

**Anita Adamczyk**

Adam Mickiewicz University in Poznań, Poland

anita.adamczyk@amu.edu.pl

ORCID ID: <https://orcid.org/0000-0002-2851-0200>

## The State of Emergency in Poland as the Key to Curbing Unregulated Migration

**Abstract:** The purpose of this article is to analyse the Polish legislature's activity during the state of emergency in the field of curbing illegal migration. The thesis of the article states that the introduction of the state of emergency on the Polish–Belarusian border facilitated the legal changes aimed at reducing the scale of illegal migration on the border and their implementation. The proposed changes brought about new solutions that provided, for example, for the obligation to immediately leave the territory of Poland, issuance of a decision obliging a foreigner to return when he/she crossed or attempted to cross the border illegally, or construction of a wall on the Polish–Belarusian border.

**Keywords:** foreigners, illegal migration, Polish–Belarusian border, state of emergency in Poland

### Introduction

Since 2015, migratory pressure to EU countries has been subject to considerable fluctuations.<sup>1</sup> Poland is also a participant in the changes in the global movement of people, and since 2016 has become a country with a positive net migration rate.<sup>2</sup> In addition to legal immigration (mostly economic), it is also experiencing illegal immigration, especially through the eastern border of Poland, which is also the external border of the EU. This type of immigration is the least desirable, and to counteract it,

---

1 E. Kuźlewska, A. Piekutowska, The EU Member States' Diverging Experiences and Policies on Refugees and the New Pact on Migration and Asylum, 'Białostockie Studia Prawnicze' 2021, no. 1, pp. 28–31.

2 A. Adamczyk, (Nie)intencjonalna polityka migracyjna Polski, Poznań 2021, p. 209.

a number of legal actions have been taken.<sup>3</sup> Apart from the signed agreements, a state of emergency, which according to Hans Kelsen's concept of law belongs to the dynamic normative tools, has become a way to stop illegal migration.<sup>4</sup>

The purpose of this article is to analyse the legislature's activity during the state of emergency in the field of inhibiting illegal immigration. The article argues that introducing a state of emergency on the Polish–Belarusian border facilitated the introduction and implementation of legal changes aimed at reducing the scale of illegal immigration at the border. The proposed changes were introduced within a short period in violation of current national and international law. Given this thesis, it seems justified to pose several research questions: what was the scale of the phenomenon of illegal immigration at the section of the border with Belarus? What were the reasons for introducing the state of emergency in Poland? What are the sources of emergency powers in the state of emergency (models)? What legal solutions were introduced to secure the border and reduce illegal immigration? The interdisciplinary approach to the studied phenomenon has enforced the use of research methods characteristic for legal sciences (the dogmatic method) and political science (the decision-making and comparative method).

## 1. The state of emergency and legal models of emergency powers

A state of emergency is one of the states distinguished in the Constitution of the Republic of Poland of 1997.<sup>5</sup> The features constituting a state of emergency include dangerous crises which 1) are real and unpredictable, 2) are urgent, making the standard mode of decision-making impossible, 3) are temporary, 4) threaten the territorial integrity of the state, security of citizens (their lives) and the proper functioning of state institutions, 5) require the use of exceptional legal measures because ordinary ones are insufficient, 6) affect the temporary suspension or restriction of civil rights and freedoms, 7) change the powers of authorities towards increasing the

---

3 Prevention of illegal migration is the subject of Polish–Belarusian agreements (Agreement between the Republic of Poland and the Republic of Belarus on Good Neighbourhood and Friendly Cooperation, signed in Warsaw on 23 June 1992 (Journal of Laws 1993, No. 118, item 527); Agreement between the Government of the Republic of Poland and the Government of the Republic of Belarus on Cooperation in Combating Crime, signed in Minsk on 8 December 2003 (Journal of Laws 2005, No. 125, item 1044)); and the Agreement between the European Union and the Republic of Belarus on the Readmission of Persons Residing without Authorisation (Dz.U. UE L. 2020.181.3). More on legal definitions of irregular migration in the EU in M. Trojanowska-Strzęboszewska, *Nielegalna czy nieregularna imigracja? Analiza wyzwań definicyjnych ze szczególnym uwzględnieniem polityki imigracyjnej UE*, 'Studia Europejskie' 2020, no. 3, pp. 145–164.

4 A. Greene, *Permanent States of Emergency and the Rule of Law: Constitutions in an Age of Crisis*, Oxford 2018, pp. 68–69.

5 Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws 1997, No. 78, item 483).

powers of the executive, 8) force measures to restore the normal state as soon as possible and 9) are territorially localized – on the territory of the whole state or part of it.

Emergency powers can have their source in the constitution as well as in laws and subordinate acts; we then call them the constitutional/legal model of emergency powers. The most common source of emergency powers in this model is the constitution. It is in the constitution where the circumstances of the introduction of this state, the types, duration and institutions responsible for their proclamation and the possibility of the suspension of civil rights and freedoms are specified. In the legal model, which also takes the form of the legislative model, the executive is equipped with special powers granted to it by ordinary legislation. This model provides for the modification or supplementation of ordinary legislation.<sup>6</sup> In addition, in view of a crisis, ordinary legislation may also be supplemented by other acts issued in that instance. Their adoption is dictated by the fact that existing law cannot cope with the emergency; therefore, emergency legislation is created, which may become a part of emergency acts or ordinary legislation.<sup>7</sup> Compared to the constitutional model, this model is flexible (it is easier to amend ordinary legislation than the constitution with regard to a state of emergency). However, it has certain disadvantages which are related, for example, to the possibility of a loss of control of the executive by the legislature and the danger that legislation adopted during the state of emergency will become a part of the standard legal system, thus perpetuating the changes adopted under the influence of the state of emergency and contributing to the institutionalization of a permanent state of emergency.<sup>8</sup> In the legal model, an interpretative model can also be distinguished. In this model, no new law is created, nor is existing law modified; an ad hoc interpretation of existing law in the context of the emergency is still made.<sup>9</sup> Apart from the legal model, we can also distinguish the non-legal model, which is based on the activities of unconstitutional authorities which go beyond the law to protect the state and citizens. This activity must be publicly known, and after the cessation of the state of emergency, society evaluates the decisions made.<sup>10</sup>

Of the above-mentioned models, the one applied in Poland is the legislative model, which involves the expansion of legal norms in a state of emergency. The basic acts referring to the state of emergency are the Constitution of the Republic of Po-

6 O. Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 'The Yale Law Journal' 2003, vol. 112, no. 5, p. 1064.

7 *Ibidem*, p. 1065.

