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Data: 18/11/2026 17:08:51

Articles

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Data: 18/11/2026 17:08:51

The COVID-19 Pandemic as an Opportunity for a Permanent Reduction in Civil Rights

Pandemia COVID-19 jako możliwość trwałego ograniczenia praw obywatelskich

ABSTRACT

The COVID-19 pandemic has had far-reaching effects, which are primarily being felt in the functioning of the health service, the organization of social life, and the state of the national economy. It is also worth paying attention to the legal and political consequences which are less obvious and noticeable for average citizens. One of the most important is the change in legislation which entails limiting civil liberties and rights. This article is on empirical proof of how Polish legislation is reducing fundamental rights. The authorities in combatting the pandemic are not using the solutions that appear in the Polish Constitution, but use the non-constitutional form of special laws. The authors, therefore, when discussing the problem refer to US legislation and policy which has the notable example of the Patriot Act which can be interpreted as being a pretext for limiting civil liberties in the name of combating terrorism. As stated, such emergencies as the current pandemic or the threat of terrorism, are used to permanently and significantly reduce civil rights.

Keywords: the COVID-19 pandemic; fundamental rights; civil liberties; civil rights; US legislation; Polish legislation

INTRODUCTION

Situations to do with threats to public security often legitimize legislative initiatives that strengthen competences of public authorities, and limit the scope of exercising civil rights and liberties. Such action is always presented as being temporary measures that are necessary to remove a threat and which will be withdrawn only as soon as the threat disappears. However, the question arises whether a situation of crisis that is a threat to the security of an entire society, such as a terrorist attack, a crisis in a financial system, or a pandemic, is not in a democratic state taken to be an opportunity to permanently, not only temporarily, strengthen the instruments of control that are available to the entities that exercise authority over the governed, and also as an opportunity for a permanent, not only temporary reduction in the scope of exercising civil rights and freedoms (of various types: personal, economic, political, etc.).

The research and analyses presented in this article serve to defend the thesis that in recent years such tendencies can be observed in democratic countries. Citizens that sense threat and uncertainty that is caused by a situation that poses a threat to the very basis of existence, such as a military attack, or a pandemic, agree to

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Data: 18/11/2026 17:08:51

a temporary reduction of rights and freedom because they recognize that the actions of the authorities will be more effective. Erich Fromm already in *Escape from Freedom* showed that a person is willing to voluntarily submit to enslavement provided that it guarantees the person a sense of security.[1] An example of such a situation is the COVID-19 pandemic which has spread throughout the world in a short time. COVID-19 is not only a highly contagious disease that spreads quickly, but above all it is very dangerous to the human species. COVID-19 meets the criteria of being the top 5th category in the CDC Pandemic Severity Index[2] chart and for which the mortality rate starts at 2.0%. For COVID-19 it is around 2.1% (as of 2 June 2021).[3] It, therefore, is a global threat to human health and life. The state of this "plague" has exposed not only the fragility of our existence, but also the weakness of today's global civilization. After all, today, we are at the stage of shaping a post-modern society. The problem was firmly emphasized by Zygmunt Bauman who indicated that today we are faced with the dire choice of security or freedom.[4]

The dangers to maintaining civil rights and freedom that result from situations of extraordinary threat are indicated, i.a., by the fact that the solutions under "anti-crisis" laws that limit the right of individuals to exercise rights may not always be justified by the need to combat a threat, and also that "extraordinary" solutions can be extended even though a threat has already subsided, or is more and more illusory.

Several research methods were used to be able to demonstrate the mentioned thesis. The first was an original empirical method of determining long-term trends in the process of creating the most important legislation for the country to do with how frequently legislators followed specific objectives of legislative policy. The second research method was a dogmatic analysis of constitutional and statutory regulations and judicature in the USA and Poland in the context of accepting solutions in law to counteract threats to public security, with specific emphasis on selected solutions in law that appeared in both countries in 2001–2020.

[1] E. Fromm, *Escape from Freedom*, New York 2013.

[2] *Pandemic severity index*, https://en.wikipedia.org/wiki/Pandemic_severity_index [access: 6.03.2021].

[3] Johns Hopkins University & Medicine. Coronavirus Resource Center, *COVID-19 Dashboard by the Center for Systems Science and Engineering (CSSE) at Johns Hopkins University*, https://coronavirus.jhu.edu/map.html [access: 2.06.2021].

[4] Z. Bauman, *Liquid Modernity*, Cambridge 2000.

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 18/11/2026 17:08:51

OPINIONS IN JURISPRUDENCE TO DO WITH THE PROBLEM OF ENACTING LAW IN A SITUATION OF THREAT TO PUBLIC SECURITY

The law can be both an instrument to strengthen the control of entities exercising authority over the actions of individuals that are being governed and a means of strengthening the control of individuals over the action of subjects exercising authority. Each of those functions of the law has an axiological foundation, but each remains, to a large extent, opposite to the other because they often serve to strengthen the position of social groups that have separate, or even opposing, interests. In the context of the process of law-making nation-wide, a transition from the function of implementing a strengthening of the control of entities in authority over the actions of individuals being governed to the function of strengthening the control of individuals over the actions of entities in authority, and *vice versa*, is not a socially easy process, or trivial. That which is beneficial for a social group wanting to make a change that is desired is a novel and exceptional circumstance that will justify the necessity of making the change and which will be so important for everyone that it will "gag" opponents. An example of such an occasion is the emergence of an extraordinary public health threat of the COVID-19 pandemic. The pandemic has caused a situation whereby society has voluntarily sacrificed freedom for the sake of security. "It's not surprising that we talk about the virus in terms of a war. The emergency provisions effectively force us to live under a curfew. But a war against an invisible enemy that can nestle in any other human being is the most absurd of wars. It is, to be truthful, a civil war. The enemy isn't somewhere outside, it's inside us".[5]

It is, therefore, no coincidence that the COVID-19 pandemic reveals close links between the response of the government to the crisis and the principle of the rule of law. At this point, it is worth recalling the constitutive components that make up the canon of understanding the rule of law. Those are:

- a public authority is bound and accountable by pre-existing, clear, and known law,
- citizens are treated as being equal under the law,
- human rights are protected,
- citizens have access to effective and predictable mechanisms to resolve disputes,
- law and public order are common.[6]

[5] M. Foucault, S. Benvenuto, G. Agamben, *Coronavirus and Philosophers*, "European Journal of Psychoanalysis" 2020, www.journal-psychoanalysis.eu/coronavirus-and-philosophers [access: 6.03.2021].

[6] T. Bingham, *The Rule of Law*, London 2011.

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 18/11/2026 17:08:51

The situation of there being such an extraordinary state enables the authorities to legislate beyond the limits of that which was permitted to date, i.e., to the phenomenon referred to as the instrumentalization of the law about which writes Ágnes Heller, meaning such an amendment of legal order by the authority (primarily, legislative and executive) that leads to the emergence of authoritarianism.[7] In literature on the subject, there is a two-fold approach to a state of emergency: constitutional-legal (normative) and extra-legal (factual).

Oren Gross and Fionnuala Ní Aoláin presented, in flowing suit, five positions for emergency situations. Among the constitutional approaches they included: necessity as a source for law and necessity as "meta-regulation of constitutional construction". The three remaining non-constitutional ones are: political necessity making issues of law irrelevant; necessity as a prerequisite for suspending law, but not the creation of novel law; necessity as a justification for unlawful conduct without giving it the nature of law, or suspending it.[8]

Many modern constitutions define emergency measures and situations necessary to their implementation. In situations of specific risk, if ordinary constitutional measures were to be insufficient, any of the following appropriate emergency measures could be implemented: martial law, a state of defense, a state of emergency, a state of natural disaster. An emergency occurs as a result of a sudden, rapid, and, usually, unexpected situation such as the current pandemic. The situation is a direct threat (loss of life, health, material and non-material losses) of global phenomenon. Such a state determines the need to provide assistance and take immediate preventive or corrective action, mainly by public authorities (government). In Poland, regulations under a state of emergency have the status of being constitutional or are in separate legislation the legitimacy of which is provided in the constitution. They are a permanent and indefeasible component of the political system of the state (Chapter XI of the Polish Constitution[9]).

Emergency measures are usually understood to mean a special manner of exercising public authority. They are usually preceded by specific circumstances, e.g., natural phenomena, rapid social or political events, armed conflict. That condition should be temporary. That applies both to the crisis itself and to how to respond to it.[10] A distinctive feature of a crisis is that the crisis changes the competence of a public authority within the principle of separation and balance of power. The

[7] Á. Heller, *Wykłady i seminaria lubelskie*, Lublin 2006, pp. 13–28.

