

Martin Löhnig, Maciej Serowaniec and
Zbigniew Witkowski (eds.)

PANDEMIC POLAND

Impacts of Covid-19 on Polish Law

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Martin Löhnig

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Martin Löhnig / Maciej Serowaniec /
Zbigniew Witkowski (eds.)

Pandemic Poland

Impacts of Covid-19 on Polish Law

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Martin Löhnig

Pandemic Poland

Poland has been in a phase of change since 2015. The constitutional system of the Third Republic, established in 1989, is being restructured. The Judiciary, media, schools and universities are the main focus of attention. This restructure is being celebrated by the government as a renewal of the Polish state, but is being branded by the opposition as the destruction of the Polish Republic in favour of an illiberal democracy, an assessment shared by the institutions of the European Union and many of its member states.

In this already very difficult situation, Poland was confronted with the major challenges posed by a pandemic. The authors of this compendium show the difficulties encountered and the legal solutions found. They also discuss whether these solutions are compatible with the Polish Constitution. The question of how the coronavirus pandemic has affected national constitutional arrangements – especially the balance of powers between the legislative branch and the executive – is one pertinent for many different nations. A question that arises specifically for Poland is what effects the crisis will have on the restructuring of the constitutional system – indeed, at present, it seems that the pandemic is acting as a catalyst for those changes.

This book aims to provide an informed commentary on those developments and what they mean for the Third Polish Republic.

Maciej Serowaniec

The (Extra)Ordinary State Of COVID-19 Pandemic In Poland

1. Introduction

The epidemic of the SARS-CoV-2 virus that induces the COVID-19 disease is an unprecedented phenomenon which has undercut social relations, economic stability and the enjoyment of fundamental human rights. Given the possible hazards to citizens' welfare and concern for the stability of the state economic system, legal regulations to effectively counteract the effects of COVID-19 had to be introduced. It is the state authorities that have solemn responsibility to maintain their ability to respond appropriately to such situations, particularly in the event of hazards to public security, life and health of citizens.¹

Examples of European countries where the epidemic started earlier than in Poland – such as Italy, Spain or Germany – have clearly demonstrated how vital it is for state institutions to quickly react to the spread of the virus in order to contain the effects of the epidemic. In accordance with their constitutional frameworks, the governments of these countries decided to introduce extraordinary measures for a limited duration with a view to protect public safety and health. It should be kept mind, however, that in the light of international standards, these measures may be deployed only for the purpose of protecting values of supreme importance, such as life or health of people.² Yet, contrary to the majority of European countries, the government of Poland has not decided to proclaim an extraordinary state of emergency (Polish: *stan nadzwyczajny*). Regrettably, the epidemic in Poland has become an element of an ongoing political struggle between political parties, including the battle for votes in the upcoming presidential elections scheduled to be held in May 2020. Right from the very beginning of the epidemic in Poland, the parliamentary majority was trying to showcase that there were no substantive grounds for proclaiming the extraordinary state of emergency in the constitutional sense of the

1 K. Booth, *Theory of World Security*, Cambridge 2007, p. 98.

2 The Paris Minimum Standards of Human Rights Norms in a State of Emergency of 1984. More on this topic: R. B. Lillich, *The Paris Minimum Standards of Human Rights Norms in a State of Emergency*, *The American Journal of International Law* 1985, Vol. 79, No. 4, pp. 1072–1081. See also Siracusa *Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights*, 1985.

term. On the other hand, in the opinion of legal scholars of constitutional law, the circumstances surrounding the SARS-CoV-2 virus epidemic demonstrate that the prerequisite requirements for declaring the extraordinary state of emergency in the form of a state of natural disaster (Polish: *stan klęski żywiołowej*), as envisaged in the Constitution of the Republic of Poland, have been fulfilled. Non-proclamation of an extraordinary state of emergency is thus a failure of the competent public authorities to fulfil their constitutional duties.

This article seeks to answer a vital question of a constitutional nature; to assess whether the measures introduced by public authorities in Poland to prevent, counteract and combat COVID-19 conform to the standards enshrined in the Constitution. Have these measures been based on appropriate legal provisions and are they necessary and proportional? When analysing the existing legal situation through the lens of constitutional provisions, one should, above all, rely on the general principles laid down in the Constitution and draw conclusions therefrom.

