perfection we ought to aim at' (such as the requirement of clarity).[19] However, it may be difficult, if not impossible, to comply with these principles in times of crisis, even to a low degree. As a utopia, however, legality can remain an inspiring ideal for the ordering and stabilisation of society. Moreover, on a practical level, it can help to reinforce people's trust in public institutions. Ricœur distinguishes three main functions of utopia: escape, critique, and exploration of the possible.[20] Firstly, utopia may offer a way to get out of the present situation by what Ricœur calls the 'magic of thought'.[21] Secondly, utopia provides a powerful

15 L. Fuller, The Morality of Law, New Haven 1964.
16 I. Krastev, Is It Tomorrow Yet? Paradoxes of the Pandemic, New York 2020.
17 I. Kant, Critique of Pure Reason, Cambridge 1999.
18 H.G. Gadamer, Platos Staat der Erzieher, (in:) H.G. Gadamer (ed.), Gesammelte Werke: Band 5: Griechische Philosophie I, Tübingen 1985, pp. 249–262, on p. 251 (our translation).
19 L. Fuller, The Morality…, *op. cit*. p. 6.
20 P. Ricœur, Lectures on Ideology and Utopia, New York 1986, pp. 269–270.
21 *Ibidem*, p. 296.

tool for criticising the present situation. Thirdly, and most fundamentally, utopia may have a transformative power. It exposes the contingency of the current social order and shows that social institutions such as law and politics could be organised differently. Whether the utopia of legality can fulfil these functions in the Netherlands and Poland is a matter that we will discuss below in sections 2 (the Netherlands) and 3 (Poland).

2. The Regulation of the Pandemic in the Netherlands

On 27 February 2020, the first COVID-19 infection was reported in the Netherlands. After that, the number of infections increased rapidly and two weeks later a state of pandemic was officially declared. [22] During the first wave of the pandemic, the Dutch government took several measures, including the closing down of schools, restaurants, cafés and childcare services.[23] People were required to work from home as much as possible, to avoid visiting vulnerable people and to keep one and a half metres distance from everybody outside their home. Moreover, they were encouraged to take further hygiene precautions. Churches, mosques, synagogues and other religious centres were put under pressure to limit the number of visitors for worship services and even to close down entirely, while events on a broader scale were cancelled. Finally, parks were closed when they became too crowded. In May 2020, the number of infections decreased, so the Dutch government decided to start lifting or relaxing some measures.

During the summer holidays, at the end of July 2020, a second wave of the pandemic began and this lasted until mid-October before a partial lockdown was declared. A full lockdown came into effect two months later. Schools were closed along with non-essential shops. People were allowed to receive at first two visitors at home and later only one. A person was permitted to walk outside with only one other person (except for people from his or her own household) and at one and a half metres distance.

At the end of January 2021, just before the third wave was announced, a curfew was installed, starting from 9 PM (later extended to 10 PM) until 4:30 the next morn-

22 A 'coronavirus time line' which lists the declarations and measures taken can be found on the website of the central government: https://www.rijksoverheid.nl/onderwerpen/coronavirus-tijdlijn/maart-2020-maatregelen-tegen-verspreiding-coronavirus. Another timeline can be found at: https://www.rivm.nl/gedragsonderzoek/tijdlijn-maatregelen-covid (accessed 15.12.2021).

23 For a discussion of these and other measures, see: A.J. Wierenga, De ongekende opleving van het noodrecht in de coronacrisis: Over de inzet van noodverordeningen en staatsnoodrecht ter infectieziektebestrijding, 'Ars Aequi' 2021, pp. 660–670. On the website of Onderzoeksinstituut Veiligheid en openbare orde (Research Institute Safety and Public Order, University of Groningen) blogs were posted regularly in which legal scholars (among whom Wierenga) comment on recent developments in the Dutch regulation, see: https://www.openbareorde.nl (accessed 15.12.2021).

ing. The curfew lasted for more than three months. Gradually, when the amount of people vaccinated increased, measures were lifted or relaxed. Under growing social pressure, the Dutch government started to allow more freedoms during the summer season. In October 2021, the number of infections suddenly started to increase dramatically, resulting in the fourth wave of the pandemic. In response, the Dutch government declared a partial or evening lockdown on 13 November 2021. Between 5 PM and 5 AM, non-essential shops, restaurants, cafés, theatres, gyms and so on were closed. The six-feet rule was restored, and people had to wear face masks in public places. People were again required to work from home and only to go to the office when necessary. On 19 December 2021, a full lockdown was declared for a period of four weeks. In the course of 2022, Dutch society has been gradually but slowly reopening despite the spread of the Omicron variant in the first half of the year.

In the first phase of the regulation – which started on 15 March and lasted until 1 December 2020 and coincided roughly with the first two waves of the pandemic – the competency for taking measures was based on the Public Health Act.[24] According to this Act, emergency measures can be taken in the case of a medical emergency situation, such as the pandemic. The Dutch government refrained from declaring a state of emergency, since it considered it a too drastic and unnecessary measure. An 'inner cabinet' was installed, consisting of several ministers, including the Prime Minister and the Minister of Health, Welfare and Sport.

During the first phase of the regulation, the Dutch parliament and the municipal councils remained largely sidelined. The inner cabinet, advised by experts, took the measures it deemed necessary, which were subsequently converted to emergency orders by the Safety Advisory Board (*Veiligheidsberaad*). The chairpersons of the 25 safety regions, comprising the mayors of the biggest city of each region, were responsible for implementing the measures in emergency orders. They convened in the Safety Advisory Board and devised together a model emergency order, which chairpersons could adopt and adjust to the situation in their own region. It was the mayor's task to enforce the emergency orders applicable in his or her municipality.

This top-down approach was heavily criticised since it was generally considered to be undemocratic. In the second phase of the regulation, when the pandemic entered its third wave, Parliament regained some control when the Corona Emergency Act came into effect on 1 December 2021.[25] The Act was valid for the period of three months, which could be extended by another three months by government's decision and with parliamentary approval. According to this Act, the Minister of Health,

24 The Public Health Act (Wet publieke gezondheid) of 9 October 2008, the Dutch Journal of Laws, 'Staatsblad' 2008, 460.

25 The Temporary Act Measures COVID-19 (Tijdelijke wet maatregelen COVID-19) of 28 October 2020, the Dutch Journal of Laws, 'Staatsblad' 2020, 441, for short: Corona Emergency Act ('Corona spoedwet').

Welfare and Sport has the competence to issue emergency decrees after having consulted other ministers in the inner cabinet.[26] Recently, on 17 May 2022, the Dutch first chamber voted against a further extension of the Corona Emergency Act, because it deemed it no longer necessary given the current health situation. That means that, if the Minister wants to take extraordinary measures in the next health crisis, the Public Health Act has to be amended.

During the first phase, the regulation violated some of Fuller's principles of legality. There were rules, certainly, and they were communicated regularly at press conferences and on government websites (in accordance with principles 1 and 2). However, it was not always clear to the citizens what the rules exactly contained since they were changed rather frequently (against principles 4 and 7). For instance, the number of people that one could receive at home or that were allowed to walk together outside changed frequently. Moreover, it was not always clear whether a prescription (such as the one and a half metres rule[27]) was a binding legal rule, backed up with a sanction, or merely an 'urgent recommendation'. As a result, the border between hard (enforceable) law and soft ('educational') law became somewhat blurred. Some legal concepts were not clearly defined in the emergency orders, such as 'gatherings', which could include private dinners at home or not. According to Wierenga and Brouwer, '[s]uch a vague prescription undermines trust in the government and jeopardises legal security for citizens.'[28] On the local level, emergency orders could differ from the model order, as devised by the Safety Advisory Board, which affects the requirement of generality (principle 1). Furthermore, distinctions were drawn in the measures that seemed at times arbitrary, e.g. between essential and non-essential shops (for instance, a liquor store was recognised as essential whereas a bookstore was not). The Temporary Act COVID-19 Justice and Safety, which is more limited in scope than the aforementioned Corona Emergency Act, had to secure that the legislative process, the judiciary and public administration could keep functioning during the pandemic. It entered into force retroactively (against principle 3).[29]

26 For a more extensive overview of the Dutch regulation of the pandemic, see: A.J. Wierenga, De ongekende…, *op. cit.*, pp. 660–670.

27 Surprisingly, the prescription to keep a six-foot distance was not a general legal rule in the emergency regulation during the first phase; only some local emergence orders contained this rule. See: A.J. Wierenga, J.G. Brouwer, Noodverordening en het verbod van samenkomsten: Coronacrisis en het recht (deel 9), 20 April 2020, https://www.openbareorde.nl/tijdschrift/coronacrisis-en-het-recht-deel-9/ (accessed 15.12.2021).

28 *Ibidem* (our translation).

29 The Temporary Act COVID-19 Justice and Safety (Tijdelijke wet COVID-19 Justitie en Veiligheid Wet) of 22 April 2020, the Dutch Journal of Laws, 'Staatsblad' 2020, 123. It is discussed in: A.J. Wierenga, A.E. Schilder, J.G. Brouwer, Coronacrisis en het recht (deel 13), 22 May 2020, https://www.openbareorde.nl/tijdschrift/coronacrisis-en-het-recht-deel-13/ (accessed 15.12.2021).

In the Dutch legal system, as a matter of principle, fundamental rights cannot be restricted or suspended based on emergency measures without any parliamentary oversight.[30] Only in an event of a major emergency and for a very limited period of time can fundamental rights be restricted or suspended. Some emergency orders even limited basic rights on a larger scale than would have been possible if a state of emergency had been officially declared, for instance by banning visitors in the private sphere.[31] From a democratic point of view, it obviously is highly problematic that, on the central level, Parliament and, on the local level, municipality councils were not involved at all in the process of law-making. This also disturbs the balance of power in the *trias politica*: the administration (in particular the inner cabinet) acquired so much power at the cost of the legislative power that some scholars spoke alarmingly of an 'administrative state'.[32] The emergency orders were enforced differently, in some parts of the country very strictly and other parts barely or not at all, which created an incongruence between official action and declared rule (principle 8).

In the second phase of the regulation, the emergency measures acquired a legal basis in the form of the Corona Emergency Act. The parliament gained more power, as the second chamber was granted the right to veto ministerial decrees. However, from the viewpoint of legality, the regulation met many of the same problems as in the first phase, in particular: the lack of *stability*: the rules continued to be changed regularly; *clarity*: it cannot be determined beforehand whether an emergency decree is necessary and, if so, when it is proportionate to the objective of protecting public health (that remains a matter of political, and not legal, assessment); and *generality*: for instance, exceptions to the general ban on mass events were granted that appeared to be arbitrary (such as in the case of the Dutch Grand Prix 2021 in Zandvoort). Moreover, the justification for the measures taken kept changing. This affects the consistency of the regulation (against principle 5). The Dutch Council of State warned against a 'yoyo effect'. Every time the number of infections decreased, measures were lifted which had to be reintroduced when the infection rate increased again. According to the Council of State, this was confusing for citizens and could affect their willingness to follow the rules. Moreover, the credibility and efficacy of the measures taken were at stake.

Early in this phase, the inner cabinet decided to install a curfew, however not on the basis of the Corona Emergency Act (which was already in force) but on another law – the Act Extraordinary Competencies Civil Authority,[33] article 8 – so it did not

30 W.J.M. Voermans, Het land moet bestuurd worden: Machiavelli in de polder, Amsterdam 2021, p. 188.

31 A.J. Wierenga, A.E. Schilder, J.G. Brouwer, Coronacrisis…, *op. cit.*

32 W.J.M. Voermans, Het…, *op. cit.,* p. 143 ff.

33 The Act Extraordinary Competencies Civil Authority (Wet buitengewone bevoegdheden burgerlijk gezag) of 3 April 1996, the Dutch Journal of Laws, 'Staatsblad' 1996, 367.

have to consult parliament. This was a rather surprising move, since a curfew is a very drastic measure which was used the last time in the Netherlands during the Nazi occupation. The action group Viruswaarheid (Virus Truth) brought the case before court. The Preliminary Relief Judge of the District Court of The Hague ruled that the curfew lacked an appropriate legal basis, since it was not demonstrated that the situation was so urgent that parliament could not have been consulted.[34] Subsequently, the state lodged an appeal but the government did not wait for the court's decision in appeal and added the curfew to the Corona Emergency Act. So ultimately, after much social, legal and political pressure, the curfew acquired an appropriate legal basis.

The question may be raised, however, as to whether this measure did not ask the impossible from citizens (against principle 6): can it be required that people stay at home between 9 or 10 o'clock in the evening until early morning and to receive only a very limited number of visitors for no less than three months? Many psychologists feared that the curfew would increase psychological problems among young people in particular. In terms of practicability, another point can be made: the enforcement of the measures is now to a large extent privatised: employees of restaurants, cafés, theatres et cetera had to check whether people were allowed to enter. This laid a heavy burden on the organisations involved. More fundamentally, the question is whether private persons are qualified and capable of enforcing legal norms. Finally, while it is true that parliament has more power to interfere in the legislative process, in practice the government has been in charge sofar and could pass most of the emergency decrees with minor interference from the second chamber.

3. The Regulation of the Pandemic in Poland

According to Polish law, the legal response to the pandemic situation can be introduced in two different ways, either by 1) the constitutional state of a natural disaster (Art. 232 of the Constitution of April 1997 of the Republic of Poland, for short: the Polish Constitution),[35] or 2) a statutory state of epidemic (the Act of 5 December 2008 on preventing and combating infections and infectious diseases, for short: the Act).[36]

The main difference between these two legal ways of combating epidemics is that the constitutional state of natural disaster provides extraordinary measures

34 ECLI:NL:RBDHA:2021:1100. The curfew is discussed in, for instance, J.G. Brouwer, Avondklok op basis van Wet publieke gezondheid: Parlementaire controle beter geborgd? Coronacrisis en het recht (deel 21), 19 February 2021, https://www.openbareorde.nl/tijdschrift/corona-en-het-recht-deel-21/ (accessed 15.12.2021).

35 Journal of Laws 1997, item 483 with amendments.

36 Journal of Laws 2020, item 1845. See L. Bosek (ed.), Ustawa o zapobieganiu oraz zwalczaniu zakażeń i chorób zakaźnych u ludzi. Komentarz, Warsaw 2021; L. Bosek, Stan epidemii. Konstrukcja prawna, Warsaw 2021.

which 'can only be applied in situations in which 'ordinary constitutional measures are inadequate" (Article 228 section 1 of the Polish Constitution).[37] These extraordinary measures can be introduced only for a definite period of time, no longer than 30 days.[38] A state of epidemic, on the other hand, can be applied to ordinary situations and is not limited in time. In other words, if the statutory state of epidemic is sufficient to combat an epidemic, the introduction of the constitutional state of a natural disaster is not necessary.[39] Since the statutory state of epidemic is considered the ordinary set of measures to combat a pandemic, the limitation of the constitutional rights and freedoms must be temporary and must meet such necessary conditions as a) the comprehensive statutory basis for the delegation of powers to the executive and b) the proportionality rule (Article 31 section 3 of the Polish Constitution).[40]

The Polish government decided to choose the second option – introducing a statutory state of epidemic. Just like in the Netherlands, the government considered the constitutional extraordinary measures as too drastic and unnecessary.[41] However, the government was strongly criticised for not introducing the state of natural disaster, and it was frequently argued that the political and economic reasons were predominant in this decision.[42]

The state of an epidemic, as well as necessary restrictive measures, can be introduced by executive regulations of the Minister of Health for a nationwide epidemic or by the voivode for the territory of a region. The Amendment of the Act of 2 March 2020 extended the extraordinary powers of the Minister of Health to the Council of Ministers, which resulted in diminishing the role of the former in managing the epidemic crisis.[43] On 13 March 2020 a state of epidemic threat was announced in the

37 M. Małecki, M. Sławiński, Repressive Nature of Selected COVID-19 Regulations in the Polish Legal System. The Question of Constitutionality, (in:) E. Hondius et al. (eds.), Coronavirus and the Law in Europe, Intersentia Online 2020, https://www.intersentiaonline.com/library/coronavirus-and-the-law-in-europe (accessed 15.12.2021).

38 An extension of a state of natural disaster requires the consent of the Polish Parliament (Sejm).

39 L. Bosek, Anti-Epidemic Emergency Regimes under Polish Law in Comparative, Historical and Jurisprudential Perspective, 'European Journal of Health Law' 2021, no. 28, pp. 113–141, on p. 138.

40 M. Małecki, M. Sławiński, Repressive…, *op. cit*.

41 The Supreme Court declared in its decision of 28 July 2020 (I NSW 2849/20) that 'the Council of Ministers was not obliged to introduce a state of natural disaster in response to the COVID-19 epidemic, in a situation where it was possible to introduce the State of Epidemic Emergency or the State of Epidemic' (in Bosek 2021, p. 139).

42 E. Rutynowska, M. Tatała, P. Wachowiec, Rule of Law…, *op. cit.,* p. 25. Yet, if the government introduced the extraordinary regime, it could also be prone to political criticism due to extraordinary power given to the executive in such a regime which may lead to the abuse of power. For instance, the extraordinary regime allows for the suspension of the freedom of assembly which would prevent anti-governmental mass demonstrations, such as those which took place in the middle of the second wave of the pandemic in response to the restriction on the anti-abortion law.

43 L. Bosek, Anti-Epidemic…, *op. cit*., p. 132.

decree by the Polish Minister of Health.[44] It resulted in the imposition of the first restrictions, such as quarantine for people returning from other countries, limiting public gatherings (in March 2020, any gatherings of more than 50 people were prohibited, on 10 April 2020 all kinds of gatherings were prohibited for a very short time) and the functioning of workplaces. A week later, on 20 March 2020, the Minister of Health announced a state of epidemic.[45] It resulted in further restrictions being imposed such as limiting freedom of movement, limiting access to public green and leisure areas, obligation to keep distance, obligation to wear face masks, and a further prohibition on gatherings (on 21 December 2020 gatherings of more than five persons were prohibited).

The most restrictive measures such as lockdowns, similar to a certain degree to the aforementioned Dutch ones, were only introduced in the early stage of the pandemic when Poland actually had a relatively small number of infections (March–April 2020). During the second and third waves of the pandemic, in which the number of infections rose drastically, partial lockdowns, restrictions on gatherings, obligation to wear facemask etc. were continued. Yet measures were never as strict as in the Netherlands, except those introduced in March–April 2020, and became less and less intrusive.

In Poland, just like in the Netherlands, rights and freedoms cannot be limited by decree, but only by statute. Since the state of natural disaster was not introduced, any limitation on constitutional rights and freedoms required a comprehensive statutory basis and the application in accordance with the proportionality rule. Although the Act gave a very broad scope of authorisation to the executive powers, most of the aforementioned, highly intrusive restrictions did not have a direct and comprehensive statutory authorisation of the parliament. For instance, the government introduced a prohibition on movement in public space except for conducting professional affairs, volunteering in affairs related to combating the epidemic, conducting religious affairs, or 'satisfying the necessary needs associated with current matters of everyday life'.[46] According to the Act, in the state of an epidemic the executive powers

44 The state of epidemic threat is defined in Article 2 point 23 of the Act as: a legal situation introduced in a given area with respect to the risk of an epidemic outbreak and in order to undertake preventive measures specified in the Act.

45 The state of epidemic is defined in Article 2 point 22 of the Act as: a legal situation introduced in a given area with respect to an epidemic and in order to undertake counter-epidemic and preventive measures specified in the Act to minimise the effects of the epidemic. The difference between the state of epidemic threat and the state of epidemic is that the former is introduced when a risk of the outbreak of an epidemic occurs, while the latter concerns combating the pandemic which has already occurred.

46 §5 of Council of Minister's Regulation of 31 March 2020 on establishing certain limits, orders and prohibitions in relation to the state of epidemic (Journal of Laws 2020, item 566), changed by the Council of Minister's regulations of 10, 19 and 26 April 2020, on establishing certain limits, orders and prohibitions in relation to the state of epidemic.

may temporarily limit specific methods or manners of movement, yet they cannot impose on the entire population a general ban on movement.[47] Besides, the phrase which was used in the regulation concerning the prohibition of movement except for 'satisfying the necessary needs' of everyday life was very ambiguous and left too much discretion to the interpretation of the police and healthcare officials.[48] The same refers to the introduction of a curfew on the New Year's Eve of 2020,[49] which belongs to extraordinary measures and could not be introduced by a decree in the state of epidemic. What is more, the restrictions on movement addressed at specific age populations, such as minors or seniors, could be considered as discriminatory policies.[50] In the case of minors, they were prohibited from travelling without a legal guardian, and in the case of seniors they could only travel for conducting professional affairs, satisfying the necessary needs associated with current matters of everyday life, or conducting religious affairs.[51]

The prohibition on the access to green and leisure areas, including parks and even forests, in the early stage of the pandemic, was also questionable from a legal point of view, since the executive power could only impose temporary restrictions of the use of sites or areas, and not prohibit access to parks and forests as such.

The general obligation to wear face masks in public spaces was also introduced without the specific statutory delegation. According to the Act, the executive powers could order wearing face masks to sick people or to those who have contact with them, yet they could not extend the obligation to cover the nose and mouth to the entire population, which would require a separate statutory basis.[52] The statutory obligation to wear face masks was introduced much later, in December 2020.

For those who violated the aforementioned restrictions, fines were imposed by the police or administrative fines by healthcare inspectors. Yet ordinary and administrative courts reviewed these sanctions and considered them not binding since they

47 Z. Ganczewska, P. Kubaszewski, Prawa człowieka w dobie pandemii, Warsaw 2021, p. 13.

48 *Ibidem*, pp. 13–14.

49 Council of Minister's Regulation of 21 December 2020 on establishing certain limits, orders and prohibitions in relation to the state of epidemic (Journal of Laws 2020, item 2316).

50 Z. Ganczewska, P. Kubaszewski, Prawa…, *op. cit.*, p. 14.

51 Council of Minister's Regulation of 31 March 2020, *op. cit.*; Council of Minister's Regulation of October 2020 on establishing certain limits, orders and prohibitions in relation to the state of epidemic, Journal of Laws 2020, item 1758.

52 E. Rutynowska, M. Tatała, P. Wachowiec, Rule of Law…, *op. cit.,* p. 25. For further discussion of other controversial legal issues during the pandemic see for instance: E.M. Guzik-Makaruk, Some Remarks on the Changes in the Polish Penal Code During the Pandemic, 'Bialystok Legal Studies' ('Białostockie Studia Prawnicze') 2021, vol. 26, no. 6 (Special Issue), pp. 27–37; G.B. Szczygieł, Prisoners During the Pandemic, 'Bialystok Legal Studies' ('Białostockie Studia Prawnicze') 2021, vol. 26, no. 6 (Special Issue), pp. 39–54; P. Chmielnicki, D. Minich, R. Rybkowski, M. Stachura, K. Szocik, The COVID-19…, *op. cit.*, pp. 77–109.

were imposed for violating the restrictions which were introduced without comprehensive and direct statutory delegation.

From the perspective of Fuller's 'internal morality of law', it is worth stressing that most of the formal principles of law-making were violated or undermined. As Fuller argues, 'infringements of legal morality tend to become cumulative'[53] and the pandemic legislation seems to be a very good example of this. The extraordinary restrictions implemented in the first phase of the pandemic lacked a proper legal basis, which violated the principle of congruence between the law as declared in the constitution and statutes and the law as actually administered by the public officials according to the decrees (principle 8). The rapid and mass-scale production of new laws and amendments violated the principle of stability (principle 7) and resulted in legal chaos and uncertainty.[54] New measures were published with little or no notice, undermining the principle of publicity (principle 2) and prospectivity (principle 3), which resulted in leaving people no time for preparation or adjustment to new legal requirements even though some of them were very intrusive in the functioning of workplaces or the organisation of people's everyday life. Moreover, the legislation was often inconsistent and full of exceptions and provided absurd solutions,[55] which violated the principle of consistency and clarity (principles 4 and 5). The governance was chaotic, uncoordinated, unpredictable and not transparent. The communication of the public officials was unclear, ambiguous and contradictory – contradictory information was provided by public officials during press conferences, on government websites and in the regulations themselves. There were also measures which violated the principle of practicability (principle 6) by requiring the impossible, for example keeping distance in places with not enough space and so on.

4. The Utopia of the Pandemic

When we compare the Polish and the Dutch approaches to the pandemic, there are some differences. For instance, at the start of the pandemic the Polish government declared a state of epidemic, whereas the Dutch government took measures that were implemented in emergency orders in the various safety regions. It is the task of these public bodies to oversee regional cooperation in areas such as firefighting, disaster management, crisis management and healthcare. The Safety Regions Act, which dates

53 L. Fuller, The Morality…, *op. cit*., p. 92.

54 E. Rutynowska, M. Tatała, P. Wachowiec, Rule…, *op. cit*., p. 4, 15 and 21.

55 The number of exceptions to each rule, their inconsistency, unclarity and absurdity were often mocked. For example, an electronic 'Generator of COVID-19 restrictions' was created where you can 'check what is allowed and what is not today' (https://koronawirus.lol, accessed 15.12.2021). Computer-generated restrictions include for instance: 'Hotels are available only for ex-miners, ex-husbands, fencers and Greta Thunberg'; 'All persons arriving to Poland by train from polar circles of Norway, Sweden and Finland are exempted from quarantine' and so on (our translation).

from 2010, regulates this type of regional cooperation in a high-quality and efficient way.[56] A geographical Coronavirus Dashboard of the 25 safety regions in the Netherlands was created.[57] The dashboard includes data information on vaccinations, hospitals, infections, behaviour, vulnerable groups and early indicators. However, in our view, the above-mentioned differences between the Netherlands and Poland are not fundamental. Ultimately, both countries seem to end up in chaos and improvisation and have difficulties preserving legality in these exceptional times. Taking the considerable difference of the initial ranking in the Rule of Law Index 2020 into account, this may seem surprising. In the report on the governance of the COVID-19 crisis in 29 countries, we can read that in terms of resilience of governance (including executive accountability) the Netherlands takes a middle position, whereas Poland ended up in the lower ranks.[58] This can be interpreted as a result of general differences in the state's capacity of the two countries, which was tested by the crisis. Yet the comparison of the pandemic regulations in the two countries reveals that Fuller's principles of legality were violated to a similar extent. Moreover, in later stages of the pandemic, the governments in both countries tried to bring the legislation more in accordance with the requirements of the rule of law. In both countries, the infringements on the legality principles had a similar effect on the people's trust in public institutions: in a recent report, it is argued that the Netherlands degraded from a high-trust to a low-trust society,[59] whereas in Poland the level of institutional distrust was further deepened.

Both the Dutch and Polish governments refrained from declaring a state of emergency. By declaring a state of epidemic, the Polish government decided to act in accordance with ordinary measures specified in the Act. The Polish government was strongly criticised for not introducing the extraordinary measures, but in fact the restrictions implemented by the executive powers, especially in the early stage of the epidemic, were of an extraordinary character.[60] These laws were questioned due to the lack of specific statutory delegation, unspecified timing and the disproportionality of the sanctions and restrictions. The overruling by the ordinary courts of the fines imposed by public officials for violating the restrictions proved that the division of

56 Safety Regions Act (Wet Veiligheidsregio's) of 11 February 2010, https://wetten.overheid.nl/BWBR0027466/2017–06–10# (accessed 29.04.2022).

57 See: Level of risk per safety region | Coronavirus Dashboard | Government.nl (accessed 29.04.2022).

58 C. Schiller et al., Just How Resilient are OECD and EU Countries? Sustainable Governance in the Context of the COVID-19 Crisis, Bertelsmann Stiftung 2021, https://www.bertelsmann-stiftung.de/de/publikationen/publikation/did/just-how-resilient-are-the-oecd-and-eu-countries-all (accessed 15.12.2021), pp. 130–132.

59 G. Engbersen et al., De laag-vertrouwensamenleving: De maatschappelijke impact van COVID-19 in Amsterdam, Den Haag, Rotterdam & Nederland (vijfde meting), Rotterdam 2021, https://www.impactcorona.nl/laag-vertrouwen-samenleving/ (accessed 15.12.2021).

60 E. Rutynowska, M. Tatała, P. Wachowiec, Rule…, *op. cit.*, p. 8.

powers worked properly. At the same time, the judgments increased the tension between the government and the judiciary and contributed to the further deterioration of trust in law and public institutions in Poland. The unjustified fines on a mass scale during the pandemic elucidate the limitations of a legal system in which the courts are solely playing the role of 'a bulwark against lawless administration of the law', as Fuller points out, since 'it makes the correction of abuses dependent upon the willingness and financial ability of the affected party to take his case to litigation'.[61]

The measures taken by the Polish government not only created a chaotic situation from a legal point of view; it also caused uncertainty among the people. This had a negative effect on the public's attitude towards the government and its willingness to comply with the measures. Although the initial level of social and institutional trust was relatively low in Poland, in the early stages of the pandemic people demonstrated an unexpected willingness to accept constraints on their rights and freedoms even when they lacked a proper legal basis. It can be argued that, as an exceptional situation, pandemics allow for the temporal 'suspension' of the rule of law for the sake of safety.[62] However, when an exceptional situation threatens to become permanent, the 'suspension' of the rule of law undermines the social contract and results in disobedience. In fact, in later stages of the pandemic, due to the governmental disregard for the rule of law, the trust in public institutions decreased and the authority of law was undermined, encouraging citizens to disobey the rules. From the second wave of the pandemic, the governmental restrictive measures in Poland were based mainly on voluntary compliance. Despite its ineffectiveness – the number of infections and the pandemic death toll were well above average – the government did 'not want to provoke the anger of its citizens and resign[ed] from acting or only pretend[ed] to act'.[63] At the same time, citizens pretended to obey the law and the government pretended not to see that they were pretending, which created a rather Kafkaesque situation. Furthermore, the state's inability to effectively coordinate social behaviour by imposing legal norms, as well as its inability to guarantee access to basic social goods, such as healthcare resources, resulted in the creation of parallel social norms and institutions based on social capital.[64] On 16 May 2022 the state of epidemic was cancelled in Poland,[65] almost all restrictions had been lifted by spring 2022 and the healthcare system has started to treat COVID-19 as a normal disease.

61 L. Fuller, The Morality…, *op. cit*., p. 81.

62 B. Biga et al., Folk Improvisations: How the Pandemic Changes Social Norms, Cracow 2021, https://politykipubliczne.pl/wp-content/uploads/2021/07/22-Folk-Improvisations_EN-raport.pdf (accessed 15.12.2021), p. 7.

63 *Ibidem*, p. 8.

64 *Ibidem*.

65 Council of Minister's Regulation of 12 May 2022 on renouncing the state of epidemic on the area of the Republic of Poland (Journal of Laws 2022, item 1027). Currently, the state of epidemic

The Dutch approach to the pandemic shows similar elements of chaos and improvisation. As Schiller et al. note, 'the government's crisis management remained preoccupied with short-term objectives, with no signs of future-oriented learning or adaption'.[66] Moreover, it can be questioned whether the approach is really based on consensus as Jasanoff and Hilgartner claim.[67] It is true that the government, before taking new measures, usually asks advice from the Outbreak Management Team (OMT), a group of medical and other experts, and it also regularly consults other people, for instance from trade unions and business and teachers' organisations.[68] However, it occasionally deviates from the advice given by appealing to the demands of 'society'. After the first wave of the pandemic, the rift between the government and the opposition in parliament deepened.[69] Dutch society became more and more divided on the question of how to deal with the crisis. Many citizens in the Netherlands no longer supported the government's seemingly erratic approach. The COVID-19 pandemic enhanced distrust of public institutions (government, medical science and the mainstream media): people in particular on the left and right extremes of the political spectrum rejected the restrictions on freedom made for the sake of public health. Regularly, groups of people demonstrated in the streets against the measures. In protest against the government's vaccination campaign, some opponents were even considering establishing a 'parallel society' outside the Netherlands (possibly somewhere in South America), a 'New Batavian Republic'.[70] In the Netherlands, as in Poland, most restrictions have recently been lifted. For example, as of 23 March 2022, the Dutch do not have to wear face masks any more, expect in airplanes and at airports. The Dutch are no longer required to work from home, unless in the case that a person does not feel well. Since 23 March 2022 it is much easier to travel than earlier in the pandemic.[71]

With regard to the rule of law, the Dutch approach is problematic too. As said above, in later phases of the regulation, both the Polish and the Dutch government did strengthen the legal basis of the measures taken. However, since the measures kept on changing constantly and a clear rationale behind the approach taken was lacking, the situation was – legally speaking – far from ideal. In terms of generality,

threat has replaced the state of epidemic in Poland which justifies certain sanitary measures (see footnote 44).

66 C. Schiller et al., Just…, *op. cit*., p. 130.

67 S. Jasanoff, S. Hilgartner, A Stress…, *op. cit.*

68 C. Schiller et al., Just…, *op. cit*., p. 130.

69 *Ibidem*, p. 27.

70 A. Kouwenhoven, W. Heck, Coronaprik jaagt 'wakkere burger' naar een eigen, parallele samenleving, 'NRC Handelsblad', 22 June 2021.

71 See: Coronavirus measures and advice in brief | Coronavirus COVID-19 | Government.nl and Verdere versoepelingen coronamaatregelen | Nieuwsbericht | Rijksoverheid.nl (accessed 29.04.2022).

clarity and stability of the regulations there remains much to be desired. And so, the search for legality continues.

Conclusion: In Search of Legality

As we have seen, the Netherlands and Poland had serious problems in preserving legality in these exceptional times. Against our initial hypothesis, the difference between the two countries in terms of the rule of law was not as large as one would have expected from their respective rankings in the Rule of Law Index 2020. The situation in the two countries seemed rather dystopian, both from the viewpoint of public health and the rule of law. Returning to our central research question, we have to conclude that the rule of law – in particular, the principle of legality – played a very limited role in regulating the pandemic in Poland as well as in the Netherlands.

However, this does not mean that legality was just a utopia in the conventional sense of a fantasy or illusion. Following Ricœur, we claim that the utopia of legality may fulfil an important critical function in criticising the current approach and may offer useful suggestions for improving the legal basis of the measures taken. In contrast to Schmitt, we do not believe that the order must be restored first before the legal order can be established. In exceptional situations it may be necessary to limit or suspend fundamental rights temporarily. This constitutes, as Agamben argues, the 'paradox of sovereignty': the sovereign is both inside and outside the legal order, since it has the *legal* power to suspend the law.[72] Although it is true that Fuller's requirements of law-making were violated, particularly in the early stage of the pandemic regulation but also later on, legality remained an important background notion on the basis of which the current approach was criticised in parliament and in society at large. Moreover, it incited legislative amendments; in due course, the legal basis of the measures was strengthened in both Poland and the Netherlands. A clear sign of this development was the decision by the Dutch First Chamber to no longer extend the Corona Emergency Act.

Building on Fuller's principles of legality, several useful recommendations can be given for how to handle crisis situations in the future, in particular:

1. The normative regime enacted to confront the emergencies must be fitting for the situation and adopted restrictive measures should be proportionate to the threat and take into account far-reaching social, economic and psychological consequences, keeping balance between ad-hoc regulations responding to current urgent problems and long-standing policies aimed at stability and welfare;

72 G. Agamben, Homo Sacer: Sovereign Power and Bare Life, Redwood City 1998, p. 15.

2. Both the laws and their communication must be as clear as possible, unambiguous and consistent;
3. The laws must be applied prospectively and must provide adequate time for adjusting to drastic changes required by the law;
4. The laws should be reflexive – they should take into account human capacities, pre-existing social norms and practices;
5. The inflation of laws and their rapid changes must be avoided;
6. The laws should not contain unjustifiable exceptions;
7. The laws should be enforceable;
8. The laws should be applied with the same force in all parts of the territory under which they are binding and to all people to which they are addressed without unjustified exceptions for the privileged individuals or groups;
9. It should be clear whether the prescriptions given constitute binding rules (hard law) or 'strong' recommendations (soft law);
10. The justification of the measures should be consistent.

The utopia of legality serves as a constant reminder that this is an exceptional and undesirable state of affairs and that a return to some kind of legal normality has to be ensured as soon as possible.

REFERENCES

Ackerman B., The Emergency Constitution, 'Yale Law Journal' 2004, vol. 113, no. 5, pp. 1029–1091.

Agamben G., Homo Sacer. Il potere sovrano e la nuda vita, Torino 1995. English translation: Homo Sacer: Sovereign Power and Bare Life, Redwood City 1998.

Agamben G., Stato di eccezione, Torino 2003. English translation: State of Exception, Chicago 2005.

Biga B. et al., Folk Improvisations: How the Pandemic Changes Social Norms, Cracow 2021, https://politykipubliczne.pl/wp-content/uploads/2021/07/22-Folk-Improvisations_EN-raport.pdf.

Bosek L., Anti-Epidemic Emergency Regimes under Polish Law in Comparative, Historical and Jurisprudential Perspective, 'European Journal of Health Law' 2021, no. 28, pp. 113–141.

Bosek L., Stan epidemii. Konstrukcja prawna, Warsaw 2021.

Bosek L. (ed.), Ustawa o zapobieganiu oraz zwalczaniu zakażeń i chorób zakaźnych u ludzi. Komentarz, Warsaw 2021.

Brouwer J.G., Avondklok op basis van Wet publieke gezondheid: Parlementaire controle beter geborgd? Coronacrisis en het recht (deel 21), 19 February 2021, https://www.openbareorde.nl/tijdschrift/corona-en-het-recht-deel-21/.

Chmielnicki P., Minich D., Rybkowski R., Stachura M., Szocik K., The COVID-19 Pandemic as an Opportunity for a Permanent Reduction in Civil Rights, 'Studia Iuridica Lublinesia' 2021, vol. 30, no. 4, pp. 77–109.

Cohen M., The Rule of Law as the Rule of Reasons, 'Archiv fuer Rechts- und Sozialphilosphie', 2010, vol. 96, no. 1, pp. 1–16.

Diac Crego M., Kotanidis S., State of emergency in response to the coronavirus crisis. Normative response and parliamentary oversight in EU Member States during the first wave of the pandemic, European Parliament Research Service, December 2020, https://www.europarl.europa.eu/RegData/etudes/STUD/2020/659385/EPRS_STU(2020)659385_EN.pdf.

Dworkin R., The Model of Rules, 'University of Chicago Law Review' 1967, vol. 35, no. 1, pp. 14–46.

Dworkin R., Political Judges and the Rule of Law, (in:) R. Dworkin, A Matter of Principle, Cambridge 1986, pp. 9–32.

Engbersen G. et al., De laag-vertrouwensamenleving: De maatschappelijke impact van COVID-19 in Amsterdam, Den Haag, Rotterdam & Nederland (vijfde meting), Rotterdam 2021, https://www.impactcorona.nl/laag-vertrouwen-samenleving/.

Ferejohn J., Pasquino P., The Law of Exception: A Typology of Emergency Powers, 'International Journal of Constitutional Law' 2004, vol. 2, no. 2., pp. 210–233.

Fleming J.E. (ed.), Nomos L: Getting to the Rule of Law, New York 2011.

Florczak-Wątor M., Niekonstytucyjność ograniczeń praw i wolności jednostki wprowadzonych w związku z epidemią COVID-19 jako przesłanka odpowiedzialności odszkodowawczej państwa, 'Państwo i Prawo' 2020, no. 12, pp. 5–22.

Fuller L., The Morality of Law, New Haven 1964.

Gadamer H.G., Platos Staat der Erzieher, (in): H.G. Gadamer, Gesammelte Werke: Band 5: Griechische Philosophie I, Tübingen 1985.

Ganczewska Z., Kubaszewski P., Prawa człowieka w dobie pandemii, Warsaw 2021.

Gowder P., The Rule of Law in the Real World, New York 2016.

Guzik-Makaruk E.M., Some Remarks on the Changes in the Polish Penal Code During the Pandemic, 'Bialystok Legal Studies' ('Białostockie Studia Prawnicze') 2021, vol. 26, no. 6 (Special Issue), pp. 27–37.

Hayek F., The Constitution of Liberty, Chicago 1960.

Jasanoff S., Hilgartner S., A Stress Test for Politics: Insights from the Comparative Covid Response Project (CompCoRe) 2020, VerfBlog, 5 November 2021, https://verfassungsblog.de/a-stress-test-for-politics-insights-from-the-comparative-covid-response-project-compcore-2020/.

Kant I., Critik der reinen Vernunft, Riga, 178. English translation: Critique of Pure Reason, Cambridge 1999.

Kleinfeld R., Do Authoritarian or Democratic Countries Handle Pandemics Better?, CEIP Commentary, 31 March 2020, https://carnegieendowment.org/2020/03/31/do-authoritarian-or-democratic-countries-handle-pandemics-better-pub-81404.

Kouwenhoven A., Heck W., Coronaprik jaagt 'wakkere burger' naar een eigen, parallele samenleving, 'NRC Handelsblad', 22 June 2021.

Kramer M., Objectivity and the Rule of Law, New York 2007.

Krastev I., Is It Tomorrow Yet? Paradoxes of the Pandemic, New York 2020.

Malec J., On the Rule of Law, 'Studia Iuridica Lublinesia' 2021, vol. 30, no. 5, pp. 445–459.

Małecki M., Sławiński M., Repressive Nature of Selected COVID-19 Regulations in the Polish Legal System. The Question of Constitutionality, (in:) E. Hondius et al. (eds.), Coronavirus and the Law in Europe, Intersentia Online 2020, https://www.intersentiaonline.com/library/coronavirus-and-the-law-in-europe.

Marmor A., The Rule of Law and Its Limits, (in:) A. Marmor (ed.), Law in the Age of Pluralism, New York 2007, pp. 3–38.

Raz J., The Authority of Law: Essays on Law and Morality, Oxford 1979.

Ricœur P., Lectures on Ideology and Utopia, New York 1986.

Rutynowska E., Tatała M., Wachowiec P., Rule of Law in Poland 2020: The Rule of Law Crisis in the Time of the COVID-19 Pandemic, Warsaw 2020, https://for.org.pl/en/publications/for-reports/rule-of-law-in-poland-2020-the-rule-of-law-crisis-in-the-time-of-the-COVID-19-pandemic.

Schiller C. et al., Just How Resilient are OECD and EU Countries? Sustainable Governance in the Context of the COVID-19 Crisis, Bertelsmann Stiftung 2021, https://www.bertelsmann-stiftung.de/de/publikationen/publikation/did/just-how-resilient-are-the-oecd-and-eu-countries-all.

Schmitt C., Die Diktatur, Berlin 1922. Polish translation: Dyktatura. Od źródeł nowożytnej idei suwerenności do proletariackiej walki klas, Warsaw 2016.

Schmitt C., Politische Theologie: Vier Kapitel zur Lehre von der Souveränität, Berlin 1996.

Shklar J.N., Political Theory and the Rule of Law, (in:) S. Hoffman (ed.), Political Thought and Political Thinkers, Chicago 1998, pp. 21–37.

Szczygieł G.B., Prisoners During the Pandemic, 'Bialystok Legal Studies' ('Białostockie Studia Prawnicze') 2021, vol. 26, no. 6 (Special Issue), pp. 39–54.

Voermans W.J.M., Het land moet bestuurd worden: Machiavelli in de polder, Amsterdam 2021.

Waldron J., The Concept and the Rule of Law, 'Georgia Law Review' 2008, vol. 43, no. 1, pp. 1–62.

Wierenga A.J., De ongekende opleving van het noodrecht in de coronacrisis: Over de inzet van noodverordeningen en staatsnoodrecht ter infectieziektebestrijding, 'Ars Aequi' 2021, pp. 660–670.

Wierenga A.J., Brouwer J.G., Noodverordening en het verbod van samenkomsten: Coronacrisis en het recht (deel 9), 20 April 2020, https://www.openbareorde.nl/tijdschrift/coronacrisis-en-het-recht-deel-9/.

Wierenga A.J., Schilder A.E., Brouwer J.G., Coronacrisis en het recht (deel 13), 22 May 2020, https://www.openbareorde.nl/tijdschrift/coronacrisis-en-het-recht-deel-13/.

WJP Rule of Law Index 2020, https://worldjusticeproject.org/rule-of-law-index/.

WJP Rule of Law Index 2021, https://worldjusticeproject.org/sites/default/files/documents/WJP-INDEX–21.pdf.

Bialystok Legal Studies
Białostockie Studia Prawnicze
2022 vol. 27 nr 2

sciendo

DOI: 10.15290/bsp.2022.27.02.02

Received: 15.01.2022
Accepted: 13.04.2022

István Hoffman
Eötvös Loránd University (Budapest), Hungary
hoffman.istvan@ajk.elte.hu
ORCID ID: https://orcid.org/0000–0002–6394–1516

Jarosław Kostrubiec
Maria Curie-Sklodowska University, Poland
jaroslaw.kostrubiec@mail.umcs.pl
ORCID ID: https://orcid.org/0000–0003–1379–9846

Political Freedoms and Rights in Relation to the COVID-19 Pandemic in Poland and Hungary in a Comparative Legal Perspective[1]

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

1 Acknowledgement: This article is based upon work from COST Action CA20123 – Intergovernmental Coordination from Local to European Governance (IGCOORD), supported by COST (European Cooperation in Science and Technology).

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 Rights[2] and the International Covenant on Economic, Social and Cultural Rights.[3] This typology is reflected to a greater or lesser extent in the Polish[4] and Hungarian[5] 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 governments[11] to act.

Certain specific legal situations necessarily entail restrictions on political rights[12]. 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. Drinóczi 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, Coronovirus, 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 introduced[14], 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, Kształtowanie 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 state[26], as in the case of a state of natural disaster,

22 J. Paśnik, 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. Paśnik, 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 Act[31] 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/Gl 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 Code[38], 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 people[48], 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 disasters[54] – 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 Devecser (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 criticism[55] 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 pandémiaárnyékában: 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 freedoms[62], 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]

REFERENCES

Ambrus I. and Gárdos-Orosz F., 15/2020. (VIII. 8.) AB határozat – rémhírterjesztés, (in:) Gárdos-Orosz F. and Zakariás K. (eds.), Az Alkotmánybírósági gyakorlat. Az Alkotmánybíróság 100 elvi jelentőségű határozata 1990–2020, Budapest 2021.

Asbóth M.D., Fazekas M. and Koncz J., Egészségügyi igazgatás és jog, Budapest 2020.

Bencze M. and Győri Cs., Hírek szárnyán: a rémhírterjesztés bűncselekménye és a jogbiztonság, 'Magyar Tudomány' 2021, vol. 182, no. 5.

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

Bożek M., Karpiuk M., Kostrubiec J. and Walczuk K., Zasady ustroju politycznego państwa, Poznań 2012.

Chmielnicki P., Minich D., Rybkowski R., Stachura M. and Szocik K., The COVID-19 Pandemic as an Opportunity for a Permanent Reduction in Civil Rights, 'Studia Iuridica Lublinensia' 2021, vol. 31, no. 4.

Cioffi A., Ruggiero M., Rinaldi R., COVID-19 Pandemic and Balance of Constitutional Rights, 'Clinica Terapeutica' 2021, vol. 172, no 2.

Cox M., States of Emergency and Human Rights During a Pandemic: A Hungarian Case Study, 'Human Rights Brief' 2020, vol. 24, no. 1, https://digitalcommons.wcl.american.edu/hrbrief/vol24/iss1/5.

Csink, L., Constitutional Rights in the Time of Pandemic The Experience of Hungary, 'Hungarian Yearbook of International Law and European Law' 2021, vol. 9, no. 1.

Czuryk M., Activities of the Local Government During a State of Natural Disaster, 'Studia Iuridica Lublinensia' 2021, vol. 30, no. 4.

Dąbrowska-Kłosińska P., The Protection of Human Rights in Pandemics - Reflections on the Past, Present, and Future, 'German Law Journal' 2021, no. 22.

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

Fazekas C., Kálmán K., Szentgáli-Tóth B., Szerencsés K. and Takács J., Demokrácia a pandémia árnyékában: választások a világjárvány idején a környező országokban, 'MTA Law Working Papers' 2021, no. 31.

Florczak-Wątor M., Niekonstytucyjność ograniczeń praw i wolności jednostki wprowadzonych w związku z epidemią COVID-19 jako przesłanka odpowiedzialności odszkodowawczej państwa, 'Państwo i Prawo' 2020, no. 12.

Gárdos-Orosz F., COVID-19 and the Responsiveness of the Hungarian Constitutional System, (in:) J.M. Serna de la Garza (ed.), COVID-19 and Constitutional Law, Ciudad de México 2020.

Hajnal Gy., Jeziorska I. and Kovács É.M., 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.

Hoffman I. and Balázs I., Administrative Law in the Time of Corona(virus): Resiliency of the Hungarian Administrative Law? 'Studia Iuridica Lublinensia' 2021, vol. 30, no. 1.

Horváth A., A 2020-as Covid-veszélyhelyzet alkotmányjogi szemmel, (in:) Z. Nagy Z. and Horváth A. (eds.), A különleges jogrend és nemzeti szabályozási modelljei, Budapest 2021.

Informacja o działalności Rzecznika Praw Obywatelskich oraz o stanie przestrzegania wolności i praw człowieka i obywatela w roku 2020, Warszawa 2021, https://bip.brpo.gov.pl/sites/default/files/Informacja_RPO_za_2020.pdf.

Jaskuła L. K., 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.

Joseph S., Castan M., The International Covenant of Civil and Political Rights. Cases, Materials and Commentary, Oxford 2013.

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

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

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

Karpiuk M., Kształtowanie się instytucji stanów nadzwyczajnych w Polsce, Warsaw 2013.

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

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

Kostrubiec J., 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.

Kurzępa E., Stan epidemii a stan klęski żywiołowej rozważania w kontekście bezpieczeństwa państwa, 'Przegląd Prawa Publicznego' 2021, no 5.

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

Maroń G., Polskie prawodawstwo ograniczające wolność religijną w okresie pandemii koronawirusa SARS-CoV–2 a standardy państwa prawa - wybrane zagadnienia, 'Przegląd Prawa Publicznego' 2021, no 1.

Orzeszyna K., Skwarzyński M. and Tabaszewski R., Prawo międzynarodowe praw człowieka, Warsaw 2020.

Paśnik J., Kilka refleksji o regulacji stanu epidemii jako sui generis pozakonstytucyjnego stanu nadzwyczajnego, 'Przegląd Prawa Publicznego' 2020, no 11.

Radajewski R., Stan zagrożenia epidemicznego oraz stan epidemii jako formy prawne ochrony zdrowia publicznego, 'Przegląd Legislacyjny' 2021, no. 4(118).

Romańczuk-Grącka M., 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.

Sensson-McCarthy A-L., The International Law of Human Rights and States of Exceptions, Hague 1998.

Szente Z., A 2020. március 11-én kihirdetett veszélyhelyzet alkotmányossági problémái, 'VÁllam- és Jogtudomány' 2020, vol. 61, no. 3.

Szmulik B. and Szymanek J., Niemożność przeprowadzenia wyborów jako przesłanka wprowadzenia stanu wyjątkowego, 'Przegląd Legislacyjny' 2020, no. 3.

Vörös I., A felhatalmazási törvénytől az egészségügyi válsághelyzetig és tovább, (in:) F. Gárdos-Orosz F. and Lőrincz V.O. (eds.), Jogi diagnózisok. A COVID-19 világjárvány hatásai a jogrendszerre, Budapest 2020.

Bialystok Legal Studies
Białostockie Studia Prawnicze
2022 vol. 27 nr 2

DOI: 10.15290/bsp.2022.27.02.03

Received: 29.01.2022
Accepted: 25.04.2022

Aleksandra Syryt
Cardinal Stefan Wyszyński University in Warsaw, Poland
a.syryt@uksw.edu.pl
ORCID ID : https://orcid.org/0000–0002–7501–0786

Bogusław Przywora
Jan Dlugosz University in Czestochowa, Poland
b.przywora@ujd.edu.pl
ORCID ID: https://orcid.org/0000–0002–8809–3971

Karol Dobrzeniecki
Nicolaus Copernicus University, Poland
karol.dobrzeniecki@umk.pl
ORCID ID: https://orcid.org/0000–0002–6364–9793

Freedom of Assembly in the COVID-19 Pandemic and the Limits of its Restraints in the Context of the Experiences of the Republic of Poland and the United States of America

Abstract: The aim of the study is to illustrate the problem of freedom of assembly during the COVID-19 pandemic against the background of the experiences of the Republic of Poland and the United States of America. This freedom is provided for in the constitutions of both states, which implies that public authorities are obliged to implement it also in COVID-19 conditions. Hence, the question arises as to whether, and if so to what extent, public authorities in Poland and the United States (countries belonging to the United Nations and obliged to consider the standards of human rights protection resulting from international law) applied solutions realising freedom of assembly in the conditions of COVID-19. The authors try to determine the extent of the impact of legal measures applied by public authorities in both countries on the realisation of freedom of assembly and the public reaction produced by these measures. The choice of such a context for assessment was justified by differences in the legal culture of

the countries being compared, the structure of the state, and the approach of both the public authorities and the society to freedom of assembly.
Keywords: constitution, COVID-19 pandemic, freedom of assembly, human rights, human rights restrictions, proportionality

Introduction

Freedom of assembly is a political right under which an individual can express their views, exercise social control, and, in more general terms, participate in political, social, and economic life. In broad terms, this freedom includes the right to peaceful protest and the people's right to assemble virtually anywhere and for any reason. The social distancing order, which has often found a normative formulation in legal acts, has also affected freedom of assembly. In order to counteract the COVID-19 pandemic, individual countries have taken different actions using different statutory instruments[1]. The consequence of this was usually the restriction of certain freedoms and rights of individuals and even a suspension of these rights in extreme cases[2]. The authorities of individual countries had to balance the reasons related to the protection of certain goods and determine how to implement socially important goals such as ensuring the safety of citizens in various dimensions, including the security of life and health[3]. It was important that the state, in the face of a threat, implemented the protection of the most important constitutional values – life and health, and at the same time maintained as long as possible the possibility of undisturbed functioning of its supreme organs. The situation has sparked a general social debate going beyond the border of one country on how far-reaching human rights restrictions can be connected to the pandemic and what instruments can be used in this respect by the state and international organisations[4]. It has been recognised that, on the one hand,

1 Public authorities, among others, undertook actions in the framework of states of emergency, created special regulations on an ongoing basis, adjusted to the level of threat, or based their actions on the applicable legal bases and possibly adapted procedures.

2 See: K. Dobrzeniecki, Prawo wobec sytuacji nadzwyczajnej. Między legalizmem a koniecznością, Toruń 2018.

3 See more: K. Dobrzeniecki and B. Przywora (eds.), Ograniczenie praw i wolności w okresie pandemii COVID-19 na tle porównawczym. Pierwsze doświadczenia, Warsaw 2021. Praca jest wynikiem badań zespołu w skład którego wchodzą: Ł. Czarnecki, P. Czarny, G. Krawiec, D. Héjj, A. Krzynówek-Arndt, K. Kakareko, J. Sobczak, M. Osuchowska, G. Pastuszko, I. Szpotakowski, A. Syryt, M. Kalinowska, M. Serowaniec, K. Jachimowicz, M. Żaba, P. Szwedo, L. Helińska, J. Woźniak, A. Rataj, A. Wróbel, M. Moulin-Stożek; see also: K. Dobrzeniecki and B. Przywora, Legal basis for introducing restrictions on human rights and freedoms during the first wave of the COVID-19 pandemic, 'Review of European and Comparative Law' 2021, no. 46 (3), pp. 43–65.

4 See e.g. J. Jaskiernia and K. Spryszak (eds.), System ochrony praw człowieka w Europie w czasie wyzwań pandemicznych, Toruń 2022; see also: S. Trociuk, Prawa i wolności w stanie epidemii, Warsaw 2021; F. Morawski, Zakaz przemieszczania się w związku z pandemią COVID-19 w świetle konstytucyjnego prawa do poruszania się, 'Przegląd Prawa Publicznego' 2020, no. 9; J. Paśnik,

assembling (in both a formalised and informal way) can help to spread COVID-19 and therefore maintain the threat. On the other hand, the introduction of social distancing orders infringes on the right of the individual to decide about his life and to participate in political, social, and cultural life through participation in various types of gatherings[5].

These circumstances have become the reason for seeking answers on how to balance the objective to reduce or prevent the threat to life and health associated with the pandemic, with the implementation of the obligation to protect freedom and human rights fundamental to man's functioning in society. The pandemic did not suspend the application of international and national standards and guarantees for the protection of human rights. Nor did it suspend the validity of national constitutions. The statutory instruments taken in response to the pandemic, including possible emergency measures restricting human rights and freedoms, such as bans on public assembly and stay-at-home orders, must comply with international human rights norms and standards, including those relating to the rights to freedom of peaceful assembly and association.

The research conducted by the authors concerning the response of states to the COVID-19 pandemic confirmed its impact on the implementation of freedoms and human rights in the normative and practical dimensions. One such right is freedom of assembly.

Recognising the impact and assessing whether the actions taken were within the framework of legality, necessity, and proportionality is not only of informational and cognitive value. It also allows us to determine to what extent human rights protection

Kilka refleksji o regulacji stanu epidemii jako sui generis pozakonstytucyjnego stanu nadzwyczajnego, 'Przegląd Prawa Publicznego' 2020, no. 11; B. Szmulik and J. Szymanek, O możliwości wprowadzenia stanu nadzwyczajnego w kontekście epidemii koronawirusa, 'Przegląd Legislacyjny' 2020, no. 2; T. Sroka, Ograniczenia praw i wolności konstytucyjnych oraz praw pacjenta w związku z wystąpieniem zagrożenia epidemicznego, 'Palestra' 2020, no. 6; M. Pecyna, Odpowiedzialność odszkodowawcza Skarbu Państwa za ograniczenia praw i wolności w czasie epidemii COVID-19, 'Państwo i Prawo' 2020, no. 12; P. Tuleja, Pandemia COVID-19 a konstytucyjne stany nadzwyczajne, 'Palestra' 2020, no. 9; 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; K. du Vall and M. Tomasiewicz, Zdrowie publiczne jako przesłanka ograniczenia działalności gospodarczej w świetle Konstytucji RP, (in:) J. Glumińska-Pawlic and B. Przywora (eds.), Swoboda działalności gospodarczej. Próba oceny polskich regulacji prawych, Warsaw 2021, pp. 103–117; B. Przywora, Granice ingerencji w sferę wolności i praw człowieka w Konstytucji RP a ich realizacja w stanie pandemii COVID-19 – wybrane zagadnienia, (in:) J. Sobczak and A. Rogacka-Łukasik (eds.), Wybrane zagadnienia prawa medycznego wobec wyzwań pandemii wywołanej wirusem SARS-CoV–2, Poznań 2022, pp. 149–162.

5 See e.g. P. Stanisz, Ograniczenia wolności kultu religijnego w czasie pandemii COVID-19: między konstytucyjnością a efektywnością, 'Przegląd Sejmowy' 2021, no. 3, pp. 143–166.

standards are applicable in emergency situations and whether measures can be established to balance conflicting interests in this area.

For the above reasons, the article's subject is an attempt to assess the implementation of freedom of assembly during the pandemic in Poland and the United States. The deliberations were based primarily on normative acts, case law related to human rights performance in the COVID-19 pandemic, and literature presenting the public's response to the imposed orders and bans.

1. The Essence of the Freedom of Assembly as a Political Right and the Premises of its Limitation

1.1. The article's objective is not to create another general study on freedom of assembly. However, in order to understand the context of executing this freedom during the COVID-19 pandemic, it is necessary to recall the general characteristics of this human right, including its importance as a political right. It is also worth pointing out the premise of permissible interference in the freedom of assembly.

The presented freedom is the foundation of a democratic state, where members of a pluralistic society can express their opinions and influence the policy of public authorities. For this reason, freedom of assembly is counted among political freedoms, and it is realised through peaceful gathering in a public space[6].

Freedom of assembly is expressed in its direct impact on the individual's relationship with the community, enabling the personal formulation of views. At the same time, this freedom has a broader meaning. It serves the exercise of other rights and principles within a system: freedom of speech, freedom of religion, the sovereignty of the nation, the right to participate in public life. Freedom of assembly includes the ability to both organise and participate in it, and it is guaranteed at a national and international level.

Freedom of assembly is expressed in public international law, including: the Universal Declaration of Human Rights of 1948 (Art. 20), the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms (Art. 11), and the 1966 International Personal and Political Rights Pact (Art. 21). Despite its weight and importance to society, freedom of assembly is not absolute. It is possible to restrict the exercise of this freedom considering appropriate forms of restriction (primarily parliamentary) and respecting the principle of proportionality. The above thesis is particularly confirmed in the European Court of Human Rights (ECHR) case law, which implies the need for a narrower interpretation of the restrictions on free, peaceful as-

6 About freedom of assembly see e.g. R. Balicki and M. Jabłoński (eds.), Wolność zgromadzeń, Wrocław 2018; A. Ławniczak, Wolność zgromadzeń, (in:) M. Jabłoński (ed.), Realizacja i ochrona konstytucyjnych wolności i praw jednostki w polskim porządku prawnym, Wrocław 2014, pp. 297–309; P. Czarny and B. Naleziński, Wolność zgromadzeń, Warsaw 1998.

sembly. The ECHR allowed restrictions if assemblies were to abandon their peaceful character and could thus endanger the security or public order[7]. It also stressed that state authorities should not introduce restrictions without prior assessment of the threat level[8].

1.2. In Poland, the issue of freedom of assembly during the COVID-19 pandemic has caused many doubts in both case law and literature. For the purposes of these considerations, it should be emphasised that the fundamental principles concerning the interference with freedoms and human rights arising from the Constitution of the Republic of Poland of 2 April 1997[9] [Art. 31 (3) of the Constitution of Poland] established restrictions only in the law, and demonstrating the necessity of restrictions in a democratic state to ensure its security or public order, or to protect the environment, public health and morals, or the freedoms and rights of others. Such limitations cannot violate the essence of freedoms and rights. This was expressed by the Constitutional Tribunal (CT), stressing that the determination requires specification whether:

a) the restrictions fulfil the objectives pursued and whether they are justified in Art. 31 (3) of the Polish Constitution (the so-called utility criterion);

b) the restriction was necessary to protect constitutional values, i.e. that no other, less restrictive measure could have been taken to accomplish the same effect (the so-called necessity criterion);

c) the prejudice to constitutional freedoms and rights arising from this restriction is not disproportionate in relation to the benefits arising from the introduced regulation (the so-called *sensu stricto* proportionality criterion[10]).

Further, the Polish Constitution grants everyone the freedom to organise and participate in peaceful assemblies, allowing the restriction only in the law. The Polish Constitution, like the International Civil and Political Rights Pact and the Convention for the Protection of Human Rights and Fundamental Freedoms, provides protection only to peaceful assemblies, i.e. those held with respect for the physical integrity of persons and private and public property; a peaceful assembly shall exclude

7 See e.g. judgments of ECHR of 2 October 2001 *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria*, complaint no. 29221/95, 29225/95 and of 20 February 2003 *Djavit An v. Turcji*, complaint no. 20652/92.

8 See judgment of ECHR of 12 June 2014 *Primov v. Russia,* complaint no. skargi 17391/06.

9 Journal of Laws of 2021, item 2,095 with amendments, hereinafter: Constitution of Poland.

10 See judgment of CT of 8 January 2019, SK 6/16, OTK ZU A/2019, item 3; see also: K. Wojtyczek, Granice ingerencji ustawodawczej w sferę praw człowieka w Konstytucji RP, Kraków 1999.

the use of violence and coercion by participants of the assembly against other participants in the assembly, third parties, and public officials[11].

When restricting freedoms and rights, the provisions of Art. 92 of the Polish Constitution should be considered, according to which regulations are issued by constitutional bodies, on the basis of a detailed authorisation contained in the act and for its implementation. The basic constitutional requirement is the specificity of the authorisation contained in the act in the scope of a) subject, b) object, c) content[12], and the prohibition of the functioning of a regulation that does not have a 'point of attachment' in the act[13].

1.3. In the United States, freedom of assembly is regulated by the First Amendment to the Constitution[14]. Under this regulation, Congress will not establish laws introducing religion or prohibiting the free exercise of religious practices, laws restricting freedom of speech or the press or violating the right to assemble and petition the government for reparations peacefully. States also cannot enact such laws, pursuant to the incorporation doctrine under the 14th Amendment. Many jurisdictions also regulate assemblies through criminal law. At the same time, several codes criminalise riots and similar conduct[15].

This freedom was affirmed by the U.S. Supreme Court, which stressed that the right to peaceful assembly is a right akin to freedom of speech and free press and is equally fundamental[16]. It explained that the right of assembly is one that, in principle,

11 See e.g. CT's judgments of 16 March 2017, Kp 1/17, OTK ZU A/2017, item 28; 18 September 2014, K 44/12, OTK ZU no. 8/A/2014, item 92; 10 July 2008, P 15/08, OTK ZU no. 6/A/2008, item 105; 10 November 2004, Kp 1/04, OTK ZU no. 10/A/2004, item 105; 28 June 2000, K 34/99, OTK ZU no. 5/2000, item 142.

12 See: CT's judgments of 9 November 1999, K. 28/98 OTK ZU no. 7/1999, item 156 and 26 April 1995, K 11/94, OTK w 1995 r., part. I. See also CT's judgments of 26 October 1999, K 12/99; 14 February 2006, P 22/05, OTK ZU no. 2/A/2006, item 16; 3 April 2012, K 12/11, OTK ZU no. 4/A/2012, item 37; 17 July 2014, K 59/13, OTK-A 2014, no. 7, item 73.

13 See: CT's judgments of 17 July 2014, K 59/13; 9 May 2006, P 4/05, OTK ZU no. 5/A/2006, item 55; 12 September 2006, K 55/05, OTK ZU no. 8/A/2006, item 104; 31 March 2009, K 28/08, OTK ZU no. 3/A/2009, item 28; 3 April 2012 r., K 12/11. See also: S. Wronkowska, Model rozporządzenia jako aktu wykonawczego do ustaw w świetle Konstytucji i praktyki, (in:) A. Szmyt (ed.), Konstytucyjny system źródeł prawa w praktyce, Warsaw 2005; B. Banaszak, Komentarz do art. 92, (in:) Konstytucja Rzeczypospolitej Polskiej. Komentarz. Wyd. 2, Warsaw 2012, P. Radziewicz, Komentarz do art. 92, (in:) P. Tuleja (ed.), Konstytucja Rzeczypospolitej Polskiej. Komentarz, wyd. II, LEX/el. 2021; M. Wiącek, Komentarz do art. 92, (in:) M. Safjan and L. Bosek (eds.), Konstytucja RP. Tom II. Komentarz do art. 87–243, Warsaw 2016.

14 See more: S.F. Rohde, Freedom of assembly, New York 2005.

15 T. El-Haj, Defining peaceably. Policing the line between constitutionally protected protest and unlawful assembly,'Missouri Law Review' 2015, vol. 80, p. 964.

16 See more: The First Amendment Encyclopedia, *DeJonge v. Oregon case* (1937) https://mtsu.edu/first-amendment/article/55/de-jonge-v-oregon (accessed 25.01.2022); and case *Cox v. New Hampshire*, 312 U.S. 569 (1941).

cannot be denied. To do otherwise would be a violation of the fundamental principles that underlie all civic and political institutions[17].

It should be underlined that classical constitutional theory thereby underwent a reinvention by the executive for the sake of speedy policy action and to the detriment of institutional control while favouring authoritarian forms of governance[18]. Permit ordinances are used to manage how citizens use public space for assemblies; restrictions on the right of assembly are allowed, usually in the form of permits, which organisers apply for to protest in public areas[19].

Under U.S. law, any interference with freedom of assembly will be permissible if there is an impending incitement to lawlessness. The assembly to which a restriction would apply will not be peaceful, and restrictions cannot serve the political goals of the rulers[20].

1.4. The above remarks on protecting freedom of assembly confirm its status as a fundamental political right. It should be protected, as it allows individuals to participate collectively in public life and express their views, also related to matters concerning the state and society. Therefore, this right will also be important in a pandemic situation, when public authorities take extraordinary measures to interfere with human rights and affect their daily lives.

In the next cases this thesis was confirmed. E.g., Supreme Court in *Grayned v. City of Rockford case* (408 U.S. 104, 116, 1972) said that'peaceful demonstrations in public places are protected by the First Amendment'.

See also: P. Gutierrez, Wolność zgromadzeń w ujęciu porównawczym na tle orzeczenia Sądu Najwyższego Stanów Zjednoczonych Ameryki: United States v. Grace z 1983 r., (in:) M. Jabłoński (ed.), Identyfikacja granic wolności i praw jednostki. Prawnoporównawcza analiza tożsamego przypadku pod kątem praktyki stosowania prawa amerykańskiego i polskiego, Wrocław 2016, pp. 401–418. See also review of the main cases of the Supreme Court of the United States on freedom of assembly: J. Seigenthaler, The First Amendment Encyclopedia (in:) https://www.mtsu.edu/first-amendment/encyclopedia/case/11/freedom-of-assembly (accessed 27.01.2022).

17 See: *De Jonge v. State of Oregon* (1937). T. Abu El-Haj, The neglected right of assembly,'University of California Law Review' 2009, vol. 56, p. 547.

18 J. Eichler and S. Sonkar, Challenging absolute executive powers in times of corona: re-examining constitutional courts and the collective right to public contestation as instruments of institutional control,'Review of economics & political science' 2021, vol. 6, no. 1, pp. 3–23.

19 J.D. Proctor, So when did public order start trumping fundamental constitutional rights? Rethinking the modern interpretation of the right to assemble and the role police should play in protecting that right,'Drexel Law Review' 2016, vol. 8, p. 84; T. El-Haj, Defining peaceably. *op. cit.*, p. 964.

20 D.J. Hudson Jr., Freedom of Assembly Overview, 29.10.2002 (in:) Freedom Forum Institute: https://www.freedomforuminstitute.org/first-amendment-center/topics/freedom-of-assembly/freedom-of-assembly-overview/ (accessed 25.01.2022). See also: J. Inazu and B. Neuborne, Right to Assemble and Petition. Common Interpretation, (in:) Interactive Constitution: https://constitutioncenter.org/interactive-constitution/interpretation/amendment-i/interps/267 (accessed 26.01.2022).

2. Realisation of Freedom of Assembly during the COVID-19 Pandemic

While freedom of assembly is not absolute and the exercise of this freedom may be limited given the requirements of legality, adequacy, necessity, and proportionality, even in exceptional circumstances – and in this case during a pandemic – public authorities have a duty to respect human rights and ensure their implementation.

On 14 April 2020 in Geneva, the UN Special Rapporteur on the Rights to Freedom of Peaceful Assembly and Association, Clément Nyaletsossi Voule, urged states not to abuse public health emergency institutions or declare a state of emergency during the COVID-19 pandemic merely to impose mass restrictions on the freedom of peaceful assembly and association. He also published guidelines to be followed by public authorities to avoid human rights violations. The UN Special Rapporteur underlined that civil society organisations play a key role in supporting the state in shaping inclusive policies, disseminating information, and providing social support to communities in need. The expert stated that where new legal regulations are adopted, the imposed restrictions on rights must comply with the principles of legality, necessity, and proportionality. He also stressed that it is unacceptable to introduce general restrictions on human rights. He recommended exemptions from certain restrictions for civil society entities, particularly those monitoring human rights, trade unions, social services providing humanitarian aid alongside journalists dealing with crisis management.

Because of the above, the question arises whether, and if so to what extent, public authorities in Poland and the United States (i.e. countries belonging to the United Nations and obliged to consider the standards of human rights protection resulting from international law) applied solutions making freedom of assembly a reality amid the COVID-19 pandemic.

2.1. Realisation of Freedom of Assembly during the COVID-19 Pandemic in the Republic of Poland

In Poland, due to the COVID-19 pandemic, the provisions of the act of 5 December 2008 on preventing and combating infections and infectious diseases in humans have been applied[21]. Additionally, detailed regulations have been introduced concerning preventing, counteracting, and fighting the disease caused by the SARS-Cov-2 virus[22]. The most controversial issues included the problem of freedom of

21 Journal of Laws of 2021, item 2069.

22 They were particularly: a) Act of 2 March 2020 on special solutions related to the prevention, counteraction and combating of COVID-19, other infectious diseases and emergencies caused by them, Journal of Laws of 2021 r. item 2,069 as amended (Act on COVID-19 of 2 March 2020); b) Regulation of the Minister of Health of 20 March 2020 on the declaration of an epidemic in the territory of the Republic of Poland, Journal of Laws, item 491 (regulation on the declaration of

movement, which was also expressed in the jurisprudence of the Supreme Court. For example, in the justification of a judgment dated 16 March 2021, the Supreme Court emphasised that legal acts of a lower rank than a statute may not affect citizens' constitutional freedom of movement. Hence, the Supreme Court recognised the Regulation of the Council of Ministers of 31 March 2020, as well as the Regulation of the Council of Ministers of 10 April 2020 (containing a similar solution) 'to the extent that it basically excluded the freedom of movement of citizens throughout the entire country' as violating Art. 52 (1) 1, in conjunction with Art. 31 (1) and (3) of the Constitution of Poland.

Similarly in the justification to the judgment of 29 June 2021[23], the Supreme Court emphasised the lack of maintaining the statutory form for restrictions concerning freedoms and rights guaranteed by the Constitution of the Republic of Poland. Also, the jurisprudence of administrative courts provides examples demonstrating the violation of requirements for limiting human rights and freedoms of constitutional provisions by the legislation issued during the COVID-19 pandemic[24]. Legal problems indicated in the rulings mentioned above could be related to the freedom of assembly.

