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ARTICLE

How Misuse of Emergency Powers Dismantled the Rule of Law in Hungary

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Abstract

The Hungarian government has been utilising emergencies to expand its political power instead of upholding constitutionalism and the rule of law. This strategy has given the government almost unlimited power to enact emergency decrees, even when the state and the population are not in immediate danger. The ninth amendment to the Fundamental Law of Hungary has raised concerns about the government's use of emergency powers, granting the executive branch even more authority during exceptional times by allowing the government to prolong the 'state of exception' indefinitely and maintain pandemic-related emergency measures to respond to potential consequences of the war in Ukraine. As a result, the executive body has been able to exert significant political control without proper parliamentary oversight.

Keywords: Hungary; permanent state of emergency; rule of law backsliding; war in Ukraine

1. Introduction

There have been many characterisations of the Hungarian regime recently, all driven by the concern that the country's commitment to liberal democracy, the rule of law and constitutionalism has changed (and is still changing) in a negative direction.[1] It is far beyond the scope of this article to present all

[1] Recently, Hungarian constitutional democracy has been deteriorating significantly, raising concerns worldwide, especially in the European Union (EU), about Hungary's commitment to

of these (legal, political, sociological, and so on) theories, but throughout the history of autocratic regimes, abusing emergency powers stands out as a common denominator.[2] The government began to abuse such powers in 2015 by passing emergency measures as seemingly ordinary, quotidian legislation;[3] this process ultimately culminated in a permanent state of exception by 2023.[4]

As I will show in this article, the misuse of emergency powers not only dismantled the rule of law in Hungary but also downgraded the importance of the

democracy and the rule of law. Because this decay started in a constitutional democracy, the process has been variously called 'democratic decay', 'illiberalisation' or 'authoritarianisation'. Diverse descriptions of the current Hungarian regime are also in circulation, ranging from 'illiberalism' and 'populism' to various types of authoritarianism (modern, electoral or competitive) and a form of hybrid regime. The current state of the Hungarian constitutional system is described in the literature as 'modern authoritarian', '*democradura*' and 'illiberal constitutionalism'. The political system has been recently classified as a hybrid regime, or even as an abusive neo-militant democracy; see Tom Gerald Daly, 'Democratic Decay: Conceptualising an Emerging Research Field' (2019) 11 *Hague Journal on the Rule of Law* 9–36; Tímea Drinóczi and Agnieszka Bień-Kacała, 'Illiberal Constitutionalism: The Case of Hungary and Poland' (2019) 20 *German Law Journal* 1140–66; Staffan I Lindberg and Anna Lührmann, 'A Third Wave of Autocratization Is Here: What Is New About It?' (2019) 26 *Democratization* 1095–113; Gábor Halmai, 'The Rise and Fall of Constitutionalism in Hungary' in Paul Blokker (ed), *Constitutional Acceleration within the European Union and Beyond* (Routledge 2018) 217–33; Arch Puddington, 'Breaking Down Democracy: Goals, Strategies, and Methods of Modern Authoritarians', Freedom House, June 2017, https://freedomhouse.org/sites/default/files/June2017_FH_Report_Breaking_Down_Democracy.pdf; Gábor Attila Tóth, 'Authoritarianism' (2017) *Max Planck Encyclopedia of Comparative Constitutional Law* 14; András Bozóki and Dániel Hegedűs, 'An Externally Constrained Hybrid Regime: Hungary in the European Union' (2018) 25 *Democratization* 1173–89; Gábor Mészáros and Tímea Drinóczy, 'Hungary: An Abusive Neo-Militant Democracy' in Joanna Rak and Roman Backer (eds), *European Neo-militant Democracies in Post-Communist Member States of the European Union* (Routledge 2022) 98–114.

[2] The case of Hungary provides a prime example of how a non-democratic state can appear to adhere to the formalities of the rule of law, while in reality it is beginning a transition towards rule *by* law. Through a parliamentary supermajority, legal formalities have been implemented into the constitution. However, this does not equate to the substantive requirements of constitutionalism and the rule of law. When the rule of law no longer serves to protect individuals from executive or parliamentary overreach, it may be recognised as formally legal but not necessarily in line with rule of law principles. In Hungary, the law now serves the government's interests rather than the protection of citizens' rights. On the notion of rule *by* law and the importance of formal legality as an authoritarian distortion of the rule of law see Brian Z Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge University Press 2004) 92–101.

[3] For a detailed analysis of this issue see Gábor Mészáros, 'Abusive Neo-Militant Democracy and the Case of the State of Migration Emergency in Hungary' in Éva Gedő and Éva Szénási (eds), *Populism and Migration* (L'Harmattan 2022) 161.

