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Public administration facing pandemic challenges - a contribution to the discussion

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***Abstract*— This publication focuses on the identification and discussion of selected issues related to combating the SARS-CoV-2 epidemic whose extraordinary nature showed that the administrative paradigm used up to that point in time proved insufficient in standard environment. The emergency measures applied changed the way public authorities acted by interfering with individual rights and freedoms, going far beyond the so-called ordinary constitutional measures permitted by the Constitution outside the state of emergency. The legal regime in force corresponded to a large extent to the constitutional characteristics of a state of emergency. The discussion also covered the issue of hybrid or non-normative states of emergency, which is interesting in many respects.**

Keywords— epidemic, state of epidemic, state of emergency.

I. INTRODUCTION

The crisis triggered by SARS-CoV-2 qualified in extremis rather than sui generis, showed that the legislation enacted, inter alia, for the cases of influenza A (H1N1), proved to be inadequate. As a result of the crisis triggered by the SARS-CoV-2 epidemic, the measures taken by public administrations, had to adapt to the new circumstances. An additional difficulty was that measures were taken "on the run," with limited resources at the same time. Consequently, the application of emergency measures was the result of accelerated procedures. The first response to SARS-CoV-2 was the implementation of horizontal preventive measures, such as mandatory social distancing, restriction of mobility, restriction of freedom of economic activity or freedom of assembly. This response was, on the one hand, a consequence of the lack of an effective plan to manage the health crisis, and on the other hand, the uncertainty of scientific evidence regarding the coronavirus transmission and the development of the epidemic in its early phases. The extraordinary nature of the circumstances that have arisen has shown that the administrative paradigm that has functioned so far has proven inadequate under normal circumstances for delivering standardized health care or health security services in environment that required a departure from standardized solutions (Peters, 2017), (Rittel and Webber, 1973).

The administrative courts in their latest rulings indicate that the dynamic situation on the onset of the epidemic required taking measures to stop the progressing epidemic. Such measures had to be taken forthwith, which follows, inter alia, from the content of Article 68(1) of the Constitution of the Republic of Poland, which indicates that everyone has the right to health protection, and Article 68(4) of the Constitution of the Republic of Poland, under which public authorities are obliged to combat epidemic diseases. At the same time, the rulings indicate that legislative measures should be taken to ensure that the restrictions introduced, on the one hand, aim at combating epidemic diseases and at health protection, and, on the other hand, that the orders and prohibitions are introduced with respect for the exclusivity of the statutory provisions (Wyrok NSA z dnia 28 października 2021 r., sygn. akt II GSK 1382/21, LEX nr 3269311, wyrok NSA z dnia 28 października 2021 r., sygn. akt II GSK 996/21, LEX nr 3269220, wyrok NSA z dnia 28 października 2021 r., sygn. akt II GSK 1032/21, LEX nr 3269200, wyrok NSA z dnia 28 października 2021 r., sygn. akt II GSK 1206/21, LEX nr 3269375, wyrok NSA z dnia 28 października 2021 r., sygn. akt II GSK 1448/21, LEX nr 3267821).

The Supreme Administrative Court has pointed out in its numerous rulings that, contrary to the principle of absolute exclusivity of the law in the repressive (sanctioning-disciplining) regulatory field, it was the executive regulations that determined the scope of the orders (prohibitions) introduced by them, the violation of which was sanctioned. (wyrok NSA z dnia 28 października 2021 r., sygn. akt II GSK 1544/21, LEX nr 3274256, wyrok NSA z dnia 28 października

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2021 r., sygn. akt II GSK 1545/21, LEX nr 326931, wyrok NSA z dnia 28 października 2021 r., sygn. akt II GSK 1546/21, LEX nr 3269265, wyrok NSA z dnia 28 października 2021 r., sygn. akt II GSK 1622/21, LEX nr 3269239).

Failure to comply with the statutory regulation of restrictions on human and civil freedoms and rights in relation to the simultaneous exclusion in this sphere of the permissibility of subdelegation must lead to the disqualification of the standardization in question, as contrary to the legal norm reconstructed from Article 31(3) of the Constitution of the Republic of Poland, since the requirements established by it must occur on a cumulative basis (wyrok Trybunału Konstytucyjnego z dnia 19 maja 1998 r., sygn. akt U 5/97, OTK 1998/4/46). Therefore, the solution of undertaking legislative interference with, for instance, the constitutional principle of freedom of economic activity in this form of law-making, which is not a law, cannot be accepted.

