

Carl Schmitt in Hungary: Constitutional Crisis in the Shadow of Covid-19

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Abstract

This paper discusses the Hungarian constitutionalism and the emergency model which can be called an ‘autocratic’ emergency model in which the government’s main aim is to create an emergency regime without real threat. That was the case in Hungary before 2020, but as the new coronavirus flourished the Hungarian constitutionalism and the rule of law withered. As the article asserts the declaration of the state of danger was unconstitutional because human epidemic is not involved in the listing of the constitution. The constitutional concerns have become even more complicated after the acceptance of the “Enabling Act” which gave unconstrained power for the Government. The spirit of Carl Schmitt’s theory is again emerged. As the coronavirus and its immediate effect necessitated extra-legal measures, the threshold between the rule of law and exceptionalism was fading swiftly and legal constitutionalism became a pleasant memory.

Keywords

crisis of constitutionalism – state of emergency – Hungary – Carl Schmitt

1 Introduction

It is almost obvious that Hungary is not a constitutional democracy anymore.¹ As Professor Kim Lane Scheppele emphasised it in her Blog Post

¹ It is difficult to define when Hungary exactly has lost its constitutional democratic nature. It is not the actual moment of the election in 2010, but Hungary is definitely not a constitutional

when the Hungarian Government put Act XII of 2020 on Protecting against the Coronavirus (hereinafter: ‘Enabling Act’)² before the National Assembly: “Hungary is on the edge of dictatorship”.³ However, in order to understand the present situation in depth, we should make a detailed analysis of the constitutional concerns in Hungary in recent years.

After the regime change in 1989, interesting developments took place not only on social, political, and economic level but in the legal system as well. The first period of Hungarian constitutionalism can be described as the era of *Rule of Law* lasting till the elections in 2010 when one political force achieved the governing majority with two-thirds of the seats in Parliament.⁴ Consequently, in April 2011, i.e. on the first anniversary of the election of 2010, a new constitution – called Basic or Fundamental Law – was promulgated. The second period of Hungarian constitutionalism includes two elections (in 2014 and 2018), which – substantially influenced by new election rules⁵ – had resulted again in a two-third majority for the governing Fidesz party.

I call this second part of modern Hungarian constitutionalism the *Rule by Law* era, because in this decade, the governing supermajority used abusive

democracy anymore. However various different scholarly opinions are available to figure out this issue. See: Miklós Bánkúti, Gábor Halmai and Kim Lane Scheppele, “Hungary’s Illiberal Turn: Disabling the Constitution,” 23 *Journal of Democracy* (2012), 138–146; Miklós Bánkúti, Gábor Halmai and Kim Lane Scheppele, “From Separation of Powers to Government without checks: Hungary’s old and New Constitutions,” in Gábor Attila Tóth (ed.), *Constitution for a Disunited Nation: On Hungary’s Old and New Constitutions* (CEU Press, Budapest, 2012), 237–268; 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), 111–124; Gábor Halmai, “A Coup Against Constitutional Democracy,” in Mark A. Graber, Sanford Levinson and Mark Tushnet (eds.), *Constitutional Democracy in Crisis?* (Oxford University Press, Oxford, 2018), 243–256.

2 See the full translation at the National Legislation Database: https://njt.hu/translated/doc/J2020T0012P_20200401_FIN.pdf.

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

4 It has to be mentioned that between 1994 and 1998 the Socialist-Liberal government also had a two-third majority but that was a coalition government with two different parties and ideologies. Meanwhile in 2010 one political force with the same political ideologies (Christian-Conservative) ensured this supermajority in the Parliament.

5 About the problems and the relevant changes of the new Act on elections see: European Commission for Democracy for Law (Venice Commission) and OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR) Joint Opinion on The Act on the Elections of Members of Parliament of Hungary (18 June 2012), available at [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).

constitutionalism⁶ 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 normal legal order.⁷ Finally, after the declaration of the state of emergency in order to handle the situation caused by the coronavirus pandemic in 2020 and the simultaneous acceptance of the 'Enabling Act' we can talk about the system of *Rule without Law* where the formal constitutional and legal considerations are fading and the main aim of the Government is to hold unconstrained power without even the slightest sign of constitutionalism. I have to admit that in 2020 the Hungarian regime has lost its 'autocratic legalist'⁸ nature because during the 'state of danger' the Hungarian government itself is now in breach of its own Fundamental Law which means that the 'era of autocratic legalism' – as described by Professor Scheppele⁹ – seems to be over. The objective of the present paper is to describe how these recent changes have altered the basic structure of Hungarian constitutionalism. In the Hungarian illiberal model, the Government has aimed to create an emergency regime even in the absence of real threat, to render extra-legal measures more acceptable, and to formally legalize the *Rule without*

6 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.

7 Although the Fundamental Law has a unified emergency powers system, the Hungarian Parliament also used ordinary legislation, which 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.

8 This phrase first used by Professor Javier Corrales to describe Hugo Chávez's rule in Venezuela. Javier Corrales, "Autocratic Legalism in Venezuela," 26 *Journal of Democracy* (2015), 37–51.

9 See: Kim Lane Scheppele, "Autocratic Legalism," 85 *The University of Chicago Law Review* (2018), 545–583. According to Professor Scheppele used Professor Corrales's phrase in a way that it means the attacking the basis of a constitutional order while using the methods made possible by the constitutional order itself. Therefore, electoral mandates with constitutional and legal change are used in the service of illiberal agendas.

