

States of Emergency and Human Rights Protection

The Theory and Practice of the Visegrad Countries

Edited by **Monika Florczak-Wątor**,
Fruzsina Gárdos-Orosz, **Jan Malíř**, and
Max Steuer

First published 2024

ISBN: 978-1-032-63745-7 (hbk)

ISBN: 978-1-032-63773-0 (pbk)

ISBN: 978-1-032-63781-5 (ebk)

Chapter 7

Human rights in states of emergency

Constitutional principles and their application
in the Republic of Poland

Monika Florczak-Wątor

CC-BY-NC-ND 4.0

DOI: 10.4324/9781032637815-10

The funder of the Open Access version of this chapter is the Faculty of Law and Administration of the Jagiellonian University granted within the Priority Research Area FutureSoc under the program “Excellence Initiative – Research University” at the Jagiellonian University in Krakow, Poland.

7 Human rights in states of emergency

Constitutional principles and their application in the Republic of Poland

Monika Florczak-Wątor

Introduction

The Constitution of the Republic of Poland,¹ which was adopted in 1997 to replace the previously binding Communist Constitution of 1952,² contains an extensive catalogue of human rights and sets out the main principles of their limitation. It is, to some extent, inspired by the European Convention on Human Rights, as Poland ratified this document in 1993, that is, at the time of the process that led to the adoption of the current Constitution four years later. However, it was the jurisprudence of the Polish Constitutional Tribunal from the period between 1989 and 1997 that most significantly shaped the current constitutional regime of individual rights and freedoms. During this period, the Tribunal introduced a series of rights and freedoms into the Polish legal order derived from the principle of a democratic state governed by the rule of law.³ This principle was added to Article 1 of the 1952 Constitution in 1989 and immediately became a source of democratic principles, values, and norms.⁴ The highly activist jurisprudence of the Tribunal at that time also contributed to the formulation of the basic requirements for the limitation of constitutional rights and freedoms, which were subsequently included in the text of the 1997 Constitution. It was during this period that the Tribunal defined the principle of proportionality and formulated the requirement of a statutory form for the imposition of restrictions on human rights. Following the entry into force of the current Constitution of the Republic of Poland, the Tribunal's jurisprudence from 1989 to 1997 remained fully up to date

1 Constitution of the Republic of Poland of 2 April 1997 (*Journal of Laws* No 78, item 483, as amended).

2 Constitution of the People's Republic of Poland of 22 July 1952 (*Journal of Laws* No 33, item 232, as amended).

3 See Piotr Czarny and Bogumił Naleziński, 'Law-Making Activity of the Polish Constitutional Tribunal' in Monika Florczak-Wątor (ed), *Judicial Law-Making in European Constitutional Courts* (Routledge 2020) 175–177; Mirosław Granat and Katarzyna Granat, *The Constitution of Poland: A Contextual Analysis* (Hart 2019) 16–17.

4 See the Act of 26 March 1982 on Amendments to the 1952 Constitution (*Journal of Laws* No 11, item 83, as amended).

and could serve as a point of reference for the interpretation of constitutional provisions relating to individual rights and freedoms.

The main purpose of this chapter is to present the model of the limitation of human rights as adopted in the Polish Constitution and the practice of its application to date. This chapter describes the general principles of limiting constitutional rights and freedoms during the normal functioning of the state and the specific principles established for a state of emergency. It then presents the measures for the protection of constitutional rights and freedoms, among which the right to a fair trial occupies a special place. Finally, the problem of extraordinary restrictions on individual rights and freedoms during a state of emergency will be discussed. In this regard, the case of the only state of emergency declared in 2021 due to the migration crisis on the eastern border of the Republic of Poland will be recalled. Restrictions on individual rights and freedoms introduced during the COVID-19 pandemic will also be mentioned, although the Polish authorities refrained from declaring a state of emergency due to the pandemic. Therefore, it is currently impossible to apply specific principles established for a state of emergency to assess the constitutionality of the restrictions introduced at that time.

General principles of the limitation of individual rights and freedoms

The principles of the limitation of constitutional rights and freedoms of an individual are regulated by the Constitution of the Republic of Poland, particularly in those of its provisions containing the so-called general and specific limitation clauses. The former establish the general principles of the limitation of all rights and freedoms, while the latter are contained in constitutional provisions dedicated to specific rights and freedoms. It should be added that specific limitation clauses take different forms and do not appear in every constitutional provision introducing a particular right or freedom. However, even if a constitutional provision does not contain such a clause, it is assumed that the right or freedom it regulates may be subject to limitations in accordance with the principles deriving from general limitation clauses. This is because the Constitution of the Republic of Poland assumes that rights and freedoms are not absolute in nature and that their limitation is not only possible, but also – in certain cases – necessary. It should be noted, by way of example, that the protection of the rights and freedoms of an individual may sometimes require the restriction of the rights and freedoms of others. A completely arbitrary and unrestricted exercise of one's own rights and freedoms would probably inevitably lead to a situation in which only the strongest individuals would be able to exercise their rights and freedoms at the expense of weaker and less powerful individuals. Therefore, the state has a duty to set limits on the exercise of individual rights and freedoms on the basis of equality and non-discrimination.

Among the general limitation clauses defining the conditions for limiting constitutional rights and freedoms, Article 31(3) of the Constitution of the

Republic of Poland is of fundamental significance. This provision stipulates that:

Any limitations on the exercise of constitutional rights and freedoms may be imposed only by statute and only when they are necessary in a democratic state for the protection of its security or public order, or for the protection of the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the very essence of the rights and freedoms.

