

# States of Emergency and Human Rights Protection

---

The Theory and Practice of the Visegrad Countries

**Edited by Monika Florczak-Wątor,  
Fruzsina Gárdos-Orosz, Jan Malíř, and  
Max Steuer**

First published 2024

ISBN: 978-1-032-63745-7 (hbk)

ISBN: 978-1-032-63773-0 (pbk)

ISBN: 978-1-032-63781-5 (ebk)

---

## States of emergency and fundamental rights in books and in action

The Visegrad countries and the COVID-19 pandemic

*Monika Florczak-Wątor, Fruzsina Gárdos-Orosz,  
Jan Malíř, and Max Steuer*

CC-BY-NC-ND 4.0

DOI: 10.4324/9781032637815-1

The funder of the Open Access version of this chapter is the Faculty of Law and Administration of the Jagiellonian University granted within the Priority Research Area FutureSoc under the program “Excellence Initiative – Research University” at the Jagiellonian University in Krakow, Poland.

# States of emergency and fundamental rights in books and in action

## The Visegrad countries and the COVID-19 pandemic

*Monika Florczak-Wątor, Fruzsina Gárdos-Orosz, Jan Malír, and Max Steuer*

The so-called Visegrad Four (V4) countries – Czech Republic, Hungary, Poland, and Slovakia – share a common history dating back to well before the Habsburg Empire was formed and, also, a common experience of being part of the Soviet bloc in the post-WWII period. After their political and economic transformation upon the fall of the state socialist regime in 1989, these countries decided to deepen their cooperation and promote their mutual interests within the framework of the Visegrad Group, established in 1991 with the ambition of ‘returning to Europe’ via, *inter alia*, the process of EU and NATO integration.<sup>1</sup> Thus, the V4 countries represent a logical and highly interesting subject of research in different areas of their jurisdictions. One such area is emergencies, which, for various reasons, has been under-researched in the V4 countries over the years.

Between 1989 and 2019, emergencies were among the challenges with which the V4 countries did not have to become overly involved. During that period, emergencies were a significant part of constitutional (d)evolution, particularly in the wake of decolonisation and post-decolonisation processes in other parts of the world.<sup>2</sup> Western Europe, too, has increasingly turned its attention to emergency discourse, initially in the wake of 9/11 and the US declaring its ‘war on terror’ and, later, due to events such as the Paris attacks in November 2015, prompting doctrinal reflections on the legal regulation of emergencies.<sup>3</sup> Moreover, even in democratic contexts, a deeper, troubling fea-

1 Michal Kopeček, ‘Sovereignty, “Return to Europe” and Democratic Distrust in the East After 1989 in the Light of Brexit’ (2019) 28(1) *Contemporary European History* 73.

2 Nasser Hussain, *The Jurisprudence of Emergency: Colonialism and the Rule of Law* (University of Michigan Press 2019); Stephen Morton, *States of Emergency: Colonialism, Literature and Law* (Liverpool University Press 2013).

3 John Ferejohn and Pasquale Pasquino, ‘The Law of the Exception: A Typology of Emergency Powers’ (2004) 2(2) *International Journal of Constitutional Law* 210 and Oren Gross and Fionnuala Ní Aoláin, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (Cambridge University Press 2006).

feature of ‘slow’<sup>4</sup> or ‘chronic’<sup>5</sup> emergencies, which manifest the unsustainability of particular policy choices (such as neglecting looming climate disasters<sup>6</sup>), has made it increasingly less feasible to ignore the study of emergencies.<sup>7</sup>

Before the outbreak of the COVID-19 pandemic, although some V4 scholars engaged in analysing the US context,<sup>8</sup> emergencies remained largely ‘off the table’ in V4 scholarship. It is not obvious why this was the case. An explanation could be sought in the sense of optimism<sup>9</sup> that emergencies will not be needed after the fall of state socialism, an era that normalized a gap between the formal legal framework on states of emergency<sup>10</sup> and its interpretive practice.<sup>11</sup> Yet, this is only one possible explanation for the lack of in-depth analysis of the problem at hand. The global financial crisis (2007–2008) and its European repercussions did not bring considerable constitutional challenges to the V4 countries either.<sup>12</sup>

In this context, it is unsurprising that the global scholarship on emergencies, extensive as it is, has hardly ever invoked examples drawn from the V4 region, even in cases where the research goes beyond the ‘usual cases’, such as the USA or the UK, and includes a wider range of jurisdictions.<sup>13</sup> Most

4 Ben Anderson, Kevin Grove, Lauren Rickards, and Matthew Kearnes, ‘Slow Emergencies: Temporality and the Racialized Biopolitics of Emergency Governance’ (2020) 44(4) *Progress in Human Geography* 621.