8 J. Ferejohn, P. Pasquino, *The Law of the Exception: A Typology of Emergency Powers*, 'International Journal of Constitutional Law' 2004, vol. 2, no. 2, p. 220.

9 O. Gross, *Chaos...*, *op. cit.*, p. 1059.

10 O. Gross, F. Ní Aoláin, *Law in Times of Crisis: Emergency Powers in Theory and Practice*, Cambridge 2006, p. 112.

land and the Act on the State of Emergency.<sup>11</sup> Among the reasons for the introduction of this state, these acts mention a threat to the constitutional system of the state and the safety of citizens or public order, caused by acts of a terrorist nature or actions in cyberspace which cannot be removed by ordinary constitutional measures.<sup>12</sup> The above-mentioned legal acts became the basis for the president of the Republic of Poland issuing a decree on introducing a state of emergency on the territory of a part of the Podlaskie and Lubelskie voivodeships in 2021. Paragraph 1.1 stated that the state of emergency is caused by ‘a particular threat to the security of citizens and public order’ in connection with the situation on the Polish–Belarusian border.<sup>13</sup> The justification of the request for the imposition of the state of emergency was cited as follows: 1) an increase in attempts to illegally cross the border, 2) actions taken by the authorities of the Republic of Belarus to destabilize the situation on the border with Poland, 3) a violation of the sense of security of people living in border areas, 4) more effective protection of the border and 5) the need to use extraordinary measures, as ordinary ones were not effective in the situation.<sup>14</sup>

The state of emergency was introduced on 2 September 2021, for 30 days and then extended for another 60 days.<sup>15</sup> During the state of emergency, during a session of the Polish Parliament (9 November 2021), Mariusz Kamiński informed the Parliament that there were approximately 2,000–4,000 illegal immigrants in the Belarusian border area, and 15,000 in Belarus. In connection with this, he stated that ‘we will not allow Poland to become a helpless country [...] which will be a route

11 Constitution of the Republic..., *op. cit.*, Arts. 228, 230, 231, 233; Act of 21 June 2002 on the State of Emergency, Journal of Laws 2017, item 1928.

12 K. Prokop, *Stany nadzwyczajne w Konstytucji Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997r.*, Białystok 2005, pp. 76–90.

13 Ordinance of the President of the Republic of Poland of 2 September 2021 on the Introduction of a State of Emergency in the Area of a Part of Podlaskie Province and a Part of Lubelskie Province (Journal of Laws 2021, item 1612). The justification was publicly criticized by deputies representing the Civic Coalition, Left and Poland 2050 factions. A. Szczesniak, *Stan wyjątkowy zostaje. Morawiecki: ‘Wprowadzamy go, żeby zapewnić wolność’*, *Oko Press*, 06.09.2021, <https://oko.press/stan-wyjatkowy-zostaje-morawiecki-wprowadzamy-go-zeby-zapewniac-wolnosc/> (05.12.2021). According to the Helsinki Foundation for Human Rights’ (HFHR) position on the issue, the application of the state of emergency was disproportionate to the nature of the threat. Of concern was the restriction of rights, including the public’s right to objective information. *Stanowisko HFPC w sprawie wprowadzenia stanu wyjątkowego*, 2.09.2021, <https://www.hfhr.pl/stanowisko-hfpc-w-sprawie-wprowadzenia-stanu-wyjatkowego/> (22.01.2022).

14 Justification of the Request to Introduce a State of Emergency in the Area of Part of the Podlaskie Province and Part of the Lubelskie Province, Warsaw, 2 September 2021, p. 1, <https://orka.sejm.gov.pl/Druki9ka.nsf/0/A3F1521EA5A80277C1258744004D7B0B/%24File/1512.pdf> (22.01.2022).

15 Ordinance of the President of the Republic of Poland of 1 October 2021 on the Extension of the State of Emergency Introduced in the Area of a Part of Podlaskie Province and a Part of Lubelskie Province, Journal of Laws 2021, item 1788.

for smugglers, organized crime groups, enemies of our country [and] a route for illegal immigration.<sup>16</sup>

## 2. Illegal border crossing

Due to the introduction of the state of emergency, access to parts of the Podlaskie and Lubelskie voivodeships was restricted. Thus, knowledge about the situation of foreigners on the border and the number of attempts to illegally cross it was limited. It was based only on information provided by the Border Guard Service (BGS), according to which there were 39,697 attempts to cross the border with Belarus illegally in 2021. This number was 300 times higher than in the previous year. Most attempts were recorded in October 2021 (17,447).<sup>17</sup> At the same time, it should be noted that the number of attempts cannot be equated with the number of persons, as the same immigrants may have made multiple attempts to cross the border. The BGS statistics also state that at the external EU border in 2021, the total number of apprehended foreigners amounted to 7,463 persons and was over 200% higher than in the previous year. On the border with Belarus, 38.5% of the total number (2,877) was apprehended, and this was an increase of 1.070% compared to 2020. (For comparison, the number of detainees on the border with Ukraine amounted to 3,712.).<sup>18</sup> The majority of those apprehended on the Polish–Belarusian border were citizens of Iraq (1,557), Afghanistan (447) and Syria (272), who crossed the border outside the crossing points.<sup>19</sup> It is worth noting that there was also an increase in the number of apprehensions on an internal EU border, which shows that some immigrants crossed the external EU border and were apprehended for illegally crossing or attempting to cross an internal border. In this case, the biggest numbers of apprehensions occurred at the border with Germany (1,134 third-country citizens), with citizens of Iraq (453), Ukraine (191) and Syria (135) apprehended.<sup>20</sup> On the other hand, German data shows that in 2021, the Federal Police detected 11,228 foreigners who illegally crossed the German border from Belarus via Poland.<sup>21</sup>

