Politeja
Nr 5(92), 2024, s. 181-204
https://doi.org/10.12797/Politeja.21.2024.92.09

Ewa BUJWID-KUREK
Jagiellonian University in Kraków
ewa.bujwid-kurek@uj.edu.pl

Łukasz JAKUBIAK
Jagiellonian University in Kraków
lukasz.jakubiak@uj.edu.pl

Arkadiusz GÓRNISIEWICZ
Jagiellonian University in Kraków
e-mail: arkadiusz.gornisiewicz@uj.edu.pl

SEPARATION OF POWERS DISMANTLED?
OVER-RATIONALISATION OF PARLIAMENTARISM DURING THE COVID-19 PANDEMIC IN THE CZECH REPUBLIC, POLAND AND FRANCE[1]

In operation, executive power covers up because the successful executive does his best to represent his choices as necessities unwillingly imposed on him.[2]

Harvey C. Mansfield

ABSTRACT: This article is intended as a contribution to the research into the increasing role of the executive in modern government systems, including the use of emergency measures. In the case of the COVID-19 pandemic, we deal with an ongoing crisis of global significance. It is the prevalence of the coronavirus threat that provides a unique opportunity to make comparisons and formulate conclusions as to the newly diagnosed phenomenon of over-rationalized parliamen-

[1] The publication has been supported by a grant from the Faculty of International and Political Studies under the Strategic Programme Excellence Initiative at Jagiellonian University.

[2] H.C. Mansfield, *Taming the Prince: The Ambivalence of Modern Executive Power*, New York–London 1989, p. 20.

tarism interpreted as an element of the ongoing strengthening of the executive power, and, at the same time, a potential serious threat to the already weakened separation of powers. The aim of this paper is to demonstrate that during the COVID-19 pandemic, the relative balance between powers – such balance being a structural element of the principle of separation of powers in a democratic state ruled by law – becomes (to a greater or lesser extent) disintegrated. The paper claims that irrespective of the formal response to COVID-19 (such as introducing a state of emergency in the Czech Republic, creating a new state of emergency in France and applying emergency measures without declaring a state of emergency in Poland), it appears that the extraordinary measures introduced are rather similar.

Keywords: separation of powers, state of emergency, the executive, France, Poland, Czech Republic.

INTRODUCTORY REMARKS

At the beginning of May 2023, the head of the World Health Organisation declared "an end to COVID-19 as a public health emergency", although he also admitted that this disease may still pose a threat to health on a global scale (*WHO chief declares...*). The more than three years that have passed since the outbreak of the pandemic have not only had specific consequences in terms of health protection, but have also brought fundamental changes in the approach of states to responding to large-scale public threats. The latter primarily refers to the operational mechanisms of political institutions and legal instruments used by public authorities to combat the existing threat. The strategies applied by governments in this regard can be assessed from the point of view of their compliance with permissible rules of restricting the rights and freedoms of individuals, as well as from the perspective of redefining relationships between public authorities. The use of various types of emergency powers (with or without the declaration of an appropriate state of emergency) is, by definition, the domain of the executive branch, which is capable of taking quick and decisive action. The aim of this paper is to demonstrate that during the COVID-19 pandemic, the relative balance between powers – such balance being a structural element of the principle of separation of powers in a democratic state ruled by law – becomes (to a greater or lesser extent) disintegrated. The strengthening of the executive at the expense of the legislature within rationalised parliamentarism no longer stems solely from constitutional solutions (e.g., a constructive vote of no confidence and other forms of stabilisation of the government vis-à-vis parliament or various means of the executive's influence on the legislative process) but rather is the consequence of increasingly frequent and unpredictable crises (such as terrorism, migration and COVID-19). Such crises provide a convenient pretext for the further expansion of the entitlements of administrative bodies to the detriment of the

legislature; this expansion is accompanied by increasing passivity of the judiciary, including – above all – constitutional courts.

In view of the above, we can formulate a hypothesis that a state of emergency – defined as a juridified construct of the government system which modifies the relations between the powers (for good reason dubbed "the time of the executive") – ceases to be treated as (in principle) the only permissible basis in a democratic state for the far-reaching strengthening of the executive, which seeks to overcome sudden and unpredictable threats. The practice of how states operate during the COVID-19 pandemic demonstrates that an emergency itself becomes sufficient; it no longer merely justifies the introduction of a state of emergency but in itself justifies the introduction of extraordinary legal measures in a "normal" situation (i.e., outside the regime of a state of emergency). Thus, measures appropriate to a state of emergency are taken outside its boundaries, which leads to the phenomenon of the "unsealing" of a state of emergency. Such unsealing occurs through: (a) creating new states of emergency on an ad hoc basis, which means that their juridification happens on the spur of the moment to address a specific threat; (b) introducing emergency measures that are specific to a particular state of emergency without formally introducing it. It is worth emphasising that this type of diversified action by public authorities was primarily felt in the first months of the pandemic, when it was necessary to take extraordinary measures that had not been used before. In the final phase of the pandemic, particularly after the Russian attack on Ukraine, the pandemic gradually ceased to attract significant public attention, even though in the months preceding the outbreak of the conflict, the emergence of new variants of the coronavirus was reported and governments were considering returning to more far-reaching measures to respond to the threat. The last phase of the pandemic meant, above all, a gradual abandonment of the most far-reaching activities in this area. For this reason, the best solution will be to focus on the actions of governments that were taken in the initial period of the pandemic, when this multi-faceted health, social and political phenomenon captured the majority of public attention. As for the specific legal measures that were taken in the final phase, it can be concluded that they no longer brought anything new compared to the actions visible in the first dozen or so months of the pandemic.

As a result, irrespective of the formal response to COVID-19 (such as introducing a state of emergency in the Czech Republic, creating a new state of emergency in France and applying emergency measures without declaring a state of emergency in Poland), it appears that the extraordinary measures introduced in different countries are rather similar. This, in turn, makes the issue of the juridification of emergency solutions less important, and the sharp division between a state of emergency and a "normal" state becomes blurred, which contributes to the ease with which governments apply emergency instruments (defined in one way or another) and, consequently, leads to their further far-reaching strengthening in relation to other powers. This process can be viewed as a kind of "over-rationalisation" of those government systems in which the government is accountable to parliament. A significant manifestation of such over-rationalisation is the further weakening of the legislative function of parliament, which is increasingly

replaced in this capacity by the executive. The role of the legislature is basically reduced to accepting the government's initiatives in order to legitimise them. A similar role, though to a lesser extent, can also be played by the judiciary, including constitutional courts, which, due to the crisis, show more flexibility in legitimising legislation created to fight the pandemic.

Therefore, it is worth answering the following research questions: (1) Are there significant differences between the three analysed countries regarding the introduction of emergency solutions, despite the different formal approaches to responding to COVID-19?; (2) In connection with epidemic policy practices, does a state of emergency (as a separate legal regime) somewhat paradoxically lose its importance and transform into a (formally) normal situation, leading to an erosion of its guarantee functions (this mainly applies to the republican formula of a state of emergency, in which the rights and freedoms that can be restricted are enumerated and the scope of these restrictions is defined)?; (3) Can the phenomena observed during the pandemic be regarded as the generator of a new set of instruments for the executive, facilitated by the liberal approach of the legislative and judicial branches towards the institutional blockades inherent in a democratic system? These blockades are intended to ensure effective control over the actions of the executive and, consequently, help maintain balance within the government system. Furthermore, can over-rationalisation of the system be seen as a disturbance to this balance?

Research into the increasing role of the executive in modern government systems, including the use of emergency measures, is well-established and has been conducted for many decades. This article is intended as a contribution to this field. In the case of the COVID-19 pandemic, we are dealing with an ongoing crisis of global significance. It is the prevalence of the coronavirus threat that provides a unique opportunity to make comparisons and formulate conclusions regarding the newly diagnosed phenomenon of over-rationalised parliamentarism, treated as the next step in the ongoing strengthening of executive power and, at the same time, a potential serious threat to the already weakened separation of powers. It is worth noting that similar studies have already been undertaken in selected countries[3] and certainly deserve to be continued, especially because their authors have slightly different research assumptions and propose their own interpretative approaches.