5 Andreas Malm, *Corona, Climate, Chronic Emergency: War Communism in the Twenty-First Century* (Verso Books 2020) ch 2. See also, Jean-Louis Halpérin, Stéphanie Henneville-Vauchez, and Éric Millard (eds), *L’état d’urgence – de l’exception à la banalisation* [State of Emergency: From Exception to Trivialisation] (Presses universitaires de Paris Nanterre 2017) and Gilles Sainati, ‘De l’État de droit à l’état d’Urgence’ [From the Rule of Law to a State of Emergency] (2007) 52(4) *Mouvements* 82.

6 Malm (n 5) ch 1.

7 See also Michael Dillon, ‘Network Society, Network-Centric Warfare and the State of Emergency’ (2002) 19(4) *Theory, Culture & Society* 71.

8 For example, Andrés Sajó saw it as a segway from an ‘emergency’ to a ‘counter-terror state’. Andrés Sajó, ‘From Militant Democracy to the Preventive State’ (2006) 27(5) *Cardozo Law Review* 2280. Selected contributions in his edited volumes also dealt with emergencies. Sanford Levinson, ‘Constitutional Norms in a State of Permanent Emergency’ in Andrés Sajó (ed), *Abuse: The Dark Side of Fundamental Rights* (Eleven International Publishing 2006); and Kent Roach, ‘Anti-Terrorism and Militant Democracy: Some Western and Eastern Responses’ in Andrés Sajó and Lorri Rutt Bentsch (eds), *Militant Democracy* (Eleven International Publishing 2004).

9 Francis Fukuyama, ‘The End of History?’ (1989) 16 *The National Interest* 3.

10 Zdeněk Kühn, *The Judiciary in Central and Eastern Europe: Mechanical Jurisprudence in Transformation?* (Martinus Nijhoff Publishers 2011).

11 Cf. Roscoe Pound, ‘Law in Books and Law in Action’ (1910) 44 *American Law Review* 12.

12 Zoltán Sente and Fruzsina Gárdos-Orosz (eds), *New Challenges to Constitutional Adjudication in Europe: A Comparative Perspective* (Routledge 2018).

13 Karin Loevy, *Emergencies in Public Law: The Legal Politics of Containment* (Cambridge University Press 2016); Alan Greene, *Permanent States of Emergency and the Rule of Law* (Hart Publishing 2018); Gross and Aoláin (n 3); Andrés Sajó and Renáta Uitz, *The Constitution of Freedom: An Introduction to Legal Constitutionalism* (OUP 2017).

public law contributions have focused on Central and Eastern Europe (CEE) or Europe more broadly, including in their analyses only some (if any) of the V4 countries.<sup>14</sup> Limited data from these countries that is available in English has effectively discouraged scholars of various disciplines from undertaking in-depth research in this area.<sup>15</sup> Therefore, very few systematic analyses of the V4 countries' constitutional systems are currently available.<sup>16</sup> The truth is that, as of July 2023, two of the V4 countries, Hungary and Poland, have become the 'black sheep' of the EU due to the processes of democratic backsliding, or, more precisely, backsliding of democracy occurring in these countries in the recent years, and have prompted rather voluminous comparative works. However, these works mostly focus on only those two countries and deal especially with their problems in the area of rule-of-law,<sup>17</sup> although not dissimilar tendencies might emerge in Czech Republic, and Slovakia as well.<sup>18</sup>

- 14 Armin von Bogdandy, Peter Huber, and Christoph Grabenwarter (eds), *The Max Planck Handbooks in European Public Law: Volume III: Constitutional Adjudication: Institutions* (OUP 2020); Zoltán Sente and Fruzsina Gárdos-Orosz (eds), (n 12); Fruzsina Gárdos-Orosz and Zoltán Sente (eds), *Populist Challenges to Constitutional Interpretation in Europe and Beyond* (Routledge 2021); András Jakab, Arthur Dyevre and Giulio Itzcovich (eds), *Comparative Constitutional Reasoning* (CUP 2017); Anna Fruhstorfer and Michael Hein (eds), *Constitutional Politics in Central and Eastern Europe: From Post-Socialist Transition to the Reform of Political Systems* (Springer 2016).
- 15 A rare exception, but quite outdated at the time of writing, is in Venelin I. Ganev, 'Emergency Powers and the New East European Constitutions' (1997) 45(3) *The American Journal of Comparative Law* 585.
- 16 Radoslav Procházka, *Mission Accomplished: On Founding Constitutional Adjudication in Central Europe* (CEU Press 2002); Paul Blokker, *New Democracies in Crisis? A Comparative Constitutional Study of the Czech Republic, Hungary, Poland, Romania and Slovakia* (Routledge 2013).
- 17 Tímea Drinóczi and Agnieszka Bień-Kacała (eds), *Rule of Law, Common Values, and Illiberal Constitutionalism: Poland and Hungary within the European Union* (Routledge 2020); Tímea Drinóczi and Agnieszka Bień-Kacała, *Illiberal Constitutionalism in Poland and Hungary: The Deterioration of Democracy, Misuse of Human Rights and Abuse of the Rule of Law* (Routledge 2021); Martin Belov (ed), *The Role of Courts in Contemporary Legal Orders* (Eleven International Publishing 2019), pt VI.
- 18 See Seán Hanley and Milada Anna Vachudova, 'Understanding the Illiberal Turn: Democratic Backsliding in the Czech Republic' (2018) 34(3) *East European Politics* 276; Jan Zielonka and Jacques Rupnik, 'From Revolution to "Counter-Revolution": Democracy in Central and Eastern Europe 30 Years On' (2020) 72(6) *Europe-Asia Studies* 1073.

