

The state-individual relationship during COVID-19 pandemic – from the human rights point of view

Abstract: Since the outbreak of the Covid-19 epidemic in November 2019 in Wuhan (China) countries experience negative impact of the coronavirus actions on their health care systems. Therefore different administrative regulations are imposed to flatten the disease curve, to ensure fluent and undisturbed work of health units.

The goal of the article is to get a closer look at practical aspects of legal and administrative regulations that are imposed in different countries to prevent the spread of coronavirus and analyse them in the context of human rights restrictions. It is difficult, if not impossible, to give a simple answer whether or which restraints are needed. Therefore, the author aims at drawing attention on the slight borderline where the restrictions are necessary for the sake of health and where are they exaggeration of public authority's power over individuals.

The novum of the article is a look at the state-individual relationship according to the concept of W. Osiatyński in the situation of the Covid-19 epidemic.

The research method used by the author is the analysis of the relationship between the state and the individual in terms of human rights, taking into account the provisions of law. The practical assessment of the implementation of the protection of individual rights was illustrated by the most recent press reports, both Polish and international.

Keywords: power, authority, restrictions, protection, autonomy

1. Introduction

The question is how will the coronavirus pandemic affect the protection of human rights?

On the one hand, prisoners are being released from serving prison sentences due to the fear of the spread of the epidemic, e.g. in Bahrain.¹ Reports of organizations monitoring the protection of human rights clearly indicate that prisons in South America, Asia and Africa are overcrowded, which favours infecting people.²

On the other hand, we see a law tightening and a takeover of power, as happened in April 2020 in Hungary.³

Coronavirus is the “new terrorism”. It’s the latest pretext for rights violations that I fear will persist long after the crisis ends. – Kenneth Roth – Executive Director of Human Rights Watch⁴ Is it true?

In this perspective, a question should be asked: are the regulations limiting the fundamental rights and freedoms of citizens compatible with the human rights protection we are entitled to?

The answer, of course, is not unclear and depends on the context and scope of the restrictions, but in fact: it is possible to introduce limitations in the scope of freedoms in order to protect health, fulfilling the obligations arising from ratified international law and constitutional regulations. It is regulated by law: in Poland, article

¹ Bahrain: Free Imprisoned Rights Defenders and Opposition Activists <https://www.hrw.org/news/2020/04/06/bahrain-free-imprisoned-rights-defenders-and-opposition-activists> [access: 10.04.2020].

² Asia: Reduce Prison Populations Facing COVID-19 <https://www.hrw.org/news/2020/04/06/asia-reduce-prison-populations-facing-covid-19> [access: 10.04.2020].

³ Coronavirus Power Grab in Hungary: Daily Brief, Human Rights Watch, <https://www.hrw.org/the-day-in-human-rights/2020/03/26> [access: 10.04.2020].

⁴ Coronavirus Is the “New Terrorism”: Daily Brief, Human Rights Watch, <https://www.hrw.org/the-day-in-human-rights/2020/04/07> [access: 10.04.2020].

31 of the Constitution, point 3⁵: *Any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights.* However, those restrictions must abide the rule of law.

State security and public order are firstly associated with two of the six values belonging to the material premises for restricting rights and freedoms, which are described in Art. 31 sec. 3 of the Constitution. The fact that the possibility of resolving the conflict of constitutional rights and freedoms of an individual for the benefit of the above-mentioned values is a strong argument to consider them as essential constitutional values. Nevertheless, the rank of constitutional values should be assessed through the prism of the entirety of the provisions of the constitution and its axiology. Adopting the axiom of the superiority of state security over individual rights and freedoms would certainly not be correct and would doubtless serve the very value of citizens' security.

The protection of citizens' security is assumed to serve as an auxiliary to the need to care for the maintenance of an order conducive to the development of all entities subject to state rule, one should exercise particular caution when limiting rights and freedoms for the sake of the discussed value.⁶ It seems reasonable for the doctrine to consider the further conclusion that these introduced restrictions must always be consistent with the original

⁵ Constitution of the Republic of Poland of April 2, 1997. Dz.U. 1997 nr 78 poz. 483.