As far as the methodological approach is concerned, the study described in this paper is a comparative analysis based on legal acts issued by public authorities as well as the jurisprudence of bodies responsible for reviewing the constitutionality of the law. The focus of a more detailed analysis is the scope of institutional changes and the strategies used to overcome the pandemic in the Czech Republic, Poland and France. The common denominator of their government systems is the principle of political accountability of the government to parliament, although it is located in different places on the parliamentarism/semi-presidentialism axis. It is also worth mentioning that in light

[3] A. Hoxhaj, F. Zhilla, "The Impact of Covid-19 Measures on the Rule of Law in the Western Balkans and the Increase of Authoritarianism," *European Journal of Comparative Law and Governance*, vol. 8, no. 4 (2021), pp. 271-303.

of the annually presented Index of Democracy, in 2021 these three countries were assigned to a large group of so-called "flawed democracies", although France is the closest to the category of full democracies.[4] This additionally justifies the comparative analysis of these countries.

More importantly, however, their governments used different legal mechanisms to achieve relatively similar effects. This refers to the decision to introduce one of the states of emergency available in constitutions or ordinary legislation (the Czech Republic), to create a new state of emergency (France) or to act without a legal basis in the form of a formalised state of emergency (Poland). Moreover, these countries also differ in terms of the scope of constitutionalisation of extraordinary measures, which do not have to be governed by constitutional provisions in every case. This methodological approach reflects the assumption that relatively similar government systems may be the area of reception of different mechanisms for dealing with an emergency, yet the pandemic strategies implemented may turn out to be relatively similar in terms of the results achieved.

SEPARATION OF POWERS IN THE AXIOLOGY OF LIBERAL DEMOCRACY

Separation of powers has become such a standard or generic element in modern constitutionalism that its theoretical justification has lost the urgency and vividness characteristic of the early stages of the development of this doctrine and the political struggles to implement it. However, the threat to the separation of powers in many contemporary liberal democracies, aggravated by the COVID-19 pandemic, deserves a reminder of the philosophical-political and legal-philosophical significance of the separation of powers to liberal democracy.

Separation of powers might be viewed – alongside the concept of representative government – as the second pillar of modern constitutionalism.[5] However, in the opinion of some authors – notably Carl Schmitt – the separation of powers is fully understandable in its legal-political and historical significance as a principle entrenched in the doctrine of the liberal state with the rule of law (*Rechtsstaat*). Separation of powers is, thus, not merely a technical solution (an unavoidable "division of labour" under modern conditions) in the machinery of the modern state, but constitutes a principle derived directly from the liberal notion of freedom. Though Schmitt is not regarded as a thinker favourable towards liberal democracy, his analysis of the liberal *Rechtsstaat* sheds light on the conceptual richness of the doctrine of separation of powers and its historical origins.

---

4 *Democracy Index 2020: In Sickness and in Health? A Report by The Economist Intelligence Unit*, at https://pages.eiu.com/rs/753-RIQ-438/images/democracy-index-2020.pdf, 27 IX 2021.

5 M.J.C. Vile, *Constitutionalism and the Separation of Powers*, 2nd edition, Indianapolis 1998, p. 2.

The principles of the modern rule of law derive from the liberal concept of individualism and freedom. The goal of the state with the rule of law is to secure liberty and protect citizens from the potentially dangerous concentration of governmental power. According to Schmitt, two basic principles of the *Rechtsstaat* follow from this modern idea of individual freedom. One of them is the principle of distribution, which considers individual freedom to be prior to the state and claims that "the freedom of the individual is in principle unlimited, while the authority of the state for intrusions into this sphere is in principle limited" and takes on the form of the so-called "liberty" or "basic rights".[6] The other is the organisational principle of separation of powers, which stems directly from this fundamental assumption of the priority of freedom and is understood as the facilitation of this principle in practice. "Basic rights and separation of powers, therefore, denote – avers Schmitt – the essential content of the *Rechtsstaat* component of the modern constitution".[7]

Calculability or predictability of the state intrusions into basic rights is grounded in the doctrine of separation of powers.

> *The genuine basic right of the individual is always absolute and corresponds to the Rechtsstaat principle of distribution, according to which the freedom of the individual is in principle unbounded, while the authority of the state is in principle bounded. From this absolute and in principle unrestricted quality of individual freedom, it does not follow that intrusions and limitations are completely excluded. But they appear as an exception that is calculable, definable, and controllable according to presupposition and content. Such exceptions may only come about on the basis of statutes, whereby statute is understood in the sense of a general norm under the Rechtsstaat concept of law and does not mean just any single act of the king or of the legislative body that has the form of law. Basic and liberty rights stand under the statutory reservations*.[8]

The reason that, in a state with the rule of law, all kinds of state infringements on the sphere of individual freedom can be introduced only on the basis of a statute is found in the very concept of the statute, which must "have certain substantive properties, with which it satisfies the idea of the *Rechtsstaat* principle of distribution".[9] This fundamental component of the 19th-century struggle for the rule of law was recognised as a crucial victory for those who considered the rule of law a remedy to arbitrary governmental power and the establishment of substantive criteria for law-making that are not purely formal.

On the other hand, the constitutionalising of states of emergency and its conceptual differentiation from the implicit emergency powers of the state (*Staatsnotrecht*) might also be interpreted as an attempt to delineate the framework for the actions of the state in times of severe or existential threats to public order. In this way, it aims to

6 C. Schmitt, *Constitutional Theory*, transl. and ed. by J. Seitzer, Durham–London 2008, p. 170.

7 Ibid.

8 Ibid., p. 213.

9 Ibid.

provide some form of legal security and prevent the misuse of power, even in emergencies, which is understandable against the backdrop of the principle of distribution in a modern constitutional state.

STRENGTHENING OF THE ADMINISTRATIVE STATE

The weakening of the separation of powers opens up a space for the burgeoning of the type of state labelled by Schmitt as the administrative state. In a time of dire emergency, decisions rather than mere deliberations are required in parliamentary commissions. Every crisis creates an opportunity for more discretionary and obtrusive governmental power and the sidelining of parliaments (the so-called "hour of the executive"). What we propose is that, as a consequence, the state model that seems particularly helpful in understanding recent legal and political tendencies is the administrative state model. We refer here to the concept introduced in the interwar period by Schmitt, who distinguished four basic types of modern state: the legislative state, governmental or executive state, jurisdiction state and the administrative state (*Verwaltungstaat*).

> *The administrative state, in which command and will do not appear authoritarian and personal and which, nevertheless, does not seek the mere application of higher norms, but rather only objective directives. In the administrative state, men do not rule, nor are norms valid as something higher. Instead, the famous formula 'things administer themselves' holds true*.[10]

Schmitt observed that it is conceivable that in such a state the dominating legal expression is the administrative decree "determined only in accordance with circumstances, in reference to the concrete situation, and motivated entirely by considerations of factual-practical purposefulness".[11] However, we propose to understand the formula that "things administer themselves" not in the sense of a smooth functioning of the political system, but as an expression of the justification of the executive's actions and decisions in terms of necessities incurred by rapidly changing circumstances and the bare need to use legal means to adjust to the flexible and unpredictable epidemic situation. It is striking that by introducing the notion of the administrative state, Schmitt did not mean any particular historical example but apparently only a theoretical possibility of such a state. The slightly paradoxical formula that in the administrative state "men do not rule, nor are norms valid as something higher" reveals its poignant accuracy when analysing the ways of dealing with COVID-19. In this paper, we claim that this tendency was clearly visible in the reactions to the pandemic crisis in many European democracies. Generally speaking, two basic ways of dealing with the crisis emerged: either an outright declaration of a state of emergency or the use of emergency powers provided by special COVID-related statutes passed by legislative bodies at the outbreak of

[10] C. Schmitt, *Legality and Legitimacy*, transl. by J. Seitzer, Durham–London 2004, p. 5.

[11] Ibid.

the pandemic. In both cases, we witnessed a significant shift towards rule by decree and administrative measures that were adapted to the changing pandemic circumstances. Some of these measures clearly overstretched constitutional boundaries.

To put it in a historical perspective: in the 19th century, the executive (predominantly monarchical) was perceived by civil society as the prime concern for the preservation of individual rights and freedoms, while after World War II, the dominant model of liberal democracy focused on the democratic majority and the legislative body as the major concern (which is the result of the Weimar Republic experience: the destruction of democracy through democratic means).[12] Now it seems that the concern shifts back to the executive, which is no longer a strong personal executive in the old style but an extended executive, relying on the advice of numerous local and global expert bodies, with its characteristic legal expression in the form of the administrative decree.