2. Measures introduced by state authorities with the aim to prevent, counteract and combat the COVID-19 epidemic in Poland

On 13 March 2020, based on Article 46(2) and Article 46(4) of the Act of 5 December 2008 on the Prevention and Combating of Infections and Infectious Diseases in Humans (hereinafter: the Epidemic Act),³ the Minister of Health issued the Regulation on the Declaration of a State of Epidemiological Emergency on the Territory of the Republic of Poland.⁴ The state of epidemiological emergency (Polish: *stan zagrożenia epidemicznego*) was defined as a legal situation proclaimed in a given area in connection with the risk of an epidemic, for the purpose of applying preventive measures laid down in the Act. On the basis of the said Regulation, from 15 to 24 March 2020, border controls were re-introduced and internal borders could only be crossed at designated places. Furthermore, international passenger airline and railway services were suspended. From 14 March 2020, restrictions were also imposed on the operation of shopping centres. Gyms, swimming pools, dance clubs, fitness clubs, museums, libraries and cinemas were shut down. Restrictions were

3 Ustawa z dnia 5 grudnia 2008 r. o zapobieganiu oraz zwalczaniu zakażeń i chorób zakaźnych u ludzi [The Act of 5 December 2008 on the Prevention and Combating of Infections and Infectious Diseases in Humans], Official Journal of the Republic of Poland (hereinafter: 'J. of L.') of 2008, No. 234, item 1570 as amended.

4 Rozporządzenie Ministra Zdrowia z dnia 13 marca 2020 r. w sprawie ogłoszenia na obszarze Rzeczypospolitej Polskiej stanu zagrożenia epidemicznego [The Minister of Health Regulation of 13 March 2020 on the State of Epidemiological Emergency in the Territory of the Republic of Poland], J. of L. of 2020, item 433.

introduced in connection with the operation of restaurants, cafés and bars, which could only provide food takeaway and delivery services. A ban was introduced on gatherings of more than 50 people for public, state or religious functions. Subsequently, on 24 March 2020, the Minister of Health had issued another Regulation on the Declaration of a State of Epidemic on the Territory of the Republic of Poland,⁵ where the state of epidemic (Polish: *stan epidemii*) was defined as a legal situation proclaimed in a given area in connection with an outbreak of an epidemic, with a view to take anti-epidemic and preventive measures, as laid down in the Act, in order to minimise the effects of the epidemic. The Regulation also envisaged the potential creation of so-called ‘zero zones’ and ‘buffer zones’. In both these zones, the Regulation provided for, *inter alia*, a potential prohibition from leaving a designated zero zone to be imposed on persons who are sick or were suspected of being sick (Article 46b points 11 and 12 of the Act on Combating Infectious Diseases). Another restriction was the ban on movement of people, except for the purpose of performing professional activities or official tasks; satisfying the basic needs of everyday life, including seeking essential healthcare; performing voluntary unpaid services to counteract the effects of COVID-19; and performing or participating in a religious worship. In addition, an order to cover the mouth and nose in public places and areas; at workplaces; and in means of public transportation was. By virtue of the Regulation of the Council of Ministers dated 31 March 2020 on the Imposition of Certain Restrictions, Orders and Prohibitions in Connection with the State of the Epidemic,⁶ persons under the age of 18 were permitted to make use of public areas only if accompanied by an adult guardian. Furthermore, parks, boulevards and beaches were closed without exceptions and the operations of, *inter alia*, hairdressers and beauty parlours were suspended. In shops and service units, the number of customers could not exceed three times the number of cash registers in the given shop, while the shopping hours from 10.00 a.m. to 12.00 p.m. were reserved for persons over 65 years of age only.

The first phase of the lifting of the lockdown began on 20 April 2020. Under the Regulation of the Council of Ministers,⁷ the number of persons that could enter a shop or participate in religious worship at a single time was increased. The ban

5 Rozporządzenie Ministra Zdrowia z dnia 24 marca 2020 r. zmieniające rozporządzenie w sprawie ogłoszenia na obszarze Rzeczypospolitej Polskiej stanu epidemii [The Minister of Health Regulation of 24 March 2020 Amending the Regulation on the State of Epidemic in the Territory of the Republic of Poland], J. of L. of 2020, item 522.

6 Rozporządzenie Rady Ministrów z dnia 31 marca 2020 r. w sprawie ustanowienia określonych ograniczeń, nakazów i zakazów w związku z wystąpieniem stanu epidemii [The Regulation of the Council of Ministers of 31 March 2020 on the Imposition of Certain Restrictions, Orders and Prohibitions in Connection with the State of the Epidemic], J. of L. 2020, item 566.

