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# Constitutional Challenges in Emergency Governance: An Analysis of Poland's Reluctance and Regulatory Ambiguities in States of Emergency

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## Abstract

This article analyses the constitutional framework regulating states of emergency in Poland and addresses key issues related to their interpretation and implementation. The first part discusses the conditions for declaring martial law, a state of an extraordinary situation, and a state of natural disaster, as well as the specific rules for the operation of public authorities in such emergencies. The next part analyses the practice, revealing the consistent reluctance of Polish authorities to invoke states of emergency, even in circumstances that seem to justify such measures. Consequently, a state of emergency under the 1997 Constitution was declared in Poland only once – in 2021, in response to a migration crisis on the border with Belarus. No constitutional emergency was declared during the COVID-19 pandemic, despite the introduction of far-reaching restrictions on individual rights and freedoms. The article argues that state authorities can abuse emergency regulations, either through their unjustified application or by deliberately circumventing them.

**Keywords:** COVID-19 pandemic; emergency governance; migration crisis; Poland; state of emergency

## I. Introduction

The 1997 Constitution of the Republic of Poland<sup>1</sup> contains a separate chapter on states of emergency, which had never been applied in practice until 2021. For various reasons, including the fear of massive compensation claims, Polish authorities have preferred to address natural disasters, such as droughts or floods, using the ordinary measures at their disposal. However, recent years, marked by the accumulation of the constitutional crisis,<sup>2</sup> the migration crisis<sup>3</sup> and the COVID-19 pandemic

<sup>1</sup> Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws No 78, item 483, as amended).

<sup>2</sup> See eg, Wojciech Sadurski, *Poland's Constitutional Breakdown* (Oxford, Oxford University Press 2019); Mirosław Wyrzykowski, "Experiencing the Unimaginable: The Collapse of the Rule of Law in Poland" (2019) 11 Hague Journal on the Rule of Law 417–22; Leszek Garlicki, "Disabling the Constitutional Court in Poland?" in Andrzej Szymt and Bogusław Banaszak (eds), *Transformation of Law Systems in Central, Eastern and South-Eastern Europe in 1989–2015. Liber Amicorum in Honorem Prof. dr. dres. H. C. Rainer Arnold* (Gdańsk, Gdańsk University Publishing 2016), 63–69.

<sup>3</sup> Ondřej Filipek, "Multilevel Analysis of the 2021 Poland-Belarus Border Crisis in the Context of Hybrid Threats" (2022) 8 Central European Journal of Politics 1–18; Krzysztof Eckhardt, "Constitutional Grounds for Introducing the State of Emergency: Comments in the Light of Threats Caused by the War in Ukraine, the Polish-Belarusian Border Crisis and the Covid-19 Pandemic" (2022) 4 Constitutional Law Review 351–61; Mieczysława Zdanowicz, "The Migration Crisis on the Polish-Belarusian Border" (2023) 28(1) Białystok Legal Studies 103–15; Małgorzata

crisis,<sup>4</sup> have demonstrated that emergency regulations can be abused, both through their unjustified application and deliberate ignorance. This raises the question of the limits of discretion in constitutional risk management and the optimal mechanism for controlling public authorities in times of emergency.

The paper aims to address these questions from the perspective of the Polish experience. It consists of two parts: the first part analyses the constitutional and statutory provisions relevant to states of emergency, while the second part examines the practice of their application. The migration crisis on the Polish–Belarusian border and the COVID-19 pandemic are explored as illustrative examples of power abuse in risk governance during situations of particular danger.

## II. The normative model of states of emergency

### I. Legal framework

The Polish Constitution of 1997 regulates three types of state of emergency, namely martial law, a state of an extraordinary situation, and a state of natural disaster. It outlines the conditions and procedures for their declaration, the permissible scope of restrictions on rights and freedoms, and the rules for issuing special legal acts of an emergency nature, such as decrees having the force of statutes.<sup>5</sup>

These constitutional provisions have been further developed by three statutes adopted in 2002 which regulate the operation of public authorities during emergencies and define the possible restrictions on individual rights and freedoms.<sup>6</sup> The statutes also provide the legal basis for decrees introducing specific states of emergency, specifying the restrictions applicable in particular situations. Additionally, in 2002, Parliament adopted a statute regulating the grounds, scope, and procedure for compensation for damages resulting from the restriction of individual rights and freedoms during a state of emergency.<sup>7</sup>

The provisions of the Constitution establish both general and specific conditions for declaring a state of emergency. The general conditions apply to all types of emergencies and must be met cumulatively. They include the existence of a situation of “particular danger” that renders “ordinary constitutional means ineffective to counteract”, thereby

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Bieńkowska, “Between Humanitarianism and Security – The Events at the Polish-Belarusian Border” in Jan Selmer Methi and Basia Nikiforova (eds), *Borderology. Spatial Perspective, Theoretical and Practical* (Cham, Springer 2023) pp 177–87.

<sup>4</sup> Łukasz Gruszczynski, Mateusz Zatoński, and Martin McKee, “Do Regulations Matter in Fighting the COVID-19 Pandemic? Lessons from Poland” (2021) 12 *European Journal of Risk Regulation* 739–57; Karol Dobrzeński and Bogusław Przywora, “Legal Basis for Introducing Restrictions on Human Rights and Freedoms during the First Wave of the Covid-19 Pandemic” (2021) 3 *Review of European and Comparative Law* 43–65; Leszek Bosek, “Anti-Epidemic Emergency Regimes under Polish Law in Comparative, Historical and Jurisprudential Perspective” (2021) 28 *European Journal of Health Law* 113–41.

