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MATEUSZ RADAJEWSKI

## THE REGULATIONS ON EXTRAORDINARY MEASURES IN THE CONSTITUTION OF THE REPUBLIC OF POLAND: THEIR CONTENT, LEGAL NATURE AND THE SUPERVISION OF THEIR LAWFULNESS

### I. INTRODUCTION

The issue of extraordinary measures remains an area that is largely unexplored in Polish legal science. This is probably due to fact that the constitutional norms concerning these institutions have thus far not required practical application. However, this is no reason why the issue cannot be investigated and discussed. Legal science should be of service to society, for example by clarifying important issues related to the existence of specific binding legal solutions. In the case of extraordinary measures, which, by their nature, are only used in extreme situations, it is therefore the role of legal science to resolve any pertinent problems in advance so that, should the time come to apply them, the State authorities can take appropriate action without hindrance. Prior abstract analysis of this issue in the doctrine should also make it possible to form an objective assessment of the actions taken within the framework of extraordinary measures, which could otherwise be distorted by political sympathies and a subjective attitude to the dangers faced by society.

In the light of the above, it seems appropriate for legal science to reflect on the regulations on extraordinary measures, understood as legal acts that affect the validity and content of particular extraordinary measures.<sup>1</sup> The aim of this article is to identify all the types of such regulations, to reconstruct the elements of their content, to define their legal nature and to discuss the implications for the supervision of their lawfulness. In order to do so, the provisions of the Constitution of the Republic of Poland<sup>2</sup> and relevant acts will be analysed.

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<sup>1</sup> The content of extraordinary measures should be understood as specific norms concerning the functioning of public authorities and the freedoms and rights of the person and citizen that are in force while the extraordinary measures apply.

<sup>2</sup> The Constitution of the Republic of Poland of 2 April 1997, Journal of Laws of the Republic of Poland [JL RP] No. 78, item 483 as amended (hereinafter: the Constitution).

## II. THE TYPES OF REGULATIONS ON EXTRAORDINARY MEASURES

Article 228 sec. 2 of the Constitution provides that extraordinary measures may only be introduced by regulation. The Constitution also uses this concept in its other provisions, referring to certain normative acts as such. This applies to implementing regulations (Article 92) and regulations having the force of statute (Article 234). These are clearly legal acts with characteristics different to those of extraordinary measures. Implementing regulations are issued only for the purpose of implementing statutes and on the basis of a detailed authorization specified therein, which indicates the organ competent to issue the regulation, the scope of matters to be regulated and guidelines concerning its provisions. The regulations that introduce extraordinary measures do not meet these requirements—their authorisation is of a general nature and its purpose is not to regulate a certain category of matters. Similarly, it does not have the characteristic possessed by regulations having the force of statute, the essence of which is the modification of ordinary legislation. This means that the constitutional legislators assigned an autonomous meaning to the term ‘regulation’ referred to in Article 228 sec. 2 of the Constitution—it is, unlike other regulations, an act of applying the law.<sup>3</sup>

The Constitution explicitly mentions only one regulation of this type, namely regulations on the introduction of extraordinary measures. It seems, however, that it is possible to deduce from the content of the provisions of the Constitution as many as three other types. The first are regulations on the extension of extraordinary measures.<sup>4</sup> The Constitution provides for the possibility of such extensions in Article 230 sec. 2 and Article 232, sentence 2. The former provision states: ‘Extension of a state of emergency may be made once only for a period no longer than 60 days and with the consent of the Sejm’. On the other hand, Article 232, sentence 2 indicates that the extension of a state of natural disaster ‘may be made with the consent of the Sejm’. The Constitution specifies neither the organs authorised to extend the extraordinary measures, nor the legal form in which such an extension is to take place. However, there should be no doubt that these norms should be interpreted as concerning extraordinary measures, and thus their extension should follow similar rules. Therefore, the organs authorized for this purpose are the Council of Ministers (in the case of a natural disaster) and the President of the Republic of Poland acting at the request of the Council of Ministers (in the case of a state of emergency). The extension of extraordinary measures should take the form of a regulation and not a resolution of the Council of Ministers or a Presidential decree (which could be suggested by a literal in

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<sup>3</sup> See K. Działocha, Uwagi do art. 87, in: L. Garlicki (ed.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, vol. 1, Warsaw 1999: 3–4. This does not rule out the fact that it also has the characteristics of a normative act. This issue will be discussed in subsequent sections.

