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Abusive Permanent State of Exception**

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Abstract

Since the Fidesz-KDNP coalition's success at the elections in Hungary in 2010, democracy and democratic tolerance have been used for their own destruction. There are many aspects of this process; this article focuses mainly on states of emergency used by the government in previous years, which represents the current government's attitude towards the rule of law. In the 'decade of abusive permanent state of exception' the Hungarian Government became the enemy of constitutional democracy, instead of protecting the values of constitutionalism, a process that has already been well-described in the constitutional law literature over the past few years. This article tries to show that autocratic legalism – a term widely accepted to describe the public law situation in the country – is no longer the best definition to describe the regime.

Keywords

autocratic legalism, permanent state of exception, Orbán regime, rule without law, Hungary

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Max Weber Programme, 2021-2022

Introduction

It is evident that Hungary is no longer a constitutional democracy, by 2020 it was described as being 'on the edge of dictatorship'.¹ This is not surprising because, since 2010, Hungarian constitutional democracy has been deteriorating significantly, raising concerns worldwide, and especially in the EU, about Hungary's commitment to democracy, the rule of law and human rights. Because this decay started to occur in a constitutional democracy, the process has been called democratic decay², illiberalization³ or authoritarianization.⁴ Diverse descriptions of the current Hungarian regime are also in circulation, ranging from illiberalism and populism to various types of authoritarianism (modern, electoral or competitive) and a form of hybrid regime.⁵ The current state of the Hungarian constitutional system is described in the literature as modern authoritarian⁶, 'democradura'⁷ and illiberal constitutionalism.⁸ The political system has been recently classified as a hybrid regime⁹, which also appears in the Freedom House democracy score index,¹⁰ or even as an abusive neo-militant democracy.¹¹ Instead of finding the best label for Hungary, what is more important to my analysis is that the democratic nature of the state has been questioned, which needs to be taken into account when investigating how the Hungarian rule without law regime is functioning.

Instead of finding a new phenomenon to use regarding the Hungarian regime, in this article I reflect on Kim Lane Scheppele's description of autocratic legalism¹² by concluding that the Hungarian regime has already lost this nature. The emergencies declared constantly (both inside and outside the constitutional order) since 2015 resulted in a permanent state of exception¹³ by 2020, which in my understanding is equal to a dictatorial wielding of power. This

¹ Kim Lane Scheppele, 'Orban's Emergency', *Verfassungsblog* (29 March 2020), available at <https://verfassungsblog.de/orbans-emergency/>

² Tom Gerald Daly: Democratic Decay: Conceptualising an Emerging Research Field, *Hague Journal on the Rule of Law* 11: 9-36, 2019.

³ Tímea Drinóczi and Agnieszka Bień-Kacała: Illiberal constitutionalism – the case of Hungary and Poland, *German Law Journal* 20 (8): 1140-1166, 2019.

⁴ Staffan I. Lindberg and Anna Lührmann: A third wave of autocratization is here: what is new about it? *Democratization* 26 (7): 1095-1113, 2019.

⁵ See Gábor Halmai: The Rise and Fall of Constitutionalism in Hungary, in *Constitutional Acceleration within the European Union and Beyond*, edited by Paul Blokker, Abingdon: Routledge, 2018, 217-233.

⁶ Arch Puddington: Breaking Down Democracy: Goals, Strategies, and Methods of Modern Authoritarians, *Freedom House*, June 2017, https://freedomhouse.org/sites/default/files/June2017_FH_Report_Breaking_Down_Democracy.pdf; Gábor Attila Tóth: Authoritarianism, in *Max Planck Encyclopedia of Comparative Constitutional Law*, edited by Rainer Grote, Frauke Lachenmann and Rüdiger Wolfrum, 2017. <https://oxcon.ouplaw.com/view/10.1093/law-mpeccol/law-mpeccol-e205?result=5>

⁷ Halmai, *The Rise...*

⁸ Drinóczi and Bień-Kacała, *Illiberal...*

⁹ András Bozóki and Dániel Hegedűs: An externally constrained hybrid regime: Hungary in the European Union, *Democratization* 25 (7): 1173-1189, 2018.

¹⁰ Freedom House ratings, Nations in Transit 2021. <https://freedomhouse.org/country/hungary/nations-transit/2021>

¹¹ See: Gábor Mészáros and Tímea Drinóczy: Hungary: An Abusive Neo-Militant Democracy, in Joanna Rak – Roman Backer (eds.), *European Neo-militant Democracies*, Routledge, forthcoming in 2022.

¹² Kim Lane Scheppele: Autocratic Legalism, *The University of Chicago Law Review* 85 (2), 2018, 545-584.

¹³ According to Alan Greene state of emergency in its 'ideal' form can be defined as a 'crisis identified and labelled by a state to be of such magnitude that it is deemed to cross a threat severity threshold, necessitating urgent, exceptional, and, consequently, temporary actions by the state not permissible when normal conditions exist.'

might not only end the rule of law but also downgrade the importance of the state of emergency paradigm, whereby its main function is to restore the normal or ordinary legal order that existed prior to the declaration of a state of emergency.¹⁴ I contend that Hungarian autocratic legalism has been assisted by the real and fake emergencies during this period and resulted in a rule without law model, instead of a rule by law type.¹⁵ My main aim here is to show that the state of exception, in the manner Rossiter presented in his book,¹⁶ is not an exception but the 'normal' characteristic of the Hungarian constitutional system. This perspective also adds something to the previously mentioned autocratic legalism. It is my understanding that after the Hungarian 'autocratic revolution'¹⁷ the relevant element of the Hungarian system was a combination of constitutional dictatorship with the phenomenon of permanent state of exception, which I call 'abusive permanent state of exception.'

Theoretical Background

According to Rossiter constitutional dictatorship serves as a general descriptive term for the various instances of emergency powers and procedures in a historical perspective in all constitutional countries. Although the theoretical background of this concept is the Roman Republic's original dictatorship, this special form is not equal to the 'legal bestowal of autocratic power on a trusted man' who enjoys unlimited emergency powers to handle the threat but soon after its success he hands back this power to the regular authorities.¹⁸ Although Rossiter's thinking on constitutional dictatorship is more than fifty years old, I assert that it is still valid and important in the theory of emergency powers. The basis of the modern constitutional or 'ideal' state of emergency paradigm can be found in the institution of the extraordinary constitutional office of the dictatorship of the ancient Roman Republic.¹⁹ According to Rossiter's concept there are three important fundamental aspects that underly this phenomenon. First, the

Alan Greene, *Permanent States of Emergency and the Rule of Law – Constitution in an Age of Crisis*, Hart Publishing, Oxford, 2018, 33. I accept that this definition should be used under 'laboratory conditions' which deal with the assumption that normalcy can be separated from emergency. On this dichotomy see eg. Oren Gross: *Chaos and Rules: Should Responses to Violent Crises always be Constitutional?*, *Yale Law Journal* 112, 2003, 1011, 1089-95. For Greene, the aftermath of 11 September 2001 has led to arguments that this dichotomy is no longer possible. Therefore, we should talk about – as Giorgio Agamben already asserted – a permanent state of emergency where the so-called exception becomes the norm and temporary powers are eventually normalized.

