



Horyzonty Polityki
2022, Vol. 13, N° 45



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DOI: 10.35765/HP.2389

The constitutional principle of common welfare at a time of a pandemic in Poland

Abstract

RESEARCH OBJECTIVE: The objective of the article is to analyse legislative acts introduced in Poland in response to COVID-19 pandemic (the so-called anti-crisis shields), which led to a clash between fundamental rights and constitutional principles and triggered a debate on systemic transgression and the principles that limit the government's activities directed at citizens.

THE RESEARCH PROBLEM AND METHODS: COVID-19 led to attempts undertaken by the Polish government to redefine the constitutional strategies established by the Solidarity generation by choosing a strategy to deal with the crisis based on limiting citizens' rights. This led to doubts triggered by the collision of this strategy with constitutional norms. The method used in the study was a legal-doctrinal comparative analysis and a synthesis of the literature.

THE PROCESS OF ARGUMENTATION: The article presents the determinants underlying the creation of constitutional principles in Poland embedded in the context of the common good as the principium which guides the relationships between the state and its citizens. The doctrinal transgression resulting from the government's attempts to fight against COVID-19 was analysed and conclusions concerning the threats to the political system in the context of the governmental attempts to reinterpret the concepts fundamental to the democratic state of law were drawn.

Suggested citation: Budzanowska, A.T. i Radziewski, M. (2022). The constitutional principle of common welfare at a time of a pandemic in Poland. *Horizons of Politics*, 13(45), 203–217. DOI: 10.35765/HP.2389.

RESEARCH RESULTS: COVID-19 proved that the existing regulations are not sufficient to secure the principle of the common good as an underlying principle of the government's activities. Crises become a pretext for decision-makers to introduce such laws which prioritise the interests of the authorities over the interests of citizens.

CONCLUSIONS, INNOVATIONS, AND RECOMMENDATIONS: It is recommended to consider the introduction of extra legislative mechanisms that would prevent the primacy of the interests of the state to take precedence over the interests of citizens in the future.

KEYWORDS:

epidemics, COVID-19, constitutional principles, anti-crisis shields, political crises

INTRODUCTION

The COVID-19 (COVID-19) pandemic has required governments to take action to protect the health of their citizens and ensure that people have access to the healthcare system. A need appeared to temporarily redefine some priorities of law, principles and social values with regard to health protection. However, this did not release the decision-makers (the authorities) from the obligation to ensure the balance of rights and guarantee constitutional principles. Government strategies collided with fundamental rights, becoming key challenges for the decision-making process and threatening to depart from the principle of the democratic rule of law.

In the Polish system, relations between the government and the citizen are regulated, amongst others, by the constitutional principle of common welfare, to which the legislator gave priority in setting the limits of permissible obligations restricting individual rights (Article 1 of the Constitution of the Republic of Poland of 1997). The initial, unpredictable social consequences of the health crisis caused by COVID-19 required legislative initiatives (the so-called anti-crisis shields), which limited the exercise by citizens of the rights and freedoms guaranteed by the Polish Constitution in almost every walk of life. It refers to the exercise of the first-generation human rights and freedoms such as for instance: personal freedom, freedom of

movement, freedom of religious practice, the right to assembly, freedom to do business. This caused controversy as to the legitimacy of introducing the restrictions, the applied legal form, the sources of the law indicated by the legislator and powers delegated to the state apparatus limiting rights in connection with COVID-19. A threat appeared of a redefinition of the principle of common welfare as an interpretation of the primacy of the state's interests over the interests of citizens, which directly collided with fundamental rights, i.e. the rights of an individual.

The subject of consideration the actions taken in Poland in connection with COVID-19, indicating the decisions of the authorities related to the establishment of specific legal measures that are controversial or in conflict with fundamental rights and with constitutional principles in the context of the overarching concept of common welfare, which has led to debate on the transgression of principles limiting the actions of public authorities aimed at citizens.