[4] I use this phenomenon as an offset to the state of emergency in its 'ideal' form, which can be defined as a 'crisis identified and labelled by a state to be of such magnitude that it is deemed to cross a threat severity threshold, necessitating urgent, exceptional, and, consequently, temporary actions by the state not permissible when normal conditions exist'. I accept that this definition should be used under laboratory conditions, meaning that normalcy can be separated from emergency. However, the aftermath of 11 September 2001 has led to arguments that this dichotomy is no longer possible. Therefore, we should discuss a permanent emergency where the so-called exception has become the norm and temporary powers endure: Alan Greene, *Permanent States of Emergency and the Rule of Law: Constitutions in an Age of Crisis* (Hart 2018) 33. On the emergency/normalcy dichotomy: Oren Gross, 'Chaos and Rules: Should Responses to Violent Crises always be Constitutional?' (2003) 112 *Yale Law Journal* 1011, 1089–95.

emergency paradigm, as the primary function of the latter is to restore the legal order that existed before the declaration of the state of emergency.[5] After the 'autocratic revolution'[6] the Hungarian government pursued a combination of emergency measures and rule *by* law. As such, the law was manipulated into an instrument of government action.[7] This approach resulted in a situation where – rather than uphold the rule of law and protect the rights of individuals – the constitution serves the government's interests.

The centrality of the rule of law to the functioning of healthy constitutional democracies is evident.[8] Many scholars have tried to define the rule of law. One of the most remarkable explanations is that by Krygier, who first posited whether it is necessary for the rule of law that the law *rules*;[9] he dubbed this notion the 'force of law'. This 'force of law' understanding of the rule of law parallels arguments about the importance of the universal application of the law – the 'supremacy of the law' – and is a further development of the principle of equality before the law. The direct link between the rule of law and the supremacy of law could mean that while the rule of law needs formal provisions, the mere existence and use of the law by themselves are not sufficient.[10] For my analysis, I assume that the rule of law also manifests equality before the law. It may be used as a formula for expressing that the law of the constitution is a consequence of rather than the source of individual rights.[11] According to

[5] To avoid the problem of the oxymoronic state of the permanent emergency paradigm, some theorists avoided the normalcy/emergency dichotomy and focused on alternative models of crisis accommodation. These theories try to protect the constitutional order while, at the same time, allowing the states to respond to crises accordingly: Greene (n 4) 33–34, 161–95; Gross (n 4) 1096; Giorgio Agamben, *State of Exception* (tr Kevin Attell, University of Chicago Press 2005) 4. In addition, some scholars attempted to reject the 'exceptionalist' paradigm and preferred unlimited judicial review power even during exceptional times, which – according to these theories – guarantees the preservation of the rule of law and constitutionalism: Nomi Claire Lazar, *States of Emergency in Liberal Democracies* (Cambridge University Press 2009) 136–62; David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (Cambridge University Press 2006).

[6] Kim Lane Scheppele, 'Understanding Hungary's Constitutional Revolution' in Armin von Bogdandy and Pal Sonnevend (eds), *Constitutional Crisis in the European Constitutional Area* (Hart 2015) 113.

[7] Tamanaha (n 2) 92–93.

[8] Martin Krygier, 'Rule of Law' in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012) 233; Jeremy Waldron, 'The Concept and the Rule of Law' (2008) 43 *Georgia Law Review* 1, 5.

[9] Krygier (n 8) 233.

[10] ibid 234.

[11] Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan 1915) 179, 183–84, 189, 191, 198–99. Dicey understood the rule of law as a synonym for the supremacy of law and stated that it is the characteristic of the constitution. He asserted that this means at least three distinct conceptions. First, no man is punishable 'except for a distinct breach of law established in the ordinary legal manner before the ordinary Courts of the land'. This idea, according to Dicey, is contrasted with all of those governments based on a person's arbitrary power. The second aspect of the rule of law is legal equity, which, as Dicey described, means that no person is above the law. Still, we should also accept that every person (whatever her rank or condition) is 'subject to the ordinary law … and amenable to the jurisdiction of the ordinary tribunals'. Finally, the third concept is related to the constitution, as the rule of law pervades it in various ways. Still, most importantly, it determines the general principles of the constitution, such as the right to liberty or the

Hayek, equality before the law leads to the conclusion that 'all men should also have the same share in making the law'.[12] Legal certainty is a crucial aspect of the rule of law; legal certainty connotes the idea that laws should not be easily amended, thus fostering confidence in the legal system and promoting freedom. In short, laws are a necessary precondition for ensuring that individuals can rely on a stable and predictable legal framework.

