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Preservation of and respect for human rights in the special COVID-19 act with regard to restriction of freedom of movement

Abstract: The COVID-19 coronavirus has forced public authorities to take immediate action to prevent the spread of the pandemic. They also included interference with the sphere of human rights and freedoms, in particular with the freedom of movement. In Poland, restrictions or temporary suspension of these rights and freedoms are allowed only in cases of emergency. However, such a state was not introduced, but the so-called special coronavirus law introducing many case solutions and amending a number of important lex generalis. Without questioning the need to temporarily suspend the freedom of movement, it was done contrary to the Polish Constitution, as the authorization to apply this measure was not included in the amended Act on preventing and combating infections and infectious diseases in humans. Thus, the principle of the exclusivity of the act for the regulation of the legal status of an individual, unquestioned in Polish doctrine and judicature, was violated. However, they were based on regulations, which, in principle, are of an executive nature. As a consequence, not only fundamental human rights were violated, but also the standards of the rule of law.

Keywords: incidental legislation, freedom of movement, special laws, human rights

1. Introduction

in 2003, an act was adopted on special rules for the preparation and implementation of public road investments[1], which was envisaged as a one-off incidental law[2], or an episodic law, i.e. a law derogating from the *lex generalis*, and whose duration is clearly defined by indicating the calendar year in which it ceases to apply[3]. As the regulation proved "effective", it has already been prolonged 3 times and in 2007 its scope was extended to include all categories of public roads[4], which means that it can be classified under the so-called *sunset legislation*[5]. Since then, a dozen or so acts of this kind have already been passed, i.e. ones concerning facilitation of public purpose investments. Therefore, the initially cautious resorting to these extraordinary acts has turned into the conviction that they may be a remedy for the shortcomings in the efficiency of implementation of these investments. Unfortunately

[1] The Act of 10 April 2013 on Special Rules for the Preparation and Implementation of Public Road Investments (Journal of Laws 2003 No. 80, item 721).

[2] "An incidental act is an act introducing legal regulations (without repealing the law previously in force) with the intention of restoring the full validity of the original regulations after the reason justifying the issuance of the incidental acts ceases to exist and the period of its transitional validity expires", A. Bałaban, *Ustawa incydentalna a pewność prawa,* [in:] M. Granat (ed.), *Ustawy incydentalne w polskim porządku prawnym,* Warsaw 2013, p. 7.

[3] Cf. § 29a and § 29b of the Ordinance of the Prime Minister of 20 June 2002 on the Principles of Legislative Technique (consolidated text: Journal of Laws 2016, item 283).

[4] See the rationale behind the draft Act submitted on 11 July 2006 on the Amendment of the Act on Special Rules for the Preparation and Implementation of Public Road Investments and on the Amendment of Certain Other Acts, Sejm of the Republic of Poland of the 5th term, paper no. 854 (http://www.sejm.gov.pl/Sejm9.nsf/page.xsp/archiwum).

[5] LATHAM, S. R. "Sunset law", *Encyclopædia Britannica*, see also BAUGUS, B., BOSE F. *Sunset Legislation in the States: Balancing the Legislature and the Executive*, p. 4.

enough, the legislator seems to be convinced that they can be a permanent element of the legal order. These acts have also gained their specific name – the special act, which is no longer present not only in the common language, but also in the legal language[6]. The above is confirmed not only by the scale of this phenomenon, but also, on the one hand, by the commencement of treating them not as incidental acts but as acts constituting a permanent element of the legal system, and on the other hand, by the adoption of acts concerning specific investments (the Świnoujście Gas Terminal, the Solidarity Transport Hub, the Vistula Spit canal, the shipping channel between Świnoujście and Szczecin), which should be treated as acts of law application rather than those of law making.

