

# To introduce or not to introduce? Regulation of the state of emergency under the 1997 Polish Constitution vs the COVID-19 pandemic

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## 1. Regulation of constitutional emergency regimes

### 1.1. How are public emergency regimes regulated in the constitution?

The Constitution of the Republic of Poland, adopted on April 2, 1997<sup>1</sup> (hereinafter the Constitution), provides for a regime applicable if the proper functioning of the state requires extraordinary action (Chapter XI, Articles 228-234 of the Constitution). Pursuant to Article 228 of the Constitution, in situations of particular danger, if ordinary constitutional measures are inadequate, any of the following extraordinary measures (*stany wyjątkowe*) – the Polish term for public emergency – may be introduced – a martial law (*stan wojenny*), a state of exception (*stan wyjątkowy*), or a state of natural disaster (*stan klęski żywiołowej*).<sup>2</sup> Beyond the scope of Chapter XI lies the state of war, which, contrary to the definition of extraordinary measures,

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1 The Constitution of the Republic of Poland adopted on April 2, 1997

2 In the present chapter, the authors use the term “public emergency,” as laid down in Article 4 of the International Covenant on Civil and Political Rights, and the expression “extraordinary measures,” which is the Polish term for constitutional emergency regimes (known as the special legal order in the Hungarian legal system) interchangeably.

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refers to external relations of the country, and can be declared in the event of armed aggression against Poland or when an obligation of common defense against aggression arises by virtue of international agreements.<sup>3</sup>

Extraordinary measures are not a new institution in the Polish legal system. Special legal regimes were envisaged in the 1921 and 1935 Constitutions of the newly-independent Polish state.<sup>4</sup> They were also provided for in the provisional constitution adopted in 1947 at the beginning of the communist era in Poland.<sup>5</sup> During the communist regime, the introduction of extraordinary measures was envisaged in the Constitution of the Polish People's Republic, adopted in 1952.<sup>6</sup> Emergency regimes were also regulated in the Small Constitution of 1992, adopted after the fall of communism, which preceded the Constitution in force.<sup>7</sup> The regulation of public emergency regimes in these variants differed in their definition of extraordinary measures; however, the general idea remained the same, implying a possibility to depart from the regular constitutional order as an emergency and threat response.

Extraordinary measures have been known to the Polish constitutional framework for 100 years during which it has been implemented several times. Nonetheless, in public discussion and collective memory of the Polish nation, the notion of public emergency is almost exclusively associated with the 1981 introduction of the martial law. The events encompassing the period between December 13, 1981 to July 22, 1983, when the communist government declared public emergency to counter political opposition, constitute one of the most infamous periods of Polish history. The egregious abuses of human rights at this time cast long shadows over present-day discussions about emergency regimes. Therefore, since the adoption of the 1997 Constitution, the provisions for the introduction of extraordinary measures have remained dormant, and the discussions about the possibilities of introducing public emergency have been inherently cautious and abstract in nature. However, the COVID-19 outbreak, and the unprecedented circumstances it engendered, prompted a heated discussion regarding the constitutional regime of extraordinary measures in concrete terms.

As mentioned before, the 1997 Polish Constitution distinguishes three types of extraordinary measures. They range from the least burdensome regime (the state of natural disaster) to the regime that allows for the most far-reaching and long-lasting restrictions on fundamental rights (the martial law). Common characteristics of all three types of extraordinary measures include:

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3 See Article 116 paras. 1 and 2 of the Constitution.

4 Act of March 17, 1921 on the Constitution of the Republic of Poland; Constitutional Act of April 23, 1935.

5 The Constitutional Act of February 19, 1947 concerning the organization and powers of the supreme organs of the Republic of Poland

6 Constitution of the Polish People's Republic adopted on July 22, 1952

7 The Constitutional Act of October 17, 1992 on the mutual relations between the legislative and executive institutions of the Republic of Poland and on local self-government

- the temporary modification of the regular competences of the public authorities stemming from the principle of the separation of powers, and the enforcement of the position of the executive branch
- the curtailment of individual freedoms and rights
- the simplification of the law-making procedures and introduction of new sources of law<sup>8</sup>

In addition, the Constitution sets out several rules that need to be observed while introducing extraordinary regimes. These include the exceptional nature of extraordinary measures, the principle of legality, the principle of proportionality, the purpose of limitation, the inalterability of the Constitution and the election laws, and the continuity of the terms of elected offices.

The principle of exceptional nature, set forth in Article 228 para. 1 of the Constitution, states that extraordinary measures may be introduced in situations of danger if ordinary constitutional measures are insufficient. The Constitution does not specify which situations shall be considered “particular danger,” leaving a margin for the executive branch to evaluate the circumstances. They shall be examined together with the provisions pertaining to a given type of extraordinary regime (Articles 229, 230, and 232 of the Constitution) to apply the most appropriate measures.<sup>9</sup> However, in each case, the prerequisite for the introduction of the extraordinary measures, given their *ultima ratio* nature, is the inadequacy (insufficiency) of the regular constitutional mechanisms.

The principle of legality (Article 228 para. 2 of the Constitution) requires that the extraordinary measures be introduced by means of a regulation anchored in a statute, and properly promulgated.<sup>10</sup> The Constitution does not provide a self-standing, autonomous legal basis for the introduction of an extraordinary regime. Consequently, stemming from the rule of legality is the obligation for the legislator to regulate extraordinary measures at the sub-constitutional level. The scope of such regulations shall cover the principles governing the public authorities during public emergency, and the extent of limitation on individual freedom and right.

The principal of proportionality and the limitation of purpose, both stipulated in Article 228 para. 5 of the Constitution, declare that the actions undertaken due to the introduction of an extraordinary measure shall be proportionate to the degree of threat, and shall be intended to achieve the swiftest restoration of normal functioning of the state. The rule of purpose limitation corresponds to the general principle that make extraordinary measures temporary in nature.

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<sup>8</sup> Radziewicz, 2021a; Tuleja, 2020, p. 10.

<sup>9</sup> Radziewicz, 2021a

<sup>10</sup> Such regulation, introducing public emergency regime, might cover issues that are subject to statutory regulation in normal circumstances, see more Radajewski, 2018, pp. 133–146.

The principle of the inalterability of the acts, the very foundation of the Polish legal system, is laid down in Article 228 para. 6 of the Constitution. It declares that during the period of extraordinary measures, the Constitution, the elections to the lower (the *Sejm*) and higher chamber (the *Senat*) of the parliament, the elections to organs of local government, and the presidential electoral law shall not be subject to change. The principle also applies to the statutes of extraordinary measures. It is closely intertwined with the rule of continuity of the terms of elected offices (Article 228 para. 7 of the Constitution), which states that during public emergency, and within 90 days following the termination of this period, the term of office of the *Sejm* may not be shortened, and the elections to the parliament, organs of local government, and presidential elections cannot be held. Therefore, the term of office of these organs shall be appropriately prolonged. The Constitutional Court has emphasized that the reason underlying the postponement of the elections during extraordinary regime is twofold. These provisions are intended to ensure undisturbed operation of the supreme state organs in times of danger, and they are envisioned to protect citizens' right to free and universal elections.<sup>11</sup> The principle of universal elections can be observed only in conditions that ensure a complete freedom to express the will of the voters.

The detailed regulations for the three extraordinary regimes, anchored in the Constitution, are laid down in the following statutes: Act of April 18, 2002 on the State of Natural Disaster (hereinafter: Act on Natural Disaster),<sup>12</sup> Act of June 21, 2002 on the State of Exception (hereinafter: Act on the State of Exception),<sup>13</sup> Act of August 29, 2002 on Martial Law and the Powers of the Supreme Commander of the Armed Forces, and on his Subordination to the Constitutional Authorities of the Republic of Poland (hereinafter: Act on Martial Law).<sup>14</sup> In addition, the Act of November 22, 2002 on Compensation for Losses resulting from the Limitations of Freedoms and Human Rights during the Period of Extraordinary Measures (hereinafter: Act on Compensation) confers on those who incur material losses due to the curtailment of the fundamental rights, therefore, can claim compensation from the State Treasury.<sup>15</sup> All of the aforementioned acts were adopted in a regular legislative procedure,<sup>16</sup> since the Constitution does not create a separate category of legislation or lawmaking procedure for even important systemic problems, such as public emergency regimes.

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<sup>11</sup> The Constitutional Court, ruling of May 26, 1998, Case no. K 17/98.

<sup>12</sup> Act of April 18, 2002 on the State of Natural Disaster

<sup>13</sup> Act of June 21, 2002 on the Emergency State

<sup>14</sup> Act of August 29, 2002 on Martial Law and the Powers of the Supreme Commander of the Armed Forces, and on his Subordination to the Constitutional Authorities of the Republic of Poland

<sup>15</sup> Act of November 22, 2002 on Compensation for Losses resulting from the Limitations of Freedoms and Human Rights during the Period of Extraordinary Measures.