An in-depth analysis of Article 31(3) of the Constitution leads to the conclusion that it contains five conditions for restricting constitutional rights and freedoms. The first of these is a formal requirement: Limitations should be introduced by way of a statute – that is, a fundamental legal act enacted by the parliament with the strongest legitimacy to govern – since it comes directly from general elections. The reservation contained in Article 31(3) of the Constitution, according to which limitations on individual rights and freedoms may be introduced ‘only’ by means of a statute, is interpreted both by the Polish legal doctrine⁵ and by the Constitutional Tribunal⁶ as meaning that limitations may also be introduced on the basis of legal acts that are superior to the statute in the hierarchy of sources of law, such as European Union law and international agreements ratified with the prior consent of the statute. Article 31(3) of the Constitution, on the other hand, prohibits the restriction of individual rights and freedoms in sub-statutory acts, including, in particular, regulations issued by the government and its members. This constitutional provision also requires that a law restricting individual rights and freedoms must be as specific and precise as possible and that the manner in which it is applied must not give rise to serious doubts in practice. Indeed, any vagueness in such legal provisions makes it impossible for citizens to reconstruct the limits of the permissible exercise of their rights and freedoms. In practice, vague and imprecise provisions give the authorities applying them, including the courts, a great deal of freedom to determine for themselves what is permitted and what is prohibited under the law. Such a shift in the power to define the limits of the exercise of the constitutional rights and freedoms of citizens from the legislative bodies to the bodies applying the law may be the reason for declaring provisions containing vague and undefined phrases as unconstitutional. There is, however, an exception to the requirement of the

5 Leszek Garlicki and Krzysztof Wojtyczek, ‘Commentary to Article 31’ in Leszek Garlicki and Marek Zubik (eds), *Konstytucja Rzeczypospolitej Polskiej. Komentarz* [The Constitution of the Republic of Poland. Commentary] (Sejm Publishing House 2016) vol 2, 79–80; Piotr Tuleja, ‘Commentary to Article 31’ in Piotr Tuleja (ed), *Konstytucja Rzeczypospolitej Polskiej. Komentarz* [The Constitution of the Republic of Poland. Commentary] (Wolters Kluwer 2019) 118.

6 Constitutional Tribunal (CT) Judgment of 16 November 2011, SK 45/09.

definiteness of provisions limiting the rights and freedoms of the individual. It concerns provisions containing the so-called general clauses, which serve the purpose of making the law more flexible, as well as vague and indefinite phrases, the application of which is justified by the lack of the possibility to regulate certain issues casuistically. In such cases, the legislator's use of vague or imprecise wording cannot be regarded as a violation of Article 31(3) of the Constitution and the requirement of the statutory form of interference in the sphere of individual rights and freedoms.

The other four requirements for the restriction of constitutional rights and freedoms that derive from Article 31(3) of the Constitution are of a substantive nature. They relate to the content of the limitations and not to the manner in which they are introduced. The said limitations on individual rights and freedoms must meet the requirement of proportionality and respect democratic standards, must not violate the essence of these rights and freedoms, and must serve to protect at least one of the values listed in Article 31(3) of the Constitution. These include both general values, such as the protection of state security and public order, and individual values, such as the protection of the rights and freedoms of others.⁷

The principle of proportionality, which is expressed in Article 31(3) of the Constitution by stating that restrictions on individual rights and freedoms must be 'necessary', consists of three sub-principles, namely the principles of appropriateness, necessity, and proportionality *sensu stricto*.⁸ These principles are elements of the so-called proportionality test, which has been applied for many years in the jurisprudence of the Polish Constitutional Tribunal.⁹

The first principle comprising this test is the principle of appropriateness, according to which restrictions on the rights and freedoms of the individual must be suitable for achieving the objective pursued, whereby that objective must, at the same time, justify the introduction of the restrictions. This element of the principle of proportionality has been referred to in the case law of the Constitutional Tribunal as the requirement of the appropriateness of the aim and the means used to achieve it.¹⁰ It should be noted that an assessment of the appropriateness of a given measure to achieve the stated objective

7 Monika Florczak-Wątor, 'States of Emergency in Poland and Their Impact on the Protection of Human Rights in Times of Covid-19 Pandemic' (2021) 12 *Romanian Journal of Comparative Law* 296.

8 See K Wojtyczek, *Granice ingerencji ustawodawczej w sferę praw człowieka w Konstytucji RP* [Limits of Legislative Interference in the Sphere of Human Rights in the Polish Constitution] (Zakamycze Publishing House 1999) 150 et seq.; Wojciech Sadurski, *Rights Before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe* (Springer 2008) 266 et seq.; Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (CUP 2012) 303 et seq.

9 See, e.g., CT Judgments of 26 April 1995, K 11/94; of 13 March 2007, K 8/07; of 23 April 2008, SK 16/07; and of 25 November 2008, K 5/08.

10 See, e.g., CT Judgments of 20 November 1996, K 27/95; of 27 April 1999, P 7/98; and of 14 June 2004, SK 21/03.

is often only possible if the assessor has expertise in the relevant field beyond the scope of typical legal knowledge.¹¹ On the other hand, the objectives, the attainment of which may justify the introduction of limitations to the rights and freedoms of the individual, should be included in the catalogue of protected values resulting from Article 31(3) of the Constitution. These values include, as mentioned above, the protection of public security or public order, the protection of the environment, health and public morals, as well as the freedoms and rights of other persons.

The second principle constituting the aforementioned proportionality test is the principle of necessity (indispensability), from which the prohibition of excessive State interference in the rights and freedoms of the individual is derived, with the determination of excessive interference being, as a rule, the consequence of comparing the legal regulation restricting those rights or freedoms with another potentially less onerous legal regulation that is suitable for achieving the intended purpose.¹² As the Constitutional Tribunal has stated in one of its judgments,

The criterion of ‘necessity’ of the application of a restriction implies (...) the obligation of the legislator to choose the least onerous measure. If the same objective can be achieved by another measure that is less restrictive for the individual’s rights and freedoms, the legislator’s application of the more restrictive measure goes beyond what is necessary and therefore violates the Constitution.¹³

The Tribunal goes on to emphasise that the application of the principle of proportionality in relation to the element of necessity is

a complicated process, since the provisions under scrutiny generally affect different subjects in different ways, so that a given rule may be more burdensome for some categories of its addressees and almost

11 Monika Florczak-Wątor, ‘Proporcjonalność jako kryterium oceny konstytucyjności ograniczeń praw i wolności jednostki wprowadzonych w związku z pandemią COVID-19’ [Proportionality as a Criterion for Assessing the Constitutionality of Restrictions on Individual Rights and Freedoms Introduced in Connection with the COVID-19 Pandemic] in Michał Araszkiewicz, Michał Krok, and Marcin Sala-Szczypiński (eds), *Nauka prawa a praktyka prawnicza. Księga jubileuszowa z okazji czterdziestolecia Okręgowej Izby Radców Prawnych w Krakowie* [Law Science and Legal Practice: Jubilee Book on the Occasion of the 40th Anniversary of the Cracow Bar Association] (Akademicka Publishing House 2022) 163.

