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ARTICLE

From Constitutional *Risk Management* to *Constitutional Risk* Management (Emergency Law Misuse) in Hungary

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Abstract

The paper offers a comprehensive overview of Hungary's emergency law and its misuse over the four years since its introduction in March 2020. Hungary serves as a clear example of how a "state of danger" – initially intended as an exceptional legal measure – can become normalised through repeated declarations. The populist government's continuous use of emergency powers has led to unchecked lawmaking and the manipulation of legal frameworks to advance populist agendas. The article argues that while Hungary's detailed emergency provisions in the Fundamental Law were intended to serve as a form of constitutional risk management, after four years of living in a permanent "state of danger", the scholarly debate has shifted to whether this very risk management has itself become the risk. According to emergency law theory, managing constitutional risks is equally vital in the emergency legal order. Yet in Hungary, both the black letter of the law and the constitutional practices observed during and after the COVID-19 pandemic – along with the Ninth Amendment to the Fundamental Law, which introduced a new emergency regime in 2021 – reveal that constitutional risk management has ultimately failed. This is manifest in the erosion of the separation of powers, the weakening of judicial review, and the shrinking of human rights protections. The article substantiates its argument by examining the related constitutional framework and constitutional practice in Hungary between 2020 and 2024.

Keywords: constitutional emergency; Hungarian constitutionalism; special legal order; state of danger

I. Introduction

Constitutional risk management within the framework of emergency law is a crucial function of any constitutional regulation.[1] This responsibility is often framed in the language of the rule of law, as even during emergencies, the rule of law must be upheld by the constitution. To address this, many modern constitutions have incorporated specific provisions – and in some cases, such as Hungary, even dedicated entire chapters – to

[1] Zoltán Szente, "How to Assess Rule-of-Law Violations in a State of Emergency? Towards a General Analytical Framework" (2024) Hague Journal on the Rule of Law. DOI: 10.1007/s40803-024-00244-1.

establish rules that both facilitate swift and effective state action to address the immediate crisis[2] while simultaneously preventing the government from avoiding its duty to safeguard constitutional values and protect human rights.[3]

The paper argues that this crucial function of constitutional risk management – namely, the protection of core constitutional values and human rights during a state of emergency – has failed in Hungary. When the government invoked a "state of danger" in 2020 to combat the COVID-19 pandemic, many decrees were aimed at mitigating the immediate threat, however, the government's crisis responses led to unintended consequences. The real issue lied therefore in how the emergency measures had impacted the broader legal, constitutional framework – specifically, constitutional and statutory codification, the application of norms, and the judicial review of these actions. The paper argues that this essential element of constitutional risk management, the constitutional protection definitively failed during the risk management in Hungary during the four years of the state of danger. The traditional function of the emergency legal order – ensuring both swift action and adherence to constitutional principles – has been misinterpreted by Hungary's constitutional institutions. Despite the formal inclusion of an entire, detailed chapter on special legal orders in the Fundamental Law, the practical application of these provisions has fallen short of the standards required for effective constitutional risk management. The current paper addresses several significant constitutional problems.

In March 2020 with regard to the outbreak of the Covid-19 pandemic the Government declared the state of danger. Although this declaration was approved by Parliament, it was formally unconstitutional. The provision in the Fundamental Law that served as the legal basis for this declaration did not reference pandemics, making the action incompatible with the constitutional rules. Following this, the National Assembly passed an enabling act that conflicted with the Fundamental Law again mandating that emergency decrees expire within fifteen days unless approved by Parliament. However, this parliamentary act allowed the government to bypass that requirement. This is how the period of permanent state of danger which lasts until today in Hungary started.

The government also issued more than a thousand emergency decrees from 2020 to 2024, typically without official justification, many of them not directly related to crisis management. This has raised concerns over the misuse of emergency powers. Furthermore, the two-thirds government majority in Parliament amended the rules regarding the special legal order during the state of danger. The Ninth Amendment to the 2011 Fundamental Law introduced a new emergency regime in 2021, and the Tenth Amendment expanded the definition of a state of danger to include humanitarian catastrophes in neighbouring countries, such as the Russo-Ukrainian war.

The state of danger has become essentially permanent in Hungary. When the COVID-19 state of danger concluded, a new one was immediately declared in response to the Russo-Ukrainian war, with only brief interruptions over the past four years. The paper argues that there is no effective oversight of the government's power. Neither the National Assembly nor the Constitutional Court nor other state institutions have meaningfully controlled the government's use of emergency powers during this prolonged state of danger.