RATIONALISING (OVER-RATIONALISING?) PARLIAMENTARISM

In the case of broadly understood European parliamentary systems (i.e., systems for which the common denominator is the principle of political accountability of the cabinet led by the prime minister to the legislature),[13] the ability to maintain a relative balance between the divided powers seems particularly pertinent. Considering the historical development of parliamentarism in European democracies in the second half of the 19th century and the first half of the 20th century, it can be concluded that the initial balance within this system was more or less clearly disturbed, leading to a significant weakening of executive power combined with the primacy of parliament as the organ

[12] J.-W. Müller, *Contesting Democracy: Political Ideas in the Twentieth-Century Europe*, New Haven–London 2013.

[13] As Cheibub observed, a key aspect in defining a system of government is "whether the government can be removed by the assembly in the course of its constitutional term of office" (J.A. Cheibub, *Presidentialism, Parliamentarism, and Democracy*, Cambridge–New York 2007, p. 34). The particular emphasis on the accountability of the government to parliament in defining the parliamentary model is characteristic of many authors discussing the main features of modern government systems (A. Siaroff, "Varieties of Parliamentarianism in the Advanced Industrial Democracies," *International Political Science Review/Revue internationale de science politiques*, vol. 24, no. 4 (2003), p. 446). However, it needs to be emphasised that the accountability of the government to parliament is also one of the key features of semi-presidentialism. According to Elgie, the latter differs from the parliamentary model only in the way the head of state is elected. In the semi-presidential model, presidents are elected by universal suffrage, and in the parliamentary model, by a parliament or other special body established on the basis of members of the legislature. This means that not only the constitution of France, but also the constitutions of the Czech Republic and Poland implement the assumptions of semi-presidentialism (R. Elgie, "What is Semi-Presidentialism and where is it Found?," in R. Elgie, S. Moestrup (eds), *Semi-Presidentialism Outside Europe: A Comparative Study*, London–New York 2007, pp. 1-14). The authors of this article, being aware of these differences, adopt a much broader definition of parliamentarism. It covers all systems where the government is not politically separated from the parliament (the government must therefore enjoy the trust of the parliament, although it does not have to be expressed directly), because in such systems, various constitutional arrangements rationalise the relationship between the executive and legislative power in order to stabilise the former.

representing a sovereign nation. The best example of such a tendency is the French Third Republic, but the same can be said about some Central European countries after World War I. This also applies to Poland before the coup of 1926.[14] In the longer term, this imbalance produced reformist tendencies that, after World War II, led to a wide-ranging and multi-directional process of rationalising the parliamentary system. The main direction of rationalisation was to further strengthen the cabinet and its head (prime minister, chancellor, etc.) vis-à-vis parliament. This process occurred as a result of the application of various constitutional structures and procedural arrangements, as evidenced by the government's constant control over the course of legislative proceedings in the Fifth French Republic[15] and the lack of individual political accountability of ministers to the parliament combined with a constructive vote of no confidence in the Federal Republic of Germany. The latter constitutional arrangement contributes to government durability,[16] which is one of the major effects of the rationalisation process.

On the other hand, the position of the head of state as the second component of the dualistic executive that occurs in the parliamentary system remains less clear. There are no specific requirements in this regard, which means that this organ can either remain indifferent to the rationalisation phenomenon or become its essential component. It is in this aspect that the German and French formulas for rationalising parliamentarism differ significantly. The former is more modest, as it concerns only the relationship between the government and the legislature, leaving a weak and politically neutralised presidency aside. The latter is broader because it also includes the head of state, who is treated as the keystone of the institutions of the Fifth Republic, acting as a political arbiter between the other authorities and possessing the appropriate instruments for this. An example of such competencies is the right to dissolve the first chamber of parliament in almost all conditions.[17] Today all parliamentary systems can be considered more or less rationalised. Based on German and French experience, this has become a kind of constitutional standard. It is hard to imagine contemporary attempts to maintain the ineffective and unstable governance mechanisms that characterised parliamentarism before World War II.

Such rationalisation of the parliamentary system did not yet mean that the principle of the separation of powers was effectively challenged. It seems that the steadily growing position of the executive led to the restoration of the separation of powers (which is by definition based on the balance of powers) rather than to its violation. This can be seen in particular when comparing the French Third and Fifth Republics. The former was only formally based on the parliamentary model, but in practice (as a result of the so-called "Grévy Constitution") it implemented the assumptions of the system

[14] M.M. Wiszowaty, "Shaken or Stirred? Polish Constitutional (Dis)Continuity between 1917-2017," *Hungarian Journal of Legal Studies*, vol. 60, no. 1 (2019), pp. 102-103.

[15] A. Stevens, *Government and Politics of France*, Basingstoke-New York 2003, pp. 171-175.

[16] A. Rubabshi-Shitrit, S. Hasson, "The Effect of the Constructive Vote of No-Confidence on Government Termination and Government Durability," *West European Politics*, vol. 45, no. 3 (2022), pp. 576-590.

[17] O. Gohin, *Droit constitutionnel*, Paris 2013, pp. 735-736.

of assembly, the basic feature of which is the dominance of parliament over government. Hence, the latter body "does not lead the legislature".[18] Such positioning of the legislature means the rejection of the separation of powers. On the other hand, it can be argued that, in specific political circumstances, highly rationalised parliamentary systems, in which the balance of power had previously been built or restored, may destabilise in the opposite direction. This is due to the fact that the earlier phenomenon of rationalisation corresponds to another process that strengthens the executive branch, namely the presidentialisation of politics.[19] Overall, this process tends to downplay the role of multi-person bodies (e.g., cabinets made up of the prime minister and ministers) and increase the role of those in top public office, including presidents, prime ministers and party leaders. Which positions are strengthened depends primarily on the specifics of a given government system. In the parliamentary system, the beneficiaries of the presidentialisation of politics are the heads of government, because the power of the presidency, not to mention the role of the monarch, remains more or less neutralised and has no growth potential. All this is accompanied by the weakening position of parliaments, which are no longer policy-making bodies but simply chambers recording the will of the executive. This opinion is confirmed in particular by the case of the Fifth French Republic.[20] This is demonstrated, among other things, by the decisive role of legislative initiatives submitted by the government.[21] The same applies to equipping the executive with the power to issue universally binding legal acts, which serves to implement various policies without involving parliament, which – thus – deprives, at least to some extent, the right to evaluate these policies during the law-making process.

However, a question arises as to whether contemporary phenomena that have a profound impact on the functioning of political institutions may contribute to the further rationalisation of parliamentary systems. It seems that the continuation of this process could undermine all parliaments' ability to control the bodies belonging to the executive branch. The only function of legislators in such circumstances would be to approve policies that governments design and implement. During the COVID-19 pandemic, various types of emergency instruments are used (depending on the country, either under a formally declared state of emergency or not), which are inspired by expert bodies that do not have adequate democratic legitimacy. The effect of the policy in the field of combating the pandemic may be the restriction of the rights and freedoms of individuals without observing the principle of proportionality (the limitations should fully meet the real needs, which means a ban on imposing restrictions that go further than actually required). The further strengthening of executive power resulting from the

[18] G. Sartori, *Comparative Constitutional Engineering: An Inquiry into Structures, Incentives, and Outcomes*, New York 1997, p. 111.

[19] T. Poguntke, P. Webb, "The Presidentialization of Politics in Democratic Societies: A Framework for Analysis," in T. Poguntke, P. Webb (eds), *The Presidentialization of Politics: A Comparative Study of Modern Democracies*, Oxford–New York 2005, pp. 1-25.

[20] O. Duhamel, G. Tusseau, *Droit constitutionnel et institutions politiques*, Paris 2013, pp. 691-700.

[21] D. Chagnollaud, J.-L. Quermonne, *Le gouvernement de la France sous la Ve République*, Paris 1996, pp. 412-413.

exercise of emergency powers during the ongoing pandemic has the potential to contribute to the phenomenon of over-nationalisation of parliamentarism, which can be seen as a consequence of the accumulation of traditional rationalisation mechanisms and epidemic-based exceptional powers. This, in turn, calls into question the durability of the separation of powers as one of the components of modern government systems that implements, at least in constitutional provisions, the principle of parliamentary responsibility of the cabinet.