12 As noted by Anna Śledzińska-Simon, in its jurisprudence to date, the CT ‘has not developed, and consequently – does not apply – a consistent method of comparing legislative alternatives’. Anna Śledzińska-Simon, *Analiza proporcjonalności ograniczeń konstytucyjnych praw i wolności. Teoria i praktyka* [The Analysis of the Proportionality of the Restrictions on Constitutional Rights and Freedoms: Theory and Practice] (Publishing House of the University of Wrocław 2019) 173. See also Florczak-Wątor (n 11) 163.

13 See the CT Judgment of 26 April 1999, K 33/98.

imperceptible for others. It is therefore necessary to decide whether, for example, a more restrictive restriction, but affecting a smaller group of addressees, or a less restrictive restriction, but with a wider subjective scope, is preferable.¹⁴

It is worth noting that the principle of necessity and the principle of appropriateness – that is, the first two components of the principle of proportionality *sensu largo* – usually have a specific backward compression. This is because legal measures that are more burdensome for the individual are, at the same time, more useful in achieving the objective pursued, while legal measures that are less burdensome are generally less effective. The interpretation of the principle of proportionality under Article 31(3) of the Constitution dictates that the principle of necessity should always prevail; therefore, priority should be given to less onerous measures, even if their effectiveness in achieving the desired objective would be compromised.¹⁵ In this context, the question arises as to whether the principle of effectiveness is also part of the principle of proportionality. This question must be answered in the affirmative, since the legislator is obliged to limit the rights and freedoms of the individual in such a way as to achieve the purpose for which the limitation is introduced.¹⁶ If, at some point, it turns out that it is not possible to achieve this purpose, it is necessary to remove the existing restrictions on the rights and freedoms of the individual. The legitimacy of this perception of the principle of effectiveness as an additional component of the principle of proportionality is also confirmed by the case law of the Constitutional Tribunal.¹⁷

The third principle forming part of the proportionality test referred to above is the principle of proportionality *sensu stricto*, which requires that restrictions on individual rights and freedoms must be proportionate to the objective pursued. This is a question of striking the right balance between what is to be protected and what is to be sacrificed in order to protect the former. If, in both cases, we have values for which constitutional protection is guaranteed, it is not legally permissible to deprive one of these values of the protection to which it is entitled. It is therefore necessary to weigh up the conflicting values,¹⁸ and to determine, in light of constitutional axiology, to what extent

14 CT Judgment of 23 November 2009, P 61/08.

15 See CT Judgments of 31 January 1996, K 9/95; of 6 February 2007, P 25/06; and of 26 March 2007, K 29/06.

16 Joanna Zakolska, *Zasada proporcjonalności w orzecznictwie Trybunału Konstytucyjnego* [The Principle of Proportionality in the Jurisprudence of the Constitutional Tribunal] (Sejm Publishing House 2008) 124.

17 See, e.g., the CT Judgments of 8 October 2007, K 20/07 and of 5 February 2008, K 34/06.

18 On proportionality as a means of weighing conflicting constitutional values, see Barak (n 8) 83–98; Wojtyczek (n 8) 160. See also the CT Judgment of 25 November 2008, K 5/08.

the realisation of one value justifies the sacrifice of the other, and to what extent this sacrificed value must also be protected.

The determination on the basis of Article 31(3) of the Constitution of whether the principle of proportionality has been infringed by the legislator cannot be of an abstract nature, but must take into account the specificity of individual rights.¹⁹ The Constitutional Tribunal accepts that, in this respect, stricter standards should be applied to personal and political rights than to economic and social rights.²⁰ At the same time, it is emphasised that the requirement of proportional limitation cannot be applied to those rights and freedoms that are absolute in nature and cannot be restricted under any circumstances. An example of such a right is the right to humane treatment.²¹ The inherent and inalienable dignity of human beings is also of an absolute nature.²²

A further condition for the limitation of constitutional rights and freedoms is the prohibition of an infringement of their essence. The examination of an allegation of an infringement of this prohibition requires, in each case, a determination by the Constitutional Tribunal of what the essence of the right or freedom in question is and whether the entitlements that have been restricted are among the core elements that make up the essence of that right or freedom. It is clear that the prohibition in question on restricting the essence of rights and freedoms excludes the possibility of temporarily suspending the exercise of those rights and freedoms, let alone abolishing them permanently.²³

The Constitution of the Republic of Poland also contains other general limitation clauses, which the legislator should take into account when limiting constitutional rights and freedoms. It follows from Article 32(1) of the Constitution that such limitations must be introduced on an equal basis in relation to all persons characterised by a common feature relevant to the given legal regulation. They must also be non-discriminatory in nature, which follows from Article 32 (2) of the Constitution. In turn, the principle of a democratic state governed by the rule of law, enshrined in Article 2 of the Constitution, entails the prohibition of the infringement of duly acquired rights, as well as the obligation to protect the vested interests of individuals and to respect

19 See Zakolska (n 16) 29; Krzysztof Wojtyczek, 'Zasada proporcjonalności' [The Principle of Proportionality] in Bogusław Banaszak and Artur Preisner (eds), *Prawa i wolności obywatelskie w Konstytucji RP* [Civil Rights and Freedoms in the Polish Constitution] (Wolters Kluwer 2002) 667; and Krzysztof Wójtowicz, 'Zasada proporcjonalności jako wyznacznik konstytucyjności norm' [The Principle of Proportionality as a Determinant of the Constitutionality of Norms] in Marek Zubik (ed), *Księga XX-lecia orzecznictwa Trybunału Konstytucyjnego* [The Volume of the Twentieth Anniversary of the Jurisprudence of the Constitutional Tribunal] (Wolters Kluwer 2006) 305. See also the CT Judgment of 1 June 1999, SK 20/98.