<sup>4</sup> See K. Działocha, Uwagi do art. 228, in: L. Garlicki (ed), *op. cit.*, vol. 5, Warsaw 2005: 6.

terpretation of Article 142 sec. 2 of the Constitution<sup>5</sup>). Consistent with this interpretation are the provisions of Article 5 sec. 1 of the Act on States of Emergency<sup>6</sup> and Article 6 sec. 1 of the Act on the State of Natural Disaster,<sup>7</sup> in which it is explicitly stated that the extension of extraordinary measures occurs by way of regulation.<sup>8</sup>

From constitutional provisions it is also possible to infer the admissibility of issuing regulations on the termination of extraordinary measures.<sup>9</sup> Although the Constitution does not explicitly provide for them, their existence is a logical consequence of the existence of some of its norms. In this context, first of all it is important to draw attention to the content of Article 229, on martial law, which, unlike the norms concerning other extraordinary measures, is silent on the issue of the maximum duration of martial law. Although this conception of constitutional provisions is to some extent imprecise, it must be interpreted as meaning that it is only possible to introduce martial law for an indefinite period of time.<sup>10</sup> The consequence of this is the need for there to be a formal mechanism for terminating martial law. It does not seem that such an important issue, so closely tied to the constitutional competence to implement it, has been left to the free regulation of the ordinary legislator<sup>11</sup>—and thus all the relevant elements of this mechanism should be reconstructed on the basis of constitutional norms. Analysis of these norms leads to one unambiguous conclusion, namely that since the President and the Council of Ministers are the organs that decide on the duration of martial law, the matter of its termination must remain their sole responsibility. Analogously, since martial law is introduced by a regulation, its legal effects, in the absence of precise norms, can only be revoked by a legal act of the same kind, and therefore also by a regulation. This interpretation was expressed by the ordinary legislator in Article 8 sec. 1 of the Act on Martial Law,<sup>12</sup> in which it is stated that martial law shall be

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<sup>5</sup> This provision states that: 'The President of the Republic shall issue decisions within the scope of discharge of his other authorities' [i.e. other than issuing implementing regulations and executive orders—M.R.]

<sup>6</sup> The Act of 21 June 2002, on States of Emergency [Ustawa o stanie wyjątkowym], JL RP 2017, item. 1928.

<sup>7</sup> The Act of 18 April 2002, On the State of Natural Disaster [Ustawa o stanie klęski żywiołowej], JL RP 2017, item. 1897.

<sup>8</sup> It should be emphasized here that the ordinary legislator only elaborated the constitutional norms in this respect. This issue has to be classified as a constitutional matter, and therefore it was not submitted to the ordinary legislator for free regulation.

<sup>9</sup> See K. Działocha, Uwagi do art. 228: 6.

<sup>10</sup> Since the Constitution regulates the duration of a state of emergency and a state of natural disaster, this issue should be classed as a constitutional matter. The issue of the duration of martial law was therefore not submitted to the ordinary legislator for regulation. In order to avoid unnecessary misunderstandings, Article 229 of the Constitution could explicitly indicate that 'the President of the Republic may, on request of the Council of Ministers, declare a state of martial law for an indefinite period'.

<sup>11</sup> Here the term 'ordinary legislator' is used to distinguish this legislator from the 'constitutional legislator'.

<sup>12</sup> The Act of 29 August 2002, on Martial Law and on the Competences of the Supreme Commander of the Armed Forces and the Principles of its Subordination to the Organs of the Republic of Poland [Ustawa o stanie wojennym oraz o kompetencjach Naczelnego Dowódcy Sił Zbro-

terminated 'by the President of the Republic, at the request of the Council of Ministers, by regulation'.

Although other extraordinary measures are introduced for a fixed period of time, the Constitution determines implicitly that it is necessary for there to be formal mechanisms for their termination before the expiry of the period for which they have been introduced. This follows from Article 228 sec. 1 of the Constitution, according to which extraordinary measures shall be introduced only 'in situations of particular danger, if ordinary constitutional measures are inadequate'. If, therefore, before a state of emergency or a state of natural disaster has actually come into force, 'ordinary constitutional measures' prove adequate for counteracting the danger (or the danger has already been averted), there is a constitutional obligation to terminate the extraordinary measures.<sup>13</sup> As with the case of martial law, this should be executed by the organs equipped with the competence to announce the introduction of such measures, and it should be executed by way of a regulation. Thus, in Article 5 sec. 2 of the Act on Extraordinary Measures and Article 6 sec. 2 of the Act on the State of Natural Disaster, the ordinary legislator has also properly elaborated on constitutional norms.