7 Rozporządzenie Rady Ministrów z dnia 10 kwietnia 2020 r. w sprawie ustanowienia określonych ograniczeń, nakazów i zakazów w związku z wystąpieniem stanu epidemii [The Regulation of the Coun-

on movement for the purpose of leisure was lifted and the requirement of adult accompaniment for minors in public places was eased, remaining applicable only to children under the age of 13). Then, as part of the second phase of the lifting of the lockdown shopping centres re-opened (subject to a sanitary regime) as did libraries, museums, art galleries, hotels and medical rehabilitation centres. Nurseries and kindergartens could re-open if compliant with, *inter alia*, the guidelines issued by the Chief Sanitary Inspector. The next phase of lifting lockdown restrictions took place on 18 May 2020. Hairdressers and beauty parlours were allowed to re-open, while restaurants, bars and cafes could operate if they met sanitary guidelines. Cinemas, theatres, opera houses, swimming pools, fitness clubs, amusement parks and kids' playgrounds, saunas and tanning salons resumed their operations from 6 June 2020. The obligation to cover the mouth and nose in public areas still remained in force. Almost three months after the first coronavirus infection was reported in Poland, the Prime Minister and the Minister of Health jointly announced to the general public that Poland was winning the fight against the epidemic.⁸

On 8 August 2020, under the Regulation on the Imposition of Certain Restrictions, Orders and Prohibitions in Connection with the State of the Epidemic,⁹ regional restrictions were introduced in selected administrative districts (Polish: *powiaty*). Particular districts were assigned the category of red zones (with the most severe restrictions) or yellow zones (with less severe restrictions); the remaining districts were green zones (with no restrictions). The organisation of fairs, conferences, cultural events and sporting events with the participation of the public in red-zone districts was prohibited. In the yellow-zone districts, it was not prohibited to organize fairs and conferences (the obligation to wear masks remained, with 1 person allowed per 4 square meters); cultural events (the number of spectators could not exceed 25% of the seats, a limit of 100 persons was applicable); and sporting events (the number of spectators could not exceed 25% of the seats).

The relaxation of these restrictions during the summer holiday period very quickly resulted in a significant deterioration of the epidemiological situation in Poland at the turn of September and October. For this reason, on 10 October 2020, the whole area of Poland (except for red-zone districts) was declared a yellow

cil of Ministers of 10 April 2020 on the Imposition of Certain Restrictions, Orders and Prohibitions in Connection with the State of Epidemic], J. of L. of 2020, item 658, as amended.

8 Rząd ogłasza sukces w walce z koronawirusem. Eksperci: nie jesteśmy w fazie wygaszania epidemii [*The Government Announces Success in the Fight Against Coronavirus. Experts: we are not in the Phase of the Fading of the Epidemic*], on-line access: <https://tvn24.pl/>

9 Rozporządzenie Rady Ministrów z dnia 7 sierpnia 2020 r. w sprawie ustanowienia określonych ograniczeń, nakazów i zakazów w związku z wystąpieniem stanu epidemii [*The Council of Ministers Regulation of 7 August 2020 on the Imposition of Certain Restrictions, Orders and Prohibitions in Connection with the State of Epidemic*], J. of L. of 2020, item 1356.

zone. The Regulation of the Council of Ministers of 23 October 2020 amending the Regulation on the Imposition of Certain Restrictions, Orders and Prohibitions in connection with the state of the epidemic was promulgated in Poland's official journal *Dziennik Ustaw*.¹⁰ In light of these new provisions, the whole of Poland was categorised as a red zone from 24 October 2020, while new restrictions and those that so far had applied to the red zone became applicable across the whole country. Furthermore, the government also decided that children and young people up to the age of 16 were not allowed to make use of public areas unless accompanied by a guardian. During the hours from 8.00 a.m. to 4.00 p.m., children and young people could not travel on their own or meet in groups unless accompanied by an adult. The special hours for senior citizens were continued as well, hence grocery shops, pharmacies and post offices etc. were allowed to serve people over 60 years of age only during the hours from 10 a.m. to 12.00 noon, from Monday through Friday. A two week closure of bars, restaurants and other similar establishments – and a ban on gatherings and meetings of more than 5 people was imposed as well.

Just before Christmas, the Council of Ministers decided to introduce further restrictions. Under the Regulation of the Council of Ministers of 21 December 2020 on the Imposition of Certain Restrictions, Orders and Prohibitions in Connection with the State of the Epidemic,¹¹ the so-called 'national quarantine' was proclaimed in Poland for the period of 28 December 2020 to 17 January 2021. Accordingly, gatherings were prohibited until 17 January 2021, except for those organised based on a notice or a decision; even these gatherings could have no more than 5 persons attending. As before, participants of a gathering were required to cover their mouths and noses and to keep a distance of at least 1.5 meters from one another. The Regulation also regulated the conditions of gatherings organised by churches and other religious associations until 17 January 2021. A limit of no more than 1 person per 15 square meters of space and the obligation to maintain a distance of no less than 1.5 meters was still applicable. The measures applicable to children and young people up to the age of 16 was extended until 17 January 2021. Accordingly, from 8 a.m. to 4 p.m., Monday through Friday, they could travel only under the supervision of a parent, guardian or other adult and only children going to or coming back

10 *Rozporządzenie Rady Ministrów z dnia 23 października 2020 r. zmieniające rozporządzenie w sprawie ustanowienia określonych ograniczeń, nakazów i zakazów w związku z wystąpieniem stanu epidemii* [The Council of Ministers Regulation of 23 October 2020 Amending the Regulation on the Imposition of Certain Restrictions, Orders and Prohibitions in Connection with the State of Epidemic], J. of L. of 2020, item 1871.