The Supreme Administrative Court, justifying the above position, points out that in light of Article 20 in conjunction with Article 22 of the Polish Constitution, freedom of economic activity is a constituent part of the market economy and at the same time is a public subjective right. Although this freedom is not of an absolute nature, as follows from Article 22, in accordance with the legislator's will, it may be subject to restrictions defined only by law. This is also confirmed by Article 31(3) of the Polish Constitution. It further follows from the article referred to hereinabove that, regardless of the indicated formal criterion for the introduction of restrictions on the exercise of constitutional freedoms, such restrictions must not at the same time violate the essence of the freedom or subjective right in question, and their introduction may be justified, and thus permissible and acceptable if, at the same time, it is necessary in a democratic state for its security or public order, or for the protection of the environment, public health and morals, or the freedoms and rights of other people (wyrok Trybunału Konstytucyjnego z dnia 12 stycznia 1999 r., sygn.akt P 2/98, OTK 1999/1/2, wyrok Trybunału Konstytucyjnego z dnia 25 maja 1999 r., sygn. akt SK 9/98, OTK 1999/4/78, wyrok Trybunału Konstytucyjnego z dnia 10 kwietnia 2002 r., sygn. akt K 26/00, OTK-A 2002/2/18).

Also, the Polish Constitutional Tribunal accepts that the assessment of the permissibility of the restriction of a particular freedom consists in determining the real need for interference in this sphere. In such cases, the legislator may use only such legal measures that will be effective for the achievement of the goals, while being the least burdensome for individuals. At the same time the postulate of necessity, usefulness and balance (sensu stricto proportionality) is implemented (wyrok Trybunału Konstytucyjnego z 18 września 2014 r sygn. akt K 44/12, wyrok Trybunału Konstytucyjnego z 28 czerwca 2000 r. sygn. akt K 34/99, OTK 2000/5/142).

In its rulings, the Polish Constitutional Tribunal has repeatedly emphasized the necessity of precise limitations in laws on the exercise of constitutional rights and freedoms, arising from the interpretation of Article 31(3) of the Polish Constitution. In view of this, sub-statutory provisions enacted under the authority of a law and for the purpose of its implementation can only supplement these grounds, containing detailed, non-essential elements of legal regulation. It is worth noting here that already in its first ruling of 28 May 1986, Ref. U 1/86, which has historical value today - the Polish Constitutional Tribunal advocated the position that the determination of the obligations of citizens and other subjects of the law can only be standardized by a parliamentary act (orzeczenie Trybunału Konstytucyjnego z dnia 28 maja 1986 r., sygn. akt U 1/86, OTK 1986/1/2).

In the context of the accepted understanding of Article 31(3) of the Constitution of the Republic of Poland, the jurisprudence of the Polish Constitutional Tribunal emphasizes that "With regard to the field of human freedoms and rights, the reservation of the exclusively statutory rank of the standardisation of their limitations should be understood literally, with the exclusion of the admissibility of subdelegation, i.e. the delegation of normative competence to another body, on the same footing as the exclusion of such an option in case of secondary legislation to the parliamentary acts. In any case, in a situation of a dispute between an individual and a public authority over the scope or manner of exercising freedoms and rights, the legal grounds for resolving such a dispute cannot be detached from the constitutional norms, nor have a rank lower than that of a parliamentary act (wyrok Trybunału Konstytucyjnego z dnia 19 maja 1998 r., sygn. akt U 5/97, OTK 1998/4/46, wyrok Trybunału Konstytucyjnego z dnia: 28 czerwca 2000 r., sygn. akt K 34/99, OTK 2000/5/142, wyrok Trybunału Konstytucyjnego z dnia 6 marca 2000 r., sygn. akt P 10/99, OTK 2000/2/56, wyrok Trybunału Konstytucyjnego z dnia 7 listopada 2000 r., sygn. akt K 16/00, OTK 2000/7/257, wyrok Trybunału Konstytucyjnego z dnia 19 lipca 2011 r., sygn. akt P 9/09, OTK-A 2011/6/59).

At this point, it should be noted that an integral structural component of the statutory authorization, which is a material guarantee of the executive nature of the regulation, are the content guidelines. The executive nature of the regulation, as an act issued on the grounds of a specific authorization, also has an effect to the extent that the regulation cannot supplement the parliamentary act, i.e. expand the prerequisites for the implementation of some legal norm stipulated by the parliamentary act (Trybunału Konstytucyjnego z dnia z 12 lipca 2007 r., U 7/06, Trybunału Konstytucyjnego z dnia z 11 maja 1999 r., P 9/98, OTK 1999/4/75). Any deviations from the content of the authorization cannot be substantiated by practical considerations or the need to address specific legal issues.