¹⁴ Ibid, 33-34; Giorgio Agamben, *State of Exception* (trans Kevin Attell), University of Chicago Press, 2005, 4. In order to avoid this problem or the oxymoronic state of permanent emergency paradigm, some theorists disclaimed the normalcy/emergency dichotomy and focused on alternative models of 'crisis accommodation', theories that try to protect the constitutional order while at the same time allowing the states to respond to the crises accordingly. See: Greene, *Permanent...*, 161-195.; Gross, *Chaos...*, 1096; Nomi Claire Lazar, *State of Emergency in Liberal Democracies*, Cambridge University Press, Cambridge, 2009, 136-162. The latter theory is about the absolute rejection of the state of exception 'exceptionalist' paradigm. I should also mention those who prefer the unlimited judicial review power even during exceptional times which – according to these theories – guarantees the preservation of the rule of law and constitutionalism. See: David Dyzenhaus, *The Constitution of Law – Legality in a Time of Emergency*, Cambridge University Press, Cambridge, 2006.

¹⁵ For further details see: Gábor Mészáros: *Carl Schmitt in Hungary: Constitutional Crisis in the Shadow of COVID-19*, *Review of Central and East European Law*, Vol. 46 No. 1., 2021, 69-90.

¹⁶ Clinton Rossiter: *Constitutional Dictatorship – Crisis Government in the Modern Democracies*, Transaction Publishers, New Brunswick and London, 2009 (originally published in 1948).

¹⁷ Kim Lane Scheppele, *Understanding Hungary's Constitutional Revolution* in Armin von Bogdandy and Pál Sonnevend (eds.), *Constitutional Crisis in the European Constitutional Area*, Oxford University Press, Oxford, 2015, 113.

¹⁸ Rossiter, *Dictatorship...*, 4-5.

¹⁹ See Greene, *Permanent...*, 3-4; Oren Gross – Fionnuala Ni Aoláin: *Law in Times of Crisis – Emergency Powers in Theory and Practice*, Cambridge University Press, Cambridge, 2006, 17-26; Rossiter, *Dictatorship...*, ch 2; Lazar, *State of ...*, 113-135.

complex system of government should be democratic, and the existence of a constitutional state must be evident. It is also important that the system must be designed for normal, peaceful conditions. Second, during exceptional situations the values of constitutional democracy 'must be temporarily altered to whatever degree is necessary to overcome the peril and restore normal conditions...the government will have more power and the people fewer rights'²⁰. This aspect of constitutional dictatorship seems to be equal with dictatorship in its original form but if we consider the constitutionally restricted style of this power, it can be easily accepted as the prelude of the modern constitutional states of emergency in modern constitutional democracies. Third, the sole purpose of this regime is to preserve the independence of the state and to maintain the constitutional order and preserve the liberties of people²¹: 'to end the crisis and restore normal times.'²² Without these three we cannot speak about constitutional democratic emergency regimes. It is also important to note that in the legislative sphere constitutional dictatorship accepts the delegation of legislative power. It is the most important element of emergency powers nowadays: the periodical delegation of legislative issues to the government.²³ But the delegation of this power is limited in time and scale as well.

The 'law of necessity doctrine' also has to be mentioned in this context. It is contrary to the liberal theories of the rule of law on the basis that 'necessity has no law'²⁴ or 'necessity knows no law'²⁵. The real and pseudo exceptional or emergency regimes – as we will see – used by the Hungarian Government in recent years did not just 'cross the threshold'²⁶ or result in a 'business as usual model of emergency powers'²⁷ in their original understanding, but made it clear that legal and extra-legal emergency measures²⁸ were used to undermine the rule of law in an abusive manner.

The Rule of Law 'Skepticism' in Time of Exception

The most crucial debate regarding the 'emergency problem' is to find the legality of those actions that are primarily extra-legal in its nature. During normal times legality constrains political judgements for those who govern through law, which results in a legal constitution provided by the rule of law. Therefore authority based on the legality of law and the people's belief in legality or the rule of law also means that lawmakers may expect that the law, with its authority, can rule without serious concerns from the people because they recognize the non-

²⁰ Rossiter, *Dictatorship...*, 5.

²¹ See: Rossiter, *Dictatorship...*, 5-7.

²² Rossiter, *Dictatorship...*, 7.

²³ Rossiter, *Dictatorship...*, 9.

²⁴ Dyzenhaus, *The Constitution...*, 4.

²⁵ Gross-Ni Aoláin, *Law...* 47.

²⁶ This phenomenon reflects on the situation when the declaration of a so-called 'low-level' state of emergency may be more readily accepted by the public. However, this could also mean that these types of emergencies can be considered not so serious and therefore may undermine the basic notion that emergencies correspond to serious threats. It could be dangerous in a way that some kind of emergency regimes become accepted, and people may think that exception is equal to normalcy. It is also threatening that some governments can introduce more strict measures than would be necessary; so "crossing the threshold" could be much easier. See Gross-Ni Aoláin, *Law...* 45-46.

²⁷ The 'business as usual' model rejects the option of handling emergencies by accommodation (constitutional, legislative or even by way of judicial interpretation) by introducing changes to the existing constitutional and legal system. According to this model no emergency powers should be introduced on either an ad hoc or permanent basis. See: Gross-Ni Aoláin, *Law...* 86-109.

²⁸ On the original distinction of 'legal and extralegal' emergency models see: Kim Lane Scheppele, Legal and Extralegal Emergencies, in K.E, Whittington – R.D, Kelemen, G.A, Caldeira (eds.): *The Oxford Handbook of Law and Politics*, Oxford University Press, Oxford, 2008, 165-184.

arbitrariness of this law in conformity with legality.²⁹ However, as Dyzenhaus asserted, if some kind of 'sovereign' has the authority to violate or even suspend the law³⁰ itself in order to preserve the state during an emergency, this authority cannot come from the legal constitution.³¹

As I mentioned earlier it is widely accepted that modern emergency power models have their origins in the ancient model of the Roman dictatorship. The most important elements of the ancient state of exception were described by Niccolo Machiavelli. According to this interpretation, in ancient Rome 'no Dictator did anything that was not good for the Republic'. This character of the ancient dictatorship reflects on the most important element of the modern state of exception regimes as well, namely, that the main task of these exceptional regimes in constitutional democracies is not just handling the crisis but also guaranteeing the recurrence of ordinary law. The Roman 'dictator was made for a limited time and not in perpetuity, and only to remove the cause for which he was created', and his main task was to use his extended authority in order to handle the threat 'without consultation, and to punish anyone without appeal'. However, with the limited time and limited authority given to the dictator³² 'it was impossible that he should exceed his limits and harm the City' instead, according to Machiavelli, experiences show that the people and the state benefited from the Dictatorship.³³ This means for us that this kind of restricted dictatorship³⁴ has remarkable characteristics, which should be reconsidered during the codification of special legal orders or the use of emergency powers in the modern era.

Although the theory of the constitutional state of emergencies is based on the ancient Roman model, nowadays it seems paradoxical that the most authentic modern parallel in the history of the establishment of a dictatorship within the constitution was the German Republic of 1919-1933.³⁵ The well-known Article 48 has become an example of the failure of emergency powers³⁶, more exactly the abusive use of exceptional measures, yet today the majority (90

²⁹ David Dyzenhaus: *The Compulsion of Legality*, in Victor V. Ramraj (ed.) *Emergencies and the Limits of Legality*, Cambridge University Press, Cambridge, 2008, 35. Dyzenhaus also compared the sovereign's moral authority and the authority of law. For him the most important question is whether states of emergency show that there are limits to law, 'because the sovereign has the authority to suspend or violate the law to deal with the emergency.'

³⁰ As it had been described by Carl Schmitt in *Political Theology: Four Chapters on the Concept of Sovereignty* (trans. George Schwab), University of Chicago Press, 2006.