11 *Rozporządzenie Rady Ministrów z dnia 21 grudnia 2020 r. w sprawie ustanowienia określonych ograniczeń, nakazów i zakazów w związku z wystąpieniem stanu epidemii* [The Regulation of the Council of Ministers of 21 December 2020 on the Imposition of Certain Restrictions, Orders and Prohibitions in Connection with the State of Epidemic], J. of L. of 2020, item 2316.

home from school were exempt from this rule. According to the above-mentioned Regulation, retail trading in commercial or service centres with an area of more than 2 000 square metres was prohibited during the period from 28 December 2020 to 17 January 2021. However, grocery shops, pharmacies, bookstores, pet shops, hardware stores, furniture shops, car accessories' shops and telecommunication services were permitted to operate in shopping centres. Furthermore, services in shopping centres were to remain closed with the exception of, *inter alia*, hairdressers, cosmetics, optical, medical, banking, postal, vehicle repair services. Additionally, food and drink providers could also open, but were only allowed to offer takeaway services. According to the latest Regulation, the lockdown also extended to hotel businesses, nightclubs, swimming pools, waterparks, gyms, clubs and fitness centres during the period of 28 December 2020 to 17 January 2021. The remote operation of public offices was also prolonged until 17 January 2021 as a continuation of previous remote working arrangements. The greatest controversy, however, was triggered by the ban on movement imposed across the whole country, applicable from 7 p.m. on 31 December 2020 to 6 a.m. on 1 January 2021, with the exception of those persons who were carrying out official or professional duties; business-related duties or satisfying the basic needs of everyday life. The imposition of nothing short of a curfew strongly suggests that what we are dealing with here is an extraordinary state of emergency, albeit in disguise.

3. Legal assessment of measures taken by state authorities in Poland in the light of the Constitution of the Republic of Poland

The Constitution of the Republic of Poland of 2 April 1997¹² envisages, in Chapter XI thereof, three types of extraordinary states of emergency (Polish: *stan nadzwyczajny*), namely: martial law (Polish: *stan wojenny*), a state of exception (Polish: *stan wyjątkowy*) and a state of natural disaster (Polish: *stan klęski żywiołowej*). One of these extraordinary states of emergency may be proclaimed “[i]n situations of particular danger, if ordinary constitutional measures are inadequate” (Article 228(1) of the Constitution). This is known as the principle of last resort and it determines the general conditions under which the states of emergency may be declared. According to the Constitution, an extraordinary state of emergency may be declared subject to the observance of four vital principles; exceptionality, legality, expediency and proportionality. The principle of exceptionality means that an extraordinary state of emergency may be declared subject to the occurrence of

12 *Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r.* [The Constitution of the Republic of Poland of 2 April 1997], J. of L. 1997, No. 78, item 483 as amended.

factual circumstances defined in the Constitution as being a ‘situation of particular danger’, where ordinary constitutional measures are inadequate. The principle of legality means that each of the above-mentioned three types of extraordinary states of emergency may only be imposed by way of a regulation issued on the basis of a statute. Furthermore, in accordance with Article 228(2) of the Constitution, the said regulation must not only be promulgated in the official journal of the Republic of Poland *Dziennik Ustaw*, but must also be made known to the general public, despite the fact that the Constitution fails to specify how this additional requirement is to be fulfilled. The principle of proportionality in the context of extraordinary states of emergency, as expressed in Article 228(5) of the Constitution, requires the measures taken by public authorities during an extraordinary state of emergency to be proportionate to the degree of the existing danger. The principle of expediency can also be derived from the above-mentioned Article, and thus the measures taken by state authorities must be aimed at the swiftest possible restoration of the conditions of a ‘normal’ functioning of the state. Thus, the principle of expediency serves as a protection against, *inter alia*, a disproportionate extension of an extraordinary state of emergency in the country. The principles of exceptionality, legality, expediency and proportionality offer protection against a discretionary proclamation of extraordinary states of emergency and abuse of power during those crisis conditions.¹³ The backbone of the existing constitutional order is further safeguarded under Articles 228(6) and 228(7). Article 228(6) provides that “the Constitution, statutes on elections to the Lower House of Parliament (the Sejm), to the Senate and to bodies of local government, statutes on elections of the President of the Republic of Poland as well as statutes on extraordinary states of emergency must not be amended throughout the duration of the extraordinary state of emergency”. In turn, Article 228(7) provides that during an extraordinary state of emergency, as well as within the period of 90 days following its lifting, the term of office of the Lower House of Parliament (the Sejm) may not be shortened; a national referendum may not be held; elections to the Lower House of Parliament (the Sejm), to the Senate and to bodies of local government and elections of the President of the Republic of Poland may not be held, while the terms of office of these respective bodies shall be extended for the duration of an extraordinary state. On the other hand, elections to bodies of local government are possible only in those places where the extraordinary state of emergency was not proclaimed. Thus, Article 228(7) of the Constitution protects the foundations of the state system not only during an extraordinary state of emergency, but also during the ‘convalescence period of the