20 CT Judgments of 11 May 1999, K 13/98; of 12 December 2005, K 32/04; of 18 January 2006, K 21/05; and of 10 July 2007, SK 50/06.

21 CT Judgments of 13 December 2004, K 20/04 and of 26 May 2008, SK 25/07.

22 See the CT Judgment of 5 March 2003, K 7/01.

23 Florczak-Wątor (n 7) 297.

the principles of proper legislation. All of these principles must be taken into account by the legislator when introducing restrictions on the constitutional rights and freedoms of the individual.

In addition to the general limitation clauses, the conditions for limiting the constitutional rights and freedoms of the individual also result from the specific limitation clauses contained in the provisions regulating concrete rights and freedoms and referring exclusively to these rights and freedoms. Some of these specific limitation clauses merely repeat the conditions arising from Article 31(3) of the Constitution, and the most frequently repeated condition is the requirement of the statutory form of regulation. However, the Constitution also contains specific limitation clauses that modify the conditions arising from Article 31(3) of the Constitution or supplement these conditions with an additional condition that does not arise from the above provision. The first situation concerns, for example, Article 53(5) of the Constitution, which modifies the catalogue of values for the protection of which freedom to manifest religion may be restricted. This provision omits the protection of the environment from the catalogue of these values, which means that invoking this value is not a sufficient argument for the legislator to impose restrictions on the exercise of the individual's freedom to manifest religion. An example of a provision that adds a new condition to the catalogue of conditions for restricting rights and freedoms is Article 21(2) of the Constitution. It stipulates that expropriation, which is a form of restriction of the right to property, may only be carried out with just compensation. The requirement to grant compensation to an individual for the restriction of his or her rights and freedoms does not derive from Article 31(3) of the Constitution and does not apply when the legislator restricts other constitutional rights and freedoms.

Restrictions on individual rights and freedoms in states of emergency

The declaration of a state of emergency²⁴ triggers various principles for limiting individual rights and freedoms, which are formulated in the two constitutional provisions contained in the chapter on states of emergency, that is, Articles 228 and 231 of the Constitution. According to these provisions, all measures taken as a result of the declaration of a state of emergency, including measures restricting the exercise of constitutional rights and freedoms, should be proportionate to the degree of threat and aimed at restoring the normal functioning of the state as soon as possible (Article 228(5) of the

24 For more on states of emergency in the Polish Constitution, see Chapter 3 by Michał Ziółkowski. See also Krzysztof Eckhardt, 'Constitutional Grounds for Introducing the State of Emergency: Comments in the Light of Threats Caused by the War in Ukraine, the Polish-Belarusian Border Crisis and the Covid-19 Pandemic' (2022) 68(4) *Przegląd Prawa Konstytucyjnego* 351–361.

Constitution). An analysis of this provision leads to the conclusion that restrictions on individual rights and freedoms introduced during a state of emergency are justified only if they serve to restore the normal functioning of the state. This is the only constitutionally legitimate reason for introducing such restrictions. Therefore, rights and freedoms may not be restricted during a state of emergency for other reasons, including those listed in Article 31(3) of the Constitution, which is intended to protect individuals from state authorities taking advantage of the coercive situation in which individuals find themselves by restricting the scope of their freedoms during a state of emergency. Furthermore, it follows from Article 228(5) of the Constitution that the principle of proportionality, which is formulated differently from Article 31(3) of the Constitution, applies to the assessment of restrictions on individual rights and freedoms.²⁵ More specifically, the degree of threat associated with the state of emergency referred to in these provisions determines the extent of permissible restrictions on individual rights and freedoms. At the same time, the level of threat is a variable factor that should be constantly monitored by the authority responsible for the restrictions that were imposed. A reduction in the level of threat during a state of emergency should lead that authority to reduce or even lift previously imposed restrictions. Keeping the restrictions in place, despite a reduction in the level of threat, renders those restrictions no longer necessary, and this in turn predetermines their incompatibility with the aforementioned Article 228(5) of the Constitution.

A state of emergency is also characterised by the application of the principle of the differentiated intensity of the protection of individual rights and freedoms, which is expressed in Article 233 of the Constitution. This provision specifies the rights and freedoms that are subject to greater protection during martial law and a state of an extraordinary situation (paragraph 1) and those that are subject to weaker protection during a state of natural disaster (paragraph 3). The stronger protection of the former rights means that the exercise of these rights cannot be suspended during martial law and a state of an extraordinary situation, and the restrictions to which these rights and freedoms are then subjected must meet the proportionality test of Article 31(3) of the Constitution. That is to say, they must be the least onerous restrictions in the context of other similar restrictions and must allow the normal functioning of the state to be restored. The rights and freedoms that are subject to such enhanced protection during martial law and a state of an extraordinary situation are those specified in the following provisions: Article 30 (human dignity), Articles 34 and 36 (citizenship), Article 38 (protection of life), Articles 39, 40, and 41(4) (humane treatment), Article 42 (criminal responsibility), Article 45 (access to justice), Article 47 (personal rights), Article 53 (conscience and

25 See Piotr Radziewicz, 'Commentary to Article 228' in Piotr Tuleja (ed), *Konstytucja Rzeczypospolitej Polskiej. Komentarz* [The Constitution of the Republic of Poland: Commentary] (Wolters Kluwer 2019) 657.

religion), Article 63 (petitions), and Articles 48 and 72 (family and children). All the other rights and freedoms provided for in the Constitution may be subject to more far-reaching restrictions during martial law and a state of extraordinary situation, including the suspension of the exercise of these rights and freedoms by the legislature, since the provisions regulating these rights and freedoms are not listed in Article 233(1) of the Constitution.

