

Polish Legal Regulations and the Legal Doctrine With Regard to States of Emergency in a Comparative Perspective

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Abstract. The subject of this analysis is the axiology and purpose of the legal regimes of martial law in Poland in a comparative perspective. The starting point of the research is a study of the roots of institution. Analysis of the institutions of ancient Rome, revolutionary France, Germany, the US, and the Weimar Republic to the modern regulation of selected countries of the Western Hemisphere is submitted. The authors, in recognizing the existence of monarchical and republican models of martial law, indicate the fundamental difference between the objective of martial law in Europe and the US/Canada. The comparative analysis provides a framework for research on law and institutions in Poland and the basis for the formulation of demands *de lege ferenda*.

Keywords: security, axiology of regulation, states of emergency, transatlantic area, models of martial law

1. INTRODUCTION AND METHODOLOGICAL ASSUMPTIONS

By acknowledging that neither a single nor universal method of studying law exists¹ and, due to the complexity and secondary nature of the legal system (in relation to other normative systems such as morality, custom, religion, culture and tradition) as well as the multidimensional and non-deliberative character of the issue of security, the present study is based on the assumption of the multi-faceted² concept of law. Although studying the conditions and factors that determine European Union policy in terms of guaranteeing and safeguarding its security is fundamental, it is also essential to realise that the framework of this study is delimited by the axiology of international law.

When stating that there is neither a single nor universal method of studying law, there is controversy over the legal method and its three stances: the rejection of method, methodological heteronomy and methodological autonomy. Moreover, particular methods of legal reasoning such as logic, analysis, argumentation and hermeneutics have been considered.³

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¹ The living law as defined by Ehrlich, i.e., “The living law is the law which dominates life itself even though it has not been posited in legal propositions. The source of our knowledge of this law is, first, the modern legal document; secondly, direct observation of life, of commerce, of customs and usages and of all associations, not only those that the law has recognised but also of those that it has overlooked and passed by, indeed even of those that it has disapproved”; Ehrlich (1936). Cited by Moll (2001) 493.

² The multi-faceted concept of law consists of five levels where the law “happens”. These levels are: law-making, binding force of law, law observation, law application, and law enforcement.

³ For a broader discussion in the Polish legal theoretical literature of the study of law, see Opałek (1962) 49–60. For recent Polish works on the theory of law, see Stelamch, Brożek (2006).

The set of assumed values⁴ and the actual meanings assigned to them by individual stakeholders of both the European (narrow view – the axiology of law, the legal structure and legal institutions of EU member states and the EU as a supranational entity) and international communities (broad view – the axiology of the international community, the legal structure and legal forms and legal institutions functioning as an international community beyond the European dimension) determine both the perception of the issue of European security (threat analysis processes) and the method and tools of achieving this security (established procedures, powers and measures that might be enforced under the existing regulations of international, European and individual EU member state laws). International legal norms, in terms of the regulatory content that serves as the protection of values of objects and states of affairs, derive from axiological orders that form the foundation, or legitimacy, of the individual countries' legal systems. In the case of European law, this refers to the legal order of the EU member states. Also with regard to international legal norms, a thesis proposed by Ch. Tomuschat appears in the literature as stating that fundamental principles of international law derive from so-called ethical premises⁵ of national legal orders that are well-socialised values-goals.

The principal problem is the impossibility of agreeing the common and unquestionable semantic ranges and sets of *designata* with respect to the values (states, things or objects) assumed by the individual members of the international community. The stakeholders in international relations, in particular the European Union, often fail to realise, when adopting a common set of values within a system of legal norms that aims to protect them, they assign same concepts with different meanings which are rooted in and understood through the prism of individual domestic legislation. This problem is an obvious consequence of the lack of an intersubjective⁶ perception of values. The second reason for this complex problem, despite the formally guaranteed and agreed understanding of the legal norms in force is the lack of intersubjective perception and understanding of norms because of the possible conflicting results of exegetical and interpretive activities, even within an authentic interpretation or legal construction of law.

Therefore, the question arises whether the axiology of the binding legal acts of the EU security system⁷ as well as European security may be agreed upon and accepted not only by

⁴ The axiological basis of a legal norm is the value that is protected, safeguarded and multiplied by this norm. Thus, the value grants sense to the creation, effect and application of legal norms. A different opinion within Polish sociology was presented by M. Borucka-Arctowa, who believed that the axiological plane must not be isolated by the multi-plane concept of law. In her opinion, the study of axiology should be conducted as part of sociological legal and not theoretical legal studies. For a broader discussion, see Borucka-Arctowa (1968) 429–437. Other leading sources can also be mentioned. The reviewer has no doubts that the cited Polish authors published very influential and leading works but these opinions had forerunners prior to the 1960s.

⁵ For a broader discussion, see Tomuschat (1995) 123. Tomuschat's work with all bibliographical data is quoted.

⁶ "Intersubjective" refers to something that in its essence may be perceived by more than one observer in the same way that is beyond doubt as to interpretation or validation.

⁷ Precisely, the legal regulations of Common Security and Defence Policy (CSDP), which is an integral part of Common Foreign and Security Policy (CFSP). CFSP was formulated in the Treaty on European Union (TUE). Its Article 41 describes the funding of CSDP and CFSP, whereas Articles 42–46, in Chapter 2, Section 2 of Title V present the policy itself in detail ("Provisions on the Common Security and Defence Policy"), as well as in Protocols 1, 10 and 11 and Declarations 13 and 14. The Lisbon Treaty mentions European capabilities and armaments policy (Article 42(3) TUE).

the EU member states but also by other European states that participate in the design of the European security architecture of the OSCE. Does the adopted axiology constitute merely formal legitimisation (official/political) or also social legitimisation (accepted by society) of the law in this area? These questions are significant insofar as calls for reform of international public law arose a decade ago, particularly in the field of security and international relations by means, among others, of verifying the axiological premises (foundations) of its norms.⁸ Although axiological justification (in social psychology) as a category refers to the conduct of individuals within a legal order, the sciences studying international relations and international public law assume that the axiological justification is a *conditio sine qua non* for the existence of its norms.

An analysis of the conditions, challenges and opportunities of modern European security can be made based on the above statements. It should be understood that this analysis will also include description, explanation and prediction, all that refer to European security. This is currently dominant method of studying law and factors that legitimise law. In particular, the study of the legitimisation of legal regulations pertaining to security must cover two aspects in order to be both correct and complete. Comprehensive, or covering the entire scope of the subject of study. Even before Poland's accession to NATO and EU association, this opinion was published in Polish literature by *G. Skapska* and *J. Stelmach*, who wrote, "therefore, the question of legitimisation of the law combines two kinds of problems that lie, so to say, on two opposite poles of legal reflection. On the one hand, it covers the issues pertaining to the relationship between the political system (state) and law, and, at present, primarily the issues of instrumental subjection of law to the political system as a tool of achieving its goals. (...) On the other hand, the question of legitimisation of the law involves the problem of the relationship between law and the society, i.e. the institutional foundations of the social structure, organisation and order."⁹

In light of the above, It can be assumed that socially legitimised law, due to the socially recognised axiology that lays the foundations for the adopted concept of security and the legal regulations/norms designed for its implementation (as a tool of effective protection of the adopted values and achieving the adopted goals) is the most effective form of law. It must be realised at the same time, in light of economic legal analysis, efficiency substitutes for the notion of justice is present in the philosophy of law.¹⁰ Nonetheless, as already indicated by *G. Radbruch*, three values forming the idea/ideal of law—security, justice, and purposefulness. This all compete with each other and it is impossible to reach an equilibrium between them. At most, a condition of homeostasis may be achieved in which individual values may prevail based on the current political, legal and social

As a result of the gradually increasing role of the EU in the realm of security, the leaders of the member states decided to reform its second pillar. The Treaty of Amsterdam introduced important legal modifications of CFSP that pertained to crisis management. Article 17(2) states that the EU shall carry out humanitarian and rescue tasks, peacekeeping tasks and tasks of combat forces in crisis management, including peacemaking. Since the Treaty entered into force, the EU has obtained the right to carry out crisis management military operations.