[8] O. Gross, F. Ní Aoláin, *Law in Times of Crisis*, Cambridge 2006, p. 47.

[9] Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws 1997, no. 78, item 483, as amended). English translation of the Constitution at: www.sejm.gov.pl/prawo/konst/angielski/kon1.htm [access: 10.09.2021].

[10] O. Gross, *"Once more unto the Breach": The Systemic Failure of Applying the European Convention on Human Rights to Entrenched Emergencies*, "Yale Journal of International Law" 1998, vol. 23(2), p. 459.

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 18/11/2026 17:08:51

pandemic is an extraordinary phenomenon and, regardless of regulations, it compels that there be specific conduct, e.g., when accessing medical care or medical resources. From the aspect of medicine, requires special action which usually means discrimination and unequal access to medical care. In such an extraordinary situation as a pandemic, the basic rule of equality is suspended in favor of one or both of the rules of use-ability (utility), or aid to those most in need. The question, here, arises whether similar discrimination can be applied outside the area of medical assistance in relation to those areas that do not involve an immediate threat to life, such as to the economy. It seems that the threat to life and health caused directly by a pandemic is a unique type of threat that is disproportionate to other types of threat or risk. It, therefore, as such, could justify a rule of discrimination in allocating access to medical assistance. But the remaining areas of risk associated with the pandemic should not mean change in legislation leading either to discrimination or to restrictions of rights or freedom except in situations that are directly related to the protection of health and life.

The emergency situations specified in the constitution should not, howsoever, infringe upon the principle of the rule of law. Even though constitutional regulations sometimes limit basic human and civil rights, the basic task of them, however, is to secure the life and health of an entire community. There is no doubt that in a public health crisis, such as the COVID-19 pandemic, there is bound to appear that which is known as "grey holes" which are an expression of open and unclear concepts.[11] The key problem is not to use emergency measures for purposes other than those for which they were designed. Ralf Salam is correct that "a state of emergency poses a challenge to democratic constitutional makers to ensure the exercise of authority, in particular, by the executive, which facilitates the exercise of strong and effective government, while at the same time providing safeguards against abuse".[12]

In many countries, public authorities to deal with the pandemic have been given specific authority to isolate and quarantine citizens. Such solutions were and are even recommended by international organizations.[13] Workplaces, kindergartens, schools, and universities were closed to contain the spread of the pandemic. The state and institutions of its, which are responsible for controlling the phenomenon were also deprived of the possibility of functioning normally. Isolation as a means of combating a pandemic is a widely accepted solution. However, even though international law permits that method of combating a pandemic (as being historically justified), isolation and quarantine are often abused. Limited testing in Poland

[11] D. Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency*, Cambridge 2009.

[12] R. Salam, *The Relationship Between States of Emergency, Politics and The Rule of Law*, "Canterbury Law Review" 2017, vol. 23, p. 24.

[13] R. Magnusson, *Chapter 11: Public Health Emergencies*, [in:] *Advancing the Right to Health: The Vital Role of Law*, Geneva 2017, p. 166.

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 18/11/2026 17:08:51

has caused prolongation of having to stay in isolation or quarantine, until recently, was the only measure used to prevent the spread of the virus. Attention should be paid to the fact that the pandemic is used to discriminate against specific social groups. In Poland, it affects the elderly, the sick, and those having an increased risk of infection, persons staying in social welfare centers, and, above all, health care workers.[14] In many countries, there have been restrictions on the freedom of speech and the media has been used to dis-inform the public about an imminent danger.[15]

In the United States, where the Constitution did not provide the institution of states of emergency, their introduction was evolutionary (through the Supreme Court jurisprudence). "We the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America"[16] – the words of the Preamble to the US Constitution reflect Founding Fathers' understanding of the "blessings of liberty" versus "defense" dilemma.

Protecting personal freedoms became more evident with the ratification of the Bill of Rights in 1791. Freedom of religion, freedom of expression, the right to organize peaceful gatherings (First Amendment), or procedural due process of law (Fifth Amendment) have been enshrined in the US Constitution. The Fourth Amendment limited the right of the authorities to search and seize: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized".

However, in 1798 Congress restricted the exercising of civil rights by passing the Alien Sedition Act.[17] To protect the security of the newly established republic congressmen approved a law that made a false critique of the government and government officials a federal crime. John Adams's administration used that law, aiming at securing national unity, to prosecute political opponents. It took the Supreme Court more than 150 years to declare the Alien Sedition Act to be unconstitutional, even though as early as in December 1798 the future President John Adams presented a resolution of the delegates of Virginia firmly condemning the act and foreseeing the consequences of an authority unbalanced in intimidating individual

[14] United Nations Department of Global Communications, *UN working to ensure vulnerable groups not left behind in COVID-19 response*, www.un.org/en/un-coronavirus-communications-team/un-working-ensure-vulnerable-groups-not-left-behind-covid-19 [access: 6.03.2021].

[15] S. Svensson, *Disinformation kills: The Covid-19 infodemic*, 29.04.2020, https://observatoryihr.org/blog/disinformation-kills-the-covid-19-infodemic [access: 6.03.2021].

[16] Constitution of the United States of America: Analysis, and Interpretation – Centennial Edition – Interim, S. Doc. 112-9, August 26, 2017.

[17] Alien Sedition Act of 1798, 1 Stat. 596.

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 18/11/2026 17:08:51

rights: "[…] the General Assembly doth particularly PROTEST against the palpable and alarming infractions of the Constitution, in the two late cases of the 'Alien and Sedition Acts', passed at the last session of Congress; the first of which exercises a power nowhere delegated to the federal government, and which, by uniting legislative and judicial powers to those of executive, subverts the general principles of free government, as well as the particular organization and positive provisions of the Federal Constitution; and the other of which acts exercises, in like manner, a power not delegated by the Constitution, but, on the contrary, expressly and positively forbidden by one of the amendments thereto, – a power which, more than any other, ought to produce universal alarm, because it is levelled against the right of freely examining public characters and measures, and of free communication among the people thereon, which has ever been justly deemed the only effectual guardian of every other right".[18]

During turbulent times the United States often resorted to emergency law to limit the scope of individual liberty. Bruce Ackerman provides a list of such infringements used in the past; viz, "curfews, evacuations, compulsory medical treatment, border controls; authority to search and seize suspicious materials and to engage in intensive surveillance and data compilation; freezing financial assets and closing otherwise lawful businesses; increasing federal control over state governments, expanding the domestic role of the military, and imposing special limitations on the right to bear arms".[19]

The experience of the use of emergency laws proves that breaching a checks-and-balances system is not limited to the executive-legislative branch struggle, but affects the judicial branch of the government as well. World War I and later the "red scare" resulted in two important cases. In *Schenck v. United States* the Supreme Court upheld a penalty of ten years' imprisonment for distributing rather harmless pamphlets and, thereby, permitted limiting the freedom of speech.[20] During the McCarthy era, in *Dennis v. United States*, the Supreme Court upheld imprisonment under the Smith Act of 1940[21] of a group from the Communist Party USA that had organized themselves to study works of Marx, Lenin, and Engels and, thereby, the Supreme Court denied the group the right to exercise freedom of speech.[22] Even though it was not, as Erwin Chemerinsky claims in his paper, that Chief Justice Red Vincent in an opinion for the court wrote: "[…] when the

[18] J. Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution*, vol. 4: *Virginia Resolutions of 1798*, Washington 1836, pp. 528–529.

[19] B. Ackerman, *Before the Next Attack: Preserving Civil Liberties in an Age of Terrorism*, New Haven 2006, p. 96; P. Laidler, *How Republicans and Democrats Strengthen Secret Surveillance in the United States*, "Political Preferences" 2019, vol. 25, pp. 5–20.

[20] *Schenck v. United States*, 249 U.S. 47 (1919).

[21] Smith Act of 1940, Stat. 670, 18 U.S.C. § 2385.

[22] *Dennis v. United States*, 341 U.S. 494 (1951); *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

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Data: 18/11/2026 17:08:51

evil is so great as to overthrow the United States government, there doesn't need to be any proof of increase in likelihood",[23] the Supreme Court decided that the communist party by merely attempting to organize the study group "created a 'clear and present danger' of an attempt to overthrow the Government by force and violence".[24] Protecting the right to privacy, to a fair trial and, to a lesser extent, the right to freedom of expression in the United States was significantly eroded after the terrorist attacks on 11 September 2001, which is discussed in more detail in the latter part of this article.

