

COVID-19 AND CONSTITUTIONAL LAW: THE CASE OF POLAND

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I. The key problem with which the Polish government had to struggle in the face of the coronavirus disease pandemic was the establishment of an appropriate legal regime of the management of public affairs in a situation of ‘emergency’. From this point of view, the activity of public authorities can be divided into three periods. The first one, which lasted until mid-March 2020, was based on the increasing activity of administrative bodies, yet without adopting broad restrictions on constitutional freedoms and rights. The reactions of state authorities were undertaken on the basis of the Act of 5 December 2008 on the prevention and combating of infections and infectious diseases (hereinafter: the Act of 2008), and then on the basis of the newly adopted Act of 2 March 2020 on special solutions related to the prevention, counteracting and combating COVID-19, other infectious diseases and crisis situations caused by them (hereinafter: the Act of 2020). The second period, which lasted until mid-May, was related to the introduction of the state of epidemic on the territory of Poland, on the basis of the Act of 2008, which enabled the government to impose far-reaching restrictions and limitations on the exercise of human rights. The third stage, which started in mid-May and lasts until today, involves the gradual lifting of the existing restrictions.

The first broad measures related to the prevention and control of the spread of COVID-19 were taken by the authorities of universities (including the suspension of classes) and local governments. These actions forced a reaction of central authorities. It was provided for closing nurseries, kindergartens, schools and universities across the country. Quite soon, the govern-

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ment realised that the provisions of the Act of 2008 were inadequate to the scale of the threat and to the necessity of taking extraordinary imperative actions. Therefore, the parliament decided not only to amend this act, but also adopted the aforementioned Act of 2020. Both acts were subsequently amended and adapted many times to the emerging challenges. On the occasion of these (and similar) legislative activities, regulations not related to combating the epidemic were adopted, e.g. there were made extensive amendments to the penal code.

II. In the beginning, restrictions on freedoms and rights were introduced gradually. At the peak, they reached a significant dimension and touched virtually all spheres of life, especially personal freedoms and rights, such as freedom of movement (including crossing the borders and the obligation to submit to quarantine), freedom of assembly, freedom of religious worship, as well as economic, social and cultural freedoms and rights, such as freedom of economic activity and right to education. In the latter scope, the classes have been suspended. The government introduced a compulsory online education, albeit without taking any measures to counteract the digital exclusion of some children and adolescents. The costs of some restrictions, likewise in several other European Union countries, were passed on to consumers, thus restricting their rights. For instance, carriers and organizers of mass events have been granted right to postpone deadlines for reimbursement for unused tickets up to six months. For this reason, the European Commission has initiated a legal procedure against Poland and other countries for violating European law on the protection of consumer rights.

Due to the far-reaching restrictions and the restrictiveness in their enforcement on the part of public administration bodies, social protests appeared. The police began sending requests to punish people for violating restrictive provisions to the appropriate epidemic control authorities. These authorities, through administrative decisions, imposed high administrative fines (ca. USD 2,600) on citizens. Appeals to courts against these decisions – unlike in the case of fines imposed by the police – did not, however, stop their immediate enforceability, which entailed an obligation to pay large amounts of money. This procedure turned out to be very painful for citizens. Some actions of administrative authorities and the police could be even perceived as legal harassment. Some of the situations publicised by the press met with the reaction from the ombudsman. These protests resulted in the easing of the repressive nature of some actions undertaken by administrative bodies.

Meanwhile, high representatives of the ruling party publicly appeared in public places, such as squares and cemeteries, disregarding bans con-

cerning other citizens. Public events and celebrations of anniversaries were organised bypassing the regulations on the sanitary regime and without following the precautionary measures required by law. This was usually explained by the circumstances of performing public duties. For example, the visit of the prime minister in a restaurant was considered as such a circumstance.

III. The adopted legal solutions raised fundamental constitutional doubts for at least two reasons. First, most of them were introduced by decrees of the minister, prime minister or government. In turn, the Polish Constitution requires that any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute. Secondly, these limitations were so restrictive that they often violated the essence of individual freedoms and rights. The Constitution does not allow such deep restrictions, even in the form of a statute. The only legitimate possibility to apply them is to introduce one of the appropriate extraordinary measures. Nonetheless, the ruling authorities consciously and deliberately – despite the growing pressure of lawyers and experts – decided not to introduce any extraordinary measures and not to put at work institutions for disaster management.