The legislator seems to have been more and more tempted to use these debatable normative acts recently, as well as to create new types of these extraordinary solutions. This is evidenced by the recently adopted Act of 5 July 2018 on Facilitation of Preparation and Implementation of Housing and Associated Investments[7], known as the special Housing Act. The characteristic feature of this act is that it is not linked to the public purpose investments referred to in Art. 6 of the Act on Real Estate Management. This is because it was passed for the implementation of private (sic!) projects.

Another type of such special acts is the Act of 2 March 2020 on Special Arrangements for the Prevention, Counteraction

[6] See e.g. the multi-author monograph Szlachetko, J.H. (ed.), *Specustawa mieszkaniowa a samodzielność planistyczna gminy. Dilemmas of lawyers and urban planners*, Gdańsk 2019, as well as several comments to this act; Bryś W., "Zakres przedmiotowy tzw. specustawy drogowej", pp. 16-31, Nahajewski, M., "Istotne problemy ustalania odszkodowania za nieruchomości przejęte pod drogi publiczne specustawą drogową", pp. 66-82, Małysa-Sulińska, K., "Zakres obowiązywania standardów urbanistycznych lokalizacji inwestycji wprowadzonych przepisami specustawy mieszkaniowej", pp. 5-9.

[7] Consolidated text: Journal of Laws 2020, item 219.

and Control of COVID-19, Other Infectious Diseases and Crisis Situations Caused by Them (the special COVID-19 act)[8], which is subject of further discussion. This act, without prejudice to the constitutional regulations on the states of emergency, introduced for a specified period, i.a. significant restrictions on movement, including those that violate the essence of this freedom. And it is precisely this aspect, i.e. the admissibility and the principles of introducing such restrictions, and sometimes the consequent nullification of the exercise of a constitutional freedom, that will be discussed further herein. At the same time, the following paper deals with the standards of the rule of law, whose existence and observance, as it appears, should be constantly reiterated.

2. Freedom of movement and ITS (constitutional) restrictions

As P. Sarnecki rightly points out, the introduction of regulations on freedom of movement into the constitution is characteristic of the former Eastern Bloc countries (cf. Article 27 of the Constitution of Russia, Article 33 of the Constitution of Ukraine, Article 30 of the Constitution of Belarus of 24 November 1996, § 34 of the Constitution of Estonia, Article 25 of the Constitution of Romania)[9]. Such a guarantee of a fundamental human right is usually not explicitly stated in the constitutions of countries with sufficiently long democratic traditions of the rule of law, although there are exceptions to this, e.g. Article 19 of the Constitution of Spain or Article 16 of the Constitution of Italy. This is probably due to the

[8] Journal of Laws 2020, item 374.

[9] Sarnecki, P., "Art. 52", [in:] Garlicki, L. Zubik M. (eds.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz.* Vol. II, Art. 52.

fact that, in countries with established democratic traditions, the inclusion of such freedom was considered unnecessary due to its obviousness and widespread adoption. This freedom can be considered to be part of the traditional understanding of individual freedom of the individual derived in the modern state of law from the principle of "being allowed to do everything that does not harm the other".

The beginnings of guaranteeing freedom of movement have a long tradition. The English *Magna Charta Libertatum* of 15 June 1215 (Articles 41-42) can be identified as one of the first legal acts to guarantee this freedom. Freedom of movement was also emphasized in the Polish Constitution of May 3, 1791 (Article IV), or in the French Constitution, also of 1791. Finally, this freedom was also included in the Universal Declaration of Human Rights (Article 13) in order to finally become part of the modern European legal system under Article 2(1) of Protocol No. 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms[10], and later globally under Article 12 of the International Covenant on Civil and Political Rights (ICCPR)[11].

Freedom of movement is usually combined with freedom of choice of place of residence as well as freedom to decide where to stay and to leave the territory of Poland. For example, the latter three were implicit in Article 101 of the March Constitution of the Second Polish Republic[12]. However, this study will focus exclusively on the issue of mobility.

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[10] Protocol No. 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, Journal of Laws 1995, No. 36, item 175/2.

[11] International Covenant on Civil and Political Rights of 19 December 1966, Journal of Laws 1977, No. 38, item 167.