16 Stenographic Report of the 41st Meeting of the Sejm of the Republic of Poland on 9 November 2021, [https://orka2.sejm.gov.pl/StenoInter9.nsf/0/E759260C92FA55C5C125878900001D34/%-24File/41\\_a\\_ksiazka\\_bis.pdf](https://orka2.sejm.gov.pl/StenoInter9.nsf/0/E759260C92FA55C5C125878900001D34/%-24File/41_a_ksiazka_bis.pdf) (22.01.2022), p. 9.

17 E. Szczepańska, Nielegalne przekroczenia granicy z Białorusią w 2021 r., <https://www.strazgraniczna.pl/pl/aktualnosci/9689,Nielegalne-przekroczenia-granicy-z-Bialorusia-w-2021-r.html>, 12.01.2022 (30.01.2022).

18 Informacja statystyczna za 2021 r., Straż Graniczna, Warszawa styczeń 2022 r., s. 12, <https://www.strazgraniczna.pl/pl/granica/statystyki-sg/2206,Statystyki-SG.html> (04.02.2022).

19 *Ibidem*, p. 17.

20 *Ibidem*, p. 15.

21 Bundespolizei, Illegale Migration aus Belarus über Polen nach Deutschland: 11.228 Feststellungen durch die Bundespolizei im Jahr 2021, 17.01.2022, [https://www.bundespolizei.de/Web/DE/04Aktuelles/01Meldungen/2021/10/pm\\_1\\_22\\_file.pdf?\\_\\_blob=publicationFile&v=2](https://www.bundespolizei.de/Web/DE/04Aktuelles/01Meldungen/2021/10/pm_1_22_file.pdf?__blob=publicationFile&v=2) (04.02.2022).

The high rate of attempted illegal border crossings was one of the major reasons for the legal changes regarding migration in the second half of 2021. The adoption of stricter legal solutions supported the introduction of the state of emergency. One of the proposed changes was an amendment to the regulation on temporary suspension or restriction of border traffic at certain border crossing points.<sup>22</sup> It entered into force on 21 August 2021, i.e. ten days before the Council of Ministers submitted a proposal to the president on the introduction of a state of emergency. The amendment of this act, by adding paragraphs 2a and 2b to § 3, gave the basis to the admonition on the obligation of persons who do not belong to the category of persons authorized to cross the border, under § 3.2 of the Act, and who have appeared at a border crossing point where border traffic has been suspended or restricted and outside the territorial range of the border crossing point (§ 3.2b) to immediately leave Poland and go back to the state border. Although this regulation does not *expressis verbis* refer to persons seeking international protection, it still prevents them from crossing the Polish border with Russia, Belarus and Ukraine. In addition, foreigners who illegally cross the border will not be able to apply for protection. The amendment, in the opinion of Ombudsman Marcin Wiącek, is contrary to international law and violates the Refugee Convention (Article 33), the EU Charter of Fundamental Rights (Article 18) and Directive 2013/32/EU of the European Parliament and the Council. It is also incompatible with the Constitution of the Republic of Poland (Article 56(2)).<sup>23</sup> The amendment of the above regulation was issued *ex post* to legalize the denial of entry to the territory of the Republic of Poland for foreigners and their applications for international protection. This concerned, inter alia, a group of immigrants camping in the area of Usnarz Górny and Grzybowszczyzna.

The next step in legalizing taking back foreigners who illegally crossed the border was an amendment to the Act on Foreigners and granting protection to foreigners within the territory of the Republic of Poland. The President of Poland signed the Act on 21 October 2021.<sup>24</sup> The justification for the amendments to the Acts states that they are aimed at adapting the law to the current migration situation at the EU external border. Attention was drawn to the need to streamline the proceedings on ille-

22 Ordinance of the Minister of Internal Affairs and Administration of 20 August 2021, amending the Ordinance on Temporary Suspension or Restriction of Border Traffic at Certain Border Crossings, Journal of Laws 2021, item 1536. More on the legality of push-back in G. Baranowska, *Legalność i dopuszczalność procedury push-back (wywózek) i ocena rób ich legalizacji w Polsce*, (in:) W. Klaus (ed.), *Poza prawem. prawna ocena działań państwa polskiego w reakcji na kryzys humanitarny na granicy polsko-białoruskiej*, Warsaw 2022, pp. 10–12.

23 Letter from RPO Marcin Wiącek to Mariusz Kamiński, Minister of Internal Affairs and Administration, Warsaw 25.08.2021, <https://bip.brpo.gov.pl/sites/default/files/Wyst%C4%85pienie%20RPO%20do%20MSWiA%2025.08.2021.pdf> (20.12.2021).