⁸ This thesis is supported, inter alia, by A. Buchanan. He attempted to formulate the concept of the necessity of moral foundations for international law, whose premises are presented in Buchanan (2004)14–70.

⁹ Skapska, Stelmach (1988–1989) 5.

¹⁰ For a broader discussion, see Stelmach, Brożek (2004) 157 ff.

situation.¹¹ Following on from *Radbruch*, the author believes that legal regulations in the field of security, i.e., the law in the sense of *lex*, should be restricted to the scope of what had already been the non-state law before (the law in the sense of *ius*).¹² Unfortunately, this law-making model, especially in the field of security, is not being implemented. In the dominant positivist model, law is seen as oppression inflicted on society by the legislator for the “good/security of this society”; however, without considering its demands and the pre-existing and functioning non-legal norms in this field. For instance, this brought about the situation that arose in the U.S. after 9/11 with respect to legal regulations regarding citizen and state security. Since then, a new hybrid model of state functioning has been developed and is now established in the U.S. It consists, on one hand, the rule of law and, on the other, of a constant state of war in which some civil rights are suspended. Consequently, American society has been mentally living at war and not at peace.¹³

Radbruch’s work had to be remembered, in the context of the legal assessment of a case from Polish history i.e., the proclamation of martial law in the Polish People’s Republic on the 13th of December 1981. Two opposite views are useful to assess this event; one being *Radbruch*’s rule of law (*Rechtsstaat*) and the other, Schmitt’s Legal Order¹⁴. The proclamation of martial law displayed features of *Carl Schmitt*’s concept of state and legal order.¹⁵ “*Schmitt*’s personal conception of the relation between institutions and law makes him reach the conclusion that the state legal order performs a twofold role. Firstly, the legal order is the filter of a society, in that it has to select those institutions that are compatible with each other and to repress those that may put social homogeneity in danger. Secondly, even though it selects and protects, law is not a mere system of selection and control, but the genuine voice of a leader, or rather, the instrument used by a leader to realize her own idea of how a society should be.”¹⁶

For *Schmitt*, the sovereign is the solely entity that possesses the actual possibility to proclaim a state of emergency, a view derived from *T. Hobbes*’s work. In this model, *Schmitt* sets only one limit on the possibility of a state of emergency, which is the interest of the state itself. For *Radbruch*, meanwhile, the possibility of introducing a state of emergency is the ultimate solution that may be used by an authority only as long as no other legal solutions allowing it to protect the existing legal order remain. According to *Radbruch*, above the interest of the state are the values of security, justice and purpose, which create the idea of law, whereas law and the state should serve these values. Contrary to *Radbruch*’s

¹¹ For a broader view on the ideal of law, see *Radbruch* (2002).

¹² For a broader discussion, see *Radbruch* (2002) 159–163.

¹³ *Luban* (2002) 9.

¹⁴ For more comparative analysis, see *Hildebrandt* (2015) 42–63.

¹⁵ *Schmitt*’s concrete order thinking can be interpreted as a critical alternative to normativism. A. Croce and Salvatore note in this context, “from a normativist point of view, normativity and facticity are two independent realities, which live their own life by and for themselves. (...) According to *Schmitt*, this understanding of the relation between normativity and social reality is gravely mistaken. Yet, it is not so much for the way rules are conceived. More seriously, this view misconceives social reality and its inner orderliness. Reality, in *Schmitt*’s view, is not mere facticity. It is the domain of normality. (...) Roughly speaking, normality is the way things work in social life when they work properly. No legal norm is able to capture this way. No legal fact-type can encapsulate once and for all a normal conduct in a normal model. Legal norms can only help normality survive and prosper.” Croce, Salvatore (2013) 35–6.

¹⁶ Croce, Salvatore (2013) 5.

view, *Schmitt* believed that a state of emergency might be proclaimed both to maintain and protect the legal order and to abolish it, and no entities/values are superior to the interest of the state. Therefore, the *Radbruch* formula is of fundamental significance to an assessment of the legality of states of emergency. In September 1945, Radbruch gave a radio talk subsequently published as an essay entitled *Five Minutes of Legal Philosophy*. In the last, fifth, minute, he stated: “There are, therefore, principles of law that are stronger than any statute, so that a law conflicting with these principles is devoid of validity. These principles are called the natural law or the law of reason. To be sure, their details remain somewhat doubtful, but the work of centuries has established a solid core of them and they have come to enjoy such a far-reaching consensus in the declarations of human and civil rights that only the deliberate sceptic can still entertain doubts about some of them.”¹⁷ Therefore, the view should be supported that “Contrary to *Schmitt*’s suggestion, this situation *établie* cannot be understood and preserved on the basis of its concrete reality; to be sustainable it requires keen attention to the normative framework it embodies and the backing of sovereign power. Norm, decision and institution are mutually constitutive or interdependent. On top of that, to qualify as law, their interplay should vouch for the ends of justice, legal certainty and the law’s own instrumentality, in all modesty.”¹⁸

2. THE TERM “STATES OF EMERGENCY” – GENERAL REMARKS

Poland is the subject and the reference of this legal analysis and the starting point of the research is the Polish political transformation of 1989. Undoubtedly, both the “Communist constitutional order” in 1944–1989 and particularly the experience of martial law have significantly affected the perception of states of emergency and their regulation in Poland. However, the turning point of 1989 is so fundamental that quoting earlier experience is only significant from the perspective of the sociology of law. Poland and Polish law in 2016 belong to the Western hemisphere, whereas Poland and Polish law until 1989 belonged to the eastern one. The state of emergency is a particular legal regime¹⁹ that is effective on the entire territory of a state or its part, as proclaimed by authorised bodies by a due procedure in order to remove a threat of a special nature that, according to these bodies, might not have been removed under regular regime(s) or would have been significantly more expensive. Personal costs prevail in the cost account; however, material costs may not be neglected either. The emergency regime consists of the temporary suspension²⁰ of the application or effect of certain legal norms and limiting material and procedural requirements as to the operation of the executive. The regime is justified by the need for more effective operation of the state, that is, the public authorities. According to the universal Polish perception of states of emergency, the essence consists of the suspension of the application of legal regulations in the area of fundamental human rights and freedoms, including civil rights²¹, i.e., waiving constitutional methods and forms of wielding and

¹⁷ Radbruch (2006) 13–15.