The following discussion demonstrates in two major parts how Hungary's constitutional framework, particularly in times of emergency, has been stretched and manipulated,

[2] Pál Kádár, "A Short Overview of the Reform of Hungarian Defence and Security Regulations" (2022) 32 *Hadtudomány* 61–73.

[3] Zoltán Szente and Fruzsina Gárdos-Orosz, "Introduction – Contemporary Challenges of Constitutional Adjudication in Europe" in Z Szente and F Gárdos-Orosz (eds), *New Challenges to Constitutional Adjudication in Europe: A Comparative Perspective* (New York, Routledge 2018) pp 3–15.

resulting in the weakening of democratic oversight and the erosion of the rule of law. The first part describes the rules on the special legal orders and the second highlights some major constitutional problems that has emerged during the state of danger.

II. The constitutional framework of risk management – An analysis of the constitutional and legal rules on emergency situations

Following Hungary's constitutional democratic transition in 1989, the Constitution[4] was designed to precisely define the circumstances under which emergency rules could be applied. This precision aimed to prevent the abuse of power by avoiding the application of a single catch-all rule that could potentially grant unchecked authority. The intention was to clearly identify the state institution authorised to enact a special rule in each specific emergency situation and to delineate the scope of permissible actions under such a regime. Crucially, it was established from the outset that the Constitution itself, along with its application, could not be suspended even in a state of emergency, ensuring that constitutional safeguards would remain in place regardless of the crisis. This framework sought to balance effective crisis management with the protection of democratic principles and the rule of law.

A total of five distinct legal categories were distinguished within the constitutional framework, providing detailed regulations for managing complex emergency situations. These legal regimes – national crisis, state of emergency, state of danger, state of unprecedented attack, and preventive defence – represented a comprehensive approach to emergency governance. Each category was designed with specific guidelines for invoking extraordinary powers while maintaining constitutional safeguards, ensuring that even during emergencies, fundamental rights would be protected within strict, predefined limits.[5]

Critics, however, argued that this approach was overly complex and sometimes tailored to current political needs, resulting in imperfect coherence and overly vague rules about human rights protection.[6]

The new constitution, the Fundamental Law of 2011, however, maintained a system akin to that of the previous Constitution, preserving the framework for emergency legal categories, mentioning the five types of emergency situations outlined in the previous Constitution. Additionally, in 2016, it introduced a sixth category: the "terrorist threat".[7]

To facilitate a clearer legal framework, the Fundamental Law established a separate chapter dedicated to these emergency rules, referred to as the "special legal order". This new contextual approach distinctly separated the constitutional provisions governing the special legal order from other sections of the Fundamental Law. This structural differentiation aimed to provide clarity on how emergency measures are regulated, emphasising the importance of maintaining constitutional safeguards even in exceptional circumstances.[8]

[4] Act XX of 1949 on the Constitution of the Republic of Hungary.

[5] András Jakab, "19/A–19/E" in András Jakab (ed), *Az Alkotmány kommentárja [Commentary on the Constitution]* (Budapest, Századvég 2009) pp 633–64.

[6] Till Szabolcs Péter and Károly Rimaszombati, *First Impressions of the Hungarian Defence and Security Regulation Reform Focusing on Special Legal Order in Practice: Possible Further Developments* (Working Paper, Védelmi-Biztonsági Szabályozási és Kormányzástani Műhelytanulmányok 2024).

[7] Lóránt Csink, "Constitutional Rights in the Time of Pandemic: The Experience of Hungary" (2021) 9 *Hungarian Yearbook of International Law and European Law* 43–50.

[8] See the official justification of the Fundamental Law, 61–2. https://www.parlament.hu/irom39/02627/02627.pdf.

In response to the initial outbreak of the COVID-19 pandemic and the subsequent experiences, the special legal order regime underwent significant transformation through the Ninth and Tenth Amendments to the Fundamental Law. These amendments effectively modified the previous six-element special legal order system, introducing a simplified alternative that concentrated executive authority in the government.[9]

The Ninth Amendment, enacted in 2020 and effective from November 2022, streamlined the special legal order to three specific instances. The Tenth Amendment introduced an additional clause that allows for the application of the state of danger regime not only in the event of a natural disaster or industrial catastrophe, but in times of war or armed conflict in a neighbouring country, or a humanitarian emergency, contingent upon government proclamation.