³¹ Ibid.

³² Although the dictator became a powerful decision maker without the many limitations put upon the ordinary magistrates, meanwhile his primary task was to take all measures deemed necessary to preserve the constitution which 'gave him authority and the Republic which gave him freedom.' The only formal limitation was the six-month term of office, which length of time – according to Rossiter – is explained by the fact that the early Romans fought only summer. Rossiter, *Dictatorship*, 23.

³³ Niccolo Machiavelli: *Discourses Upon the First Ten (Books) of Titus Livy to Zanobi Buondelmonti and to Cosimo Rucellai*, Chapter XXXIV, 51, available at <https://constitution.org/2-Authors/mac/disclivy.pdf>

³⁴ It seems that the self-restraining character of the Roman Dictatorship comes from the experience of possibly the first dictator's behaviour. As Machiavelli described 'when the Consul Minitius with his army besieged Equeans, Rome was full of apprehension that the army should be lost, so that they had recourse to the creation of a Dictator, their last remedy in times of affliction. And they created Quintius Cincinnatus (Dictator), who was then to be found on his little farm, which he worked with his own hands ... when the Legate came from Rome to announce to him his election to the Dictatorship, and to show him in what peril the Roman Republic found itself (h)e put on his toga, went to Rome and gathered an army, and went to liberate Minitius', Machiavelli, *Discourses*, 190-91. According to the legend, Cincinnatus after sixteen days of unlimited, dictatorial power, by which he was able to defeat the enemy, laid down the sword and went back to the farm again. This act symbolizes the most crucial aspect of state of emergency regimes transitory style. Rossiter, *Dictatorship*, 16, 21.

³⁵ Rossiter, *Dictatorship*, 31.

³⁶ As András Sajó and Renáta Uitz figured out the 'demise of constitutional democracy under the Weimar Constitution was orchestrated through the ominous use of emergency powers and delegated legislation. This

per cent) of the world's constitutions contain some kind of emergency provisions within their texts.³⁷

The Emergency Regime of Hungary: From Permanent State of Exception to Rule without Law

After the 2010 parliamentary elections, the winning party Fidesz started to reshuffle the Hungarian constitutional order by using both the elements of abusive constitutionalism³⁸ and legislation to consolidate its political power and to undermine democracy. It is also to be noted that this was the period when emergency measures started to leak into the regular legal order, a sign that political power is exercised by legal means, and law finally became a useful camouflage for the authoritarian government to exercise its power by declaring that everything is formally controlled under the rule of law.³⁹

The Fundamental Law of Hungary created a *sui generis* state of emergency chapter, called the 'Special Legal Order', which contains the descriptions of the state of national crisis⁴⁰, state

happened in an unprecedented economic crisis in a country without democratic commitment, full of resentment, and under extreme political Fragmentation.' András Sajó – Renáta Uitz: *The Constitution of Freedom – An Introduction to Legal Constitutionalism*, Oxford University Press, Oxford, 2017, 420. This background of the Weimar Constitution has some similarities with the current situation of Hungary, as I have already described elsewhere. See: Mészáros, *Carl Schmitt...*

³⁷ Christian Bjornskov – Stefan Voigt: *The Architecture of Emergency Constitutions*, I-CON, Vol. 16, No. 1, 101-127, 2018.

³⁸ According to David Landau, abusive constitutionalism involves the use of the mechanism of constitutional change – both constitutional amendment and constitutional replacement – in order to create authoritarian or semi-authoritarian regimes. As a result, these systems still look democratic from a distance and contain various elements that are not different from liberal democratic constitutions. See: David Landau, *Abusive Constitutionalism*, 47 *UC Davis Law Review* (2013), 189-260, at 191.

³⁹ Although the Fundamental Law has a unified emergency powers system, the Hungarian Parliament also used ordinary legislation that contained extra-legal measures to deal with the so-called emergencies such as the newly founded mass migration crisis in 2015, which was unknown within the Fundamental Law's relevant rules. Because of this so-called refugee crisis, the Hungarian Parliament adopted two acts on 4 and 21 September 2015 which enabled to proclaim a 'state of migration emergency', without using the Fundamental Law's emergency mechanism. Consequently, many emergency restrictions could be used without the constitutional guarantees, and the state of emergency started to leak into the regular constitutional order. See: Gábor Mészáros, *The Hungarian Response to Terrorism: Blank Check for the Government*, 154 *Studia Iuridica Auctoritate Universitatis Pecs Publicata* (2016), 135-137.

⁴⁰ According to the first paragraph, point a) of Article 48 of the Fundamental Law of Hungary, Parliament shall declare a state of national crisis and set up a National Defense Council in the event of the declaration of a state of war or the immediate danger of an armed intrusion by a foreign power (danger of war).

of emergency⁴¹, state of preventive defence⁴², unforeseen intrusion⁴³, state of danger⁴⁴, and the emergency response to terrorism.⁴⁵ This chapter was the result of a countrywide campaign against mass migration in 2015, a series of events resulting in an amendment of the Fundamental Law.⁴⁶ The new chapter aimed to fulfil the requirements of the constitution to protect citizens and democratic institutions especially in situations that threaten the lives of people and the security of the state. Meanwhile, the ultimate goal of the special law was to guarantee the return to ordinary law and order.⁴⁷ In order to fulfil this aim, the Fundamental Law has opted to regulate these issues in a very detailed manner. Although this approach is not unique within European constitutionalism,⁴⁸ as I will show, the government used pseudo- and real emergencies for political benefits.

Though Fidesz's own constitution regulates states of emergency in detail, the framework for the new medical state of emergency in responding to the COVID-19 pandemic and previously the state of migration emergency is inserted into ordinary acts, available for use by the government as part of normal law. The new medical state of emergency began when the country's Chief Medical Officer (an appointee of the government) advised the government that a health emergency requires exceptional measures. It can be used when a sudden incident endangers, or disrupts lives, corporal integrity, and the health of citizens, or jeopardizes the functioning of health care providers to such a degree that the situation may

⁴¹ Parliament shall declare a state of emergency in the event of armed actions aimed at undermining law and order or at seizing exclusive control of power, or in the event of grave acts of violence committed by force of arms or by armed groups which gravely endanger the lives and property of citizens on a mass scale [First paragraph, point b) of Article 48 of the Fundamental Law of Hungary].

⁴² In the event of an imminent threat of armed invasion or if deemed necessary in connection with the country's commitment under an alliance treaty, Parliament shall declare a state of preventive defense and simultaneously authorize the Government to introduce the emergency measures specified in an implementing act. The duration of the state of preventive defense may be extended scale [First paragraph of Article 51 of the Fundamental Law of Hungary].

⁴³ In the event that the territory of Hungary is subject to an unforeseen invasion by foreign armed units, the Government shall take immediate action, in accordance with the defense plan approved by the President of the Republic, using forces as commensurate with the gravity of the attack and that are equipped for such a role, prior to the declaration of a state of emergency or a state of national crisis in order to repel such attack, defend the territorial integrity of the country with the active air and air defense forces of the Hungarian and allied armed forces, maintain law and order and to protect the security of the lives and property of citizens, protect public policy and public security [First paragraph of Article 52 of the Fundamental Law of Hungary].