<sup>5</sup> Krzysztof Prokop, *Stany nadzwyczajne w Konstytucji Rzeczypospolitej Polskiej z 2.04.1997* (Białystok, Temida 2 Publishing House 2005); Michał Brzezinski, *Stany nadzwyczajne w polskich konstytucjach* (Warsaw, Sejmowe Publishing House 2007); Krzysztof Eckhardt, *Stan nadzwyczajny jako instytucja polskiego prawa konstytucyjnego* (Rzeszów, WSPiA University of Rzeszów Publishing House 2012); Krzysztof Prokop, *Modele stanu nadzwyczajnego* (Białystok, Temida 2 Publishing House 2012).

<sup>6</sup> Act on the state of natural disaster of 18 April 2002 (Journal of Laws No 62, item 558); Act on the state of an extraordinary situation of 21 June 2002 (Journal of Laws No 113, item 985); Act on the state of martial law and powers of Commander-in-Chief of the Armed Forces and the principles of Commander-in-Chief subordination to the constitutional authorities of the Republic of Poland of 29 August 2002 (Journal of Laws No 156, item 1301).

<sup>7</sup> Act on the compensation of damages caused by the limitation of human rights during the state of emergency of 22 November 2002 (Journal of Laws No 233, item 1955). See also Michał Ziółkowski, *Odpowiedzialność odszkodowawcza za niezgodne z prawem działanie władzy publicznej: Studium z prawa konstytucyjnego* (Warsaw, Wolters Kluwer 2021).

making “the normal functioning of the State” impossible.<sup>8</sup> These requirements are evaluative in nature. The “particularity” of the threat, the “ineffectiveness” of ordinary constitutional means, and the disruption to the “normal” functioning of the state must all be assessed in relation to the specific emergency situation and the state’s capacity for action in a given location and at a given time.

Although the Constitution indicates that a state of emergency “may be declared” when the general outlined in this provision are met, this should be interpreted as an obligation on public authorities to take appropriate and necessary measures. This interpretation arises from the principle that state authorities cannot fail to act in situations where a particular threat cannot be countered through ordinary constitutional means.<sup>9</sup>

In addition to these general requirements, the Constitution specifies conditions that enable national authorities to adopt the most suitable emergency measures. Thus, martial law may be declared “in the event of an external threat to the State, an armed attack on the territory of the Republic of Poland, or when an international agreement imposes an obligation of common defence against aggression”, a state of an extraordinary situation can be announced “in the event of a threat to the constitutional order of the State, to the security of citizens or to public order” and a state of natural disaster may be introduced “to prevent or eliminate the consequences of a natural disaster or a technological accident having the characteristics of a natural disaster”.<sup>10</sup>

Despite the detailed definition of the conditions for each state of emergency contained in the Constitution, selecting the most appropriate one can prove challenging due to the coexistence and overlap of different types of potential threats. Theoretically, what distinguishes a state of martial law from a state of extraordinary situation is the source of the threat. An external threat (originating outside the Polish state) justifies the imposition of martial law, whereas an internal threat (arising within the Polish state) is more appropriately addressed by declaring a state of extraordinary situation. However, these two types of threats are closely interconnected. The internal weakening of a state increases the likelihood of an external threat, such as another state exploiting the first state’s vulnerabilities. Conversely, an external threat, such as an armed attack by one state against another, inevitably generates internal threats for the latter.

The Polish Constitution does not preclude the simultaneous enforcement of two or even three states of emergency, provided that the conditions for their declaration are met. This framework permits the concurrent imposition of martial law and a state of extraordinary situation in response to a combination of external and internal threats occurring simultaneously in the same location. Similarly, a state of natural disaster could be declared alongside a state of extraordinary situation or martial law. However, such a combination may present challenges due to the differing scopes of permissible restrictions under these respective states of emergency.

The catalogue of states of emergency does not include a state of war,<sup>11</sup> which can be declared in the case of “an armed attack on the territory of the Republic of Poland, or when an international agreement imposes an obligation of common defence against aggression”.<sup>12</sup> Although these conditions are identical to two of the three conditions for declaring martial law, this does not mean that the two emergencies are essentially the same. While martial law is a domestic legal institution that falls within the category of

<sup>8</sup> See Article 228(1) of the Constitution.

<sup>9</sup> On the meaning of the “ordinary constitutional measures” see Krzysztof Urbaniak and Monika Urbaniak, “Limitation of Human and Civil Rights and Freedoms During the Pandemic in Poland” (2021) 64(6) Constitutional Law Review 334.

<sup>10</sup> See, respectively, Art 229, Art 230, and Art 232 of the Constitution.

<sup>11</sup> See Krzysztof Prokop, “Stan wojny a stan wojenny w Konstytucji RP” (2002) 3 The State and the Law 23–34.

<sup>12</sup> See Article 116 of the Constitution.

states of emergency, a state of war is an institution of international law that governs the relations between the Polish state and another state. Nonetheless, both states of emergency may be declared simultaneously, enabling the Polish authorities to take all extraordinary measures necessary to safeguard the independence and sovereignty of the Polish state effectively.