The article analyses the legislative work within the framework of four legal acts, the so-called anti-crisis shields and legal acts directly related to COVID-19: Act of 2 March 2020 on special solutions related to preventing, counteracting and eradicating COVID-19, other infectious diseases and emergencies caused by them – shield one; Act of 31 March 2020 amending the act on special solutions related to preventing, counteracting and eradicating COVID-19, other infectious diseases and emergencies caused by them, and some other acts –shield two; Act of 16 April 2020 on specific support instruments in connection with the spread of the SARS-CoV-2 virus – shield three; Act of 19 June 2020 on subsidies for bank loans granted to entrepreneurs affected by COVID-19 and on simplified proceedings for approval of arrangements in connection with the occurrence of COVID-19 – shield four.

GOVERNMENT STRATEGIES ON HEALTH CRISES

Reflections on analogies to the response of decision-makers to health crises and the state's political regime were the subject of research long before the world plunged into the fight against COVID-19. Research in the field of the public health system in the context of the theory of

politics and state regimes and the consequences of health crises was conducted for instance by Richard J. Evans. (Evans, 1988, pp. 123–146). In *Epidemics and Revolutions*, he claimed that the evolution of individual consciousness based on knowledge of a health crisis accelerated social discontent and political conflicts. Obviously, epidemics bring out many social problems with various consequences for the countries which they affect. In the course of research, it was found that in the long term, a co-relation was reported between epidemics and social trends that led to the evolution of political regimes, primarily through articulated postulates of social dissatisfaction related to the need to reorganise certain areas of the administration and the health care system in the event of crises (Cohn, 2012, pp. 535–555). The transformations affected those areas of the system where the authorities suffered a defeat while fighting a health crisis (Chevalier, 1958). A simplified approach to strategies was adopted in models of dealing with health crises and epidemics, with regard to the types of political systems and trends. Systemic polarisation was highlighted – authoritarian regimes and strong-arm states versus systems based on the tradition of liberal political culture (Budzanowska, 2021, p. 16). The proposed dichotomic division indicates that when struggling with health crises, authoritarian regimes and states applying the strong-arm tactics readily multiplied obligations and restrictions using them to consolidate power. A paternalistic, offensive model was adopted in relation to freedoms. On the other hand, democratic governments deciding to adopt a liberal strategy used the general principle of limited coercive measures, deciding to promote the principles of hygiene and preventive care, to improve the quality of health care services and to keep up sanitary standards in public space. A minimalist, passive model in terms of limiting rights was selected. Regardless of the group to which a given model of fighting a health crisis may be included, what they had in common were the following conditions – defending the status quo of decision-makers who represented the implemented strategies within an adopted ideology, the applicable public order system and the political agenda defined by the authorities (Budzanowska, 2021, pp. 19–20).

Analysing two extreme models of government strategies which limit rights and freedoms when dealing with crises in situations of states of emergency, it is possible to identify certain features of the

state regime – minimalist and passive strategies in the application of legal measures or limitation of the exercise of individual powers as opposed to paternalistic and offensive models. This bipolar, simplified division highlights the scale of public intervention in the sphere of liberties: the passive model, in principle, maintains the status quo in the field of civic rights and obligations, while the paternalistic model imposes new, restrictive patterns of behaviour on the members of the state community.

COVID-19 has verified both approaches in practice, including: the passive approach in Sweden (Guldbrandsson Mansdotter, 2022). and the paternalistic approach in Poland. Paradoxically, in the Polish system, this issue seemed to be systemically and doctrinally settled long before the current health crisis, as a result of the consensus around the ideological heritage of the Solidarity generation (1980s), relating to the understanding of the principle of common welfare and of emergency situations. Following the downfall of the communist regime in 1989 it was inscribed in the Polish Constitution of 1997. COVID-19 unexpectedly opened up the above-mentioned issues for reinterpretation.