[12] The Act of 17 March 1921 – Constitution of the Republic of Poland (Journal of Laws 1921, No. 44, item 267).

The freedom of movement within the territory of the Republic of Poland should be seen as a manifestation of personal freedom (Art. 31(2) second sentence, Art. 41(1)), of the right to decide about one's personal life (Art. 47), as well as a stamp of the general freedom-related status of the individual (Art. 31(1)). For example, the judgement of the Constitutional Tribunal of 18 January 2006 stated that "everyone legally residing in the territory of a country has the right to move freely and to choose his or her place of residence. According to this standard [Article 12 of the ICCPR], people are entitled to move and settle in any chosen place. The exercise of this right shall not depend on the motives or intentions of any person wishing to leave or remain in a particular place (cf. General Comments of the UN Human Rights Committee 1999-2004, Poznań 2004, pp. 17-18)"[13].

Article 52 of the Constitution of the Republic of Poland generally prohibits the introduction of any requirements for obtaining permissions of public administration bodies to exercise freedom of movement within the territory of the Republic of Poland, however, due to the general construction of rights and freedoms, restrictions in this respect are permissible, as this law is not imperative. When the state is operating on a standard basis, these restrictions may be related to a police-type regulation, e.g. ban on entering the forest[14]. However, their imposition must respect the principle of proportionality. Thus, the admissibility of restrictions on constitutional freedoms and rights must be regarded as an exception and must therefore be interpreted in accordance with the rules for the interpretation of

[13] Judgement of the Constitutional Tribunal of 18 January 2006, K 21/05, OTK-A 2006/1/4.

[14] Banaszak, B. Jabłoński, M., [in:] Boć, J. (ed.), *Konstytucja Rzeczypospolitej. Komentarz*, p. 101.

exceptions, which means, above all, prohibiting any extending interpretation of its provisions.[15]

The situation is different when it comes to the extraordinary functioning of the state. Among the constitutional provisions explicitly permitting interference with this freedom, one should specially note the provisions relating to states of emergency, in particular those relating to a state of natural disaster. Article 229(3) of the Constitution of the Republic of Poland states that an act defining the scope of restrictions on freedoms and human and civil rights in a state of natural disaster may restrict the freedoms and rights specified i.a. in Article 52(1) of the Constitution. The Act of 18 April 2002 on the State of a Natural Disaster (hereinafter: ASND)[16], implementing this proposal, in Article 21(1) in conjunction with Article 20 states the following:

a) in item 6 on the obligation to go into quarantine,
b) in item 13 on an order or prohibition to stay in certain places and facilities and in certain areas,
c) in item 15 on an order or prohibition to use a particular mode of movement.

The doctrine indicates that Article 233(2) of the Constitution of the Republic of Poland contains an enumerative list of rights and freedoms that may be limited by an act defining the scope of these limitations in a state of natural disaster. Thus, the ASND should not extend this list, which it, however, according to P. Ruczkowski, sometimes does[17].

[15] The jurisprudence of the Constitutional Tribunal is clear on this issue, e.g. in the judgement of 12 July 2012, SK 31/10, section III.2.3 and in the judgement of 25 July 2013, P 56/11, section IV.3.4.

[16] Consolidated text: Journal of Laws 2017, item 1897.

[17] Ruczkowski P., *Stan klęski żywiołowej. Komentarz*, Art. 21.