Arguments contained in the justification of the judgment of the Supreme Administrative Court of 27 April 2021[25] should also be noted. The court pointed out that 'the restrictions of rights and freedoms in connection to the state of an epidemic are based on the statutory regulation, which constitutes an implementation of the constitutional order resulting from Art. 68 (4) of the Polish Constitution'[26]. Therefore, according to the Supreme Administrative Court, 'this type of restrictions should be regarded as ordinary constitutional measures that do not require the use of legal solutions specific to states of emergency, more precisely a state of natural disaster'. In the Supreme Administrative Court's opinion, 'a restriction may take the form of a ban on holding assemblies, which may lead to questions concerning the relation of this ban to Art. 57 of the Constitution of Poland when it comes to public assemblies'. The

an epidemic); c) regulation of the Council of Ministers of 31 March 2020 on the establishment of certain restrictions, orders and bans in connection with the occurrence of an epidemic, Journal of Laws, item 566 as amended (CM Regulation of 31 March 2020); d) Regulation of the Council of Ministers of 19 April 2020 on the establishment of certain restrictions, orders and bans in connection with an epidemic, Journal of Laws, item 679 as amended (CM Regulation of 19 April 2020 r.). See also law on pandemic in Poland on GOV.PL https://www.gov.pl/web/koronawirus/podstawa-prawna (accessed 29.01.2022).

23 Judgment of the Polish Supreme Court of 29 June 2021, II KK 255/21, LEX no. 3207608.

24 e.g., judgments of the Supreme Administrative Court (NSA) of 8 September 2021, case no. II GSK 602/21, LEX no. 3230490; Provincial Administrative Court in Szczecin of 11 December 2020, case no. II SA/Sz 765/20; Provincial Administrative Court in Gorzów Wielkopolski of 7 October 2021, Legalis no. 2357975.

25 Case no. II GSK 673/21; LEX no. 3185186.

26 Case no. II GSK 673/21.

Supreme Administrative Court pointed to the linguistic interpretation of the term 'restriction'. We have to use this meaning when restricting civil rights and freedoms.

In the context of the discussed issues, it is worth paying attention to the so-called strike of entrepreneurs of 16 May 2020[27]. The city authorities refused to accept the notification of a public assembly due to the ban under the Regulation of the Council of Ministers of 2 May 2020. The organisers appealed against this decision. The District Court in Warsaw dismissed the appeal with a decision dated 14 May 2020, XXV Ns 45/20. It found that there was a reason for prohibiting the assembly due to the threat to life or health under Art. 14 point 2 of the Act of 24 July 2015 – Law on Assemblies[28] and referred to the obligation of public authorities to combat epidemic diseases specified in Art. 68 (4) of the Constitution of the Republic of Poland.

The Commissioner for Human Rights joined the proceedings, requesting that the decision of the President of the Capital City of Warsaw be revoked. The Commissioner for Human Rights justified his intervention, among other things, with the fact that the prohibition of assemblies in the ordinance issued by the Council of Ministers violates the principle of proportionality and the essence of the freedom of assembly expressed in the Constitution of the Republic of Poland. The Court of Appeal in Warsaw agreed with the Commissioner. It stated that banning assemblies by ordinance without proper statutory authorisation raises constitutional doubts about the freedom of assembly and the principle of proportionality[29].

In Poland, the problem of the ban on assemblies during the COVID-19 pandemic has been the subject of many discussions, including its expression in a report of the Commissioner for Human Rights[30]. The Commissioner emphasised the necessity of restrictions during the state of a pandemic but pointed out that a total ban on assemblies violates the essence of the citizens' constitutional right to an assembly and the principle of proportionality[31]. In his opinion, 'the legislator could reduce the risk of an epidemic by using less severe measures (even by indicating how to demonstrate during the times of an epidemic)' [32]. The report also shows the disturbing practice of the Warsaw City Hall of refusing to register notifications concerning organising

27 Legalis no. 2357975.

28 Journal of Laws of 2019, item 631.

29 See: decition of postanowienie Sądu Apelacyjnego w Warszawie of 15 May 2020. Description of a case on: the Public Information Bulletin of the Commissioner for Human Rights: https://bip.brpo.gov.pl/pl/content/koronawirus-rpo-do-wsa-calkowity-zakaz-zgromadzen-niekonstytucyjny (accessed 22.01.2022).

30 Information on the activities of the Commissioner for Human Rights in the year 2020, pp. 199–204: https://bip.brpo.gov.pl/sites/default/files/Informacja_RPO_za_2020.pdf, accessed 24.01.2022 r.).

31 Information on the activities of the Commissioner for Human Rights in the year 2020, p. 200; see also critical stance towards regulations introducing a ban on assemblies: S. Trociuk, Prawa i wolności w stanie epidemii…, *op. cit.*, pp. 65–69.

32 Information on the activities of the Commissioner for Human Rights in the year 2020, p. 200.

public assemblies and not issuing administrative decisions prohibiting assemblies, in accordance with Art. 14 Laws on Assemblies. The Commissioner pointed out that these assemblies took place despite the information provided to the notifying parties, which led to radicalising public moods and citizens losing trust in the authorities.

The Commissioner addressed the President of the Capital City of Warsaw to change this practice[33]. The Commissioner also intervened ex officio in the case of actions undertaken by the police against participants of the spontaneous assembly on the night of 22–23 October 2020, which constituted a social reaction to the ruling of the Constitutional Tribunal regarding the non-compliance of certain provisions on the admissibility of abortion with the Constitution of Poland[34]. The Commissioner's doubts were raised due to the proportionality of direct coercion measures by the police against demonstrators and the significant number of detained people. In the Commissioner's opinion, due to the pandemic and the need to care for health, the necessary sanitary guidelines should be followed (including masks and the recommended distances between participants). In his opinion, the situation of a spontaneous assembly does not exclude the necessity to apply the following principles:

a) participants of all demonstrations should behave in a manner that respects the rights and freedoms of other people and public order, avoid hate speech, as well as limit behaviours and gestures that may provoke violence,

b) actions by public authorities that impede conducting an assembly are unacceptable,

c) officers (of the police and other services) should not take actions that make it difficult or even impossible for peaceful demonstrators/counter-demonstrators to exercise the freedom of public assembly,

d) measures of direct coercion applied by the police to participants of public assemblies should be proportionate and adequate[35].

The above shows that society took advantage of the freedom of assembly despite the existing bans. Various types of protests took place during the pandemic, and public authorities reacted when the participants' behaviour could endanger life or health and public safety and order.

The formal bans introduced by ordinances connected to the COVID-19 pandemic have not prevented the public from expressing views collectively.

33 *Ibidem*.

34 CT's judgment of 22 October 2020, K 1/20, OTK A/2021, item 1.

35 Information on the activities of the Commissioner for Human Rights in the year 2020, pp. 201–202.

2.2. Realisation of Freedom of Assembly during the COVID-19 Pandemic in the United States

The observation of the situation related to the COVID-19 pandemic in the United States in the context of exercising constitutional freedoms and rights has highlighted that this period exerted significant pressure on the freedoms resulting from the First Amendment, and therefore the freedom of assembly. This pressure was related to the legal instruments used by public authorities at the federal and state levels[36]. John Whitehead from the Rutherford Institute wrote: 'Never before in the history of this nation has the government (federal or state) attempted to impose such burdensome restrictions on the rights of religious units as seen in response to the COVID-19 pandemic.'[37]

Regarding this claim, it should be noted that most of the court cases involving religious assemblies in the context of pandemic restrictions have dealt with restrictions under the First Amendment's religion clauses. Therefore, it was not a reference directly to freedom of assembly per se. Undoubtedly, however, the restrictions in question indirectly affected the ability to assemble and the exercise of the right to assemble. More important than the political right to manifest one's views, however, was the realisation of religious freedom, especially in religious practice. This perspective clearly shows the weaker position of freedom of assembly in the United States compared to religious freedom. During the summer 2020 protests, the protesters had their right of peaceful assembly restricted[38].

A question has been raised in public debate conducted in the United States on whether the COVID-19 pandemic justifies a direct restraint of the fundamental rights under the Constitution's First Amendment. It is worth recalling that in the *Jacobson v. Massachusetts* case (1905)[39], the Supreme Court stressed that 'There are manifold restraints to which every person is necessarily subject for the common good.' Therefore, in the case of health measures, the Court upheld the state immunisation bill, which pastor P. Henning Jacobson contested. This decision, however, was made before the Supreme Court ensured enhanced protection of individual rights, including

36 For more about the restrictions of human rights during the pandemic in the United States see: M. Kalinowska and A. Syryt, Ograniczenia praw i wolności w okresie pandemii COVID-19 w Stanach Zjednoczonych Ameryki, (in:) K. Dobrzeniecki and B. Przywora (eds.), Ograniczenie praw i wolności w okresie pandemii COVID-19 na tle porównawczym. Pierwsze doświadczenia, Warsaw 2021, pp. 403–428.

37 Cited after D.L. Hudson Jr., COVID-19 Emergency Measures And The First Amendment, (in:) TheFire.ORG: https://www.thefire.org/first-amendment-library/special-collections/COVID-19-emergency-measures-and-the-first-amendment/ (accessed 24.01.2022).

38 See more: O. Moulds, Fracking the bedrock of democracy. The United States policing of protests violates the right of peaceful assembly under the ICCPR,'American University International Law Review' 2021, vol. 36, i. 4, pp. 926–927.

39 See: JUSTIA US Supreme Court: https://supreme.justia.com/cases/federal/us/197/11/ (accessed 23.01.2022).

freedoms under the First Amendment[40]. The issue of interference with the rights under the First Amendment to the United States Constitution was approached in various ways in jurisprudence during the pandemic. The stances of the courts on the admissibility of restrictions on fundamental rights under the First Amendment to the Constitution were not uniform. Quite the contrary – their viewpoints can be assessed as widely divergent.

For example, the judge of the federal district court for the district of California, Judge J.G. Bernal, in the ruling of 23 April 2020 in the *Gish v. Newsom case*[41] vacated the request for a temporary restraining order. The case concerned the orders imposed by California's governor, G. Newsom, who had directed 'all California residents to stay home or at their place of residence except as needed to maintain continuity of operations of the federal critical infrastructure sectors'. Riverside County officials issued a disposition prohibiting public or private meetings in any indoor or outdoor space. Officials in San Bernardino County issued an order allowing for 'faith-based services' to be provided through streaming or other technology while people may not leave their homes. No gatherings during religious services in an in-person mode were allowed. Four people, including lead plaintiff Wendy Gish, filed a lawsuit against Newsom and officials in both counties, alleging 'gross abuse of their power'. Their complaint included allegations that the defendants had violated their First Amendment religious liberty, freedom of expression and assembly, as well as other constitutional rights[42].

It should be emphasised that commonly, where public authorities directly violate fundamental rights, such as the freedoms resulting from the First Amendment, the court examines whether the regulation meets the constitutional standards of restraint proportionality. It requires the public authorities to limit or regulate them to support important public interests in the least restrictive way. Judge Bernal decided that traditional constitutional review does not apply in an emergency. Hence his rejection of the possibility of not respecting emergency law restricting the laws under the First Amendment. The ruling explains that extraordinary measures are in line with the Constitution as long as 1) they have a 'real or significant relationship with the crisis' and 2) 'do not constitute a simple, tangible violation of clearly protected rights'. According to Bernal, it is easy to prove that emergency measures meet this test, as physical remoteness is necessary to slow down the spread of the virus. He stressed that the freedoms were not suspended as they can be exercised in other forms, e.g. online. The judge affirmed that secondary legislations in the form of orders of public authorities

40 See more about this case: J. Blackman, The Irrepressible Myth of Jacobson v. Massachusetts (17 August 2021),'Buffalo Law Review' 2021, vol. 70, no. 113, available at SSRN: https://ssrn.com/abstract=3906452 (accessed 25.03.2022).

41 See: CASETEXT: https://casetext.com/case/gish-v-newsom-1 (accessed 26.01.2022).

42 *Ibidem*.

were admissible during a nationwide state of emergency. Bernal acknowledged that the extraordinary orders did not affect the very essence of religious practices or gatherings, and he described them as generally applicable to all kinds of meetings[43].

Judge J.R. Walker from the federal district court for the District of Kentucky maintained a contrary position on the limitation on human rights during the pandemic in *On Fire Christian Center, Inc. v. Fischer*[44]. It was based on the following state of affairs: the mayor, L.G. Fischer, prohibited the organisation of services a few days before Easter. He banned large gatherings that could have led to the spread of the coronavirus. The On Fire Christian Center challenged this ban, invoking the Free Exercise Clause of the First Amendment and the Kentucky Religious Freedom Act. The Church pointed to the inconsistency between the prohibition of attending church services and the permission to gather in shops and access other businesses.

Judge Walker referred to the Supreme Court ruling in the *Jacobson* case, stressing that even in that ruling, the existence of constitutional rights, including those covered by the First Amendment, had not been denied. The judge, therefore, gave priority to fundamental rights, including freedom of assembly, over extraordinary orders issued in connection with the pandemic.

The examples provided represent various court reactions to public authority acts restricting freedom of assembly in the time of COVID-19 in the United States. They reflect the interpretation of the freedoms under the First Amendment in the face of the state of emergency. It should be noted that these are some of the first rulings related to COVID-19 and the First Amendment. Since then, many rulings associated with the restraint of the First Amendment freedoms have been issued during this pandemic. Various restrictions related to COVID-19 have reached the US Supreme Court. They were particularly concerned about exercising religious liberty, closely related to the freedom of assembly. It is because freedom of assembly allows one to pursue religious practices. Moreover, the subject of proceedings before the courts was not the issue of freedom of assembly but the freedom of assembly in connection with religious liberty. What was particularly emphasised was the discrimination against the possibility of exercising the freedom of assembly by members of religious communities as part of practising religion, compared to other individuals exercising the freedom of assembly for other purposes[45].

A general afterthought on observing the events regarding the freedom of assembly in the United States comes down to acknowledging the need to weigh values. Un-

43 *Ibidem*.

44 See: documents on this case on JUSTIA US Law https://law.justia.com/cases/federal/district-courts/kentucky/kywdce/3:2020cv00264/116558/6/ (accessed 24.01.2022).

45 See e.g. case *Roman Catholic Diocese of Brooklyn v. Cuomo* (more on https://www.law.cornell.edu/supremecourt/text/20A87, accessed: 22.01.2022) and *South Bay Unified Pentecostal Church v. Newsom* (more on: https://www.law.cornell.edu/supremecourt/text/19A1044, accessed 22.01.2022).

doubtedly, the pandemic of COVID-19 is a threat to public life and health, but it should not justify extraordinary long-term interference with fundamental freedoms.

Conclusions

States are obliged to perform their constitutional functions, particularly to be proactive (including the immediate introduction of legal regulations) in the face of the need to combat epidemic diseases. Hence, when assessing the legality of restrictions on freedom of assembly during the COVID-19 pandemic, the principle of proportionality should be regarded as particularly important.

Against this background, the United States gave priority to the need to respond to the threats posed by the pandemic. Still, at the same time, the perspective of actions of public authorities was strongly confronted with the rights resulting from the First Amendment to the US Constitution, considered fundamental by Americans. In particular, the introduced restrictions were emphasised as temporary measures which should not become an instrument used by the state to limit the ability of individuals to participate in public life through expressing their opinions during specific assemblies. The restrictions met with public opposition, which frequently led to consequences in court proceedings. At the same time, it should be underlined that in the conflict between the implementation of the state's objectives related to ensuring sanitary safety and the protection of freedom of assembly and the First Amendment, various fundamentally different lines of jurisprudence have developed. Freedom of assembly was often analysed with freedom of assembly of members of individual religious communities and religious organisations aimed at religious observance.

In Poland, while the regulations introduced during the COVID-19 pandemic were substantively justified, the primary object of the debate was the method of their introduction. It was argued that the statutory and sub-statutory solutions adopted during the pandemic did not meet constitutional standards (violation of the principle of the exclusivity of the act by 'transferring' statutory matters to lower-level acts which then served as a basis for interfering with the essence of constitutional freedoms and rights)[46]. It concerned especially the prohibition on organising assemblies, which – within the meaning of Art. 31 (3) of the Constitution of Poland – failed the 'test of proportionality'. Therefore, public bodies were accused of failing to act based on the law by introducing prohibitions within the law without introducing constitutional states of emergency[47].

46 P. Tuleja, Ustrojowe znaczenie…, *op. cit.*, p. 51.

47 M. Florczak-Wątor, Niekonstytucyjność…, *op. cit.*, p. 18 i p. 200; S. Trociuk, Prawa i wolności w stanie epidemii…, *op. cit.,* pp. 65–69; Informacja o działalności Rzecznika Praw Obywatelskich…, *op. cit.*, p. 200.

By contrast, in the United States, there were apparent conflicts between the public interest and individual interest, especially in the case of extraordinary orders imposed by state authorities. The conflicts were resolved in courts or through agreements with state authorities[48].

The examples of Poland and the United States demonstrate that the protection of life and health as superior values justifies far-reaching restrictions directly or indirectly affecting freedom of assembly. However, the problem remains at the level of the limits of the admissibility of restrictions. This was reflected in the public debate but also in court proceedings.

The American and Polish experiences have highlighted different contexts of limiting the freedom of assembly. The main question regarding the legality of restrictions in Poland was the form of the introduced restrictions (statutory or executive act) and their rationality (purposefulness). In America in comparison, two trends of assessment developed, one of them giving priority to fundamental rights – despite the existing jurisprudence of the Supreme Court on the possibility of restricting the First Amendment rights in order to achieve important public goals – and the other allowing for an exception to the strong protection of fundamental rights in order to protect the life and health of the public.

In Poland, both the entities that justified the restrictions and those that questioned them focused on the constitutional principle of proportionality. In the United States, the benchmark was the high rank of First Amendment rights as essentially not subject to state interference and the extraordinary circumstances in which certain action had to be taken. Therefore, more emphasis was placed on the issues related to adequacy rather than proportionality as understood by Polish constitutional law.

REFERENCES

Abu El-Haj T., Defining peaceably. Policing the line between constitutionally protected protest and unlawful assembly, 'Missouri Law Review' 2015, vol. 80.

Abu El-Haj T., The neglected right of assembly, 'University of California Law Review' 2009, vol. 56.

Balicki R. and Jabłoński M. (eds.), Wolność zgromadzeń, Wrocław 2018.

Banaszak B., Komentarz do art. 92, (in:) Konstytucja Rzeczypospolitej Polskiej. Komentarz. Wyd. 2, Warsaw 2012.

Biuletyn Informacji Publicznej RPO: https://bip.brpo.gov.pl/pl/content/koronawirus-rpo-do-wsa-calkowity-zakaz-zgromadzen-niekonstytucyjny.

Blackman J., The Irrepressible Myth of Jacobson v. Massachusetts (17 August 2021),'Buffalo Law Review' 2021, vol. 70, no. 113, https://ssrn.com/abstract=3906452.

Checklist United Nations Human Rights. Office of the High Commissioner – FoAA during public health emergencies: https://www.ohchr.org/Documents/Issues/FAssociation/Checklist.pdf.

48 See: On Fire Christian Center, Inc. v. Fischer.

Czarny P. and Naleziński B., Wolność zgromadzeń, Warsaw 1998.

de Silva Santistéban F. and Wysokinska A., La liberté de réunion à l'épreuve de la Constitution, 'Le Petit Juriste' 3.03.2014, https://www.lepetitjuriste.fr/la-liberte-de-reunion-a-lepreuve-de-la-constitution/.

Dobrzeniecki K., Prawo wobec sytuacji nadzwyczajnej. Między legalizmem a koniecznością, Toruń 2018.

Dobrzeniecki K. and Przywora B. (eds.), Ograniczenie praw i wolności w okresie pandemii COVID-19 na tle porównawczym. Pierwsze doświadczenia, Warsaw 2021.

Dobrzeniecki K. and Przywora B., Legal basis for introducing restrictions on human rights and freedoms during the first wave of the COVID-19 Pandemic, 'Review of European and Comparative Law' 2021, no. 46 (3).

du Vall K. and Tomasiewicz M., Zdrowie publiczne jako przesłanka ograniczenia działalności gospodarczej w świetle Konstytucji RP, (in:) J. Glumińska-Pawlic and B. Przywora (eds.), Swoboda działalności gospodarczej. Próba oceny polskich regulacji prawych, Warsaw 2021.

Duffy-Meunier A. and Perroud Th., La liberté de manifestation dans l'espace public en droit comparé, 'Thinking about Federalism(s)' 2017, no. 17, 'Jus Politicum'.

Eichler J. and Sonkar S., Challenging absolute executive powers in times of corona: re-examining constitutional courts and the collective right to public contestation as instruments of institutional control, 'Review of economics & political science' 2021, vol. 6, no. 1.

El-Haj T., Defining peaceably. Policing the line between constitutionally protected protest and unlawful assembly, 'Missouri Law Review' 2015, vol. 80.

Florczak-Wątor M., Komentarz do art. 57, (in:) P. Tuleja (ed.), Konstytucja Rzeczypospolitej Polskiej. Komentarz, wyd. II, LEX/el. 2021.

Florczak-Wątor M., Niekonstytucyjność ograniczeń praw i wolności jednostki wprowadzonych w związku z epidemią COVID-19 jako przesłanka odpowiedzialności odszkodowawczej państwa, 'Państwo i Prawo' 2020, no. 12.

GOV.PL https://www.gov.pl/web/koronawirus/podstawa-prawna.

Gutierrez P., Wolność zgromadzeń w ujęciu porównawczym na tle orzeczenia Sądu Najwyższego Stanów Zjednoczonych Ameryki: United States v. Grace z 1983 r., (in:) M. Jabłoński (ed.), Identyfikacja granic wolności i praw jednostki. Prawnoporównawcza analiza tożsamego przypadku pod kątem praktyki stosowania prawa amerykańskiego i polskiego, Wrocław 2016.

Hudson Jr. D.L., COVID-19 Emergency Measures And The First Amendment, (in:) TheFire.ORG: https://www.thefire.org/first-amendment-library/special-collections/COVID-19-emergency-measures-and-the-first-amendment/.

Hudson Jr. D.L., Freedom of Assembly Overview, 29.10.2002 (in:) Freedom Forum Institute: https://www.freedomforuminstitute.org/first-amendment-center/topics/freedom-of-assembly/freedom-of-assembly-overview/.

Inazu J. and Neuborne B., Right to Assemble and Petition. Common Interpretation, (in:) Interactive Constitution: https://constitutioncenter.org/interactive-constitution/interpretation/amendment-i/interps/267.

Informacja o działalności Rzecznika Praw Obywatelskich w roku 2020, https://bip.brpo.gov.pl/sites/default/files/Informacja_RPO_za_2020.pdf.

Jaskiernia J. and Spryszak K. (eds.), System ochrony praw człowieka w Europie w czasie wyzwań pandemicznych, Toruń 2022.

Kalinowska M. and Syryt A., Ograniczenia praw i wolności w okresie pandemii COVID-19 w Stanach Zjednoczonych Ameryki, (in:) K. Dobrzeniecki and B. Przywora (eds.), Ograniczenie praw i wolności w okresie pandemii COVID-19 na tle porównawczym. Pierwsze doświadczenia, Warsaw 2021.

Le Bot O., La liberté de manifestation en France: un droit fondamental sur la sellette, (in:) A. Duffy-Meuner and Th. Perroud (eds.), La liberté de manifester et ses limites: perspective de droit comparé, Aix Marseille 2017.

Ławniczak A., Wolność zgromadzeń, (in:) M. Jabłoński (ed.), Realizacja i ochrona konstytucyjnych wolności i praw jednostki w polskim porządku prawnym, Wrocław 2014.

Morawski F., Zakaz przemieszczania się w związku z pandemią COVID-19 w świetle konstytucyjnego prawa do poruszania się, 'Przegląd Prawa Publicznego' 2020, no. 9.

Paśnik J., Kilka refleksji o regulacji stanu epidemii jako sui generis pozakonstytucyjnego stanu nadzwyczajnego, 'Przegląd Prawa Publicznego' 2020, no. 11.

Pecyna M., Odpowiedzialność odszkodowawcza Skarbu Państwa za ograniczenia praw i wolności w czasie epidemii COVID-19, 'Państwo i Prawo' 2020, no. 12.

Proctor J.D., So when did public order start trumping fundamental constitutional rights? Rethinking the modern interpretation of the right to assemble and the role police should play in protecting that right, 'Drexel Law Review' 2016, vol. 8.

Przywora B., Granice ingerencji w sferę wolności i praw człowieka w Konstytucji RP a ich realizacja w stanie pandemii COVID-19 – wybrane zagadnienia, (in:) J. Sobczak and A. Rogacka-Łukasik (eds.), Wybrane zagadnienia prawa medycznego wobec wyzwań pandemii wywołanej wirusem SARS-CoV–2, Poznań 2022

Radziewicz P., Komentarz do art. 92, (in:) P. Tuleja (ed.), Konstytucja Rzeczypospolitej Polskiej. Komentarz, wyd. II, LEX/el. 2021.

Rohde S.F., Freedom of assembly, New York 2005.

Sokolewicz W. and Wojtyczek K., Komentarz do art. 57, (in:) L. Garlicki and M. Zubik (eds.), Konstytucja Rzeczypospolitej Polskiej. Komentarz. Tom II, wyd. II, Warsaw 2016.

Sroka T., Ograniczenia praw i wolności konstytucyjnych oraz praw pacjenta w związku z wystąpieniem zagrożenia epidemicznego, 'Palestra' 2020, no. 6.

Stanisz P., Ograniczenia wolności kultu religijnego w czasie pandemii COVID-19: między konstytucyjnością a efektywnością, 'Przegląd Sejmowy' 2021, no. 3.

Szmulik B. and Szymanek J., O możliwości wprowadzenia stanu nadzwyczajnego w kontekście epidemii koronawirusa, 'Przegląd Legislacyjny' 2020, no. 2.

Trociuk S., Prawa i wolności w stanie epidemii, Warsaw 2021.

Tuleja P., Pandemia COVID-19 a konstytucyjne stany nadzwyczajne, 'Palestra' 2020, no. 9.

Tuleja P., Ustrojowe znaczenie uchwały SN z 23.01.2020 r., 'Państwo i Prawo' 2020, no. 10.

Wiącek M., Komentarz do art. 92, (in:) M. Safjan and L. Bosek (eds.), Konstytucja RP. Tom II. Komentarz do art. 87–243, Warsaw 2016.

Wojtyczek K., Granice ingerencji ustawodawczej w sferę praw człowieka w Konstytucji RP, Kraków 1999.

Wronkowska S., Model rozporządzenia jako aktu wykonawczego do ustaw w świetle Konstytucji i praktyki, (in:) A. Szmyt (ed.), Konstytucyjny system źródeł prawa w praktyce, Warsaw 2005.

Bialystok Legal Studies
Białostockie Studia Prawnicze
2022 vol. 27 nr 2

DOI: 10.15290/bsp.2022.27.02.04

Received: 30.01.2022
Accepted: 29.04.2022

Stefan Haack
Europa-Universität Viadrina, Germany
haack@europa-uni.de
ORCID ID: https://orcid.org/0000–0001–8715–558X

Things Will Never be the Same Again: How the Coronavirus Pandemic is Changing the Understanding of Fundamental Rights in Germany

Abstract: In the coronavirus pandemic, the challenges for the doctrine of fundamental rights are significantly different from comparable issues in all previous crises in terms of their intensity, dynamics and the uncertainty of the risk. Scrutiny of the proportionality of the measures against the COVID-19 virus caused serious difficulties, and these difficulties could barely be overcome in the most critical phases during the first and second wave of infections. Furthermore, the combination of intensity, dynamics and uncertainties has forced federal and state legislators to make seemingly arbitrary differences in many cases. Therefore, in the jurisprudence of the administrative courts on the restrictions of fundamental rights during the coronavirus pandemic, there has been a shift in the standard of justification from aspects of freedom to aspects of equality. The pandemic has also led to the questioning of central categories of state liability law that are closely related to fundamental rights. Last but not least, the pandemic raised the question of the essence of fundamental rights. On the whole, the pandemic has made the limits of the efficiency of fundamental rights visible. The higher the expectations of optimization requirements and new dimensions of fundamental rights protection under normal conditions, the greater the disappointments will be about the effectiveness of fundamental rights in the case of an emergency such as the coronavirus pandemic. The luxury of fundamental rights afforded under normal conditions becomes a problem in an emergency situation. This carries the risk of obscuring the essence of fundamental rights protection.
Keywords: fundamental rights, pandemic, proportionality, state of emergency

Introduction

If we ask ourselves what distinguishes the coronavirus pandemic from other dangerous situations and crisis scenarios that modern constitutional states have had to cope with within the past decades (such as the financial crisis or the terrorist threat), three particular features can be identified. First, the intensity of the danger is remarkable: the highly contagious virus SARS-CoV–2, which leads to life-threatening illnesses, could have cost hundreds of thousands of lives in the Federal Republic of Germany, for example, if nothing had been done to prevent its spread. The second peculiarity lies in the dynamics of the pandemic, which required rapid and consistent action by the state after the outbreak.[1] Delays and misjudgments are directly linked to loss of life in such a situation. The same dynamic also characterized the later phases of the pandemic, when viral mutations ensured an accelerated spread of the disease. The third and possibly most significant feature is that at the beginning of the pandemic there was no reliable knowledge about the danger or the transmission routes of the virus – not to mention knowledge about possible methods of treatment.[2] With the spread of more and more new mutations, this became a permanent problem. The confluence of these three factors, intensity, dynamics and uncertainty, forced the German state to impose restrictions on fundamental freedoms unprecedented in the history of the Federal Republic. In order to justify these restrictions on fundamental rights, which were established primarily by executive orders of the German *Länder* (and, since the third wave of the pandemic in April 2021, in part directly by the federal Infection Protection Act), the state's duty to protect life and health, which can be derived from Article 2(2) of Germany's Basic Law, has been invoked.[3] The threat of

1 M. Erdmann, Kohärenz in der Krise? 'Neue Zeitschrift für Verwaltungsrecht' 2020, p. 1800; F. Hase, Verfassungsrechtswissenschaft in der Corona-Krise – worauf kommt es an? 'Juristenzeitung'2020, p. 1107.

2 M. Erdmann, Kohärenz in der Krise? *op. cit.*, p. 1800; M. Goldhammer and S. Neuhöfer, Grundrechte in der Pandemie – Allgemeine Lehren, 'Juristische Schulung' 2021, p. 214; F. Hase, Verfassungsrechtswissenschaft…, *op. cit.*, p. 1107; J. Kersten and S. Rixen, Der Verfassungsstaat in der Corona-Krise, 2nd ed., Munich 2021, V. 1 (quoted from the online edition of the book).

3 Bundesverfassungsgericht, 'Neue Zeitschrift für Verwaltungsrecht' 2020, pp. 876, 877; Oberverwaltungsgericht Bautzen, 'Neue Zeitschrift für Verwaltungsrecht' 2020, pp. 1853, 1854; for more detail, see C. Richter, Die Schutzpflicht des Verfassungsstaates in der Pandemie, 'Deutsches Verwaltungsblatt' 2021, p. 16. Also see D. Murswiek, Schutz – Freiheit – Covid, 'Die öffentliche Verwaltung' 2021, p. 505, who argues that the duty to protect, under Article 2(2) of the Basic Law, only relates to the prevention of dangers arising from the actions of persons, not to the prevention of damaging by natural events. Whether this is correct may be left open here. Contrary to Murswiek's assertion, the state would nevertheless have a duty to protect in the case of the coronavirus pandemic under Article 2(2) of the Basic Law, since natural events and human error cannot be distinguished in a pandemic situation. In essence, infection protection law is less about protection against a natural disaster than about protection against the careless behaviour of other people with regard to the risk of infection and transmission.

overburdening the healthcare system also jeopardizes the welfare state principle of Article 20(1) of the Basic Law, which includes an adequate level of in-patient medical care.[4]

The constitutionality of these pandemic-related restrictions on fundamental rights was disputed in hundreds of lawsuits before the administrative courts (*Verwaltungsgerichtsbarkeit*), the state constitutional courts (*Landesverfassungsgerichte*) and the Federal Constitutional Court (*Bundesverfassungsgericht*). Among other things, these restrictions involved shop closures, curfews, masking obligations and bans on public assembly.[5] In most cases, decisions were made by way of interim legal protection. When the courts examined the proportionality of restrictions on fundamental rights in these proceedings and accepted or rejected their suitability, necessity and appropriateness, they always operated with the traditional categories of constitutional dogmatics. It almost seems as if we are dealing with the usual weighing of constitutional interests, as is familiar from numerous other contexts of security law (*Gefahrenabwehrrecht*). Can it be said that fundamental rights dogmatics have withstood the test, even in this crisis? Can we assume that our understanding of the meaning and functioning of fundamental rights will be the same after the crisis as before it? Probably not. We will see below how the coronavirus pandemic has cast light on the efficiency of our fundamental rights. To avoid misunderstandings, it should be emphasized at this point that our aim is not to confirm or cast doubt on the constitutionality of the individual measures or even of the coronavirus policy as a whole.[6] Nevertheless, the following reflections shed some light on the arguments of one side or the other.

4 *Ibidem*, p. 505; for general information on medical care as a component of the welfare state principle, see F. Stollmann and A. Wollschläger, Die Aufgaben der Krankenhäuser im gesundheitlichen Versorgungssystem, (in:) A. Laufs, B.-R. Kern and M. Rehborn (eds.), Handbuch des Arztrechts, 5th ed., Munich 2019, § 79 mn. 4ff.

5 For more information on the jurisprudence of the German courts with regard to coronavirus-related restrictions on fundamental rights see M. Erdmann, Kohärenz in der Krise? *op. cit.*, p. 1798; J.A. Kämmerer and L. Jischkowski, Grundrechtsschutz in der Pandemie – Der 'Corona-Lockdown' im Visier der Verfassungs- und Verwaltungsgerichtsbarkeit, 'Gesundheitsrecht' 2020, p. 341; M.H.W. Möllers, Der Verhältnismäßigkeitsgrundsatz bei Freiheitsbeschränkungen infolge der Coronavirus SARS CoV–2 Pandemie, 'Recht und Politik' 2020, vol. 56, p. 300; R. Zuck and H. Zuck, Die Rechtsprechung des BVerfG zu Corona-Fällen, 'Neue Juristische Wochenschrift' 2020, p. 2302.

6 Many statements on this issue are available; see for example M. Dumbs, Zwangsmaßnahmen gegen den Menschen als Gemeinschaftswesen, 'Neue Juristische Online-Zeitschrift' 2021, p. 69; C. Katzenmeier, Grundrechte in Zeiten von Corona, 'Medizinrecht' 2020, p. 461; O. Lepsius, Grundrechtsschutz in der Corona-Pandemie, 'Recht und Politik' 2020, vol. 56, p. 264; H. Schmitz and C.-W. Neubert, Praktische Konkordanz in der Covid-Krise, 'Neue Zeitschrift für Verwaltungsrecht' 2020, p. 666.

1. The Test of Proportionality and the Principle of Practical Concordance in the Coronavirus-Related Restriction of Civil Liberties

If the state restricts civil liberties, it must observe the principle of proportionality, which derives from the rule of law.[7] According to this principle, restrictions on conduct protected by fundamental rights can only be justified insofar as they must serve a legitimate purpose and prove their suitability, necessity and appropriateness for this purpose. When it comes to the restrictions on fundamental rights in the coronavirus pandemic, the examination of proportionality poses enormous problems, problems which could barely have been overcome in the critical phases during the first and second waves of infection.[8] A few brief references will illustrate this issue.[9] The difficulties begin with the question of the suitability of concrete containment measures, which can only be satisfactorily assessed once the transmission routes of a virus have been adequately researched.[10] The same applies to the examination of the necessity of certain governmental actions when the effectiveness of the measures in question is just as unclear as the effectiveness of alternative approaches. In addition, in the case of the containment of SARS-CoV–2, one is dealing with a comprehensive set of measures that encompasses a variety of very different interferences on fundamental rights – ranging from masking obligations and contact restrictions to the closure of stores. In such a context, how can it be determined whether less restrictive measures would have been available and whether they would have proved to be equally effective?[11] If the restrictions are components of a complex bundle of measures, their necessity will depend on whether the entire bundle of measures would be less effec-

7 See for example C. Degenhart, Staatsrecht I. Staatsorganisationsrecht, 36th ed., Heidelberg 2020, mn. 419ff.

8 See P. Häberle and M. Kotzur, Die COVID-19-Pandemie aus der kulturwissenschaftlichen Perspektive einer europäischen und universalen Verfassungslehre, 'Neue Juristische Wochenschrift' 2021, p. 134; F. Hase, Verfassungsrechtswissenschaft…, *op. cit.*, p. 1108; for a critical perspective, see I. Heberlein, Staatliche Pflichten verletzt – Lockdown als Folge, 'Gesundheit und Pflege' 2021, p. 50ff., who considers the proportionality test to have been undermined.

9 For further information, see M. Goldhammer and S. Neuhöfer, Grundrechte in der Pandemie…, *op. cit.*, pp. 215ff.; P. Häberle and M. Kotzur, Die COVID-19-Pandemie…, *op. cit.*, p. 134; I. Heberlein, COVID-19 – Stresstest für das Prinzip der Verhältnismäßigkeit, 'Gesundheit und Pflege' 2020, p. 97; I. Heberlein, Staatliche Pflichten verletzt…, *op. cit.*, pp. 50ff.; C. Katzenmeier, Grundrechte…, *op. cit.*, pp. 463ff.; J. Kersten and S. Rixen, Der Verfassungsstaat…, *op. cit.*, V. 1; M. Kloepfer, Verfassungsschwächung durch Pandemiebekämpfung, 'Verwaltungsarchiv' 2021, vol. 112, pp. 175ff.; M.H.W. Möllers, Der Verhältnismäßigkeitsgrundsatz…, *op. cit.*, p. 286; D. Murswiek, Die Corona-Waage – Kriterien für die Prüfung der Verhältnismäßigkeit von Corona-Maßnahmen, 'Neue Zeitschrift für Verwaltungsrecht' 2021, special issue no. 5, p. 1; H. Schmitz and C.-W. Neubert, Praktische Konkordanz…, *op. cit.*, p. 666.

10 I. Heberlein, Staatliche Pflichten verletzt…, *op. cit.*, p. 51.

11 See J. Kersten and S. Rixen, Der Verfassungsstaat…, *op. cit.*, V. 1 and 2.

tive without their addition.[12] Nevertheless, the question remains, and even becomes more acute: how can the effectiveness of a complex bundle of measures be evaluated in comparison to other possible bundles of measures – and this within a short period of time? It can already be seen here that all this leads to a wide margin of appreciation on the part of government agencies.[13] When it comes to the appropriateness of a measure (as the last stage of the proportionality test), the distinction between 'disruptors'[14] and 'non-disruptors'[15] was especially important in the area of hazard prevention. Until the coronavirus pandemic, this had also applied to the proportionality test of infection protection measures.[16] The pandemic indicated that this differentiation could not be maintained in times of crisis: it played no role in the restrictions on fundamental rights during the hard lockdown in the critical phases of the pandemic.[17] Again, this was a direct consequence of the three factors of intensity, dynamics and uncertainty. Significantly, it only became an issue when it came to the relaxation of restrictions for vaccinated and recovered persons.

These pandemic-specific problems of the proportionality test culminate when courts have to rule on encroachments on those fundamental rights that may be restricted by the legislature only in order to protect conflicting constitutional values; in constitutional dogmatics, this is referred to as unconditionally guaranteed fundamental rights.[18] In these cases, the so-called 'practical concordance' must be established, which seeks to find the best possible balance between the conflicting constitutional rights.[19] Courts must check whether a statutory regulation or a certain intervening administrative measure is the best possible balance. In this way, fundamental rights take on the character of optimization requirements.[20] When it comes to pandemic-induced restrictions on fundamental rights, achieving practical concord-

12 D. Murswiek, Die Corona-Waage…, *op. cit.*, p. 5.

13 J. Kersten and S. Rixen, Der Verfassungsstaat,… *op. cit.*, V. 1 and 2; D. Murswiek, Die Corona-Waage…, *op. cit.*, p. 5.

14 In the terminology of German security law, a 'disruptor' (*Störer*) is a person in accountability due to a dangerous behaviour or due to a legal position concerning a dangerous object.

15 In the terminology of German security law, a 'non-disruptor' (*Nichtstörer*) is a person who is held accountable even though he or she did not directly contribute to the danger. For further information, see T. Kingreen and R. Poscher, Polizei- und Ordnungsrecht, 11th ed., Munich 2020, § 9 mn. 74ff.

16 For details, see S. Kluckert, Verfassungs- und verwaltungsrechtliche Grundlagen des Infektionsschutzrechts, (in:) S. Kluckert (ed.), Das neue Infektionsschutzrecht, 2nd ed., Baden-Baden 2021, § 2 mn. 1ff.

17 I. Heberlein, COVID-19…, *op. cit.*, p. 99; M. Kloepfer, Verfassungsschwächung…, *op. cit.*, p. 184; for a critical perspective, see D. Murswiek, Die Corona-Waage…, *op. cit.*, p. 11.

18 See generally G. Manssen, Staatsrecht II, 18th ed., Munich 2021, § 8 mn. 182ff.

19 See M. Goldhammer and S. Neuhöfer, Grundrechte in der Pandemie…, *op. cit.*, p. 215.

20 For details, see T. Barczak, Rechtsgrundsätze, 'Juristische Schulung' 2021, p. 4; M. Klatt and M. Meister, Der Grundsatz der Verhältnismäßigkeit, 'Juristische Schulung' 2014, pp. 193–194.

ance in the sense of the best possible balance proves to be an insoluble problem.[21] For example, who could speak of only a gentle interference with the freedom of the arts (which is unconditionally guaranteed according to Article 5(3) of the Basic Law) when theatres, opera houses and concert halls had to close down for many months for reasons of health protection? In the end, it may have been right to prioritize health protection, but there can be no question of achieving practical concordance if one of the conflicting constitutional values crushes all the others.

Some of these challenges in relation to the proportionality test are associated with, and exacerbated by, tangible practical difficulties. Where should administrative courts acquire the necessary expertise to weigh constitutional rights, especially if they are required to provide urgent relief?[22] How do they determine the epidemiological viability of a particular event when a new virus mutation increases the risk of infection in a way that is difficult to calculate at that point in time? In this situation, administrative courts are burdened with a responsibility that can hardly be overstated for life and health, but also for the economic existence of large sections of the population.[23] The call for experts, which was required and practicable in normal times, has been almost impossible in view of the limited number, and other urgent tasks, of virologists and epidemiologists. The courts had to look for other solutions in this (by no means enviable) situation – and they found them. The methods to which they have resorted, however, contribute to relativizing our previous understanding of fundamental rights.

2. Reducing the Standards of Review – Coherence as a Substitute Scale in a Crisis

Where the suitability, necessity and appropriateness of fundamental rights interventions can only be assessed in a limited way due to the three factors of intensity, dynamics and uncertainty, the margins of appreciation of the legislator and the executive increase.[24] In order to mitigate and compensate for the reduction in judicial review, the courts emphasized the obligation of the public authorities to con-

21 Cf. P. Häberle and M. Kotzur, Die COVID-19-Pandemie…, *op. cit.*, pp. 132–133.

22 O. Lepsius, Grundrechtsschutz…, *op. cit.*, pp. 276, emphasizes that it is unsatisfactory for the courts, as with all other government agencies, to rely significantly on the assessment of the Robert Koch Institute (RKI), a German federal government agency and research institute responsible for disease control and prevention. The risk assessment of the RKI thus has a force of precedent that neutralizes control by the courts in terms of content, because authorities and courts refer to the same assessments.

23 Cf. J.A. Kämmerer and L. Jischkowski, Grundrechtsschutz in der Pandemie…, *op. cit.*, p. 352.

24 Cf. J. Kersten and S. Rixen, Der Verfassungsstaat…, *op. cit.*, V. 1; S. Rixen, Grenzenloser Infektionsschutz in der Corona-Krise?, 'Recht und Politik' 2020, vol. 56, p. 113.

tinuously monitor and regularly reassess the situation.[25] The constitutionality of the restrictions on fundamental rights has also been justified by the argument that they are temporary measures.[26] These considerations are plausible in themselves; however, they inevitably lead to the question as to when a measure (which is to be regarded as proportionate by reason of its time limit) becomes disproportionate and therefore unconstitutional in the passage of time;[27] the court is thus faced with similar difficulties to before.

In the administrative jurisdiction, there was also a different strategy to deal with the particular challenges of monitoring fundamental rights. A strict proportionality test was replaced in part by an examination of coherent and appropriate differentiations in the concrete design of containment measures[28] – to put it bluntly, one could speak of coherence as a possible substitute scale in a crisis situation.[29] Arguments such as consistency or conformity have so far played a role primarily in highly complex regulatory areas such as tax law,[30] where the main focus has been on certain minimum requirements for coherent legislation from an equality perspective: systemic deficiencies may indicate unequal treatment. Given the difficulties of administrative courts in resolving conflicts in fundamental rights according to the usual patterns of proportionality and practical concordance, this approach gained new importance

25 Bundesverfassungsgericht, 'Neue Juristische Wochenschrift' 2020, p. 1427 (on the prohibition of religious gatherings); Bundesverfassungsgericht, 'Neue Zeitschrift für Verwaltungsrecht' 2020, pp. 1040, 1041 (on the closure of schools and kindergartens); Bayerischer Verfassungsgerichtshof, 'Neue Zeitschrift für Verwaltungsrecht' 2020, pp. 785, 788 (on curfews); see M. Goldhammer and S. Neuhöfer, Grundrechte in der Pandemie…, *op. cit.*, p. 214; J.A. Kämmerer and L. Jischkowski, Grundrechtsschutz in der Pandemie…, *op. cit.*, p. 352; S. Rixen, Grenzenloser Infektionsschutz…, *op. cit.*, pp. 112ff.; H. Schmitz and C.-W. Neubert, Praktische Konkordanz…, *op. cit.*, p. 668.

26 For example, Bundesverfassungsgericht, 'Neue Juristische Wochenschrift' 2020, pp. 1429, 1430 (on curfews); Bundesverfassungsgericht, 'Neue Juristische Wochenschrift' 2020, p. 1427 (on prohibition of religious gatherings); Verwaltungsgerichtshof München, 'Neue Juristische Wochenschrift' 2020, pp. 1236, 1240 (on curfews); see S. Rixen, Grenzenloser Infektionsschutz…, *op. cit.*, p. 113; H. Schmitz and C.-W. Neubert, Praktische Konkordanz…, *op. cit.*, p. 668.

27 Cf. D. Murswiek, Die Corona-Waage…, *op. cit.*, p. 14; H. Schmitz and C.-W. Neubert, Praktische Konkordanz…, *op. cit.*, p. 668.

28 See for example Verwaltungsgerichtshof Kassel, 'Neue Zeitschrift für Verwaltungsrecht' 2020, p. 732 (on differentiations in school attendance); Verwaltungsgerichtshof München, BeckRS 2020, no. 6630 (on differentiations in closures in the retail trade); Verwaltungsgerichtshof München, BeckRS 2020, no. 32232 (on the closure of beauty salons); Oberverwaltungsgericht Bremen, BeckRS 2020, no. 30295 (on the closure of prostitution establishments).

29 For details, see M. Erdmann, Kohärenz in der Krise?, *op. cit.*, p. 1798 and J. Kersten and S. Rixen, Der Verfassungsstaat…, *op. cit.*, V. 2; also see J.A. Kämmerer and L. Jischkowski, Grundrechtsschutz in der Pandemie…, *op. cit.*, p. 342.

30 Fundamental texts include C. Degenhart, Systemgerechtigkeit und Selbstbindung des Gesetzgebers als Verfassungspostulat, Munich 1976 and F.-J. Peine, Systemgerechtigkeit, Baden-Baden 1985; from the current legal literature, see P. Kirchhof, Comment on Article 3, (in:) T. Maunz and G. Dürig, Grundgesetz-Kommentar, Munich 2020, mn. 404ff. to Art. 3(1).

during the coronavirus crisis. The problem of coherent and appropriate differentiation was an issue, among other things, where courts had to rule on whether (and if so, how) the closure of retail stores may be graded according to the type and size of the stores. Accordingly, a violation of fundamental rights could be found in the inconsistent inclusion or non-inclusion of certain types of stores.[31] The crisis thus witnessed a certain shift in the standards of review, from aspects concerning freedom to those about equality: when the dangers are enormous and the effectiveness of countermeasures uncertain, more attention is drawn to equality in the commitment of different segments of the population to cope with the crisis. However, even this approach to solving the problem quickly reaches its limits. In many cases, the combination of intensity, dynamics and uncertainty has forced legislators and regulators to adopt seemingly arbitrary definitions and delimitations: an example is the setting of coronavirus incidence rates (negotiated in part as a compromise between the federal government and the *Länder*) as decisive factors for the closure of stores and service agencies.[32] Accordingly, numerous decisions of higher administrative courts on coronavirus-related measures state that strict compliance with the requirement of consistency cannot be demanded.[33]

3. The Concept of 'Special Sacrifices' in State Liability Law and Its Limits in the Coronavirus Pandemic

From the point of view of equal treatment, yet another limit of traditional legal doctrine has become apparent. This has to do with a category that plays a key role in compensation claims by private individuals against the state: the concept of the 'special sacrifice' (*Sonderopfer*). Where state measures interfere with the fundamental right to property (Article 14 of the Basic Law) or the right of life and health (Article 2(2) of the Basic Law), the Federal High Court of Justice (*Bundesgerichtshof*) awards compensation under certain conditions.[34] When one considers that the civil courts also subsume the 'right to an established and practised business' under the

31 See for example Verwaltungsgerichtshof München, BeckRS 2020, no. 6630; Verwaltungsgericht Hamburg, BeckRS 2020, no. 6396.

32 For a critical view, see I. Heberlein, Staatliche Pflichten verletzt…, *op. cit.*, p. 47.

33 Cf. Oberverwaltungsgericht Bremen, 'Zeitschrift für öffentliches Recht in Norddeutschland' 2020, p. 462 (on the closure of shisha bars) and Oberverwaltungsgericht Lüneburg, 'Zeitschrift für öffentliches Recht in Norddeutschland' 2020, p. 312 (on restrictions for furniture stores).

34 Claims to 'special sacrifice' (in the broader sense) are linked to the impairment of fundamental rights under Article 14 of the Basic Law or Article 2(2) of the Basic Law; however, these are not derived from these fundamental rights but apply by virtue of customary law. Therefore, they do not have constitutional status. See for example H. Sodan and J. Ziekow, Grundkurs Öffentliches Recht, 9th ed., Munich 2020, § 87 mn. 6.

concept of property,[35] it can be seen that such claims may also be relevant in the case of pandemic control.[36] A special feature of these legal institutions is that under certain circumstances, those affected must also be compensated for lawful measures.[37] The liability requirement presupposes that a so-called 'special sacrifice' has been demanded of those affected. According to a formulation from the standard literature on state liability law, such a special sacrifice will be given if the encroachment on property (in the context of the pandemic, the encroachment on the business) and its consequences are so severe that acceptance without compensation would be unreasonable.[38] The coronavirus pandemic has highlighted the limits of this concept.[39] Who would say that it was reasonable for entrepreneurs in particular sectors of the economy (such as hoteliers, event organizers or owners of clubs and discotheques) to not provide their services nor open their facilities for many months? The sacrifices demanded of these entrepreneurs by legislators and regulators can hardly be qualified as 'reasonable' when measured against previous standards.[40] Nevertheless, the assumption that we are dealing with special sacrifices in the original meaning of this term is questionable – precisely because it is a matter of whole economic sectors, and thus thousands and thousands of people were involved.[41] How should jurisdiction deal with cases of sacrifices in which the consequences of a lawful government action turn out to be unreasonable not only for individual recipients but also for entire professional categories and population groups? There is no answer to this yet.[42]

35 See for example Bundesgerichtshof, 'Neue Juristische Wochenschrift' 1990, p. 3260; Bundesverwaltungsgericht, 'Neue Zeitschrift für Verwaltungsrecht' 2005, pp. 1178, 1181. In the recent past, the *Bundesverfassungsgericht* has left unanswered the question of whether the 'right to an established and practised business' is a component of the fundamental right to property; see Entscheidungen des Bundesverfassungsgerichts, vol. 143, pp. 246, 331ff.

36 It may be left open, however, to what extent the compensation provisions of IfSG (German Infection Protection Act) §§ 56ff. may derogate claims by customary law, such as the claim of 'special sacrifice'; on this, see P. Bachmann and J. Rung, Entschädigungsrecht und IfSG, (in:) S. Kluckert (ed.), Das neue Infektionsschutzrecht…, *op. cit.*, § 15 mn. 68ff.

37 Cf. for example S. Detterbeck, Allgemeines Verwaltungsrecht, 19th ed., Munich 2021, § 22 mn. 1161.

38 *Ibidem*, mn. 1171; see also H. Schmitz and C.-W. Neubert, Praktische Konkordanz…, *op. cit.*, p. 670, and from case law, Bundesgerichtshof, 'Neue Juristische Wochenschrift' 2013, p. 1736 and Bundesgerichtshof, 'Neue Juristische Wochenschrift' 2017, pp. 1324ff.

39 Also see J. Rinze and R. Schwab, Dulde und liquidiere – Staatshaftungsansprüche in Coronazeiten, 'Neue Juristische Wochenschrift' 2020, p. 1910; H. Schmitz and C.-W. Neubert, Praktische Konkordanz…, *op. cit.*, pp. 670ff.

40 *Ibidem*, p. 670.

41 Landgericht Hannover, 'Neue Juristische Wochenschrift – Rechtsprechungsreport' 2020, pp. 1226, 1230 (on claims for compensation of restaurants); Landgericht Hannover, BeckRS 2020, no. 34842 (on claims for compensation by cinema operators, hoteliers and owners of escape rooms); for a different opinion, see H. Schmitz and C.-W. Neubert, Praktische Konkordanz…, *op. cit.*, p. 670.

42 *Ibidem*, p. 670.

During the coronavirus pandemic the state itself ensured financial compensation for losses in sales (although it is questionable whether these compensation payments have been sufficient).[43] Due to this, the difficulty of state liability law has been slightly mitigated. Jurisdiction[44] and legal literature[45] have considered these compensation payments as an instrument to contribute to the proportionality of limitations on fundamental rights. It will be possible in the future that one considers the limitations of fundamental rights to be justified more easily if the state pays financial compensation for that interference. This would be a development that must be watched with concern: administrations and legislators could 'buy' the proportionality of interferences in fundamental rights.[46] Whether it will come to that is uncertain, but it is certain that the criterion of the 'special sacrifice' as an essential requirement of the liability to pay compensation for interferences in fundamental rights has been shaken through the coronavirus pandemic and needs to be reconsidered.

4. The Essence of Fundamental Rights

From this plethora of problems, one last aspect should be touched upon. Article 19(2) of the Basic Law stipulates that the essence of a fundamental right must not be touched. Contrary to a misunderstanding which is sometimes advocated, this is not about constitutional amendments but about the limits of the restriction on fundamental rights by legislator and administration.[47] This is why in the German constitutional debate, Article 19(2) of the Basic Law is referred to as a so-called '*Schranken-Schranke*' (boundary on the limitation of fundamental rights).[48] It is not unreasonable to consider a fundamental right such as the freedom of assembly, in Article 8 of the Basic Law, being impaired in its essence if assemblies cannot take place over many months or can only take place under very difficult conditions, particularly as the scope of this fundamental right comprises not only rallies and demonstrations but also assemblies in closed rooms, which have been significantly limited due to the pandemic.[49] Significantly, assemblies in closed rooms are not at all or only inciden-

43 Schmitz and Neubert are sceptical about this; *ibidem*, p. 669.

44 See for example Oberverwaltungsgericht Münster, BeckRS 2020, no. 5158, mn. 63; Verwaltungsgerichtshof München, 'BeckRS 2020', no. 6266, mn. 43.

45 See for example K.P. Dolde and M. Marquard, Ausgleichspflicht für pandemiebedingte Betriebs- und Tätigkeitsverbote, 'Neue Zeitschrift für Verwaltungsrecht' 2021, p. 674.

46 For details, see S. Haack, Entschädigungspflichtige Grundrechtseingriffe außerhalb des Eigentumsschutzes, 'Deutsches Verwaltungsblatt' 2010, pp. 1477ff.

47 For example, see Bundesverfassungsgericht, 'Entscheidungen des Bundesverfassungsgerichts', vol. 109, pp. 279, 310ff.; H. Dreier, Comment on Article 19 sec. 2, (in:) H. Dreier (ed.), Grundgesetz-Kommentar, 3rd ed., vol. 1, Tübingen 2013, mn. 11 to Art. 19(2); G. Manssen, Staatsrecht II…, *op. cit.*, mn. 230.

48 H. Dreier, Comment…, *op. cit.*, mn. 7 to Art. 19(2).

49 H. Schmitz and C.-W. Neubert, Praktische Konkordanz…, *op. cit.*, p. 669.

tally mentioned by many authors who focus on coronavirus-caused interferences in fundamental rights.

How can one identify whether (and if so, from which moment) the essence of this fundamental right has been damaged due to the coronavirus restrictions? This is difficult to answer. Article 19(2) of the Basic Law barely played a role in the jurisdiction of the Federal Constitutional Court.[50] The interpretation of this provision is disputed among constitutional lawyers: while many supporters assume an inner core, an essence, of every fundamental right, which should be determined absolutely,[51] others look at what remains of the fundamental right with the restriction.[52] In the end both approaches are helpless in facing the question of the violation of the essence of fundamental rights during the coronavirus pandemic. In the constitutional law debate, a violation of the essence of Article 8 of the Basic Law due to the coronavirus containment regulations that restrict assemblies is rejected with the argument that those restrictions have a time limitation.[53] This sounds plausible: if the exercising of this constitutionally protected conduct is inhibited only for a short period, one could hardly speak of the violation of the essence of the fundamental right. Nevertheless, the question arises of how these time limitations must be determined and how often they can be extended until the violation of the essence occurs. The same would apply to the assumption[54] that the essence of a fundamental right is not infringed if the constitutionally protected conduct is exercised by getting special permission (which is reasonably expected to be granted), despite a general prohibition.[55] The question arises of how long such a prohibition, when permission is reserved, will

50 H. Dreier, Comment…, *op. cit.*, mn. 8 to Art. 19(2).

51 The so-called 'Lehre vom absoluten Wesensgehalt'; see for example C.D. Classen, Staatsrecht II, Munich 2018, § 5 mn. 69; C. Hillgruber, Grundrechtsschranken, (in:) J. Isensee and P. Kirchhof (eds.), Handbuch des Staatsrechts, vol. 9, 3rd ed., Heidelberg 2011, § 201 mn. 100; H.D. Jarass, Comment on Article 19, (in:) H.D. Jarass and B. Pieroth (eds.), Grundgesetz, 16th ed., Munich 2020, mn. 9 to Art. 19.

52 The so-called 'Lehre vom relativen Wesensgehalt'; see for example H. Dreier, Comment…, *op. cit.*, mn. 17 to Art. 19 (2); M. Martini, B. Thiessen and J. Ganter, Zwischen Vermummungsverbot und Maskengebot: Die Versammlungsfreiheit in Zeiten der Corona-Pandemie, 'Neue Juristische Online-Zeitschrift' 2020, p. 934.

53 Oberverwaltungsgericht Weimar, BeckRS 2020, no. 6395, mn. 30; M. Martini, B. Thiessen and J. Ganter, Zwischen Vermummungsverbot…, *op. cit.*, p. 934.

54 Cf. Oberverwaltungsgericht Bautzen, BeckRS 2020, no. 9349, mn. 34; M. Martini, B. Thiessen and J. Ganter, Zwischen Vermummungsverbot…, *op. cit.*, p. 934.

55 Such regulations could be found in many coronavirus containment regulations, whereas a total prohibition on assemblies has remained an exception. For details, see J. Kersten and S. Rixen, Der Verfassungsstaat…, *op. cit.*, V. 3; M. Martini, B. Thiessen and J. Ganter, Zwischen Vermummungsverbot…, *op. cit.*, p. 929; cf. also R. Sinder, Versammlungsfreiheit unter Pandemiebedingungen, 'Neue Zeitschrift für Verwaltungsrecht' 2021, p. 103.

satisfy the demand for such an important fundamental right.[56] How tight are the exception clauses allowed to be to not affect the essence of the fundamental right? In the coronavirus pandemic one could experience that the violation of the guarantee of the essence moved further and further away the more one thought the critical issues were being approached. If the infection situation had remained as difficult as at the height of the first and second waves of infection over a longer period of time, the legal substance of Article 19(2) of the Basic Law might have turned out to be a mirage and would have evaporated.

Conclusions

What conclusion can be drawn from these considerations? The functioning of constitutional reasoning, with its processes of weighing and its standards of reviewing, is tailored to a normal state – and for this area it continues to be valid. As soon as we have returned to normality, the dogmatics of fundamental rights will, in many contexts, be able to take up what had been regarded as the secure state of affairs before the pandemic.[57] However, this does not change the fact that our understanding of the fundamental rights will never be the same again.[58] The coronavirus pandemic visualized the limits of the power of the provisions of fundamental rights – brutally and unambiguously, in fact – and awareness of these limits will remain engraved. If in the future one is talking about the proportionality test, the practical concordance, the special sacrifice, or the guarantee of the essence, one will know that a situation can suddenly and quickly arise in which the familiar instruments of the protection of fundamental rights fail.

The question remains of how to deal, not to mention cope, with this finding. In politics, the implementation of provisions for a state of emergency in the constitution for hazardous situations such as the coronavirus pandemic was proposed, which

56 To what extent a prohibition when permission is reserved can be consistent with Article 8 of the Basic Law in the specific circumstances of the pandemic was left open by the Bundesverfassungsgericht, 'Neue Zeitschrift für Verwaltungsrecht' 2020, pp. 711, 712. In the jurisdiction of the administrative courts, this question has been answered inconsistently (for compatibility with Article 8 of the Basic Law, see Verwaltungsgericht Hamburg, BeckRS 2020, no. 7213; for the opposite view, see Verwaltungsgericht Hamburg, BeckRS 2020, no. 9930). It should be noted that according to its wording, Article 8 of the Basic Law guarantees the right to assemble 'without application or permission'.

57 A mainly optimistic view is presented by M. Kloepfer, Verfassungsschwächung…, *op. cit.*, pp. 202ff.; for a more sceptical comment, see H.M. Heinig, T. Kingreen, O. Lepsius, C. Möllers, U. Volkmann and H. Wißmann, Why Constitution Matters – Verfassungsrechtswissenschaft in Zeiten der Corona-Krise, 'Juristenzeitung' 2020, pp. 861–862.

58 H.M. Heinig et al. doubt that 'the complex connection of freedom and responsibility', as it shapes the liberal order of the modern constitutional state, can be switched off and on at will; *ibidem*, p. 865.

would allow – similarly to Article 15 of the European Convention on Human Rights (ECHR)[59] – a time-limited derogation of the fundamental rights.[60] This would not be applied in an unlimited way but would have to preserve the core of human dignity in the fundamental rights, just as in the law of the ECHR[61] some fundamental rights are excluded from the possibility of the derogation. This suggestion involves the risk that such an opportunity could be made use of to reduce the constitutional standard in an abusive and excessive way, which is why it appears to be more advisable to leave the constitution as it is and to look for other ways to overcome the experience with the capacities of the fundamental rights. This primarily requires jurisprudence which must cope with the knowledge gained in these further developments. The more expectations have been raised by optimization requirements and ever new dimensions of fundamental rights protection during a normal state, the greater the disappointment will be in a real state of emergency later on, such as in the coronavirus pandemic. Fundamental rights standards that cannot be realized must turn out to be false promises in such situation, which harms the trust of all legal subjects in the constitutional system; in the coronavirus pandemic this loss of trust turned out to be a real threat. Constitutional jurisprudence does not need to take this risk because the classic theorems of the interpretation of fundamental rights, as they emerged for constitutional reasoning in the first decades of the Federal Republic of Germany, conveyed a satisfactory level of fundamental rights protection. Therefore, we can learn from the pandemic that overambitious fundamental rights doctrines do more harm than good. If

59 During the pandemic, ten Member States of ECHR notified derogations according to Article 15 ECHR: the lawfulness of this practice has been discussed throughout Europe. See for example R. Duminică, Some Reflections about the Activation of Art 15 of the European Convention on Human Rights by Romania in the Context of the COVID-19 Pandemic, 'Journal of Law and Administrative Sciences' 2020, vol. 13, p. 78; M.L. Fremuth and A. Sauermoser, Menschenrechte im Ausnahmezustand?, 'Zeitschrift für Menschenrechte' 2020, p. 150; S. Haack, Die Corona-Pandemie und das Abweichen von Konventionsrechten gem. Art. 15 EMRK bei Vorliegen eines Notstands, 'Europäische Grundrechte-Zeitschrift' 2021, p. 364; S. Jovičić, COVID-19 Restrictions on Human Rights in the Light of the Case-Law of the European Court of Human Rights, 'ERA Forum' 2021, vol. 21, p. 545; S. Panov, To Derogate (and Notify) or Not to Derogate (and Not to Notify), That is the Question!, (in:) TRAFO Re:constitution Working Paper 2020, vol. 1; N. Rusi and F. Shqarri, Limitation or Derogation? The Dilemma of the States in Response to Human Rights Threat During the COVID-19 Crisis, 'Academic Journal of Interdisciplinary Studies' 2020, vol. 9, p. 166; K.A. Suyunova, Dimensions of Human Rights and Derogation Clauses During Covid 19 Pandemic Under Article 15 of the European Convention on Human Rights, 'Lawyer Herald' 2020, vol. 6, p. 147; V.P. Tzevelekos and K. Dzehtsiarou, Normal as Usual? Human Rights in Times of COVID-19, 'European Convention on Human Rights Law Review' 2020, vol. 1, p. 141.

60 This view was expressed by the former Federal Minister of the Interior Thomas de Maizière, in an interview with the Frankfurter Allgemeine Sonntagszeitung of 4 April 2021. The considerations of the first minister of Baden-Wurttemberg, Winfried Kretschmann, which he shared in an interview with the Stuttgarter Zeitung of 24 June 2021, aim in the same direction.

61 See footnote 59.

the legal instruments that are used by the courts are to be suitable for the normal state of affairs as well as for a state of emergency, they must be as robust as possible and must leave aside all components of special 'extras'. The higher the standard of the fundamental rights doctrine in the normal state, the more likely that one is forced to fall back on constitutionally questionable emergency rules and ad hoc measures in a state of emergency. If you want to buy a vehicle that has proven itself in all situations and is suitable for traversing rough terrain, you should buy an off-road vehicle and not a convertible. During the coronavirus pandemic, German constitutional jurisprudence has been driving through difficult ground with a luxurious cabriolet, but there is hope that we will make it to the destination (which will be the continued existence of the constitutional state after the end of the pandemic). As soon as we have arrived, we should go to a car repair shop to check whether the damage which has occurred can be fixed. If this is not possible – as is to be feared – we should continue our journey with a more robust car.

REFERENCES

Bachmann P. and Rung J., Entschädigungsrecht und IfSG, (in:) S. Kluckert (ed.), Das neue Infektionsschutzrecht, 2nd ed., Baden-Baden 2021, § 15.

Barczak T., Rechtsgrundsätze, 'Juristische Schulung' 2021, pp. 1–7.

Classen C.D., Staatsrecht II, Munich 2018.

Degenhart C., Systemgerechtigkeit und Selbstbindung des Gesetzgebers als Verfassungspostulat, Munich 1976.

Degenhart C., Staatsrecht I. Staatsorganisationsrecht, 36th ed., Heidelberg 2020.

Detterbeck S., Allgemeines Verwaltungsrecht, 19th ed., Munich 2021.

Dolde K.P. and Marquard M., Ausgleichspflicht für pandemiebedingte Betriebs- und Tätigkeitsverbote, 'Neue Zeitschrift für Verwaltungsrecht' 2021, pp. 674–679.

Dreier H., Comment on Article 19 sec. 2, (in:) H. Dreier (ed.), Grundgesetz-Kommentar, 3rd ed., vol. 1, Tübingen 2013.

Dumbs M., Zwangsmaßnahmen gegen den Menschen als Gemeinschaftswesen, 'Neue Juristische Online-Zeitschrift' 2021, pp. 65–74.

Duminică R., Some Reflections about the Activation of Art 15 of the European Convention on Human Rights by Romania in the Context of the COVID-19 Pandemic, 'Journal of Law and Administrative Sciences' 2020, vol. 13, pp. 78–88.

Erdmann M., Kohärenz in der Krise? 'Neue Zeitschrift für Verwaltungsrecht' 2020, pp. 1798–1802.

Fremuth M.L. and Sauermoser A., Menschenrechte im Ausnahmezustand? 'Zeitschrift für Menschenrechte' 2020, pp. 150–172.

Goldhammer M. and Neuhöfer S., Grundrechte in der Pandemie – Allgemeine Lehren, 'Juristische Schulung' 2021, pp. 212–217.

Haack S., Entschädigungspflichtige Grundrechtseingriffe außerhalb des Eigentumsschutzes, 'Deutsches Verwaltungsblatt' 2010, pp. 1475–1483.

Haack S., Die Corona-Pandemie und das Abweichen von Konventionsrechten gem. Art. 15 EMRK bei Vorliegen eines Notstands, 'Europäische Grundrechte-Zeitschrift' 2021, pp. 364–369.

Häberle P. and Kotzur M., Die COVID-19-Pandemie aus der kulturwissenschaftlichen Perspektive einer europäischen und universalen Verfassungslehre, 'Neue Juristische Wochenschrift' 2021, pp. 132–137.

Hase F., Verfassungsrechtswissenschaft in der Corona-Krise – worauf kommt es an? 'Juristenzeitung' 2020, pp. 1107–1108.

Heberlein I., COVID-19 – Stresstest für das Prinzip der Verhältnismäßigkeit, 'Gesundheit und Pflege' 2020, pp. 97–104.

Heberlein I., Staatliche Pflichten verletzt – Lockdown als Folge, 'Gesundheit und Pflege' 2021, pp. 41–51.

Heinig H.M., Kingreen T., Lepsius O., Möllers C., Volkmann U. and Wißmann H., Why Constitution Matters – Verfassungsrechtswissenschaft in Zeiten der Corona-Krise, 'Juristenzeitung' 2020, pp. 861–872.

Hillgruber C., Grundrechtsschranken, (in:) J. Isensee and P. Kirchhof (eds.), Handbuch des Staatsrechts, 3rd ed., vol. 9, Heidelberg 2011, § 201.

Jarass H.D., Comment on Article 19, (in:) H.D. Jarass and B. Pieroth (eds.), Grundgesetz, 16th ed., Munich 2020.

Jovičić S., COVID-19 Restrictions on Human Rights in the Light of the Case-Law of the European Court of Human Rights, 'ERA Forum' 2021, vol. 21, pp. 545–560.

Kämmerer J.A. and Jischkowski L., Grundrechtsschutz in der Pandemie – Der 'Corona-Lockdown' im Visier der Verfassungs- und Verwaltungsgerichtsbarkeit, 'Gesundheitsrecht' 2020, pp. 341–353.

Katzenmeier C., Grundrechte in Zeiten von Corona, 'Medizinrecht' 2020, pp. 461–465.

Kersten J. and Rixen, S., Der Verfassungsstaat in der Corona-Krise, 2nd ed., Munich 2021.

Kingreen T. and Poscher R., Polizei- und Ordnungsrecht, 11th ed., Munich 2020.

Kirchhof P., Comment on Article 3, (in:) T. Maunz and G. Dürig, Grundgesetz-Kommentar, Munich 2020.

Klatt M. and Meister M., Der Grundsatz der Verhältnismäßigkeit, 'Juristische Schulung' 2014, pp. 193–199.

Kloepfer M., Verfassungsschwächung durch Pandemiebekämpfung, 'Verwaltungsarchiv' 2021, vol. 112, pp. 169–204.

Kluckert S., Verfassungs- und verwaltungsrechtliche Grundlagen des Infektionsschutzrechts, (in:) S. Kluckert (ed.), Das neue Infektionsschutzrecht, 2nd ed., Baden-Baden 2021, § 2.

Lepsius O., Grundrechtsschutz in der Corona-Pandemie, 'Recht und Politik' 2020, vol. 56, pp. 258–281.

Manssen G., Staatsrecht II, 18th ed., Munich 2021.

Martini M., Thiessen B. and Ganter J., Zwischen Vermummungsverbot und Maskengebot: Die Versammlungsfreiheit in Zeiten der Corona-Pandemie, 'Neue Juristische Online-Zeitschrift' 2020, pp. 929–935.

Möllers M.H.W., Der Verhältnismäßigkeitsgrundsatz bei Freiheitsbeschränkungen infolge der Coronavirus SARS CoV–2 Pandemie, 'Recht und Politik' 2020, vol. 56, pp. 286–308.

Murswiek D., Schutz – Freiheit – Covid, 'Die öffentliche Verwaltung' 2021, pp. 505–510.

Murswiek D., Die Corona-Waage – Kriterien für die Prüfung der Verhältnismäßigkeit von Corona-Maßnahmen, 'Neue Zeitschrift für Verwaltungsrecht' 2021, special issue no. 5, pp. 1–15.

Panov S., To Derogate (and Notify) or Not to Derogate (and Not to Notify), That is the Question, (in:) TRAFO ReConstitution Working Paper 2020, vol. 1.

Peine F.-J., Systemgerechtigkeit, Baden-Baden 1985.

Richter C., Die Schutzpflicht des Verfassungsstaates in der Pandemie, 'Deutsches Verwaltungsblatt' 2021, pp. 16–19.

Rinze J. and Schwab R., Dulde und liquidiere – Staatshaftungsansprüche in Coronazeiten, 'Neue Juristische Wochenschrift' 2020, pp. 1905–1911.

Rixen S., Grenzenloser Infektionsschutz in der Corona-Krise?, 'Recht und Politik' 2020, vol. 56, pp. 109–117.

Rusi N. and Shqarri F., Limitation or Derogation? The Dilemma of the States in Response to Human Rights Threat During the COVID-19 Crisis, 'Academic Journal of Interdisciplinary Studies' 2020, vol. 9, pp. 166–176.