⁴⁴ In the event of a natural or industrial disaster endangering lives and property, or in order to mitigate the consequences thereof, the Government shall declare a state of danger, and may introduce emergency measures defined in an implementing act. [First paragraph of Article 53 of the Fundamental Law of Hungary]

⁴⁵ Article 54 of the Fundamental Law also provides for the common rules relating to a special legal order such as the possibility to suspend or restrict fundamental rights beyond the extent of ordinary law standards. This Article also contains special guarantees such as the prohibition of suspension of the Fundamental Law and other temporal restrictions. According to this Article, the exercise of fundamental rights – other than the right to life and human dignity, the prohibition of torture, inhuman or degrading treatment or punishment, the prohibition of trafficking in human beings, the prohibition of medical or scientific experiment without one's free and informed consent, the prohibition of practices aimed at eugenics, making the human body and its parts as such a source of financial gain, and human cloning and some guarantees of criminal proceedings – may be suspended, or restricted beyond the extent that is necessary and proportionate to the objective pursued.

⁴⁶ About the concerns of the necessity of this amendment see: Mészáros, *The Hungarian...*, 129-142.

⁴⁷ See András Jakab, "Az Országgyűlés akadályoztatása különleges állapotokban (Incapacitation of the Parliament in Special Legal Orders)," in András Jakab (ed.), *Az alkotmány kommentárja (Commentary on the Hungarian Constitution)* (Századvég, Budapest, 2009, 2nd edition), 634.

⁴⁸ The Venice Commission in its Opinion referred to the Polish and the German model as an example. See Christoph Grabenwarter - Wolfgang Hoffmann-Riem – Hanna Suchocka – Kaarlo Tuori – Jan Velaers, *Opinion on the New Constitution of Hungary*, European Commission for Democracy through Law (Venice Commission) (Strasbourg, 20 June 2011) Opinion no. 621/2011, para. 134.

lead to a disequilibrium between the demand for health care and the locally available capabilities. Moreover, the ‘state of migration emergency’ – first declared in 2015, renewed at six-month intervals down to the present day and remains in effect even in the absence of floods of incoming migrants that justified its initiation – used new standards for rejecting asylum seekers and made it possible to manoeuvre by exceptional measures under the ordinary legal regime.

Autocratic legalism and emergencies

The elections in 2014 and 2018, both of which were criticized by the OSCE as having been conducted under unfair⁴⁹ conditions, resulted again in a two-thirds majority for the same party. Both elections were substantially influenced by new election rules⁵⁰, a phenomenon that on its own is a sign of ‘autocratic populism’; namely, where the autocrats after a successful democratic election change the electoral law to keep their power.⁵¹ This was the period when emergency measures started to leak into the regular legal order, a sign indicating the increasing use of legal means for nakedly partisan purposes. In this way, the law finally became a useful camouflage for the authoritarian government in exercising its power by declaring that everything is formally controlled under the rule of law. During this period, the government used its supermajority in order to gain more political power via legislation.

The hallmark of this period was the practice of Parliament using ordinary legislation containing extra-legal measures to deal with pseudo-emergencies. Such a situation was the newly founded emergency rules called ‘state of migration emergency’ in 2015, which was unknown within the Fundamental Law’s relevant rules. Responding to the mass migration crisis, the Hungarian Parliament adopted two acts on 4 and 21 September 2015, enabling the proclamation of ‘emergency caused by immigration’, without using the Fundamental Law emergency mechanism. This meant that various emergency restrictions could be used without the constitutional guarantees. This new so-called emergency first declared in September 2015 has been renewed at six-month intervals down to the present day.

Consequently, it became possible to use emergency restrictions without constitutional guarantees, and the state of emergency started to leak into the regular constitutional order. This period also contained the sixth amendment of the Fundamental Law in 2016, with the new chapter called the ‘Emergency Response to Terrorism’ implemented in the ‘Special Legal Order’, although this new emergency framework was unnecessary.⁵²

Withering Constitutionalism: Permanent States of Emergency Becoming the Norm

In 2020 the Hungarian regime has finally lost its ‘autocratic legalist’⁵³ nature because during the enforcement of the ‘state of danger’ the Hungarian Government itself was in breach of the Fundamental Law. With the declaration of the state of danger in order to handle the situation caused by the coronavirus pandemic in 2020 and with the simultaneous acceptance of the so-

⁴⁹ OSCE Office for Democratic Institutions and Human Rights Final Report on the Hungarian Parliamentary Elections of 6 April 2014 can be found here: <https://www.osce.org/files/f/documents/c/0/121098.pdf>; the full report of the Parliamentary Elections of Hungary of 8 April 2018 here: <https://www.osce.org/files/f/documents/0/9/385959.pdf>

⁵⁰ Joint Opinion on the Act on the Elections of Members of Parliament of Hungary, Venice Commission, Opinion No. 662/2012, Strasbourg, 18 June, 2012. [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2012\)012-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2012)012-e)

⁵¹ Gábor Halmai, Populism, authoritarianism and constitutionalism, *German Law Journal*, Vol. 20. No. 3., 2019, 296-313.

⁵² For a more detailed description see: Mészáros, *The Hungarian...*, 129-142.

⁵³ Scheppele, *Autocratic...*, 545-583.

called 'Enabling Act'⁵⁴ it became apparent that the government's main aim was to hold unconstrained power without even the slightest characteristic of constitutionalism.⁵⁵ After the declaration of a state of danger, during the first wave of the pandemic and under the first Enabling Act, the Hungarian Government issued more than a hundred decrees and, with its two-thirds majority in Parliament, also used ordinary legislation to handle the situation. The most controversial was the above-mentioned 'Enabling Act', which was accepted by the Fidesz supermajority in Parliament on 30 March and gave the government free rein to govern directly by decree without the constraint of the existing law. It also allowed suspension of the enforcement of specific laws, departed from statutory regulations and implemented additional extraordinary measures by decree in addition to the extraordinary measures and regulations outlined in Act CXXVIII of 2011 concerning disaster management.

However, the 'Enabling Act' lacked a constitutional basis.⁵⁶ According to the Fundamental Law, it is the government's authority to issue decrees that may suspend the application of certain laws or to derogate from the provisions of laws, and to take other extraordinary measures. The only role of Parliament is to give the government authorisation to extend the effect of the decree. There is no constitutional authority for Parliament to enact new laws concerning the state of danger. Therefore, Parliament had no authority to accept exceptional laws because the government has its limited power to use extraordinary measures – which are defined in the implementing act – according to the Fundamental Law.⁵⁷ So Parliament enacted a new law that de facto overwrites the provisions of the Fundamental Law by extending the taxation of the constitution in an act (even if this act was also adopted by the same two-thirds majority). In such a case, this law is unconstitutional because the act amends the constitution without complying with the formal prescriptions.⁵⁸

From Emergency Legislation to Rule by Decrees: Never-ending state of exception?

Facing criticism from the EU, the government declared an end to the March emergency in June 2020. On the same June day when the government terminated the March 'state of danger,' however, Parliament passed two laws, one rescinded the parliamentary confirmation of the state of danger and the other amended the Health Act to create a new 'medical state of emergency', which is nowhere mentioned in the detailed regulation of states of emergency in the Fundamental Law.⁵⁹ This new form of emergency, like the state of migration emergency, was inserted into ordinary law without the constitutional scaffolding that guarantees there are serious checks on emergency powers. But the 'medical state of emergency' provided that the operation of all institutions, programmes or activities that could promote the spread of the epidemic could be suspended, gave the government the power to use special 'epidemic' measures provided in other laws, and permitted this catalogue of special powers to be

⁵⁴ Act XII of 2020 on Protecting against the Coronavirus

⁵⁵ I have already pointed out the most important concerns regarding this emergency regime in another article. See: Mészáros, *Carl Schmitt...*

⁵⁶ *Ibid.*

⁵⁷ Gábor Mészáros, 'COVID-19 flourishes and Hungarian constitutionalism withers', *Law against pandemic*, 10 April, 2020.