<sup>16</sup> See Article 120 of the Constitution

## 1.2. Types of public emergency regimes

### a) Martial law (*stan wojenny*)

The institution of martial law, that first appeared in the 1921 Constitution, is the most restrictive of all the extraordinary measures provided for in the 1997 Polish Constitution. According to Article 229 of the Constitution, it can be declared in the case of external threats to the state, acts of armed aggression against the territory of Poland, or when an obligation of common defense against aggression arises by virtue of international agreement. Each of these preconditions may constitute a separate ground for the introduction of the martial law, provided that it represents a grave and real threat to the territorial integrity of Poland or its sovereignty, or endangers the life of its inhabitants.<sup>17</sup> Such situation can, most commonly, result from a hostile attitude of another state or an armed aggression. The constitutional regulations are further elaborated in the Act on Martial Law. It specifies that external threats to the state, including those caused by terrorist or cyberspace activities, shall be considered deliberate actions to undermine the independence of Poland, the integrity of its territory, or its economic interests, or prevent or seriously disrupt the normal functioning of the state.<sup>18</sup> The preconditions for the introduction of martial law bear a close resemblance to those prescribed for the declaration of a state of war,<sup>19</sup> therefore, it is not easy to draw a clear demarcation between these two regimes.<sup>20</sup>

The state of martial law can be declared by the president of Poland at the request of the Council of Ministers.<sup>21</sup> This power is exercised in the form of a regulation and stems from the constitutional principle according to which the president shall safeguard the sovereignty and security of the state, and the inviolability and integrity of its territory.<sup>22</sup> The request of the Council of Ministers is an essential formal requirement for the introduction of martial law by the president. The president may comply with the request or reject it.<sup>23</sup> The presidential regulation shall specify the reasons for the introduction of the extraordinary regime, the area on which it is to be declared, and the scope of restrictions on human rights.<sup>24</sup> The

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<sup>17</sup> Radziewicz, 2021b

<sup>18</sup> Article 2 paras. 1 and 1a of the Act on Martial Law

<sup>19</sup> See Article 116 of the Constitution.

<sup>20</sup> A declaration of war may be followed by the introduction of extraordinary measures, however, not necessarily, see also Skrzydło, 2013a; Prokop, 2002, pp. 33–34.

<sup>21</sup> Article 229 of the Constitution, Article 2 para. 1 of the Act on Martial Law. The Council of Ministers of the Republic of Poland, presided by the Prime Minister, is the executive decision-making body of the Polish government (the Cabinet).

<sup>22</sup> Articles 126 para. 2 and 142 para. 1 of the Constitution

<sup>23</sup> Article 3 para. 1 of the Act on Martial Law

<sup>24</sup> Article 3 para. 2 of the Act on Martial Law. Pursuant to Article 229 of the Constitution, the state of martial law can be introduced on the entire territory or only on specific parts.

presidential decision resulting in the introduction of martial law is subject to subsequent review by the parliament. The Constitution requires the president to submit the regulation to the *Sejm* within 48 hours of signing it.<sup>25</sup> The *Sejm*, by an absolute majority of votes taken in the presence of, at least, half the statutory number of deputies, may revoke the presidential regulation.

The procedure to end the state of martial law is similar to its introduction and requires a regulation of the president issued at the request of the Council of Ministers.<sup>26</sup> Martial law may be lifted if the reasons for its introduction no longer apply, and normal functioning of the state can be restored. Both the introduction and the termination of the martial law must be notified to the United Nations Secretary-General and to the Secretary General of the Council of Europe.<sup>27</sup>

#### **b) State of exception (*stan wyjątkowy*)**

The state of exception, provided for by Article 230 of the Polish Constitution, appeared in Polish law in the 1921 Constitution. Unlike the martial law, which refers to external circumstances, the state of exception can be declared in domestic situations, including a threat to the constitutional order of Poland, to the security of its citizens, or to the public order. Each condition, on its own or in conjunction with others, may form grounds for the introduction of the state of exception. The threat to the constitutional order needs to threaten the entire democratic statehood ruled by law and implementing the principles of social justice, such as a *coup d'état* or a secession of a part of the territory.<sup>28</sup> Regarding the security of the Polish citizens or public order, several forms of social unrests may justify the introduction of the exceptional state, such as large-scale protests caused by deepening economic and financial crisis.<sup>29</sup> According to the Act on the State of Exception, which elaborates the constitutional framework, the need to declare the state of exception might arise *inter alia* as a consequence of terrorist or cyberspace activities.<sup>30</sup> The state of exception can be declared on the entire territory or on specific parts of it.

Procedural requirements for the introduction of the state of exception are similar to those prescribed for martial law. This regime may be declared by the president of

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25 Article 231 of the Constitution, similarly: Article 3 para. 1 of the Act on Martial Law

26 Article 8 para. 1 of the Act on Martial Law

27 Article 2 para. 2 of the Act on Martial Law

28 Radziewicz, 2021c. See also the general principles underlying the Polish statehood, stipulated in Article 2 of the Constitution.

29 Radziewicz, 2021c

30 Article 2 para.1 of the Act on the State of Exception

Poland on request of the Council of Ministers.<sup>31</sup> The presidential regulation on the introduction of the state of exception shall specify the reasons for the introduction of such extraordinary measures, the area on which it is to be declared, as well as the scope of restrictions on human rights and the duration of the state of exception. However, unlike the martial law with regard to which the Constitution does not set a time-limit, the state of exception can be introduced for a maximum of 90 days.<sup>32</sup> It can be extended by the president only once, for a maximum of 60 days, if the reasons for its introduction have not ceased to exist, and the normal functioning of the state cannot be restored.<sup>33</sup> Such extension of the state of exception requires the consent of the *Sejm*. The presidential decision for the introduction of the state of exception, or its prolongation, is subject to review by the parliament, as the Constitution requires the regulation to be submitted to the *Sejm* within 48 hours of signing.<sup>34</sup> The *Sejm*, by an absolute majority of votes taken in the presence of, at least, half the statutory number of deputies, may revoke the presidential regulation.

As a rule, the state of exception expires upon the lapse of the time for which it was introduced. However, if the reasons for its introduction have ceased to exist and the normal functioning of the state can be restored, the president, at the request of the Council of Ministers, may lift the emergency regime before the lapse of the specified time.<sup>35</sup> Both the introduction and the expiry of the state of exception must be notified to the United Nations Secretary-General and to the Secretary General of the Council of Europe.<sup>36</sup>

### **c) State of natural disaster (*stan klęski żywiołowej*)**

The state of natural disaster, unlike the martial law and the state of exception, does not have a longstanding tradition in Poland. It first appeared as a separate extraordinary regime in the 1997 Constitution, and its regulations differ in several respects from that of the martial law and the state of emergency. Contrary to martial law and the state of emergency, the state of natural disaster is not political in nature. It implies a random event, not caused intentionally by human activity.<sup>37</sup> According to the coherent wording of the Constitution and the Act on Natural Disaster, the state of natural disaster can be declared to

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31 Article 230 of the Constitution, similarly: Article 2 para. 1 of the Act on the State of Exception

32 Article 3 para. 1 of the Act on the State of Exception

33 Article 3 para. 1 of the Act on the State of Exception. Article 5 para. 1 of the Act on the State of Exception

34 Article 231 of the Constitution, similarly: Article 3 para. 1 of the Act on the State of Exception

35 Article 5 para. 2 of the Act on the State of Exception

36 Article 7 of the Act on the State of Exception

37 Complak, 2014; Skrzydło, 2013b

prevent or to eliminate the effects of natural catastrophes or technological failures, which bear characteristics of a natural disaster.<sup>38</sup>

A state of natural disaster may be declared on the entire territory or on specific parts of it where the natural disaster occurred, where its effects took place, or where it is supposed to take place.<sup>39</sup> The duration of this extraordinary measure must not exceed 30 days; however, it may be extended with the consent of the *Sejm*. The power to declare a state of natural disaster is vested entirely in the Council of Ministers, which may introduce such extraordinary measures on its own or at the request of a competent *voivode*.<sup>40</sup> The regulation of the Council of Ministers shall specify the reasons for the introduction of the state of natural disaster, the area to which it shall apply, its duration, and the necessary limitations to the fundamental rights and freedoms being placed.<sup>41</sup> The state of natural disaster can be lifted by the Council of Ministers before the end of the specified time, if the reasons for its introduction no longer apply.<sup>42</sup>

### ***1.3. Quasi- public emergency regimes***

The jurisprudence of the Polish Constitutional Court, together with the Polish legal doctrine, present an exhaustive catalogue of extraordinary measures stemming from the Constitution which comprises the martial law, the state of exception, and the state of natural disaster.<sup>43</sup> No other extraconstitutional regime can be considered as public emergency within the meaning of the Constitution. As the Polish Constitutional Court has observed, it would be contrary to the Constitution if an emergency situation expected to occur in the

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38 Article 232 of the Constitution, similarly, Article 2 of the Act on Natural Disaster. Article 3 of the Act on Natural Disaster provides for the relevant definitions: (i) natural disaster: a natural catastrophe or a technical failure, the effects of which threaten the life or health of a large number of people, property in large sizes, or the environment in large areas, whose assistance and protection can be effectively undertaken only with the use of extraordinary measures, in cooperation with various bodies and institutions, as well as specialized services and formations operating under uniform leadership; (ii) natural catastrophe: an event related to the action of natural forces, in particular, atmospheric discharges, seismic tremors, strong winds, intense precipitation, long-term occurrence of extreme temperatures, landslides, fires, droughts, floods, ice phenomena on rivers and sea, lakes and water reservoirs, mass occurrence of pests, animals, or plant diseases, human infectious diseases, or by the action of another element of nature, (iii) technical failure: a sudden, unforeseen damage or destruction of a building, technical device, or system of technical devices causing a break in their use or a loss of their properties. A natural disaster or a technical failure can also be caused by events in cyberspace and acts of a terrorist nature.