RESEARCH

1. Method of research

The research project, the results of which are discussed in this article, was based on a unique, innovative method of study of Polish legislation from 1990 onwards. The method is qualitative and quantitative in nature. It is based on the assumption that the creation of generally binding law shows long-term tendencies, as it is subject to the law of supply and demand, just as is the production of any other tangible or intangible goods in society. The tendencies are manifested in a periodic increase or periodic reduction of the involvement of the legislator in creating legislation that refers to specific social, economic, and political reasons for creating the law (i.e., so-termed material sources of law). In the project, the starting point was the formulation of partial research questions (research issues) based on theoretical assumptions about the occurrence of basic economic, social and political reasons (factors) determining the creation of specific legislation. The questions were used to assess whether the reasons for drafting the legislation being analyzed were the factors that have been mentioned, and to what extent and how often. An assessment of the occurrence of a factor (assessment) was made in accordance with the importance of the factor in creating the legislation. The data obtained in that way was aggregated into time-number sequences (time series), with the standard unit of time being one year.

The last tranche of research is a certain exception to the mentioned assumptions because it only applies to the middle of a year, i.e., the period January–June 2020. That period has almost all the regulations adopted by the Polish parliament to counteract the COVID-19 pandemic and to combating the social-economic effects of it.

[23] E. Chemerinsky, *Post 9/11 Civil Rights: Are Americans Sacrificing Freedom for Security?*, "Denver University Law Review" 2004, vol. 81(4), p. 761.

[24] *Dennis v. United States*, 341 U.S. 494 (1951).

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 18/11/2026 17:08:51

An assessment of the occurrence of specific reasons for the creation of a specific act is made on the basis of aggregating data on the course of the legislative process that was obtained from sources such as the justifications of draft legislation, opinions of experts (e.g., employees of the Polish Sejm Analysis Bureau), opinions of entities consulted in the legislative process (e.g., opinions of the Polish Supreme Court, positions of trade unions, opinions of employer organizations, etc.), records of the course of discussions at plenary sessions of the Sejm and Senate of the Republic of Poland, parliamentary and senate committees, etc.

The process of an assessment consisted in assessing each act, from the aspect of the partial research questions, in accordance with seven possible types of assessment. For each of the questions (research issues) formulated in relation to each of the acts one of the following values was given: –3, –2, –1, 0, 1, 2, 3. To note is that the assessments that were given were in accordance with a seven-point ordinal scale (similar to the five-point Likert scale that is considered in social sciences).[25] The point was to emphasize clear differences in socio-economic and political importance between specific regulations (e.g., between a novel codification and an amendment to a single provision). Providing a value depended on the degree of convergence with the regulatory effect that was assumed in the research question (issue): from "3" (strong, significant connection with the research issue, the purpose of legislation coincides with the direction assumed in the research question), to "–3" (strong, significant connection with the research issue, the purpose of the legislation is opposite to the direction assumed in the research question), and the value of "0" (meaning no reference to the issue under research).

The sequences of annual distributions of cumulative assessments obtained for each of the questions were the basis for creating appropriate time series that were subject to further analysis: each of the time series that was created should be understood to be a series of annual measures (synthetic measures) featuring the chosen properties of the distributions of aggregate assessments. The created series were divided into two types: a series of absolute values, which reflect the total number of assessed acts in specific years (type "counting") and, for a change, a series of relative values, i.e., those which did not reflect the number of acts in subsequent years (type "frequency"). In brief, the type "counting" portrays the legislator's overall commitment to the creation of law relevant to a given research issue, while the type "frequency" gives a better idea of how much – in that total number – there was draft legislation of great social, economic, or political importance.

For questions for which the annual cumulative assessments are in the vast majority the same in terms of value, the important measures are those that distinguish –3 and –2 (or only –3) from the others, or, to the contrary, distinguish values 2 and 3

[25] R. Likert, *A technique for the measurement of attitudes*, "Archives of Psychology" 1932, vol. 140, pp. 5–55.

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 18/11/2026 17:08:51

(or only 3) from other assessments. That approach leads to a group of working measures termed "cut down" or, correspondingly, "cut up". In brief, figuratively, the measures permit assessing the action of the legislator that is solely intended to achieve a legislative goal that coincides with the direction assumed in the research question, or the action of the legislator solely intended to achieve a legislative goal opposite to the direction assumed in the research question.

Finally, it is worth noting that the number of assessed acts, enacted in the first half of 2020, is significantly lower than those in corresponding periods in previous years. From around 2000, a typical figure is the enacting of about 80–100 statutes in one 6-month period. Assessments in the first half of 2020 were only of 53 acts. This is very significant information in the context of some of the research results that is discussed below.[26]

2. Research results

The results of the Polish legislator's activity in the first half of 2020 partially confirm a number of theses that could be formulated intuitively on the basis of general knowledge about the goals of legislative policy at the time of the COVID-19 pandemic. However, some research results were quite surprising, and even disturbing, in the context of the values to be cultivated through democratic rule of law. In the presentation of research data that follows the research results that are first discussed are those that can be taken to confirm the goals of legislative policy implementation that were declared by the ruling coalition, and then those the results of which can be interpreted to be the change, that was mentioned, in the implementation of the functioning of the law that was made for the benefit of entities dominant in society (politically and economically).

The assessed research issue was to do with determining whether the goal of legislative policy was to strengthen the sense of security in business transactions, to reduce the risk of failure in business (e.g., as a result of random factors or as a result of competition), or to create more favourable conditions for assessing the chances of achieving assumed economic goals (whether it was about increasing the predictability of the result of business). Negative assessments were justified in a situation when a regulation led to a reduction in the predictability of a business venture, or an increase in the risk of business failure. That issue relates to one of the key declared goals of legislative policy which was to reduce the risk of operating a business during the COVID-19 pandemic. The ruling coalition prepared a number

[26] For a broader discussion of the research method, see P. Chmielnicki, A. Dybała, M. Stachura, *Activity Rules of Economic Man in Society as the Source of Legal Norms*, Warsaw 2010, pp. 143–159, 174–184.

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 18/11/2026 17:08:51

of solutions that were intended to counter the effects of "freezing" the economy and the fleeing of customers.

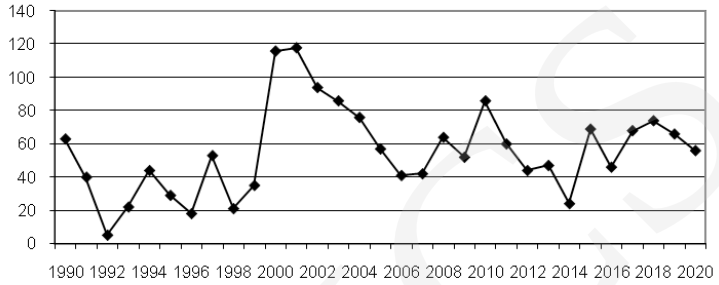


Figure 1. Regulations reducing business risk. Type, counting

Source: own elaboration.

In the basic type of compilation of data taking, when considering only a general level of legislator involvement in creating acts relevant to the research issue, it is not possible to observe a lack of increase in involvement for the type "frequency", when considering not only the "quantity" of legislative work, but also the "quality", i.e., the socio-economic importance of individual legislative initiatives. In 2020, there was a very clear increase in involvement in creating law reducing risk to business persons.

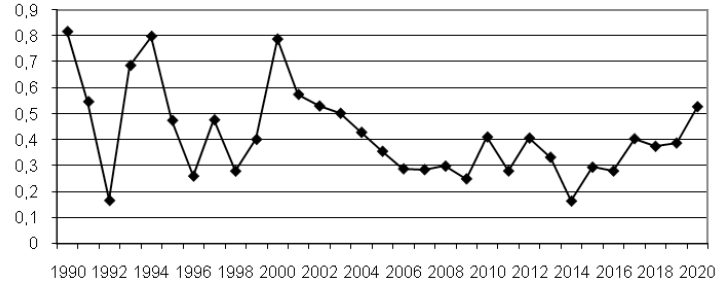


Figure 2. Regulations reducing business risk. Type, frequency

Source: own elaboration.

The results of the research, therefore, correspond, from one side, to the specific nature of the period being analyzed (a minor overall number of acts enacted in the first half of 2020), and, from another side, to the knowledge of the main goals of the legislative policy in the period being analyzed. The same is true for the next issue.

It is to do with determining whether the reason for creating the regulation is the intention to increase – broadly understood – the costs of functioning of the state (in

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Data: 18/11/2026 17:08:51

particular, activities related to increased expenditure from the state budget, or the budget of a local unit of government). Of course, negative assessments are justified in a situation when regulation was intended to reduce the costs of functioning in the public sphere.