The regulatory framework of the Ninth Amendment largely remained consistent with previous conceptualisations, however it aimed to take into consideration better the inherent problems of predicting modern, future risks. While extending the special regime to encompass potentially similar cases, the legislation sought to mitigate the challenges posed by the unpredictability of crises by securing the flexibility in governance, ensuring that the state can respond effectively to a broader range of emergencies while maintaining constitutional integrity.[10]

The new legislation therefore simplified the special legal order but involved the drawback of being more open-ended than its predecessor, effectively granting carte blanche regarding the circumstances under which a special legal order may be declared. This legislative approach is motivated by an ideology of effective crisis management, empowering the government with a robust mandate to respond to emergencies.[11]

The state of war, the first special legal order, serves as a defensive measure against external aggression. This declaration is made by Parliament, and within this framework, the government is authorised to issue decrees that can override laws enacted by Parliament. The Fundamental Law is designed to facilitate the declaration of a state of war in response to actions equivalent to an external armed attack, as well as in the face of the imminent threat of such an attack. This flexibility is intended to enhance the nation's capacity for defence, allowing the government to act decisively to protect national security and public safety.[12]

In the event of a state of war, the Parliament is empowered by the Fundamental Law to repeal the decisions of the Government at any time. However, the new legislation grants the government the authority to enact new regulations with the same content if the circumstances demand so.

[9] In the aftermath of the declaration of a state of danger on 11 March 2020, the specific legal framework became a pivotal topic of scholarly dialogue. Many have addressed practical risk management issues concerning the state of danger (Pál Kádár, "A különleges jogrendi szabályozás megújítása és a Magyar Katonai Jogi és Hadijogi Társaság [The Renewal of the Regulation of the Special Legal Order and the Hungarian Military Law and Warfare Law Society]" (2020) 4 Katonai Jogi és Hadijogi Szemle 7–33.), while others have contributed to the theoretical and critical public law literature on the subject Márton Matyasovszky-Németh and Adrián Fábián, "A rendkívüli állapot jog- és társadalomelmélete a COVID-19-világjárvány árnyékában [The Legal and Social Theory of the State of Emergency in the Shadow of the COVID-19 Pandemic]" in N Bán-Forgács, VO Lőrincz, K Mezei, and B Szentgáli-Tóth (eds), *Poszt-COVID: A Covid-19 hatásai a jogrendszerre [Post-COVID: The Effects of Covid-19 on the Legal System]* (Budapest, Akadémiai Kiadó 2024) pp 81–102.

[10] Pál Kádár, "A Short Overview of the Reform of Hungarian Defence and Security Regulations" (2022) 32 *Hadtudomány* 61–73.

[11] Till Szabolcs Péter and Károly Rimaszombati, *First Impressions of the Hungarian Defence and Security Regulation Reform Focusing on Special Legal Order in Practice: Possible Further Developments* (Working Paper, Védelmi-Biztonsági Szabályozási és Kormányzástani Műhelytanulmányok 2024).

[12] Pál Kádár, "A Short Overview of the Reform of Hungarian Defence and Security Regulations" (2022) 32 Hadtudomány 61–73.

The second special legal order is the state of emergency, designed to address situations that threaten internal security and the functioning of the state, as well as the safety of life and property. The requirement of serious violence involving arms or weapons is not necessary for the declaration; a sufficient basis for the declaration is if the situation is deemed serious and unlawful, thereby threatening the security of life and property.

A state of emergency may be declared in response to acts aimed at subverting the constitutional order. This formulation is meant to offer greater flexibility, allowing the parliamentary majority to respond effectively to "hybrid" challenges – those that are unpredictable or cannot be adequately managed by existing legislation. This flexibility aims at sustaining the government's capacity to adapt to emerging threats, reinforcing the notion that the state can maintain order and protect citizens even in the face of complex and evolving crises.[13]

With conflicts that have the potential to undermine the internal order of the state, the authority to issue a decree has shifted from the President of the Republic to the Government. Under the current provisions, a state of emergency can be declared for an initial period of up to 30 days. To extend this state of emergency beyond the initial period, the government must secure the support of two-thirds of all members of Parliament. This shift intends to reflect a consolidation of power within the executive branch, allowing the government to respond swiftly to threats to internal security while still necessitating legislative oversight of any extensions of the emergency measures.