Contributions engaging with only one of the countries,<sup>19</sup> or with all four – but rather superficially<sup>20</sup> – do not shed light on the V4 specificities.

The COVID-19 pandemic put the V4 region firmly on the map, regarding the study of emergencies. While, with this new pandemic, the issue of emergencies became more central globally,<sup>21</sup> the impact of the new pandemic on the V4 region was significant for at least three reasons. First, the lack of knowledge in terms of understanding emergencies (and reconciling them with the protection of human rights in practice) in the V4 became visible, unlike in those countries where scholarship dealing with the subject matter had evolved in response to the ‘war on terror’ or similar events.<sup>22</sup> Second, in one of the V4 countries, in Hungary, the pandemic served as a means for extended abuses of public authority that were more blatant than in other countries, some of which were, according to existing surveys, successful in implementing at least some checks and balances.<sup>23</sup> As a result, Hungary is the only country from among the V4 countries that has ‘earned’ separate chapters in several volumes to address the deterioration of democracy and the rule of law in relation to the pandemic, affirming growing global interest in the (mis)management of emergencies.<sup>24</sup> Yet, the other V4 countries remained understudied and a joint perspective was generally missing, although these countries have historically common backgrounds in many aspects and their constitutions were adopted after the democratic transition from socialism to constitutional democracies. Third, even though, as of 2023, COVID-19 is receiving reduced attention, the repercussions of the pandemic are still palpable. As such, the pandemic has no doubt led to a transformation of thinking about emergencies in both scholarly and public discourses. Moreover, from a public policy perspective, comprehending and studying emergencies and their practice continues to be

- 19 Rafał Mańko, ‘“Our Fatherland Has Found Itself on the Verge of an Abyss”: Poland’s 1981 Martial Law, or the Unexpected Appearance of the State of Exception Under Actually Existing Socialism’ in Cosmin Cercel, Gian Giacomo Fusco, and Simon Lavis (eds), *States of Exception: Law, History, Theory* (Routledge 2020); Jerzy Menkes, ‘The Legal Aspects of the Introduction of a Lockdown in Poland’ in Jerzy Menkes and Magdalena Suska (eds), *The Economic and Legal Impact of Covid-19* (Routledge 2021).
- 20 Andrzej Misiuk, Marcin Jurgilewicz, and Jozefína Drotárová, ‘Management of Restrictions During the SARS-COV-2 Pandemic in Central European Countries’ in Jolanta Itrich-Drabarek (ed), *The Pandemic in Central Europe: A Case Study* (Routledge 2023).
- 21 See Joelle Grogan, ‘COVID-19, The Rule of Law and Democracy: Analysis of Legal Responses to a Global Health Crisis’ (2022) 14(2–3) *Hague Journal on the Rule of Law* 349.
- 22 This includes countries such as France, the UK, or even Russia.
- 23 Tom Ginsburg and Mila Versteeg, ‘The Bound Executive: Emergency Powers During the Pandemic’ (2021) 19(5) *International Journal of Constitutional Law* 1498.
- 24 Gábor Halmai, ‘From “Illiberal Democracy” to Autocracy: How Covid-19 Helped to Destroy the Remnants of Democracy in Hungary’ in Jakub Urbanik and Adam Bodnar (eds), *Law in a Time of Constitutional Crisis: Studies Offered to Miroslaw Wyrzykowski* (Verlag CH Beck 2021); Kriszta Kovács, ‘The COVID-19 Pandemic: A Pretext for Expanding Power in Hungary’ in Joelle Grogan and Alice Donald (eds), *Routledge Handbook of Law and the COVID-19 Pandemic* (Routledge 2022).

urgent and significant, not least because of the Russian invasion of Ukraine, which borders three of the V4 countries and the EU.

