

Dr Krzysztof Winiarski
Judge of the Supreme Administrative Court
in Warsaw
Head of the 3rd Division of the Finance Chamber

Budgetary Security of Military Threat and Martial Law in the Polish legal system

The problem of limiting individual rights and freedoms

1. The essence of a state of emergency

During the normal functioning of the state and its institutions, there are situations in which an action of the authorities is affected by specific circumstances, such as:

- natural disasters;
- other supervening events threatening the constitutional system of the state, the security of citizens or the public order;
- the occurrence of an external threat to the state, including that caused by terrorist actions, an armed attack on the territory of the Republic of Poland or when an international agreement imposes an obligation of joint defence against aggression.

The situations indicated are related by a common circumstance, namely that the application of ordinary constitutional measures is insufficient to remove them. It is in such cases that the fundamental constitutional acts of the state envisage a special legal regime aimed at reversing or mitigating the effects of the threats. This legal regime is usually referred to as a state of emergency covering the territory of the whole or part of the country.

A state of emergency is therefore a legal form that is always preceded by specific factual circumstances (natural disasters, social or political events, armed conflict) that cannot be remedied or removed in the ordinary course of the state's functioning. The characteristic features of the state of emergency are temporary modifications of the competences of public authority entities under the principle of the separation and balancing of powers (the executive branch usually acquires a stronger

position), limitation of guarantees of individual freedoms and rights, simplification of law-making procedures and introduction of new sources of law.

It is, of course, controversial to determine what the limits of permissible interference with an individual's rights and freedoms are when declaring a state of emergency. In the past, a theory of the so-called state's necessity was promoted, which legitimised the actions of public authority or excluded the illegality of the action of the holders of such authority, even in violation of the applicable law to repel a public threat. According to this concept, it was important to achieve the intended result, irrelevant of what methods. The theory of the state's necessity has been abandoned in modern democratic states embodying the postulate of the rule of law. States of emergency are now subject to increasing regulation. They often have a constitutional status and are a permanent and non-transferable part of the state's political system.

In Poland's constitutional order, the issues of restrictions on individual freedoms and rights are not dependent on the state authorities but are defined in the Constitution, as well as in the statutes on specific states of emergency. The introduction of a state of emergency and the scope of restrictions on individual freedoms and rights must be consistent with the general principles defined in the Constitution of the Republic of Poland of 2 April 1997. These are the following rules: subsidiarity, rule of law, proportionality, expediency, and temporariness. Actions taken because of the introduction of a state of emergency must correspond to the degree of danger and should aim to restore the normal functioning of the state as soon as possible. Only statutes may lay down rules and procedures for compensating property losses resulting from the restrictions imposed.

The introduction of a specific constitutional regulation of emergency states corresponds to Article 4 of the International Covenant on Civil and Political Rights and Article 15 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

2. Types of emergency states in the Polish legal system and the conditions for their introduction

The Constitution of the Republic of Poland, in Chapter 11, comprising Articles 228-234, stipulates the possibility of situations that force the declaration of a state of emergency, namely that of a war, an emergency or a natural disaster. However, as

already pointed out, they may be introduced only in the conditions of specific threats, if the ordinary constitutional measures are insufficient, which follows directly from Article 228(1) of the Constitution.

Article 228(2) of the Constitution expresses the principle of legality, according to which the introduction of a state of emergency is possible only through a regulation issued under a statute, made available to the public. Therefore, to introduce a state of emergency, it is necessary to have already existing statutes that regulate the subject of the state of emergency, including the principles of the functioning of public authorities, as well as restrictions on human and civil rights and freedoms. The statutes are the following:

- 1) Act on the martial law and the competences of the Commander-in-Chief of the Armed Forces and the principles of his/her subordination to the constitutional bodies of the Republic of Poland of 29 August 2002;
- 2) Act on the state of emergency of 21 June 2002 ;
- 3) Act on the state of natural disaster of 18 April 2002 and
- 4) Act on the compensation of property losses resulting from the restriction on human and civil freedoms and rights during a state of emergency of 22 November 2002
- 5) Act on the Defence of the Homeland of 11 March 2002.