Law instead of the *Rule of Law*. As we will see below in detail, extra-legality has finally become normality and the values of constitutionalism have withered.¹⁰

2 Backgrounds of Constitutionality and the Rule of Law in Hungary

The present paper uses the term ‘constitutionalism’ in a way accepting the dominant element of this phenomenon and, consequently, will treat ‘constitutionalism’ as a synonym of ‘liberal constitutionalism’. It is to be noted, however, that in legal theory, constitutionalism is also used as the short form of the term ‘nonliberal constitutionalism’¹¹ or of other preliberal versions of ‘ancient constitutionalism’.¹² It is widely accepted that neither anarchy nor a totalizing concentration of power is consistent with constitutionalism. However, a wide range of constitutionalist politics and political systems may exist between the aforementioned extremities.¹³ Nevertheless, a real constitutional system should have – according to Mark E. Brandon – the following three essential elements: the institutions authorized by and accountable to the people, some kind of intention of limited governance, and the rule of law.¹⁴ Constitutionalism in a liberal sense means not only regulating state (and governmental) power through rule of law and simultaneous empowerment, and restraint of government action but the separation of powers, truly democratic elections and judicially enforceable rights as well.¹⁵ It is important to note that – with or without a written constitution – constitutionalism has a close relationship with liberalism due to the aim of protecting individual rights against the state.¹⁶

10 Gábor Mészáros, “COVID-19 flourishes and Hungarian constitutionalism withers”, *Law against pandemic* (10 April 2020), available at <https://lawagainstpandemic.uj.edu.pl/2020/04/10/covid-19-flourishes-and-hungarian-constitutionalism-withers/>.

11 See Graham Walker, “The Idea of Nonliberal Constitutionalism,” in Ian Shapiro and Will Kymlicka (eds.), *Ethnicity and Group Rights* (New York University Press, New York-London, 1997), 154.

12 Li-Ann Thio, “Constitutionalism in Illiberal Polities,” in Michel Rosenfeld and András Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, Oxford, 2013), 133.

13 Mark E. Brandon, “Constitutionalism,” in Mark Tushnet, Mark A. Graber and Sanford Levinson (eds.), *The Oxford Handbook of the U.S. Constitution* (Oxford University Press, Oxford, 2015), 763.

14 *Ibid.*, 763.

15 Thio, *op.cit.* note 13, 134.

16 Keith E. Whittington, “Constitutionalism,” in Keith E. Whittington, R. Daniel Kelemen and Gregory A. Caldeira (eds.), *The Oxford Handbook of Law and Politics* (Oxford University Press, Oxford, 2013.), 281.

In 1989–1990, after amending the old, Stalin-inspired, so-called Rákosi Constitution of 1949, the legal frameworks of the new Hungarian democracy were created according to the main institutions of constitutionalism, such as democratic parliamentary system, representative government, independent judiciary system, ombudsman to guard fundamental rights, and a Constitutional Court whose main task was to review the laws for their constitutionality.¹⁷ Hungary was the first country in the region that adopted a new constitution with the amendment of approximately 80 per cent of the clauses of the former Stalinist constitution of 1949. The basic element of the Hungarian constitutional structure was an adapted parliamentary system, whereas the Constitution also used the German chancellor-led system with a weak president – elected by the parliament – and a strong prime minister, who was the head of the government. The Constitutional Court was considered as the safeguard of fundamental rights, and the body also became the most important institutional guarantee of constitutionalism. In the first two decades, the Court was the real constitutional check on the powers of the parliament and the government.¹⁸ It is true that the established Constitutional Court with its very strong scope of authority “*ha(d) taken advantage of its broad powers of review to become the most powerful high court in the world.*”¹⁹ These were the basic elements of Hungarian constitutionalism, which lasted for about two decades.

In 2011, the newly appointed two-third majority accepted the new one-party constitution of Hungary called the Fundamental Law. This was the symbolic moment when Hungary had lost the values of the ‘Rule of Law Revolution’²⁰

17 Kriszta Kovács – Gábor Attila Tóth, “Hungary’s Constitutional Transformation,” (7) *European Constitutional Law Review* (2011), 183–203, at 184.

18 *Ibid.* 185.

19 Antal Örkény – Kim Lane Scheppele, “Rules of Law: The Complexity of Legality in Hungary,” in Martin Krygier and Adam Czarnota (eds.), *The Rule of Law after Communism* (Routledge, New York, 1999), 59.

20 This term reflects on the fact that after the political transition in 1989 Hungary was one of the first countries which provided all the institutional elements of constitutionalism such as the separation of powers and the constitutional guarantees of fundamental rights. This meant the transforming of the Stalin-inspired 1949 Rákosi Constitution into a ‘rule of law’ one, which document became the basic element of the so-called ‘constitutional revolution’. The first element of this process was the constitutional amendment of 1989, which already inserted new content into the old framework. As Gábor Halmai asserted the “*other decisive element of the new constitutional system was a very strong judicial review power.*” The first Constitutional Court led by the Chief Justice László Sólyom followed an activist approach in the interpretation of the Constitution (laid down in the concept of the ‘invisible constitution’), which finalized the ‘revolution under the rule of law’ process [Judgment 11/1992. (III. 5.) of the Hungarian Constitutional Court]. See Halmai, *op.cit.* note 1, 243–244. This process is very similar to the ‘post-sovereign’ or ‘pacted constitution-making’ process

of 1989 and became an illiberal democracy (or constitutionalism²¹) after the ‘Constitutional Counter-Revolution’ started in 2010.²² As we will see, although the new Fundamental Law created a sui generis emergency framework, which was unambiguously a positive development in a rule of law point of view, this was the first step when exception started to leak into normalcy.²³ In order to understand this process, it may be useful to revise the problem of emergencies and the theories which themselves were also affected by the Hungarian model.

that took place in Spain (1970s) and in South Africa (1990s). These terms were used by: Andrew Arato, “Post-Sovereign Constitution-Making in Hungary: After Success, Partial Failure, and Now What?,” 26 *South African Journal of Human Rights* (2010), 19–44 and Michel Rosenfeld, *The Identity of the Constitutional Subject* (Routledge, New York, 2010).