¹⁸ Hildebrandt (2015) 63.

¹⁹ The legal nature of the regime is the result of the 20th century rejection of the paradigm “*Not kennt kein Gebot*”.

²⁰ The fact that the regime is temporary means that it is *kommissarische Diktatur* (as understood by Schmitt) and not *souveraine Diktatur* (constitutional Dictatorship); i.e., the law governs and not the ruler. (Schmitt (2010)).

²¹ As in Cybichowski (1929) 162.

exercising authority.²² Such an understanding of the possibility of granting “immunities and privileges” to state authorities, e.g. exemption from duties imposed on them in ordinary times and granting rights to which they are not entitled, in relation to the obligation of observing the law, including human rights and freedoms, results from perceiving the relationship between law and authority as a deliberate restraint of the latter. If it were not for law, the authority would be more effective.²³ Moreover, the concept of a state of emergency fails to distinguish whether suspending respect of human rights and freedoms results from the fact that the state as the greater value (compared with human rights and freedoms) is jeopardised and that in order to protect it the lesser good may be sacrificed, or that it is man who is jeopardised but lacks sufficient wisdom to reasonably care for his own business, his security, and therefore a paternalistic state, i.e., the good father, must restrict itself in observing the rights of the unwise man lest he not harm himself. At the same time, the followers of this belief fail to answer/ask the question about the sense of the state—the category of effectiveness. Nonetheless, it is undoubtedly different from the one derived from the premise that the state was created by free people to protect their freedom and to serve the common good.²⁴

Positive verification of this paradigm i.e., the higher effectiveness of a state free from the obligation to observe fundamental human rights and freedoms would lead to acknowledging that a state with a permanent state of emergency would be more effective. This is a line of thinking that, in its extreme version, constitutes Schmitt’s views of the total state and essence, instruments, and sense of exercising authority.²⁵

Nonetheless, this paradigm, at best specific to a democratic state following the rule of law, has never been positively verified. On the contrary, a state under a state of emergency and the question of its effectiveness are not a matter of theoretical reflection but the sum of experience. A set of information on various models of a totalitarian state and the effects of its existence contains more data than a similar set pertaining to a democratic state because its history is longer and its practice more abundant. The conclusion is contrary to that which would lead to an argument justifying the proclamation of a state of emergency. A country under a state of emergency manages its public affairs in a less effective way than a democratic state, and this applies to each situation. One may not ignore the conclusions derived from the fact that the Nazi regime lost World War II, and the Cold War was “won”

²² As in Stembrowicz (1983) 7.

²³ International Commission of Jurists (ICJ) Comments To The UN Human Rights Committee On Its Half-Day Of General Discussion In Preparation For A General Comment On Article 9 (Liberty And Security Of The Person) Of The International Covenant On Civil And Political Rights. Submitted September 2012, 12–18. See at <<http://www.ohchr.org/Documents/HRBodies/CCPR/GConArticle9/ICJ.pdf>> accessed 25 May 2016.

²⁴ This concept laid the foundations for the Virginia Declaration of Rights.

²⁵ “Sovereign is he who decides on the exception. Only this definition can do justice to a borderline concept. Contrary to the imprecise terminology that is found in popular literature, a borderline concept is not a vague concept, but one pertaining to the outermost sphere. This definition of sovereignty must therefore be associated with a borderline case and not with routine. It will soon become clear that the exception is to be understood to refer to a general concept in the theory of the state, and not merely to a construct applied to any emergency decree or state of siege. The assertion that the exception is truly appropriate for the juristic definition of sovereignty has a systematic, legal-logical foundation. The decision on the exception is a decision in the true sense of the word. Because a general norm, as represented by an ordinary legal prescription, can never encompass a total exception.” Schmitt (2000) 32.

by the states of the western-democratic hemisphere Just as respect of law, being restrained by the law, did not stop the eventual winners, the suspension of the application of law or even unlawfulness did not help the defeated.

This does not mean that the attitude to states of emergency should be determined by the Manichaeian vision of a separation between “good and evil”. This separation should refer to the states based on their systems, which imply goals and rules of applying a state of emergency regime. In every case, the emergency regime is a tool with which authorities react to threats to security. Nonetheless, in non-democratic states, the catalogue of threats perceived by the authorities includes the social contesting of the system and its practice. Meanwhile, in a democratic state, the contesting of authority is a form of practising political rights by citizens. The consent to a state of emergency is underlain by the axiom that in certain states/situations it is necessary that state institutions operate more efficiently in order to eliminate or reduce the consequences of a threat to security.²⁶ This axiom cannot be questioned e.g., one cannot deny the benefits of the smooth operation of state institutions or the necessity to impose a “prohibition of assembly” during an epidemic. Therefore, the real problem/challenge of states of emergency is an assessment whether the proclamation of an emergency regime and its regulation are legitimate, which should include not only “good reasons” but also an analysis of necessary and acceptable limitations of human rights and the rights of the authorities, that is, the “principle of proportionality.”²⁷

Nonetheless, the fact that the paradigm was not positively verified did not prevent the Polish legislature from stating in Article 228 of the Polish Constitution that: “In situations of particular danger, if ordinary constitutional measures are inadequate, any of the following appropriate extraordinary measures may be introduced: martial law, a state of emergency or a state of natural disaster.” In Poland’s case, the relatively prompt, within the process of the creation of a systemic framework for the state, i.e., political transformation and relatively complete (by European standards) regulation of states of emergency in the form of legal acts at the level of the Constitution and statutes is an understandable and positive (in terms of the attitude towards the law) effect of the traumatic event of the 13th of December 1981 – the declaration of martial law by the communist government. Nevertheless, what may and should surprise, is the fact that the Polish legal regulations, with their weaknesses, comply with the common thoughtless Western European standard, common among the societies and states with both the experience of non-democratic and undemocratic governments as well as those free from such experience. Undoubtedly, it is a good thing, that states of emergency have a constitutional basis in the Republic of Poland, which is not the case in every democratic state under the rule of law²⁸ and, that they are subject to permanent statutory regulation (and are not provisional and *ad hoc*). The diversity of regimes may also be perceived as an advantage. The multitude of emergency regimes in Poland results from different premises for the proclamation of a state of emergency and different “needs” with regard to the discussed regulation that may and should be managed by different tools defined by the regulation. A positive assessment of laws regulating states of emergency in Poland disregards the fact that the Polish regulatory solutions in the discussed field are not

²⁶ Posner (2003) 292.

²⁷ See also Derogation from human rights treaties in situations of emergency. Geneva academy of international humanitarian law and human rights, at <http://www.geneva-academy.ch/RULAC/derogation_from_human_rights_treaties_in_situations_of_emergency.php> accessed 25 May 2016; Arai-Takahashi (2001) 172–182.

²⁸ For example, the US.

derived from national thought but are the result of imitation of (German) solutions. What may and should encourage moderation in the praise of the Polish regulations is not merely the fact of imitation, but the thoughtlessness thereof.