Schmitz H. and Neubert C.-W., Praktische Konkordanz in der Covid-Krise, 'Neue Zeitschrift für Verwaltungsrecht' 2020, pp. 666–671.

Sinder R., Versammlungsfreiheit unter Pandemiebedingungen, 'Neue Zeitschrift für Verwaltungsrecht' 2021, pp. 103–108.

Sodan H. and Ziekow J., Grundkurs Öffentliches Recht, 9th ed., Munich 2020.

Stollmann F. and Wollschläger A., Die Aufgaben der Krankenhäuser im gesundheitlichen Versorgungssystem, (in:) A. Laufs, B.-R. Kern and M. Rehborn (eds.), Handbuch des Arztrechts, 5th ed., Munich 2019, § 79.

Suyunova K.A., Dimensions of Human Rights and Derogation Clauses During Covid 19 Pandemic Under Article 15 of the European Convention on Human Rights (ECHR), 'Lawyer Herald' 2020, vol. 6, pp. 147–152.

Tzevelekos V.P. and Dzehtsiarou K., Normal as Usual? Human Rights in Times of COVID-19, 'European Convention on Human Rights Law Review' 2020, vol. 1, pp. 141–149.

Zuck R. and Zuck H., Die Rechtsprechung des BVerfG zu Corona-Fällen, 'Neue Juristische Wochenschrift' 2020, pp. 2302–2307.

Bialystok Legal Studies
Białostockie Studia Prawnicze
2022 vol. 27 nr 2

sciendo

DOI: 10.15290/bsp.2022.27.02.05

Received: 17.01.2022
Accepted: 12.04.2022

Alena Krunková
Pavol Jozef Šafárik University in Košice, Slovakia
alena.krunkova@upjs.sk
ORCID ID: https://orcid.org/0000–0002–4327–4795

Gabriela Dobrovičová
Pavol Jozef Šafárik University in Košice, Slovakia, Slovakia
gabriela.dobrovicova@upjs.sk
ORCID ID: https://orcid.org/0000–002–9312–4402

Political Rights during the COVID-19 Pandemic in the Slovak Republic[1]

Abstract: Political rights are an essential part of modern states' constitutions as certain means through which power is exercised in the state. The article points to the existence and exercise of political rights in the Slovak Republic at the time of extraordinary circumstances related to the global COVID-19 pandemic. It analyses the options of their restriction within the sense of the Constitutional Law no. 227/2002 Statutes on State Security in Time of War, State of War, Extraordinary Circumstances and State of Emergency, and it also points to the decision-making activities of the Constitutional Court of the Slovak Republic related thereto.
Keywords: Constitutional Court of the Slovak Republic, COVID-19 pandemic, electoral law, political rights, state of emergency

Introduction

As the rights of the first generation, political rights constitute a stable part of the fundamental human rights catalogues in every modern state. Exercising most

1 The article is a result of the APVV–17–0561 project 'Human-legal and ethical aspects of cybersecurity'.

of them, especially the right to vote, is also monitored by relevant international organizations, as the path to their exercise has not been the same or straightforward in every country. In addition, this is a group of rights through which citizens are largely involved in the exercise of public authority in society. This aspect makes them the rights the exercise of which requires increased guarantees and a higher level of protection on the part of the state. At the same time, the extent to which they are restricted is monitored, especially in situations beyond the standard regime of state functioning.[2]

Since the end of 2019, states, including the Slovak Republic, have been exposed to a new serious acute respiratory illness, the SARS-CoV–2 coronavirus (COVID-19). As a result of its alarming spread and the consequences this brought about, on 11 March 2020, the World Health Organization (WHO) declared a coronavirus pandemic. Thus, for over two years now, global events have been mired by this pandemic to a greater degree in some, a lesser degree in other countries. As a result of ensuring the protection of society, the affected states applied a number of reactive and preventive measures to reduce the spread of this virus and enable its treatment. At the same time, the measures adopted required legal regulation, founded on, among other things, a change in the relevant legislation. This affected an enormously wide range of actors. In addition, in the Slovak Republic, the social situation was made more difficult by the natural process of government change as a result of regular parliamentary elections held on 29 February 2020.

The paper aims to analyse the exercise of individual political rights during the COVID-19 pandemic in the Slovak Republic, to identify unwanted interventions and restrictions of political rights, to synthesize polemical points and to propose possible solutions that would contribute to ensuring a balance is reached between the restriction of fundamental rights and the protection of life and health.

1. Political Rights in the Slovak Republic

The Constitution of the Slovak Republic no. 460/1992 Statutes as amended (hereinafter referred to as the 'Constitution') regulates the issue of political rights in its second Article, in the third section, which also bears the same title – 'Political Rights'.

Thus, political rights include those defined by the Constitution in Articles 26 to 32, namely freedom of expression and the right to information (Art. 26), the petition right (Art. 27), the right to assemble peacefully (Art. 28 – hereinafter referred to as the 'right to assemble'), the right to associate (Art. 29), the right to establish political parties and political movements and to associate in the same (Art. 29 para. 2), the electoral right (Art. 30), the right to participate in the administration of public af-

2 More details: Bílková, V., Kysela, J., Šturma, P. et al. (eds.), Extraordinary circumstances and human rights, Prague: Aditorium, 2016, p. 41 et seq.

fairs (Art. 30, para. 1), the right to free competition of political powers (Art. 31) and the right to protest (Art. 32). These are traditional political rights, corresponding to international law in the spirit of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the Charter of Fundamental Rights of the European Union. The exercise of political rights is bound to be specified in the relevant laws, as each of them is regulated in the Constitution only as a framework.

The above-mentioned constitutional aspect identifies political rights at the time of regular operation of the country. Their exercise in crisis is governed by the Constitutional Law no. 227/2002 Statutes on State Security in Time of War, State of War, Extraordinary Circumstances and State of Emergency (hereinafter referred to as the 'Constitutional Law on State Security').[3] The last amendment to this Constitutional Law, passed on 28 December 2020 and effective since 29 December 2020 as Constitutional Law no. 414/2020, has become the subject of extensive expert discussion. In addition to the content of the aforementioned amendment, formal requirements consisting of the manner of adoption of this Constitutional Law have become controversial, as it passed in the National Council of the Slovak Republic in an expedited legislative procedure.

In its Art. 1 para. 4, the Constitutional Law on State Security specifies a 'crisis' as a period during which the security of the state is immediately threatened or impaired and to resolve the crisis, the constitutional authorities may, subject to satisfying the conditions laid down in this Constitutional Law, either declare war, declare a state of war, declare extraordinary circumstances or declare a state of emergency.

These are indeed exceptional situations where it is assumed they will not be invoked too frequently. Out of the four situations defined as a crisis, only the state of emergency has been declared in the Slovak Republic to date.

The Government of the Slovak Republic (hereinafter referred to as the 'Government') shall declare a state of emergency if one of the following alternative conditions is met:

- the life and health of persons or the environment is at real or imminent risk (this may be the causal consequence of the onset of a pandemic)
- or significant property values are at risk as a result of a natural disaster, a catastrophe or industrial, transport or other operational emergency.

A state of emergency may be declared in the affected or in the immediately endangered area only, which may also be the entire territory of the Slovak Republic.[4] To avoid abuse of the state of emergency, the provision of Art. 5 para. 2 of the Constitu-

3 This Constitutional Law has been amended five times so far by Constitutional Acts No. 113/2004; No. 566/2005; No. 181/2006; No. 344/2015; No. 414/2020.

4 Art. 5 para. 1 of the Constitutional Law on State Security.

tional Law on State Security has been included, according to which a state of emergency may be declared to the extent and time necessary, for no more than 90 days.

It was the last amendment that allowed the state of emergency to be extended by a maximum of another 40 days, even repeatedly, subject to satisfaction of a cumulative condition that it is declared due to threat to life and health of people in a causal consequence of the onset of the pandemic. The Constitutional Law states that this extension must also be declared to the extent and time necessary. Such an extension of the state of emergency must be subsequently approved by the National Council of the Slovak Republic within 20 days of the first day of the extended state of emergency. Should the National Council of the Slovak Republic fail to endorse it, the extended state of emergency shall cease on the day on which the Government's proposal to endorse the extension of the state of emergency does not pass in the Council. The consent of the National Council of the Slovak Republic is also required in the event of repeated declaration of a state of emergency provided less than 90 days have elapsed since the end of the previous state of emergency declared for the same reasons.[5] The solution conceived in this way, i.e. in which two constitutional bodies (the Parliament and the Government) participate in unison, makes a good impression at first glance. However, its credibility is undermined by the manner in which it was adopted, as well as by the fact that it was adopted both at the time of the state of emergency and just before the expiry of the 90-day period, which could not have been extended at that time.[6] The above facts thus put it in a different light and allow it to be assessed as serving a certain agenda. The gravity of the state of emergency also lies in the constitutional possibility of restricting fundamental rights and freedoms, which cannot be implemented at the time of regular operation of the society. The practice of declaring a state of emergency and restricting fundamental rights to date has shown that it would have been more effective had the Parliament endorsed the state of emergency before it was declared, since after the state of emergency had already been declared the Parliament took a rather formal approach to endorsing it, even in the absence of justification for its extension.

The Constitutional Law exhaustively determines which rights may be restricted and determines the possible scope of their restriction as well.

As far as the political rights are concerned, where it comes to the state of emergency, the Constitutional Law on State Security stipulates the respective restrictions only in two cases:

5 Art. 5 para. 2 of the Constitutional Law on State Security.

6 The Parliament has resolved the above-mentioned fact through Art. 11a, where it provided for a transitional provision to govern the effective date of the declaration in the sense that it also allowed the state of emergency declared before this Constitutional Law came into force to be extended.

1. The Government may prohibit the exercise of the right to peacefully assemble or make gatherings in public subject to authorization.
2. The Government may restrict the right to freely disseminate information regardless of the borders of the state and freedom of expression in public (Art. 5 para. 3).[7]

Under the state of emergency, the President may, on a proposal of the Government, order extraordinary service to professional soldiers, soldiers in reserve called for regular training or tasks of the armed forces and soldiers of voluntary military training, or call into extraordinary service soldiers in reserve if necessary. We consider it important to add that the scope and time necessary for the restriction must be assessed separately in specific legal relations and differently in relation to their addressees.[8]

2. State of Emergency in the Slovak Republic in Application Practice

Despite the fact that the state of emergency belongs to those situations considered least risky under the Constitutional Law on State Security, and its regulation includes the least possible interference with human rights and freedoms, experience confirms that even in this state it is necessary to approach restrictions of fundamental rights and freedoms in a very cautious manner. Law, including the Constitutional Law, must reflect the crisis not as a para-legal exception, but as a normal occurrence subject to regulation.[9]

7 In relation to other categories of fundamental rights and freedoms, the Government may limit the inviolability of a person and their privacy by forced stay in a dwelling or by evacuation to a designated place, impose a work obligation aimed at providing supplies, maintaining roads and railways, carrying out transport, operating water pipes and sewers, producing and distributing electricity, gas and heat, providing healthcare, providing social services, implementing measures of social and legal protection of children and social guardianship, maintaining public order or remediating damage, limit the exercise of property rights to real estate to deploy soldiers, members of armed forces, medical facilities, supply facilities, rescue services and release and other technical equipment, limit the exercise of property rights to movable property by prohibiting the entry of motor vehicles or limiting their use for private and business purposes, limit the inviolability of dwelling to accommodate evacuated persons, limit postal services, freedom of movement and stay, ensure the entry into radio and television broadcasting to make announcements for and inform the public, ban the right to strike and implement measures to address the situation of crude oil deficiency.

8 Great resentment was caused by the Government's Resolution No. 207 of 6 April, by which the Government restricted the freedom of movement and stay by a curfew from 8 April 2020, 0.00 a.m. to 13 April 2020, 11.59 p.m., exactly during the Easter holidays.

9 As pointed out by Nassehi, from a sociological standpoint, *'even in times of a crisis, modern society operates according to well-known models'* (Neue Zürcher Zeitung [NZZ], No. 99, 29 April 2020, p. 5).

In connection with the COVID-19 pandemic, the Government proceeded with declaring a state of emergency and with interfering with fundamental rights for the second time during the so-called first coronavirus wave. Effective as of 16 March 2020, the then Government imposed an obligation of work on healthcare employees of institutional healthcare providers located in the territory of districts in which a state of emergency was declared to ensure healthcare, and as of that date, it prohibited the exercise of the right to strike by persons under the imposed work obligation (Resolution no. 114 of 15 March, no. 45/2020 Statutes). This Government Resolution launched a series of 'Covid resolutions' of the Government, a high number of which, and sometimes the ambiguity of the legislation involved, caused at least confusion and doubts about the effect of the Government resolutions adopted.

Subsequently, the same Government extended the state of emergency and, taking effect on 19 March 2020, imposed an obligation of work on employees of the entities listed in the Annex to Resolution no. 115 (no. 49/2020 Statutes), for example on the employees of holders of a licence to operate a medical facility of institutional healthcare, holders of a licence to operate an emergency medical service ambulance, but also employees of funeral services, and prohibited them from exercising the right to strike.

Before Easter, on 6 April 2020, the already new Government[10] passed Resolution no. 207 (no. 72/2020 Statutes), which restricted the freedom of movement and stay by a curfew from 8 April 2020 starting at 0.00 a.m. to 13 April 2020 expiring at 11.59 p.m., with limited exceptions. From 8 April 2020, it also prohibited, without a similar time limit, the exercise of the right to peacefully assemble, with the exception of persons living in the same household. The track record of the second state of emergency that was declared is unflattering: four times imposition of the obligation to work, four times prohibition on the exercise of the right to strike, long-term restriction on freedom of movement and stay and long-term restriction of the exercise of the right to peacefully assemble. In neither case did the Constitutional Court of the Slovak Republic (hereinafter referred to as the 'Constitutional Court') have an opportunity to examine the constitutionality of the interference with these fundamental rights.

The state of emergency was declared for the third time taking effect from 1 October 2020 (Government Resolution no. 587 of 30 September 2020, no. 268/2020 Statutes), and kept being extended until 16 May 2021 (more than seven months). During this state of emergency, a motion was filed to initiate proceedings before the Consti-

10 The new and current Government was appointed on 21 March 2020, then on 27 March it approved Resolution No. 169 (No. 64/2020 Statutes), which, with effect from 28 March 2020, imposed a work obligation on employees of residential social services facilities, which are facilities for seniors, care facilities, social services homes, specialized facilities, and on employees of social and legal protection facilities for children and social guardianship, which are centres for children and families. These persons, too, were prohibited from exercising their right to strike.

tutional Court pursuant to Art. 129 para. 6 of the Constitution. In its finding PL. ÚS 22/2020 of 14 October 2020, the Constitutional Court decided that the adopted Resolution no. 587 complies with the Constitution and the Constitutional Law.

The problem up for debate became the manner in which the measures were being adopted, directly restricting the fundamental rights and freedoms, or secondary rights and freedoms, under the state of emergency. This provided the ground for a broad expert discussion[11], which culminated in the issue being addressed by the Constitutional Court.[12]

The Venice Commission[13] has already drawn attention to the risk of abuse of emergency powers and recommended that the legislation contained in laws and sublegal acts should be as detailed as possible and should not contain open clauses.[14] However, the Parliament adopted the opposite tack and in the amendment to the Public Health Protection Act, it enshrined an open competence clause with respect to the Slovak Republic Health Department and the Public Health Authority of the Slovak Republic. [15]

11 See e.g. M. Domin, What to do with an assembly held in violation of the state of emergency conditions? https://comeniusblog.flaw.uniba.sk/2020/10/22/co-robit-so-zhromazdenim-konanym-v-rozpore-s-podmienkami-nudzoveho-stavu/; I. Slovák, A few remarks on criminal liability of persons spreading conspiracies during the COVID-19 pandemic, https://comeniusblog.flaw.uniba.sk/2020/10/28/niekolko-poznamok-k-trestnej-zodpovednosti-osob-siriacich-konspiracie-v-case-pandemie-COVID-19/; Burda, E., State of emergency, restriction of the right to assemble and legal risks connected with disrespecting it, https://comeniusblog.flaw.uniba.sk/2020/11/15/nudzovy-stav-obmedzenie-zhromazdovacieho-prava-a-pravne-rizika-spojene-s-jeho-nerespektovanim/; R. Lysina, Imposing quarantine on Roma settlements – Fast and Furious Ride of the Regional Public Health Authorities?, https://comeniusblog.flaw.uniba.sk/2021/02/26/karantenizacia-romskych-osad-rychla-a-zbesila-jazda-regionalnych-uradov-verejneho-zdravotnictva/; G. Dobrovičová, A few notes on the measures of the Public Health Authority of the Slovak Republic, https://comeniusblog.flaw.uniba.sk/2020/11/09/niekolko-poznamok-k-opatreniam-uradu-verejneho-zdravotnictva-slovenskej-republiky/.

12 PL. ÚS 22/2021 of 14 October 2020, PL. ÚS 2/2021 of 31 March 2021, PL. ÚS 8/2021 of 26 May 2021, PL. ÚS 4/2021 of 8 December 2021.

13 Venice Commission, CDL (2020)018, Preliminary report on the measures taken in the Member States of the European Union as a result of the COVID-19 crisis and their impact on democracy, the rule of law, and fundamental rights, 8 October 2020, point 58.

14 For example, empowering the executive branch to adopt 'any other measures that might be necessary to deal with the state of emergency'.

15 The Health Department and the Public Health Authority of the Slovak Republic were entitled to 'impose further measures by which they could prohibit or order further activities to the necessary extent and for the necessary time.' It is worth pointing out that the competence of the Health Department was limited to critical situations, but the competence of the Public Health Authority was determined without any limitation. In its finding PL. ÚS 4/2021 of 8 December 2021, the Constitutional Court of the Slovak Republic ruled on the unconstitutionality of the provisions governing open competence clauses.

Measures taken by the Public Health Authority during the state of emergency specifying behaviour of entities in the form of a ban or order due to the COVID-19 pandemic were largely involved in the restriction of fundamental rights and freedoms.[16] A serious problem is that individuals do not yet have effective tools with which they would be entitled to challenge, by judicial means, the constitutionality and legality of emergency measures. The measures are contained in sublegal legislation and the Constitutional Court Law[17] does not grant an individual an active procedural legitimacy to file a petition regarding non-compliance of a law of lower legal force with a law of higher legal force. This created wide room for the executive branch (Public Health Authority and Regional Public Health Authority) to issue emergency measures with only limited review by the Constitutional Court.[18] The question thus arises about who is to make essential decisions on Covid policy. The answer is not straightforward and is based on a traditional conflict of competence. It is not enough if the problem of substantive decisions is seen as a problem of 'power-sharing' between the Parliament and the Government. The Parliament is the place where decisions that correspond to democratic legitimacy are to be made. Clear laws must be enacted in Parliament to determine how much must be allowed and how much must be tightened up in order for measures to have effect. If the Parliament is passive, the focus shifts to the executive branch, from which help is sought. Yet, decisions of the executive branch pertaining to the issue examined are viewed negatively, because the Government cannot restrict fundamental rights and freedoms.[19]

The above facts have also been reflected to a considerable extent in the exercise of political rights. In general, fundamental rights and freedoms cannot be presented as a product of administration authorizations and failures because that is not what they are.

16 For example, restrictions of freedom of movement and stay were reflected in the Public Health Authority measure that closed schools and restricted the right to education, or restrictions of the right to peacefully assemble were reflected in the Public Health Authority measure that restricted mass events and restricted the right to freely express one's religion or belief.

17 Act no. 314/2018 Statutes on the Constitutional Court of the Slovak Republic.

18 The consequence of this is the fact that so far there has been only one decision of the Constitutional Court issued on the basis of a petition filed by the Public Defender of Rights of the Slovak Republic, which ruled on the inconsistency of the provisions of the Public Health Protection Act regulating quarantine measures as a restriction of personal freedom guaranteed by Art. 17 para. 1 and 2 of the Slovak Republic Constitution. More details in the Finding of the Constitutional Court of the Slovak Republic PL. ÚS 4/2021 of 8 December 2021.

19 For more details: ZEH, W. Pandemie und Parlament, (In:) Ooyen, van R. Ch. and Wasserman, H. Recht und Politik. Beiheft 7. Zeitschrift für deutsche und europäische Rechtspolitik. Corona und Grundgesetz, Berlin: Duncker & Humboldt, 2021, p. 23.

3. Exercising Political Rights during the COVID-19 Pandemic

It should be noted at the outset that the natural decline in the exercise of certain political rights was related directly to the restriction of freedom of movement and stay and the curfew. The Slovak Republic was applying a state of emergency regime with which it had not had any extensive experience. The state focused on issuing measures to prevent the spread of the virus and the society went into a social downturn, although under the Constitutional Law on State Security, it was only possible to prohibit the exercise of the right to peacefully assemble or to make gathering in public subject to authorization, or to limit the right to freely disseminate information regardless of state borders and freedom of expression in public from the catalogue of political rights.

If we were to examine the exercise of political rights in terms of the constitutional structure, the restrictions probably least affected the first one in order, namely the freedom of expression and the right to information (Art. 26 of the Constitution). The Government did not make use of the option afforded thereto by the Constitutional Law on State Security of restricting the right to freely disseminate information regardless of national borders and freedom of expression in public, as the nature of this right and the purpose of the state of emergency did not require it to do so and was not necessary. In this context, it is important to remember that freedom of expression cannot be perceived individually and separately from other rights. This is because it is closely linked to some human rights, such as freedom of thought, conscience, religion or belief, or freedom of scientific research, but it is also linked to the petition right and the right to assemble or associate. 'Freedom of expression belongs to the realm of human freedom which is primarily connected with the inner sphere of consciousness and includes the attributes of this human freedom, which include freedom of conscience, freedom of thought and freedom to hold, disseminate, and receive opinions on all issues related to life of the society. Freedom of expression is practically inseparable from freedom of thought. No society in which these freedoms are not respected is free, no matter what form of government this society (state) has. Every person has an inalienable right to express their opinion in public, and prohibiting public expression means destroying freedom of expression.'[20] During the state of emergency and the so-called lockdown related thereto, the exercise of freedom of expression moved to the virtual environment. Multiple manifestations of a diverse nature, revealing a new dimension of freedom of expression and the right to information, appeared in particular on social networks.

The work of public authorities on the pandemic has also required intelligible communication, providing as much information as possible, developing streams of thought, opinions and argumentative models in the course of public opinion forma-

20 Cf. finding in case no. II. ÚS 439/2016 of 27 October 2016.

tion. This limits the scope for presenting differing views by 'corona deniers' under the pretext of pluralism, the acceptability of which is problematic. The Government may not have chosen the most appropriate path in responding to the growing amount of false information that is produced and disseminated, especially in connection with the COVID-19 pandemic, by proposing a new crime in the forthcoming amendment to the Criminal Code titled 'Dissemination of false information'. The Government's move is evaluated by the professional public as also an attempt to introduce censorship of different views. This gives rise to concerns as to whether the introduction of the offence in question will not result in the suppression of debate, the gradual disappearance of arguments and counter-arguments and the criminalization of opinions that are not referred to as majority opinions, and in particular whether freedom of expression will not become suppressed. 'The Constitutional Court has already stated that freedom of expression in all states that are built on democratic principles is one of the fundamental pillars of democracy and applies not only to information and ideas that are received favourably or are considered harmless or neutral, but also to those that offend, shock or disturb the state or a part of the population, which is the operation of the requirements of pluralism, tolerance, and openness, without which it is impossible to talk about a democratic society.' [21]

The right to petition (Art. 27 of the Constitution), as another of the political rights, is sometimes also perceived as the so-called support right, which usually allows those who enjoy this right to exercise their other rights. As to this matter, the Constitutional Court stated: 'The right to petition thus acquires an information dimension guaranteeing the petitioner an informal communication channel, drawing the attention of a public authority to a problematic matter of public or other common interest. Consequently, the right to petition naturally also has an implementation dimension, consisting of the obligation of the public authority to investigate the petition, to process it and to communicate the result of its processing to the person designated in the petition as a representative acting towards a public authority. However, the content of the right to petition does not extend further towards naming the prescribed ways of handling the petition or even naming the only possible way of handling it.'[22] According to the Constitution, a petition may be presented in three alternative but equivalent forms – in the form of a petition, proposal or complaint.[23] The right to petition is very closely linked to freedom of expression. According to the jurisprudence of the Constitutional Court of the Slovak Republic[24], it was even con-

21 Finding in case no. II. ÚS 307/2014 of 18 December 2014.

22 Cf. finding in case no. PL. ÚS 4/2016 of 10 May 2017.

23 A special category are complaints which are assessed in accordance with the Act on Complaints no. 9/2010 Statutes, as amended.

24 In the event that the complainant contacts the competent public authority with correspondence in the public interest that the complainant does not disclose, the protection requirements pursuant to Art. 10 para. 2 of the Convention, in such a case, are not balanced against freedom of expres-

sidered a part of the freedom of expression – *'The right to petition within the meaning of Art. 27 para. 1 of the Constitution may be understood as a special form of freedom of expression regulated in Art. 26 para. 1 of the Constitution.*'[25] Petitions may be drawn up in writing (in paper form) or electronically.[26] The above methods are equivalent in terms of the effects they cause, but the electronification of petition sheets has specific rules of their implementation for the management of the electronic portal. All content and formal requirements stipulated in the Petition Law[27] apply equally to petitions filed in writing as well as to petitions filed electronically. Therefore, the exercise of the right to petition in electronic form was also possible under the state of emergency, which was also used in the petition for the early parliamentary elections. At the beginning of 2021, the political parties constituting the opposition in Parliament initiated the activities necessary for holding a referendum based on the citizens' petition in accordance with Art. 95 para. 1 of the Constitution. The Petitions Committee submitted the petition, with over 600,000 signatures, to the Presidential Palace Registry on 3 May 2021 calling for a referendum on early elections. Subsequently, pursuant to Art. 95 para. 2 of the Constitution, the President of the Slovak Republic (hereinafter referred to as the 'President') approached the Constitutional Court for it to assess whether the subject matter of the proposed referendum was in accordance with the Constitution of the Slovak Republic or not. Although at a closed hearing on 7 July 2021 the Constitutional Court ruled that the question under review in the referendum was unconstitutional, the exercise of the right to petition in the state of emergency was made possible.

The only political right that was restricted under the Constitutional Law on State Security was the right to peacefully assemble – the right to gather (Art. 28 of the Constitution). In terms of its importance, it is a fundamental political right, and we can also characterize it as a right enabling the exercise of the freedom of expression and other related political rights.[28] The right to assemble may be closely linked to the right to vote (in particular in connection with election campaigning), religious freedom, the right to own property, the right to judicial protection, or the protec-

sion or discussion on matters of public interest, but with the complainant's right to turn to the authorities competent to deal with such initiatives with their complaints about alleged irregularities in the procedure of public officials. Cf. Regulation (EU) 2019/788 of the European Parliament and of the Council on the European Citizens' Initiative.

25 Cf. decision in case no. I. ÚS 38/94 of 27 February 1995.

26 The said change occurred in accordance with Act no. 29/2015 Statutes of 28 January 2015 amending the Act on the right to petition and, at the same time, supplementing Act no. 305/2013 Statutes on the electronic form of exercising the powers of public authorities as amended (the e-Government Act). With effect from 1 September 2015, the possibility of implementing the right to petition by electronic means was introduced.

27 Act no. 85/1990 Statutes on the Petition Right, as amended.

28 J. Drgonec, Fundamental Rights and Freedoms under the Constitution of the Slovak Republic, Volume 2, Bratislava: MANZ, 1999.

tion of the physical integrity of a person and the prohibition of discrimination.[29] On this basis, it can be characterized as a right that reaches beyond the scope of political rights. It should also be emphasized that the Constitution guarantees peaceful exercise of the right to assemble as a means of communication, thus implicitly excluding any forms of riot or violent or aggressive assembling. Due to the fact that the exercise of the right to assemble[30] requires a collective element and assumes gathering of people mostly in a limited (close) quarters, its restriction in the time of a pandemic made some sense**.** However, its restriction also interfered with the exercise of other rights, e.g. that of religious freedom. The restriction of the right to assemble was in place almost throughout 2020 and subsequently until 14 May 2021.

It is worth emphasizing that even in a state of emergency, fundamental rights and freedoms can be restricted only temporarily, i.e. the temporal dimension of proportionality (most often for a few weeks) is important. Restrictions that are initially considered to be admissible must be monitored and subsequently checked as to whether they are still appropriate.[31] As follows from the above, the long-term restriction of the right to assemble in the Slovak Republic was not subject to assessment and it was not checked as to whether it is still necessary and the test of necessity was not applied.

In the context of freedom to assemble, the courts in the Federal Republic of Germany recognized that an absolute ban on assembly, without introducing more lenient measures (in particular as regards distance regulations and other hygiene requirements to be observed at the gathering), was disproportionate.[32]

In the first wave of the pandemic, by its Resolution no. 207, the Government banned the exercise of the right to peacefully assemble as of 8 April 2020, with the exception of persons living in a common household, and this ban was lifted only with effect from 10 June 2020.

Subsequently, in the second wave, by its Resolution no. 645 of 12 October 2020 (no. 284/2020 Statutes), effective from 13 October 2020, the Government limited the right to peacefully assemble to six persons, except for persons living in the same household. This was followed by a substantial restriction of the freedom of movement and stay by a curfew with certain exceptions under Resolution no. 678 of 22 October 2020 (no. 290/2020 Statutes), Resolution no. 693 of 28 October 2020 (no. 298/2020 Statutes) and Resolution no. 704 of 4 November 2020 (no. 306/2020 Statutes). The

29 J. Svák, and T. Grünwald, Transnational human rights protection systems, Volume I, The structure of the systems and the protection of political rights, Bratislava: Wolters Kluwer, 2019, p. 447 et seq.

30 Act no. 84/1990 Statutes on the Right to Assemble, as amended.

31 S. Rixen, Grenzenloser Infektionsschutz in der Corona-Krise? (in:) van R.Ch. Ooyen and H. Wasserman (eds.), Recht und Politik. Beiheft 7. Zeitschrift für deutsche und europäische Rechtspolitik. Corona und Grundgesetz, Berlin: Duncker & Humboldt, 2.

32 See BVerfG, Beschl. v. 15. 04. 2020– 1 BvR 828/20 – (www.bverfg.de).

right to peacefully assemble was almost completely banned for 38.52% of 366 days in 2020.[33] Nevertheless, several protest rallies took place in the Slovak Republic, namely on 17 October 2020 in Bratislava outside the Office of Government, which was dispersed by the police. Subsequently, on 17 November 2020, protest rallies were held in several cities in Slovakia against the measures introduced in connection with the COVID-19 pandemic and against the Government of Igor Matovič.[34] These were assemblies clearly held in violation of the rules resulting from the Government Resolution issued in connection with the declared state of emergency. There was no doubt that this was an exercise of a political right and that the number of participants that assembled was many times higher than six.[35]

On the other hand, it should also be noted that the restriction of the right to assemble was in place for a disproportionately long time, and these protests may not be limited to participation solely by 'corona deniers', but might have included concerned citizens who feared for their businesses, work or the advancement of their children, who came to oppose public authorities, as the latter did not seem to take their problems sufficiently seriously and had failed at creating at least some room for co-decision-making.

The right to associate (Art. 29) can be perceived in a way as a 'continuation' of the right to assemble. 'Unlike assembling, which is only a limited form of association of natural persons (citizens) and ceases upon their parting, associating is the right to associate in a permanent form.'[36] At the same time, it is a specific constitutional formulation that simultaneously combines that right with freedom.[37] The right to associate is an individual subjective right granted to a natural person or legal entity, and it is also one of those fundamental rights the purpose of which can be achieved only by joint exercise of the right by multiple persons.[38] With respect to this, the Constitutional Court stated: 'Regarding the political nature of the right to associate, it means the ambition to participate in the formation and creation of a political system. In this sense, the right to associate represents an important level of the process by which an individual coming from an atomized mass of individual legal entities integrates into

33 V. Bujňák, Prohibition to exercise the right to peacefully assemble during Christmas in the context of hitherto development, Comenius blog, https://comeniusblog.flaw.uniba.sk/2020/11/12/zakaz-uplatnovania-prava-pokojne-sa-zhromazdovat-pocas-vianoc-v-kontexte-doterajsieho-vyvoja/.

34 https://www.teraz.sk/slovensko/sledujeme-protesty-na-slovensku/508408-clanok.html.

35 https://comeniusblog.flaw.uniba.sk/2020/10/22/co-robit-so-zhromazdenim-konanym-v-rozpore-s-podmienkami-nudzoveho-stav/.

36 M. Čič et al., Commentary on the Constitution of the Slovak Republic, Bratislava: Eurokodedex, s.r.o., 2012, p. 216.

37 J. Drgonec, Constitution of the Slovak Republic. Theory and Practice. 2nd revised and amended edition, Bratislava: C.H. Beck, 2019, p. 715.; as to the definitions see also S. Košičiarová, Right and duty to associate (public law aspects), Prague: Leges, 2019, pp. 12–17.

38 Act No. 83/1990 Statutes on Citizens Associating, as amended.

society for the purpose of promoting and transforming their own will and individual interests into the level of social interests. The above-mentioned process is constitutionally determined at the first stage by freedom of expression (Art. 26 para. 1 and 2 of the Constitution), the right to peacefully assemble at the second stage (Art. 28 of the Constitution), the right to freely associate at the third level (Art. 29 para. 1 of the Constitution) and culminates in the exercise of the right to associate in political parties and movements (Art. 29 para. 2 of the Constitution). Freedom of association plays a key role in the process outlined. Crucially dependent on it is the realization of democracy in a modern rule of law, as it bridges the imaginary gap between the state and the individual.'[39] The second paragraph of Article 29 contains a combination of two rights – the right to form political parties and movements and the right to associate in political parties and movements. These rights are interrelated, but they can also be exercised separately.[40] No specific form of restriction of the above right occurred under the state of emergency.

The right to participate in the administration of public affairs (Art. 30), as one of the most important political rights, is regulated by the Constitution in three forms, namely in the form of direct exercise of power, in the form of direct democracy, in particular by a referendum (Art. 30, para. 1), in the form of the right to vote (Art. 30, para. 1, 2 and 3) and finally through the right of access to elected or other public office (Art. 30, para. 4). These forms must be understood only as rights, not duties. Citizens are, therefore, not obliged to run for a public office or to participate in direct exercise of democracy, neither does the Constitution provide for an electoral obligation.

Of the above-mentioned forms of this political right, we focus on the right to vote, as its exercise under the state of emergency requires a specific approach, even though it cannot be restricted under the Constitutional Law on State Security. Electoral law in the Slovak Republic is exercised in several forms – in the elections to the National Council of the Slovak Republic, in the presidential elections, in the elections to the European Parliament and in the elections to the local self-government bodies (municipalities and higher territorial units).[41]

A few comments are made on different types of elections in relation to the pandemic. The first case of COVID-19 was confirmed in Slovakia on 6 March 2020, which means only less than a week after the last elections to the National Council, which took place on 28 February 2020, were held. Had these elections been held even a week or two later, postponing them for reasons of public health protection would have very likely been on the table. There is no doubt that if several hundred people met

39 Finding in case no. PL. ÚS 11/2010 of 23 November 2010.

40 J. Drgonec, Constitution of the Slovak Republic, *op. cit.*, p. 717.

41 The implementation of all types of elections is regulated by the so-called Electoral Code – Act no. 180/2014 Statutes on Conditions for Exercising the Voting Right, as amended.

in almost 6,000 polling stations throughout the territory of the Slovak Republic, that would almost guarantee the further spread of infectious disease.[42]

A different situation occurred in relation to municipal elections, where new and supplementary elections were held twice during the pandemic, on 3 October 2020[43] and 15 May 2021[44]. The first of these took place in 48 municipalities in Slovakia, where it was necessary to finish voting for mayors and local council members. Pursuant to Act no. 180/2014 Statutes on Conditions for Exercising the Voting Right, as amended (hereinafter referred to as the 'Voting Right Act'), a barrier to exercising one's right to vote is the restriction of personal freedom provided for by law for the protection of public health. Thus persons who were ordered to isolate at home could not exercise their right to vote, even by means of a portable ballot box.[45] It was essential that district electoral committees be able to identify a voter with a barrier to the right to vote, which was only possible in liaison with the relevant regional public health authorities. Thus, on the election day, the district election committees had a list of voters marked with a note about having a barrier to their voting right under § 4 of the Voting Right Act which concerned voters who were ordered to isolate.[46] For this reason, telephone hotlines were established for the election committees and the election day was jointly monitored by the Home Department, the State Commission for Elections and Control of Political Parties Funding, as well as the Public Health Authority of the Slovak Republic. The case of the elections of 15 May 2021 was similar. Fortunately, in both cases the elections took place without major complications. Due to the nature of municipal elections, additional elections to municipal offices were scheduled for 23 October 2021[47] in 20 municipalities in Slovakia. Other types of elections did not happen during the state of emergency as their periodic schedule did not coincide therewith.

Article 31 of the Constitution contains no specific right and rather establishes a constitutional principle; it is of a general nature[48], according to which the statutory regulation of the rights provided for in Art. 30 must allow and facilitate free

42 See M. Domin, Elections at the time of the pandemic (constitutional view), https://comeniusblog.flaw.uniba.sk/2020/03/18/volby-v-case-pandemie-ustavnopravny-pohlad/.

43 Declared under the decision of the Chairman of the National Council of the Slovak Republic no. 187/2020 Statutes of 4 July 2020.

44 Declared under the decision of the Chairman of the National Council of the Slovak Republic no. 54/2021 Statutes of 9 February 2021.

45 33 mayors and 28 municipal councillors were to be elected in the supplementary municipal elections. More than 32,000 voters were expected to arrive at the polling stations in 55 precincts.

46 M. Domin, Isolation in the home environment and exercise of the voting right, https://comeniusblog.flaw.uniba.sk/2020/07/28/izolacia-v-domacom-prostredi-a-vykon-volebnego-prava/#_ftn1.

47 Declared under the decision of the Chairman of the National Council of the Slovak Republic no. 235/2021 Statutes of 8 June 2021.

48 M. Čič, et al., Commentary on the Constitution of the Slovak Republic, Bratislava: Eurokodedex, s.r.o., 2012, p. 230 et seq.

competition of political forces in a democratic society. This principle does not apply to free competition between political parties and movements only. Free competition between political forces is also guaranteed within individual political parties and movements, among all citizens exercising the constitutional right of access to elected office.[49]

The right to protest (Art. 32 of the Constitution) closes the category of political rights in terms of the constitutional system. In order for any mass protests of citizens of a peaceful or less peaceful nature to be regarded as the exercise of the right to protest and not an anarchy, the mandatory material conditions of a cumulative nature laid down in the Constitution must be satisfied. Within the meaning of the Constitution, one of them is the fact that the democratic order of fundamental human rights and freedoms in the country, referred to in this Constitution, is being scrapped. The second essential condition that must be met for constitutional exercise of the right to protest is the fact that the constitutional bodies are obstructed in carrying out their activity and, simultaneously, the use of legal means has proved ineffective, or was effective, but subsequently blocked. With respect to this matter, the Constitutional Court stated that: 'The right to protest is the ultimate means for the citizens to resort to only if the democratic order of fundamental rights and freedoms is threatened in the territory of the Slovak Republic and the public authorities cannot or do not want to ensure it.'[50] Hopefully, it will not be necessary to exercise this right in the Slovak Republic either under a state of emergency or during regular operation of society.

Conclusion

Based on legal analysis and empirical experience, several conclusions can be drawn with respect to the issue examined:

- Experience with a long-lasting state of emergency shows that the society is sufficiently rational and adaptable.
- In the Slovak Republic, both the Parliament and the Government have largely failed in handling the coronavirus crisis. This is evidenced by long-lasting restrictions of fundamental rights and freedoms, the non-reviewability of emergency measures by the judiciary and somewhat lacking emergency legislation.
- It seems necessary to adopt a law that would regulate measures aimed at controlling epidemics caused by infectious diseases and respect constitutional complexity in restricting fundamental rights and freedoms (Art. 13 of the Constitution of the Slovak Republic).

49 Finding in case no. PL. ÚS 15/98 of 11 March 1999.
50 Decision in case no. II. ÚS 105/07 of 24 May 2007.

- Due to the fact that anti-pandemic measures were entrusted to the executive authorities (Health Department, Public Health Authority of the Slovak Republic), the boundaries of fundamental rights and freedoms due to internal competence of these authorities were not systematically taken into account and there was no room for them to be balanced. The protection of fundamental rights is thus spread thinly in the division of competencies.
- The requirements for the content of the law which restricts fundamental rights and freedoms must be more stringent in terms of certainty, taking into account also the intensity of intervention and the scope of intervention, because what is not regulated and compensated for in the law can no longer be remedied at the level of sublegal norms. This was clearly demonstrated in the experience from the Slovak Republic, that fundamental rights and freedoms cannot be restricted through Public Health Authority decrees. These must be implemented by law.
- In relation to political rights, it is important to regulate more specifically the options, scope and intensity of restrictions of the right to assemble, as this right was restricted the most and disproportionately. Interferences with the right to assemble were unprecedented in nature and must not be repeated. This is all the more so given that the interpretation of the restrictions associated with it also touched upon the exercise of other, mostly personal rights and freedoms. In addition, this is a sensitive political right, through which in the territory of the Slovak Republic almost all fundamental social changes related to the establishment of democratic processes in the state have taken place.
- The exercise of the right to vote may also be a problem. This was not the case during the past pandemic, as the regular elections schedule did not coincide therewith. However, it is necessary to supplement the legislation with such form of exercising the right to vote that would foresee similar situations (pandemic, terrorism).
- If an option of electronic voting in elections or referendums is introduced, it is important to strictly guard the avenues of such voting, especially in the context of frequent cyberattacks. This also applies to the conditions of electronification in the case of the exercise of the right to petition.

REFERENCES

Act No. 83/1990 Coll. on the Association of Citizens, as amended.

Act No. 314/2018 Coll. on the Constitutional Court of the Slovak Republic.

Antoš M. and Wintr J. (eds.), Constitutional Law and Coronavirus, Prague: Leges, 2021.

BayVGH, Beschl. v. 27.04. 2020 – 20 NE 20.793 –, Rn. 45.

Bílková V., Kysela J., Šturma P. et al. (eds.), States of Exception and Human Rights, Prague: Aditorium 2016.

Bujňák V., The Prohibition of Exercising the Right to Peaceful Assembly at Christmas in the Context of Developments to Date, Comenius blog,: https://comeniusblog.flaw.uniba.sk/2020/11/12/zakaz-uplatnovania-prava-pokojne-sa-zhromazdovat-pocas-vianoc-v-kontexte-doterajsieho-vyvoja/.

Burda E., State of emergency, restriction of the right to assemble and legal risks connected with disrespecting it, https://comeniusblog.flaw.uniba.sk/2020/11/15/nudzovy-stav-obmedzenie-zhromazdovacieho-prava-a-pravne-rizika-spojene-s-jeho-nerespektovanim/.

Buštíková L. and Baboš P., Best in Covid: Populists in the Time of Pandemic, 'Politics and Governance' 2020, Volume 8, Issue 4, pp. 496–508.

BVerfG, Beschl. v. 15. 04. 2020– 1 BvR 828/20 – (www.bverfg.de).

Called based on the Decision of the Speaker of the National Council of the Slovak Republic No. 187/2020 Coll. of 4 July 2020.

Called based on the Decision of the Speaker of the National Council of the Slovak Republic No. 54/2021 Coll. of 9 February 2021.

Called based on the Decision of the Speaker of the National Council of the Slovak Republic No. 235/2021 Coll. of 8 June 2021.

Čič M. et al., Commentary to the Constitution of the Slovak Republic, Bratislava: Eurokódex, s.r.o., 2012.

Dobrovičová G., A few notes on the measures of the Public Health Authority of the Slovak Republic, https://comeniusblog.flaw.uniba.sk/2020/11/09/niekolko-poznamok-k-opatreniam-uradu-verejneho-zdravotnictva-slovenskej-republiky/.

Domin M., Elections in a Time of Pandemic (Constitutional Law Perspective), https://comeniusblog.flaw.uniba.sk/2020/03/18/volby-v-case-pandemie-ustavnopravny-pohlad/.

Domin M., Isolation in the Home Environment and the Exercise of the Right to Vote, https://comeniusblog.flaw.uniba.sk/2020/07/28/izolacia-v-domacom-prostredi-a-vykon-volebneho-prava/#_ftn1.

Domin M., What to do with an assembly held in violation of the state of emergency conditions?, https://comeniusblog.flaw.uniba.sk/2020/10/22/co-robit-so-zhromazdenim-konanym-v-rozpore-s-podmienkami-nudzoveho-stavu/.

Drgonec J., Basic Rights and Freedoms according to the Constitution of the Slovak Republic, Volume II, Bratislava: MANZ, 1999.

Drgonec J., Fundamental Rights and Freedoms and Derived Jurisdiction of the Constitutional Court of the Slovak Republic, (in:) L. Orosz and T. Majerčák et al. (eds.), Protection of Human Rights and Fundamental Freedoms by the Constitutional Court and International Judicial Bodies – III – Constitutional Days, Košice, 2014.

Drgonec J., Constitution of the Slovak Republic, Theory and Practice, 2nd Revised and Supplemented Edition, Bratislava: C.H. Beck, 2019.

Engler S., Brunner P., Loviat R., Abou-Chadi T., Leemann L., Glaser A. and Kubler D., Democracy in times of the pandemic: explaining the variation of COVID-19 policies across European democracies, 'West European Politics' 2021, vol. 44, nos. 5–6, 1077–1102.

Finding File Ref. PL. ÚS 11/2010 of 23 November 2010.

Finding File Ref. II. ÚS 439/2016 of 27 October 2016.

Finding File Ref. II. ÚS 307/2014 of 18 December 2014.

Finding File Ref. PL. ÚS 4/2016 of 10 May 2017.

Finding File Ref. PL. ÚS 15/98 of 11 March 1999.

Finding of the Constitutional Court of the Slovak Republic PL. ÚS 4/2021 of 8 December 2021.

Fisherová I., Forejtová M., Klíma P. and Kramář K. (eds.) Tribute to Karel Klím on His 70th Birthday. Constitutionality as a Criterion of the Legal Order (National and European), Prague: Metropolitan University Prague Press, Wolters Kluwer ČR, 2021.

Forejtová M., The Constitutionality of Restrictions on Freedom of Movement in the Context of the COVID-19 Pandemic.

Holländer P., Stories of Legal Concepts, Pilsen: Aleš Čeněk, 2017.

Jovičič S, COVID-19 restrictions on human rights in the light of the case-law of the European Court of Human

Rights, ERA Forum (2021) 21:545–560, Published online: 6 October 2020.

Košičiarová S., Right and Duty to Associate (Public-Law Aspects), Prague: Leges, 2019.

Kysela J., Constitution between Law and Politics – Introduction to Constitutional Theory, Prague: Leges, 2014.

Lysina R., Imposing quarantine on Roma settlements – Fast and Furious Ride of the Regional Public Health Authorities?, https://comeniusblog.flaw.uniba.sk/2021/02/26/karantenizacia-romskych-osad-rychla-a-zbesila-jazda-regionalnych-uradov-verejneho-zdravotnictva/.

Ondřejek P., Proportionality of Measures Adopted in Emergencies, 'Journal for Legal Science and Practice', XXVIII, 4/2020.

Ooyen van R.Ch. and Wasserman H., Recht und Politik. Supplement 7. Zeitschrift für deutsche und europäische Rechtspolitik. Corona und Grundgesetz, Berlin: Duncker & Humboldt, 2021.

Ruling File Ref. II. ÚS 105/07 of 24 May 2007.

Slovák I., A few remarks on criminal liability of persons spreading conspiracies during the COVID-19 pandemic, https://comeniusblog.flaw.uniba.sk/2020/10/28/niekolko-poznamok-k-trestnej-zodpovednosti-osob-siriacich-konspiracie-v-case-pandemie-COVID-19/.

Svák J. and Grünwald T., National Systems of Human Rights Protection, Volume I, Structure of Systems and Protection of Political Rights, Bratislava: Wolters Kluwer, 2019.

Thomson S. and Eric C. Ip., COVID-19 emergency measures and the impending authoritarian pandemic, 'Journal of Law and the Biosciences' 2020, Oxford University Press, 1–33.

Venice Commission, CDL (2020)018, Interim report on the measures taken by the EU Member States as a result of the COVID-19 crisis and their impact on democracy, the rule of law and fundamental rights, 8 October 2020, point 58.

Bialystok Legal Studies
Białostockie Studia Prawnicze
2022 vol. 27 nr 2

sciendo

DOI: 10.15290/bsp.2022.27.02.06

Received: 20.01.2022
Accepted: 18.04.2022

Agnė Juškevičiūtė-Vilienė
Vilnius University, Lithuania
agne.juskeviciute-viliene@tf.vu.lt
ORCID ID: https://orcid.org/0000–0002–0295–054X

The Coronavirus Pandemic and the Right to Vote in Lithuania[1]

Abstract: This article analyses the special legal regimes that were introduced in Lithuania which dealt with the COVID-19 pandemic during the spring of 2020 and which decided on extraordinary measures in order to contain the spread of this vicious transmissible disease, and how the right to vote was ensured during the 2020 Parliament (Seimas) elections. After examining these special legal regimes, the article concludes that according to the Constitution, the threat to public health, inter alia caused by the worldwide spread of a vicious contagious disease, is not a constitutional ground for introducing a state of emergency per se, unless this threat to public health menaces the constitutional order or social peace. Therefore, the establishment of other special legal regimes – a disaster management regime and quarantine – was chosen, and were introduced by the government in accordance with the law. The analysis in this article shows that the right to vote during the 2020 Seimas elections was proportionately restricted due to the pandemic, and the pandemic did not prevent the holding of general, secret and direct parliamentary elections. The pandemic forced the Seimas to adopt long-awaited amendments to the laws that legalized electronic voting in the country.
Keywords: special legal regime, quarantine, the electoral right

Introduction

As the COVID-19 pandemic spread across the globe, authorities across the European Union adopted myriad restrictive measures to protect people's lives and health. These interfered with a wide range of fundamental rights, such as to movement and assembly; to private and family life, including personal data protection; and to educa-

1 The author would like to thank her student Monika Šukyte from the Faculty of Law at Vilnius University for her help in carefully collecting and translating the material for this article.

tion, work and social security.[2] The pandemic also affected political rights. One of the most important political rights enshrined in the Constitution of the Republic of Lithuania is the right to participate in the governance of one's country directly or through democratically elected representatives (Articles 4 and 33 of the Constitution of the Republic of Lithuania).[3] This right includes the right to vote, the right to initiate a referendum, the right of citizens to initiate legislation, the right to petition and the right to criticize and appeal against the work of public bodies or officials. In 2020, elections to the Seimas of the Republic of Lithuania were due to take place. The media often advertised the idea of postponing these elections until a vaccine was invented and administered, in order to protect the health and lives of citizens. However, it was decided that the Seimas elections would be held; the two rounds of the Seimas elections took place on 11 October and 25 October. In order to provide an analysis of how political rights were implemented during the COVID-19 pandemic in Lithuania, I consider in this article the implementation of electoral rights during this difficult period. The aim is to examine what special legal regimes were introduced in Lithuania during the COVID-19 pandemic and how they affected the implementation of the right to vote during the 2020 Seimas elections. The article is based on analytical methods (critically analysed legal regulation), constitutionally oriented methods (presenting the provisions of the Constitution and the constitutional doctrine) and other research methods.

1. The Coronavirus Pandemic and Special Legal Regimes

With the rapid spread of the new and little-studied COVID-19 virus in the early 2020s, countries needed to take urgent and effective action to halt the spread of the contagious disease and manage its effects on public health. In view of the situation and the legal framework enshrined in national law, some European countries immediately introduced special legal regimes. For example, some states imposed a state of emergency, others a quarantine or disaster management regime, and sometimes states exercised their usual national executive powers by broadly interpreting the competencies of the president or government.

Special legal regimes are usually associated with a serious threat to the interests of the state and society. At such times, the power of the state is strengthened by other constitutional entities (such as a nation, community or person). In the event

2 European Union Agency for Fundamental Rights, Fundamental Rights Report 2021, https://fra.europa.eu/en/publication/2021/fundamental-rights-report-2021 (accessed 30.08.2021).

3 Art. 4 of the Constitution of the Republic of Lithuania: 'The Nation shall execute its supreme sovereign power either directly or through its democratically elected representatives'; Art. 33: 'Citizens shall have the right to participate in the governance of their State both directly and through their democratically elected representatives.'

of a crisis situation in the state which is regulated by special legal regimes, temporary constitutional 'misunderstanding' is possible, which may be much more likely than usual because this regime is supported by centralized government measures that prevent the operation of the principle of checks and balances in these special times. Thus, on the one hand, a special legal regime may appear as a natural temporary deviation from the general constitutional balance of power, but on the other hand, this regime can be seen as a certain exception to the general legal rule.[4] Moreover, for the first time, we were facing a global emergency, which meant that almost all states had to adopt extraordinary measures. This is a unique situation that has not occurred since human rights treaties entered into force and international protection bodies were created.[5] It poses a number of challenges to democracy, the rule of law and the protection of fundamental human rights and freedoms.[6]

The 1992 Constitution of the Republic of Lithuania provides *expressis verbis* for only one special legal regime – a state of emergency.[7] However, the Constitution does not prohibit the legislator from providing for other special legal regimes. Such regimes may be introduced when 'natural disasters, epidemics or other special cases occur' (Article 48 Paragraph 4). Pursuant to the Constitution, only the Seimas may introduce a state of emergency, or the president between Seimas sessions. In order to establish a state of emergency, a certain legal fact must occur: a 'threat for the constitutional system or social peace' must arise (Article 144). Therefore, a state of emergency in Lithuania cannot be imposed when there is an outbreak of a contagious disease or an event such as an irresistible force of nature or an ecological catastrophe, unless there is a real threat that it may escalate into greater public unrest or threaten the state's constitutional system. It should be mentioned that during the more than 30 years of the existence of the independent Republic of Lithuania, the state of emergency has never been imposed in the country, because so far there has been no real threat to the constitutional system or to social peace.

4 V. Vaičaitis, Specialieji teisiniai režimai, 'Teisė' 2020, vol. 117, p. 81.

5 C. Ayala Corao, Challenges that the COVID-19 Pandemic Poses to the Rule of Law, Democracy, and Human Rights, Max Planck Institute for Comparative Public Law & International Law (MPIL) Research Paper No. 2020–23, https://ssrn.com/abstract=3638158 (accessed 16.08.2021).

6 T. Birmontienė and J. Miliuvienė, Konstituciniai reikalavimai valstybės valdžios institucijoms reaguojant į pandemijos padiktuotus iššūkius Lietuvoje, (in:) L. Jakulevičienė and V. Sinkevičius (eds.), Esminiai pokyčiai I dalis. COVID-19 pandemijos sprendimai: teisiniai, valdymo ir ekonominiai aspektai, Lietuvos teisė 2020, Vilnius 2020, p. 8.

7 Art. 144 of the Constitution of the Republic of Lithuania: 'When a threat arises for the constitutional system or social peace of the State, the Seimas may declare a state of emergency throughout the territory of the State, or in any part of it. The period of the state of emergency shall not exceed six months. In cases of urgency, between sessions of the Seimas, the President of the Republic shall have the right to adopt such a decision and convene, at the same time, an extraordinary session of the Seimas for the consideration of this issue. The Seimas shall approve or overrule the decision of the President of the Republic. The state of emergency shall be regulated by law.'

As already mentioned, the Constitution of the Republic of Lithuania provides that other 'special cases' related to 'natural disasters and epidemics' may arise in the state. As epidemics and natural disasters can cause significant damage to society and the state as a whole, the legislature can enact special laws that establish special legal regimes to help manage such cases and restrict human rights more intensively than is normally possible. Thus, to manage these cases, the Law on the Prevention and Control of Communicable Diseases in Humans was adopted in 1996, which provides for the special legal regime of quarantine,[8] and the Law on Civil Protection in 1998, which provides for the special legal regime of disaster management.[9] Pursuant to these two laws, the government of Lithuania may introduce these two special legal regimes.

Taking into account the unfavourable global epidemiological situation of COVID-19, the government of the Republic of Lithuania, in accordance with the Law on Civil Protection, adopted a resolution on 26 February 2020 and introduced a disaster management regime 'regarding the threat of the spread of the new coronavirus (COVID-19)'.[10] But now, two years later, this government resolution is being criticized, and legal scholars say the Law on Civil Protection does not provide for the possibility of declaring a disaster management regime in the event of an epidemic of a communicable disease. This law provides for the possibility of declaring an emergency when there is a natural, technical, ecological or social emergency, but not a medical one.[11] Interestingly, on 14 March 2020, the government adopted another resolution introducing another special legal regime – quarantine.[12] These two resolutions provided for measures restricting human rights and freedoms; in particular, the constitutional freedom of movement, the right to work and business, freedom of assembly and association, and the right to public services were severely restricted. These resolutions were subsequently amended several times, and other new restrictions on rights, as well as new obligations, were imposed on natural and legal persons. A number of legal scholars argue that the government could not restrict human rights and freedoms on such a large scale and for such a long time; only parliament could do that.[13] Despite the fact that all these restrictions were adopted while seeking

8 Law on the Prevention and Control of Communicable Diseases in Humans, 25 September 1996, No. I–1553, https://e-seimas.lrs.lt/portal/legalActPrint/lt?jfwid=-0zrzend5&documentId=TAIS.373789&category=TAD (accessed 12.07.2021).

9 Law on Civil Protection, 15 December 1998, No VIII–971, https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.378978?jfwid=92zt7rthx (accessed 12.07.2021).

10 Lietuvos Respublikos Vyriausybė nutarimas 'Dėl valstybės lygio ekstremaliosios situacijos paskelbimo', 26 February 2020, No. 152, Register of Legal Acts, No. 4023.

11 V. Vaičaitis, Specialieji teisiniai režimai, *op. cit.*, p. 85.

12 Lietuvos Respublikos Vyriausybė nutarimas 'Dėl karantino Lietuvos Respublikos teritorijoje paskelbimo', 14 March 2020, No. 207, Register of Legal Acts, No. 5466.

13 Teise.pro, Karantinas – ir mobilumui, ir žmogaus teisėms? https://www.teise.pro/index.php/2020/05/01/karantinas-ir-mobilumui-ir-zmogaus-teisems/ (accessed 28.07.2021).

to ensure legitimate and constitutional aims – the protection of public health and the proper functioning of health care institutions – some of them were not legitimate as they lacked legal grounds; others could be regarded as violating the principle of proportionality and even denying the very essence of the relevant human right or freedom itself.[14]

Thus, due to the COVID-19 pandemic, two special legal regimes were introduced in Lithuania: quarantine and a disaster management regime. This situation was due to the fact that quarantine was possible under the Law on the Prevention and Control of Communicable Diseases in Humans, but this law did not provide for the possibility for the authorities to apply special measures to manage the pandemic situation in the country (such as the right of the police to monitor compliance with mandatory isolation or the right to impose movement and assembly restrictions). Such measures were regulated by the Law on Civil Protection, and in order to apply these measures during a pandemic, it was necessary to introduce a disaster management regime in Lithuania. This situation is often criticized by legal scholars, who point out that several special legal regimes cannot be in force in the state at the same time on the same legal basis, for example due to an outbreak of an epidemic.[15]

Lithuanian legal scholars, as well as public figures and politicians, have also criticized the fact that the restrictions on human rights and freedoms imposed by the government during the pandemic are not much different from those that can be applied during a state of emergency. In this way, the powers of the government compared to the legislature were strengthened during the special legal regimes, and in some ways some of the mechanisms of the principle of democracy were also weakened. Therefore, the Seimas has been encouraged to be more active and to ensure the rule of law, the principle of democracy and the mechanism of parliamentary control during quarantine and a disaster management regime.[16]

It should be noted that the disaster management regime declared on 26 February 2020 is still valid at the time of writing this article (September 2021), and the quarantine established on 16 March 2020 lasted until 17 June 2020. The government announced the second quarantine only after the Seimas elections on 4 November 2020. There was a lot of information in the media that the government specifically delayed the second implementation of a quarantine before the elections because it did not want to lose its voters, who were already tired of the quarantine restrictions. Thus, in 2020, the Seimas elections took place under one special legal regime – the disaster management regime. How this special legal regime affected the implementation of the right to vote during the 2020 Seimas elections will be further analysed.

14 T. Birmontienė and J. Miliuvienė, Pandemijos iššūkiai žmogaus teisėms ir laisvėms, (in:) L. Jakulevičienė and V. Sinkevičius (eds.), Lietuvos teisė 2020, *op. cit.*, p. 64.

15 V. Vaičaitis, Specialieji teisiniai režimai, *op. cit.*, p. 85.

16 T. Birmontienė and J. Miliuvienė, Konstituciniai reikalavimai, *op. cit.*, p. 22.

2. Exercise of the Right to Vote during a Pandemic

The institution of election is one of the oldest institutes in society; in many modern states, elections are an integral part of public political life, and the level of democracy of a political regime depends on them. In democracies, elections are the main form of expression of the will of the nation and of the implementation of the sovereignty of the nation as one of the basic constitutional principles. Participation in elections is the most important means of ensuring the right and opportunity of voters to control the formation and activities of elected authorities (parliament, president and municipal councils).[17]

The right to vote is one of the most important institutes of Lithuanian constitutional law. The term 'suffrage' is understood in two senses: objective and subjective. The right to vote in the objective sense is a set of norms of constitutional law regulating public relations arising from the formation of electoral institutions of public power; the norms of this institute of constitutional law regulate the procedure for the organization and conduct of elections. The right to vote in the subjective sense is the right of a person to participate in elections, divided into active and passive suffrage. The constitutional foundations of active and passive suffrage are enshrined in Article 34 of the Constitution.[18] Article 34 Paragraph 1 ('Citizens who, on the day of election, have reached 18 years of age, shall have the electoral right') enshrines active suffrage, that is, the possibility for individuals to participate in elections of relevant public authorities. Paragraph 2 ('The right to stand for election shall be established by the Constitution of the Republic of Lithuania and by the election laws') enshrines the passive right to vote, i.e. the possibility for a person to stand for election to the relevant elected public authority in accordance with the procedure established by the Constitution and electoral laws. Paragraph 3 ('Citizens who are recognised incapable by a court shall not participate in elections') shall restrict the right to vote and stand as a candidate.[19] These rights of a person guaranteed by the Constitution – the right to vote (active suffrage) and the right to be elected (passive suffrage) – are important constitutional rights which are recognized and protected in the Republic of Lithuania.

In 2020, ordinary elections to the Seimas were to take place in the Republic of Lithuania, which, in accordance with Article 57 of the Constitution,[20] were due

17 I. Pukanasytė, Atstovaujamosios demokratijos institutai Lietuvos konstitucinė teisė, (in:) Jarašiūnas, E. *et al*. (eds.), Lietuvos konstitucinė teisė, VĮ Registrų centras, Vilnius 2017. Vilnius 2017, pp. 328–368.

18 The ruling of 29 March 2012 of the Constitutional Court of the Republic of Lithuania, Valstybės žinios 2012, No. 40–1973.

19 The ruling of 1 October 2008 of the Constitutional Court of the Republic of Lithuania, Valstybės žinios 2008, No. 114–4367.

20 Art. 57 of the Constitution of the Republic of Lithuania: 'Regular elections to the Seimas shall be held on the year of the expiration of the powers of the Members of Seimas on the second Sunday of October'.

to take place on the second Sunday of October.[21] Given the massive spread of the COVID-19 virus, the organization of the Seimas elections and the guarantee of political rights during these elections were not easy. In order to provide information on the implementation of the right to vote during the Seimas elections, it is necessary to provide some information on the electoral system of the Lithuanian Seimas.

Lithuania is a parliamentary republic which is characterized by certain features of the semi-presidential system. The right to legislate is exercised by a unicameral parliament (Seimas) of 141 members elected for a four-year term. Most of the executive power belongs to the government, which is headed by the prime minister. Seimas elections are held according to a mixed system: 71 members of the Seimas are elected in single-member constituencies according to a majority representation (majority) system, and the other 70 members, in one nationwide (multi-member) constituency, according to a proportional representation system. In single-member constituencies, if the voter turnout is more than 40%, a candidate must obtain an absolute majority of votes in order to be elected in the first round. If voter turnout is lower, it is necessary to collect at least 20% of the votes of all eligible voters. If no candidate is selected in the first round, a second round of elections is held, in which the two candidates who receive the most votes compete and win by collecting more votes, regardless of voter turnout. In a multi-member constituency, elections are considered to have taken place if the turnout is at least 25%. In order to be entitled to the distribution of mandates, the number of votes cast on the party list must exceed 5% and that of the coalition 7% of the election bar. Mandates are distributed to parties and coalitions that cross the electoral barrier and for which at least 60% of the votes are cast. The right to take part in the distribution of mandates is won by the parties whose lists of candidates receive over 5% of all votes cast. After an amendment to the Law on Elections to the Seimas, an electoral constituency was formed for the first time in 2020 for voters voting abroad[22]. The legal basis for the Seimas elections is the 1992 Constitution (last amended in 2019), the 1992 Law on Elections to the Seimas, the 2002 Law on the Central Electoral Commission, and decisions of the Central Electoral Commission.

21 According to the doctrine of the Constitutional Court of the Republic of Lithuania: 'Under Paragraph 1 of Article 57 of the Constitution, a regular election to the Seimas is held in the year of the expiry of the powers of the members of the Seimas on the second Sunday of October, and, according to Paragraph 2 of the same article, a regular election to the Seimas following an early election to the Seimas is held at the time specified in the first paragraph of this article. Thus, Article 57 of the Constitution *expressis verbis* establishes a specific date for regular elections to the Seimas, i.e. one day for an election to the Seimas.' For more, see the ruling of 15 February 2019 of the Constitutional Court of the Republic of Lithuania, Valstybės žinios (Official Gazette) No. KT8-N2/2019, Register of Legal Acts, No. 2373.

22 In this election, 43,500 voters who were abroad at the time of the election registered to vote. For more, see Demokratinių institucijų ir žmogaus teisių biuras, Lietuvos Respublikos Seimo rinkimai 2020 m. spalio 11 ir 25 d. ODIHR rinkimų ekspertų grupės ataskaita. Warsaw 2021, p. 4.

Members of the Seimas are elected by universal and equal suffrage, in a secret ballot, during direct, mixed-system elections.[23]

In order to analyse how voting rights were implemented during the 2020 Seimas elections, this article will further examine how the active and passive voting rights were implemented during these elections. Let us first analyse whether active suffrage was ensured.

The president announced the elections to the Seimas on 9 April 2020, and official preparations for the elections began from that date. As mentioned earlier, after the announcement of the election campaign, two special legal regimes operated in Lithuania – quarantine and a state of emergency. The quarantine was lifted on 17 June, while the state of emergency continued on election day. In view of this, a number of restrictions on the rights and freedoms of the citizen were introduced, but no decision was made to cancel the Seimas elections.

Following the experience of neighbouring countries in organizing elections (for example, presidential elections in Poland), and given that the organization of elections is a complex process especially during a pandemic, on 30 June 2020 the Seimas amended some norms of the Law on Elections to the Seimas in order to run elections during the pandemic in a clearer and easier manner and thus guarantee the right of citizens to vote. The following amendments can be distinguished, which have to be applied when a state or municipal level emergency is declared in all or part of the territory of the Republic of Lithuania, when the freedom of movement of persons is temporarily restricted, or when other special conditions to manage a situation are established:

- voters must be provided with the necessary protection at the polling station;
- by decision of the Central Electoral Commission, voting on election day in polling stations with more than 3,000 registered voters may take place in such a polling station if it is specially and additionally prepared and suitable for voting;
- due to the declared special situation, voters in self-isolation may vote at home by submitting a request to vote at home in the form established by the Central Electoral Commission;
- advance voting may also take place on the last Monday, Tuesday, Wednesday and Thursday before election day from 7 am to 8 pm.[24]

Thus, voters who came to the polls had to be provided with the necessary safeguards, and if necessary, additional polling stations had to be installed in larger constituencies in order to reduce overcrowding. Amendments to the Law on Elections

23 Law on Elections to the Seimas, 9 July 1992, No I–2721, https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/10831a4018db11e5bfc0854048a4e288?jfwid=bkaxmnua (accessed 13.06.2021).

24 *Ibidem.*

to the Seimas extended the duration of early elections from two to four days. Voters were able to express their will at one of 73 selected pre-voting locations, which could be found in municipal buildings and elsewhere, from the Monday to the Thursday before each round of elections. During the pre-election period, the voter could vote several times; on the day of the election, the last vote cast was counted.[25]

The procedure for voting at home was also adjusted. Until then, people over the age of 70, people with disabilities, people caring for those with disabilities, and people who are unable to enter polling stations on election day due to a medical condition had the right to vote at home. According to the amendments to the Law on Elections to the Seimas in 2020, people in self-isolation were also able to vote at home.[26]

It is important to mention that on 30 June 2020, an amendment to the Law on Elections to the Seimas was adopted, according to which the possibility of electronic voting for voters in self-isolation due to COVID-19 was established. Article 67 Paragraph 1 established that an electronic voting code may be sent by post to voters in self-isolation in accordance with the procedure established by the Central Electoral Commission, allowing the voter to vote on the Central Electoral Commission website. By establishing the possibility of electronic voting, the Seimas sought to encourage voter participation during the pandemic. According to the National Progress Strategy, the turnout of the Lithuanian population and confidence in the transparency of the policy and its implementation are some of the key features of a democratic state, but the turnout of Lithuanian voters was 17 percentage points lower than the OECD average.[27] Therefore, in order to encourage voter turnout, the Seimas adopted an amendment to the Law on Elections to the Seimas, which legally opened up the possibility of electronic voting. Such a sudden decision was criticized in the media, as it was adopted as a matter of urgency, a day before the end of the spring session of the Seimas and without consultation with the public and the Central Electoral Commission, which actually became responsible for implementing electronic voting.

It should be mentioned that the initiative for online voting in Lithuania started in 2006, when the Seimas adopted the concept of online voting. In 2009, 2010 and 2011, the Seimas voted on draft laws legitimizing this method of voting, but rejected

25 Demokratinių institucijų ir žmogaus teisių biuras, ODIHR rinkimų ekspertų grupės ataskaita, *op. cit.*, p. 9.

26 Lrytas. Rinkimai, kokių Lietuvoje nebuvo: tūkstančiai žmonių namuose sulauks 'kostiumuotų' svečių, balsuodami turės būti stebimi, https://www.lrytas.lt/lietuvosdiena/aktualijos/2020/09/24/news/rinkimai-kokiu-lietuvoje-nebuvo-tukstanciai-zmoniu-namuose-sulauks-kostiumuotu-sveciu-balsuodami-tures-buti-stebimi-16452432/ (accessed 15.08.2021).

27 Lietuvos Respublikos Vyriausybės nutarimas 'Dėl 2021–2030 metų nacionalinio pažangos plano patvirtinimo', 16 September 2020, No. 998. Register of Legal Acts, Nr. 19293.

all of them.[28] Only the pandemic prompted the Seimas to take decisive action and legalize online voting.

With electronic voting approved by the Seimas, the Central Electoral Commission adopted a protocol decision on the Action Plan on the Implementation of Electronic Voting and the Description of the Procedure for Electronic Voting.[29] Although the provisions came into force immediately, the electronic voting procedure was not applied in the 2020 Seimas elections. It should be mentioned that the Lithuanian electoral system is designed for voting on printed paper ballots as a means of expressing the independent will of the voter, and there is no separate system where it would be possible to vote electronically by sending voters codes. Around the world, this method of voting is also called the Australian method, as it was first used in Australia in 1856 to hold elections in Victoria, South Australia and Tasmania.[30] Thus, although the legal basis for electronic voting was created by the Seimas, in order to ensure the security and reliability of elections and public confidence in democratic processes, electronic voting was not possible in the 2020 Seimas elections because there was too little time (only two and a half months) to prepare for such voting. The Central Electoral Commission hopes that, following a feasibility study on the electronic voting system, consultations with the public and other institutions, international public procurement procedures, independent audits and public testing, the possibility of electronic voting will be available in the next elections.[31]

The good administration of the 2020 Seimas elections was also confirmed by 'White Gloves' ('Baltosios pirštinės'), an independent election observation organization in Lithuania. Members of this organization observed the Seimas elections and established reports of possible violations of the electoral process. Of the 804 reports of possible election irregularities, only 13% were related to the COVID-19 pandemic. Such reports included, for example, members of electoral commissions or voters not wearing protective equipment or wearing it incorrectly; social distancing not being observed; long queues of voters not being coordinated; polling stations not being provided with all the necessary security measures; advance voting at home not being

28 S. Valadkevičius, Balsavimo internetu įgyvendinimas ir elektroninės apylinkės. Geriausios užsienio praktikos ir taikymo Lietuvoje galimybės, http://kurklt.lt/wp-content/uploads/2015/10/Balsavimo-internetu-%C4%AFgyvendinimo-ir-elektronini%C5%B3-apylinki%C5%B3-projektas.pdf (accessed 15.08.2021).

29 Central Electoral Commission, Implementation of electronic voting, https://www.vrk.lt/elektroninio-balsavimo-igyvendinimas (accessed 15.08.2021).

30 V. Stancelis, Balsavimo ir balsų skaičiavimo įranga: nuo popierinio biuletenio iki balsavimo internetu. Istorija galimybės, problem os ir spendimai, 'Parlamento Studijos' 2016, no. 20, http://www.parlamentostudijos.lt/Nr20/files/88–111.pdf (accessed 15.08.2021).