Martial law on part or the whole state's territory is imposed by regulation by the President of the Republic of Poland at the request of the Council of Ministers if there is an external threat to the state, an armed attack on the territory of the Republic of Poland or when an international agreement imposes an obligation to defend against aggression jointly.

The full-scale war in Ukraine has created the need to redefine the concept of a "threat of war". This requires answering the question of what war means in the contemporary world. We are, after all, confronted with cyber warfare, hybrid warfare, and full-scale war involving the use of conventional armed forces.

A state of emergency on part or the whole territory of the state is imposed by regulation issued by the President of the Republic of Poland for a period of no longer than 90 days if there is a threat to the constitutional system of the state, security of citizens or the public order. The state of emergency may be extended only once, with

the consent of the Sejm [lower Chamber of the Parliament] and for a period not exceeding 60 days.

The President of the Republic of Poland presents the regulation on introducing martial law or a state of emergency to the Sejm within 48 hours of signing the regulation. The Sejm considers the regulation of the President of the Republic without delay. The Sejm may repeal it by an absolute majority of votes in the presence of at least half of the statutory number of deputies.

If, during martial law, the Sejm cannot be assembled for a sitting, the President of the Republic, at the request of the Council of Ministers, issues regulations with the force of law. These regulations are subject to the approval of the Sejm at its next sitting. This is currently the only case in which the President is authorised to issue autonomous regulations with the force of a statute, i.e. the legal act with the greatest, after the Constitution, legal significance. Regulations issued in the normal course by the President of the Republic, the Council of Ministers, individual ministers, and other bodies indicated in the Constitution must be based on the authorisation contained in the law and aim at its implementation.

In turn, a state of natural disaster is imposed by the Council of Ministers by regulation for a fixed period, not longer than 30 days, on part or all of the state's territory, to prevent the effects of natural disasters or technical failures bearing the hallmarks of a natural disaster and to remove them. The state of natural disaster may be extended with the consent of the Sejm.

During a state of emergency, the following acts may not be amended: the Constitution, electoral laws for the Sejm, Senate and local government bodies, the law on the election of the President of the Republic and laws on states of emergency. During a state of emergency and within 90 days after its termination, the term of office of the Sejm may not be shortened, a nationwide referendum may not be held, elections to the Sejm, the Senate, local government bodies and elections of the President of the Republic may not be held, and the terms of office of these bodies are extended accordingly. Elections to local self-government bodies are possible only in the districts, where a state of emergency has not been declared.

A threat of war, and even more so a state of war, requires an increase in defence expenditure, namely military and paramilitary spending. The Act on the Defence of the

Homeland consolidates all defence-related legislation, including for the purpose of properly safeguarding public finances.

The Armed Forces Support Fund has been established. Defence-related tasks may be imposed on entrepreneurs and financed through targeted grants, as well as planning-related tasks, which are generally to be financed from their own resources.

Companies and natural persons may also be required to provide material services, such as making their real estate or means of transport available, as well as personal services, such as additional work.

The Fund also establishes a framework for cooperation between the state budget, Bank Gospodarstwa Krajowego, and other institutions in financing armaments. Bank Gospodarstwa Krajowego is Poland's only state development bank and is wholly owned by the State Treasury. Unlike commercial banks, it does not serve individual clients, but implements government socio-economic programmes and supports local governments and infrastructure development.

3. Limits of permissible restrictions on individual freedoms and rights during states of emergency

Article 233 of the Constitution sets out the rules for restricting an individual's constitutional rights and freedoms during states of emergency.