Each of the states of emergency may be declared “only on the basis of a statute, by means of a decree which must be additionally announced”.<sup>13</sup> Martial law and a state of an extraordinary situation are declared by the President of the Republic at the request of the government, whereas a state of natural disaster may be proclaimed by the government independently, without the President’s involvement. A decree declaring martial law or a state of an extraordinary situation must be countersigned by the Prime Minister and then submitted by the President of the Republic to the Sejm (the lower chamber of the Polish parliament) within the next 48 hours. The Sejm is required to consider the decree immediately and has the authority to repeal it with an absolute majority of votes. This process ensures that deputies, as representatives of the sovereign, can effectively oversee the legality and necessity of declaring martial law or a state of extraordinary situation. It also enables the Sejm to hold the government politically accountable for the Prime Minister’s countersignature of the President’s decree declaring a state of emergency. This oversight is particularly significant, given that the President of the Republic cannot be held politically accountable. Furthermore, the Sejm can revoke the emergency decree by deeming the declaration of martial law or a state of extraordinary situation unjustified or unlawful, and it can also hold the government accountable through a vote of no confidence.<sup>14</sup> Unfortunately, the Constitution does not provide similar safeguard mechanisms for a state of natural disaster, which the government may declare independently, without the involvement of either the President of the Republic or the Sejm. The latter is only entitled to express its consent or objection to the government’s extension of a state of natural disaster.

The permissible duration of a state of emergency is another issue that is regulated differently for various types of states of emergency. Martial law can be declared for an indefinite period, meaning its duration cannot be predicted in advance. A state of an extraordinary situation may be introduced for up to ninety days and may be extended only once, for a period not exceeding sixty days. Conversely, a state of natural disaster is also proclaimed for a limited duration, not exceeding thirty days, but it may be extended multiple times. Therefore, while a state of extraordinary situation may last no more than 150 days, the maximum duration of a state of natural disaster is not specified in the Constitution.

The Constitution sets out special rules for state action following the promulgation of any of the aforementioned states of emergency. Broadly speaking, these rules concentrate power in the executive branch, modify the structure and operating principles of state authorities, and alter the law-making process.

To safeguard the foundations of the legal system, the Constitution prohibits amendments to the Constitution itself, electoral laws, and emergency laws during a state of emergency. This prohibition stems from the principle that legal acts fundamental to the functioning of the state should not be amended under coercive conditions, which

<sup>13</sup> See Art 228(2) of the Constitution.

<sup>14</sup> On the parliamentary scrutiny of the emergency legislation, see Tom Ginsburg and Mila Versteeg, “The Bound Executive: Emergency Powers during the Pandemic” (2021) 19(5) *International Journal of Constitutional Law* 1526–8; Tímea Drinóczi and Agnieszka Bień-Kacala, “COVID-19 in Hungary and Poland: Extraordinary Situation and Illiberal Constitutionalism” (2020) 8 *The Theory and Practice of Legislation* 6–7; Michał Ziółkowski, “States of Emergency in Poland. A Model Under Construction” in Monika Florczak-Wątor, Fruzsina Gárdos-Orosz, Jan Malíř, and Max Steuer (eds), *States of Emergency and Human Rights Protection. The Theory and Practice of the Visegrad Countries* (Abingdon-on-Thames, Routledge 2024) pp 69–70.

are inherent to a state of emergency. Additionally, the Constitution prohibits shortening the parliamentary term and holding referendums or elections during a state of emergency.

Besides that, the Constitution stipulates that “measures undertaken as a result of the introduction of any state of emergency shall be proportionate to the degree of threat and shall be intended to achieve the swiftest restoration of conditions allowing for the normal functioning of the State”.<sup>15</sup> The term “measures” encompasses various forms of state action, including restrictions on individual rights and freedoms imposed by public authorities during states of emergency. This provision significantly alters the principles governing the restriction of individual rights and freedoms compared to those applicable during the normal functioning of the state. These changes particularly affect two constitutional principles: the principle of proportionality and the principle of non-violation of the essence of constitutional rights and freedoms. This issue highlights the existence of two distinct regimes for imposing restrictions on individual rights and freedoms, which require further clarification.

## 2. Principles for restricting individual rights and freedoms

The Constitution of 1997 establishes two distinct regimes for imposing restrictions on individual rights and freedoms: one applicable during the normal functioning of the state and the other during a formally declared state of emergency.<sup>16</sup>

During the normal functioning of the state, limitations to constitutional rights and freedoms are introduced under the conditions prescribed by the Constitution. The first of these conditions is a formal requirement: the limitations should be introduced “only by statute”. According to Polish legal doctrine<sup>17</sup> and the jurisprudence of the Constitutional Tribunal,<sup>18</sup> this requirement is interpreted to include limitations introduced through legal acts that rank above statutes in the hierarchy of legal sources, such as EU law and international agreements ratified with prior statutory consent. The remaining four conditions for limiting individual rights and freedoms are substantive in nature. Such limitations must satisfy the principle of proportionality, adhere to democratic standards, avoid infringing on the essence of individual rights and freedoms, and aim to protect certain general values, such as security, public order, the natural environment, health, or public morals, and individual values, such as the rights and freedoms of others.

The proportionality principle comprises three key requirements: appropriateness (restrictions on individual rights and freedoms must be effective in achieving the defined objectives), necessity (such restrictions must not impose an excessive burden on the individual), and proportionality *sensu stricto* (the disadvantages suffered by the individual must be outweighed by the benefits derived from the restrictions).<sup>19</sup> Without delving into a detailed analysis of these three criteria, it is important to highlight the inherent tension between the requirements of appropriateness and necessity, as the most effective

<sup>15</sup> See Art 228(6) of the Constitution.