The Polish Constitution provides for the following appropriate extraordinary measures: martial law, a state of emergency or a state of natural disaster. In the face of the coronavirus disease pandemic, the most rational solution would be to introduce a state of natural disaster, which is aimed at preventing or removing the consequences of a natural catastrophe or a technological accident exhibiting characteristics of a natural disaster. Such a decision of the government was mainly related to the fact that the constitutional effect of introducing any of extraordinary measures is the automatic extension of the term of office of some public bodies and the necessity to postpone the elections to a later period. According to the Constitution, during a period of introduction of extraordinary measures, as well as within the period of 90 days following its termination, no elections can be held. In February 2020, the Marshal of the Sejm (the Sejm is the lower house of the Polish parliament) set out the date of the presidential election on 10 May 2020. The parliamentary majority, with which the current President identifies himself, predicted that along with the epidemic and its proven destructive impact on the economy, there would be a decline in support for the incumbency. The second argument was the – more or less well-founded – fear that the introduction of extraordinary measures will imply the payment of high compensation to citizens for actions aimed at limiting human rights.

IV. The period of restrictions related to preventing and controlling the spread of the disease coincided with the presidential campaign launched

at the beginning of February 2020. The term of office of the incumbent President expires on 6 August 2020. Restrictions on assembly and mobility have significantly reduced the latitude of running the election campaign by candidates. At the same time, the ruling party were pushing at all costs to hold the presidential election on a predetermined date. The President was given a strong support in the election campaign from the public television, controlled by the government majority. During this period, the parliament changed the regulations on the already ongoing election campaign three times, thus ignoring the good practice of not amending the election law in the run-up to the elections. One of the adopted acts, which entered into force the day before the planned election date, provided for the election to be held only by general correspondence voting. Some political groups, including one of the coalition partners of the government majority, began to question the legality of such election activities and the manner of introducing legal changes.

Ultimately, the presidential election scheduled for 10 May 2020 were not held on this date. However, it was not dismissed in any formal way (in fact, there is no legal possibility to do so at all), and the formal campaign silence that preceded them was generally ignored. Instead, it was publicly announced that it came to a political agreement between the two leaders of parties forming a government coalition, under which the election was to be postponed. This agreement shall explain the failure to hold the presidential election on time. It was an unprecedented situation, because the Constitution does not allow – but for on account of the introduction of prevailing extraordinary measures – not to hold the already ordered election. In this way, it became clear that presidential election would have to take place on a date not provided for in the Constitution.

V. Subsequently, it was adopted the Act of 2 June 2020 on special rules for the organisation of general election for the President of the Republic of Poland ordered in 2020 with the possibility of voting by correspondence. This act made it possible to hold the election by means of alternative voting methods and allowed the voting date to be postponed to the end of June. Furthermore, it provided for the possibility of re-proposing presidential candidates, as well as limiting the time to collect 100,000 endorsement signatures, which are required to submit a candidate, up to a couple of days. Under these conditions, two new candidates were registered, including the one who replaced the former candidate from the main opposition party.

After the presidential election, which took place in two rounds – on 28 June 2020 and on 12 July 2020 – and ended up with the re-election of the incumbent President, numerous election protests were received by the

Supreme Court, mainly from citizens living outside of Poland and from the election committee of the opposition's main opponent. Protests are to be examined by the chamber of the Supreme Court composed of judges appointed by the current President at the request of the newly composed National Council of the Judiciary. The independence of these judges, appointed under the changed conditions, is sometimes questioned, also by the Court of Justice of the European Union. The procedure for examining these protests is still ongoing.

VI. The Polish legislation from the period of the coronavirus pandemic introduced numerous changes in the functioning of individual segments of public authorities. The Sejm introduced provisions allowing remote sittings and voting by means of electronic communication. In turn, the second house of the Polish parliament decided to hold sittings simultaneously in several rooms. Citizens' access to courts has been severely restricted. Particularly in the second period of the COVID-19 crisis, the activity of courts was actually stopped, limiting it only to urgent cases, such as the examination of law enforcement requests for pre-trial detention. In many cases, court and trial periods have been suspended. This has naturally affected the length of court proceedings, as well as the effectiveness of the judicial protection on human rights.

One of the adopted acts introduced provisions exempting officials from legal liability for violating the provisions on the management of public funds. Meanwhile, the media reported on questionable activities of the Ministry of Health related to ordering protective measures and the purchase of respirators. One has formulated corruption allegations and revealed transactions raising some objections to the reliable and economic use of public funds. These cases have not been thoroughly investigated and clarified so far. Significant doubts are also raised against the expenditure made by the government to cover the costs of holding the presidential election in May 2020 and compensate the public postal operator for the costs related to the preparation of the postal voting. The governmental actions from that period were largely undertaken without being backed by applicable provisions. The estimated cost of preparing the election packages is USD 18.5 million.

VII. During the period at least until the end of the presidential election, it was difficult to find statistical data depicting the actual condition of the Polish economy, including macroeconomic data on the state debt, inflation level, etc. At the same time, it is commonly known that the government has undertaken to finance some protective measures aimed at saving the economy by issuing treasury bonds purchased by the National Bank

of Poland. The scale of financing of the state's activity through the central bank in this way is currently unknown. Constitutional doubts may be raised by the fact that the Polish Constitution explicitly prohibits the covering a budget deficit by way of contracting credit obligations to the state's central bank.