⁶ More on the issue of values: Sitek M. (2018) Human rights in the age of value conflict. Selected issues [in:] Sitek M., Tafaro L., Indelicato M. (ed.) From human rights to essential rights, Józefów, 13-23.

goal of ensuring the development of the community, including all those who make it up, and guaranteeing the free exercise of their rights and freedoms, depending on their predispositions.⁷

2. State obligations towards citizens in the era of epidemics

The state is responsible for ensuring that human rights are respected⁸ and it is the responsibility of the state to ensure that restrictions on these rights are as little severe as possible for people. According to the definition of human rights presented by prof. Wiktor Osiatyński, human rights are “universal moral rights of a basic nature, applicable to each individual in their contacts with the state.” „Freedoms, means of protection and benefits, the respect of which are rights, in accordance with the freedoms respected today, all people should be able to demand from the society in which they live”.⁹

According to the cited author, the concept of human rights is based on three theses:

- 1) every authority is limited;
- 2) each individual has a sphere of autonomy to which no authority has access;
- 3) each individual may demand protection of his rights from the state.

⁷ Karakulski, J. (2019) Ustrojowy obowiązek zapewnienia bezpieczeństwa obywateli : analiza art. 5 media parte Konstytucji Rzeczypospolitej Polskiej, [in:] Mierzwa, M. and Niewęglowski, K. (eds) Naczelne zasady systemowe w Konstytucji Rzeczypospolitej Polskiej. Lublin : Studenckie Koło Naukowe Prawników UMCS, pp. 134–144. https://www.academia.edu/40557613/NACZELNE_ZASADY_SYSTEMOWE_W_KONSTYTUCJI_RZECZPOSPOLITEJ_POLSKIEJ (Accessed: April 22, 2020).

⁸ https://ec.europa.eu/poland/sites/poland/files/190118_prawa_czlowieka.pdf p. 13.

⁹ Osiatyński W. Wprowadzenie do praw człowieka, Helsińska Fundacja Praw Człowieka, <https://www.hfhr.pl/publication/wprowadzenie-do-pojecia-praw-czlowieka/> [access: 15.08.2020].

Has the power of the state really not expanded beyond its borders during the pandemic? Has it not entered the sphere of individual autonomy too much?

3. Every authority is limited – is it?

Limited power is the basis for the activities of state organs – organs operate within the framework and within the limits of the law. They have no unfettered power. Human rights – the area of law recognized as part of public law¹⁰ determines the relationship between the authority and the individual. The authorities are guided by the principle of legalism, which is to protect certain values. The content and scope of the principle of legalism in Poland is set out in Art. 7 of the Constitution¹¹, which states that organs of public authority operate on the basis and within the limits of the law. It means that actions taken by public authorities must be based on the competences vested in them. Actions by public authorities may be undertaken only on the basis of generally applicable provisions of law¹², which means that interference in the legal sphere of an individual must be based on a specifically indicated provision (this action is based on an explicit legal basis that is applicable in a specific factual state).

¹⁰ Some authors also rightly recognize that when it comes to human rights, there is an aspect of responsibility towards one another, or the question of protecting a person from sovereign actions against oneself (euthanasia, suicide, drug use). In this sense, human rights also belong to private law. More: Augustyniak M. (2016) *Wolności i prawa człowieka w Konstytucji Rzeczypospolitej Polskiej*, Chmaj M. (ed.), Warsaw, 15.

¹¹ Constitution of the Republic of Poland of April 2, 1997. Dz.U. 1997 nr 78 poz. 483.

¹² Stadniczenko J. (2018) *Etyka w administracji publicznej i jej znaczenie w demokratycznym państwie prawa* [in:] Parente F., Sitek B., Florek I. (ed.) *Human rights in the functioning of public administration Prawa człowieka w funkcjonowaniu administracji publicznej*. Józefów, 91.