39 Article 4 para. 1 of the Act on Natural Disaster

40 Article 5 para. 1 of the Act on Natural Disaster

41 Article 5 para. 2 of the Act on Natural Disaster

42 Article 6 para 2. of the Act on Natural Disaster

43 The Constitutional Court, ruling of April 21, 2009, Case No. K 50/07; decision (order) of March 6, 2001, Case No. S 1/01. See also: Radziejewicz, 2021a; Kardas, 2020, p. 12, Tuleja, 2020, p. 15.



course of the “normal” functioning of the state is regulated at a sub-constitutional level in the characteristics of the “extraordinary measures.”<sup>44</sup> Nevertheless, the Polish law provides for some institutions that may be activated in response to crises, however, do not call for public emergency. These include the institution of crisis management and the state of epidemic or epidemic threat.

The Polish crisis management system is regulated by the Act of April 26, 2007, on Crisis Management (hereinafter: Act on Crisis Management).<sup>45</sup> According to the definition laid down in Article 2, crisis management is the activity of public administration bodies and an element of national security management, which consists of preventing crisis situations, preparing to take control over them through planned activities, reacting in the event of crisis situations, eliminating their effects, and restoring resources and critical infrastructure. The case-law of the Constitutional Court indicates that a “crisis situation” lies within the normal functioning of the state and, as such, shall not be confused with the constitutional extraordinary measures.<sup>46</sup> However, such situations, too, require public authorities and Armed Forces to take special measures to eliminate or reduce threats and to effectively monitor the situation. Therefore, the crisis management system is an important element to ensure national security and should be considered complementary to the regulation on public emergency.<sup>47</sup>

The Council of Ministers is the public authority responsible for crisis management at the central level.<sup>48</sup> The prime minister is responsible for determining the list of tasks and procedures and the public authorities, and the execution of crisis management.<sup>49</sup> The obligations arising from the membership of the North Atlantic Treaty Organization need to be taken into account. In addition, the Act on Crisis Management regulates the responsibilities in connection with crisis management at a regional level (in *voivodships*, *powiats*, and *gminas*).<sup>50</sup>

The rules of conduct during a state of epidemic threat or a state of epidemic are regulated in the Act of December 5, 2008, on Preventing and Combating Infections and Infectious Diseases in Humans (hereinafter: Act on Infectious Diseases).<sup>51</sup> Within the Act on Infectious Diseases, “the state of an epidemic threat” means a legal situation introduced in a given area in connection with the risk of an epidemic that may require preventive measures,

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44 The Constitutional Court, ruling of April 21, 2009, Case No. K 50/07. See also: Tuleja, 2021a

45 Act of April 26, 2007 on the Crisis Management

46 The Constitutional Court, ruling of April 21, 2009, Case No. K 50/07; ruling of July 3, 2012, Case No. K 22/09.

47 The Constitutional Court, ruling of April 21, 2009, Case No. K 50/07.

48 Article 7 para. 1 of the Act on Crisis Management

49 Article 7 para. 4 of the Act on Crisis Management

50 Respectively: provinces, districts, and communes/municipalities. See Articles 14–19 of the Act on Crisis Management

51 Act of December 5, 2008 on preventing and combating infections and infectious diseases in humans

while “the state of epidemic” is a legal situation in connection with an epidemic that require anti-epidemic and preventive measures to minimize the adverse effects.<sup>52</sup>

If an epidemic threat or an epidemic occurs in *voivodeship*, then the state of epidemic threat or the state of epidemic is declared by the *voivode* on the entire *voivodeship* or a part of it, at the request of the Regional Sanitary Inspector.<sup>53</sup> If more than one *voivodeship* is impacted, the state of epidemic threat or epidemic state is announced by the Minister of Health upon consultation with the Minister of Public Administration, at the request of the Chief Sanitary Inspector.<sup>54</sup> Both the state of epidemic threat and the state of epidemic must be declared by way of a regulation. The Act on Infectious Diseases requires such regulation to be immediately promulgated in the appropriate official journal. Additionally, the *voivode* is obliged to inform the citizens about the obligations arising from such regulation in a customary manner.<sup>55</sup> The Act on Infectious Diseases provides for the possibility to impose temporary limitations on individual rights and freedoms, such the freedom of movement and assembly, put restrictions on the marketing and use of certain items or food products, or on the functioning of specific institutions or workplaces.<sup>56</sup> The freedom of economic activity may also be curtailed. However, neither the state of epidemic threat nor the state of epidemic is provided for in the Polish Constitution as the legal ground for limiting human rights beyond the general limitation clause set forth in Article 31 para. 3 of the Constitution.<sup>57</sup> Unless one of the constitutional public emergency regimes has also been declared, any restrictions on fundamental rights and freedoms shall be evaluated in accordance with the principles applicable during the normal functioning of the state.

## 2. Limitations of fundamental rights

In the 1997 Polish Constitution, fundamental rights and freedoms are enumerated in Chapter II, which begins with an enunciation of the general principles. Article 30, which is concerned with the source of the fundamental rights, declares that “the natural and inalienable dignity of the human being constitutes the source of the freedoms and rights of man and citizen. It is inviolable, and its respect and protection are the obligation of public

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52 Article 2 points 22-23 of the Act on Infectious Diseases

53 Article 46 para. 1 of the Act on Infectious Diseases

54 Article 46 para. 2 of the Act on Infectious Diseases

55 Article 46 paras. 5–6 and Article 46b of the Act on Infectious Diseases

56 Article 46 para. 4 of the Act on Infectious Diseases

57 Gajda, 2020, p. 19; Kardas, 2020, pp. 13–14.

authorities.<sup>58</sup> Nonetheless, the constitutional rights and freedoms are not absolute in nature and may be subject to certain limitations, both in time of public emergency and during the normal functioning of the state.

The general rules governing the restriction of human rights and freedoms are laid down in Article 31 para. 3 of the Constitution (the general limitation clause) and are supplemented by several right-specific limitation clauses, which must be read together with the general principles. According to the general limitation clause, which applies to the entire catalogue of constitutional rights, any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute and only when it is necessary in a democratic state to protect security, public order, the natural environment, health, public morality, or the freedoms and rights of others. The restrictions must not infringe upon the essence of the rights. Therefore, in normal situations, derogation of human rights is not permissible and the enjoyment of the rights are limited only to the extent that they do not violate the essence of the rights. The Constitution lays down the principle of proportionality, which requires that the scope of interference with the constitutional rights shall be proportionate to the public interest protected by such measures. The Polish Constitutional Court applies a three-part test of proportionality to assess the lawfulness of the restrictive measures, which requires the criteria of suitability, necessity, and proportionality *sensu stricto* be met.<sup>59</sup> According to the proportionality test, any restrictions on constitutional guarantees must be suitable to achieve the objective pursued and necessary to achieve that objective, provided no less restrictive alternative is available and all the burdens imposed and the benefits thereof are balanced.<sup>60</sup>

The Constitution sets out special rules for the limitation of human rights in times of public emergency (see Article 233 of the Constitution). In line with international standards, it permits the public authorities to derogate constitutional rights and freedoms when extraordinary measures are in force.<sup>61</sup> While laying down the rules of conduct during public emergency, the Constitution reiterates the principle of proportionality; however, its interpretation and application differs from that of the normal situation. Article 288 para. 5 states that actions undertaken due to the introduction of extraordinary measure and

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58 Article 30 of the Constitution. On the human rights protection under the 1997 Constitution, see e.g., Cholewinski, 1998, pp. 236-291.

59 For the relevant case-law of the Polish Constitutional Court see e.g.: ruling of December 19, 2002, Case No. K 33/02; ruling of October 3, 2000, Case No. K 33/99; ruling of April 11, 2006, Case No. SK 57/04; ruling of November 4, 2014, Case No. SK 55/13.