The fourth type of regulation consists of regulations amending regulations on the introduction of emergency measures. These are not expressly provided for either in the Constitution or in ordinary legislation, but their existence derives indirectly from the provisions in force. If, to anticipate later considerations, one necessary element of emergency measures is to define permissible limitations on freedoms and human rights, it could be the case that this issue will be regulated incorrectly in the regulation on emergency measures—for example the anticipated limitations on freedoms and rights might prove to be insufficient. It is difficult to believe that in such a situation the state would remain helpless or that it would be necessary to resort to the doctrine of the state of necessity.<sup>14</sup> It should be supposed that it would be possible to amend the provisions of the regulation introducing emergency measures accordingly. There should be no doubt that this could only be done in the form of a regulation issued by the same organs that introduced the extraordinary measures. Where the Constitution provides for the Sejm's supervision over the introduction of the extraordinary measures, it is necessary that the amending regulation in question also be placed under the Sejm's supervision.<sup>15</sup> Since such an act enters into force before the Sejm adopts the relevant resolution, it must

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jnych i zasadach jego podległości konstytucyjnym organom Rzeczypospolitej Polskiej], JL RP 2017, item. 1932.

<sup>13</sup> It is worth noting that this provision also imposes the obligation to terminate the extraordinary measures (including martial law) in areas where they are no longer necessary, even if it is necessary for them to be in force in other parts of the country.

<sup>14</sup> For more detailed discussion on this issue, see K. Wojtyczek, *Konieczność jako legitymizacja działań władzy w demokratycznym państwie prawnym*, *Państwo i Prawo* 1994, issue 9: 39–49.

<sup>15</sup> Otherwise, constitutional provisions would be circumvented. Since the subject of control of the Sejm is the entire regulation introducing the extraordinary measures, it adjudicates not only on the need to introduce such measures, but also the admissibility of using the means that the President, on the government's behest, specified in the regulation.

be assumed that its repeal would have 'reanimation' effects and would thus restore the legal status prior to the amendment.<sup>16</sup> However, it does not seem that a regulation amending a regulation on the introduction of a state of natural disaster should be subject to such supervision, in the event that the state has already been extended with the consent of the Sejm. This is due to the fact that the Constitution only subjects the very fact of the extension of this state to the supervision of the Sejm. A regulation that extends a state of disaster is not a self-existent act, in the sense that its essence is limited solely to extending the previous regulation introducing these extraordinary measures.

The possibility of amending the regulations which introduce extraordinary measures is also supported by Article 228 sec. 5 of the Constitution, according to which all actions taken as a result of the introduction of the extraordinary measures shall be proportionate to the degree of threat. Thus, if the limitations on freedoms and rights provided for in the extraordinary measures prove to be too radical, there is a constitutional obligation to amend the regulation so that it allows only those forms of limitations on rights and freedoms that are necessary to counteract the threat.

At this juncture it is worth mentioning that such a regulation, since it was not expressly provided for in legal provisions, should only be issued when it is necessary to modify the scope of permissible limitations on freedoms and rights. In the event that it proves necessary to extend the extraordinary measures to areas other than the original one, the relevant State organs should rather adopt a regulation introducing (parallel) extraordinary measures in these areas. Similarly, as has already been indicated, when it is no longer necessary to maintain extraordinary measures in a given part of the national territory, a regulation terminating the extraordinary measures in these areas should be adopted, rather than a regulation amending the regulation that introduced the extraordinary measures.

### III. THE CONTENT OF THE REGULATIONS ON EXTRAORDINARY MEASURES

The second research problem indicated in the introduction is the reconstruction of the content of the aforementioned regulations. It appears that this issue has been regulated at the constitutional level. According to Article 228 sec. 3 of the Constitution, the essence of extraordinary measures is the modification of the principles for activity by organs of public authority as well as the degree to which the freedoms and rights may be subject to limitation. However, as provided for in Article 228 sec. 5, emergency measures must be proportionate to the degree of threat. The combination of these two norms leads to the conclusion that out of all the specific principles for activity by

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<sup>16</sup> Otherwise, the Sejm's control over the extraordinary measures would be meaningless, since its repeal would not lead to the withdrawal of the effects that the measure caused in the sphere of law (see the decision of the Constitutional Tribunal of 21 March 2000, K 4/99, OTK ZU 2000, no. 2, item 65, in which the Constitutional Tribunal similarly justified the existence of the 'reanimation' effect of some of its rulings on amending provisions).

