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Lawfulness of the introduction of a state of emergency and the limitations on civil rights under it, including restriction on movement

Under Art. 228 § 1 of the [Constitution of the Republic of Poland](#), the introduction of a state of emergency is permissible only in situations of special threat, if the ordinary constitutional measures are insufficient. Furthermore, the declaration of a state of emergency is admissible only in the event of a threat to the constitutional system of the state, security of citizens or public order (Art. 230 § 1 of the Constitution). The prerequisites specified in both these provisions must be met jointly for the introduction of a state of emergency to be permissible, and therefore legal.

A state of emergency, pursuant to Art. 230 (1) and (2) of the Constitution, may be imposed once, for a period no longer than 90 days, and then extended only once for a maximum of 60 days.

Art. 233 (1) of the Constitution identifies the fundamental freedoms and rights that may not be restricted when a state of emergency is imposed. The enactment of limitations to these rights and freedoms is allowed only to the extent defined by law (in accordance with Art. 228 § 3 of the Constitution).

The [Act on State of Emergency](#) regulates the scope of restrictions on freedoms and human and civil rights in Chapter 3 (Art. 15–21). In accordance with Art. 18² (1) and (2) of the same Act, ‘orders or prohibitions may be introduced during a state of emergency’ with respect to, inter alia, ‘staying or leaving designated places, facilities and areas at a designated time’ and ‘obtaining permission from public administration bodies to change the place of permanent and temporary residence’.

The [Ordinance of the President of the Republic of Poland](#) of 2 September 2021 on the introduction of a state of emergency in some parts of the Podlaskie Voivodeship and some parts of the Lubelskie Voivodeship stipulates in § 2 (4) that ‘during the state of emergency, ... a ban is introduced on staying in designated places, facilities and areas located in the territory covered by the state of emergency at a designated time’.

Thus, it is apparent at first glance that contrary to Art. 18² (1) of the Act on State of Emergency in conjunction with Art. 228 (3) of the Polish Constitution, § 2 (4) of the Presidential Ordinance of 2 September 2021 did not specify either the ‘designated places, facilities and areas’ that the ban was to concern or the ‘designated time’ to which the ban was to apply. Let us add right away that the problem is not the duration of the state of emergency, as this is defined on the basis of Art. 230 of the Constitution and Art. 3 (2) of the Act on State of Emergency, and not on the basis of Art. 18 of the Act on State of Emergency. Nor is it a matter of the area in which the state of emergency is in force, for that too is defined on the basis of Art. 3 of the State of Emergency Act and not on the basis of Art. 18 thereof.

It can hardly be assumed in this case that this omission is a mere legislative shortcoming (if only an extreme one). Even the current government is able to avoid such an obvious mistake. It should therefore be concluded that the Polish political authorities deliberately decided to determine the territorial and temporal scope of the ban in such an indefinite (and unconstitutional) manner, in order to cause a [chilling effect](#).

If the services responsible for enforcing the law in Poland acted with the same basic efficiency as such services do in civilised countries, then the prohibition ‘specified’ in § 2 (4) of the Ordinance of 2 September 2021 would not be enforced at all. This is because it is impossible to enforce a ban which does not specify where and when one is not allowed to stay. It is a ‘blank check’ prohibition. This enforcement, which de facto and *contra legem* takes place, is therefore based on the officers of the state conjecturing what the legislators wished to express. Such guessing as to the content of the prohibition, which constitutes an infringe-

ment of constitutional rights and freedoms, has the features of the prohibited act of an officer exceeding his or her powers ([Art. 231 § 1 of the Penal Code](#)). This is precisely what is prohibited by the principle of legalism, which is the cornerstone of this criminal provision.

It cannot be ruled out that the President of the Republic of Poland, by issuing such a grossly flawed regulation, was attempting to escape responsibility for enforcing the stay ban with measures of direct coercion by shifting this responsibility to officers of the Border Guard or the Polish Army. The practices of recent years clearly raise such a suspicion.

If legal sanctions are imposed for the violation of the said restrictions, it is the duty of the courts to refuse to apply the provisions of the ordinance that are contrary to the law. In practice, this means that the defendants must be acquitted of the charges against them. Provided that the courts act correctly, the only result of the regulation would be the chilling effect it was intended to produce. It should be assumed that this was also the intention of the lawmaker, as it is unlikely that the lawmaker was not aware of such an obvious flaw in the regulation.

At this point we should also refer to the [Act of 17 November 2021 amending the Act on State Border Protection and some other acts](#). It added a regulation to the Act on State Border Protection, which enables the minister of internal affairs to impose, by means of a regulation, ‘a temporary ban on staying in a specified area in the border zone adjacent to the state border constituting an external border within the meaning of the Schengen Borders Code’ (Art. 12a of the Law on State Border Protection). Under the amendment, Art. 18d has also been added to the Act, according to which the violation of a residence ban introduced by a ministerial decree is a misdemeanour punishable by arrest or a fine. Pursuant to Art. 12a of the aforementioned [Act, the Ministry of Internal Affairs and Administration issued an ordinance of 30 November 2021 on the introduction of a temporary ban on staying in a specified area in the border zone adjacent to the state border with the Republic of Belarus](#), which introduces a temporary ban on staying in 183 administrative districts of certain communes located within the borders of the Lubelskie and Podlaskie provinces.

The essence of such a regulation is an unconstitutional ‘prolongation’ of the state of emergency beyond the constitutional time limit (Art. 230 § 2 of the Constitution of the Republic of Poland) through ignoring the constitutional ban on the use of an urgent procedure with respect to acts governing the political system and jurisdiction of public authorities (Art. 123 § 1 of the Constitution of the Republic of Poland). This regulation is therefore unconstitutional both in terms of procedure (because it was passed in violation of Art. 123 § 1 of the Constitution) and substance (because it violates Art. 230 § 2 of the Constitution of the Republic of Poland, as it introduces an extension of the state of emergency beyond the constitutional time limit that is contrary to this provision). Moreover, the regulation in question also violates Art. 92 § 1 in conjunction with Art. 230 § 1 of the Constitution, as the provision of the act authorises the prolongation of the state of emergency by a body other than the one indicated in the Constitution (i.e. other than the President of the Republic of Poland). Finally, the said regulation is in breach of Art. 31 (3) and Art. 52 (3) of the Constitution of the Republic of Poland, in that it mandates the limitation of the constitutional freedom of movement by way of a regulation, whereas such limitations may only be introduced by way of a law. The Ordinance of the Ministry of Internal Affairs and Administration of 30 November 2021 is, therefore, also unconstitutional, being, as it were, an extension of the same substantive defects that can be found in the legal basis for its enactment.

In practice, this means that state officials are obliged, on pain of criminal liability under Art. 231 of the Criminal Code, to refrain from holding possible violators of the temporary stay ban liable for offences. The courts, on the other hand, are under an obligation to acquit such violators of the charges of infringement of the temporary restraining order, since the charges would have to be based on a breach of a regulation, the application of which is inadmissible for reasons of its unconstitutionality. Let us add here that it is

the MIAA regulation itself, and not ‘merely’ the legislative authorisation that is unconstitutional, which relieves the court of any possible dilemmas in the application of the refusal to apply the unconstitutional statutory provision. To sum up, persons staying in the area covered by the temporary stay ban discussed here do so in a perfectly legal manner.