FURTHER REVALORISATION OF THE EXECUTIVE POWER IN THE CONTEXT OF FIGHTING THE COVID-19 PANDEMIC: SELECTED CASES

a) Legal grounds for applying emergency measures

On 12 March 2020, the government of the Czech Republic – with a view to counteracting the effects of COVID-19 and wishing to prevent the spread of the pandemic in the country's territory – declared a state of emergency (*nouzov'y stav*).[22] The declaration was made by resolution of the government of the Czech Republic (*Usneseni Vlady).* The legislation currently in force in the Czech Republic, which constitutes the basic framework for addressing emergency situations, is based on a constitutional act that is in force alongside the Constitution of the Czech Republic.[23] It, thus, fills a constitutional gaps allowing the state to function in emergency situations that, until its enactment, were not covered by the Constitution.

In connection with the COVID-19 pandemic, a state of emergency (in Czech called a "state of higher necessity") was introduced (declared by the Prime Minister) on 1 March 2020 under the constitutional act of 1998.[24] It is worth mentioning that in the Czech Republic, it is the Prime Minister who plays the most significant role during the pandemic, both in terms of declaring a state of emergency and introducing any resulting restrictions. Between 1 March and 14 May 2020, the "first" state of emergency was declared throughout the country,[25] which has been repeatedly renewed since then.[26]

[22] Usneseni Vlády České Republiky ze dne 12. března 2020 č. 194, at https://www.epravo.cz/top/zakony/sbirka-zakonu/usneseni-vlady-ceske-republiky-ze-dne-12-brezna-2020-c-19, 15 X 2021. See also: M. Żaba, "Ograniczenia praw i wolności w okresie pandemii COVID-19 w Republice Czeskiej," in K. Dobrzaniecki, B. Przywora (eds), *Ograniczenia praw i wolności w okresie pandemii COVID-19 na tle porównawczym. Pierwsze doświadczenia*, Warszawa 2021, p. 128.

[23] V. Jirásková, "Wybory w dobie koronawirusa – Republika Czeska," *Studia Wyborcze*, vol. 31 (2021), p. 17.

[24] *Ústavní zakon ze dne 22. dubna 1998 o bezpečnosti České republiky* 110/1998 Sb., at https://www.aspi.cz/products/lawText/1/46612/1/2/ustavni-zakon-c-110-1998-sb-o-bezpecnosti-ceske-republiky/ust, 27 IX 2021.

[25] K. Janicek, "Czechs Re-Declare State of Emergency to Keep Restrictions," *AP News*, 14 February 2021, at https://apnews.com/general-news-afe89f923934f5ae6fcee56509624f20, 27 IX 2021.

[26] A. Zachová, O. Plevák, "Czech Parliament Puts End to State of Emergency," *EURACTIV*, 12 February 2021, at https://www.euractiv.com/section/politics/short_news/czech-parliament-puts-end-to-

On 1 March 2021, new restrictions came into force, including a ban on free movement between counties and communes, the introduction of new travel rules, the closure of schools/kindergartens and allowing only shops selling basic necessities to remain open.[27]

Article 2 of the Constitutional Act of 1998 on the security of the Czech Republic regulates the conditions for introducing a state of emergency and martial law either throughout the country or in specific regions. This is the predominant matter of that Act. According to the Act on Crisis Management, a state of emergency (a state of higher necessity) is the first norm that can be introduced across the entire territory, followed by a state of external threat to national security and a state of war. It should be noted that a state of emergency (a state of higher necessity) can be introduced for a strictly defined period, specifically for 30 days, after which the government must seek permission from the Chamber of Deputies (the parliament) to extend it.[28] Thus, the final decision of the executive depends on approval from the legislature.

Extraordinary activity of the executive during the periods of the successively declared states of emergency is reflected in a considerable number of resolutions it passed in each of those periods. For example, on 12 March 2020, a state of emergency was declared, which served as the basis for introducing significant restrictions aimed at combating the epidemic. On the same day, eight additional resolutions were issued, one of which resulted in the dismissal of the Chief Sanitary Inspector.[29] On 13 March 2020, the government passed eight resolutions, and on 14 March, another one. Between 15 March and 18 September 2020, 33 resolutions were issued, including the most significant one regarding the COVID-19 pandemic relief shield.[30] Also, during that period, the Ministry of Health issued a number of regulations, some of which, in particular their validity, were challenged by a court. Between 9 April and 30 April 2020, the government passed as many as 99 resolutions, and between 30 April and 17 May 2020, 78 resolutions. Notably, some of these were drafts of new acts, such as the act on waiving social security contributions and the act on amendments to certain tax laws in connection with COVID-19.[31]

In Poland, the executive decided to take actions aimed at combating the COVID-19 epidemic under the act of 5 December 2008 on preventing and combating

-state-of-emergency/, 27 IX 2021.

27 Ibid.

28 "The State of Emergency to End on Monday, some Restrictions will be Lifted, First Children Back in Schools and Nurseries," *Government of the Czech Republic*, 6 April 2021, at https://www.vlada.cz/en/media-centrum/aktualne/the-state-of-emergency-to-end-on-monday--some-restrictions-will-be-lifted--first-children-back-in-schools-and-nurseries-187741/, 27 IX 2021.

29 Usneseni Vlády Českė Republiky ze dne 12. března 2020 č.195 o odvoláni hlavniho hygenika https://apps.odok.cz/attachment/-/down/IHOABMNHPDFM, 14 X 2021. See also: M. Żaba, "Ograniczenia praw i wolności...," p. 133.

30 Usneseni Vlády Českė Republiky ze dne 16. března 2020 č. 237 o záruce COVID, at https://www.vlada.cz/assets/media-centrum/aktualne/DOC160320-160320_237.pdf, 15 X 2021.

31 M. Żaba, "Ograniczenia praw i wolności...," p. 135.

infections and infectious diseases in humans[32] and, more precisely, under a state of epidemic threat and an epidemic state specified in that act.[33] It should be emphasised that such measures to respond to the epidemic threat do not fall within the three states of emergency (martial law, state of exception, state of natural disaster) provided for in the Polish Constitution of 1997. Therefore, these measures, from a formal point of view, are not extraordinary conditions. The constitutional regulation of states of emergency does not allow other types of extraordinary actions, which are included in ordinary legislation, to be referred to as states of emergency. However, this does not mean that these measures are unconstitutional by definition. In light of the above-mentioned act of 2008, when an epidemic threat or an epidemic occurs in the territory of more than one voivodeship, a state of epidemic threat or an epidemic state is declared and then lifted by a regulation of the Minister of Health, who cooperates with the minister in charge of public administration at the request of the Chief Sanitary Inspector.[34] Based on the act, on 13 March 2020, the Minister of Health issued the regulation on the declaration of a state of epidemic threat in the territory of the Republic of Poland.[35] On 24 March 2020, the Regulation of the Minister of Health amended the regulation on the declaration of a state of epidemic in the territory of the Republic of Poland.[36] In the following weeks and months, various specific actions were ordered, primarily including restrictions on individual rights and freedoms (e.g., orders to wear masks in specific places, staying in public areas), which took the form of regulations from the executive power (i.e., acts placed below ordinary legislation).[37] Thus, while in the Czech Republic

[32] Ustawa z dnia 5 grudnia 2008 r. o zapobieganiu oraz zwalczaniu zakażeń i chorób zakaźnych u ludzi, at https://sip.lex.pl/akty-prawne/dzu-dziennik-ustaw/zapobieganie-oraz-zwalczanie-zakazen-i-chorob-zakaznych-u-ludzi-17507739, 15 X 2021.

[33] From a formal point of view, these are not states of emergency, because the 1997 Constitution includes only three such extraordinary measures: martial law, a state of exception and a state of natural disaster. In the case of the first two states of emergency, the decision to introduce them is taken by the president. Only a state of natural disaster is introduced by the government. See: M. Bożek, "The Executive Power: The President of the Republic and the Council of Ministers," in J. Szymanek (ed.), *Polish Political System: An Introduction*, Warszawa 2018, p. 284.

[34] Ustawa z dnia 5 grudnia 2008 r. o zapobieganiu oraz zwalczaniu zakażeń i chorób zakaźnych u ludzi, Art. 46 (2), see also: Ustawa z dnia 17 marca 2021 r. o zmianie ustawy o zapobieganiu oraz zwalczaniu zakażeń i chorób zakaźnych u ludzi, at https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20210000616, 30 X 2021.

[35] Rozporządzenie Ministra Zdrowia z dnia 13 marca 2020 r. w sprawie ogłoszenia na obszarze Rzeczypospolitej Polskiej stanu zagrożenia epidemicznego, at https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20200000433, 16 X 2021.