organs of public authorities and limitations of freedoms and rights in specific extraordinary measures, only those which are necessary may be applied. It is therefore necessary to formally concretize statutory norms for the needs of given extraordinary measures. The only instrument that can be used for this purpose is the very regulation introducing these measures. The Constitution therefore determines that the necessary elements of such a regulation are at least the principles for activity by organs of public authority<sup>17</sup> and limitations on freedoms and rights selected from the provisions of the Act on Extraordinary Measures.<sup>18</sup>

The legislation currently in force only partially meets this requirement. In Article 3 sec. 2 of the Act on Martial Law, Article 3 sec. 2 of the Act on States of Emergency and Article 5 sec. 2 of the Act on Natural Disasters, it is stated that the regulation introducing extraordinary measures only defines the scope of permissible limitations of freedoms and rights. Thus, the admissibility of applying any specific principles for activity by organs of public authority is assumed in advance, which should be assessed negatively from the point of view of the constitutional solutions analysed above.

The second obligatory element of any emergency measure is undoubtedly the specification of its territorial scope. This ensues clearly from the provisions of the Constitution, which explicitly state that all extraordinary measures (including martial law) may be introduced in a part of or upon the whole territory of the State. Ordinary legislation does not specify these norms and, in particular, does not specify how to describe the territory in which emergency measures are introduced. This entails that it is necessary to have recourse to the general provisions on the territorial division of the State. Thus, the President or the Council of Ministers are obliged to describe the territory in which the extraordinary measures are to be in force, by indicating in the content of the regulation the names of the basic territorial units where the measures are to apply. This should be done in the simplest possible way, such as by indicating the largest possible units (e.g. voivodeships). The indication of smaller units should only be done when the extraordinary measures are not implemented to the full extent in the larger territorial unit. Theoretically, it may be problematic to describe the emergency measures if they are to be in force in an area smaller than a municipality (*gmina*). In practice, however, such a situation should not arise. A threat that may justify the imposition of extraordinary measures ought to, in terms of its extent, threaten much larger areas than a single municipality, let alone a part of it. However, if reality were to prove this thesis wrong, it seems that one rational solution would be to divide the municipality into smaller component units (such as districts, housing estates).

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<sup>17</sup> For an alternative view, see K. Prokop, *Stany nadzwyczajne w Konstytucji Rzeczypospolitej Polskiej*, Białystok 2005: 28.

<sup>18</sup> See K. Działocha, *Uwagi do art. 231*, in: L. Garlicki (ed.), op. cit., vol. 4, Warsaw 2005: 1.

It is worth pointing out here that there are no grounds for requiring the area covered by the extraordinary measures to be designated in the regulation in an additional graphic form. However, this is certainly not prohibited. On the other hand, such a designation on its own, without the boundaries being described in words, could in practice give rise to some problems—especially with regard to the status of the areas surrounding the boundary line of the area where the extraordinary measures are in force. This type of solution should therefore be rejected.

The third element of these regulations is the indication of the time period during which the extraordinary measures will be in place. However, as was mentioned, this does not apply to martial law, which is always to be imposed for an indefinite period of time. In the case of the remaining two extraordinary measures, the Constitution precisely specifies their maximum initial length, namely 90 days in the case of states of emergency (Article 230 sec. 1) and 30 days in the case of a state of natural disaster (Article 232, sentence 1). These norms also indicate how the duration of extraordinary measures should be described: the only applicable unit are days. This is also due to the fact that it would be difficult to describe the expected duration of such measures by means of more precise units, such as hours. On the other hand, the use of units such as weeks or months could introduce unnecessary chaos, all the more so because the duration of a natural disaster or state of emergency would typically be short, and thus the use of days simply seems natural and optimal.<sup>19</sup>

It is doubtful whether, from the point of view of the Constitution, it is necessary to provide at least a brief description of the reasons for the introduction of extraordinary measures in the relevant regulations. It seems that such a norm can be interpreted through consideration of the nature its regulation. In addition to its legal function, to some extent such regulations also play a symbolic<sup>20</sup> and informative role, which is reflected in the constitutional obligation to make them public (Article 228 sec. 2 *in fine*). Moreover, when the normal flow of information may be disrupted, such regulation could even, in certain specific conditions, serve as a medium of public information, access to which is guaranteed by Article 61 of the Constitution. All these arguments lead to the conclusion that the regulations in question should contain information as to the reasons for the introduction of extraordinary measures. This may be done both in the content itself (for example in the preamble or introductory section) and in an appendix thereto, provided that it is an integral part, subject to publication together with its provisions.