This provision (point 1) formulates a negative clause, i.e. it lists the rights and freedoms that 'may not be restricted' during martial law and state of emergency. Among the rights and freedoms listed is human dignity, which, under Article 30 of the Constitution, is inherent, inalienable, and inviolable and therefore should never be subject to limitations, but also other rights and freedoms, mainly from the chapter on personal rights and freedoms, which, in the normal absence of a state of emergency, may be subject to limitations under the conditions indicated in Article 31(3) of the Constitution. These rights include citizenship, protection of life, humane treatment, criminal responsibility, access to court, personal rights, conscience and religion, family, and child.

However, this negative clause cannot be perceived in such a way that, in the remaining scope, the powers of the state authorities to restrict an individual's freedoms and rights become absolute. A certain barrier to the temptation of the state authorities

to abuse their powers is stipulated here by Article 228(5) of the Constitution, under which the actions taken because of the introduction of a state of emergency must correspond to the degree of danger. They should aim at the quickest possible restoration of the state's normal functioning. The intensity of the state's interference with these rights and freedoms should therefore be proportionate to the degree of threat. The provision of Article 228(5) of the Constitution modifies (for martial law and a state of emergency) the principle of proportionality expressed in Article 31(3) of the Constitution, under which limitations on the exercise of constitutional freedoms and rights may be established only by a statute and only when they are necessary in a democratic state for its security or public order, or for the protection of the environment, public health and morals, or the freedoms and rights of others. These restrictions must not affect the essence of freedoms and rights. During states of emergency, there is no prohibition on violating the essence of a given right or freedom, as this type of restriction is not indicated in the content of Article 228(5) of the Constitution. Mentioned above. Therefore, rights and freedoms may even be suspended if the legislator decides so. Nevertheless, the catalogue of rights and freedoms contained in Article 233(1) is, therefore, a catalogue of particularly protected rights and freedoms, which may not be restricted during martial law and state of emergency to such a broad extent as follows from the content of Article 228(5) of the Constitution.

In contrast, Article 233(3) of the Constitution, referring to the state of natural disaster, contains a positive clause, indicating the rights that 'may be subject to limitations' during this state. These restrictions may therefore concern freedom of economic activity, personal freedom, inviolability of the dwelling, freedom of movement and stay in the territory of Poland, the right to strike, the right to property, freedom of work, the right to safety and hygienic working conditions and the right to rest.

All these rights are not absolute and may be subject to restrictions also when there is no state of emergency. The commented provision, however, introduces the possibility of limiting them under the specific conditions indicated in Article 228(5) of the Constitution, which are more lenient - as mentioned earlier - than those indicated in Article 31(3) of the Constitution. Restrictions on the rights enumerated in Article 233(3) must correspond to the degree of danger and should aim to restore the normal functioning of the state as soon as possible. These restrictions may also lead to a

violation of the essence of the right in question, including its suspension for the duration of the state of disaster.

An important regulation is Article 233(2) of the Constitution, which prohibits the restriction on an individual's rights and freedoms solely on a discriminatory basis, indicating race, sex, language, religion or no religion, social origin, birth, and property as discriminatory criteria.

4. Compensatory liability of the State Treasury

The introduction of the state of emergency does not constitute a premise exempting the State Treasury from liability for damages but changes its legal basis from the Civil Code to the provision of the 2002 Act on Compensation of Property Losses Resulting from Restrictions during a State of Emergency of Freedoms and Rights of Man and Citizen. Under Article 2(1) of this Act, anyone who has suffered a property loss because of the restriction on human and civil freedoms and rights during a state of emergency is entitled to claim damages. The Act, in Article 2(2), introduces certain limitations on the claim for damages, which differ from the solutions adopted in the Civil Code.

The damages anticipated in Article 2 of the Act can only compensate for damage in the form of loss (*damnum emergens*). Lost benefits (*lucrum cessans*) are excluded from the scope of damages anticipated under this specific regime of the Act. Damages are payable by the State Treasury. Damages are not payable if the property loss was caused solely by the fault of the injured party or a third party. The decision on damages is issued by the provincial governor in whose jurisdiction the property loss occurred. Such a decision is final (the normal two-instance procedure does not apply). A person dissatisfied with the decision may bring an action before a common court, rather than a complaint before an administrative court. Compensation claims are time-barred one year from the date the injured person became aware of the damage, but no later than three years from the termination of the state of emergency. The claim for damages passes to the legal successors of the injured party.