<https://lawagainstpandemic.uj.edu.pl/2020/04/10/covid-19-flourishes-and-hungarian-constitutionalism-withers/>

⁵⁸ Gábor Mészáros, 'The Role of Emergency Politics in Autocratic Transition in Hungary', *IACL Democracy 2020 Roundtable Blog*, November 23, 2020.

<https://www.iacl-democracy-2020.org/blog/2016/3/23/blog-post-sample-9wntn-6ye75-hwawc-xx9lz-p6k2z-y8y6h-cplw4-4bcr5-t2hdf-pt4np-nzc2g-f64jl-c53x4-d693x>

⁵⁹ Gábor Halmai – Gábor Mészáros – Kim Lane Scheppele: 'From Emergency to Disaster – How Hungary's Second Pandemic Emergency will Further Destroy the Rule of Law.' *Verfassungsblog*. May 30, 2020.

<https://verfassungsblog.de/from-emergency-to-disaster/>

supplemented by future ordinary legislation. On 17 June 2020 the government activated this newly minted 'state of medical emergency' by decree, but it seemed that, even with this unlimited power, the government did not want to accept any restrictions in order to prepare for the second, third and fourth wave of the pandemic now in effect. Without using the Health Act's new framework to handle the situation, though it was still in place to be used, the government declared a state of danger on 3 November 2020 and, soon after, Enabling Act II⁶⁰ was passed.⁶¹

On 10 November 2020, Hungary once again entered a state of danger in which ordinary constitutional government is suspended. Although it seemed necessary to introduce a state of danger again, the measures undertaken exceeded those necessary or even relevant for coping with the problem for which they were invoked; all of them could have been undertaken under ordinary law in any event.⁶²

Like the previous pandemic-related emergency in March 2020⁶³, which stirred international fears, the November emergency gave the government the unlimited power to govern by decree. Unlike the previous emergency, and acknowledging international criticism, the government's extraordinary powers under the November emergency lasted only 90 days (also applied for those declared afterwards). According to the Fundamental Law, however, a state of emergency gives the government the power to issue decrees that endure for a maximum of 15 days, unless each decree is specifically renewed by Parliament. But with this new November emergency, Parliament gave its blanket endorsement to any decree that the government issues for 90 days, without the need to return to Parliament for its approval. It is flatly unconstitutional for Parliament to give a blank cheque to government to issue endless emergency decrees for 90 days without parliamentary oversight. Finally, Parliament also lacked the authority to prolong the declaration of the state of danger itself, although its November emergency law did so.⁶⁴

As the 90day effect of Enabling Act II passed, the government declared a state of danger again (for the third time in almost one year)⁶⁵, on 8 February 2021, but this 'new' state of danger simply renewed the restrictions of the former decree⁶⁶. Soon after, the National Assembly accepted Enabling Act III⁶⁷, which, like the previous pandemic-related emergencies, gave nearly unlimited power to the government until 22 May 2021. Before the end of the 90-day effect of the law – the deadline given by the two-thirds majority itself – on 19 May 2021 Parliament accepted an amendment of Enabling Act III. According to the latter modification the emergency measures were to remain in force until September 2021, because as the Minister of Justice Judit Varga asserted 'bolstered defences are indispensable' as new virus mutations were present in Hungary.⁶⁸ According to the act, the state of exception is prolonged for more than 3 months, however nearly all restrictions were dissolved by the government during the

⁶⁰ Act CIX of 2020 on Protecting against the Second Wave of the Global Coronavirus Pandemic

⁶¹ Viktor Kazai: Power Grabs in Times of Emergency, *Verfassungsblog*, November 12, 2020.

<https://verfassungsblog.de/power-grab-in-times-of-emergency/>

⁶² Gábor Halmai – Gábor Mészáros – Kim Lane Scheppele: So It Goes – Part I, *Verfassungsblog*, November 19, 2020.

<https://verfassungsblog.de/so-it-goes-part-i/>

⁶³ Halmai –Scheppele: Don't be Fooled by Autocrats, *Verfassungsblog*, April 22, 2020.
<https://verfassungsblog.de/dont-be-fooled-by-autocrats/>

⁶⁴ Halmai-Mészáros-Scheppele, *So it...*

⁶⁵ Government Decree no. 27/2021. (I. 29.)

⁶⁶ Government Decree no. 478/2020. (XI. 03.)

⁶⁷ Act I of 2021 on Protecting against the Global Coronavirus Pandemic

⁶⁸ <https://abouthungary.hu/blog/a-busy-day-in-the-hungarian-parliament-laws-regulating-foreign-universities-and-foreign-funded-ngos-follow-european-examples>

summer.⁶⁹ As Prime Minister Viktor Orbán, on 21 May 2021 on the Kossuth Radio Programme 'Good Morning Hungary', anticipated: after there were 5 million vaccinated people many restrictions would be lifted, including the obligatory, universal outdoor mask-wearing restrictions and the curfew.⁷⁰ Although the state of medical emergency was still in effect, the Orbán government introduced again an amendment to the sunset clause of Enabling Act III on 30 September 2021, which has declared that the act itself (with emergency restrictions) will be effective at least until 1 January 2022. However, this system, which enables the government (in practice the Prime Minister) to rule by decree and therefore enjoy nearly unlimited power – with exemptions such as the application of the Fundamental Law may not be suspended, nor may the functioning of the Constitutional Court be restricted – does not serve effective protection. For example, instead of the dictatorial wielding of power, universal mask-wearing restrictions were included only in the middle of November when the fourth wave was already taking victims and morbidity started to reach the same numbers as we had seen in March.⁷¹ Not to mention that before the autumn the Government Decree no. 457/2021. (VII. 3.) made clear exemptions from emergency restrictions (most importantly from the restriction of right to assembly) in order to legalize various mass events such as the fireworks and commemorations in relation with the founding of the state; the 52nd International Eucharistic Congress in Budapest; the FEI Driving European Championship for four in hand; or One with Nature, the World of Hunting and Nature Exhibition which, according to government sources, has been visited by 616 thousand people⁷², a number which is apparently relevant to the increasing cases of infection.