[36] Rozporządzenie Ministra Zdrowia z dnia 24 marca 2020 r. zmieniające rozporządzenie w sprawie ogłoszenia na obszarze Rzeczypospolitej Polskiej stanu epidemii, at https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20200000522, 16 X 2021.

[37] Examples include the following acts of the executive power: Rozporządzenie Rady Ministrów z dnia 19 kwietnia 2020 r. w sprawie ustanowienia określonych ograniczeń, nakazów i zakazów w związku z wystąpieniem stanu epidemii, at https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20200000697, 16 X 2021; Rozporządzenie Rady Ministrów z dnia 2 maja 2020 r. w sprawie ustanowienia określonych ograniczeń, nakazów i zakazów w związku z wystąpieniem stanu epidemii, at https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20200000792, 16 X 2021; Rozporządze-

the Prime Minister had the greatest competence in the area discussed in this paper, in Poland it was the Minister of Health who was primarily responsible for decisions regarding the restrictions introduced during the COVID-19 pandemic.

When it comes to France, it should be emphasised that it is a country in which the response to various crisis situations is the subject of legal regulations contained in the constitution (extraordinary presidential powers set out in Article 16 of the 1958 Constitution and a state of siege, *état de siège*, regulated in Article 36) as well as in legislation (a state of emergency, *état d'urgence*, referred to in the Act of 3 April 1955). The latter formula was used after the terrorist attacks of 2015, and the total duration of its application covered two years.[38] The nature of the threats to which specific states of emergency are supposed to provide a response is also diverse, but this does not mean that these states can effectively respond to every danger. This was clearly demonstrated by the COVID-19 pandemic, which resulted in the expansion of existing legal regulations in this area. None of the existing legal mechanisms seemed to be an appropriate means of reacting in the event of a widespread threat to public health. This was due to the fact that they mainly referred to threats resulting from political activities (both on a national and international scale), including those of a military nature.[39] For this reason, the Act of 23 March 2020 on urgent measures in response to the COVID-19 epidemic[40] introduced a new legal structure called a "state of sanitary emergency" (*état d'urgence sanitaire*). As a result of its enactment, the public health code (*code de la santé*) *publique*) was amended. Currently, this legal act fully regulates a state of sanitary emergency. Consequently, its provisions have become the primary means of combating the pandemic in France. It should be emphasised that this particular legal regime was extended several times (in November 2020 and February 2021) due to the continuing unsatisfactory public health situation. The application of these provisions raised the question of the scope of permissible extraordinary regulations in a democratic state ruled by law.[41]

A state of sanitary emergency in France is introduced (in the whole or parts of a country's territory) at the meeting of the Council of Ministers for a period of two months. A report on the epidemic situation is presented by the Minister of Health. The condition necessary for introducing this type of state of emergency is a sanitary catastrophe which, by its nature or severity, threatens the health of the population (*en cas de catastrophe sanitaire mettant en péril, par sa nature et sa gravité, la santé de la population*).

nie Rady Ministrów z dnia 16 maja 2020 r. w sprawie ustanowienia określonych ograniczeń, nakazów i zakazów w związku z wystąpieniem stanu epidemii, at https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20200000878, 16 X 2021; Rozporządzenie Rady Ministrów z dnia 29 maja 2020 r. w sprawie ustanowienia określonych ograniczeń, nakazów i zakazów w związku z wystąpieniem stanu epidemii, at https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20200000964, 16 X 2021.

38 O. Beaud, C. Guérin-Bargues, *L'état d'urgence. Une étude constitutionnelle, historique et critique*, 2e édition, Issy-les-Moulineaux 2018, pp. 143-150.

39 F. Lamy, *État d'urgence*, Paris 2018, pp. 35-36.

40 Loi n° 2020-290 du 23 mars 2020 d'urgence pour faire face à l'épidémie de covid-19, https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000041746313/, 20 X 2021.

41 V. Souty, "L'état d'urgence à la française," *Délibérée*, vol. 3, no. 11 (2020), pp. 87-92.

If necessary, it is possible – according to the Public Health Code – to extend this state of emergency; in such cases, parliamentary consent is required. The latter applies when the extension is meant for a period exceeding one month. In turn, the Act of 31 May 2021 concerning the management of the exit from the health crisis[42] marked the launch of a relatively permanent transitional period in the fight against the effects of the pandemic, which was also extended. For this purpose, the Act of 5 August 2021[43] was passed, and its consequence is the validity of the aforementioned transitional period until 15 November 2021. It is worth mentioning that similar regulations regarding the exit from a state of sanitary emergency were already in force in 2020, but they turned out not to be permanent. In 2021, the situation seems more stable in this respect. On the other hand, the current legislation extends the scope of application of new tools to fight the pandemic, as evidenced by the provisions on the use of the so-called "sanitary passport" in public places, as well as the compulsory vaccination requirement for certain professional groups. This is the effect of legislative changes adopted in the aforementioned Act of 5 August 2021. Overall, to combat the effects of the COVID-19 pandemic in France, it was necessary to adopt completely new legal structures, as those that existed before proved useless. Moreover, a state of sanitary emergency can legitimately be treated as an instrument falling within the scope of the French states of emergency. The set of the latter is not regulated exhaustively (as indicated above, a different approach was used, for example, in Poland, whose Constitution of 1997 lists three specific states of emergency; therefore, all other similar structures cannot, from a formal point of view, be called extraordinary states).

b) Tools to fight the pandemic in the context of far-reaching strengthening of the executive power

One of the most specific features of a state of emergency, as a general theoretical structure, is the more or less extensive strengthening of executive power, which occurs through decisions regarding both the very application of such a state and the use of specific competencies (e.g., in the field of limiting the rights and freedoms of the individual).

The examples of the restriction of civil rights and liberties in the case of the Czech Republic[44] include: the restriction of free movement of persons, the restriction of sales of goods and provision of services, the restriction of activities of the authorities, the restriction of the functioning of schools and school facilities, the restriction of visits to healthcare centres and social care institutions and the restriction of activities of public authorities and administrative bodies (e.g., introducing the so-called "smart quarantine"), which involves electronic monitoring of payment cards and mobile phones of a person infected with the coronavirus (with the consent of the infected person) and

[42] Loi n° 2021-689 du 31 mai 2021 relative à la gestion de la sortie de crise sanitaire, at https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000043567200, 30 X 2021.

[43] Loi n° 2021-1040 du 5 août 2021 relative à la gestion de la crise sanitaire, at https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000043909676, 30 X 2021.

[44] Usneseni Vlády Českė Republiky ze dne 7. ledne 2021 č. 9 o znecne krizovych opatrėni, at https://apps.odok.cz/attachment/-/down/RCIABX2HRLUD, 27 X 2021.

the temporary restriction of movement enforced by specific legal sanctions.[45] The decision of the Czech government to introduce a state of emergency had a significant impact on the Czech economy. The sectors that were most severely affected by the precautionary measures primarily included the services sector, as well as retail trade, food services, hotels and transport services. The coronavirus pandemic also impacted the industrial sector, both locally and globally. People employed in industry, unlike office workers, cannot work remotely, so an increase in the epidemic could bring production to a halt, significantly lowering the economic outlook.[46] It is worth noting that the 1992 Constitution of the Czech Republic does not contain any general provisions regarding the right to life or the right to health, as these are specified directly in the Charter of Fundamental Rights and Freedoms, which, together with the Constitution and constitutional acts, make up the so-called "constitutional order" of the Czech Republic. Any limitations to fundamental rights or freedoms can only be introduced by an act (Article 4(2) of the Charter). In addition, Article 4 of the Constitution establishes the principle that these fundamental rights and freedoms are subject to protection by the judiciary. Rights and freedoms hold "constitutional" value here; their limitation should be imposed in compliance with the so-called "proportionality test". As emphasised in Czech case law, this test is based on three criteria: suitability, necessity and proportionality (in the strict sense). This proportionality test was applied against the Czech Minister of Health.[47] The court examined whether the restrictions of rights and freedoms introduced by the Minister of Health of the Czech Republic (and earlier also by the government) complied with the constitution and the acts, and concluded that some of the regulations issued by the Minister of Health exceeded his competence.[48]

In Poland, the far-reaching restrictions on movement that were applied during most of the epidemic disproportionately interfered with the rights of individuals (particularly children, youths and the elderly) guaranteed in the Constitution. Conflicting messages make it difficult for citizens to comply with the restrictions, and excessively harsh administrative penalties may lead to further infringements of their rights. In the context of the analyses conducted in this paper, the restrictions introduced by the Government of Poland on the freedom of economic activity during the COVID-19 pandemic are particularly important. The first restrictions on the activities of entrepreneurs, which violate the essence of the freedom of economic activity, were introduced as early

[45] *Pandemia Covid-19, Sytuacja w wybranych krajach europejskich* (2020), opracowania tematyczne OT-680, Warszawa 2020, at https://www.senat.gov.pl/gfx/senat/pl/senatopracowania/186/plik/ot-680.pdf, 26 IX 2021.