3. ROOTS OF THE REGIME

The origins of the institution of a state of emergency may be traced back to the Roman dictatorship (509 BC), when the power was taken over by the *dictator* for a limited period of time (six months). He was appointed for the purpose of repelling external (*rei gerundae causa*) and internal (*rei seditionis causa*) threats and he was equipped with full authority (only limited by a ban on amending or repealing statutes pertaining to the system of the state). The institution of *dictator* expired at the end of the second Punic War. Nonetheless, the search for the roots of modern states of emergency in the Roman institution of the *dictator* is marked by significant weakness, i.e., omitting the crucial difference between the Roman state and the modern state as well as the function and purpose of the solution. The discussed institution was a legal formula that led to the creation of the executive, which was absent in the Roman state, whereas this tool is an inherent part of the system of authority in the modern state. It is thus difficult to trace and, in fact, to find the roots of the modern emergency state in the Roman institution and to relate them to modern states with an inherent executive that needs to be balanced and controlled rather than created.²⁹

In England, martial law has been developed since the Middle Ages and the regime was finally shaped in the late 1800s and early 1900s. On the European continent, it was the French Revolution that brought *l'état de siège*. Its provisions included basic institutions and solutions of emergency regimes, primarily in terms of waiving fundamental constitutional human rights and freedoms. The regime was based on the constitution, whereas its content and scope of regulation were determined by statutes. The adopted solutions created the so-called “republican model.”³⁰ In Germany, a different model was designed where proclamation of a state of emergency was granted to the executive.³¹ *Notrecht* (national emergency) provided the basis for the authorisation to issue legal acts with the power of statutes. Such a solution (“monarchical model”³²) was in effect in Germany until the Weimar Republic,³³ after which it was imported to France, the cradle of continental solutions with regard to states of emergency, i.e., the French Fifth Republic, substituting the “republican model”. The full formula of the German monarchical model

²⁹ Ferejohn, Pasquino (2004); Prokop (2012) 27–31.

³⁰ The essence of the “monarchical model” is the obligatory legal regulation of the grounds and conditions of both proclaiming and repealing an emergency state; a closed catalogue of human rights that may be suspended under a state of emergency (and, on the contrary, a hard core of human rights that are not subject to suspension); organisation of public authorities under the state of emergency (including the extent of acceptable changes).

³¹ The essence of the “monarchical model” (whose roots lie in the monarch of Louis XVIII) is the reduction of legal regulations to appointing the chief executive with the exclusive power to proclaim states of emergency and the right to create relevant regulations. In this model, the powers of executive under the state of emergency are not legally defined.

³² The name originates from the prototype of the model, i.e., the solutions designed by Louis XVIII.

³³ See also Dunaj (2010) 139 ff.

was expressed by Article 48 of the Weimar Constitution,³⁴ whose provisions were *de facto* iterated with a slightly milder formula in Article 16 of the Constitution of the Fifth Republic. Such convergence of legal regulations indicating the victory of the monarchical model in the cradle of the republican one (and essentially meaning the capitulation of the republic, its values, and model) may be seen as an irony of history, particularly in light of the abandonment (and in fact relinquishment) by the Federal German Republic of the Weimar solutions and shaping regulations according to the republican (French) model.³⁵

The post-World War II German legal path from dictatorship to democracy encountered a notably positive assessment both in terms of normative solutions and the related practice and, as a consequence, the applied legal solutions inspired a number of countries to follow them.³⁶ One may even speak about a uniform European (Western) reception of solutions by democratic states under the rule of law. This convergence derives both from the common values of the member states of the EU, NATO and the Council of Europe and from the institutionalised cooperation in the law-making process (including legal regulations of states of emergency).

4. A COMMON MODEL–THE POLISH SOLUTION

4.1. A common model

Under these conditions, it is hardly surprising that the Polish regulations are in line with the mainstream of European legislation. This imitation was further facilitated by unanimous reflection on state security and a tool for its protection. It is easy to realise that the tendency, quite automatically, of its reception is displayed not only by Polish legislators. As a result, both legal solutions and related academic reflection in Poland originate from the same source. This brings about certain advantages, undoubtedly including the lack of dissonance between reflection and practice. At the same time, it is impossible to ignore the fact that Polish academic reflection in this field is reactive in relation to the practice (and not anticipative) and that it assesses the practice as satisfactory or unsatisfactory (rarely). However, it does not formulate alternative proposals, i.e., it does not ask borderline questions or undertake related critical reflection. The ambiguities, inconsistencies and automatism perceivable in the results of the legislation are also displayed in academic papers and analysis conducted for practical application. The authors who undertake research on security, noting the interchangeable use of the terms “public security” and “national security” in the literature (in the field of security *sensu largo*), suggest even to equate and use interchangeably the concepts of state security and national security. This proposal is based on the statement that the concept of national security in the Polish study of security has been derived from the Anglo-Saxon doctrine without broader theoretical reflection.³⁷

³⁴ For a broader discussion, see Grzybowski (1934).

³⁵ Needless to say, it comes as no surprise, for example, in light of searching Article 48 of the Weimar Constitution for the legal basis for granting special prerogatives to Adolf Hitler by the President; for a broader discussion, see Ryszka (1974) 63.

³⁶ See Prokop (2012) 274 ff.

³⁷ See Walczuk (2013) 11.

Among the most popular (in terms of Polish study of security) definitions of national security is the one stating that national security is “such (an) actual state of internal stability and sovereignty of the state which reflects the lack or existence of any threats (in the sense of satisfying basic existential and behavioural needs of the society and seeing the state as a sovereign entity in international relations).”³⁸

The researchers indicate that the existence and development of communities and organisations, in particular of the state, depends on their security.³⁹ Notably, they tend to point out the relationships between theoretical reflection on security *sui generis* and case studies. This way of perceiving security is reflected in the clear conclusion that a significant element pertaining to the concept of security is the identification and perception of threats that are faced by the country in question. Furthermore, the historic, economic and cultural ties as well as axiologies constitute the “core” around which the structure of security of a particular, precisely defined, community is built.⁴⁰

Nonetheless, fortunately, this local character of security is not absolutized. It may be noted that the paradigm of the “indivisibility of security” that lays the foundation for idealism and the related solutions in the form of institutionalisation of the “collective security system” has been internalised. It is considered that the risks are common or even singular, which allows the conclusion about the emergence of a global pop-culture of security. The 9/11 attacks shook the confidence of most people in the world and on that day, most of them felt American. Watching the reactions, it was difficult to distinguish rationality from the group-like hysteria. In many cases, even the very behaviour comes as no surprise, doubts may arise as to its scale in terms of both the action taken by the United Nations and the application of Article 5 of the North Atlantic Treaty. It appears that the long-term effect has been the consent to recognise the priority of state security over fundamental human rights and freedoms. In the US, it led to, among others, the adopting of the USA PATRIOT Act, Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, which permits far-reaching restrictions on the rights of individuals and interference with their privacy.⁴¹

4.2. Antecedence of the Polish regulations

Extraordinary measures that are defined in the Polish legislation as “martial law”, “state of emergency” and “state of natural disaster” are known to the legislation of those countries whose system is based on the unconditional obligation to respect the principles of democracy, the rule of law and fundamental human rights and freedoms. The comparative analysis indicates that the relevant regulations have been adopted gradually and a number of times in the process of building those states.