13 K. Eckhardt, *Stany nadzwyczajne jako instytucja polskiego prawa konstytucyjnego* [Extraordinary States of Emergency as an Institution of the Polish Constitutional Law], Przemyśl–Rzeszów 2012, p. 142 et seq.

state, i.e., during the period in which the state resets and returns to its ‘normal’ functioning.

Detailed conditions for the proclamation of particular categories of the extraordinary states of emergency are laid down in other provisions of the Constitution. Martial law may be proclaimed in the case of an “external danger to the state, armed aggression against the territory of the Republic of Poland or when the obligation of common defence against aggression arises from an international agreement” (Article 229). The state of exception may be proclaimed in the case of “threats to the constitutional system of the state, security of citizens or public order” (Article 230(1)). Both martial law and the state of exception may be imposed by the President of the Republic of Poland. However, this may not be done on their own initiative; rather it is ordered following a motion forwarded by the Council of Ministers. The state of natural disaster may be proclaimed by the Council of Ministers “[i]n order to prevent or remove the consequences of natural calamities or technological accidents exhibiting the characteristics of a natural disaster” (Article 232). The COVID-19 epidemic qualifies as a natural disaster, per Article 3(1)(2) of the Act on the State of Natural Disasters,¹⁴ which defines a natural disaster as “an event associated with an action of natural forces, in particular (...) infectious diseases of humans”. It is also a natural disaster within the meaning of Article 3(1)(1) of the said Act, since its effects pose a hazard to the life or health of a large number of people, while help and protection can only be effectively provided via extraordinary measures, through cooperation between various bodies and institutions, specialist services and units acting under united leadership. It is important because, as follows from Article 233(3) of the Constitution of the Republic of Poland, during a state of natural disaster, certain freedoms and rights guaranteed in Article 22 (freedom of economic activity), Article 41(1), 41(3) and 41(5) (personal freedom), Article 50 (inviolability of the dwelling), Article 52(1) (freedom of movement and residence within the territory of the Republic of Poland), Article 59(3) (right to strike), Article 64 (right to property), Article 65(1) (freedom to work), Article 66(1) (right to safe and hygienic working conditions) and Article 66(2) (right to rest) may be restricted on the basis of a statute.¹⁵

The Council of Ministers decided not to officially proclaim a state of natural disaster. Thus, one can indeed assume that the Council of Ministers believed that

14 *Ustawa z dnia 18 kwietnia 2002 r. o stanie klęski żywiołowej* [The Act of 18 April 2002 on the State of Natural Disasters], J. of L. of 2017, item 1897.

15 M. Florczak-Wątor, *Niekonstytucyjność ograniczeń praw i wolności jednostki wprowadzonych w związku z epidemią COVID-19 jako przesłanka odpowiedzialności odszkodowawczej państwa* [Unconstitutional Restrictions on Rights and Freedoms of an Individual Imposed in Connection with the COVID-19 Epidemic as the Premise for the State's Liability for Damages], *Państwo i Prawo* 2020, no. 12, pp. 8–9.

the ordinary constitutional measures within the meaning of Article 228(1) of the Constitution, which it is empowered to apply, were sufficient to contain the state of the epidemic. That is why all constitutional and legislative principles, except for those pertaining to extraordinary states of emergency under Chapter XI of the Constitution of the Republic of Poland, should apply to the legal provisions that impose restrictions on human and civil rights and freedoms. Consequently, the Council of Ministers should not be able to invoke extraordinary circumstances to justify any special legal provisions aimed at introducing restrictions on human freedoms and rights. Furthermore, those circumstances cannot serve as grounds for far-reaching restrictions on civil freedoms, introduced in the form of regulations.¹⁶ Epidemics should therefore be combated within the framework of the constitutional order, which public authorities must observe. Unless an extraordinary state of emergency is proclaimed, those bodies may only act within the framework of ordinary constitutional limitation clauses appropriate for situations in which no special hazards occur. Thus, the failure to proclaim an extraordinary state of emergency in a situation when extraordinary hazards indeed occur may therefore be regarded as a violation by a public authority of the principle to act on the basis and within the limits of the law, expressed in Article 7 of the Constitution.¹⁷