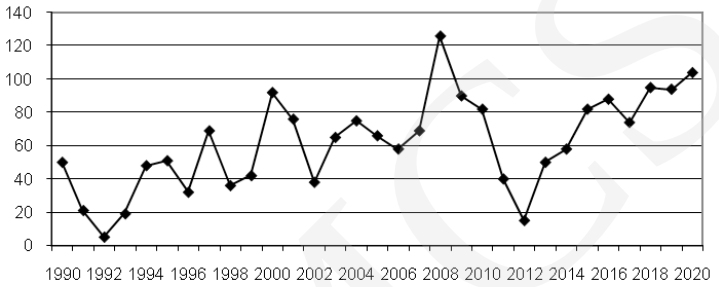


Figure 3. Regulations generating an increase in public spending. Type, counting

Source: own elaboration.

Draft legislation implemented in connection with the pandemic, described in propaganda as "shields", includes a very significant increase in public spending for purposes to do with counteracting the effects of the pandemic. That was the second goal of legislative policy that was extensively publicized by the Polish Coalition of a United Right. It is as could have been expected intuitively; both types of compilation of data actually show a clear upward trend that appears in 2020, and the scale of the phenomenon is evidenced by the course of the type "frequency" which shows that the legislator involvement in the creation of laws on increasing public expenditure reached a level that was a 30-year record!

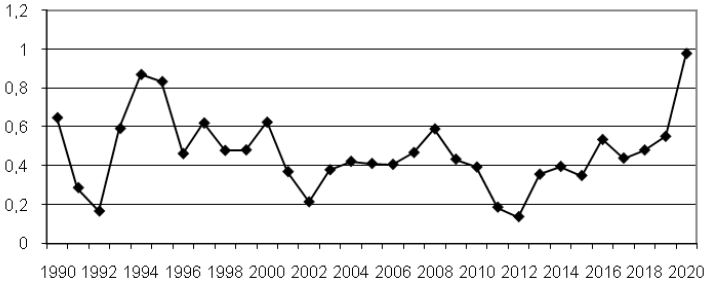


Figure 4. Regulations generating an increase in public spending. Type, frequency

Source: own elaboration.

The question arises, however, who was to benefit from the expenditure. That problem is related to another research issue the subject of which is to determine

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Data: 18/11/2026 17:08:51

whether the goal of legislative policy was to redistribute (allocate) goods (material or non-material benefit) solely on the basis of compensation for belonging to a community. This issue relates primarily to the implementation of the so-termed redistributive function of the state, i.e., the distribution of some of the goods generated/acquired within the state (as part of the distribution of national income), e.g., as a so-termed transfer of benefits.

Negative assessments are justified in a situation when the purpose of the act is to collect benefits in kind, financial or provided in the form of services to a beneficiary who received them as an entitlement (privilege) because of having a required status (e.g., the abolition of the possibility of some categories of pensioners to receive free drugs).

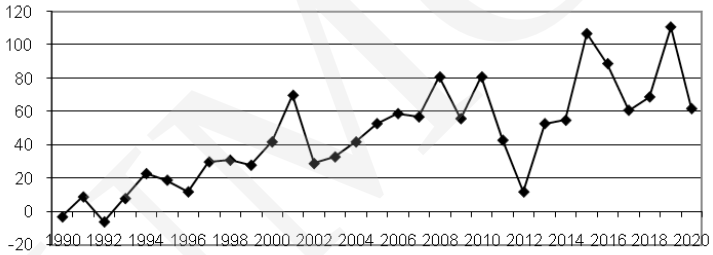


Figure 5. Regulations realizing the function of redistribution. Type, counting

Source: own elaboration.

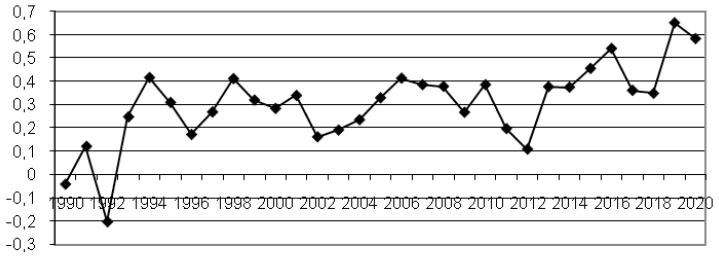


Figure 6. Regulations realizing the function of redistribution. Type, frequency

Source: own elaboration.

It happens to be that the increase in public spending generated by anti-COVID-19 laws was not intended to implement the function of redistribution (increasing the volume of transferring benefits). We draw attention to the fact that the involvement of the legislator in creating regulations aimed at achieving that goal of legislative policy even decreased in comparison to 2019 when, before the parliamentary elections, a number of legislative initiatives were adopted to increase the volume of social transfers.

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 18/11/2026 17:08:51

The research results presented so far correspond, essentially, to the intuitive (common) understanding of the direction of legislative work undertaken because of the threat from the COVID-19 pandemic. Subsequent results reveal a less obvious profile of decisions by legislators. Specifically alarming is the data obtained from assessing acts in the context of the issue of whether the reason for creating the regulation was the intention to formally strengthen (extend) the protection of the rights, which are respected in a democratic state, of subjects that have a relatively low economic or political ("dominated") possibilities. Put differently, the subject of the research was the problem of whether a regulation serves to protect civil or labour rights, to strengthen the means of citizens to control political authority, or to protect the rights of consumers against business persons having a dominant position on the market, etc.

Negative assessments are justified, here, in a situation when a regulation is to reduce (formally) the rights of "dominated" subjects in relation to "dominant" entities, e.g., it reduces access to information about the actions of the authorities, reduces the rights of employees, consumers, etc.

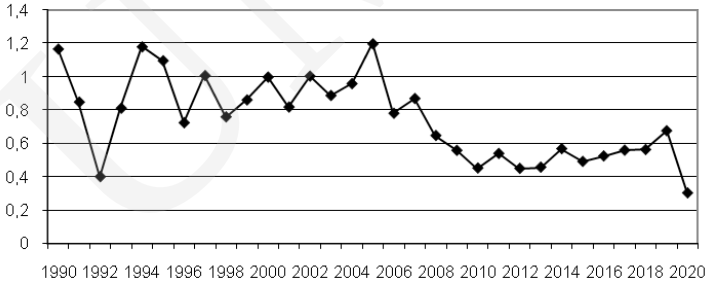


Figure 7. Regulations strengthening rights of subjects. Type, frequency

Source: own elaboration.

The slight upward trend that had been maintained for several years was suddenly broken in the first half of 2020. Even if the data for 2020 is only for six months, the direction that has been described is definitely unfavorable from the aspect of a democratic state of law. Of course, the rationale behind the practice is well-known, which is that a temporary restriction of civil rights is justified by the need to take extraordinary measures to combat the COVID-19 pandemic. An analysis of the documentation of individual legislative initiatives shows, however, that the necessity to introduce some solutions causes controversy. Some examples appear below.

The Act of 2 March 2020 on special solutions to prevent, counteract, and combat COVID-19, other infectious diseases, and the crises caused by them[27] includes

[27] Journal of Laws 2020, item 374.

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 18/11/2026 17:08:51

a solution by which public authorities are not to be liable for the harm caused by the authorities in performing public tasks related to counteracting COVID-19. The parliamentary opposition protested against that provision in very blunt terms and argued, i.a., that the bill is actually an introduction of martial law, that in the bill it is expressly provided that the State Treasury, units of local government, and state organizational units, are not to be liable for harm caused in connection with justified action and so, for example, they could demolish a house for a hospital and the State Treasury would not be responsible for that.[28]

The Act of 31 March 2020 amending the Act on the system of development of institutions[29] introduced the possibility of transferring all personal data to PFR from the Ministry of Finance and KAS, e.g., data from tax returns that was to date a fiscal secret. That also applied to data from other state organizational units and public authorities which includes that to which applied the law of secrecy (Article 21ab of the Act). There is doubt about the need for such a far-reaching deviation from protecting the data of citizens.

The purpose of the Act of 6 April 2020 on specific rules for holding general elections for the presidency of the Republic of Poland that were scheduled for 2020[30] was to establish that a method of correspondence was to be the only form of participating in the elections. That regulation, which was ultimately not implemented, although being in force for some time, was heavily criticized because of the risk of electoral irregularity and fraud in conditions of weakened social control over the course of voting.