31 Kauno diena, VRK vadovė apie elektroninį balsavimą: šiems rinkimams daugiau ne negu taip, https://kauno.diena.lt/naujienos/lietuva/politika/vrk-vadove-apie-elektronini-balsavima-siems-rinkimams-daugiau-ne-negu-taip-976603 (accessed 15.08.2021).

on schedule due to lack of preparedness for safeguards; and poor public awareness of opportunities to vote in self-isolation.[32]

Conclusions

The short study in this article shows that two special legal regimes were introduced in Lithuania during the COVID-19 pandemic – the quarantine and disaster management regimes – and were introduced not by the parliament but by the government. Such a legal situation is criticized because, first, several special legal regimes cannot be in force in the state at the same time on the same legal basis, for example due to an outbreak of an epidemic, and second, the government could not restrict human rights and freedoms on such a large scale and for such a long time, only parliament. Assessing how the right to vote was exercised during the pandemic, the restrictions during the elections were proportionate with the aim of preventing the spread of coronavirus and protecting human health and life. Restrictions were essentially linked to additional measures designed to protect the health of those participating in the elections and to enable persons whose freedom of movement was restricted to vote. This did not affect the usual election deadlines (on the contrary, the advance voting was two days longer than during the 2016 Seimas elections), a secret ballot was ensured and people who were in isolation were given the right to vote at home. The pandemic prompted the Seimas to pass long-awaited amendments to the law that legalized electronic voting in the country.

REFERENCES

Ayala Corao, C., Challenges that the COVID-19 Pandemic Poses to the Rule of Law, Democracy, and Human Rights, Max Planck Institute for Comparative Public Law & International Law (MPIL) Research Paper No. 2020–23, https://ssrn.com/abstract=3638158.

Birmontienė, T. and Miliuvienė J., Konstituciniai reikalavimai valstybės valdžios institucijoms reaguojant į pandemijos padiktuotus iššūkius Lietuvoje, (in:) L. Jakulevičienė and V. Sinkevičius (eds.), Lietuvos teisė 2020. Esminiai pokyčiai I dalis. COVI D-19 pandemijos sprendimai: teisiniai, valdymo ir ekonominiai aspektai, Vilnius 2020, pp. 7–22.

Birmontienė T. and Miliuvienė J., Pandemijos iššūkiai žmogaus teisėms ir laisvėms, (in:) L. Jakulevičienė and V. Sinkevičius (eds.), Lietuvos teisė 2020. Esminiai pokyčiai I dalis. COVI D-19 pandemijos sprendimai: teisiniai, valdymo ir ekonominiai aspektai, Vilnius, 2020, pp. 47–65.

Central Electoral Commission, Implementation of electronic voting https://www.vrk.lt/elektroninio-balsavimo-igyvendinimas.

Constitution of the Republic of Lithuania, Valstybės žinios (Official Gazette) 1992, No. 33–1014.

32 Seimas election observation data of 'White Gloves', https://www.baltosiospirstines.lt/apie/ataskaitos (accessed 31.08.2021).

Constitutional Court of the Republic of Lithuania, Ruling of 1 October 2008, Valstybės žinios (Official Gazette) 2008, No. 114–4367.

Constitutional Court of the Republic of Lithuania, Ruling of 29 March 2012, Valstybės žinios (Official Gazette) 2012, No. 40–1973.

Constitutional Court of the Republic of Lithuania, Ruling of 15 February 2019, Valstybės žinios (Official Gazette) No. KT8-N2/2019, Register of Legal Acts, No. 2373.

Demokratinių institucijų ir žmogaus teisių biuras, Lietuvos Respublikos Seimo rinkimai 2020 m. spalio 11 ir 25 d. ODIHR rinkimų ekspertų grupės ataskaita, Warsaw 2021.

European Union Agency for Fundamental Rights, Fundamental Rights Report 2021, https://fra.europa.eu/en/publication/2021/fundamental-rights-report-2021.

Kauno diena, VRK vadovė apie elektroninį balsavimą: šiems rinkimams daugiau ne negu taip. https://kauno.diena.lt/naujienos/lietuva/politika/vrk-vadove-apie-elektronini-balsavima-siems-rinkimams-daugiau-ne-negu-taip-976603c.

Law on Civil Protection, 15 December 1998, No VIII–971, https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.378978?jfwid=92zt7rthx.

Law on Elections to the Seimas, 9 July 1992, No I–2721, https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/10831a4018db11e5bfc0854048a4e288?jfwid=bkaxmnua.

Law on the Prevention and Control of Communicable Diseases in Humans, 25 September 1996, No. I–1553. https://e-seimas.lrs.lt/portal/legalActPrint/lt?jfwid=-0zrzend5&documentId=TAIS.373789&category=TAD.

Lietuvos Respublikos Vyriausybė nutarimas 'Dėl valstybės lygio ekstremaliosios situacijos paskelbimo', 26 February 2020, No-152, Register of Legal Acts, No. 4023.

Lietuvos Respublikos Vyriausybė nutarimas 'Dėl karantino Lietuvos Respublikos teritorijoje paskelbimo', 14 March 2020, No-207, Register of Legal Acts, No. 5466.

Lietuvos Respublikos Vyriausybės nutarimas 'Dėl 2021–2030 metų nacionalinio pažangos plano patvirtinimo', 16 September 2020, No-998, Register of Legal Acts, No. 19293.

Lrytas. Rinkimai, kokių Lietuvoje nebuvo: tūkstančiai žmonių namuose sulauks „kostiumuotų' svečių, balsuodami turės būti stebimi https://www.lrytas.lt/lietuvosdiena/aktualijos/2020/09/24/news/rinkimai-kokiu-lietuvoje-nebuvo-tukstanciai-zmoniu-namuose-sulauks-kostiumuotu-sveciu-balsuodami-tures-buti-stebimi-16452432/.

Pukanasytė I., Atstovaujamosios demokratijos institutai Lietuvos konstitucinė teisė, (in:) Jarašiūnas, E. *et al.* (eds.), Lietuvos konstitucinė teisė, VĮ Registrų centras, Vilnius 2017. Vilnius 2017, pp. 328–368.

Stancelis, V., Balsavimo ir balsų skaičiavimo įranga: nuo popierinio biuletenio iki balsavimo internetu. Istorija galimybės, problem os ir spendimai, 'Parlamento Studijos' 2016, no. 20, http://www.parlamentostudijos.lt/Nr20/files/88–111.pdf.

Teise.pro, Karantinas – ir mobilumui, ir žmogaus teisėms? https://www.teise.pro/index.php/2020/05/01/karantinas-ir-mobilumui-ir-zmogaus-teisems/.

Vaičaitis, V., Specialieji teisiniai režimai, 'Teisė' 2020, vol. 117, pp. 79–98.

Valadkevičius, S., Balsavimo internetu įgyvendinimas ir elektroninės apylinkės. Geriausios užsienio praktikos ir taikymo Lietuvoje galimybės, http://kurklt.lt/wp-content/uploads/2015/10/Balsavimo-internetu-%C4%AFgyvendinimo-ir-elektronini%C5%B3-apylinki%C5%B3-projektas.pdf.

White Gloves, Seimas election observation data, https://www.baltosiospirstines.lt/apie/ataskaitos.

Bialystok Legal Studies
Białostockie Studia Prawnicze
2022 vol. 27 nr 2

sciendo

DOI: 10.15290/bsp.2022.27.02.07

Received: 29.01.2022
Accepted: 29.04.2022

Agnieszka Gloria Kamińska
Jagiellonian University, Poland
akaminska@uj.edu.pl
ORCID ID: https://orcid.org/0000–0002–0762–6829

Profiles of Potential Unconstitutionality of Legislation Restricting Personal Freedom for the Containment of COVID-19 on the Example of the Italian Republic

Abstract: The Sars-CoV–2 pandemic is changing the main issues of Italian constitutional law. The phases of the Italian normative management of the crisis focused on important and extraordinary measures and brought to light some structural problems of the Italian constitutional legal system. More generally the ongoing health crisis is revealing the lack of an articulated emergency framework in the Italian Constitution and questioning whether existing legislative tools are suitable to face contemporary threats. This article aims to analyse the main issues raised by the Italian government's reaction to the coronavirus: the notion of emergency in Italian constitutional law, the legal forms chosen to fight the virus, the choice of the Italian Government to regulate the emergency by decrees of the President of the Council of Ministers, the role of decree law ('*decreto-legge*'), from the emergency and the compression and restriction of fundamental rights to the balance of the fundamental freedoms with the protection of right to health.
Keywords: emergency, fundamental rights, Italian Constitution, Italian system, Pandemic crisis

Introduction

The pandemic crisis, which has now been going on for over two years around the globe, is not only causing tens of thousands of deaths every day but is also radically changing our way of life.[1] It is fundamentally changing the way each individual lives,

1 N. Chomsky, Precipice, London 2021; Autori Vari, Il Mondo dopo la fine del Mondo, Bari-Roma 2020.

but above all the way in which the individual relates in a society, perceives 'the other', the community, and the way in which each citizen builds the relationship with the established power, in other words the state.[2]

It would be enough to think about the main rules of behaviour recommended to avoid contagion, such as social distancing, mask wearing, the use of the 'green pass' and the prohibition of gathering that are building a world in which, in order to survive, each person must isolate himself, must be alone.

The negative effects produced by the pandemic crisis are at their worst during the so-called 'lockdowns', during which millions of people have been forced to isolate themselves, to avoid leaving their homes, to live like recluses in jail.

Also under Polish law, the COVID-19 pandemic has had a significant impact on legislative activities and human life. Reduced income of enterprises forced the legislator to partially reduce the protective function of the labour law, which is expressed by protecting the durability of the employment relationship and establishing far-reaching facilities for employers dismissing employees in the process of reducing employment.[3]

These experiences also reflect on societies, on their internal articulations, on the mechanisms of functioning, on relations between individuals, and even on relations with the city and with nature. But that is not all. The emergency – this is a recurring term that has constructed a 'new' normality – has led to the adoption of different legal instruments and rules, inspired by logic that does not always comply with the dictates of the constitutions of the countries involved.

We have addressed the various forms of rupture in the fragile balance between freedom, rights and constituted power. This fracture has emerged most strongly in 'Western' legal systems, in Europe, the USA and Canada in particular, with a liberal matrix and a neo-liberal economic system.

In a certain way, the devastation wrought by COVID-19 spread more effectively in countries that we might define as 'democratic' and liberal, where the exercise of certain fundamental rights, first and foremost health, is the prerogative of the individual and where the choices and guidelines adopted by parliaments are the result of moments of confrontation and consultation. The prerogatives of the individual and the lethargy of the centers of power have, in some ways, slowed down and made less effective the capacity to respond and fight the virus. The fragility of capitalist and liberal economies has become even more evident.

The pandemic crisis has in fact exacerbated the weakness of systems that had already been struggling for several years and were incapable of bringing about any redistribution of wealth among citizens.

2 D. Di Cesare, Virus sovrano? L'asfissiacapitalistica, Torino 2020, p. 10.

3 M. Wieczorek, Some aspects of the protective function of labour law in the COVID-19 era, 'Studia Iuridica Lublinensia' 2021, vol. 30, no. 1.

In this way, not only has health been put at risk, but also employment and work. That means the two most important and characteristic aspects concerning everyone have thus been affected.

In synthesis, Western legal models have been put under check. Within a few months, they have shown a certain weakness in first holding up and then reacting to an emergency of extraordinary magnitude. This has led to various degrees and in various ways throughout Europe to an 'emergency' type of crisis management, in which the executive power has taken over prerogatives that had hitherto been the exclusive competence of parliament and in which fundamental freedoms have also been restricted by exceptional legislative sources, thus creating moments of conflict with the constitutions. In some systems, only the intervention of the high constitutional courts ensured that the democratic system did not enter a definitive crisis.

Furthermore, legal sciences is confronted with numerous problems and not only in the field of civil and medical law, but also criminal and administrative law, which is strongly emphasised by German legal literature.[4] Polish criminal law was also affected by changes in the scope of tightening sanctions in the area of crimes against health, such as direct exposure of another person to life-threatening disease.[5]

There is no doubt that the pandemic emergency has put the role of the state and, in general, of the institutions, to which all citizens have turned their gaze to obtain adequate and effective solutions, back on centre stage.

Similarly, however, there is no doubt that the real challenge has been, and still is, to carry out the task of combating the effects of the COVID-19 health crisis in a democratic and constitutionally oriented manner without compromising the personal, civil and political freedoms of EU citizens.

And in such a crisis, we must also remain vigilant and verify that the hundreds of billions allocated by the European Union for the next-generation EU project[6], for the recovery and resilience of European economies, are not spent according to the legal-economic logic of the 'emergency', and of the 'state of exception'. In fact, it is commonly known that such crises, especially those with economic effects, produce corruption and bribery, fraud and money laundering if regulatory instruments are not put in place to ensure a fair, effective and real distribution of resources, not only in favour of individuals but of entire economic systems and territories.

On this point, the challenge we face soon will be to guarantee a social and democratic order in which the human being always remains the end for which action is

4 H. Lorenz, E. Turhan, The Pandemic and Criminal Law – A Look at Theory and Practice in Germany, 'Bialystok Legal Studies' 2021, vol. 26, no. 6.

5 E.M. Guzik-Makaruk, Some remarks on the changes in the Polish Penal Code during the pandemic, 'Bialystok Legal Studies' 2021, vol. 26, no. 6.

6 About Next Generation EU, see https://ec.europa.eu/info/strategy/recovery-plan-europe_en; to see an OCSE perspective see https://www.oecd.org/economy/surveys/european-union-2021-OECD-economic-survey-overview.pdf (accessed 12.12.2021).

taken and not the means. Equity, solidarity, inclusion and sustainability are the cardinal points around which a new European system can be built, capable of reacting definitively to this crisis in a unified and democratic way.

In this paper, an attempt will therefore be made to analyze what have been and still are the most harmful effects of the pandemic crisis on the maintenance of the democratic order, on the balancing of the principles and fundamental values sanctioned by the constitutions of some European countries, especially personal freedom and freedom of movement, the right to health and free economic initiative, in order to verify whether the limitation and contraction of some fundamental freedoms has taken place in a manner that is consistent and coherent with democratic values, also provided by the European Convention on Human Rights. The Italian system is chosen here as the reference point for this scientific work for several reasons.

Firstly, because it was the first Western country, as well as the first European continental economic power, to face the COVID-19 emergency. Secondly, because Italy has a rather articulated and well-balanced constitution, since it was derived from the historical-political compromise of the three main political forces that freed the country from fascism: Catholics, communists and liberals. Thirdly, because it is the country where essential services, such as healthcare, still remain the main prerogative of the state and are provided regardless of the economic capacity of the individual citizen. Finally, because Italy's legislative and regulatory system, despite appearing *prima facie* very rigid, i.e. fully inspired by Montesquieu's principle of the tripartition and separation of powers, takes on a certain fluidity and an absolute peculiarity in the continental panorama.

In this way, an attempt will be made to ascertain whether what has been produced by the pandemic (socio-sanitary) crisis has brought to light the capacity of the Italian legal system to respond in an adequate and constitutionally compliant manner to the problems derived from it[7], or whether it is inevitable in the medium term to reflect on an institutional reform that could remodel democratic values in the light of an increasingly globalised context in which politics is weaker and the categories representing citizens are more fragmented and, likewise, less able to ensure the protection of the individual within an organised community. In short, we need to un-

7 A. Algostino, Costituzionalismo e distopia nella pandemia di COVID-19 tra fonti dell'emergenza e (s)bilanciamento dei diritti, 'Costituzionalismo.it' 2021, vol. 1, pp. 1–81; A.M. Cerere, Ruoli e competenze dei diversi livelli istituzionali nella gestione della pandemia Covid 19 in Italia tra distonie sistemiche e carenze strutturali, 'Rivista AIC' 2021, vol. 3, pp. 358–378; D. Morana, Sulla fondamentalità perduta (e forse ritrovata) del diritto e dell'interesse della collettività alla salute: metamorfosi di una garanzia costituzionale, dal caso ILVA ai tempi della pandemia, 'Consulta online', 30 April 2020, p. 2; A. Venanzoni, L'innominabile attuale. L'emergenza COVID-19 tra diritti fondamentali e stato di eccezione, 'Forum di Quaderni Costituzionali', 26 March 2020, pp. 491–503; B. Raganelli, Stato di emergenza e tutela dei diritti e delle libertà fondamentali, 'Il diritto dell'economia' 2020, vol. 3, pp. 35–62.

derstand whether the archetypal traits of the constitutional state remain present even when the protection of the individual takes second place to the guarantee of other values and/or ends.

1. Italy's Response to the Pandemic. Emergency Measures on Movement and Control Over People's Activities

As anticipated, in Italy the pandemic caused by the new coronavirus Sars-CoV–2 gave rise to a health emergency to which an immediate response was given with a series of urgent measures since 31 January 2020, the day on which a state of emergency was declared.

As can be seen from the overview of the measures that have been adopted, the Italian legislator also acted in an emergency manner, often through ministerial decrees and not through laws passed by parliament, as recommended by the constitution when regulating fundamental rights.[8]

The COVID-19 epidemic, in fact, in a first phase was addressed following the provisions of the Civil Protection Code, which regulates the legal acts to be performed to cope with emergency situations, specifically the declaration of the state of emergency by the Council of Ministers, which can be deliberated for a maximum of 12 months, extendable once for another 12, and by the ordinances of the President of the Council of Ministers and the Head of the Department of Civil Protection.

In this same first phase were contingent and urgent ordinances, sources of administrative law, by the Ministry of Health, ex Art. 32 of Law no. 833 of 1978, whose effectiveness can be extended to the entire national territory or part of it, including two or more regions. At the regional level, the same article provides for the issuing of similar ordinances by the president of the regional council or the mayor.

In face of the persistence of the epidemic, the subsequent phases have been characterised by the compression of some fundamental rights provided by the Italian Constitutional Charter, with the aim of preserving the right to health, both individual and collective. The legal instrument used was that of the decree-law containing provisions aimed at the adoption of punctual provisions to cope with the emergency, both health and socio-economic, others with the aim of defining a framework of legal instrumentation for the adoption of subsequent measures to deal with the emergency.[9]

8 A. Formisano, Limiti e criticità dei sistemi costituzionali a fronte dell'emergenza COVID-19, 'Nomos' 2020, vol. 1, pp. 1–18.

9 G. Azzariti, I limiti costituzionali della situazione d'emergenza provocati dal COVID-19, 'Questione giustizia', 27 March 2020, *passim*.

Both Law Decree no. 6/2020 and Law Decree no. 19/2020 have typified the measures introduced in light of the emergency, defining the relationship between the state and the regions, with coordination under the President of the Council of Ministers.

The measures established therein may be taken for specific periods, each lasting no more than fifty days, which may be repeated and modified. The instrument for the adoption of these measures is the Decree of the President of the Council of Ministers, adopted on the proposal of the Minister of Health and other competent ministers, having heard the presidents of the regions concerned or the President of the Conference of Regions and Autonomous Provinces.[10]

Subsequently, Legislative Decree no. 33/2020 marked a change in the management of the pandemic, sanctioning on the one hand a progressive loosening of the prohibitions and constraints put in place in the most acute phase of the pandemic emergency (March–May 2020), and on the other hand allowing the possibility of regional regulation on 'economic, productive and social activities', marking the second phase of the management of the pandemic.

With the arrival of a new critical phase, Decree Law no. 125 of 7 October 2020 was adopted. Decree Law no. 125, in addition to extending the state of emergency and the possibility of adopting the measures to combat the epidemic provided for by Decree Laws no. 19 and no. 33 until 31 January 2021, also introduced the obligation to wear a mask, and the possibility of the regions to adopt less restrictive measures than the national ones ceased to exist.

Articles 1-quinquies and 19-bis of Decree Law no. 137 of 2020 regulated the publication of the results of monitoring related to the epidemiological emergency, also defining a procedure for the identification of the regions targeted by restrictive measures. More specifically, the Ministry of Health was committed to publish, on its institutional website and on a weekly basis, the results of the monitoring of health risk related to the evolution of the epidemiological crisis.[11] On the basis of the data acquired, the Ministry of Health, following consultation with the Technical-Scientific Committee, can identify by ordinance, after consulting the presidents of the regions concerned, the regions with the highest epidemiological risk. These regions will adopt more restrictive measures than those applicable to the entire national territory, as defined by the relevant prime ministerial decree.[12]

The Decree of the President of the Council of Ministers of 17 June 2021, as amended by the Prime Ministerial Decree of 17 December 2021, implements Art. 9,

10 A. Lucarelli, Costituzione, fonti del diritto ed emergenza sanitaria, 'Rivista AIC' 2020, no. 2, p. 558 ff.

11 https://www.salute.gov.it/portale/nuovocoronavirus/dettaglioContenutiNuovoCoronavirus (accessed 12.12.2021).

12 M. Luciani, Il sistema delle fonti del diritto alla prova dell'emergenza, 'Rivista AIC' 2020, no. 2, p. 119 ff.

paragraph 10, of Law Decree 52 of 2021 (so-called Reopening) in the specific matter of COVID-19 Green Certifications and governs the procedures for the issue of said certifications aimed at facilitating the free movement of citizens in safety within the national territory and the European Union (see Council Recommendation (EU) 2021/961 of 14 June 2021).

As a preliminary remark, it should be noted that the COVID-19 green certification – EU Digital COVID Certificate, which will be in force for one year starting from 1 July 2021, was adopted following the provision created at the European level of a common technical platform for Member States (gateway) active from 1 June 2021 to ensure that certificates issued by European states can be verified throughout the EU.

With regard to this, Regulation (EU) 2021/953 of 14 June 2021 was adopted for the definition of the Community framework for the issue, verification and acceptance of interoperable certificates of vaccination, testing and recovery for the movement of EU citizens and Regulation (EU) 2021/954 of 14 June 2021 for third-country nationals legally residing in the territory of the Member States during the COVID-19 pandemic.

On 5 July 2021, a corrigendum to the 36th Recital was published in OJEU L regarding the principle of no direct or indirect discrimination of persons who are not vaccinated, not only for medical reasons, but because they are not in the target group for which the COVID-19 vaccine is currently administered or allowed, such as children, or because they have not yet had the opportunity to be vaccinated, but also because they have chosen not to be vaccinated.

Since 1 July 2021 the COVID-19 green certificate is in fact valid as an EU Digital COVID Certificate to allow free travel within all EU countries and the Schengen area. On 17 June in Italy the national platform at the Ministry of Health (DGC platform – digital green certificate) was activated, allowing members of the public to obtain the green certificate, both in digital and printable format, containing identification data validated by a QR code relating to vaccination or recovery or even the type of test carried out that shows a negative result regarding infection (Annex A to the decree). It can be requested to be shown at public events, to access nursing homes or other facilities, or to enter or exit territories classified as 'red zone' or 'orange zone'. In addition to allowing the collection, modification and verification of the data of the certifications, the platform guarantees interoperability with the information systems of other EU countries, also for the purposes of monitoring the data collected (Attachment B to the decree).

2. Restriction of Fundamental Freedoms and Emergency Legislation

The lockdowns, to which Italy also has been subjected as a result of the COVID-19 pandemic, have had an impact on the fundamental freedoms provided for by the

Italian Constitution, thus limiting even the constitutionally guaranteed rights: right to work (Art. 4), the freedom and secrecy of correspondence (Art. 15), freedom of movement (Art. 16), freedom of assembly (Art. 17), freedom of religion (Art. 19), to some extent freedom of thought (Art. 21), the right to education (Art. 33–34), the right to strike (Art. 40) and the freedom of private economic initiative (Art. 41).[13]

During the pandemic, all of these freedoms and rights should have been balanced with the right to health (Art. 32), which is defined by the Italian Constitutional Charter as 'the interest of the community'.[14] However, the balance was not carried out in an adequately considered manner. Although, as will now be shown, the Constitution allows for the limitation of fundamental rights, public health reasons were much preferred.

Constitutional foundations 'legitimise' limitations to freedoms: as regards freedom of movement, in the 'reasons of health or safety' (Art. 16); freedom of assembly, in the 'proven reasons of safety and public security' (Art. 17); private economic initiative, since it cannot be carried out in contrast with social utility or in such a way as to damage security, freedom, human dignity (Art. 41).[15]

In any case, there are certain requirements to be met for restrictive measures to remain within the constitutional perimeter: 1) temporariness; 2) proportionality and reasonableness; 3) dialogue with the executive power:

1. the compression of fundamental freedoms must be time-limited and permanently linked to the state of affairs giving rise to them;
2. the compression of fundamental freedoms must be strictly proportional and reasonable with respect to the protection of health but, at the same time, since it is a question of limitations to some fundamental rights and freedoms, the balancing must lead to protecting the other rights as much as possible, while preserving the right to health. For example, the balancing of rights arises when personal data are tracked both for prevention purposes and in order to track contacts of persons testing positive for the virus;
3. the respect of forms and balances in relation to the executive power arises to the extent that the adoption of emergency measures entails forms of concentration of powers in the hands of the executive and in general with the other constitutional bodies. This implies the need to ensure the exercise of the guaranteeing role of the president of the Republic, as well as of parliament,

13 A. Algostino, COVID-19: primo tracciato per una riflessione nel nome della Costituzione, 'Rivista AIC' 2020, no. 3 *passim*.

14 F. Scalia, Principio di precauzione e ragionevole bilanciamento dei diritti nello stato di emergenza, 'Federalismi.it', 18 novembre 2020, p. 186 ff.

15 T.E. Frosini, La libertà costituzionale nell'emergenza costituzionale, (in:) T.E. Frosini (ed.), Teoremi e problemi di diritto costituzionale, Milano 2008, p. 116 ff.

which should be constantly informed. When converting decree laws, parliament should express its opinion on the measures adopted by the executive.

In any case, the restriction of fundamental rights can only be tolerated in cases of absolute 'emergency'.

Although the Italian Constitution does not provide for the notion of 'emergency', it has proved that it is flexible enough in dealing with exceptional events[16]. In fact, the Italian constitutional fathers wanted to avoid introducing a so-called 'state of emergency'[17] into the constitution in order to prevent it from legitimising the adoption by the executive or legislative powers of measures aimed at changing the established order or altering relations between powers and between powers and citizens.

Given serious emergency situations, the Italian Constitution provides that the executive power can take over from the legislative power; however, this substitution must take place in the form of an urgent decree ('*decreto-legge*', as provided by Art. 77 of the Italian Constitution), precisely because it is the unpredictability of the emergency that justifies its adoption as it gives rise to a conflict between fundamental rights.

The acts of necessity and urgency are therefore only constitutionally provided if the intervention of the executive power is then subject to the control of parliament within the following 60 days (as provided for by Article 77 of the Constitution[18]) and if the measures adopted in the decree respect the principles of temporality, proportionality and adequacy mentioned above. Only if these conditions are fully observed are acts having the force and value of law (*decreto-legge*) also compatible with the principle of reservation of law ('*riserva di legge*'). This principle states that matters governing fundamental principles must always be regulated by law and with parliamentary control and not by sub-legislative sources.

16 F. Rimoli, Emergenza e adattamento sistemico. Sui limiti di resilienza degli ordinamenti democratici. Parte Prima, in Lo Stato, 'Rivista Semestrale di Scienza costituzionale e teoria del diritto' 2020, no. 14, p. 164 ff.

17 A. Algostino, Costituzionalismo …, *op.cit.,* p. 6; for further analyis,G. Bascherini, L'emergenza e i diritti. Un'ipotesi di lettura, 'Rivista di Diritto Costituzionale' 2003, p. 3 ff; A. Pizzorusso, Emergenza, state of (in:) Enciclopedia delle scienze sociali, Roma 1993, p. 551; F. Modugno, D. Nocilla, Problemi vecchi e nuovi sugli stati di emergenza nell'ordinamento italiano, (in:) Scritti in onore di M.S. Giannini, Milano 1988, vol. II, p. 515.

18 Art. 77 of the Italian Constitution states that: '*The Government may not, without delegation from Parliament, issue decrees that have the force of an ordinary law. When, in extraordinary cases of necessity and urgency, the Government adopts, on its own responsibility, provisional measures with the force of law, it shall on the same day submit them for conversion to the Houses of Parliament which, even if dissolved, shall be specially convened and shall meet within five days. Decrees shall cease to have effect from the outset unless they are converted into law within sixty days of their publication. The Houses may, however, regulate by law the legal relations that have arisen on the decrees that have not been converted into law.*'

In certain matters, therefore, it is essential that the law should always dictate the rules to bind the executive power. In fact, the issue of the compatibility of emergency sources with the constitutional framework has arisen precisely in relation to those secondary sources that have been adopted to deal with the pandemic crisis.

As has also emerged from what has been partly evoked in the second paragraph, the Italian legislator has faced and responded to the urgencies and emergencies of the pandemic crisis especially using 'decree laws' (*decreti-legge*). These instruments appeared to be the most effective in ensuring a rapid and constitutionally oriented intervention. The intervention of the parliament, which, pursuant to Article 77, converts the decree law (*decreto-legge*), therefore promotes the regulatory activity of the government, ensuring compliance with the fundamental principles of reservation of law and legality.

However, the 'formal' respect of the rules does not always determine a 'substantial' respect of rights. In fact, despite this, the promotion and protection of the public interest in health has severely limited the exercise of the above-mentioned fundamental rights.

The distorted use of sources of law during the pandemic, however, cannot be substantially denied. In fact, it is already possible here to highlight how the Italian Constitutional Court has twice intervened on the relationship between legislative instruments (decree laws and decrees of the President of the Council of Ministers (DPCMs)) and the emergency, and on the division of competences between state and regions in the management of the same.

In the first case, in fact, the Constitutional Court, in its judgment No. 37 of 2021[19], intervened following the Italian Government's challenge to Valle d'Aosta's regional law No. 11/2020, by which the region had intervened concerning the containment of COVID-19. On that occasion, the court affirmed the unconstitutionality of the regional law for violation of the state's exclusive competence by the region in the field of international prophylaxis because in the face of highly contagious diseases capable of spreading globally, logical and not only juridical reasons impose on the constitutional system the need for unitary discipline at the national level, capable of preserving and guaranteeing the equality of persons in the exercise of the fundamental right to health and at the same time protecting the interests of the community. In view of the seriousness of the pandemic and the need to ensure equality among citi-

19 Cf. M. Mandato, Sulla titolarità delle competenze in materia di emergenza sanitaria. A proposito della sentenza della Corte Costituzionale no. 37/2021, 'Rivista Quadrimestrale di diritto pubblico' 2021, p. 529 and following; V. Baldini, Conflitto di competenze tra Stato e regione nella lotta alla pandemia. Un sindacato politico della Corte costituzionale? Riflessioni a margine della sent. no. 37 del 2021 della Corte costituzionale, 'dirittifondamentali.it' 2021, no. 1, p. 415; G. Caggiano. I vincoli di legittimità costituzionale, sovranazionale e internazionale quale garanzia dei diritti fondamentali degli stranieri nell'ordinamento italiano, 'Studi sull'integrazione europea' 2021, p. 9 and following.

zens from the outset and not to prejudice citizens, the Court used the 'precautionary suspension of the law' for the first time in its history, thus avoiding further risks of contagion.

The main interesting aspect of the pronouncement given by the Constitutional Court therefore relates to the importance of having placed the subject of 'international prophylaxis'[20] among the exclusive competences of the state, excluding that the epidemiological emergency constitutes a legislative sector in which both state and regions can intervene. The pronouncement thus goes beyond the principle of loyal cooperation between state and regions, admitting that discretion is primarily the prerogative of the state. The Constitutional Court, in practice, did no more than confirm the central government's operational model that had been pursued since the beginning of the pandemic, which has provided for a form of centralisation of the management of the virus containment procedures, effectively limiting the discussion with the regions to a 'consultation' phase.[21]

In the second case, by sentence no. 198/2021[22], the Italian Constitutional Court rejected the issue of constitutional illegitimacy concerning the emergency legislation with which the government managed the initial phase of the COVID-19 pandemic.[23] In particular, the question of legitimacy was raised by the judge of Frosinone, who doubted the conformity of certain provisions of Decree Law no. 6/2020 and Decree Law no. 19/2020, with Articles 76 and 77 of the Constitution (about the legislative procedure of '*decreti legislativi*' and *decreto-legge*), in the part in which the regulations in question were essentially delegating the legislative function, typical of parliament, to the government. It was therefore a question of putting the spotlight on the very frequent use of DPCMs in 2020 and 2021 in Italy. The instruments in question, in fact, are not laws of parliament but government decrees (such as administrative acts[24]); therefore, they are not the same source.

The issue of constitutionality originated from a request made by an Italian citizen not to execute an administrative sanction imposed for violating the prohibition to move without justified reason from his home, provided for by the Prime Ministerial Decree of 22 March. The doubt of constitutionality raised by the referring court, con-

20 M. Mezzanotte, Pandemia e riparto di competenze Stato-Regioni in periodi emergenziali, 'Consulta online' 2021, p. 329 and following.

21 M. Mandato, Sulla titolarità …, *op.cit.,* p. 536.

22 *Ex multis,* A. Arcuri, La Corte Costituzionale salva i DPCM e la gestione della pandemia. Riflessione e interrogativi a margine della sentenza no. 198/2021, www.giustiziainsieme.it, 19 gennaio 2021 (accessed 10.12.2021).

23 In general, about the topic, A. Iannotti Della Valle, F. Marone, Parlamentarismo e regionalismo alla prova della pandemia: bilancio costituzionale di un'emergenza, 'Le Regioni' 2021, p. 725 and following.

24 M. Calamo Specchia, F. Salmoni, A. Lucarelli, Sistema normativo delle fonti nel governo giuridico della pandemia. Illegittimità diffuse e strumenti di tutela, 'Rivista AIC' 2021, no. 1, p. 400.

cerning the special legal framework governing, *ratione temporis*, the measures that may be adopted by the President of the Council of Ministers and the sanctions connected therewith, would have led to the conduct of the appellant being deemed legitimate. From the point of view of the judge of Frosinone, the DPCM adopted by the prime minister would derogate to ordinary and primary laws, in violation of Art. 76 and 77 of the Constitution.

The argument raised by the judge of Frosinone relied on the fact that the reference made by the decree laws to the prime ministerial decrees translated into the attribution of a power to dictate real and proper general and abstract rules derogating from regulatory sources of ordinary or primary rank, i.e. having the force of law, 'thus delegating to administrative acts the decrees of the President of the Council of Ministers, the regulation of new offences, first criminal and then administrative'.

Nevertheless, the Italian Constitutional Court, in rejecting the merits of the question posed by the judge of Frosinone, does not fully clarify the nature of the DPCMs adopted during the first phase of COVID-19; the reference to the possibility of qualifying them, now as general administrative acts, now as ordinances adopted for reasons of urgency, remains not fully explicit. At the end the Court stated that the containment measures were in any case subject to determination by the primary source. It is the law that ultimately provides the measure and limits of the exercise of the prime minister's administrative matrix power.

Through this decision, the Constitutional Court basically 'saves' the standardisation model adopted during the most severe pandemic phases, consisting mostly in the exercise of the substantial legislative power by the government. Thus, what cannot be denied is that the Italian Parliament has long been ousted from exercising its function.

To date, the balance of legislative and executive power does not appear to have been restored; on the contrary, it seems that a new relationship between these two kinds of institutional powers has been achieved with a pre-eminence of the former over the latter.

3. Article 32 of the Italian Constitution. Health Protection and Balancing Mechanisms in Protecting Fundamental Rights

As has already been pointed out, one of the peculiar and main effects of the pandemic crisis in Western democratic systems has been recorded in the exercise of constitutionally guaranteed rights and duties. Already during the first phase of the pandemic, the so-called 'lockdown' emphasised the emergence of a deep and lacerating conflict of values within the democratic and liberal state, which has as its object precisely the relationship, or rather the balancing act, between the protection of life (*über alles*) on the one hand and human dignity on the other, understood as the set of

rights, freedoms and prerogatives attributed to the citizen in his dealings with public power.[25]

Also in Italy, the legislator had to question whether it was really appropriate to give absolute primacy to the protection of the life and physical integrity of the citizen (guaranteed in Art. 32 of the Constitution) and, therefore, to ensure adequate standards of public health and hygiene, and refraining from promoting effective balancing mechanisms between the constitutional values involved – as seen, first and foremost, health, personal freedom (Art. 13 of the Constitution) and freedom of movement (Art. 16 of the Constitution) right to education (Art. 34 of the Constitution), private autonomy (Art. 41 of the Constitution.); all this has raised some doubts as to the adequacy and proportionality of the restrictive and restraining measures adopted with respect to the prefixed purpose of protection, namely the reduction of contagion and the maintenance of an efficient health service.

Article 32 of the Italian Constitution expresses a unitary vision of the good of health as the object of both individual and collective interest, marked by a strong element of novelty compared to the basic approach that characterised previous periods.

The Constituent Assembly, when examining Article 26 of the Draft of the Italian Constitution, highlighted the connection between health and the integral realization of freedom and equality of individuals.

The constitutional provision, in fact, places health in a condition of well-being, as a value perceived by the individual as a result of elements internal and external to the subject and, in this respect, differs from the content of the other constitutional rights, since it does not refer directly to a material activity or legal conduct.[26]

The collective shock generated by the diffusivity and lethality of the virus, and the unpreparedness of almost all the countries involved, including Italy, made it easier for citizens to accept that the bodies delegated with legislative and regulatory powers could act in an emergency manner, adopting binding measures that restricted constitutionally guaranteed rights and sanctions to enforce the measures.[27]

Here, a reference is made to the enhancement of the right to health[28], as set out in Article 32 of the Italian Constitution, which has led to the adoption of measures restricting personal freedom and movement rights.

---

25 J. Habermas, K. Gunther, Nessun diritto fondamentale vale senza limiti, inwww.giustiziainsieme.it, 30 May 2020 (accessed 10.12.2021).

26 R. Bifulco, A. Celotto, M. Olivetti (eds.), Commentario alla Costituzione, Torino 2006, pp. 659–660.

27 M. Luciani, Il sistema delle fonti del diritto alla prova dell'emergenza, in Liber Amicorum per Pasquale Costanzo, 2020, in www.giurcost.org; G.L. Gatta, Emergenza COVID-19 e "fase 2": misure limitative e sanzioni nel d.l. 16.5.2020, no. 33 (nuova disciplina della quarantena), www.sistemapenale.it, 18 maggio 2020 (accessed 9.12.2021).

28 C. Clemente, La salute prima di tutto. Art. 32 della Costituzione italiana: testo integrale del dibattito costituente e attualità di un'analisi sociologica, Milano 2020.

In order to provide a brief overview of what has happened, it is sufficient to recall that, precisely because of the need to protect the right to health, the first lockdown, in the spring of 2020, led to the total closure of all shops, schools and universities and, in general, most workplaces, except for essential ones such as supermarkets and pharmacies, and the obligation for Italian citizens not to leave their homes for any reason whatsoever, except for health reasons (having to go to the hospital), for work reasons (having to go to one's workplace, provided that it was a public body or a company that had not adopted smart working) or for other reasons clearly stated by the public authority.[29]

In addition, citizens wishing to leave their homes were required to prove the existence of one of these circumstances by completing a so-called 'self-certification' that the police authorities could request in the event of a check.[30] Violation of this obligation or the drawing up of false self-certification would have led to the imposition of administrative and criminal penalties (in the case of the crime of forgery or in the case of violation of the quarantine obligation due to COVID-19).

The protection of public health, linked to the need to limit contagion among the population and the overloading of hospital facilities, had thus led the Italian government, having established the 'state of emergency' currently still in force, to adopt the DPCMs[31], i.e. a sub-legislative regulation, with which, in fact, the restriction or limitation of certain fundamental rights was given shape, precisely on the assumption that the need to ensure the collective protection of health should not be delayed. Personal freedom, freedom of movement, freedom of education, free private economic initiative and the right to health itself, if understood as a prerogative of the individual (Art. 32, paragraph 1, of the Constitution) who freely chooses whether and how to protect his integrity, were indirectly deemed expendable rights.

In order to understand how it was possible to adopt these decisions without a direct intervention of the Italian Constitutional Court[32], aimed at restoring and affirming due equality and, therefore, a rational and proportional balance between all the rights in question, it is useful to investigate the content of the right to health, as desired by the constitutional fathers in 1946.

29 F. Ancora, Coronavirus, spostamenti, motivazioni, autocertificazione, 'Sanità Pubblica e Privata' 2020, vol. 3, pp. 5–8.

30 L. Marilotti, Contenimento del contagio, limitazioni domiciliari e salute psicofisica nell'attività di polizia sanitaria anti-coronavirus, 'in federalismi.it' 2021, vol. 1, pp. 214–258; G.L. Gatta, Emergenza COVID-19 e 'fase 2', op. cit. pp. 1–5; V. Tamburrini, La limitazione dei diritti costituzionali in tempo di pandemia: alcune osservazioni sul carattere fondamentale dell'interesse della collettività alla salute, G. Scaccia (ed.), Emergenza COVID-19 e ordinamento costituzionale, Torino 2020, p. 34.

31 See § 2.

32 In the past for Constitutional Court's interventions, S. Barbareschi, Tecniche argomentative della Corte Costituzionale e tutela dei diritti sociali condizionati. Riflessioni a partire dal diritto alla salute, 'in federalismi.it' 2018, vol. 13, p. 10.

It is now appropriate to remember how the right to health, as anticipated enshrined in Article 32 of the Italian Constitution[33], is protected both in an individual dimension, precisely as a right[34], and in a collective dimension, as a public value connected to the safeguarding of public health. In its collective dimension, health is defined as a public 'interest'[35], i.e. as a super-individual interest that unites an entire collective or society, for the protection of which all members of the community are required to adopt a certain behaviour or to avoid it.

The right to health is therefore protected from a perspective that ensures a balance between individual and collective reasons. In this context, the human being is placed at the very centre of the protected interest and not as an instrument to be placed in relation to the state, as the final subject to be protected.[36]

This is demonstrated by the fact that any citizen may be subjected to compulsory health treatment (such as, for example, the vaccine[37], which is still under discussion in Italy) except by provision of law, following a parliamentary debate, and provided that fundamental human rights are not violated and that there is a 'cost–benefit' ratio between the inoculation of the population and the associated spread of harmful events for human health.

In fact, Art. 32 of the Italian Constitution provides that 'the Republic protects health as a fundamental right of the individual and as interest of the community and guarantees free treatment for the indigent. No one may be obliged to undergo a given medical treatment except by provision of law. The law may in no case violate the limits imposed by respect for the human person.'

The right to health, as constitutionalised in Italy, actually reveals a sort of 'opposition', a perennial conflict between two different ways of conceiving the human being and his dignity.[38]

At present, for example, the introduction of compulsory vaccination to protect against COVID-19 infection is being discussed in Italy. This field is a constant battleground between scientists and politicians.

---

33 Ex multis, A. Simoncini, E. Longo, Art. 32, in Commentario alla Costituzione. Rapporti etico-sociali, (in:) R. Bifulco, A. Celotto, M. Olivetti (eds.), Commentario..., *op. cit.,* pp. 659–660.

34 G. Bianco, Persona e diritto alla salute, Padova 2018.

35 A. Pizzorusso, Interesse pubblico e interessi pubblici, 'Rivista Trimestrale diritto e procedura civile' 1972, pp. 58–87.

36 A. De Cupis, Integrità fisica, Enciclopedia Giuridica, Roma,1989, vol. 17, pp. 1–2.

37 About vaccines and obligations, see C. Magnani, I vaccini e la Corte costituzionale: la salute tra interesse della collettività e scienza nelle sentenze 268 del 2017 e 5 del 2018, in Forum di quaderni costituzionali, pp. 10–15.

38 In the Italian perspective, ex multis, F. Sacco, Note sulla dignità umana nel diritto costituzionale europeo, S. Panunzio (ed.), I diritti fondamentali e le Corti in Europa, Napoli 2005, p. 609; S. Prisco, La dignità nel dibattito biogiuridico e biopolitico. Linee ricostruttive, 'BioLaw Journal' 2019, vol. 2, pp. 61–82.

In any case, these provisions, according to which medical treatment can only be imposed by law and in no case can it 'violate the limits imposed by respect for the human person', have been further specified by constitutional jurisprudence. In fact, it has been clarified that 'Article 32 of the Constitution postulates the necessary balancing of the individual's right to health (also in its content of freedom of treatment) with the coexisting and reciprocal right of others and with the interest of the community', so that the law imposing medical treatment is not incompatible with Article 32 of the Constitution[39]. Treatment is intended not only to improve or preserve the state of health of the person subjected to it, but also to preserve the state of health of others; if it is provided that it does not adversely affect the state of health of the person who is obliged to undergo it, except only for those consequences that appear normal and, therefore, tolerable; and if, in the event of further damage, the payment of a fair indemnity in favour of the injured party is provided for, regardless of the parallel protection of compensation.

More broadly, about the provisions on the right to health, the general consideration that these fundamental rights are decisive 'for the construction of the identity of their holders', but at the same time they establish the order of a political and social community.

In this sense, it is fundamental to reflect on whether 'health reasons' can determine freedom of movement and freedom of assembly in the respective provisions that consecrate them at constitutional level. The same question would also seem to apply to other constitutional rights, the exercise of which presupposes assembly as is the case for the enjoyment of religious freedom (e.g. the profession of worship); or the right to education; or the right to work.

What actually matters, in order to ensure a minimum level of proportionality and reasonableness to be respected in the limitation of constitutional rights, is that the limitation should take place only as a last step, for an absolutely circumscribed period of time and for the achievement of an objective of common interest and only after the legislator has acknowledged that the individual citizen is absolutely unable to contribute with his own autonomous and free behaviour to the safeguarding of the collective interest.

Only in this hypothesis could the absolute ineffectiveness of health protection as a right of the individual in a community perspective give way to the use of instruments and regulatory measures that compulsorily tend to achieve the above-mentioned objective.

Definitively, what can be said is that the Italian Constitution, therefore, does not impose a 'model' but, on the one hand, seeks to ensure that each individual can develop his own capacity for self-determination even in the field of the right

39 About that, see F. Modugno, Trattamenti sanitari «non obbligatori» e Costituzione, 'Dir. e Soc.' 1982, p. 313; S. Panunzio, Trattamenti sanitari obbligatori e Costituzione, 'Dir. e Soc.' 1979, p. 875.

to health, choose treatment in the light of informed consent or even not have any treatment at all.

However, the state may intervene when the right of the individual is not capable – by itself – of ensuring the 'public interest' of the community, i.e. a safe and adequate public health situation.

The collective value of the right to health can sometimes justify compulsory health treatments such as, only in cases strictly provided for by law, vaccines. This was recently recognized by the Council of State's ruling no. 7045/2021[40], which stated that 'the selective compulsory vaccination introduced by Article 4 of d.l. no. 44 of 2021 for medical personnel and, more generally, of health interest responds to a clear purpose of protection of these personnel in the workplace and, therefore, for the benefit of the person, according to the personalist principle'[41], but also for the protection of patients and users of healthcare, public and private, according to the principle of solidarity, which animates the Constitution, and more particularly of the most fragile categories and the most vulnerable individuals (due to the existence of previous illnesses, even serious ones, such as cancer or heart disease, or advanced age), who are in need of care and assistance, often urgent, and for this reason are in frequent or continuous contact with healthcare or social-healthcare personnel in places of care and assistance. The *ratio* for this specific provision is to be found not only in the introduction to Decree Law 44/2021, which highlights 'he extraordinary need and urgency of issuing provisions to ensure homogeneous national activities aimed at containing the epidemic and reducing risks to public health, with particular reference to the most fragile categories, also in the light of the data and medical and scientific knowledge acquired to deal with the epidemic of COVID-19 and the commitments made, including at international level, in terms of prophylaxis and vaccination coverage', but also in the same text of Art. 4, when in paragraph 4 it expressly recalls the 'purpose of protecting public health and maintaining adequate conditions of safety in the provision of treatment and care services'.

The Constitutional Court too, in 2018[42], rejected an appeal by the Veneto region[43], subordinating its legitimacy to a series of requirements: circumstances such as to require a 'pact of solidarity' between citizen and state; negative consequences that are absent or normally tolerable for the obliged party; limited number of compensations for more serious cases regardless of fault; scientific reasonableness.

40 See Constitution Stato, sent. 20 October 2021, no. 7045, 'Rass. dir. Farmaceutico' 2021, p. 1400.

41 G. Zampini, L'obbligo di vaccinazione anti Sars-Cov-2 tra evidenze scientifiche e stato di diritto, 'Il Lavoro nella giurisprudenza' 2021, p. 221.

42 Italian Constitutional Court, sent. no. 5/2018.

43 See L Durst, Il modello italiano di vaccinazione obbligatoria tra giurisprudenza costituzionale e sviluppi legislativi, 'GiustAmm.it' 2019, no. 1, p. 13.

Conclusions

In the space given to me to examine the case of Italy, it has certainly not been possible to highlight all the various profiles, both positive and critical, that characterize this legal system in relation to the pandemic emergency.

The Italian legal system has overall proved to be adequate, thanks to the flexibility and plurality of legal instruments provided for in the Constitution, first and foremost the *decreto-legge*, although the balance between the powers of the state seems to be skewed in favour of the government, in responding to legislative needs for an immediate response to Covid. If, however, from a formal point of view any significant profiles of constitutional incompatibility have emerged yet, from a substantial point of view some critical profiles remain.

There is no doubt that the decision to prioritise the protection of the public interest of health over the exercise of many individual rights and freedoms (movement, association, religion, etc.) was not the result of a proper weighing up of the interests at stake, which should have taken place in parliament, but the result of an emergency situation.

Certainly, profiles of unconstitutionality may emerge if the 'state of emergency' does not come to an end within a few months. Recently, it has been prorogated until March 2022. Nevertheless, if the pandemic crisis, as it seems to be, continues to be the reality and not only a passing emergency, the Italian state should intervene only with law promulgated by the parliament, ensuring an effective and objective balancing of all interests, rights and liberties. Only in this way can the Italian democracy prevail over the pandemic and over other emergencies.

REFERENCES

Algostino A., Costituzionalismo e distopia nella pandemia di Covid-19 tra fonti dell'emergenza e (s)bilanciamento dei diritti, 'Costituzionalismo.it' 2021, vol. 1.

Ancora F., Coronavirus, spostamenti, motivazioni, autocertificazione, 'Sanità Pubblica e Privata' 2020, vol. 3.

Arcuri A., La Corte Costituzionale salva i DPCM e la gestione della pandemia. Riflessione e interrogativi a margine della sentenza no. 198/2021, in www.giustiziainsieme.it, 19 January 2021.

Autori Vari, Il Mondo dopo la fine del Mondo, Bari-Roma 2020.

Azzariti G., I limiti costituzionali della situazione d'emergenza provocati dal Covid-19, 'Questione giustizia' 27 March 2020.

Baldini V., Conflitto di competenze tra Stato e regione nella lotta alla pandemia. Un sindacato politico della Corte costituzionale? Riflessioni a margine della sent. no. 37 del 2021 della Corte costituzionale, 'dirittifondamentali.it' 2021, no. 1.

Baldini V., Emergenza sanitaria e Stato di prevenzione, 'Dirittifondamentali.it' 2020, no. 1.

Barbareschi S., Tecniche argomentative della Corte Costituzionale e tutela dei diritti sociali condizionati. Riflessioni a partire dal diritto alla salute, 'federalismi.it' 2018, vol. 13.

Bianco G., Persona e diritto alla salute, Padova 2018.

Bifulco R., Celotto A., Olivetti M. (eds.), Commentario alla Costituzione, Torino 2006.

Caggiano M., I vincoli di legittimità costituzionale, sovranazionale e internazionale quale garanzia dei diritti fondamentali degli stranieri nell'ordinamento italiano, 'Studi sull'integrazione europea' 2021.

Calamo Specchia M., Salmoni F., Lucarelli A., Sistema normativo delle fonti nel governo giuridico della pandemia. Illegittimità diffuse e strumenti di tutela, 'Rivista AIC' 2021, no. 1.

Caravita B., L'Italia ai tempi del coronavirus: rileggendo la Costituzione italiana, 'Federalismi.it' 2020, no. 6.

Cerere A.M., Ruoli e competenze dei diversi livelli istituzionali nella gestione della pandemia Covid 19 in Italia tra distonie sistemiche e carenze strutturali, 'Rivista AIC' 2021, vol. 3.

Chomsky N., Precipice, London, 2021.

Clemente C., La salute prima di tutto. Art. 32 della Costituzione italiana: testo integrale del dibattito costituente e attualità di un'analisi sociologica, Milano 2020.

Clementi F., Il lascito della gestione normativa dell'emergenza: tre riforme ormai ineludibili, 'Osservatorio AIC' 2020, no. 3.

De Cupis A., Integrità fisica, Enciclopedia Giuridica, Roma1989, vol. 17.

Di Cesare D., Virus sovrano? L'asfissia capitalistica, Torino 2020.

Durst L. Il modello italiano di vaccinazione obbligatoria tra giurisprudenza costituzionale e sviluppi legislativi, 'GiustAmm.it' 2019, no. 1.

Formisano A., Limiti e criticità dei sistemi costituzionali a fronte dell'emergenza Covid-19, 'Nomos'2020, no. 1.

Frosini T.E., La libertà costituzionale nell'emergenza costituzionale, (in:) T.E. Frosini (ed.), Teoremi e problemi di diritto costituzionale, Milano 2008.

Gatta G.L., Emergenza COVID-19 e "fase 2": misure limitative e sanzioni nel d.l. 16.5.2020, no. 33 (nuova disciplina della quarantena), www.sistemapenale.it, 18 March 2020.

Giuffré F., Calamità naturali ed emergenza nella transizione costituzionale italiana: spunti a proposito di retaggi statualistici e nuova ispirazione autonomistica, 'Diritto e società' 2001, no. 1.

Guzik-Makaruk E.M., Some remarks on the changes in the Polish Penal Code during the pandemic, 'Bialystok Legal Studies' 2021, vol. 26, no. 6.

Habermas J., Gunther K., Nessun diritto fondamentale vale senza limiti, www.giustiziainsieme.it, 30 May 2020.

Iannotti Della Valle A., Marone F., Parlamentarismo e regionalismo alla prova della pandemia: bilancio costituzionale di un'emergenza, 'Le Regioni' 2021.

Lorenz H., Turhan E., The Pandemic and Criminal Law – A Look at Theory and Practice in Germany, 'Bialystok Legal Studies' 2021, vol. 26, no. 6.

Lucarelli A., Costituzione, fonti del diritto ed emergenza sanitaria, 'Rivista AIC' 2020, no. 2.

Luciani M., Il sistema delle fonti del diritto alla prova dell'emergenza, 'Rivista AIC'2020, no. 2.

Magnani C., I vaccini e la Corte costituzionale: la salute tra interesse della collettività e scienza nelle sentenze 268 del 2017 e 5 del 2018, 'Forum di quaderni costituzionali'.

Mandato M., Sulla titolarità delle competenze in materia di emergenza sanitaria. A proposito della sentenza della Corte Costituzionale no. 37/2021, 'Rivista Quadrimestrale di diritto pubblico' 2021.

Marilotti L., Contenimento del contagio, limitazioni domiciliari e salute psicofisica nell'attività di polizia sanitaria anti-coronavirus, 'federalismi.it' 2021, vol. 1.

Mezzanotte M., Pandemia e riparto di competenze Stato-Regioni in periodi emergenziali, 'Consulta online' 2021.

Morana D., Sulla fondamentalità perduta (e forse ritrovata) del diritto e dell'interesse della collettività alla salute: metamorfosi di una garanzia costituzionale, dal caso ILVA ai tempi della pandemia, 'Consulta online', 30 April 2020.

Modugno F., Trattamenti sanitari «non obbligatori» e Costituzione, 'Dir. e Soc.' 1982.

Ormanni A., Necessità (stato di), 'Enc. Dir.', vol. XXVII, Milano 1995.

Panunzio S., Trattamenti sanitari obbligatori e Costituzione, 'Dir. e Soc.' 1979.

Prisco S., La dignità nel dibattito biogiuridico e biopolitico. Linee ricostruttive, 'BioLaw Journal' 2019, vol. 2.

Pizzorusso A., Interesse pubblico e interessi pubblici, 'Rivista Trimestrale diritto e procedura civile' 1972.

Raganelli B., Stato di emergenza e tutela dei diritti e delle libertà fondamentali, 'Il diritto dell'economia' 2020, vol. 3.

Razzano G., L'amministrazione dell'emergenza, profili costituzionali, Bari 2010.

Rimoli F., Emergenza e adattamento sistemico. Sui limiti di resilienza degli ordinamenti democratici. Parte Prima, 'Lo Stato, Rivista Semestrale di Scienza costituzionale e teoria del diritto' 2020, no. 14.

Sacco F., Note sulla dignità umana nel diritto costituzionale europeo, (in:) S. Panunzio (ed.), I diritti fondamentali e le Corti in Europa, Napoli 2005.

Scalia F., Principio di precauzione e ragionevole bilanciamento dei diritti nello stato di emergenza, Federalismi.it, 18 November 2020.

Silvestri G., Covid-19 e Costituzione, in UniCost.eu.

Simoncini A., LONGO E., Art. 32, in Commentario alla Costituzione. Rapporti etico-sociali, (in:) R. Bifulco, A. Celotto, M.Olivetti (eds.), Torino 2006.

Tamburrini V., La limitazione dei diritti costituzionali in tempo di pandemia: alcune osservazioni sul carattere fondamentale dell'interesse della collettività alla salute, G. Scaccia (ed.), Emergenza Covid-19 e ordinamento costituzionale, Torino 2020.

Tripodina C., La Costituzione al tempo del Coronavirus, 'Costituzionalismo.it' 2020, vol. 1.

Venanzoni A., L'innominabile attuale. L'emergenza Covid-19 tra diritti fondamentali e stato di eccezione, 'Forum di Quaderni Costituzionali', 26 March 2020.

Wieczorek M., Some aspects of the protective function of labour law in the COVID-19 era, 'Studia Iuridica Lublinensia' 2021, vol. 30, no. 1.

Zampini G., L'obbligo di vaccinazione anti Sars-Cov-2 tra evidenze scientifiche e stato di diritto. 'Il Lavoro nella giurisprudenza' 2021.

Bialystok Legal Studies
Białostockie Studia Prawnicze
2022 vol. 27 nr 2

sciendo

DOI: 10.15290/bsp.2022.27.02.08

Received: 15.01.2022
Accepted: 12.04.2022

Aldona Domańska
University of Lodz, Poland
adomanska@wpia.uni.lodz.pl
ORCID ID: https://orcid.org/0000–0002–9343–6932

Constitutionality of Restrictions on Freedom of Assembly during the COVID-19 Pandemic in Poland

Abstract: Since the beginning of the pandemic, the Polish government has repeatedly imposed restrictions or a total ban on the freedom of assembly. A total of five different restrictions to this right were announced during this period, from a total ban on organizing and participating in assemblies to allowing assemblies in limited groups (150, 50, 5 and 2 persons). The restrictions were introduced each time by an ordinance, a legal act of a lower rank than the law. The government, wrongly, justified the authority to introduce such restrictions with the provisions of the act on preventing and combating infections and infectious diseases among people. In this paper, the author demonstrates that the ban on the organization of and participation in assemblies was introduced without a proper legal basis – by means of an ordinance instead of a statute – and contrary to the provisions of Article 57 and Article 31(3) of the Polish Constitution. The author also points out that as a result of the defective regulation, citizens have the right to refuse to accept criminal fines imposed by the police, pursuant to Article 54 of the Petty Offence Code, during assemblies. In the author's opinion, no circumstances, not even extraordinary ones, can justify the failure of authorities to observe the provisions of the Polish Constitution. Such a failure leads to a violation of the principle of individual trust in the state, legal certainty and security, and consequently the clause of a democratic legal state.
Keywords: ban on assembly, freedom of assembly, ordinance, pandemic, violation of the Constitution

Introduction

The freedom of assembly results from the natural human need to satisfy the social instinct to collectively express opinions – to support or oppose the decisions of

authorities.[1] Despite the distant history of the formation of this freedom, the first act which established it was the Pennsylvania Constitution of 1776.[2] On the European continent it was first guaranteed in the French Constitution of 3 September 1791, the first title of which regulated the freedom of citizens to assemble peacefully and without arms, respecting the laws of order[3]. Representatives of doctrine indicate that this regulation includes all the essential elements of the freedom of assembly[4].

Today in a pluralistic and democratic state, the freedom of assembly plays a very important social function. Above all, the participants of an assembly have the opportunity to express their opinions or to propose new solutions.[5] Thanks to this public discussion, the freedom of assembly performs a communicative function. After all, state policy is influenced through the presentation of opinions, assessments, demands or expressions of dissatisfaction.[6]

Freedom of assembly is guaranteed *expressis verbis* in Article 57 of the Polish Constitution[7], whereas detailed regulations can be found in the Law on Assemblies.[8] It is also guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms.[9] In the opinion of the Constitutional Tribunal. Freedom of assembly is a condition and necessary component of democracy, as well as a prerequisite for the exercise of other freedoms and human rights related to the sphere of public life (…). Assemblies are an essential part of democratic public opinion, providing an opportunity to influence the political process, enabling criticism and protest"[10] However, this does not mean that the freedom of assembly is absolute. It may be subject to restrictions, but only in accordance with the relevant provisions of the

1 A. Ławniczak, Wolność zgromadzeń, (in:) M. Jabłoński (ed.) Realizacja i ochrona konstytucyjnych wolności praw jednostki w polskim porządku prawnym, Wrocław 2014, p. 298.

2 B.P. Poore (ed.), The Federal and States Constitutions, Colonial Charters, and Other Organic Laws of the United States, Washington 1877, vol. 2, pp. 1544–1555; W. P. Adams, The First American Constitutions, Chapel Hill 1980, pp. 179–180 and 262–266.

3 French Constitution of 1791, https://www.sbc.org.pl/dlibra/publication/323839/edition/305978/content (accessed 25.08.2021).

4 M. Gołda-Sokolewicz, Zgromadzenia publiczne w polskim systemie prawnym i ich znaczenie dla kultury i sztuki, 'Środkowoeuropejskie Studia Polityczne' 2014, no. 2, p. 151.

5 W. Sokolewicz, K. Wojtyczek, komentarz do art. 57 (in:) L. Garlicki, M. Zubik (eds.) Konstytucja Rzeczpospolitej Polskiej, Komentarz. Tom II, Warsaw 2016.

6 See in more detail the arguments contained in the judgment of the Constitutional Tribunal of 10 July 2008 in case ref. P 15/08.

7 Constitution of the Republic of Poland of 2 April 1997 passed by the National Assembly on 2 April 1997, approved by the Nation in a constitutional referendum on 25 May 1997, signed by the President of the Republic of Poland on 16 July 1997, Journal of Laws of 1997, no. 78, item 483.

8 Act of 24 July 2015 – Law on Assemblies, Journal of Laws of 2019, item 631.

9 Article 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950, Journal of Laws of 1993 no. 61, item 284.

10 Judgment of the Constitutional Tribunal of 18 January 2006, ref. K 21/05, see also the judgment of the Constitutional Tribunal of 28 June 2000, ref. no. K 34/99.

1997 Constitution. The restrictions must be adequate, necessary and proportionate. The most severe restrictions can only be imposed in certain states of emergency.

Detailed regulations governing the exercise of this freedom can be found in the Law on Assemblies.[11] The legislator has allowed for three types of assemblies:

1) ordinary, requiring notification no later than six days before the planned date of the assembly (two days in the simplified procedure – if the assembly will not cause traffic obstruction),
2) cyclic assemblies, requiring the consent of the provincial governor, and
3) spontaneous assemblies, not requiring consent or notification, held in relation to a sudden event associated with the public sphere.

Moreover, the legislator indicated that an assembly may be dissolved if its course poses a threat to human life or health or property of significant size, as well as if it violates the provisions of the Law on Assemblies or criminal law. It is also possible to dissolve an assembly due to a serious threat to public safety or order or to traffic disruption on public roads in the case of spontaneous assemblies, or due to disturbances in the course of ordinary and cyclical assemblies.

The aim of this study is to analyse the acts implementing in the Polish legal system the prohibition or restriction of the freedom of assembly during a special state which does not have the nature of a constitutional state of emergency. In order to achieve this aim, two basic hypotheses were set. The first comes down to the statement that the permissible limits of freedom of assembly are indicated directly in the Constitution of the Republic of Poland and the pandemic does not constitute justification for violating these limits. The second hypothesis assumes that the restrictions imposed in Poland in relation to the COVID-19 pandemic were unconstitutional. In order to verify the hypotheses, primarily the dogmatic method was used, which includes the exegesis of standards and the analysis of judicial decisions.

1. Permissible Limits for Restricting the Constitutional Freedom of Assembly

The Polish Constitution of 1997 in Article 57 guarantees the freedom to organize peaceful assemblies and participate in them. The principles of organization, conduct and dissolution of assemblies are regulated in detail by the Law on Assemblies.[12] It follows from the provision of the basic law that in addition to previously announced assemblies, citizens also have the right to spontaneous assembly in response to sudden events in the public sphere. As it follows from the provision wording, the sub-

11 Act of 24 July 2015 – Law on Assemblies, Journal of Laws of 2019, item 631.
12 Act of 24 July 2015 – Law on Assemblies, Journal of Laws of 2019, item 631.

jective scope of this freedom includes both Polish citizens as well as foreigners and stateless persons, and also legal persons[13] and other organizational units.[14] The sine qua non condition for including an assembly in the protection of the Constitution of the Republic of Poland is its peaceful character, which should be assessed as a whole, and not on the basis of individual incidents.[15] An assembly where participants incite the use of violence, insult and slander other persons or destroy private or public property does not meet the peaceful character.[16] It should be noted that it is the duty of the state to ensure the security of an assembly if there is a risk of its disruption.[17] 'It is the duty of the public authorities not only to remove obstacles to the exercise of the sphere of freedom of assembly and to refrain from unjustified interference with this sphere, but also to take positive steps to make this right a reality.[18]'

Freedom of assembly, like most other rights and freedoms, is not absolute. When considering the issue of permissible limits of its restriction, it should be emphasized that Article 57 does not contain a catalogue of such premises. There is no content suggesting any limitations that may be imposed on the organizers of an event, if the violations cited above occur during the above-mentioned activities. It should be presumed that the aim of the legislator was to regulate the freedom of assembly in such a way that the authorities in the Republic of Poland would not constrain the actions of Polish citizens, stateless persons or foreigners aimed at raising awareness of a topic aiming at familiarizing the public with slogans which are considered by the organizers of a social event as important content that should become widely known.[19] This means that the freedom of assembly is subject to limitations if the premises specified in Article 31(3) of the Constitution are met, according to which 'limitations on the exercise of constitutional freedoms and rights may be established only by statute and only when they are necessary in a democratic state for its security or public order, or for the environment, health and protection of public morals public morals protection, or for the freedoms and rights of others. Such limitations may not impair the essence of freedoms and rights.' This provision is the starting point for considering the legitimacy and legality of the restrictions on the freedom of assembly introduced during the COVID-19 pandemic. It should be emphasized that the provision

13 A. Wróbel, Wolność zgromadzania się (in:) M. Chmaj, W. Orłowski, W. Skrzydło, Z. Witkowski, A. Wróbel, Wolności i prawa polityczne, Kraków 2002, p. 36.

14 J. Sułkowski, Art. 57, (in:) L. Bosek, M. Safjan, Konstytucja RP. Tom I. Komentarz do art. 1–86, Legalis 2016.

15 See justification of the judgment of the Constitutional Tribunal in case ref. no. Kp 1/04.

16 M. Florczak-Wątor, Wolność zgromadzeń (in:) P. Tuleja (ed.), Konstytucja Rzeczypospolitej Polskiej, Komentarz 2019.

17 W. Sokolewicz, K. Wojtyczek, *ibidem*.

18 Judgment of the Constitutional Tribunal of 28 June 2000, ref. no. K 34/99.

19 A. Ławniczak, Wolność zgromadzeń, p. 7; http://www.repozytorium.uni.wroc.pl/Content/52929/18_Artur_Lawniczak.pdf (accessed 25.07.2021).

is unique in its regulation, as when interpreting it, the principles of exception interpretation must be applied – first and foremost, the prohibition of an expansive interpretation of its provisions.[20] In addition, it follows from the constitutional principle of proportionality indicated here that the restriction of individual rights and freedoms must be equivalent to the purpose pursued by the regulation. The compatibility of a limitation with the Polish Constitution depends on the answers to three questions:

1. Does the introduced limitation serve a specific purpose? (usefulness)
2. Is it necessary for its achievement? (necessity)
3. Does it not constitute an excessive cost of achieving the stated goal – is the good sacrificed in proper proportion to the effect achieved? (proportionality).[21]

Therefore, the freedom of assembly regulated in Article 57 of the Constitution must be interpreted in conjunction with Article 31(3) of the Constitution, i.e. the principle of proportionality of limitations. This freedom may thus be restricted only in absolutely exceptional cases and only to the absolutely necessary extent. Only in one place does the Constitution explicitly mention a possible limitation of the mentioned freedom – in the chapter concerning states of emergency. However, as none of the states of emergency have to date been introduced during the COVID-19 pandemic, this is not the subject of the legal analysis.

2. Content and Legal basis of Restrictions Bans on Assembly during the COVID-19 Pandemic

Although the provisions of the Constitution of the Republic of Poland regarding permissible restrictions on human freedom are unambiguous, in the case of freedom of assembly during the COVID-19 pandemic, the restrictions were primarily introduced through regulations issued initially by the Minister of Health and then by the Council of Ministers. On the basis of Articles 46–46b of the act of 5 December 2008 on preventing and combating infections and infectious diseases among people,[22] a state of epidemic emergency was declared,[23] and then a state of epidemic.[24] The

20 M. Wyrzykowski, Granice praw i wolności – granice władzy, (in:) Obywatel – jego wolności i prawa. Warsaw 1998, pp. 45–59.

21 L. Garlicki, Orzecznictwo Trybunału Konstytucyjnego w 2000 r., 'Przegląd Sejmowy' 2001, no. 9, p. 97.

22 Ordinance of the Minister of Health of 13 March 2020 on the declaration of an epidemic emergency on the territory of the Republic of Poland (Journal of Laws 2020, item 433).

23 Journal of Laws of 2008 no. 234, item 1,570 as amended.

24 Ordinance of the Minister of Health of 20 March 2020 on the declaration of an epidemic state on the territory of the Republic of Poland (Journal of Laws 2020, item 491).

government considered this state, which does not have the nature of a constitutional state of emergency, as a premise authorizing the introduction of further limitations on human rights and freedoms, including the freedom of assembly. This freedom was prohibited or restricted on the basis of subsequent acts, which were enacted as ordinances.

Pursuant to the ordinance of the Minister of Health of 13 March 2020 on the declaration of an epidemic emergency on the territory of the Republic of Poland,[25] the organization of assemblies within the meaning of Article 3 of the Act of 24 July 2015 – Law on Assemblies[26] – was prohibited from 14 March 2020 until further notice. However, the ban did not apply when the number of participants in the assembly was no more than 50 persons, including the organizer and persons acting on his behalf.[27] The above ban was maintained in the ordinance of 20 March 2020[28] until the amendment introduced by the ordinance amending the ordinance on declaring a state of epidemic in the area of the Republic of Poland[29] and consisting of a total ban on holding assemblies within the meaning of Article 3 of the Law on Assemblies. This total ban was maintained in subsequent ordinances on the establishment of certain restrictions, orders and prohibitions in relation to the occurrence of an epidemic.[30] The change took place on 30 May 2020, when it was prohibited to organize assemblies within the meaning of Article 3 of the Law on Assemblies, with the exception of assemblies organized on the basis of notice referred to in Article 7(1), Article 22(1) of the Law on Assemblies or the decision referred to in Article 26b(1) of the Law on Assemblies, with the maximum number of participants not exceeding 150 persons.[31] In October 2020, after the amendments,[32] this maximum number of participants was drastically reduced and could not exceed five persons. This rule was maintained in subsequent ordinances banning assemblies.[33]

The year 2021 did not bring the abolition of restrictions in this regard. The ordinance of the Council of Ministers of 19 March 2021 on establishing certain restrictions, orders and prohibitions in relation to the outbreak of an epidemic until 3 May

25 § 9(1) of the Ordinance of 13 March 2020 on the declaration on the territory of the Republic of Poland of a state of epidemic emergency, Journal of Laws of 2020, item 433.

26 Act of 24 July 2015 – Law on Assemblies, Journal of Laws of 2019, item 631.

27 § 9(2) of the Ordinance of 13 March 2020, item 433.

28 Ordinance of the Minister of Health of 20 March 2020 on revoking the state of epidemic emergency in the territory of the Republic of Poland, Journal of Laws of 2020, item 490.

29 § 1(6) of the Ordinance of 24 March 2020.

30 § 14(1)(1) of the Ordinances of 31 March 2020, 10 April 2020, 19 April 2020, 2 May 2020; § 13(1)(1) of the Ordinance of 16 May 2020.

31 § 15(1) of the Ordinance of 29 May 2020; § 16(1) of the Ordinance of 19 June 2020; § 25(1) of the Ordinance of 7 August 2020; § 28(1)(1) of the Ordinance of 9 October 2020.

32 § 1(17) of the Ordinance of 23 October 2020.

33 § 26(1)(1) of the Ordinances of 26 November 2020 and 1 December 2020; § 28(1)(1) of the Ordinance of 21 December 2020.

