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The limits of individual freedom in a democratic state A contribution to the discussion based on the example of the Constitution of the Republic of Poland

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Abstract— **In the Polish Constitution, freedom does not have a status equivalent to the principle of dignity. However, freedom is genetically linked to dignity. Two fundamental consequences follow from the above. Firstly, the protection of dignity requires that a person is guaranteed the right to freedom, understood as the freedom to act according to one's own will. Secondly, freedom may be subject to limitations. Still, these may not be introduced arbitrarily but only under a procedure and principles set out in the Polish Constitution. Freedom is also subject to harmonisation with other constitutional principles and values of higher or equivalent rank. Freedom and the resulting subjective right entail the right to freedom within the limits set by law. The sanctioning of freedom and the related subjective right significantly limits public authorities in action, especially the legislature and the executive. Under the COVID-19 pandemic, it became necessary to confront the scope of protection of two conflicting values: human freedom and the duty of public authorities to ensure health protection and prevent epidemic diseases. This article demonstrates that, as the law currently stands, adequate alignment of these two tasks is not possible. An appropriate constitutional amendment is required.**

Keywords— human dignity, individual liberty, rule of law, limitations of freedoms and rights, health protection, COVID-19, implementing regulation.

I. INTRODUCTION (FREEDOM AS A LEGAL CATEGORY)

The idea of freedom understood as the individual's freedom to decide on his or her own behaviour dates back to antiquity. However, it was not until the school of natural law that its importance was recognised. Among others, J. Locke and the physiocrats, I. Kant, E.J. Sieyès and B. Constant wrote about freedom. In the political sphere, freedom became a prominent value in the 18th century, when it was enshrined in acts of constitutional rank and acts on human rights such as the Virginia Declaration of Rights (1776) and the French Declaration of the Rights of Man and of the Citizen (1789) (Garlicki & Wojtyczek 2016: 56-57). It should be noted that, alongside the Constitution of the Fifth Republic of 1958 and other fundamental constitutional acts, the Declaration of 1789 belongs to the so-called constitutional bloc, i.e. it makes up the content of the French Constitution in the largo sense (Sarnecki 2003, Jamróz 2014). The French Declaration has therefore retained the force of law and, by virtue of the jurisprudence of the Constitutional Council, continues to shape the legal status of man and citizen in the French Republic to this day. Its preamble reads, among other things (Constitution of the French Republic of 4 October 1958), that "ignorance, forgetfulness and disregard of the Rights of Man are the only causes of public misery and abuse of government," and to prevent this, the Declaration contains "the natural, inalienable and sacred rights of Man, so that this Declaration, constantly present among the members of society, reminds them constantly of their rights and duties(...)." The Declaration then includes among values and, at the same time, constitutional principles, but also subjective rights of the individual, the idea of individual freedom, stating that: "People are born and remain free and equal in their rights. Social differences can only be based on consideration of the general interest" (Article I), "The purpose of any political organisation is to preserve natural and unalienable human rights. These rights are liberty, property, security and resistance to oppression" (Article II), "Liberty consists in the ability to do whatever does not harm another; thus, the exercise of the natural rights of each individual has no limits other than those which ensure the exercise of the same rights to other members of society. These limits can only be determined by law" (Article IV), "A law can only prohibit conduct that harms Society. Everything that is not forbidden by law cannot be forbidden, and no one can be compelled to do what the law does not prescribe" (Article V). The cited provisions, first, unequivocally emphasise the legal-natural source of individual freedom (Garlicki 2003) and, second, constitute one of the few

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attempts at a normative definition of freedom.

Most of today's leading human rights documents, while referring to the idea of freedom, unfortunately fail to define it (Article 9 of the ICCPR, Article 5 of the ECHR, Article 6 of the CFR), and approach the issue of its limitation by means of the construction of abuse of rights (Article 5 of the ICCPR; Article 17 of the ECHR; Article 54 of the CFR). By way of example, the Charter of Fundamental Rights of the European Union reads, inter alia, that: "The peoples of Europe, forming an ever closer union among themselves, are determined to share a peaceful future based on common values. The Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law. By establishing the citizenship of the Union and creating an area of freedom, security and justice, it places the individual at the centre of its activities. (...)" (Preamble), "everyone has the right to liberty and security of person" (Article 6). In broader terms, the idea of freedom is referred to in the Universal Declaration of Human Rights, adopted by the United Nations General Assembly on 10 December 1948, stating that: "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood" (Article 1), "Everyone has the right to life, liberty and security of person" (Article 3), " In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society. These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations." (Article 29(2) and (3)).