[46] R. Ambriško, J. Gec, O. Michálek, J. Šolc, "Direct Impacts of the Covid-19 Pandemic on the Czech Economy," *Czech National Bank*, February 2020, at https://www.cnb.cz/en/monetary-policy/inflationwis-reports/boxes-and-annexes-contained-in-inflation-reports/Direct-impacts-of-the-Covid-19-pandemic-on-the-Czech-economy, 26 IX 2021.

[47] M. Żaba, "Ograniczenia praw i wolności...," p. 130.

[48] Ibid., pp. 130-131.

as March 2020.[49] The Council of Ministers went beyond the competences granted to it in the statutory authority.[50] Many regulations issued by the Council of Ministers during the pandemic period contained the provision "until further notice", meaning they did not specify in detail the time horizon of the introduced restrictions.[51] Some restrictions on economic freedom related to the current pandemic situation introduced a total ban on activity for certain enterprises in Poland. The Council of Ministers' failure to declare a state of natural disaster should be assessed negatively because, in fact, the Council did take actions that would have been taken if this state had been formally declared. This decision may have been motivated by its intention to limit citizens' rights to claim compensation from the state. Numerous legal irregularities accompanied the introduction of restrictions on economic freedom, for example, the use of a legal act of a rank inadequate for this purpose, the enactment of a statutory authority that did not meet constitutional requirements, the Council of Ministers exceeding the powers granted to it by this statutory authority and the infringement of the essence of freedom of economic activity through certain regulations. Because a state of natural disaster was not declared in Poland, restrictions on entitlements of the individual necessary to combat the COVID-19 pandemic are possible only if the requirements arising from Article 31(3) of the Polish Constitution are met. Otherwise, the legal regulations introduced regarding restrictions on the freedoms and rights of the individual should be deemed unconstitutional.[52] It should be emphasised here that no provision of the act on combating infectious diseases authorises the Minister of Health – nor any other minister nor even the Council of Ministers – to introduce restrictions on the exercise of fundamental rights, that is, human rights.[53]

In the case of France, the newly added legal regulations strengthen not so much the government as a whole but the Prime Minister himself, who, in the context of actions taken during a sanitary emergency, may act at the request of the Minister of Health. Consequently, the Head of Government has the power to: introduce restrictions on the movement of persons and vehicles; prohibit leaving places of residence; decide on the imposition of quarantine on persons who pose a potential risk; determine access to certain categories of public places; impose restrictions or even prohibitions on the exercise of freedom of assembly; take provisional measures to fix the prices of certain

[49] Rozporządzenie Rady Ministrów z dnia 31 marca 2020 r. w sprawie ustanowienia określonych ograniczeń, nakazów i zakazów w związku z wystąpieniem stanu epidemii, at https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20200000566, 15 X 2021, see also: M. Żaba, "Ograniczenia praw i wolności...," p. 65.

[50] M. Żaba, "Ograniczenia praw i wolności...," p. 65.

[51] *Adam Bodnar do premiera: najnowsze nakazy i zakazy nadal sprzeczne z Konstytucją*, at https://bip.brpo.gov.pl/pl/content/rpo-do-premiera-najnowsze-nakazy-zakazy-nadal-sprzeczne-z-konstytucja, 30 X 2021.

[52] J. Węgrzyn, "Realizacja normy programowej wynikającej z art. 68 ust. 4 Konstytucji RP w stanie epidemii COVID-19 (uwagi ogólne)," *Przegląd Prawa Konstytucyjnego*, vol. 61, no. 3 (2021), p. 157.

[53] K. Dyda, M. Olszówka, "Analiza konstytucyjności ograniczeń w korzystaniu z wolności religii podczas pandemii koronawirusa w Polsce," *Studia z Prawa Wyznaniowego*, vol. 23 (2020), p. 453.

products (Article L. 3131-15 of the public health code). Further significant changes, justified by the need to fight the pandemic, affected labour law and regulations related to the activities of enterprises. The same applies to the regulations in the field of electoral law, which were particularly important due to the municipal elections scheduled for March 2020 (Articles 19-21 of Act of 23 March 2021). Last but not least, the Act of 23 March 2020 extended the scope of the government's activities regarding the issuance of ordinances provided for in Article 38 of the 1958 Constitution; for example, it refers to Article 20 on electoral law concerning the aforementioned municipal elections. It is worth mentioning that in the initial period of the pandemic, holding the municipal elections scheduled for March 2021 turned out to be a significant challenge. In the end, only the first round was held, which may raise reasonable doubts from the perspective of the proper implementation of election procedures. All this created additional means of action for the executive branch, regardless of whether they were to be taken individually by the Prime Minister or assigned to the government as such. The enhanced law-making activity of the executive during the pandemic could be balanced by Parliament only to a certain extent (e.g., its consent is required to extend the state of sanitary emergency).

c) Strengthening the executive power from the perspective of judiciary or quasi-judiciary bodies settling disputes concerning legislation and public life

In all three countries analysed in the paper, the use of extraordinary powers and other unusual actions also affected the activities of the bodies responsible for examining the constitutionality of legal acts and for making other decisions, including those related to the application of specific election procedures.

In the case of the Czech Republic, it is worth paying attention to role of the Constitutional Court in the context of elections to the first chamber scheduled for 2021. Despite the pandemic threat, on 9 April 2020, the President of the Republic called the elections to the Senate and national representations[54] and scheduled them for 2 and 3 October 2020. The year 2021 was the year of the most important election in the Czech Republic (i.e., the election to the Chamber of Deputies). On 28 December 2020, the President of the Czech Republic decided to call it surprisingly soon,[55] and this decision provoked a lot of opposition. In the end, however, the Constitutional Court, by a plenary resolution ref. Pl.ÚS 2/21 announced on 2 February 2021, rejected the application of a group of 18 senators on the grounds that it had been submitted by an unauthorised applicant. The Constitutional Court concluded that it was not another legal regulation, as the senators had claimed, but the decision of a public authority body that can be subjected to review in a constitutional complaint procedure.[56]

[54] Razhodnuti č 169/2020 Sb, Rozhodnutí prezidenta republiky o vyhlášení voleb do Senátu Parlamentu České republiky a o vyhlášení voleb do zastupitelstev kraju, at https://www.zakonyprolidi.cz/cs/2020-169, 16 X 2021.

[55] Rozhodnuti č.611/2020 Sb, Rozhodnutí prezidenta republiky o vyhlášení voleb do Poslanecké sněmovny Parlamentu České republiky, at https://www.zakonyprolidi.cz/cs/2020-611, 16 X 2021.

[56] K. Jirásková, "Wybory w dobie...," p. 10.

In Poland, the pandemic exacerbated the crisis in the rule of law that had been in place for over five years. As before, during the period of the pandemic this country witnessed various instances of violations of the Constitution and adjustments of laws to fit political will. As a result of the crisis in the rule of law, the control exercised by the Constitutional Tribunal has become ineffective, and the Tribunal itself has remained a tool in the hands of those in power.[57] Moreover, the pandemic led to many restrictions and changes in the functioning of the judiciary. In Poland, it highlighted and exacerbated many of the problems that existed prior to the pandemic; for example, hearings and meetings were cancelled, which is likely to result in lengthened periods of court proceedings in the future. There was also a lack of uniform information on how to contact courts during the pandemic, which undoubtedly hindered citizens' access to the courts, and restrictions on the external openness of court proceedings (both in common and administrative courts) significantly hindered social control over the judiciary or even made it impossible.[58] The need to activate the judiciary stems from the fact that a number of legal regulations adopted within the so-called "anti-crisis shield" were processed at an accelerated pace and without adequate social consultations. In some cases, the adoption of a specific legal regulation was used to change laws unrelated to the fight against the pandemic; for example, this happened to some parts of the Election Code.[59] The failure to declare a state of natural disaster also affected crucial democratic processes, including the presidential election in Poland in 2020 – the date scheduled for it was the result of a political agreement.