Conversely, during a state of natural disaster, only the rights listed in Article 233(3) of the Constitution may be subject to extraordinary restrictions. These are the rights listed in the following provisions: Article 22 (freedom of economic activity), Article 41(1), (3) and (5) (personal freedom), Article 50 (inviolability of the home), Article 52(1) (freedom of movement and residence within the territory of the Republic of Poland), Article 59(3) (right to strike), Article 64 (right to property), Article 65(1) (freedom of work), Article 66(1) (right to safe and hygienic working conditions), and Article 66(2) (right to rest). Other rights and freedoms of the individual that are not listed in Article 233(3) of the Constitution may be restricted during a state of natural disaster only to the extent that this is permissible in the course of the normal functioning of the State and is therefore based on the principles set out in Article 31(3) of the Constitution. This leads to the conclusion that far more rights and freedoms may be suspended during martial law and a state of an extraordinary situation (Article 233(1) of the Constitution) than during a state of natural disaster (Article 233(3) of the Constitution). However, none of these restrictions may be imposed in violation of the prohibition of discrimination based on race, sex, language, religion or lack thereof, social origin, birth, or property, which is further emphasised in Article 233(2) of the Constitution.

It should be added that the above-mentioned principles on the limitation of the constitutional rights and freedoms of the individual during a state of emergency have been further specified in statutes adopted on the basis of Article 228(3) of the Constitution. The statutes on martial law, a state of an extraordinary situation, and the state of natural disaster were issued by parliament more than 20 years ago and are still in force today.²⁶ They determine the restrictions on rights and freedoms that are permissible during the respective states of emergency. From the catalogue of these restrictions, the authority declaring the state of emergency may select for implementation those that, in a given situation, are proportionate to the level of threat and which will allow the normal functioning of the state to be restored as quickly as possible.

The possibility for the legislator to suspend the exercise of certain constitutional rights and freedoms of an individual during the above-mentioned states of emergency is a constitutionally permissible exception to the prohibition on

26 See Act on a State of Martial Law and on Competences of the Commander-In-Chief of the Armed Forces of 29 August 2002 (*Journal of Laws* No 156, item 1301); Act on a State of Extraordinary Situation of 21 June 2002 (*Journal of Laws* No 113, item 985); and Act on a State of Natural Disaster of 18 April 2002 (*Journal of Laws* No 62, item 558).

violating the essence of constitutional rights and freedoms expressed in Article 31(3) of the Constitution. Although the essence of constitutional rights and freedoms is defined variously in the legal doctrine,²⁷ and there is therefore no common understanding of the prohibition of violating this essence, there is no doubt that a total prohibition of the exercise of rights and freedoms, even if only temporary, can be qualified as a violation of their essence.²⁸ Moreover, the prohibition against violating the essence of constitutional rights and freedoms is not completely abolished during a state of emergency. It continues to apply to rights and freedoms that are not listed in Article 233(3) of the Constitution, such as freedom of economic activity, personal freedom, freedom of movement and residence within the territory of the Republic of Poland, freedom of work, the right to strike, the right to rest, and the right to property. The exercise of these rights and freedoms may therefore be temporarily suspended during a state of natural disaster, as confirmed by Article 21 of the Act on Natural Disaster. The latter provision expressly provides that, during a state of natural disaster, the operation of certain entrepreneurs may be suspended, and organising or holding mass events may be prohibited. However, the Act on Natural Disaster does not allow for the temporary suspension of rights and freedoms not listed in Article 233(3) of the Constitution. Thus, during a state of natural disaster, it is not permissible to suspend, for example, freedom to organise assemblies, as this freedom is not listed in Article 233(3) of the Constitution.²⁹ The indication in the emergency statutes of the specific requirements or prohibitions that may be introduced in the event of a declaration of a state of emergency is of a guaranteed nature for the individual. In this way, he or she has the opportunity to become familiar with the principles of expected state action in a state of emergency, including the modified principles of the restriction of his or her rights and freedoms. The prohibition on amending the emergency statutes during a state of emergency, as expressed in Article 228(6) of the Constitution, means that following a declaration of a state of emergency, these rules cannot be arbitrarily changed by those in power and adapted to their political needs.

The principles described above for the restriction of individual rights and freedoms during a state of emergency are not applicable to the assessment of the restrictions introduced in connection with the COVID-19 pandemic, since in Poland the authorities did not proclaim a state of emergency as provided for by the Constitution, but merely acted on the basis of the emergency regulations laid down by statutory law. Therefore, the legality of these extraordinary

27 See, e.g., Agata Niżnik-Mucha, *Zakaz naruszania istoty konstytucyjnych wolności i praw w Konstytucji Rzeczypospolitej Polskiej* [Prohibition Against Violating the Essence of Constitutional Freedoms and Rights in the Constitution of the Republic of Poland] (Sejm Publishing House 2014) 322. See also Garlicki and Wojtyczek (n 5) 97.

28 Florczak-Wątor (n 7) 300.

29 Florczak-Wątor (n 7) 300.

restrictions introduced during the COVID-19 pandemic must be assessed on the basis of the criteria listed in Article 31(3) of the Constitution.³⁰ The application of these criteria inevitably leads to the conclusion that many of the statutory and sub-statutory solutions adopted in Poland during the COVID-19 pandemic were unconstitutional. This applies, in particular, to restrictions that suspended the possibility of exercising constitutional rights and freedoms, such as the ban on organising assemblies³¹ or the ban on doing business.

Measures for the protection of constitutional rights and freedoms

The Constitution of the Republic of Poland includes, among the means for protecting the constitutional rights and freedoms of the individual, the right to a fair trial, the right to compensation for the unlawful action of public authorities, the right to appeal against court judgements and administrative decisions of the first instance, the right to lodge a constitutional complaint with the Constitutional Tribunal, and the right to lodge an application to the Ombudsman. All these remedies are regulated in one of the sub-chapters of Chapter II of the Constitution, which deals with individual rights and freedoms. They are available to all persons under the authority of the Republic of Poland whose constitutional rights and freedoms have been violated.

The main legal instrument for the protection of constitutional rights and freedoms is the right to a fair trial, which includes ‘the right to a fair and public hearing of a case without undue delay by a competent, independent and impartial court’ (Article 45(1) of the Constitution). This right is complemented by the prohibition against closing down the judicial route for the assertion of violated freedoms or rights, which is expressed in Article 77(2) of the Constitution. The Constitution contains basic guarantees regarding the independence of the courts and the independence of judges, which have not, however, protected the Polish judiciary from actions aimed at subordinating it to those currently in power.³² The crisis in the judiciary, which has

30 Stanisław Trociuk, *Stan wyjątkowy przy granicy z Białorusią – konsekwencje prawne* [State of Extraordinary Situation at the Border with Belarus: Legal Consequences] (LEX/el. 2021) 19. Among the recent rich jurisprudence confirming the validity of this thesis, see, e.g., the Judgments of the Voivodship Administrative Court in Gdańsk of 23 June 2022, III SA/Gd 1154/21 and of 2 June 2022, III SA/Gd 758/21.

