

## THE EPIDEMIC AND THE LAW.

### SOME REFLECTIONS FROM THE POINT OF VIEW OF HISTORY AND PHILOSOPHY OF LAW

Piotr Szymaniec<sup>1</sup>

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#### Abstrakt

*W artykule omówiono problematykę reakcji prawnej na nowe, nieznane dotąd zagrożenia bezpieczeństwa, takie jak epidemie nieznanymi wcześniej chorobami. W swoich rozważaniach autor odwołuje się do przykładów historycznych, a także do teorii takich uczonych, jak Ulrich Beck. Szczególną uwagę zwrócono na regulacje prawne podczas epidemii cholery w latach 1829–1837, gdyż epidemia ta jest bardzo dobrze udokumentowana przez władze wielu państw europejskich, a ponadto miała miejsce, gdy kształtowały się zarówno instytucje prawne współczesnych państw, jak i społeczeństwo masowe. W ostatniej części zostaną postawione pytania o możliwy wpływ obecnej pandemii COVID-19 na rozumienie prawa i jego społecznej roli.*

#### Słowa kluczowe

epidemia, prawo, COVID-19, prawa, zasada proporcjonalności

#### Abstract

*The paper discusses the issues of legal response to new, hitherto unknown security threats, such as epidemics of previously unknown diseases. In his considerations, the author refers to historical examples as well as theories of such scholars as Ulrich Beck. Particular attention will be paid to legal regulations during the cholera epidemic in 1829–1837, because this epidemic is very well documented by the authorities of many European states, and moreover, it took place when both the legal institutions of modern states and the mass society were emerging. The final section will ask questions about the possible influence of the current COVID-19 pandemic on the understanding of law and its social role.*

#### Key words

epidemic, law, COVID-19, rights, principle of proportionality

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<sup>1</sup> Dr. habil. in law, professor and director of the Institute of Socio-Legal Studies at the Angelus Silesius University of Applied Sciences in Wałbrzych (Poland), pszymaniec@pwsz.com.pl, ORCID: 0000-0002-5415-9215.

Legal regulation always – like Hegel’s “Minerva’s owl” – comes somewhat “late”,<sup>2</sup> i.e. it is secondary to social phenomena, trying to force them into a specific institutional framework. Regulations created to be “ready” before the phenomenon actually occurs, most often turn out to be insufficient or even inappropriate, so lawmakers are compelled to modify them. This is evident in the case of regulations in which attempts were made to “stay ahead” of technical progress by defining the legal consequences of using technologies that are not yet in common use. This can also be seen in the legal response to new security threats, such as pandemics of previously unknown diseases. Before I present a few reflections on the role of law in the current situation, I would like to recall a few facts about the great epidemic, about which we have detailed reports, because it took place on the brink of modernity, and its course was captured by the public administration of individual European states.

Six cholera pandemics broke out in the 19th century. The first of them, lasting between 1817 and 1824, passed through India, Southeast Asia, the Middle East, East Africa and reached the shores of the Mediterranean Sea. Thus, it took place on the outskirts of the contemporary world. The second pandemic took place in 1826–1837 /1838<sup>3</sup> and touched Europe in the hot time of the revolutionary movements and the Polish November Uprising (the course of the latter was, by the way, influenced by the epidemic). Then it reached North America. In France alone, it cost about 100,000 lives (out of a population of 33.5 million). Among the victims were prominent figures, such as Russian Grand Duke Konstantin, the commander-in-chief of the Russian army Ivan Diebitsch, Prussian general Carl von Clausewitz and the philosopher G.W.F. Hegel. Cholera appeared in Russia in 1829, in September 1830 it was recorded in Moscow. In February of the following year it reached St. Petersburg and the Polish lands engulfed by the uprising, and from there it spread all over Europe.<sup>4</sup> Almost everywhere, it was preceded by panic among the population, fueled by the press.

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<sup>2</sup> „The owl of Minerva spreads its wings only with the falling of the dusk”: G.W.F. HEGEL: *Hegel’s Philosophy of Right*. Translated with notes by T.M. Knox. London, Oxford, New York: Oxford University Press, 1976, p. 13. ISBN: 0-19-500276-8.