Constitutional consensus on the principle of common welfare as an indicator of government strategy

In a state regarded as a community of people with heterogeneous views, the common welfare is the key to cooperation between the authorities and citizens by setting the limit of permissible obligations in the sphere of individual rights, thus preventing the state's domination over the community (Brzozowski, 2006, pp. 17–28). In Poland, the primacy of principles and their balance was developed in the consensus of the Solidarity generation in 1980 regarding basic systemic values (Grzybowski, Rec, Rydlewski, 2022, pp. 3–16). Despite the differences, common welfare, human dignity, freedom and solidarity were – as it seemed – unshakable (Schomburg, 2005, pp. 3–9). In the 1990s, these principles were inscribed in the Polish constitution.

In a doctrinal consensus relating to the concept of common welfare, it was stated that the implementation of the principle of servitude of the state requires the implementation of law in the socio-political space of a democratic state, however this does not guarantee the fulfilment of this principle. This is because it requires the implementation

of other principles, including: social solidarity, respect for personal freedom and equality in law. Therefore, common welfare cannot be interpreted in disregard of the remaining constitutional axioms. Their functions, inscribed in the constitution, protect the society against legal conditions which would allow the authorities to impose restrictions or release decision-makers from their obligations towards the citizens under their fundamental rights and freedoms (Machnikowska, 2019, pp.523–542).

COVID-19 has disturbed these relations due to the level of health crisis threats, the need for social interventions, and the scale and speed of adjustments of the law. The decision-makers' choice of a strategy for limiting civil rights and imposing new obligations and restrictions has exacerbated the legal and political disputes on the understanding of a state system's features. The government, understanding the constitutional principle of common welfare as a principle establishing the primacy of the state's interests over the interests of citizens (and simultaneously subjecting it to an interpretation that ignores other provisions of the Constitution), connected it with the necessity to comply with the imposed obligations related to the right to health care, which is also a systemic axiom. However, even if it were recognised that COVID-19 (the necessity to protect public health caused by this virus) may affect the primacy of individual rights and freedoms through the adoption of specific patterns of collective modes of operation constituted by statute in the form of temporary or incidental regulations, it is difficult to accept the view that common welfare may legitimise any action taken by the authorities in relation to fighting and preventing a health crisis. Such a position would constitute a violation of the correct interpretation of the principle of common welfare. Regardless of the choice of strategy for limiting the rights during the fight against the crises, the standards of a democratic state of law apply to the authorities and require respect for mechanisms which comply with the postulate of public co-management. However, during COVID-19 also this postulate is sometimes unfulfilled, due to the unpredictability of threats, but even so the model of regulatory decisions versus the principles of public co-management must not be openly contradictory. It should also not be forgotten that the principle of common welfare is inextricably connected with the constitutional principle of dignity, as defined in Art. 30 of the Constitution of the

Republic of Poland, according to which the inherent and inalienable dignity of a human being is the source of human and civil freedom and rights. It is inviolable, and respect for it and its protection is the responsibility of public authorities. It is worth recalling that in the aftermath of World War II and totalitarianism, the system of the United Nations (UN) put the right to life and human dignity at the top of the hierarchy of fundamental rights and ranked the rights of freedom and solidarity as subsequent in importance.

In the case of the principle of dignity, inviolability (as in the case of the essence of freedoms and rights)

is normative and not descriptive; recognition of inviolability should be interpreted as recognition of the interdiction to violate the essence of freedoms and rights as well as dignity. The inviolable cannot under any circumstances be sacrificed for the sake of other values. The Constitution does not recognise such an attribute with reference to any element of statutory law (Piechowiak, 2009, p. 74).

The principle of human dignity therefore provides the most significant curb for public authorities in introducing further restrictions under the pretext of combating COVID-19 – it is impermissible to enact legal provisions that could in any way violate human dignity. In the light of the above, it seems justified to make an objective assessment of whether the legal solutions introduced during the COVID-19 pandemic have not potentially encroached upon the inviolable sphere of human dignity. This thesis is confirmed by the position contained in the justification of the sentence of the Constitutional Tribunal of 7 October 2015 (file reference number K 12/14; OTK ZU 9A/2015, item 143; Journals of Laws of 2015 item 1633 of 16 October 2015), according to which