The concept of freedom and the subjective right reflexively expressing it has been given in-depth analyses in legal science. On the pages of academic studies, it is accepted that freedom, alongside the principles of human dignity and equality, belongs to the central values in democratic human rights systems (Wisniewski 1997, Dudek 1999). Freedom and equality are directly linked to human dignity and have a natural law origin. This is because everyone is born equal in terms of their dignity. It is therefore impossible to guarantee a person's dignity and, at the same time, deprive him or her of freedom. Commentators agree that the idea of freedom belongs to axiological concepts and, as such, may be defined differently from the perspective of different philosophical or religious systems (Sobczak 2008, Sabczak 2004, Sobczak 2000). It is impossible to point to a single binding definition of freedom and its limits.

These conditions also led the Polish constitution-maker to devote a great deal of attention, in the course of legislative work, to the normative grasp of freedom and the subjective right expressing it. This was due to the fact that the previous Polish constitutions did not contain a normative provision referring more broadly to the idea of freedom. Only in Article 95 of the March Constitution do we find a general statement that 'the Republic of Poland shall ensure within its territory complete protection of life, liberty and property to all (...)'. Later constitutions did not even contain such a mention. The legislative works on the 1997 Constitution therefore lacked a normative reference. This led to an intense debate on the question of freedom at the meetings of the Constitutional Committee of the National Assembly. Experts advocated that the term should be defined as follows: "Freedom consists in being able to do anything that does not harm others; in this way, the exercise of natural freedoms by each person has no other limits than those that ensure the exercise of the same freedoms to other members of society. These limits may be defined by law." (National Assembly Constitutional Commission, 1995). The proposal was eventually rejected, and no definition of freedom was adopted. This does not mean that the importance of the concept in the constitution was overlooked or ignored. It was quite the contrary. In highlighting the importance of freedom, the Polish legislator referred to it already in the preamble to the 1997 Constitution, reading, inter alia, that: "Having regard for the existence and future of our Homeland, Which recovered, in 1989, the possibility of a sovereign and democratic determination of its fate, We, the Polish Nation - all citizens of the Republic, (...) Hereby establish this Constitution of the Republic of Poland as the basic law for the State, based on respect for freedom and justice." In this connection, the Preamble requires in the process of applying the Constitution "paying respect to the inherent dignity of the person, his or her right to freedom, the obligation of solidarity with others." In this way, a background and interpretative context was established for the provisions of Articles 31(1) and 31(2) of the Constitution, which situate the principle of freedom as one of the basic principles of the political system, specifying the axiology inherent in the principles of: democratic state, rule of law and social state (Article 2). In turn, Article 31(1) and (2) was given the following wording: "Freedom of the person shall receive legal protection. Everyone shall respect the freedoms and rights of others. No one shall be compelled to do that which is not required by law". Thus, the Polish Constitution includes as many as four senses of freedom (Dudek 2009, Garlicki & Wojtyczek 2016: 55): (1) it is defined as an intrinsic value - "the general principle of human freedom" (Article 31(1)), understood primarily as the freedom to decide about one's own conduct; (2) it is included as a concept related to constitutional "freedoms" (in the title of Chapter II - next to "human and civil rights and duties"; in Article 31(2) sentence 1); (3) it is expressed in the formula of prohibition: "it shall not be allowed" (Article 31(2), 2nd sentence); (4) its meaning is clarified by an impermissible antithesis of freedom: "shall not be compelled" (Article 31(2), second sentence). Consequently, paragraph 1 of Article 31 resolves about the vertical applicability of the principle of freedom and about a reflexive subjective right of the individual to freedom (in relations between the state and the individual), while paragraph 2 of Article 31 gives constitutional freedoms and rights a horizontal dimension (referring them to relations among people, thus limiting the freedom of action of an individual by the obligation to respect the freedoms and rights of others) (Wojtyczek 1999). In this way, freedom has been assigned three essential functions: (1) a central constitutional value expressed as a principle of the political

system, (2) one of the principles of the system of individual freedoms and rights, and (3) a subjective right (Garlicki & Wojtyczek: 56-65). These norms are complemented by the delimitation of boundaries to individual freedoms in Article 31(3), which provision defines the principles of interference by public authorities in the sphere of constitutionally protected individual freedoms and rights.