The "guidelines" are meant to imply subject matter guidance on the content of the legal norms to be incorporated into the regulation to be issued. There are no such guidelines for regulating the orders, prohibitions, restrictions and obligations specified in the authorization contained in Article 46b (2-12) of the Law on Prevention and Control of Infections and Infectious Diseases Suffered by the Human Beings (ustawa z dnia 5 grudnia 2008 r. z zapobieganiu oraz zwalczaniu zakażeń i chorób zakaźnych u ludzi Dz.U.2022.1657 t.j.) In this regard, the statutory authorization only specifies the authority competent to issue a regulation (Article 46a) and the scope of matters delegated to be regulated by the regulation (Article 46b

items 2-12) . However, it does not indicate guidelines as to the required specific content to be regulated in the regulation. The statement in Article 46a of the Law on Preventing and Combating Infections and Infectious Diseases in Humans that, in issuing a regulation, the Council of Ministers should "take into account the scope of the solutions to be applied" and "the current capabilities of the central government budget and the budgets of local government units" does not fulfil the requirement in the Constitution to indicate guidelines. Consequently, it does not fulfil the conditions required by Article 92(1) of the Polish Constitution (wyrok Wojewódzkiego Sądu Administracyjnego w Gdańsku z dnia 15 lipca 2021 r., sygn. akt III SA/Gd 424/21, LEX nr 3206412).

Nor can such guidelines be found in Article 46b(1) of the aforementioned parliamentary act. From the wording of the authorization contained in this provision, it follows that in the regulation referred to in Article 46a, the Council of Ministers may establish the restrictions, obligations and orders referred to in Article 46(4). The authorization in this regard thus contains only a reference to the restrictions, obligations and orders specified in Article 46(4). 4, and thus only to the specific scope of that provision, and does not include the conditions for the introduction of these restrictions, obligations and orders (and thus the need to take into account in the regulation the path of spread of infectious infections and infectious diseases and the epidemic situation in the area where an epidemic emergency or state of epidemic has been declared). To sum up, it should be pointed out that the Decree of the Council of Ministers of 1 December 2020 Rozporządzenie Rady Ministrów z dnia 1 grudnia 2020 r. w sprawie ustanowienia określonych ograniczeń, nakazów i zakazów w związku z wystąpieniem stanu epidemii, Dz.U.2020.2132.

(issued on the basis of Article 46a and Article 46b, points 1-6 and 8-12 of the Act on the Prevention and Control of Infections and Infectious Diseases Suffered by the Human Beings, did not fulfil the constitutional condition for its issuance on the basis of a statutory authorization providing guidance on the content of the implementing act. This is because the legislator in the body of the indicated statutory authorizations did not incorporate guidance on the subject matter delegated for regulation in the aforementioned legal acts. The consequence of the law-making activity outlined above was that the regulation covered statutory matter and violated a number of fundamental freedoms and rights of the individual, including freedom of economic activity.

The temporary restriction placed on running business by businessmen resulted, in fact, in a complete ban on business activities. The above statement is important in that the above-mentioned regulations do not allow the adoption of a legal structure that in fact consists in limiting the conduct of business by prohibiting it. Restriction of business activity understood as a state when the activity can be carried out after fulfilling certain conditions is not tantamount to its prohibition, i.e. a state when business activity of a given type cannot be carried out at all.

It should be pointed out here that the doctrine formulates a de lege ferenda postulate that a chapter should be added to the Act on Prevention and Control of Infections and Infectious Diseases Suffered by the Human Beings on the introduction of restrictions on constitutional rights and freedoms in this state of epidemic, on the same footing as in the Act on the state of emergency (Ożóg 2021). The proposed solutions were introduced, inter alia, in Italy where the law was amended and Decree No. 65 authorized the executive bodies to establish the restrictions required to counteract the SARS-CoV-2 virus (Canestrini 2020).

The introduction of far-reaching restrictions in the field of constitutional rights and freedoms caused the state of epidemic to be referred to as a sui generis extra-constitutional state of emergency (Paśnik, 2020). Some representatives of the doctrine refer to the category of hybrid state of emergency, which means that the occurrence of the material prerequisites of a state of emergency updates certain constitutional orders and prohibitions regardless of the failure to declare such a state in accordance with the provisions of Article 228(2) of the Constitution (Kardas 2020).

At this point a question should be posed whether the Polish legislator distinguishes precisely and delimits the objective scopes of the state of epidemic and the state of emergency. Both states are aimed at preventing the spread of infectious diseases and their consequences.