The third form of the special legal order is the state of danger, which was originally established to address situations arising from natural disasters or industrial accidents that threaten life and property. Following the enactment of the Tenth Amendment to the Fundamental Law, the criteria for declaring a state of danger have been significantly expanded. Now, it can also be and is proclaimed in response to situations of war or humanitarian catastrophes occurring in neighbouring countries.[14]

From the perspective of the separation of powers, it is crucial to note that under the previous regulatory framework, both the Defence Council and the President of the Republic were authorised to issue decrees during exceptional and war situations[15] and states of emergency,[16] respectively. In contrast, the Government was solely responsible for implementing rules in other special legal orders. However, the new regulation has effectively centralised all powers of action within the Government, consolidating authority over emergency measures.[17]

In parallel, the COVID-19 pandemic has prompted significant changes at the legislative level. So-called "Lex COVID"[18] was adopted to ensure the continued applicability of many special legal order regulations even after the lifting of the special legal order. Additionally, preparations began for an integrated defence and security regulation, which Parliament subsequently enacted as the Integrated Protection and Security Act.[19] This Act consolidates all rules that can be established at the sub-constitutional level based on the authorisation of the Fundamental Law, creating a comprehensive and unified framework. This marks a departure from the previous legislative approach (wherein

[13] Ibid.
[14] Ibid.
[15] Article 49(4) of the Fundamental Law (in force until 31 October 2022).
[16] Article 50(3) of the Fundamental Law (in force until 31 October 2022).
[17] Article 53(1) of the Fundamental Law.
[18] Act XII of 2020 about the protection against the Covid-19 pandemic ("Lex COVID").
[19] Act XCIII of 2021 about the defence and security.

multiple laws contained similar provisions), seeking to enhance the clarity and coherence of the legal framework governing emergencies[20] but at the same time giving extremely wide authorisation for the limitation of fundamental rights and deviation from the standard rules on the separation of powers.

Furthermore, in addition to the extensive constitutional provisions, Parliament has enacted a range of emergency rules codified in statutory law to address a diverse array of situations. In this "quasi special legal order" the rules may not formally fall under the special legal orders outlined in the Fundamental Law, they serve, however, a similar purpose in enabling swift governmental responses to emergencies. This designation underscores the increasing complexity and adaptability of the legal framework in Hungary, reflecting a trend toward more nuanced regulatory mechanisms that can be deployed in various contexts without strictly adhering to the traditional categories of emergency law.[21]

A common feature of these "quasi special legal orders" is that the Government or a member of the Government is granted broader competence to address a situation than is normally the case. A number of different "quasi-special legal orders" exist in Hungarian legislation, including crises in the supply of oil and petroleum products,[22] crisis in natural gas supply,[23] electricity supply crisis,[24] nuclear emergency,[25] crisis due to mass immigration[26] and health emergency.[27] The key distinction between the constitutional and these sub constitutional special legal orders is that the rules established at the statutory level cannot – in theory – override constitutional requirements.

This constitutional and statutory environment framed many constitutional problems in practice after 2020 when the state of danger was declared by the government. First, the constitutional amendment which made it possible that the state of danger could be declared purely regarding the fact of a war in the neighbouring country led to a permanent emergency. However, most of the problems were not caused by the specific legal rules, but by their abusive constitutional practice.

III. The special legal order in practice: lessons from Covid-19 state of danger

1. The lack of parliamentary oversight and control

In March 2020, Hungary declared a state of danger under the provisions of the Fundamental Law, granting the Government the authority to issue decrees with the force of statutory law. This allowed the Government to establish rules that could override existing statutory laws. Ordinarily, legislative power in Hungary resides with the National Assembly, the highest representative body of the people according to the Fundamental Law. However, according to the special legal order, the Government is permitted to issue statutory decrees specifically to address the state of emergency and facilitate a return to normal legal order and social stability as soon as possible. Under the regulations in place in

[20] Ádám Farkas, "Questions and Options for the Emerging Reform of the Hungarian Security and Defence Regulation" (2022) MTA Law Working Papers 14, 1–11. https://jog.tk.hu/mtalwp/questions-and-options-for-the-emerging-reform-of-the-hungarian-security-and-defence-regulation accessed 15 December 2024.

[21] Pál Kádár and István Hoffman, "A különleges jogrend és a válságkezelés közigazgatási jogi kihívásai: a 'kvázi különleges jogrendek' helye és szerepe a magyar közigazgatásban" ("The Challenges of Administrative Law in Special Legal Orders and Crisis Management: The Role and Place of 'Quasi-Special Legal Orders' in Hungarian Public Administration") (2021) 14(3) Közjogi Szemle 1–11.

[22] Act XXIII of 2013 on the Emergency Stockpiling of Imported Petroleum and Petroleum Products, § 1.

[23] Act XL of 2008 on the Supply of Natural Gas § 3.

[24] Act LXXXVI of 2007 on Electricity, § 138.

[25] Act CXVI of 1996 on Nuclear Energy, § 2.

[26] Act LXXX of 2007 on the Right of Asylum § 80/A.

[27] Act CLIV of 1997 on Health Care § 228.