Although during the twentieth century the rule of law emerged as a modern western concept and became part of the European constitutional traditions of most of the EU member states,[13] the role of the concept in post-communist member states was slightly different. After 1989, in the Central and Eastern European area, the rule of law had a specific importance compared with the evolution of the rule of law in western countries. The rule of law here became a marker of the states' democratisation and constitutional development, and it soon emerged as a guideline to measure the state of constitutionalism and democracy.[14] Despite efforts to democratise Hungary and promote the rule of law, legalism has persisted in the country. This presence is likely to be more significant than in any other post-communist nation.[15] At the constitutional level[16] the concept the of rule of law has been firmly established, but

right to a private person. This final concept emphasises the importance of the constitutional guarantees of individual rights. It points out that the rule of law is not simply a collection of formal rules but involves substantive materials as constitutional guarantees. In accordance with the idea of constitutionalism, the rule of law (or supremacy of the law), together with parliamentary sovereignty, are the two most important ideas that determine the English constitution, as Dicey stated that the 'sovereignty of Parliament and the supremacy of the law of the land – the two principles which pervade the whole of the English constitution – may appear to stand in opposition to each other, or to be at best only counterbalancing forces. But this appearance is delusive; the sovereignty of Parliament, as contrasted with other forms of sovereign power, favours the supremacy of the law, whilst the predominance of rigid legality ... increases the authority, of Parliamentary sovereignty': Dicey, ibid 268.

[12] Friedrich A Hayek, *The Constitution of Liberty* (Routledge 1960) 103.

[13] Martin Belov, 'Introduction' in Martin Belov (ed), *Rule of Law in Crisis: Constitutionalism in a State of Flux* (Routledge 2023) 2.

[14] ibid 2.

[15] Antal Örkény and 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: Problems and Prospects in East-Central Europe* (Routledge 1999) 55.

[16] According to Örkény and Scheppele the rule of law (more precisely the formal legal commitment in a society) in the Hungarian context can be distinguished at three levels at least: (i) constitutional, (ii) state-citizen, and (iii) citizen-citizen. At the constitutional level, the minimum requirement, in accordance with the rule of law, is that the state institutions operate within the framework of the formal law: the Constitution in a constitutional democracy. In this understanding, the Constitution gives power to various state institutions, which must respect the relevant provisions and obey the rules of the law. So, the branches of state power must stay within their constitutionally allocated powers. As for state-citizen interactions, the rule of law does not simply require that the state must act in accordance with the Constitution (law), but must do so in a procedurally accountable manner with its citizens. This allows citizens to know how the state will treat them and also ensures the possible channels for challenging decisions made by the branches of state power. Finally, citizen-citizen interactions would imply that citizens treat each other with respect; this mutual acceptance of the law is necessary, but, in each society, there are situations between citizens that should be resolved. Therefore, citizen-citizen interactions also require the

the Hungarian government erroneously equates it with formal legality. This fallacy could be the driving force behind its actions, including amending the Fundamental Law and the creation of new 'legal' emergencies, which ostensibly allow the government to exercise emergency powers whenever it deems necessary.[17] However, we must acknowledge that the misuse of emergency powers poses a threat to the rule of law, even if formal legality at the constitutional level appears to be intact.

The central theme of this article is the perpetual state of emergency in the Hungarian constitutional framework and its implications for the constitutional doctrine of the nation. Of particular concern is the misuse of this state of emergency, which has resulted in a significant erosion of the rule of law and democratic norms. I will consider whether the notion of unlimited emergency power is consistent with the rule of law, in general, and the Hungarian Fundamental Law, in particular. Contrary to the Hungarian government's view, I will argue that the pandemic-related emergency powers – in effect from 2020 until 2022 – were used contrary to the idea of the constitutional state of emergency and especially to the rule of law because the rule of law presupposes the absence of broad discretionary authority of rulers, and they must govern by the established law instead of making their own. It should also be mentioned that, according to the emergency paradigm, governments (or those who receive the temporary but substantially almost unlimited constitutional emergency powers) can use legislative or constitutional authority to address a real threat effectively. In accordance with the rule of law, however, it is not allowed to use this 'dictatorial' power permanently, or to abuse exceptional situations as reasons for implementing new emergency powers into the legal order and realising the emergency powers within the normal legal order.

2. From a normalcy/emergency dichotomy to normalising emergencies

2.1. Emergency powers without a constitutional state of emergency: The 'state of migration emergency'

The (mis)use of emergency powers started with a countrywide campaign against mass migration. In 2015, the Hungarian government declared a state

ability for individuals to turn to the courts for a fair resolution of their grievances: Örkény and Scheppele, ibid 58, 65, 70.