5. Final remarks

In the modern history of Poland, the last martial law was in 1981-1983 imposed by the communist authorities. Significantly, the imposition of this state was not caused by external aggression, but by internal conditions (mass protests by workers). However, the then Constitution of the People's Republic of Poland of 22 July 1952 did not stipulate a state of emergency. In the decree of 13 December 1981 that introduced martial law, the movement of people in public places between 22:00 and 6:00 on the territory of the People's Republic of Poland was restricted (known as the militia hour). To allow employees to come to work for the first shift, the duration of the militia hour was later shortened by two hours, i.e. from 23:00 to 5:00

In contrast, the situation was different with the imposition of a state of emergency, although it never covered the entire country. On 2 September, a state of emergency was introduced in the border strip with Belarus, i.e. in parts of Podlaskie and Lubelskie Voivodeships. As of 2 September 2021, the strip encompassed 115 villages in Podlaskie Voivodeship and 68 villages in Lubelskie Voivodeship. This was a consequence of the mass migration to Poland of people mainly from Central Asia and Africa, from the territory of Belarus, inspired by the authorities of that country. The restrictions that were introduced at that time were the following:

- Suspension of the right to organise public assemblies in the area covered by the state of emergency,
- Suspension of the right to organise mass artistic and entertainment events,
- the obligation to carry an identity card or other proof of identity,
- the prohibition on staying in the area under the state of emergency for 24 hours a day with exceptions specified in the legislation (this did not apply to permanent residents in the area),
- prohibiting the recording, videotaping, and photographing of objects and areas comprising border infrastructure, including the image of Border Guard officers, Police, and soldiers,
- restricting access to public information on activities carried out in the area of the state of emergency related to the protection of the state border and the prevention and counteraction of illegal migration.

In contrast, the Polish authorities did not decide to impose a state of emergency in connection with the spreading epidemic of the COVID-19 disease. Counteracting the pandemic constitutes an obligation of public authorities stemming directly from Article 68(4) of the Constitution. The implementation of this obligation is not possible through ordinary measures at the disposal of the public authorities when exercising restrictions on constitutional rights based on the requirements of Article 31(3) of the Constitution. We are not dealing with an armed attack on the territory of the Republic of Poland, nor with a threat to the constitutional system of the state, therefore there are no grounds for the imposition of martial law or a state of emergency. Indeed, one can currently speak of a threat to the constitutional system of the state, but the source of this threat is not COVID-19. The pandemic we are dealing with falls within the concept of a natural disaster. We are dealing with an act of nature, the effects of which threaten human life and health. Although all the material prerequisites for a state of natural disaster were present, the Council of Ministers did not issue a relevant regulation and did not declare a state of natural disaster. Following the outbreak of a pandemic in Poland, instead, a state of epidemic threat was declared, followed by a state of epidemics. The legal basis for combating epidemics became the Act on special solutions related to the prevention, counteracting, and combating of COVID-19, other infectious diseases and crises caused by them as of 2 March 2020. This Act was ad hoc amended in the early days of the pandemic, and regulated several restrictions on constitutional freedoms and rights, as in the case of the imposition of one of the states of emergency. In the Ombudsman's view, the failure to introduce a state of emergency, in a situation where there are extraordinary threats, amounts to a violation of the injunction formulated in Article 7 of the Constitution to act on the basis and within the limits of the law.

The challenges that the tax system must already confront — not only in Poland, but also in other countries — include the creation of legal mechanisms providing for:

- 1) extraordinary expenditure needs and, consequently, the raising of new state revenues
 - 2) an increase in fiscal burdens, while also preventing inflation
- and additionally:

- 3) the creation of a system for managing tax authorities under extreme conditions, including under fire
- 4) the identification of new sources of budget revenue.