24 Act of 14 October 2021 Amending the Act on Foreigners and Certain Other Acts (Journal of Laws 2021, item 1918).

gal border crossings and ensure the internal security of the country in the face of the abuse of refugee procedures by economic migrants who intend to continue their illegal migration.<sup>25</sup> The amendment of the Act on Foreigners concerned extending the circumstances for issuing a decision on obliging a foreigner to return in an instance when the immigrant crossed or attempted to cross the border illegally. Circumstances in which they were apprehended immediately after crossing the external EU border in violation of the law (Article 303(1)(9)(a)) were to be an exception. In this case, the commanding officer of the Border Guard with jurisdiction over the place where the border was crossed draws up a report on the border crossing and issues a decision on leaving Poland, which may be appealed against to the Commander-in-Chief of the Border Guard (Article 303(b)(1)). The decision includes the obligation to leave the Republic of Poland and the prohibition on re-entry into the territory of Poland and other Schengen states, and specifies the period of its validity (from six months to three years (Article 303(b)(3))). The above-mentioned decision may be appealed against, but this does not suspend its execution (Article 303(b)(1)). The amendments to the Act on Foreigners introduced during the state of emergency also concerned the prerequisites for entering and keeping in the register the data of a foreigner whose stay in Poland is undesirable. These were supplemented by an instance in which a foreigner can be issued a decision on crossing the border illegally with a ruling prohibiting re-entry into the territory of Poland and other Schengen states (Article 435(1)(1)). This decision is a new institution introduced by the Act. It also results in data being sent to the Schengen Information System (Article 443(1)(1)(a)).

Apart from the Act on Foreigners, the Act on Granting Protection to Foreigners within the territory of the Republic of Poland was also amended. It consisted in adding a new circumstance under which an application for granting international protection shall be left without examination (Article 33(1)(a)). Apart from legal issues (e.g. the lack of the applicant's first and last name or country of origin), a situation in which the application was submitted by a foreigner apprehended immediately after crossing the border in violation of the law was mentioned. This does not concern a foreigner who meets the following conditions: 1) he/she came directly from a territory where his/her life or freedom was threatened by the danger of persecution or the risk of serious harm, 2) he/she presented credible reasons for illegal entry into Poland or 3) he/she applied for international protection immediately after crossing the border (Article 33(1)(a)).

The above amendments were evaluated for compliance with international and domestic law. Opinions were expressed by the ombudsman, the Office of the United Nations High Commissioner for Refugees in Poland, the Office for Democratic In-

---

25 Explanatory Memorandum to the Law on Amending the Law on Foreigners and the Law on Granting Protection to Foreigners on the Territory of the Republic of Poland, Print No. 1507, <https://www.sejm.gov.pl/sejm9.nsf/druk.xsp?nr=1507> (20.12.2021).

stitutions and Human Rights of the Organization for Security and Cooperation in Europe, the Centre for Research, Studies and Legislation of the National Council of Legal Advisers and representatives of non-governmental organizations.<sup>26</sup> In their opinion, the proposed amendments violate the rights of foreigners to apply for international and national protection. They stand in contradiction to the Geneva Convention (Articles 31, 32(2) and 33), the Universal Declaration of Human Rights (Article 14(1)), the Charter of Fundamental Rights of the European Union (Articles 18 and 19(2)), the Treaty on the Functioning of the EU (Article 78), EU directives,<sup>27</sup> Regulation (EC) No. 1987/2006 (Article 24) and the Constitution of the Republic of Poland (Article 56(2)). It is also worth noting that in the assessment made by Marek Jaśkowiak and Bartosz Pawłowski from the Bureau of Sejm Analyses of the Chancellery of the Sejm of the Republic of Poland of 7 September 2021, some of the proposed legal changes also raised concerns about their compatibility with international and domestic law.<sup>28</sup>

### 3. Protection of the state border against illegal migration

Reducing illegal migration and increasing the internal security of the country and its citizens were also the reasons for amending the Law on State Border Protection, according to those in power. The need for modification was also dictated by the ending of the period of the state of emergency and, thus, the extension of re-

26 Letter from RPO Marcin Wiącek to Speaker of the Senate of the Republic of Poland Tomasz Grodzki, Warsaw 03.10.2021, [https://bip.brpo.gov.pl/sites/default/files/2021-10/Opinia\\_RPO\\_cudzoziemcy\\_3.10.2021.pdf](https://bip.brpo.gov.pl/sites/default/files/2021-10/Opinia_RPO_cudzoziemcy_3.10.2021.pdf) (15.10.2021); Opinion of the Centre for Research, Studies and Legislation of the National Council of Legal Advisors to the Draft Law on Amendments to the Law on Foreigners and the Law on Granting Protection to Foreigners on the Territory of the Republic of Poland (Print No. 1507), Warsaw, 13 September 2021, <http://obsil.kirp.pl/wp-content/uploads/2021/09/Opinia-z-13.09.2021-ustawa-o-cudzoziemcach.pdf> (22.12.2021); UNHCR Comments to the Draft Law on Amendments to the Law on Foreigners and the Law on Granting Protection to Foreigners on the Territory of the Republic of Poland, 13 September 2021, [https://www.unhcr.org/pl/wp-content/uploads/sites/22/2021/10/Uwagi-UNHCR-do-projektu-ustawy\\_PL.pdf](https://www.unhcr.org/pl/wp-content/uploads/sites/22/2021/10/Uwagi-UNHCR-do-projektu-ustawy_PL.pdf) (22.12.2021).

27 Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) (Dz.U. UE L 2013.180.6); Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (Dz.U. UE L 2008.348.98).