The rule of law is the vehicle for the promotion and protection of the common normative framework. It provides a structure through which the exercise of power is subjected to agreed rules, guaranteeing the protection of all human rights.¹³ The rule of law is a moral ideal that protects distinctive legal values such as generality, equality before the law, the independence of courts, and due process rights.¹⁴

In the difficult situation of epidemic threats and epidemics faced by states and public authorities, the principle of legalism was not fully respected. In Poland, there were only objections to the unauthorized issuance of regulations¹⁵ which purpose, it seems, was to protect the population against the spreading disease. In some countries, however, an epidemic emergency has become a pretext for abuse power.¹⁶ „While we recognize the severity of the current health crisis and acknowledge that the use of emergency powers is allowed by international law in response to significant threats, we urgently remind States

¹³ Rule of Law and Human Rights, <https://www.un.org/ruleoflaw/rule-of-law-and-human-rights/>

¹⁴ Carmen E. Pavel (2020) The international rule of law, *Critical Review of International Social and Political Philosophy*, 23:3, 332-351, DOI: 10.1080/13698230.2019.1565714

¹⁵ <https://www.rpo.gov.pl/pl/content/koronawirus-rpo-rozporzadzenia-MZ-niezgodne-z-ustawa>

¹⁶ Hungarian Prime Minister Viktor Orban used the COVID-19 pandemic to further undermine the fundamental principles of democracy and the rule of law. Following the adoption of the proposed new emergency bill, Orban and his government will have the means to exercise arbitrary and unlimited power.

The president of the Council of Europe chastises Hungarian Prime Minister Viktor Orban for using the coronavirus as an excuse to limit civil liberties. Warns, do not undermine “democracy, the rule of law and human rights”https://www.coe.int/en/web/portal/-/secretary-general-writes-to-victor-orban-regarding-covid-19-state-of-emergency-in-hungary?utm_source=POLITICO.EU&utm_campaign=94a7478967-EMAIL_CAMPAIGN_2020_03_25_06_01&utm_medium=email&utm_term=0_10959edeb5-94a7478967-189097005 [access: 10.04.2020].

that any emergency responses to the coronavirus must be proportionate, necessary and non-discriminatory.”¹⁷

Moreover, it should be noted and emphasized the heterogeneity in the actions of public authorities regarding the requirement to wear masks. On the one hand, there is a judgment of the District Court in Kościany, who accepted the complaint of a man who did not accept the fine for riding a bicycle without a mask covering his mouth and nose. According to the court, the restrictions were “introduced illegally”.¹⁸ On the other hand, the District Court in Suwałki imposed a fine of 100 PLN on a saleswoman who refused to serve a client without a mask. The court found that the cashier had no right to deny the client the opportunity to make purchases.¹⁹

On the one hand, such a situation reflects the principle of the independence of the judiciary, but it raises doubts as to the rightness and legality of public administration. In a situation where the jurisprudence is not uniform, it causes confusion for citizens. In my opinion, in this situation the courts should not be blamed for a different opinion, but the legislative authority, which introduces legal provisions without an appropriate legal basis, as indicated by the Ombudsman²⁰²¹

¹⁷ COVID-19: States should not abuse emergency measures to suppress human rights – UN experts (2020) United Nations Human Rights Office of the High Commissioner <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25722>

¹⁸ Przełomowy wyrok polskiego sądu. Chodzi o brak maseczki <https://www.o2.pl/biznes/przełomowy-wyrok-polskiego-sadu-chodzi-o-brak-maseczki-6528490034146016a>. [access: 03.09.2020] Wyrok nie jest jeszcze zamieszczony w bazie orzeczeń.

¹⁹ Nie obsłużyła klientki bez maseczki. Rzecznik MZ chce się dołożyć do mandatu https://next.gazeta.pl/next/7,151003,26263632,nie-obsluzyla-klientki-bez-maseczki-rzecznik-mz-chce-sie-dolozyc.html#do_w=57&do_v=67&do_a=330&s=-BoxOpLink [access: 03.09.2020] Proceedings by writ of payment, the judgment is not included in the judgment database.