31 See Aldona Domańska, ‘Konstytucyjność ograniczeń wolności zgromadzeń podczas pandemii COVID-19 w Polsce’ [Constitutionality of Restrictions on Freedom of Assembly During the COVID-19 Pandemic in Poland] (2022) 27(2) *Białostockie Studia Prawnicze* 152, and also Chapter 10 by Piotr Tuleja in this volume. See also, e.g., the Decisions of the Regional Court in Warsaw of 14 May 2020, XXV Ns 45/20 and of 27 May 2020, XXV Ns 49/20.

32 See, e.g., Wojciech Sadurski, *Poland’s Constitutional Breakdown* (Oxford University Press 2019) 58; Mirosław Wyrzykowski, ‘Experiencing the Unimaginable: The Collapse of the Rule of Law in Poland’ (2019) 11 *Hague Journal on the Rule of Law* 417; Mirosław Wyrzykowski, ‘Constitutional Security in a State of Emergency’ in Udziślau Belavusau and Aleksandra Gliszczyńska-Grabias (eds), *Constitutionalism Under Stress* (OUP 2020).

spread to the Supreme Court, the National Council of the Judiciary, and the Constitutional Tribunal, is currently the greatest threat to the protection of individual rights and freedoms in Poland. In fact, apart from applying to the Ombudsman, all other means of protecting rights and freedoms require the involvement of either the courts (as in the case of the right to compensation for unlawful action by public authorities or the right to challenge court decisions) or the Constitutional Tribunal (as in the case of the right to lodge a constitutional complaint). The crisis in the Polish judiciary is therefore *de facto* a crisis in the system for the protection of the constitutional rights and freedoms of the individual.

It should be added that the Constitution does not provide for special measures to protect individual rights and freedoms, which are restricted during states of emergency. Citizens may then avail themselves of the standard means of protection listed in Chapter II of the Constitution. Article 233(1) of the Constitution includes the right to a fair trial in the catalogue of rights that enjoy special protection during martial law and a state of an extraordinary situation, which excludes the possibility of suspending this right or restricting its essence in any other way. Moreover, during a state of natural disaster, it is not permissible to suspend the possibility for individuals to exercise their constitutionally guaranteed right to a fair trial, as Article 233(3) of the Constitution does not include this right among the rights that may be subject to extraordinary restrictions when a state of natural disaster is declared.³³

The constitutionality of statutory restrictions introduced during a state of emergency may be reviewed by the Constitutional Tribunal. This review may be triggered, *inter alia*, by a constitutional complaint, which may be submitted to the Tribunal by any person whose constitutional rights and freedoms have been violated (Article 79(1) of the Constitution), as well as by a question of law, which may be submitted by any court that intends to rule on an individual case on the basis of constitutionally questionable provisions (Article 193 of the Constitution). However, the progressive politicisation of the Constitutional Tribunal, observed since 2016,³⁴ has discouraged many citizens and judges from initiating proceedings before this authority. This situation has led to the development of a decentralised constitutional review of law in Poland, which is carried out by each court within the framework of the case under consideration

33 On the unconstitutional restrictions imposed on the right to a fair trial during the COVID-19 pandemic in Poland see Chapter 13 by Marta Kłopocka-Jasińska.

34 See Aleksandra Kuśtra, 'Poland's Constitutional Crisis: From Court-Packing Agenda to Denial of Constitutional Court's Judgments' (2016) 12 *Toruń Polish-Italian Studies* 343; Leszek Garlicki, 'Disabling the Constitutional Court in Poland?' in Andrzej Szmyt and Bogusław Banaszak (eds), *Transformation of Law Systems in Central, Eastern and South-Eastern Europe in 1989–2015. Liber Amicorum in Honorem Prof. dr. dres. H. C. Rainer Arnold* (Publishing House of the University of Gdańsk 2016) 63; Granat and Granat (n 3) 157; Monika Florczak-Wątor, 'The Polish Constitutional Tribunal and Its Transformation' (2020) 32 *European Review of Public Law* 466.

and for the purpose of issuing a decision. There is some doubt as to whether this practice is compatible with Article 178(1) of the Constitution, which provides that judges are bound by both the Constitution and statutes in the exercise of their functions. However, the absence of the possibility for judges to refer a question of law to the independent and impartial Constitutional Tribunal requires them to resolve any doubts that may arise autonomously, including those concerning the constitutionality of statutes. Thus, it can be concluded that at present, the decentralised constitutional review of law has become an institution that effectively complements the system for the protection of the constitutional rights and freedoms of the individual in Poland.³⁵

One of the basic means of protecting constitutional rights and freedoms is the right to compensation for the unlawful action of a public authority, which Article 77(1) of the Constitution grants to everyone.³⁶ This provision requires the person seeking compensation to prove the damage and its amount, as well as the unlawfulness of the act or omission of the public authority and the existence of a causal link between the damage suffered and that unlawful act or omission. On the other hand, a citizen is not obliged to prove the fault of a particular public official or to identify the person who caused the damage. A special type of unlawfulness is the adoption of an unconstitutional act by a state body or its failure to adopt an act that should have been adopted in accordance with the Constitution. Such an unconstitutional act may be one that restricts the constitutional rights and freedoms of an individual both during the normal functioning of the state and during a state of emergency.