28 M. Jaśkowiak, B. Pawłowski, Opinion on the Compatibility with International Law and European Union Law of the Governmental Bill on Amending the Act on Foreigners and the Act on Granting Protection to Foreigners on the Territory of the Republic of Poland (Print No. 1507), Warsaw, 7 September 2021, <https://www.sejm.gov.pl/sejm9.nsf/opinieBAS.xsp?nr=1507> (15.12.2021).



lated restrictions in Poland.<sup>29</sup> The importance of this issue is demonstrated by the fact that on 17 November 2021, the Polish Parliament passed a resolution of solidarity for the protection of Polish borders.<sup>30</sup> This act expressed gratitude to the Border Guard, the Police, the soldiers of the Polish Army, the Territorial Defence Forces and representatives of other units for their dedicated service in protecting territorial integrity. Gratitude was also expressed to the local community for their support of the above-mentioned services and their humanitarian assistance to the ‘victims of the crisis.’ Following the resolution, President Andrzej Duda signed the bill amending the Act on the Protection of the State Border and Some Other Acts.<sup>31</sup> In the justification of the bill, the legislator, referring to the high number of attempts to illegally cross the border, incidents provoked by the Belarusian border services, considered it necessary to increase the effectiveness of BGS actions. To this end, he introduced restrictions on staying in the area adjacent to the state border. The decision in this matter was entrusted to the minister in charge of internal affairs (after consultation with the Commander-in-Chief of the Border Guard), who, based on an ordinance, determines the area and duration of the ban (Article 12(a)(1,2)). The act provides for a number of exceptions for the categories of persons listed in Article 12(b). In addition, persons who are not listed in Article 12(b) and who are present in the prohibited area may face arrest or a fine (Article 18(d)).

The Act of 17 November 2021 also amended the Act on Border Guards. New legal solutions extended the catalogue of direct coercive measures at the disposal of Border Guard officers to include the spraying of incapacitating substances (Article 23(1)). Access to such a measure is supposed to increase ‘the safety of the Border Guard officer in confrontation with an aggressive person who does not obey orders issued on the basis of the law and enables their incapacitation.’<sup>32</sup> In the opinion of the Legislative Bureau of the Senate, the discussed amendments to the Act should be deemed unconstitutional due to the defective mode of their enactment (lack of compliance with Article 123(1) of the Constitution of the Republic of Poland). Moreover, Article 12(a)(1,2) of the Act on the Protection of the State Border (contrary to Article 52(1) in connection with Articles 31(3), 52(3) and Article 92 of the Polish Constitution) and Article 18(d) of the Act (contrary to Article 42(1) in connection with

29 M. Nowicki, President of the Board of the Helsinki Foundation for Human Rights, Warsaw, 22 November 2021, <https://www.hfhr.pl/wp-content/uploads/2021/11/nowelizacja-ustawy-o-ochronie-granicy.pdf> (18.12.2021).

30 Resolution of the Sejm of the Republic of Poland on 17 November 2021 on Solidarity in the Protection of Polish Borders (Polish Monitor 2021, item 1129).

31 Act of 17 November 2021 Amending the Act on State Border Protection and Some Other Acts (Journal of Laws 2021, item 2191).

32 Justification of the Government’s Draft Law on Amending the Law on State Border Security and Some Other Laws (Print no. 1754), p. 3, <https://www.sejm.gov.pl/sejm9.nsf/druk.xsp?nr=1754> (22.01.2022).

Article 31(3) of the Polish Constitution) were deemed unconstitutional.<sup>33</sup> The ombudsman and the Helsinki Foundation for Human Rights have also raised objections to the amendment of the Act.<sup>34</sup>

Counteracting illegal immigration on the Polish–Belarusian border was also supported by non-legal actions aimed at sealing the border. For this purpose, at the beginning of July 2021, the construction of a temporary fence with entanglements in the form of a spiral fence began. An additional 123,891 metres of fence was placed in the border strip in September.<sup>35</sup> Joint patrols of BGS officers and Polish Army soldiers started to take place at the border. The Territorial Defence Forces were also involved in border protection. These efforts, however, proved ineffective, and therefore it was decided to build a wall on the border, which in Mariusz Kamiński's opinion is to be a symbol of 'the determination of the Polish state to limit mass illegal migration into our country'.<sup>36</sup>

The announcement of changes in the protection of Poland's eastern border was made by Minister of Interior and Administration Mariusz Kamiński at a meeting of the Polish Parliament on 30 September 2021. In November 2021, the president of Poland signed the relevant law.<sup>37</sup> Its purpose is to define the principles of preparation and implementation of border security construction. It is also intended to ensure the speed and efficiency of the planned investment. According to Article 4(1) of the Act, the investor of this project is the Commander-in-Chief of the Border Guard, who cooperates in this regard with the Team for the Preparation and Implementation of Border Security and the Plenipotentiary for the Preparation and Implementation of State Border Security. The team was given two tasks, namely to support the Commander-in-Chief of the Border Guard and to monitor and evaluate the implementation of the investment at the border (Article 5(1)). These were further detailed in § 2 of Regulation No. 256 of the prime minister.<sup>38</sup>

33 P. Magda, Opinion on the Law on Amendments to the Law on State Border Protection and Some Other Laws (Print No. 569), Legislative Bureau of the Chancellery of the Senate of the Republic of Poland, Warsaw, 22 November 2021, <https://www.senat.gov.pl/gfx/senat/pl/senatekspertyzy/6124/plik/569o.pdf> (30.12.2021).

34 M. Nowicki, President of the Board..., *op. cit.*; Letter from RPO Marcin Wiącek to Speaker of the Senate of the Republic of Poland Tomasz Grodzki, Warsaw, 22.11.2021, [https://bip.brpo.gov.pl/sites/default/files/2021-11/Do\\_Senatu\\_granica\\_panstwowa\\_22.11.2021.pdf](https://bip.brpo.gov.pl/sites/default/files/2021-11/Do_Senatu_granica_panstwowa_22.11.2021.pdf) (22.12.2021).

35 Justification of the Draft Law on the Construction of State Border Security (Print No. 1657), p. 2, <https://www.sejm.gov.pl/sejm9.nsf/druk.xsp?nr=1657> (22.12.2021).