When it comes to France, attention should be focused primarily on the Constitutional Council, which exercises the functions attributed to typical constitutional courts in other countries and can be reasonably compared with them, even though it is not a Kelsen-type constitutional court and – formally – it is not part of the judiciary.[60] It is worth mentioning here the position taken by the Constitutional Council on the Organic Act of March 30, 2020 on urgent measures in response to the COVID-19 epidemic[61] (this act must not be confused with the above-mentioned ordinary act of the same title, which was passed a week earlier). It concerned the use of legal tools in the event of a potential violation of individual rights and freedoms.[62] The unconstitutionality of this act was not declared, despite a clear breach of the procedural requirements for adopting such acts, as outlined in Article 46 of the Constitution. The Constitutio-

[57] M. Kalisz, M. Szuleka, M. Wolny, F. Bakierski, *Pandemia, kryzys praworządności, wyzwania dla praw człowieka*, Warszawa 2021, at https://archiwumosiatynskiego.pl/archiwum/raport-hfpc-za-2020-rok-pandemia-kryzys-praworzadnosci-wyzwa, 16 X 2021, p. 2.

[58] Ibid., pp. 24-26.

[59] Ibid., p. 31.

[60] A. Stone, *The Birth of Judicial Politics in France: The Constitutional Council in Comparative Perspective*, Oxford–New York 1992, pp. 8-10, 228-231.

[61] Loi organique n° 2020-365 du 30 mars 2020 d'urgence pour faire face à l'épidémie de covid-19, at https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000041768067, 11 X 2021.

[62] V. Mutelet, "Rapport introductif: Le citoyen et la QPC, un jeu de rôles," in R. Colavitti, S. Corioland (eds), *Question prioritaire de constitutionnalité (QPC) et État de droit*, Paris 2021, pp. 13-48.

nal Council was convinced that the failure to meet this requirement could be justified by specific circumstances (*circonstances particulières*) that had arisen due to the emergence of the pandemic.[63] It should be observed that the act under consideration did not concern the strengthening of the government's powers in the context of the fight against COVID-19; rather, it was the result of the Prime Minister's legislative initiative and, therefore, part of the broadly understood government political strategy during the pandemic. The decision of August 5, 2021,[64] which directly related to the government's policy of combating COVID-19, was also of great importance. The Council did not recognise the unconstitutionality of the so-called "sanitary passports" used to limit the accessibility of unvaccinated persons to certain public places. The same also applies to the requirement of compulsory vaccination for certain professional groups. One of the consequences of the Council's decision, which did not prevent the entry into force of these regulations, was mass public protests by opponents of the government's policy on COVID-19.[65] In practice, the Constitutional Council proved to be the government's ally in the area of COVID-19 policy, and the opinions criticising the legislation promoted by the executive did not undermine the fundamental lines of this policy in any way.

CONCLUSIONS

In the three European countries analysed in the paper, where rationalised parliamentary mechanisms are among the components of their government systems, various formal mechanisms have been employed that give rise to more or less justifiable grounds for using emergency measures to overcome the pandemic. Regardless of their legal form (for example, introducing one of the existing states of emergency, ad hoc creating a new state of emergency or taking measures outside a formally declared state of emergency), the emergency measures applied turned out to be relatively similar. In some areas, the executive acted on the basis of pure necessity, which resulted in a breach of the applicable procedural rules for the correct drafting of legal acts. For instance, the reference to necessity justified by unusual circumstances can be seen in the jurisprudence of the French Constitutional Council. The judiciary does not appear to be a sufficient obstacle to this. In particular, the example of Poland confirms that the very method of creating law also poses a threat to democracy. The acts created by the government (which is below the legislature in the hierarchy of universally binding sources of law) became the legal basis for the response to the pandemic. This weakened the parliament as the body responsible for adopting legislation.

[63] Décision n° 2020-799 DC du 26 mars 2020 (Loi organique d'urgence pour faire face à l'épidémie de covid-19), at https://www.conseil-constitutionnel.fr/decision/2020/2020799DC.htm, 30 X 2021.

[64] Décision n° 2021-824 DC du 5 août 2021 (Loi relative à la gestion de la crise sanitaire), at https://www.conseil-constitutionnel.fr/decision/2021/2021824DC.htm, 30 X 2021.

[65] A. Hird, "Coercive Health Pass Galvanises New Wave of French Resistance," *Radio France Internationale*, 15 September 2021, at https://www.rfi.fr/en/france/20210915-who-is-protesting-france-s-coercive-covid-health-pass-and-why-the-resistance, 30 X 2021.

Moreover, the agreement among the most important political forces on the methods of fighting the pandemic (such agreement is one of the aspects of the over-rationalisation of parliamentarism, which translates into further relative weakening of the legislature) resulted in blurring the differences between the ruling groups and the largest opposition formations in this area. It also contributed to the passivity of the legislative power, which generally did not utilise even those instruments that are formally granted to it. An example of this is a vote of no confidence, which is a necessary component of any governance system based on the government's political accountability to parliament. This was accompanied by the personalisation of politics during the pandemic. The need to make quick decisions in order to adequately respond to emerging threats facilitated the strengthening of the individual competencies of prime ministers and some other members of the government (the state of the pandemic primarily enhanced the powers of ministers of health and their subordinate officers, including those at the head of the sanitary services). This, in turn, aligned with the general tendency within political systems to strengthen the position of individual political leaders (e.g., presidents, prime ministers), which is commonly referred to as the "presidentialisation of politics". This applies in particular to the strengthening of the powers of prime ministers, exercised outside the meetings of the government and without requiring its formal approval.

The above-mentioned tendencies that surfaced during the fight against the pandemic had an impact on the social assessment of the functioning of the executive bodies responsible for actions aimed at improving the epidemic situation. It should be emphasised that, in light of Eurobarometer data, social support for actions taken by the governments in Poland and the Czech Republic clearly exceeded the general support for these governments. In Poland, the support was 29% and 40%, respectively, while in the Czech Republic it was 52% and 65%. Only in France was there no difference in this respect, with support equalling 42% in both cases.[66] This data indicates that the governments' use of extraordinary powers, including those that resulted in far-reaching restrictions of rights and freedoms (not always in accordance with the principle of proportionality), does not necessarily mean social delegitimisation of political decision-makers. Rather, it highlights (at least in some countries) the phenomenon of increasing acceptance of the actions of the executive under conditions of high uncertainty. This could potentially encourage governments to further expand the scope of their activities and strengthen their role as creators of applicable law that forms the basis for decisions taken by public administration bodies towards citizens. In such a case, the gate to further dismantle the principle of separation of powers, as one of the manifestations of over-rationalised parliamentarism, would be opened. Although the pandemic, as a global threat to public health declared by the WHO, is officially over, the above-described trends and processes visible in the functioning of political systems are no

[66] Eurobarometer (2020), *Uncertainty/EU/Hope: Public Opinion in Times of Covid-19*, https://www.europarl.europa.eu/at-your-service/files/be-heard/eurobarometer/2020/public_opinion_in_the_eu_in_time_of_coronavirus_crisis/report/en-covid19-survey-report.pdf, 30 X 2021, pp. 39-45.

longer purely hypothetical but may remain within reach in the event of similar threats in the future. Moreover, ongoing work on international solutions to centralise mechanisms for combating various types of pandemics may provide even stronger legitimacy for actions taken at the national level.

BIBLIOGRAPHY

Adam Bodnar do premiera: najnowsze nakazy i zakazy nadal sprzeczne z Konstytucją, at https://bip.brpo.gov.pl/pl/content/rpo-do-premiera-najnowsze-nakazy-zakazy-nadal-sprzeczne-z-konstytucja.

Ambriško R., Gec J., Michálek O., Šolc J., *Direct impacts of the Covid-19 pandemic on the Czech economy*, at https://www.cnb.cz/en/monetary-policy/inflationwis-reports/boxes-and-annexes-contained-in-inflation-reports/Direct-impacts-of-the-Covid-19-pandemic-on-the-Czech-economy.

Beaud O., Guérin-Bargues C., *L'état d'urgence. Une étude constitutionnelle, historique et critique*, Issy-les-Moulineaux 2018.

Bożek M., "The Executive Power: The President of the Republic and the Council of Ministers," in J. Szymane (ed.), *Polish Political System: An Introduction*, Warszawa 2018.

Chagnollaud D., Quermonne J.-L., *Le gouvernement de la France sous la Ve République*, Paris 1996.

