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## Management of Legal Instruments in Fighting Pandemics

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**Abstract:**

**Purpose:** Law constitutes an effective instrument of society management and goods distribution. The law's impact is verified in situations of threat to public policy and safety or citizens' health and life. In Poland the state of fight against pandemics connected with corona virus SARS-CoV-2 threat showed very low level of legal instruments management. Permanent institutional instability, and sometimes chaos in the implementation of particular law solutions, led to negation of rationality basics in administrative and judicial practice. The goal of the paper is to present Polish official authorities' legal actions.

**Design/Methodology/Approach:** Social research methods (observation), study of documents and case study with regard to administrative and judicial practice.

**Findings:** Shaping authorities' tasks and competences.

**Practical implications:** Research of actual influence of law institutions.

**Originality/value:** The study has features of originality due to the general nature of the topic taken, the methods adopted and the results obtained. Skillfully refer to the normative state and previous knowledge. The value of the article lies in the analysis of detailed issues that take up not only theoretical and legal topics, but also those that are directly related to practice.

**Keywords:** Law institutions, state of emergency, threat to public policy and safety, pandemics, public administration, judiciary, rights and freedoms of an individual.

**JEL codes:** K10, K30, K40.

**Paper type:** A research article.

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## **1. Introduction**

Pandemics caused by corona virus SARS-CoV-2 in 2019 was accompanied by lack of information concerning hazard sources and scale, lack of societies and countries' institutional preparation to fight the threat and intensive search of vaccination. The awareness that intended range of activities had to be placed on a political, economic and cultural level including mainly medical level. Considerations in this research constitute law analysis and execution, preventing and counteracting pandemics.

They are based on two hypotheses: firstly – available legal instruments for balancing different classes of public and private businesses were not appropriately used; secondly – while implementing law regulations constitutional principles and national values were breached with regard to legal status of an individual and legal persons.

## **2. Foundations of Implemented Law Regulations**

At the end of February 2020 in Polish hospitals there were people with suspicion of corona virus infection. Some of them were subjected to quarantine, and others to sanitary monitoring (NIST 2022). The first case of COVID-19 infection was made public on 4th March 2020 during Minister of Health conference (NIST 2022). Two days before this conference, the Law of 2nd March 2020 had been adopted. It concerned specific arrangements concerning prevention, counteracting and fighting Covid-19, other infectious diseases and related crisis situations (OJ 2020, item 374).

It entered into force on 8th March 2020. Many EU countries made a decision to implement constitutional state of emergency. Poland, similarly to Italy or France, declared state of epidemics on the basis of article 46, paragraph 2 of the act of 5th December 2008 on counteracting and fighting infections and human infectious diseases (OJ 2020, item 1850). It entered into force from 14th March 2020 until cancellation by means of Minister of Health resolution of 13 March 2020 on declaring epidemiological threat in Poland (OJ 2020, item 433).

The state of epidemics became formalized with blanket provisions included in article 46 paragraph 2 and 4 of the above indicated act of 5th December 2008. Next, implementing acts restricting constitutional laws and freedoms, among others, freedom to relocate (article 52, paragraph 1 of the Constitution of Republic of Poland), freedom of economic activity (article 20 of the Constitution of Republic of Poland) were issued on the basis of the blanket provisions regulated in article 46a and 46b which were implemented by the act of 2nd March 2020 amending the act of 5th December 2008 and of 2nd March 2020 on specific arrangements concerning prevention, counteraction and fighting Covid-19, other infectious diseases and related crisis situations (OJ 2020, item 1842).

The indicated acts of law normalized competencies and tasks mainly of organs and offices acting in the sphere of anti-epidemic and preventing operations, assuring

access to diagnostics and medical treatment, online education, suspending classes in educational units, sanitary control on boarders, exemption from the application of public procurement law, construction law and other issues. In order to regulate social relations not indicated in the above mentioned act of law, provisions of the act of law of 5th December 2008 on counteracting and fighting infections and human infectious diseases were adopted in so called corona virus special law.

Due to the fact that according to article 68, paragraph 4 of Polish Constitution, fighting and epidemiologic diseases is the official authorities' responsibility, a following problem has arisen: should this duty be referred to in the context of injunction implemented in article 228.1 of the Polish Constitution and use law instruments provided in chapter XI of the Constitution of Polish Republic?

Notwithstanding different points of view, the author of this article states that, according to article 68 paragraph 4 of the Polish Constitution, the form had been acceptable. Constitutional Tribunal sanctioned its implementation as distinct from situations stipulated in chapter XI of the Polish Constitution and also appropriate for crisis situations regulation (decision of Constitutional Tribunal of 3rd June 2012, K 22/09).