The Act of 19 June 2020 on interest subsidies on bank loans granted to business persons affected by COVID-19, and on simplification of proceedings to approve an arrangement because of the occurrence of COVID-19[31] introduced very unfavorable solutions for employees. Experts employed in the Sejm of the Republic of Poland indicated that a reduction in working hours, or inclusion of an employee in budgetary downtime by an employer that experiences a decrease in revenues from the sale of goods or services as a result of COVID-19 which, thereby, results in a significant increase in the burden on the wage fund is permitted upon a 5% increase in the burden on the wage fund. Such a significant increase is to justify reducing the working time and remuneration by a maximum of 20% or to have it be included in budgetary downtime with a reduction in pay by no more than 50%. It is, therefore, disputable whether the restriction of employee rights is proportion-

[28] Statement of MP Katarzyna Lubnauer, record of the session of the Health Committee of the Sejm of the Republic of Poland (no. 13) of 2 March 2020, www.sejm.gov.pl/Sejm9.nsf/biuletyn.xsp?skrnr=ZDR-13 [access: 6.03.2021].

[29] Journal of Laws 2020, item 569.

[30] Journal of Laws 2020, item 827.

[31] Journal of Laws 2020, item 1086.

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Data: 18/11/2026 17:08:51

ate to the situation of an employer. The draft significantly worsens the situation of employees in a difficult situation of termination of employment and introduces novel mechanisms into civil law the effect of which is difficult to predict.[32]

Experts also indicate a controversial change to the criminal law. There is the opinion that the enacted amendments to the Penal Code infringe the constitutional principle of equality before the law, the principle of proportionality, the necessity and usefulness of tightening penal repression, the right to defend, the principle of defining the features activity that are prohibited under the sanction of a penalty, the principle of good legislation, the principle of a citizen having trust in the state, the principle of predictability of repressive provisions to do with a specific *vacatio legis*, give privileges to perpetrators of more serious acts in relation to the legal situation of perpetrators who commit acts less socially harmful and give rise to unfair and grossly inconsistent consequences in terms of penalties, which breach Article 31 (3), Article 32 (1), and Article 42 (1) and (3) in conjunction with Article 2 of the Polish Constitution.[33]

Knowledge about the adoption of such solutions makes the course of the graph in Figure 8 understandable. The value of only negative assessments concerning the protection of the rights of subjects (i.e., the level of legislator involvement in creating laws reducing civil rights and freedom) has reached a shameful record over a 30-year period, precisely in 2020, and the number of adopted acts is significantly lower than in corresponding periods of previous years.

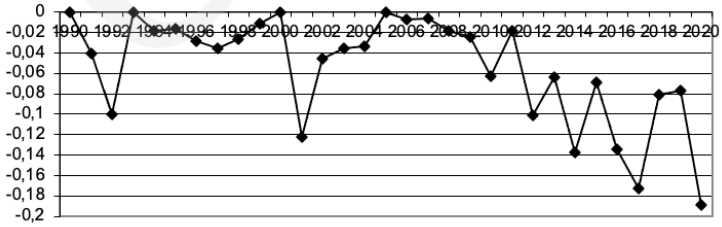


Figure 8. Regulations strengthening rights. Type, frequency, expected value reduced down by –1

Source: own elaboration.

The results of research on issues related to economic activity complete a portrayal of the situation. They indicate that the objectives of legislative policy favour those that have an economic advantage over the rest of society (business persons, employers). One of them was to do with determining whether the purpose of the

[32] Government bill on interest subsidies for bank loans to provide financial liquidity to business affected by COVID-19 and on amendments to certain other acts (Print no. 382 and 382-A), 2020, www.sejm.gov.pl/Sejm9.nsf/PrzebiegProc.xsp?nr=382 [access: 6.03.2021].

[33] *Ibidem*.

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 18/11/2026 17:08:51

regulation was to introduce novel burdens (novel transaction costs), or to impede business persons from achieving a business goal (new "entry barriers"). Negative assessments in this matter are justified when the goal of the legislative policy is the opposite, i.e., reducing the burden/obstacles to a business person achieving a business goal (a reduction of transaction costs or lowering entry barriers).

The graph in Figure 9 indicates a very strong commitment of the legislator in 2020 that was intended, precisely, to reduce transaction costs or lower entry barriers for business persons. The joint interpretation of the results of that and the previously discussed research issue lead to the conclusion that the Polish legislator in the COVID-19 pandemic took care of the interests of employers/business persons at the expense of the interests of "ordinary" citizens. However, that portrayal would be incomplete if attention is not paid to which business persons did the legislator create to be beneficiaries of novel legislative solutions.

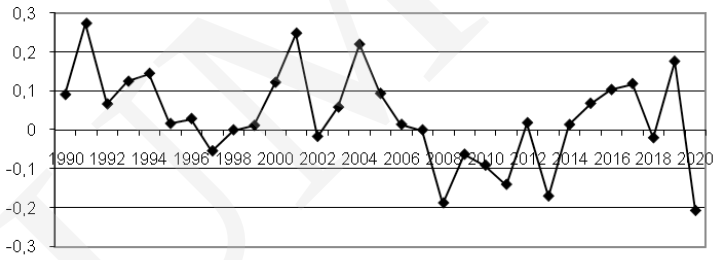


Figure 9. Regulations increasing burdens on business persons. Type, frequency

Source: own elaboration.

The research results indicate that the actions of the Polish legislator after the outbreak of the COVID-19 pandemic were largely driven by the concern to maintain a healthy economy. Ordinary citizens were beneficiaries of the activities to a much lesser extent. Even more, there are a number of solutions limiting civil and labour rights that are difficult to justify by giving the reason that they are meant to combat the pandemic.

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Data: 18/11/2026 17:08:51

DOGMATIC ANALYSIS OF LEGAL REGULATIONS AND JURISPRUDENCE IN THE CONTEXT OF ACCEPTING SOLUTIONS THAT COUNTERACT THREATS TO PUBLIC SECURITY – SELECTED LEGAL SOLUTIONS IN THE USA AND POLAND IN 2001–2020

The research results that have been presented indicate a behaviour of the Polish legislator during the COVID-19 pandemic that is disturbing, under the standards of a democratic state ruled by law, and which behaviour is moving to reduce civil rights and liberties beyond the needs resulting from combating the pandemic. The question arises whether citizens can rely on the effects of the legislative action being temporary or whether they will have a permanent effect on the Polish legal system. To be able to answer the question, it is worth comparing the legislative effect of other emergency situations in Poland to those in other countries. Very interesting conclusions can be drawn, among others, from the history of the action of US authorities aimed at combating terrorism after 11 September 2001.

In jurisprudence, it is claimed that in a democratic state ruled by law the constitution designates all the rules and is the basis for the functioning of the state. Each item of legislation that functions in legal circulation is subordinated to the constitution. It is that which sets the axiological foundation of the life of a political community.[34] Constitutionalism is the dominant model of normative regulation of the sphere of politics[35] because a constitution does not only define the framework of activities of state authorities, but also defines a set of professed values and political goals. That act ensures the stability of an entire system; it defines the rules of the political game between subjects in authority and organizes mutual relations between them. The law in a constitution restricts sovereign rule. Holders of political authority must themselves be ruled by law.[36] That is done by:

- determining the formal properties of the law itself and creating numerous procedural guarantees regarding the creation and application of it for which the state determines the limits of the use of sanctions and state coercion,

[34] R. Alexy, *La doble naturaleza del derecho*, Madrid 2016.

[35] *Constitutionalism: Philosophical Foundations*, ed. L.A. Alexander, Cambridge 2001; L.A. Alexander, *Constitutionalism*, [in:] *The Blackwell Guide to the Philosophy of Law and Legal Theory*, eds. M.P. Golding, W.A. Edmundson, Oxford 2008, pp. 248–258; N. Devins, L. Fisher, *The Democratic Constitution*, Oxford 2004; H. Dippel, *Modern Constitutionalism: An Introduction to a History in the Need of Writing*, "Legal History Review" 2005, vol. 73, pp. 153–170; *The Paradox of Constitutionalism. Constituent Power and Constitutional Form*, eds. M. Loughlin, N. Walker, Oxford 2007; G. Pino, *Il costituzionalismo dei diritti. Struttura e limiti del costituzionalismo contemporaneo*, Bologna 2017; A. Barbera, *Le basi filosofiche del costituzionalismo*, Bari–Roma 2019.

[36] M. Krygier, *Four Puzzles about the Rule of Law: Why, what, where? And who cares?*, "Sant'Anna Legal Studies" 2015, vol. 5, p. 20.