It should also be borne in mind that the statute on the introduction of martial law or state of emergency are presented to the Sejm, which may repeal them. Careful supervision of these statutes requires a statement on the reasons for their issuance. However, this could be included in an explanatory memorandum, which would not be so widely published. Therefore, this

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<sup>19</sup> It would certainly be different if the extraordinary measures could be introduced for a period of two years, for example.

<sup>20</sup> It seems that the purpose of its 'dramatic' character is to mobilise society.

requirement is not a conclusive argument that a description must be included in the regulation itself. However, this clearly shows that the organs introducing martial law or a state of emergency are obliged to elaborate on the reasons why they were introduced, although it is not necessary for them to be included in the regulation, at least not to their full extent.

The obligation to indicate in the regulation introducing the extraordinary measures the reasons for its issuance is provided for at the statutory level, which—following the above considerations—should be fully approved. The provisions of specific statutes on extraordinary measures do not specify this requirement in detail. Therefore, the description of the reasons for introduction of extraordinary measures need not be detailed. However, it seems that it should contain at least two elements. The first of these is a reference to the specific constitutional basis for the introduction of the extraordinary measures in question, and therefore to indicate explicitly that it is, for example, due to the need to defend against aggression. Secondly, it is necessary to cite briefly the factual circumstances relating to this basis, thus, for example, to identify the catastrophe or the country which carried out the aggression against the territory of the Republic of Poland. However, it is not necessary for the regulation to indicate that ‘ordinary constitutional measures are inadequate’, although, as has already been mentioned, it is necessary to indicate this in the justification of the regulation, especially in the case of martial law or a state of emergency, when the Sejm supervises the legitimacy of its introduction.

It would appear that the last element of the regulation introducing extraordinary measures should be the indication of the date from which it takes effect. This stems from the need to provide citizens with certainty as to the legal regime in force. It is obvious that martial law and states of emergency are a response to sudden events, so they should be introduced immediately, as soon as the regulation is announced. In such cases, it is no longer necessary to indicate a specific date, as its validity will depend on the content of the regulation itself. This assertion is consistent with the provisions of the Acts on Martial Law and States of Emergency, in which it is explicitly stated that these come into force on the date the relevant regulation is published in the Journal of Laws.<sup>21</sup>

The situation is different in the case of a state of natural disaster. This is because catastrophes and their effects can sometimes be predicted some time in advance. The Council of Ministers should therefore have some discretion to determine the date on which the emergency measures take effect, so that a regulation on this matter can be announced in advance, which should result

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<sup>21</sup> It should be assumed that such publication will take place immediately after the regulation is signed, hence the dates of these two actions should not differ. However, if they occurred at night, at the turn of two days, the President, anticipating that the regulation will be published after midnight, should indicate in the regulation the next day as the date of the extraordinary measures.



in the authorities and citizens being better prepared for its implementation. This is reflected in Article 5 sec. 2 of the Act on States of Natural Disaster, in which it is stated that an obligatory element of the regulation introducing this extraordinary measure is the date of its introduction. Thus, even if the Council of Ministers wants the measures to come into force immediately, the Council cannot merely indicate that a state of natural disaster is being introduced, but must specify the exact date on which it will occur—in this case, it will be the same as the date the regulation is published in the Journal of Laws.

Here it is worth mentioning in passing that it would not be acceptable to introduce any extraordinary measures, including a state of natural disaster, in a retroactive manner. This is a consequence of the binding principle of the rule of law and, above all, the resulting principle of citizens' trust in the state.<sup>22</sup> Thanks to this, the organs of public authority cannot try to legalise actions that were taken even to protect the State,<sup>23</sup> especially since the late introduction of extraordinary measures will most often be a consequence of negligence on the part of those authorities.

It appears that regulations introducing extraordinary measures cannot contain any elements of content other than those referred to above. They cannot be used to regulate other matters, including those in some way related to extraordinary measures (such as compensation for damages resulting from the limitation of the freedoms and rights of the person and citizen when the measures were in force), or to determine under what conditions the extraordinary measures are terminated *ex lege*.