36 Minister Mariusz Kamiński Presented Details of the Construction of a Dam on the Border with Belarus, 04.11.2021, <https://www.gov.pl/web/mswia/minister-mariusz-kaminski-przedstawil-szczegoly-dotyczace-budowy-zapory-na-granicy-z-bialorusia> (22.12.2021).

37 Act of 29 October 2021 on the Construction of State Border Security (Journal of Laws 2021, item 1992).

38 Order No. 256 of the Prime Minister dated 9 November 2021 on the Team for Preparation and Implementation of State Border Security (Polish Monitor 2021, item 1042).

The team consisted of six ministers (or their authorized secretaries or undersecretaries of state) responsible for internal affairs, construction, budget, the environment, rural development and national defence. Apart from them, the BGS<sup>39</sup> and other institutions<sup>40</sup> have their own representatives. The Podlaskie and Lublin voivodes (or authorized deputies), the Plenipotentiary for the Preparation and Implementation of State Border Security and other persons invited by the team chairman were also appointed to the team (Article 5(2)). In addition to the above team, the institution of a Plenipotentiary for the Preparation and Implementation of State Border Security was created by law. The Commander-in-Chief of the Border Guard appoints them with the consent of the minister in charge of internal affairs. The plenipotentiary is entitled to undertake the tasks assigned to them (Article 4(3)) on behalf of the Commander-in-Chief. Within the scope of his/her activity, he/she can cooperate with public authorities, legal persons with State Treasury shareholding, state legal persons, non-governmental organisations and other entities (Article 4(5)).

In order to facilitate the planned investment, exemptions have been made from certain provisions,<sup>41</sup> including the Public Procurement Law (Article 9(1)), and the issue of the expropriation of property has been regulated (Article 11). The legislator, guided by the needs of the investment, has also provided for the possibility of 1) imposing a ban on staying in a specific area no wider than 200 m from the state borderline and 2) issuing a permit for a temporary stay in that area in particularly justified situations. In the first case, the decision is made by the voivode in charge of the location of the investment, at the request of or after consultation with the chief of the BGS unit in charge of the location (Article 8(1)). Only owners or holders of real estate located in the area are excluded from this if they use it in accordance with its intended purpose (Article 8(2)). In the second case, the decision belongs to the commander of the BGS branch competent for the location of the investment (Article 8(3)). The solutions proposed in the act raised doubts in the ombudsman, who is concerned about the means of its implementation.<sup>42</sup>

---

39 They include the Deputy Commander-in-Chief of the Border Guard and the Commander of the Podlaskie and Nadbużański Branch of the Border Guard or their deputies.

40 Among them are the President of the General Prosecutor's Office of the Republic of Poland or a deputy authorized by them, the General Director of Environmental Protection, the Chief Geodesist of the Country and the Head of the Central Anti-Corruption Bureau or deputies authorized by them.

41 Including the Construction Law, the Water Law, the Environmental Protection Law and the regulations on providing access to information about the environment, the Geodetic and Cartographic Law, the regulations on spatial planning and development, the regulations on the protection of agricultural and forest land and the environment, the regulations on railroad transport and the regulations on special principles of preparing and implementing investments in the field of public roads (Article 6(1)).

42 Letter from RPO Marcin Wiącek to Speaker of the Senate of the Republic of Poland Tomasz Grodzki, Warsaw 20.10.2021, [https://bip.brpo.gov.pl/sites/default/files/2021-10/Do\\_Marszalka\\_](https://bip.brpo.gov.pl/sites/default/files/2021-10/Do_Marszalka_)

As a result of the above law, on 4 January 2022 agreements on the construction of security facilities on the Polish–Belarusian border were signed. The total amount for the investment has been estimated at PLN 1,233,000,000<sup>43</sup> (the justification to the Act reports PLN 1,615,000,000 coming from the state budget).<sup>44</sup> The planned investment was to be completed within 180 days, i.e. by the end of the first half of 2022.

## Conclusions

The introduction of a state of emergency on the Polish–Belarusian border was triggered, among other things, by an increase in the number of attempts to illegally cross the border, which was related to the implementation of the constitutional obligation of those in power to protect the security of the state. The declaration of this state in some parts of the country resulted in adopting new legal solutions which aim at driving out immigrants who illegally crossed the border from Poland. In addition, the background of the changes was to strengthen border security. The above objectives were achieved by introducing new solutions, which provided, for example, 1) an instruction on the obligation to immediately leave the territory of Poland, 2) issuing a decision obliging a foreigner to return when he/she crossed or attempted to cross the border illegally, 3) issuing a decision on leaving Poland, 4) extending the scope of grounds under which an application for international protection is left without examination, 5) the possibility of introducing restrictions on staying in the area adjacent to the state border, 6) extending the scope of means of direct coercion at the disposal of BGS officers and 7) building a wall on the Polish–Belarusian border. It should be noted that the proposed legal solutions are not temporary, as is the case in exceptional situations. They have become a permanent element of the Polish legal system. Therefore one may wonder whether they were introduced to restore the normal situation as soon as possible and whether the state of emergency has become a tool for tightening the rights of foreigners, especially those crossing the border illegally.

---

Senatu\_zabezpieczenie\_granicy\_20.10.2021.pdf (02.12.2021).

43 Straż Graniczna podpisała umowy dotyczące budowy zapory na granicy polsko-białoruskiej, 04.01.2022, <https://www.gov.pl/web/mswia/straz-graniczna-podpisała-umowy-dotyczące-budowy-zapory-na-granicy-polsko-białoruskiej> (16.01.2022).

44 Regulatory Impact Assessment, Justification to the Bill, Warsaw, 12 October 2021, p. 6, <https://orka.sejm.gov.pl/Druki9ka.nsf/0/87A320926EF10C1DC125876C006DCA9E/%24File/1657.pdf> (16.01.2022).