²⁰ <https://www.wiadomoscihandlowe.pl/artukul/rpo-przepisy-zobowiazujace-do-noszenia-maseczek-w-sklepach-sa-wadliwe/1> [access: 03.09.2020]

²¹ Regulation of the Council of Ministers of August 7, 2020 on the establishment of certain restrictions, orders and bans in connection with an epidemic, Dz.U. 2020 poz. 1356

4. Restrictions on the individual's sphere of autonomy

The most commonly restricted freedom during the pandemic is freedom of movement. Historically, the right to move was negative – people were free to move unless for some reason it was forbidden to do so. One of the first known regulations in this matter was the ban on travelling without Augustus consent for senators only, in 27 BCE when Roman empire seized power over Egypt. However, this ban was retreated only in 6 CE during the famine when Augustus tried to make his subjects independent of the food supply, giving senators the opportunity to leave Rome and travel wherever they wanted.

Further examples of the freedom of movement were recorded in the document Magna Carta (1215), art. 42: “In future it shall be lawful for any man to leave and return to our kingdom unharmed and without fear, by land or water, preserving his allegiance to us, except in time of war, for some short period, for the common benefit of the realm. People that have been imprisoned or outlawed in accordance with the law of the land, people from a country that is at war with us, and merchants – who shall be dealt with as stated above – are excepted from this provision.”²² This formulation shows that as early as the beginning of the 13th century, freedom of travel was assumed for various purposes, with the exception of political activities. Such persons could freely leave the territory of England and return to the country.

Currently, also international legal acts regulate the issue of the right to free movement. Universal Declaration of Human Rights²³

²² Howard, A. D. (1998) Magna Carta: text and commentary (Vol. 1). USA. 19.

²³ The United Nations. (1948) Universal Declaration of Human Rights.

article 13 point 1 says that “Everyone has the right to freedom of movement and residence within the borders of each State.” Similar provision is repeated in Article 12 of the International Covenant on Civil and Political Rights²⁴. However, the exercise of this right may be subject to limitations specified by statute and “necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others” (article 12 point 3). Meanwhile, we hear about harsh restrictions on freedom of movement and expression in Jammu and Kashmir (India) ostensibly due to Covid-19 pandemic. The government restraints also access to information, health and education.²⁵

It is the same with freedom of assembly and association “Everyone has the right to freedom of peaceful assembly and association” (Article 20).²⁶ This right is developed in article 22 of International Covenant on Civil and Political Rights. Again permitted restriction is included in this provision: “ No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.”

The lack of precise regulations and doubts as to the recognition of the epidemic as *vis maior* may also raise the risk

²⁴ The United Nations General Assembly. (1966) International Covenant on Civil and Political Rights. Treaty Series, 999, 171.

²⁵ India: Abuses Persist in Jammu and Kashmir, Internet Restrictions Amid Pandemic Exacerbate Yearlong Crackdown, <https://www.hrw.org/news/2020/08/04/india-abuses-persist-jammu-and-kashmir> [access: 15.08.2020].

²⁶ The United Nations. (1948) Universal Declaration of Human Rights.

of actual deprivation citizens of the possibility of effective pursuit of claims, and consequently depriving them or at least severely restricting their constitutional right to a fair trial.²⁷

The authors of the texts in this publication point out many other human rights that are being limited during the coronavirus epidemic, which I do not want to repeat. They include: the right to privacy, the right to religious worship, the right to good administration, the right to health care, the right to education and many more.

5. Each individual may demand protection of his rights from the state

Public safety, including epidemiological safety, understood as a positively existing state, which can be described as a reality in which members of the state community have a justified sense of security, is certainly a value in itself in every community. The security of citizens is particularly important here.²⁸ People need security for their development (and at the same time to use their rights and freedoms), because in their absence, it is difficult and in some situations even impossible to build a strong, developed community and comprehensive self-development of each individual. There is no doubt that one of the fundamental tasks of the state is to ensure internal and external security in order to maintain order and the conditions for development mentioned

²⁷ Rzewuski M. (2020) Funkcjonowanie sądów i wymiaru sprawiedliwości w obliczu koronawirusa, LEX/el. 2020.

