

EPIDEMICAL RESTRICTIONS IN THE LEGAL ORDER - CAN WE IGNORE AN UNFAIR LAW? QUESTIONS AND CONSEQUENCES FOR BUSINESS IN EU

ARTUR KOKOSZKIEWICZ

The University College of Enterprise and Administration in Lublin, Poland.
E-mail: artur.kokoszkiwicz@gmail.com

Abstract Currently, we feel the impact of the epidemic in all areas of social life. It has also been included in the legal framework. Through legal regulations, states take specific actions that have measurable consequences - also for business. There is an interesting problem of the validity and effectiveness of a law that we can call "epidemic law". Thus, the title question arises, to which I will answer in the text - is it possible to ignore unfair law?

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1 Introduction

The coronavirus epidemic, which entered the EU for good in March 2020, is a phenomenon with very large consequences for almost all areas of social life, including the economic one. The epidemic has an impact on the health policy of states, the defense sector, the judiciary, maintaining order, and education. The epidemic shapes the economy - despite its generally negative impact, we observe sectors of the economy that have recorded significant progress (such as enterprises dealing with Internet communication, entertainment via the Internet or the medical industry). These changes are correlated with the legislative activity of authorized centers of power. The centers of power authorized to legislate decide on the introduction of specific legal solutions in a given territory. The EU member states decided on various solutions, sometimes more and sometimes less restrictive. So we can talk about a kind of "epidemic law". We know the phenomenon of "lock down", that is, a significant restriction of civil liberties consisting in the closure of certain branches of the economy and a significant limitation of movement. There are also various tools in the sphere of social law that allow to support those in need (benefits, subsidies). Therefore, we can easily say, which is nothing new, that we observe the regulation of social life by law. Of course, the regulation of social life by law is nothing new, and nothing in principle wrong. However, a number of problems may arise, such that in an epidemic situation, the centers of power will appropriate certain powers that they would not normally have. In other words, will the pandemic problem be used to instrumentalise the law. By means of do's and don'ts - authorized centers of power create reality. In the era of an epidemic, it is an outstanding example of the "empire of law" as Ronald Dworkin and his numerous commentators write about (Dworkin, 2006). However, there is - it is also obvious - a field for abuse by power centers. The epidemic may turn out to be an excellent pretext for pursuing a policy of repressive legislation. Restricting civil liberties, not only in the economic sphere but also in the personal sphere, may be perceived by citizens as excessive, disproportionate to the situation. It is easy to imagine a situation where an epidemic could be accepted as a basis for banning any gatherings, which could disrupt political life. Similarly, legal prohibitions can block the functioning of entire branches of the economy almost overnight. A situation may arise in which we are dealing with the so-called unfair law. So interesting questions arise - what is an unfair law? Is an epidemic a justification for any legal regulation? Is this a new problem? How can a citizen behave? We can also consider the questions (and many others) in terms of

extraordinary situations. This is because in many legal orders there are special regulations concerning special (extraordinary) situations. These can be special regulations for war, flood or hurricanes. Therefore, the situation should also be considered in the context of solutions already known and functioning in legal systems. However, the broader perspective cannot be forgotten. After all, we sometimes say that "the end justifies the means." But is it in every situation? Should there be limits somewhere? And will the specific regulations for a time of emergency finally disappear with this state of emergency? Or will they remain forever and the same, the emergency situation and special laws may lead to a totalitarian regime? These are questions concerning the theory of law of a fundamental nature for all legal orders within the democratic state of law of the Western model. The answers to them go beyond the legal sphere and have a direct relationship with, among others, business.

2 Unfair law

Considerations on the meaning of the concept of justice in law are as old as the first legal regulations known to us. From the earliest times, thinkers have been wondering what is justice in law. We need to know what this concept means in order to know its antithesis, i.e. what an unfair law is. Leszek Kołakowski ironically observes "since almost all philosophers, moralists and legal theorists tried to explain what justice, a just deed, a just man and a just state consisted of, it should be assumed that they did not come to clarity and agreement in this matter" (Kołakowski, 2000). Indeed, it is so and there is no uniform opinion on this subject.

In antiquity, such as in the Egyptian, Mesopotamian, and Hebrew legal systems, justice was combined with righteousness. As Moshe Weinfeld points out, "justice and righteousness are considered an exalted, divine ideal" (Weinfeld, 1994). Just law was very universal, it can be said that it was universal and it was not limited only to legal relations. The mine of knowledge about justice in law is Antiquity and Roman thought. The famous maxim *Iustitia est constans et perpetua voluntas ius suum cuique tribuendi* is considered to be classic, i.e. that justice is the constant and unchanging will to grant everyone the rights he deserves. Commonly known from Justinian Digests is the definition of law (just law) as the art (skill) of finding and applying what is good and right - *Iuri operam daturum prius nosse oportet, unde*

nomen iuris descendat, est autem a iustitia appellatum: nam, ut eleganter Celsus definit, ius est ars boni et aequi (Kuryłowicz, 2003).