However, human freedom does not have a rank equivalent to human dignity, i.e. the status of a supra-constitutional Grundnorm in the Polish constitutional order (Łabno 2002). Only the principle of dignity is ascribed the attribute of an innate value to man, inalienable and inviolable. When in conflict with dignity, freedom and other principles should give way (Complak 2002). Nevertheless, as being even genetically linked to dignity, freedom protects and articulates the former. Consequently, dignity cannot be preserved when an individual is deprived of freedom and the right to it. Freedom is also subject to harmonisation with other constitutional principles and values. The subjective right to freedom is expressed in the individual's right - within the limits set by law - to act according to his or her own will (freedom to undertake and manifest acts of will and choice). At the same time, freedom and the right to freedom limit the freedom of action of the public authority and, more precisely, of the legislator and the executive, in particular, public administration. The principle of freedom, as binding on the lawmaker, enforces certain normative solutions, and imposes certain obligations on the bodies applying the law in terms of its interpretation and application, including, in particular, the requirement of interpretation in dubio pro libertate (Zajadło 1999, Judgment of the Constitutional Tribunal of 5 June 2014, K 35/11, paragraph III.6).

Freedom understood in this way is undoubtedly of universal nature. It covers all spheres of life, both private and public, and is used in defining the relationship between the state (public authority) and society (the individual) when restrictions on freedom are imposed. In turn, constitutional provisions expressing particular categories of individual rights and freedoms have two functions. Firstly, they regulate the freedom of the individual by establishing its legal limits and defining the rules for its exercise in particular types of relations. Secondly, they provide guarantees of freedom by confirming that it applies in specific areas of relations. In this way, Article 31(1) and (2) constitute a binding background, a complement to the provisions sanctioning individual constitutional freedoms and a kind of lex generalis in relation to the provisions establishing such individual freedoms (Constitutional Tribunal Judgments of: 20 December 1999, K 4/99; 4 November 2015, K 1/14, point III.11.3 & of 7 May 2002, SK 20/00). These specific provisions on freedoms thus have a dual role, both guaranteeing and regulating freedom in a given field of relations, setting its legal framework.

The individual's autonomous subjective right to freedom derives directly from Article 31(1) and (2), and, by virtue of the Constitution, is in itself subject to legal protection. The content of this right is consistent with the general understanding of a constitutional principle. It guarantees everyone the freedom to decide on his or her own conduct. This freedom applies to the sphere of external human activity as well as to the sphere of security and personal integrity. In this way, the limits to the influence of the external world on an individual's situation are set. They are concretised in the prohibition of interference by external agents (above all - public authorities) in the sphere of individual freedom of action protected by the Constitution. Pursuant to Article 31(2), limitations of freedom should meet two prerequisites. In formal terms, limitations of freedom may only be imposed by law. An adopted legal norm may sanction restrictions of various nature, including those relating to religious or ethical principles (Winczorek 2002). In the substantive aspect, it is required that a restriction serves to protect the freedoms and rights of other subjects. Paragraph 2 of Article 31 is complemented by paragraph 3 of the same Article. When analysed together, these norms establish the precepts of restricting individual freedoms and rights by public authorities (vertical approach) and, in addition, limit the freedom of an individual in the exercise of his/her subjective right to freedom and specific categories of freedoms and rights (horizontal approach). In exercising freedoms and rights, the individual is obliged, on the one hand, to respect the freedoms and rights of other persons, subjects of the same subjective right, and, on the other hand, is bound by the prohibition against infringing the essence of the specific categories of public interest listed in Article 31(3).

It should be added that there is disagreement in Polish legal literature as to the issue of the horizontal application of norms on rights and freedoms. However, it is not disputed that constitutional freedoms and rights guide the interpretation of provisions governing relations between private subjects and may be jointly applied with statutory provisions when rulings are delivered on such relations, which gives rise to the so-called indirect horizontal effect (Florczak-Wątor 2013). However, it is disputed whether the analysed provisions have a direct horizontal effect, whether they can serve as an independent basis for adjudication on relations between private subjects (Wojtyczek 1999, against, inter alia, Banaszak 2010). What is indisputable is that, in limiting an individual's freedom, the legislator should, on the one hand, aim to protect the particular categories of public interest indicated in Article 31(3) in conjunction with Article 22 and, on the other hand, to provide adequate guarantees for the exercise of freedoms and rights by each subject of these rights. In reference to the techniques of harmonising and balancing conflicting interests, the legislator should appropriately balance, in statutory law, the legitimate rights and claims of subjects that may be in conflict or be mutually exclusive. In doing so, there is no obstacle for the legislator, when weighing out these interests, to refer to general clauses or principles of social co-existence, as has been done, for example, in the Civil Code. In defining the object of a restriction, the legislator should consider the nature of the freedom or right that is thus protected. Some, by virtue of their object and essence, can only be limited in the relationship between the state and the individual, i.e. vertically, such as the right to free education in public schools - Article 70(2) of the Constitution. The nature of certain freedoms and rights, on the other hand, predetermines the possibility of their protection not

only vertically, but also horizontally. By way of example, the obligation to pay social security contributions for employees by private employers may be imposed on private entities under statutory law (Garlicki & Wojtyczek 2016: 64-66).