- 21 According to Tímea Drinóczi and Agnieszka Bien-Kacala, a populist political majority can transform a liberal constitutionalism to an illiberal one by capturing the constitution and constitutionalism with legal means such as formal and informal constitutional change and paralyzing the constitutional court. Illiberal constitutionalism is built in states that have already experienced liberal constitutionalism, and “are supported by the misunderstood concept of political constitutionalism, relying heavily on the emotional components of national identity” such as Poland or Hungary. See: Tímea Drinóczi and Agnieszka Bien-Kacala, “Illiberal Constitutionalism: The Case of Hungary and Poland,” 20 *German Law Journal* (2019), 1140–1166, at 1141. About the concept of political constitutionalism in Hungary see: András Zs. Varga, *From Ideal to Idol? The Concept of the Rule of Law* (Dialóg Campus, Budapest, 2019); Béla Pokol: *The Juristocratic State: Its Victory and the Possibility of Taming* (Dialóg Campus, Budapest, 2017).
- 22 This term – according to Gábor Halmai – describes the current Hungarian constitutional system, which was a result (and is also a model case) of constitutional backsliding from a liberal democratic system into an illiberal autocratic regime. The new constitutional order with the new constitution enacted in April 2011 based on the votes of one political bloc alone with the aim to keep the opposition at bay. The Fundamental Law’s ‘constitutional order’ with the already enacted cardinal laws does not respect the separation of powers and the guarantees of fundamental rights, therefore the whole system cannot be considered a constitutional democracy anymore. In this system, the institutions of a constitutional state such as the judicial councils, regular and constitutional court(s), ombudsman etc. still exist meanwhile with a limited power. It is also recognizable that there is a list of fundamental rights in the constitution but – because of the lack of an independent judiciary and a constitutional court – the institutional guarantees of human rights are endangered. See: Halmai, *op.cit.* note 1, 245–247, 255.
- 23 I use the term emergency (or exception)/normalcy dichotomy, which reflects on a healthy operation of state of emergencies. If it is no longer possible to separate them from each other, it is accepted to talk about a “permanent state of emergency”. See: Oren Gross, “Chaos and Rules: Should Responses to Violent Crisis Always Be Constitutional?,” 112 *Yale Law Journal* (2003), 1011–1134, at 1089–1095. On “permanent state of emergency” see: Giorgio Agamben, *State of Exception* (University of Chicago Press, Chicago-London, 2005, trans. Kevin Attell).

3 Special Legal Orders and the Fundamental Law

The basic problem with the state of emergencies in constitutional democracies is that responses to an emergency often result in expansion of governmental powers and restrictions of constitutional democratic values such as the rule of law, separation of powers, and, probably most importantly, individual rights and liberties. As Clinton Rossiter wrote decades ago: “*in time of crisis a democratic, constitutional government must be temporarily altered to whatever degree is necessary to overcome the peril and restore normal conditions.*”²⁴ This simply means that “*the government will have more power and the people fewer rights.*”²⁵ According to Oren Gross, emergencies “*present constitutional systems with critical substantive, institutional, and jurisprudential challenges.*”²⁶ However, balancing between the necessities of crisis and individual rights can be really complicated. In liberal democracies, constitutions are limiting the ability of the executive power to respond “*effectively and efficiently to emergencies.*”²⁷ It is up to the constitutional systems to find a way how to handle emergencies and defend the state and the democratic regime in parallel with ensuring constitutional guarantees to prevent constitutional backsliding in the long term.

In the light of the above-mentioned idea, it is widely accepted that there are legalist and extralegalist answers to the question how to respond to emergencies. The legalists argue that emergencies must be handled by entirely legal responses, though these responses might well be different from those of normal times. Legalists think that this is the only way to preserve constitutionalism and the rule of law. The so-called extralegalist²⁸ position is of the opinion

24 Clinton Rossiter, *Constitutional Dictatorship: Crisis Government in the Modern Democracies* (Transaction Publishers, New Brunswick, U.S.A – London, U.K., 1948), 5.

25 *Ibid.* 5.

26 Oren Gross, “Emergency Powers”, in Mark Tushnet, Mark A. Graber and Sanford Levinson (eds.), *The Oxford Handbook of the U.S. Constitution* (Oxford University Press, Oxford, 2015) 785.

27 *Ibid.*, 785.

28 It is also acceptable to use the term ‘exceptionalist view’, which accepts that legal norms apply only in ordinary situations, while in a real crisis these rules are not in effect at such times. Therefore, emergency measures do not violate human rights and the rule of law. See: Nomi Claire Lazar, *States of Emergency in Liberal Democracies* (Cambridge University Press, New York, 2013), 3. Meanwhile there are a lot of arguments about this thesis and many scholars assert that the rule of law is designed for normal as well as special times. They accept that the law cannot be law if it allows exceptions in it. About these later phenomenon see: William E. Scheuerman, “Rethinking Crisis Government,” 9 (4) *Constellations* (2002), 492.; Michael Ignatieff, *The Lesser Evil: Political Ethics in an Age of Terror* (Princeton University Press, Princeton, 2004), 25.; David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (Cambridge University Press, Cambridge, 2006), 7.

that serious emergencies need to be handled with measures outside the law.²⁹ However, the extralegal theory can be separated from dictatorship because its main aim is to defend the integrity of law from bringing emergencies into it. According to these theories, the real threat to the legal order is the aftermath of the accommodation to emergencies, when there is a possibility that extra-legal measures become the ordinary law itself. This theory is in direct connection with Carl Schmitt's declaration about the sovereign "*who decides on the exception*."³⁰ According to Schmitt the sovereign is standing outside the legal order because he is the only one who can handle the emergency by using the exception, which is the only way to restore normalcy.³¹

However, Schmitt was not the only legal theorist who had his own idea on the nature of emergencies and on the question of how to handle a crisis in constitutional democracies. His intellectual opponent was Hans Kelsen with his legalist ideas (expressed about the popularly accepted 'basic norm'³²), which can be used in the theory of the state of emergencies as well.³³ According to Kelsen, the "*hierarchical structure of the legal order of the State is roughly as follows: Presupposing the basic norm, the constitution is the highest level within national law*."³⁴ This idea has a direct link with the principle of legitimacy meaning that legal norms "*remain valid as long as they have not been invalidated in the way which the legal order itself determines*."³⁵ But this principle fails to hold true in the case of a revolution which "*occurs*

29 About the legal and extralegal emergencies see: Kim Lane Scheppele, "Legal and Extralegal Emergencies," in Keith E. Whittington, R. Daniel Kelemen and Gregory A. Caldeira (eds.), *The Oxford Handbook of Law and Politics* (Oxford University Press, Oxford, 2013), 165–166.