March 2020, these special decrees were initially valid for fifteen days, after which they would require parliamentary review and could only be extended with Parliament's approval.[28]

The Enabling Act in effect from 31 March to 17 June 2020,[29] altered Hungary's separation of powers by allowing regulations with the force of law to be enacted without individual oversight for the duration of the emergency. While Parliament technically retained the power to revoke this authorisation, this control was symbolic, given that the governing parties have had a parliamentary majority since 2010. From a constitutional perspective, the Act also gave the Government authority to prevent Parliament from convening by decree, highlighting a shift in constitutional power dynamics.[30] While one might argue this was inconsequential since Parliament remained in continuous session, it raises questions about why the legislature did not exercise its supervisory role or why it was deemed constitutionally acceptable for the Government to create a separate legal framework alongside existing laws.

Furthermore, in June 2020, Parliament adopted the act that lifted the emergency and declared a new health emergency, Lex COVID. This 410-article legislative monstrosity amended dozens of laws and introduced a number of emergency provisions into the ordinary legal system.[31]

Furthermore, Act CLIV of 1997 on Health Care was amended by Parliament, thereby creating a situation in which the Government is empowered to declare a quasi-constitutional special legal order (an "epidemic alert") on the occasion of any other event that endangers or harms the life, limb or health of citizens or the operation of health care providers. In this scenario, the Government has the authority to implement a wide range of measures that would otherwise be permitted under a special legal order, except for any restrictions or suspensions to fundamental rights that could be deemed to exceed the scope of the general standard.

Although the Government has adopted a number of controversial decrees unrelated to pandemic protection, Parliament has not examined the necessity or proportionality of any of its emergency decrees, but to the contrary – as described above – has assisted the Government's actions by introducing newer and newer legislation to foster the powers of the Government.[32]

The case also applies to the declaration(s) of the consecutive state of danger, which is still in effect in 2024 in relation to the humanitarian catastrophe of the Russo-Ukrainian war in the neighbouring country.

While parliaments have responded to the emergency posed by the COVID-19 pandemic in a multitude of ways, including the creation of new organisational and procedural frameworks, accelerated legislative processes and the deployment of alternative oversight

[28] See the argumentation on separation of powers and the function of the constitutional institutions also at Fruzsina Gárdos-Orosz, "The Concentration of Emergency Competencies during the COVID-19 Pandemic in Hungary: The Lack of Effective Control" (2024) 22(2) Lex Localis: Journal of Local Self Government 120–42. Some lines of the argumentation are identical as it follows.

[29] Act XII of 2020 on Protection Against the Coronavirus.

[30] For a discussion on the arguments regarding the constitutionality of the Enabling Act: Tímea Drinóczi and Agnieszka Bień-Kacała, "COVID-19 in Hungary and Poland: Extraordinary Situation and Illiberal Constitutionalism" (2020) 8 Theory and Practice of Legislation 171; Gábor Mészáros, "Carl Schmitt in Hungary: Constitutional Crisis in the Shadow of Covid-19" (2021) 46 Review of Central and East European Law 69–90.

[31] Imre Vörös, "A felhatalmazási törvénytől az egészségügyi válsághelyzetig és tovább . . . [From the Empowerment Law to the Health Crisis and Beyond . . .]" in F Gárdos-Orosz and VO Lőrincz (eds), *Jogi diagnózisok. A COVID-19-világjárvány hatásai a jogrendszerre [Legal Diagnoses: The Effects of the COVID-19 Pandemic on the Legal System]* (Társadalomtudományi Kutatóközpont Jogtudományi Intézet – L'Harmattan 2020) pp 17–43.

[32] Gábor Mészáros, "How Misuse of Emergency Powers Dismantled the Rule of Law in Hungary" (2024) 57 Israel Law Review 288, 307.

mechanisms, the Hungarian Parliament has not provided a constitutional guarantee for its own continued functioning. Indeed, as Zoltán Szente has remarked, the Hungarian legislature has, in effect, committed "suicide".[33] Yet, as a "dead hand", it has continued to assist the Government by enacting legislation whenever needed.

During the consecutive special legal orders, the government engaged in broad and extensive legislative activity. The government's law-making was highly active,[34] even though the National Assembly was continuously at work throughout.[35]

2. *The unrestricted power of the government*

The pandemic created significant challenges for national governments, not only in managing the health crisis but also in maintaining democratic and constitutional processes.[36] Although extraordinary executive powers may be warranted in such emergencies, they inherently increase the risk of autocratic practices. This underscores the importance of institutional safeguards – vital defenders of democracy and the rule of law under normal circumstances – which become even more crucial in a state of emergency, where the potential for the abuse of power is greater.