In turn, in jurisprudence, the problem of restricting freedom of movement emerged on a rather incidental basis. However, this issue is raised more often when it comes to determining the scope of the statutory authority to enact local laws and to introduce restrictions or even prohibitions. This includes, for example, regulations on the use of communal cemeteries, i.e. defining the rules and procedures for the use of communal public buildings and facilities. Namely, prohibitions introduced by some communal councils concerning behaviour in the cemetery included i.a. a ban on children under 7 years of age staying in the cemetery without adult care. Such prohibitions have been found inadmissible. The Voivodship Administrative Court ruled on 27 September 2017 that the delegation resulting from Article 40(2)(4) of the Act on Commune Self-Government "does not authorise the stipulation in the regulations of cemeteries that children under 7 years of age are forbidden to stay in the cemetery when not accompanied by an adult. The limitation of the right to stay in public places, as an element of human freedom and the right of movement as protected by Articles 31(1) and 52(1) of the Constitution, requires, in accordance with Articles 31(3) and 52(3) of the Constitution, statutory authorisation"[18]. The same issue, i.e. concerning the rules of access to communal cemeteries by minors, was the subject of the judgement of the Voivodship Administrative Court of 7 September 2017. In this case, only the age threshold was defined differently (13 years)[19]. Another example of a local law violating the freedom of movement are the resolutions of the commune council on a general ban on the use of motor vessels in water areas within the territory

[18] Judgement of the Voivodship Administrative Court in Gorzów Wielkopolski of 27 September 2017, II SA/Go 650/17, LEX no. 2363382.

[19] Judgement of the Voivodship Administrative Court in Łódź of 7 September 2017, III SA/Łd 573/17, LEX no. 2354761.

of a commune without considering the possibility of intermediate solutions taking into account the interests of persons who intend to use the lake in different ways, for example by separating areas for different forms of recreation[20]. This is due to the fact that in jurisprudence it is emphasised that there are no "arguments in favour of excluding from this constitutional freedom the freedom of choice of means of movement and limiting its functioning to the matter of the direction of movement within the territory of the State, if only because the provisions concerning constitutional freedom cannot be subject to a restrictive interpretation given the meaning of Articles 30 and 31(1) of the Constitution of the Republic of Poland referring to specific sources and scope of protection of these rights"[21].

Infringement of Article 52(1) of the Constitution of the Republic of Poland may also occur in the case of protracted administrative proceedings, all the more so if the protraction occurred in gross violation of the law[22], which is particularly significant in the case of proceedings in foreigners' cases.

In the jurisprudence of administrative courts, a point is repeatedly made that Article 52(1) of the Constitution of the Republic of Poland is not a proper model of control. Among other things, the subject matter of freedom of movement was attempted to cover animals. The judgement of the Supreme Administrative Court of 20 June argued that it cannot be claimed that the ban on walking dogs in the park contained in the regulations on the

[20] See judgement of the Voivodship Administrative Court in Gorzów Wielkopolski of 21 November 2019, II SA/Go 580/19, CBOSA.

[21] Judgement of the Supreme Administrative Court, branch office in Poznań, of 3 March 1999, II SA/Po 1399/98, CBOSA.

[22] See e.g. judgement of the Voivodship Administrative Court in Wrocław of 6 November 2019, III SAB/Wr 570/19, CBOSA.

use of public parks infringes Art. 52(1) of the Constitution which implies freedom of movement[23]. Also, the Court noted that there is no separate right of dog owners to take dogs out in public places. As a matter of principle, only natural persons are subjects of this freedom[24], while animals' freedom is not protected in this respect.

The issue of freedom of movement is, on the other hand, analysed in detail in the doctrine of criminal law. It may be restricted in case of coercive measures such as temporary arrest, as well as measures restricting only personal freedom, e.g. police supervision, release of the defendant on bail, ban on leaving a place, obligation to inform about leaving, retention of the identity document[25].

3. Freedom of movement and residence on the territory of the republic of poland vs. the state of epidemic emergency in case of the SARS-COV-2 VIRUS

In case of the suspected state of epidemic emergency in Poland, the decisive element for further proceedings is the Act of 5 December 2008 on Preventing and Combating Infections and Infectious Diseases in Humans (APCIIDH), in particular Chapter

[23] Judgement of the Supreme Administrative Court of 20 June 2018, II OSK 3084/17, CBOSA, see also judgement of the Supreme Administrative Court of 22 March 2015, II OSK 1747/15, CBOSA.