2021 prohibited the organization of or participation in assemblies, with the exception of assemblies organized on the basis of notice referred to in Article 7(1), Article 22(1) or the decision referred to in Article 26b(1) of that act, provided that the maximum number of participants did not exceed five and the distance between assemblies could not be less than 100 meters. Thus, the ban not only on organizing assemblies but also on participating in assemblies was maintained. In addition, the organization of or participation in 'events, meetings and gatherings of any kind' was prohibited. From 6 May 2021[34] to 5 June 2021, it continued to be prohibited to organize or participate in assemblies within the meaning of Article 3 of the Law on Assemblies, with the exception of assemblies organized on the basis of notice referred to in Article 7(1), Article 22(1) or the decision referred to in Article 26b(1) of that act, whereby the maximum number of participants could not exceed five and the distance between assemblies could not be less than 100 m. At the same time, from 15 May 2021 to 5 June 2021, assemblies organized as part of church or other religious associations' activities could take place, provided that the assembly took place in a church or other building of religious worship, with a distance between people of not less than 1.5 m, no more participants than one person per 15 sq m of space (excluding persons performing religious worship or persons conducting funerals, or persons employed by a funeral establishment or funeral home in the case of a funeral) and that participants comply with the order to cover the mouth and nose referred to in § 25(1), with the exception of persons engaged in religious worship. In case such assemblies were held outdoors, participants were to remain at a distance of not less than 1.5 m from each other. On 11 June 2021, pursuant to the regulation of the Council of Ministers[35] amending the regulation on the establishment of certain restrictions, orders and prohibitions in relation to an outbreak of epidemic, § 26 indicated that from 26 June 2021 until 31 August 2021 the organization of or participation in gatherings within the meaning of Article 3 of the Law on Assemblies was possible subject to the condition that the maximum number of participants should not exceed 150 and the distance between the assemblies should not be less than 100 m. Furthermore, these restrictions did not apply to the National Fan Zone event held on 19 June 2021 in Warsaw at the PGE National stadium, where half the seats were made available to the public. Until 31 August 2021 the participants of assemblies referred to in Sections 1a and 1b were required to keep a distance of at least 1.5 m between each other and to cover their mouth and nose, unless the assembly was held in the open air. The cited regulation also established that from 13 June 2021 to 25 June 2021, assemblies organized as part of church or other religious associations' activities could take place under the same conditions as previously. From 26 June 2021 to 31 August 2021, the limit for assem-

34 Regulation of the Council of Ministers of 6 May 2021 on the establishment of certain restrictions, orders and prohibitions in relation to an epidemic state, item 861.

35 Ordinance of the Council of Ministers of 11 June 2021 item 1,054.

blies held as part of church or other religious associations' activities was increased to 75% occupancy of a church or other religious building (excluding persons performing religious worship or persons conducting funerals, or persons employed by a funeral establishment or funeral home in the case of a funeral), and with the order to cover the mouth and nose.

3. Practice – Protests Despite Assembly Bans

As life has shown, the imposed ban on assemblies had little effect did not have any effect. Citizens participated in spontaneous assemblies. Examples include: demonstrations of entrepreneurs[36], farmers[37], an attempt to organize an annual Independence March, numerous protests organized by women or representatives of LGBT+ communities, or protests that have been taking place since 22 October 2020 after the Constitutional Tribunal ruled that the premise allowing abortion on the grounds of severe and irreversible fetal disability or incurable life-threatening disease was unconstitutional.[38]

In the first of these cases, the applicant notified the Mayor of Warsaw of its intention to hold a public assembly on 16 May 2020. The mayor replied that the assembly could not be registered due to the ban on assemblies. The applicant appealed to the Regional Court in Warsaw. He pointed out that the Law on Assemblies does not provide for the possibility of refusing to register an assembly. In dismissing the appeal,[39] the court referred to the aforementioned regulation.[40] In the court's opinion, the mayor was therefore entitled not to register the assembly and not to apply the Law on Assemblies on the grounds that the provisions of the ordinance exclude the application of the Law on Assemblies. The prejudging factor for the court was the epidemic state. Hence, it held that the office was not obliged to apply, under the present special circumstances, the standard procedure in proceedings concerning assemblies regulated by the Act. Furthermore, the court held that there was a prerequisite for

36 Dissatisfied with the aid offered by the government in relation to the pandemic, demonstrations began in Warsaw already on 7 May 2020. One of the initiators of the protests was Paweł Tanajno, who was also a presidential candidate. Police intervened during the protests.

37 The protests took various forms; farmers organized for example road blockades with tractors (21 October) and a car protest in Warsaw (28 October). The demonstrations, organized by Agrounia, concerned opposition to the so-called Animal Friday, i.e. the Law and Justice Party's bill which would prohibit, among others, raising animals for fur and ritual slaughter for export. Ultimately, the Sejm did not pass the bill.

38 The Constitutional Tribunal announced the ruling on 22 October 2020. The decision triggered massive protests across the country. See https://wiadomosci.onet.pl/kraj/wyrok-tk-ws-aborcji-kolejne-protesty-w-calej-polsce-zdjecia/9dlb8yw (accessed 10.02.2022).

39 Decision of the District Court in Warsaw of 14 May 2020, XXV Ns 45/20.

40 Ordinance of the Council of Ministers of 2 May 2020 on the establishment of certain restrictions, orders and prohibitions in relation to an epidemic state.

prohibiting an assembly due to a threat to human life or health as set forth in Article 14(2) of the Law on Assemblies. He referred to the obligation under Article 68 of the Polish Constitution to combat epidemic diseases. The applicant filed a complaint with the Court of Appeal in Warsaw. The proceedings were joined by the Ombudsman,[41] who requested that the contested decision be annulled in its entirety and alleged that it violated

- Article 7(3) of the Act of 24 July 2015 of the Law on Assemblies – by the failure to immediately make available information about the place and date of the organized assembly on the subject page in the Public Information Bulletin;
- Article 14 of the Law on Assemblies – by the failure to issue a decision to ban an assembly in a situation where the authority considered that the premises for banning a registered assembly existed;
- Article 57 in relation to Article 31(3) of the Constitution.

The Court of Appeal, while considering the appeal on 15 May 2020, pointed out that failure to register an assembly does not mean its prohibition. Such behaviour of the city hall can be considered in terms of inaction – as it should have either banned the assembly or entered it in the register. Only the prohibition of assembly may be reviewed by the court. Given the absence of such a decision, the court dismissed the applicant's appeal. At the same time, the court agreed with both the appellant and the Ombudsman that the ban on assembly imposed by the ordinance of the Council of Ministers raises serious constitutional questions, especially in the context of permissible restrictions of subjective rights and the principle of proportionality (Article 31(3) of the Constitution).

On 6 June 2020, the first manifestation of the anti-vaccinationists and the so-called corona sceptics, i.e. people who do not believe in the existence of the COVID-19 virus, was held in Warsaw. It was registered and included within the limit allowed by the regulation (150 people). Another large demonstration of this group, held on 24 October, exceeded the regulation limit and ended with the detention of about 120 people.

In August 2020, protests in defence of LGBT+ rights took place in many cities in Poland. During the protests, the police invoked the ordinance of 7 August, which establishes a ban on spontaneous assembly, and on the basis of it called on people to disperse if the protest was not previously registered.

Numerous demonstrations took place in over 500 Polish cities as part of the All-Poland Women's Strike, the participants of which demanded liberalization of

41 https://bip.brpo.gov.pl/pl/content/koronawirus-rpo-do-wsa-calkowity-zakaz-zgromadzen-niekonstytucyjny (accessed 25.08.2021).

the abortion law.[42] Police questioned and arrested participants in the protests, citing the provisions of the ordinances (initially those of 9 October, then the stricter ones of 26 November). The annual Independence March was also banned under the so-called Covid ordinance.

As practice showed, these assemblies were, as a rule, spontaneous and often quite numerous. Their number exceeded the limit indicated in subsequent ordinances.[43] The protests resulted in a response from the police, who extensively questioned and detained people participating in the assemblies.[44] The media frequently reported on improper behaviour of the police in relation to the detained participants of the assemblies. The National Mechanism for the Prevention of Torture has repeatedly drawn attention to this in its reports.[45]

4. Constitutionality of the Implemented Restrictions/Prohibitions

Article 57 of the Constitution, which stipulates the freedom of assembly, in the second sentence states that its limitation may be specified by statute, thus reiterating the general principle expressed in Article 31(3) of the Constitution. Therefore, it is inadmissible to establish any limitation without a statutory basis. However, the Constitutional Tribunal has indicated that the constitutional 'principle of the exclusive nature of statutes in the sphere of human rights does not exclude the transfer of certain matters related to the realization of constitutional freedoms and rights to be regulated by way of ordinances.'[46] It should be stressed that '(…) it is inadmissible (…) to adopt blanket regulations in the law, leaving the executive authorities or local government bodies the freedom to regulate the final shape of these limitations, and in particular to determine the scope of these limitations,'[47] which is contained in Article 46(4)(4) of the act of 5 December 2008 on preventing and combating infections and infectious diseases among people.

42 On 22 October 2020, the Constitutional Court announced its verdict declaring the premise of abortion 'due to severe and irreversible fetal impairment or incurable life-threatening disease' to be unconstitutional. The decision triggered massive protests across the country.

43 See for example On Warsaw! One hundred thousand people protested in the capital, https://oko.press/na-warszawe-100-tysiecy-osob-protestowalow-stolicy-zdjecia (accessed 10.02.2022).

44 On 28 November 2020, 900 people were questioned at one of the protests. See for example A. Karwowska, Strajk kobiet i prof. Płatek radzą obywatelom. Co zrobić, gdy policja ogranicza nasze prawa, Gazeta Wyborcza, https://wyborcza.pl/7,162657,26566398,strajk-kobiet-radzi-obywatelom-co-zrobic-gdy-policja-ogranicza.html (accessed 09.02.2022).

45 See https://bip.brpo.gov.pl/pl/content/oswiadczenie-kmpt-po-uniewinnieniu-katarzyny-augustynek and https://bip.brpo.gov.pl/pl/content/Policja-zatrzymania-demonstracje-strajk-kobiet-raport-KMPT (accessed 10.02.2022).

46 Judgment of the Constitutional Tribunal of 8 July 2003, ref. no. P 10/02

47 Judgment of the Constitutional Tribunal of 12 January 2000, ref. no. P 11/98

During the period when the ban on assembly was in force, several judgments were issued in which the courts recognized the unconstitutionality of the above restrictions on freedom of assembly. In the ruling of the District Court for Warsaw-Śródmieście, it reads as follows: 'The failure to implement a state of natural disaster, which corresponds to the current situation related to the coronavirus, means that the bans expressed in the content of the (…) ordinance should be deemed unconstitutional, and therefore without legal basis.'[48] However, it should be emphasized that even the introduction of a state of natural disaster would not authorize such actions by the authorities, because the Constitution does not indicate the freedom of assembly among those that may be restricted after the introduction of martial law or a state of emergency.[49] Also the Court of Appeal in Warsaw indicated that 'the above legal state raises significant doubts from the point of view of the constitutional right of citizens to assemble, arising from Article 57 of the Constitution of the Republic of Poland, particularly in the context of constitutionally permissible limitations of subjective rights and the principle of proportionality contained in Article 31(3) of the Constitution of the Republic of Poland'[50] The jurisprudence also states that even if it was possible to limit the freedom of assembly through ordinance, the ordinances in force since March 2020 did not prohibit participation in assemblies, but only their organization.[51] As practice has shown, participants of small assemblies, where it was possible to maintain a sanitary regime in the form of prescribed distances between participants, were also exposed to problems.

In the decision of the District Court in Rzeszów, II W 539/20, it was stated that the ban on organization of assemblies under the ordinance of the Council of Ministers violated the principle of proportionality set out in Article 31(3) of the Constitution. The ordinance unconditionally banned all assembly without taking into account the degree of threat of the SARS-CoV–2 virus and the impact on such a possibility of other restrictions, bans and orders established at the same time. Therefore, the prohibition on exercising one of the fundamental rights set forth in the Constitution was established without considering whether other simultaneously applied measures are not sufficient to achieve the intended purpose in terms of public health protection.

In the decision of the District Court for Łódź-Śródmieście in case no. IV W 455/20, it was emphasized that since the assembled people were standing at a distance from each other and were wearing face masks, there was no social harmfulness of the act. The defendants did not pose a threat and their actions, in this particular case, could not result in the spread of an epidemic, i.e. they did not in any way interfere with the purpose of the prohibition.

48 Judgment of the District Court for Warsaw-Śródmieście of 16 October 2020, ref. no. V W 2757/20.
49 Article 233 of the Constitution.
50 Order of the Court of Appeal in Warsaw of 15 May 2020, ref. no. VI ACz 339/20.
51 Judgment of the District Court for Warsaw-Śródmieście in Warsaw, ref. no. V W 1083/20.

A very important issue was pointed out by the District Court for Warsaw-Śródmieście, V W 2519/20. In its opinion, the prohibition set out in the ordinance concerns only the organization of assemblies. It does not ban participation in any assembly. Thus, the regulations are addressed to public authorities and not to citizens participating in assemblies.

Even if we accept the assumption that due to the ongoing epidemic state and the need to protect public health it was permissible to restrict many rights and freedoms, the introduction of a total ban on assembly on the basis of the ordinance of the Council of Ministers raises justified doubts. The assessment of regulations introduced by the ordinance leads to the conclusion that the essence of constitutional freedom of assembly (Article 57 of the Constitution) has been infringed, which in no way satisfies the proportionality test, and therefore is in contradiction with Article 31(3) of the Constitution. Pursuant to Article 31(3) of the Constitution, the government should at most introduce certain restrictions, e.g. concerning the distance between demonstrators or the obligation to cover their mouth and nose, and not prohibit assemblies in general.

Conclusion

The above analysis allows to verify the theses made in the introduction, that the permissible limits of freedom of assembly are indicated directly in the Constitution of the Republic of Poland, and the pandemic does not constitute justification for violating these limits and that the restrictions imposed in Poland in relation to the COVID-19 pandemic were unconstitutional. Since the beginning of the pandemic, the Polish government has repeatedly imposed restrictions or bans on the freedom of assembly. A total of five different restrictions to this right were announced during this period, from a total ban on organizing and participating in assemblies to allowing assemblies in limited groups (150, 50, 5 and 2 persons). The restrictions were introduced each time by an ordinance, a legal act of a lower rank than the law. The government, wrongly, justified the authority to impose such restrictions with the provisions of the law on preventing and combating infections and infectious diseases among people (Article 4(4)). According to experts from the Helsinki Foundation for Human Rights (HFHR), the organization of and participation in assemblies remain legal, despite the restrictions imposed by the authorities.[52] A breakthrough, hopefully, will be the decision of the Supreme Court of 1 July 2021, in which it found that the ban on the organization of and participation in assemblies was introduced without due legal basis – by way of an ordinance – instead of an act of law, and contrary to the provi-

52 https://www.hfhr.pl/wolnosc-zgromadzen/ (accessed 26.08.2021).

sions of Article 57 and Article 31(3) of the Constitution of the Republic of Poland.[53] It also emphasized that the provision prohibiting the organization of assemblies 'has been issued in excess of the statutory delegation'. In view of the above, it is necessary to agree with the opinion expressed by the HFHR experts that citizens have the right to refuse to accept criminal fines imposed by the police, pursuant to Article 54 of the Petty Offence Code, during assemblies. Everyone also has the right to defend themselves in court and to appeal against administrative fines imposed by the State Sanitary Inspectorate (e.g. on protesters who did not keep the required distance). It should be pointed out that no circumstances, not even extraordinary ones, can justify the failure of authorities to observe the provisions of the Constitution of the Republic of Poland. This leads to a violation of the principle of individual trust in the state, legal certainty and security, and consequently the clause of a democratic state of law.

REFERENCES

Act of 5 December 2008 on preventing and combating infections and infectious diseases among people, consolidated text in Journal of Laws of 2020.0.1845.

Act of 24 July 2015 – Law on assemblies, Journal of Laws of 2019, item 631.

Adams W.P., The First American Constitutions, Chapel Hill 1980.

Constitution of the Republic of Poland of 2 April 1997 passed by the National Assembly on 2 April 1997, approved by the Nation in a constitutional referendum on 25 May 1997, signed by the President of the Republic of Poland on 16 July 1997, Journal of Laws of 1997, no. 78, item 483.

District Court in Rzeszów, ref. no. II W 539/20.

District Court for Łódź-Śródmieście, ref. no. IV W 455/20.

District Court for Warsaw-Śródmieście, file ref. no. V W 2519/20.

European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950, Journal of Laws of 1993 no. 61, item 284.

Florczak-Wątor M., Wolność zgromadzeń (in:) P. Tuleja (ed.), Konstytucja Rzeczypospolitej Polskiej, Komentarz 2019.

French Constitution of 1791, https://www.sbc.org.pl/dlibra/publication/323839/edition/305978/content (accessed 25.08.2021).

Garlicki L., Orzecznictwo Trybunału Konstytucyjnego w 2000 r., Przegląd Sejmowy 2001, no. 9.

Gołda-Sokolewicz M., Zgromadzenia publiczne w polskim systemie prawnym i ich znaczenie dla kultury i sztuki (in:) Środkowoeuropejskie Studia Polityczne, 2014, no 2.

https://bip.brpo.gov.pl/pl/content/koronawirus-rpo-do-wsa-calkowity-zakaz-zgromadzen-niekonstytucyjny.

53 Judgment of the Supreme Court of 1 July 2021 Supreme Court in the Criminal Chamber (file ref. no. IV KK 238/21).

https://www.hfhr.pl/wolnosc-zgromadzen/.

https://wyborcza.pl/7,162657,26566398,strajk-kobiet-radzi-obywatelom-co-zrobic-gdy-policja-ogranicza.html.

https://wiadomosci.onet.pl/kraj/wyrok-tk-ws-aborcji-kolejne-protesty-w-calej-polsce-zdjecia/9dlb8yw.

https://bip.brpo.gov.pl/pl/content/oswiadczenie-kmpt-po-uniewinnieniu-katarzyny-augustynek.

https://bip.brpo.gov.pl/pl/content/Policja-zatrzymania-demonstracje-strajk-kobiet-raport-KMPT.

https://oko.press/na-warszawe-100-tysiecy-osob-protestowalow-stolicy-zdjecia.

Judgment of the Constitutional Tribunal of 12 January 2000, ref. no. P 11/98.

Judgment of the Constitutional Tribunal of 28 June 2000, ref. no. K 34/99.

Judgment of the Constitutional Tribunal of 8 July 2003, ref. no. P 10/02.

Judgment of the Constitutional Tribunal of 10 November 2004, ref. no. Kp 1/04.

Judgment of the Constitutional Tribunal of 18 January 2006, ref. K 21/05.

Judgment of the Constitutional Tribunal of 10 July 2008 in case ref. P 15/08.

Judgment of the Regional Court for Warsaw-Śródmieście in Warsaw of 16 October 2020, ref. no. V W 2757/20.

Judgment of the Regional Court for Warsaw-Śródmieście in Warsaw, ref. no. V W 1083/20.

Judgment of the Supreme Court of 1 July 2021, Supreme Court in the Criminal Chamber, ref. no. IV KK 238/21.

Ławniczak A., Wolność zgromadzeń, p. 7; http://www.repozytorium.uni.wroc.pl/Content/52929/18_Artur_Lawniczak.pdf.

Ławniczak A., Wolność zgromadzeń, (in:) M. Jabłoński (ed.) Realizacja i ochrona konstytucyjnych wolności praw jednostki w polskim porządku prawnym, Wrocław 2014.

Order of the Regional Court in Warsaw of 14 May 2020, ref. no. XXV Ns 45/20.

Order of the Court of Appeal in Warsaw of 15 May 2020, ref. no. VI ACz 339/20.

Ordinance of 13 March 2020 on the declaration on the territory of the Republic of Poland of a state of epidemic emergency, Journal of Laws of 2020, item 433.

Ordinance of the Minister of Health of 20 March 2020 on revoking the state of epidemic emergency in the territory of the Republic of Poland, Journal of Laws of 2020, item 490.

Ordinance of the Minister of Health of 24 March 2020 amending the ordinance on the declaration of an epidemic state on the territory of the Republic of Poland, Journal of Laws of 2020 item 522.

Ordinance of the Council of Ministers of 31 March 2020 on the establishment of certain restrictions, orders and prohibitions in relation to an epidemic state, Journal of Laws of 2020 item 566.

Ordinance of the Council of Ministers of 9 April 2020 on the establishment of certain restrictions, orders and prohibitions in relation to an epidemic state, Journal of Laws of 2020 item 697.

Ordinance of the Council of Ministers of 10 April 2020 on the establishment of certain restrictions, orders and prohibitions in relation to an epidemic state, Journal of Laws of 2020 item 658.

Ordinance of the Council of Ministers of 2 May 2020 on the establishment of certain restrictions, orders and prohibitions in relation to an epidemic state, Journal of Laws of 2020 item 792.

Ordinance of the Council of Ministers of 16 May 2020 on the establishment of certain restrictions, orders and prohibitions in relation to an epidemic state, Journal of Laws of 2020 item 878.

Ordinance of the Council of Ministers of 29 May 2020 on the establishment of certain restrictions, orders and prohibitions in relation to an epidemic state, Journal of Laws of 2020 item 964.

Ordinance of the Council of Ministers of 19 June 2020 on the establishment of certain restrictions, orders and prohibitions in relation to an epidemic state, Journal of Laws of 2020 item 1,066.

Ordinance of the Council of Ministers of 7 August 2020 on the establishment of certain restrictions, orders and prohibitions in relation to an epidemic state, Journal of Laws of 2020 item 1,356.

Ordinance of the Council of Ministers of 9 October 2020 on the establishment of certain restrictions, orders and prohibitions in relation to an epidemic state, Journal of Laws of 2020 item 1,758.

Ordinance of the Council of Ministers of 23 October 2020 amending the ordinance on the establishment of certain restrictions, orders and prohibitions in relation to an epidemic state, Journal of Laws of 2020 item 1,871.

Ordinance of the Council of Ministers of 26 November 2020 on the establishment of certain restrictions, orders and prohibitions in relation to an epidemic state, Journal of Laws of 2020 item 2,091.

Ordinance of the Council of Ministers of 1 December 2020 on the establishment of certain restrictions, orders and prohibitions in relation to an epidemic state, Journal of Laws of 2020 item 2,132.

Ordinance of the Council of Ministers of 21 December 2020 on the establishment of certain restrictions, orders and prohibitions in relation to an epidemic state, Journal of Laws of 2020 item 2,316.

Ordinance of the Council of Ministers of 6 May 2021 on the establishment of certain restrictions, orders and prohibitions in relation to an epidemic state, Journal of Laws of 2021 item 861.

Ordinance of the Council of Ministers of 11 June 2021 amending the ordinance on establishing certain restrictions, orders and prohibitions in relation to an epidemic state, Journal of Laws of 2021 item 1,054.

Poore B.P. (ed.), The Federal and States Constitutions, Colonial Charters, and Other Organic Laws of the United States, Washington 1877, vol. 2, pp. 1544–1555;

Sokolewicz W., Wojtyczek K., Komentarz do art. 57, (in:) L. Garlicki, M. Zubik (eds.), Konstytucja Rzeczpospolitej Polskiej, Komentarz. Vol. II, Warsaw 2016.

Sułkowski J., Art. 57, [in]: L. Bosek, M. Safjan, Konstytucja RP. Vol. I. Komentarz do art. 1–86, Legalis 2016.

Trociuk S., Prawa i wolności w stanie epidemii, Warsaw 2021.

Wróbel A., Wolność zgromadzania się, (in:) M. Chmaj, W. Orłowski, W. Skrzydło, Z. Witkowski, A. Wróbel, Wolności i prawa polityczne, Kraków 2002.

Wyrzykowski M., Granice praw i wolności – granice władzy, (in:) Obywatel – jego wolności i prawa. Warsaw 1998.

Bialystok Legal Studies
Białostockie Studia Prawnicze
2022 vol. 27 nr 2

sciendo

DOI: 10.15290/bsp.2022.27.02.09

Received: 30.01.2022
Accepted: 30.04.2022

Tomasz Wicha
Maria Curie-Sklodowska University in Lublin, Poland
tomasz.wicha@mail.umcs.pl
ORCID ID: https://orcid.org/0000–0003–3547–2238

Spontaneous Assemblies during the COVID-19 Pandemic in Poland – A Case Study Analysis

Abstract: COVID-19 turned into a global pandemic and affected public life in many states worldwide and in the Republic of Poland as well. The change of life under the pandemic regime meant a huge alteration in many aspects for most people. The unprecedented situation, for which the Polish authorities were unprepared, forced an immediate change in the law in Poland because of the introduction of the state of epidemic emergency. One of the instances of the changes of law was the limitation of freedom of assembly. The restriction of freedom of assembly was introduced by decrees, not by acts of parliament. The restrictions were described as illegal by the opposition and some parts of society. Many formal remarks were made by the Polish Ombudsman. The judgment of the Constitutional Tribunal in Poland of 22 October 2020 on abortion caused large-scale demonstrations throughout Poland as people wanted to express their views on the decision, which was perceived as the practical end of the compromise on abortion in the Republic of Poland. The research for this article was undertaken by means of system analysis and the analysis of the decision-making process.
Keywords: COVID-19 pandemic, freedom of assembly, spontaneous assemblies

Introductory Remarks

The COVID-19 pandemic had its beginnings in late 2019 in China. The first impact of the pandemic in Poland was visible in late February 2020. The authorities introduced a state of epidemic emergency in March 2020. Many legal measures were taken to deal with the spread of the virus. The authorities claimed that the restrictions which were implemented were necessary to fight against the pandemic. A large num-

ber of legal regulations were therefore adopted to combat the spread of the virus.[1] The legal framework for restrictions changed many times during the pandemic and implicated many changes in public and private affairs in Poland.[2] The government decided to implement many measures which restricted the freedom guaranteed by the Constitution of the Republic of Poland. The authorities were not eager to introduce a state of emergency on the territory of Poland. Instead, the state of epidemic emergency was announced, which was not the proper legal constitutional basis and would restrict human rights even under such unprecedented and unexpected circumstances such as a pandemic.[3] Some of the applied changes were not fully communicated to the public and the issue of disinformation and the vast amount of fake news became a serious difficulty.[4] Moreover, there was a problem with the legal framework for the implemented restrictions of selected aspects of freedom, e.g. the freedom for the organisation of spontaneous assemblies.[5]

It is of utmost importance to examine the following research questions:

– What were the implications of the changes of law introduced by the government as anti-Covid measures and the outcomes of the legal changes in the context of the political rights and freedom to organise a spontaneous assembly? How did the ban on spontaneous assemblies affect the protection of human rights in Poland, in particular political rights?
– Did the introduced ban on spontaneous assemblies have any effect on the public arena of Poland, especially on the intensification of the internal po-

1 K. Urbaniak and M. Urbaniak, Limitation of human and civil rights and freedoms during the pandemic in Poland, 'Przegląd Prawa Konstytucyjnego' 2021, vol. 64, no. 6, pp. 329–340.

2 S. Trociuk, Prawa i wolności w stanie epidemii, Warsaw 2021, pp. 15–110; Ł. Goździaszek, Electronic signature of the taxpayer in times of COVID-19, 'Bialystok Legal Studies' 2021, vol. 26, no. 4, pp. 111–120; M. Ofiarska, Government Fund for Local Investments – legal aspects of financial support for local government investment projects during the COVID-19 pandemic, 'Bialystok Legal Studies' 2021, vol. 26, no. 4, pp. 140–162; T. Gwóźdź, Special legal solutions introduced in regard to the relationship with COVID-19 affecting municipal budgets – selected issues, 'Bialystok Legal Studies' 2021, vol. 26, no. 4, pp. 163–178; P. Dąbrowska-Kłosińska, A. Grzelak and A. Nimark, The use of COVID-19 digital applications and unavoidable threats to the protection of health data and privacy, 'Bialystok Legal Studies' 2021, vol. 26, no. 3, pp. 61–94; P. Pawluczuk-Bućko, The impact of the pandemic on economic crime, 'Bialystok Legal Studies' 2021, vol. 26, no. 6, pp. 71–84.

3 A. Gajda, Restrictions on human rights and freedoms during the time of epidemic in Poland, 'Przegląd Prawa Konstytucyjnego' 2020, vol. 57, no. 5, pp. 17–27.

4 Read more: M. Barańska, The subjective dimension of fake news, 'Studia Iuridica Lublinensia' 2021, vol. 30, no. 5, pp. 53–74.

5 Compare: Państwo prawa i prawa człowieka w czasach koronawirusa, 24 June 2020, https://bip.brpo.gov.pl/pl/content/panstwo-prawa-i-prawa-czlowieka-w-czasach-koronawirusa (accessed 20.02.2022); Państwo prawa i prawa człowieka w czasach koronawirusa – prof. A. Bodnar (RPO) i prof. E. Łętowska, 24 June 2020, https://www.youtube.com/watch?v=JRJbf0oEILQ (accessed 30.01.2022).

litical conflict in Poland? What are the core implications of the situation in which the political rights guaranteed by the Constitution are suspended?

– Did the government justify the introduction of the ban on spontaneous assemblies? How did the government react in the case of a spontaneous assembly such as the one after the Constitutional Tribunal Judgment on Abortion (22 October 2020)? What were the consequences and implications of the assemblies organised after the judgment on abortion?

1. The Notion of a Spontaneous Assembly

After the period of transformation, it was certain that there was a necessity to secure freedom of assembly to the Polish nation.[6] The freedom of assembly remained one of the rights which was guaranteed not only in the state constitutions but in international law as well.[7] The notion of a spontaneous assembly refers to an assembly which is organised without prior registration.[8] The goal of such an assembly is to react ad hoc to an event which affects a particular group who wishes to publicly show their satisfaction or dissatisfaction with the event.[9] Naturally, through the public presentation of discontent, there is a likelihood that the number of the people demonstrating increases. A spontaneous assembly might be a reaction to the adoption of a law, a statement by the representatives of an institution or a court judgment. By participating in the spontaneous assembly, people have the opportunity to express opinions and display their discontent publicly. The core issue of such a type of assembly is to react to unforeseen events or a sequence of unexpected events.[10] The possibility to gather to protest and express views remains one of the constitutional laws in Poland.[11] Furthermore, article 57 of the Constitution gives everybody freedom to gather for

6 A. Gajda, Important amendments in Polish regulation of freedom of assembly, 'Przegląd Prawa Konstytucyjnego' 2016, vol. 34, no. 6, p. 335.

7 A. Łukaszczuk, Zgromadzenia spontaniczne w orzecznictwie Europejskiego Trybunału Praw Człowieka i ich wpływ na Polską regulację prawną, (in:) R. Balicki and M. Jabłoński (eds.), Wolność zgromadzeń, Wrocław 2018, pp. 105–116; M. Gołda-Sobczak, Zgromadzenia publiczne w polskim systemie prawnym i ich znaczenie dla kultury i sztuki, 'Środkowoeuropejskie Studia Polityczne' 2014, no. 2, pp. 151–168; A. Malkiewicz-Jaros, O wolności zgromadzeń w aspekcie teorii formalizmu, pozytywizmu prawniczego i prawa natury, (in:) R. Balicki and M. Jabłoński (eds.), Wolność zgromadzeń…, *op. cit.*, pp. 13–26.

8 A spontaneous assembly cannot be mistaken with a crowd which is spontaneous as well but is accidental and random; compare: Helsińska Fundacja Praw Człowieka, Prawo o zgromadzeniach. Praktyczny przewodnik, Warsaw 2017, pp. 12–13.

9 B. Kołaczkowski, The new notion and classification of assemblies, 'Adam Mickiewicz University Law Review' 2016, pp. 107–108.

10 A. Bodnar and M. Ziółkowski, Zgromadzenia spontaniczne, 'Państwo i Prawo' 2018, no. 5, p. 38.

11 The Constitution of the Republic of Poland, art. 54 (Journal of Law from 1997, no. 78, pos. 483).

peaceful assemblies and participate in them and the restriction or limitation of such freedom is possible only by an act of parliament (not by decree).[12]

The notion of a spontaneous assembly comes from the notion present in literature which was classified as an urgent assembly.[13] There is a definition of a spontaneous assembly in the law on assemblies operating in Poland since 2015. The notion of an assembly refers to a situation where a group of people gather in an open space which is available for everybody who wishes to join the group in order to express a view or present an opinion on public affairs. A spontaneous assembly is a particular type of assembly where the assembly is triggered by an urgent event which was not predicted. The legislator did not specify exact reasons which ought to occur to classify an assembly a spontaneous one, but it was stated that the event is somewhat connected with the public sphere. The organisation of the spontaneous assembly as an urgent follow-up for the event which triggered some social movement is perceived as necessary for the public debate, and the delay of such an activity would have an impairing impact on the public sphere.[14]

There is no notification of a spontaneous assembly.[15] Still, the legislator protects the assemblies organised in a normal or a simplified mode. That was the reason for the would-be ban on possible disturbances at a registered assembly by the people participating in a spontaneous assembly. Furthermore, such disturbances are classified as a sufficient reason to dissolve a spontaneous assembly.[16]

The organisation of numerous spontaneous assemblies definitely has political implications, even in the case in which the reason for the assembly does not directly refer to a political arena. In democratic states such as Poland every public event – planned or spontaneous – has its political implication in the context of political competition. The understanding of the key concepts in political science – a political conflict and political polarisation – helps to analyse every single issue happening on the public arena as there is no public event which is neutral for a political conflict. Therefore, the impact of the spontaneous events is important for the political market in which there is a constant struggle between those who form and support the government and those who remain against the government and form the opposition. The decision-making process is the domain of the government and there is vast inequality in the number of spontaneous assemblies supported or planned by the gov-

12 Read more: The law on assemblies (Journal of Laws from 2019, pos. 631); The Constitution of the Republic of Poland, art. 57 (Journal of Law from 1997, no. 78, pos. 483).

13 Compare: P. Czarny and B. Naleziński, Wolność zgromadzeń, Warsaw 1996, p. 6.

14 The law on assemblies, art. 3 (Journal of Laws from 2019, pos. 631).

15 Compare: M. Florczak-Wątor, Zgromadzenia cykliczne. Glosa do wyroku TK z dnia 16 marca 2017 roku, Kp 1/17, LEX/el. 2017.

16 A. Rzetecka-Gil, Prawo o zgromadzeniach. Komentarz do art. 27, LEX; M. Polinceusz, Dissolving assemblies to guarantee security, 'Humanities and Social Sciences' 2020, vol. XXV, no. 3 (27), pp. 113–119.

ernment which are follow-up reactions to particular government decisions. Still, the system analysis and the examination of the decision-making process are necessary for the examination of the reasons and the inspirations of particular assemblies as the lack of a political decision might result in social resentment and lead to spontaneous assemblies as well.[17]

The core issue of the public assemblies is the possibility to react immediately to the most important events and the changes taking place in the public arena. The direct and fast reaction is often a condition for the effectiveness of the assembly. The urgent character of the assemblies is the cause of the actions of the authorities and public institutions which inform about certain facts or aspects. As soon as the aspect occurs, it may result in the need to express an opinion by means of public assembly. Where society is surprised by particular situations, spontaneous assemblies are justified.[18] The freedom to organise such assemblies is one of the citizens' rights which allows them to make their voices heard by the authorities.[19] Moreover, the freedom to organise assemblies has its individual and group dimension and is strictly connected with the idea of the pluralism of values.[20]

2. The Ban on Spontaneous Assemblies as One of the COVID-19 Measures

The COVID-19 measures which were introduced by the decrees of the Ministry for Health and the decrees of the Council of Ministers placed restrictions on the rights for spontaneous assemblies. The first restrictions and limitations were implemented simultaneously with the introduction of the state of epidemic emergency. There were severe doubts when the government brought in the change of law concerning the admissibility. The restrictions were appropriate for the state of emergency – the state of epidemic emergency was treated as a state of emergency but without the classification recognised in the Constitution of the Republic of Poland.[21] The juris-

17 H.E. Zadrożniak, Zgromadzenia publiczne jako forma udziału obywateli w życiu społecznym, 'Samorząd Terytorialny' 2009, no. 5, pp. 63–70.

18 List Rzecznika Praw Obywatelskich Adama Bodnara do Ministra Spraw Wewnętrznych i Administracji Mariusza Kamińskiego z dnia 23 października 2020 r. – VII.613.112.2020.MAW, https://bip.brpo.gov.pl/sites/default/files/Do%20MSWiA%20ws.%20zgromadze%C5%84%20spontanicznych,%2023.10.2020.pdf (accessed 30.01.2022).

19 R. Grabowski, Ewolucja ustawowych wolności zgromadzeń w Polsce, (in:) R. Balicki and M. Jabłoński (eds.) Wolność zgromadzeń…, *op. cit*., p. 27–36.

20 J. Holocher, *In dubio pro libertata* jako dyrektywa interpretacyjna – uwagi na kanwie orzecznictwa Trybunału Konstytucyjnego, 'Przegląd Prawa Publicznego' 2019, no. 7–8, p. 87.

21 Rzecznik Praw Obywatelskich, Raport RPO na temat pandemii. Doświadczenia i wnioski, Warsaw 2021, p. 7.

prudence of the Constitutional Tribunal in Poland excluded the possibility to restrict freedom via such an indirect state of emergency.[22]

The absolute ban on spontaneous assemblies was evaluated critically by the Polish Ombudsman as it was established to be against the rules of the Constitution of the Republic of Poland. The ban on spontaneous assemblies was introduced by the decrees of the Council of Ministers instead of an act of parliament. The ban on spontaneous assemblies which was introduced by the decrees restricted several aspects of freedom which were guaranteed in the Constitution of the Republic of Poland.[23]

Additionally, the ban on spontaneous assemblies was a breach of the rule of proportionality. According to art. 31 of the Constitution of the Republic of Poland, restrictions on the use of the freedoms guaranteed in the Constitution may only be introduced when it was necessary in a democratic state. The Polish Ombudsman claimed that the introduction of the ban was excessive because ultimately the law was altered and the decrees made it possible to organise meetings and assemblies connected with professional activities or with the running of businesses.[24] Furthermore, it was claimed that spontaneous assemblies were a permitted and legally protected form of public assembly. The ban on spontaneous assemblies which was introduced by the decree should have been evaluated in the context of its concordance with art. 31 of the Constitution of the Republic of Poland – the restrictions of law can be limited only by an act of parliament (not a decree) and such restrictions had to fulfil the test of proportionality in a democratic state.[25]

In selected judgments the Supreme Administrative Court and the Highest Court of Poland reached an unequivocal conclusion – the restrictions breached the Constitution as neither the Ministry for Health nor the Council of Ministers had the power to introduce such restrictions.[26]

---

22 Compare: The judgment of the Constitutional Tribunal of the Republic of Poland from 21 April 2009, K 50/07.

23 List Rzecznika Praw Obywatelskich Adama Bodnara do Ministra Spraw Wewnętrznych i Administracji Mariusza Kamińskiego z dnia 23 października 2020 r. – VII.613.112.2020.MAW, https://bip.brpo.gov.pl/sites/default/files/Do%20MSWiA%20ws.%20zgromadze%C5%84%20spontanicznych,%2023.10.2020.pdf (accessed 30.01.2022).

24 *Ibidem;* 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, pp. 5–21.

25 List Rzecznika Praw Obywatelskich Adama Bodnara do Ministra Spraw Wewnętrznych i Administracji Mariusza Kamińskiego z dnia 23 października 2020 r. – VII.613.112.2020.MAW, https://bip.brpo.gov.pl/sites/default/files/Do%20MSWiA%20ws.%20zgromadze%C5%84%20spontanicznych,%2023.10.2020.pdf (accessed 30.01.2022).

26 Compare: the judgments by the Supreme Administrative Court from 8 September 2021 (II GSK 1010/21; II GSK 781/21) and 23 September 2021 (II GSK 1011/21; II GSK 949/21); the judgments by the Supreme Court of Poland from 16 March 2021 (II KK 64/21), 15 April 2021 (V KK 111/21), 26 April 2021 (II KK 67/21) and 29 June 2021 (II KK 255/21).

3. Spontaneous Assemblies in Poland during the COVID-19 Pandemic – the Case of the Constitutional Tribunal on Abortion (K 1/20 – 22 October 2020)[27]

Since 2015, the Constitutional Tribunal has been the subject of political conflict in the Republic of Poland.[28] The controversy started with the choice of judges made 'in advance' by the Sejm majority who, after the shift of power in 2015, were not accepted by the president of Poland. This was how the political struggle over the Constitutional Tribunal began. The opposition started to treat the Constitutional Tribunal as a politicised institution and, furthermore, accused the institution of being an instrument used by the ruling party in case of unsuccessful attempts to change legislation in the parliament.[29] The opposition claimed that instead of organising parliamentary debates on controversial issues, the ruling party (Law and Justice) made use of the Polish Constitutional Tribunal in order to implement certain sensitive laws.

There are certain issues concerning a question of conscience which are a matter of public compromise in Poland – the notion of legal abortion was one of these issues.[30] Still, Poland was perceived as one of the EU states with strict abortion laws. The judgment of the Polish Constitutional Tribunal of 22 October 2020 restricted the possibility to have an abortion. The announcement of the Polish Constitutional Tribunal strongly divided the nation and caused large-scale demonstrations in many locations in Poland – mainly in big cities. The judgment of the Constitutional Tribunal in Poland was presented by the opposition as the end of the 'abortion compromise' which had existed since 1993 and 1996.[31]

27 R. Adamus, Przesłanka eugeniczna (embriopatologiczna) jako przesłanka legalnego przerywania ciąży – glosa do wyroku Trybunału Konstytucyjnego z 22.10.2020 r. (K 1/20), 'Palestra' 2020, no. 11.

28 Compare: Poland: Constitutional Tribunal is illegitimate, unfit to interpret Constitution, https://www.europarl.europa.eu/news/en/press-room/20211015IPR15016/poland-constitutional-tribunal-is-illegitimate-unfit-to-interpret-constitution (accessed 30.01.2022).

29 See: W. Czuchnowski, 'Trybunał zagwarantował PiS bezkarność', 17 July 2018, https://wyborcza.pl/7,75398,23683227,trybunal-konstytucyjny-zagwarantowal-pis-bezkarnosc.html (accessed 30.01.2022); Historia o tym, jak PiS podporządkował sobie Trybunał Konstytucyjny, 30 November 2016, https://www.polityka.pl/tygodnikpolityka/kraj/1685206,1,historia-o-tym-jak-pis-podporzadkowal-sobie-trybunal-konstytucyjny.read (accessed 20.01.2022).

30 Compare: E. Korolczuk, Explaining mass protests against abortion ban in Poland: the power of connective action, 'Zoon Politikon', 2016, no. 7, pp. 91–113; Z. Kinowska-Mazaraki, The Polish Paradox: From a Fight for Democracy to the Political Radicalization and Social Exclusion, 'Social Sciences' 2021, no. 10, pp. 2–16.

31 Compare: The judgment of the Constitutional Tribunal of the Republic of Poland from 28 May 1997, K 26/96.

The Polish Constitutional Tribunal announced that one of the three exceptions which formed the compromise on abortion in contemporary Poland was classified as unconstitutional. Before the judgment, abortion was possible when prenatal tests indicated either a high probability of irreversible and severe impairment of the foetus or an incurable disease which was life-threatening. This represented a significant change in the legal system in Poland. As a result of the ruling, abortion is only permitted in two cases: 1) when the pregnancy was a result of a prohibited act, e.g. incest or rape; 2) when the pregnancy posed a threat to the life or health of a woman.

The COVID-19 pandemic statistics in Poland in October 2020 were not positive. Every day, the Ministry for Health released statistics showing the high number of infections and deaths. At the beginning of autumn, the statistics fueled rising concerns over the pandemic among the public. Still, the Constitutional Tribunal judgment on abortion saw politicians, political observers, civil activists and many others take to the streets to show their discontent at the decision. The demonstrations were among the biggest since the fall of communism.[32] The protests, which initially were due to the assault on human rights, turned into a protest against the ruling party as well.[33]

The social reaction towards the judgment of 22 October 2020 certainly had a significant impact on Poland's political arena. Still, over time, the protests weakened, a normal trend in the dynamics of such social movements. Nevertheless, the public realised there was a violation of women's rights to make their own decisions.[34]

The reaction of the citizens was the subject of the initiative of the Polish Ombudsman Adam Bodnar, who wrote a formal statement to the Minister of Home Affairs and Administration.[35] In the letter the Polish Ombudsman referred to the reaction of the Polish police towards the spontaneous assemblies after the judgment of the Polish Constitutional Tribunal. One of the greatest concerns of the Polish Ombudsman was the use of the measures of direct coercion, e.g. tear gas, which in his opinion was unacceptable.[36] The other issue of concern was the great number of dem-

32 M. Pronczuk, Why are there protests in Poland?, 'The New York Times', 27 Oct. 2020.

33 A. Gliszczyńska-Grabias and W. Sadurski, The Judgment that wasn't (but which nearly brought Poland to a standstill) – 'Judgment' of the Polish Constitutional Tribunal of 22 October 2020, K1/20, 'European Constitutional Law Review' 2021, vol. 17, issue 1, pp. 130–131.

34 *Ibidem.*

35 List Rzecznika Praw Obywatelskich Adama Bodnara do Ministra Spraw Wewnętrznych i Administracji Mariusza Kamińskiego z dnia 23 października 2020 r. – VII.613.112.2020.MAW, https://bip.brpo.gov.pl/sites/default/files/Do%20MSWiA%20ws.%20zgromadze%C5%84%20spontanicznych,%2023.10.2020.pdf (accessed 30.01.2022).

36 Compare: COVID-19 nie usprawiedliwia tłumienia protestów, https://amnesty.org.pl/covid-19-nie-usprawiedliwia-tlumienia-protestow (accessed 10.01.2022); Protesty po wyroku TK – interwencja KGP, 23 October 2020, https://www.hfhr.pl/wp-content/uploads/2020/10/Protesty-po-wyroku-TK-interwencja-KGP.pdf (accessed 10.01.2022).

onstrators who were detained.[37] In the opinion of the submitter, the key aspect for democracy was the possibility to organise a spontaneous assembly. The Polish Ombudsman appealed for a change in the approach of the law enforcement service.[38] Moreover, he claimed that the assemblies organised as a reaction to the judgment of the Constitutional Tribunal had to be spontaneous as even the simplified procedure for organising a demonstration took three days. This would make it impossible in the context of a situation which provoked people to express their discontent on the streets. The Polish Ombudsman stated that the situation resulting from the social reaction to the judgment of the Polish Constitutional Tribunal required immediate measures and reactions. These included the freedom to express one's voice, a key freedom in a democratic state.[39]

One of the greatest concerns of the Polish Ombudsman were the activities of the Polish police undertaken towards the protesters and called the Chief of the Polish Police to undertake measures in concordance with the Constitution of the Republic of Poland.[40] One of the essential elements of the democratic standard was the freedom to participate in a public assembly, which could not be restricted or limited by the decrees announced during the pandemic in Poland. Peaceful participation in such a gathering was a purely practical exemplification of the freedom guaranteed in the Constitution of the Republic of Poland.[41]

37 List Rzecznika Praw Obywatelskich Adama Bodnara do Komendanta Stołecznego Policji Pawła Dobrodzieja z dnia 23 października 2020 r. – VII.613.112.2020.MAW, https://bip.brpo.gov.pl/sites/default/files/%2FDo%20KSP%20ws.%20zgromadze%C5%84%20spontanicznych%2C%2023.10.2020.pdf (accessed 30.01.2022).

38 List Rzecznika Praw Obywatelskich Adama Bodnara do Ministra Spraw Wewnętrznych i Administracji Mariusza Kamińskiego z dnia 23 października 2020 r. – VII.613.112.2020.MAW, https://bip.brpo.gov.pl/sites/default/files/Do%20MSWiA%20ws.%20zgromadze%C5%84%20spontanicznych,%2023.10.2020.pdf (accessed 30.01.2022) .

39 *Ibidem;* List Rzecznika Praw Obywatelskich Adama Bodnara do Komendanta Głównego Policji Jarosława Szymczyka z dnia 4 listopada 2020 r. – VII.613.112.2020.MAW, https://bip.brpo.gov.pl/sites/default/files/Wyst%C4%85pienie%20do%20KGP%2C%204.11.2020.pdf (accessed 30.01.2022).

40 Compare: T. Witkowski, Uprawnienia policji wobec zgromadzeń, (in:) R. Balicki and M. Jabłoński (eds.) Wolność zgromadzeń…, *op. cit*.

41 List Rzecznika Praw Obywatelskich Adama Bodnara do Komendanta Głównego Policji Jarosława Szymczyka z dnia 4. listopada 2020 r. – VII.613.112.2020.MAW, https://bip.brpo.gov.pl/sites/default/files/Wyst%C4%85pienie%20do%20KGP%2C%204.11.2020.pdf (accessed 30.01.2022). As a response, the Deputy of the Commander in Chief of the police claimed the priority of the activities undertaken by the police was to ensure the safety of all taking part in the assembly and to prevent the escalation of a conflict among those who participated in the event and that the actions of the police were not aimed at the restriction to anybody to demonstrate and were within the law; compare: List Zastępcy Komendanta Głównego Policji Tomasza Szymańskiego z dnia 3 grudnia 2020 r. – Kplp–1993/1460/20/GB, https://bip.brpo.gov.pl/sites/default/files/Informacja_RPO_za_2020.pdf (accessed 30.01.2022).

The measures taken by the police during the spontaneous assembly in the night of 22/23 October 2020 were classified as excessive by the Polish Ombudsman. Detention and the imposition of fines were one of the actions which were considered a breach of law by the police. Moreover, the Ombudsman expected the withdrawal of the motion from the court as it was an illegal decision. All things considered, it was claimed that the actions of the police violated the sphere of freedom of the demonstrators, as they did not break any law (there was no act of parliament which restricted the freedoms guaranteed in the Constitution of the Republic of Poland).[42]

Conclusions

The global COVID-19 pandemic affected the public sphere in many areas.[43] Still, even the unprecedented battle with the pandemic could not justify some of the actions undertaken by the authorities in Poland. The Polish government claimed that public health was of utmost importance and did not explain the whole context of the implemented legal changes and the ban on spontaneous assemblies. In the opinion of the Polish Ombudsman, the COVID-19 pandemic could not have been the explanation for the practical ban on spontaneous assemblies as one of the COVID-19 measures.[44] The right of the society in a democratic state to react immediately to an event which affects people cannot be limited by the decree. The authorities in Poland did not wish to discuss the implications of the ban on spontaneous assemblies in public. Such an attitude helped the opposition to consolidate and gather those who wanted to protest against the government. Potentially, it may have resulted in changes in the political arena – for example the formation of the movement for the protection of political rights in Poland operating even in times of pandemic. Nevertheless, those who

42 List Rzecznika Praw Obywatelskich Adama Bodnara do Komendanta Stołecznego Policji Pawła Dobrodzieja z dnia 25 listopada 2020 r. – VII.613.112.2020.ST, https://bip.brpo.gov.pl/sites/default/files/Informacja_RPO_za_2020.pdf (accessed 30.01.2022). As a response, the Deputy of the Commander in Chief of the police answered that it was not possible to expect from the police the analysis of the concordance of a particular legal act (a decree) with the Constitution of Poland; compare: List Rzecznika Praw Obywatelskich do Komendanta Głównego Policji, https://bip.brpo.gov.pl/sites/default/files/2021–11/Do_KGP_zgromadzenia_spontaniczne_22.11.2021.pdf (accessed 30.01.2022).

43 H. Lorenz, E. Turhan, The Pandemic and Criminal Law – A Look at Theory and Practice in Germany, 'Bialystok Legal Studies' 2021, vol. 6, pp. 9–10; E. M. Guzik-Makaruk, Some Remarks on the Changes in the Polish Penal Code During the Pandemic, 'Bialystok Legal Studies' 2021, vol. 6, pp. 28–29.

44 The website of the Polish Ombudsman, www.rpo.gov.pl, List Rzecznika Praw Obywatelskich Adama Bodnara do Ministra Spraw Wewnętrznych i Administracji Mariusza Kamińskiego z dnia 23 października 2020 r. – VII.613.112.2020.MAW,https://bip.brpo.gov.pl/sites/default/files/Do%20MSWiA%20ws.%20zgromadze%C5%84%20spontanicznych,%2023.10.2020.pdf (accessed 30.01.2022).

decided to participate in the spontaneous assembly were not discouraged by a potential penalty.[45]

Furthermore, the decree is not a proper legal framework to restrict the right which was guaranteed in the Constitution of the Republic of Poland. The opportunity to organise a spontaneous event is widely treated in democratic states as a freedom which cannot be restricted, even under a pandemic regime.[46] Moreover, under the circumstances of the COVID-19 pandemic, the authorities should have made it possible to organise spontaneous assemblies in a safe way for those participating in the event.[47] In fact, in the situation when a prior announcement of a demonstration is not possible or is impractical, it is the responsibility of the authorities to prepare the infrastructure for a spontaneous assembly.[48] The lack of such infrastructure should be perceived as a breach of human rights. The ban on spontaneous assemblies due to the pandemic could have had an additional implication as well – the possibility to ban spontaneous assemblies under other circumstances as well.[49] Last but not least, the protection of diverse forms of the organisation of society including spontaneous assembly is a core responsibility of a democratic state.[50] The protection of the freedom of assemblies is guaranteed by the Constitution of Poland and its limitation could be established by the Council of Ministers, but such a decision must not breach the principle of such freedom.

45 P. Rojek-Socha: Karać za zgromadzenia? Są wytyczne dla prokuratorów, 31 October 2020, https://www.prawo.pl/prawnicy-sady/jakie-zarzuty-za-udzial-w-manifestacji-nielegalne-zbiegowisko,504168.html (accessed 10.01.2022); S. Szołucha: Wolność zgromadzeń w pandemii. Mimo kilkudziesięciu rozporządzeń, obywatele protestują, 15 February 2021, https://mamprawowiedziec.pl/czytelnia/artykul/wolnosc-zgromadzen-w-pandemii-mimo-kilkudziesieciu-rozporzadzen-obywatele-protestuja (accessed 20.12.2021); D. Sitnicka: Nowe limity, to samo bezprawie. Rząd nadal dusi zgromadzenia publiczne, 30 May 2021, https://oko.press/nowe-limity-to-samo-bezprawie-rzad-nadal-dusi-zgromadzenia-publiczne (accessed 20.02.2022).

46 Rok 2020 – pandemia, kryzys praworządności, wyzwania dla praw człowieka, Warsaw 2021, https://www.hfhr.pl/wp-content/uploads/2021/02/2020.Pandemia-kryzys-praworzadnosci-wyzwania-dla-praw-czlowieka-01–02.pdf, pp. 43–50 (accessed 20.01.2022).

47 List Rzecznika Praw Obywatelskich Adama Bodnara do Komendanta Stołecznego Policji Pawła Dobrodzieja z dnia 23 października 2020 r. – VII.613.112.2020.MAW, https://bip.brpo.gov.pl/sites/default/files/%2FDo%20KSP%20ws.%20zgromadze%C5%84%20spontanicznych%2C%2023.10.2020.pdf (accessed 30.01.2022).

48 Read more: D. Habrat, Problematyka odpowiedzialności za wybrane wykroczenia związane ze zgromadzeniami, 'Wojskowy Przegląd Prawniczy' 2012, no. 3, pp. 1–9.

49 Read more: P. Chmielnicki, D. Minich, R. Rybkowski, M. Stachura and K. Szocie, The COVID-19 Pandemic as an opportunity for a permanent reduction in civil rights, 'Studia Iuridica Lublinensia' 2021, vol. 30, no. 4, pp. 77–109.

50 Compare: S. Iwanowski, Prawne formy organizowania się społeczeństwa, 'Samorząd Terytorialny' 2010, no. 1–2, pp. 22–30.

REFERENCES

Adamus R., Przesłanka eugeniczna (embriopatologiczna) jako przesłanka legalnego przerywania ciąży – glosa do wyroku Trybunału Konstytucyjnego z 22.10.2020 r. (K 1/20), 'Palestra' 2020, no. 11.

Bodnar A. and Ziółkowski M., Zgromadzenia spontaniczne, 'Państwo i Prawo' 2018, no. 5.

Barańska M., The subjective dimension of fake news, 'Studia Iuridica Lublinensia' 2021, vol. 30, no. 5.

Chmielnicki P., Minich D., Rybkowski R., Stachura M. and Szocie K., The COVID-19 Pandemic as an opportunity for a permanent reduction in civil rights, 'Studia Iuridica Lublinensia' 2021, vol. 30, no. 4.

COVID-19 nie usprawiedliwia tłumienia protestów, https://amnesty.org.pl/covid-19-nie-usprawiedliwia-tlumienia-protestow.

Czarny P. and Naleziński B., Wolność zgromadzeń, Warsaw 1996.

Czuchnowski W., 'Trybunał zagwarantował PiS bezkarność', 17 July 2018, https://wyborcza.pl/7,75398,23683227,trybunal-konstytucyjny-zagwarantowal-pis-bezkarnosc.html.

Dąbrowska-Kłosińska P., Grzelak A. and Nimark A., The use of COVID-19 digital applications and unavoidable threats to the protection of health data and privacy, 'Bialystok Legal Studies' 2021, vol. 26, no. 3.

Florczak-Wątor M., Niekonstytucyjność ograniczeń praw i wolności jednostki wprowadzonych w związku z epidemią COVID-19 jako przesłanka odpowiedzialności odszkodowawczej państwa, 'Państwo i Prawo' 2020, no. 12.

Florczak-Wątor M., Zgromadzenia cykliczne. Glosa do wyroku TK z dnia 16 marca 2017 roku, Kp 1/17, LEX/el. 2017.

Gajda A., Important amendments in Polish regulation of freedom of assembly, 'Przegląd Prawa Konstytucyjnego' 2016, vol. 34, no. 6.

Gajda A., Restrictions on human rights and freedoms during the time of epidemic in Poland, 'Przegląd Prawa Konstytucyjnego' 2020, vol. 57, no. 5.

Gliszczyńska-Grabias A. and Sadurski W., The Judgment that wasn't (but which nearly brought Poland to a standstill) – 'Judgment' of the Polish Constitutional Tribunal of 22 October 2020, K1/20, 'European Constitutional Law Review' 2021, vol. 17, issue 1.

Gołda-Sobczak M., Zgromadzenia publiczne w polskim systemie prawnym i ich znaczenie dla kultury i sztuki, 'Środkowoeuropejskie Studia Polityczne' 2014, no. 2.

Goździaszek Ł., Electronic signature of the taxpayer in times of COVID-19, 'Bialystok Legal Studies' 2021, vol. 26, no. 4.

Grabowski R., Ewolucja ustawowych wolności zgromadzeń w Polsce, (in:) R. Balicki and M. Jabłoński (eds.) Wolność zgromadzeń, Wrocław 2018.

Guzik-Makaruk E. M., Some Remarks on the Changes in the Polish Penal Code During the Pandemic, 'Bialystok Legal Studies' 2021, vol. 6.

Gwóźdź T., Special legal solutions introduced in regard to the relationship with COVID-19 affecting municipal budgets – selected issues, 'Bialystok Legal Studies' 2021, vol. 26, no. 4.

Habrat D., Problematyka odpowiedzialności za wybrane wykroczenia związane ze zgromadzeniami, 'Wojskowy Przegląd Prawniczy' 2012, no. 3.

Helsińska Fundacja Praw Człowieka, Prawo o zgromadzeniach. Praktyczny przewodnik, Warsaw 2017.

Historia o tym, jak PiS podporządkował sobie Trybunał Konstytucyjny, 30 November 2016, https://www.polityka.pl/tygodnikpolityka/kraj/1685206,1,historia-o-tym-jak-pis-podporzadkowal-sobie-trybunal-konstytucyjny.read.

Holocher J., *In dubio pro libertata* jako dyrektywa interpretacyjna – uwagi na kanwie orzecznictwa Trybunału Konstytucyjnego, 'Przegląd Prawa Publicznego' 2019, no. 7–8.

Iwanowski S., Prawne formy organizowania się społeczeństwa, 'Samorząd Terytorialny' 2010, no. 1–2.

Kinowska-Mazaraki Z., The Polish Paradox: From a Fight for Democracy to the Political Radicalization and Social Exclusion, 'Social Sciences' 2021, no. 10.

Kołaczkowski B., The new notion and classification of assemblies, 'Adam Mickiewicz University Law Review', 2016.

Korolczuk E., Explaining mass protests against abortion ban in Poland: the power of connective action, 'Zoon Politikon' 2016, no. 7.

List Rzecznika Praw Obywatelskich Adama Bodnara do Komendanta Głównego Policji Jarosława Szymczyka z dnia 4 listopada 2020 r. – VII.613.112.2020.MAW, https://bip.brpo.gov.pl/sites/default/files/Wyst%C4%85pienie%20do%20KGP%2C%204.11.2020.pdf.

List Rzecznika Praw Obywatelskich do Komendanta Głównego Policji, https://bip.brpo.gov.pl/sites/default/files/202111Do_KGP_zgromadzenia_spontaniczne_22.11.2021.pdf.

List Rzecznika Praw Obywatelskich Adama Bodnara do Komendanta Stołecznego Policji Pawła Dobrodzieja z dnia 23 października 2020 r. – VII.613.112.2020.MAW, https://bip.brpo.gov.pl/sites/default/files/%2FDo%20KSP%20ws.%20zgromadze%C5%84%20spontanicznych%2C%2023.10.2020.pdf.

List Rzecznika Praw Obywatelskich Adama Bodnara do Komendanta Stołecznego Policji Pawła Dobrodzieja z dnia 25 listopada 2020 r. – VII.613.112.2020.ST, https://bip.brpo.gov.pl/sites/default/files/Informacja_RPO_za_2020.pdf

List Rzecznika Praw Obywatelskich Adama Bodnara do Ministra Spraw Wewnętrznych i Administracji Mariusza Kamińskiego z dnia 23 października 2020 r. – VII.613.112.2020.MAW, https://bip.brpo.gov.pl/sites/default/files/Do%20MSWiA%20ws.%20zgromadze%C5%84%20spontanicznych,%2023.10.2020.pdf.

List Zastępcy Komendanta Głównego Policji Tomasza Szymańskiego z dnia 3 grudnia 2020 r. – Kplp–1993/1460/20/GB, https://bip.brpo.gov.pl/sites/default/files/Informacja_RPO_za_2020.pdf.

Lorenz H., Turhan E., The Pandemic and Criminal Law – A Look at Theory and Practice in Germany, 'Bialystok Legal Studies' 2021, vol. 6.

Łukaszczyk A., Zgromadzenia spontaniczne w orzecznictwie Europejskiego Trybunału Praw Człowieka i ich wpływ na Polską regulację prawną, (in:) R. Balicki and M. Jabłoński (eds.), Wolność zgromadzeń, Wrocław 2018.

Malkiewicz-Jaros A., O wolności zgromadzeń w aspekcie teorii formalizmu, pozytywizmu prawniczego i prawa natury, (in:) R. Balicki and M. Jabłoński (eds.), Wolność zgromadzeń, Wrocław 2018.

Ofiarska M., Government Fund for Local Investments – legal aspects of financial support for local government investment projects during the COVID-19 pandemic, 'Bialystok Legal Studies' 2021, vol. 26, no. 4.

Państwo prawa i prawa człowieka w czasach koronawirusa, 24 June 2020, https://bip.brpo.gov.pl/pl/content/panstwo-prawa-i-prawa-czlowieka-w-czasach-koronawirusa.

Państwo prawa i prawa człowieka w czasach koronawirusa – prof. A. Bodnar (RPO) i prof. E. Łętowska, 24 June 2020, https://www.youtube.com/watch?v=JRJbf0oEILQ.

Pawluczuk-Bućko P., The impact of the pandemic on economic crime, 'Bialystok Legal Studies' 2021, vol. 26, no. 6.

Poland: Constitutional Tribunal is illegitimate, unfit to interpret Constitution, https://www.europarl.europa.eu/news/en/press-room/20211015IPR15016/poland-constitutional-tribunal-is-illegitimate-unfit-to-interpret-constitution.

Polinceusz M., Dissolving assemblies to guarantee security, 'Humanities and Social Sciences' 2020, vol. XXV, no. 3 (27).

Pronczuk M., Why are there protests in Poland?, 'The New York Times', 27 Oct. 2020.

Rojek-Socha P., Karać za zgromadzenia? Są wytyczne dla prokuratorów, 31 October 2020, https://www.prawo.pl/prawnicy-sady/jakie-zarzuty-za-udzial-w-manifestacji-nielegalne-zbiegowisko,504168.html.

Rok 2020 – pandemia, kryzys praworządności, wyzwania dla praw człowieka, Warsaw 2021, https://www.hfhr.pl/wp-content/uploads/2021/02/2020.Pandemia-kryzys-praworzadnosci-wyzwania-dla-praw-czlowieka-01–02.pdf.

Rzecznik Praw Obywatelskich, Raport RPO na temat pandemii. Doświadczenia i wnioski, Warsaw 2021.

Rzetecka–Gil A., Prawo o zgromadzeniach. Komentarz do art. 27., LEX.

The Constitution of the Republic of Poland (Journal of Law from 1997, no. 78, pos. 483).

The judgments by the Supreme Administrative Court from 8. September 2021 (II GSK 1010/21; II GSK 781/21) and 23. September 2021 (II GSK 1011/21; II GSK 949/21).

The judgments by the Supreme Court of Poland from 16. March 2021 (II KK 64/21), 15. April 2021 (V KK 111/21), 26. April 2021 (II KK 67/21), 29. June 2021 (II KK 255/21).

The judgment of the Constitutional Tribunal of the Republic of Poland from 28. May 1997 (K 26/96) and 21. April 2009 (K 50/07).

The law on assemblies (Journal of Laws from 2019, pos. 631).

Trociuk S., Prawa i wolności w stanie epidemii, Warsaw 2021.

Urbaniak K. and Urbaniak M., Limitation of human and civil rights and freedoms during the pandemic in Poland, 'Przegląd Prawa Konstytucyjnego' 2021, vol. 64, no. 6.

WitkowskiT., Uprawnienia policji wobec zgromadzeń, (in:) R. Balicki and M. Jabłoński (eds.) Wolność zgromadzeń, Wrocław 2018.

Zadrożniak H.E., Zgromadzenia publiczne jako forma udziału obywateli w życiu społecznym, 'Samorząd Terytorialny' 2009, no. 5.

Bialystok Legal Studies
Białostockie Studia Prawnicze
2022 vol. 27 nr 2

sciendo

DOI: 10.15290/bsp.2022.27.02.10

Received: 30.01.2022
Accepted: 29.04.2022

Joanna Kielin-Maziarz
Kozminski University, Poland
jkielin@alk.edu.pl
ORCID ID: https//orcid.org/0000–0003–1728–3361

Krzysztof Skotnicki
University of Lodz, Poland
kskotnicki@wpia.uni.lodz.pl
ORCID ID: https://orcid.org/0000–0002–9428–2103

Restrictions on the Right to Vote in the Pandemic during the Election of the President of the Republic of Poland in 2020

Abstract: In 2020, presidential elections were due to be conducted in Poland. Despite the COVID-19 pandemic, it was decided not to introduce a state of natural disaster and, as a consequence, postpone the elections but to execute them on the grounds of episodicact. On the basis of the first episodic law, from 6 April 2020, the elections did not take place because they were completely unprepared. This law had many flaws. The elections were to be purely postal, so voters had no possibility of choosing which method to use to vote. The law's entry into force on the eve of the election meant that voters were disoriented until the last minute and did not know how they could vote, whether they would receive election packages, where they would have to deliver return envelopes with a ballot paper and were not sure whether their vote would be counted. The second episodic law, of 2 June 2020, did not contain so many flaws, and voters in the country could decide for themselves which method to use. However, voting was very difficult abroad, and in 20 countries was not carried out at all. There were also only three days to submit election objections. However, above all, the lack of impartiality in the public media, especially public television, which supported the candidate promoted by the ruling majority, limited voters' right to access truth-based information on public matters, candidates and their political programmes. These circumstances prompt us to consider whether the presidential elections in Poland in 2020 met the constitutional requirement of universality, equality and secrecy, and whether they were reliable and fair. Do they therefore serve to legitimize the office of the president of the Republic of Poland?
Keywords: active election rights, elections, election campaign, election objections, postal voting, presidential elections

Introduction

In accordance with Article 127(2) of the Constitution of the Republic of Poland of 1997, in 2020 the term of office of President Andrzej Duda, elected in 2015, was coming to an end, and there was a need to order the election of a new president. Therefore, the marshal of the Sejm, pursuant to Article 128(2) of the Polish Constitution and Arts. 289(1) and 290 of the Electoral Code,[1] issued a decision on 5 February 2020 to order the election of the new president of the republic,[2] setting the election date for 10 May 2020 and specifying the electoral timetable. However, the SARS-CoV–2 virus, referred to as COVID-19, which causes an acute infectious disease of the respiratory system, soon reached Poland. This first led to the issuing of the Regulation of the Minister of Health of 13 March 2020 on the declaration of an epidemic emergency in the territory of the Republic of Poland,[3] and a week later, of the Regulation of the Minister of Health of 20 March 2020 on the declaration of the state of an epidemic in the territory of the Republic of Poland,[4] and the introduction of a lockdown. This made it obvious that the ordered presidential elections could not be held in the same way as they had been done in the past, i.e. under the Electoral Code Act of 5 January 2011. It was difficult or even impossible to conduct an election campaign, as well as also being understood that the vote could not take place on the election day under the current rules. This problem applied not only to the presidential elections but also to local elections, in the case of the necessity of supplementary elections to the decision-making body in a commune or filling the executive body of the commune in the event of the vacancy of the office of the commune head, mayor or city president.

In this situation, there were two possible solutions. As in some other countries, the first option consisted of the introduction of one of the states of emergency (a state of natural disaster or a state of emergency),[5] which, according to Art. 228(7) of the Constitution, would automatically extend the term of office of the incumbent president and postpone the presidential and local elections until after the end of this state. In addition to political problems, due to the lack of precision in the regulations in the Constitution and the Electoral Code regarding such a situation, this would primarily give rise to a number of strictly legal complications, different depending on when

1 The Act of 5 January 2011 – Election Code, 'Journal of Laws' 2020, item 1319.

2 The Decision of the Marshal of the Sejm of the Republic of Poland of 5 February 2020 on ordering the election of the President of the Republic of Poland, 'Journal of Laws' 2020, item 184.

3 The Regulation of the Minister of Health of 13 March 2020 on the declaration of an epidemic threat in the territory of the Republic of Poland, 'Journal of Laws' 2020, item 433.

4 The Regulation of the Minister of Health of 20 March 2020 on the declaration of an epidemic in the territory of the Republic of Poland, 'Journal of Laws' 2020, item 491 with changes.

5 As happened for example in the Czech Republic. For details, see V. Jirásková, Wybory w dobie koronawirusa – Republika Czeska, 'Studia Wyborcze' 2021, vol. 31, pp. 17–34.

the state of emergency was ordered (e.g. whether the elections are continued or start again, or whether new candidates can be proposed). Despite this, such a decision for the introduction of a state of emergency was encouraged by parliamentary opposition parties as well as by the majority of representatives of the doctrine of constitutional law,[6] because in order to eliminate the particular threat of COVID-19, a special measure had to be used, and the legislator in the Act of 18 April 2002 on the state of a natural disaster clearly links infectious diseases of people with the state of a natural disaster.[7] The second approach was to look for another solution. In the case of presidential elections, this was to be a specifically episodic electoral law adopted to attempt to conduct this election, whereas in the case of local elections, it was necessary to withdraw them on the basis of other decisions. The ruling groups of the so-called united right (*zjednoczona prawica*) chose the latter solution, striving at all costs to hold presidential elections as soon as possible. The solutions introduced established a peculiar kind of parallel, unconstitutional state of emergency, the scope and nature of which can be equated with the state of emergency provided for in the Constitution. This state of affairs which is a manifestation of the circumvention of the provisions of the Constitution.[8] They even used the argument that the suddenness of the event required them to act outside or in breach of the binding constitutional provisions, which, as was rightly emphasized in the literature on the subject, may be a source of a constitutional crisis.[9] It should be remembered that this decision was viewed differently at the time, and it should be assessed differently in two years' time, when our experience of the pandemic is greater.

Under Article 102 of the Act of 16 April 2020 on special support instruments in connection with the spread of the SARS-CoV–2 virus,[10] a number of provisions of the Electoral Code were suspended, including in particular the powers of the National Electoral Commission in terms of specifying a voting card template and ordering the printing of cards. This prevented the holding of elections by this permanent, central and highest electoral body competent in the matters of conducting elections and referenda, and which also performs very important tasks related to the study of the financing of political parties. By breaking a number of constitutional and statutory provisions in the Sejm, including those relating to, inter alia, consultations on draft

6 See P. Tuleja, Pandemia COVID-19 a konstytucyjne stany nadzwyczajne, 'Palestra' 2020, no. 9, p. 18; P. Bała, Constitutional Failure. Regulacja stanów nadzwyczajnych i zbliżonych w Konstytucji RP z 2 kwietnia 1997 r. a praktyka ustrojowa zwalczania epidemii COVID-19/SARS-CoV–2, 'Przegląd Konstytucyjny' 2020, no. 2, p. 69.

7 See 'Journal of Laws' 2017, item 1897.

8 L. Garlicki, Polskie prawo konstytucyjne. Zarys wykładu, Warsaw 2020, p. 461.

9 P. Radziewicz, Kryzys konstytucyjny i paradygmatyczna zmiana konstytucji, 'Państwo i Prawo' 2020, no. 10, p. 6.

10 'Journal of Laws' 2020, item 695.

laws, the content of justifications and the dates of subsequent readings of drafts,[11] the Act of 6 April 2020 on the special rules for conducting general elections for the President of the Republic of Poland ordered in 2020[12] was first adopted, and then, when the elections on 10 May 2020 did not take place, there was adopted the Act of 2 June 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 postal voting.[13] Even before the Act of 2 June 2020 was adopted, on 3 June 2020 the marshal of the Sejm issued a decision on ordering the election of the president,[14] for which she set the date for 28 June 2020. The possibility of issuing this decision outside the deadline specified in Article 128(2) of the Constitution raises doubts as to the admissibility of its adoption, but the considerations of this subject are outside the subject of this study.