³⁸ S. Dworecki (1994) 16. In the extended version, it is defined as follows: “national security should be understood as the supreme value, national need, and the primary goal of the activity by the state, individuals, and social groups, and at the same time involving diverse measures to guarantee sustainable and undisturbed existence and development of the nation, the protection and defence of the state as a political institution as well as the protection of the individuals, their assets, and the natural environment against any threats that could significantly restrict its operation and jeopardise the values which are subject to special protection”.

³⁹ S. Sulowski (2009) 12.

⁴⁰ Kościuk (2008) 21.

⁴¹ Cole, Dempsey (2006) 195–218. Wieruszewski (2008) 19.

4.2.1. Virginia. Virginia Declaration of Rights⁴²

Translating the provisions to modern language, it should be indicated that solely the legislature was equipped with the power to adopt exceptional regulations that could suspend the application of laws. It was stated that a militia composed of the people was sufficient (and necessary) to ensure security in time of peace, whereas it was forbidden *expressis verbis* to maintain a standing army in such time as it was deemed to be an instrument of government and “dangerous to liberty” in itself. The quoted articles (7 and 13) are a constitutional prototype of modern regulations pertaining to emergency states and even if these regulations have been subject to significant modifications, the fears or phobias that are at their origin have survived.

4.2.3. US

The fears of Virginia’s founding fathers are even more clearly displayed in the Second⁴³ and Third⁴⁴ amendments to the Constitution of the United States (part of the *Bill of Rights*) or in defining, in Article 1 Section 8 of the Constitution, the period of time for which the financing of the army may be granted.⁴⁵ The above-mentioned regulations set the legal framework for performing the state’s duties, which include the obligations to “insure domestic tranquillity, provide for the common defense ...” (Preamble)⁴⁶ The powers of Congress in the field of security include not only the power “to lay and collect taxes, duties, imposts and excises, to (...) provide for the common defense” but also the exclusive power of the legislative to declare war ... raise and support armies ... provide and maintain a navy ... provide for calling forth the militia to execute the laws of the union, suppress insurrections and repel invasions ... provide for organizing, arming, and disciplining, the militia, and for governing such part of them as may be employed in the service of the United States” (Article 1 Section 8).

The Founding Fathers foresaw not only states of emergency directly related to domestic occurrences, defined as “insurrections” or “rebellions” but also the need and possibility of creating exceptional legal regulations: “The privilege of the writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.” (Article 1 Section 9). They also provided for an additional penalty of limited deprivation of passive suffrage against a person obliged to support the Constitution who engaged in insurrection or rebellion against the same.

4.3. Polish solutions

In the Republic of Poland, the system of distribution of powers related to national security is the adopted dualistic model of the executive, which includes the President of the Republic of Poland and the Government. On one hand, Article 126.2 of the Constitution states that

⁴² The Declaration was adopted by the Virginia Convention (1776) at <http://www.constitution.org/bcp/virg_dor.htm> accessed 25 May 2016.

⁴³ “A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed.”

⁴⁴ “No soldier shall, in time of peace be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.”

⁴⁵ “... no appropriation of money to that use shall be for a longer term than two years”.

⁴⁶ Text: <http://www.law.cornell.edu/constitution/overview>.

“The President of the Republic shall ensure (...) security of the State “and, on the other, Article 146 indicates that “The Council of Ministers shall conduct the internal affairs and foreign policy of the Republic of Poland” (paragraph 1), “ensure the internal security of the State and public order” (paragraph 4, point 7), and “ensure the external security of the State” (paragraph 4, point 8). The security of the state (and public security understood as part of state security) and public order may serve as a justification for restraining fundamental human and civil rights and freedoms.⁴⁷

Martial law, besides the state of emergency and state of natural disaster, is another exceptional state defined in Article 228.1 of the Constitution of the Republic of Poland. Pursuant to the hypothesis of the norm of Article 229 of the Constitution, the initiation of warfare or armed aggression against the territory of the Republic of Poland constitutes a reason to declare martial law. Meanwhile, a state of war is a term used by international law. Using the terms state of war (Polish: *stan wojny*) and martial law (Polish: *stan wojenny*) interchangeably is thus incorrect, clearly proved by Polish legislation (national law) only including regulations pertaining to martial law as a consequence of the state of war. Both discussed conditions are significantly different and their consequences are respectively the state of war in international law and martial law in national law, whereas the sets of conditions for the former and the latter are identical.⁴⁸

The state of natural disaster is a special condition compared to those previously discussed. Its regulation, both constitutional and statutory, is a formal novelty in Poland and is an area where the positive consequences of the reception of German solutions must be seen. Such diversity of regulations indicates the possibility admitted by the legislature that the state of emergency is a set of necessary and useful instruments for achieving a certain goal and not a single universal remedy for each and every instance of evil. Compared to other emergency states under Polish law, the state of natural disaster displays the lowest level of restriction of human rights and freedoms.

The procedure and rules governing the functioning of state authorities (the structures of the state government) are not subject to significant changes under martial law, which is guaranteed by Article 9 of the Martial Law statute⁴⁹ providing that under martial law the public authorities operate within the previous organisational framework of the state and within the powers assigned, unless otherwise stated in the said law.

From the formal legal perspective, the Polish legislation contains legal guarantees securing the integrity of human rights and freedoms, even under any of the emergency states. The mechanism of the “legal guarantee” in this field may be found in Article 233 of the Constitution of the Republic of Poland, which states that “the statute specifying the scope of limitation of the freedoms and rights of persons and citizens in times of martial law and states of emergency shall not limit the freedoms and rights” enumerated in respective articles of the Constitution.⁵⁰

The Polish regulation of emergency states is based on Article 228 of the Constitution, pursuant to which, such states may be declared in “situations of particular danger” if, however, “ordinary constitutional measures are inadequate”. The authors of the Constitution define:

⁴⁷ See Article 31.3 of the Constitution of the Republic of Poland.

⁴⁸ Wolpiuk (2002) 22 ff.

⁴⁹ Journal of Laws Dz. U. 2002 No. 156 Item 1301.

⁵⁰ For a broader discussion, see Brzeziński (2007) 192 ff.

- a state of emergency “may be introduced only by regulation, issued upon the basis of statute, and which shall additionally require to be publicised”, whereas the regulation is subject to consideration by the *Sejm* (which may also annul the regulation);
- three extraordinary measures: (martial law, Article 229; state of emergency, Article 230; state of natural disaster, Article 232);
- that the compensation for loss of property may be regulated by statute.⁵¹

Pursuant to the Constitution, the extraordinary measures should vary depending on the individual situation and, thus, they must be taken on a case-by-case basis in order to correspond to the extent of the threat in each case. On one hand, the authors of the Constitution define the hard core, i.e., a negative catalogue, of human rights: dignity, citizenship, the right to life, the right to humane treatment, criminal responsibility, the right to appeal to a court, personal rights, rights related to conscience, religion, petition, family, and child, which may not be subject to restrictions during martial law or other states of emergency. On the other hand, the Constitution sets forth a positive catalogue of limitations of human rights and freedoms that might be limited under a state of natural disaster.