Thus, we can consider as a just law a law that contributes to doing good, allowing for the granting of due rights - although, it must be emphasized, these rights will be differentiated. Just law cannot mean absolute equality. Just law is an art and, like any art, it must ensure harmony both in its formal and material terms. In other words, a just law is one that reflects and protects certain values of the good and has the correct form. This means that it is understandable, legible, duly advertised, accessible and enforceable, among other things, and guarantees the defense of values. These are, of course, brief considerations to signal the topic under discussion.

However, a problem may arise when we are dealing with only formally correct law. Some will say about such a case - the law is formally just. It is about the situation when an authorized center of power (for example parliament) will pass a law and announce it - but it will be materially unfair? In other words, from a formal perspective, everything is fine - the legislative process has been preserved and a country has enacted a law that allows certain behaviors that may be considered unfair. This may be, for example, the right to discriminate against a specific group of people - for example by limiting their personal rights or prohibiting them from running a business. In extreme cases, as our history knows, formally just (correct) law may allow the extermination of certain nationalities. An example from history is the so-called "Soviet justice", which allowed for murders, repressions, and harms against millions of people, for example, the exile of hundreds of thousands of Polish citizens to Siberia, many of whom died (Zamorski, Starzewski, 1994). This "Soviet justice" is the contradiction, the antithesis of what we think of justice in its true sense. It is an example of the instrumentalisation of law and its use as a tool of political struggle. Franziska Exeler points out directly that "for Stalin and his closest circle, internal and international justice, as well as politics, were closely intertwined. In the post-war years, Moscow continued to adapt the public trials of Axis soldiers and Soviet citizens to its political needs "(Exeler, 2019).

Nowadays, starting from the times after the Second World War, the so-called Gustav Radbruch Formula is being discussed. This eminent German thinker was an opponent of Nazism, recognizing that Germans who were guilty of crimes should be punished for them. The problem for such action was the legislation of the Third

German Reich, which formally and correctly sanctioned and allowed for criminal behavior. So a dissonance has arisen - what to do in a situation when certain actions comply with positive law (formally announced, in force at a given time in a given territory), and which are also inconsistent with what we can call natural law?

In terms of content, "the formula consists of three elements that have the form of separate theses. Each of the theses, therefore, constitutes a separate fragment of the concept which as a whole does not have a homogeneous character. The first thesis is called "the thesis of gross contradiction" (Unerträglichkeitsthese) (...) The second thesis is "the thesis about the lack of legal character" (Verleugnungsthese) (...) The third thesis is the statement about the defenselessness of legal circles (Wehrlosigkeitsthese) (Lubertowicz, 2010).

As Radbruch himself states: "the conflict between justice and legal security should be resolved in such a way that the positive law guaranteed by the legislation and state authority would take precedence also when it is essentially unfair and pointless, unless the contradiction to the positive law with justice reaches such a degree. that the act as an unjust law should give way to justice" (Radbruch, 1985). Therefore, we are talking about the primacy of just law (justice) over positive (formal) law in a situation where it is deprived of the value of justice and is in conflict with it. Nowadays, one should remember about the necessity of the functioning of law as a regulator of social life and, if it can be expressed this way, about the need to respect the mutual reasons put forward both from the perspective of naturalism and positivism.

The above-mentioned (German and Soviet) examples of unjust law are extreme, but they adequately illustrate the seriousness of the situation and the consequences for Western societies of instrumentalization, relativism and objectification of law. Paying attention only to its formal side, without analyzing its values, is dangerous. The coronavirus pandemic example shows this. In the EU, we are dealing with far-reaching legal restrictions, limiting civic rights as we know (or have known) so far. The rationale is to fight the pandemic, which of course is a noble goal. However, the tools that we use to solve problem situations should be analyzed each time. There is a saying in Poland that "you shouldn't aim the cannon at the fly", which jokingly reflects the need to analyze in terms of effectiveness or purposefulness.

3 Consequences of unfair law

Now we return to the ground of theoretical considerations, not forgetting, however, the practical burden they carry. As we established at the beginning, legal solutions - both fair and unfair - have a measurable impact on social life, including the economy.

The reality we experience during a pandemic can be very different from what we know from years ago. Communication problems, closed branches of the economy, assembly bans or the order to cover the mouth and nose - all this accompanies us every day. Thus, such regulations of the "epidemic law" directly shape our social life. So we are dealing with a certain established law, a positive law. So one may ask, is it a fair law?