[17] The Hungarian government's two-thirds majority in the Parliament amended the Fundamental Law in order to ensure formal authorisation to use emergency powers to respond to threats such as terrorism or the war in Ukraine. Formally these amendments were based on significant crisis situations but these constitutional authorisations were also used to serve the political aims of the government rather than respond to the real threat. On the concerns of the amendment to handle possible terrorist attacks see Gábor Mészáros, 'The Hungarian Response to Terrorism: Blank Check for the Government' (2016) 154 *Studia Iuridica Auctoritate Universitas Pecs Publicata* 129. The ninth and tenth amendments of the Fundamental Law are discussed briefly later in this article (Sections 2.3 and 2.4).

of migration emergency in response to the crisis.[18] This allowed the government to use emergency restrictions by bypassing the 'state of emergency' chapter of the Fundamental Law ('Special Legal Orders').[19] It should be noted that this chapter includes various constitutional guarantees,[20] but under a state of migration emergency these restrictions on emergency powers are ineffective. Although regular constitutional checks by the Hungarian Constitutional Court would have prevailed, the already packed Court is no longer an effective judicial body in the country.[21] Previously, the government's two-thirds majority amended the relevant act on migration[22] by declaring a 'state of migration emergency' to address the migration crisis. The government has extended this so-called emergency at six-month intervals, but the emergency has never become a 'state of emergency' under the framework of the Fundamental Law's relevant 'Special Legal Orders' chapter. As a result of the amendment to the Asylum Act, the government can declare a state of migration emergency by way of decree, on the recommendation of the Interior Minister, upon the initiative of the national chief of police and the head of the refugee authority, if the conditions described in the Law are met.[23]

[18] Gábor Mészáros, 'Egy menekültcsomag veszélyei: Mit is jelent valójában a tömeges bevándorlás okozta válsághelyzet? [The Dangers of an Asylum Law Package: What Does the State of Migration Emergency Mean in Reality?]' (2015) 19 *Fundamentum* 107–19.

[19] The Special Legal Orders chapter of the Fundamental Law following the ninth amendment contains three special legal orders: the state of war, state of emergency, and the state of danger. The regulation includes general provisions on emergency powers; guarantees; the roles of the government, president and Parliament; as well as the rules relating to restrictions of personal rights under exceptional situations (Articles 48–56 of the Fundamental Law). English translation of the Fundamental Law can be found on the homepage of the Hungarian Parliament: https://www.parlament.hu/documents/125505/138409/Fundamental+law/73811993-c377-428d-9808-ee03d6fb8178.

[20] Restrictions of emergency powers, such as deadlines or the requirement that the application of the Fundamental Law may not be suspended according to its Article 52. English translation of the Fundamental Law can be found on the homepage of the Hungarian Parliament (n 19).

[21] See Nóra Chronowski and others, 'The Hungarian Constitutional Court and the Abusive Constitutionalism', 2022, MTA Law Working Papers No 2022-05, July 2022, https://jog.tk.hu/mtalwp/the-hungarian-constitutional-court-and-the-abusive-constitutionalism.

[22] Act CXL of 2015 and Act CXLII of 2015. The two Acts amended Act LXXX of 2007 on Asylum by creating the rules of the 'State of Migration Emergency' (s 80/A), the 'Temporary Appropriation Applicable during a State of Mass Migration Crisis' (s 80/B–80/C), and 'Other Regulatory Actions Applicable during a State of Mass Migration Crisis' (s 80/D–80/G). The English translations of the Act used in this article are the translations of Wolters Kluwer Új Jogtár, https://uj.jogtar.hu/#doc/db/62/id/A0700080.TV/ts/20230101.

[23] According to the Asylum Act, art 80/A, the state of migration emergency may be declared:

(a) if the number of asylum seekers entering Hungary exceeds:

(aa) 500 a day on the monthly average,
(ab) 750 a day on the average of two consecutive weeks, or
(ac) 800 a day on a weekly average;

(b) if the number of persons in the transit zones of Hungary, other than the persons participating in providing care for the aliens, exceeds:

(ba) 1,000 a day on the monthly average,
(bb) 1,500 a day on the average of two consecutive weeks, or

According to the applicable provisions, the conditions underlying the state of migration emergency are to be continually monitored by the national chief of police and the head of the refugee authority. If the conditions for declaring the 'state of migration emergency' no longer apply, they shall request the Interior Minister to make a recommendation to the government to abolish the decree. The Minister shall present the proposal to the government, and the government must address the issue without delay and annul the government decree if the conditions for declaring the emergency no longer apply. The government decree will remain in force for no more than six months, except if the government extends the effect of the order, which can be done only if the conditions for declaring the 'state of migration emergency' continue to apply at the time of an extension.[24] Although the conditions underlying this special emergency regime have not applied for years, the Hungarian government has renewed it at six-month intervals to the present day;[25] not only is this problematic at the constitutional level, but such action contradicts the Act itself.