Further, the Constitution sets forth unconditional legislative limitations in times of extraordinary measures as well as during a ninety-day period after their termination with respect to matters concerning the system of the state, prohibition on holding elections, and the possibility to extend the state of emergency, which may be used only once for a period no longer than 60 days. A state of natural disaster may be declared for a period not extending beyond 30 days.

Each of the three extraordinary measures is additionally regulated by statute. Therefore, the statutes on the state of national disaster, on the state of emergency, on martial law as well as on the powers of the Supreme Commander of the Armed Forces and the principles of the commander’s reporting to the constitutional authorities of the Republic of Poland are in force. Each of the above statutes enumerates the admissible restrictions to human rights and freedoms as follows:

- possible restrictions of fundamental rights and freedoms in the face of a natural disaster are set forth in Chapter III of the statute;
- with respect to the state of emergency, the scope of “restrictions of the human and civil rights and freedoms” are set forth in Chapter III;
- with regard to martial law, such restrictions are regulated by Chapter IV of the Statute.

As follows from Article 31.3 of the Constitution of the Republic of Poland, any “limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights.” Rights provided for in Article 47 of the Constitution are subject to special constitutional protection (Article 233 of the Constitution), as they may not be limited in times of martial law and states of emergency. The legislature is not authorised, therefore, to limit or legitimately waive the protection of individual privacy or mitigate the constitutional conditions of interference with the right to privacy in times of extraordinary measures.

Measures solely resulting from statutory provisions are meant when speaking of legitimate procedure. Such an opinion was already presented by the Constitutional Tribunal

⁵¹ Loss must be considered in broader terms than merely pertaining to property.

“making the limiting rights and freedoms admissible by statute only is something more than a mere reminder of the general principle that the exclusive power to govern the legal status of individuals lies with the statute, which constitutes a classical element in the concept of state under the rule of law. It implies also the requirement that the statutory regulation must be adequately thorough. As the limitation of constitutional rights and freedoms may be imposed by statute only, the statutory regulation must be comprehensive, i.e. it must define all basic elements of the limitation of particular rights making it possible to designate (delimit) the scope of the limitation by merely analysing the statutory provisions.”⁵²

Meanwhile, it is not difficult to find provisions of the statutes in force that do not comply with the above requirement as they do not contain a closed and exhaustive catalogue of conditions admitting the limitation of privacy rights not only in times of extraordinary measures but also during the regular operation of the state.⁵³

Despite the fact that, comparatively, the vast amount and casuistic character of the Polish regulation seem to support the view that it is complete and exhaustive, the final conclusion is different. The Polish constitutional regime of states of emergency fails to sufficiently protect fundamental rights through the Constitutional Tribunal and does not guarantee that the proclamation of an emergency state and its governing rules be indispensable and proportional.

5. AXIOLOGY OF REGULATION

The (Western) European concept of human rights and freedoms as well as the practice that it is based on is the paradigm of the state constituting an oppressive authority from which the individual is protected by inherent human rights and the state's obligation to observe them. The executive and state institutions, which at the same time are indispensable (as will be further discussed), constitute a source of threat to the person. The concept of negative human rights with a vertical effect, personal and political rights as well as first-generation rights expresses the fear that an individual will be suppressed by the tyranny of the power-hungry Leviathan.⁵⁴

Such opinions combined with liberalism not only reduce the role of the state but also aim at preventing the expansion of state functions above the indispensable minimum, which is never fully defined. In this sense:

- the state should not have its own sources of income (other than taxes), because it deprives the citizens of control over the state;
- the state's involvement in the economy may be at most reduced to the role of a fair judge who controls the observation of the defined rules (of the market game) by the participants;
- positive economic and social second-generation rights not only pave the way for the state's omnipotence by extending the functions and powers of the state but also “make the individuals accustomed” to living without the need to rely on oneself. as well as on one's

⁵² Judgment of 12th January 2000, file ref. P. 11/98, OTK of 2000, No. 1, Item 3.

⁵³ Examples of such provisions are the following: Article 19.6.3 of the Police Act, Article 9e.7.3 of the Border Guards Act, Article 36c.4.3 of the Fiscal Control Act, Article 31.7.3 of the Military Police and Military Bodies for the Maintenance of Order Act, Article 27.6.3 of the Agency for Internal Security and Intelligence Agency Act, Art. 17.5.3 of the Central Anti-Corruption Bureau Act, Article 31.4.3 of the Military Counterintelligence Service Act and Military Intelligence Service Act.

⁵⁴ In the meaning assigned by Hobbes (Th. Hobbes (2010) Part II).

family and the neighbourhood community, thus making them vulnerable and permissive to the deprivation of liberty.

If, therefore, as a consequence of such a reductive way of thinking, it was believed that the state is an indispensable institution, this indispensability was related to the more or less expressed need to guarantee security to individuals, groups and the society. As the state was seen as necessary to provide security, its authorities were equipped with certain instruments—powers to perform this function. Among these instruments is the power to declare a state of emergency if the security of the state (its institutions, territory or infrastructure) or social groups are jeopardised. During the state of emergency, the authorities receive a wide range of immunities and privileges; they are exempt from their regular duties and authorised to actions to which they are “normally” not entitled.

The legal regimes of declaring the states of emergency and their functioning are defined by national law. It determines:

- the conditions, the actual e.g., military aggression, civil unrest, natural disaster or calamity. or legal (international obligations) situations in which a state of emergency may be declared;
- who may declare it (which authorities), by which legal instrument, when e.g., whether it may be declared by an executive body during a session of the legislative branch, and by which procedure, and what control/confirmation of the decision to declare the state of emergency is required;
- the territory on which it is effective. The whole/part of the territory of the state;
- the period of time for which it is declared and whether it may be extended, for how long, and how many times;
- the procedure by which the decision is nullified;
- the scope of admissible privileges and immunities of the state authorities in the time of an emergency state; in particular, those pertaining to the obligation to respect human rights and freedoms.

Nonetheless, with regard to the latter, the national regulations may not contradict those imperative norms of international law pertaining to human rights that indicate norms that may not be repealed. The state authorities may not be exempt from the observation of these norms, including those that constitute the hard core of the international law of human rights.

As far as states of emergency are concerned, defining the subject scope of the hard core of the international law of human rights has a legal (and not juridical) character. Beginning with the International Covenant on Civil and Political Rights, the constitutive acts of the International Bill of Rights⁵⁵ system and the international agreements enumerate the contents of the norms belonging to this system. Article 4 of the Covenant defines:

- the actual basis to declare the state of emergency;
- the requirement of the necessary restrictions;
- the necessary minimum period of derogation;
- required procedures, i.e., “official proclamation” and communication through the intermediary of the Secretary-General of the United Nations to the other States Parties to the Covenant;

⁵⁵ The International Bill of Human Rights consists of the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights and its two Optional Protocols. Fact Sheet No.2 (Rev.1), the International Bill of Human Rights. See at <<http://www.ohchr.org/Documents/Publications/FactSheet2Rev.1en.pdf>> accessed 25 May 2016.