The content of the other regulations referred to above stems from their very substance. Thus, a regulation terminating extraordinary measures only defines that same fact, referring to the regulation that implemented it. The same will apply to regulations extending a state of emergency or natural disaster. The regulation amending the regulation that introduced the extraordinary measures should, in turn, only contain provisions relating to the amendment of the specific regulations of the original act.

#### IV. THE LEGAL NATURE OF REGULATIONS ON EXTRAORDINARY MEASURES

The content of regulations on extraordinary measures is closely linked to the question of their legal nature. Even a superficial analysis of their content leads to the conclusion that for some of them it should be defined as mixed—they have the characteristics of both individual and normative acts. This is certainly the case for regulations on extraordinary measures, since their very introduction would constitute individual acts—they do not create new norms,

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<sup>22</sup> This could lead to serious abuse, for example, the governing parties questioning the validity of lost elections which were held on first day after extraordinary measures were announced.

<sup>23</sup> Of course, in this case, the path to qualifying specific actions as taken in a state of higher necessity still remains open.

but only open the possibility of applying the specific regulations provided for in the specified circumstances. In addition, however, such regulations also delineate specific forms of limiting freedoms and rights. Although these forms were previously provided for in the relevant statutes, it is only the regulations that allow for their application. Regulations and statutes thus co-shape the norms that are binding in given situation in which extraordinary measures are introduced. There can be no doubt that these norms, reconstructed on the basis of the content of regulations and statutes, are of a general and abstract nature—they are addressed to entities which are not distinguished with regard to their identity and they express replicable rules of behaviour. This means that such regulations are normative in this respect. These legal acts, taken as a whole, should therefore be referred to as mixed or hybrid acts.<sup>24</sup>

It is clear that regulations extending and terminating extraordinary measures will be individual acts. However, there is also the question of whether they would also be normative in nature, since they indirectly affect the temporal application of the norms expressed in the regulation on emergency measures. It would seem that this indirectness entails that they cannot be classed as normative acts—they do not repeal or extend the validity of certain norms, but merely cause them to be no longer fulfilled (a terminating regulation) or their fulfilment to take more time (an extending regulation). Therefore, these regulations should only be counted as acts of law application.

The fourth type of regulation concerning extraordinary measures, namely amending regulations, are of a purely normative nature. They merely change the content of the provisions of the emergency measures. The nature of these legal acts is therefore analogous to other acts that amend normative acts.

## V. SUPERVISING THE LAWFULNESS OF REGULATIONS ON EXTRAORDINARY MEASURES

The last research problem signalled in the introduction is the question of supervising the lawfulness of regulations on extraordinary measures. Although in principle the Constitution does not regulate this issue explicitly, it seems that relevant constitutional norms can be interpreted on the basis of some of its provisions.

The supervision of some regulations on emergency measures is directly provided for in Article 231 of the Constitution, according to which regulations on the introduction of martial law or a state of emergency shall be submitted

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<sup>24</sup> See M. Brzeziński, *Stany nadzwyczajne w polskich konstytucjach*, Warsaw 2007: 187. In this respect, it is possible to see an analogy with a resolution on the appointment of an inquiry committee. The Constitutional Tribunal stated that this act is mixed—with regard to the scope in which it appoints a specific committee, it has the characteristics of an individual act, while to the extent it defines general and abstract principles of its activity, it is a normative act (see the judgment of the Constitutional Tribunal of 22 September 2006, U 4/06, OTK ZU, Series A, no. 8, item 109).

to the Sejm, which may annul them by an absolute majority of votes. Although this provision does not specify the criteria to be followed by the Sejm in this respect, it is clear that the grounds for repealing the regulations in question may include their unlawfulness. As has already been mentioned, similar parliamentary scrutiny should be given to regulations that amend regulations introducing martial law or a state of emergency.

The supervision of some of the regulations in question is also provided for in Article 230 sec. 2 and the second sentence of Article 232 of the Constitution. According to these provisions, a state of emergency and a state of natural disaster may be extended only with the consent of the Sejm. This means that such regulations are subject to review before they enter into force. It is clear that the unlawful nature of the proposed regulation may be one of the grounds for refusing to grant an extension to the extraordinary measures.<sup>25</sup>