Ożóg is right to point out that assessment whether at the level of state law clearly and precisely distinguished the prerequisites conditioning their declaration plays a pivotal role. The presumption of legislator's rationality allows us to assume that there are no redundant legal institutions in the legal system. There should therefore be corresponding normative differences between the analysed states (Ożóg 2021).

A state of epidemic should be understood as a legal status introduced in a certain area in connection with an epidemic outbreak in order to take the anti-epidemic and preventive measures stipulated by law to minimize the impact of the epidemic. The body authorized to introduce the state of epidemic emergency and the state of epidemic is referred to in Article 46 (2) of the Act on Prevention and Control of Infections and Infectious Diseases Suffered by the Human Beings. According to the article referred to hereinabove, "if an epidemic hazard or epidemic occurs in the area with a territory larger than one province, a state of epidemic hazard or a state of epidemic shall be declared and revoked, by virtue of ordinance, by the minister in charge of health in consultation with the minister in charge of public administration, upon the request of the Chief Sanitary Inspector." Thus, a state of epidemic is a legal condition that is introduced due to epidemic outbreak, understood under the law as a factual situation. Thus, the occurrence of the prerequisites of Article 46 (2) of the Law on Prevention and Control of Infections and Infectious Diseases Suffered by Human Beings results in the obligation to introduce a state of epidemic. This is evidenced by the imperative wording of the legal provision - the authority "shall declare and revoke", without using the operator "may" (Ożóg 2021).

The prerequisites for the introduction of a state of emergency - unlike the state of epidemic - are vague. Referring to the genesis, it should be noted that the underlying cause of the

decision to constitutionalize the state of emergency was the need to limit the scope of the state of emergency, by excluding from it the prerequisites for the introduction of this state due to events caused by technical failures or natural disasters. Thus, an additional category was created - a state of emergency. However, in doing so, a precise definition of the statutory prerequisites for the introduction of a state of emergency was not provided. This raises the question of whether the assessment of the existence or not of the prerequisites for a state of emergency is at the discretion of the Council of Ministers, or whether the public authorities do not enjoy the discretionary decision-making freedom to this extent (Czarnow 2021).

As the Supreme Court pointed out in its decision of 28 July 2020, the decision to declare a state of emergency, due to the generality of the prerequisites for its introduction, belongs to the sphere of administrative discretion of government authorities, which means that it is up to them to assess whether these prerequisites have been met in a particular situation - such as an epidemic outbreak (Postanowienie SN z dnia 28 lipca 2020 r., I NSW 2849/20, LEX nr 3043973; Szewczyk 2020). On the other hand, the view is presented that the authorities have no discretion and should declare a state of emergency "if the substantive legal substrate (content) of the constitutional institution of such a state - special rules for the functioning of the state system and extended interference in the field of individual rights and freedoms - has already occurred in practice." Indeed, it should be noted that Article 228(1) of the Constitution of the Republic of Poland imposes an "instrumental obligation" on the body authorized to introduce a certain state of emergency, the fulfilment of which is intended to protect the constitutional order of the state as well as the rights and freedoms of citizens. Fulfilment of the prerequisites for a state of emergency under Article 232 of the Polish Constitution is tantamount to an obligation on the part of the Council of Ministers to introduce a state of emergency.

Pursuant to Article 3(1)(1) of the Law on the State of Emergency, on the other hand, a natural disaster is understood as "a natural catastrophe or technical failure, the consequences of which threaten the life or health of a large number of people, property of great magnitude or the environment over large areas, and assistance and protection can only be effectively undertaken with extraordinary measures, in cooperation between various bodies and institutions and specialized services and formations acting under unified leadership." Thus, the scope of the term disaster is broad and includes various categories of factual events. According to Article 3(1)(2) of the Law on the State of Emergency, a "natural disaster" should be understood as an event associated with natural forces, in particular lightning, seismic shocks, strong winds, intense precipitation, prolonged occurrence of extreme temperatures, landslides, fires, droughts, floods, ice phenomena on rivers and the sea, as well as lakes and reservoirs, mass occurrence of pests, plant or animal diseases or infectious diseases of humans, or the action of another natural element.

It will be extremely important to provide the general public with the exact rationale behind the decision to introduce the selected legal regime. This also applies to the restrictions introduced in the sphere of human rights. It seems that the difference between a state of epidemic and a state of emergency introduced due to an infectious disease occurs primarily at the level of the course of the epidemic and its scale. The above legal institutions were established to counteract the spread of infectious diseases and their consequences. The state of epidemic and the state of epidemic emergency are mainly connected with taking the on-going measures stipulated by law to withhold the spread of an infectious disease. The above objectives are also important from the perspective of the state of emergency category, but with regard to this institution, the main emphasis is on put on counteracting the effects and mitigating the consequences of an epidemic that has already occurred.