Under this emergency regime – compared with a non-emergency asylum rule – asylum applications must be submitted in person before the refugee authority, exclusively in the transit zone. The person seeking asylum is not entitled to reside or to receive authorisation to reside in the territory of Hungary. The refugee authority shall designate the transit zone as the compulsory place of confinement for the person seeking asylum if the non-contestable

(bc) 1,600 a day on a weekly average;

(c) apart from the cases under paragraphs (a) and (b), where any migration-related situation develops:

(ca) that represents a direct threat to the protection of Hungary's border line that constitutes an external border according to Point 2 of Article 2 of the Schengen Borders Code,
(cb) inside a 60-metre zone from Hungary's border line that constitutes an external border according to Point 2 of Article 2 of the Schengen Borders Code or any frontier sign, or in any Hungarian municipality that represents a direct threat to public security, public safety, or public health in that community, in particular, if a riot or similar disorder breaks out in the community or in a reception centre located in the immediate vicinity of that community, or in any other facility for the accommodation of aliens, or if any violent acts are committed.

[24] Asylum Act, art 80/A(3), contains the following: The conditions underlying the state of migration emergency shall be continually monitored by the national chief of police and the head of the refugee authority, and if the conditions for declaring the state of migration emergency no longer apply, they shall request the Minister to make a recommendation to the government to abolish the government decree referred to in subsection 2. The Minister shall forthwith present the recommendation to the government, and the government shall address the issue without delay and – if the conditions for declaring the state of migration emergency no longer apply – shall abolish the government decree referred to in subsection 2. Whereas subsection 2 regulates the procedural backgrounds of the declaration of a state of migration emergency as follows: The state of mass migration crisis may be declared by the government, by way of decree, by recommendation of the Minister upon the initiative of the national chief of police and the head of the refugee authority. The state of migration emergency may be declared to cover the entire territory of Hungary, or specific parts of Hungary.

[25] Mészáros (n 3) 171.

decision or the ruling for transfer under the Dublin process becomes operative. An accelerated procedure is used, and the deadline for challenging the findings of the refugee authorities is shorter (three days instead of eight). Although the mentioned rules are mainly procedural issues, other essential restrictions could be effective under this emergency regime. For example, the police can stop and deport foreigners from Hungary who are staying unlawfully if captured within eight kilometres of the border. During a 'state of migration emergency' this rule can be used without limitation.[26] It even ensures that the armed forces can be deployed to maintain the security of the border with the possibility of using weapons.

2.2. The emergence of 'rule by decree' and the importance of the Covid-19 pandemic

In the wake of the initial outbreaks of the novel coronavirus in 2020, the government implemented a state of danger (*veszélyhelyzet*) by invoking the Fundamental Law's emergency chapter; it also authorised Enabling Acts, granting the government broad authority to manage the Covid-19 pandemic.[27] The unconstitutional situation related to the Enabling Acts seemed to change when the government terminated the state of danger during the pandemic outbreak in June 2020. However, the Parliament simultaneously accepted two laws: one rescinded the parliamentary confirmation of the state of danger; the other amended the 'state of medical emergency' provisions in the Health Act.[28] The new regulation of 'state of medical emergency' ('*egészségügyi válsághelyzet*'), like the previously mentioned 'state of migration emergency', was included in the Hungarian legal system as an ordinary law without the presence of constitutional scaffolding to guarantee the control of emergency powers, which would be applied when the emergency powers under the Fundamental Law were in effect.[29] Furthermore, the newly amended provision of the Act provided that the operation of all institutions, programmes or activities that could promote the spread of the epidemic might be suspended, giving the government the power to use special epidemic measures.[30] On 17 June 2020, a few days after the first state of danger was terminated, the government declared this new so-called 'emergency'.

On 4 November 2020, when the second wave of the pandemic spread through Hungary, the government declared the second state of danger, which was effective until 8 February 2021;[31] the 'state of medical emergency'

[26] Act LXXXIX of 2007 on State Boundary, art 5 s 1B.

[27] For a more detailed analysis of the constitutional concerns of the state of danger and especially the first Enabling Act during the first wave of the pandemic see Gábor Mészáros, 'Carl Schmitt in Hungary: Constitutional Crisis in the Shadow of COVID-19' (2021) 46 *Review of Central and East European Law* 88–90.