- requirement of compliance of derogation with international obligations;
- a negative *modus operandi* of the Covenant's derogation, i.e. the prohibition of discrimination;⁵⁶
- norms from which no derogation is admissible, i.e., those which must be observed by the state under any conditions, including during a state of emergency.

In the case of the Convention for the Protection of Human Rights and Fundamental Freedoms of the Council of Europe, there are exemptions from duties and prohibitions justified by reasons related to public security in the face of a public emergency. At the same time, the provisions of the Convention clearly indicate the hard core: the right to life, prohibition of torture, prohibition of slavery and forced labour and the principle *nullum crimen, nulla poena sine praevia lege poenali*. Immunities exempting the state from the normally effective prohibitions pertain to:

- prohibition of the deprivation of life, it is admissible as a consequence of an absolutely necessary use of force in order to suppress a riot or insurrection;
- prohibition of forced or compulsory labour, the term does not include "any service exacted in case of an emergency or calamity threatening the life or well-being of the community" (Article 4.3.c.);
- the obligation to respect private and family life – "interference by a public authority with the exercise of this right" is admissible (Article 8.2);
- freedom to manifest one's religion or beliefs and to express one's opinions may be subject to statutory restrictions (Article 9.2 and 10.2).

The parties to the Convention are obliged to notify the Secretary General of the Council of Europe of the measures derogating from their obligations under the Convention in the face of public emergency and the reasons for the derogations. The norm included in Article 30 of the European Social Charter that admits a derogation from the obligations provided for therein must be seen as supplementary to the Convention. Such a derogation is possible "in time of war or other public emergency threatening the life of the nation". The admissibility is restricted by material guarantees, i.e., the absolute necessity and adequateness of measures as well as formal guarantees including the obligation to notify the Secretary General of the Council of Europe of the decision and to inform, through the intermediary of the Secretary-General, other contracting parties and the Director General of the International Labour Office.

The legal regimes of states of emergency reflect the search for an unstable balance between the need for and risk of their implementation. If all societies that are based on democracy and the rule of law seem to prove with their regulations in force that in the face of an emergency, they accept granting privileges and immunities to state authorities with the purpose of enabling or facilitating them to perform their obligations with respect to security, the same legal regulations, legislative process, discussions and social controversies indicate the sense of danger that derives from said privileges and immunities with which the state is equipped. It seems that society has a sense (perhaps prevailing) that in fighting a threat it releases the binds on another threat, "the cure is worse than the disease", Pandora's

⁵⁶ Despite the formally enumerative character of the prohibited reasons of discrimination, i.e., "race, colour, sex, language, religion or social origin", the interpretation should comply with the universal international standard according to which any discrimination is prohibited and therefore the indicated reasons may be only seen as examples.

box is opened, i.e., the tyranny of the state is free to threaten the inherent human rights and freedoms, rules of civil society, etc. Fighting this tyranny may appear more difficult and expensive than fighting the threat that led to declaring the state of emergency.

Such a state of anxiety is present in all countries of the Western Hemisphere, where it is most clearly revealed in cases of declaring emergency states. It is independent of the experience of dictatorship or the lack of such experience and is also independent of long-term and permanent relations to the state, in terms of trust in the state and its institutions. In this light, it comes as no surprise that the level of fear of dictatorship in Poland is relatively high. It is obvious and understandable that the Polish regulations on states of emergency that are also ample enough and fit with international standards grew from the trauma of martial law declared on 13th December 1981 and on the generally low level of trust in the state and its institutions,⁵⁷ the acceptance of the particular country and its institutions. The Polish regulations, which are largely oriented at protecting the society against the threats coming from the state and its institutions, seem to be more of an umbrella over the individual and society than a set of instruments available to the state and its institutions. This conclusion does not surprise nor should be questioned. The relatively short and non-continuous experience of (recovered) statehood, from the Second Republic, with long periods of a state contested by a significant share of the citizens, to “martial law”, which divided the society for a long time, and the (false) sense of absolute security after 1989, created a situation in which emergency regimes are seen as a reverse “sword of Damocles” hanging over people who do not always feel they are citizens or members of civil society.

6. STATES OF EMERGENCY–LEGAL SOLUTIONS⁵⁸

Undoubtedly, the authors of the Constitution of the United States paved the way for their followers and those who would realise the idea of a democratic state under the rule of law between the Scylla of threats to security flowing from internal and external sources and the Charybdis of the threats against fundamental rights and freedoms. At the same time, it comes as no surprise that with the passing of time, this path of state activity has been delimited more and more precisely, even to the point of being casuistic. As a result, constitutions contain complete or incomplete regulations of states of emergency.

6.1. Complete regulation–Germany

This is illustrated by the German Constitution for the Federal Republic of Germany,⁵⁹ which in Chapter 1, “Fundamental rights”, provides the possibility both to impose special duties related to states of emergency on the citizens (Article 12a.4 – 5) and to restrict their rights (Article 13.4, 7). The Constitution provides for threats against the country, called “internal emergency” and defines instruments based on force to combat them (Articles 91, 115a).

⁵⁷ In general, the surveys about the trust-level of Polish society indicate a radically lower level compared to the countries of the same hemisphere.

⁵⁸ The Report of the European Commission for Democracy through Law (Venice Commission), Emergency Powers considers 32 states (CDL-STD (1995) 012). See at <[http://www.venice.coe.int/webforms/documents/default.aspx?pdf=C&file=CDL-STD\(1995\)012-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdf=C&file=CDL-STD(1995)012-e)> accessed 25 May 2016.

⁵⁹ See at <http://www.gesetze-im-internet.de/englisch_gg/> accessed 25 May 2016.

6.2. Incomplete regulation

Many constitutions partially govern the matter:

6.2.1. *Spain*

Its constitutional provisions regulate “state of emergency” and “state of siege”. The regulations are similar to the respective German provisions, which may result from the similar experiences of its society and the role of Germany in the democratic transformation of the country; nonetheless, it is not an exact limitation. Instances justifying a declaration of a state of emergency are pointed out in Article 30⁶⁰ include: “grave risk, catastrophe or public calamity”. The lack of a casuistic regulation of conditions for declaring states of emergency is compensated for by regulating in a considerably detailed manner the legal scope of derogation from respecting fundamental human rights and freedoms. The Constitution clearly indicates both laws whose application may be suspended by statute and those that are not subject to such suspension;

6.2.2. *Sweden*

Chapter 13 of the Constitution of Sweden pertaining to the “War and danger of war”⁶¹ precisely regulates issues related to the operation of the state and its institutions under the state of emergency, the opposite situation to Spain. This reversed perspective enhances the vagueness and permissiveness of the regulation of the privileges and immunities of the state with respect to fundamental human rights and freedoms. Chapter 6 of the Constitution provides for a far-reaching delegation of power to the executive with respect to regulating the matters in the field of fundamental human rights and freedoms otherwise restricted to the exclusive competence of the legislative;

6.2.3. *Hungary*

A specific case with respect to the matter in question is that of Hungary, where the constitutional order (rejecting the 1949 Constitution, which, despite numerous amendments, was rooted in “Stalin’s” constitution of 1936) was only established on the 1st of January 2012. The Hungarian constitutional regulations are complete and casuistic with regard to the causes and procedure of proclaiming a state of emergency as well as to the implementation of human rights under such a state, which may be regarded as resulting from the experience of an oppressive regime, despite the relatively long time that has passed since the transformation began. The constitution provides for “special legal orders” (Article 48), i.e., state of national crisis, state of war, and state of emergency. They clearly differ in the actual bases for proclamation. A state of national crisis may be proclaimed “in the event of a state of war or an imminent danger of armed attack by a foreign power (danger of war)”, whereas a state of emergency may be declared “in the event of armed acts aimed at the overturning of the constitutional order or at the exclusive acquisition of power, and of serious mass acts of violence threatening life and property, committed with arms or in an armed manner”. Hungary adopted the “republican model” of regulating emergency states,

⁶⁰ See at <<http://www.tribunalconstitucional.es/en/constitucion/Pages/ConstitucionIngles.aspx>> accessed 25 May 2016.