REFERENCES

- Act of 14 October 2021 Amending the Act on Foreigners and Certain Other Acts, *Journal of Laws* 2021, item 1918.
- Act of 17 November 2021 Amending the Act on State Border Protection and Some Other Acts, *Journal of Laws* 2021, item 2191.
- Act of 29 October 2021 on the Construction of State Border Security (*Journal of Laws* 2021, item 1992).
- Act of 21 June 2002 on the State of Emergency (*Journal of Laws* 2017, item 1928).
- Adamczyk A., (Nie)intencjonalna polityka migracyjna Polski, Poznań 2021.
- Agreement between the European Union and the Republic of Belarus on the Readmission of Persons Residing without Authorisation (Dz.U. UE L 2020.181.3).
- Agreement between the Government of the Republic of Poland and the Government of the Republic of Belarus on Cooperation in Combating Crime, signed in Minsk on 8 December 2003 (*Journal of Laws* 2005, No. 125, item 1044).
- Agreement between the Republic of Poland and the Republic of Belarus on Good Neighbourhood and Friendly Cooperation, signed in Warsaw on 23 June 1992 (*Journal of Laws* 1993, No. 118, item 527).
- Baranowska G., Legalność i dopuszczalność procedury push-back (wywózek) i ocena ról ich legalizacji w Polsce, (in:) W. Klaus (ed.), *Poza prawem. prawna ocena działań państwa polskiego w reakcji na kryzys humanitarny na granicy polsko-białoruskiej*, Warsaw 2022, pp. 10–12.
- Bundespolizei, *Illegale Migration aus Belarus über Polen nach Deutschland: 11.228 Feststellungen durch die Bundespolizei im Jahr 2021*, 17.01.2022, [https://www.bundespolizei.de/Web/DE/04Aktuelles/01Meldungen/2021/10/pm\\_1\\_22\\_file.pdf?\\_\\_blob=publicationFile&v=2](https://www.bundespolizei.de/Web/DE/04Aktuelles/01Meldungen/2021/10/pm_1_22_file.pdf?__blob=publicationFile&v=2).
- Constitution of the Republic of Poland of 2 April 1997 (*Journal of Laws* 1997, No. 78, item 483).
- Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in the Member States for returning illegally staying third-country nationals (Dz.U. UE L 2008.348.98).
- Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) (Dz.U. UE L 2013.180.6).
- Explanatory Memorandum to the Law on Amending the Law on Foreigners and the Law on Granting Protection to Foreigners on the Territory of the Republic of Poland, Print No. 1507, <https://www.sejm.gov.pl/sejm9.nsf/druk.xsp?nr=1507>.
- Ferejohn J., Pasquino P., *The Law of the Exception: A Typology of Emergency Powers*, 'International Journal of Constitutional Law' 2004, vol. 2, no. 2, pp. 210–239.
- Greene A., *Permanent States of Emergency and the Rule of Law: Constitutions in an Age of Crisis*, Oxford 2018.
- Gross O., *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 'The Yale Law Journal' 2003, vol. 112, no. 5, pp. 1011–1134.
- Gross O., Ní Aoláin F., *Law in Times of Crisis: Emergency Powers in Theory and Practice*, Cambridge 2006.

- Informacja statystyczna za 2021 r., Straż Graniczna, Warszawa styczeń 2022 r., <https://www.strazgraniczna.pl/pl/granica/statystyki-sg/2206,Statystyki-SG.html>.
- Jaśkowiak M., Pawłowski B., *Opinion on The Compatibility with International Law and European Union Law of the Governmental Bill on Amending the Act on Foreigners and the Act on Granting Protection to Foreigners on the Territory of the Republic of Poland (Print No. 1507)*, Warsaw, 7 September 2021, <https://www.sejm.gov.pl/sejm9.nsf/opinieBAS.xsp?nr=1507>.
- Justification of the Draft Law on the Construction of State Border Security (Print No. 1657)*, <https://www.sejm.gov.pl/sejm9.nsf/druk.xsp?nr=1657>.
- Justification of the Government's Draft Law on Amending the Law on State Border Security and Some Other Laws (Print No. 1754)*, <https://www.sejm.gov.pl/sejm9.nsf/druk.xsp?nr=1754>.
- Justification of the Request to Introduce a State of Emergency in the Area of Part of the Podlaskie Province and Part of the Lubelskie Province, Warsaw, 2 September 2021*, <https://orka.sejm.gov.pl/Druki9ka.nsf/0/A3F1521EA5A80277C1258744004D7B0B/%24File/1512.pdf>.
- Kuźelewska E., Piekutowska A., *The EU Member States' Diverging Experiences and Policies on Refugees and the New Pact on Migration and Asylum, 'Białostockie Studia Prawnicze' 2021, no. 1, pp. 23–36.*
- Letter from RPO Marcin Wiącek to Mariusz Kamiński, Minister of Internal Affairs and Administration, Warsaw 25.08.2021*, <https://bip.brpo.gov.pl/sites/default/files/Wyst%C4%85piecie%20RPO%20do%20MSWiA%2025.08.2021.pdf>.
- Letter from RPO Marcin Wiącek to Speaker of the Senate of the Republic of Poland Tomasz Grodzki, Warsaw 03.10.2021*, [https://bip.brpo.gov.pl/sites/default/files/202110/Opinia\\_RPO\\_cudzoziemcy\\_3.10.2021.pdf](https://bip.brpo.gov.pl/sites/default/files/202110/Opinia_RPO_cudzoziemcy_3.10.2021.pdf).
- Letter from RPO Marcin Wiącek to Speaker of the Senate of the Republic of Poland Tomasz Grodzki, Warsaw 20.10.2021*, [https://bip.brpo.gov.pl/sites/default/files/2021-10/Do\\_Marszalka\\_Senatu\\_zabezpieczenie\\_granicy\\_20.10.2021.pdf](https://bip.brpo.gov.pl/sites/default/files/2021-10/Do_Marszalka_Senatu_zabezpieczenie_granicy_20.10.2021.pdf) (02.12.2021).
- Letter from RPO Marcin Wiącek to Speaker of the Senate of the Republic of Poland Tomasz Grodzki, Warsaw 22.11.2021*, [https://bip.brpo.gov.pl/sites/default/files/202111/Do\\_Senatu\\_granica\\_panstwowa\\_22.11.2021.pdf](https://bip.brpo.gov.pl/sites/default/files/202111/Do_Senatu_granica_panstwowa_22.11.2021.pdf).
- Magda P., *Opinion to the Law on Amendments to the Law on State Border Protection and Some Other Laws (Print No. 569)*, Legislative Bureau of the Chancellery of the Senate of the Republic of Poland, Warsaw, 22 November 2021, <https://www.senat.gov.pl/gfx/senat/pl/senatekspertyzy/6124/plik/569o.pdf>.
- Minister Mariusz Kamiński Presented Details on the Construction of a Dam on the Border with Belarus, 04.11.2021, <https://www.gov.pl/web/mswia/minister-mariusz-kaminski-przedstawil-szczegoly-dotyczace-budowy-zapory-na-granicy-z-bialorusia>.
- Nowicki M., *President of the Board of the Helsinki Foundation for Human Rights, Warsaw, 22 November 2021*, <https://www.hfhr.pl/wp-content/uploads/2021/11/nowelizacja-ustawy-o-ochronie-granicy.pdf>.
- Opinion of the Centre for Research, Studies and Legislation of the National Council of Legal Advisors to The Draft Law on Amendments to the Law on Foreigners and the Law on Granting Protection to Foreigners on the Territory of the Republic of Poland (Print No. 1507)*, Warsaw, 13 September 2021, <http://obsil.kirp.pl/wp-content/uploads/2021/09/Opinia-z-13.09.2021-ustawa-o-cudzoziemcach.pdf>.