Cheibub J.A., *Presidentialism, Parliamentarism, and Democracy*, Cambridge–New York 2007.

Democracy Index 2020: In Sickness and in Health? A Report by The Economist Intelligence Unit, at https://pages.eiu.com/rs/753-RIQ-438/images/democracy-index-2020.pdf.

Duhamel O., Tusseau G., *Droit constitutionnel et institutions politiques*, Paris 2013.

Dyda K., Olszówka M., "Analiza konstytucyjności ograniczeń w korzystaniu z wolności religii podczas pandemii koronawirusa w Polsce," *Studia z Prawa Wyznaniowego*, vol. 23 (2020), pp. 441-469, https://doi.org/10.31743/spw.10656.

Elgie R., "What is Semi-Presidentialism and where is it Found?," in R. Elgie, S. Moestrup (eds), *Semi-Presidentialism Outside Europe: A Comparative Study*, London–New York 2007.

Eurobarometer (2020), *Uncertainty/EU/Hope: Public Opinion in Times of Covid-19*, at https://www.europarl.europa.eu/at-your-service/files/be-heard/eurobarometer/2020/public_opinion_in_the_eu_in_time_of_coronavirus_crisis/report/en-covid19-survey-report.pdf.

Gohin O., *Droit constitutionnel*, Paris 2013.

Hird A., "Coercive Health Pass Galvanises New Wave of French Resistance," *Radio France Internationale*, 15 September 2021, at https://www.rfi.fr/en/france/20210915-who-is-protesting-france-s-coercive-covid-health-pass-and-why-the-resistance.

Hoxhaj A., Zhilla F., "The Impact of Covid-19 Measures on the Rule of Law in the Western Balkans and the Increase of Authoritarianism," *European Journal of Comparative Law and Governance*, 2021, Advance Articles, https://doi.org/10.1163/22134514-bja10024.

Janicek K., "Czechs Re-Declare State of Emergency to Keep Restrictions," *AP News*, 14 February 2021, at https://apnews.com/general-news-afe89f923934f5ae6fcee56509624f20.

Jiräsková V., "Wybory w dobie koronawirusa – Republika Czeska," *Studia Wyborcze*, vol. 31 (2021), pp. 17-34, https://doi.org/10.26485/SW/2021/31/2.

Kalisz M., Szuleka M., Wolny M., *Pandemia. Kryzys praworządności. Wyzwania dla praw człowieka*, Warszawa 2021, at https://archiwumosiatynskiego.pl/archiwum/raport-hfpc-za-2020-rok-pandemia-kryzys-praworzadnosci-wyzwa.

Kersten J., Rixen S., *Der Verfassungsstaat in der Corona-Krise*, München 2021.

Krastev I., *Is it Tomorrow Yet? Paradoxes of the Pandemic*, London 2020.

Lamy F., *État d'urgence*, Paris 2018.

Mansfield H.C., *Taming the Prince: The Ambivalence of Modern Executive Power*, New York–London 1989.

Müller J.-W., *Contesting Democracy: Political Ideas in the Twentieth-Century Europe*, New Haven–London 2013.

Mutelet V., "Rapport introductif: Le citoyen et la QPC, un jeu de rôles," in R. Colavitti, S. Corioland (eds), *Question prioritaire de constitutionnalité (QPC) et État de droit*, Paris 2021.

Pandemia Covid-19, Sytuacja w wybranych krajach europejskich, opracowania tematyczne OT-680, Warszawa 2020, at https://www.senat.gov.pl/gfx/senat/pl/senatopracowania/186/plik/ot-680.pdf.

Poguntke T., Webb P., "The Presidentialisation of Politics in Democratic Societies: A Framework for Analysis," in T. Poguntke, P. Webb (eds), *The Presidentialisation of Politics: A Comparative Study of Modern Democracies*, Oxford–New York 2005.

Rubabshi-Shitrit A., Hasson S., "The Effect of the Constructive Vote of No-Confidence on Government Termination and Government Durability,' *West European Politics*, vol. 45, no. 3 (2022), https://doi.org/10.1080/01402382.2021.1914421.

Sartori G., *Comparative Constitutional Engineering: An Inquiry into Structures, Incentives and Outcomes*, New York 1997.

Schmitt C., *Constitutional Theory*, transl. and ed. by J. Seitzer, Durham–London 2008.

Schmitt C., *Legality and Legitimacy*, transl. by J. Seitzer, Durham–London 2004.

Siaroff A., "Varieties of Parliamentarianism in the Advanced Industrial Democracies," *International Political Science Review/Revue internationale de science politiques*, vol. 24, no. 4 (2003), pp. 445-464.

Souty V., "L'état d'urgence à la française," *Délibérée* vol. 3 (2020), pp. 87-92.

Stevens A., *Government and Politics of France*, Basingstoke–New York 2003.

Stone A., *The Birth of Judicial Politics in France: The Constitutional Council in Comparative Perspective*, Oxford–New York 1992.

The State of Emergency to End on Monday, some Restrictions will be Lifted, First Children Back in Schools and Nurseries, 6 April 2021, at https://www.vlada.cz/en/media-centrum/aktualne/the-state-of-emergency-to-end-on-monday--some-restrictions-will-be-lifted--first-children-back-in-schools-and-nurseries-187741/.

Vile M.J.C., *Constitutionalism and the Separation of Powers*, 2nd edition, Indianapolis 1998.

Węgrzyn J., "Realizacja normy programowej wynikającej z art. 68 ust. 4 Konstytucji RP w stanie pandemii COVID-19 (uwagi ogólne)," *Przegląd Prawa Konstytucyjnego*, vol. 61, no. 3 (2021), pp. 147-158, https://doi.org/10.15804/ppk.2021.03.09.

WHO Chief Declares End to COVID-19 as a Global Health Emergency, 5 May 2023, at https://news.un.org/en/story/2023/05/1136367.

Wiszowaty M.M., "Shaken or Stirred? Polish Constitutional (Dis)Continuity between 1917-2017," *Hungarian Journal of Legal Studies*, vol. 60, no. 1 (2019), pp. 95-118, https://doi.org/10.1556/2052.2019.60107.

Zachová A., Plevák O., *Czech parliament puts end to state of emergency*, 12 February 2021, at https://www.euractiv.com/section/politics/short_news/czech-parliament-puts-end-to-state-of-emergency/.

Żaba M., "Ograniczenia praw i wolności w okresie pandemii COVID-19 w Republice Czeskiej," in K. Dobrzaniecki, B. Przywora (eds), *Ograniczenia praw i wolności w okresie pandemii COVID-19 na tle porównawczym. Pierwsze doświadczenia*, Warszawa 2021.

Łukasz JAKUBIAK – a political scientist and legal scholar, Associate Professor of Political Science at the Institute of Political Science and International Relations, Jagiellonian University in Krakow. His research interests include French constitutionalism, political institutions of the Fifth Republic of France, constitutional law and party systems in former French colonies in Africa, as well as systems of government in a comparative perspective.

Ewa BUJWID-KUREK – political scientist, Professor at the Institute of Political Science and International Relations of the Jagiellonian University in Kraków. In her research work, she deals with the issues of contemporary political systems, with particular emphasis on the Central and South-Eastern Europe. She is the author of many publications, including several scientific monographs, m.in.: *Legitymizacja ustroju polityczna państw poygosłowiańskich* (Kraków 2019). She is also a co-author of academic textbook *Transformation of the political system of selected countries of Central and South-Eastern Europe* (Kraków 2015) and a monograph: *III Rzeczpospolita Polska 1990-2016. Opinions-Dilemmas-Controversies* (Kraków 2016) and *Culture and Identities* (Belgrade 2020). She translated *Constitution of the Republic of Serbia* from Serbian into Polish (Warsaw 2018).

Arkadiusz GÓRNISIEWICZ – political scientist, Professor at the Institute of Political Science and International Relations of the Jagiellonian University in Kraków. His research interests include history of political thought, political philosophy, and the theories of modernity. His publications include two books in Polish (*Nowoczesność, nihilizm, polityka*; *Wojna i nomos. Carl Schmitt o problemie porządku światowego*) and three co-edited volumes in English: *Modernity and What Has Been Lost. Considerations on the Legacy of Leo Strauss* (2011); *The Problem of Political Theology* (2012); *The Concept of Constitution in the History of Political Thought* (2017). He has published in various journals, including *History of European Ideas*, *Ratio Juris. An International Journal of Jurisprudence and Philosophy of Law*, *Journal of Political Ideologies*.