[24] GARLICKI, L. WOJTYCZEK, K., "Art. 31", [in:] L. GARLICKI, ZUBIK, M. op. cit., Art. 31, section 13.

[25] See WILIŃSKI P., "Proces karny w świetle konstytucji", Lex/el. chapter 8 section 8; see also PUDO, T., "Środek karny w postaci zakazu opuszczania określonego miejsca pobytu bez zgody sądu – próba analizy", *Czasopismo Prawa Karnego i Nauk Penalnych*, pp. 79-88.

8 entitled “Principles of dealing with the state of epidemic threat or emergency”. Until 8 March 2020, i.e. until the entry into force of Article 25 of the special COVID-19 act, the above states could be announced in a part of the territory of the Republic of Poland or in its entirety only under the rules set out in Article 46 APCIIDH. In the first case, a state of epidemic threat or emergency in the area of a voivodship or a part of it shall be announced and cancelled by the voivode by way of an ordinance issued at the request of the Voivodeship Sanitary Inspector. If, in turn, the threat is present on the entire territory of the country, this is done by the minister in charge of health in consultation with the minister in charge of public administration by way of an ordinance, at the request of the Chief Sanitary Inspector. Central to the present study is the indication that pursuant to Article 46(4)(1) APCIIDH, only a temporary restriction of a specific mode of movement may be established in these ordinances, taking into account the ways in which infections and infectious diseases spread and the epidemic situation in the area where a state of epidemic threat or emergency has been declared. It is clear from the above provision that a general ban on movement is not acceptable since it is contrary to the essence (core) of that freedom; only the mode of movement may be restricted, and this must be reasonably justified, i.e. adequate to the way in which the virus spreads.

Although, as indicated in the previous section, a ban on movement principally could be established by the introduction of one of the states of emergency, including the declaration of a state of natural disaster, i.e. in accordance with Article 233(3) of the Constitution of the Republic of Poland, this state has not been declared. Meanwhile, in order to counteract the SARS-CoV-2 coronavirus pandemic, including the possibility of the so-called lockdown, a special COVID-19 act was adopted – an

extensive act comprising over 180 pages and regulating many key aspects of public life and more. The adoption of this act is debatable from a legislative point of view[26], as the existing legal regulations prepared for such extraordinary circumstances might have been taken advantage of instead. This Act amended several important provisions of the *lex generalis* level, including the Act of 5 December 2008 on Preventing and Combating Infections and Infectious Diseases in Humans, i.a. by adding, following Article 46, Articles 46a-46f, which in the majority of cases refer to the restrictions on the freedom and rights of individuals as referred to in Article 21 ASND.

Pursuant to art. 46a APCIIDH, the Council of Ministers has become the authority empowered to establish a state of epidemic emergency or threat of the type and size exceeding the capacity of competent government and local administration bodies. It is precisely the authority that can define restrictions, orders and prohibitions in the area at risk by means of an ordinance. As a result, the Council of Ministers was granted i.a. the authority to establish:

a) temporary restriction on the use of a particular mode of movement,
b) an obligation to go into quarantine,
c) an order or prohibition to stay in certain places and facilities and in certain areas, and
d) an order to use a particular mode of movement.

In Poland, the state of SARS-CoV-2 epidemic threat was established by the Ordinance of the Minister of Health of 13 March

[26] Example of article numbering: Art. 15zzzzl[1].

2020[27], which was repealed on 20 March 2020 and on the same day the state of epidemic emergency was introduced by the Ordinance of the same Minister[28]. Four days later, the above implementing act was amended by adding § 3a, which in paragraph 1 stated that:

"1. In the period from 25 March 2020 until 11 April 2020, the persons residing in the territory of the Republic of Poland shall be prohibited from movement, except for movement for the following purposes:

1) performance of professional activities or tasks, or non-agricultural economic activity, or agricultural activity or work on a farm, and the purchase of goods and services related thereto;
2) satisfying the necessary needs related to the current affairs of everyday life, including obtaining health or psychological care, of/for that person, the person closest to them within the meaning of Article 115 § 11 of the Act of 6 June 1997 – Penal Code (Journal of Laws of 2019, item 1950 and 2128), and if the moving person lives together with another person – also the person closest to the person with whom the former lives, and to the purchase of goods and services related thereto;
3) providing of voluntary and unpaid contributions to counteract the effects of COVID-19, including through volunteering;
4) exercise of or participation in the exercise of religious worship, including religious acts or rituals."