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 18/11/2026 17:08:51

- determination of the axiological properties of law, which include: the "internal morality of law" as defined by Lon L. Fuller[37]; Herbert L.A. Hart's rule of recognition and the thesis about the minimum morality of the law;[38] Gustaw Radbruch's formula *Lex iniustissima non est lex*, which opens the way to moral values in judicial decisions;[39] Robert Alexy's a non-positivist understanding of law, whereby next to the real dimension related to, e.g., the act of decision-making, coercion or effectiveness, there is an "ideal element" (values contained in a constitution),[40]
- institutionalization of a specific dualism of law, a dualism that balances law as an instrument of governing by law, wherefrom one aspect there are spheres excluded from interference by an authority, or at least deprived of the possibility of easily or arbitrarily changing it (this applies to the constitution and fundamental rights, "eternal law"),[41] and at the same time the law created and applied is subject to judicial or tribunal control;
- unequivocal constitutional regulations permitting restrictions on civil rights and freedoms during a state of emergency, which must be restrictive and clearly defined.[42]

Theoretically, under the assumption of the double nature of the law and moral correction of it, one can counteract phenomena that threaten individual and collective security. Contemporary constitutionalism should be an effective means of securing against (to use the term of G. Radbruch) "statutory lawlessness". Do modern constitutions in fact fulfill such a role?

After the terrorist attacks of 11 September 2001, it became clear not only to the George W. Bush administration, but to society as a whole, that the United States must start a "War on Terror" (also known as "Global War on Terrorism"). On 20 September, President G.W. Bush stated before the Congress: "Our enemy is a radical network of terrorists, and every government that supports them. Our war on terror begins with al Qaeda, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped and defeated. […]

[37] L.L. Fuller, *The Morality of Law*, New Haven–London 1969.

[38] H.L.A. Hart, *The Concept of Law*, Oxford 1961.

[39] G. Radbruch, *Gesetzliches. Unrecht und übergesetzliches Recht*, "Süddeutsche Juristen-Zaitung" 1946, vol. 1, pp. 105–108.

[40] R. Alexy, *op. cit.*, pp. 73–83.

[41] G. Palombella, *The Rule of Law as Institutional Ideal*, "Comparative Sociology" 2010, vol. 9(1), pp. 4–39.

[42] K. Dobrzeniecki, *Prawo wobec sytuacji nadzwyczajnej. Między legalizmem a koniecznością*, Toruń 2018.

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 18/11/2026 17:08:51

Americans should not expect one battle, but a lengthy campaign, unlike any other we have ever seen. It may".[43]

In the weeks after the attacks on the World Trade Center and the Pentagon, the US Congress adopted several changes to existing regulations relating to national security. The USA Patriot Act of 2001[44] went through Congress with almost unprecedented,[45] ubiquitous support from both the republican and the democratic parties. Even on such a rare occasion of national unity, there were some voices criticizing the Patriot Act as the departure from the long tradition of protecting individual liberty and the right to privacy.[46] This has led to significant facilitation in eavesdropping on persons suspected of terrorism or supporting such activity, or in collecting information about such persons. One such investigative tool is the National Security Letter (NSL) used "to obtain subscriber information from third parties such as telephone companies, Internet service providers, financial service providers, and credit institutions".[47]

Ironically, NSLs are rooted in the Right to Financial Privacy Act of 1978[48] that aims to protect "customers of financial institutions from unwarranted intrusion into their records while at the same time permitting legitimate law enforcement activity". The adoption of this law was a congressional response to the Supreme Court decision in *United States v. Miller*.[49] But the original intent to protect individuals was changed by the Electronic Communications Privacy Act of 1986[50] which further extended the types of information that could be gathered through NSLs. An NSL prohibits a third party from revealing to anyone that such a request was made (a so-termed "gag order")[51] to protect the secrecy of the operation.

The USA Patriot Act of 2001, as Brett Weinstein observed, "bolstered the government's ability to use NSLs to demand information by weakening the requirement

[43] *Address to a Joint Session of Congress and the American People*, https://georgewbush-whitehouse.archives.gov/news/releases/2001/09/text/20010920-8.html [access: 6.03.2021].

[44] Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA Patriot Act) of 2001, Pub. L. 107-56, 115 Stat. 272.

[45] 147 Cong. Rec. 7224 (2001); 147 Cong. Rec. 11059 (2001).

[46] R. Rybkowski, *Dyskurs strachu. Jak się nie bać współczesnych mediów?*, "Horyzonty Wychowania" 2011, vol. 10(19), pp. 43–57; R. Wyden, C. Guthrie, J. Dickas, A. Perkins, *Law and Policy Efforts to Balance Security, Privacy and Civil Liberties in Post-9/11 America*, "Stanford Law and Policy Review" 2006, vol. 17(329), pp. 331–352.

[47] H. Bloch-Wehba, *Process Without Procedure: National Security Letters and First Amendment Rights*, "Suffolk University Law Review" 2016, vol. 39(3), p. 369.

[48] Financial Institutions Regulatory and Interest Rate Control Act of 1978, Pub. L. 95-630, 92 Stat. 3641.

[49] House of Representatives Report 95-1383 (1986).

[50] Electronic Communications Privacy Act of 1986, Pub. L. 99-508, 100 Stat. 1848.

[51] J.M. Zitter, Annotation, *Constitutionality of National Security Letters Issued Pursuant to 18 U.S.C.A. § 2709*, (2008), 25 A.L.R. FED. 2d 547.

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 18/11/2026 17:08:51

for individualized suspicion and increasing the number of agents who can certify the need for an NSL. As a result, the use of NSLs has since skyrocketed".[52] Andrew E. Nieland noted that the novel law "eliminated the requirement of 'articulable facts' showing a connection to a foreign power. As a result, an FBI agent could […] issue an NSL upon internal certification that the information sought is relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities".[53]

The administration did, when drafting the Patriot Act, indicate the need to change the law which was compelled by technological progress access to which is available to persons involved in terrorist activities. As it was then explained: "Terrorist organizations have increasingly used technology to facilitate their criminal acts and hide their communications from law enforcement. Intelligence-gathering laws that were written for an era of landline telephone communications are ill-adapted for use in communications over multiple cell phones and computer networks, communications that are also carried by multiple telecommunications providers located in different jurisdictions. Terrorists are trained to change cell phones frequently, to route e-mail through different Internet computers in order to defeat surveillance. Our proposal creates a more efficient, technology-neutral standard for intelligence gathering, ensuring law enforcement's ability to trace the communications of terrorists over cell phones, computer networks and the new technologies that may be developed in the years ahead".[54]

But in the 21st century, when more and more advanced mobile phones are used not only for the purposes of conversation, or sending SMSs, but also as maps, primary devices to follow social media, or to monitor physical exercises "toll-billing records can reveal friendships and intimate relationships and religious beliefs, political associations, or reporter-source relationships".[55]

The extensive use of NSLs by federal agencies caught the attention of the public in the two court cases *Doe v. Ashcroft*, vacated and remanded sub nom. *Doe v. Gonzales*. In the first case, an anonymous Internet service provider (ISP), supported by the American Civil Liberties Union (ACLU), claimed that the NSL that was received breached the plaintiff's rights under the First, Fourth, and Fifth Amendment. The court ruled that the Fourth Amendment was breached and "the crux of the problem is that the form of an NSL, such as the one issued in this case, which is preceded by a personal call from an FBI agent, is framed in imposing language

[52] B. Weinstein, *Legal Responses and Countermeasures to National Security Letters*, "Washington University Journal of Law & Policy" 2015, vol. 47, pp. 217–263.

[53] A.E. Nieland, *National Security Letters and the Amended Patriot Act*, "Cornell Law Review" 2007, vol. 92(6), p. 1211.

[54] Administration's Draft Anti-Terrorism Act, Serial no. 39, 2001, Washington 2001, p. 6.

[55] H. Bloch-Wehba, *op. cit.*, p. 381; *Riley v. California*, 134 S. Ct. 2473, 2484 (2014).