60 See more: Śledzińska-Simon, 2020; Tuleja, 2021b; Garlicki and Wojtyczek, 2016

61 See, e.g., Article 4 of the International Covenant on Civil and Political Rights, UN General Assembly resolution 2200A (XXI) of December 16, 1966; Article 15 of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) of November 4, 1950

the curtailment of individual guarantees must be proportionate to the degree of threat and intended to achieve the swiftest restoration of conditions for the normal functioning of the state. The higher the level of threat, the more far-reaching the restrictions may be; however, a lowering of threat must lead to removal or, at least, diminishing of the restrictions imposed.<sup>62</sup>

The specific rule of proportionality and its “softer standards” for restriction of human rights in time of public emergency do not apply to the most essential human rights. The limitation of such rights, albeit possible, must meet the requirements specified in the general limitation clause, which include *inter alia* the requirement of non-interference with the essence of the rights.<sup>63</sup> Therefore, these rights can be referred to as non-derogable rights.

The list of non-derogable rights varies depending upon the type of emergency regime. During the martial law and the state of exception, the guarantees relating to human dignity, citizenship, the protection of life, the prohibition of torture and inhumane treatment, the ascription of criminal responsibility, the access to a court, the protection of private life, the freedom of conscience and religion, the right to a petition, and parental and children’s rights are non-derogable.<sup>64</sup> Restrictions upon these rights must respect the general limitation clause, while restrictions on any other rights is possible under the requirements set out in Article 228 para. 5 and Article 233 para. 2 (non-discrimination on the grounds of race, gender, language, belief, social origin, birth, or property).

In case of a state of natural disaster, the Constitution provides a list of derogable rights, allowing the application of “softer standards” under Article 228 para. 5 and derogation with respect to the following guarantees: the freedom of economic activity, personal freedom, the inviolability of the home, freedom of movement and residence within Poland, the right to strike, ownership rights, freedom to choose an occupation, the right to safe and hygienic conditions of work, and the right to rest.<sup>65</sup> All other rights are considered non-derogable during a natural disaster. Any restriction upon such rights shall be imposed in accordance with the general limitation clause (Article 31 para. 3), which does not allow the interference with the essence of the rights in accordance with the general anti-discrimination clause (Article 32 para. 2 of the Constitution).

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62 Florczak-Wątor, 2020, p. 18.

63 Florczak-Wątor, 2021; see also Jabłoński, 2016, pp. 186–187.

64 Article 233 para. 1 of the Constitution

65 Article 233 para. 3 of the Constitution

### 3. Public emergency regimes in practice (except for COVID-19)

Since the adoption of its first constitutional regulation on emergency regimes in 1921, Poland has not resorted to extraordinary measures often. Public emergency was introduced a few times during the interwar period, in connection with various internal events (e.g., the assassination of a president in 1922 and *coup d'état* in 1926) and external threats (the German attack on Poland in 1939).<sup>66</sup>

The most infamous case of public emergency in Poland took place under the non-democratic regime. In December 1981, a state of martial law was imposed by the communist government “due to the threat to the vital interests of the state and nation.”<sup>67</sup> The Military Council of National Salvation (*Wojskowa Rada Ocalenia Narodowego*) was formed to put an end to the anti-communist demonstrations and to suppress the opposition by force and significant curtailment of individual freedom. The military *junta* was headed by the First Secretary of the Polish United Workers Party, General Wojciech Jaruzelski. Although ruled unconstitutional by the Polish Constitutional Court in 2011, the lawfulness and necessity of the 1981 martial law remains a subject of social and historical controversy. The premises and circumstances of the martial law have raised intense public discussions for years and remain unclear to this day.<sup>68</sup>

The institution of martial law, not included in the original text of the 1952 Constitution of the People's Republic of Poland, was added in 1976 by a constitutional amendment. Para. 2 of the amended Article 33 provided that the Council of State may declare martial law, in part or in the entire territory of the Polish People's Republic, if it is required for the defense or security of the state.

The 1981 martial law was introduced with several acts issued by the Council of State on December 12, 1981, which took effect on December 13, 1981. These included the decree on the martial law,<sup>69</sup> the resolution on the introduction of martial law for state security, the decree on special proceedings of crimes and minor offenses during martial law,<sup>70</sup> and the decree on the transfer of certain crimes to the jurisdiction of military courts and the change in the system of military courts and military organizational units of the Public Prosecutor's Office of the People's Republic of Poland during martial law.<sup>71</sup> The acts of the Council of States were

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<sup>66</sup> Socha, 2013, pp. 205-209.

<sup>67</sup> Resolution of December 12, 1981 on the introduction of martial law for reasons of state security

<sup>68</sup> On 1981–1983 Martial law in Poland, see, e.g., Paczkowski and Byrne, 2008; Polak, 2016.

<sup>69</sup> Decree of December 12, 1981 on the martial law.

<sup>70</sup> Decree on special proceedings in cases of crimes and minor offenses during the period of martial law

<sup>71</sup> Decree on the transfer of certain crimes to the jurisdiction of military courts and on the change in the system of military courts and military organizational units of the Public Prosecutor's Office of the People's Republic of Poland during martial law

subsequently confirmed by the *Sejm* in the Act of January 25, 1982, on Special Legal Regulations During the Period of Martial Law.<sup>72</sup>

The reasons for the imposition of martial law were specified in the resolution of the Council of State of December 12, 1981. These implied a threat to the vital interests of the state and the nation and referred to the need “to counteract the further collapse of social discipline and to create effective protection of peace and public order, as well as to ensure strict compliance with the law and respect for the principles of social coexistence.” It is claimed to be beyond doubt that the protection of domestic sovereignty and the socialist regime was the reason for the introduction of the 1981 public emergency.<sup>73</sup> However, whether the protection of domestic sovereignty through martial law was in conformity with the 1952 Constitution remains controversial.

The 1952 Constitution empowered the Council of State to issue decrees only between parliamentary sessions, outside which the decision was to be taken by the *Sejm*.<sup>74</sup> However, at the time the martial law was declared, the *Sejm* was in session; therefore, the lawfulness and constitutionality of the decrees became questionable, even though they were subsequently confirmed by an act of parliament. The Polish Constitutional Tribunal, in its judgment of March 16, 2011, found that two of the decrees of the Council of State violated the principle of the rule of law set forth in Article 7 of the 1997 Constitution in connection with Article 31 para. 1 of the 1952 Constitution that allowed the Council of State to decree while the *Sejm* was not in session.<sup>75</sup> In addition, the Constitutional Court established an infringement of Article 15 para. 1 of the International Covenant of Civil and Political Rights, which prohibits punishment based on retroactive application of the law. The decrees issued by the Council of the State on December 12, 1981, were, beyond doubt, retroactive in nature. Their provisions stipulated that the decrees entered into force on the day of their publication in the official gazette, with the retroactive effect from the date of their adoption.<sup>76</sup> The violation of the principle *lex retro non agit* was also due to the fact that the official journal where they were promulgated, as a prerequisite for their enactment, was backdated.<sup>77</sup> Some authors disagree with the Constitutional Tribunal scrutinizing the constitutionality of the acts that had lost their binding force. It has been pointed out that such conduct, too, amounts to a breach of non-retroactivity.<sup>78</sup>

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72 Act of January 25, 1982 on special legal regulations during the period of martial law

73 Eckhardt, 2012, pp. 183–184.

74 1952 Constitution of the Polish People’s Republic, Article 31 para. 1.

75 The Constitutional Court, ruling of March 16, 2011, Case no. K 35/08. The following two acts were deemed unconstitutional: the Decree of December 12, 1981 on martial law and the Decree on special proceedings in cases of crimes and minor offenses during martial law.

76 See Article 61 of the Decree of December 12, 1981 on the martial law and Article 25 of the Decree on special proceedings in cases of crimes and minor offenses during martial law.