The practice of governing by statutory force decree is particularly liable to occur in countries where there are inherent weaknesses in the rule of law. As evidenced by political science literature, autocrats are inclined to exploit crises as a rationale for implementing anti-democratic measures.[37] Historically, citizens tend to be more tolerant, and even supportive, of restrictive measures when they feel their security is threatened, especially during crises. Against this backdrop, the European Union launched rule of law investigations into the situation in Hungary (and Poland) several years ago to assess whether there has been a systematic erosion of rule of law standards.[38] Since then, various proceedings have been initiated within the EU framework to restore and uphold the rule of law in Hungary.[39] The question of parliamentary control over emergency decrees has been a topic of significant debate in the literature.[40]

The epidemic alert, furthermore, which was also declared by the aforementioned Government Decree 283/2020,[41] may last for a maximum of six months. However, the Government can extend it as often as it deems necessary, as it has full discretion to judge whether the declared conditions have been fulfilled. It is noteworthy that, at the same time

[33] Zoltán Szente, "A 2020. március 11-én kihirdetett veszélyhelyzet alkotmányossági problémái' ('The Constitutional Issues of the State of Danger Declared on 11 March 2020')" (2020) 61(3) Állam- és Jogtudomány 115–139.

[34] See eg, Csaba Győry and Nyasha Weinberg, "Emergency Powers in a Hybrid Regime: The Case of Hungary" (2020) 8 Theory and Practice of Legislation 329, 341.

[35] Zoltán Szente and Fruzsina Gárdos-Orosz, "Using Emergency Powers in Hungary: Against the Pandemic and/or Democracy?" in MC Kettemann and K Lachmayer (eds), *Pandemocracy in Europe: Power, Parliaments and People in Times of COVID-19* (London, Hart 2022) pp 155–78.

[36] Nóra Chronowski, "Democracy and Elections in the Visegrád Countries in the Shadow of the COVID-19 Pandemic and Beyond" (2023) 11 ArsBoni 4–13.

[37] Roger Eatwell and Matthew Goodwin, *National Populism: The Revolt Against Liberal Democracy* (London, Penguin 2018).

[38] Zoltán Szente, "The Myth of Populist Constitutionalism in Hungary and Poland: Populist or Authoritarian Constitutionalism?" (2023) 21 International Journal of Constitutional Law 127–155.

[39] László Detre, András Jakab, and Tamás Lukácsi, "Comparing Three Financial Conditionality Regimes and Their Application to Hungary: The Conditionality Regulation, the Recovery and Resilience Facility Regulation, and the Common Provisions Regulation" (Max Planck Institute for Comparative Public Law & International Law (MPIL) Research Paper No. 2023-23).

[40] Tímea Drinóczi and Agnieszka Bien Kacala, "COVID19 in Hungary and Poland: Extraordinary Situation and Illiberal Constitutionalism" (2020) 8 The Theory and Practice of Legislation 187–8.

[41] Government Decree No. 283/2020 (VI. 17.) on the Introduction of Epidemic Preparedness.

as the state of emergency was lifted, the Government introduced an epidemic alert that was to last for six months but, as previously mentioned, it was subsequently extended for a further six months, eventually until December 2022.

The Government formally ended the constitutional level state of danger when Act CIX of 2020 on Protection Against the Second Wave of the Coronavirus Epidemic expired; however, this had little impact, as a third state of emergency was declared the same day, a pattern that has continued in recent years.

Parliament promptly passed additional enabling acts, as it had before, effectively easing the Government's administrative processes. This legislation has permitted the reenactment of over a thousand emergency decrees[42] many without specific justification, including measures unrelated to the emergency, such as a special tax on hop-on-hop-off buses, certain wine production regulations, and restrictions on the right to strike in the sphere of public education.[43]

Following the introduction of a fourth state of danger due to the COVID-19 pandemic, the Government invoked the Tenth Amendment to the Fundamental Law, permitting the declaration of a state of emergency "to avert the consequences of an armed conflict or humanitarian disaster in a neighbouring country". This move not only validated numerous emergency decrees issued on the day the new state of danger was declared but also retroactively approved over thirty previously enacted decrees aimed at managing the pandemic. Some of these decrees had already been used to address the Ukrainian refugee situation, indicating that the Government had pre-emptively applied these measures before declaring the new state of danger, thereby utilising powers initially granted under the COVID-19 emergency framework.[44]

In sum, the government (mis)used the opportunity to be left uncontrolled by parliament and promulgated the constitutional and the statutory level special, emergency type legal rules without ultimate necessity and temporality just in order to minimise the obstacles and difficulties it faced in governing.