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 18/11/2026 17:08:51

on FBI letterhead and which, citing the authorizing statute, orders a combination of disclosure in person and in complete secrecy, essentially coerces a reasonable recipient into immediate compliance".[56]

The second of the cases was even more informative, not only because it led to changes in the Patriot Act and procedures of issuing NSLs, but also because it proved that secrecy of the FBI's operation was dubious. In *Doe v. Gonzales* the plaintiffs, once again represented by the ACLU, filed a suit claiming that NSLs based on 18 U.S.C. § 2709 "violate the First Amendment by prohibiting any person from disclosing that the FBI has sought or obtained information with an NSL; second, that § 2709 violates the First Amendment by authorizing the FBI to order disclosure of constitutionally protected information without tailoring its demand to a demonstrably compelling need; third, that § 2709 violates the First and Fourth Amendments because it fails to provide for or specify a mechanism by which a recipient can challenge the NSL's validity; fourth, that § 2709 violates the First, Fourth, and Fifth Amendments by authorizing the FBI to demand disclosure of constitutionally protected information without prior notice to individuals whose information is disclosed and without requiring that the FBI justify that denial of notice on a case-by-case basis; and fifth, that § 2709 violates the Fifth Amendment because it is unconstitutionally vague".[57]

Judge Janet Hall reasoned in the opinion that "considering the current national interest in and the important issues surrounding the debate on renewal of the Patriot Act provisions, it is apparent to this court that the loss of Doe's ability to speak out now on the subject as an NSL recipient is a real and present loss of its First Amendment right to free speech that cannot be remedied".[58] The Appellate Court later dismissed the case because in the meantime the reauthorization of the Patriot Act made the case moot. Also, in the meantime the case was no longer secret because on 2 September 2005 the "New York Times" published the article *Hartford Libraries Watch as US Makes Demands*, correctly indicating that the "John Doe" of the case was the Library Connection of Windsor, Connecticut.[59]

But even the reauthorization of the Patriot Act in 2005[60] did not end the controversy surrounding the extensive use of NSLs and several more important court cases were to discuss the security-liberty balance, or the extent to which the quest for national security could limit the constitutional rights guaranteed by the First,

[56] *Doe v. Ashcroft*, 334 F. Supp. 2d 471 (S.D.N.Y. 2004).

[57] *Doe v. Gonzales*, 386 F. Supp. 2d 66 (D. Conn. 2005).

[58] *Ibidem*.

[59] A. Leigh Cowan, *Hartford Libraries Watch as U.S. Makes Demands*, 2.09.2005, www.nytimes.com/2005/09/02/nyregion/hartford-libraries-watch-as-us-makes-demands.html [access: 6.03.2021].

[60] USA Patriot Improvement and Reauthorization Act of 2005, Publ. L. 109-177, 120 Stat. 192.

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 18/11/2026 17:08:51

Fourth and Fifth Amendments.[61] In 2006, in *Gonzales v. Google, Inc.*, the government wanted Google to disclose a substantial number of user online searches, but Google argued that complying with the demand would cause the loss of user's trust because Google's success was "attributed in a large part to the volume of its users and these users may be attracted to its search engine because of the privacy and anonymity of the service". The District Court of Northern District of California, eventually granted "the Government's motion to compel only as to the sample of 50,000 URLs from Google's search index".[62] Judge James Ware proved to have a good understanding of use of the Internet use when providing reasons for the limitation: "[…] while a user's search query reading '[user name] stanford glee club' may not raise serious privacy concerns, a user's search for '[user name] third trimester abortion san jose' could raise certain privacy issues as of yet unaddressed by the parties' papers".[63]

In 2010, the Sixth Circuit Court in *United States v. Warshak* ruled that even a defendant that has been convicted should enjoy the privacy of e-mails and, therefore, government agents breached the Fourth Amendment by ordering ISP to disclose the e-mails without first obtaining a warrant based on probable cause.[64] In 2012, the Supreme Court in *United States v. Jones* decided that attaching a GPS device to a motor vehicle is a search under the Fourth Amendment and Justice Sotomayor observed that the mere "awareness that the Government may be watching chills associational and expressive freedoms"[65]. On 14 March 2013, the District Court for the Northern District of California in In re National Security Letter concluded that "the nondisclosure provision of 18 U.S.C. § 2709 (c) violates the First Amendment and 18 U.S.C. § 3511 (b) (2) and (b) (3) violate the First Amendment and separation of powers principles. The Government is therefore enjoined from issuing NSLs under § 2709 or from enforcing the nondisclosure provision in this or any other case".[66]

As a result, in June 2015, Congress passed the USA Freedom Act that gave the recipient of an NSL the right to file a petition for judicial review of a nondisclosure order. Under that novel law, a recipient could notify the FBI of the desire to challenge the nondisclosure order, and by doing that the FBI would be bound to apply for an order prohibiting "disclosure of the existence or contents" of the relevant NSL. Under that Act, the US Attorney General was obliged to develop novel procedures that permit the examination of each issued confidentiality clause

[61] D.J. Solove, *The First Amendment as Criminal Procedure*, "New York University Law Review" 2007, vol. 82, p. 167.

[62] *Doe v. Gonzales*, 449 F.3d 415 (2d Cir. 2006).

[63] *Gonzales v. Google, Inc.*, 234 F.R.D. 674 (N.D. Cal. 2006).

[64] *United States v. Warshak*, 631 F.3d 266, 288 (6th Cir. 2010).

[65] *United States v. Jones*, 132 S. Ct. 945, 956 (2012).

[66] In re National Security Letter 930 F. Supp. 2d 1064 (N.D. Cal. 2013).

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 18/11/2026 17:08:51

to ascertain whether the material that has been collected justifies secrecy.[67] On 15 March 2020, Section 215 of the Patriot Act, an emergency provision expanding surveillance to an unprecedented level, was to expire. A week before the expiration date the House of the Representatives passed the USA Freedom Reauthorization Act of 2020,[68] but in a political twist Senator Mitch McConnell, Senate majority leader, brought the bill to the floor (thereby extending the expiration date for another 77 days).[69] The reason was obvious; a debate in the Senate was needed for the bill to pass. The lack of time and lack of certainty of support made McConnell's decision the only option. And finally, on 14 May 2020, the Senate passed the bill with substantial support (80–16). The Senate, however, added a significant amendment to the bill by adding Section 901 to the title, focusing on "limitations on authorities to surveil United States persons and on the use of information concerning United States persons".[70]

An examination of the issue of National Security Letters in post-9/11 America leads to four key observations. First, it is important to note that a firm response such as the Patriot Act of 2001 was expected not only in the USA. Alexandra Gheciu observes, in her analysis of security narratives in the 21st century, that "In the post-9/11 world, in a situation marked by the rise to prominence of a new type of enemy, the EU, NATO, and the OSCE have all faced the pressure to adapt to changing notions of security. They have had to reposition themselves along the liberty/security spectrum to be able to devise new combinations of normal liberal practices/exceptions to those practices in an effort to enhance the capacity to combat that new type of enemy".[71]

Second, in times of trouble, the nation expresses unity in understanding that sometimes security is more important than liberty. Just after the 9/11 terrorist attacks the president, Congress, the general public, and even the judicial branch, were eager to accept massive surveillance.

Third, the case of National Security Letters and the extensive use of various methods of surveillance and information gathering proves that it does not take much time to pass emergency laws and limit individual liberties for the sake of security, but it takes a substantial amount of time to restore the balance between liberty and security.

Fourth, the experience of the United States proves that in the long term the only way to secure individual liberties is a well-informed and independent ju-

[67] Uniting and Strengthening America by Fulfilling Rights and Ensuring Effective Discipline Over Monitoring Act of 2015, Pub. L. 114-23, 129 Stat. 269.

[68] USA Freedom Reauthorization Act of 2020, H.R.6172 – 116th Congress.

[69] 166 Cong. Rec. 2441 (2020).

[70] 166 Cong. Rec. 2439 (2020).

[71] A. Gheciu, *Securing Civilization? The EU, NATO, and OSCE in the Post-9/11 World*, Oxford 2008, p. 28.

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 18/11/2026 17:08:51

dicial branch. The limitations imposed on the government in using surveillance techniques, even those adopted by Congress, most often were the results of court rulings that defended freedoms granted by the Constitution.

The situation of the USA that has been discussed above shows that withdrawal by authorities from "temporary" regulations that negatively affect the realization of civil rights and freedoms can encounter difficulties even in a country that is a "flagship" example of a democratic state ruled by law and in which society is committed to constitutional values. That is a bad omen for Poland which is a country where democracy does not have as long a history as it does in the USA. The mere manner of how formally solutions were introduced in Poland to counteract the COVID-19 pandemic and its consequences it is already worrying. Namely, the Polish authorities decided not to resort to the, seemingly, most obvious implements in law which are declaring one of the states of emergency that are provided in the Constitution, or implementing solutions under one of the laws adopted long ago regulating states of emergency (primarily a declaration of a state of natural disaster). The structure of states of emergency should be interpreted under constitutional axiology and the pragmatics of the actions of authorized entities to restore the normal mode of functioning of a state as soon as possible.[72] Meanwhile, the law to counteract the COVID-19 pandemic and its consequences was adopted in the form of so-termed "special law" which under the typology of Oren Gross and Fionnuala Ní Aoláin can be categorized to be factual (non-constitutional) solutions.[73]

Of course, the Polish system of sources of law defined by the binding Constitution does not provide for the concept of a "special law". Therefore, it is not a concept within the notion of the language of the law. However, it is used in practicing the law (it is used by the judicature, in legal doctrine, and by the media as an expression of colloquial language). In the Third Polish Republic, the formulation was used for the first time when passing the Act of 10 April 2003 on special rules for preparing and implementing investments in public roads.[74] To this day, such solutions are more and more often used in Polish legislative practice. The peculiarity of them is emphasized, which can be considered on many levels. The distinctiveness of them relates to many aspects (objective and subjective). Acts of that type should meet specific doctrinally defined criteria:

- the subject of regulation should relate to a segment of matters in a specific area,
- the provisions of the act are a *lex specialis* in relation to those already in force,

[72] K. Dobrzeniecki, *op. cit*.
[73] O. Gross, F. Ní Aoláin, *op. cit*.
[74] Journal of Laws 2003, no. 80, item 721.