The Act of 2 March 2020 on Special Solutions Related to Preventing, Counter-acting and Combating COVID-19, other Contagious Diseases and Crises Involved Thereby has been provided the main legal framework under which the pandemic has been fought in Poland.¹⁸ Article 25 of the COVID-19 Act introduced many changes the Epidemic Act. Attention should first of all be drawn to Article 46a, added to the Epidemic Act, which authorises the Council of Ministers to issue regulations to combat the pandemic, in areas identified as posing an epidemiological threat or an epidemic. Initially, Article 46 of the Epidemic Act was the basis for legislation combating the epidemic. A provision with a general delegation of legislative powers became the basis for the Minister of Health to issue several regulations that laid down the principles of action during an epidemic and radically restricted constitutional freedoms and rights.

16 P. Kardas, *Konstytucyjne podstawy rozstrzygania kolizji obowiązków i konfliktów dóbr w czasie epidemii* [Constitutional Grounds for Resolving Conflicts of Obligations and Conflicts of Values During Epidemics], *Palestra* 2020, no. 6, p. 8.

17 M. Brzeziński, *Stany nadzwyczajne w polskich konstytucjach* [Extraordinary States of Emergency in Polish Constitutions], Warszawa 2007, p. 187; K. Prokop, *Modele stanu nadzwyczajnego* [Types of Extraordinary States of Emergency], Białystok 2012, p. 19.

18 *Ustawa z dnia 2 marca 2020 r. o szczególnych rozwiązaniach związanych z zapobieganiem, przeciwdziałaniem i zwalczaniem COVID-19, innych chorób zakaźnych oraz wywołanych nimi sytuacji kryzysowych* [The Act of 2 March 2020 on Special Solutions Related to Preventing, Counter-acting and Combating COVID-19, other Contagious Diseases and Crises Involved Thereby], *J. of L.* of 2020, item 374.

Only later did the Council of Ministers turn to Article 46a of the Epidemic Act. The form of action followed the same pattern as under Article 46: the announcement of a state of epidemic threat; and then of an epidemic itself; the establishment of general principles of action of state authorities; and, last but not least, the restriction of constitutional rights and freedoms in regulations rather than in a statute. This mode of limiting constitutional rights is contrary to Article 31(3) of the Constitution and those provisions of Chapter Two of the Constitution that contain detailed clauses on limitation of rights.¹⁹ According to Article 31(3) of the Constitution of the Republic of Poland, limitations upon the exercise of constitutional rights and freedoms may be imposed ‘only by statute’. In the light of the well-established jurisprudence of the Constitutional Tribunal, a statute must independently lay down fundamental elements of limitations imposed upon a given right or freedom.²⁰ Thus, the Constitution of the Republic of Poland expresses and guarantees a fundamental concept that limitations of constitutional rights and freedoms may be introduced and maintained only when so envisaged by a provision of a universally binding law laid down in a statute. What is meant is a legal provision adopted by a democratically legitimised parliament, in accordance with a legislative procedure as provided for by law, which should guarantee openness of a parliamentary debate and the opportunity for the pluralistic consideration of various interests at stake, which should then be duly announced and promulgated and which can be at least potentially subject to subsequent control by the Constitutional Tribunal, in order to determine its conformity with the Constitution of the Republic of Poland. As rightly noted by legal scholars, the requirement of statutory legal grounds for the imposition of limitations to constitutional rights and freedoms is a manifestation of the principle of a democratic state (Article 2 of the Constitution of the Republic of Poland), under which the supreme political power is vested in ‘The Nation’ and where the Nation exercises this supreme authority either directly or through its representatives (Article 4 of the Constitution of the Republic of Poland), particularly through its representatives to the Parliament. The Parliament that consists of representatives of the Nation is considered to be the body that most appropriately expresses the will of the Nation and may express this will in the statutes it enacts.²¹

19 P. Tuleja, *Pandemia COVID-19 a konstytucyjne stany nadzwyczajne* [COVID-19 Pandemic and Constitutional Extraordinary States of Emergency], *Palestra* 2020, no. 9, p. 12.

20 Cf. Judgements of the Constitutional Tribunal of 12 January 2000, P 11/98; of 28 June 2000, K 34/99; of 20 February 2001, P 2/00; of 10 April 2001, U 7/00; of 3 April 2001, K 32/99; of 11 December 2001, SK 16/00; of 19 February 2002, U 3/01.

21 M. Szydło, *Komentarz do Art. 31 Konstytucji RP* [Commentary on Article 31 of the Constitution of the Republic of Poland], in: *Komentarz do Konstytucji RP* [Commentary on the Constitution of the Republic of Poland], Vol. I, (eds.) M. Safjan, L. Bosek, Warszawa 2016, *Legalis/el*.