30 Carl Schmitt, *Political Theology: Four Chapters on the Theory of Sovereignty* (University of Chicago Press, Chicago, 2005, trans. George Schwab) 5. The original, German version was first published in 1922 and then republished after 1934 when the Nazi regime finally consolidated the dictatorship with the assistance of Schmitt's ideology by using emergency powers.

31 Scheppele, *op.cit.* note 30, 171.

32 See Hans Kelsen, *General Theory of Law and State* (Harvard University Press, Cambridge, 1949, trans. Anders Wedberg), 115–122.

33 This debate was not the only relevant one between these two scholars. There is also a well-known debate on the guardians of the constitution. See: Hans Kelsen, "Wesen und Entwicklung der Staatsgerichtsbarkeit (1927)", in Peter Häberle (Hg), *Verfassungsgerichtsbarkeit* (Wissenschaftliche Buchgesellschaft, Darmstadt, 1976) and Carl Schmitt, *Der Hüter der Verfassung* (Duncker & Humblot, Berlin, 1996).

34 Kelsen, *op.cit.* note 33, 124.

35 *Ibid.*, 117.

whenever the legal order of a community is nullified and replaced by a new order in an illegitimate way.”³⁶ The “decisive criterion of a revolution is that the order in force is overthrown and replaced by a new order in a way which the former had not itself anticipated.”³⁷ These are the basic elements of Kelsen’s “revolutionary legality”,³⁸ which leads to the idea that the constitutional system is a unitary legal order, and – according to Kelsen – it is not acceptable to use political order to overthrow the legal (constitutional) order. If it still happens, this means not just the overthrow of the constitutional order but a new constitution as well.

This concept also leads to the viewpoint that there is no legal space outside the law. After World War II, most constitutions used this idea when they accepted the legalist framework and enacted emergency rules into the legal order. The above-mentioned theory was the legal basis for the Hungarian Fundamental Law’s Special Legal Order (‘Különleges jogrend’), the chapter which contains the relevant provisions on state of emergency. The Fundamental Law – as we will see – follows a so-called ‘suspension model’,³⁹ which means that the constitution gives the government (or executive bodies) the power to dissolve parliaments for various reasons. Alternatively, the constitution gives the executive branch the power to act on their own in case the legislature is not in sessions. Meanwhile, there is one exception under the Hungarian ‘suspension model’ and this is the ‘state of danger’, which emergency does not exclude the functioning of the Parliament therefore during a state of danger the Parliament is still in session. In this way, the ‘state of danger’ has become a ‘partition-styled model’⁴⁰ suggesting that normalcy and emergency are functioning in the same way and this results in a dichotomy: the normal legislation and the emergency rules are operating simultaneously. This concept also contains the threat that the emergency may become the norm. As I will point out, this process already started years ago, the extra-legal responses to the coronavirus were only the bitter end of a long-lasting period.

The Fundamental Law created a *sui generis* state of emergency chapter, called ‘Special Legal Order’, which contains the descriptions of the state of

36 *Ibid.*, 117.

37 *Ibid.*, 117.

38 Scheppele, *op.cit.* note 30, 172.

39 *Ibid.*, 175.

40 *Ibid.*, 177–178.

national crisis,⁴¹ state of emergency,⁴² state of preventive defence,⁴³ unforeseen intrusion,⁴⁴ state of danger,⁴⁵ and the emergency response to terrorism. This latter chapter was a result of a countrywide campaign against the mass migration in 2015, which line of events finally resulted 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 life 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

41 According to the first paragraph, point a) of Article 48 of the Fundamental Law of Hungary, the 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).

42 The 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].

43 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, the 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].

44 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].

45 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].

46 About the concerns of the necessity of this amendment see: Mészáros, *op.cit.* note 7, 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.

regulate these issues in a very detailed manner. This approach is not unique within the European constitutionalism.⁴⁸

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.

4 Constitutional Concerns about the Responses to COVID-19

Soon after the official declaration of the first infection by the new coronavirus on 4 March 2020, the Government declared a state of emergency using Article 53 of the Fundamental Law by Decree 40/2020 (III. 11.)⁴⁹. The first paragraph of Article 53 allows the Government to declare a state of danger and to introduce emergency measures – these measures defined in an implementing act⁵⁰ – in the case of a natural or industrial disaster endangering lives and property or to mitigate the consequences thereof. During a state of danger, the Government may issue decrees empowered – under the implementing act of Act CXXVIII of 2011 on emergency management and the amendment of certain relevant laws – to suspend the application of certain laws or derogating from the provisions of laws, and to take other extraordinary measures.⁵¹ Nevertheless, this

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.

49 The Hungarian version of the declaration of state of danger can be found at: <https://magyarkozlony.hu/dokumentumok/6ddbac40c788cb35b5bd5a5be4bb31294b59f9fc/megtekintes>.

50 The Act CXXVIII of 2011 on emergency management and the amendment of certain relevant laws.

51 Second paragraph of Article 53 of the Fundamental Law of Hungary.

decree of the Government shall remain in force for fifteen days only, except if the Government – based on an authorization from Parliament – extends the effect of the decree. According to the last paragraph of Article 53 upon the termination of the state of danger the decree of the Government should cease to have effect.

It seems clear that the Fundamental Law is granting the opportunity to declare this kind of state of emergency and the implementing act is responsible for regulating the relevant emergency measures to be used in a state of danger. According to the Fundamental Law, there are only two relevant situations that would result in a state of danger: natural and industrial disasters. Human epidemic is not involved in the listing of the constitution, although the relevant implementing act, Act CXXVIII of 2011 concerning disaster management and the amendment of certain relevant laws extends the cases by the “other dangers” specified in Article 44, which allows to declare a state of danger to protect the health and life of citizens when a human epidemic jeopardizes human life and property and causes mass infections. Consequently, the Act overwrote the Fundamental Law’s specification of the relevant cases and enabled the declaration of a state of danger by using a provision of the Act instead of the Fundamental Law. For the Fundamental Law, this provision is unconstitutional. The state of danger can be declared by the Government by a decree, and it is also possible for the Government to use temporary nullification measures – it can be found in the Act on Emergency Management – but this latter Act cannot ease the enumeration of the Constitution, although it is constitutional to explain what natural and industrial disaster⁵² mean. The Hungarian emergency rules on a constitutional level simply cannot ensure the possibility to declare a state of danger regarding human pandemic because neither natural nor industrial disasters include this phenomenon according to the relevant rules of the implementing act.