In sum, although the COVID-19 pandemic appears to have faded, the issue of emergencies, including their legal regulation and practices, continues to be relevant. This is because EU member states, including the V4 countries, now operate in permanent and multifaceted crisis discourses that are related to re-emerging crises, such as those linked to the economy, to more or less rhetorically constructed ‘crises’, such as refugee crisis,<sup>25</sup> and to new emerging crises, such as the climate crisis or the crisis triggered by the invasion of Ukraine by the Russian Federation. The V4 countries are affected by all of these critical developments but have been especially hit by the consequences of the latter.<sup>26</sup> With this in mind, the systematic analysis of states of emergency in the V4 countries and, in particular, their approaches to crisis management, as well as human rights limitations or restrictions<sup>27</sup> during states of emergency, is of interest far beyond the scope of the CEE region.

The present volume thus seeks to offer a comprehensive and critical account of the legal doctrine and interpretive practice of emergencies in the V4, with special regard to human rights protection, by considering the COVID-19 pandemic as an example that constituted a ‘critical juncture’.<sup>28</sup> While some chapters embrace a doctrinal approach, others engage in a more contextual or critical-conceptual analysis that aims to bring to the surface philosophical and comparative inspirations for legal regulation and judicial decision-making on emergencies, the interplay between (partisan) politics and law when enacting and amending the legal regulation, and, last but not least, the implications of this regulation for fundamental rights protection.

The key assumption the present volume builds upon is that the legal regulation of states of emergency, as interpreted by key political actors, directly influences the quality of the protection of human rights in any legal system, and that not only for as long as a state of emergency lasts, but also, through its repercussions, even in the long term. This assumption also reflects the permanent potentiality of emergencies in the political regimes of the V4, embedded both in external unforeseen shocks (such as the COVID-19 pandemic) or in

25 See Max Steuer, ‘Newspaper Portrayal of the EU in Crises in the Czech Republic, Slovakia and Hungary: The Union’s Imagined Linearity’ in Jozef Bátora and John Erik Fossum (eds), *Towards a Segmented European Political Order: The European Union’s Post-Crises Conundrum* (Routledge 2019).

26 In some states, and Hungary is a good example, this even led to a permanent state of emergency. See Gábor Mészáros, ‘Never-Ending Exception: The Ukraine War Perpetuates Hungary’s Government by Decree’ (*Verfassungsblog*, 10 May 2022) <<https://verfassungsblog.de/never-ending-exception/>> accessed 20 July 2023.

27 We use these two terms interchangeably in the chapter.

28 See, e.g., Sven Steinmo, ‘Historical Institutionalism’ in Donatella Della Porta and Michael Keating (eds), *Approaches and Methodologies in the Social Sciences: A Pluralist Perspective* (CUP 2008).

more mundane events<sup>29</sup> that can easily be framed as necessitating exceptional solutions, particularly due to the alleged ‘gaps’ in the legal system.<sup>30</sup> By advancing the assumption that emergencies and human rights are inherently intertwined, the volume not only contributes to comparative constitutional studies<sup>31</sup> and the international human rights literature, but also to studies on the legal impacts of the COVID-19 pandemic. In other words, the volume heeds Loevy’s call to ‘ask about process and procedure for identifying emergencies, about standards and methods, about places for contestation and the voices that different actors are accorded in the discussion.’<sup>32</sup> The insights from the V4 countries can be debated in conceptual and jurisdictional dimensions well beyond the scope of these countries.

In extending the basic assumption described above, there are several theses that represent the “files rouges” running through the three parts of the present volume.

First, the legacies of non-democratic regimes before 1989, shared by all V4 countries, continue to have an impact on these countries’ emergency legislation, as does the lack of political or doctrinal attention thereof prior to the COVID-19 pandemic. The mentions of the pre-1989 discourses, as articulated in some chapters of the volume, engage with this thesis in particular.

Second, the study of emergencies may benefit from accentuating the links with the study of constitutionalism(s), as constitutional regulation is normally and necessarily the starting point for any decision-making on emergencies by political actors, and for contrasting constitutional regulation with judicial practice and, in some cases, political practice. Some of the chapters contained in the volume, in particular when engaging with illiberal tendencies in the respective V4 political regimes, speak about the implications of emergencies for changing or even impairing the established models of constitutionalism as a result of the interpretations of rules on emergencies.

Third, the further study of emergencies, as compared to the existing state of the art, may contribute to enriching our understanding of the inter-institutional relations in the respective jurisdictions, highlighting both the potential and the limits that specific institutions (particularly the courts, the ‘fourth-branch’ institutions,<sup>33</sup> or civil society) have with respect to avoiding the concentration of powers in other branches or institutions (most notably, the Executive).