<sup>16</sup> Monika Florczak-Wątor, “States of Emergency in Poland and Their Impact on the Protection of Human Rights in Times of Covid-19 Pandemic” (2021) 12 Romanian Journal of Comparative Law 296.

<sup>17</sup> Leszek Garlicki and Krzysztof Wojtyczek, “Commentary to Article 31” in Leszek Garlicki and Marek Zubik (eds), *Konstytucja Rzeczypospolitej Polskiej. Komentarz* (Warsaw, Sejm Publishing House 2016) pp 79–80.

<sup>18</sup> Judgment of the Constitutional Tribunal of 16 November 2011, ref. SK 45/09.

<sup>19</sup> See, eg, Judgments of the Constitutional Tribunal of 11 April 2006, ref. SK 57/04 and of 4 November 2014, ref. SK 55/13. See also Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (Cambridge, Cambridge University Press 2012) 243–370; Krzysztof Wojtyczek, *Granice ingerencji ustawodawczej w sferę praw człowieka w Konstytucji RP* (Kraków, Zakamycze Publishing House 1999) pp 150–67; and Anna Śledzińska-Simon, *Analiza proporcjonalności ograniczeń konstytucyjnych praw i wolności. Teoria i praktyka* (Wrocław, Wrocław University Publishing House 2019) 129–200.

restrictions are often the most burdensome.<sup>20</sup> The Constitution resolves this tension in favour of the principle of necessity. Consequently, when two restrictions satisfy the condition of appropriateness, preference should be given to the one that imposes the least burden on the individual, rather than the one that achieves the desired objective in the shortest time.<sup>21</sup>

The final element of the regime governing the restriction of individual rights and freedoms during the normal functioning of the state is the prohibition of interference with the essence of these rights and freedoms. The concept of the “essence” of rights and freedoms is interpreted in various ways within legal doctrine<sup>22</sup>; however, it is widely accepted that a total prohibition on exercising rights and freedoms, even temporarily, constitutes an infringement of their essence. Under the Constitution, the prohibition of interference with the essence of rights and freedoms is absolute, with no exceptions permitted.

The second regime for imposing restrictions on individual rights and freedoms is activated upon the declaration of one of the three constitutional states of emergency. All measures undertaken as a result of introducing a state of emergency, including those restricting individual rights and freedoms, must, as indicated in Article 228(5) of the Constitution, “be proportionate to the degree of threat and be intended to achieve the swiftest restoration of conditions allowing for the normal functioning of the State.” This provision implies that the sole constitutionally permissible aim of restricting individual rights and freedoms during a state of emergency is to restore the normal functioning of the state. This significantly narrows the possible justifications for state interference in constitutional rights and freedoms, particularly in comparison to those applicable during the normal functioning of the state. Moreover, the principle of proportionality applied during a state of emergency differs from its counterpart in force during normal circumstances.<sup>23</sup> Restrictions on individual rights and freedoms must correspond to the degree of threat and be directed towards achieving the swiftest restoration of conditions that allow for the normal functioning of the state. The higher degree of threat that accompanies states of emergency may, therefore, justify more far-reaching restrictions. However, a lower degree of threat during a state of emergency should result in the reduction or even removal of previously imposed restrictions. Accordingly, during a state of emergency, authorities are obligated to continuously monitor the level of threat and to adjust restrictions on individual rights and freedoms to what is necessary under the prevailing circumstances. A restriction that was justified at the time of its introduction may become unjustified if it is no longer required.

Furthermore, during an emergency regime, restrictions that violate the essence of certain rights and freedoms are permissible, although the catalogue of rights and freedoms whose essence may be violated varies depending on the specific state of emergency declared.

### III. Emergency regime in practice

#### I. Historical reluctance in declaring states of emergency

Over the 25 years of the Polish Constitution of 1997 being in force, various situations have arisen that could have justified the declaration of a state of emergency. However,

<sup>20</sup> See the Judgments of the Constitutional Tribunal of 26 April 1999, K 33/98; Barak (n 14) 320 *et seq.*

<sup>21</sup> See Tomasz Sroka, “Ograniczenia praw i wolności konstytucyjnych oraz praw pacjenta w związku z wystąpieniem zagrożenia epidemicznego” (2020) 6 *Palestra* 81.

<sup>22</sup> See, eg, Agata Niżnik-Mucha, *Zakaz naruszania istoty konstytucyjnych wolności i praw w Konstytucji Rzeczypospolitej Polskiej* (Warsaw, Sejm Publishing House 2014) 322. See also Garlicki and Wojtyczek (n 18) 97.

<sup>23</sup> See Piotr Radzewicz, “Commentary to Article 228” in Piotr Tuleja (ed), *Konstytucja Rzeczypospolitej Polskiej. Komentarz* (Warsaw, Wolters Kluwer 2023) p 710.

successive authorities have consistently refrained from imposing such extraordinary measures. The need to declare a state of natural disaster arose during the great floods of 2001, which affected large parts of the country, as well as during the droughts of 2000, 2003 and 2006, which caused significant agricultural losses, forest fires, and challenges in supplying water to the population. Nevertheless, no state of natural disaster was officially declared in any of these instances. Similarly, the need for a state of extraordinary situation arose during the global financial crisis and the migration crisis. In the latter case, a state of extraordinary situation was declared in response to the migration crisis on the border with Belarus.<sup>24</sup> However, no such declaration was made a few months later during an even more severe emergency on the border with Ukraine, when large numbers of Ukrainian citizens were forced to flee their country in search of safety due to Russian aggression.