II. Freedom as a limited category. Principles of limiting constitutional freedoms and rights as manifestations of universal individual freedom

When defining the limits of the subjective right to liberty, the legislator in of Art 31(3) and in Art. 22 of the Constitution, following the model developed in German academic literature, known as Schranken-Schranken, used a concept of limitations based on three prerequisites: (1) formal - the requirement of the statutory form of restrictions; (2) substantive - the requirement that restrictions be imposed solely for the purpose of protecting one of the categories of 'public interest' named in those provisions (public security, public order, natural environment, public health, public morals, the freedoms and rights of other persons), and, in case of limiting the freedom of economic activity, for the sake of any important public interest); (3) limiting the freedom of the legislator in the introduction of restrictions by prescribing observance of the principle of proportionality and prohibition of compromising the "essence" of rights and freedoms (Wyrzykowski 1998).

It is worth noting that during the period of the People's Republic of Poland, prior to the introduction to the Constitution of the requirement of statutory form of establishing limitations on freedoms and rights of the individual, the jurisprudence of the Supreme Administrative Court and the Constitutional Tribunal formulated the concept of exclusive nature of the statutory form in shaping the legal situation of the individual. The reason behind such a requirement is obvious. It was intended to have the effect of ensuring parliamentary participation and control in shaping the legal situation of an individual. Consequently, it cannot be disputed that a failure to observe the statutory form of restricting freedoms and rights will always lead to the disqualification of a given norm as contrary to Article 31(3) of the Constitution, and this regardless of whether the other prerequisites for such restriction have been fulfilled (Judgments of the Constitutional Tribunal of: 19 May 1998, U 5/97; 12 January 1999, P 2/98 & 12 January 2000, P 11/98).

It appears that the jurisprudence of the Constitutional Tribunal reviewing fulfilment of the formal prerequisite of limiting the freedoms and rights of the individual is not uniform. In certain cases, the Court has opted for an absolute understanding of the prerequisite and excluded the possibility of imposing any restrictions whatsoever outside statutory law (Judgments of the Constitutional Tribunal of: 19 May 1998, U 5/97; 1 May 1999, P 9/98; 6 March 2000, P 10/99 & 5 March 2001, P 11/00). One can also encounter a more liberal approach according to which the requirement of statutory form in imposition of limitations implicates more than mere reminder of the general principle of exclusive nature of statutory law. It should be interpreted as a formulation of the requirement that a statutory provision be sufficiently specific. It is therefore required that at least all the essential elements of the legal regime establishing a restriction be included directly in the text of the statute (Judgment of the Constitutional Tribunal of 25 May 1998, U 19/97) so that "already upon reading the provisions of the Act one can determine the complete outline (contour) of the restriction" (Judgment of the Constitutional Tribunal of 12 January 2000, P 11/98). Norms that do not constitute the 'basic' or 'essential' elements of a restriction can therefore be included in a lower-rank act, such as regulation (Garlicki & Wojtyczek 2016: 69-100).

The constitutional principle of the determinacy of law (Article 2) has influenced the interpretation and application of Article 31(3) of the Constitution through the formulation of the requirement of determinacy of a statutory intervention in the sphere of constitutional freedoms and rights of the individual. Its definition is expressed in two prerequisites of qualitative nature: the rule of precision and the rule of completeness. The statutory formulation of limitations to freedoms and rights should be characterised by an adequate degree of precision in its formulation and an adequate degree of completeness. The rule of precision means that vagueness of legal provisions beyond a certain level may constitute a self-contained ground for ascertaining their incompatibility with the provisions requiring a statutory form of limiting civil liberties (Article 31(3), sentence 1), as well as with the rule of law (Article 2) (Constitutional Tribunal judgments of: 22 May 2002, K 6/02; 24 February 2003, K 28/02; 29 October 2003, K 53/02; 11 May 2004, K 4/03; 7 January 2004, K 14/03; 3 November 2004, K 18/03). The rule of completeness requires that a statutory restriction of individual freedoms should, by itself, include all its basic elements to the extent allowing determination of its object and scope. It is inadmissible to include in statutory law norms of a blanket nature, leaving to the executive branch a considerable margin of discretion in determining the final shape and scope of the introduced restriction (Judgments of the Constitutional Tribunal of: 18 February 2014, K 29/12; 12 January 2000, P 11/98). This would be contrary to both Article 31(3) and Article 92(1), as implying only ostensible compliance with the requirements under these provisions. It is obvious that when establishing restrictions, the scope of the matter left for specification must be narrower than the scope of matters generally delegated to be specified in accordance with Article 92 of the Constitution (Judgment of the Constitutional Tribunal of 10 April 2001, U 7/00).