29 Kim Lane Scheppele, ‘Small Emergencies’ (2005) 40(3) *Georgia Law Review* 835.

30 Herbert L. A. Hart, *The Concept of Law* (3rd edn, OUP 2012) ch 7.

31 Ran Hirschl, *Comparative Matters: The Renaissance of Comparative Constitutional Law* (OUP 2014).

32 Karin Loevy, *Emergencies in Public Law: The Legal Politics of Containment* (CUP 2015) 316–317.

33 Mark Tushnet, *The New Fourth Branch: Institutions for Protecting Constitutional Democracy* (CUP 2021).

Fourth, the focus on the relationship between states of emergency and human rights protection allows us to uncover stories about the relationship between individuals, communities, and the state, the internalisation (or lack thereof) of constitutional values by the state's elites, the trust of individuals and communities in state capacities, and, last but not least, views on the role of the state when faced with crises, as embedded in the minds of institutions and societies in the V4 countries.

In order to meet the aims that the present volume pursues, it is structured into three major parts. While the first two parts comprehensively and systematically discuss the constitutional models of states of emergency and the protection of human rights in each of the V4 countries (both in normalcy and during emergencies), Part III illustrates how these models and the general framework of rights protection materialised during the COVID-19 pandemic in the V4 countries. Unlike the first two parts, the aim of the third part is thus not to provide a systematic comparison of the restrictions on the same fundamental rights in each V4 country imposed during emergencies linked to COVID-19 but rather to highlight the interactions between the policies for eradicating the pandemic and fundamental rights guarantees as well as the dynamics of these interactions. This structure is believed to be helpful in elaborating the discussion on approaches to emergencies in V4 countries and their comparisons.

The purpose of Part I of the present volume is to show the complexity and diversity of the legal regulation of states of emergency and the practice of its application in the V4 countries. The chapters are based on a uniform structure with the aim to guarantee the comprehensiveness and comparability of the analysis, as well as examining features that are peculiar to each country. In each of the chapters, the constitutional regulation of states of emergency is introduced, including the types of states of emergency, the principles and conditions of their introduction, the legal consequences of their declaration and the past and present practice of their application. The historical background of the constitutional regulation is mentioned, and the possibilities of having both the decisions of state authorities to introduce (or not to introduce) a particular state of emergency and the decisions limiting (or not limiting) the rights of individuals during particular states of emergency are reviewed. Moreover, illiberal regimes tend to hold a particular position on emergencies, where these are ever present in public life, whether in a more or less explicit manner.

Part I thus follows the logic of learning from the (albeit limited) discussions on the states of emergency preceding the COVID-19 pandemic for the purpose of assessing the public health emergencies caused by it. Within the framework of Part I, not only the constitutional regulation of emergencies but also their statutory regulation is analysed. This approach is considered imperative, as, in all of the V4 countries, considerable space is left for the Legislator with respect to implementing and expanding rules on emergencies through statutory provisions. This approach makes it possible to obtain a comprehensive picture of the legal bases for the operation of emergencies in the



V4. The chapters contained in Part I depart from the assumption that all V4 countries are civil law systems, thus, presumably following what Scheuerman calls a ‘formalist’ as opposed to a ‘common law’ approach to the regulation of emergencies, characterised by a strong role being played by the constitutional framework.<sup>34</sup> However, this assumption of systems in which ‘the rule of law is never discarded altogether’<sup>35</sup> needs to be subject to closer scrutiny by featuring brief analytical descriptions of the historical evolution of the present model in each jurisdiction. Attention to history is essential, considering the enduring patterns of emergency governance<sup>36</sup> and, more particularly, the legacies of authoritarian regimes that have shaped the post-1989 legal framework and its application in (not only) the V4 countries.<sup>37</sup> The chapters in Part I employ existing classifications and typologies of emergencies and are sensitive to the political context in which the legal regulation was adopted. The chapters also indicate some difficulties in distinguishing between constitutional and sub-constitutional regulation in a straightforward manner.<sup>38</sup>

Part II addresses the status quo, the historical development and the main challenges pertaining to the protection of fundamental rights, as enshrined in the constitutions of the V4 countries, including the conditions and principles for limiting fundamental rights, as well as the institutions and mechanisms for their protection, in particular, the judicially enforceable remedies. Therefore, each chapter describes the general principles of human rights restrictions both during the normal functioning of the state and during states of emergency. This makes it possible to highlight the specificity of the restrictions on human rights in emergency situations against the background of the general principles of the restriction of these rights and the practice of their application. As none of the V4 jurisdictions apparently subscribe to the theory of absolute rights<sup>39</sup> (with very limited exceptions), mapping the constitutional and statutory basis for human rights restrictions is essential for assessing the legitimacy of special measures introduced during states of emergency. The latter themselves tend to have an uneven impact on the rights of particular social groups, thus generating what existing scholarship aptly describes as the

34 William E. Scheuerman, ‘Emergency Powers’ (2006) 2(1) *Annual Review of Law and Social Science* 257.

35 *ibid* 271. The piece comes clearly from before the erosion of democracy, including the usurpation of emergency powers in Hungary.