3. *The self-restricting Constitutional Court*

The Fundamental Law mandates that during a special legal order, the Constitutional Court's operations must remain unrestricted, with the Government ensuring its continuous functioning. This principle was reaffirmed by the Constitutional Court in March 2020, stating that the emergency heightened its members' responsibility. Throughout the pandemic, the Court's availability was maintained, allowing it to examine COVID-19-related cases, primarily submitted as constitutional complaints, along with a few legislative reviews and judicial requests. While the Court aimed to clarify its role in reviewing rights restrictions during the emergency, it ultimately upheld the constitutionality of all regulations, finding no constitutional violations.[45]

During the early state of danger jurisprudence, many petitions were dismissed on formal grounds, partly due to the Constitutional Court's limited authority under

[42] Fruzsina Gárdos-Orosz and Nóra Bán-Forgács, "Introduction – The (Non)Resilience of the Hungarian Legal System: From Populist Constitutionalism to a Parlament State of Danger" in F Gárdos-Orosz (ed), *The Resilience of the Hungarian Legal System since 2010: A Failed Resilience* (Cham, Springer 2024) pp 1–12.

[43] Zoltán Szente, "Emergency as a Pretext to Restrict Political Rights: The Hungarian Autocratic Regime at Work" in M Florczak-Wątor, F Gárdos-Orosz, J Malíř, and M Steuer (eds), *States of Emergency and Human Rights Protection. The Theory and Practice of the Visegrad Countries* (London, Routledge 2024) pp 187–99.

[44] Gárdos-Orosz and Bán-Forgács (n 31).

[45] Fruzsina Gárdos-Orosz, *Constitutional Justice Under Populism* (Alphen aan den Rijn, AK-Wolters Kluwer 2024) pp 143–178; Fruzsina Gárdos-Orosz, "The Concentration of Emergency Competencies during the COVID-19 Pandemic in Hungary: The Lack of Effective Control" (2024) 22(2) Lex Localis: Journal of Local Self Government 120–42.

Article 37(4) of the Fundamental Law, which prohibits it from reviewing norms related to the central budget. In Decision 3234/2020 (VII. 1.), the Court reviewed a provision that redirected motor vehicle tax revenue from local governments to the central budget's Epidemic Protection Fund. Petitioners, a quarter of the MPs, argued that this tax was a crucial local government resource, especially as they faced new pandemic-related responsibilities. However, the Court rejected the petition, citing its restricted competence in matters of public finance under Article 37(4). Article 54 (1) of the Fundamental Law gives an exemption during a special legal order from the general restriction rules related to the protection of fundamental rights[46]from the ordinary proportionality test. As to the constitutional complaints, very few were decided on the merits in 2020, and many were rejected without examining the merits. Only nine cases arrived in 2020, and many in 2021 and 2022, with hundreds on the same topics of obligatory vaccination or employment matters. In 2021 and 2022 most of these complaints were decided in merged procedures.

An emblematic case involved a constitutional complaint challenging new Criminal Code provisions on scaremongering (Article 337(2)), introduced in March 2020. The amendment increased penalties for scaremongering during a state of danger, such as the pandemic. Petitioners argued it disproportionately restricted free speech, allowing for arbitrary enforcement. The Constitutional Court upheld the provision, clarifying that it applies only to knowingly false or distorted facts communicated publicly in ways that hinder efforts at defence – not to critical opinions (Decision 15/2020 [VII. 8.]). Critics argue that rather than annulling the amendment, the Court effectively modified its interpretation to align with standards of free expression, thus acting as a "soft" legislator rather than a strict check on power.[47]

As to the restriction of political rights, the most emblematic decision is 23/2021. (VII. 13.) AB concerning the general ban on demonstrations.[48] This highly contested decision, featuring five separate opinions, applied the most deferential constitutional justification tests. The petitioners, who had organised a car-based protest during the state of danger's general ban on gatherings, complied with health regulations by staying in their cars, displaying banners, and honking to protest crisis measures. Despite this, police detained and fined them. The constitutional complaints were based on decisions from the Pest Central District Court.