Regulating the Exception

During the second wave of the coronavirus pandemic the government also submitted the ninth amendment of the Fundamental Law under the state of danger regime, which rewrote the structure of the 'Special Legal Orders', although the new rules will come into force only in 2023. The most important change was the abolition of The National Defence Council from the State of National Crisis, which latter special legal order will also be repealed. The National Defence Council is supposed to govern in a state of national crisis, especially if Parliament cannot meet, in order to ensure the continuation of representative government even in adverse circumstances. During this special legal order, the government was supposed to convene this Council, which was to consist not only of the prime minister and president but also parliamentary leaders and the leaders of the opposition.⁷³

The new Special Legal Orders chapter compressed the current six special legal orders into three. The 'state of national crisis', the 'state of preventive defence' and 'unforeseen intrusion' from the present constitution will be collapsed into a new 'state of war' category while the 'state of emergency' and the 'state of danger' will retain their titles, although with relevant modifications in the circumstances in which they can be invoked. Regardless of which new emergency is invoked, however, it is evident that the government will play a central role in all

⁶⁹ <https://abouthungary.hu/news-in-brief/4-790-996-people-have-so-far-been-vaccinated-against-covid-19-in-hungary>; <https://abouthungary.hu/news-in-brief/4-898-866-people-have-so-far-been-vaccinated-against-covid-19-in-hungary>

⁷⁰ <https://hungarytoday.hu/orban-restrictions-lifted-hungary-coronavirus-5-million-vaccinated/>

⁷¹ Although the share of fully vaccinated population reached 60 percent, in the middle of November 2021 the daily infection cases were getting close to the peak of the third wave of the pandemic. See: Eszter Zalán: Central Europe struggles with new Covid-19 wave, *Euobserver*, 18 November 2021, <https://euobserver.com/coronavirus/153548>

⁷² <https://onewithnature2021.org/en/news/the-series-of-programs-has-attracted-a-total-of-over-one-and-a-half-million-visitors>

⁷³ Halmai-Mészáros-Scheppele, *So it...*

three.⁷⁴ Under the new emergency regimes, the government shall exercise the rights delegated by Parliament and may rule with special decrees. That is what the government has done mostly unconstitutionally under all real- and fake-emergencies to date, so this authorizes the prime minister to govern in this way going forward.⁷⁵ Perhaps the most important elements in the revised constitutional regulation of special legal orders are the new provisions that substantially broaden the situations in which these emergencies can be declared.⁷⁶ Under the present constitution, the declaration of a 'state of emergency' requires the presence of 'armed actions' and/or 'violence committed by force of arms or by armed groups.' The amendment removes this requirement by declaring that a 'state of emergency' may be declared in the event of any action aimed at overthrowing the constitutional order or for seizing exclusive control of power, or in the event of serious illegal activity that poses a threat to the safety of life and property on a massive scale. It seems that the scope of the new provision has been greatly widened to include non-violent threats, therefore the bar for declaring such an emergency has been lowered. The most crucial element of this new 'state of emergency' is that it may be declared in the event of 'overthrowing' ('felforgatás') the constitutional order. But 'felforgatás' is a concept previously unknown in Hungarian law and it has no clear definition. Therefore, the constitutional amendment rewriting the rules on special legal orders gives the government broad, vaguely defined new powers with even fewer checks and balances to use.

An ineffective judicial review

Modern emergency regimes, especially under the European continental doctrine, believe that the constitutional regulation of emergencies helps to handle the threat effectively but also prevents the abuse of exceptional powers.⁷⁷ It is also important for the judiciary to review the constitutionality of the existence of the emergency itself and the emergency measures taken by the government. Although the Fundamental Law has no exact provision that clearly prescribes for the Constitutional Court to attend to this task, according to Article 54 the functioning of the court may not be restricted under a special legal order. Therefore, it seems evident that the Constitutional Court can review the constitutionality of the state of danger and the emergency decrees as well. However, in 2020, during the first wave of the coronavirus pandemic, when emergency laws were for the first time introduced, the court was reluctant to

⁷⁴ According to the new Article 49 of the Fundamental Law the Parliament with a two-thirds majority of the votes of all members may declare a state of war in the event of the proclamation of a military conflict or threat of war, in the event of armed aggression from abroad, an act equivalent to an external armed attack, and an imminent threat thereof, or for the purpose of fulfilment of an alliance treaty obligation of collective defence. Parliament with the same two-thirds majority may declare a state of emergency under Article 50 in the event of any action aimed at overthrowing, overturning the constitutional order or for seizing exclusive control of power, or in the event of a serious illegal activity that poses a massive threat to the safety of life and property on a massive scale. The state of emergency may be declared for thirty days but can be extended by thirty days with the vote of two-thirds of all Members of Parliament, if the reasons giving rise to the declaration of the state of emergency persist. Finally, the state of danger may be declared by the Government for thirty days in the event of a serious incident – in particular a natural or industrial disaster – endangering lives and property, or in order to mitigate the consequences thereof. The Government may extend the state of danger by thirty days under the authorization by the two-thirds majority of Parliament, if the reasons giving rise to the declaration of the state of danger persist.

⁷⁵ See: Halmai – Mészáros – Scheppele, *So it...*

⁷⁶ *Ibid.*

⁷⁷ There are at least two main theories on how to handle emergencies: first, there are those who prefer crisis management and accept that no legal provisions should constrain the exceptional power; second, there are those who claim that there should be legal, constitutional norms that regulate the emergency. Among the latter 'group' there are those who claim that exceptional government – although separated from regular government – has to be regulated by constitutional provisions and those who believe that special laws or executive measures are better able to confront the threat. See: John Ferejohn – Pasquale Pasquino: *The Law of the Exception: A Typology of Emergency Powers*, *International Journal of Constitutional Law* 2, 2004, 210-239, 229.

review several important emergency decrees issued by the government. While Hungarian NGOs urged the government to establish strict deadlines for constitutional review procedures in order to ensure the effective supervision of emergency legislation, the government failed to react and the Constitutional Court decided on several complaints only when the state of danger was already terminated, which resulted in a series of inadmissibility decisions. This was the case, for instance, of the decree on new labour law legislation⁷⁸ and also the extended deadline for fulfilling all kinds of freedom of information requests. The latter decree providing a 45 + 45-day deadline for data managers to issue public interest data was reintroduced to the legal system in November 2020,⁷⁹ just days after the court published its inadmissibility decision on the previous decree.⁸⁰ In April, 2021, after around a one-year saga, the Constitutional Court did not find the decree unconstitutional.⁸¹ This means that there is no effective control on the emergency government, neither Parliament (with the Fidesz-KDNP two-thirds majority in it) nor the Constitutional Court can guarantee to restore normalcy and rule of law.

Conclusion

States of emergency have by now become normalized in Hungary, so the government has introduced a new constitutional amendment that rewrites the entire section of the constitution regulating them. Under the new changes, any role for Parliament during emergencies disappears and the government can govern alone. In addition, the situations in which emergencies can be declared have been expanded so that it will be easier to meet the threshold for declaring an emergency in the first place. The constitution will now magically fix all of the unconstitutional emergencies that have been accumulating since 2015, demonstrating once again that if the government keeps engaging in unconstitutional behaviour, the constitution can be changed to regularize it.⁸²

In Hungary, it seems that 'unorthodox' demonstrations were used to strengthen the government's political power in the framework of antiterrorist measures. Therefore, the emergency response to terrorism became a new special legal order in 2015 but it was not a direct answer to a real threat rather than a countrywide campaign against mass migration⁸³. It also became evident by 2020 that the government favours the use of so-called emergency measures outside the emergency provisions of the Fundamental Law. Not to mention that in the shadow of the coronavirus pandemic the government has started to use 'Special Legal Order' (namely the state of danger) and also ordinary legislation simultaneously to handle the situation, as we have seen during the acceptance of the so-called 'Enabling Act'⁸⁴. When the 'state of danger' was declared again in November 2020, it brought to three the number of current emergency regimes in effect in Hungary. The 'state of migration emergency,' initiated in 2015, is nowhere mentioned in the detailed regulation of Special Legal Orders in the Fundamental Law. It has been perpetually renewed and remains in effect even in the absence of floods of incoming migrants that justified the initiation of this state of emergency in the first place.⁸⁵ When Parliament (with the assistance of government) repealed the said act and therefore formally ended the state of danger, enacting at the same time an amendment to the Health Act with the introduction of another kind of quasi-emergency situation, we can translate

⁷⁸ CC Decision 3326/2020. (VIII. 5.) AB

⁷⁹ Government Decree no. 521/2020. (XI. 25.)