36 David Stasavage, ‘Democracy, Autocracy, and Emergency Threats: Lessons for COVID-19 From the Last Thousand Years’ (2020) 74(S1) *International Organization* E1.

37 See, generally, Sabrina P. Ramet and Christine M. Hassenstab (eds), *Central and Southeast European Politics Since 1989* (CUP 2019).

38 Cf. Christian Bjørnskov and Stefan Voigt, ‘This Time Is Different?: On the Use of Emergency Measures During the Corona Pandemic’ (2022) 54(1) *European Journal of Law and Economics* 63.

39 E.g., C. Edwin Baker, ‘Scope of the First Amendment Freedom of Speech’ (1978) 25 *UCLA Law Review* 964.

localised and uneven impact of emergency powers.<sup>40</sup> The chapters contained in Part II point to several major open questions pertaining to fundamental rights restrictions that may amplify the uncertainty of how these restrictions should be scrutinised by courts under pressure – a situation that is typical of emergencies. At the same time, they point to how essential courts, especially constitutional courts, are for the purpose of minimising human rights violations and hint at a few instances where the language of emergencies may be used, counterintuitively, for rights-protecting purposes.<sup>41</sup> The spectre of de-democratisation comes back to haunt us here as well,<sup>42</sup> pointing to the necessity of evaluating the state of human rights protection within the context of the political regime. Some of the chapters included in this part of the volume also offer case studies that illustrate both the general and country-specific problems related to the restrictions of particular human rights in emergencies. Each of the chapters in Part II provides grounds for assessing how the respective constitutional models for the protection and restriction of human rights worked under the conditions of the COVID-19 pandemic, raising, inter alia, the issue how to balance conflicting rights.

Finally, Part III of the volume consists of chapter-length case studies concerning restrictions on particular fundamental rights during the COVID-19 pandemic. Several rights and freedoms that were restricted during the COVID-19 pandemic and that are both legally and socially of paramount importance, namely freedom of assembly and other political rights and freedoms, freedom of movement, the right to a fair trial and the right to education, were selected for the purposes of the analysis. The authors, who are experts in the selected human rights issues, have been relied upon to identify the most pertinent rights restrictions in the respective jurisdictions that may yield lessons for comparative studies of rights protection during emergencies. For each of the respective countries, rights whose restrictions were problematic both in theory and practice at the time of the pandemic and which, at the same time, became the subject of an intense public debate were selected by the experts. The choice also considered the need to avoid the charge of absolutising the importance of so-called first-generation rights (civil and political rights) at the expense of ‘second-generation rights’ (economic, social, and cultural rights). Since a comprehensive study of all the rights affected by COVID-19 would be technically too challenging and too extensive, we decided to select the most relevant examples so as to show the specifics of the protection of these rights

40 See Clement Fatovic, ‘Emergencies and the Rule of Law’ in William R. Thompson (ed), *Oxford Research Encyclopedia of Politics* (OUP 2019) and sources therein.

41 Bonnie Honig, *Emergency Politics: Paradox, Law, Democracy, Emergency Politics* (Princeton University Press 2009). She juxtaposes this positive potential of emergencies with Giorgio Agamben’s much more sceptical view.

42 Cf. Gábor Halmai, ‘Rights Revolution and Counter-Revolution: Democratic Backsliding and Human Rights in Hungary’ (2020) 14(1) *Law & Ethics of Human Rights* 97.

in an inductive way, and thus also to understand the difficulties encountered by the V4 countries in providing this protection.

The inductive methodology applied in Part III allows us to explain and understand difficulties that may analogically emerge during other emergencies, be it the ‘migration crises’, the humanitarian or economic crises resulting from the Russian Federation’s invasion of Ukraine, or even emergencies related to the threats of war. It is a notoriety that the development of any legal system (law in books) depends on the application of the law (law in action). The COVID-19 pandemic enabled us to see how the emergency regimes (described in Part I) and the standards of human rights protection (elaborated in Part II) worked in practice. As described in Part III, while the problems of human rights restrictions are similar, the proposals for addressing them are quite often different. It is certainly not possible to standardise solutions to these problems, but lessons from the case studies assembled in Part III bring us much closer to understanding how human rights tools do – or do not – work in times of crises. It is believed that even though some solutions were developed for the problems associated with the COVID-19 pandemic, they can serve as lessons for future cases. Raising awareness of the existence of at least some of the problems in constitutional, legislative, or judicial practice is, in itself, useful for strengthening the legal system in the face of challenges in order to preserve the democratic value of the rule of law and that of the protection of human rights in such times.

Turning to a breakdown of the edited volume, Part I consists of four chapters dedicated to the state of emergency models in the V4 countries.