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 18/11/2026 17:08:51

- be episodic in nature (although there are also some with no specified term of validity),
- the axiological justification for adopting them (and, therefore, for legalization of them) is an important national matter or in the public interest.[75]

A comparison of the premises and features of extraordinary measures to those attributed to special laws in the literature on the subject lead to the conclusion that they are very similar. Through this act, the legislator intends to achieve the underlying goal by using quicker and easier means. Applying standard statutory rules in a given area would have meant that legislative barriers would have prevented so quick an implementation. It happens to be, therefore, that the "special law" is, i.a., a form of avoiding the unequivocal establishment of states of emergency. Such an instrumental approach to achieving the intended goals, with the limitation of human and civil rights, could lead to the end of the liberal and democratic state. History shows that it is relatively easy to extend a state of emergency and the state specified in a "special law", which may even lead to the end of a nation altogether.[76] This type of phenomenon leads to paradoxes in emergency situations an example of which is the current pandemic and the fight against it through subsequent special law.

Various justifications were officially given for not declaring in Poland a state of natural disaster, but that was probably determined in the context of the forthcoming presidential elections in Poland. The constitutional regulation is that during a state of emergency the provisions of the Constitution, Electoral Law, and Acts on extraordinary measures, cannot be changed, and the elections planned for that period are to be held on strictly defined later dates (Article 228 (6) and (7) of the Polish Constitution).[77] Under the Constitution, general elections cannot be held during a state of emergency, or within 90 days after it ends. The public opinion polls in spring 2020 indicated that it would have been unfavourable for the ruling coalition of the United Right in Poland and Andrzej Duda the President of the Republic of Poland who had been in office since 2015, and who is associated with the coalition. Therefore, the electoral rules were changed by means of a "special law" (in the first version, these were only to be elections by correspondence, but which did not eventuate; the next version permitted direct elections, in addition to elections by correspondence). Ultimately, the actions of the ruling coalition proved effective and at the end of June, beginning of July 2020, Andrzej Duda was re-elected, although the lead over the opponent happened to be minimal.

[75] Ł. Zaliwski, *„Specustawy" w prawodawstwie polskim – zjawisko incydentalne czy stałe?*, "Zeszyty Naukowe PWSZ im. Witelona w Legnicy" 2018, vol. 27(2), pp. 133–151.

[76] N.C. Lazar, *State of Emergency in Liberal Democracies*, Cambridge 2009, p. 2.

[77] *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, ed. P. Tuleja, Warszawa 2019; *Konstytucja RP*, vol. 2: *Komentarz do art. 87–243*, ed. M. Safjan, Warszawa 2016.

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 18/11/2026 17:08:51

The "special laws" have been and still are a threat to the rule of law because they concentrate authority in the executive and disrupt legislative and judicial activities. Under the provisions of the COVID-19 special law, restrictions limiting human and civil rights can be extended. A preliminary assessment of that approach by the legislator, already, at this point, raises major doubt under the principle of the rule of law as to the legality of the introduced legislation. All this puts human and civil rights at risk. In Poland, this was reflected, for example, in disrupting proper conduct of the presidential elections. They even led to the disclosure of documents evidencing corruption (the purchase of respirators and protective masks from unverified suppliers under the provisions of the "special law"). That weakened the readiness and capacity of the national health service to manage the pandemic.

CONCLUSIONS

The comparative analysis presented in this paper demonstrates how legislation operates and adapts to great emergency situations. The spread of COVID-19 undoubtedly affects the form of the rule of law. It creates an opportunity to concentrate authority in the executive and causes disruption in parliamentary activities, and disruption in the activities of courts and the organization of elections. The measures that are being applied to deal with the pandemic crisis could endanger fundamental rights and civil liberties. They can lead to social discrimination and the disruption of economic processes, education, and general security. It is worth noting that at a time of a common threat citizens are ready to voluntarily resign from enforcing the rights and freedoms that they have, and perceive being rescued from trouble by a "strong-arm" government. Indeed, it might seem that the epidemic should be dealt with efficiently by authoritarian or quasi-authoritarian systems. However, it is necessary to consider exceptions to that regularity. That is because in some authoritarian countries those in authority could ignore the existence of an actual epidemiological threat and minimize it, or even ignore it altogether (see the example of Belarus). The authorities in authoritarian countries in fearing an economic crisis that could be caused by the limitations of an anti-pandemic policy could order the continuation of a normal lifestyle. Therefore, while authoritarian countries could, formally, have a greater possibility to implement radical restrictions, a negative side effect could be ignoring an actual epidemiological threat. That also applies to those democratic countries in which the degree of transparency and the rule of law is lower, such as it is in Poland. That is a generalization that illustrates that modern forms of democracy cannot cope with such an unusual situation. Democratic systems will have the necessity of solving difficult problems of coexistence and cooperation in conditions of pluralism, and the constant confrontation of different values arising from different cultures. The pandemic means that it could seem that

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Data: 18/11/2026 17:08:51

a future form of democracy should be less permissive (tolerant) and depart from the equality of different positions (pluralism). In democratic countries entities such as parliaments, courts, and similar decision-making bodies that participate in the process of solving problems and conflicts brought about by today's reality must, however, be open to cooperation, compromise, and concession. Undoubtedly, that is a tenuous instrument because procedural democracy (appropriate for a liberal society in a postmodern era) does not have numerous sanctions, but is based on mutual tolerance and good will of the participating subjects. It is worth mentioning here that one of the components of the criticism of the optimism of Enlightenment, which based on the concept of democracy, human rights, individual freedom, and trust in the wisdom and effectiveness of human reason, was the conviction that that optimism is a relatively effective solution only in times of peace and prosperity in appropriately wealthy societies. In exceptional and extraordinary situations such as conflicts, social unrest, or crises, optimism fails. It is reasonable in that situation to state that freedom means being able to choose, but at the same time it intimates bearing consequences for decisions that are made. Undoubtedly, too broad an understanding of equality and freedom is very dangerous; it opens the way for populist politicians that have authoritarian temptations.[78]

The authors' goal was to show some regularities, not to give proposals on how to better manage such emergency situations. The experiences of the USA and Poland that have been described above remind us that civil rights and freedoms are not given "once and for all". It should not be forgotten that the law is not only an instrument of extending the rights of individuals, civil liberties and social rights. The law can also be a very effective instrument for reducing those rights and directing society onto a path of building authoritarianism, and situations of widespread danger such as is the COVID-19 pandemic or terrorist threat can favour achieving advantage by legislative solutions that serve to achieve such goals.

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ABSTRAKT

Pandemia COVID-19 wywołała daleko idące skutki, które są widoczne przede wszystkim w funkcjonowaniu służby zdrowia, organizacji życia społecznego i stanie gospodarki narodowej. Warto zwrócić uwagę także na konsekwencje prawne i polityczne, które są mniej oczywiste i odczuwalne dla przeciętnych obywateli. Jedną z najważniejszych jest zmiana ustawodawstwa, która pociąga za sobą ograniczenie wolności i praw obywatelskich. Niniejszy artykuł jest empirycznym dowodem na to, jak polskie ustawodawstwo ogranicza prawa podstawowe. Władze w walce z pandemią nie korzystają z rozwiązań, które znajdują się w Konstytucji RP, lecz sięgają po pozakonstytucyjną formę

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Data: 18/11/2026 17:08:51

tzw. specustaw. Omawiając to zagadnienie, autorzy odwołują się do amerykańskiego ustawodawstwa i polityki, gdzie znamiennym przykładem jest Patriot Act, który można interpretować jako pretekst do ograniczania swobód obywatelskich w imię walki z terroryzmem. Jak stwierdzono, takie sytuacje nadzwyczajne jak obecna pandemia czy zagrożenie terroryzmem są wykorzystywane do trwałego i znaczącego ograniczania praw obywatelskich.

Słowa kluczowe: pandemia COVID-19; prawa podstawowe; wolności obywatelskie; prawa obywatelskie; amerykańskie ustawodawstwo ; polskie ustawodawstwo

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