[28] Gábor Halmai, Gábor Mészáros and Kim Lane Scheppele, 'From Emergency to Disaster: How Hungary's Second Pandemic Emergency Will Further Destroy the Rule of Law,' *Verfassungsblog*, 30 May 2020, para 4, https://verfassungsblog.de/from-emergency-to-disaster.

[29] ibid paras 5–6.

[30] ibid para 14.

[31] Viktor Z Kazai, 'Power Grab in Times of Emergency', *Verfassungsblog*, 12 November 2020, para 1, https://verfassungsblog.de/power-grab-in-times-of-emergency.

was still in effect and, soon after (on 11 November 2020), a new Enabling Act[32] was also passed.[33] This again gave the government the power to rule by decree[34] without further parliamentary oversight. However, this Act stated that the government's extraordinary powers were limited to 90 days. This was in response to international criticism of the first Act in that the Act gave almost unlimited power to the government for an undefined period.[35] According to the former paragraph (3) of Article 53 of the Fundamental Law – effective in 2020 – a state of danger gave the government the power to issue emergency decrees[36] that could be in effect for a maximum of 15 days, unless each decree was renewed explicitly by the Parliament. So, in November 2020, a two-thirds majority of the Parliament gave its blanket endorsement to any future decree that the government issued for 90 days without requiring parliamentary approval.[37] Finally, the Parliament also lacked authority to prolong the state of danger itself. However, according to the former text of paragraph 3 of Article 53 of the Fundamental Law, the Parliament might authorise an extension of the emergency decree(s) instead of the declaration of the state of danger itself. Upon the expiration of the 90 days, the government declared a state of danger again (for the third time within one year)[38] on 8 February 2021, but this 'new' state of danger simply renewed the restrictions of the former decrees.[39] Shortly after, the Parliament accepted a new (Enabling) Act,[40] which – like the previous pandemic-related emergencies – gave almost unlimited power to the government to rule by emergency decree until 22 May 2021. Before the end of the 90-day effect of the law, on 19 May 2021 the Parliament accepted an amendment to this Act which again pushed back the sunset clause of the original Act. According to the modification, the emergency measures were to remain in force until September 2021.

[32] Act CIX of 2020 on Protecting against the Second Wave of the Global Coronavirus Pandemic.

[33] Kazai (n 31) para 1.

[34] In accordance with the Special Legal Order regulations outlined in the Fundamental Law, the government is granted the authority to issue emergency decrees during times of peril or other exceptional circumstances. These decrees allow for the suspension of certain laws or deviations from legal provisions, in addition to other extraordinary measures. It is worth noting that emergency decrees are formally identical to ordinary decrees, with no discernible differences in their titles, names or numbers. The only discrepancy between the two is found at the beginning of the text, where emergency decrees explicitly state the government's authorisation to suspend or deviate from laws based on the Special Legal Orders chapter of the Fundamental Law. English translation of the Fundamental Law can be found on the homepage of the Hungarian Parliament (n 19).

[35] Gábor Halmai, Gábor Mészáros and Kim Lane Scheppele, 'So it Goes – Part I', *Verfassungsblog*, 19 November 2020, para 8, https://verfassungsblog.de/so-it-goes-part-i.

[36] According to the relevant rules of Article 53 of the Fundamental Law, under the framework of the already declared 'state of danger', which is also declared by government decree, the emergency measures can be introduced by the government through emergency decrees, but these latter decrees are different from the one that issued the state of danger itself.

[37] Halmai, Mészáros and Scheppele (n 35) paras 8–9.

[38] Hungarian Government Decree 27/2021 (I. 29).

[39] Hungarian Government Decree 478/2020 (XI. 03).

[40] Act I of 2021 on Protecting against the Global Coronavirus Pandemic.

Despite the state of danger being prolonged for more than three months, the government dissolved nearly all emergency restrictions during the summer of 2021.[41] On the Kossuth Radio programme *Good Morning Hungary* on 21 May 2021, Prime Minister Viktor Orbán anticipated that after 5 million people were vaccinated many restrictions would be lifted, including the obligatory, universal outdoor mask-wearing restrictions and the curfew.[42] The Orbán government amended the sunset clause of the latest Enabling Act on 30 September 2021. This amendment extended the duration of the Act itself, along with all the emergency restrictions already declared, until 1 January 2022. Additionally, the state of danger was further prolonged until the summer. It is important to note that despite the current 'state of medical emergency', these actions were taken within the legal framework of the Enabling Act and its provisions.[43] Although the pandemic-related state of danger was still in effect during the summer, preventive measures, such as the universal mask-wearing restrictions, were introduced only in mid-November 2021, when the fourth wave was already spreading through the population and the mortality rate started to reach the same numbers as had been seen in March.[44] Not to mention that before the autumn, Government Decree No 457/2021. (VII. 3.) made explicit exemptions from emergency restrictions (most notably from the limitation of the right to assembly) to legalise various mass events such as the fireworks and commemorations for the founding of the state, the 52nd International Eucharistic Congress in Budapest, the FEI Driving European Championship for four-in-hand, or One with Nature (the World of Hunting and Nature Exhibition) which, according to government sources, was attended by 616,000 people.[45]