77 Mażewski, 2013, p. 125.

78 Zdziennicki, 2013, p. 178.

The 1981 martial law was lifted in 1983. Earlier, it was suspended due to the adoption of the Act of December 18, 1982, on the amendment of the Act on Special Legal Regulations During the Period of Martial Law.<sup>79</sup> However, this suspension was tantamount to continuing the emergency regime with less severe restrictions on the fundamental rights.<sup>80</sup> The “suspended” martial law continued to be in force until the Council of the State’s resolution of July 20, 1983, on the abolition of martial law.<sup>81</sup>

Under the democratic rule since 1989, Poland has not witnessed any public emergency regimes.<sup>82</sup> Nevertheless, the possibility was considered multiple times, mainly in the face of severe floods in 1997, 2001, and 2010, entailing a threat to the life and health of Polish citizens, and massive material damage.<sup>83</sup> Such events, classified as natural disaster, confronted the Polish authorities with the dilemma of introducing a state of natural disaster. Eventually, no constitutional emergency regime was triggered, which indicated that the Polish regulation on extraordinary measures does not encourage its practical application. This is associated with a distrustful attitude toward the extraordinary measures and with legal uncertainties regarding the premises, conditions, and consequences of public emergency.<sup>84</sup> In 2010, a natural disaster occurred ahead of the presidential elections, a situation that repeated in 2020 during the COVID-19 pandemic. This gave rise to further political considerations in view of the principle of the continuity of the terms of the elected offices, which require that elections to be postponed during public emergency, and the term of office to be prolonged.<sup>85</sup>

#### **4. Experiences of COVID-19 from the aspect of constitutional law**

The government’s response to the outbreak of the coronavirus pandemic in March 2020 was prompt and decisive. It triggered an increased activity of executive bodies and the adoption of several protective and restrictive measures under the 2008 Act on Infectious Diseases, and the newly adopted Act of March 2, 2020 on Special Solutions Related to Preventing, Counteracting, and Combating COVID-19, Other Infectious Diseases, and Crisis Situations

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79 Act of December 18, 1982 on the amendment of the Act on special legal regulations during the period of martial law

80 Eckhardt, 2012, p. 88.

81 Resolution of July 20, 1983 on the abolition of martial law

82 As of the time of this manuscript (June 2021)

83 Brzeziński, 2013, p. 34.

84 Brzeziński, 2013, p. 35.

85 Brzeziński, 2013, pp. 41–43.

Arising Therefrom (hereinafter: the COVID Act).<sup>86</sup> Soon after the outbreak of the pandemic, the Polish government realized that the existing procedures, envisaged in the 2008 Act on Infectious Diseases to cope with epidemics in general terms, were inadequate to meet the scale of the threat, hence, the adoption of a COVID-specific act.<sup>87</sup> Adopted on March 2, 2020, it entered into force on March 8, 2020 (patient zero with COVID-19 was reported on March 4, 2020).

On March 13, 2020, the state of epidemic threat was declared in Poland through a regulation issued by the Minister of Health.<sup>88</sup> It was cancelled on March 20, 2020, and a state of epidemic was announced through another ministry regulation.<sup>89</sup> The state of epidemic threat and, subsequently, the state of epidemic served as the legal anchor for the government's response throughout the COVID crisis in Poland as none of the extraordinary regimes were invoked. While declaring the state of epidemic threat and the state of epidemic, the Ministry of Health imposed severe restrictions on the fundamental rights and freedoms with the purpose of limiting the spread of COVID-19. The restrictions concerned the freedom of movement, assembly, and religion. Later, further extensive limitations in various areas of activity were implemented by the Council of Ministers.<sup>90</sup> As a result of an amendment introduced by the COVID Act, a blank authorization appeared in the Act on Infectious Diseases, which enabled the Cabinet to adopt secondary legislation, restricting human rights and fundamental freedoms with the view to counter the epidemic threat or the epidemic.<sup>91</sup>

The legal framework of the crisis management adopted by the Polish government during the COVID-19 pandemic has been widely discussed. Several issues have been identified that require deeper consideration from the point of view of constitutional regulations. The government's decision to not declare a state of natural disaster sparked a heated discussion on the premises for the introduction of extraordinary measures. The question was prompted as to whether, and to what extent, public authorities enjoy margin of appreciation in deciding upon the introduction of public emergency. In addition, several concerns were expressed

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86 Act of March 2, 2020 on Special Solutions Related to Preventing, Counteracting, and Combating COVID-19, Other Infectious Diseases, and Crisis Situations Arising Therefrom

87 Zubik and Łukowiak, 2020, pp. 175–176.

88 Regulation of the Ministry of Health of March 13, 2020 on the announcement of the state of epidemic threat on the territory of the Republic of Poland

89 Regulation of the Ministry of Health of March 20, 2020 on the announcement of the state of epidemic on the territory of the Republic of Poland

90 See, e.g., Regulation of the Council of Ministers of March 31, 2020 on the establishment of certain restrictions, orders, and bans in connection with the state of epidemic; Regulation of the Council of Ministers of November 26, 2020 on the establishment of certain restrictions, orders, and bans in connection with the state of epidemic; Regulation of the Council of Ministers of May 6, 2021 on the establishment of certain restrictions, orders, and bans in connection with the state of epidemic

91 See Articles 46a and 46b of the Act on Infectious Diseases, added by the COVID Act



about the scope of restrictions on the constitutional freedoms and rights, in terms of their consistency with the general limitation clause prescribed by the Constitution for any limitations taking place within “ordinary” circumstances. The fact that such restrictive measures were adopted by means of a secondary legislation also gave rise to doubts about the constitutional principle that required imposed limitations upon human rights by a statute before public emergency is announced. Furthermore, the question was prompted as to the liability of the state for losses resulting from the restrictions on business activity during the COVID-19 pandemic. As will be discussed below, the Constitutional Tribunal was confronted with a request to scrutinize the provisions of the Civil Code relevant to the liability of the public authorities. It must be mentioned that during the COVID-19 pandemic, presidential elections were due to be held in Poland. Therefore, the continuity of the terms of the elected offices, being one of the leading principles governing the extraordinary measures, became a subject of constitutional debate.

#### ***4.1. The government’s discretion to declare public emergency***

The wording of the 1997 Polish Constitution *prima facie* leads to the conclusion that the Constitution allows for, but does not mandate, the introduction of extraordinary measures.<sup>92</sup> However, many authors concur that the executive authorities, although enjoy a wide margin of discretion in determining whether there are indications to declare public emergency, do not have complete freedom of exercising the discretion.<sup>93</sup> According to this point of view, Article 228 para. 1 of the Constitution, in fact, imposes an obligation upon the authorities to declare extraordinary measures once the conditions of public emergency are met. Thus, the executive authorities are obliged to issue a regulation for the most fitting emergency regime to safeguard the constitutional order of the state, and the rights and freedoms of its citizens. It is argued that the unprecedented situation caused by COVID-19 called for the introduction of the state of natural disaster. The COVID-19 pandemic must be considered both a natural disaster and a natural catastrophe, according to the definitions provided in Article 3 para. 1, points 1 and 2 of the Act on the State of Natural Disaster. Some authors claim that the state of natural disaster should have been declared by the Council of Ministers on March 12, 2020,

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92 See, e.g., Article 228 para. 1 of the Constitution: “In situations of particular danger, if ordinary constitutional measures are inadequate, any of the following appropriate extraordinary measures may be introduced: martial law, a state of exception, or a state of natural disaster.” or Article 232 of the Constitution: “In order to prevent or remove the consequences of a natural catastrophe or a technological accident exhibiting characteristics of a natural disaster, the Council of Ministers may introduce, for a period no longer than 30 days, a state of natural disaster in a part of or upon the whole territory of the State.”

93 See, e.g., Florczak-Wątor, 2020, pp. 8–9; Kardas, 2020, pp. 10–11; Tuleja, 2020, pp. 8–10.

along with the announcement of the state of epidemic threat.<sup>94</sup> Since nothing prevents the simultaneous introduction of public emergency and the state of epidemic threat or epidemic, such a conduct would have provided for better protection of individual rights and freedoms. This view is further supported by the fact that countering the pandemic is an obligation of the public authorities, set forth in explicit terms, in Article 68 para. 4 of the Constitution.<sup>95</sup> In order to effectively face the challenges posed by the COVID-19 pandemic, the government needed to resort to restrictions beyond those allowed under the general limitation clause in Article 31 para 3. of the Constitution. This clearly indicates that the regular constitutional measures were not sufficient; therefore, the situation called for the introduction of public emergency.<sup>96</sup>

In the nationwide debate on the government's response to COVID-19, the Supreme Court of Poland took the opposite stand. While hearing an election dispute related to the 2020 presidential elections, the Supreme Court ruled that it remains entirely within the discretion of public authorities to decide whether extraordinary measures shall be introduced.<sup>97</sup> According to the court, the Council of Ministers had no obligation to introduce a state of natural disaster, as long as there was a possibility to counter the pandemic with regular measures, provided for in the 2008 Act on Infectious Diseases, such as the state of epidemic threat or the state of epidemic. A similar standpoint was presented by some authors who claimed that public authorities were under no obligation to declare public emergency, even if there were circumstances that justified such measures.<sup>98</sup> These considerations are rooted in the principle of the exceptional nature of public emergency, whereby, such regimes shall be used only as a last resort. Since the introduction of the extraordinary measures is a radical and far-reaching response, public authorities are obliged to refrain from adopting such measures if possible.

Regardless of different standpoints, it is evident that the Council of Ministers did not formally resort to the constitutional provisions allowing for the introduction of extraordinary measures. The state of epidemic threat and the state of epidemic, declared on March 13, 2020, and March 20, 2020, respectively, do not qualify as extraordinary measures (public emergency) within the Constitution. This observation is of particular importance and relevance in the debate on the legality of restrictions imposed by the government to combat the COVID-19 pandemic.

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94 Florczak-Wątor, 2020, p. 8.