Consequently, restrictions complying with the above qualitative requirements may be established both in statutes and in legislative acts having the force of a statute. In the Polish system of sources of law, such pieces of legislation are acts with supra-statutory force, such as international agreements ratified pursuant to Article 89 Paragraph 1 (with prior consent granted under a statute) and provisions of law established by an international organisation authorised, within the meaning of Article 91 Paragraph 3, to introduce laws with direct effect in the Polish legal system having priority in the event of conflict with statutory provisions. In practice, this refers to regulations

adopted by the European Union. The Constitutional Tribunal, by declaring constitutionality of one of the Community regulations, implicitly confirmed the admissibility of regulating the issues related to the realisation of constitutional freedoms and rights by means of secondary EU legislation (Judgment of the Constitutional Tribunal of 16 November 2011, SK 45/09).

III. The requirement for statutory form of restrictions and the case of public health protection under COVID-19 pandemic conditions

The requirement of statutory form in introducing restrictions on freedoms and rights excludes the possibility to impose them independently in sub-statutory regulations. It is required that limitations must be set out in a statutory norm in a precise and complete manner as regards their basic and essential elements. In this context, a question arose as to whether, and if so to what extent, limitations could be specified in a sub-statutory act. In the jurisprudence of the Constitutional Tribunal it has been pointed out that the requirement of completeness of a statutory regime permits to include in a regulation only provisions of technical nature, without fundamental importance from the point of view of individual rights or freedoms (Judgement of the Constitutional Tribunal of 12 January 2000, P 11/98). Only such matters that are not of fundamental importance for the realisation of freedoms and human rights enshrined in the Constitution may be submitted for specification by means of a regulation (Judgments of the Constitutional Tribunal of: 19 May 2009, K 47/07 & 9 February 2002, U 3/01).

The Covid-19 pandemic forced public authorities to take measures adequate to the situation in order to protect public health. Their essence boiled down to the need to establish different types of restrictions on the exercise of civil liberties. These could either be introduced by ordinary constitutional measures or, as a result of identifying extraordinary threats, by emergency measures. Ordinary measures should be understood, in the first place, as the possibility of interfering with human rights in accordance with Article 31(3) in conjunction with Article 22 of the Constitution. The use of extraordinary measures, as defined in Articles 228 et seq. of the Constitution, is only possible under conditions of a state of emergency in the country. Consequently, attempts to counter special threats in violation of the requirements for limiting civil liberties contained in Article 31(3) in a situation where one of the states of emergency under Article 228(1) of the Constitution has not been introduced in the country should be regarded as impermissible (Tuleja 2021).

Under the conditions of the Covid-10 pandemic, the Polish government decided not to resort to emergency measures. A state of emergency was not introduced in the territory of the Republic of Poland. This meant that, in limiting the exercise of constitutional freedoms and rights by persons residing in the country during the pandemic, the legislature and the executive were obliged to act within the limits of Article 31(3) of the Constitution. It was impermissible to compromise the essence of individual freedoms and rights or to completely deprive specific persons of the enjoyment of their freedoms or rights.

The actions of Polish authorities during the COVID-19 pandemic have been reviewed negatively in literature. It has been concluded that 'the legislator and the executive branch led to a significant erosion of the principle of the exclusivity of statutory law and the hierarchy of sources of law as defined in Chapter Three of the Constitution' (Tuleja 2020). It was explained that Articles 46 and 46a of the Act of 5 December 2008 on preventing and combating infections and infectious diseases in humans (Journal of Laws 2020, item 1845, as amended, hereinafter: the Act on preventing and combating infections) became the key provisions from the perspective of those actions. The indicated norms contained a statutory delegation formulated in very general terms, empowering the Minister of Health and the Council of Ministers to introduce, by regulations, far-reaching restrictions on civil liberties. The principles of exclusivity of statutory law, proportionality and the requirement to preserve (not violate) the essence of constitutional freedoms and rights by introducing restrictions were not respected.