<sup>3</sup> At this point, I just want to point out that I did not choose the more famous example of the Spanish flu, because the Spanish flu pandemic started while the First World War was still going on. For this reason, the authorities of the states taking part in the war reacted to the pandemic in a manner that was conditioned by the situation on the war front and efforts to maintain the war economy.

<sup>4</sup> According to official data, widely regarded by modern historians as greatly underestimated, 22 718 out of 3 million 900 thousand of inhabitants in the Polish Kingdom fell ill, while 13,105 people died. It is estimated that 40,000 could be ill, half of which died. Cf. Z. OLKOWSKI: Epidemia cholery azjatyckiej w Prusach Wschodnich w latach 1831–1832. *Komunikaty Mazursko-Warmińskie*, 1968, No. 4, p. 533. About 10% of the population died in the towns of East Prussia, where the epidemic appeared; cf. *ibid.*, p. 559.

Particularly interesting in the context of the topic discussed here is the reaction of the Prussian authorities. The first cases of cholera in the territory of Prussia were recorded in May 1831. The administration issued daily bulletins on the spread of the disease. At that time, a number of order regulations were introduced for the period of the epidemic. Poznań (Posen) and Gdańsk (Danzig), the cities where the disease appeared at the beginning, were closed and cordoned off. The borders were closed and people coming from Russia were quarantined. Traveling was possible only for people with special documents (travel cards). Offices, schools and theaters were closed, only churches remained open. Freedom of speech was restricted, because it was forbidden, among other things, to spread the view that cholera is not contagious. The regulations – initially followed scrupulously – concerned specific hygienic issues (disinfection of various objects using calcium chloride) and the treatment of sick people and corpses (houses where the disease had occurred were marked). The adopted measures were very expensive, and their economic burden was borne primarily by cities and communes (some even had to go into debt), and additionally increased panic among the population. Speculation emerged, and in reaction to it, riots of the poor broke out (often provoked by rumors that the disease was invented by the rich against the poor, and that doctors were colluding with the rich). Moreover, the epidemic was progressing more slowly than originally thought. Therefore, it was clear that the adopted restrictions would not last long. When cholera appeared in Berlin in August 1831, the restrictions were now lifted.<sup>5</sup> An additional factor that influenced the situation was the state of medical knowledge at the time. The etiology of cholera was not known until the discoveries of Robert Koch, and among doctors two opposing theories were presented. According to one of them, cholera was contagious and transmitted by touch, while according to the other theory, the disease was to be caused by a “miasma”, i.e. a harmful, but not contagious factor present in environment that could be activated under favorable conditions. While the first theory was dominant in the first period of the epidemic, the second theory gained priority and it was used as a justification for departing from the restrictions, not only in Prussia, but also in Russia and Italy, despite the fact that the epidemic was still ongoing.<sup>6</sup>

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<sup>5</sup> Initially, the residents of the house where cholera appeared were quarantined for 20 days. Over time, the number of days in quarantine was reduced to 10 and then to 5. Cf. J.W. BECKER: *Letters on the Cholera in Prussia: Letter I. To John Thomson*. London: John Murray, 1832, p. 51.

<sup>6</sup> Details on fighting cholera in Prussia are given in: B. MARKIEWICZ: *Żywe obrazy. O kształtowaniu pojęć poprzez ich przedstawienie*. Warszawa: Wydawnictwo Instytutu Filozofii i Socjologii PAN, 1994, pp. 79–86. ISBN: 83-86166-11-8. Z. OLKOWSKI: *Epidemia cholery azjatyckiej w Prusach Wschodnich w latach 1831–1832. Komunikaty Mazursko-Warmińskie*, 1968, No. 4, pp. 533–570. ISSN: 0023-3196. R.S. ROSS III:

The example I presented here shows a certain and, as it seems, inevitable inadequacy of the adopted regulations to a phenomenon that is known only fragmentarily at a given moment. Moreover, it makes us aware that not only medical factors, but also social expectations and economic conditions determine when restrictions are introduced and when they are abandoned. German sociologist Ulrich Beck wrote about “risk staging” when presenting his concept of a risk society (*Risikogesellschaft*), the first and basic variant of which was developed after the Chernobyl disaster. By “risk staging”, he understood the social processes that determine to what extent we consider a given phenomenon to be dangerous and how to respond to the threat, including the use of legal tools, although we do not have full knowledge about this threat.<sup>7</sup> In the current pandemic, the authorities’ decisions are made under conditions of limited access to information. The full knowledge of the COVID-19 disease and the factors affecting its spread and course in specific people will probably be known in a few years. Inevitably, therefore, these decisions may turn out to be suboptimal or even wrong afterwards, but it is difficult to afford not to act. Besides, in this case there is a tendency to follow the anti-crisis policy model that is already being implemented in neighboring countries. It may be regarded as the least risky one, or at least allowing for the “distribution” of responsibility in the eyes of societies among all governments implementing a given policy model. I also think that during the epidemic even multiple changes to the executive acts issued by the government are something normal. The phenomenon itself is changing, so legal regulations must follow its dynamics. Decisions considered to be justified today may soon turn out to be insufficient or excessively restrictive. The possibility of making quick changes in these regulations is a manifestation of appropriate crisis management mechanisms.

Almost everywhere, the COVID-19 pandemic has strengthened the executive branch. This also applies to Poland: the Act of December 5, 2008 on the prevention and combating of infections and infectious diseases in humans, amended in March 2020,<sup>8</sup> authorized in Articles 46a–46b the Council of Ministers to define certain restrictions by a regulation, including

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*Contagion in Prussia, 1831: The Cholera Epidemic and the Threat of the Polish Uprising.* Jefferson, North Carolina: McFarland & Company, 2015, pp. 59–195. ISBN: 978-0-7864-9772-0. T. STAMM-KUHLMANN: *Die Cholera von 1831. Herausforderungen an Wissenschaft und staatliche Verwaltung.* *Sudhoffs Archiv*, 1989, Vol. 73, no. 2, pp. 176–189. ISSN: 0039-4564.

<sup>7</sup> Cf. U. BECK: *Risk Society: Towards a New Modernity.* London: Sage, 1992. ISBN: 0-8039-8345-x. U. BECK: *World Risk Society.* Cambridge: Polity Press, 2008. ISBN: 978-0-7456-2220-0. A good discussion of Beck’s theory: P. STANKIEWICZ: *W Świecie ryzyka. Niekończąca się opowieść Ulricha Becka,* *Studia Socjologiczne*, 2008, no. 3 (190), pp. 117–132. ISSN: 0039-3371.

<sup>8</sup> Consolidated text: *Journal of Laws* of 2019, item 1239 as amended.

“temporary limitation of certain areas of activity of entrepreneurs”, “temporary limitation of the use of premises or land and the obligation to secure them”, “an order to stay or prohibition of staying in specific places and facilities and in specific areas”, and “ordering certain ways of travelling” (Article 46b points 2, 8, 10 12). However, there is no maximum period for which these restrictions may be established and no procedure for assessing the legitimacy of these restrictions by the legislature.

The government’s lawmaking activity under statutory authorization is particularly visible in France. Pursuant to the Constitution of the Fifth Republic of 1958, the Council of Ministers has the power to issue decrees and ordinances. On March 22, 2020, the French Parliament passed a law<sup>9</sup> giving the government extended powers to issue decrees for two months in the period of “state of health emergency” (*l’état d’urgence sanitaire*), concerning, inter alia, limiting the movement of people and ordering the requisition of goods and services. Legal acts issued on this basis have concerned various branches of law, including the sphere of civil law contracts, e.g. postponing payment terms for specific services.<sup>10</sup> The Act of May 11 extended the “state of health emergency”, and thus also the powers of the government, for another two months. The law of July 11, 2020<sup>11</sup> repealed these regulations, but at the same time introduced a “régime transitoire” under which the government continues to have the power to adopt emergency measures. The regime, initially expected to last until the end of October, was extended by the law from October 1 to April 1, 2021. Moreover, the decree of October 14, 2020,<sup>12</sup> i.e. an act of the executive power, reintroduced the state of health emergency, which was extended by the Act of November 14, 2020<sup>13</sup> until February 16, 2021. The introduced catalog of situations in which it is possible to leave the place of residence, and the restrictions on movement by residents can be changed by the executive authority.