In Chapter 1 **Jan Malíř** and **Jan Grinc** describe the process of the constitutionalisation of rules on emergencies that the Czech Republic has undergone over the past 30 years. As a result of this process, three major emergencies are now recognised and regulated at the constitutional level. In spite of this development, an important space remains for the Legislator, who may lay down implementing rules and also provide for quasi-emergencies at the statutory level, as highlighted by the COVID-19 pandemic and the adoption of the Pandemic Act (2021), which was intended to overcome the difficulties encountered in the legal and practical handling of the pandemic. In Chapter 2, on the state of emergency in Hungary, **Zoltán Szente** not only presents the constitutional environment of special legal orders but also confronts the constitutional rules with the recent practice. He provides a critical analysis of the situation in Hungary which is characterised by the perpetuation of the state of exception, the weaknesses of institutional guarantees, and the unlimited power of the government. In Chapter 3, **Michał Ziółkowski** discusses the model of states of emergency, as contained in the Polish Constitution, and the problems relating to its application. He claims that current practice does not follow theoretical assumptions and that the constitutional regulation of emergencies has so far been consistently omitted. Both during the COVID-19 pandemic and during natural disasters predating COVID-19, the Polish authorities did not

declare a state of emergency, as provided for in the Constitution. Ziółkowski concludes that the fully developed model of states of emergency in Poland is still under construction. In Chapter 4, **Max Steuer** narrates the emergence of emergencies as a component of the Slovak constitutional discourse, identifying history, particularly the legacy of the First Czechoslovak Republic, the state socialist regime, and the societal and elite propensity towards EU/NATO accession in the early 2000s as key factors shaping that discourse. Despite the gradual involvement of more actors in changing, implementing, and (at least in the case of one of the four models in place) applying the regulations on states of emergency, Steuer argues that the regime has remained unprepared for the ‘practice of emergencies’, which, even without partisan motivations, indirectly strengthened the Executive to do so to an extent comparable to the Hungarian and Polish cases.

Part II of the edited volume is devoted to the restrictions on human rights in times of emergency in comparison with the restrictions available during the normal functioning of the state and to the means of protecting human rights in the regimes of the V4 countries.

In Chapter 5, **Jan Malíř and Jan Grinc** argue that, in the Czech Republic, fundamental rights continue to apply in emergencies and, in principle, can be limited by the Executive only if provided for in a statute. However, as the rules on emergencies were not designed with contagious diseases in mind, legal bases for imposing limits on fundamental rights were frequently sought in statutes other than those that were adopted for the purpose of implementing constitutional rules on emergencies, which has led to intense litigation. In terms of judicial protection, while crisis and extraordinary measures taken by the Executive in emergencies are subject to judicial review, crisis acts of a normative nature can be directly challenged only by constitutional actors rather than by individuals, which is subject of concern both in legal doctrine and in public debate. On closer examination, however, most disputes over the restrictions on fundamental rights in emergencies raise the question of what constitutes a legitimate limit for action of the state when confronted with crises or disasters. Chapter 6, on human rights protection in Hungary, written by **Fruzsina Gárdos-Orosz**, describes how the major standards of this protection did not change with the Fundamental Law entering into force in 2012. This does not mean that there has been no change in the constitutional text relating to certain rights, but that the standard of protection, the so-called test, has retained its main features, essentially remaining the same as the so-called necessity-proportionality test. The chapter argues that although it is possible according to the Fundamental Law to suspend or limit the rights in the special legal order and although – accordingly – it is not clear from the constitutional text if the restriction or the suspension prevails in certain rights-related cases, ultimately the state should protect rights as much as possible in a special legal order as well. However, the chapter illustrates, with some cases – together with the chapters written by Zoltán Szente – that rights protection

does not have a well-established practice in COVID-19 jurisprudence based on the text of the Fundamental Law. In Chapter 7, **Monika Florczak-Wątor** explains that the Polish Constitution sets different requirements for limiting human rights during the normal functioning of the state and during a state of emergency. She argues that, following the declaration of a state of emergency, the principle of proportionality is applied differently, while the prohibition on violating the essence of certain human rights is lifted, making their temporary suspension constitutionally permissible. As she points out, assessing the constitutionality of human rights restrictions introduced during the COVID-19 pandemic will be a challenge for Polish courts. Although many of these restrictions were justified by the high risk to the lives and health of citizens, they must now be assessed in light of the restrictive criteria that are binding during the normal functioning of the state, as the authorities did not declare a state of emergency. Chapter 8, by **Max Steuer and Radka Vicensová**, establishes a bridge between Part II and Part III of the volume by providing an overview of the standards of the protection and restriction of fundamental rights in Slovakia and by illustrating their application (or lack thereof) in the case of the right to education during the early stage of the COVID-19 pandemic. While not a fully-fledged case study of a particular fundamental right, such as those that follow in Part III, the illustration underscores the significance of the pandemic for understanding the practices of rights protection and restrictions, as well as the problems associated with the widespread perception of the ‘inferiority’ of so-called ‘second-generation’ rights, compared to civil and political rights. These overlap with the tendency to endorse widespread rights restrictions conducive to Executive overreach with few timely remedial options for individuals and communities.