Both laws were thus passed during a period of so-called legislative silence, when no changes should be made to electoral law. However, the uniqueness of the situation due to the pandemic meant that, in our opinion, episodic electoral regulations could be established but had to be done in consultation with all the major parliamentary opposition groups; this was missing in this case, and the ruling majority unilaterally imposed its will without respecting the opinion of other political groups.[15]

The purpose of this study is to examine to what extent episodic presidential election laws adopted in 2020 influenced voters' ability to exercise their right to active participation, and thus to answer the question of to what extent the pandemic limited the possibility of active participation in the election of the president of the Republic of Poland. The research was conducted mostly on the basis of the legal-dogmatic method and partly on research methods appropriate for social sciences related to the observation of real phenomena of interference with the law.

1. The Stability of Electoral Law and Restrictions on Electoral Rights

In a democratic state ruled by law, the problem of the stability, durability and immutability of law is extremely important. This issue is crucial and desirable for the

11 For details, see P. Uziębło Jak nie stanowić prawa, czyli uwagi na marginesie procesu uchwalania ustawy z 6.04.2020 r. o szczególnych zasadach przeprowadzania wyborów powszechnych na Prezydenta Rzeczypospolitej Polskiej zarządzonych w 2020 r., 'e-Palestra' 2020, no. 17 (www.palestra.pl, accessed 02.07.2021); K. Skotnicki, Państwo prawa a tryb uchwalania w 2020 r. ustaw regulujących wybory Prezydenta RP, (in:) J. Ciapała and A. Pyrzyńska (eds.), Dylematy polskiego prawa wyborczego, Warsaw 2021, pp. 139–157.

12 'Journal of Laws' 2020, item 827.

13 'Journal of Laws' 2020, item 979.

14 The Decision of the Marshal of the Sejm of the Republic of Poland of 3 June 2020 on ordering the election of the President of the Republic of Poland, 'Journal of Laws' 2020, item 988.

15 See L. Garlicki, Europejskie standardy rzetelności wyborów (Komisja Wenecka i Europejski Trybunał Prawa Człowieka), 'Przegląd Konstytucyjny' 2020, no. 4, p. 156; K. Skotnicki, Państwo prawa, *op. cit.*, p. 143.

state, but perhaps above all for society. This is because it creates a sense of legal certainty for all entities in the state, both physical and legal, and likewise for all citizens, for whom this is a key situation which guarantees legal security and allows them to plan their activities in a calm manner.[16] It means that a special value for the legal order is the fact that it is not subject to frequent changes, and if they are introduced, they are justified by socio-economic or systemic changes, including, first of all, the fact that the legal regulation in force does not meet, or at least does not fully fulfill, its functions, and second, that there are special circumstances or reasons which make it necessary. In a democratic state ruled by law, changes to the law should, therefore, be made extremely rarely, and only when necessary. Only in a country with stable law is the sense of the legal security of citizens, and their trust in the state and the law, fully developed. If there is no such stabilization, it results sooner or later in chaos in the legal system, which affects not only the legal system itself but also all other areas of life, while at the same time leading to the belief that the state is setting a kind of legislative trap.[17] As a consequence, when work on a new law is being introduced or when it enters into force, instead of looking for its benefits, citizens wonder what the 'hidden meaning' or what the 'catch' is.

However, the stability of the law is understandably not an absolute value or an unwavering paradigm. It is therefore up to the legislator, on the one hand, to seek legal stability and, on the other, to respond to changing reality, situations and circumstances.[18] The law cannot hinder political or socio-economic change.

The requirement of legal stability is particularly understandable in the area of election issues. In this matter, any change always raises doubts as to whether it is being made in order to correct the election results in a way which is most favourable to the governing majority at that time. Moreover, specific examples of changes in electoral law which were established solely for that particular purpose can be presented.[19] It is for this reason that the Constitutional Tribunal, in the justification of the judgment of 3 November 2006 in case K 31/06, made an extensive analysis of the problem of *vacatio legis* in relation to changes in electoral law, recognizing that a specific *minimum minimorum* in the case of significant changes should be made at least six months before the next elections, 'understood not only as the voting act itself, but as all the activities covered by the so-called election timetable, and possible exceptions

16 See T. Biernat, Wprowadzenie, (in:) T. Biernat (ed.), Stabilność prawa w kontekście wartości, instytucji i funkcjonowania systemu prawnego, Kraków 2016, p. 9.

17 For details, see B. Stępień-Załucka, Stabilność prawa. Zadanie na dziś czy na wczoraj? 'Przegląd Prawa Publicznego' 2017, no. 12, pp. 9–22 (sip.lex.pl, accessed 01.07.2021).

18 *Ibidem*.

19 Examples include the change in the electoral system in the narrow sense in the Act on Electoral Regulations for the Sejm and the Senate in 2001, and the adoption of the Act of 6 September 2006 on the amendment of the Act on Electoral Regulations for commune councils, *powiat* councils and voivodeship assemblies, which introduced the institution of blocking lists in local elections.

to such a defined dimension could only result from extraordinary objective circumstances'.[20]

Establishing so-called legislative silence is intended, however, not only to prevent the election result from being influenced but also in order to properly prepare for the elections and the act of voting, both by the voters and also by those who will stand as candidates. After all, they must not be surprised, for example, by other rules for submitting candidates, conducting and financing an election campaign, the size of constituencies, the place of voting, the possibility of voting in an alternative manner, changing the way the ballot card is formatted, etc. The introduction of such changes creates a restriction of voting rights for both voters and candidates, because they are confused as to when and how to proceed. And it is, inter alia, to prevent this that the particularity of electoral matters means that both in the Constitution and in the Rules of Procedure of the Sejm there are provisions which impede the procedure of adopting codes.[21]

As we have already emphasized, the specificity of the pandemic situation meant that the most appropriate solution was the introduction of one of the extraordinary states (a state of natural disaster or even a state of emergency). We do not believe that in this situation, during the period of legislative silence, it was not permissible, as many doctrine representatives claim, to enact changes to the election law or even to adopt an episodic act,[22] although this should be done by a consensus of all major parliamentary political forces. However, the ruling majority has preferred political considerations over legal ones, which most clearly demonstrates the departure from the principle of a democratic rule of law. At the same time, it introduced an exceptional legal chaos, which meant that four days before the elections scheduled for 10 May 2020, the legal status on the basis of which they were to be held was not established. This was on the one hand because there was an election code in force in which some were excluded and made it impossible for the National Electoral Commission to hold elections, and on the other hand because work on the first of the episodic acts was still ongoing; the Act of 6 April 2020 on special rules for holding general elections for the President of the Republic of Poland ordered in 2020 entered into force only on 9 May 2020, i.e. a day before the scheduled election date.[23]

20 See also A. Rakowska and K. Skotnicki, Kodeks wyborczy jako szansa na stabilizację prawa wyborczego, (in:) S.J. Jaworski and K.W. Czaplicki (eds.), Księga pamiątkowa z okazji obchodów 20-lecia demokratycznych wyborów w Polsce, Warsaw 2011, pp. 107–120.

21 For details, see *ibidem*, pp. 118–119.

22 See for example R. Piotrowski, Opinia o ustawie z dnia 6 kwietnia 2020 r. o szczególnych zasadach przeprowadzania wyborów powszechnych na Prezydenta Rzeczypospolitej Polskiej zarządzonych w 2020 r. (druk senacki nr 99), Opinie i Ekspertyzy, OE-292 (senat.gov.pl; accessed 03.07.2021).

23 For details on the chronology of the deepening of this chaos before 10 May 2020, see R. Balicki, Głosowanie korespondencyjne w polskim porządku prawnym – zmienne dzieje regulacji, (in:) J. Ciapała and A. Pyrzyńska (eds.), Dylematy polskiego, *op. cit*., pp. 202–203.

Therefore, it is not surprising that voters and also presidential candidates were confused; as we discuss in more detail later, they not only did not know about the legal basis of elections, which was not necessarily so important to them, but above all did not know about the voting methods and locations. Moreover, it should be remembered that Article 20(2) of the Act provided for the possibility of changing the date of elections, which is, of course, constitutionally doubtful and additionally exacerbated disinformation. For many voters, this meant that their participation in the elections was becoming questionable, and they were generally confused about the elections scheduled for 10 May 2020, especially as politicians accused each other of breaking the law and of irregularities regarding the elections. The lack of legal certainty was thus obvious, which constitutes a breach of the principle of trust in the law and, more broadly, in the state.[24]

The presidential election of 10 May 2020, as is known, did not take place, which is undoubtedly an unprecedented event. It was also surprising that the National Electoral Commission adopted a resolution that this was due to the lack of presidential candidates[25] (strange since, in the reduced circumstances of the pandemic, the candidates were conducting their election campaign all the time), and that during the preparations, many actions were taken (e.g. printing of voting cards and appropriate envelopes) without a legal basis, which exposed the state to multi-million Euro losses, as was confirmed by the inspection of the Supreme Audit Office.[26]

Work was immediately undertaken on the new regulation for the procedure for holding the presidential elections in 2020, which resulted in the adoption of the second episodic act – the Act of 2 June 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 postal voting. During its adoption, a number of procedural shortcomings also occurred in the Sejm (e.g. the unacceptable shortening of deadlines for subsequent readings of the draft law), which despite smaller political disputes, but also the overtiredness of society with the pandemic, to some extent also undermined the trust of citizens in the state and the law, as well as limiting electoral rights.

24 See for example A. Domańska and M. Wrzalik, Przejawy zasady (nie)uczciwości wyborów na przykładzie wyborów prezydenckich, (in:) J. Ciapała and A. Pyrzyńska (eds.), Dylematy polskiego, *op. cit.*, pp. 114–115.

25 The Resolution of PKW No. 129/2020 of 10 May 2020 on the impossibility of voting for candidates in the election of the President of the Republic of Poland, 'Journal of Laws' 2020, item 967.

26 In the report, the prime minister and representatives of his chancellery, the Minister of Internal Affairs and Administration, the Minister of State Assets, the Polish Security Printing Works and the Polish Post were accused of violating the law. The Supreme Audit Office also notified the prosecutor's office about the possibility of committing a crime during the preparations for these elections. See 'Dziennik Gazeta Prawna', 13.05.2021 (accessed 03.07.2021) Due to the subject of the study, we leave these issues beyond discussion.

2. Restrictions on the Exercise of the Active Electoral Right

The first episodic law (of 6 April 2020) established only postal voting for the presidential elections in 2020. Thus this method of voting, regarded as alternative and complementary to traditional voting by the regional electoral commission,[27] became the only way in which it was possible to cast a vote. This fact alone gave rise to understandable opposition, as in this way the voter was deprived of the opportunity of choosing a method to vote. The problem was that the manner of organizing these elections provided for in this Act did not guarantee that the elections would conform to the constitutional principles of universality, equality, directness and secrecy, and that they would be fair and honest. This was pointed out not only by opposition politicians but also by most of the opinions prepared during the work on the draft, by state authorities (e.g. the Supreme Court and the Ombudsman) as well as by numerous representatives of the scholarly community. Most of the allegations made related to limiting or even depriving voters of the opportunity to vote.

The first fact to mention is that voters were not sure whether they would receive the election package[28] or whether it would arrive before the elections. This was due to the fact that it was to be delivered by the designated operator, Poczta Polska, to the voter's address as indicated in the voters' register, as ordinary mail and not as a registered letter (Article 3(1)). Voters were not only not sure that they would receive the package but also had no claim to be issued such a package, or could even ask for it to be sent to another address. Finally, they had no possibility of claiming that they had not received their package, and it is not difficult to imagine a situation where a postal worker, knowing or guessing someone's political preferences and having completely different views, would make the conscious decision to not deliver such a package; such cases are known in the world. Unfortunately, these mail-outs were not treated as registered or valuable, and there was no document confirming the delivery of such a package to the voter.

Voters staying abroad were in a much worse situation. The deadline for notifying the consulate of the intention to vote had expired before the Act entered into force (Article 7(1)), which means that they were not able to vote at all in elections conducted on the basis of this Act.

In the case of voting at the seat of the regional electoral commission, the state's task is, inter alia, guaranteeing voters the possibility of free and secret voting. The introduction of a purely postal method of voting during the presidential elections meant that ensuring the conditions necessary to vote in secret was entirely trans-

27 A. Jackiewicz, Postal Voting and Voting by Proxy as an Alternative Voting Methods in the Light of the Electoral Code in Poland, 'Białostockie Studia Prawnicze' 2016, vol. 20/A, p. 263.

28 The election package, pursuant to Article 3(3) of the Act, included a return envelope, a voting card, an envelope for the voting card, an instruction for correspondence voting and a declaration of voting in person and in secret on the voting card.

ferred to the voter and did not depend on the will of the person voting in this way. Understandably, there was the risk of so-called family voting, which means that the dominant person in the family not only imposes on the other members of the family who they are to vote for but can also control whether they actually vote for them, or can even fill in ballot papers for them. The same restriction of the voter's right to vote could, moreover, occur not only in the family but, for example, in nursing homes or prisons. It is understandable that such a danger occurs in these kind of places during each election; however, the episodic act of 6 April 2020 facilitated such behaviour and thus exacerbated the threat, which meant that the results of the elections conducted in the established manner might not reflect the actual voters' will.

Confirmation of a personal and secret vote is sent back in a return envelope not only with a completed ballot paper but also a relevant signed declaration. The problem, however, is that the person imposing and controlling the content of the vote cast could check the filling and signing of such a declaration in exactly the same way, and thus its compliance with the truth became questionable. For many voters, the requirement that the voter must provide his or her PESEL[29] number next to their signature on their declaration of personal and secret voting, (Article 5(1)) could also be completely incomprehensible and also restrict the right to vote.

Another major restriction was the establishment in the law of 2 April 2020 that voters would vote by delivering their return envelope, with the envelope containing the ballot paper and the declaration of personal and secret voting, to a specially prepared mailbox designated by the specified postal operator in the area of the commune where they appear on the electoral register (Article 5(2)), or in the district in Warsaw where they appear on the electoral register (Article 5(3)). The Act does not specify such important issues as the number or location of such mailboxes in the commune, nor whether this is decided by the postal operator or another entity, nor, above all, how voters will be notified. In this situation, it was understandable that many voters would be so confused that they would give up participating in the elections, including because of the fear of being infected with the virus.

We consider it obvious that the apparent facilitation for the voter to hand over the return envelope for this special mailbox to another person (Article 5(2)) was a solution that violated the constitutional principle of direct elections, as, in addition, it did not guarantee that the envelope would actually be thrown into that mailbox, as was very likely if the person fulfilling the request knew or guessed the vote of the

29 The PESEL number is an eleven-digit numeric symbol that allows you to easily identify the person who has it. The PESEL number includes the date of birth, serial number, gender and a control number, availabe at: https://www.gov.pl/web/gov/czym-jest-numer-pesel (accessed 09.07.2020).

voter who asked them to do such a favour. It is also understood that the status of the 'other person' was legally absolutely unclear.[30]

Finally, attention should be paid to the fact that these special mailboxes of the postal operator were not ballot boxes, and only the postal operator was supposed to deliver them to the commune electoral commission, which also limited the active voting right of the person entitled to vote as it did not guarantee that this would actually happen.[31]

The special situation that took place on 10 May 2020 meant that it was impossible to file election objections. This happened because Article 321 of the Electoral Code states that 'an objection against the election of the President of the Republic of Poland shall be submitted in writing to the Supreme Court not later than within 14 days from the date of publishing the results of the elections to the public by the National Electoral Commission'[32]. However, such results were not published, hence there could be no deadline for lodging an objection. Therefore, despite the obvious irregularities (such as no possibility of voting in the elections), it was impossible to lodge an election objection. Consequently, the Supreme Court did not rule on the validity of the elections because it could not rule on something that did not take place.

Along with the turmoil related to the elections ordered on 10 May 2020, it is also necessary to indicate an event that not only limited but even violated the rights of voters. This happened after the Minister of Digitization provided the Poczta Polska S.A. (Polish Post S.A)., upon its request, with personal data from the PESEL register of living Polish citizens who had reached the age of majority by 10 May 2020 and who resided in Poland. The minister referred to Article 99 of the Act of 16 April 2020 on specific support instruments in connection with the spread of SARS-CoV–2 virus. The Ombudsman intervening in this case referred to the Regulation of the European Parliament and of the Council (EU) 2016/679 of 27 April 2016,[33] according to which the processing of personal data is lawful only if it is necessary to fulfill the legal obligation imposed on the administrator or if processing is necessary to perform a task carried out in the public interest or in the exercise of official authority vested in the administrator. In these circumstances, this was not the case, as at the time of transfer-

30 This was very clearly pointed out by Dr. hab. Ryszard Piotrowski, Prof. UW, in the opinion presented during the work on the draft in the Senate. See Opinia o ustawie z dnia 6 kwietnia 2020 r. o szczególnych zasadach przeprowadzania wyborów powszechnych na Prezydenta Rzeczypospolitej Polskiej zarządzonych w 2020 r. (druk senacki nr 99), https://www.senat.gov.pl/gfx/senat/pl/senatekspertyzy/5487/plik/oe_292.pdf (accessed 09.07.2020).

31 In this case, the Supreme Court pointed out, in an opinion sent to the Sejm during the work on the draft, that the role of the designated postal operator was unclear.

32 Państwowa Komisja Wyborcza.

33 Article 6(1)(e) of Regulation of the European Parliament and of the Council (EU) 2016/679 of 27 April 2016 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46 / EC (general regulation on data protection).

ring the data, there was no statutory basis for the performance by Polish Post S.A. of the tasks related to the conduct of elections. This was confirmed in the judgment of the Provincial Administrative Court in Warsaw of 26 February 2021.[34]

As we have already indicated, the election of the president on 10 May 2020 did not take place, and the episodic law of 6 April 2020 was derogated on 2 June 2020 by another episodic law – on special rules for the organization of general elections for the President of the Republic of Poland ordered in 2020 with the possibility of postal voting. The new law generally removed the limitations of the active electoral law envisaged by its predecessor. First of all, it returned to the solution in which the basic form of voting was voting at the officies of the regional election commission, while each voter was given the possibility of postal voting (Article 2(1)). Thus, the voter had a choice regarding the method of voting. There were, however, some limitations that seem understandable. This is because voters did not have the possibility of postal voting in the case of separate voting precincts established in health centres, nursing homes, student houses or dormitories, prisons and detention centres and the external departments of such centres, and in voting precincts established on Polish seagoing ships, as well as in the case of a voter with a disability being given a proxy vote (Article 2(2)). If voters opted for postal voting, they were free to choose the method of collecting the election package – in person from the commune office or by delivery via the postal operator – and returning the return envelope – by the postal operator, in person at the commune office or at the precinct electoral commission (Article 5(1–4)).[35]

However, the threat of the SARS-CoV–2 virus meant that the legislator decided to limit the voting possibilities in the commune, or in part of it, as a result of a deteriorating situation in a given area. In such a case, the National Electoral Commission therefore acquired the power to order only postal voting for a given commune or part of it (Article 15(5)). In practice, this was the case in only two communes.[36]

Under the second episodic act regulating the elections of the president, although to a lesser extent than in the case of its predecessor, the possibility of voting by voters residing abroad was also limited or even excluded. The Act stated directly in Article 2(3) that 'Foreign postal voting shall not be conducted [...] in countries where there

34 Judgment of the Provincial Administrative Court in Warsaw of 26 February 2021, IV SA/Wa 1817/20.

35 L. Garlicki, Polskie prawo konstytucyjne…, *op. cit.*, p. 295.

36 These were the commune of Baranów in the Greater Poland voivodeship and the commune of Marklowice in the Śląskie voivodeship; Resolution of PKW No. 197/2020 of 19 June 2020 on ordering only correspondence voting in the Baranów commune in the election of the President of the Republic of Poland ordered on 28 June 2020, 'Polish Monitor' 2020, item 544, and Resolution of PKW No. 198/2020 of 19 June 2020 ordering the voting only by correspondence in the Marklowice commune in the election of the President of the Republic of Poland ordered on 28 June 2020, 'Polish Monitor' 2020, item 545.

is no organizational, technical or legal possibility to carry out voting in this form.' In practice, 169 election districts were created abroad,[37] which is significantly fewer than in 2015, when 229 such districts were created.[38] Moreover, in Article 2(4) it was established that 'Due to the epidemic situation in the receiving state, it is allowed to indicate the territorial jurisdiction of the consul of the districts where only postal voting is possible.' In the end, only 20 countries voted by post.[39]

When presenting the limitations in the implementation of active election law during the presidential elections in 2020, we would like to draw attention to one more circumstance, namely the lack of integrity and neutrality of the public media, and most of all public television, in informing the public about candidates and their programmes. The candidate with the support of the ruling so-called united right (*zjednoczona prawica*) was strongly favoured. He was presented much more often than the other candidates and only in a positive way, whereas a number of different allegations were made against the other candidates and they were generally attacked. The more neutral non-public media was not able to compensate for this. Thus, voters' right to access truthful information on public matters, candidates and their political programmes was limited.[40] Even the Supreme Court noticed this, but in its decision of 3 August 2020 confirming the validity of the election of the president, it stated that 'unequal access of candidates to the mass media does not affect the validity of the election, as long as unimpeded (legally and in fact) media pluralism is ensured […] However, the violations of these standards signalled in public space and in election objections did not take a form in which the possibility of free choice would be limited.'[41] This might be regarded as a controversial assessment.

Finally, a significant limitation of the electoral law related to the presidential elections held in 2020 as broadly understood was the shortening in the second episodic act of the time limit for submitting election objections to three days from the date on which the election results were made public by the National Electoral Commission (Article 15(2)), when it is now 14 days (Article 321(1)). The shortening of this deadline, as well as the time for the examination of the objections by the Supreme Court, was dictated by the desire to close the entire election procedure, including the declaration of the validity of the elections before the end of the term of office of the

37 The Regulation of the Minister of Foreign Affairs of 8 June 2020 on the creation of voting precincts in the elections of the President of the Republic of Poland in 2020 for Polish citizens staying abroad, 'Journal of Laws' 2020, item 1014.

38 The Regulation of the Minister of Foreign Affairs of 27 March 2015 on the creation of voting precincts in the elections of the President of the Republic of Poland for Polish citizens residing abroad, 'Journal of Laws' 2015, item 471.

39 See R. Balicki, Głosowanie korespondencyjne…, *op. cit.*, p. 204.

40 A. Domańska and M. Wrzalik, Przejawy zasady, *op. cit.*, p. 115 ff.

41 Resolution of the Supreme Court of 3 August 2020, I NSW 5890/20, OSNKN 2020/4/27.

incumbent president. However, this did not allow for proper submission and consideration of the objections.[42]

Conclusions

The COVID-19 pandemic changed the world. Therefore, the presidential elections held in Poland in 2020 would have been best postponed, as in such a case, the Constitution provides for the possibility of introducing a state of natural disaster. The ruling majority, however, tried to carry the elections out, disregarding the existing threat to the health and life of citizens. For this purpose, it was decided to introduce the unknown into the Constitution, an epidemic state and a state of epidemic that are extraordinary states de facto, and to elect the president on the basis of an episodic law. However, the law's adoption faced serious difficulties and only came into force immediately before the election date of 10 May 2020. Voters were thus confused as to whether an election would take place and how they would be able to vote.

As Ryszard Balicki aptly wrote, 'The law did not, fortunately, become the basis for electoral process; we were not witnesses to the events when election packages would have been passed form passed would be passed on by someone unknown to someone unknown [...] However, an unprecedented event took place – the elections were not held on the scheduled date.'[43] The episodic act had many disadvantages, including the fact that it significantly limited the possibility of exercising an active electoral law. Establishing only postal voting during these elections deprived the voter of the possibility of choosing the voting method. Voters were also not sure whether they would receive a voting package at all, where they would have to hand over a return envelope with their vote, and finally whether their vote would reach the election commission and be counted. The burden of securing the secrecy of voting was also transferred to the voter, which posed the risk of pressure from other people, especially in so-called family voting when the dominant person in the family decides the content of the vote of all family members.

The failure to run the election resulted in constitutionally questionable elections on 28 June 2020; another episodic law was also adopted, on 2 June 2020, regulating their implementation. This did not have as many flaws as its predecessor and, above all, left voters the option of choosing how to vote – traditionally, at the offieciesf the regional electoral commission, or by postal voting. Due to the increase in the number of infections, however, it was possible to introduce only postal voting in a commune or a part of it; in practice, this fortunately happened in only two communes. Signif-

42 Despite this, more than 5,800 objections were reported, which in the history of direct presidential elections is the second most significant number since the 1995 elections, when as many as 593,238 objections were reported.

43 See R. Balicki, Głosowanie korespondencyjne…, *op. cit.*, p. 203.

icantly, the time for submitting an electoral protest was also reduced, from fourteen to only three days, which made it much more difficult to decide whether to come forward. Under both episodic laws, the possibility for voters residing abroad to vote was also severely restricted or even ruled out.

Throughout the electoral period, finally, there was a lack of neutrality in the involvement of the public media, especially public television, in favour of a presidential candidate supported by the ruling so-called united right. The lack of a reliable message limited voters' right to access truthful information about public affairs, candidates and their political agendas.

All this suggests that the presidential elections in Poland in 2020 raise serious doubts about whether the constitutional requirements of universality, equality, secrecy and, above all, reliability and honesty were fulfilled and thus whether they served the legitimacy of the president of the Republic of Poland in his office.

REFERENCES

Act of 18 April 2002 on the state of natural disaster, 'Journal of Laws' 2017, item 1897.

Act of 5 January 2011 – Election Code, 'Journal of Laws' 2020, item 1319.

Act of 6 April 2020 on the special rules for holding general elections for the President of the Republic of Poland ordered in 2020, 'Journal of Laws' 2020, item 827.

Act of 16 April 2020 on specific support instruments in connection with the spread of SARS-CoV–2 virus, 'Journal of Laws' 2020, item 695.

Act of 2 June 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 postal voting, 'Journal of Laws' 2020, item 979.

Bała P., Constitutional Failure. Regulacja stanów nadzwyczajnych i zbliżonych w Konstytucji RP z 2 kwietnia 1997 r. a praktyka ustrojowa zwalczania epidemii COVID-19/SARS-CoV–2, 'Przegląd Konstytucyjny' 2020, no. 2, pp. 68–121.

Balicki R., Głosowanie korespondencyjne w polskim porządku prawnym – zmienne dzieje regulacji, (in:) J. Ciapała and A. Pyrzyńska (eds.), Dylematy polskiego prawa wyborczego, Warsaw 2021, pp. 191–207.

Biernat T., Wprowadzenie, (in:) T. Biernat (ed.), Stabilność prawa w kontekście wartości, instytucji i funkcjonowania systemu prawnego, Kraków 2016.

Decision of the Marshal of the Sejm of the Republic of Poland of 5 February 2020 on ordering the election of the President of the Republic of Poland, 'Journal of Laws' 2020, item 184.

Decision of the Marshal of the Sejm of the Republic of Poland of 3 June 2020 on ordering the election of the President of the Republic of Poland, 'Journal of Laws' 2020, item 988.

Domańska A. and Wrzalik M., Przejawy zasady (nie)uczciwości wyborów na przykładzie wyborów prezydenckich, (in:) J. Ciapała and A. Pyrzyńska (eds.), Dylematy polskiego prawa wyborczego, Warsaw 2021, pp. 105–121.

'Dziennik Gazeta Prawna', 13.05.2021.

Garlicki L., Europejskie standardy rzetelności wyborów (Komisja Wenecka i Europejski Trybunał Prawa Człowieka), 'Przegląd Konstytucyjny' 2020 no. 4, pp. 142–185.

Garlicki L., Polskie prawo konstytucyjne. Zarys wykładu, Warsaw 2020.

Jackiewicz A., Postal Voting and Voting by Proxy as an Alternative Voting Methods in the Light of the Electoral Code in Poland, 'Białostockie Studia Prawnicze' 2016, vol. 20/A, pp. 261–271.

Jirásková V., Wybory w dobie koronawirusa – Republika Czeska, 'Studia Wyborcze' 2021, vol. 31, pp. 17–34.

Judgment of the Constitutional Tribunal of 3 November 2006 in case K 31/06.

Judgment of the Provincial Administrative Court in Warsaw of 26 February 2021, IV SA/Wa 1817/20.

Piotrowski R., Opinia o ustawie z dnia 6 kwietnia 2020 r. o szczególnych zasadach przeprowadzania wyborów powszechnych na Prezydenta Rzeczypospolitej Polskiej zarządzonych w 2020 r. (druk senacki nr 99), Opinie i Ekspertyzy, OE-292, https://senat.gov.pl).

Radziewicz P., Kryzys konstytucyjny i paradygmatyczna zmiana konstytucji, 'Państwo i prawo' 2020, no. 10, pp. 3–24.

Rakowska A. and Skotnicki K., Kodeks wyborczy jako szansa na stabilizację prawa wyborczego, (in:) S.J. Jaworski and K.W. Czaplicki (eds.), Księga pamiątkowa z okazji obchodów 20-lecia demokratycznych wyborów w Polsce, Warsaw 2011, pp. 107–120.

Regulation of the European Parliament and of the Council (EU) 2016/679 of 27 April 2016 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46 / EC.

Regulation of the Minister of Foreign Affairs of 27 March 2015 on the creation of voting precincts in the elections of the President of the Republic of Poland for Polish citizens residing abroad, 'Journal of Laws' 2015, item 471.

Regulation of the Minister of Foreign Affairs of 8 June 2020 on the creation of voting precincts in the elections of the President of the Republic of Poland in 2020 for Polish citizens staying abroad, 'Journal of Laws' 2020, item 1014.

Regulation of the Minister of Health of 13 March 2020 on the declaration of an epidemic threat in the territory of the Republic of Poland, 'Journal of Laws' 2020, item 433.

Regulation of the Minister of Health of 20 March 2020 on the declaration of an epidemic in the territory of the Republic of Poland, 'Journal of Laws' 2020, item 491 with changes.

Resolution of PKW No. 129/2020 of 10 May 2020 on the impossibility of voting for candidates in the election of the President of the Republic of Poland, 'Journal of Laws' 2020, item 967.

Resolution of PKW No. 197/2020 of 19 June 2020 on ordering only correspondence voting in the Baranów commune in the election of the President of the Republic of Poland ordered on 28 June 2020, 'Polish Monitor' 2020, item 544.

Resolution of PKW No. 198/2020 of 19 June 2020 ordering the voting only by correspondence in the Marklowice commune in the election of the President of the Republic of Poland ordered on 28 June 2020, 'Polish Monitor' 2020, item 545.

Resolution of the Supreme Court of 3 August 2020, I NSW 5890/20, OSNKN 2020/4/27.

Skotnicki K., Państwo prawa a tryb uchwalania w 2020 r. ustaw regulujących wybory Prezydenta RP, (in:) J. Ciapała and A. Pyrzyńska (eds.), Dylematy polskiego prawa wyborczego, Warsaw 2021, pp. 139–157.

Stępień-Załucka, B., Stabilność prawa. Zadanie na dziś czy na wczoraj? 'Przegląd Prawa Publicznego' 2017, no. 12, pp. 9–22, https://sip.lex.pl.

Tuleja P., Pandemia COVID-19 a konstytucyjne stany nadzwyczajne, 'Palestra' 2020, no. 9.

Uziębło P., Jak nie stanowić prawa, czyli uwagi na marginesie procesu uchwalania ustawy z 6.04.2020 r. o szczególnych zasadach przeprowadzania wyborów powszechnych na Prezydenta Rzeczypospolitej Polskiej zarządzonych w 2020 r., 'e-Palestra' 2020, no. 17, www.palestra.pl.

Bialystok Legal Studies
Białostockie Studia Prawnicze
2022 vol. 27 nr 2

sciendo

DOI: 10.15290/bsp.2022.27.02.11

Received: 31.01.2022
Accepted: 19.04.2022

Radosław Grabowski
Rzeszow University, Poland
rgrabowski@ur.edu.pl
ORCID ID: https://orcid.org/0000–0003–3362–7363

Sabina Grabowska
Rzeszow University, Poland
sgrabowska@ur.edu.pl
ORCID ID: https://orcid.org/0000–0003–0530–708X

The Election for the Office of the President of the Republic of Poland on 10 May 2020 during the COVID-19 Pandemic – A Case Study

Abstract: Citizens' election rights are among the most important political rights in a democratic state. The SARS-CoV–2 pandemic has brought chaos to countries and thus to their proper functioning. Therefore, the authors of the text, analysing the case of the presidential elections in 2020, put forward the thesis that the provisions regulating the rules of these elections contain significant gaps, which were revealed by the pandemic. The Constitution of the Republic of Poland of 1997 contains a catalogue of conditions that make it possible to elect a president under an extraordinary procedure. They all relate to a necessity to shorten the president's term of office. However, no rules consider the likelihood of other obstacles to voting by the deadline, such as a pandemic.
Keywords: elections, Marshal of the Sejm, President of the Republic of Poland, National Electoral Commission

Introduction

One-man leadership exercised by the president in the state is an important value, especially in emergencies. The President of the Republic of Poland guarantees the

continuity of state power.[1] At the same time, the continuity of the president's office in the Constitution of the Republic of Poland is guaranteed by the institution of the temporary performance of the president's duties. Let us add that this is not a substitution carried out according to the usual rules but a 'double' substitution, performed successively by the Marshal of the Sejm and the Senate, which minimises the risk of discontinuity of power. In this case, the constitution-maker complied with the required diligence, ensuring that the office of the president was held continuously.[2] The representatives of the doctrine emphasise that the provisions assign the 'deputy' president the same systemic function as the President of the Republic of Poland.[3] The Constitution of the Republic of Poland allows for the correct temporal functioning of the state in case of failure to elect a president. It even assumes that such situations will occur and lays down regulations for this circumstance, but the expiry of the term of office was not mentioned among the premises of 'replacing' the president. The lack of such provisions could have been the reason for actions taken to conduct the elections to the office of the President of the Republic of Poland, ordered for 10 May 2020.

The events accompanying the elections of the President of the Republic of Poland in 2020 allow us to argue that the provisions regulating the rules of this election contain significant gaps. Although the authors of the Constitution of the Republic of Poland of 1997 took into account premises enabling the election of the head of state outside the ordinary mode,[4] i.e. in an extraordinary mode,[5] all of them relate to the situation in which it is necessary to shorten the president's term of office. There are no provisions that consider the probability of obstacles that would prevent the voting from being held within the prescribed period. This gap is not fulfilled by the provisions of the Electoral Code,[6] which regulates numerous issues related to the election and term of office of the President of the Republic of Poland, but does not comprehensively regulate these issues.

Disadvantages of the legal acts were revealed during the elections of the President of the Republic of Poland, organised during the crisis. Regardless of the ade-

1 Art. 126 sec. 1 of the Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws No. 78, item 483 as amended), http://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU19970780483 (accessed 31.01.2022), further: the Polish Constitution. D. Dudek, Prezydent Rzeczypospolitej Polskiej – refleksje w 100-lecie instytucji, 'Przegląd Prawa Konstytucyjnego' 2021, no. 4(62), p. 39.

2 M. Florczak-Wątor, Konstytucyjne uregulowania problematyki zastępstwa prezydenta w Rzeczypospolitej Polskiej i państwach z nią sąsiadujących, 'Przegląd Prawa Konstytucyjnego' 2010, no. 2–3, p. 187.

3 G. Pastuszko, Marszałek Sejmu jako osoba wykonująca tymczasowo obowiązki Prezydenta RP – dylematy konstytucyjne, 'Przegląd Prawa Konstytucyjnego' 2011, no. 1(5), p. 94.

4 Art. 127 sec. 4–6, Art. 128 sec. 2 of the Polish Constitution.

5 Art. 128 sec. 2 in connection with Art. 131 sec. 1 and 2 of the Polish Constitution.

6 Act of 5 January 2011 – Electoral Code (uniform text, Journal of Laws of 2020, item 1319 as amended), https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20110210112/U/D20110112Lj.pdf (accessed 31.01.2022).

quacy of the measures applied in Poland in spring 2020, it should be assumed that it was an example of such flaws. The legal assessment of the activities of the Polish government and parliament at the beginning of the coronavirus pandemic will certainly be the subject of many studies. This analysis attempts to assess selected aspects of the organisation of the elections of 10 May 2020 and the adequacy of actions taken by the authorities, with particular emphasis on the provisions constituting the basis for making specific decisions. For this purpose, an analysis of the Constitution of the Republic of Poland, the Electoral Code, other acts, resolutions, and communications of the National Electoral Commission (hereinafter: PKW) related to the election of the President of the Republic of Poland of 10 May 2020 will be carried out.

1. Constitutional Regulations

The rules governing the president's election during political transformations in Poland in 1989–1990 were subject to rapid changes.[7] Originally, the election of the President of the People's Republic of Poland was made by the National Assembly,[8] but in the following year, the regulations were changed.[9] As a result of amending the Constitution of the Republic of Poland of 1952, according to point 1 of Art. 32b sec. 1, the election of the President of the Republic of Poland was conducted by the National Assembly. The solutions developed in the 1990s were consolidated in the Constitution of the Republic of Poland of 1997.

The most important regulations related to the elections of the President of the Republic of Poland are included in Art. 128 sec. 2 of the Constitution of the Republic of Poland: ' The election of the President of the Republic shall be ordered by the Marshal of the Sejm to be held on a day no sooner than 100 days and no later than 75 days before expiry of the term of office of the serving President of the Republic, and in the event of the office of President of the Republic falling vacant - no later than the 14th day thereafter, specifying the date of the election which shall be on a non-work-

7 R. Mojak, Instytucja prezydenta RP w okresie przekształceń ustrojowych, Lublin 1995, p. 182.

8 Art. 32a and Art. 32b of the Act of 7 April 1989 amending the Constitution of the Polish People's Republic (Journal of Laws No. 19, item 101) entrusted the election of the President of the People's Republic of Poland to the National Assembly, requiring an absolute majority in the presence of at least half of the members of the assembly. The term of office was six years, and the regulations forbid holding this office again, https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU19890190101/O/D19890101.pdf (accessed 31.01.2022). R. Grabowski, Evolution of the Constitutional Organ on the Example of the Polish National Assembly, 'Przegląd Prawa Konstytucyjnego' 2020, no. 5(57), p. 75, K.M. Bezubik, A. Olechno, Could the Election Deposit Become an Electoral Qualification? Remarks on the Example of the Election of Head of State, 'Białostockie Studia Prawnicze' 2016, no. 20/A, pp. 273–281.

9 Act of 27 September 1990 on the amendment to the Constitution of the Republic of Poland (Journal of Laws No. 67, item 397), https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU19900670397/O/D19900397.pdf (accessed 31.01.2022).

ing day and within a period of 60 days of the day of ordering the election.' Therefore, the Constitution defines the election schedule in an ordinary situation (the seat is filled) and an extraordinary situation (vacant seat). In both situations, there are specific deadlines within which a choice is possible, but in an emergency, they are shorter. In both cases, the Marshal of the Sejm must undertake activity in this respect, but the provisions leave him with only minimal decision-making slack. The situation where the deadline expires and voting does not take place has not been settled. In 2020, practice proved that there might be ineffective elections or ineffective attempts to conduct them by an organ without constitutional authority in this regard.

The provisions of Art. 127 sec. 2 and Art. 128 sec. 1 of the Polish Constitution refer to the term of office of the President. The former states that he is re-elected for a five-year term and may be re-elected only once, the latter indicates that his term of office begins on the day he takes office. A drawback of this regulation is the lack of references to the end of the term of office. Practice indicates a literal interpretation of the provisions, and the full terms so far lasted exactly five years, with a one-day tolerance. However, the Constitution of the Republic of Poland does not provide instructions on how to proceed in case of an inability to hold elections within the constitutional time limit unless an extraordinary state is introduced. It should be assumed that some crises may not justify introducing such a state, or it cannot be introduced before the election date due to too little time. In such a situation, it is important to establish when the term of office of the President of the Republic of Poland will end. Does it happen five years after taking office, or only after assuming office by the President-elect?

The analyses of the 'replacement' of the President of the Republic of Poland by the Marshal of the Sejm highlight this problem.[10] According to the provisions of Art. 131 sec. 2 of the Constitution of the Republic of Poland, the 'The Marshal of the Sejm shall, until the time of election of a new President of the Republic, temporarily discharge the duties of the President of the Republic in the following instances: 1) the death of the President of the Republic; 2) the President's resignation from office; 3) judicial declaration of the invalidity of the election to the Presidency or other reasons for not assuming office following the election; 4) a declaration by the National Assembly of the President's permanent incapacity to exercise his duties due to the state of his health; such declaration shall require a resolution adopted by a majority vote of at least two-thirds of the statutory number of members of the National Assembly; 5) dismissal of the President of the Republic from office by a judgment of the Tribunal of State.' The ill-thought-out narrow catalogue of conditions necessary to perform

10 Z. Witkowski, Prezydent Rzeczypospolitej Polskiej, (in:) Z. Witkowski (ed.), Prawo konstytucyjne, Toruń 2001, p. 300.

the "substitution" is criticized[11], The ill-thought-out narrow catalogue of conditions necessary to perform the "substitution" is criticized.[12]

The provisions in force in 1990–1997 entrusted the National Assembly with determining the validity of the election of the President of the Republic of Poland. The Constitution of the Republic of Poland of 1997 introduced a significant amendment in this respect, transferring the competence to declare the validity or invalidity of an election to the Supreme Court (Art. 129 sec. 1 and 3). In the case of the presidential election ordered for 10 May 2020, the content of Art. 129 sec. 3 states: 'If the election of the President of the Republic is declared invalid, new elections shall be held pursuant to the principles provided for in Art. 128 sec. 2 for vacancies in the office of the President of the Republic of Poland', i.e. on a non-working day within 60 days from ordering elections.

2. Electoral Code

The provision of Art. 127 sec. 7 of the Polish Constitution on the principles and procedure of nominating candidates and holding elections and the conditions of validity of the election of the President refers to the Act.[13] In this way, the legislator entrusted the clarification of the election rules to the legislator who decided to adopt the Electoral Code, assuming that it was to regulate the issue of elections in a comprehensive manner. The analysis of the code provisions relating to the presidential elections concludes that the Act does not fulfil its system function. Some provisions constitute an almost literal repetition of constitutional regulations (Art. 287–289, 292). Code regulations do not cover the areas related to the election of the President of the Republic of Poland, the regulation of which was assumed by the Constitution of the Republic of Poland. As an example, there are issues relating to the presidential term of office, the beginning and end of which are specified in the code as follows: 'The President of the Republic takes office after taking the oath' (Art. 291 § 4), the

11 D. Górecki, Pozycja ustrojowo-prawna prezydenta Rzeczypospolitej Polski i rządu w ustawie konstytucyjnej z 23 kwietnia 1935 roku, Łódź 1992, p. 53, F. Siemieński, Ewolucja instytucji Prezydenta Rzeczypospolitej Polskiej, 'Annales Universitatis Marie Curie-Sklodowska Lublin – Polonia', vol. XXXVII, 13, sectio G, 1990, p. 189, J. Ciapała, Prezydent w systemie ustrojowym Polski, Warsaw 1999, p. 127, M. Zubik, Gdy marszałek Sejmu jest pierwszą osobą w państwie, czyli polskie interregnum, 'Przegląd Sejmowy' 2010, no. 5, p. 78.

12 P. Winczorek, Komentarz do Konstytucji Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r., Warsaw 2000, p. 178; G. Pastuszko, *op. cit*., pp. 95–96.

13 R. Balicki, Weryfikacja ważności wyborów ogólnokrajowych w Polsce, 'Przegląd Prawa Konstytucyjnego' 2021, no. 4(62), p. 249.

'outgoing President of the Republic shall terminate his office upon the swearing of the newly elected President of the Republic of Poland' (Art. 291 § 2).[14]

While constitutional regulations provide for extraordinary situations related to holding the office of the President of the Republic of Poland, the code regulations are devoid of deeper reflection in this regard. Only the provisions of Art. 293 of the Electoral Code assume that the course of elections may sometimes deviate from the norm; however, the catalogue of extraordinary situations that may occur during the election for the office of the President of the Republic of Poland includes only two cases: the nomination of only one candidate (Art. 293 § 1) and the lack of candidates (§ 3).[15] It is too narrow an approach that does not list the premises known to the Polish legal system in detail, described in detail in the acts regulating the introduction of emergency and epidemic measures, and does not refer to these legal acts. Meanwhile, it should be assumed that not in every such case will a state of emergency be introduced – postponing the election – either for objective reasons (too little time) or subjective reasons (type of threat, lack of political will).

Therefore, it can be concluded that the Electoral Code contains significant regulatory gaps. Despite its considerable volume, this act does not address many significant issues that the constitution-maker ordered to be regulated in the Act. It can be assumed that further shortcomings of the code regulations will emerge in the future, preventing the holding of elections in the event of abnormal situations, which will harm the functioning of the constitutional organs of the state.

3. Organisation of Elections during the Pandemic

The activities related to the elections for the office of the President of the Republic of Poland in 2020 were initiated by the Marshal of the Sejm of the Republic of Poland. On 5 February 2020 he issued a decision ordering the elections and setting their date for 10 May 2020 and scheduling election activities.[16] The spreading SARS-CoV–2 epidemic disrupted the activity of administration bodies, candidates and supporting election committees. On 4 March 2020 the first case of infection with this virus was found in Poland. On 11 March 2020 the virus-induced COVID-19 disease was designated a pandemic by the World Health Organization. The Polish authorities initially

14 G. Maroń, Instytucja przysięgi Prezydenta w polskim porządku prawnym, 'Przegląd Prawa Konstytucyjnego' 2012, no. 2 (10), p. 159.

15 Pursuant to Art. 293 of the Electoral Code, the National Electoral Commission confirms this fact by way of a resolution, which it submits to the Marshal of the Sejm, makes it public and announces it in the Journal of Laws of the Republic of Poland, and the Marshal of the Sejm again orders elections no later than on the 14th day from the date of announcement of the resolution.

16 Decision of the Marshal of the Sejm of the Republic of Poland of 5 February 2020 on ordering the election of the President of the Republic of Poland (Journal of Laws, item 184), http://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20200000184/O/D20200184.pdf (accessed 31.01.2022).

introduced an epidemic emergency between 14 and 20 March 2020[17] and then a state of epidemic.[18] Despite the constitutional and statutory premises, it was not decided to introduce a state of natural disaster in Poland, as in many other countries.

Instead, a draft of a special act was prepared on special solutions related to the prevention, counteraction and combating of COVID-19, other infectious diseases and resulting crises. This legal act was to provide the rulers with the tools necessary during a pandemic. The Act was adopted on 2 March 2020[19] and entered into force on 8 March. On 31 March the Act was amended twice, interfering with numerous areas of the state's functioning, including the provisions of the Electoral Code. This included expanding the catalogue of people entitled to vote by correspondence method, including this subject to compulsory quarantine or isolation at home on the day of voting, as well as those who have reached the age of 60 at the latest on the day of the election (Art. 40).[20]

Regardless of the procedure for amending the provisions of the Electoral Code, it should be stated that the above modification of the provisions was adequate to the epidemic situation at that time and made it possible to elect the President of the Republic of Poland within the constitutional period. The preparations for the elections were, however, interrupted by the Prime Minister, who, on 16 April, issued decisions based on which he ordered the Polish Security Printing Works S.A. to prepare the materials necessary for the correspondence elections of the President of the Republic of Poland[21] and Poczta Polska (Polish Post) to take the organisational steps necessary for preparing and holding such elections.[22] These decisions became the subject of court proceedings, in which a final judgment was issued. The Provincial Admin-

17 Pursuant to Art. 293 of the Electoral Code, the National Electoral Commission confirms this fact by way of a resolution, which it submits to the Marshal of the Sejm, makes it public and announces it in the Journal of Laws of the Republic of Poland, and the Marshal of the Sejm again orders elections no later than on the 14th day from the date of announcement of the resolution.

18 Regulation of the Minister of Health of 20 March 2020 on the declaration of an epidemic in the territory of the Republic of Poland (Journal of Laws, item 491, as amended), https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20200000491 (accessed 31.01.2022).

19 Act of 2 March 2020 on special solutions related to the prevention, ᶜounteracting and combating of COVID-19, other infectious diseases and crisis situations caused by them (Journal of Laws, item 374, as amended), http://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20200000374/O/D20200374.pdf (accessed 31.01.2022), further: the Covid Act.

20 The Act of 31 March 2020 amending the Act on special solutions related to the prevention, counteracting and combating of COVID-19, other infectious diseases and crisis situations caused by them and some other acts (Journal of Laws, item 568), http://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20200000568/O/D20200568.pdf (accessed 31.01.2022). See: M. Dahl, M. Lewandowska, COVID-19 a proces legislacyjny – posiedzenia Sejmu Rzeczypospolitej Polskiej IX kadencji, 'Przegląd Prawa Konstytucyjnego' 2021, no. 5(63), p. 137.

21 Decision of the President of the Council of Ministers of 16 April 2020. BPRM.4820.2.4.2020.

22 Decision of the President of the Council of Ministers of 16 April 2020. BPRM.4820.2.3.2020.

istrative Court in Warsaw on 15 September 2020[23] annulled both decisions because they had no legal basis. It also found that the decision of the President of the Council of Ministers 'grossly violated Art. 127 sec. 1 of the Constitution of the Republic of Poland due to the fact that it commissioned Poczta Polska to prepare elections for the President of the Republic of Poland only by correspondence, i.e. in a manner that did not guarantee voters equal, direct and secret voting and was contrary to the applicable law'.[24] Moreover, the Provincial Administrative Court stated that the 'violation of Art. 157 § 1 and Art. 187 § 1 and § 2 of the Electoral Code, because the above-mentioned provisions are clear, do not require interpretation and in a precise and binding manner *erga omnes* constitute the exclusive competence of the PKW as the highest authority competent in matters of holding elections in the Republic of Poland'.[25] Provincial Administrative Court also stated gross violation of Art. 7 of the Polish Constitution, Art. 6 of the Code of Administrative Procedure, Art. 5 of the Act of 8 August 1996 on the Council of Ministers,[26] Art. 11 sec. 2 in connection with Art. 11 sec. 2a, sec. 3 of the COVID-19 Act.

Holding the elections on 10 May 2020 in a manner not compliant with the Electoral Code – i.e. by correspondence by Poczta Polska – was to be guaranteed by the Act of 6 April 2020 on the special rules for holding general elections for the President of the Republic of Poland ordered in 2020.[27] The Act was based on similar assumptions, such as the decisions of the Prime Minister of 16 April 2020. Voting was to take place only by correspondence (Art. 2 sec. 1). Poczta Polska (Art. 3 sec. 1) was responsible for organising and holding the elections. Decisions significant for the elections were to be made by the minister competent for state assets (e.g. establishing the model of the voting card, Art. 3 sec. 9) and the votes were to be verified using the PESEL number (Art. 14 sec. 2). The manner of organising elections adopted in the Act raises doubts about ensuring the principle of direct elections and the method of iden-

23 Judgment of the Provincial Administrative Court in Warsaw on 15 September 2020 regarding the complaints of the Ombudsman and the Free Society Foundation based in Poznań against the decision of the Prime Minister of 16 April 2020, ref. BPRM.4820.2.3.2020 regarding the order of Poczta Polska S.A. implementation of activities in the field of counteracting COVID-19 aimed at the preparation and holding of the elections of the President of the Republic of Poland in 2020 by correspondence, Ref. no. VII SA / Wa 992/20, https://bip.warszawa.wsa.gov.pl/download/attachment/3545/pelna-tresc-wyroku-w-sprawie-vii-sa-wa-992–20.pdf (accessed 30.01.2022).

24 *Ibidem,* p. 33.

25 *Ibidem,* p. 39.

26 J. Szymanek, Bezpieczeństwo procesów wyborczych (uwagi de lege lata i de lege ferenda na tle rozwiązań stosowanych w państwach demokratycznych), 'Zeszyty Prawnicze' 2017, no. 1(53), pp. 9–40.

27 The Act of 6 April 2020 on the special rules for holding general elections for the President of the Republic of Poland ordered in 2020 (Journal of Laws, item 827), https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20200000827/O/D20200827.pdf (accessed 30.01.2022).

tifying the entitled person and verifying the vote – the principle of secret voting.[28] The Act was adopted – after the Senate's amendments were rejected – in the Sejm on 7 May 2020, signed by the President of the Republic of Poland on 8 May, with the announcement and entry into force on 9 May, i.e. on the day before the date for which the elections were called. [29]

The National Electoral Commission, in a communique of 7 May 2020, assessed the situation as follows: 'The National Electoral Commission informs that it has undertaken all activities related to the election of the President of the Republic of Poland, ordered by the Marshal of the Sejm of the Republic of Poland on 10 May 2020, to which it was obliged by law. However, on 16 April 2020, the Act on special support instruments in connection with the spread of the SARS-CoV–2 virus was passed.[30] Under Art. 102 of this Act, the information obligations resulting from the provisions of the Electoral Code imposed on commune heads and election commissioners, as well as provisions concerning the issuing of certificates of the right to vote, postal voting and proxy voting, were suspended. First of all, the powers of the National Electoral Commission concerning determining the specimen of the voting card and ordering the printing of the cards have been suspended. Depriving the National Electoral Commission of the legal possibility to print ballots made voting in the election of the President of the Republic of Poland on 10 May 2020 impossible. Election cards are a prerequisite for voting. The legal regulation deprived the National Electoral Commission of the instruments necessary to perform its duties. In this context, the National Electoral Commission informs voters, election committees, candidates, election administrations and local government units that voting cannot be held on 10 May 2020.'[31]

The analysis proves that the voting on 10 May 2020 could not take place not so much for epidemic reasons, but because of organisational and legal chaos. Considering that the establishment of the calendar of presidential elections by the Marshal of the Sejm takes place through a one-off legal act, it was not possible to reissue an ordinance with different content.[32] Therefore, it should be concluded that the activi-

28 M. Musiał-Karg, Głosowanie korespondencyjne podczas pandemii COVID-19. Doświadczenia z polskich wyborów prezydenckich w 2020 r., 'Przegląd Prawa Konstytucyjnego' 2021, no. 2(60), p. 31.

29 A. Jackiewicz, Postal Voting and Voting by Proxy as an Alternative Voting Methods in the Light of the Electoral Code in Poland, 'Białostockie Studia Prawnicze' 2016, no. 20/A, pp. 261–271.

30 Act of 16 April 2020 on specific support instruments in connection with the spread of SARS-CoV–2 virus (Journal of Laws, item 695), https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20200000695 (accessed 30.01.2022).

31 The announcement is available on the website: https://pkw.gov.pl/aktualnosci/wyjasnienia-stanowiska-komunikaty/komunikat-panstwowej-komisji-wyborczej-z-dnia-7-maja-2020-roku (accessed 30.01.2022).

32 J. Flis, Gang Olsena w amoku, 'Tygodnik Powszechny' 05.05.2020, http://jaroslawflis.blog.tygodnikpowszechny.pl/2020/05/05/gang-olsena-w-amoku/ (accessed 30.01.2022).

ties of the Prime Minister and the Sejm aimed at preparing and holding the presidential elections for 10 May 2020 in an unconstitutional manner not compliant with the Electoral Code resulted in a constitutional crisis.[33]

4. A Solution to the Constitutional Crisis

The rulers entrusted the solution to the constitutional crisis with the PKW, which on 10 May 2020 adopted a resolution that was the basis for actions aimed at setting the next voting date and – finally – electing the President of the Republic of Poland before the end of the term of office.

The PKW in Resolution No. 129/2020 of 10 May 2020[34] stated that 'in the election of the President of the Republic of Poland ordered for 10 May 2020, it was not possible to vote for candidates' (§ 1). However, the conclusion that the 'fact indicated in § 1 is equivalent in effect to that provided for in Art. 293 § 3 of the Act of 5 January 2011 – Electoral Code, the impossibility of voting due to the lack of candidates', which the PKW formulated in § 2 of the resolution, raises doubts. This statement did not correspond to the actual state of affairs. As well as the content of the Resolution of the PKW No. 121/2020 of 15 April 2020 on the list of candidates for the President of the Republic of Poland in the elections ordered on 10 May 2020[35] Content of § 2 of Resolution 129/2020 also disregards the legal status – the provisions of the Constitution of the Republic of Poland and the Electoral Code, in particular the provisions of Art. 161 § 3 of the Code. According to them, the PKW adopts resolutions within its statutory powers, particularly in the cases specified in Art. 161 § 1 and 2.[36]

33 See NIK audit results, Actions of selected entities in connection with the preparation of general elections for the President of the Republic of Poland ordered for 10 May 2020 using correspondence voting, Registration number: D/20/502, https://www.nik.gov.pl/kontrole/D/20/502/ (accessed 30.01.2022).

34 Resolution No. 129/2020 of the National Electoral Commission of 10 May 2020 on the impossibility of voting for candidates in the election of the President of the Republic of Poland (Journal of Laws, item 967), http://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20200000967/O/D20200967.pdf (accessed 31.01.2022).

35 It confirmed the registration of the following candidates: Biedroń Robert, Bosak Krzysztof, Duda Andrzej Sebastian, Hołownia Szymon Franciszek, Kidawa-Błońska Małgorzata Maria, Kosiniak-Kamysz Władysław Marcin, Piotrowski Mirosław Mariusz, Tanajno Paweł Jan, Żółtek Stanisław Józef. See Resolution No. 121/2020 of the National Electoral Commission of 15 April 2020 on the list of candidates for the President of the Republic of Poland in the elections ordered for 10 May 2020, https://pkw.gov.pl/uploaded_files/1586984616_uchwala-o-liscie-kandydatow.pdf (accessed 30.01.2022).

36 § 1 The National Electoral Commission issues guidelines binding on election commissioners, election officials and lower-level election commissions, as well as explanations for government administration bodies and local government units, as well as for organisational units subordinate to them that perform tasks related to the conduct of elections, and for election committees, and radio and television broadcasters.

PKW Resolution No. 129/2020 resolved the constitutional crisis but – due to the existence of glaring regulatory gaps in the Electoral Code – was based on a fictitious claim that there were no candidates, which was contrary to the facts. Instead, it responded to the political demand by quickly explaining the problem. There was no pro-system attitude in the actions of the PKW that would allow the problem to be solved while at the same time generating a clear signal about the need to change the law. To this end, on 10 May 2020 it should have taken the same steps as after any actual election, i.e. convene a press conference and announce the voting results. It could have read as follows: 'Since in the elections for the office of the President of the Republic of Poland, ordered for 10 May 2022, it was not possible to vote, the results of the elections, in terms of the number of votes cast for each candidate, amounted to 0 (zero) votes. The turnout was 0 (zero) per cent.' Thus, the PKW would gain a basis for issuing a resolution in which the solution of the existing constitutional crisis would be entrusted to the Supreme Court. Then, the problem would be resolved in a manner that does not raise legal doubts, based on the existing provisions, indicating the Supreme Court as the only body authorised to make decisions on the validity of elections, i.e. Art. 129 of the Polish Constitution.

Conclusions

The conducted analysis allows for the following conclusions:

The regulations in force in Poland regulating the procedure for holding elections to the office of the President of the Republic of Poland are stable, as they have been in force since 1997, and their origins date back to 1990. They have also been repeatedly tested in practice – elections were held on their basis in 2000, 2005, 2010 and 2015. It should be noted that the 2010 elections took place after the death of the incumbent President of the Republic of Poland, under Art. 128 sec. 2 and Art. 131 sec. 1 and 2.

The election of the President of the Republic of Poland in 2020 was accompanied by emotions related to the polls of political parties and the candidates they support and the unusual epidemic situation. In addition, the course of the election was complicated by the Prime Minister and the Sejm. These authorities significantly modified the election procedure, containing derogations from the binding provisions of the Constitution of the Republic of Poland and the Electoral Code.

This disrupted the preparation for the elections, which were initially to be held under the constitutional and code provisions that had been in force for many years and verified in practice. As a result of the legally dubious entrustment of the powers

§ 2 The National Electoral Commission shall repeal resolutions of district and regional electoral commissions and decisions of election commissioners made in violation of the law or inconsistent with its guidelines and refer the matter to the competent commission for reconsideration or decide on the matter.

to prepare and conduct elections to Poczta Polska, especially in the form of remote general elections by postal voting unknown to Polish regulations, the voting was not properly prepared and did not take place within the prescribed period.

In this context, doubts can be expressed as to the comprehensiveness of the constitutional and code provisions regulating the principles of election to the office of the President of the Republic of Poland. The events of 2020 revealed the existence of numerous legal loopholes relating to the presidential term of office, the institution of a 'substitute' for the President of the Republic of Poland, and the catalogue of premises authorising the election authorities to take steps to conduct elections despite the occurrence of abnormal situations.

The Act of 2 March 2020 on special solutions related to the prevention, counteraction and combating of COVID-19, other infectious diseases, and the emergencies caused by them is still in force. It has been amended 45 times, its volume has increased from 13 to 201 pages, and the scope of the regulations cover almost all areas of the functioning of the state and the people living in it. Based on it, an informal extraordinary state was introduced, which at the time of writing the article is already almost 22 months.

In 2020, the certainty as to the rules governing the election of the President of the Republic of Poland was seriously shaken. The findings made in this analysis allow us to treat the events of this period as a model example of a situation defined as the primacy of politics over law. Hence, numerous aspects of the identified problem elude research conducted in legal sciences and require a separate analysis, taking into account research areas typical for political science.

REFERENCES

Balicki R., Weryfikacja ważności wyborów ogólnokrajowych w Polsce, 'Przegląd Prawa Konstytucyjnego' 2021, no. 4(62).

Bezubik K.M., Olechno A., Could the Election Deposit Become an Electoral Qualification? Remarks on the Example of the Election of Head of State, 'Białostockie Studia Prawnicze' 2016, no. 20/A.

Ciapała J., Prezydent w systemie ustrojowym Polski, Warsaw 1999.

Dahl M., Lewandowska M., COVID-19 a proces legislacyjny - posiedzenia Sejmu Rzeczypospolitej Polskiej IX kadencji, 'Przegląd Prawa Konstytucyjnego' 2021, no. 5(63).

Dudek D., Prezydent Rzeczypospolitej Polskiej – refleksje w 100-lecie instytucji, 'Przegląd Prawa Konstytucyjnego' 2021, no. 4(62).

Flis J., Gang Olsena w amoku, 'Tygodnik Powszechny', 05.05.2020, http://jaroslawflis.blog.tygodnikpowszechny.pl/2020/05/05/gang-olsena-w-amoku/.

Florczak-Wątor M., Konstytucyjne uregulowania problematyki zastępstwa prezydenta w Rzeczypospolitej Polskiej i państwach z nią sąsiadujących, 'Przegląd Prawa Konstytucyjnego' 2010, no. 2–3.

Górecki D., Pozycja ustrojowo-prawna prezydenta Rzeczypospolitej Polski i rządu w ustawie konstytucyjnej z 23 kwietnia 1935 roku, Łódź 1992.

Grabowski R., Evolution of the Constitutional Organ on the Example of the Polish National Assembly, 'Przegląd Prawa Konstytucyjnego' 2020, no. 5(57).

Jackiewicz A., Postal Voting and Voting by Proxy as an Alternative Voting Methods in the Light of the Electoral Code in Poland, 'Białostockie Studia Prawnicze' 2016, no. 20/A.

Maroń G., Instytucja przysięgi Prezydenta w polskim porządku prawnym, 'Przegląd Prawa Konstytucyjnego' 2012, no. 2(10).

Mojak R., Instytucja prezydenta RP w okresie przekształceń ustrojowych, Lublin 1995.

Musiał-Karg M., Głosowanie korespondencyjne podczas pandemii COVID-19. Doświadczenia z polskich wyborów prezydenckich w 2020 r., 'Przegląd Prawa Konstytucyjnego' 2021, no. 2(60).

Pastuszko G., Marszałek Sejmu jako osoba wykonująca tymczasowo obowiązki Prezydenta RP – dylematy konstytucyjne, 'Przegląd Prawa Konstytucyjnego' 2011, no. 1(5),

Siemieński F., Ewolucja instytucji Prezydenta Rzeczypospolitej Polskiej, 'Annales Universitatis Marie Curie-Sklodowska Lublin – Polonia' 1990, vol. XXXVII, 13, sectio G.

Szymanek J., Bezpieczeństwo procesów wyborczych (uwagi de lege lata i de lege ferenda na tle rozwiązań stosowanych w państwach demokratycznych), 'Zeszyty Prawnicze' 2017, no. 1(53).

Winczorek P., Komentarz do Konstytucji Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r., Warsaw 2000.

Witkowski Z., Prezydent Rzeczypospolitej Polskiej, (in:) Z. Witkowski (ed.), Prawo konstytucyjne, Toruń 2001.

NIK audit results, Actions of selected entities in connection with the preparation of general elections for the President of the Republic of Poland ordered on 10 May 2020 using correspondence voting, No. D/20/502, https://www.nik.gov.pl/kontrole/D/20/502/.

Zubik M., Gdy Marszałek Sejmu jest pierwszą osobą w państwie, czyli polskie interregnum, 'Przegląd Sejmowy' 2010, no. 5.

Bialystok Legal Studies
Białostockie Studia Prawnicze
2022 vol. 27 nr 2

sciendo

DOI: 10.15290/bsp.2022.27.02.12

Received: 30.01.2022
Accepted: 20.04.2022

Mariusz Jabłoński
University of Wroclaw, Poland
mariusx@prawo.uni.wroc.pl
ORCID ID: https://orcid.org/0000–0001–8347–1884

Dominika Kuźnicka-Błaszkowska
University of Wroclaw, Poland
dominika.kuznicka-blaszkowska@uwr.edu.pl
ORCID ID: https://orcid.org/0000–0001–8804–569X

Limiting the Right of Access to Public Information in the Age of COVID-19 – Case Study of Poland

Abstract: The right of access to public information is one of the most fundamental political rights granted to citizens under Art. 61 of the Polish Constitution. In the Act of 6 September 2001, not only was the procedure for providing the public information specified, but also some detailed rules on obliged entities. In practice, the right to access public information not only enables citizens to take mature political decisions, but also prevents the abuse, corruption, nepotism or waste of public funds. The transparency of public administration actions forces its representatives to behave by the book and to respect the rules governing a democratic state of law as well as human rights. Undoubtedly, the full implementation of the right of access to public information may not be possible in urgent and unexpected scenarios such as a state of emergency or martial law, but any restrictions should always be introduced in a proportionate manner and only to the extent necessary to protect other (more important) goods and values. The epidemic threat facing Poland in March 2020, followed by the state of the epidemic and the accompanying activities of the broadly understood legislator, have significantly impacted the implementation of the openness principle and the right to access public information in the country. Simultaneously, doubts were raised not only due to the scope and nature of these changes, but also because of their constitutionality. In order to obtain a full picture of these threats to the implementation of the law in question, one must take into account possible decisions of the Constitutional Tribunal (with positive or negative effects) in cases that will be ruled on soon. The analysis that we present is aimed not only at determining whether the functioning of the state in the epidemic regime justified the need to limit the constitutional right of access to public information, but also – in a broader systemic

context – at demonstrating that the transparency standards existing in our national model need to be strengthened, not weakened.
Keywords: democratic state of law, epidemic state, human rights, right to information

Introduction

The right of access to public information is one of the most fundamental political rights granted to citizens under Art. 61 of the Polish Constitution.[1] In the Act of 6 September 2001,[2] not only was the procedure for providing the public information specified, but also some detailed rules.[3] According to its Art. 1, any information relating to a public matter is considered to be public information;[4] the entities obliged to disclose public information include, inter alia, public authorities (Art. 4 (1)(1) u.d.i.p.); and anyone can request access, without the need to demonstrate a legal and/or factual interest. Art. 2 u.d.i.p.[5] established how to effectively exercise the powers.

In practice, the right to access public information not only allows citizens to make mature political decisions, but also prevents the abuse, corruption, nepotism or waste of public funds. The openness of actions of public administration bodies forces their representatives to behave transparently and honestly, to respect the rules governing a democratic state of law and to respect human rights. Undoubtedly, the full implementation of the right of access to public information may not be possible in urgent scenarios such as a state of emergency or martial law, but any restrictions should always be introduced in a proportionate manner and only to the extent necessary to protect other (more important) goods and values.

The state of epidemic threat introduced in Poland in March 2020, followed by the state of the epidemic and the accompanying activities of the broadly understood legislator, significantly influenced the implementation of the principle of openness and the right to access public information in the state. At the same time, doubts are

1 The Constitution of the Republic of Poland of 2 April 1997, Dz. U. no. 78, item 483 with changes.

2 Act of 6 September 2001 on access to public information (Dz. U. 2020 item 2,176 with changes), further 'u.d.i.p.'.

3 I. Kamińska and M. Rozbicka-Ostrowska, Ustawa o dostępie do informacji publicznej, Komentarz, Warsaw 2015, p. 17 et seq.

4 In broad terms, the source of information is 'not only every document in the legal sense, recorded in any form, or official material, but also data recorded in any form, even if they do not take the formalized form of a document (e.g. an object). In this approach, the information can be obtained in any form (view, copy of the document, sending the document in the form of a file, photo scan, access to the item etc.), also through direct statements of persons belonging to public authorities or persons authorized or obliged to represent such a body and the staff providing its service, which means that from the point of view of information protection, it becomes necessary to distinguish between its components' – WSA in Warsaw, 3.01.2011, II SAB/Wa 264/10; NSA 18.09.2008, I OSK 315/08.

5 M. Jabłoński, Udostępnienie informacji publicznej w formie wglądu do dokumentu, Wrocław 2013, p. 47 et seq.

raised not only by the scope and nature of the changes, but also by their constitutionality. For a full picture of the threats to the implementation of the law in question, it is necessary to take into account possible (positive or negative) decisions of the Constitutional Tribunal in cases that will be ruled on soon.

The analysis that we present is aimed not only at determining whether the functioning of the state in the epidemic regime justified the need to limit the constitutional right of access to public information, but also – in a broader systemic context – at demonstrating that the standards of transparency existing in our national model need to be strengthened, not weakened. Even though the introduced during Covid epidemic law mainly changed procedural aspects of access to information, it could have potentially impacted its material parts, and as a result threaten other rights and freedoms, including freedom of press. It is worth remembering that democracy must be inherently related to the existence of a guarantee of the so-called transparency of public life, which should be identified with the principle of openness and transparency of a democratic state of law. The essence of this principle boils down to the assumption that the functioning of the state apparatus and all persons holding public functions connected with it should be disclosed, and exceptions, although possible and justified, should be treated as exhaustive exceptions to the rule. The main research hypothesis is that the restrictions on access to public information introduced in the state of epidemic cannot be considered justified (as they have not met the requirements of Art. 31 of the Polish Constitution) and have led to the degradation of the value of transparency in Poland. In this study, the authors try to prove that the motion for annulment of a number of provisions of the u.d.i.p., which is being examined by the Constitutional Tribunal, may lead to the inability to use the constitutional right of access to public information. Formal and legal research methods were used in the writing of this article. It aims to present a case study of the limiting of the right to access public information by changing the procedure of access during the COVID-19 pandemic in Poland only and is not a comparative study.

1. The Importance of the Principle of Openness in Extraordinary Situations

Openness is of particular importance in the context of deliberations on the principles governing a democratic state ruled by law. The importance of the openness rule for a political culture is highly recognized[6]. The level of exercise of citizens' rights to

6 A. Dylus, Aksjologiczne podstawy jawności i jej ograniczenia. Perspektywa etyki politycznej, (in:) Z. Cieślak and G. Szpor (eds.), Jawność i jej ograniczenia t. 2, Podstawy aksjologiczne, Warsaw 2013, p. 22.

obtain information is treated as a measure of the democracy's maturity level.[7] Some authors emphasize that the traditional role of citizens in societies based on ancient culture is related to the principles of limited trust, controlling power and, in exceptional situations, civil disobedience.[8] The freedom to obtain information is also described as controlled scepticism towards representative democracy, whose aim is to care for the common good[9]. The openness is also an inseparable element of the political education, directly pointing to the arguments for adopting specific, detailed solutions, efficient translation of the individual elements of political reality to citizens and the consequences of decisions made, not only affecting the acquisition of civic competences, but above all allowing a citizen to abandon utopian desires to create an ideal society.[10] The adoption of pro-transparency regulations leads to the empowerment of the citizen in relations with the public administration; the citizen becomes an equal partner of the administration, when exercising their powers of control[11].

The conscious citizens create the foundations of a civil society and, at the same time, an information society, i.e. the one in which the information becomes not only a source of knowledge, but the real tools for determining various types of processes, ranging from the political, social and controlling to economic and educational ones. Such a society bases its existence on knowledge, the foundation of which is access to information.[12] At the same time, such knowledge becomes the basis for modifying the existing importance of the state, economy, information processes, management systems etc.[13] serving the goal of deepening the democracy, including democratic law-making processes.

Ensuring the transparency and openness of public authority activities is particularly important in times of crisis and social unrest. The access to public information should be fully implemented, especially when the level of citizens' trust in the state

7 J. Pitera, Wkład Transparency International Polska w przezwyciężanie korupcji, (in:) A Dylus, A. Rudowski and M. Zaborski (eds.), Korupcja. Oblicza, uwarunkowania, przeciwdziałanie, Wroclaw/Warsaw/Cracow 2006, p. 152.

8 G. Skąpska, Głos w dyskusji nt. Etyka i polityka w społecznym odbiorze, (in:) G. Skąpska (ed.), Etyka w polityce, Cracow 1997, pp. 158–159.

9 M. Bernaczyk, Funkcje prawa do informacji w polskim porządku prawnym, (in:) M. Jabłoński (ed.), Realizacja i ochrona konstytucyjnych wolności i praw jednostki w polskim porządku prawny, Wroclaw 2014, p. 369.

10 A. Dylus, Aksjologiczne podstawy…, *op. cit.* p. 24.

11 A. Piskorz-Ryń, Dostęp do informacji publicznej- zasady konstrukcyjne ustawy, Kwartalnik Prawa Publicznego, 2002 v. 4, p. 185.

12 On the components of the concept of 'information society' with an indication of the important role of 'technical instruments' accompanying its functioning, see: T. Burczyński, Elektroniczna wymiana informacji w administracji publicznej, Wroclaw 2011, p. 15 et seq.