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<sup>9</sup> Loi n° 2020-290 du 23 mars 2020 d’urgence pour faire face à l’épidémie de covid-19, <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000041746313&categorieLien=id>. Cf. C. DESFONTAINES: *Covid-19: Confinement – Measures taken by the Government and applicable penalties*, <https://www.soulier-avocats.com/en/covid-19-confinement-measures-taken-by-the-government-and-applicable-sanctions/> [19.05.2020].

<sup>10</sup> Cf. L. GRYNBAUM: *COVID-19 French health emergency orders and adaptation of contracts*, <https://www.degaulleflurance.com/en/ordonnances-etat-durgence-sanitaire-covid-19-et-adaptation-des-contrats/> [19.05.2020].

<sup>11</sup> Loi n° 2020-856 du 9 juillet 2020 organisant la sortie de l’état d’urgence sanitaire, <https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000042101318/> [9.10.2020].

<sup>12</sup> Décret n° 2020-1257 du 14 octobre 2020 déclarant l’état d’urgence sanitaire, <https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000042424377> [29.11.2020].

<sup>13</sup> Loi n° 2020-1379 du 14 novembre 2020 autorisant la prorogation de l’état d’urgence sanitaire et portant diverses mesures de gestion de la crise sanitaire, <https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000042520662?r=xlhRIpB5A0> [29.11.2020].

Government's lawmaking activity in itself does not yet pose a threat to the rule of law, provided that it is maintained within the framework prescribed by the law. Certainly, there are exceptions to this tendency to expand the powers of the government. The best example of which is Sweden, where strategies for introducing a few restrictions have been adopted, and the main role in managing the crisis situation is played by experts.

Greater or lesser restrictions on human or civil rights and freedoms accompany the current epidemic, from huge restrictions on freedom of movement, through far-reaching limitation of freedom of assembly and freedom to manifest religion or belief, to interference in economic freedoms. Even in states with a high standard of human rights, it happens that unjustified restrictions go beyond what is necessary under the present conditions. I will give just one example concerning the sphere that I deal with in my scholarly activity. In Germany, following the recommendations of the federal government, the majority of federal states introduced a general ban on religious services, from which no exceptions were granted. A Muslim organization from Lower Saxony, wishing to hold the Good Friday prayers for the remainder of Ramadan while respecting all sanitary requirements, appealed the ban to the Federal Constitutional Court in Karlsruhe. On April 29, 2020 The Court ruled the ban unconstitutional. The Court indicated that the ban was a "serious violation of the freedom of religion", the more so as it did not provide for any exceptions. According to the Court, the violation was particularly significant with regard to the Friday prayers of Muslims, although – as noted in the Court's opinion – the ban also affected churches, synagogues and other religious communities.<sup>14</sup> The given case is in fact optimistic as it shows that the rights protection mechanisms worked properly and that the excessive ban was quickly lifted.

How to avoid unduly restricting individual rights? Any prohibitions should be made so as to be as precise as possible and not cause almost scholastic considerations as to where the prohibition begins and ends. The danger of imprecise bans lies in the fact that, in extreme cases, they may lead to a reversal of the Western paradigm of thinking about individual rights, derived from Montesquieu, assuming that what is not explicitly forbidden by the law is permitted. Montesquieu developed his ideas against the background of considerations about the English legal and political system, which he considered to be the most perfect existing

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<sup>14</sup> Bundesverfassungsgericht, Beschluss der 2. Kammer des Ersten Senats vom 29. April 2020, [https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2020/04/qk20200429\\_1bvq004420.html](https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2020/04/qk20200429_1bvq004420.html); *Germany's top court rules against virus ban on religious services*, <https://www.timesofisrael.com/germanys-top-court-rules-against-virus-ban-on-religious-services/> [19.05.2020].