Part III of the present volume is composed of in-depth case studies of selected human rights restrictions in the V4 countries during the COVID-19 pandemic.

In Chapter 9, **Zoltán Szente** examines the restrictions imposed on political rights in Hungary, arguing that authoritarian regimes are keen to use the exceptional power they enjoy in a state of emergency in order to consolidate their power. The author demonstrates this claim by exposing the unjustified restrictions on political rights that were imposed in Hungary during the period of governing by decree. Case studies of restrictions on freedom of assembly, freedom of information, the right to strike, and freedom of expression follow. In Chapter 10, **Piotr Tuleja** deals with the restrictions imposed on freedom of assembly during the COVID-19 pandemic in Poland. He argues that the Polish authorities interpreted the premises justifying these restrictions in a very controversial way, as demonstrated by the restrictions implemented during the COVID-19 pandemic and during the migration crisis on the Polish–Belarusian border. In both cases, excessive restrictions on freedom of assembly violated constitutional standards, but the constitutional crisis in Poland, including with the Constitutional Tribunal, made it impossible to confirm the unconstitutionality of these legal solutions. In Chapter 11, **Kamil**

**Baraník** makes the case for considering restrictions on freedom of movement during the COVID-19 pandemic as pivotal for identifying the byzantine and often chaotic framework of rights restrictions during and after the state of emergency in Slovakia. He focuses particularly on the interplay between the decisions of the Public Health Authority led by the Chief Hygienic Officer, who executed the government's intentions to adopt widespread restrictions on movement, and the Slovak Constitutional Court, which, as he argues, adopted an overly deferential position towards the concerns for rights violations by the Executive. Even though the Constitutional Court ultimately invalidated one of the most blatant violations, triggered by the so-called state quarantine regime, this was too little too late, as there were other, less apparent but equally significant Executive measures that could not withstand constitutional scrutiny. In Chapter 12, **Jana Ondřejková** maps how the right to education was limited in the Czechia during emergencies related to the COVID-19 pandemic. During the pandemic, the Executive opted for rather extensive closures of schools and universities and, also, for extensive testing that led to intense litigation. Although the courts, especially with the adoption of the Pandemic Act (2021), started to scrutinise limits on the right to education more strictly, the right to education was still limited to a considerable degree or, in other words, reduced to distance teaching and assignments for pupils and students. At the very end of Part III, Chapter 13 by **Marta Klopocka-Jasińska** analyses the restrictions imposed on the right to a fair trial in Poland during the COVID-19 pandemic. She claims that some of these restrictions lacked constitutional justification and were adopted in a chaotic manner, contrary to the requirements of the rule of law (foreseeability, intelligibility, stability, and consistency of the law). She argues that measures restricting the activities of the courts should be implemented with particular care and caution, as in an emergency, only the courts can effectively control the public authorities and protect human rights from excessive and unjustified restrictions being placed on them by public authorities.

In sum, the present volume provides a compass for more in-depth, comparative, and critical enquiry into the forms and practices of emergencies and human rights protection in post-communist or transitory democratic contexts. It supports the assertion that 'the work of critique is to make possible responses other than approval, acceptance or acquiescence of the emergency claims issued by the state or that which governs.'<sup>43</sup> With a looming climate emergency, deepening inequalities,<sup>44</sup> increased regional and global insecurity caused by invasion of Ukraine by Russian Federation, and the unpredictability

43 Anderson et al. (n 4) 635.

44 Kevin Grove, Lauren Rickards, Ben Anderson, and Matthew Kearnes, 'The Uneven Distribution of Futurity: Slow Emergencies and the Event of COVID-19' (2022) 60(1) *Geographical Research* 6.

of new developments,<sup>45</sup> including in the digital realm, it is high time that emergencies become more central in studies on constitutionalism, with a particular focus on young democracies. This volume invites broader intra- and inter-regional collaborative works in the years to come in order to better understand ‘emergency constitutionalism’ and human rights protection.

The present volume was prepared as part of the research project entitled ‘Human Rights Protection in States of Emergency: Theory and Practice of the Visegrad Group Countries’, funded by the Polish National Science Centre (DEC-2020/37/B/HS5/02756). The editors would like to thank all the contributors to the volume, the participants in the seminars and conferences organised as part of the research project and the anonymous reviewers for their valuable comments and suggestions.

45 Graham Smith, *Can Democracy Safeguard the Future?* (Polity 2021).