[27] The Ordinance of the Minister of Health of 13 March 2020 on declaring a state of epidemic threat on the territory of the Republic of Poland, Journal of Laws 2020, item 433.

[28] The Ordinance of the Minister of Health of 20 March 2020 on declaring a state of epidemic emergency on the territory of the Republic of Poland, Journal of Laws 2020, item 491.

This provision therefore directly interferes with constitutional freedom of movement, violating several standards set out therein. First and foremost, this was done without the introduction any of the states of emergency, i.e. in the manner directly contrary to the constitution. Thus, the law was abused by the failure to introduce a state of emergency – an adequate one to the threat. Secondly, equally importantly, the statutory delegation to issue the ordinance only allows for the possibility of "temporary restriction of a particular mode of movement" and not of prohibiting it, i.e. such public law interference that violates its essence. The government authorities seem to forget at this point that the verb "to restrict" means only "to put some limits on", but also "to diminish, narrow the scope of something, reduce, deplete"[29]. Meanwhile, the ban on movement as a rule completely destroys this freedom in all respects, precisely through its temporary suspension[30]. Therefore, despite the fact that, pursuant to Article 31(3) of the Constitution of the Republic of Poland, the restriction of the rights and freedoms of an individual is allowed only in an act, this standard has not been met, and this has been done in the implementing act – as a consequence, the statutory delegation to issue ordinances has been exceeded. In this way, the principle of exclusive application of an act for regulating the legal status of an individual, which has been established in Polish constitutional doctrine, is broken[31]. This conclusion is all the more significant as, in the opinion of the Constitutional Tribunal, with regard to the regulation of restrictions on freedoms and rights, "the act must itself determine the essential elements of the legal regulation, and thus – in other words, these essential elements

[29] Szymczak, M. (ed.), *Słownik języka polskiego*, p. 475.

[30] See Niżnik-Mucha, A., *Zakaz naruszania istoty konstytucyjnych wolności i praw w Konstytucji Rzeczypospolitej Polskiej*, p. 322.

[31] L. Garlicki, K. Wojtyczek, *op. cit.*, section 28.

cannot be included in an ordinance. Also, the scope of the matter left for regulation in an ordinance must always be narrower than that generally allowed under Article 92 of the Constitution"[32]. It ensues from the above that the ordinances in question cannot standardise "essential" or "principal" elements, and such an element is certainly a general prohibition of movement. The vagueness of the allowed exceptions to this prohibition, including the imprecise phrase "satisfying the necessary needs related to the current affairs of everyday life", cannot be considered to meet the standards of the rule of law either. Thirdly, Article 52(1) of the Constitution of the Republic of Poland, as a freedom-related provision, not only binds the legislator by indicating the direction of law-making, but also imposes certain obligations on public administration bodies, including the requirement of interpretation *in dubio pro libertate*[33]*.* Meanwhile, in both cases an extended interpretation of the provisions of the *ius strictum* Chapter 8 of the APCIIDH was made in a manner inconsistent with their literal wording.

The above legal status was attempted to be remedied a few days later, i.e. on 31 March 2020, when the Council of Ministers, acting on the basis of Article 46a in conjunction with 46b, issued the Ordinance of 31 March 2020 on the establishment of certain restrictions, orders and prohibitions in connection with the state of epidemic emergency[34]. However, § 5 of this implementing act re-introduced a general ban on the movement of persons residing in the territory of the Republic of Poland, almost copying § 3a of the Ordinance of the Minister of Health of 25 March 2020. This

[32] Judgement of the Constitutional Tribunal of 10 April 2001, U 7/00, OTK 2001/3/56.