Using armed forces in a state of danger is also highly questionable. The use of military forces in a state of emergency is controversial because the military

52 According to the Act CXXVIII of 2011 Article 44, natural disaster may be a flood; inland waters; in the case of major obstacles caused by snowfall; earthquakes; other serious weather issues which gravely endanger the lives and property of citizens. Meanwhile, industrial danger may be a mass disease and pollution of radiation and air. According to the Fundamental Law, these are the relevant cases which may result in a state of danger. This enumeration, the purpose of which is to clarify the notion of ‘natural disaster’ and ‘industrial disaster’ – terms used by the Fundamental Law – had been complemented with the ‘other dangers’ phrase without the amendment of the Constitution. This latter phrase contains meanwhile the human (and animal) epidemic with other issues such as the pollution of drinking water and that of the air.

operates under different sets of procedures and expectations as civil authorities do, specifically, it has the “right” to shoot or even kill those who just look like an enemy, it can use overwhelming violence even if doing so kills innocent civilians (at least as long as the destruction of innocent lives is proportionate with the military goals). In summary, military authorities are much broader than the law enforcement possibilities of non-military authorities.⁵³ By now, the Hungarian Government has put military commanders as heads of every hospital; moreover, military commanders have already been inserted into more than 140 so-called strategic companies.⁵⁴ The essential problem with these measures is the lack of any constitutional or legal authority to justify these changes. Although it is possible to use armed forces to handle disasters effectively,⁵⁵ neither the Fundamental Law nor the relevant Act enables the use of military in the manner described above.

This issue becomes even more controversial if we take into consideration that the relevant rules of the ordinary legal system have various options to prevent and control the spread of infectious diseases and epidemics and to increase human and social resistance to infectious diseases. According to the Title 6 of Chapter III on Public Health (Epidemiology) of the Act CLIV of 1997 on Health, the health authority may limit the rights of individuals to exercise personal liberties, may limit the rights of patients, may mandate natural and legal entities as well as unincorporated entities to tolerate or take the measures defined in the Act if the health service declares mandatory epidemic management measures that may limit the rights of patients. Sections 63–70 of the Act ensure special measures such as isolation, epidemiological observation, quarantine, and epidemiological surveillance. According to these sections, it is possible to use special measures such as isolating infectious persons (in their home, place of residence or a separate ward for infectious diseases in an inpatient facility or designated healthcare institution). Those people who are suffering from certain infectious diseases specified in the Decree of the Minister of Health shall be isolated and treated exclusively in a ward for infectious diseases in an inpatient facility or designated healthcare institution. And those who have been in contact with someone suffering from an infectious disease and who are assumed to be in the incubation period for the disease may be placed under epidemic

53 Eric A. Posner – Adrian Vermeule, *Terror in the Balance – Security, Liberty, and the Courts* (Oxford University Press, New York, 2007) 249.

54 <https://www.reuters.com/article/us-health-coronavirus-hungary-military/hungary-to-deploy-military-personnel-to-140-state-companies-during-pandemic-idUSKBN2161C8>.

55 Act CXXVIII of 2011 Second paragraph Article 45.

observation or quarantine for infectious diseases defined in the appropriate Decree of the Minister of Health. During the period in which a person has been placed under epidemiological observation, he or she may be restricted in pursuing his or her occupation, his or her right to maintain contacts, and his or her right to freedom of movement. Meanwhile, the quarantine is defined as observation or isolation based on tightened and special requirements that shall occur at a venue stipulated for such purposes. Furthermore, it is also possible for the health authority to determine an epidemic hazard or the presence of an epidemic. In the case of an epidemic, the 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 at 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.⁵⁶ Moreover, a decree by the health authority under these measures may be executed immediately, even if a legal remedy is sought. According to Section 228 of this Act, it is further possible to declare a “Disaster Medical Care” when an incident of sudden occurrence endangers, or disrupts lives, corporal integrity, and health of citizens, or jeopardize the functioning of health care providers to such magnitude that may lead to a disequilibrium between the demand for health care and the locally available capabilities. Moreover, the decree calls for collaboration of health authorities, health-care providers as well as other central and local government agencies. Based on the considerations described in detail above, there are already various options that could have been useful in handling the threat of the coronavirus crisis in Hungary. Most importantly, these options were and are available in the Hungarian legal system without using state of emergency measures.

On the one hand, a lot of restrictions and measures could have been used to handle the situation effectively without declaring the state of danger. On the other hand, declaring a state of emergency referring to the human epidemic is unknown in the Fundamental Law so there is no constitutional basis of all exceptional restrictions. Therefore, Act CXXVIII of 2011 concerning disaster management extends the cases unconstitutionally without the authority to do so.

⁵⁶ See Section 74 of the Act of 1997 on Health.

5 Exception has become the Norm: The ‘Enabling Act’

After the declaration of a state of danger, the Hungarian Government issued more than seventy decrees until 1 May 2020, and also used ordinary legislation to handle the situation. The most controversial was the ‘Enabling Act’, which was accepted by 2/3rd of the Parliament on Monday 30 March and was signed by the president within two hours without a veto,⁵⁷ which even reflects on this own feature on the state of Hungarian constitutionalism. This ‘Enabling Act’ has given the Government free rein to govern directly by decree without the constraint of existing law. It has also allowed suspending the enforcement of certain laws, departed from statutory regulations and implemented additional extraordinary measures by the decree in addition to the extraordinary measures and regulations outlined in Act CXXVIII of 2011 concerning disaster management and the amendment of certain relevant laws.