⁸⁰ CC Decision 3413/2020 (XI. 26.) AB

⁸¹ Case no. IV/100/2021.

⁸² Halmai-Mészáros-Scheppele, *So it...*

⁸³ Mészáros, *The Hungarian...* 129-142.

⁸⁴ Gábor Mészáros, 'Rethinking the Theory of State of Exception after the Coronavirus Pandemic? – The Case of Hungary', *Regional Law Review*, Ius Nulla Continentur Loco, Belgrade, 2020, 91-100.

⁸⁵ See: Halmai-Mészáros-Scheppele *So it....*; Mészáros, *The Hungarian...*

it as a 'state of medical emergency.'⁸⁶ The new regulation awarded nearly unlimited power to the government without any superficial requirement that Parliament approves of the decrees issued to carry out the recent emergency.⁸⁷ The government declared a state of danger again using the Fundamental Law's emergency mechanism with Act I of 2021, again for 90 days, however – as I've explained – this was prolonged until September 2021 and with a new amendment until January 2022, but the Act is not observant of minimal legislative requirements and therefore does not comply with the rule of law. It seems that abusive constitutional issues – such as formal legality – are no longer important and not a decision of the government: the prime minister is above the rule of law. Between 2010 and 2020 autocratic legalism determined the ordinary legal order while the permanent state of emergency gradually occupied the law itself. Although formal restrictions seemed to be important for the government to present the 'façade of rule of law' at an international level, especially to demonstrate the existence of it for the European Union, the pandemic constantly evoked (or prolonged) the state of danger without valid constitutional authorization, showing that unconstrained political power is more important than demonstrating 'legality' is still alive in Hungary.

These are clear signs suggesting that the threshold between emergency and normalcy has faded. The government is systematically using emergency powers as ordinary everyday authorizations, instead of relying sparingly on the emergency powers provided for in the Fundamental Law, which have built-in protections against abuse. It seems that the Hungarian Government's response is perhaps the most extreme example of executive overreach⁸⁸ from a legal point of view. Although it is easy to uncover some elements of executive underreach⁸⁹ as well if we consider the exemptions from emergency restrictions within the Government Decree no. 457/2021. (VII. 3.). Unfortunately, as we have seen during the fourth wave, these measures are supporting political ambitions instead of serving effective protection against the disease. We can hardly figure out which actions taken by the government are 'ordinary' and which are 'emergency' measures.⁹⁰ Through real and quasi-state of emergencies, the government has yet to become the supreme and sole power of the political nation.

The Hungarian 'Special Legal Orders' are not open-ended, but the government neglected the constitutional guarantees. This is a significant question: why did the government, with its two-thirds majority in Parliament, enact new so-called emergencies instead of using the Fundamental Law's special mechanism? Or why is government using emergency measures for an indefinite period as we have seen during the COVID-19 pandemic? This government is loudly proclaiming that it is committed to the rule of law, so this situation of growing numbers of unconstitutional states of emergency must be remedied.

It also seems that this story is not just about the misuse of emergency measures but about the abuse of rule of law. Most importantly, the government has stated many times that the rule of law mechanism is false because there are various meanings of this phenomenon. This is the main reason why government has amended the constitution nine times till now; implemented emergency measures into ordinary acts; or upheld the Constitutional Court, which is fully engaged with the Fidesz party etc. It appears more important than anything else to strengthen their political power as early as possible and this is not a problem if it means that extra-legality is becoming the norm. At a European level it means that the

⁸⁶ Mészáros, *Carl Schmitt...*

⁸⁷ Halmai-Mészáros-Scheppele, *So it...*

⁸⁸ Kim Lane Scheppele – David Pozen, Executive Overreach and Underreach in the Pandemic, in *Democracy in Times of Pandemic – Different Futures Imagined*, Miguel Poiaras Maduro and Paul W. Kahn (eds.), Cambridge University Press, Cambridge, 2020, 38-53.

⁸⁹ As for this thesis populist leaders such as Donald Trump and Jair Bolsonaro refused to act accordingly, belittled the significance of the threat although one might have expected that populist leaders welcome the crisis as an opportunity that give them to centralize executive power. See: Scheppele – Pozen, *Executive...* 89.

⁹⁰ Halmai-Mészáros-Scheppele, *So it...*

reference to rule of law today is formally also invalid because the government does not respect its own constitution and its own theory on the rule of law.

What the government is doing in the name of ‘handling the emergency’ – as we have seen – includes various unconstitutional measures, which means that the government itself breaches its ‘own’ Fundamental Law, this is the reason why I refer to rule without law instead of abusive constitutionalism or rule by law. According to Article 54 (par. 2) of the Fundamental Law the application of it may not be suspended under a special legal order (nor may the functioning of the Constitutional Court be restricted). Furthermore, paragraph 3 of the same article declares that if the conditions for declaration of any special legal order no longer apply it shall be terminated by the body competent to introduce it. This is a widely accepted criterion of states of emergency, which has determined the institution since the Ancient Romans.⁹¹ The constitutional concerns surrounding the Enabling Acts and the latest amendment of the third means at least two things: first, the Hungarian abusive permanent state of emergency is basically a pre-emptive one, although it is prohibited in constitutional democracies⁹²; and second, by prolonging the exception for an indeterminate period and enabling emergency measures to be effective even when the state of danger is repealed by the government, is not just contrary to the rule of law, because of vagueness, but is equal with a dictatorial exercise of power. This is also against the Fundamental Law itself because, according to Article 54, when the special legal order no longer applies it should be terminated. The only constitutional reading of this provision is that with the declaration itself and the special emergency measures, government decrees also must be terminated. There is no authority to hold the scope of emergency decrees after the state of danger itself is repealed. The Enabling Acts are unbefitting with the rule of law, the government decrees are clear signs of rule without law, which in this context means that the emergency legislation lacks constitutional entitlement. The reasons for unconstitutionality of the state of danger itself and the emergency decrees should be separated. According to the former it is unconstitutional because based on Enabling Acts (enacted by Parliament), which not only gave the authority for the government to uphold the effect of emergency decrees after the fifteen-day period, but also prolonged the state of danger itself for an undefined period or for 90 days.

As I mentioned a year ago ‘the state of danger has become a tool in a way that it can be used to ignore or defeat the so-called (political) enemies’⁹³, which statement is still valid. However, I should add one minor element to this argument: the government is now enjoying unlimited power and rule by decree, it seems that at least in Hungary the new authoritarians have finally started to use extra-legal measures without amending the constitution⁹⁴, and ‘constitutional dictatorship’ as described by Rossiter has finally lost its ‘constitutional’ nature. This style of emergency government even lacks the substance of ‘exceptionalism’, which is grounded in the claim that ordinary rules can hardly apply during exceptional times. The call for exceptional measures, and by suspending exceptionalist conceptions of emergency, exempt government from accountability, when this is the central element of responsibility. According to Sarat responsibility and responsible government means that political leaders act

⁹¹ The most important requirement is that ‘special legal order and the restrictions on fundamental rights should not last longer than necessitated by the conditions which triggered the declaration of emergency and should aim to restore constitutional normalcy’. See: Sajó – Uitz, *The Constitution...*, 431.

⁹² Greene, *Permanent...*, 25.

⁹³ Mészáros, *Carl Schmitt...*, 89.