Besides the cases mentioned above, the law does not expressly provide for the possibility of challenging extraordinary measures with *erga omnes* effects. It does not seem, however, that the review of their lawfulness is completely ruled out altogether. In this regard, particular attention should be paid to Article 188 sec. 3 of the Constitution, which indicates that the Constitutional Tribunal adjudicates on the 'the conformity of legal provisions issued by central State organs' with higher level normative acts. Thus, if any act contains normative elements and is issued by a central State organ, it is subject to the review of the Constitutional Tribunal<sup>26</sup>. As has already been indicated, normative elements include regulations introducing extraordinary measures and regulations amending such acts. Since they are issued by the President or the Council of Ministers, and therefore central State organs, they are subject to the control of the Constitutional Tribunal.<sup>27</sup>

Since regulations introducing extraordinary measures are mixed in nature, only those parts that contain normative elements are subject to the Constitutional Tribunal's review. The issue of examining the regulations in question from the perspective of norms of procedure and competence is problematic.<sup>28</sup> *Prima facie*, the whole act would thus necessarily be reviewed and a negative ruling in this respect would result in the regulation losing its

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<sup>25</sup> In practice, such a refusal should most often result in a different assessment of whether there are circumstances determining the admissibility of extending the extraordinary measures. In such a case, the Sejm, stating that there is no legal basis for such extension, will question not only the legitimacy, but also the lawfulness of the President's regulation.

<sup>26</sup> See L. Garlicki, *Uwagi do art. 188*, in: idem (ed.), *op. cit.*, vol. 5, Warsaw 2007: 10 and 21.

<sup>27</sup> K. Prokop arrived at similar conclusions (see, idem, *op. cit.*: 30).

<sup>28</sup> According to Article 68 of the Act of 30 November 2016, on the Organisation and Procedure of the Constitutional Tribunal [*Ustawa o organizacji i trybie postępowania przed Trybunałem Konstytucyjnym*] (JL RP, item 2072): 'When deciding on the compliance of a normative act [...] with the Constitution, the Tribunal shall examine both the content of such an act [...], as well as the competence and observance of the procedure required by the law to issue the act'. Although this norm was explicitly expressed only at the statutory level, it implicitly follows from the provisions of the Constitution.

legal force, and this would lead to the extraordinary measures being terminated by a ruling of the Constitutional Tribunal. However, such an effect would be contrary to the Constitution, which does not provide that individual acts are subject to the review of this body, including decisions on the introduction of extraordinary measures. It appears that this problem can be solved by assuming that the ruling of the Constitutional Tribunal can only have an impact on the normative element of such regulations. Thus, even if the Tribunal finds that a regulation was issued in breach of rules of procedure or competence, it can only deprive the normative provisions of their binding force. In such a case, the extraordinary measures would remain in force, but no limitations on human rights specified in the extraordinary measures would be binding. This would then require an immediate revision of the regulation,<sup>29</sup> which would redefine this issue.

At this point it is worth pointing out that such problems do not occur in the case of amending regulations. These are purely normative in nature and are therefore entirely subject to the Constitutional Tribunal's review. Thus, a ruling finding that there has been an infringement of the procedure or of the competence necessary for issuing such a regulation would result in the complete loss of the regulation's binding force.

There does not seem to be any other way of monitoring the lawfulness of such regulations with *erga omnes* effects. In particular, they are not subject to review by administrative courts. The introduction, termination or extension of extraordinary measures essentially involves modifying the basic principles of the State's functioning—so it is difficult to classify actions of this level of importance as falling under the scope of public administration. Unquestionably, the President and the Council of Ministers, when taking decisions on matters of extraordinary measures, do not act as administrative bodies, but as central State organs exercising their powers in the sphere of the constitutionally conferred *imperium*.<sup>30</sup>

An interesting issue is whether the regulations in question, to the extent that they are not subject to the review of the Constitutional Tribunal, could, at the behest of the ordinary legislator, become subject to review by the Supreme Court. A specific legal basis for this could be Article 183 sec. 2 of the Constitution, in which it is indicated that the Supreme Court carries out activities other than the supervision of common and military courts, as specified in the Constitution and statutes. It is not clear how much room for manoeuvre this provision grants to the ordinary legislator. The creation of mechanisms for binding judicial review of the lawfulness of regulations on extraordinary measures would without a doubt significantly modify relations between the organs of public authority. However, this would only serve to protect the rule of law, which is one of the fundamental principles of the

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<sup>29</sup> And the principles for activity by public authorities, if this issue also falls within the scope of the regulations under discussion.