13 R. Raszewska-Skałecka, Edukacja jednostki wobec wyzwań społeczeństwa informacyjnego – kwestie wybrane, (in:) J. Blicharz and J. Boć (eds.), Prawna działalność instytucji społeczeństwa obywatelskiego, Wroclaw 2009, p. 464 et seq.

apparatus drops dramatically. As the Polish Ombudsman pointed out, 'In view of the current state of epidemic and numerous limitations of fundamental rights and freedoms (...) providing citizens with access to reliable information about the activities of public authorities should be considered particularly important'[14].

The SARS-CoV–2 epidemic also showed the importance of the rapid information flow in social behaviour. Guaranteeing the full implementation of the transparency principle in the state could have contributed to combating fake news and preventing social panic. The World Health Organization states that during the COVID-19 pandemic, one could observe an 'infodemic' in the majority of states.[15] An 'infodemic' may cause serious harm in the societies as it feeds on people's most basic anxieties. Considering the novelty of the virus and unusual situations we all had to face, gaps in knowledge have proven to be an ideal breeding ground for false or misleading narratives to spread.[16] To illustrate, one can recall the panic that broke out during the first wave of the SARS-CoV–2 epidemic in Poland in March 2020, manifested, inter alia, by the mass buying of products from stores, losses incurred by hotels and restaurants (introducing restrictions overnight on the entrepreneurs' functioning was associated with the loss of previously purchased food products), repeated rumours of the closure of cities, or uncertainties related to the ability to leave and return to the country.

A prudent information policy could contribute to a faster end to the pandemic by increasing the level of vaccination coverage in the society. The contradictory information provided by various government representatives with the introduced restrictions on access to public information led to increased fears amongst many citizens related to receiving the new COVID-19 vaccine. It also has to be emphasized that the lack of transparency of governmental bodies making impactful decisions leads to an infringement not only of the passive obligation to provide public information (which is broadly described further in the article) but also its active side.[17]

---

14 Letter of the Polish Ombudsman to the Minister of Administration and Interior Affairs dated 15.04.2020, VII.6060.19.2020.MM.

15 The term has been used and described by the WHO: 'infodemics are an excessive amount of information about a problem, which makes it difficult to identify a solution. They can spread misinformation, disinformation and rumours during a health emergency. Infodemics can hamper an effective public health response and create confusion and distrust among people', https://www.who.int/docs/defaultsource/coronaviruse/situation-reports/20200305-sitrep-45-COVID-19.pdf?sfvrsn=ed2ba78b_4 (accessed 07.03.2022).

16 Joint Communication to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions Tackling COVID-19 disinformation – Getting the facts right, dated: 10.06.2020.

17 See judgment of European Court of Human Rights from 19.02.1998 Guerra and others v. Italy, case no. 12967/89.

In its guidelines on freedom of expression and information in times of crisis,[18] the Committee of the Council of Europe listed among the recommendations guaranteeing free access to information, avoiding unclear wording when imposing restrictions on freedom of expression and information, and adhering to the highest professional and ethical standards when making available up-to-date, reliable and comprehensive information to the public. This is particularly important as any restrictions in access to public information may further lead to the infringing of other rights and freedoms, such as the right to freely communicate and receive information, the right to participate in public affairs (which was restricted through other means) and the freedom of assembly[19], ultimately leading to limiting the freedom of the press. This has been the subject of various ECHR cases, and included in the above-mentioned guidelines of the Council of Europe and communication from EU bodies and institutions.

The Secretary General of the Council of Europe in a document addressed to all member states[20] pointed out that even during the crisis caused by the COVID-19 pandemic, access to public information should be based on the rules guaranteed up to that point. The document also stressed that official announcements cannot be the only source of information regarding the pandemic, as it risks introducing censorship and disregarding legitimate concerns. Attention was also brought to the role of state information campaigns in combating disinformation, the duty of state authorities to counteract information manipulation and the prohibition of using the argument of fighting the pandemic to silence whistleblowers and opposition parties.

2. Restrictions to the Right of Access to Public Information during the Epidemic Threat and Epidemic State

Under the ordinance of the Minister of Health of 13 March 2020[21] starting from 14 March 2020, the epidemic threat was introduced in Poland, which lasted until 19 March 2020. Due to the worsening epidemic situation, with the use of next ordinance of the Minister of Health,[22] on 20 March 2020 the state of the epidemic was im-

18 Guidelines of the Committee of Ministers of the Council of Europe on protecting freedom of expression and information in times of crisis, Adopted by the Committee of Ministers on 26 September 2007 at the 1005th meeting of the Ministers' Deputies.

19 More about freedom of assembly see in A. Koman-Bednarczyk and N. Kurek, Freedom of Assembly in the Light of Polish Regulations and Selected Case Law Standards of the European Court of Human Rights, 'Studia Iuridica Lublinesia' 2021, vol. 30, no. 5, pp. 309–324.

20 Respecting democracy, rule of law and human rights in the framework of the COVID-19 sanitary crisis – A toolkit for member states. Information Documents SG/Inf(2020)11.

21 Ordinance of the Minister of Health of 13 March 2020 on the declaration of an epidemic threat in the territory of the Republic of Poland (Dz.U.2020.433 with changes).

22 Ordinance of the Minister of Health of 20 March 2020 on the declaration of an epidemic in the territory of the Republic of Poland (Dz.U.2020.491 with changes).

posed, which, despite the visible improvement in the epidemic situation, continues to this day. In order to reduce the number of SARS-CoV–2 infections and the deaths caused by them, it became necessary to introduce a number of restrictions on the exercise of individual rights and freedoms. Apart from the necessity to temporarily suspend certain types of economic activity (restaurants, gyms, hotels, bars, discos, cinemas, theatres and others), significant changes were also introduced in the functioning of the public administration.[23].

One such example was the introduction, through Arts. 15zzs (1)(6) and (10)(1) of the act of 2 March 2020 on special solutions related to the prevention and combating of COVID-19, other infectious diseases and crisis situations caused by them,[24] of changes to the procedure of public information access. The change provided by Art. 15zzs (1)(6) assumed that during the period of an epidemic threat or state of an epidemic announced due to COVID-19, the procedural and judicial deadlines in administrative proceedings would not start and the initiated ones were suspended. In turn according to Art. 15zzs (10)(1), during the period of an epidemic threat or state of an epidemic announced due to COVID-19, the provisions on the inactivity of the authorities and the obligation of the authority and entity conducting the proceedings or control, respectively, to notify the party or participant in the proceedings about failure to settle the case on time are not in force.

It should be noted that the time limit for making public information available specified in Art. 13 u.d.i.p. is not only of an instructional nature. As indicated in Art. 13 u.d.i.p., the disclosure of public information upon request is to take place without undue delay, but not later than 14 days from the date of submission of the request. If the public information cannot be made available within the time limit specified in section 1, the entity obliged to disclose it shall notify the subject within this period of the reasons for the delay and the date on which it will make the information available, which should not be longer than two months from the date of submission of the request. The exceptions to this rule are not only the situation in which, as a result of disclosing the information, the obliged entity is to incur additional costs,[25] but also those that will be a consequence of: the inability to meet the request by the obliged person

23 It is worth to notice, that a number of these changes have shown that in emergency situations, processes that previously had taken years could be carried out in just a few days (e.g. the online court hearings or city council sessions, e-education, e-studies etc.), but some of these restrictions could not be fully justified. See also 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 Lublinesia' 2021, vol. 30, no. 4, pp. 77–109.

24 The act of 2 March 2020 on special solutions related to the prevention, counteracting and combating of COVID-19, other infectious diseases and the emergencies caused by them (Dz. U. item 374 with changes), further 'Covid act'.

25 In such a situation, the obligated entity shall notify the applicant of the amount of the fee within 14 days of the date of submitting the application. The disclosure of information in accordance with the application takes place within 14 days from the date of notification to the applicant, un-

as to the form and/or method (Article 14), or the determination that the request concerns the disclosure of processed information (Article 3 (1) (1))[26]. If the case is not resolved (by providing the information or by issuing a negative decision), the applicant has the right to lodge a complaint with the administrative court for the inactivity of the authority. However, the provisions of the Code of Administrative Procedure apply only to a limited extent when it comes to the procedure for public information disclosure, i.e. to issue negative decisions on providing information and decisions to discontinue the procedure of disclosure of information. At the same time, there are no grounds for considering that the time limit specified in Art. 13 u.d.i.p. should depend on the state of epidemic threat or state of the epidemic announced due to Covid.[27] Therefore, Art. 15zzs (1)(6) should not apply to proceedings for the disclosure of public information.

Additionally, in Art. 15zzs (2) of the Covid act, it is indicated that the suspension of the commencement and of the time limits referred to in para. 1 does not apply to the time limits in cases recognized by courts referred to in Art. 14a (4) and (5) of that Covid act, i.e. time limits recognized by the legislator as urgent ones. Pursuant to Art. 14a (5) of the Covid Act, the urgent cases are cases where the law specifies the time limit for their consideration by the court. It should be noted that Art. 21 u.d.i.p. specifies the deadlines within which, in the case of proceedings for access to public information, the files and replies to the complaint should be submitted (15 days from the receipt of the complaint) and the deadline for considering the complaint (30 days). Despite this legal background, the Regional Administrative Court in Łódź ruled that cases for disclosure of public information constitute a category of urgent matters and therefore Art. 15zzs (1)(6) shall not apply.[28] However, it seems that this conclusion has gone too far and is contrary to the intention of the rational legislator. The purpose of creating a category of 'urgent matters' was to ensure that specific administrative cases whose outcome may seriously impact individuals' ongoing matters are resolved in a timely manner. This category includes such cases as issuing ID cards, driving permissions, passports or others essentials for daily activities. Without doubt, access to public information is an important right, but this does not fall into the category of administrative cases/proceedings which are essential for individual daily living. Undoubtedly, the imprecise wording of the Covid act allowed for such a broad interpretation.

less the applicant changes the application within this period in terms of the manner or form of providing the information or withdraws the application.

26 On the specificity and various types of solutions that appeared in the jurisprudence due to the general provisions of the act on access to public information see: M. Jabłoński, Udostępnienie informacji publicznej w formie wglądu do dokumentu, Wroclaw 2015, p. 77 et seq.

27 VII.6060.19.2020.MM.

28 Judgment of the Regional Administrative Court in Łódź of 28 April 2020, II SAB/Łd 12/20, LEX no. 2974739.

Simultaneously, in the practice of exercising u.d.i.p., a complaint about inactivity is of a key nature. The expiry of the deadline for disclosing public information does not entail any material-legal consequences, but only allows for the introduction of measures aimed at disciplining the entities obliged to disclose public information which remained inactive. The jurisprudence of courts in cases concerning the inactivity of an authority led to a non-statutory definition of the scope and nature of public information. It is for this reason that the amendment introduced in Art. 15zzs (10)(1) of the Covid act was particularly important for access to public information.

The temporary suspension of the provisions regarding the inactivity of the authorities and the obligation of the authority and entity conducting the proceedings or control to notify the party or participant in the proceedings that the case has not been resolved within the deadline did not cover only the proceedings for access to public information. In order to apply the regulation in question to a specific proceeding, two conditions had to be met. The first is the existence of administrative deadlines for settling a specific case. This premise has undoubtedly been met in the case of public information procedures.

The second condition for applying the provision of Art. 15zzs (10)(1) requires an administrative case to be conditional upon legal protection being granted in front of a court or an authority. Given that the legislator has granted the tools to monitor and control the access to public information proceedings through the possibility of lodging a complaint for inactivity, lodging an appeal against the issued decision (as well as a request for reconsideration of the case) and also filing an appeal against the decision issued in the course of the proceedings, it should be considered that this premise has also been fulfilled. This means that Art. 15zzs (10)(1) should also be applied in the case of inactivity of the authority in the proceedings for disclosure of public information.

3. The Practice of Exercising Art. 15zzs (10)(1) of the Covid Act

Due to how the norm in question was construed, it has been causing significant interpretation problems. In Art. 15zzs (10)(1) of the Covid act, it is set out that during the period of an epidemic threat or state of an epidemic announced due to COVID-19, the provisions regarding the authorities' inactivity and their obligation to notify the party or participant about the failure to settle the case on time do not apply. Looking at how the norm was created, it is not clear whether the superior body (or in the case of access to public information the administrative court) could decide that the authority was inactive at the time of the state of epidemic threat or epidemic. It is also not clear whether such superior body (or a court) could rule on the inactivity, concerning the lack of action of an authority before the introduction of the state of epidemic threat or epidemic.

The Regional Administrative Court in Opole indicated that 'in the period of an epidemic threat or epidemic administrative bodies do not remain inactive, and therefore negative consequences in the form of penalties and fines cannot be imposed on them, or any sums of money awarded against them to the complainants for failure to issue decisions within the time limits specified by law cannot be ruled. Such consequences may apply only with regard to inactivity occurring in such periods (state of epidemic threat or epidemic)'.[29] It follows that the non-application of the provisions on inactivity concerns only the activities of the authority during an epidemic threat or epidemic. The court also noted that the wording of the provision in question was contrary to the general principle of declaring inactivity as of the date of the judgment, but that at the same time 'in the circumstances of this particular case, if the authority could not remain in inactivity, and the court could not impose a fine or order an appropriate sum, then the complaint must have been dismissed'.

Interestingly, it seems that the discussed norm only allows for the inaction of the authority to be stated during its validity, but does not preclude the imposition of a fine on the authority for its previous actions. The Supreme Administrative Court came to such conclusions twice.[30] The Supreme Administrative Court indicated that Art. 15zzs (10)(1) stating the non-application of the provisions on inactivity of an authority or failure to resolve the case may not be referred to inaction that occurred before the period specified in Art. 15zzs (1) of the Covid act. In its opinion it stated: 'The exclusion of the application of the provisions listed in Art. 15zzs (10) of the Covid act, in fact, boiled down to the exclusion of the obligation for the authorities to undertake activities during an epidemic threat or epidemic state announced due to Covid (and in fact during the period of this provision, i.e. from 1 April to 16 May 2020) within the time limits specified by law; however, it could not be equated with the inadmissibility of bringing legal remedies regarding inactivity or excessive length which existed before 1 April 2020.' This position should be considered as proper and correct. A different interpretation would lead to the suspension of all proceedings pending on the date of entry into force of the discussed provision and later causing further delays in administrative proceedings, including those related to access to public information.

The introduced restrictions were undoubtedly an abuse provided by the legislator. Any restrictions should be introduced only insofar as they are proportionate and necessary to protect the overriding value of public health. Furthermore, there are serious doubts as to whether the restrictions in the procedure for disclosure of

29 Judgment of the Regional Administrative Court in Opole of 30 June 2020, II SAB/Op 32/20, LEX no. 3034582.

30 Judgment of the Supreme Administrative Court of 5 May 2021, II GSK 399/21, LEX no. 3197679 and Judgment of the Supreme Administrative Court of 12 August 2021, II GSK 977/21, LEX no. 3229366.

public information were introduced in accordance with the Constitution, including in particular Art. 31 (3). As indicated in the doctrine, even in the case of a state of emergency (which is much more interfering in the sphere of rights and freedoms), restrictions on access to public information will not always be justified[31]. In the case of the Covid act, the justification for its draft in no way refers to the issue of openness, as it seems the project initiator did not specify why and for what purpose it was necessary to introduce restrictions on access to public information and what impact it would have on counteracting the epidemic or protecting public health.

The way in which the regulation in question is structured leaves too much freedom for the authorities applying the law. This could potentially lead to unequal treatment of citizens, shake the trust in the state apparatus and, as a consequence, weaken the constitutional guarantees contained in Art. 61 of the Constitution. The lack of precision in drafting the provisions of the Covid act, as well as the fact that the changes had been introduced too quickly, had a negative impact on the functioning of public administration bodies and the manner of implementing requests for access to public information. Notwithstanding the foregoing, the exclusion of the application of the provisions on the inactivity of the authority during an epidemic emergency or epidemic was one of the elements of the deepening crisis in the implementation of the constitutional principle of openness.

The controversial provision was repealed pursuant to Art. 46 of the Act of 14 May 2020.[32] This means that despite the continuing state of the epidemic, from the day the standard in question was repealed, the procedure regarding access to public information should be conducted in accordance with Art. 13 of u.d.i.p., and therefore if the authority remains inactive, there are currently no obstacles to its finding.

4. Proceeding Before the Constitutional Tribunal to Declare the Provisions of the Act on Access to Public Information Inconsistent with the Polish Constitution

A few weeks before the introduction of the state of epidemic threat in Poland, and later the state of epidemic, the Constitutional Tribunal received an application from the First President of the Supreme Administrative Court asking it to declare a number of provisions of the act on access to public information inconsistent with the Polish Constitution. This is not the first case concerning access to public information which is pending in the Constitutional Tribunal. The doubts as to the method

31 G. Sibiga, Stan dziurawy informacyjnie, https://www.rp.pl/inne/art18919981-grzegorz-sibiga-stan-dziurawy-informacyjnie (accessed 03.01.2022).

32 Act of 14 May 2020 amending certain acts in the field of protective measures in connection with the spread of SARS-CoV–2 virus (Dz. U. item 875 with changes).

of disclosing public information had arisen before the u.d.i.p. was implemented.[33] The issue of the constitutionality of individual u.d.i.p. provisions has already been resolved by the Constitutional Tribunal several times, including in 2006[34] and 2018.[35] The current interpretation of u.d.i.p. presented by the Constitutional Tribunal significantly contributed to the development of the right of access to public information and strongly preferred a pro-transparent approach, while at the same time trying to provide adequate protection to other freedoms and rights that could conflict with the principle of openness.

The application, addressed to the Constitutional Tribunal on 16 February 2021, concerns the potential inconsistency with the Polish Constitution of a number of provisions of u.d.i.p. The main objection raised in the present application is the use in u.d.i.p. of unclear and imprecise concepts and a significant extension of the catalogue of entities obliged to disclose public information in relation to the standards contained in Art. 61 of the Basic Law. Additionally, the applicant points out the lack of a detailed statutory definition of the catalogue of public information, which means that it is not possible to define the statutory features of a prohibited act, and therefore it is not possible, on the basis of the provisions of u.d.i.p., to adjudicate on the commission of a prohibited act (failure to disclose public information in breach of the binding obligation – Art. 23 of u.d.i.p.). Separate allegations have concerned the conflict between the exercise of the right to information and the right to privacy, but they can hardly be considered justified.

Without question, the provisions of the act on access to public information are in many cases formulated imprecisely and leave the room for free interpretation. The basic definition of 'public information' required multiple interpretations by the courts, and the jurisprudence on u.d.i.p. itself is vast. Against this background, there are still doubts as to the authorized and obliged entities, the procedure for disclosing public information, the processed information and the costs incurred in disclosing public information.[36] It must be admitted, however, that after more than 20 years of the u.d.i.p.'s operation, a relatively unified and constant practice of its application has developed. The Polish Ombudsman spoke in a similar vein, pointing out that: 'The practice of its [u.d.i.p.'s] application has changed along with the increase in social awareness and the natural changes that public life has undergone. The resulting rights and obligations are now known to both citizens and entities obliged to provide public

33 Judgment of the Constitutional Tribunal of 16 September 2002, K 38/01, OTK-A 2002/5/59; M. Jabłoński, Realizacja prawa dostępu do informacji publicznej w praktyce funkcjonowania samorządu terytorialnego – wybrane zagadnienia, 'Finanse Komunalne' 2008, no. 1–2, p. 7.

34 Judgment of the Constitutional Tribunal of 20 March 2006, K 17/05, OTK-A 2006/3/30.

35 Judgment of the Constitutional Tribunal of 18 December 2018, SK 27/14, OTK-A 2019/5.

36 See also: D.J. Kościuk and J. Kulikowska-Kulesza, The Right to Public Information. Selected Interpretation Doubts in the Doctrine and Jurisprudence of Administrative Courts, 'Studia Iuridica Lublinesia' 2020, vol. 29, no. 1, pp. 129–143.

information'[37]. In his position, the Ombudsman also argued that although the provisions of u.d.i.p. were formulated in a broad manner, it has not prevented the exercise of the right to access public information.

Although certain elements of the charges (considered in isolation from the practice to date and its systemic consequences) raised in the application of the First President of the Supreme Administrative Court should undoubtedly be treated as justified, the recognition of the unconstitutionality of the above-mentioned provisions would be 'throwing the baby out with the bathwater'. If a ruling was issued in accordance with the content of the application, it would de facto lead to the hollowing out of the tax ordinance from the content and impossibility of applying this act in practice. The justification analysis of the First President of the Supreme Court's application leads to the conclusion that the applicant's intention was in fact to challenge the previous jurisprudence of the Constitutional Tribunal, the Supreme Court and administrative courts regarding the application of the Act on Laws and Regulations, leading to a fundamental change (and in practice to eliminating the possibility of its application) of this act, and not a hierarchical control of standards within the meaning of Art. 188 of the Polish Constitution.[38] As a consequence of the issuance of a judgment declaring the unconstitutionality of the challenged provisions, we are threatened with a reality of returning to the state prior to the entry into force of u.d.i.p.

Although the right to public information is regulated directly in Art. 61 of the Polish Constitution, as experience so far has shown, it cannot be implemented without an appropriate statutory basis. The lack of an act (1997–2001) specifying the procedure for providing information (Art. 61 (4) of the Constitution) resulted in the actual limitation or even exclusion of the possibility of effectively obtaining the requested information directly on the basis of Art. 61 of the Constitution. The submitted applications were considered not on the basis of the content of Art. 61 sec. 1 and 2, but on the basis of separate statutory regulations, the most frequent of which were those defining the rules for exercising the right to access the case files, i.e. in principle relating only to the rights of the parties and participants in the proceedings.[39]

Conclusions

The restrictions on access to public information introduced by the Covid act cannot be considered justified, taking into account both the content of Art. 31 (3) of the Polish Constitution as well as Poland's obligations on the international legal

37 K 1/21 – Letter of the Ombudsman of 17 June 2021 – justification of the position, Vll.6060.15.2021.MMIMKS.

38 Vll.6060.15.2021.MMIMKS.

39 A. Piskorz-Ryń, Prawo do informacji od podmiotów wykonujących administrację publiczną w polskim porządku prawnym, 'Samorząd Terytorialny' 2000, no. 7–8, p. 92.

arena. The legislator has not examined whether there are other, less invasive measures that could achieve the desired effect. Considering that the regulations discussed in this study were repealed despite the ongoing epidemic, it seems that they did not contribute to the fight against SARS-CoV–2. Therefore, it should be concluded that these restrictions were not necessary for the protection of public health, and that their introduction was a violation of the basic principles of the democratic state ruled by law.

The introduced restrictions led to the depreciation of the fundamental principle of transparency in the actions of the state authorities in the Republic of Poland. Given the direction of legal interpretation adopted by the Constitutional Tribunal in recent years and the restrictions on access to information introduced in the territory (near Polish-Belarus boarder) under the state of emergency in September 2021 which do not have sufficient justification, it seems that the actions taken by the ruling party are aimed at permanent limitation of the right specified in Art. 61 of the Polish Constitution.

The imprecise provisions of the Covid act in the scope of limitations related to the declaration of the authority's inactivity required in-depth interpretation by the bodies applying the law. Due to the relatively short duration of the discussed regulation, this led to the issuance of judgments stating inactivity after the repeal of Art. 15zzs of the Covid act, which in many cases led to a departure from the basic principle of declaring inactivity as at the date of the decision or judgment. Leaving wide discretionary powers to the authorities applying the law is of particular concern, given the repeated allegations (also included in case K 1/21) concerning imprecise and overly broad wording used in the act. The experience to date shows that the courts did not in all cases interpret constitutional provisions in a way that guaranteed the open operation of the state apparatus, an example of which may be the practice developed in cases concerning so-called internal documents. The introduction of such imprecise and highly questionable interpretative regulations is worrying.

The arrival of the epidemic in the territory of the Republic of Poland has contributed to a significant limitation of the rights and freedoms of citizens. Although the provisions of the Covid act did not refer directly to the proceedings regarding disclosure of public information, the principle of transparency in the operation of public authorities and the right under Art. 61 of the Polish Constitution was significantly limited and thus deprived citizens of the possibility to obtain the information on the current activities of public bodies. Such actions could have increased social unrest and contributed to the spread of disinformation or fake news. They were and are also a manifestation of the democratic state of law depreciation, which is based on the principles of civil society, subsidiarity as well as mutual respect and subjective treatment of partners.

REFERENCES

Bernaczyk M., Funkcje prawa do informacji w polskim porządku prawnym, (in:) M. Jabłoński (ed.), Realizacja i ochrona konstytucyjnych wolności i praw jednostki w polskim porządku prawny, Wroclaw 2014.

Chmielnicki P., Minich D., Rybkowski R., Stachura M. and Szocik K., The COVID-19 Pandemic as an Opportunity for a Permanent Reduction in Civil Rights, 'Studia Iuridica Lublinesia' 2021, vol. 30, no. 4.

Dylus A., Aksjologiczne podstawy jawności i jej ograniczenia. Perspektywa etyki politycznej, (in:) Z. Cieślak and G. Szpor (eds.), Jawność i jej ograniczenia t. 2, Podstawy aksjologiczne, Warsaw 2013.

Jabłoński M., Udostępnienie informacji publicznej w formie wglądu do dokumentu, Wroclaw 2013.

Jabłoński M., Udostępnienie informacji publicznej w formie wglądu do dokumentu, Wroclaw 2015.

Kamińska I. and Rozbicka-Ostrowska M., Ustawa o dostępie do informacji publicznej. Komentarz, Warsaw 2015.

Koman-Bednarczyk A. and Kurek N., Freedom of Assembly in the Light of Polish Regulations and Selected Case Law Standards of the European Court of Human Rights, 'Studia Iuridica Lublinesia' 2021, vol. 30, no. 5.

Kościuk D.K. and Kulikowska-Kulesza J., The Right to Public Information. Selected Interpretation Doubts in the Doctrine and Jurisprudence of Administrative Courts, 'Studia Iuridica Lublinesia' 2020, vol. 29, no. 1.

Piskorz-Ryń A., Dostęp do informacji publicznej- zasady konstrukcyjne ustawy, 'Kwartalnik Prawa Publicznego' 2002, vol. 4.

Piskorz-Ryń A., Prawo do informacji od podmiotów wykonujących administrację publiczną w polskim porządku prawnym, 'Samorząd Terytorialny' 2000, no. 7–8.

Pitera J., Wkład Transparency International Polska w przezwyciężanie korupcji, (in:) A. Dylus, A. Rudowski and M. Zaborski (eds.), Korupcja. Oblicza, uwarunkowania, przeciwdziałanie, Wroclaw/Warsaw/Cracow 2006.

Raszewska-Skałecka R., Edukacja jednostki wobec wyzwań społeczeństwa informacyjnego – kwestie wybrane, (in:) J. Blicharz and J. Boć (eds.), Prawna działalność instytucji społeczeństwa obywatelskiego, Wroclaw 2009.

Sibiga G., Stan dziurawy informacyjnie, https://www.rp.pl/inne/art18919981-grzegorz-sibiga-stan-dziurawy-informacyjnie.

Skąpska G., Głos w dyskusji nt. Etyka i polityka w społecznym odbiorze, (in:) G. Skąpska (ed.), Etyka w polityce, Cracow 1997.

Bialystok Legal Studies
Białostockie Studia Prawnicze
2022 vol. 27 nr 2

sciendo

DOI: 10.15290/bsp.2022.27.02.13

Received: 25.01.2022
Accepted: 19.04.2022

Radosław Olszewski
University of Lodz, Poland
rolszewski@wpia.uni.lodz.pl
ORCID ID: https://orcid.org/0000–0001–8119–1635

Amadeusz Małolepszy
University of Lodz, Poland
amalolepszy@wpia.uni.lodz.pl
ORCID ID: https://orcid.org/0000–0001–9737–9923

Exercise of the Right to Defence in Criminal Proceedings during the COVID-19 Pandemic with Particular Reference to the Relation Between the Accused and the Defence Counsel

Abstract: The aim of this article is to present the legal solutions adopted in criminal proceedings during the COVID-19 pandemic and their impact on the implementation of the right to defence, focusing, in particular, on the relation between the accused and the defence counsel. During the pandemic, online trials and hearings became widespread and communication with the courts via email developed. Issues of confidentiality between the accused and his/her defence counsel, as well as access of the defence counsel to files, were analysed, particularly in cases related to pretrial detention. The new solutions have been evaluated, possibilities of their use after the end of the pandemic have been indicated and postulates as to the desired directions of changes have been formulated. The issues addressed are relevant today and extremely important in the sphere of public law, as criminal liability is proved during criminal proceedings. In general, it should be assessed positively that the COVID-19 pandemic has become an opportunity to introduce new legal solutions for the modernisation of criminal proceedings. However, some of these regulations do not fully meet the objectives set for them, hindering, through the adoption of specific solutions and practices, the proper implementation of certain key procedural principles, primarily the right to defence.
Keywords: accused, criminal proceedings, defence counsel, defence secrecy, online hearing, online trial, right to defence

Introduction

The COVID-19 pandemic has affected every sphere of economic, social and legal life. The world has faced many challenges. The economy came to an unprecedented halt, the work of public institutions came to a standstill, and the freedom of movement was severely restricted. Over the last two years, terms such as lockdown, restrictions, working from home and online classes have become a permanent part of our vocabulary.

Countering the spread of the COVID-19 pandemic has been accelerated by the implementation of technological solutions in public institutions, which make it possible to communicate or perform activities remotely using the internet. This has contributed significantly to the spread of online trials, email communication with courts and the online examination of witnesses.

The unexpected and sudden entry into the 21st century has exposed weaknesses resulting from insufficient technical preparation and a state of legislation ill-suited to modern needs.[1] The remedy for the legislative problems was to be the enactment of the Act of 2 March 2020 on specific solutions related to the prevention, countering and combating of COVID-19, other infectious diseases and crisis situations caused by them.[2] The changes introduced by this legal act regulated many issues related to the organisation of healthcare and state aid to entrepreneurs, but also amended the emerging normative gaps. One of such gaps was the lack of powers, resulting from the provisions of the system regulating proceedings before a designated authority, to hold hearings and make legally binding decisions in a remote or mixed mode. That was the case, for example, with the courts, universities and professional self-governing bodies.

The normative solutions introduced in March 2020 are characterised by the fact that they respond to current problems of an organisational and legal nature. This is best demonstrated by the fact that since its promulgation, the COVID-19 Act has lived to see 34 amendments.[3] The force majeure, which is undoubtedly the ongoing pandemic and the consequent need to protect the lives and health of citizens, necessitated taking rapid steps to adapt the legal provisions to the emerging challenges.

---

1 See on this subject: A. Klepczyński, P. Kładoczny, P. Kubaszewski, K. Wiśniewska, Raport Helsińskiej Fundacji Praw Człowieka, Czy koronawirus SARS-CoV–2 zaatakował system wymiaru sprawiedliwości w sprawach karnych?, Warsaw 2021, https://www.hfhr.pl/wp-content/uploads/2021/11/Raport-COVID-a-proces-karny-PL.pdf (accessed 26.11.2021).

2 Uniform text. Journal of Laws of 2021, item 2095 with amendments. (hereinafter: the Act on COVID-19).

3 Journal of Laws of 2020, item 1639, item 2112, item 2123, item 2157, item 2255, item 2275, item 2320, item 2327, item 2338, item 2361 and item 2401; of 2021, item 11, item 159, item 180, item 694, item 981, item 1023, item 1090, item 1162, item 1163, item 1192, item 1510, item 1535, item 1777, item 2120, item 2133, item 2269, item 2317, item 2368, item 2459 and of 2022 item 202, item 218, item 830 and item 771.

Many solutions are of a temporary nature, i.e. they are binding for the duration of the state of epidemic and up to one year after its cancellation as well. It should be noted, however, that there are also such solutions that will remain in force regardless of the situation related to the COVID-19 pandemic. Among them are changes leading to the increase of the use of the internet in criminal proceedings and remote communication. This trend should be assessed positively, although there are problems with some of the specific legal solutions that raise doubts, e.g. those concerning the implementation of certain fundamental procedural principles in criminal proceedings, including the right to defence.

1. Online Hearings and Trials

Reducing interpersonal contact to stop the spread of COVID-19 has presented the justice system with a difficult challenge. The first months of the 2020 pandemic revealed legislative, technical and organisational unreadiness to conduct online hearings or trials without the need for participants to appear in the court building. Consequently, common courts ceased to continue work and the hearing of cases was suspended, except for those deemed urgent[4] by the legislator, and court business and procedural deadlines were suspended as well.[5] The response to this situation was to adapt the existing legislation to the challenges of reality and to enable online hearings and trials. The problem has affected not only Poland, but many other European countries as well, and resulted in changes of the law in force or in the passing of new legislation.[6] In the literature on the analysis of Covid legislation in European coun-

4 This was regulated by Article 14a of the COVID-19 Act in force from 31 March 2020 to 4 September 2020. Urgent cases included the following cases: on motions for the application, extension, amendment and revocation of pretrial detention; in which detention or a preventive measure in the form of pretrial detention was used; in which a protective measure was ordered; the hearing of a witness in pretrial proceedings by the court pursuant to Articles 185a–185c or 316 § 3 of the Code of Criminal Procedure, if the hearing under the procedure provided for the examination of urgent cases was requested by the prosecutor; on the European arrest warrant; on conditional discontinuance of proceedings.

5 This was regulated by Article 15zzs of the COVID-19 Act in force from 31 March 2020 to 16 May 2020. Among the suspended deadlines, the legislator also listed deadlines in criminal proceedings, criminal fiscal proceedings and proceedings in misdemeanour cases. At the same time, it should also be pointed out that by the Act of 20 April 2021 amending the Act – Penal Code and certain other acts (Journal of Laws, item 1023), Article 15zzr[1] was added to the COVID-19 Act, under which the running of the statute of limitations for criminal prosecution in cases of offences and fiscal offences was suspended during the period when the state of epidemic emergency or the state of epidemic declared due to COVID-19 was in force and during the period of six months after their revocation. The pause is counted from 14 March 2020 (for the epidemic emergency), and from 20 March 2020 (for the epidemic state).

6 A. Sanders, Video-Hearings in Europe Before, During and After the COVID-19 Pandemic, 'International Journal for Court Administration' 2020, no. 12(2), pp. 1–12, http://doi.org/10.36745/

tries, it was generally noted that the use of videoconferencing instead of a traditional hearing should meet the standards of a fair trial, based on Article 6 of the ECHR.[7] As far as the procedure of videoconferencing itself is concerned, the necessity to use specialised audiovisual equipment was raised, while noting that the use of videoconferencing is not a good solution for all court actions. That is why it has been proposed to divide court actions into three groups: a) those that can be performed equally well, or even better, by videoconferencing than by conventional means, b) those that can be performed with the aid of such a tool but require the related complications to be taken into account (e.g. multi-party proceedings), and c) those which are not compatible with videoconferencing and should not be carried out by means of it (e.g. the confrontation of witnesses or the accused, because of the psychological implications of a judicial assessment of the credibility of the participants involved).[8]

Initially, the changes covered civil and administrative court proceedings. Pursuant to the provisions of Article 15zzs[1] to Article 15zzs[4] amending the COVID-19 Act[9], in civil and administrative cases during the period of an epidemic emergency or a state of epidemic declared due to COVID-19, the possibility of holding a hearing or a public hearing remotely was admitted, and the persons participating in them did not have to be in the court building. The possibility to abandon holding a trial or a hearing in favour of a closed session was also adopted, including the entitlement to issue a decision in a closed session after collecting written positions from the parties or participants in the proceedings. It is also worth mentioning that since 3 July 2021[10] it has become the rule to hear cases in accordance with the provisions of the Code of Civil Procedure[11] in online sessions.

Subsequently, it was decided to make changes in criminal proceedings. This was done pursuant to the Act of 19 June 2020 on interest subsidies for bank loans granted to entrepreneurs affected by COVID-19 and on simplified proceedings for approval of this arrangement in connection with the occurrence of COVID-19,[12] thus amend-

ijca.379 (accessed 25.04.2022).

7 P. Gori, A. Pahladsingh, Fundamental rights under COVID-19: a European perspective on videoconferencing in court, 'ERA Forum' 2021, no. 21, p. 574, https://doi.org/10.1007/s12027–020–00643–5 (accessed 25.04.2022).

8 C. Kulesza, Rozprawa zdalna oraz zdalne posiedzenie aresztowe w świetle konwencyjnego standardu praw oskarżonego, 'Białostockie Studia Prawnicze' 2021, vol. 26, no. 3, pp. 211–212 and the literature referred to therein.

9 By virtue of the Act of 14 May 2020 on amending certain laws in the field of protective measures in connection with the spread of the SARS-CoV–2 virus (Journal of Laws, item 875).

10 Entry into force of the Act of 28 May 2021 on amending the Act – Code of Civil Procedure and certain other acts (Journal of Laws, item 1090).

11 Act of 17 November 1964 – Code of Civil Procedure (uniform text Journal of Laws of 2021, item 1805 as amended).

12 Uniform text Journal of Laws of 2021, item 1072 as amended (hereinafter: amendment of the Code of Criminal Procedure of 2020).

ing the Code of Criminal Procedure.[13] A different manner of regulations in relation to civil procedure emerges at first sight. For, while the changes in civil proceedings are temporary and were included in the COVID-19 Act, the changes in criminal proceedings are permanent and, in addition, they were also included in the Code of Criminal Procedure.

In criminal proceedings, even before the changes introduced during the pandemic, the possibility to hold an online hearing was allowed if the case was subject to examination in a fast-track procedure (Article 517 §§ 2a–2d of the Code of Criminal Procedure).[14] In other cases, it was only possible to conduct certain evidentiary actions remotely with the use of devices allowing for direct transmission of images or sound. A witness, expert or interpreter may be examined in this manner (Article 177 §§ 1a and 1b, Article 185b § 2, Article 197 § 3 and Article 204 § 3 of the Code of Criminal Procedure), as well as the injured party (Article 185c § 3 of the Code of Criminal Procedure) and the accused who is absent during the trial (Article 377 § 4 of the Code of Criminal Procedure).

The amendment to the Code of Criminal Procedure of 2020, by adding §§ 3–9 to Article 374 of the Code of Criminal Procedure, enabled, apart from the already mentioned procedural actions, online participation in the trial by the prosecutor and defence counsel, as well as persons deprived of liberty: the accused, an auxiliary prosecutor and a private prosecutor. Furthermore, online conduct of sessions has also been allowed, which is regulated in Article 96a (referring to the appropriate application of the provisions on trial), Article 100 § 10 (on considering as present an entity or party participating in an online session during the announcement of a decision or order) and Article 250 §§ 3b–3h (online participation in a sitting on pretrial detention).

The solutions adopted in Article 83 of the 2020 amendment to the Code of Criminal Procedure should also be considered here. This provision provides for the possibility of participation of parties, defence counsels or legal representatives in the hearing with the use of technical equipment which makes it possible to conduct the hearing remotely with simultaneous direct transmission of an image or sound. It differs from the regulation of Article 374 of the Code of Criminal Procedure in that it applies to situations other than deprivation of liberty, on condition that the partic-

13 Act of 6 June 1997 – Code of Criminal Procedure (uniform text Journal of Laws of 2021, item 534 as amended).

14 Act of 31 August 2011 amending the Act on mass events safety and certain other acts (Journal of Laws of 2011, No. 217, item 1280). The Act in this respect entered into force on 12 November 2011. This procedure determines cases in which an investigation is carried out, if a perpetrator has been apprehended in the commission of an offence or immediately afterwards, detained and within 48 hours brought by the police and handed over to the court's disposal together with a motion to examine the case in fast-track proceedings (Article 517b, paragraph 1 of the Code of Criminal Procedure).

ipants are in the court building, in a room or rooms properly equipped to conduct a hearing remotely. Thus, this excludes the participation in a court sitting or hearing of, for example, persons in quarantine. This solution, to which Article 374 §§ 3–8 of the Code of Criminal Procedure applies accordingly, can hardly be described as remote. It would be more effective to adopt in this case a solution known in the civil procedure, which allows for participation of all participants in a hearing or a session by means of technical equipment allowing for their participation online with simultaneous direct transmission of images and sound without the necessity to be present in the court building.

The initiators of online participation in a session or hearing may be the prosecutor or the parties to the proceedings.[15] Ł. Brzezowski expressed a different view in this respect, that *verba legis* only the prosecutor is granted the right to submit a motion, and in the remaining scope the legal norm gives the right to exemption from appearing in person only to the chairman, not the participants.[16] This view does not seem justified. The prosecutor is referred to *expressis verbis* in Article 374 § 3 of the Code of Criminal Procedure (this also applies in the case of online hearings or sessions ordered pursuant to Article 83, paragraph 1 of the amendment to the Code of Criminal Procedure of 2020), but this does not mean exclusion of Article 9 § 2 of the Code of Criminal Procedure, under which the parties may request actions which the authority may or is obliged to undertake *ex officio*. The decision is made by the chairman of the adjudicating panel, and in the case of a motion of the prosecutor, but not of another public prosecutor, it is binding on the chairman, unless technical reasons stand in the way.[17]

The analysis of the adopted solutions regarding online hearings and sessions leads to the conclusion that in criminal proceedings the legislator has not decided to enable the parties and their legal representatives to participate in a hearing or a session to the same extent as in civil proceedings. It is still necessary for the accused who is not deprived of liberty, defence counsel, legal representatives and prosecutors to appear in the court building, although there is no such requirement for witnesses, experts or interpreters. An exception is a hearing or session in which the prosecutor, the accused and his/her defence counsel participate online in the place of residence of the accused.

15 R.A. Stefański, S. Zabłocki, Kodeks postępowania karnego. Tom III. Komentarz do art. 297–424, R.A. Stefański, S. Zabłocki, WKP 2021, com. to Art. 374, point 10.

16 Ł. Brzezowski, Udział prokuratora w rozprawie i posiedzeniu zdalnym, 'Prokuratura i Prawo' 2021, no. 3, pp. 40–41.

17 D. Świecki, (in:) D. Świecki (ed.), B. Augustyniak, K. Eichstaedt, M. Kurowski, Kodeks postępowania karnego. Tom I. Komentarz aktualizowany, LEX/el. 2021, com. to Art. 374, point 25; C. Kulesza, (in:) K. Dudka (ed.), Kodeks postępowania karnego. Komentarz, WKP 2020, com. to Art. 374, point 12; R.A. Stefański, S. Zabłocki, Kodeks…, *op. cit.*, com. to Art. 374, point 9.

2. Online Hearings and Trials and the Right to Defence

Regardless of whether a hearing or trial is held in a fixed location or online, the accused must be able to exercise his/her right to defence in both formal and substantive terms. Considering the amendment to the Code of Criminal Procedure of 2020, threats to the realisation of the right to defence should be seen in the insufficient guarantee of confidentiality of the contact between the defence counsel and the accused when they are not in the same place, difficulties in accessing the case files, and the limited possibility to communicate with the court by email. The lack of digitisation of files was particularly noticeable in the early days of the pandemic when the majority of courts restricted access to client service offices, and consequently access to files.[18]

Pursuant to Article 250 § 3b of the Code of Criminal Procedure, Article 374 §§ 4–6 of the Code of Criminal Procedure and Article 96a of the Code of Criminal Procedure the prosecutor, the accused and the defence counsel may participate in the session or hearing on pretrial detention in the place of residence (penal institution, detention centre, prosecutor's office). The presiding judge may release the accused, who is deprived of liberty, from the obligation to appear in court if he/she has been provided with the right of remote participation. The defence counsel is also entitled to participate both in physical and remote sessions on pretrial detention (Article 250 § 3d of the Code of Criminal Procedure).[19]

In the event the defence counsel is in a different place than the accused, the legislator is allowed to order a time-limited break for telephone contact between the defence counsel and the accused during the hearing on pretrial detention (Art. 250 3e of the Code of Criminal Procedure), and in the case of a trial to order a time-limited break to allow telephone contact between the defence counsel and the accused (Art. 374 § 7 of the Code of Criminal Procedure). In essence, therefore, it will be a short technical break to conduct a telephone conversation between the defence counsel and the accused.[20] The court, however, has the right to refuse if it considers that granting the motion may disrupt the proper course of the hearing or if it poses a risk of not adjudicating on the motion on the application of a pretrial detention before the expiry of the permissible period of detention of the accused, or if it considers that the submission of the motion clearly does not serve the implementation of the right to defence and, in particular, aims at disrupting or unreasonably prolonging

18 A. Klepczyński, P. Kładoczny, P. Kubaszewski, K. Wiśniewska, Raport…, *op. cit.*, pp. 21–24.

19 See more: P. Misztal, Zdalne posiedzenia aresztowe w trybie art. 250 §§ 3b–3h Kodeksu postępowania karnego. Uwagi de lege lata i de lege ferenda, 'Studia Prawnoustrojowe' 2021, no. 54, pp. 405–421.

20 J. Mierzwińska-Lorencka, E-rozprawa w sprawach karnych w związku z regulacjami z tarczy 4.0, LEX/el. 2020, point 7.

the hearing. The Helsinki Foundation for Human Rights[21], the Supreme Bar Council[22] and the representatives of the doctrine of criminal procedure[23], among others, were critical of the above-mentioned solutions as they infringed the right to defence. Defence secrecy is a special type of advocate's secrecy, i.e. the duty of the advocate to keep secret everything he/she learns in connection with the provision of legal assistance. Its function is to protect the rights and freedoms of citizens, and consequently it is the foundation of liberal constitutional democracy in which every person can feel safe from the arbitrary use of power by the state.[24] For this reason, the increasingly frequent attempts to interfere in this aspect of the legal profession must give rise to justified concern and opposition.[25]

It is impossible to speak of effective realisation of the right to defence in its material sense when the use of services of a professional defence counsel is limited by the presence of a third person who is controlling the contact of the accused and his/her defence counsel. The assumption of a fully confidential contact of the defence counsel with his/her mandate constitutes the foundation of the provision of effective and professional legal assistance. Without it, the right to defence of the accused is considerably restricted.[26] For it is difficult to expect that a suspect will provide the defence counsel with all the information required for effective defence in a situation where their conversation is not of a confidential nature – and the third party present is, at the same time, the suspect's litigation opponent. In this case it is also difficult for the defence counsel to inform the suspect of all his/her rights, including potential procedural scenarios, for example the possibility to cooperate with law enforcement authorities and to benefit from the institution of a small crown witness.[27]

21 Opinion of Helsinki Foundation for Human Rights of 14 June 2020 do Druku Senackiego no. 142, https://www.hfhr.pl/wp-content/uploads/2020/06/druk-senacki-nr-142-uwagi-HFPC-1.pdf (accessed 25.04.2022).

22 Opinion of Legislative Committee at Supreme Bar Council (Komisji Legislacyjnej przy Naczelnej Radzie Adwokackiej) of 2 June 2020, https://www.adwokatura.pl/admin/wgrane_pliki/file-20200608-u-o-doplatach-do-oprecent-kredytow-tarcza-04-sm-24–20–29964.pdf (accessed 25.04.2022).

23 See e.g. C. Kulesza, Rozprawa…, *op. cit.*, pp. 217–218; J. Zagrodnik, (in:) J. Skorupka (ed.), Kodeks postępowania karnego. Komentarz aktualizowany, 33rd edition, Legalis, com. to Art. 374 k.p.k.

24 M. Pietrzak, Tajemnica adwokacka jako fundamentalny element systemu ochrony praw i wolności, 'Palestra' 2019, no. 7–8, pp. 89 and 96–97.

25 M. Gutowski, P. Kardas, J. Giezek, Tajemnica adwokacka w świetle wyzwań współczesności – uwagi wprowadzające, 'Palestra' 2019, no. 7–8, p. 9; see more about advocate's secrecy C. Kulesza, Obrońca, Tajemnica obrończa, (in:) P. Hofmański (ed.), System Prawa Karnego Procesowego, tom VI, Strony i inni uczestnicy postępowania karnego, C. Kulesza (ed.), Warsaw 2016, pp. 935–939.

26 M. Szurman, M. Korzeniak, Poufność w kontakcie z obrońcą na wstępnym etapie postępowania karnego – analiza regulacji 73 § 2 oraz art. 245 § 1 Kodeksu postępowania karnego w świetle standardów konstytucyjnych, unijnych i konwencyjnych, 'Palestra' 2020, no. 9, p. 37.

27 *Ibidem*, p. 40.

Obstacles to the confidentiality of contact between the accused and his defence counsel can also undermine the European standards of a fair criminal trial developed by the European Court of Human Rights[28] with regard to the right to defence. In one of its judgments in Modarca v. Moldova[29], the ECHR held that an accused's contact with his/her defence counsel must be unrestricted, as this is the only condition for the proper functioning of the defence relationship. The ECHR also held that the violation of Article 6 of the Convention was due to the design of the meeting room of a suspect remanded in custody with his/her counsel. The counsel was separated from the detainee by a glass pane, which hindered the contact between them and necessitated raising the voice, thus making it impossible to ensure confidentiality and discretion.[30] In addition, the Court is sceptical about some of the ways in which contact between the accused and his/her defence counsel is ensured during the trial by videoconference, pointing out that the contact during which the equipment is provided and operated by the state may generate doubts about confidentiality of contact with legal counsel.[31] This illustrates the importance and significance of ensuring unrestricted contact between the accused and his/her defence counsel.

In situations referred to in Article 250 § 3e of the Code of Criminal Procedure and in Article 374 § 7 of the Code of Criminal Procedure, ensuring confidential contact appears to be limited. The defence counsel will be present in court. The telephone conversation will therefore take place either in the courtroom or in the court corridor. In the case of the accused, it cannot be ruled out that the contact will take place in the presence of a court clerk, a judge's assistant or a prison service officer. According to Article 8 § 3 and Article 215 § 1 of the Penal Code[32], a convicted person deprived of liberty or a detainee may communicate with his/her defence counsel, legal representative who is an advocate or legal adviser in the absence of other persons, and conversations with these persons during visits and telephone calls are not subject to control. Access to telephone in prison or detention centre should be provided, enabling the defence counsel to communicate with the accused. Since it is not possible to

28 Judgment of ECHR of 13 August 2016 in Ibrahim and others v. Great Britain, ECLI:CE:ECHR:2016:0913; Judgment of ECHR of 27 November 2008 in Salduz v. Turcji, ECLI:CE:ECHR:2008:1127; Judgment of 31 March 2009 in Płonka v. Poland, ECLI:CE:ECHR:2009:0331; Judgment of ECHR of 9 November 2018 in Beuze v. Belgium, ECLI:CE:ECHR:2018:1109; Judgment of ECHR of 30 August 1985 in Can v. Austria, ECLI:CE:ECHR:1985:0930; Judgment of ECHR of 15 November 1996 in Domenichini v. Italy ECLI:CE:ECHR:1996:1115.

29 Judgment of the ECHR of 10 May 2007 in Modarca v. Moldova (no. 14437/05), ECLI:CE:ECHR:2007:0510.

30 M. Szurman, M. Korzeniak, Poufność…, *op. cit.*, p. 42.

31 A. Lach, Rzetelne postępowanie dowodowe w sprawach karnych w świetle orzecznictwa strasburskiego, Warsaw 2018, p. 118 and ECHR case law cited therein.

32 Act of 6 June 1997 – Executive Penal Code (uniform text Journal of Laws of 2021, item 53 as amended).

call the telephone number from which the person detained in a penitentiary institution or in custody uses to contact his/her defence counsel, the telephone conversation will take place in the premises of the administration of the penitentiary unit. This may result in the accused not being able to remain there alone for security reasons (e.g. in the case of particularly dangerous inmates). The rules governing the online trial and hearing do not require third parties (a prison service officer, a judge's assistant or a court clerk) to leave the place of residence of the accused or suspect for the duration of his or her interview with the counsel. In addition, in the context of an online hearing on pretrial detention, one should remember about the possibility of the presence of a prosecutor or a person authorised by the prosecutor, pursuant to Article 73 § 2 of the Code of Criminal Procedure.

3. Postulates de lege ferenda

We should approve the view expressed by C. Kulesza, who points out that in the case of an online detention hearing the defence counsel, having a choice of either reading the case files or travelling to the detention centre or prison to participate in the hearing at the accused's place of residence, will most often choose to stay at the seat of the court (or be obliged to do so by the court). In the latter case, he or she will usually not be able to establish direct contact with the accused before the hearing, and telephone contact during the hearing, which depends on a discretionary decision of the court, may prove inadequate.[33]

In view of the above, it is worth considering the introduction of the possibility to have remote access to the prosecutor's motion and the evidence justifying the application for pretrial detention. Lack of digitisation of files was particularly felt at the beginning of the pandemic when most courts had limited access to customer service offices and consequently also access to files.[34] Effective exercise of the right to defence in such conditions, given the short time for consideration of a motion for pretrial detention, was very difficult. It is worth adding that pursuant to Article 7 (1) of Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings[35], the evidentiary basis for a motion for the application or extension of pretrial detention must be fully open to the accused and his/her defence counsel. Therefore, both the evidence contained in the case files and any other information carriers (e.g. surveillance video stored only on a USB drive)[36] should be accessible. A solution to this situation could be digitisation of a mo-

33 C. Kulesza, Rozprawa…, *op. cit.*, p. 218.

34 A. Klepczyński, P. Kładoczny, P. Kubaszewski, K. Wiśniewska, Raport…, *op. cit.*, pp. 21–24.

35 Official Journal L 142, p. 1.

36 M. Fingas, Bezpośrednie stosowanie dyrektywy 2012/13 w zakresie dostępu obrony do akt sprawy w procesie karnym – glosa do postanowienia Sądu Apelacyjnego w Gdańsku z 8.04.2020 r. (II AKz 207/20), 'Palestra' 2020, no. 12, p. 95.

tion for temporary arrest together with evidence referred to in Article 250 § 2a of the Code of Criminal Procedure. This would not be a novelty, as similar regulations are in force in fast-track proceedings (Article 517e § 1 and § 1a of the Code of Criminal Procedure). The motion with enclosures and a notification about an online hearing on pretrial detention would be delivered to the defence counsel via electronic mail. Then, the defence counsel would be able to participate in the hearing at the place of residence of the suspect, increasing the effectiveness of the exercised right to defence.

Apart from online sittings and the digitisation of case files, the use of electronic mail in criminal proceedings for the delivery of letters and procedural decisions deserves attention. Many public institutions, including courts and prosecutor's offices, introduced compulsory quarantine for incoming correspondence, installed inboxes to minimise direct contact, and even prevented the filing of pleadings directly at a trial or hearing to limit the transmission of the virus. It should have become natural to switch to communication by email. However, this is not possible because of the incompatibility of the Code regulations to modern needs. While communication by email is possible between the court and the party, sending letters by email the other way has no legal effect. That is why the doctrine postulates a wider use of electronic mail in criminal proceedings as one of the areas of development of the criminal procedure aimed at its digitisation.[37] The legislator also seems to be heading in this direction. This is the aim of the Act of 18 November 2020 on Electronic Service[38], which in Article 82 amends the Code of Criminal Procedure by extending the possibilities for electronic service in criminal proceedings. However, major changes will not enter into force until 1 October 2029.

In the case of online hearings and trials, the above considerations become particularly important, especially because the participants may submit motions and other statements and perform procedural actions only orally for the record. For these reasons, the participation of defence counsel is very important.[39] Delivery of letters and motions by email makes it possible to become familiarised with their content, even shortly before the commencement of the trial or session in an online form. This eliminates the need to read them out, gives room for a quick reaction of the party to the proceedings or his/her legal representative, and leaves the court more time to take a decision.

The adoption of a fully online hearing or trial requires, for the exercise of the rights to defence, that the submissions and statements made be reflected as accurately

37 See more: J. Kosowski, Elektronizacja jako kierunek rozwoju procesu karnego?, (in:) Quo vadit processus criminalis? Rzeczywistość i wyzwania, R. Olszewski, A. Małolepszy (eds.), Warsaw 2021, pp. 380–391; S. Kowalski, O potrzebie upowszechnienia doręczania pism sądowych za pośrednictwem poczty elektronicznej, (in:) Quo…, *op. cit.*, pp. 405–414.

38 Journal of Laws, item 2320, as amended.

39 C. Kulesza, Rozprawa…, *op. cit.*, p. 215.

as possible in the court record. The traditional form, if we consider available equipment and software, is becoming unsuitable for modern requirements. One must agree with J. Kosowski that in criminal proceedings, following the example of proceedings in misdemeanour cases, e-records should be implemented.[40] Transcription of spoken words into written form in real time, combined with digital audiovisual recording, allows for a reliable reflection of the course of a hearing or trial, while providing permanent and easy access to these materials.

Conclusions

In general, it should be stated that solutions in the field of criminal proceedings adopted during the COVID-19 pandemic are needed, as they indicate the possibilities of action in these special conditions. Online recognition of cases, digitisation of files, and facilitating and improving communication between participants of the proceedings have been necessary during the pandemic and will be useful also after its end. These solutions create new possibilities for streamlining proceedings, while at the same time responding to contemporary challenges. The point is that these issues should be regulated and implemented in a well-thought-out way, considering procedural principles and guarantees, ensuring the fairness of the criminal procedure.[41] Doubts, however, concern specific solutions and practice, which appear to be debatable and may be assessed as violating certain fundamental procedural principles. The lack of comprehensive legal solutions means that what was supposed to facilitate and accelerate proceedings using the internet and modern technology will not achieve this goal.

Penitentiary units pose a significant problem, as they are not fully adapted to conduct online proceedings during sessions held there. This concerns access of inmates to email or digitised case files. It is noteworthy that hearings conducted in an online mode apply only to a narrow group of situations involving deprivation of liberty of an accused person. In other cases, personal appearance in court is necessary, which in the perspective of pandemic threats and limitations is questionable. Furthermore, the procedure adopted at that time, whereby the defence counsel stays in a separate room during the trial, significantly impedes the exercise of the rights to defence, if only for the reason that in order to ensure contact between the defence counsel and the accused it becomes necessary to order a break. Of course, being aware of the completely different nature of cases, it is worth pointing out that in civil proceedings online sessions have become the rule. It seems worth considering the extension of the catalogue of cases that could be heard online in criminal proceedings.

40 J. Kosowski, Elektronizacja jako kierunek rozwoju procesu karnego?, Quo…, *op. cit.*, pp. 381–384.
41 R. Olszewski, Wprowadzenie, (in:) Quo…, *op. cit.*, p. 16.

Implementation of another change, important from the perspective of the right to defence as well as adversarialism, would be to create the possibility to improve electronic communication between the court and the litigating parties. This concerns the equalisation of rights and, while it is permissible and feasible for the procedural authorities to send information to the parties via email, it would be desirable to create the possibility for the parties to do the same to the procedural authorities.

In conclusion, it should be stated that the COVID-19 pandemic has become an opportunity to introduce new legal solutions for the modernisation of criminal proceedings, which should generally be assessed positively. The point is, however, that some of these regulations do not fully realise the objectives set for them, hindering, through the adoption of specific solutions, the proper realisation of certain fundamental procedural principles, first and foremost the right to defence.

REFERENCES

Brzezowski Ł., Udział prokuratora w rozprawie i posiedzeniu zdalnym, 'Prokuratura i Prawo' 2021, no. 3.

Dudka K. (ed.), Kodeks postępowania karnego. Komentarz, WKP 2020.

Fingas M., Bezpośrednie stosowanie dyrektywy 2012/13 w zakresie dostępu obrony do akt sprawy w procesie karnym – glosa do postanowienia Sądu Apelacyjnego w Gdańsku z 8.04.2020 r. (II AKz 207/20), 'Palestra' 2020, no. 12.

Gori P., Pahladsingh A., Fundamental rights under COVID-19: a European perspective on videoconferencing in court, 'ERA Forum' 2021, no. 21, https://doi.org/10.1007/s12027–020–00643–5.

Gutowski M., Kardas P., Giezek J., Tajemnica adwokacka w świetle wyzwań współczesności – uwagi wprowadzające, 'Palestra' 2019, no. 7–8.

Klepczyński A., Kładoczny P., Kubaszewski P., Wiśniewska K., Raport Helsińskiej Fundacji Praw Człowieka, Czy koronawirus SARS-CoV–2 zaatakował system wymiaru sprawiedliwości w sprawach karnych?, Warsaw 2021, https://www.hfhr.pl/wp-content/uploads/2021/11/Raport-COVID-a-proces-karny-PL.pdf.

Kosowski J., Elektronizacja jako kierunek rozwoju procesu karnego?, (in:) R. Olszewski, A. Małolepszy (eds.), Quo vadit processus criminalis? Rzeczywistość i wyzwania, Warsaw 2021.

Kowalski S., O potrzebie upowszechnienia doręczania pism sądowych za pośrednictwem poczty elektronicznej, (in:) R. Olszewski, A. Małolepszy (eds.), Quo vadit processus criminalis? Rzeczywistość i wyzwania, Warsaw 2021.

Kulesza C., Obrońca, Tajemnica obrończa, (in:) P. Hofmański (ed.), System Prawa Karnego Procesowego, tom VI, Strony i inni uczestnicy postępowania karnego, C. Kulesza (ed.), Warsaw 2016.

Kulesza C., Rozprawa zdalna oraz zdalne posiedzenie aresztowe w świetle konwencyjnego standardu praw oskarżonego, 'Białostockie Studia Prawnicze' 2021, no. 3 (vol. 26).

Lach A., Rzetelne postępowanie dowodowe w sprawach karnych w świetle orzecznictwa strasburskiego, Warsaw 2018.

Mierzwińska-Lorencka J., E-rozprawa w sprawach karnych w związku z regulacjami z tarczy 4.0, LEX/el. 2020.

Misztal P., Zdalne posiedzenia aresztowe w trybie art. 250 §§ 3b–3h Kodeksu postępowania karnego. Uwagi de lege lata i de lege ferenda, 'Studia Prawnoustrojowe' 2021, no. 54.

Olszewski R., Wprowadzenie, (in:) R. Olszewski, A. Małolepszy (eds.), Quo vadit processus criminalis? Rzeczywistość i wyzwania, Warsaw 2021.

Opinion of Helsinki Foundation for Human Rights of 14 June 2020 r. do Druku Senackiego no. 142, https://www.hfhr.pl/wp-content/uploads/2020/06/druk-senacki-nr-142-uwagi-HFPC-1.pdf.

Opinion of Legislative Committee at Supreme Bar Council (Komisji Legislacyjnej przy Naczelnej Radzie Adwokackiej) of 2 June 2020, https://www.adwokatura.pl/admin/wgrane_pliki/file-20200608-u-o-doplatach-do-oprecent-kredytow-tarcza-04-sm-24–20–29964.pdf.

Pietrzak M., Tajemnica adwokacka jako fundamentalny element systemu ochrony praw i wolności, 'Palestra' 2019, no. 7–8.

Sanders A., Video-Hearings in Europe Before, During and After the COVID-19 Pandemic, 'International Journal for Court Administration' 2020 no. 12(2), http://doi.org/10.36745/ijca.379.

Skorupka J. (ed.), Kodeks postępowania karnego. Komentarz aktualizowany, 33rd edition, Legalis.

Stefański R.A., Zabłocki S., Kodeks postępowania karnego. Tom III. Komentarz do art. 297–424, WKP 2021.

Szurman M., Korzeniak M., Poufność w kontakcie z obrońcą na wstępnym etapie postępowania karnego – analiza regulacji 73 § 2 oraz art. 245 § 1 Kodeksu postępowania karnego w świetle standardów konstytucyjnych, unijnych i konwencyjnych, 'Palestra' 2020, no. 9.

Świecki D. (ed.), Kodeks postępowania karnego. Tom I. Komentarz aktualizowany, B. Augustyniak, K. Eichstaedt, M. Kurowski, D. Świecki, LEX/el. 2021.

Bialystok Legal Studies
Białostockie Studia Prawnicze
2022 vol. 27 nr 2

sciendo

DOI: 10.15290/bsp.2022.27.02.14

Received: 31.01.2022
Accepted: 19.04.2022

Michał Ożóg
University of Bialystok, Poland
m.ozog@uwb.edu.pl
ORCID ID: https://orcid.org/0000–0002–4315–5235

Qualification of Freedom of Religious Assembly in the Period of Ordinary Functioning of the State and in the Legislation from the Time of COVID-19 Pandemic in Poland

Abstract: The subject of this article is to present the legal qualification of the freedom of religious assembly in the period of ordinary functioning of the state and in the content of regulations from the period of the COVID-19 pandemic in Poland. The analysis is concerned with determining how the legislator treats this freedom from the point of view of links between freedom of assembly and freedom of thought, conscience and religion. The function of freedom of religious assembly is presented, as well as the legal model of religious freedom assembly in the conditions of ordinary state action, as well as on the ground of legal regimes possible to introduce in connection with counteracting the occurrence and effects of an infectious disease. In the research the dogmatic method was applied. Amendments to the Law on Assemblies and special law regulations have been proposed to take into account constitutional principles and values, as well as ongoing social changes.
Keywords: conscience and religion, COVID-19, epidemic state, freedom of assembly, freedom of thought

Introduction

More than two years of the COVID-19 pandemic has revealed many problems in the functioning of the Polish state and its legal system.[1] It may even be said that there has been an unexpected verification of the assumptions of the Constitution of the

1 P. Mierzejewski (ed.), Ombudsman's report on the pandemic – experiences and conclusions, Warsaw 2021, passim.

Republic of Poland of 2 April 1997[2] and the disclosure of its gaps in the field of legal regulations concerning state action in a crisis situation. Particular attention should be paid to the issue of legal qualification of religious assemblies in the Polish legal system. The analysis of the legal solutions adopted in the state of an epidemic will be set in the context of the qualification of such gatherings in the conditions of the ordinary functioning of the state.

It should be noted that the evaluation of the established legal regulations on religious assemblies in a pandemic in Polish law raises extreme and differentiated assessments. In public opinion one can note a critical position towards the adopted limitation of the organization of religious assemblies in a pandemic[3], as well as disapproval of the organization of such gatherings.[4] It seems that the ongoing discussion is due to the lack of a precise and unambiguous legal qualification of religious gatherings in the Polish legal system. Some commentators consider them as a realization of the freedom of thought, conscience and religion, others as a manifestation of the freedom of assembly. The focus is usually on one of these two freedoms. It is worth mentioning that the above relationship between these two freedoms is strongly emphasized in the case law of the European Court of Human Rights.[5]

The legal literature mainly focuses on the issue of limitations to the freedom of manifestation of religious beliefs[6], whereas there is no detailed analysis of the limitations to the freedom of religious assembly *in genere*. The aim of the article is not a dogmatic analysis of the numerous regulations on religious assemblies, but an attempt to take a model view of the problems of regulating such gatherings of the population in the context of combating the spread of an infectious disease.

2 Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws 1997 No. 78, item 483).

3 E.g. B. Zalewski, Opinia prawna dotycząca ograniczeń w sprawowaniu kultu religijnego w związku ze stanem epidemii (stan prawny na 29 marca 2021 r.), https://ordoiuris.pl/wolnosc-sumienia/opinia-prawna-dotyczaca-ograniczen-w-sprawowaniu-kultu-religijnego-w-zwiazku-ze (accessed 28.02.2022).

4 E.g. M. Piasecki, W Kościołach łamią zakaz zgromadzeń. OKO.press zwraca uwagę dla wspólnego bezpieczeństwa, https://oko.press/oko-press-zwraca-uwage-na-lamanie-ograniczen-zgromadzen-w-kosciolach-dla-wspolnego-bezpieczenstwa/ (accessed 28.02.2022).

5 A. Koman-Bednarczyk and N. Kurek, Freedom of Assembly in the Light of Polish Regulations and Selected Case Law Standards of the European Court of Human Rights, 'Studia Iuridica Lublinensia' 2021, vol. XXX, (5), p. 309 et seq.

6 K. Dyda and M. Olszówka, Analiza konstytucyjności ograniczeń w korzystaniu z wolności religii podczas pandemii koronawirusa w Polsce, 'Studia z Prawa Wyznaniowego' 2020, vol. 23, pp. 441–469; P. Stanisz, Ograniczenia wolności kultu religijnego w czasie pandemii COVID-19: między konstytucyjnością a efektywnością, 'Przegląd Sejmowy' 2021, no. 3, pp. 143–165; A.M. Abramowicz, Wolność religijna w czasie pandemii koronawirusa ocena rozwiązań polskich, 'Studia z Prawa Wyznaniowego' 2021, vol. 24, pp. 255–278; M. Bielecki, Ograniczenia wolności religijnej w pandemii, (in:) P. Szustakiewicz and M. Wieczorek (eds.), Transformacje prawa polskiego w dobie epidemii COVID-19, Radom 2020, pp. 37–57.

1. Religious Assemblies in the Ordinary Period of the State

The considerations must be countered with the content of the regular legislation. Polish law does not explicitly differentiate religious assembly as a special legal category in the Constitution. In this regard, the Polish Constitution does not distinguish itself from others. On the contrary, in the regular legislation, the phrase concerning assemblies held as part of the activities of churches and other religious associations (Article 2 of the Law on Assemblies of 24 July 2015[7]) or religious assemblies (Article 19, paragraph 2, point 3 *in fine* of the Law on Guarantees of Freedom of Conscience and Religion of 17 May 1989[8]) is most common.

An assembly of a religious nature may derive from the profile of the assembly, and therefore relate to religious issues and faith that provide the motivation for people's participation in a given meeting. That in turn entails the need to find out what religion is within the meaning of the domestic legal order. First, it must be acknowledged that Polish law does not provide a definition of religion.[9] This is fairly understandable in terms of the requirement to respect the principle of the impartiality of public authorities in Article 25(2) of the Constitution. Nevertheless, we can find some clues in the interpretative practice concerning the content of Article 2.1. of the l.g.f.c.r. This provision stipulates that a church and a religious association is understood as a religious community founded in order to profess and spread religious faith. The legal provisions do not in any way specify what this 'religious faith' is, but for years the administrative practice of the Polish registration authority has presumed that religion should be rooted in a specific *sacrum* and has discarded the phenomenological concept of religion, which in practice implies that communities based on beliefs that depart from the classical divinity are not granted entry in the register of churches and other religious associations.[10]

Adopting a restricted understanding of the definition of religion, it should be concluded that a religious assembly would not be a gathering of people concentrated around the so-called new religious movements and other new contemporary forms of religiosity dissociated from institutional structures.

The realization of the freedom of conscience and religion of an individual may not be determined by an organizational criterion.[11] The Constitutional Tribunal found that 'freedom of religion is construed very broadly in the constitutional norm,

7 Consolidated text of Journals of Laws 2019, item 631, hereinafter: l.a.

8 Consolidated text of Journals of Laws 2017, item 1,153, hereafter: l.g.f.c.r.

9 G. Maroń, O pojmowaniu religii w polskim porządku prawnym, 'Forum Prawnicze' 2021, no. 3, p. 39.

10 M. Ożóg, Rejestrowanie kościołów i innych związków wyznaniowych w trybie administracyjnym, 'Forum Prawnicze' 2015, no. 2, p. 35.

11 P. Sarnecki, art. 53, (in:) L. Garlicki (ed.), Konstytucja Rzeczypospolitej Polskiej. Komentarz. Vol. III, Warsaw 2003, pp. 4–5.

as it embraces all religions and membership in all religious associations, and thus it is not limited to participation in religious communities forming a formal, separate organizational structure and registered in the relevant registers kept by public authorities'.[12] This is especially crucial nowadays, when the phenomenon of deinstitutionalization of religion becomes visible, and the role of subjective experience of religiosity in separation from permanent organizational structures increases.[13]

Of fundamental importance for the legal qualification of religious assemblies under the terms of ordinary functioning of the state is the l.a., which determines that the l.a. provisions do not apply to assemblies held as part of the activities of churches and other religious associations. Neither do the provisions of the l.a. make any reference to whether this exemption refers only to churches and religious associations with a regulated legal situation, or also to all confessional communities. It appears that an appropriate meaning would be to apply the general directive of narrowing interpretation of provisions concerning exceptions in the legal regulation of a given subject. Therefore, it must be stated that the provisions of the l.a. will be applicable to religious assemblies organized by churches and religious associations with an unregulated legal position.[14] The security of the legal law system therefore demands recognition that the exclusion of the l.a. regulation applies only to churches and religious associations with a legal status grounded in one of the ways prescribed by the Polish legal order.[15] The religious communities with an unregulated legal position or with a position shaped in foreign law will be allowed to organize their assemblies on the general principles of the realization of freedom in Articles 53 and 57 of the Constitution.

The phrase 'within the scope of activities' of churches and religious associations is therefore crucial. The meaning of this formulation may be a controversial issue. Two interpretations could be proposed for consideration. The subjective interpretation would assume that this would be any de facto activity undertaken by a given religious community. The objective interpretation, on the other hand, would presuppose that these are activities specific to confessional organizational structures, given the classical definition of religion. These should be their own affairs according to Article 25, paragraph 3 of the Constitution. The author is in favour of the second proposal. The first approach seems unacceptable due to the full wording of the l.a. formula – 'the provisions of the Act shall not apply to assemblies within the activities of churches and other religious associations'. If the lawmaker had allowed the exclusion of the l.a. to any meetings of the confessional community, then the legal provi-

12 Judgment of the Constitutional Tribunal of 16 February 1999, ref. no SK 11/98, LEX no. 36175.

13 Zob. E. Ciupak, Religijność poza Kościołem, (in:) W. Zdaniewicz (ed.), Znaczenie Kościoła w pierwszych latach III Rzeczpospolitej, Warsaw 1994, pp. 27–37.