Until the Parliament amended the Fundamental Law to ensure the possibility of declaring a state of danger to respond to a humanitarian catastrophe or war in a neighbouring country, it became the practice of the government, with its two-thirds majority in the Parliament, to amend and therefore extend the effect of the latest Enabling Act initially by three but later by five months. This

[41] '4,790,996 People Have So Far Been Vaccinated Against COVID-19 in Hungary', *About Hungary*, 19 May 2021, https://abouthungary.hu/news-in-brief/4-790-996-people-have-so-far-been-vaccinated-against-covid-19-in-hungary; '4,898,866 People Have So Far Been Vaccinated Against COVID-19 in Hungary', *About Hungary*, 21 May 2021, https://abouthungary.hu/news-in-brief/4-898-866-people-have-so-far-been-vaccinated-against-covid-19-in-hungary.

[42] Hungary Today, 'Orbán Announces Many Restrictions To Be Lifted', *MTI*, 21 May 2021, https://hungarytoday.hu/orban-restrictions-lifted-hungary-coronavirus-5-million-vaccinated.

[43] The sunset clause in the third Enabling Act had been amended three times by three different Acts: Act XL of 2021 on 22 May 2021, Act CII of 2021 on 30 September 2021, and Articles 84–86 of Act CXXX of 2021 on 1 January 2022. As a result, the rule by decree regime was effective until 1 June 2022.

[44] Although the share of the fully vaccinated population reached 60 per cent, by mid-November 2021 the daily infection cases were getting close to the peak of the third wave of the pandemic: Eszter Zalan, 'Central Europe Struggles with New Covid-19 Wave', *EU Observer*, 18 November 2021, https://euobserver.com/coronavirus/153548.

[45] One with Nature, 'The Series of Programs Has Attracted a Total of Over One and a Half Million Visitors', 25 October 2021, https://onewithnature2021.org/en/news/the-series-of-programs-has-attracted-a-total-of-over-one-and-a-half-million-visitors.

would also mean that the government gained free reign to rule by decree without the obligation to declare a state of danger repeatedly. The authoritarian government relied heavily on emergency decrees to exert its control, even in situations unrelated to the pandemic. For instance, it employed this tactic to enforce caps on food and fuel prices, extending their reach beyond what is legally permissible.[46] It is worth noting that the constitutional basis for maintaining the state of emergency was the global Covid-19 pandemic, not any underlying economic issues.

After the start of the war in Ukraine and the incremental lifting of pandemic-related restrictions worldwide, the government found a further opportunity to prolong the practice of rule by decree. Before that, however, in December 2020, in the midst of the pandemic, while the population was preparing for an exceptional holiday period burdened with restrictions, the Hungarian Parliament adopted the ninth amendment to the Fundamental Law by the government's supermajority.[47]

2.3. Amending the Constitution in the middle of the pandemic

The situation was peculiar because the chapter in the Fundamental Law on 'Special Legal Orders' was effective at that time as a result of the state of danger, so a retrospective rewriting of the chapter was possible only with a later date for entry into force. The subject of the amendment is not surprising; in recent years, it had become a regular practice for the government to use a crisis for political ends in some form. This is how the state of migration or medical emergency, which uses the former legal regime as an analogy, is introduced into the ordinary legal order. By the end of 2020 – when the number of those infected with the coronavirus reached and, in some cases, exceeded 5,000 per day in the country[48] – the government, by making use of the state of danger,[49] had laid the foundations of permanent rule by decree.[50] However, by (ab)using its two-thirds majority, the supermajority had rewritten the rules of the state of emergency chapter of the Fundamental Law.

[46] Gábor Mészáros, 'Never-Ending Exception, The Ukraine War Perpetuates Hungary's Government by Decree', *Verfassungsblog*, 10 May 2022, para 4, https://verfassungsblog.de/never-ending-exception.

[47] Gábor Mészáros, 'Exceptional Governmental Measures without Constitutional Restraints,' *Hungarian Helsinki Committee*, 14 November 2022, 1, https://helsinki.hu/en/wp-content/uploads/sites/2/2023/01/Meszaros_special_legal_order_02112022.pdf.