It should be noted that it cannot be ruled out that if a state of emergency is declared after the introduction of a state of epidemic. However, the prior declaration of a state of epidemic cannot, of course, be treated as a legal requirement for the introduction of a state of emergency. It will be the role of policymakers to determine which legal institution may be more fit to the circumstances and capability of achieving the set objectives (Ożóg 2021).

The evaluation of the measures taken by the authorities (whether they act within the scope of discretion or obligation, when it comes to the decision to declare a state of emergency) also strongly affects the assessment of the legal nature of the state of epidemic. As Trociuk rightly points out, the state of epidemic declared in Poland, as a threat to the proper functioning of society, corresponds to the state of emergency described in Article 232 of the Polish Constitution (Trociuk 2021).

An interesting view was presented by P. Kardas, who proposes four approaches to the constitutional evaluation of the state of epidemic:

1) It is a de facto state of emergency (caused by natural disaster), but not a de jure state of emergency;
2) It is a material state of emergency (caused by natural disaster) in which all the constitutional prerequisites for the imposition of a state of emergency have been met, but there has been no formal declaration of a state of emergency;
3) It is a hybrid state of emergency (rather than a state of emergency caused by natural disaster), updating constitutional guarantee norms in the field of civil rights and freedoms, but excluding the measures of public authorities under the rules provided for constitutional states of emergency, due to the lack of formal introduction of a state of emergency caused by natural disaster;
4) It is a de facto and de jure constitutional state of emergency caused by natural disaster, in which all the effects of a state of emergency come true, both in the area of protection of civil rights and freedoms and in the area of measures under special rules of public authorities (Kardas 2020).

Evaluating the measures of public authorities, their being bound by the existing rationale of the state of emergency caused by natural disaster and their desire to avoid the formal introduction of a state of emergency at all costs, it appears that the state of epidemic in effect between 20 March 2020 and 15

May 2022 was a "hybrid state of emergency," not defined by type, which was implemented by introducing the norms constituting it into the legal system, but bypassing the formal rigors of the Constitution (Krzemiński 2022).

In light of the considerations presented above in relations to the restrictions on rights and freedoms, it is necessary to point out one more aspect of the long-term nature of a state of epidemic (Tuleja, 2020). A rudimentary feature of states of emergency is their episodic nature. An emergency situation, leading to the modification of the mechanisms of governance and introducing restrictions on human rights, should be absolutely exceptional. So another question arises against this background - if the state of emergency caused by natural disaster is to be, as a rule, episodic and exceptional, then at the same time could it last as long as the state of epidemic in Poland (Rokicka-Murszewska.

II. Conclusions

The analysis presented above makes it possible to bring forward the postulate that the measures of the legislature give way to proactive, flexible measures, which will provide opportunities for rapid response in emergency situations. The SARS-CoV-2 epidemic, on the one hand, revealed the weaknesses and limitations of public administration, but on the other hand, it uncovered hidden opportunities for reform. In this regard, the SARS-CoV-2 epidemic has created a strong incentive for reforms that go far beyond managing its immediate effects. Public sector entities have undergone major transformations, and the favourable changes could be the forerunner of broader systemic changes. The goal of the reforms should not only be to strengthen the protection of law and freedom, but also to strengthen the adaptive capacity through which public organizations will reduce their vulnerability to extraordinarily violent situations. Particularly as we should expect not only successive waves of SARS-CoV-2 epidemic, but also new epidemic.

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- Management and Finance in Real Estate

Law
- this program gives strong legal foundations to undertake further professional training for judges, prosecutors, atorneys, notaries, bailiffs.

Administration
- Fiscal Administration
- Local Government Administration

Logistics
- this program gives good preparation for work in logistics companies as well as in other economic and administrative units.

Cyberspace and Social Communication
- Communication and Image Creations
- Safety in the Cyberspace

Internal Security
- Administration and Management in Security
- Security and Public Order
- Security and Development in Euro-region
- Security of Information and Information Systems
- Security in Business
- Criminology and Investigative Studies
- Criminology and Forensics
- Protection of People and Property
- Public Order Agencies

Information Technology
- Databases and Net Systems
- Computer Graphics and Multimedia Techniques
- Design of Applications for Mobile Devices
- IT Services in Public Administration Units

Postgraduate courses
- Administrative studies
- Fiscal Administration
- Law and management in health service