Hence, the use of statutes to restrict basic constitutional rights and freedoms allows those freedoms to be appropriately circumscribed in a modern democracy.²²

It is furthermore noteworthy that each of the analysed regulations contain provisions that very deeply interfere with rights of individuals, by far exceeding the limits of interference admissible when the state operates within its ordinary constitutional confines. For example, the freedom of economic activity, specifically the types of economic activity listed in the cited regulations, have been suspended for an indefinite period of time. Furthermore, the regulations also provide that state authorities may introduce, *inter alia*, temporary restrictions on a particular mode of travel; temporary restrictions or prohibitions of trading in or the use of certain objects or food products; temporary restrictions on the operation of certain institutions or workplaces; prohibitions on the organisation of shows and other public gatherings and may issue an order to make real property, premises and land available and means of transport to be supplied for anti-epidemic measures provided for in epidemic-combating plans. Thus, a quasi-emergency state was in fact introduced in Poland.²³

It is rightly noted by constitutional law scholars that not all the limitations provided for in the statutes on extraordinary states of emergency need to be imposed in order to recognise that a given situation meets the criteria of an extraordinary state of emergency. Due to the principle of the autonomy of constitutional concepts, even in the case of a formal proclamation of an extraordinary state of emergency, emergency measures are not imposed automatically, but in proportion to the degree and type of hazard. There is no doubt that the formal conditions of a lawful proclamation of an extraordinary state of emergency have not been fulfilled.²⁴ Specifically, a competent authority has not issued a regulation proclaiming a particular extraordinary state of emergency in accordance with the appropriate procedure, which consequently means that no specific extraordinary state of emergency has been proclaimed. Although from a formal perspective, the interference with constitutional rights and freedoms of an individual through legislation secondary to a statute is a characteristic feature of an extraordinary state of emergency, the above-mentioned Regulation of the Minister of Health of 20 March 2020 may not be considered to be such secondary legislation, since it was issued neither after a formal proclamation

22 K. Wojtyczek, *Granice ingerencji ustawodawczej w sferę praw człowieka w Konstytucji RP* [Limits of Legislative Interference in the Sphere of Human Rights in the Polish Constitution], Kraków 1999, pp. 106–107.

23 M. Pach, *Stan epidemii fałszywej wierności Konstytucji* [The State of Epidemic of False Allegiance to the Constitution], on-line access: <http://konstytucyjny.pl/>, (downloaded on: 28.03.2020).

24 M. Krzemiński, *Hybrydowy stan nadzwyczajny* [Hybrid State of Emergency], on-line access: <http://konstytucyjny.pl/> (downloaded on: 28.03.2020).

of an extraordinary state of emergency nor on the basis of a statute specifying the consequences of the proclamation of such a state.²⁵

A question also arises as to whether ordinary statutes may additionally regulate matters regulated in acts on extraordinary states of emergency. As rightly pointed out in legal scholars' writings, given the limited number of the types of extraordinary states of emergency, it should be inferred that each of these extraordinary states of emergency should be regulated under a separate statute or that they should all be regulated in a single statute that separately defines each of these states.²⁶ In practice, taking into account the applicable rules of legislation drafting, the current legal framework, i.e., the existence of three statutes defining three constitutional extraordinary states of emergency, should be considered optimal. The subject matter regulated by these statutes may be additionally regulated or modified by ordinary statutes. It should, however, be kept in mind that the special constitutional regime laid down in Article 228 of the Constitution does not apply to these statutes. An act on epidemics may, therefore, neither provide for any special modes of operation of state authorities nor impose any special limitations on human rights other than as permitted under Article 228(3) of the Constitution. These special rules can only be imposed in a specific statute on an extraordinary state of emergency and in a regulation proclaiming the introduction of the said state. In connection with the former, a certain general correlation between 'regular' legislation and legislation on extraordinary states of emergency can be noted.²⁷ The imposition of one of the extraordinary states of emergency does not suspend the binding force of general acts specified in Article 87 of the Constitution nor does it cause all legislative enactments to follow the extraordinary emergency procedure regulated in Article 228 of the Constitution; they continue to operate as per normal. It must be kept in mind, however, that counteracting the hazards as specified in Article 228(1) of the Constitution, which requires extraordinary rules for the functioning of the state and special limitations on human rights, should take place by way of legislation on extraordinary states of emergency.