⁹⁴ In recent years it has become accepted among scholars that attacks on democracy have a ‘legalist tinge.’ It means that instead of using extra-legal mechanisms, today’s autocrats prefer formal or informal constitutional change and ordinary legal mechanisms to remake the constitutional order for their political benefits. See: Scheppele, *Autocratic...* 560-562; Landau, *Abusive...* 191; David Landau – Rosalind Dixon, Abusive Judicial Review: Courts Against Democracy, *University of California Davis Law Review* 53, 2020, 1313-1387, 1315; Ozan O. Varol, Stealth Authoritarianism, *Iowa Law Review* 100, 2015, 1673-1740, 1676-1677.

on behalf of their citizens,⁹⁵ and not solely for political benefits of their own. This attitude has not led only to an abusive permanent state of emergency, when extra-legality has also evolved outside the legal sphere, the dictator, after suspending the existing legal order, has finally started to operate outside his own constitution.

⁹⁵ Sarat, *States of...*, 20.

APPENDIX

(The current pseudo and real emergency powers have become hard to track, the following timetable is an attempt to list them all.)

	Effective	Declared by...	Most important restrictions	Remarks	Ordinary law	Special legal order
State of migration emergency	From 9 th of March 2016 -	41/2016. Governmental Decree on 9 th of March 2016	<p>Temporary appropriation on moveable and immoveable assets of any business association over which the State or any municipal government exercises right of ownership.</p> <p>Those who carry out official police business and the Hungarian Armed Forces may participate in the registration of asylum applications.</p> <p>Accelerated process for refugee seekers with less legal remedies.</p>	<p>Gov. may declare by decree by the recommendation of the Minister, upon the initiative of the national chief of police and the head of the refugee authority.</p> <p>May be declared covering the entire territory of Hungary, or specific parts of Hungary when the following conditions are fulfilled: the number of asylum-seekers entering Hungary exceeds 500 per day on a monthly average, 750 per day on an average of two consecutive weeks, or 800 per day on a weekly average. It was also possible to declare this kind of 'state of emergency' if the number of persons in the transit zones of Hungary, other than the persons participating in providing care for the aliens, exceeds 1000 per day on a monthly average, 1500 per day on an average of two consecutive weeks, or 1600 per day on a weekly average. Apart from the above-mentioned cases it was also possible to declare a 'state of migration emergency' where any migration-related situation develops in any municipality that represents a direct threat to public security, public safety or public health in that community, in particular if a riot or similar disorder breaks out in the community or in a reception centre located in the immediate vicinity of that community, or in any other facility for the accommodation of aliens, or if any violent acts are committed.</p> <p>These criteria were not fulfilled for years, however the SoME was renewed at six-month</p>	√	X

				intervals down to the present day.		
State of danger (1.)	11 March 2020 – 18 June 2020	40/2020. Governmental Decree on 11 th of March 2020	Under the Fundamental Law Special Legal orders chapter (Art. 53), various emergency restrictions are available; hundreds of emergency decrees were issued by the government under this emergency regime.	No sunset clause implemented in the text; according to the FL (Art. 53. Sec. 3) emergency decrees shall remain in force for 15 days except if the government – on the basis of an authorization from Parliament – extends the effect of the decrees.	X	√
Enabling Act (1.)	30 March – 2020 – 18 June 2020 (repealed by Act LVII of 2020 on terminating the state of danger)	Act XII of 2020 on Protecting against the Coronavirus	The aim of the act was to extend the effect of the emergency decrees; however, it unconstitutionally extended the state of danger itself and gave the government a blank cheque to rule by decrees for an unlimited period.	The Act extended the already accepted and future decrees, and also amended the Criminal Code (which is an ordinary law), therefore emergency rules again implemented into the ordinary law.	√	√
State of medical emergency	17 June 2020 – 18 December 2020 Sunset clause amended (until 30 November 2021) twice: 584/2020. Governmental Decree on 15 th of December 2020 and	283/2020. Governmental Decree on 17 th of June 2020	May begin when the country's Chief Medical Officer (an appointee of the government) advises the government that a health emergency requires exceptional measures. This can occur when a sudden incident endangers, or disrupts lives, corporal integrity, and health of citizens, or jeopardizes the functioning of health care providers to such a degree that the situation may lead to a disequilibrium between the demand for health care and the locally available capabilities. Allows the government to order any measures it deems necessary if the measures previously specified by Parliament are inadequate to deal with the crisis. The government is explicitly authorized to restrict the exercise of	Renewed six-months intervals. Gives the government back the almost unlimited decree power without any superficial requirement that Parliament approve of the decrees issued to carry out the emergency	√	X

	343/2021. Governmental Decree on 16 th of June. The first prolonged the effect of decree until 18 June 2021 and second till 18 December 2021. This is the same method used by the government regarding the state of migration emergency.		<p>fundamental rights, such as the freedom of movement or the freedom of assembly. The operation of all institutions, programs or activities that could promote the spread of the epidemic can be suspended. The government has the power to use special “epidemic” measures provided in other laws.</p> <p>Isolating infectious persons, operation of all institutions, programs or activities that can promote the spread of the epidemic, travel by persons, or the transport of live animals or commodities from one region to another, personal contacts between persons in one region and persons in another region, visiting healthcare facilities, leaving certain areas, the sale and consumption of certain foods, the consumption of drinking water and the keeping of certain livestock may be restricted or prohibited.</p>			
State of danger (2.)	4 November 2020 – 8 February 2021	478/2020. Governmental Decree on 3rd of November 2020	See above SoD 1.		X	√
Enabling Act (2.)	11 November	Act CIX of 2020 on	See above EA 1.	90 days sunset clause implemented	√	X

	2020 – 8 February 2021	Protecting against the Second Wave of the Global Coronavirus Pandemic				
State of danger (3.)	8 February 2021 -	27/2021. Governmental Decree on 29th of January 2021	-	-	X	√
Enabling Act (3)	22 February 2021 -	Act I of 2021 on Protecting against the Global Coronavirus Pandemic	-	90 days sunset clause implemented		
Amendment of the Enabling Act (3.)	22 May 2021 -	Act XL of 2021 on amending the Act I of 2021 on Protecting against the Global Pandemic	-	According to the modification the emergency measures and the state of danger itself will be in force until September 2021, however, more and more restrictions are dissolved by the Government after May.	X	√
Amendment of the Enabling Act (3.)	30 September 2021.	Act CII. of 2021 on amending the Act I of 2021 on Protecting against the Global Pandemic	-	Amended the sunset clause of Enabling Act (3.) therefore the special legal order will be in force until 1 st January 2022. Although the state of danger was not issued by the government as the Fundamental Law requires, this amendment, by prolonging the effect of the act the Parliament, extended the effect of the special legal order without formal declaration.	√	X

Amendment of the Enabling Act (3.)	30 September 2021.	Article 84-86 of Act CXXX. of 2021 on special rules in context of the coronavirus pandemic	-	<p>Amended the sunset clause of Enabling Act (3.), therefore the special legal order will be in force until 31 May 2022. Although the state of danger was not issued by the government as the Fundamental Law requires, this amendment, by prolonging the effect of the act, extended the effect of the special legal order without formal declaration.</p> <p>Note that before the amendment there was a prohibition on organizing nationwide referendums, however this new amendment endorsed this regulation for local referendums only. Therefore, the new rules gave the green light for a referendum in April 2022 on the controversial law that bans educational materials for children that are considered to promote homosexuality and gender reassignment. The relevant law was widely criticized by the opposition and civil rights activists when it was passed in June 2021. The vote will be held on April 3, the same day as Hungary's general parliamentary election.</p>	√	X
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