It should be added that during a state of emergency, there are special rules for claiming compensation for damage caused by the introduction of lawful restrictions on individual rights and freedoms. Article 228(4) of the Constitution empowers the legislator to determine the principles, scope, and manner of compensation for property losses resulting from such restrictions. The relevant law was adopted in 2002, when parliament also adopted all three emergency statutes. This act sets out the rules for claiming compensation for damage lawfully caused by public authorities and therefore not falling within the scope of Article 77(1) of the Constitution.³⁷ The compensation provided

35 See Maciej Gutowski and Piotr Kardas, ‘Sądowa kontrola konstytucyjności prawa. Kilka uwag o kompetencjach sądów powszechnych do bezpośredniego stosowania Konstytucji’ [Judicial Review of the Constitutionality of the Law: Some Remarks on the Competence of Common Courts to Directly Apply the Constitution] (2016) 4 *Palestra* 5 and Anna Rakowska-Trela, ‘Sądy i sędziowie wobec niedemokratycznych przemian’ [Courts and Judges in the Face of Undemocratic Change] (2018) 47 *Studia Politologiczne* 299.

36 See Michał Ziółkowski, *Odpowiedzialność odszkodowawcza za niezgodne z prawem działanie władzy publicznej: Studium z prawa konstytucyjnego* [Liability for Damages for Unlawful Actions of Public Authorities: Constitutional Law Study] (Wolters Kluwer 2021) 143 et seq.

37 Act on Compensation for Property Losses Resulting from the Restriction, During a State of Emergency, of Human and Civil Liberties and Rights, enacted on 22 November 2002 (*Journal of Laws* No 233, item 1955).

for in this law only covers damage that occurs during one of the three states of emergency provided for in the Constitution. It is limited to the losses incurred (*damnum emergens*) and does not cover lost benefits (*lucrum cessans*). Claims for compensation are time-barred after one year from the date on which the injured party became aware of the loss, but no later than three years from the date on which the damage occurred. However, it is also possible to claim additional compensation for wrongful acts of public authorities on the basis of Article 77(1) of the Constitution and the relevant provisions of the Civil Code.

The practice of imposing extraordinary restrictions on individual rights and freedoms in emergency situations

To date, in the more than 25-year history of the Polish Constitution, a state of emergency has only been declared once, together with the above-mentioned extraordinary restrictions on the constitutional rights and freedoms of the individual. The migration crisis on the Polish border with Belarus, which occurred in 2021, prompted the Council of Ministers to apply to the President of the Republic of Poland for the introduction of a state of an extraordinary situation in the territory of part of two voivodships. This state of emergency was introduced by a special decree from the President of the Republic of Poland on 2 September 2021³⁸ for a period of 30 days, which was subsequently extended by the Sejm on 2 October 2021 for another 60 days at the request of the President of the Republic (preceded by a motion from the Council of Ministers).

In the decree declaring a state of an extraordinary situation, the President of the Republic indicated specific restrictions on the rights and freedoms of the individual applicable during that emergency time, which, in principle, coincided with the restrictions provided for in the Act on the State of an Extraordinary Situation. These restrictions included the suspension of the right to organise assemblies and mass events in the area covered by the state of an extraordinary situation. Significant restrictions on freedom of movement were also introduced. Non-residents were completely banned from the area, and residents were required to carry identity documents. Access to public information about the activities of the authorities in the area under the state of emergency was also restricted, while photographing places and objects in the area was completely banned. All these restrictions were officially justified by the need to protect the state border and prevent illegal migration, but in fact, they were aimed at preventing Polish citizens from providing assistance to migrants trying to enter the territory of the Polish state from Belarus. It

38 Decree of the President of the Republic of Poland of 2 September 2021 on the Introduction of a State of Extraordinary Situation in the Area of a Part of Podlaskie Voivodeship and a Part of Lubelskie Voivodeship (*Journal of Laws* 2021, item 1612).

should be clarified that, according to the information available to the Polish authorities, the migration crisis at the border was triggered by the actions of the Belarusian authorities aimed at unleashing the so-called hybrid war. In response to these actions, the Polish Border Guard and Military Police forced migrants to return to the territory of Belarus using so-called pushbacks, which are prohibited by international law. Migrants who entered the territory of the Polish state could rely only on Polish activists and humanitarian organisations to provide them with food and medicine. Those assisting the migrants provided the public with information about the mistreatment of migrants by Polish officers and their use of pushbacks. Thus, it can be assumed that the real reason for the introduction of the state of emergency was the desire to give the authorities extraordinary powers to remove the aforementioned activists from the border areas, to prevent them from providing assistance to migrants crossing the border and to ensure that border guards and military police officers were free to act without public control.

The restrictions imposed on individual rights and freedoms in connection with the migration crisis on the border with Belarus by the aforementioned decree of the President of the Republic of Poland were subsequently detailed and, to some extent, developed in a decree from the Council of Ministers issued on the same day.³⁹ The constitutionality of the provision on the basis of which this decree was adopted – that is, Article 22(1) of the Act on the State of an Extraordinary Situation – has raised serious doubts in the legal doctrine.⁴⁰ Indeed, it should be noted that the constitutional provisions do not confer the power to regulate the legal status of individuals during a state of an extraordinary situation on the Council of Ministers, but only authorise it to request the President of the Republic to declare such a state of emergency. Admittedly, Article 228(3) of the Constitution provides that the rules of action of the public authorities, including the Council of Ministers, during a state of emergency shall be laid down by a statute, but this does not mean that a statute may modify the constitutional provision. The legal construction adopted in Article 22(1) of the Act on the State of an Extraordinary Situation leads to the conclusion that the decree of the Council of Ministers, which formally implemented the authorisation contained in this statutory provision, in reality developed the regulation contained in the presidential decree. Meanwhile, the government decree issued on the basis of Article 22(1) of the Act on the State of an Extraordinary Situation remained outside the control of the Sejm,

39 Decree of the Council of Ministers of 2 September 2021 on restrictions of freedoms and rights in connection with the introduction of a state of an extraordinary situation (*Journal of Laws*, item 1613).