4. Conclusions

From the point of view of the material constitutional regime, certain legal conditions have existed since the beginning of March in Poland, which the Constitution

25 Judgement of the Voivodship Appellate Court (WSA) in Opole of 27 October 2020, II SA/Op 219/20.

26 A. Kustra-Rogatka, *Stany nadzwyczajne [States of emergency]*, in: *Polskie prawo konstytucyjne w obliczu wyzwań współczesności [Polish constitutional law in the context of contemporary challenges]*, eds. Z. Witkowski, D. Lis-Staranowicz, M. Serowaniec, Toruń 2021, pp. 581–583.

27 Judgement of the Constitutional Tribunal of 21 April 2009, K 50/07.

defines as an extraordinary state of emergency. Then again, from a formal point of view, this state has not been proclaimed. In fact – none of the specific types of an extraordinary state of emergency (i.e., martial law, the state of exception, nor the state of natural disaster) has been proclaimed. Thus, Poland is experiencing a hybrid state of emergency imposed through the introduction into the legal system of the norms establishing the said state, but with disregard for the formal rigours laid down in the Constitution and without specification of the type thereof. All in all, we are in a situation in which public authorities are acting in accordance with the rules envisaged in the Constitution for an extraordinary state of emergency, but without formally proclaiming this state, thus attempting to evade the limitations provided for in the Constitution for the duration of these circumstances, such as a ban on holding elections (including presidential elections); a ban on the organisation of national referenda and a ban on amendments of law (including the electoral code).²⁸ It follows from the foregoing that the analysed legislative acts introduced a legal regime that has all the constitutive features of an extraordinary state of emergency, including measures envisaged in the statutes on the particular types of an extraordinary state of emergency, such as the issue of binding orders by public bodies; the limitation of rights and freedoms by virtue of a secondary legislation (regulations); restrictions (and sometimes even bans) on freedom of movement, the freedom of pursuit of business, and freedom of assembly and worship; restrictions on transportation and trading in goods, and the issue of orders to undergo medical procedures.²⁹ The existence of the legal regime which Article 228 of the Constitution defines as an extraordinary state of emergency is distinctly demonstrated by legal provisions curtailing the essence of constitutionally protected rights (such as economic freedom, freedom of movement, and freedom of gatherings) and overruling the constitutional principle of subsidiarity. Insofar as the analysed restrictions, orders and prohibitions have had a substantial legal impact for the citizens of Poland, the way they have been imposed has led to violation of fundamental rights and freedoms of individuals under the Constitution of the Republic of Poland.

²⁸ Krzemiński, (above n. 24).

²⁹ P. Tuleja, Wprowadzenie stanu nadzwyczajnego nie uniemożliwi ani nie utrudni walki z epidemią (w odpowiedzi Tymonowi Nowinie Konopce) [The Imposition of an Extraordinary State of Emergency Will Neither Prevent nor Hinder the Fight Against the Epidemic (Response to Tymon Nowina Konopka)], on-line access: <http://konstytucyjny.pl/> (downloaded on: 21.12.2020).

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Poland A.D. 2020 – Arbitrary Legislative Process Or Legislative Lawlessness In the Era of COVID-19?¹

1. Introduction

The victories of the right wing in successive parliamentary elections in 2015 and 2019 unexpectedly brought about a completely new approach to the institutions, processes, procedures and political phenomena in our country. Relatively quickly, it became apparent that the new majority had decided to undermine the standards which had been accepted to date in the democratic world, including the rule of law. Ignoring the foundations of democracy also affected Parliament and its legislative process. As a result, the functions of the Parliament and the role of the opposition were *de facto* weakened, without taking into account the universally respected rights of minorities, thus far unquestionably recognised in a well-established democracy. On the contrary, by way of a *fait accompli*, the conviction that the view of the majority, as long as it is legitimised by democratic processes, is absolute began to be consolidated. This state of affairs has seen the beginning of an increasingly powerful process of eliminating from political practice many seemingly obvious and unquestionable democratic standards that had been developed over generations. As a result, the initially low-key but now open rejection of the modern model of the Sejm which was established after 1990, has deepened in organizational, procedural, and functional terms. Parliament is beginning to be a facade institution, treated instrumentally by politicians, its power being systematically excluded from public or social control and with its legislative function being often carried out in a scandalous manner. Such initiatives have been implemented under the guise of the need to improve law and democracy in general. However, those decision-makers implementing said policies have rejected the accusation that they are destroying the law; the average citizen, who lacks general knowledge of the rules of the political game, may therefore find it difficult to determine, objectively, what damage is being done. Nevertheless, the effect of the measures must be considered as harmful, irrespective of how they are seen by the public.² In fact, those currently in power

1 Concept taken from the title of the monograph: L. Bosek, *Bezprawie legislacyjne* [Legislative lawlessness], Warszawa 2007.

2 A. Antoszewski, *Demokracja nieoliberalna jako projekt polityczny* [Illiberal democracy as a political project], *Przegląd Europejski* 2018, No. 2, p.13.