14 Compare the different position – P. Suski, Zgromadzenia i imprezy masowe, Warsaw 2007, pp. 38–39.

15 K. Mamak, Prawo o zgromadzeniach. Komentarz, Warsaw 2014, p. 45.

sion would have *express verbis* provided that the provisions of the Act shall not refer to assemblies organized by churches and other religious associations, similarly as it was adopted in Article 2.1 of the l.a. with respect to assemblies organized by public authorities. For these reasons, the view expressed in the literature, according to which the provision of Article 2.2 l.a. applies to all meetings, is controversial, and it may result in a lack of competence of public authorities to interfere when an assembly ceases to be peaceful.[16]

The exemption of l.a. regulations should pertain to confessional assemblies in the narrow sense, i.e. concerning the matters of worship and participation in it. This is the scope of activity of religious communities in the light of the Polish model of the relationship between the state and churches and religious associations in the light of Article 25(3) of the Constitution. Possible political assemblies set up on the initiative of religious communities should be subordinate to the general rules of the l.a. It seems that the reasons for excluding confessional assemblies from the regulation of the l.a. was to take into account the nature of these assemblies connected with worship in places other than public space. However, when it comes to political matters, it is sometimes difficult to make a strict delineation between the political and the non-political, given that religious questions concern a very wide category of phenomena in social life and can also concern political issues. Thomas Mann said that 'there is no non-politics, everything is politics'.[17] People who gather to collectively express their beliefs for religious motivation will in this case enjoy freedom of assembly.[18]

Article 19(2)(2) of the l.g.f.c.r. provides for the free exercise of religious functions of churches and religious associations through the organization and public performance of worship. The substance of this statutory provision focuses on the protection of the autonomy of religious communities in the organization and conduct of meetings connected with the performance of religious worship. On the other hand, Article 19(2)(3) *in fine* of the l.g.f.c.r. explicitly mentions the possibility of organizing religious assemblies. This indicates that on the grounds of the l.g.f.c.r. the legislator used two formulations – 'organizing and public worship' and 'religious assemblies'. Such a distinction could suggest that the former category is something separable from the latter, but it seems to be its exemplification. It is possible for public worship to take place without the participation of the community by the celebrant alone, but this is usually done with the participation of a smaller or larger number of worshippers, thus forming an assembly. It must be assumed that religious assembly is a category broader in meaning and includes not only collective worship but also other gatherings.

16 A. Jakubowski, komentarz do art. 2, (in:) S. Gajewski and A. Jakubowski (eds.), Prawo o zgromadzeniach. Komentarz, Warsaw 2017, p. 30.

17 T. Mann, Czarodziejska góra, vol. 1–2, Warsaw 2009–2012.

18 A. Wróbel, Wolność zgromadzania się, (in:) M. Chmaj, W. Orłowski, W. Skrzydło, Z. Witkowski and A. Wróbel (eds.), Wolności i prawa polityczne, Zakamycze 2002, p. 30.

Thus, when discussing possible restrictions on the freedom of religious assembly, it will be necessary to distinguish the profile of the religious assembly in question. A religious assembly *sensu stricto* will be a meeting during which public worship takes place, i.e. with access for some group of participants. In this case, participation in such an assembly will be a manifestation of the exercise of personal freedom, and therefore of freedom of conscience and religion. It should be remembered that an assembly of a church or religious association may raise political issues, and the state law may not prohibit this, because it would be discrimination on the grounds of religion, but in such a case the *ratio legis* of special treatment of religious assemblies disappears, and then the regulations concerning the realization of freedom of assembly should be applied.

2. Religious Assemblies in Light of the COVID-19 Pandemic Regulations

At the onset, it should be noted that in Poland, as of 14 March 2020, a state of epidemic emergency was declared[19], and then as of 20 March 2020, a state of epidemic was introduced. As of May 16, 2022 an epidemic emergency was declared and the epidemic status was lifted.[20]

Referring to the legal qualification of religious assemblies in the period of the COVID-19 pandemic, it should be stated that the Polish legal regulations of that period referred only to a small extent to the issue of religious gatherings, given the wide scope of these meetings, as the restrictions enacted concerned primarily the performance of public worship in public places, including religious facilities. From the point of view of the adopted legislative technique, the legal regulations in question did not directly refer to the terminology used in the Constitution, l.a., l.g.f.c.r. and individual laws to define the categories of religious gatherings subject to restriction, which would have been highly desirable in order to maintain terminological consistency and order.

It should be highlighted that the regulation of freedom of religious assembly in the COVID-19 pandemic is flawed in terms of its merits and the adopted linguistic drafting of the legal provisions. Namely, the content of § 9.1.3 of the Decree of the Council of Ministers of 31 March 2020 on the establishment of certain restric-

19 Regulation of the Minister of Health of 13 March 2020 on the declaration of an epidemic emergency on the territory of the Republic of Poland (Journal of Laws of 2020, item 433).

20 Regulation of the Council of Ministers of 13 May 2022 amending the regulation on the establishment of specific restrictions, orders and prohibitions in connection with regard to the occurrence of an epidemic situation (Journal of Laws 2022, item 1025).

tions, orders and prohibitions in connection with the outbreak of the epidemic[21] determined a limit of persons during religious worship, including religious activities or rituals, in a given area or facility, both inside and outside the premises. On the other hand, the content of § 7, section 1, item 3 of the Ordinance of the Minister of Health of 20 March 2020 on the declaration of a state of epidemic in the territory of the Republic of Poland provides for the necessity to adhere to the limit of persons during religious worship in a given area or in a given facility, both inside and outside the premises. The difference relates to the use of three linguistic phrases in the 31 March 2020 ordinance instead of one to denote what appears to be the same freedom of conscience and religion entitlement. Indeed, the semantic scopes of the phrases 'religious worship, religious acts or rites' are closely related to each other and generally coincide in meaning. If it were to be envisaged that specific rights concerning the collective performance of religious practices were to be restricted, then the best solution would seem to be a reference to the wording of Article 53, paragraph 2 of the Constitution, i.e. defining the restrictions on the organization of meetings with public worship, prayer, participation in rituals, practice and teaching, taking place inside and outside the premises. In addition, the phrases used may indicate the adoption of a broader scope of legal regulation, although this is an entirely apparent impression. Moreover, the enumeration used by the legislator does not fulfil the criteria of logical division and contradicts the requirement of conciseness of legal acts.

In the first period of legal regulation resulting from the COVID-19 pandemic, limits were set in the executive acts issued on the number of persons who could participate in a religious worship. Initially, a numerical criterion of five persons participating in religious worship regardless of the size of the church facility was adopted[22], and later this number was increased to 50 persons.[23] Subsequently, a different method was used based on indicating the maximum permissible number of persons taking part in religious practice per square metre of space. This second method seems to be more appropriate, as it takes into account the different sizes of the religious facilities in which religious worship takes place.[24] The limits to the number of participants have undergone numerous changes in the law, the study of which is beyond the scope

21 The Regulation of the Council of Ministers of 31 March 2020 on the establishment of certain restrictions, orders and prohibitions in connection with the occurrence of an epidemic (Journal of Laws 2020, item 566).

22 The above arrangement was effective from 24 March to 11 April 2020.

23 Regulation of the Council of Ministers of 10 April 2020 on the establishment of certain restrictions, orders and prohibitions in connection with the occurrence of an epidemic (Journals of Laws 2020, item 658).

24 M. Olszówka and K. Dyda, Analiza zgodności z Konstytucją RP ograniczeń w korzystaniu z wolności religii i przemieszczania się związanych z pandemią koronawirusa SARS-Cov-2 oraz strategii ich znoszenia (stan na 14 maja 2020 r.), https://ordoiuris.pl/wolnosci-obywatelskie/analiza-zgodnosci-z-konstytucja-rp-ograniczen-w-korzystaniu-z-wolnosci (accessed 21.03.2022).

of this paper, since the purpose of the study is to try to bring out the general approach of the legislator to religious assemblies.

Limitations on religious gatherings should take into consideration the pluralism of world views. Modern holistic law should be open to diverse world views.[25] This issue is of practical importance because the limits of persons participating in assemblies within the activities of churches and religious associations were shaped differently. As a result, the legal provisions on restrictions on the freedom of assembly were applied to persons with a world view that was not connected with the organizational structure of a church or religious association.[26] An example is the question of participation of persons in secular funerals, which are not organized by confessional denominations. There is no doubt that the organization of such a funeral is linked to freedom of thought, conscience and religion, which cannot be narrowed down to a theistic world view, since it also includes freedom from religion (the negative aspect of freedom of thought, conscience and religion). The respective wish for such a burial could have been expressed by the deceased during life or such is the will of the family members organizing the funeral.

It is also worth noting that the content of § 14, section 1, item 2 of the 31 March 2020 Ordinance of the Council of Ministers on establishing certain restrictions, orders and prohibitions in connection with the occurrence of an epidemic situation additionally provided for a ban on assemblies organized as part of the activities of churches and other religious associations. Therefore, the formula clearly referred to the expressions of the l.a. Interestingly, § 11 of the Regulation of the Minister of Health of 20 March 2020 on the declaration of an epidemic in the territory of the Republic of Poland did not provide such a restriction. Arguably, the subsequent legal regulation decided to strengthen the ban on assembly by broadening its scope to include the activities of churches and religious associations along with events, meetings and gatherings with some narrow exceptions for meetings with loved ones. This regulation meant that it was not lawful for a church or religious association to hold an assembly on matters unrelated to public worship, such as socio-political issues, so it had a much broader scope. This approach seems to consider religious assemblies other than public worship as equivalent to assemblies defined as 'events, meetings and gatherings', which may be subject to limitation. The content of this legal regulation should be evaluated positively. Exceptions to the freedom of religious assembly should be especially justified so as not to create the impression of discrimination on the basis of world view. Assemblies of believers on matters other than worship should be treated in the same way as political assemblies in terms of sanitary safety restrictions.

25 M. Szyszkowska, Prawo holistyczne, 'Białostockie Studia Prawnicze' 2010, vol. 8, p. 12.

26 M. Sewastianowicz, Uroczysty pogrzeb nie dla ateisty – absurd w rozporządzeniu epidemicznym, https://www.prawo.pl/prawo/pogrzeb-swiecki-a-obostrzenia-koronawirus-limity,507419.html (accessed 21.03.2022).

It was also indicated that the provisions of the Act of 5 December 2008 on prevention and control of infections and infectious diseases in humans[27] in no way address the issue of the feasibility of restricting in the executive acts the freedom of religious assemblies or the performance of religious worship. It is definitely appropriate to share the position that the restriction of this freedom could only take place by means of a law, which follows from Article 31(3) and Article 53(5) of the Constitution. As to the remaining allegations, it must be acknowledged that indeed the wording of Article 46(4) of the p.c.i.d. does not explicitly mention the possibility of temporarily limiting the freedom of religious assembly or restricting the organization of public worship. It is therefore worth noting the statutory provisions that could potentially be considered as a legal basis for such restrictions and the choice made by the legislator.

Article 46(4)(4) of the p.c.i.d. mandates the 'prohibition of the holding of spectacles and other assemblies of the public' by ordinance. There is no doubt that the gathering of people in a temple, sacred place or other facility for the purpose of religious worship constitutes an assembly of the population. However, according to P. Stanisz, such a legal basis is not adequate to limit the freedom of worship. The author points out that the legal provisions on the freedom of worship have a special feature in relation to the general freedom of assembly and 'from this it follows that the restriction of the performance of religious worship cannot be based exclusively on the general authority to limit the freedom of assembly'.[28] This agrees with the above statement that the Polish legislator treats religious assemblies in a different way, which has already been hinted at earlier in this article. Probably this is the reason the legislator did not place the mentioned restrictions in the chapters concerning, according to their titles, bans on organizing spectacles and other public assemblies, and they directly referred to the statutory phrases.[29]

Nevertheless, the legislator decided to reference in the restriction of the freedom of public worship the provision of Article 46(4)(3) of the p.c.i.d. This provision allows the limitation of 'the functioning of certain institutions or establishments'. Thus, the legislature classified churches and other religious associations as 'institutions'. The provision does not specify in any way which institutions fall within its scope, which is presumably a conscious effort to avoid the omission of some organizational structures in the context of the introduced restrictions. The provision of Art. 46, sec. 4(3) of the p.c.i.d. does not differentiate between state and other institutions, e.g. churches and religious associations, foundations and societies, so one should assume that it is permissible to include confessional organizational structures within the scope of

27 Consolidated text of Journals of Laws 2021, item 2,069, hereinafter: p.c.i.d.

28 P. Stanisz, Ograniczenia wolności kultu religijnego w czasie pandemii COVID-19: między konstytucyjnością a efektywnością, 'Przegląd Sejmowy' 2021, no. 3, p. 154.

29 *Ibidem*.

this legal provision, in accordance with the *lege non distinguente* principle, although this is not a common view.[30] Churches and other religious associations, together with all their organizational structures, are subject to the generally binding law issued for the purpose of preventing infectious diseases and their effects.[31] Obviously, the autonomy and independence of churches and other religious associations should not be infringed. To be precise this constraint concerns only the limitation of holding a meeting for the purpose of public worship, whereas it cannot forbid the performing of acts of worship as such.

However, the adopted legal basis may arouse some reservations. Without doubt, the regulation containing restrictions on the freedom of worship requires the form of a statutory act, and not a regulation, which follows from the content of Article 46, section 4 of the p.c.i.d. Article 53, section 5 of the Constitution demands the form of a statutory act for introducing restrictions on the freedom of manifestation of religion.[32] This is a serious defect in the legal regime of the epidemic state. It worth noting that in some countries, the executive authorities have been given special powers to impose restrictions on freedom of assembly and explicitly singled out religious observances.[33] This is because the Act is a legal act that has an appropriate level of social legitimacy, and the legislative procedure allows for a proper discussion of the permissibility of the restrictions and their scope.[34] The ordinance as a legal act is not distinguished by these characteristics.

Adequate discussion should be entered into regarding the extent of restrictions on the freedom of religious assembly for the sake of preventing the spread of an infectious disease and its consequences. The answer to this question demands an honest discussion and balancing of values. As of the present time, it is clear that the current model of protecting the freedom of religious assembly does not find effective realization on the basis of the current legislative practice. In the case of social acceptance of additional protection of freedom from Article 53 of the Constitution in a state of epidemic, it is worth considering the addition of a legal provision securing the perfor-

30 E.g. G. Maroń, Polskie prawodawstwo ograniczające wolność religijną w okresie pandemii koronawirusa SARS-CoV–2 a standardy państwa prawa – wybrane zagadnienia, 'Przegląd Prawa Publicznego' 2021, vol. 1, p. 39.

31 M. Ożóg, Zwalczanie chorób zakaźnych w stanie epidemii oraz w stanie klęski żywiołowej a realizacja wolności sumienia i religii w świetle Konstytucji Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 roku i ustawodawstwa, 'Studia z Prawa Wyznaniowego' 2021, vol. 24, p. 345.

32 W. Skrzydło, Konstytucja Rzeczypospolitej Polskiej. Komentarz, Warsaw 2013, p. 62.

33 L. Bosek, Anti-Epidemic Emergency Regimes under Polish Law in Comparative, Historical and Jurisprudential Perspective, 'European Journal of Health Law' 2021, vol. 28, p. 127.

34 K. Wojtyczek, Granice ingerencji ustawodawczej w sferę praw człowieka w Konstytucji RP, Kraków 1999, p. 107.

mance of religious services in facilities used for religious worship, as was accepted in the regulation of the institution of a state of emergency.[35]

It can be considered that since such a guarantee was provided for in the statutory regulation of one of the states of emergency, it should be adopted all the more in the legal model of the state of epidemic. Suspension of freedom of assembly would be possible during the state of emergency.[36] However, the provision of Article 22, section 2 of the act of 21 June 2002 on the state of emergency establishes[37] that the prohibition of assembly in this state of the functioning of the state does not pertain to gatherings held by churches and other religious associations and religious organizations conducting their activities in temples, church buildings or other premises serving the organization and public performance of worship. This provision explicitly includes derogations in favour of protecting religious freedoms organized by religious communities. The legislator sets limits to the freedom of assembly in a state of emergency but establishes an exception for the realization of the freedom of religious assembly. In this regard, the criterion of the organizer of the assembly is of particular importance. It should be observed that the provisions of the p.c.i.d. do not envisage such an exemption for the freedom of assembly, similar to the statutory regulation of the state of emergency. The previous practice of the Polish legislature during the COVID-19 pandemic proves the positive approach towards religious gathering relative to assemblies of other types, but in the absence of relevant constitutional and statutory guarantees this is left entirely to the goodwill of the lawmaker, and one can conceive a case where there is no preferred treatment of religious assemblies.

On the other hand, the public belief in the permissibility of limiting the freedom of religious assemblies would demand, in order to dispel doubts, the addition of a legal provision to the p.c.i.d. that would expressly address the possibility of limiting the holding of religious assemblies. The law would then have to distinguish with precision between public worship and other meetings as part of the activities of churches and religious associations. It would be necessary to refer to the distinction made in Article 19 of the l.g.f.c.r. There is no doubt that a full restriction of the ability to participate in public worship would be inadmissible, because it would constitute an intrusion into the essence of the freedom to manifest religion, which is impermissible in the light of Article 31(3) of the Constitution and Article 53(5) of the Constitution. Attending such religious practices usually constitutes the foundation of faith. Restrictions on other religious gatherings, which may touch on cultural events, scientific

35 M. Ożóg, Zwalczanie chorób zakaźnych w stanie epidemii oraz w stanie klęski żywiołowej a realizacja wolności sumienia i religii w świetle Konstytucji Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 roku i ustawodawstwa, 'Studia z Prawa Wyznaniowego' 2021, vol. 24, p. 354.

36 Compare the dissenting view: K. Urbaniak, Ograniczenie praw i wolności człowieka i obywatela w okresie pandemii w Polsce, (in:) K. Hajder, M. Musiał-Karg and M. Górny (eds.), Konsekwencje pandemii COVID-19: państwo i społeczeństwo, Poznań 2020, p. 175.

37 Consolidated text of Journals of Laws 2017, item 1,928.

conferences, popularization of faith etc., may be carried out much more deeply. At this point it is worth pointing out that the literature draws attention to the deficiency of the constitutional regulation in terms of the lack of violating the essence of the freedom of assembly and the freedom to manifest religion, which may be needed to prevent the spread of an infectious disease.[38] The possibility of violating the essence of the freedom of assembly, or freedom of manifestation of religion, also holds true for state actions under a state of natural disaster.

Conclusions

Religious assemblies make up a special category of popular assemblies in Polish law. They have their specific legal basis in the Constitution, in the l.g.f.c.r. and in individual laws on the relationship of the state to individual churches and other religious associations. Religious congregations constitute a broad category. With the established exclusion of the application of the l.a. it would be necessary to add relevant legal regulations in the provisions of the l.g.f.c.r. to further define the principles of their implementation in the conditions of ordinary functioning of the state. In contrast, counteracting the occurrence of infectious diseases and their consequences may demand that freedom of religious assembly be restricted to a certain extent. For this purpose, an adequate legal basis should be established in the provisions of the p.c.i.d., but with the admission of religious worship organizations. With respect to these assemblies, the possibility of their fulfilment in a state of epidemic or natural disaster should be respected. Restrictions should constitute the *ultima ratio*. A broader scope of interference may apply to other religious assemblies that do not concern worship and thus involve, for example, socio-political matters. The category of religious assemblies should be viewed from a broad perspective, taking into consideration the wide range of functions of religious communities and relating the scope of allowable restrictions to this.

REFERENCES

Abramowicz A.M., Wolność religijna w czasie pandemii koronawirusa ocena rozwiązań polskich, 'Studia z Prawa Wyznaniowego' 2021, vol. 24.

Bielecki B., Ograniczenia wolności religijnej w pandemii, (in:) P. Szustakiewicz and M. Wieczorek (eds.), Transformacje prawa polskiego w dobie epidemii COVID-19, Radom 2020.

Bosek L., Anti-Epidemic Emergency Regimes under Polish Law in Comparative, Historical and Jurisprudential Perspective, 'European Journal of Health Law' 2021, vol. 28.

38 M. Radajewski, Prawa i wolności człowieka i obywatela w dobie pandemii, (in:) T. Gardocka and D. Jagiełło (eds.), Pandemia COVID-19 a prawa i wolności obywatela, Warsaw 2020, p. 91.

Ciupak E., Religijność poza Kościołem, (in:) W. Zdaniewicz (ed.), Znaczenie Kościoła w pierwszych latach III Rzeczpospolitej, Warsaw 1994.

Dyda K. and Olszówka M., Analiza konstytucyjności ograniczeń w korzystaniu z wolności religii podczas pandemii koronawirusa w Polsce, 'Studia z Prawa Wyznaniowego' 2020, vol. 23.

Jakubowski A., komentarz do art. 2, (in:) S. Gajewski and A. Jakubowski (eds.), Prawo o zgromadzeniach. Komentarz, Warsaw 2017.

Koman-Bednarczyk A. and Kurek N., Freedom of Assembly in the Light of Polish Regulations and Selected Case Law Standards of the European Court of Human Rights, 'Studia Iuridica Lublinensia' 2021, vol. XXX.

Mamak K., Prawo o zgromadzeniach. Komentarz, Warsaw 2014.

Maroń G., O pojmowaniu religii w polskim porządku prawnym, 'Forum Prawnicze' 2021, no. 3.

Maroń G., Polskie prawodawstwo ograniczające wolność religijną w okresie pandemii koronawirusa SARS-CoV–2 a standardy państwa prawa – wybrane zagadnienia, 'Przegląd Prawa Publicznego' 2021, vol. 1.

Olszówka M. and Dyda K., Analiza zgodności z Konstytucją RP ograniczeń w korzystaniu z wolności religii i przemieszczania się związanych z pandemią koronawirusa SARS-Cov-2 oraz strategii ich znoszenia (stan na 14 maja 2020 r.), https://ordoiuris.pl/wolnosci-obywatelskie/analiza-zgodnosci-z-konstytucja-rp-ograniczen-w-korzystaniu-z-wolnosci.

Ożóg M., Rejestrowanie kościołów i innych związków wyznaniowych w trybie administracyjnym, 'Forum Prawnicze' 2015, no. 2.

Ożóg, M., Zwalczanie chorób zakaźnych w stanie epidemii oraz w stanie klęski żywiołowej a realizacja wolności sumienia i religii w świetle Konstytucji Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 roku i ustawodawstwa, 'Studia z Prawa Wyznaniowego' 2021, vol. 24.

Piasecki M., W Kościołach łamią zakaz zgromadzeń. OKO.press zwraca uwagę dla wspólnego bezpieczeństwa, https://oko.press/oko-press-zwraca-uwage-na-lamanie-ograniczen-zgromadzen-w-kosciolach-dla-wspolnego-bezpieczenstwa.

Radajewski M., Prawa i wolności człowieka i obywatela w dobie pandemii, (in:) T. Gardocka and D. Jagiełło (eds.), Pandemia COVID-19 a prawa i wolności obywatela, Warsaw 2020.

Sewastianowicz M., Uroczysty pogrzeb nie dla ateisty – absurd w rozporządzeniu epidemicznym, https://www.prawo.pl/prawo/pogrzeb-swiecki-a-obostrzenia-koronawirus-limity,507419.html.

Skrzydło W., Konstytucja Rzeczypospolitej Polskiej. Komentarz, Warsaw 2013.

Stanisz P., Ograniczenia wolności kultu religijnego w czasie pandemii COVID-19: między konstytucyjnością a efektywnością, 'Przegląd Sejmowy' 2021, no. 3.

Suski P., Zgromadzenia i imprezy masowe, Warsaw 2007.

Szyszkowska, M., Prawo holistyczne, 'Białostockie Studia Prawnicze' 2010, vol. 8.

Urbaniak K., Ograniczenie praw i wolności człowieka i obywatela w okresie pandemii w Polsce, (in:) K. Hajder, M. Musiał-Karg and M. Górny (eds.), Konsekwencje pandemii COVID-19: państwo i społeczeństwo, Poznań 2020.

Wojtyczek K., Granice ingerencji ustawodawczej w sferę praw człowieka w Konstytucji RP, Kraków 1999.

Wróbel A., Wolność zgromadzania się, (in:) M. Chmaj, W. Orłowski, W. Skrzydło, Z. Witkowski and A. Wróbel (eds.), Wolności i prawa polityczne, Zakamycze 2002.

Zalewski B., Opinia prawna dotycząca ograniczeń w sprawowaniu kultu religijnego w związku ze stanem epidemii (stan prawny na 29 marca 2021 r.), https://ordoiuris.pl/wolnosc-sumienia/opinia-prawna-dotyczaca-ograniczen-w-sprawowaniu-kultu-religijnego-w-zwiazku-ze.

Bialystok Legal Studies
Białostockie Studia Prawnicze
2022 vol. 27 nr 2

sciendo

DOI: 10.15290/bsp.2022.27.02.15

Received: 28.03.2022
Accepted: 30.05.2022

Elżbieta Kużelewska
University of Białystok, Poland
e.kuzelewska@uwb.edu.pl
ORCID ID: https://orcid.org/0000–0002–6092–7284

Małgorzata Podolak
Maria Curie-Skłodowska Univiersity, Poland
Malgorzata.Podolak@umcs.lublin.pl
ORCID ID: https://orcid.org/0000–0002–6250–4170

Ograniczenia wolności zgromadzeń i stowarzyszania się w Słowenii w dobie pandemii COVID-19

Restrictions of Freedom of Assembly and Association in Slovenia during COVID-19 Pandemic

Abstract: Slovenia is one of the European Union Member States which disproportionately restricted political rights during the COVID-19 pandemic. Since the new government of Prime Minister Janez Janša came to power in March 2020, the anti-government and anti-lockdown protests have been taking place across the country. The pandemic-related restrictions have been introduced by government's ordinances. They have greatly limited political rights of citizens, in particular the right to public assembly and association. Citizens' dissatisfaction with the government's policies and inadequate handling of the epidemic, resulting in undue restrictions on liberty and other fundamental rights, led to the filing of petitions to the Constitutional Court. The Constitutional Court, resolving the dispute between citizens and the government, ruled that government regulations implementing restrictions on fundamental rights, particularly the rights to public assembly and association, were unconstitutional in several cases.
Keywords: Constitutional Court, civil rights, freedom of assembly, freedom of association, political rights, Slovenia
Słowa kluczowe: Sąd Konstytucyjny, prawa obywatelskie, wolność zgromadzeń, wolność stowarzyszeń, prawa polityczne, Słowenia

Wprowadzenie

Zgodnie z art. 15 ust. 1 konstytucji Słowenii[1] prawa człowieka i podstawowe wolności na mocy ustawy zasadniczej realizowane są bezpośrednio. Oznacza to, że prawa te mają charakter gwarancji prawnych, a nie wytycznych dla ustawodawcy. Słowenia jest stroną konwencji o ochronie praw człowieka i podstawowych wolności z 1950 r. Artykuł 11 konwencji zapewnia wolność zgromadzeń i stowarzyszania się. Od momentu przyjęcia Słowenii do Rady Europy w 1993 r. Europejski Trybunał Praw Człowieka nie stwierdził naruszenia przez Słowenię artykułu 11 Konwencji. Oznacza to, że jedno z istotniejszych praw politycznych jest skutecznie gwarantowane przez słoweński system konstytucyjny.

Sytuacja uległa zmianie w marcu 2020 roku, kiedy w reakcji na pandemię COVID-19 rozszerzono uprawnienia władzy wykonawczej. W całym kraju odbyły się protesty antyrządowe przeciwko wprowadzeniu restrykcji związanych z pandemią. Wolność zgromadzeń została w nieproporcjonalnie dużym stopniu ograniczona, a działania rządu Sąd Konstytucyjny uznał za sprzeczne z konstytucją. Ograniczanie praw politycznych miało szerszy zakres, bowiem dochodziło do limitowania swobody wypowiedzi i niezależności mediów[2].

Celem artykułu jest próba analizy sukcesywnego ograniczania przez rząd prawa do zgromadzeń i stowarzyszania się w dobie pandemii. Artykuł ma odpowiedzieć na pytanie badawcze, czy i w jakich granicach dopuszczalne jest ograniczanie praw politycznych z uwagi na zagrożenie epidemiczne oraz czy wprowadzone przez rząd Słowenii ograniczenia wynikały z troski o zdrowie obywateli, czy raczej podyktowane były względami politycznymi. Artykuł ma również na celu ukazanie roli Sądu Konstytucyjnego w rozstrzygnięciu sporu pomiędzy obywatelami a rządem w kontekście ograniczania praw politycznych. W artykule wykorzystano metodę dogmatyczną oraz analizę orzecznictwa Sądu Konstytucyjnego Republiki Słowenii.

1. Prawa polityczne w Słowenii

Szeroki katalog praw politycznych zawiera konstytucja z 1991 roku[3]. Ustawa zasadnicza Słowenii nawiązuje do idei i zasad demokratycznych konstytucji europejskich. Podobnie jak w innych państwach preambuła konstytucji zawiera odniesienia

1 Konstytucja Republiki Słowenii z dnia 23 grudnia 1991 r., tłum. Piotr Winczorek, http://biblioteka.sejm.gov.pl/wp-content/uploads/2016/11/Slowenia_pol_010711.pdf (dostęp 12.02.2022).

2 L. Bayer, Inside Slovenia's War on the Media, www.politico.eu/article/slovenia-war-on-media-janez-jansa/ (dostęp 10.03.2022); S. Istenič, The Role of Media in Democratic Consolidation of Taiwan and Slovenia, "Asian and African Studies" 2012, vol. 16 (2), s. 67–77; R. Knoll, We Will Not Yield to Pressure, www.ecpmf.eu/22-slovene-editors-write-joint-public-letter/ (dostęp 10.03.2022).

3 Konstytucja Republiki Słowenii…, *op.cit*.

do aspiracji narodowych wraz z uniwersalną kwestią poszanowania praw i wolności jednostki[4]. Rozdział II konstytucji poświęcony jest prawom człowieka i podstawowym wolnościom. Wolność zgromadzeń i zrzeszania się jest uregulowana w konstytucji (art. 42) oraz w ustawie o zgromadzeniach publicznych z 2002 roku[5]. Artykuł 42 konstytucji zapewnia wolność pokojowego gromadzenia się i udziału w zgromadzeniach publicznych. Ponadto każdy ma prawo do swobodnego stowarzyszania się z innymi. Z artykułu tego wynika też zastrzeżenie, że owe prawa mogą być ustawowo ograniczone ze względu na bezpieczeństwo państwa, bezpieczeństwo publiczne lub ochronę przed szerzeniem się chorób zakaźnych.

Ustawa o zgromadzeniach publicznych z 2002 roku (ze zmianami z 2011 roku) szczegółowo reguluje zasady i wytyczne dotyczące organizowania zgromadzeń publicznych. Każdy ma prawo do organizowania zgromadzeń publicznych i imprez publicznych oraz uczestniczenia w nich (art. 2). Zgromadzenia muszą być wcześniej zarejestrowane w urzędzie, w niektórych przypadkach wymagane są zezwolenia. Artykuł 6 ustawy zakazuje organizowania zgromadzeń lub imprez w celu popełniania przestępstw lub podżegania do nich, stosowania przemocy, zakłócania porządku publicznego lub utrudniania ruchu publicznego. Zabrania również organizowania zgromadzeń lub imprez na otwartej przestrzeni w bezpośrednim sąsiedztwie budynków zabezpieczonych na podstawie przepisów szczególnych, jeżeli zgromadzenie lub impreza mogą zakłócić bezpieczeństwo tych budynków. Artykuł 9 ustawy stanowi m.in., że na wniosek ministra odpowiedzialnego za środowisko naturalne rząd Republiki Słowenii określi, w jaki sposób należy używać sprzętu nagłaśniającego i innego sprzętu powodującego hałas podczas zgromadzeń lub imprez, aby nie stanowił on nadmiernej uciążliwości dla środowiska naturalnego. Artykuł 16 ustawy określa procedurę wydawania zezwoleń. Właściwy organ wydaje zezwolenie na zgromadzenie lub imprezę, jeżeli organizator wykazał w postępowaniu, że przedsięwziął wystarczające środki w celu zapewnienia porządku publicznego, bezpieczeństwa życia i zdrowia uczestników i innych osób oraz ochrony mienia, a także że zgromadzenie lub impreza nie zakłóci ruchu publicznego ani nie obciąży nadmiernie środowiska. W zezwoleniu właściwy organ może nałożyć na organizatora dodatkowe środki w celu zapewnienia większego stopnia bezpieczeństwa osób i mienia oraz utrzymania porządku publicznego. Właściwy organ niezwłocznie powiadamia właściwy komisariat policji o wydanym zezwoleniu.

Artykuł 18 ustawy określa warunki cofnięcia pozwolenia na zgromadzenia. Jednym z nich jest m.in. zaistnienie pilnych środków podyktowanych interesem publicz-

4 M. Podolak, Rights of Sexual Minorities as the Subject of Referenda in the Republic of Slovenia, „Białostockie Studia Prawnicze" 2019, vol. 24, nr 1, s. 47.

5 Zakon o javnih zbiranjih (ZJZ), [Ustawa Prawo o zgromadzeniach] (Uradni list RS, št. 64/11 – uradno prečiščeno besedilo), https://www.uradni-list.si/glasilo-uradni-list-rs/vsebina/2011–01–2970?sop=2011–01–2970 (dostęp 12.02.2022).

nym. Wówczas właściwy organ ustnie cofa zezwolenie i nakazuje natychmiastowe wykonanie tej decyzji. Artykuł 20 wskazuje przesłanki zakazu zgromadzeń. Właściwy organ zakazuje odbycia zgromadzenia lub imprezy, jeżeli okoliczności wskazują, że zostały one zorganizowane w celu, o którym mowa w art. 6 ust. 1 lub w przypadkach określonych w art. 6 ust. 2 i 3. Jeżeli zgromadzenie jest zakazane ze względu na to, że mogłoby zakłócić porządek publiczny lub ruch publiczny, ponieważ czas i miejsce wyznaczone na zgromadzenie nie są odpowiednie, właściwy organ przed wydaniem decyzji wzywa organizatora do wyznaczenia alternatywnego czasu lub miejsca zgromadzenia. Jeżeli organizator wskaże odpowiedni czas lub miejsce zgromadzenia, organ wstrzymuje procedurę zakazu zgromadzenia i wydaje zezwolenie.

Słowenia jest jednym z państw UE, które nieproporcjonalnie ograniczyły prawa polityczne w okresie pandemii koronawirusa[6]. Wolność zgromadzeń i zrzeszania się została znacznie ograniczona przez rząd przez wykorzystanie środków i restrykcji związanych z COVID-19.

2. Ograniczenia wolności zgromadzeń i stowarzyszania się podczas pandemii

W marcu 2020 r. w całym kraju odbyły się protesty antyrządowe przeciwko restrykcjom związanym z pandemią. Uczestnicy protestów zarzucali centroprawicowemu rządowi bezskuteczną i niewłaściwą walkę z epidemią oraz działania, które nadmiernie ograniczały wolność i inne podstawowe prawa oraz podważyły społeczne zaufanie wobec instytucji państwowych[7]. Protestujący oskarżali rząd o niszczenie demokracji i praworządności oraz atakowanie niezależnego dziennikarstwa[8]. Pojawiały się również zarzuty o prowadzenie przez władze państwowe polityki nienawiści wobec przeciwników ideologicznych i politycznych oraz korupcję (m.in. przy zakupie sprzętu ochronnego i medycznego, takiego jak maseczki ochronne, respiratory czy szybkie testy antygenowe)[9]. Minister spraw wewnętrznych zachęcał policję do śledzenia protestujących za pośrednictwem Internetu i mediów społecznościowych oraz do

6 Report Critical of Slovenia Limiting Freedom during Pandemic, „Slovenia Times" 2021, https://sloveniatimes.com/report-critical-of-slovenia-limiting-freedoms-during-pandemic/ (dostęp 10.02.2022).

7 M. Hafner-Fink, S. Uhan, Life and Attitudes of Slovenians during the COVID-19 Pandemic: The Problem of Trust, „International Journal of Sociology" 2021, vol. 51, no. 1, s. 71–83.

8 MFRR REPORT: Press Freedom Deteriorating in Slovenia under Latest Janša Government, https://www.mfrr.eu/wp-content/uploads/2021/06/Slovenia_PressFreedomMission_Report_Final_20210630.pdf (dostęp 11.02.2022).

9 B. Flander, 'Constitutional Unconstitutionality': Constitutional Review of the COVID-19 Restrictions on Fundamental Rights in Slovenia, „Law, Identity and Values" 2022, vol. 2, nr 1, s. 28.

wnoszenia przeciwko nim oskarżeń[10]. Działania te w znacznym stopniu naruszały prawa polityczne – wolność zgromadzeń.

Po raz pierwszy ograniczenie wolności zgromadzeń uchwalono na dwa dni przed wybuchem epidemii (12 marca 2020 roku), 20 marca 2020 roku zakazano zgromadzeń w miejscach i przestrzeni publicznej[11], a 20 października 2020 roku wprowadzono wyraźny zakaz organizowania zgromadzeń w całym kraju[12]. Przemieszczanie się, dostęp i przebywanie w miejscach publicznych, pod warunkiem zachowania bezpiecznej odległości od innych osób, zostały dozwolone dla pojedynczej osoby tylko w określonych sytuacjach (np. udanie się do pracy, wykonywanie czynności gospodarczych, rolniczych i leśnych czy zapobieganie bezpośredniemu zagrożeniu zdrowia, życia i mienia)[13]. Zauważyć należy, że ustawa o chorobach zakaźnych[14] nie przewiduje by minister właściwy ds. zdrowia lub rząd mógł wydać rozporządzenie, które w jakikolwiek sposób i w nieograniczonym zakresie ograniczałoby prawo obywateli Słowenii do swobodnego przemieszczania się. Zakwestionowane pod względem prawnym i konstytucyjnym rozporządzenie zostało przyjęte przez rząd, który jednak nie posiadał umocowania prawnego dla swojej działalności normatywnej, w szczególności w tej sprawie. W rozporządzeniu rząd odwołuje się do artykułów 2 i 20(8) ustawy o Rządzie Republiki Słowenii[15] oraz do punktów 2 i 3 artykułu 39(1) ustawy o chorobach zakaźnych. Żaden z tych aktów prawnych nie upoważnia rządu do przyjęcia rozporządzenia szczegółowo określającego treść odpowiedniej ustawy. W związku z tym uzasadnione jest pytanie, czy rząd mógł działać poza ramami dozwolonymi przez ustawę i konstytucję? Mimo że Sąd Konstytucyjny zakwestionował uprawnienia egzekutywy w tym zakresie, w doktrynie można spotkać poglądy aprobujące jego działania[16]. Niewątpliwie wprowadzenie środków mających na celu ochronę zdrowia publicznego powinno być uprzednio konsultowane z ekspertami

10 E. Kużelewska, Slovenia's crisis-driven path from neo- to quasi-militant democracy, (w:) J. Rak, R. Bäcker (red.), Neo-militant Democracies in Post-communist Member States of the European Union, Routledge: Abington, New York 2022, s. 187.

11 Odlok o začasni splošni prepovedi gibanja in zbiranja ljudi na javnih mestih in površinah v Republiki Sloveniji (Dz.U. RS nr 30/20 i 38/20), http://www.pisrs.si/Pis.web/pregledPredpisa?id=ODLO2018 (dostęp 14.02.2022).

12 Rule of Law Report 2021: Slovenia, https://s3.fr-par.scw.cloud/djnd/pravnamreza/documents/Rule_of_Law_Slovenia_2021.pdf, s. 28 (dostęp 1002.2022).

13 K. Vučko, I. Šori, Legal environment and space of civil society organisations in supporting fundamental rights. Slovenia, https://fra.europa.eu/sites/default/files/fra_uploads/franet_slovenia_civic_space_2021.pdf, s. 5 (dostęp 10.03.2022).

14 Zakon o nalezljivih boleznih [ustawa o chorobach zakaźnych], (Dz.U. RS nr 69/95 i 178/21), http://www.pisrs.si/Pis.web/pregledPredpisa?id=ZAKO433 (dostęp 10.03.2022).

15 Zakon o dopolnitvi Zakona o Vladi Republike Slovenije [ustawa o Rządzie Słowenii] (Dz.U. RS nr 109/08 i 8/12), http://www.pisrs.si/Pis.web/pravniRedRSSearch?search=Government+of+the+Republic+of+Slovenia+Act (dostęp 15.03.2022).

16 A. Teršek, J. Dragan, D. Pavlin, B. Nastran, N. Vražič, On the Legality and Constitutionality of the Measures by which the Slovenian Government Restricted Constitutional Rights and Freedoms

z zakresu medycyny z Krajowego Centrum Kontroli Chorób[17]. Ocena ich restrykcyjności i proporcjonalności w odniesieniu do konstytucyjnie chronionego prawa do zgromadzeń i zrzeszania się powinna należeć do władzy sądowniczej[18].

Słoweńskie Zgromadzenie Narodowe przyjęło ustawę z dnia 2 kwietnia 2020 r. określającą środki interwencyjne mające na celu powstrzymanie epidemii COVID-19 i złagodzenie jej skutków dla obywateli i gospodarki. Ustawa ta weszła w życie 11 kwietnia 2020 roku. Na jej mocy policji przyznano nowe uprawnienia i wzmocniono środki nadzoru. Organy ścigania mogły gromadzić i przetwarzać dane osobowe pozyskiwane z platform internetowych w celu ścigania przestępstw, w tym naruszeń zakazów zgromadzeń. Uczestnicy protestów zostali ukarani grzywną w wysokości do 400 euro za naruszenie środków zapobiegających pandemii[19]. W okresie od 24 października 2020 roku do 18 lutego 2021 roku policja nałożyła 3 761 mandatów za udział w zgromadzeniach publicznych[20].

Rząd Słowenii wykorzystał środki przeciwko pandemii COVID-19 jako uzasadnienie zapobieżenia krytyce, która pojawiła się w odpowiedzi na ograniczenie prawa obywateli do pokojowych zgromadzeń. Wdrożenie środków naruszających prawa demokratyczne i prawa człowieka w walce z pandemią, w połączeniu z wykorzystaniem technologii cyfrowej do śledzenia protestujących, to wyraźne odejście od modelu państwa demokratycznego gwarantującego ochronę praw politycznych swym obywatelom. Stanowisko takie przyjął też Sąd Konstytucyjny w kwietniu 2020 r., kwestionując konieczność i proporcjonalność restrykcji rządowych związanych z pandemią[21].

Niemniej rząd wykorzystał sytuację kryzysową do dalszego osłabiania standardów praw obywatelskich. Równocześnie ograniczono prawa dostępu do informacji użyteczności publicznej, co znacznie utrudniało kontrolę nad wykorzystywaniem przez władze państwowe rozszerzonych ustawą uprawnień wykonawczych. W odpowiedzi na sytuację pandemiczną i protesty społeczne rząd wydał kilka rozporządzeń, które całkowicie zakazywały protestów publicznych między 27 lutego a 17 marca oraz między 1 kwietnia a 18 kwietnia 2021 roku, a następnie ograniczył liczbę uczestników protestów publicznych do dziesięciu osób w okresie od 18 marca do 31 marca

Before and After the 2020 Coronavirus Pandemic: Part 1, „Open Political Science" 2021, vol. 4, s. 158 i n.

17 S. Kukovič, Local government fighting COVID-19: the Case of Slovenian Municipalities, „Politics in Central Europe" 2021, vol. 17, no. 4, s. 647.

18 S. Bardutzky, Limits in Times of Crisis: on Limitations of Human Rights and Fundamental Freedoms in the Slovenian Constitutional Order, „Central European Journal of Comparative Law" 2020, vol. 1, no. 2, s. 28.

19 Report Critical of Slovenia Limiting Freedom during Pandemic, „Slovenia Times" 2021, https://sloveniatimes.com/report-critical-of-slovenia-limiting-freedoms-during-pandemic/ (dostęp 10.02.2022).

20 Rule of Law Report…, op.cit.

21 Constitutional Court of the Republic of Slovenia, U-I–83/20, http://www.us-rs.si/documents/2e/ab/u-i-83–20-odlocba4.pdf (dostęp 10.03.2022).

oraz od 23 kwietnia do 14 maja 2021 roku[22]. Wprowadzenie restrykcyjnych przepisów rząd argumentował sytuacją, jaka miała miejsce 27 kwietnia 2021 r., kiedy to w proteście publicznym wzięło udział 10 000 uczestników. Zasłaniając się względami bezpieczeństwa rząd wydał rozporządzenie 63/21, mocą którego wprowadzono zakaz spontanicznych protestów publicznych z uwagi na brak możliwości przewidzenia liczby uczestników oraz ich zachowania.

Razi niekonsekwentne stanowisko rządu, który określił sposoby przeprowadzania imprez publicznych, uroczystości religijnych, religijnego lub gospodarczego zrzeszania się osób. Nie zrobił tego jednak w odniesieniu do pokojowych zgromadzeń w celu wyrażania poglądów politycznych. Dodatkowo rząd *ad hoc* podejmował próbę właściwej interpretacji przepisów prawa, co zostało uznane za swoiste interpretowanie prawa przez władzę wykonawczą naruszające tradycyjną równowagę władz w systemie konstytucyjnym.

3. Kontrola konstytucyjności rozporządzeń rządowych wydanych w związku z pandemią COVID-19

Legalność i zgodność z Konstytucją środków ograniczających prawa podstawowe (w tym prawa do protestów i publicznych zgromadzeń) były przedmiotem analizy Sądu Konstytucyjnego. Zgodnie z ustawą o Sądzie Konstytucyjnym[23] jest on najwyższym organem sądownictwa w dziedzinie konstytucyjności, legalności oraz ochrony praw człowieka i podstawowych wolności (art. 1§ 1). W myśl art. 160 konstytucji Sąd Konstytucyjny orzeka o zgodności aktów prawnych z konstytucją. Do Sądu Konstytucyjnego wpłynęło kilka wniosków o zbadanie konstytucyjności i legalności rozporządzeń rządowych oraz zawartych w nich ograniczeń praw podstawowych w związku z pandemią COVID-19.

W grudniu 2020 roku Sąd Konstytucyjny orzekł, że dwa rozporządzenia rządu rozszerzające zamknięcie szkół (w rozumieniu ograniczenia zgromadzeń w przedszkolach, szkołach i uniwersytetach) oraz decyzja ministra edukacji w sprawie kształcenia na odległość były nieważne z uwagi na brak ich opublikowania w Dzienniku Ustaw (rząd opublikował je na swojej stronie internetowej). Sąd Konstytucyjny orzekł, że z powodu niewłaściwego sposobu opublikowania rozporządzenia w sprawie czasowego ograniczenia zgromadzeń w placówkach oświatowych, utraciło ono moc obowiązującą także w zakresie, w jakim dotyczyło placówek zajmujących się

22 Rozporządzenia w sprawie tymczasowego, częściowego zakazu przemieszczania się i gromadzenia się osób w celu zapobiegania zakażeniom SARS-CoV–2, (Dz.U. RS, nr 27/21, 30/21 i 35/21; Dz.U. RS, nr 27/21, 30/21, 35/21, 40/21 oraz 43/21, Dz.U. RS, nr 47/21; DZ.U. RS, nr 55/21 oraz DZ.U. RS, nr 63/21, 66/21, i 69/21.

23 Ustawa o Sądzie Konstytucyjnym (Dz.U. RS nr 64/07 i 109/12) https://www.us-rs.si/media/the.constitutional.court.act-zusts.pdf (dostęp 10.03.2022).

kształceniem dzieci i młodzieży specjalnej troski. Sąd Konstytucyjny wyznaczył rządowi trzy dni na usunięcie nieprawidłowości prawnych w publikacji aktów. W przeciwnym razie należałoby zrezygnować z nauczania na odległość, a zajęcia musiałyby odbywać się w szkołach, mimo że pandemia COVID-19 stwarzała istotne zagrożenie zdrowotne[24].

Kolejne ważne orzeczenie Sądu Konstytucyjnego zostało wydane pod koniec marca 2021 roku. Sąd uznał wniosek za dopuszczalny i rozpoczął postępowanie mające na celu ocenę konstytucyjności rozporządzeń rządu ograniczających protesty publiczne do maksymalnie dziesięciu uczestników. Jednocześnie Sąd Konstytucyjny zawiesił wykonanie zaskarżonych przepisów do czasu wydania ostatecznej decyzji w lipcu 2021 roku i stwierdził, że zakwestionowane przepisy poważnie ingerowały w prawo do pokojowych zgromadzeń i wolności zrzeszania się w myśl art. 42 konstytucji.

W maju 2021 roku Sąd Konstytucyjny dokonał przeglądu przepisów ustawy o chorobach zakaźnych[25], upoważniającej rząd do ograniczenia lub zakazania przemieszczania się i/lub gromadzenia ludzi celem zapobieżenia wprowadzeniu choroby zakaźnej do kraju lub jej rozprzestrzenianiu się w kraju. Sąd Konstytucyjny zbadał także konstytucyjność przepisów kilku rozporządzeń, które ograniczały przemieszczanie się i zakazywały gromadzenia się ludzi w miejscach publicznych od kwietnia do października 2020 roku. Rozporządzenia te zostały przyjęte na podstawie zakwestionowanych przepisów ustawy. Sąd Konstytucyjny słusznie orzekł, że przepisy ustawy są niezgodne z konstytucją, ponieważ pozostawiają swobodę działania władzy wykonawczej bez żadnych ograniczeń w zakresie wyboru metod, rodzajów, zakresu i czasu trwania ograniczeń, za pomocą których może ona intensywnie ingerować w konstytucyjne prawa do swobodnego przemieszczania się i pokojowych zgromadzeń. W związku z tym Sąd Konstytucyjny uznał, że zakwestionowane rozporządzenia w częściach, w których zostały przyjęte na podstawie niekonstytucyjnych przepisów ustawy, były również niezgodne z Konstytucją[26]. Podkreślić należy, że Sąd Konstytucyjny nie wspomniał w swojej argumentacji o istnieniu mniej rygorystycznych alternatyw.

Na posiedzeniu w dniu 17 czerwca 2021 r. w postępowaniu w sprawie kontroli konstytucyjności rozporządzeń rządowych wszczętym na podstawie wniosku dwóch osób fizycznych (Sanji Fidler i Irfana Beširevicia) Sąd Konstytucyjny orzekł, że były

24 B. Flander, op.cit., s. 33.

25 Zakon o nalezljivih boleznih [ustawa o chorobach zakaźnych], (Dz.U. RS nr 69/95 i 178/21), http://www.pisrs.si/Pis.web/pregledPredpisa?id=ZAKO433 (dostęp 10.03.2022).

26 Sąd Konstytucyjny Słowenii, U-I–79/20, https://www.us-rs.si/odlocba-ustavnega-sodisca-st-u-i-79–20-z-dne-13–5–2021/ (dostęp 12.03.2022).

one niezgodne z Konstytucją w części, w której zakazywały zgromadzeń lub ograniczały ich liczbę do maksymalnie dziesięciu osób[27] i je uchylił.

We wniosku z dnia 2 marca 2021 r. oboje składający zakwestionowali ustęp trzeci art. 5 rozporządzenia w sprawie tymczasowego częściowego zakazu przemieszczania się i gromadzenia się ludzi w celu zapobieżenia zakażeniu wirusem SARS-CoV–2 (rozporządzenie 27/21), w którym zakazano wszelkich protestów publicznych. W uzupełnieniu z 19 marca 2021 roku rozszerzono wniosek o zmieniony akapit drugi art. 5 rozporządzenia 40/21 ograniczającego liczbę protestów publicznych do maksymalnie dziesięciu uczestników.

Sąd Konstytucyjny tymczasowo zawiesił wykonanie zaskarżonego przepisu rozporządzenia 55/21. Równocześnie nałożył na rząd obowiązek przyjęcia nowego rozporządzenia w sprawie protestów publicznych, w którym podkreślone zostanie znaczenie protestów publicznych dla funkcjonowania demokratycznego państwa oraz w większym stopniu uwzględnione byłyby zróżnicowane możliwości ograniczenia negatywnych skutków dla zdrowia publicznego. Sąd wskazał, że w ramach nowego rozporządzenia należy ustalić większą maksymalną liczbę uczestników protestu publicznego, określić minimalną odległość między nimi oraz wprowadzić wymóg maseczek ochronnych i środków dezynfekujących, podobnie jak to wcześniej uregulowano w sprawie zbiorowego korzystania z wolności religijnej.

Wskazano, że rozporządzenie 62/21 ograniczało liczbę uczestników zorganizowanych protestów publicznych do 100 i obowiązywało tylko przez trzy dni. Na mocy rozporządzenia nr 63/21 rząd na nowo uregulował liczbę uczestników protestów publicznych, zmniejszając ją do dziesięciu osób, a także – inaczej niż w przypadku innych form zgromadzeń – wprowadził dodatkowe warunki (dystans społeczny i maksymalne dopuszczalne zagęszczenie).

Składający wniosek podnosili również, że rozporządzenie 63/21 całkowicie zakazywało spontanicznych protestów publicznych. Autorzy wniosku zwrócili uwagę na niekonsekwencję postanowień tego rozporządzenia z uwagi na fakt, że kontakty między więcej niż dziesięcioma osobami były dozwolone w sklepach, na otwartych targowiskach, w ogródkach barów i restauracji oraz miejscu pracy, które było istotnym źródłem zakażeń.

Sąd Konstytucyjny potwierdził, że artykuł 42 ust. 1 konstytucji gwarantuje prawo do pokojowych zgromadzeń i zebrań publicznych. Prawo to chroni możliwość zrzeszania się wielu osób celem publicznego wyrażania i wymiany myśli i opinii. Mimo że jest to prawo przysługujące jednostce, może być wykonywane jedynie zbiorowo ze względu na swój szczególny charakter. Prawo to chroni nie tylko zgromadzenia, na których prezentowane są publiczne dyskusje i polemiki, ale także różne

27 Sąd Konstytucyjny Słowenii, U-I–50/21, https://www.us-rs.si/decision/?lang=en&q=&caseId=U-I–50%2F21&df=&dt=&af=&at=&pri=1&vd=&vo=&vv=&vs=&ui=&va=&page=1&sort=&order=&id=116659 (dostęp 12.03.2022).

formy działań zbiorowych, w tym ich formy niewerbalne, np. w postaci protestów publicznych, podczas których uczestnicy wyrażają swoje opinie w sposób obrazowy lub w inny przyciągający uwagę osób trzecich.

Sąd Konstytucyjny trafnie podniósł, że jako prawo obronne zapewnia ono jednostkom prawo do niezależnego decydowania o miejscu, czasie, sposobie i treści zgromadzenia, a jednocześnie zakazuje państwu zmuszania jednostki do zgromadzenia lub uniemożliwiania jej udziału. Z tej perspektywy prawo do pokojowych i publicznych zgromadzeń ma szczególne znaczenie w wolnym społeczeństwie, ponieważ możliwość gromadzenia się bez ograniczeń i bez obowiązku uzyskania uprzedniego zezwolenia zawsze była uważana za symbol wolności, niezależności i suwerenności świadomych obywateli.

Sąd Konstytucyjny podkreślił, że zgodnie z art. 3, 43, 44, 80 i 90 konstytucji prawo obywateli do udziału w procesie kształtowania woli politycznej nie wyczerpuje się, lecz jest realizowane także poprzez korzystanie z prawa do pokojowych i publicznych zgromadzeń zgodnie z art. 42 konstytucji. Wpływ organizowanych protestów społecznych na proces kształtowania woli politycznej jest tym ważniejszy, że w przeciwieństwie do dużych stowarzyszeń i silnych finansowo podmiotów dostęp jednostek do mediów oraz publiczne wyrażanie opinii jest zwykle ograniczony. Protesty publiczne w formie zgromadzeń są szczególnie ważne, gdy przedstawiciele władzy nie dostrzegają ewentualnych złych tendencji oraz nieprawidłowości w podejmowaniu decyzji lub świadomie do nich dopuszczają, uwzględniając jedynie interesy bardziej wpływowej grupy społecznej. Z tej perspektywy swobodne korzystanie z prawa do pokojowych zgromadzeń i publicznych spotkań pełni rolę stabilizatora w społeczeństwie, które pozwala jednostkom publicznie wyrażać swoje niezadowolenie, gniew i krytykę.

Sąd Konstytucyjny uznał, że rząd nie dowiódł konieczności wprowadzenia całkowitego zakazu protestów publicznych (zorganizowanych oraz spontanicznych) lub ograniczenia ich do dziesięciu osób. W rzeczywistości rząd nie zapewnił możliwości wprowadzenia łagodniejszych środków znanych w regulacjach prawnych innych państw, w tym dążenia do porozumienia z organizatorami co do sposobu przeprowadzenia protestu publicznego bezpiecznego pod względem epidemiologicznym.

Sąd Konstytucyjny orzekł, że z uwagi na fakt utraty mocy obowiązującej wymienionych przepisów rozporządzeń były one niezgodne z konstytucją w części, w której zakazywały wszelkich protestów publicznych lub ograniczały je do maksymalnie dziesięciu uczestników i uchylił je.

Warto podkreślić, że wszystkie środki podjęte przez rząd w największym stopniu naruszały prawa człowieka i podstawowe wolności zagwarantowane w konstytucji. Zdziwienie może budzić fakt, że Sąd Konstytucyjny wyraził swoje stanowisko w sposób niezwykle łagodny w stosunku do stopnia naruszenia konstytucji.

Wnioski

Konstytucyjnie chronione prawo do pokojowych zgromadzeń w celu wyrażania poglądów na sprawy publiczne zostało znacznie ograniczone w czasie trwania epidemii i całkowicie zakazane w okresie po jej ogłoszeniu w drugiej fali. Prawo do protestów jest konstytucyjnie chronionym prawem do wolności wypowiedzi i prawem do pokojowych zgromadzeń.

Bez wątpienia słoweński rząd próbował wykorzystać działania przeciwko pandemii COVID-19 jako uzasadnienie dla zapobieżenia jego krytyce, która pojawiła się zwłaszcza w odpowiedzi na ograniczenie praw obywateli do pokojowych zgromadzeń. Pandemia i działania rządu Janšy doprowadziły do naruszenia wolności zrzeszania się i pokojowych zgromadzeń. Co prawda rząd argumentował, że owe rozporządzenia przyjęte zostały zgodnie z propozycją grupy ekspertów, która rzekomo podkreśliła, że tymczasowy zakaz masowych protestów publicznych przyczyniłby się do zmniejszenia liczby osób zakażonych w sytuacji, gdyby inne środki nie zostały zbyt szybko złagodzone. Odpierając zarzuty dotyczące ograniczenia zgromadzenia do maksymalnie dziesięciu osób uczestniczących, rząd podkreślał, że w przypadku jakichkolwiek naruszeń przez uczestników policja może skuteczniej zapobiegać niekontrolowanej eskalacji, a tym samym szerszej fali rozprzestrzeniania się infekcji.

Wspólną cechą środków mających na celu powstrzymanie pandemii COVID-19 w Słowenii były ograniczenia nakładane przez władzę wykonawczą bez prowadzenia debaty publicznej i udziału ustawodawcy oraz zwiększenie zakresu kompetencji policji w wgląd do danych osobowych protestujących. Obywatele nie aprobowali ograniczeń wprowadzonych przez rząd i złożyli wnioski do Sądu Konstytucyjnego, który uznał rozporządzenia nakładające ograniczenia praw podstawowych za niezgodne z konstytucją w kilku przypadkach. Co prawda w części zaskarżonych rozporządzeń nie dowiedziono niekonstytucyjności środków, lecz niekonstytucyjność ich ustawowej podstawy prawnej. Niemniej Sąd Konstytucyjny uznał rozporządzenia za nielegalne i niekonstytucyjne, a wprowadzone środki za niezgodne z konstytucją z uwagi na nadmierną i nieproporcjonalną ingerencję w prawa konstytucyjne i podstawowe wolności. Sąd Konstytucyjny trafnie orzekł, że rząd Republiki Słowenii nie uzasadnił adekwatności środków, proporcjonalności naruszeń praw konstytucyjnych i podstawowych wolności ani konieczności zastosowania środków dla osiągnięcia zakładanego celu. Niezbyt mocno jednak wyartykułował, że wprowadzenie całkowitego zakazu zgromadzeń było istotnym naruszeniem konstytucyjnej wolności zgromadzeń i *de facto* uniemożliwiło to skuteczne korzystanie z niej obywatelem.

BIBLIOGRAFIA

Bardutzky S., Limits in Times of Crisis: on Limitations of Human Rights and Fundamental Freedoms in the Slovenian Constitutional Order, „Central European Journal of Comparative Law" 2020, vol. 1, no. 2.

Bayer L., Inside Slovenia's War on the Media, www.politico.eu/article/slovenia-war-on-media-janez-jansa/.

Constitutional Court of the Republic of Slovenia, U-I–83/20, http://www.us-rs.si/documents/2e/ab/u-i-83–20-odlocba4.pdf.

Flander B., "Constitutional Unconstitutionality": Constitutional Review of the COVID-19 Restrictions on Fundamental Rights in Slovenia, „Law, Identity and Values" 2022, vol. 2, nr 1.

Hafner-Fink M., S. Uhan, Life and Attitudes of Slovenians during the COVID-19 Pandemic: The Problem of Trust, „International Journal of Sociology" 2021, vol. 51, no. 1.

Istenič S., The Role of Media in Democratic Consolidation of Taiwan and Slovenia, „Asian and African Studies" 2012, vol. 16(2).

Knoll R., We Will Not Yield to Pressure, www.ecpmf.eu/22-slovene-editors-write-joint-public-letter/.

Konstytucja Republiki Słowenii z dnia 23 grudnia 1991 r., tłum. Piotr Winczorek, http://biblioteka.sejm.gov.pl/wp-content/uploads/2016/11/Slowenia_pol_010711.pdf.

Kukovič S., Local government fighting COVID-19: the Case of Slovenian Municipalities, „Politics in Central Europe" 2021, vol. 17, no. 4.

Kużelewska E., Slovenia's crisis-driven path from neo- to quasi-militant democracy, (w:) J. Rak, R. Bäcker (red.), Neo-militant Democracies in Post-communist Member States of the European Union, Routledge: Abington, New York.

MFRR REPORT: Press Freedom Deteriorating in Slovenia under Latest Janša Government, https://www.mfrr.eu/wpcontent/uploads/2021/06/Slovenia_PressFreedomMission_Report_Final_20210630.pdf.

Odlok o začasni splošni prepovedi gibanja in zbiranja ljudi na javnih mestih in površinah v Republiki Sloveniji (Dz.U. RS nr 30/20 i 38/20), http://www.pisrs.si/Pis.web/pregledPredpisa?id=ODLO2018.

Podolak M., Rights of Sexual Minorities as the subject of Referenda in the Republic of Slovenia, „Białostockie Studia Prawnicze" 2019, vol. 24, nr 1.

Report Critical of Slovenia Limiting Freedom during Pandemic, „Slovenia Times" 2021, https://sloveniatimes.com/report-critical-of-slovenia-limiting-freedoms-during-pandemic/.

Rozporządzenia w sprawie tymczasowego, częściowego zakazu przemieszczania się i gromadzenia się osób w celu zapobiegania zakażeniom SARS-CoV–2, (Dz.U. RS, nr 27/21, 30/21 i 35/21; Dz.U. RS, nr 27/21, 30/21, 35/21, 40/21 oraz 43/21, Dz.U. RS, nr 47/21; Dz.U. RS, nr 55/21 oraz Dz.U. RS, nr 63/21, 66/21, i 69/21).

Rule of Law Report 2021: Slovenia, https://s3.fr-par.scw.cloud/djnd/pravnamreza/documents/Rule_of_Law_Slovenia_2021.pdf.

Sąd Konstytucyjny Słowenii, U-I–50/21, https://www.us-rs.si/decision/?lang=en&q=&caseId=U-I–50%2F21&df=&dt=&af=&at=&pri=1&vd=&vo=&vv=&vs=&ui=&va=&page=1&sort=&order=&id=116659.

Sąd Konstytucyjny Słowenii, U-I–79/20, https://www.us-rs.si/odlocba-ustavnega-sodisca-st-u-i-79–20-z-dne-13–5–2021/.

Teršek A., J. Dragan, D. Pavlin, B. Nastran, N. Vražič, On the Legality and Constitutionality of the Measures by which the Slovenian Government Restricted Constitutional Rights and Freedoms Before and After the 2020 Coronavirus Pandemic: Part 1, „Open Political Science" 2021, vol. 4.

Ustawa o Sądzie Konstytucyjnym (Dz.U. RS nr 64/07 i 109/12) https://www.us-rs.si/media/the.constitutional.court.act-zusts.pdf.

Vučko K., I. Šori, Legal environment and space of civil society organisations in supporting fundamental rights. Slovenia, https://fra.europa.eu/sites/default/files/fra_uploads/franet_slovenia_civic_space_2021.pdf.

Zakon o dopolnitvi Zakona o Vladi Republike Slovenije [Ustawa o Rządzie Słowenii], (Dz.U. RS nr 109/08 i 8/12), http://www.pisrs.si/Pis.web/pravniRedRSSearch?search=Government+of+the+Republic+of+Slovenia+Act.

Zakon o javnih zbiranjih (ZJZ) [ustawa Prawo o zgromadzeniach publicznych], (Uradni list RS, št. 64/11 – uradno prečiščeno besedilo), https://www.uradni-list.si/glasilo-uradni-list-rs/vsebina/2011–01–2970?sop=2011–01–2970.

Zakon o nalezljivih boleznih [ustawa o chorobach zakaźnych], (Dz.U. RS nr 69/95 i 178/21), http://www.pisrs.si/Pis.web/pregledPredpisa?id=ZAKO433.

Contributors

Gabriela Dobrovičová – prof. JUDr. at the Department of Theory of the State and Law, Pavol Jozef Šafárik University in Košice, Slovakia. From 2011 to 2019 she held a position of the Dean of the Faculty of Law, Pavol Jozef Šafárik University in Košice. Member of the Slovak Section of the International Association for Legal and Social Philosophy (IVR).

Karol Dobrzeniecki – University Professor at the Department of Theory of Law and State, Nicolaus Copernicus University, Poland. Member of the Digitization Council to the Minister of Digitization from 2016 to 2018. Arbitrator of the Court of Arbitration for Internet Domains at the Polish Chamber of Information Technology and Telecommunications in Warsaw.

Aldona Domańska – University Professor at the Department of Constitutional Law, Faculty of Law and Administration, University of Lodz, Poland; treasurer of the Polish Constitutional Law Association. She is the deputy editor-in-chief of the scientific journal *Studia Wyborcze*.

Sabina Grabowska – University Professor at the Department of Political Science, University of Rzeszow, Poland, where since October 2019 she holds a position of the Dean of College of Social Sciences. She is the Head of Department of Political and Media Systems and Editor-in-Chief of *Przegląd Prawa Kostytucyjnego* journal.

Radosław Grabowski – University Professor at the Department of Political Science, University of Rzeszow, Poland and Head of the Department of Constitutional Law and Human Rights.

Stefan Haack – studied law at the Universität Leipzig; 2001 – doctorate; 2007 – habilitation; from 2009 until 2014 – full professor for public law at the Rheinische Friedrich-Wilhelms-Universität Bonn; since 2015 – full professor for constitutional law at the Europa-Universität Viadrina in Frankfurt (Oder).

István Hoffman – Full Professor at the Faculty of Law, Department of Administrative Law, Eötvös Loránd University (Budapest) in Hungary. From 2015 to 2016 – expert at the Supreme Court of Hungary in the department of administrative and labour law; legal advisor and general counsel at the Office of the Prime Minister (2008–2010). From 2006 to 2008 he was a legal advisor at the Ministry of Labour and Social Policy. From 2004 to 2006 he worked at the Ministry for Youth, Family and Social Affairs and Equality. In 2004 he became Legal Adviser to the Secretary to the Minister for Equality.

Mariusz Jabłoński – Full Professor, Head of Department of Constitutional Law at the Faculty of Law, Administration and Economics of the University of Wroclaw, Poland. Author of over 350 publications in the field of constitutional law, human rights and access to public information or personal data protection.

Agnė Juškevičiūtė-Vilienė – Assistant Prof. Dr. at the Faculty of Law, Vilnius University, Lithuania.

Agnieszka Gloria Kamińska – PhD in law, Assistant Professor at the Public Matters Institute at the Department of Management and Social Communication, Jagiellonian University in Krakow, Poland. Lecturer at the Faculty of International Management of the Economic University in Krakow.

Joanna Kielin-Maziarz – University Professor at the Department of Constitutional Law, Kozminski University, Poland. Since 2009, she has been a member of the Polish Society of Constitutional Law and the International Association of Constitutional Law. Since 2011 she is a member of the International Centre for Sustainable Development of Energy, Water and Environment Systems. Since 2012 she is a member of the Center for the Theory and Philosophy of Human Rights. In 2021 she became a member of the Review Commission of the Polish Society of Constitutional Law.

Jarosław Kostrubiec – University Professor at the Faculty of Law and Administration, Maria Curie-Sklodowska University, Poland, where he holds a position of Vice-Dean; expert of the Polish Accreditation Committee (discipline: law); scholarship holder of the *Deutscher Akademischer Austausch Diens* at the University in Heidelberg (2005/2006), Germany. He was the president of the Lawyers' Scientific Circle (1999/2000). He is a member of the board of the Association of DAAD Scholarship Holders and the Polish Society of Political Thought. He is the Managing Editor *of Lex localis – Journal of Local Self-Government* (SCOPUS, Web of Science) and the member of the editorial board of *Juridical Tribune – Tribuna Juridica* (SCOPUS, Web of Science). He is the Managing Editor of the scientific journals *Studia Iuridica Lublinesia* and *Social Studies*.

Alena Krunková – doc. JUDr., PhD at the Department of Constitutional Law and Administrative Law, Faculty of Law, Pavol Jozef Šafárik University in Košice, Slovakia. Since 2019 Chairwoman of the UPJŠ Commission for VVGS – Pavol Jozef Šafárik University in Košice.

Dominika Kuźnicka-Błaszkowska – PhD, principal investigator and lecturer at the Department of Constitutional Law, Faculty of Law, Administration and Economics, University of Wroclaw, Poland. Team Lead of Legal Data Protection Team of the International Investment Bank. Author of several publications in the field of access to public information and personal data protection.

Elżbieta Kużelewska – University Professor at the Department of Constitutional Law and Political Systems, Faculty of Law, University of Bialystok, Poland, where since October 2019 she holds a position of Vice-Dean for Science. She is a Chair of the Centre for Direct Democracy Studies (CDDS) at the Faculty of Law, University of Bialystok. She is Co-Editor-in-Chief of European Integration and Democracy Series, published by Intersentia: Cambridge-Antwerp-Chicago.

Amadeusz Małolepszy – PhD, Assistant in the Department of Criminal Proceedings and Criminalistics, Faculty of Law and Administration, University of Lodz, Poland.

Radosław Olszewski – University Professor, Head of Department of Criminal Proceedings and Criminalistics, Faculty of Law and Administration, University of Lodz, Poland. From 2016 to 2020 he held a position of Vice-Dean.

Michał Ożóg – PhD, Assistant at the Department of Constitutional Law and Political Systems, Faculty of Law, University of Bialystok, Poland; scholarship holder of the Prime Minister's Council. Author of papers on constitutional and religious law.

Małgorzata Podolak – University Professor at the Department of Political Systems and Human Rights, Faculty of Political Science and Journalism, Maria Curie-Sklodowska University, Poland. Author of papers on direct democracy, environmental policy and political systems of European states.

Bogusław Przywora – University Professor, Head of the Department of Constitutional and Comparative Law, Faculty of Law and Economics, Jan Dlugosz University in Czestochowa, Poland. Head of the Legal Studies Laboratory. Holder of the Minister of Education and Science Award in 2021 in the category for significant achievements in scientific activities.

Krzysztof Skotnicki – Full Professor at the Faculty of Law and Administration, University of Lodz, Poland. Head of the Department of Constitutional Law and the Centre for Electoral Studies. President of the Polish Constitutional Law Association from 2017 to 2021. Member of the Committee of Legal Sciences of the Polish Academy of

Sciences from 2020 to 2023. Since December 2012 he has been an honorary consul of the Czech Republic in Lodz.

Marta Soniewicka – University Professor at the Department of Philosophy of Law and Legal Ethics, Faculty of Law and Administration, Jagiellonian University, Poland. She authored numerous articles, chapters and books. Currently, she is working on a research project on law and emotions, and as part of the research group Societas Im/perfecta, on the role of utopia in law and politics.

Aleksandra Syryt – PhD, *habilitatus*, Assistant Professor in law at the Faculty of Law and Administration, Cardinal Stefan Wyszyński University in Warsaw, Poland. She is a Member of Croatian-Polish Scientific Network and Central European Professors' Network. She is a lecturer at the National School of Public Administration in Poland. Her research focuses on the field of constitutional law.

Leon van den Broeke – Extraordinary Professor Theology of Law and Church Polity at the Theologische Universiteit Kampen, The Netherlands; Associate Professor Religion, Law, and Society at the Faculty of Religion and Theology, director of the research programme Religion for Sustainable Societies and chair of the Centre for Religion and Law at the Vrije Universiteit Amsterdam, the Netherlands. Currently, he is working, as part of the research group Societas Im/perfecta, on the role of utopia in law and politics.

Bart van Klink – Professor of Legal Methodology at Vrije Universiteit Amsterdam, The Netherlands. He is co-editor-in-chief of the international journal *Law and Method* and director of the research programme Boundaries of Law. His research interests include the fact-value distinction in multidisciplinary research, symbolic legislation and contemporary challenges to the rule of law, such as populism and the pandemic. Currently, he is working, as part of the research group Societas Im/perfecta, on the role of utopia in law and politics.

Tomasz Wicha – PhD, Assistant Professor at the Department of Theory and Methodology of Political Science and Administration, Faculty of Political Science and Journalism, Maria Curie-Sklodowska University, Poland. Graduated from the Diplomatic Academy at the Ministry of Foreign Affairs of the Republic of Poland. Attaché at the Ministry of Foreign Affairs of the Republic of Poland. Master of Science in Professional Communication and Business Management, Clark University, USA.