Provisions of the state of epidemics, which is still in force today, provided some kind of concretization of the state of emergency during which constitutional order in respect to fundamental area of setting boarders between an individual and a country is 'suspended'.

### **3. Typology of Chosen Law Institutions**

As it was indicated above, Polish government chose 'normal' functioning regime of the country without using instruments characteristic of the state of emergency which give the authority greater maneuver possibilities and more freedom in shaping individual's law status. Implementation of certain institutions limiting virus transmission and subsequent mutation was obviously accompanied with interference in rights and freedoms of an individual. It is fully understood that these interferences based on 'fragile' law foundations could be contested as at least unlawful.

Execution of the obligation connected with wearing masks aroused a lot of social controversies and great problems, shaping at the same time application of law by courts and public administration organs. Since articles 46a and 46b of the act of 5th December 2008 were indicated as a basis for this obligation, there was conflict with the Polish law as to delegation of competences expansion.

This act of law allows solely for establishing the obligation of using preventive measures (such as masks and visors etc.) with reference to people who are infected or suspected of being infected, through the means of resolution. Summing up, obligation of wearing such preventive measure implemented under the above

indicated resolution did not have legal basis. It was incompatible with the Constitution of Polish Republic, enforced with serious infringement of article 92 paragraph 1 of the Constitution, with prejudice to rule of law included in article 7 (Constitution of Republic of Poland, OJ no. 78, item 483). These kinds of restrictions should be enforced only by the means of acts of law, as it is stipulated in article 31 paragraph 3 and article 43 paragraph 1.

The obligation to cover mouth and nose came into effect since 16th April 2020 and concerned public places. Even though, doubts concerning the necessity to use 'masks', their effectiveness were not anyhow distracted by the authorities. Poles stocked up 'masks' from January and the representatives of the Ministry of Health ensured many times that wearing them is not obligatory and that they do not prevent from infection.

The next law instrument applied by the Cabinet of Ministers was lockdown which closed or limited operations of business or cultural activity, such as casinos, hotels, touristic objects etc. On 15th June 2021 so called covid passport was implemented within the European Union. Its rationale was again sanctioned by the Cabinet of Ministers' resolution of 14th December 2021 amending resolution on establishing specific limitations, orders and prohibitions connected with the state of epidemic (OJ of 2021, item 2311). It entered into force on 15th December 2021.

The number of people staying in buildings, restaurants, religious places and sports facilities, etc., was increased with regard to the vaccinated ones. This act of law regulated the way such verification should take place – by means of showing EU digital COVID certificate of vaccination, the result of COVID test or a document certifying recovery after COVID-19 infection.

However, it did not regulate other very important issue related to the obligations of one party and rights of the other party, such as: practical ways of such verification. The legal basis concerning demand to show passport or a certificate was not specified. There was a vital question referred to the rights of an event organizers, shop or other organizational unit's security to check the above mentioned documents.

There are no relevant provisions in, for example, the act of 10th May 2018 on personal data protection (OJ 2018, item 1000) which could potentially include regulations on personal goods of natural persons in the context of individual laws, their privacy etc.

The next restriction implemented pursuant to the above indicated resolutions of the Minister of Health of 13 March 2020 and 20 March 2020 and subsequently of the Cabinet of Ministers, was the obligation to quarantine people returning from foreign countries. The issues connected with quarantine were regulated by the Cabinet of

Ministers via the resolution of 6 May 2021 on setting specific limitations, orders and prohibitions related to the state of epidemics (OJ 2021, item 861).

The resolution included the entry connected with the obligation to take diagnostic tests, limit business activity in the area where the state of epidemic had been declared and other rigors connected with wearing masks and using sanitizers etc.

The order to obey quarantine regulations adopted by virtue of resolution went beyond statutory solutions. It can be enforced towards people who are ill or a healthy, however, at the risk of infection, in other words, it should not be commonly applicable.

According to regulations incorporated in the above act of law, this order cannot refer to a person who was directed by a doctor to have SARS-Cov-2 test either. The subsequent law instrument introduced by the provisions of resolutions was implementing vaccines, however the problem of compulsory vaccinations arose at this point, which is discussed in the following part of this publication.

The issue of entitling employers to verify covid tests of their workers has been raised for a long time and caused a lot of arguments and controversies. Another questionable law instrument is the obligation to vaccinate, referred to particular professions. According to the amendment of the Minister of Health resolution of 22 December 2021 on declaring the state of epidemics (OJ 2021, item 2398), it concerns people who work in medical facilities.