It is widely accepted that enabling acts are the “*most common vehicle(s) of emergency governance*”⁵⁸ by delegating a substantial body of legislative power to the executive, which has the authority to invoke crisis laws discretionally within the framework of pre-existing statutory law. This also means that – theoretically – the government or the executive branch can govern during the crisis entirely through the enabling of ordinary law.⁵⁹ However, the Hungarian ‘Enabling Act’ lacks constitutional entitlement. According to the Fundamental Law, it is the Government’s authority to issue decrees which may suspend the application of certain laws or to derogate from the provisions of laws, and to take other extraordinary measures. The role of the Parliament is only to give the Government authorization to extend the effect of the decree. There is no constitutional authority for the Parliament to enact new laws concerning the state of danger. Therefore, the Parliament has no authority to accept exceptional laws because the Government has its limited power to use special

57 According to paragraph 4 and 5 of Article 6 of the Fundamental Law if the president considers an act or any of its provisions to be contrary to the Fundamental Law, he shall send the act to the Constitutional Court to examine it for conformity with the Fundamental Law. If he has not exercised this authority, prior to signing the act he may return it, together with comments, to the Parliament for reconsideration on one occasion. Parliament shall deliberate over the act once more and decide upon passing it once again. The president may exercise this right also if in the course of the deliberations according to the resolution of the Parliament the Constitutional Court did not find the act to be contrary to the Fundamental Law.

58 Scheppele, *op.cit.* note 30, 174.

59 *Ibid.*, 174–175.

measures – which are defined in the implementing act⁶⁰ – according to the Fundamental Law. So, if the Parliament enacts a new law that de facto overwrites the provisions of the Fundamental Law by extending a taxation of the constitution in an act (even if this act also adopted by the same two-third majority), it is unconstitutional because this act amends the constitution without complying with the formal prescriptions.

Moreover, there are other aspects which arouse constitutional concerns. According to the second and third paragraph of Article 53 of the Fundamental Law, during a state of emergency, the Government may issue decrees and suspend the application of certain laws or may derogate from the provisions of laws. These measures shall remain in force for fifteen days except the Government extends these, based on the authorization of the Parliament. This latter regulation is one of the most relevant ones according to all special legal orders because this guarantees that emergency powers will be available to the government for a well-defined short period of time. After all, emergency legislation should not extend beyond the termination of the state of danger.⁶¹ It is widely accepted that in a constitutional democracy, where in some cases there are transition periods between normalcy and exception, the emergency period must be followed by return to normalcy⁶² and must be as brief as possible while avoiding to “*spill over into the restored normalcy*.”⁶³ The aim of the “Enabling Act” was mainly to give the authorization from the Parliament to extend the temporal authority of the measures done by the Government. Nevertheless, the Act has gone beyond this constitutional task. According to the first paragraph of Section 2 of the ‘Enabling Act’, the Government may use extra-legal measures in addition to the extraordinary measures and regulations outlined in Act CXXVIII of 2011 on emergency management and the amendment of certain relevant laws. This rule overwrites the mentioned Act without amending it, although the Parliament cannot suspend the application of certain laws or cannot derogate from provisions of laws in a state of danger.⁶⁴

60 See: Act CXXVIII of 2011 concerning disaster management and the amendment of certain relevant laws Article 45–49. These measures: the Government may depart from the ordinary rules related to the national budget; may issue a decree which can be issued by the mayor or the municipal clerk in normal times; may differ from exact general rules of administrative proceedings and services.

61 Oren Gross, *op.cit.* note 24, 1089.

62 Christopher D. Gilbert, “There Will Be Wars and Rumours of Wars: A Comparison of the Treatment of Defence and Emergency Powers in the Federal Constitutions of Australia and Canada,” 18 *Osgoode Hall Law Journal* (1980), 307–335, at 320–324.

63 Gross, *op.cit.* note 24, 1090.

64 As I have already mentioned, according to the Second paragraph of Article 53 of the Fundamental Law, these measures may be taken by solely the Government with the

Nevertheless, the most controversial element of the Act is the first paragraph of Section 3, which gives the Government an unconstrained power to use exceptional measures and authorizes the Government to extend the effect of the decrees until the end of the emergency. However, this latter decision can also be made by the Government itself, so future decrees automatically get the authorization for extending its effect until this same body makes it clear that the human pandemic or the threat of epidemic is over. According to this provision, the state of danger may be a determining element in Hungary for a long time. It is not an unfounded concern: On 1 May 2020, the Prime Minister was already warning of a potential second coronavirus wave in October-November by mentioning “(t)he virus has not gone away, we have only won some time ... We have to prepare for a second wave (of the epidemic) in October-November.”⁶⁵ In the name of this preparation the Parliament already accepted two acts on 17 June 2020. One on the end of the state of danger which is less than one page long.⁶⁶ And an other one⁶⁷ on the transitional provisions related to the end of the state of danger. At first this latter seems only to provide lots of technical answers to questions that arise about how to reset deadlines for various legal processes that were delayed when the economy stopped. But it is also an introduction of another kind of quasi-emergency situation called the ‘state of medical emergency’ which was already known in the terminology of the Act of Health but the previous version ensured more restricted scope for the government.⁶⁸

The main concern is that the Hungarian Government also had used so-called emergencies to strengthen its power and to maintain the pretence of continuous threat when in 2015 a new law passed by the Parliament gave the power to the Government to declare a ‘state of migration emergency’ and to detain asylum seekers, punish the NGOs who were helping them, and use new standards for rejecting asylum seekers. The Parliament used ordinary legislation,

restrictions that the extra-legality shall remain in force for fifteen days and the potential extension depends on the authority of the Parliament.

65 See: Krisztina Than, “Hungary PM warns of potential second coronavirus wave October-November”, *Reuters* (1 May 2020), available at <https://www.reuters.com/article/us-health-coronavirus-hungary-orban-idUSKBN22D4L5>.

66 Act LVII of 2020 on terminating the state of danger (an official translation of the text can be found here: https://njt.hu/translated/doc/J2020T0057P_20200618_FIN.pdf).