95 According to Article 68 para. 4 of the Constitution, public authorities shall combat epidemic illnesses and prevent the negative health consequences of degradation of the environment.

96 Tuleja, 2020, p. 8.

97 The Supreme Court, decision of July 28, 2020, Case No. I NSW 2849/20.

98 Szmulik and Szymanek, 2020, p. 31.

#### **4.2. Restrictions of human rights during COVID-19 pandemic**

The Polish Constitution lays down rules for limiting fundamental rights and freedoms, both in regular times and in times of public emergency. During the normal functioning of the state, restrictions on human rights are permissible if they comply with the general and right-specific limitation clauses provided in the Constitution (see above). During public emergency, however, Article 31 para. 3 of the Constitution is no longer the default for restricting human rights and freedoms, and the Constitution allows for more extensive interference. Therefore, the key issue is to determine the precise legal regime to introduce and enforce. Since no extraordinary measures were evoked during the COVID-19 pandemic in Poland, the conduct of the state organs needs to be assessed under the general rules applicable in regular times, from the point of view of human rights limitations.

The restrictions on the fundamental rights, to counter the COVID-19 pandemic, were put in place by the Polish government through regulations (i.e., secondary legislation), while the general limitation clause requires primary legislation. The regulations issued by the Minister of Health on March 13 and March 20, 2020, announcing the state of epidemic threat and the state of epidemic, imposed several restrictions on the freedom of movement, assembly, and publicly professing religion. The questionable remains whether the 2008 Act on Infectious Diseases, which makes it possible for the Ministry of Health and the Cabinet to limit fundamental rights in a regulation,<sup>99</sup> complies with the requirements set out in Article 31 para. 3 of the Constitution. In 2020, several cases were filed by Polish citizens who sought legal remedy against the decision of the public authorities to impose fine for the violation of the restrictive measures (e.g., ban on free movement or the mandatory mask-wearing). In these individual cases, Polish administrative courts examined the constitutionality of the regulations through which restrictions were imposed.<sup>100</sup> According to the courts, restrictions to human rights can be put in place, exclusively, by means of the primary legislation and must observe the principles stipulated in the general and specific limitation clauses provided in the

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<sup>99</sup> See Article 46 para. 4 and Articles 46a and 46b of the Act on Infectious Diseases.

<sup>100</sup> See, e.g., Voivodship Administrative Court in Warsaw, ruling of January 12, 2021, Case No. VII SA/Wa 1545/20 (concerning mandatory mask-wearing), Voivodship Administrative Court in Warsaw, ruling of January 28, 2021, Case No. VII SA/Wa 1515/20 (concerning the ban on free movement), Voivodship Administrative Court in Warsaw, ruling of February 2, 2021, Case No. VII SA/Wa 1761/20 (concerning mandatory distancing measures), Voivodship Administrative Court in Gdańsk, ruling of January 28, 2021 r., III SA/Gd 703/20 (concerning the ban on free assembly), Voivodship Administrative Court in Gliwice, ruling of January 12, 2021, Case No. II SA/Gl 421/20 (concerning mandatory quarantine). While examining the constitutionality of the governmental regulations, the courts referred to Article 178 para. 1 of the Constitution, which states that “judges, within the exercise of their office, shall be independent and subject only to the Constitution and statutes.” Therefore, it shall be assumed that the authority of the courts, including administrative courts, covers the review of the constitutionality and legality of such a regulation that constitutes a basic act in an individual case.

Constitution, unless extraordinary measures were in force. Imposing limitations in lower legislation in regular times is a breach of the Constitution, in particular, the principle of legality. Therefore, the government regulations do not constitute valid and legitimate grounds for limiting citizens' rights; thus, the decisions of the sanitary authorities imposing fines for non-compliance with the COVID restrictions were cancelled by the administrative courts.

Although nearly all the courts expressed a consistent and concurring view on the subject, a different approach was also applied. One of the courts while hearing an appeal against a fine for violation of the ban on conducting economic activity found the restrictions legitimate and compatible with the Constitution.<sup>101</sup> According to the court, during the times of pandemic, existing rules should be interpreted in a way to protect citizens, as much as possible, against "the behavior of highly irresponsible entities who do not comply with the regulations aimed at mitigating the threat in the entire country." The court reminded that the obligation of public authorities to counter the pandemic stems directly from Article 68 para. 4 of the Constitution and corresponds to everyone's right to protection of health set out in Article 68 para. 1. According to the court, the sanctions were based on the provisions of the 2008 Act on Infectious Diseases, while the government regulation of March 31, 2020, prohibiting entrepreneurs from pursuing business activities in specific areas, provided for a detailed implementation of the statutory provisions. Since the imposition of the fine was found statutory and lawful, the appeal was overruled.

As mentioned earlier, the restrictions upon fundamental rights must meet three requirements – suitability, necessity, and proportionality *sensu stricto*. It is argued that the restrictions during the COVID-19 pandemic, such as the total ban on free assembly, do not pass the regular proportionality test under Article 31 para. 3 of the Constitution.<sup>102</sup> Furthermore, since no emergency regime was put into operation, the public authorities were bound by the prohibition of infringing upon the essence of the rights stemming from the general limitation clause. Nevertheless, several measures introduced by the Minister of Health and the Council of Ministers amounted to a derogation of the constitutional guarantees. For example, the regulation of the Minister of Health on March 24, 2020, introduced a general ban on assembly, including assemblies organized by churches,<sup>103</sup> while the regulation of the Council of Ministers issued on March 31, 2020, established a general prohibition on personal movement, except for essential needs, and entirely prohibited entrepreneurs from several branches from pursuing

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101 Voivodship Administrative Court in Bydgoszcz, ruling of November 17, 2020, Case No. II SA/Bd 834/20 (concerning the ban on conducting economic activities).

102 Florczak-Wątor, 2020, p. 18; Gajda, 2020, pp. 23–26; Tuleja, 2020, p. 17.

103 Regulation of the Minister of Health on March 24, 2020, amending the regulation on the announcement of the state of epidemic on the territory of the Republic of Poland

economic activities.<sup>104</sup> Without questioning the need for restrictions to limit the spread of the coronavirus, several authors concurred that imposing such far-reaching measures could have been lawfully done within the framework of one of the constitutional emergency regimes.<sup>105</sup>

#### 4.3. *Liability of the state for damages*

The economic losses incurred because of the limitation of the fundamental rights during the public emergency can be compensated by the State Treasury.<sup>106</sup> The compensation can be claimed even if the conduct of the state was lawful and necessary. However, during the COVID-19 pandemic, the Polish government did not resort to extraordinary measures; therefore, the provisions of the Act on Compensation did not apply. Thus, the economic losses could be compensated according to the regular regime under Article 77 para. 1 of the Constitution, which offers compensation for any harm done by any action of the public authorities contrary to law. It should be noted that every court is entitled to declare the restrictions imposed in response to the COVID-19 pandemic as unlawful in accordance with 417<sup>1</sup> para. 1 of the Civil Code.<sup>107</sup> Since judges are independent and subject only to the Constitution and statutes (Article 178 of the Constitution), in individual cases, the courts may autonomously rule on the constitutionality of the governmental regulations by virtue of which the restrictions were imposed.<sup>108</sup>

Several months after the outbreak of the pandemic, two separate cases were brought before the Constitutional Court for it to scrutinize the constitutionality of 417<sup>1</sup> para. 1 of the Civil Code.<sup>109</sup> One of them was filed by the Prime Minister and the other one by the Speaker of the *Sejm* on the grounds that it is contrary to the Constitution that the Civil Code does not provide for an explicit requirement and only the Constitutional Court has the power to declare unconstitutionality for the purpose of claiming compensations. At the moment of writing, the cases were still pending before the Constitutional Court; its outcome may have a large bearing on the practical implementation of the compensation scheme under 417<sup>1</sup> para. 1 of the Civil Code. However, regardless of what the judicial body declares as the unlawfulness of a normative act, in compensation cases against the state, the burden of proof will rest with

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104 Regulation of the Council of Ministers on March 31, 2020 on the establishment of certain restrictions, orders, and bans in connection with the state of epidemic

105 Gajda, 2020, p. 25; Florczak-Wątor, 2020, p. 15; Zubik and Łukowiak, 2020, p. 177; Drinóczy and Bień-Kacala, 2020, p. 190.

106 Article 228 para. 4 of the Constitution, similarly Article 2 para. 1 of the Act on Compensation.

107 Act of April 23, 1964 on Civil Code. Article 417<sup>1</sup> para. 1 of the Civil Code states that "If the damage has been inflicted by issuing a normative act, one may demand its redress after it has been acknowledged in an appropriate proceeding that this act contradicts the Constitution, a ratified international treaty, or a statute."