the Tribunal in its jurisprudence assumes that human dignity is “the axiological basis and premise of the entire constitutional order”, it is a value “of central importance for building the axiology of the current constitutional solutions” (cf. M. Granat, *Godność Człowieka z Art. Konstytucji RP jako wartość i norma prawna*, “Państwo i Prawo” z. 8/2014, p. 3 et seq., and the sentences of the Constitutional Tribunal cited by the author of: 9 July 2009, file reference number SK 48/05, OTK ZU No. 7/A/2009, item 108 and of 30 September 2008, file reference number K 44/07, OTK ZU No. 7/A/2008, item 126). At

the same time, the Tribunal recognises the correlation between human dignity and specific rights or freedoms and generally accepts that their violation “reflects upon human dignity” (Granat, 2014, pp. 9–17).

The position of the Constitutional Tribunal expressed in the justification to the sentence of 3 March 2003, file ref. act K 7/01, according to which

human dignity as a transcendent value, primary to other human rights and freedoms (for which it is the source), inherent and inalienable – is every human being’s prerogative and it can be violated neither by the legislator nor by specific acts of other entities. In this sense, every human being always has dignity, and no behaviour can deprive them of this dignity nor violate it (OTK ZU 3A/2003, item 19; Journal of Laws No. 44, item 390 of 14 March 2003).

CONSTITUTIONALITY AND CONFLICT OF LAWS

At the time of the COVID-19 pandemic, restrictions of fundamental rights were interpreted pursuant to constitutional provisions and international conventions, and they were enforced as laws and administrative measures.

Constitutional consent to the restriction of fundamental rights may be based on the verification of the following premises: the scope of the fundamental right, legal intervention of the government and justification based on constitutional principles. Moreover, the principles of proportionality and legality should be taken into account in every considered legal event. Therefore, when restriction of fundamental rights takes place in the course of measures with no constitutional justification taken by public authorities, they are an unconstitutional intervention. This means a conflict between laws and principles. Even the application of the principle of proportionality, reflection on the related principles and indication of the one which is most important for a given legal status (having greatest significance), does not always make it possible to decide which of the principles is most appropriate for the government measures in the face of the crisis (COVID-19), aimed at restricting the enjoyment of fundamental rights as seen in the light of the Constitution.

By imposing new obligations and introducing restrictions on the rights of an individual, the legislator, provides public authorities with various grounds for their enforcement. In emergency situations, they are often controversial and contested. It is then that conflict of fundamental rights emerges as a significant problem of decision-making on limiting the exercise of liberty rights in relation to other principles – in the case of health care with the principle of solidarity in particular. In Poland the imperative of common welfare is also interpreted together with the principles set out in Art. 2 of the Constitution – the principle of a democratic state ruled by law and the principle of social justice (Tuleja, 2021, art. 1). Justice as a normative constitutional value refers in its application not only to the distribution of goods, but also to the imposition on individuals of burdens interpreted as obligations (cf, Karp, 2004, pp. 11–19). When amending the legal regime in the spirit of the servitude of the state, public authorities may not privilege or discriminate arbitrarily determined social groups, even to guarantee the right to health, guided by the principle of justice and equality, but must treat them equally. Decision-making asymmetry due to the conflict of principles highlights the choices of government strategy models regarding rights and freedoms. There is an escalation, especially when there is a restriction of rights, e.g. related to the freedom of movement, travel, labour law or access to training and education through digital exclusion. This applies not only to the application of constitutional procedures and norms in the legislative process aimed at interfering with the rights of an individual, but also applies to legal institutions unknown to citizens, privileging some groups over others, such as in the case of the government programme called “Financial Shield of the Polish Development Fund for Small and Medium-Sized Companies”, guidelines on segregation of vaccinations for various professional groups, conditions in prisons or camps for migrants (Militz, 2021, pp. 21–24). The measures of public authorities should be subject to special assessment in the light of the provisions of Art. 31 sec. 3 of the Constitution of the Republic of Poland, according to which

restrictions on the exercise of constitutional freedoms and rights may be established only by statute and only if they are necessary in a democratic state for its safety or public order, or for the protection of the environment, health and public morality, or the freedoms and rights of others. These restrictions must not violate the essence of freedoms and rights.