<sup>30</sup> A similar argument in the area of refusal to acknowledge the President's activity in the area of appointing judges for administrative activities is used by administrative courts (see, for example, the decision of the Supreme Administrative Court of October 16, 2012, I OSK 1879/12).

constitutional order and which, by its very nature, does not contradict other norms, principles or constitutional values. It would therefore be difficult to find adequate arguments against such a solution in the Constitution. It is therefore necessary to argue in favour of its admissibility.

A separate issue is the possibility of incidental supervision of the lawfulness of regulations on extraordinary measures by judges in a specific case. In accordance with Article 178 sec. 1 of the Constitution, judges in the exercise of their office shall be subject only to the Constitution and statutes.<sup>31</sup> This entails that they are not subject to acts of a lower rank if they are incompatible with the Constitution and statutes, which results in the matter being settled without them or,<sup>32</sup> alternatively, in such an act being referred to the Constitutional Tribunal as a query regarding a point of law. There seems to be no reason to suppose that these rules cannot also apply to regulations on extraordinary measures (whether they contain normative elements or are devoid of them).<sup>33</sup> The specific nature of these regulations does not in any way preclude the fact that, in the context of a specific case, their unlawfulness can be established, and the matter can be resolved without them<sup>34</sup>. In some cases, this may even be the only way to ensure the rule of law.<sup>35</sup>

## VI. CONCLUSION

The above reflections indicate that the issue of regulations on extraordinary measures, despite the seemingly laconic nature of the provisions concerning them in the Constitution, has been regulated quite precisely at the constitutional level. The role of the ordinary legislator is, in principle, only to elaborate on some of the issues discussed above.

It seems that the analysed constitutional regulations deserve approval. The regulations concerning extraordinary measures have been constructed

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<sup>31</sup> An analogous solution with regard to the judges of the State Tribunal is included in Article 199 sec. 3 of the Constitution.

<sup>32</sup> See, e.g., L. Garlicki, Uwagi do art. 178, in: idem (ed), op. cit., vol. 4, Warsaw 2005: 15–16; R. Hauser, J. Trzeciński, O formach kontroli konstytucyjności prawa przez sądy, *Ruch Prawniczy, Ekonomiczny i Socjologiczny* 70(2), 2008: 13.

<sup>33</sup> The possibility of the courts incidentally questioning unlawful individual acts originating from central State organs was confirmed in the resolution of the Supreme Court of 31 May 2017. (I KZP 4/17, OSNKW 2017, no. 7, item 37).

<sup>34</sup> For an alternative view, see K. Prokop, op. cit.: 30.

<sup>35</sup> This could be the case, for example, in the case of the President or members of the government, who unjustly, in bad faith introduced extraordinary measure in order to take actions that would normally be prohibited (for example related to harassment of the opposition). In such a state of affairs, the State Tribunal (or a common court) should be able to state that the extraordinary measures were introduced in violation of the law and, consequently, settle the matter as if the actions taken by the accused took place outside the extraordinary measures. It is worth noting here that part of the doctrine wrongly rejects the possibility of the judiciary examining the legality of the introduction of extraordinary measures—see, for example L. Mażewski, Kilka uwag o instytucji stanu nadzwyczajnego, *Wojskowy Przegląd Prawniczy* 82(2), 2009: 37.

correctly and can therefore be expected to fulfil their purpose, should they ever need to be applied.

*Mateusz Radajewski*  
*SWPS University, Wrocław*  
*mradajewski@swps.edu.pl*  
*<https://orcid.org/0000-0002-7547-9197>*

THE REGULATIONS ON EXTRAORDINARY MEASURES  
IN THE CONSTITUTION OF THE REPUBLIC OF POLAND:  
THEIR CONTENT, LEGAL NATURE  
AND THE SUPERVISION OF THEIR LAWFULNESS

S u m m a r y

The objective of the article is to: identify all kinds of regulations related to extraordinary measures (that is legal acts that affect the validity and content of particular extraordinary measures); to reconstruct the elements of their content and define their legal nature, along with the means of supervising their lawfulness. In the article four types of such regulations will be distinguished: regulations introducing extraordinary measures, regulations which extend and terminate them, as well as regulations that amend the regulation introducing extraordinary measures. Their content and legal character are varied. The most complex is the regulation introducing extraordinary measures, since it is both an individual and normative act. The author concludes that the analysed regulations are subject to the review of the Constitutional Tribunal. In the remaining scope, the possibility of their supervision by the judiciary is limited; however, it is possible to question them incidentally before the courts and the State Tribunal. The reflections lead to the formulation of a positive assessment of the constitutional provisions related to the issue under analysis.