108 Tuleja, 2020, p. 17; Florczak-Wątor, 2020, p. 19.

109 Cases No. K 18/20 and 21/20.

the citizen (the claimant) to demonstrate the reality and extent of the damage and the causal link between the damage and the adoption of unlawful restrictive measures.<sup>110</sup>

#### 4.4. *The 2020 presidential election*

Every five years, the Polish citizens elect their President in universal, equal, and direct elections. The President is the supreme representative of the Republic of Poland and the guarantor of the continuity of the state authority.<sup>111</sup> In 2020, the presidential election was scheduled for May 10; two months after the outbreak of the COVID-19 pandemic. Due to the outbreak, elections were not held on that day, and a new election date was scheduled for June 28, 2020, with a second round on July 12, 2020.<sup>112</sup> A newly-adopted law on June 2, 2020, was the legal basis governing the 2020 presidential elections, which provided for the possibility of postal voting, in addition to in-person voting.<sup>113</sup> Postal voting was first introduced in Poland with a 2014 amendment to the Electoral Code<sup>114</sup> and was applied during the 2015 parliamentary and presidential elections. In 2018, postal voting was limited to citizens with disabilities. However, the Act of March 31, 2020,<sup>115</sup> together with several pandemic-related measures, amended the Electoral Code and broadened the possibility for postal voting to include citizens in quarantine and those over 60 years of age.

It has been widely commented that the amendments adopted by the Polish legislator in response to the COVID-19 pandemic altered the key aspects of the electoral legal framework shortly before the scheduled elections.<sup>116</sup> According to the case-law of the Polish Constitutional Court, no significant changes to the electoral law can be introduced during the 6-month period of “legislative silence” before the date of the elections, except for extraordinary circumstances of an objective nature.<sup>117</sup> Nevertheless, the Supreme Court of Poland, in its resolution of August 3, 2020, recognized the validity of the presidential elections.<sup>118</sup> In its argument,

110 See more: Strugała, 2021, pp. 26–32.

111 See Articles 126 and 127 of the Constitution.

112 The National Electoral Commission, in its Resolution no. 129/2020 of May 10, 2020, confirmed the inability to hold voting for candidates of the presidential election on the due date. According to the National Electoral Commission, the effect thereof was equivalent to the impossibility to vote due to an absence of the candidates, whereby, Article 293 para. 3 of the Electoral Code provides for the possibility of ordering a new election.

113 Act of June 2, 2020 on the special regulations for general elections of the President of the Republic of Poland ordered in 2020 the possibility of postal voting

114 Act of January 5, 2011 on the Electoral Code

115 The Act of March 31, 2020 on the Amendment of the Act on Specific Solutions Related to the Prevention and Control of COVID-19, Other Infectious Diseases, and Crisis Situations

116 See, e.g., Zubik and Łukowiak, 2020, p. 178; OSCE, 2020, p. 1; Serowaniec and Witkowski, 2020, p. 167.

117 For the relevant case-law of the Constitutional Court, see, e.g., ruling of November 3, 2006, Case No. K 31/06; ruling of October 28, 2009, Case No. Kp 3/09; ruling of July 20, 2011, Case No. K 9/11.

118 The Supreme Court, resolution of August 3, 2020, Case No. I NSW 5890/20. The Supreme Court is the competent authority to rule on the validity of the presidential election according to Article 129 para. 1 of the Constitution.

the Supreme Court acknowledged that the state of epidemic, together with the fact that the elections could not be held within the constitutionally appointed time, can be considered “extraordinary circumstances of an objective nature,” as referred to by the Constitutional Court. According to the Supreme Court, the amendments to the electoral law extended the possibility of participating in elections during the pandemic, in particular, by postal voting, which provided for a fuller exercise of the electoral rights of the Polish citizens (Article 62 of the Constitution). Furthermore, it ensured a better implementation of the principle of democracy (Article 2 of the Constitution) and the continuity of the state authority (Article 126 of the Constitution). The Supreme Court was of the view that it was the duty of the state to hold elections that had not taken place in due time without further delay. This opinion is shared by some Polish authors who argue that amendments to the electoral law were necessary to make the presidential elections possible during the COVID-19 pandemic.<sup>119</sup> The failure to hold the presidential election, despite such legislative measures, might have been considered a threat to the constitutional order of the state, which would have called for the introduction of the state of exception under Article 230 para. 1 of the Constitution.

Another issue, widely discussed in connection with the 2020 presidential election, was the principle of the continuity of the terms of the elected offices, applicable in times of extraordinary measures. Since no emergency regime was in force, there were no legal obstacles to order and pursue presidential election. Nevertheless, it is expressed that extraordinary measures should have been imposed and the elections should have been postponed to focus all human and financial resources on combating the pandemic, and mitigating its effects.<sup>120</sup> Some authors argue that there were political reasons for the Polish government not declaring public emergency and can be explained by the fear of the then incumbent President of losing electoral support due to postponement.<sup>121</sup>

## **5. COVID-19 as an economic crisis: fiscal and monetary measures of crisis management**

The Polish government tried to mitigate the negative economic effects caused by the COVID-19 pandemic with a package of measures called the anti-crisis shield (*tarcza*

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119 Szmulik and Szymanek, 2020, pp. 33–36.

120 Matczak, 2020, p. 350; Serowaniec and Witkowski, 2020, p. 169.

121 Zubik and Łukowiak, 2020, p. 177; Drinóczi and Bień-Kacała, 2020, p. 190; Bała, 2020, p. 87. Similar comments were made regarding the government’s decision avoiding the introduction of public emergency in 2010; the then-governing party is today’s parliamentary opposition, Piękoś, 2021, pp. 67–68.

*antykryzysowa*). The anti-crisis shield<sup>122</sup> was a set of acts made by, for example, the Ministries of Development, Family, Labor, and Social Policy, and Finance. While some existing solutions were expanded, completely new support mechanisms were also introduced for workers and entrepreneurs. The anti-crisis shield consisted of five pillars:

- employee safety
- business financing
- strengthening health care
- strengthening the financial system
- public investment program

The Polish anti-crisis shields were created in several forms and for different areas. The government's first policy response to the pandemic was the "Anti-Crisis Shield"<sup>123</sup> Program 1.0, which aimed to protect jobs, support private enterprise, and provide for public investment. The second shield, "2.0 Incentive Program," provided financial assistance to entrepreneurs and farmers. The third (Shield 3.0) government package included a wide range of economic measures, including for private sector entrepreneurs and the public sector. The "Shield 4.0" package was approved in June 2020 to offset the negative effects of the previous program. Subsequently, additional shield packages were adopted under Shield Measures 5.0 and 6.0. The table below shows the date of each shield, its content, and its purpose.<sup>124</sup>

Name of the shield	Support purpose	Date of implementation	Duration
Shield 1.0	Co-financing the salaries of employees (contractors) in the event of economic shutdown or reduced working hours, co-financing of workers' salaries (entrepreneurs) for micro, small, and medium-sized enterprises. One-off downtime payment to cover the costs of running a micro-enterprise. (PLN 5000)	March 31, 2020	3 months
Shield 2.0	Incentive program for entrepreneurs and farmers	April 2020	—

122 Website of the Government of the Republic of Poland: <https://www.gov.pl/web/family/we-got-it-president-signs-an-anti-crisis-shield> (Accessed: 10 June 2021)

123 Roberts and Chmielowski, 2020, p. 3.

124 Information and service website for entrepreneurs: <https://www.biznes.gov.pl/pl/firma/sprawy-urzedowe/chce-przestrzegac-przepisow-szczegolnych/tarcze-antykrzysowe-aktualne-wsparcie-dla-przedsiębiorców> (Accessed: 5 July 2021)



Name of the shield	Support purpose	Date of implementation	Duration
Shield 3.0	It included a wide range of economic measures, including for the private sector entrepreneurs and the public sector	May 2020	—
Shield 4.0	Co-financing the salaries of employees (contractors).	June 24, 2020	3 months
Industrial shield	Co-financing the salaries of employees (contractors) from selected industries.	April 26, 2021	3 months
Shield 5.0	Measures for travel agencies, travel agents, and tour guides	October 15, 2020	3 months
Shield 6.0	Additional incentives for non-agricultural industries	Since December 30, 2020	3 months

Table 7  
System of anti-crisis shields in Poland  
Source: Authors' compilation

It is worth dividing the packages into two parts as different measures were required during the first and the subsequent waves of the pandemic. The International Monetary Fund (IMF) Country Reports, published on its website, also provide an adequate summary of the economic measures adopted by Poland to mitigate the negative economic effects of the coronavirus pandemic.