40 See Trociuk (n 30); Monika Florczak-Wątor, ‘Niekonstytucyjność ograniczeń praw i wolności jednostek wprowadzonych w związku z epidemią COVID-19 jako przesłanka odpowiedzialności odszkodowawczej państwa’ [Unconstitutionality of Restrictions on the Rights and Freedoms of Individuals Introduced in Connection with the COVID-19 Epidemic as a Premise for State Liability for Damages] (2022) 10 *Państwo i Prawo* 342.

as described in Article 231 of the Constitution, which covers only the aforementioned regulation issued by the President of the Republic.⁴¹ A comparison of the scope of the subject restrictions introduced in the two decrees issued during the state of an extraordinary situation in 2021 leads to the conclusion that the scope of these restrictions was broader in the government decrees. Indeed, whereas, for example, the presidential decree implied a ban on being in certain places at a certain time, the government decree implied that the ban applied ‘around the clock’ and ‘in the entire area covered by the state of emergency’. Obviously, the Council of Ministers widened the temporal and territorial scope of the said prohibition from that established by the President of the Republic.⁴²

It is also worth noting that some of the restrictions on individual rights and freedoms introduced in connection with the declaration of the state of an extraordinary situation in 2021 were maintained after this state was formally lifted, which was made possible by amending the Act on the Protection of the State Border.⁴³ Such an indefinite restriction became a temporary ban on staying in the border zone adjacent to the state border. Exceptions to this ban were introduced in line with the government decree specifying the presidential decree on the declaration of a state of an extraordinary situation. Failure to comply with the ban on staying in the border zone was made punishable by arrest or a fine. The ban on staying in the border zone under the new Article 12a(2) of the Act on the Protection of the State Border could be imposed by the Minister of Internal Affairs after consulting the Chief Commander of the Border Guard. Exercising the powers granted to him, the Minister of Internal Affairs issued a decree on the introduction of a temporary ban on staying in a specific area of the border zone adjacent to the state border with the Republic of Belarus on 30 November 2021.⁴⁴ This ban was introduced for the period from 1 December 2021 to 1 March 2022 in a sub-statutory act in contravention of Article 31(3) of the Constitution, which requires that restrictions on the exercise of constitutional rights and freedoms may only be introduced by statute. This obviously also applies to freedom of movement, which has the status of a constitutional freedom, as it is regulated in Article 52(1) of the Constitution. It should be borne in mind that a prohibition on the residence of citizens in a given territory restricts not only their freedom of movement, but also other rights and freedoms, the exercise of which requires citizens to reside in a given territory. This is the case, for example, with freedom of

41 Trociuk (n 30).

42 Florczak-Wątor (n 40) 342.

43 Act of 12 October 1990 on the Protection of the State Border (*Journal of Laws* of 2022, item 295, as amended).

44 *Journal of Laws*, item 2193.

economic activity, the right to the protection of family life, freedom of the press, or the right to information.⁴⁵

None of the three above-mentioned constitutional states of emergency was introduced in Poland in connection with the COVID-19 pandemic, although there were constitutional grounds for declaring both an extraordinary situation and a natural disaster.⁴⁶ Instead, Poland initially introduced a state of epidemic emergency and then a state of epidemic, neither of which is a state of emergency under the Constitution. Both states were introduced on the basis of statutory provisions, giving the Minister of Health the power to introduce them. This circumstance is crucial in assessing the constitutionality of the restrictions on individual rights and freedoms introduced in connection with the COVID-19 pandemic. This is because these restrictions can only be assessed from the point of view of the principles in force during the normal functioning of the state and therefore under the conditions described in Article 31(3) of the Constitution. This means that these restrictions should not have been excessive and should not have violated the essence of constitutional rights and freedoms, including not depriving the individual of the possibility of exercising these rights and freedoms. Meanwhile, despite the absence of a state of emergency, the Polish legislator introduced a number of extraordinary restrictions similar to those introduced in countries where a state of emergency was declared. Examples include the ban on movement in Poland from 25 March 2020 to 19 April 2020,⁴⁷ and the ban on organising public assemblies from 14 March 2020 to 28 May 2020.⁴⁸ The latter ban was introduced despite the fact that its introduction would have been impermissible, even during a declaration of a state of natural disaster. In fact, Article 233(3) of the Constitution does not include freedom of assembly among the rights and freedoms that can be suspended for the duration of a state of natural disaster.

Conclusion

The Constitution of the Republic of Poland of 1997 contains the comprehensive regulation of individual rights and freedoms, the principles of their

45 Florczak-Wątor (n 40) 343.

46 See Tímea Drinóczi and Agnieszka Bień-Kacała, 'COVID-19 in Hungary and Poland: Extraordinary Situation and Illiberal Constitutionalism' (2020) 8(1–2) *The Theory and Practice of Legislation* 187 and Bart van Klink, Marta Soniewicka, and Leon van den Broeke, 'The Utopia of Legality: A Comparison of the Dutch and Polish Approaches to the Regulation of the COVID-19 Pandemic' (2022) 27(2) *Białostockie Studia Prawnicze* 19.

47 See the Judgment of the Voivodship Administrative Court in Krakow of 26 January 2021, III SA/Kr 924/20.

48 See Mirosław Wróblewski, *Wolność zgromadzeń w czasie epidemii* [Freedom of Assembly During an Epidemic] (LEX/el. 2020). See also the Judgment of the Supreme Court of 1 July 2021, IV KK 238/21.

limitation, and the means of their protection. At the same time, it establishes different requirements for limiting individual rights and freedoms during the normal functioning of the state and during a state of emergency. The differences between the two legal regimes mainly concern the form of the principle of proportionality, the validity of the prohibition on violating the essence of constitutional rights and freedoms, and the possibility of temporarily suspending the exercise of these individual rights and freedoms. As a state of emergency has been introduced in Poland only once, namely in 2021, in connection with the crisis on the eastern border, the assessment of the practice of applying extraordinary measures restricting constitutional rights and freedoms is very limited. At present, the greatest challenge is to assess the constitutionality of the restrictions on individual rights and freedoms introduced during the COVID-19 pandemic. Although many of these restrictions were justified in view of the epidemic situation at the time and the widespread threat to individual life and health, the mitigated criteria applicable during a state of emergency cannot be used to assess these restrictions because the Polish authorities did not choose to introduce such a special regime. On the other hand, an assessment of these restrictions in light of the more restrictive requirements established for a situation of the normal functioning of the state leads to the conclusion that the most far-reaching restrictions, in particular those consisting in the temporary suspension of certain rights and freedoms, were unconstitutional. The introduction of these restrictions outside the constitutional framework of a state of emergency may expose the Polish authorities to substantial claims for compensation, which are already being brought before the courts by Polish citizens affected by the economic consequences of the pandemic.