A similarly negative assessment of the actions of the authorities in the pandemic period can be found in the jurisprudence of administrative courts in cases relating to the assessment of interpretation and application of the provisions of the Act on preventing and combating of infections (Art. 48a(1) item 3 and (3) item 1, (4) in connection with Art. 46b item 2, Art. 46a) and the regulations issued on its basis, namely: the Regulation of the Council of Ministers of 19 March 2021 on the establishment of certain restrictions, orders and prohibitions in connection with the state of epidemic (Journal of Laws of 2021, item 512, as amended, hereinafter RM Ordinance of 19 March 2021) and the Regulation of the Council of Ministers of 6 May 2021 on the establishment of certain restrictions, orders and prohibitions in connection with the state of epidemic (Journal of Laws of 2021, item 861 as amended, hereinafter RM Ordinance of 6 May 2021).

Article 46a of the Act on Preventing and Combating Infections provided that in the event of a state of epidemic or a state of epidemic threat of a nature and extent exceeding the capacities of the competent government administration bodies and the bodies of local self-government units, the Council of Ministers may specify, under a regulation, based on the data provided by the Minister responsible for health, the Minister responsible for internal affairs, the Minister responsible for public administration, the Chief Sanitary Inspector and voivods:

1) the area at risk, including specification of the type of zone in which the epidemic or epidemic emergency has occurred,
2) within the scope specified in Article 46b, the type of solutions applied, taking into account the current capacity of the state budget and the budgets of local self-governments; on this basis, it became permissible to establish, during a pandemic, temporary restrictions on the operation of specific areas of business, and, after the introduction of a state of epidemic threat or state of epidemic, also temporary restrictions on the operation of

specific institutions or workplaces.

The Regulation of the Council of Ministers of 19 March 2021, issued pursuant to the Act on preventing and combating infections granted, under § 9(10), to administrative bodies, such as field units of county sanitary inspectorates, a legal basis to impose high administrative penalties in connection with a breach of prohibitions on conducting certain strictly defined types of business activity by entrepreneurs introduced under the Regulation. On the other hand, § 5(1), sentence 2, of the Regulation of the Council of Ministers of 6 May 2021 introduced a derogation from the statutory principle of imposing quarantine only by administrative decision issued by a competent sanitary authority. This led to a fundamental change to the statutory construction that performs guarantee and protection functions. The change under analysis consisted in the introduction of the institution of 'quarantine by operation of law', hitherto unknown to the Act on preventing and combating infections.

In assessing those actions of the state, administrative courts have developed a uniform line of jurisprudence, confirming the unconstitutionality of the actions of public authorities in the pandemic period (e.g. with regard to the principles and method of limiting the freedom of economic activity, see the judgments of the Supreme Administrative Court of: 28 October 2021, II GSK 1382/21; 9 December 2021, II GSK 2184/21 & II GSK 2385/21; 4 March 2022, II GSK 38/22; 25 January 2023, II GSK 843/22; 25 January 2023, II GSK 851/22 & II GSK 843/22, with regard to limiting civil liberties, see, e.g., the judgments of: the Supreme Administrative Court of 8 September 2021, II GSK 835/21 and the Voivodship Administrative Court in Łódź of 25 January 2023, III SA/Łd 394/22).

Attention was drawn in the jurisprudence of administrative courts that although Article 68(4) of the Constitution imposes an obligation on public authorities to counter epidemic diseases, the legislator has not specified what measures should be used to fulfil this obligation. The concepts of state of epidemic threat and state of epidemic present in statutory law have no corresponding constitutional basis. This circumstance has major legal implications. An epidemic threat and a disease outbreak cannot be qualified as states of emergency provided for in the constitution. This means that, in the case of both states, restrictions on constitutional freedoms and rights cannot be introduced using the legal instruments available in states of emergency. Interference in the sphere of freedoms and rights during these two states should therefore meet all the requirements under Article 31(3), including the overriding principle of exclusively statutory form of introducing such interference.

Consequently, administrative courts followed the position, well-established in the jurisprudence of the Constitutional Tribunal, that the stipulation in Article 31(3) of the exclusive nature of statutory law for regulating the sphere of human freedoms and rights must be understood literally. Admissibility of any sub-delegation, i.e. delegation of the competence to establish restrictions in implementing regulations, is out of question. At the same time, a statutory regime limiting freedoms should be characterised by completeness. The legal basis for resolving a dispute between an individual and a public authority concerning the scope or manner of exercising freedoms and rights, or their binding limitations, cannot be detached from constitutional norms, or have a rank lower than that of a statute (Supreme Administrative Court in the case resolved by the judgement of 4 March 2022, II GSK 38/22 with reference to the judgement of the Constitutional Tribunal of 19 May 1998, U 5/97 and the judgements of the Constitutional Tribunal of: 28 June 2000, K 34/99; 6 March 2000, P 10/99; 7 November 2000, K 16/00 & 19 July 2011, P 9/09).