During the first wave of the pandemic, the new regulation aimed, *inter alia*, to limit the extent of the adverse market effects resulting from the SARS-CoV-2 virus outbreak.<sup>125</sup> The new regulation significantly changed the scope of the rights and obligations of the companies operating in Poland.<sup>126</sup> Shield 1.0 package, designed to alleviate the first wave of the pandemic, was signed on March 31, 2020, by the President of Poland. The package included:

- amendment to the Act on Special Solutions for the Prevention, Compensation, and Combating of COVID-19 (separate legislation)<sup>127</sup>
- the law for granting state aid for the rescue or restructuring of entrepreneurs (new opportunity policy)

125 IMF – Policy responses to COVID-19 <https://www.imf.org/en/Topics/imf-and-covid19/Policy-Responses-to-COVID-19#P> (Accessed: 5 May 2021)

126 Mezykowski, Korzeniewski and Koryzma, 2020

127 Act of March 31, 2020 amending the Act on Special Solutions for the Prevention, Compensation, And Combating of COVID-19, Other Infectious Diseases, And Crisis Situations, together with other acts

- the Act Amending the Development Institution System (PFR) Act<sup>128</sup>

The fiscal policy response to the first wave of the pandemic was significant. It is estimated at PLN 116 billion (5.2% of the GDP). New business loan guarantees and micro-credits were estimated at PLN 74 billion (3.3% of the GDP). In addition, the Polish Development Fund financed a PLN 100 billion (4.5% of the GDP) liquidity program for businesses. Most of the measures have expired, except the PFR liquidity loan program for large corporations. The main measures are:

- Additional funds for hospital equipment
- Wage subsidies for employees and self-employed persons of the enterprises concerned. Businesses, regardless of size, could apply for three months of support in the event of redundancies or reduced working hours. This subsidy covered social security contributions and ranged from 50-90% of the minimum wage for each worker, depending on the turnover decline in 2020.
- A new liquidity guarantee fund, offering guarantees for loans taken out by medium and large companies
- Additional loans for micro-enterprises
- Deadline for payment of social security contributions postponed or the obligation to pay cancelled. For micro-enterprises, with up to nine employees, social security contributions were covered by the budget for three months. For companies with 10-49 employees, 50% of the social security contributions were covered by the budget.
- The 2019 tax returns could be adjusted to deduct the 2020 losses from the 2019 taxable income
- Support was provided to parents of young children facing school closures
- A three-month “solidarity allowance” for those who lost their jobs after March 15, 2020
- The amount of unemployment benefits was increased by 39% in the first 90 days of unemployment
- To support local tourism and families with children, a tourist voucher was introduced, providing a one-time PLN 500 voucher for all children eligible for the Family 500+ allowance, which had to be spent in hotels or tourist events in Poland
- A new COVID fund of PLN 100 billion. The fund is overseen by the Prime Minister; however, the resources are transferred to various ministers and institutions involved

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<sup>128</sup> Act of March 31, 2020 amending the Act on Development Institution System. Website of the Government of the Republic of Poland: <https://www.gov.pl/web/finanse/ustawy-tarczy-antykryzysowej-z-podpisem-prezydenta> (Accessed: 5 June 2021)

in combating the consequences of the pandemic. The fund generates its income by issuing bonds guaranteed by the State Treasury

- Investment tasks managed by local governments up to PLN 12 billion will be provided by the COVID fund until the end of 2022
- An interest-subsidized bank loan was provided to ensure the financial liquidity of the entrepreneurs affected by the economic crisis
- The Polish Development Fund provided liquidity loans and grants to micro, small, medium-sized, and large enterprises. The total value of the program was PLN 100 billion
- The permit for foreign workers was extended to continue residence and work in Poland

In response to the second wave of the pandemic, the Shield 6.0 package was announced on November 4, 2020, and signed by the President on December 15, 2020.<sup>129</sup> The main measures of the shield are contained in Article 1 of the law promulgating it:

- Co-financing fixed costs for SMEs in the industries most affected by the restrictions
- A description of the grants to micro-enterprises and SMEs affected by the new health restrictions and the repayable part of the PFR liquidity loans, if their revenues decrease by at least 30% on an annual basis between March 2020 and March 2021
- Continuation of minimum guarantees for SMEs and liquidity guarantees for large companies
- Continuation of job support in the form of breaks and reduced working hours
- Exemption of industries affected by restrictions from social security contributions
- Second Chance Policy: Co-financing restructuring of enterprises by the Industrial Development Agency
- Leasing co-financing in the transport sector
- PLN 500 voucher for each teacher to cover the cost of IT equipment for distance learning

Preliminary government estimates put the fiscal cost of the anti-crisis measures at 4-4.5% of the GDP in 2020.<sup>130</sup> In addition to the government shield measures, the National Bank of

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<sup>129</sup> Act of December 9, 2020, amending the Act on Special Solutions for the Prevention, Compensation, And Combating of COVID-19, Other Infectious Diseases, And Crisis Situations, together with other acts (Ustawa z dnia 9 grudnia 2020 r. o zmianie ustawy o szczególnych rozwiązaniach związanych z zapobieganiem, przeciwdziałaniem i zwalczaniem COVID-19, innych chorób zakaźnych oraz wywołanych nimi sytuacji kryzysowych oraz niektórych innych ustaw), Journal of Laws [Dz. U.] of 2020, item 2255.

<sup>130</sup> IMF – Policy responses to COVID-19 <https://www.imf.org/en/Topics/imf-and-covid19/Policy-Responses-to-COVID-19#P> (Accessed: 5 June 2021)

Poland (NBP) used monetary and financial means to help the affected economic operators. Since March 2020, the NBP has gradually reduced the key interest rate by 140 basis points to 10 basis points.<sup>131</sup> The NBP provided liquidity to banks, reducing the required reserve ratio from 3.5% to 0.5%. It also purchased Polish treasury securities on the secondary market and on April 8, 2020, expanded the eligible securities with those guaranteed by the State Treasury. In addition, it introduced a program to finance corporate bank lending. By May 26, 2021, the NBP had purchased PLN 133.8 billion (5.8% of 2020's GDP) in treasury and government-guaranteed securities on the secondary market. Furthermore, the 3% systemic risk buffer for bank capital requirements was repealed.

The Polish Financial Supervision Authority (PFSA, *Komisja Nadzoru Finansowego*<sup>132</sup>) announced measures for the provisioning and reclassification of loans to existing SMEs/micro-enterprises, which allowed the effects of the credit losses to be spread over a longer period. Flexibility was provided in the ways that banks met capital and liquidity requirements, and the PFSA accepted the treatment of the National Development Bank (BGK) guarantee for meeting the “special collateral” condition.

In addition, the Polish Banking Association proposed a voluntary deferral of loan payments for up to three months for the borrowers.

## 6. Summary

The 1997 Polish Constitution provides for three types of public emergency, which can be declared in situations where regular constitutional mechanisms prove to be inadequate. The common characteristics of all three types of public emergency include the enforcement of the position of the executive branch and the restrictions on or derogation of individual freedoms and rights. The emergencies allow regime with the most far-reaching and long-lasting interference with fundamental rights (the martial law) to the least burdensome regime (the state of natural disaster). The three types of extraordinary measures have been regulated, in detail, at the sub-constitutional level (2002 Act on Martial Law, 2002 Act on the State of Exception, and 2002 Act on Natural Disaster). The catalogue of the types of public emergency stemming from the Constitution is exhaustive. Nevertheless, the Polish law only provides for institutions that can be activated in response to crisis situations, but does not call for the introduction of

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<sup>131</sup> Interest rate: <https://www.nbp.pl/homen.aspx?f=/en/dzienne/stopy.htm> (Accessed: 1 June 2021)

<sup>132</sup> Website of the Polish Financial Supervisory Authority: [https://www.knf.gov.pl/en/MARKET/Coronavirus\\_Information\\_for\\_supervised\\_entities](https://www.knf.gov.pl/en/MARKET/Coronavirus_Information_for_supervised_entities) (Accessed: 1 June 2021)

public emergency, such as the state of epidemic or epidemic threat, or the institution of crisis management.

In Poland, the discussion on public emergency is inherently associated with the tragic events of 1981. This may partially explain why, in face of the outbreak of the COVID-19 pandemic, the Polish government opted for a crisis management framework that did not entail public emergency – the state of epidemic threat and, subsequently, the state of epidemic. The overall assessment of the government's response to COVID-19, however, gives rise to several difficulties. Questions arise regarding the legality and constitutionality of the adopted measures and their legal consequences. While the premises for the introduction of a state of natural disaster were met, no constitutional emergency regime was officially triggered. Therefore, all the measures taken to counteract the COVID-19 pandemic were considered a part of the regular functioning of the state, which does not allow the derogation of the fundamental rights, or the use of secondary legislation to limit them. The case-law of Polish courts indicate that the scope of pandemic-related restrictions, and the manner of their imposition, did not comply with the constitutional standards applicable to the limitations implemented in regular circumstances.

The Polish government and the Central Bank have sought to mitigate the negative effects of the economic crisis caused by the coronavirus pandemic with detailed and comprehensive packages. Interventions have been made in several areas to restart the economy as smoothly as possible. The Polish measures focused mainly on enterprises and sought to save surviving enterprises with a significant state budget contribution. The anti-crisis shield package, gradually building up, supported both economic operators and individuals in recovering from the crisis. However, some of the negative economic effects will only occur in the future, whereby, new measures may be needed.

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