During the COVID-19 pandemic, the need to declare a state of emergency in Poland was also evident, particularly as similar measures were adopted in other countries, including those bordering Poland.<sup>25</sup> The pandemic justified the imposition of either a state of natural disaster or a state of extraordinary situation.<sup>26</sup> Indeed, a pandemic fell under the scope of the Act of 18 April 2002 on a State of Natural Disaster, which defines a natural disaster as “an event associated with the action of natural forces, in particular (...) infectious diseases of humans.” Moreover, the pandemic posed a clear threat to citizens’ health security, which would also justify the declaration of a state of extraordinary situation, as the latter may be imposed “in the event of a threat to the security of citizens.” Ultimately, however, no state of emergency was declared in response to the COVID-19 pandemic. This decision was likely influenced by concerns over the substantial compensation that authorities would have been required to pay to citizens for damages incurred following the declaration of a state of emergency.<sup>27</sup>

## 2. Practice defined by the single case

The practice of applying constitutional provisions related to states of emergency in Poland has been exceptionally limited, with a state of emergency being declared only once since the adoption of the 1997 Constitution. This occurred in 2021, when a state of extraordinary situation was declared in response to the so-called migration crisis on the Polish border with Belarus. The state of emergency was initially imposed for thirty days and applied to parts of two voivodships (regions) bordering Belarus: Podlaskie and Lubelskie. It was subsequently extended by sixty days but ceased to be in effect in December 2021 and has not been reinstated since.

This single case of the introduction of a state of emergency in Poland in the 25-year history of the 1997 Constitution raised serious doubts about the legality of the decision.<sup>28</sup>

<sup>24</sup> Witold Klaus (ed), *Beyond the Law. Legal Assessment of the Polish State’s Activities in Response to the Humanitarian Crisis on the Polish-Belarusian Border* (Warsaw, Polish Academy of Sciences Publishing House 2022); Adam Bodnar and Agnieszka Grzelak, “The Polish-Belarusian Crisis and the (Lack of) European Union Response” (2023) 28(1) *Białystok Legal Studies* 57–86.

<sup>25</sup> See Elżbieta Kurzępa, “Stan epidemii a stan klęski żywiołowej – rozważania w kontekście bezpieczeństwa państwa” (2021) 5 *Public Law Review* 8; M Florczyk-Wątor, “Niekonstytucyjność ograniczeń praw i wolności jednostek wprowadzonych w związku z epidemią COVID-19 jako przesłanka odpowiedzialności odszkodowawczej państwa” (2022) 10 *The State and the Law* 8–9.

<sup>26</sup> Drinóczy and Bień-Kacała (n 15) 187; Stanisław Trociuk, *Prawa i wolności w stanie epidemii* (Warsaw, Wolters Kluwer 2021) 12; Bart van Klink, Marta Soniewicka and Leon van den Boeken, “The Utopia of Legality: A Comparison of the Dutch and Polish Approaches to the Regulation of the COVID-19 Pandemic” (2022) 27(2) *Białystok Legal Studies* 19–20.

<sup>27</sup> See Urbaniak and Urbaniak (n 10) 337.

<sup>28</sup> Also from a European Union legal perspective. See Bodnar and Grzelak (n 25) 68–70; Agnieszka Nitszke, “Poland’s Response to the Migration Crisis on the Polish-Belarusian Border in the Light of European Union Law” (2023) 79 *Athenaeum. Polish Political Science Studies* 179–93.

The presidential decree imposing this state of emergency explained that it was necessary due to “a particular threat to the safety of citizens and public order associated with the current situation on the state border of the Republic of Poland with the Republic of Belarus.” The Council of Ministers, in its justification for requesting the President to introduce the state of emergency, argued that the threat did not primarily arise from the large number of refugees crossing the Polish–Belarusian border in 2021.<sup>29</sup> but the situation in which “deliberate and planned actions of the Belarusian services, aimed at destabilising the situation on the border with Poland and other European Union Member States, i.e. Lithuania and Latvia” took the form of a “hybrid war”, aiming at causing a migration crisis.<sup>30</sup> Instead, it emphasised the deliberate and planned actions of Belarusian services, which aimed to destabilise the border region with Poland and other EU Member States, including Lithuania and Latvia. These actions were described as constituting a “hybrid war” intended to provoke a migration crisis. The justification for declaring the state of emergency, as outlined, could indeed be interpreted as meeting the special prerequisites for its introduction – namely, a threat to the security of citizens and public order.

However, in his justification of the decree imposing a state of extraordinary situation, the President of the Republic did not refer to the general premises outlined in the Constitution that justify the imposition of any state of emergency. These include the premise of a “specific threat”, the insufficiency of “ordinary constitutional measures,” and the absence of the “normal functioning of the state”. While a “hybrid war” could arguably satisfy the requirement for a qualifying nature of the threat, doubts may arise regarding the existence of the second and third prerequisites in light of the justification provided by the President of the Republic. When submitting the decree on the introduction of the state of emergency to the Sejm for approval, the President indicated as a reason for the inadequacy of ordinary constitutional measures the fact that “it is (...) impossible for Border Guard officers and soldiers of the Polish Army to perform their tasks effectively in the area of the Polish–Belarusian border as a result of actions taken by other entities”. This general assertion was elaborated upon in the motion of the Council of Ministers for the introduction of the state of emergency, which stated:

[...] the existing threat related to the situation on the Polish–Belarusian border cannot be mitigated by using ordinary measures [...] without the introduction of the state of emergency. In fact, the effectiveness of operational activities carried out by state authorities responsible for border protection is significantly hindered by the actions of individuals lawfully present in the area of the Polish–Belarusian border. These individuals are exercising their constitutional rights and freedoms, such as the right to reside freely within the territory of the Republic of Poland or the freedom of assembly. The persistent presence of such bystanders obstructs the ability of the border guards and soldiers deployed in the area to perform their duties effectively. Furthermore, the attention the situation attracts from outsiders intensifies the problem by creating incidents that require the intervention of border guards, thereby diverting resources and personnel from tasks directly related to border protection during the migration crisis. Therefore, to ensure the full effectiveness of the actions currently undertaken by Polish authorities to secure the state border with Belarus, it is necessary to grant officers and soldiers deployed at the border the authority to compel bystanders, whose presence is deemed undesirable for the operational objectives being pursued, to immediately vacate the area where these operations are conducted.<sup>31</sup>

<sup>29</sup> As of 25 August 2021, more than 3,000 illegal border-crossing attempts had been recorded.

<sup>30</sup> The Council of Ministers’ request of 31 August 2022, No. RM-060-218-21, 3.

<sup>31</sup> *ibid*, p 7.

An in-depth analysis of the reasons provided by the President of the Republic and the Council of Ministers leads to the conclusion that the state of emergency, in this case, was introduced in order to prevent Polish citizens (mainly activists, including lawyers and doctors) from providing assistance to migrants crossing or attempting to cross the border with Belarus, whom the Polish authorities were preventing from entering the territory of Poland by using so-called push-backs.<sup>32</sup> The aforementioned Polish citizens were providing lawful assistance to the migrants, exercising their constitutional rights and freedoms. However, their actions hindered the work of border guards and soldiers tasked with preventing migrants from crossing the Polish–Belarusian border.<sup>33</sup>

The actual reason for imposing the state of emergency was, therefore, not the insufficiency of ordinary constitutional means to address the threat posed by the Belarusian authorities and to restore the normal functioning of the Polish state but the intention to grant extraordinary powers to border guards and soldiers to prevent Polish citizens from exercising their rights and freedoms in helping migrants crossing the border.<sup>34</sup> Consequently, it is highly questionable whether such reasoning by state authorities justified the introduction of a state of emergency on the border with Belarus, resulting in an unacceptable degree of restriction on the rights and freedoms of Polish citizens during the normal functioning of the state.<sup>35</sup>

The only state of emergency introduced in Poland under the current Constitution also raised serious doubts for another reason. The declaration of a state of emergency should activate the compensation mechanism regulated by the Act of 22 November 2002 on the Compensation of Damages Caused by the Limitation of Human Rights During the State of Emergency. Among other things, this law provides for a faster mechanism for obtaining compensation for actual damages suffered by citizens as a result of the declaration of a state of emergency.

However, despite the applicability of this law during the state of emergency, it was not implemented in practice. Instead, the Parliament adopted a special law on 29 September 2021 (after the state of emergency had already been declared on the border with Belarus), which established alternative rules for compensating tourism and hotel businesses operating in the affected area.<sup>36</sup> These rules were significantly less favourable to the affected citizens compared to the mechanisms provided for emergencies under the 2002 Act.

### 3. Extraordinary crisis responses outside the constitutional framework

The practice of non-application of the constitutional state of emergency, even in the case of an obvious need for its application, is particularly doubtful when it is accompanied

<sup>32</sup> Florczak-Wątor (n 26) pp 341–3; Bodnar and Grzelak (n 25) pp 61–3; Witold Klaus, “Criminalisation of Solidarity. Whether Activists Who Help Forced Migrants in the Borderland Can Be Penalised for Their Actions?” in Witold Klaus (ed), *Beyond the Law: Legal Assessment of the Polish State’s Activities in Response to the Humanitarian Crisis on the Polish–Belarusian Border* (Warsaw, Polish Academy of Sciences Publishing House 2022) pp 30–2.

<sup>33</sup> Dominika Liszkowska, “Securitization of Migration and Crisis Management in Poland” (2023) 17 Defence Science Review 34–5.

<sup>34</sup> Filipec (n 4) pp 12–13; Alicja Fajfer, “The Costs of Deterring Migration on the Polish–Belarusian Border in 2021” (2021) 8 Cross-Border Review 84–8.

<sup>35</sup> Marcin Górski, “Lawfulness of the Introduction of a State of Emergency and the Limitations on Civil Rights Under It, Including Restriction on Movement” in Witold Klaus (ed), *Beyond the Law: Legal Assessment of the Polish State’s Activities in Response to the Humanitarian Crisis on the Polish–Belarusian Border* (Warsaw, Polish Academy of Sciences Publishing House 2022) pp 20–2.

<sup>36</sup> Act on Compensation in Connection With the Introduction of the State of Emergency in the Area of Part of the Podlaskie Voivodeship and Part of the Lubelskie Voivodeship in 2021, of 29 September 2001 (Journal of Laws, item 425, as amended).

by creating alternative solutions supplementing or bypassing those indicated in the Constitution. Such alternative solutions can be introduced to circumvent the constraints inherent in constitutional provisions. This approach is advantageous for authorities as it allows them to act outside the framework of constitutional restrictions and, consequently, beyond institutional oversight. This has, in turn, raised the question of whether the creation of such alternative solutions is permissible in light of the Constitution, which does not provide for the possibility of introducing extra-constitutional states of emergency.