67 Act LVIII of 2020 on the transitional provisions related to the end of the state of danger.

68 About the most relevant concerns related to this new ‘state of medical emergency’ see: 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* (30 May 2020), available at <https://verfassungsblog.de/from-emergency-to-disaster/>.

which contained extra-legal measures to deal with the so-called emergency because of the mass migration crisis, but this is unknown in the Fundamental Law's relevant rules. Furthermore, the real serious problem with it is the present situation that we can hardly find any legal remedy included in the process, comparing it with the Special Legal Order Article in the Fundamental Law of Hungary, which means that emergency restrictions could be used without the constitutional guarantees.⁶⁹ After nearly five years, these emergency powers have continuously been renewed up to the present day, although the criteria were not fulfilled for a long period of time, and one can hardly see mass migration in Hungary at all.⁷⁰ It is, therefore, a real concern that the current (unconstitutionally declared) state of danger will be the next permanent emergency prolonged for an indefinite time.⁷¹

It is also important to note that since the Government started to use emergency legislation, the Parliament has continuously been in session⁷² and has accepted bills which will remain ordinary laws even in case the emergency is over.⁷³ Of course, many of these ordinary laws can hardly be regarded as effective responses against the pandemic.⁷⁴ Furthermore, there were various

69 About these constitutional concerns see: Mészáros, *op.cit.* note 7, 136–137 and Mészáros Gábor, “A ‘militáns demokrácia’ esete a tömeges bevándorlás okozta válsághelyzettel” [The Case of ‘Militant Democracy’ with the State of Mass Migration], 60 (4) *Állam és jogtudomány* (2019), 43–55.

70 See the relevant statistics on this issue at the homepage of Central Bureau for Statistics: https://www.ksh.hu/docs/hun/xstadat/xstadat_eves/i_wvnvno03.html. The first column contains the number of asylum seekers in the relevant year. According to the data it is evident that in the last two years these numbers continued to fall.

71 See for example: Gábor Halmai – Kim Lane Scheppelle, “Orbán is Still the Sole Judge of his Own Law”, *Verfassungsblog* (30 April 2020), available at <https://verfassungsblog.de/orban-is-still-the-sole-judge-of-his-own-law/>; Kriszta Kovács, “Hungary’s Orbanistan: A Complete Arsenal of Emergency Powers”, *Verfassungsblog* (6 April 2020), available at <https://verfassungsblog.de/hungarys-orbanistan-a-complete-arsenal-of-emergency-powers/>.

72 <https://www.parlament.hu/en/web/house-of-the-national-assembly/covid-info>.

73 See for example Section 10 of the “Enabling Act”, which amended the Act C of 2012 on the Criminal Code and created two new crimes in the ordinary legal system. According to these new enactments, anyone who publicizes false or distorted facts that interfere with the successful protection of the public – or that alarm or agitate that public – could be punished by up to five years in prison. Anyone who interferes with the operation of measures taken to fight the pandemic could also face a prison sentence.

74 Since the acceptance of the ‘Enabling Act’ nine ordinary bills have been accepted in thirty days, which clearly show that the Parliament can attend its main task. In the list one can find international treaties and agreements, financial aid and provided property for the Catholic Church and an act (Act XIX of 2020) which has amended various other ones, for example the Act XL of 1994 on The Hungarian Academy of Sciences, the Act CX of 2011 on the status and stipend of the President, or the Act CXI of 2011 on the Ombudsman. About these bills see: <https://magyarkozlony.hu/> (homepage of the National Gazette).

ongoing drafts that may have nothing to do with the pandemic and were not justified by the emergency situation, e.g. – the one to ban gender change in the birth register after a person has transitioned from one sex to another as an adult.⁷⁵ These are clear signs suggesting that the threshold between emergency and normalcy has faded⁷⁶ and one can hardly find any remnant of constitutionality and the rule of law. The emergency has finally become a tool in the hand of the Government already using sovereign power. Without a strict legal framework, it is also possible for the Government to give *sui generis* meaning for various threats and use them as a blank check solely for political advantage. What I've mentioned a few years ago, is even more true now than at that time: “(i)f a regulation makes possible for one branch of power to use the exceptional powers abusively, the rule is odd and could hardly be in compliance with the principle of legality and the rule of law.”⁷⁷

6 Conclusion

Based on Hans Kelsen's theory, modern constitutional democracies are constructing emergency powers with the assumption of separating normalcy from emergency, therefore they use emergency measures separated from ordinary rules.⁷⁸ These regulations aim to assure that extra-legal measures can be used solely in extraordinary times, therefore, these unconstitutional measures – in the sense of the ordinary legal order – are separated from normalcy. The state of emergencies used worldwide against the threat of coronavirus – especially in the case of Hungary – has raised again the important question: is it possible to make bright-line distinctions between normalcy and the state of emergency in an era when emergency government is becoming the norm?⁷⁹

75 Gábor Halmai – Kim Lane Scheppele, “Don't Be Fooled by Autocrats! – Why Hungary's Emergency Violates Rule of Law”, *Verfassungsblog* (22 April 2020), available at <https://verfassungsblog.de/dont-be-fooled-by-autocrats/>.

76 A clear sign that exceptional measures are becoming the norm is that the Government has also used an emergency decree in relation with Mother's Day. See: Government's Decree 160 of 2020 (29 April 2020) on The Opening Hours of Florist's on Mother's Day, available at <https://magyarokozlony.hu/dokumentumok/foaf7acaf20930c3760fe972027d1171ddde335/megtekintes> (at the homepage of the National Gazette, Hungarian).

77 Mészáros, *op.cit.* note 7, 142.

78 See Oren Gross, “The Normal Exception,” in Mark A. Graber, Sanford Levinson and Mark Tushnet (eds.), *Constitutional Democracy in Crisis?* (Oxford University Press, Oxford, 2018), 585.

79 Oren Gross and Ní Aoláin, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (Cambridge University Press, Cambridge, 2006), 171–243.