In the Polish legal system, we observe interesting phenomena in the above context in the last months of 2020 and in the first half of 2021. First of all, the jurisprudence of administrative courts (i.e. repeated judgments according to the same general motive) lifting administrative penalties imposed on citizens - be they natural persons or entrepreneurs, in connection with violations of "epidemic" law is noticeable. The justifications indicate that the legal restrictions were introduced incorrectly - inter alia, in the form of an ordinance instead of a statute (i.e. a subordinate act, which makes this form of legislation incorrect for such far-reaching restrictions). It means no less, no more, that the judiciary acted against the legislature in this respect, pointing to the mistakes that the latter had committed. Secondly, there are observable - as in many EU countries - social behavior that ignores the formally introduced bans. This is manifested, for example, in faces that are not properly covered with masks or in running a business despite the ban. It is an interesting example of the disobedience of EU citizens to the legal rules imposed on them. Now, I leave the issues raised by Polish administrative courts beyond the considerations - because here the problem is completely different and the cause of the courts' interference is the described defectiveness of the legislator's actions. The key is the collective act of disobedience to the regulation of the "epidemic law" which is becoming more and more common among EU citizens. As I have signaled, it takes many forms.

Therefore, the question arises whether we can speak of an unfair law in such a case? For example, is the ban on the free movement of EU citizens or the ban on business activities fair or not? Of course, discussions on this topic can be very hot and take a long time. Among the arguments "for" we can mention the argument of excessively stringent regulation, disproportionate to the epidemic threat, while on the opposite side the argument is exactly the opposite - regulations, although painful, are to save life and health. The discussion can be very lively (and it is, as confirmed by the analyzes of information services of the EU Member States). It is good that there is room for dialogue in a democratic country. However, it should proceed rationally, by which I mean the search for optimal solutions to the situation. Such solutions then translate into legal (legislative) solutions.

Without entering into this dispute, we can ask further - what in the situation of increasing the rigorism of the "epidemic law"? After all, we can imagine very drastic restrictions that we know from history. In a situation where the centers of power and law-making decide to take such actions, can they be said to be contrary to justice and denied their validity, and thus refused to obey?

It all depends on the degree of violation of justice. In my opinion, some of the legal regulations that we are already encountering in the territory of the EU can be considered as violating the principles of justice. Shutting down certain economic activities (and not restricting sanitary safety rules) or far-reaching travel bans are examples of this. The situation is dynamic, however, and it may worsen as well as improve. Personally, I would focus on the direction of maintaining certain forms of repression (for example, the prohibition of movement or restriction of movement), intensive supervision of state services over citizens while "opening" the economy. The cases of business activity analyzed by me (these are Polish, Spanish, Slovak and German cases) are individual and may be unrepresentative. However, they show that entrepreneurs, despite the bans contained in the "epidemic law", want to act. In fact, their economic activity is conducted despite legal prohibitions. The analysis of the justifications shows that the bans imposed by the state are, in the opinion of entrepreneurs, inadequate to the situation, and therefore unfair. I believe that such a rationale has solid foundations. Forbidding someone to use his basic right to run a business condemns him to liquidation in business and, consequently, to poverty. As a consequence, it will have to benefit from the social support of the state. Legal

regulations introducing such solutions are unfair and therefore they can be denied their validity.

Of course, one should remember about the seriousness of the situation related to the epidemic, which, however, does not exclude (or even mandate) seeking rational solutions.

4 Conclusions

Undoubtedly, we live in very interesting times that provide excellent research material on the questions that have been asked for thousands of years. One should expect with impatience the further development of the situation in the field of the "epidemic law" and its impact on the social and economic reality.

By answering the questions posed at the beginning, we can clarify that unjust law is the antithesis of just law. It is a law that does not take into account the value of the good. Considerations on this issue are not a new problem and have accompanied mankind for centuries. Unfortunately, we know examples of the application of unfair law in practice (Soviet Union, German Third Reich). Using the discussed formula of Radbruch, in the event of a conflict of the established positive law with the principles of justice, the citizen has the right to disobey this law. Of course, this will have certain consequences. It is worth, however, always striving for justice - and that of justice not only understood in a formal way. The ideal is, of course, a positivist-naturalistic symbiosis. What are the consequences for business in the case of unfair law? These are only negative consequences. Such normative solutions lead to the withdrawal of people from conducting business activity. Part of the business is disappearing and some of them are moving to the shadow economy. These are undesirable phenomena and that is why it is so important to moderate prohibitions and orders in the law, also - and perhaps most importantly - in "pandemic law". It should also be emphasized that the lack of a stable law - and some solutions to the "epidemic law" may be such unstable law - is negative for society and the economy. In the examples we have considered, recognizing a law as wrong and refusing to apply it leads to chaos. One can imagine a situation where the citizen's right to disobey is being abused. Then disobedience can be used in situations where the injustice is not that significant (which is, of course, a judgmental and difficult phenomenon). This is another big threat that we may have to deal with. I believe

that all legal methods should be used to fight against unfair law. It must be believed that in such a situation the judiciary will critically approach the activities of the legislature. All forms of civic activity such as extraordinary complaints, lawsuits and other legal instruments should take place. It should be emphasized once again that civil objection to unfair, "pandemic" law should be opposition to excessive instruments that do not serve society, and not erga omnes, against all and to deny the fact itself.

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