This issue is not new and was addressed by the Constitutional Tribunal in 2009,<sup>37</sup> when one of the provisions of the Crisis Management Act was declared unconstitutional. The contested provision<sup>38</sup> defined a “crisis situation” as “a situation adversely affecting the level of security of people, property of significant size or the environment, causing significant limitations in the operation of competent public administration bodies due to inadequacy of available forces and resources”. This definition was crucial to the functioning of the crisis management system in Poland, particularly in scenarios where threats required public administration bodies and the Armed Forces of the Republic of Poland to undertake measures aimed at ensuring the safety of citizens. In its justification of the judgment, the Constitutional Tribunal stated:

[...] a crisis situation cannot be equated with states of emergency referred to in Article 228(1) of the Constitution. The Basic Law provides a closed catalogue of states of emergency, thereby prohibiting the introduction of additional states of emergency through ordinary legislation. [...] The inadmissibility of applying extraordinary measures in a crisis situation indicates that such situations fall within the so-called normal functioning of the state. When the authorities restrict themselves to declaring a crisis situation, it reflects their assessment that the threats in question do not justify the introduction of a state of emergency. In other words, there is no need to restrict rights and freedoms, and “normal” measures are considered sufficient to address these threats.

The issue of the permissibility of an extra-constitutional state of emergency resurfaced during the COVID-19 pandemic, when no state of emergency was declared, despite conditions that could have justified a state of extraordinary situation or a state of natural disaster. Instead, the government introduced a state of epidemic threat,<sup>39</sup> followed by a state of epidemic<sup>40</sup> and then returned to a state of epidemic threat,<sup>41</sup> which was ultimately lifted on 1 July 2023.<sup>42</sup> These two emergencies are regulated by the Act of 5 December 2008 on Preventing and Combating Infections and Infectious Diseases,<sup>43</sup> under which a state of epidemic threat can be declared when there is a risk of an epidemic outbreak requiring the

<sup>37</sup> Judgment of the Constitutional Tribunal of 21 April 2009, ref. K 50/07.

<sup>38</sup> At issue was Article 3(1) of the Act of 26 April 2007 on Crisis Management (Journal of Laws 2007, No 89, item 590, as amended).

<sup>39</sup> Ordinance of the Minister of Health of 13 March 2020 on the Declaration of a State of Epidemic Threat in the Territory of the Republic of Poland (Journal of Laws 2020, item 433).

<sup>40</sup> Ordinance of the Minister of Health of 20 March 2020 on the Declaration of the State of Epidemic in the Territory of the Republic of Poland (Journal of Laws, item 491).

<sup>41</sup> Ordinance of the Minister of Health of 12 May 2022 on the Declaration of a State of Epidemic Threat in the Territory of the Republic of Poland (Journal of Laws 2022, item 1028).

<sup>42</sup> Ordinance of the Minister of Health of 14 June 2023 on the Cancellation of a State of Epidemic Threat in the Territory of the Republic of Poland (Journal of Laws 2023, item 1118).

<sup>43</sup> Journal of Laws 2021, item 2069.

implementation of preventive measures specified in the law. A state of epidemic, on the other hand, is declared when an epidemic outbreak occurs, necessitating counter-epidemic and preventive measures outlined in the legislation to minimise its consequences. The primary distinction between a state of epidemic threat and a state of epidemic is that “the former is introduced when a risk of the outbreak of an epidemic occurs, while the latter concerns combating the pandemic which has already occurred”.<sup>44</sup>

Neither a state of epidemic threat nor a state of epidemic constitutes a state of emergency within the meaning of the Constitution and, consequently, neither can produce equivalent legal effects, whether in the actions of state authorities or in the restriction of individual rights and freedoms. Some scholars have characterised this situation as a *de facto* but not *de iure* state of emergency or as a material but not formal emergency,<sup>45</sup> or even as a hybrid state.<sup>46</sup> However, such descriptions merely highlight that restrictions similar to those imposed during a state of emergency were introduced without formally declaring one. There is no doubt that a state of emergency, as defined in the Constitution, was not declared. Obviously, alternative measures such as a state of epidemic threat or a state of epidemic cannot be deemed unconstitutional solely because they are not explicitly regulated by the Constitution. These measures are grounded in constitutional provisions obliging the authorities to combat epidemic diseases. If the declaration of an epidemic threat or epidemic state serves this constitutional purpose, it cannot be considered unconstitutional.<sup>47</sup> Nevertheless, an alternative view has been presented in the literature, drawing on the principles established in the Constitutional Tribunal’s judgment of 21 April 2009. According to this perspective, the legislature may not expand the constitutional catalogue of states of emergency by introducing new forms of emergency. Proponents of this view argue that the Constitution implicitly prohibits the enactment of legislation defining additional states of emergency beyond the three explicitly authorised, as it grants the legislature authority to regulate only those three. In my view, however, this interpretation is open to challenge. Statutes are enacted based on Parliament’s general legislative competence, and it is therefore unnecessary to predefine all permissible types of legislation. This broader legislative authority allows for statutory measures addressing specific circumstances, such as epidemics, without violating constitutional principles.

Assuming the admissibility of the creation of extra-constitutional states of emergency by the ordinary legislator, it must be emphasised that these states cannot produce the same effects as those provided for under constitutional states of emergency. In this regard, the catalogue of constitutional states of emergency is closed and cannot be extended by the ordinary legislature to include other states of emergency with comparable effects. Furthermore, extra-constitutional states of emergency cannot serve as substitutes for those regulated by the Constitution, although they should be considered subsidiary to them. In other words, the declaration of a state of martial law, a state of an extraordinary situation or a state of natural disaster is justified only when

<sup>44</sup> Van Klink, Soniewicka and van den Boeken (n 27) p 21; Florczak-Wątor (n 26) pp 344–345.