Nevertheless, we cannot forget that the rule of law remains a core element of security because it is a misleading and “*dangerous illusion to believe one can ‘protect’ liberal democracy by suspending liberal rights and forms of government. Contemporary history abounds in examples of ‘emergency’ or ‘military’ rule carrying countries from democracy to dictatorship with irrevocable ease.*”⁸⁰ We hoped that we had already learned the meaning of Paul Wilkinson’s words. The reality is that the border between democracy and dictatorship is at least as thin as the one between normalcy and exception. Contrary to the detailed emergency regime in the Hungarian Fundamental Law, Carl Schmitt’s well-known idea has become relevant anew: “*It is precisely the exception that makes relevant the subject of sovereignty, that is, the whole question of sovereignty.*”⁸¹ It seems that formal legalism meaning that pre-established general norms can cover all possible situations⁸² – emergencies included – have lost the present battle. At this point, one should remember what Schmitt argued about the legalist view: emergencies demand measures from the states that are inconsistent with the rule of law, and constitutional emergency power clauses like Weimar’s Article 48 or the Hungarian Fundamental Law’s Special Legal Order regularly fail.⁸³ Meanwhile – again according to Schmitt – the “*specific political distinction to which political actions and motives can be reduced is that between friend and enemy.*”⁸⁴ This enemy-friend dichotomy related to the exceptionalism “*has an especially decisive meaning which exposes the core of the matter. For only in real combat is revealed the most extreme consequence of the political grouping of friend and enemy.*”⁸⁵

According to the ‘revolutionary model of emergency regimes’⁸⁶ embracing a sovereign dictatorship, one can recognize the core element which is in the idea of the dichotomy. It seems evident that the basic element of this political power can be found in the human realm; both the ‘enemy’ and the ‘friend’ are human beings. It is the paradox of the concept of sovereignty that the present

80 Paul Wilkinson, *Terrorism and the Liberal State* (New York University Press, New York, 1986, 2nd edition), 122–123.

81 Schmitt, *op.cit.* note 31, 6.

82 See John P. McCormick, “Schmittian Positions on Law and Politics?: CLS and Derrida,” 21 *Cardozo Law Review* (2000), 1693–1722; David Dyzenhaus, “Now the Machine Runs Itself: Carl Schmitt on Hobbes and Kelsen,” 16 *Cardozo Law Review* (1994), 1–19, at 10–14.

83 William E. Scheuerman, “States of Emergency,” in Jens Meierhenrich and Oliver Simons, *The Oxford Handbook of Carl Schmitt* (Oxford University Press, Oxford, 2016), 547.

84 Carl Schmitt, *The Concept of the Political* (Rutgers University Press, New Brunswick, 1976, trans. George Schwab), 26.

85 *Ibid.*, 37.

86 See John P. McCormick, *Carl Schmitt’s Critique of Liberalism: Against Politics as Technology* (Cambridge University Press, New York, 1997), 133–141.

enemy (a virus), which enabled the use of sovereign dictatorship, is so small that we cannot see it with our own eyes.

It is also important to note that Carl Schmitt's idea of the state of exception has found its way into Hungary. According to Schmitt, a sovereign of a nation has the main task to define who the friend is and who the enemy is,⁸⁷ and the exception is what allows him to strike out against the enemy "*with the rationale that he is protecting the friend*".⁸⁸

As we have seen previously, 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. The 'Enabling Act's' scope is broad and emergency powers can be used to "*guarantee for Hungarian citizens the safety of life and health, personal safety, the safety of assets and legal certainty as well as the stability of the national economy*".⁸⁹ With this doubtful constitutional authority, the Government used extra-legal measures to take revenge on opposition-led municipalities at last October's municipal elections when the opposition won in numerous important cities including important districts in Budapest and the post of the mayor of several big cities such as Budapest, Pécs, Miskolc or Szeged. In this framework, the Government issued Government Decree 135 of 2020 (17 April) on measures necessary for the stability of national economy with regard to the state of danger, which made it possible to establish special economic areas in the territory of the municipalities where the local industry tax – which is one of the main sources of income in the level of local government – can be collected not by the municipalities but by the central governmental budget. With Government Decree 136 of 2020 (17 April) on creating a special economic area in the town of Göd, the Government has promptly established such an area in the town of Göd which has an opposition mayor and where a Samsung factory is located. Consequently, the town is losing around 1/3 of its yearly budget.⁹⁰ These actions can be hardly interpretable as necessary measures to handle the emergency. Constitutionally, state of emergency is temporary by definition and "*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*".⁹¹ The measures taken to handle

87 Schmitt, *op.cit.* note 86.

88 Kim Lane Scheppele, "Law in a Time of Emergency: States of Exception and the Temptations of 9/11," 55 *Scholarship at Penn Law* (2004), 1–75, at 68.

89 See Section 2 of the 'Enabling Act'.

90 Dániel Karsai, "Let's not fool ourselves either!", *Verfassungsblog* (27 April 2020), available at <https://verfassungsblog.de/lets-not-fool-ourselves-either/>.

91 András Sajó – Renáta Uitz, *The Constitution of Freedom – An Introduction to Legal Constitutionalism* (Oxford University Press, Oxford, 2017), 431.

the epidemic can hardly correspond with these principles, especially if we are taking into account that the Hungarian ordinary legal system already contains measures which could have been effective without the declaration of a state of emergency.

This very development means that one can hardly find the principle of legality and the rule of law behind these actions. It is more proper to refer to Schmitt's idea on commissarial and sovereign dictatorship.⁹² The key element of the former one is the commissarial dictator with basic elements to be found in the Roman republican tradition. This dictator is appointed by a higher political authority and has the main task to eliminate the enemies during a crisis that threatens the survival of the regime.⁹³ In order to achieve this goal, the dictator may suspend the existing legal order to remove the threat and to restore the normal conditions.⁹⁴ However, the dictator not only suspends the existing legal order but operates outside of it as well.⁹⁵ And as the sovereign dictatorship is also a type of delegation, its main task is to establish "a new political and legal order ... (which) signifies the radical beginning of a new regime that cannot be reduced or tracked back to any anterior procedure, set of rights, legal structure, or fundamental laws."⁹⁶ Finally, Carl Schmitt has arrived in Hungary and the main concern is not related solely to the question of the constitutionality of emergency measures taken by the Government. The main question is, unfortunately, more political: Is the system in Hungary more similar to the commissarial or to the sovereign type of dictatorship?

92 Carl Schmitt, *Die Dictatur* (Duncker und Humblot, Berlin, 1994), 137.

93 Andreas Kalyvas, *Democracy and the Politics of the Extraordinary – Max Weber, Carl Schmitt and Hannah Arendt* (Cambridge University Press, New York, 2008), 89.

94 Schmitt *op.cit.* note 94, xvi.

95 Kalyvas *op.cit.* note 95, 89.

96 *Ibid.*, 90.

AUTHOR QUERIES

NO QUERIES