Contestation of this obligation by workers or other people whose responsibility is managing hospitals arises from the fact that regulation of statutory significance is necessary to perform such actions. Others, including many directors of hospitals, were of the opinion that this resolution and its connection with the act of law was enough to fire an employee or to change his responsibilities at work so that not to expose other people to infection.

If a worker decided to take legal actions due to the fact that he was not remunerated for the time of his readiness to work, the court decree would depend on a judge's approach. However, it seems that the judge will favor public interest connected with epidemic threat over protecting workers' rights.

Crucial problems related to defining legal status of vaccinated and not vaccinated people has not been solved, neither within public law rigors (for example access to cafes), nor within private sphere. No preventive instruments in any sectors of public operations or in employment places especially exposed to coronavirus were created till the end of 2021.

Nevertheless, medical law assumptions concerning vaccinations and preventive health care have been clear. Respecting patient's decisive autonomy and recommendations of current medical knowledge are required.

However, vaccination has also social, ethical and moral dimension. There is a strong need to set boundaries between social and personal values in the country administrating conflicts and fighting pandemics which ruin economy. Creating medical and law vaccination purposefulness balance, concerning at least chosen social groups, for example teachers, police or medical care workers seems to be of crucial importance.

Wrongfully understood personal freedom; freedom of conscience clause; superstitions etc. require depriving them of rationality and taking appropriate actions, at least in these social groups.

After all, it is very difficult to imagine voluntariness of vaccination, for example, against measles or chicken pox, lack of consent for blood transfusion for Jehovah's Witnesses if there was threat to life and decision was on the side of Polish jurisdiction.

The employer did not receive any tools enabling to require a certificate from an employee, not to mention other restrictions which are demanded for safety of a company and its workers' health. There are no unambiguous law regulations by virtue of which an employer (like other authorities) could check body temperature.

Provisions of law, directives and opinions of Chief Sanitary Inspector, particular ministers and Inspector General for Personal Data Protection did not implement consolidated, undoubtful rules of conduct. There was such great law chaos that contesting competences of sanitary inspectors, possibility to issue decisions connected with obligation of checking body temperature, requiring related information or performing different prohibitive actions could be justified.

#### **4. Law Enforcement in the State of Epidemic**

More and more effective voices of authorities in the field of law including, for example the ones connected with Helsinki Foundation for Human Rights, extensive law education of society and social awareness increase led to the above mentioned obligation connected with covering face and nose and other restrictions' erosion.

These phenomena were accompanied by fear of responsibility, contesting or even negating operations performed by sanitation and security forces. Sometimes it was possible to notice aggression by the persons interested, as well as third parties which contributed to criticism of the whole law management of the state of pandemics. When shop assistants refused to sell products to a person without masks on their faces, they could expose themselves to allegation of offenses on the basis of article

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135 of Petty Offences Code (the act of 20 May 1971, Code of Petty Offences, OJ no.12, item 114)

Fortunately, guarantee mechanisms of rule of law appeared and worked well in Polish judiciary. In confrontation with the normative state which was in contradiction with Polish legal order, Administrative Courts did not have other possibilities than giving negative opinion of legality concerning implementation of norms sanctioning above described restrictions of the state of pandemics, which also violated legislative standards provided by the Constitution of Polish Republic for ordinary legislation.

Decisions of police officers and sanitary and epidemiological inspectors were revoked since, as it had been stated in one of the decisions of Voivodship Administrative Court in Warsaw, ‘Implementing the obligation (of wearing masks – A. Kwiatkowski’s annotation) constituted an abuse of authority included in the act on fighting infections and human infectious diseases’ (file reference number VIII SA/WA 491/20).

The decision of a Voivodship Sanitary Inspector concerning violation of temporary closure of a service point by an entrepreneur owning a barbershop was revoked by virtue of Voivodship Administrative Court in Opole decree of 27 October 2020 (file reference number SA/GI 319/20). This decision became widespread, giving other entrepreneurs a possibility to refer to it and justify breaching rigors provided for in subsequent resolutions of council of ministers in their business operations.

In 2020 and 2021 Administrative Courts heard hundreds of complaints related to decisions of voivodship sanitary inspectors maintaining decisions of lower level inspectors connected with the issues described above, as well as the prohibition of relocating, running certain businesses or obligations to be quarantined.

It was strongly emphasized that operations of the Minister of Health who imposes an obligation of quarantine without any legal basis, deprived people of personal freedom (article 41 of the Polish Constitution) and the freedom to relocate (article 52 paragraph 1 of the Polish Constitution). A fundamental allegation on the part of Administrative Courts when it comes to implemented restrictions related to running business concerned the fact that they violated the provisions of article 22 of the Polish Constitution.