[33] See Zajadło, Z., "Godność i prawa człowieka", p. 61-62; see also judgement of the Constitutional Tribunal of June 2014, K 35/11, section III.6.

[34] Journal of Laws 2020.566, as amended.

prohibition was upheld in the follow-up Ordinance of 10 April 2020[35] and was finally in force until 19 April 2020. This regulation can also be subject to the above-mentioned objections, including the infringement of the possible admissibility of introducing a general ban on the movement of persons only by way of an act, since at present the Council of Ministers simply does not have such statutory powers. The purpose of this interference was not to implement the act, i.e. the APCIIDH, as this authorisation only made it possible to indicate the mode of movement and the scope of its limitation, which has been raised by the Commissioner for Human Rights since the very beginning of the ordinance[36].

4. Conclusions

There is no doubt that the state of epidemic emergency empowers the public authorities to take appropriate measures to remove the risk involved. This may also involve temporary restrictions on, or even prohibitions on, freedom of movement and social contact. However, such restrictions must be introduced respecting constitutional standards for the protection of fundamental rights and freedoms, which are not particularly difficult to comply with even during a pandemic.

The introduction of a general ban on movement by Ordinances of 25 and 31 March 2020 should be considered a violation of the

[35] Journal of Laws 2020.658.

[36] *Koronawirus. Rozporządzenie rządu z 31 marca o ograniczeniach poruszania się – krytyczna ocena RPO*, 3 April 2020, https://www.rpo.gov.pl/pl/content/koronawirus-rozporzadzenie-rzadu-z-31-marca-krytyczna-ocena-rpo%C2%A0 (accessed on: 03.07.2020), see also *Analiza RPO dla premiera o tworzeniu prawa w stanie epidemii: rozporządzenia zamiast ustaw naruszają prawa obywateli*, 4 June 2020 (https://www.rpo.gov.pl/pl/content/raport-rpo-dla-premiera-nt-prawa-w-stanie-epidemii (accessed on: 03.07.2020).

Polish Constitution. From a formal point of view, such a ban could only be introduced on the basis of an explicit statutory authorisation, which, however, was not and still is not present (sic!) in the Act of 5 December 2008 on Preventing and Combating Infections and Infectious Diseases in Humans. The provision referred to as legal basis in Art. 46(4)(1) in conjunction with Art. 46a and Art. 46b (1-6) and (8-12) of this act only allows for the possibility of temporary restriction of a certain mode of movement. It shall be noted that Article 46(4)(1) should be regarded as fully constitutional, since it respects all the demands of the principle of proportionality, including the fact that it does not affect the essence of freedom of movement by making restrictions on only certain modes of movement legal. It should be stressed that even in states of emergency, the scope of constitutional restrictions on freedoms and rights must result from an act. Using an extraordinary legislative path by adopting an *ad hoc* special COVID-19 act does not justify the violation of the basic rules for issuing legislative instruments subordinate to acts, as specified in Article 92(1) of the Constitution of the Republic of Poland. Thus, the analysed, no longer valid ordinances were also contrary to Article 52(1) and (3) of the Constitution in that they excluded freedom of movement within the territory of the Republic of Poland not on the basis of an act, but on the basis of an ordinance which had no legal basis in an act.

To sum up, it is alarming to note that ordinances and special acts impose restrictions on citizens, which are equivalent to those in states of emergency. Therefore, although in substantive terms there occurred a state similar to that of a natural disaster, it was not formally declared. Although it is not an obligation but a right of public administration bodies to introduce this state, the use of this competence cannot be treated instrumentally, including with a view to achieving *ad hoc* political goals. The point is that “in a democratic

state of law, restrictions, even those resulting from an emergency situation, must be imposed only in the manner strictly prescribed by law"[37].

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