<sup>45</sup> See Piotr Kardas, “Konstytucyjne podstawy rozstrzygnięcia kolizji obowiązków i konfliktów dóbr w czasie pandemii” (2020) 6 *Palestra* 9.

<sup>46</sup> Marcin Krzeminski, “Hybrydowy stan nadzwyczajny” (2020) (<<https://konstytucyjny.pl/marcin-krzeminski-hybrydowy-stan-nadzwyczajny/>> and Piotr Tuleja, “Pandemia COVID-19 a konstytucyjne stany nadzwyczajne” (2020) 9 *Palestra* 14–17.

<sup>47</sup> See Leszek Bosek, “Anti-Epidemic Emergency Regimes under Polish Law in Comparative, Historical and Jurisprudential Perspective” (2021) 28 *European Journal of Health Law* 113, 138; Van Klink, Soniewicka and van den Boeken (n 27) p 20.

the application of an extra-constitutional measures, such as a state of epidemic threat or a state of epidemic, is neither possible nor expedient.<sup>48</sup> Indeed, extra-constitutional states of emergency fall into the category of “ordinary constitutional measures”.<sup>49</sup> While not explicitly regulated by the Constitution, they may nonetheless serve to implement constitutional norms.<sup>50</sup>

The absence of a declaration of a state of emergency during the COVID-19 pandemic is a decisive factor in assessing the constitutionality of the restrictions imposed on individual rights and freedoms in connection with the pandemic. Such restrictions can only be evaluated according to the principles applicable during the normal functioning of the state and, therefore, under the conditions outlined in the Constitution. This implies that the restrictions must not be excessive and must not violate the essence of constitutional rights and freedoms, including ensuring that individuals are not deprived of the ability to exercise these rights and freedoms. However, despite the absence of a declared state of emergency, a number of extraordinary restrictions were introduced, comparable to those imposed during situations where a state of emergency has been formally declared.<sup>51</sup>

#### IV. Conclusions

The regulation of states of emergency in the Polish Constitution of 1997, supplemented by extensive legislation, appears to be comprehensive and well-designed. It accounts for various sources of threat and provides for appropriate measures to be taken by the state authorities in response. However, the application of these provisions leaves much to be desired. Polish authorities either avoid declaring states of emergency at all or abuse their declaration to unconstitutionally impose restrictions on individual rights and freedoms. The only state of emergency introduced in Poland to date, namely a state of an extraordinary situation declared in 2021, serves as a clear example of such abuse. The creation of alternative emergency regimes to replace constitutionally regulated states of emergency, while circumventing the limitations imposed by the latter, undermines the rule of law and basic democratic standards. The state of epidemic emergency and the state of epidemic declared in Poland during the COVID-19 pandemic exemplify such duplicate states of emergency, introduced to enable the use of extraordinary powers without adhering to the constitutional safeguards and limitations that regulate such measures.

The unsatisfactory, and at times erroneous, practice of applying constitutional states of emergency in Poland suggests that this model requires improvement and further development. Decisions by the executive regarding whether to declare a state of emergency should be subject to more effective controls, including enhanced parliamentary scrutiny and judicial review. A lack of effective checks and balances invariably creates opportunities for further abuses.<sup>52</sup> Furthermore, the possibility should be expressly excluded for Parliament to create alternative states of emergency outside those provided

<sup>48</sup> See the decision of the Polish Supreme Court of 28 July 2020, ref. 1 NSW 2849/20.

<sup>49</sup> See Article 228(1) of the Constitution.

<sup>50</sup> Florczak-Wątor (n 26) p 344.

<sup>51</sup> Drinóczy and Bień-Kacała (n 15) pp 187–8.

<sup>52</sup> Petra Guasti and Lenka Buščíková, “Pandemic Power Grab” (2022) 38 *East European Politics* 529; Kriszta Kovács, “The COVID-19 Pandemic: A Pretext for Expanding Power in Hungary” in Joelle Grogan and Alice Donald (eds), *Routledge Handbook of Law and the COVID-19 Pandemic* (Abingdon-on-Thames, Routledge 2022), pp 259–70; Max Steuer, “States of Emergency, Simultaneous Overreach and Underreach and the COVID-19 Pan(dem)ic” (2023) 15 *European Journal of Risk Regulation* 1–15.

for in the Constitution. Introducing a fast-track mechanism for reviewing the constitutionality of emergency regulations by the Constitutional Tribunal would also be advisable. However, any such reform must first address the Constitutional Tribunal itself, which is currently mired in a deep constitutional crisis due to its lack of independence.<sup>53</sup>

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<sup>53</sup> See eg, Aleksandra Kustra, “Poland’s Constitutional Crisis. From Court-Packing Agenda to Denial of Constitutional Court’s Judgments” (2016) 12 *Polish-Italian Studies in Toruń* 343–66; Wojciech Sadurski, “Polish Constitutional Tribunal under PiS: from an Activist Court, to a Paralysed Tribunal, to a Governmental Enabler” (2019) 11 *Hague Journal on the Rule of Law*, 63–84; Monika Florczak-Wątor, “The Polish Constitutional Tribunal and its Transformation” (2020) 32 *European Review of Public Law* 466–7.

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