In these cases, the ordinary court partially overturned the authorities' decisions, reducing the petitioners' fines. The petitioners argued that their protest, held in cars while observing social distancing, had lawfully exercised free expression. However, the Constitutional Court upheld the lower court's view that the event, classified as an unlawful assembly under the general ban, meant that honking and minor traffic violations were not covered under protected fundamental rights. The Court stated it could not assess the necessity of the assembly ban in relation to public health and dismissed the complaints. This deferential stance sparked debate within the Court, yet even under stricter tests, pandemic-related decrees were consistently upheld as constitutional.[49]

After the Ninth and the Tenth Amendment to the Fundamental Law two decisions of the Constitutional Court in 2024[50] have made significant attempts to use a stricter test than pure temporality examination in order to proceed towards reviewing necessity or even

[46] Decision No 3234/2020 (1 July 2020) of the Constitutional Court of Hungary.

[47] István Ambrus and Fruzsina Gárdos-Orosz, "Decision 15/2020. (VII.8.) AB – Fear-Mongering II" in Fruzsina Gárdos-Orosz and Kinga Zakariás (eds), *The Main Lines of the Jurisprudence of the Hungarian Constitutional Court: 30 Case Studies from the 30 Years of the Constitutional Court (1990–2020)* (Baden-Baden, Nomos 2022) pp 521–38.

[48] Szente (n 32) 187–99.

[49] Such as Decision No 27/2021 (5 November 2021) and Decision No 3537/2021 (22 December 2021) of the Constitutional Court of Hungary. See further examples in Gárdos-Orosz (n 30).

[50] Decision 3004/2024 (12 January 2024) and 9/2024 (30 April 2024) of the Constitutional Court of Hungary.

proportionality of the Government measures but these attempts are sporadic so far in the jurisprudence of the court.

Even if the measures introduced by the Government indeed restricted certain fundamental rights (such as access to information of public interest, the right of assembly, or the right to undertakings) or limited the separation of powers (eg, through abrogative government decrees or the limitation of the rights of local authorities), they did not meet consequent opposition from the Constitutional Court, either because of the absence of appropriate motions or because of the Court's self-restricting practice. The Court avoided making negative decisions on the merits every time issues were sensitive and instead issued a so-called constitutional requirement, which is a soft vehicle intended to advise the legislator or the courts. It is also true that the number and relevance of the petitions were not very high. This period of constitutional jurisprudence has contributed neither to the limitation of the Government's power nor to a deeper understanding of the constitutional scope of the Hungarian state of danger limitations.

IV. Conclusion – Constitutional risk management

In Hungary, the **constitutional risk** associated with the **state of danger** arises primarily from the potential abuse of executive power, the erosion of democratic checks and balances, and the uncertainty of fundamental rights. This risk is rooted in the **expanded and indefinite use** of the state of danger by the government, which has been a significant concern since its initial declaration in response to the COVID-19 pandemic in 2020 and its subsequent use in relation to other crises, such as the Russo-Ukrainian war. The risk management issue stems from the **broad discretionary powers** granted to the executive without sufficient oversight from Parliament, the judiciary, or other state institutions.

The concentration of power in the executive branch leads to the government having sweeping powers to issue decrees that may override existing laws during a state of danger, and which are, in many cases, not related to the danger and not officially justified by the government. This poses the risk of bypassing regular legislative procedures and weakening the role of Parliament. The state of danger was originally designed to address temporary crises; it has become, however, almost permanent in Hungary due to successive declarations and amendments of the Fundamental Law (eg, the Ninth and Tenth Amendments).[51] This creates a **risk of normalising emergency powers**, making it difficult to revert to a fully democratic governance model.

The **Constitutional Court** may have limited scope for reviewing emergency decrees during a state of danger, as the government is granted broad interpretative authority. This weakens judicial checks on the executive and diminishes judicial oversight.

Emergency powers allow the government to limit fundamental rights (eg, the freedom of assembly, privacy, and property rights) under the justification of managing crises. Without stringent safeguards, this leads to disproportionate or unjustified restrictions on certain rights.

The definition of what constitutes a "danger" has been expanded, particularly with the Ninth and Tenth Amendments to the Fundamental Law, the latter of which allows for a state of danger to be imposed in response to humanitarian crises or war in neighbouring countries. This **vagueness** creates the risk that a state of danger may be invoked in a broad array of situations, not limited to genuine emergencies.

The **constitutional risk in Hungary's state of danger** lies in the **concentration of unchecked power** in the executive leading to potential abuses and undermining

[51] See eg, Gábor Mészáros, "Rule Without Law in Hungary: The Decade of Abusive Permanent State of Exception" (2022) EUI Working Paper 13.

democratic institutions and fundamental rights.[52] **Effective risk management** would involve enhancing oversight, defining clearer criteria for invoking emergency powers, and ensuring that emergency measures are time-limited, proportionate, and subject to judicial review.

[52] See in wider context Szente (n 27) 127–55.

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