²⁸ Banaszak, A. (2018). Welfare as a Form of Ensuring the Social Safety of Society and an Effective and Successful Tool in Election Campaigns (Thoughts Based on the Situation in Contemporary Poland). *Regional Formulation and development studies*, 3(26). Klaipeda: Klaipeda University – Faculty of Social Sciences and Humanities. [ISSN: 2351-6542, DOI: <http://dx.doi.org/10.15181/rfds.v26i3.1806>], p. 17.

above. The state is obliged to ensure the safety of residents by introducing legal regulations: administrative or criminal, which define the scope of public administration activities as well as the scope of individual freedoms.²⁹

Unfortunately, during a pandemic, states do not ensure the implementation of all rights and freedoms, limiting their scope above the limits resulting from ensuring the epidemiological safety of citizens.

For example in Philippines the authorities is using 'drug war' tactics to fight Covid-19. In a bid to control the virus, police are conducting house-to-house searches and asking citizens to report others they believe are infected.³⁰ It is an example of a very aggressive interference in the sphere of privacy, domestic peace, which is in the contrary to article 12 of the Universal Declaration of Human Rights. However, what might be even worse, denouncing and practices of surveillance of citizens bring to mind the worst actions of totalitarian regimes.

6. Conclusions

The coronavirus outbreak has changed the lives of people around the world. States had to adapt their actions to ensure the safety of their inhabitants. However, these actions were not always compliant with the rule of law. There were many instances of excess power or incorrect implementation of the law. Although there is a legal possibility of restricting human rights, it must be used with great care, maintaining a balance between ensuring the safety of citizens and limiting the rights of individuals.

²⁹ Karakulski, J., op. it.

³⁰ Philippines Uses 'Drug War' Tactics to Fight Covid-19, <https://www.hrw.org/news/2020/07/15/philippines-uses-drug-war-tactics-fight-covid-19> [access: 15.08.2020].

Summing up the article, I would also like to emphasize that I notice the insufficient meaning of social responsibility in the state-individual relationship in literature. Much is said about the obligations of the state (probably because the relationship between the state and the individual is not equal), but too little attention is paid to the role of civil society in ensuring security.

Speaking of ensuring security during a pandemic, it is worth adding the view presented by T. Graca and M. Such-Pyrgiel that respecting human rights depends on social awareness.³¹ It draws attention to solidarity and social responsibility³² of a civil society as a specific guarantor of epidemiological safety and public health. As A. Gut states: *“the civil society can be broadly described as a social community, conscious of its rights and obligations arising from them, which actively cares for the common good and respect for all its members. Moreover, such a community is secured by mechanisms aimed at protecting the interests and rights of its members from undie state interference.”*³³ Therefore, it can be concluded that the state is responsible for ensuring security by regulating the actions of individuals in society and society is responsible for collective abidance those rules.

³¹ Graca, T., Such-Pyrgiel, M. (2018). Prawa człowieka i ich upowszechnianie w strukturach różnych poziomów edukacji [in:] Parente F., Sitek B., Florek I. (ed.) Human rights in the functioning of public administration Prawa człowieka w funkcjonowaniu administracji publicznej, Józefów, 77.

³² Stadniczenko S. L. (2018) Etos powszechnej solidarności – wołanie o odpowiedzialność współczesnego człowieka [in:] Parente F., Sitek B., Florek I. (ed.) Human rights in the functioning of public administration Prawa człowieka w funkcjonowaniu administracji publicznej. Józefów, 43-61.

³³ Gut A. (2019) The role of civil society in the development of a local government in Poland [in:] Rzewuski M., Mamiński M. Współczesne problem praw człowieka. Wybrane aspekty, Warszawa, 469.

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https://ec.europa.eu/poland/sites/poland/files/190118_prawa_czlowieka.pdf (Accessed: April 22, 2020).

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<https://www.wiadomoscihandlowe.pl/artukul/rpo-przepisy-zobowiazujace-do-noszenia-maseczek-w-sklepach-sa-wadliwe/1> .

India: Abuses Persist in Jammu and Kashmir, Internet Restrictions Amid Pandemic Exacerbate Yearlong Crackdown, <https://www.hrw.org/news/2020/08/04/india-abuses-persist-jammu-and-kashmir> .

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