This provision clearly specifies under which conditions it is possible to introduce restrictions in the exercise of constitutional freedoms and rights. One of these conditions is that constitutional rights and freedoms cannot be restricted by executive authorities.

Common welfare is to benefit the citizens, even if at the time of COVID-19 entities or subjects of law were affected by inconveniences (imposed restrictions, orders and bans). Additionally, the implemented doctrine of the rule of law assumes that the principle of servitude privileges citizens and their rights over the authorities, since the latter's task is to respect the rights of the community. There is no doubt, therefore, that in the Constitution of the Republic of Poland of 1997, the principle of common welfare includes an order addressed to public authorities to implement common welfare. Meanwhile, in the political discourse in Poland around the COVID-19 health crisis, an intention of the decision-makers appeared to interpret the current wording of the article opening the normative part of the Constitution of the Republic of Poland of 1997 with reference to the concept of "common welfare" in the April 1935 constitution (Bodnar, 2020). This is an important remark, because the concept of "common welfare" inscribed in the constitution of 1935 assumed the primacy of the interests of the state subordinating citizens who mainly fulfil their duties and service functions (Piechowiak, 2003, p. 3). The potential theoretical and doctrinal redefinition made during the amendment of the legal regime at the time of COVID-19 in relation to the principle set out in the first article of the fundamental law would distort and change (redefine) the intention of the legislator which in the Constitution of 1997 referred to the 18th-century Polish Enlightenment ideological tradition as the foundation of the Republic of Poland. According to Irena Lipowicz

Already the Constitution of the Third of May declared it would be adopted "for common welfare", as well as "to strength freedom" and "protect the homeland and its borders", so it was an important third aim of the enactment of the constitution itself. In it, the state is not a supreme concept over everyone else. It also determines the concept of common welfare, the concept of the state and servitude of its authorities towards the community. (Lipowicz, 2017, p. 18).

The core of the dispute (at present or earlier when the constitution of 1997 was being written?) over the interpretation of common welfare

concerned the reinterpretation of the sensitive foundation of the systemic relationship between the state and the citizen/power and the society in terms of reversing the primacy of this principle in the legal and political dimension. As a systemic value, the principle of servitude of the state not only ennobles the provisions of the Constitution, but also impacts the practice of applying fundamental rights and freedoms in terms of interpreting the rights of citizens in their relations with the authorities and other public entities, thus fulfilling the standards of the rule of law. In a democratic state ruled by law, there should always be guarantees for the citizen that during the restriction of rights for a specified period, e.g. for the time of COVID-19 or in other emergency conditions, decision-makers will not have legal grounds to violate or permanently abolish civic rights that are unfavourable to them. The prerogatives of the authorities should be limited also in emergency situations, because an emergency situation, e.g. a health crisis, is not a sufficient condition to seriously interfere with the rights of an individual, as it is only an organisational obligation of public services at a specific time and of determined scope. Freedoms and civil rights must always limit these restrictions. Meanwhile, at the time of COVID-19, a one-sided (governmental) attempt at transgression of the definition of common welfare endeavouring to reverse the function of this principle indicated the government's strategy for the time of the health crisis and raised concerns about the change of the state regime to strong-arm rule, which would not be in line with the position according to which the principle of common welfare is a principle addressed to the public authority, ordering that authority to implement common welfare.