When examining the regulation of the Act on preventing and combating infections (Articles 46a and 46b), administrative courts were of the opinion that the Act should establish limitations precisely and exhaustively and, on top of that, unambiguously determine in what respect and to what extent the terms setting out the statutory limitations may be technically made specific in a sub-statutory act. Statutory law should provide detailed guidelines for the content of the legal norms delegated for specification.

These requirements were not met by the statutory authorisations under Article 46b of the Act on preventing and combating infections. In item 2 of that provision, the legislator provided only for a general possibility of establishing, in the form of a regulation, temporary restrictions of certain areas of entrepreneurs' activities. The analysed provision of the Act did not contain any guidelines in this matter, in particular, it did not indicate precisely in what circumstances and to what type of business activity the restrictions may apply. Similarly, the provision of Article 46(4) item 3 of the analysed Act should be evaluated negatively. The provision authorised introduction, under a regulation, of a temporary limitation of operation of certain institutions or workplaces.

These findings led Polish courts to the conclusion that the limitation of the freedom of economic activity provided for under § 9(10) of the Regulation of the Council of Ministers of 19 March 2021 was in violation of constitutional standards (Articles 20 and 22 in conjunction with Article 31(3)) due to a failure to comply with the required statutory form. Courts also identified a contradiction between the authorisation granted to the Council of Ministers under Articles 46a and 46b of the Act on preventing and combating infections to introduce restrictions on freedom of economic activity by means of a regulation and Article 92 of the Constitution. As a consequence of the delegation, all relevant subjective and objective elements of a delict, i.e. provision of sanctioning and disciplining nature, were not contained in statutory law, but in an implementing regulation. This way, the principle of absolute exclusivity of the statute was violated. An analysis of constitutionality and legality of the Regulation of the Council of Ministers of 19 March 2021, as a normative act that should be issued pursuant to and for the purpose of implementing the Act, led to the conclusion that, in fact, the Regulation was a substantively independent act, i.e. deprived of its strictly implementing character in relation to the Act.

During the Covid-19 pandemic, the legal basis for imposing the quarantine obligation was provided under the Regulation of

the Council of Ministers of 6 May 2021, issued under the authority of the Act on preventing and combating infections and infectious diseases in humans. Under the discussed provisions, imposition of this obligation on an individual did not require an administrative decision. An administrative body, acting in pursuance of § 5(1) and (2) of the Regulation, merely made an entry in the ICT system on the obligation to undergo quarantine. Such entry constituted a technical substantive operation of the authority. This was because § 5(1), sentence 2, of the Regulation derogated from the principle of imposing the quarantine obligation solely under an administrative decision. In the opinion of administrative courts, the provisions of the Regulation defined in this way went beyond the limits of the statutory authorisation as set out in Articles 46a and 46b items 1-6 and 8-12 of the Act on preventing and combating infections and infectious diseases in humans. Attention was drawn to the fact that the authorisation granted under Article 46b(5) and (6) lacked any guidance on a possibility to regulate the quarantine obligation differently from what the Act provided for. Legal science has evaluated these legislative acts similarly. It has been emphasised in literature that the introduction of the institution of peculiar 'quarantine by operation of law' requires amendment to the statutory regime. It is not permissible to introduce it by means of a sub-statutory act. The statutory construction has a guarantee function. It can only be derogated from by statute (Bosek 2022).

IV. CONCLUSIONS

These analyses give rise to two conclusions regarding the assessment of constitutionality of the institution of quarantine by operation of law. First, they point to its incompatibility with the constitutional principle of legality of actions of public authorities, and second, to its inconsistency with Articles 31(3) and 41(1) of the Constitution. According to the principle of formal rule of law, binding on the organs of public authority (Article 7 of the Constitution and Article 6 of the Code of Administrative Procedure), such bodies are obliged to act exclusively on the basis and within the limits of the law in force. This applies not only to acts of interpreting and applying the law, but more broadly to the legislative process, including sub-statutory acts (Garlicki & Zubik 2016). The principle of legalism must also be observed when issuing legislation under relevant competence, procedural and substantive provisions, implementing regulations. This obligation has undoubtedly been breached. In addition, it was pointed out that Article 41(1) of the Constitution guarantees personal inviolability and liberty to everyone, and requires that deprivation or restriction of liberty should take place only in accordance with principles and under procedures specified by statute. In the context of the provisions under review (Articles 31(3) and 41(1)), imposition of quarantine, as a form of restriction of individual freedom, is only permissible by statute due to interference with fundamental civil rights. At the same time, such restriction must not violate the essence of the restricted freedom. Imposition of a quarantine obligation on a particular person should take place under an administrative decision issued according to a statute and not as a technical substantive operation of an administrative body.