This article stipulates that any interferences in this matter are possible only in a statutory form and due to significant public interest. Deciding if is a case of ‘significant public interest’ is, as emphasized in the doctrine (Boć 2001), *exclusive* on the part of Parliament, Senate, President and Constitutional Tribunal. Administrative discretion in the course of particular statutory norm ‘will be minimal or none’ (Boć, 2001).

Courts created some kinds of precedents in all of these cases, basing their opinions of statute exclusivity in situation related to personal freedom and rights limitations (article 31 paragraph 3 of the Polish Constitution), as well as executive character of resolutions (article 92 paragraph 1 of the Polish Constitution). They declared that breaching statutory authorization to regulate certain matter through the means of resolution is unacceptable. Even unquestionable advisability of various restrictions did not justify 'taking a legislative shortcut'.

Administrative Courts created a necessity to perform a new model of legislation in the times of pandemics. Acquitting people directed attention to the fact that a citizen cannot be responsible for legislative chaos. At the same time courts indicated the way a law regime should be perceived and obeyed by means of new legal matrix and court paradigm of rights and freedom protection guarantee.

It is very important to notice a very important matter without even diving into the depths of exercising law by judges. The fact that legislation in the times of pandemics did not fulfill its basic functions such as protective, motivational, warranty assuring, preventive and educational or justice related, led to its instrumentalization, imposing sanctions or issuing verdicts depending on 'whims' of the authorities.

Crucial, desired and indispensable changes for execution of law in the state of pandemics came only by means of adopting act of law of 28th October 2020 on changing some acts in connection with fighting and counteracting crisis situations related to COVID-19 (OJ 2020, item 2112). Due to implementation of changes in article 46b of hereinabove mentioned act of law of 5th December 2008, there was a possibility to introduce adequate regulations by means of resolution.

However, the case is not as easy as it seems. Taking into consideration only linguistic interpretation of provisions included in articles 46a and 46b of the act of 5th December 2008, it can be noted that there are no legislative norms authorizing to impose a common obligation to cover mouth and nose.

Their current wording include only foundations for imposing certain restrictions, obligations and prohibitions in certain, precisely defined area of Poland, not in the whole country as is used to be before. It means that legal foundations of resolution of the Cabinet of Ministers of 21st December 2020 on establishing restrictions, obligations and prohibitions in reference to the state of epidemics (OJ 2021, item 2316), as of 14th December 2020 amending resolution on establishing restrictions, obligations and prohibitions in reference to the state of pandemics (OJ 2021, item 2311) did not constitute legal basis for imposing certain obligations in the whole country.

The Supreme Court (file reference number KK 64/21, KK 74), District Court in Mińsk Mazowiecki, II Criminal Division (file reference number IIW 155.21) or

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District Court in Kraków which issued an Order concerning the case III Kp 354/20 stipulating that the president Andrzej Duda and other politics visiting Wawel during the time of pandemics did not break the law since the resolution of the Cabinet of Ministers ‘concerning covid obligations and prohibitions had been not constitutional’ (LEGAARTIS 2022).

## **5. Use of Expertise**

Consultative and/or advisory activities requiring special and specialist view are a crucial element of the above described legal instruments in the state of pandemics. Rational legislation also requires comprehensive and coherent knowledge concerning results of potential deferment of some medical procedures, performing surgery, closing hospital wards for a certain period of time etc.

A Very Important Law Act in this Matter is the Ordinance No 205 of Prime Minister of 6th November 2020 on creating Medical Council for issues connected with COVID-19. Its responsibilities included, among others, analysis of current situation in the country, presenting propositions of operations, giving opinions concerning prepared law acts projects within implemented rules, restrictions and limitations (GOV 2022).

Since the moment it had been constituted till January 2022, this Council issued 36 opinions concerning different cases such as, for example, obeying rules limiting infections: distance, disinfection, masks (of 15 March 2021), vaccination in age group 12-15 (of 30 May 2021) or urgent vaccination of people above 60 years old (of 14 January 2022). Five announcements were formulated, for example, concerning vaccination procedure (of 10 May 2021) (GOV 2022).

The fact that 13 out of 17 members of this Council decided to leave the organization on 14th January 2022 was justified with various reasons. According to these people, the government deliberately does not fight with pandemics, allowing for hundreds of deaths daily in the name of party interest which is retaining power (ONET 2022).

Experts mainly paid attention to the following issues. Since the beginning of the Council’s existence there was no direct influence of issued opinions on government’s policy in reference to pandemics. ‘No optimal and checked worldwide solutions’ (ONET 2022) were implemented.