- Order No. 256 of the Prime Minister dated 9 November 2021 on the Team for Preparation and Implementation of State Border Security (Polish Monitor 2021, item 1042).
- Ordinance of the Minister of Internal Affairs and Administration of 20 August 2021, Amending the Ordinance on Temporary Suspension or Restriction of Border Traffic at Certain Border Crossings (Journal of Laws 2021, item 1536).
- Ordinance of the President of the Republic of Poland of 2 September 2021 on the Introduction of a State of Emergency in the Area of a Part of Podlaskie Province and a Part of Lubelskie Province (Journal of Laws 2021, item 1612).
- Ordinance of the President of the Republic of Poland of 1 October 2021 on the Extension of the State of Emergency Introduced in the Area of a Part of Podlaskie Province and a Part of Lubelskie Province (Journal of Laws 2021, item 1788).
- Prokop K., *Stany nadzwyczajne w Konstytucji Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997r.*, Białystok 2005.
- Regulatory Impact Assessment, Justification to the Bill, Warsaw, 12 October 2021, <https://orka.sejm.gov.pl/Druki9ka.nsf/0/87A320926EF10C1DC125876C006DCA9E/%24File/1657.pdf>.
- Resolution of the Sejm of the Republic of Poland on 17 November 2021 on Solidarity in the Protection of Polish Borders (Polish Monitor 2021, item 1129).
- Stanowisko HFPC w sprawie wprowadzenia stanu wyjątkowego, 2.09.2021, <https://www.hfhr.pl/stanowisko-hfpc-w-sprawie-wprowadzenia-stanu-wyjatkowego/>.
- Stenographic Report of the 41st Meeting of the Sejm of the Republic of Poland on 9 November 2021, [https://orka2.sejm.gov.pl/StenoInter9.nsf/0/E759260C92FA55C5C125878900001D34/%24File/41\\_a\\_ksiazka\\_bis.pdf](https://orka2.sejm.gov.pl/StenoInter9.nsf/0/E759260C92FA55C5C125878900001D34/%24File/41_a_ksiazka_bis.pdf).
- Straż Graniczna podpisała umowy dotyczące budowy zapory na granicy polsko-białoruskiej, 04.01.2022, <https://www.gov.pl/web/mswia/straz-graniczna-podpisala-umowy-dotyczace-budowy-zapory-na-granicy-polsko-bialoruskiej>.
- Szczepańska E., Nielegalne przekroczenia granicy z Białorusią w 2021 r., <https://www.strazgraniczna.pl/pl/aktualnosci/9689,Nielegalne-przekroczenia-granicy-z-Bialorusia-w-2021-r.html>, 12.01.2022.
- Szcześniak A., Stan wyjątkowy zostaje. Morawiecki: 'Wprowadzamy go, żeby zapewniać wolność', *Oko Press* 06.09.2021, <https://oko.press/stan-wyjatkowy-zostaje-morawiecki-wprowadzamy-go-zeby-zapewniac-wolnosc/>.
- Trojanowska-Strzęboszewska M., Nielegalna czy nieregularna imigracji? Analiza wyzwań definicyjnych ze szczególnym uwzględnieniem polityki imigracyjnej UE, 'Studia Europejskie' 2020, no 3, pp. 145–164.
- UNHCR Comments to the Draft Law on Amendments to the Law on Foreigners and the Law on Granting Protection to Foreigners on the Territory of the Republic of Poland, 13 September 2021, [https://www.unhcr.org/pl/wp-content/uploads/sites/22/2021/10/Uwagi-UNHCR-do-projektu-ustawy\\_PL.pdf](https://www.unhcr.org/pl/wp-content/uploads/sites/22/2021/10/Uwagi-UNHCR-do-projektu-ustawy_PL.pdf).