example of a “moderate” system.<sup>15</sup> In this context, it should be noted that during current epidemic, ministerial ordinance adopted in England and Wales on March 26, 2020 (announced three days in advance)<sup>16</sup> stated (paragraph 6) that no one may leave the place of living without a “reasonable excuse”, while very casuistic situations regarded as reasonable excuses were listed. For instance, a reasonable excuse was to go “to obtain basic necessities, including food and medical supplies for those in the same household (including any pets or animals in the household)”. Only two-person assemblies were allowed, and only a few exceptions were introduced from this provision, e.g. funeral attendance. Similar regulations were introduced in other parts of the United Kingdom. The public was also told that one form of physical exercises, such as running or cycling, was acceptable per day. I dare say that these were the most far-reaching restrictions on rights of individuals introduced in England since the “Glorious Revolution” of 1688. Such restrictions reversed the Montesquieu paradigm. The Western modern state – in each of its classic models, developed in the nineteenth century, i.e. the German, French, British or American models – was not to be a monster like the mythological Argus with a hundred eyes, intended to keep an eye on others forever. The paradigm shift means the complete change of role of the state.

There is perhaps no better way to protect individual rights than to take the principle of proportionality seriously. This principle, derived from Aristotle’s concept of the “golden mean”, is common in the most general terms in Western legal culture and consists in resolving conflicts of various reasons or values not by eliminating one of them, but by balancing them.<sup>17</sup> In the Polish legal system, this principle was found in Art. 31 sec. 3 of the Constitution of the Republic of Poland of April 2, 1997, stating that restrictions on the exercise of constitutional rights and freedoms could be imposed only on the basis of a statute

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<sup>15</sup> MONTESQUIEU: *A view of the English constitution. By the late Baron de Montesquieu. Being a translation of the sixth chapter of the eleventh book of his celebrated treatise L’Esprit des Loix.* Translated by F. Masères. London: W. White and H. Payne, 1781, pp. 1–8.

<sup>16</sup> *The Health Protection (Coronavirus, Restrictions) (England) Regulations 2020*, “Statutory Instruments” 2020, no. 350.

<sup>17</sup> E. ŁĘTOWSKA: Wprowadzenie do problematyki proporcjonalności. In P. SZYMANIEC (ed.): *Zasada proporcjonalności a ochrona praw podstawowych w państwach Europy. The Principle of Proportionality and the Protection of the Fundamental Rights in the European States.* Warszawa: Wydawnictwo PWSZ AS, 2015, pp. 15–22. ISBN: 978-83-63839-33-8. Cf. R. ALEXY: Proportionality and rationality. In V. C. JACKSON, M. TUSHNET: *Proportionality. New Frontiers. New Challenges.* Cambridge: Cambridge University Press, 2017, pp. 13–29. ISBN: 978-1-316-61700-7. Cf. A. BARAK: *Proportionality: Constitutional Rights and their Limitations.* Cambridge: Cambridge University Press, Cambridge 2012. ISBN: 978-1-107-40119-8. Cf. M. TUROŠÍK: Ľudské práva v rímskom práve. In P. SZYMANIEC (ed.): *Zasada proporcjonalności a ochrona praw podstawowych w państwach Europy. The Principle of Proportionality and the Protection of the Fundamental Rights in the European States.* Warszawa: Wydawnictwo PWSZ AS, 2015, pp. 65–72.

and “only when they are necessary in a democratic state” to protect the values indicated in this provision. i.e. state security, environmental protection, public morality, freedoms and rights of other people, and also public health.

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*The Health Protection (Coronavirus, Restrictions) (England) Regulations 2020*, “Statutory Instruments” 2020, no. 350.

**PŘÁVNE ROZPRAVY ON-SCREEN II. – Sekcia dejín a teórie štátu a práva**

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TUROŠÍK, M.: Ľudské práva v rímskom práve. In P. SZYMANIEC (ed.): *Zasada proporcjonalności a ochrona praw podstawowych w państwach Europy. The Principle of Proportionality and the Protection of the Fundamental Rights in the European States*. Warszawa: Wydawnictwo PWSZ AS, 2015, pp. 65–72. ISBN: 978–83–63839–33–8.