CONCLUSIONS

The coupling of liberal rights in the face of the models of strategies for combating a health crisis adopted by the authorities in order to protect the rights to health and to ensure access to health care systems, shows the possibility of a conflict between constitutional principles i.e. the right to freedom with the principle of the right to health care, as a measure restricting the constitutive principle of freedom. When constitutional principles collide, for instance the principle of

individual freedom and the principle of public health, their priority may be assessed. Usually, it is determined by the rule of the most just decision. In this context, it is worth referring to the theoretical reflection of John Rawls, who in his *Theory of Justice*, considering the concept of the right to freedom, stated that freedom can be limited in favour of equal freedom of every human being (Rawls, 1971). He assumed that in any society, individuals must be equally free and democratically equal (the principles of egalitarian freedom and democratic equality), and that institutions monitoring social inequalities should strive to equalise the status of less privileged social groups. This is not always the case in a pandemic, especially when decision-making pragmatism wins among the members of the government. Therefore, at the time of a pandemic, references to common welfare should serve to give appropriate content to the norms of law and to alleviate disputes surrounding its provisions. COVID-19 meant that the conflict alive in recent decades between Peter Singer's concept of impartiality (Singer, 2003, p. 29), in which he referred to his earlier concept enshrined in *Practical Ethics* supposed that utilitarianism is the "default setting" of moral thinking (Singer, 1979), and Rawls' principle of solidarity has ceased to be the main axis of the dispute in shaping the legal policy of the state, because opposing concepts of state philosophy appeared side by side with no clear advantage of any of them. The Rawls' concept of justice as impartiality was an alternative to utilitarianism in the area of Anglo-Saxon practical philosophy. It was distinguished by a systematic character comparable to the utilitarian one and theoretical rigor, but which, in contrast to it, corresponded to the common but well-established moral convictions (Rawls, 1994, pp. 3–5). Thus, the turning point in redefining the axiological priorities of the political system, becoming the perspective of the authorities (even when the latter were responsible for fighting the health crisis), unexpectedly became a pretext to change the principles of the state regime. Decision-making revealed a unilateral tendency of the authorities to change the model of governance known from historical descriptions or from theoretical philosophical and legal concepts that are opposed to the rule of law, taking into account doctrinal implications. The policy of fighting crises is based on exceptions to legal events in specific aspects of social life, which cannot be resolved by objectively adopted principles. At a time of a pandemic, two

kinds of rationality are brought together. The strategic approach to making ethical decisions based on the law of “utilitarianism of rules” gives way to tactical “utilitarianism of measures”, especially when it comes to optimisation of operations and the question: whether to act in an optimal way, maximising the likely benefits, economising inputs and limiting losses (“utilitarianism of measures”) or to give up reasoning based on the rule that the best world is the one where the so-called “right actions” should be maximised (“utilitarianism of rules”) (Probučka, 1994, pp. 188–193). Hence, the principle of common welfare may be a trap for the authorities. Competitive visions of the state manifested in the strategies of combating a health crisis have determined the perception of the authorities’ responsibility for actions in the axiological dimension in post-pandemic conditions, when the authorities, having the obligation to care for the development of citizens by guaranteeing their justified needs, will be guided by the principle of common welfare as a starting point (Zamelski, 2014, s. 277; Trzciński, 2018, s. 23–31).

COVID-19 proved that the regulations in force in the legal system are not sufficient to explicitly embed the principle of common welfare as an obligation addressed to public authorities, i.e. of servitude towards all citizens. In the context of the fight against COVID-19, this was done by making regulatory decisions concerning the society (e.g. in the field of public health care, combating the health crisis), while striving to establish normative solutions unacceptable in the standards of the rule of law¹, threatening to introduce the primacy of the interests of power over the interests of the citizens, violating the inviolable principle of human dignity as a source of civil liberties and rights, and the inviolable essence of freedoms and rights. The above observation is important because it indicates the risk of repeated use of emergency situations as a pretext by decision-makers following the need to redefine constitutional principles due to the need to implement the ruling strategy of their choice. Therefore, it is worth considering to introduce additional legal mechanisms by way of expanding the solutions in force in the Constitution of the Republic of Poland, guaranteeing the primacy of the interests of all citizens

1 https://eur-lex.europa.eu/legal-content/PL/TXT/?uri=LEGISSUM:accession_criteria_copenhagen [online], 22 IX 2022.

over the interests of the authorities, including by establishing clearer rules for the legal accountability of public authorities for violations of constitutional principles.

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