⁶¹ See at <<http://www.parliament.am/library/sahmanadrutyunner/Sweden.pdf>> accessed 25 May 2016.

which grants priority in proclaiming such emergency states to the legislative; the President may proclaim a state of emergency only “if Parliament is prevented from making such decisions”. A constitutional mechanism preventing the President from abusing his right (to declare a state of emergency) is the obligation to collectively ascertain the occurrence of two grounds for the President’s decision, “The incapacity of Parliament and the justifiability of the declaration of a state of war, state of national crisis or state of emergency.” Such a decision granting the President the consent to proclaim a special order is “unanimously determined by the Speaker of the House, the President of the Constitutional Court and the Prime Minister.” The Constitution allows that “the exercise of fundamental rights may be suspended or restricted”; however, it enumerates the laws belonging to the hard core of human rights, which are not subject to repeal or suspension as well as the legal framework for implementing the emergency regime: “The rules for fundamental rights and obligations shall be determined by special Acts. A fundamental right may be restricted to allow the exercise of another fundamental right or to defend any constitutional value to the extent absolutely necessary, in proportion to the desired goal and in respect of the essential content of such fundamental right. (article I. 3)”

6.2.4. *Canada*

Emergencies Act (a specific statute on states of emergency)⁶² allows a declaration in the event of a national⁶³ or public welfare⁶⁴ emergency and sets out the purposes for declaring such an emergency. It is “an Act to authorise the taking of special temporary measures to ensure safety and security during national emergencies and to amend other Acts in consequence thereof.” As set forth in the Preamble of the Act: “Whereas the safety and security of the individual, the protection of the values of the body politic and the preservation of the sovereignty, security and territorial integrity of the state are fundamental obligations of government; and whereas the fulfilment of those obligations in Canada may be seriously threatened by a national emergency and, in order to ensure safety and security during such an emergency, the Governor in Council should be authorised ... to take special temporary measures that may not be appropriate in normal times”. The Act thoroughly regulates the powers of public authorities with regard to restricting liberty during national emergencies declared in the face of both internal and external emergencies.

The cases of Canada as well as of Hungary are interesting and symptomatic insofar as it indicates that there is no relationship between the experience of dictatorship or well as trust (and potential distrust) in state institutions and the level of precision with which

⁶² Emergencies Act (R.S.C., 1985, c. 22 (4th Supp.)).

⁶³ Defined as follows: “3. For the purposes of this Act, a ‘national emergency’ is an urgent and critical situation of a temporary nature that (a) seriously endangers the lives, health or safety of Canadians and is of such proportions or nature as to exceed the capacity or authority of a province to deal with it, or (b) seriously threatens the ability of the Government of Canada to preserve the sovereignty, security and territorial integrity of Canada and that cannot be effectively dealt with under any other law of Canada.”

⁶⁴ Defined as follows: “‘declaration of a public welfare emergency’ means a proclamation issued pursuant to subsection 6(1); ‘public welfare emergency’ means an emergency that is caused by a real or imminent (a) fire, flood, drought, storm, earthquake or other natural phenomenon, (b) disease in human beings, animals or plants, or (c) accident or pollution and that results or may result in a danger to life or property, social disruption or a breakdown in the flow of essential goods, services or resources, so serious as to be a national emergency.”

emergencies are regulated. It shows that the manner of regulation highly reflects the perception of the role of law in the organisation and functioning of the society.

Taking a broader perspective than just the discussed regulations, it may be *prima facie* concluded that the European provisions protect the state whereas the Canadian ones protect from the state. However, in the case of the countries in question, the regime of “emergency states” is not solely determined by national legal norms. This regime is co-created by the norms of national law, international-universal human rights (International Covenant on Civil and Political Rights, also known as the International Bill of Human Rights), and European human rights (European Convention on Human Rights, Protocols and the *EC acquis*). The indicated synergy of norms and institutions (national, international and European) builds a bridge connecting countries on both sides of the Atlantic⁶⁵ and determines the actual convergence of the regimes.⁶⁶

7. FINAL REMARKS

The “Atlantic ditch.”

The indicated similarities and differences, the monarchical vs. republican models neither exhaust the set of differences nor describe the entire scope of problems. A significant and, apparently, sustained difference in the modern approaches to states of emergency and regulations thereof is that between the belief prevailing in the US and Canada that the state constitutes a threat (against citizens) and the European belief that the state is endangered.⁶⁷

7.1. Why and how to legislate

It may be stated that the fear of a dangerous state or a state in danger are a fundamental reason for introducing emergency states by the legislature. This leads to the belief that only suspending the application of law can protect the state and that the ruler-state aims to avoid observing the law. It seems obvious that this type of motivation, i.e., collective sense of subjective threats is not a sufficient reason to legislate, while this motive of rationalisation seems to lie only behind the legislation pertaining to states of emergency. The awareness and acceptance of the societal needs, i.e., expectations towards the state with regard to social security and the security of citizens in general, should lay the foundation for rational legislative activity aiming at regulating states of emergency. It seems that the social debate and achieving consensus with regard to the instruments, needs, and provisions of the regulations must be an important part of this process. All stages of the legislative process must be conducted publicly. The starting point for legislating in European legal systems should involve indicating the needs, answering the question as to why a state should be granted privileges and immunities, i.e., instances for waive the application of the law, seeing the privileges and immunities as intelligent tools and not as a threat against fundamental human rights and freedoms.

⁶⁵ Analogically, in the case of the Western hemisphere countries on the American coast of the Atlantic, the conditions that are considered necessary for legitimacy of an emergency state include: “(1) necessity; (2) temporality; (3) proportionality; (4) non-discrimination; (5) compatibility with other international obligations; and (6) adherence to domestic law.” For more, see Grossman (1986) 51.

⁶⁶ See also Recommendations of the Venice Commission.

⁶⁷ For a broader perspective, see Finn (1991).

It seems both reasonable and necessary to transfer legislative activity in this field to the domain of European law. The cooperation within the EU based on including the EU in the area covered by the European Convention on Human Rights (of the Council of Europe) makes national regulations not only counter-effective, but also counter-rational.

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