The members of the Council who decided to leave the organization stated that they had observed increasing tolerance of behavior presented by environments negating COVID-19 threat and vaccination significance in the struggle with pandemics, which was manifested by statements of Government and other public officials. They came to conclusion that ‘flattering the lowest instincts, lack of knowledge and fears at the cost of death is not the role of authority and government’ (WP 2022a).

## **6. Drifting in the Seas of Legislative Projects**

There are such situations, related to common threat of life and health, public order and safety, when legislator should take advantage of legal tools ensuring maximal impact efficiency. Experiences of other countries, implementing certain solutions and verifying them made it possible to perceive reality from the point of view of values adopted by Polish government.

For example, act of law rejected on 2nd September 2022 which assumed, among others, regulations unacceptable from the viewpoint of rights and freedoms of an individual or rationality of work, etc. Solutions which assumed proving that infection took place in the place of employment, because of a particular worker were included in this act making it unreal and deprived of scientific foundations.

Medical Council had not been appointed yet in the first months of pandemics spread. However, as it was indicated above, not much has changed since the Council had been created. As a consequence, appointed law institutions did not create indispensable in such situations belief that the way public authorities work is really rational and effective.

The legislator in the state of pandemics did not have full and unquestionable knowledge within the subject matter being regulated, which does not mean that there was no possibility to express certain system of values and adjust the way of proceeding to this system. The legislator had freedom in anticipating the state of emergency (anticipated first, second or third wave of pandemics), potential sphere of life or health threat, ranges of organization and functioning of health care institutions, etc.

The areas of administrating future, potential conflicts, for example between employers and employees, clients of public service entities, or within some environments resistance to receive an obligatory vaccination etc. were quite sufficiently defined.

The changeability of law in the struggle with corona virus seems to be understandable. In the period of time from March 2020 till December 2020, 12 resolutions of the Council of Ministers were issued. They concerned establishing certain limitations, obligations and prohibitions related to the state of pandemics.

On the other hand, since May to December 2021 there were 19 such resolutions. The whole legislative process could be treated as legislators' country rather than legal country. Informing about legal acts by the means of press conferences of social media when they had not been published on time in legally binding period of time could be encountered. *Vocatio legis* and the rules of legislative technique were breached. Social and specialists factors were not appropriately used even at the stage

of their creation. Recommendations and instructions of sanitary administration organs could go beyond constitutional catalogue of law sources.

Solutions implemented in the analyzed acts of law did not bring results adequate to threat situations, did not shape desired habits, change of customs, did not constitute unquestionable foundation to establish and enforce obedience. Their utility was on a very low level, contributing to demoralization of societies and not mobilizing them. Mechanisms of basic functions of preventive, organizational and repressive character disappointed. Some kind of anarchy appeared.

Honestly speaking, nobody was concerned with the threat or consequences of breaching provisions of law. Trivialization of law was an ongoing process. Loss of respect towards security forces and law-governed state could be noticed. The credibility of public institutions, mainly administrative police has been weakened.

The practice of establishing law in the state of pandemics negated respect towards primacy of the law related to priority of rules of law before other rules of proceeding. One of crucial rules and values presented by G. Radbruch saying 'that law governs not because it gained obedience, but it governs if it is capable of gaining obedience because this is the only situation when it can guarantee legal clarity' was erased from public sphere (Olszewski and Zmierczak, 1994).

According to a doctor and former vice minister of health, K. Łanda 'the strategy of government in the struggle with pandemics was composed of chaotic moves, similar to the ones of a drunk person bouncing off the walls. In March 2020 forests and parks were being closed due to lockdown. Later on the rules were not obeyed by anyone' (WP 2022b).

In view of one of the research presented on the basis of European Center for disease prevention and Control report, from 23 December 2021 to 15 January 2022 there was the largest number of covid related deaths in Poland in comparison to other EU countries. Poland also had the lowest weekly average of COVID-19 infections, which are infections for million cases with the lowest level of performed tests. As one of Twitter users indicated, due to negligence of the governing authorities, Poland is the largest funeral home in the whole Europe (WP, 2022b).

## **7. Conclusion**

Everyday matters are in the supreme power of people – sovereign, however they rely on clerks. The value of a country, especially in the states of the highest emergency, lies in the fact that it makes decisions adjusted to certain situation. Law is to serve right, just and rational things.

Managing legislative institutions presented in this research has become an expression of one-sided projection of authorities which have performed chaotic

reactions. Negation of specialist knowledge and, as it seems, politically conditioned actions gave the beginning of authority excess. Conditions for breaching law and freedoms developed in the created areas of norms, rules and constitutional values negation.

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