The findings made lead to the conclusion that the public authority, in combating epidemic diseases, cannot resort to extraordinary constitutional measures if the authority has not decided to impose an appropriate state of emergency in the territory of the Republic. However, apart from this just constatation, one should not to overlook three important questions. Protection of public health belongs to important, guaranteed and constitutionally protected categories of public interest (Articles 31(3) and 68(1)). Identification of a threat to this value, by virtue of constitutional provisions, justifies interference in the sphere of individual freedoms. However, without the introduction of a state of emergency, the limitation of individual freedoms may only take place in accordance with Article 31(3) of the Constitution, which significantly reduces the effectiveness of acts of public authorities. At the same time, it should be noted that combating epidemic diseases with instruments appropriate to states of emergency does not necessarily have to be effective or increase the level of security of citizens and persons residing in the Republic. In its essence, introduction of a state of emergency entails suspension of a part of constitutional provisions and their replacement with an exceptional regime. The Constitution characterises states of emergency in terms of the following 6 principles: exceptionality (subsidiarity), legality, proportionality, expediency, protection of the foundations of the legal system and representative bodies (Garlicki 2019). According to Article 228(5) of the Constitution, actions taken as a result of introducing a state of emergency should aim to restore the normal functioning of the state as soon as possible. Transformation of a state of emergency into a form of permanent governance due to the occurrence of specific threats gives rise to a permanent modification to the normal legal order (Eckhardt 2012) and, as such, negates the purpose of this institution. For the above reason, under the conditions of the long-lasting Covid-19 pandemic, recourse to the institution of state of emergency could be questioned. Indeed, purposefulness of imposition of a state of emergency is directly correlated to the principle of its temporariness. Measures taken by public authorities under a state of emergency should be applied only for a necessary period of time, i.e. no longer than the duration of the specific threat, which, in the light of constitutional assumptions, should be possible to remove in a relatively short period of time.

In this context, a question arises as to how the public authority can effectively protect public health and effectively discharge its obligation under Article 64(4) of the Constitution, i.e. to combat epidemic diseases under conditions of a pandemic such as COVID-19? The long-lasting Covid-19 pandemic demonstrated that health protection in reliance on the provisions of Article 31(3) is ineffective and does not allow the authority to respond quickly to changing epidemic conditions. Under such conditions, recourse to the institution of state of emergency is contradicted by the constitutional rule of the institution's temporariness. On the other hand, the horizontal

dimension of constitutional freedoms and rights requires that the individual should exercise them in such a way as not to infringe on the freedoms and rights of others, or on constitutionally protected values, such as public health. Under the conditions of the Covid-19 pandemic, an individual must reckon with the fact that the public authority should be able to take measures necessary to protect people's health and lives, including those that will interfere with the individual's freedoms. The current constitutional regime shows some shortcomings in this matter. It seems that the provision of Article 68(4), imposing on the public authority the duty to combat epidemic diseases, should be supplemented by specification of basic constitutional standards for limiting the individual's freedoms under the conditions of a state of epidemic threat or a state of epidemic declared with a view to protecting public health. This regime should, on the one hand, indicate objective prerequisites allowing to declare these states and, on the other hand, define, as lex specialis in relation to the provision of Article 31(3), the object and scope of interference in the sphere of individual freedoms. The constitution-maker should therefore specify in what forms and by what means the constitutional obligation to combat epidemic diseases should be fulfilled (Article 68(4)). These means should be different from ordinary constitutional measures and, at the same time, less intense than those available in states of emergency. In this way, in the future, it will be possible to ensure adequate public health protection in the event of another pandemic. Without a constitutional amendment, any efforts by the legislature may once again prove misguided and ineffective. The rigours dictated by the need to combat epidemic diseases do not allow the requirements under Article 31(3) to be complied with when introducing restrictions on civil liberties. On the other hand, introduction of a state of emergency in such a situation would undoubtedly constitute too intense an interference in the sphere of people's freedoms and, as such, seems incompatible with the constitutional assumptions of the use of this institution. Only an amendment to the Constitution, with regard to Article 68, will provide the legislature with the ability to manage the affairs of the state and offer necessary protection for the health and life of people in the conditions of another pandemic.

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