[48] Daily data in this regard can be retrieved at Worldometer, 'Hungary', https://www.worldometers.info/coronavirus/country/hungary.

[49] On the concerns related to ordering and maintaining the state of danger see Zoltán Szente, 'A 2020. Március 11-én kihirdetett veszélyhelyzet alkotmányossági problémái [The Constitutional Problems of the State of Danger Declared on 11 March 2020]', MTA Law Working Papers No 2020-09, https://jog.tk.hu/mtalwp/a-2020-marcius-11-en-kihirdetett-veszelyhelyzet-alkotmanyossagi-problemai; Gábor Mészáros, 'Indokolt-e különleges jogrend koronavírus idején – Avagy a 40/2020. (III. 11.) Korm. rendelettel összefüggö alkotmányjogi kérdésekröl [Is Special Legal Order Justified in the Time of the Coronavirus – About the Constitutional Law Questions Related to Government Decree 40/2020. (III. 11.)]' (2019) 23 *Fundamentum* 63–72.

[50] Mészáros (n 46) para 3.

To assess the reasons for the new regulation (which entered into force earlier, on 1 November 2022, instead of the initially planned date of 1 July 2023, because of the adoption of the Tenth Amendment to the Fundamental Law on 24 May 2022[51]), it is essential to reflect on the public law situation prior to the amendment. As mentioned earlier, the Parliament adopted the Ninth Amendment to the Fundamental Law at the end of December 2020, when the pandemic was heavily affecting the country. Yet what could be the reasons behind a government that considers the country to be a constitutional democracy transforming the special legal order rules that are currently prioritised amid a global crisis? There are two possible explanations – and, of course, the two may be linked. On the one hand, it is essential to underline that the application of emergency regimes – provided that the Constitution contains such rules – is not, by definition, part of normal day-to-day governing (if it were to become that, it would already be a major sign of an autocratic transition, as was the case of the Weimar Republic). Therefore, primarily when an emergency regime is enacted for the first time to address a real crisis, it is natural that shortcomings may arise which could not have been foreseen during the codification process. Of course, it can and should be disputed whether a practical anomaly or dysfunction arising from a constitutional rule requires a constitutional amendment. On the other hand, it is also possible that this practical experience opens up new possibilities for an autocratising regime, which seeks to assert its extraordinary powers through regulatory actions, based on 'autocratic legalism'.[52] As I will show below, I believe both scenarios can be considered in the context of the Ninth Amendment to the Fundamental Law.

According to the general explanatory memorandum for this amendment, the new regulation (reform):[53]

> [R]ealises the reform of the constitutional regulation of the special legal order, clarifying the constitutional obligations related to defence and security, the related rights of the Parliament through changes in the forms of special legal order, the national referendum subjects, the constitutional regulation pertaining to the Hungarian Defence Forces, and the decision-making related to military operations.

The explanatory memorandum also confirms the reduction in the number of constitutional emergency regimes – which was indeed high by international comparison[54] – by half, so that the amendment aims to create a 'more modern

[51] Although originally not included in the Ninth Amendment, the Tenth Amendment to the Fundamental Law supplemented the rules on the state of danger with those rules already introduced as a result of the Ukrainian-Russian war, which were criticised: Mészáros (n 47) 1.

[52] Kim Lane Scheppele, 'Autocratic Legalism' (2018) 85 *The University of Chicago Law Review* 545–84; Gábor Mészáros, 'Az autokratikus legalizmus vége [The End of Autocratic Legalism]' (2021) 25 *Fundamentum* 55–61.

[53] Mészáros (n 47) 3.

[54] When comparing the constitutions of several countries, the number of special legal order regimes in the respective chapters of the constitutions is between one and four in most cases,

and effective system, which can better adapt to the changing security environment and builds on the experience of crisis management in recent years', while also incorporating additional guarantees. Furthermore, the detailed explanatory memorandum states that the systemic overhaul aims to ensure transparency and gradualness in a modern way, adapted to the changing security environment, and with additional guarantees. However, in apparent contradiction of the principle of gradualness and the aim of providing additional guarantees, as of 1 November 2022 the government is the sole legislator in the case of all emergency regimes – that is, the government solely is entitled to issue decrees in extraordinary situations (rule by decree). This development is not so surprising, given the government's clear objective during the coronavirus epidemic to extend the scope of its rule by decree as much as possible.[55] The detailed explanatory memorandum also contains a very important additional statement – namely, in a crisis there is a need for rapid, operational, legal and politically responsible decision making. Additionally, in accordance with the suggested modification, the government has the capacity to enact such measures with the utmost efficiency within the confines of the domestic constitutional framework.

As mentioned above, the new amendment reduced the number of special legal orders and placed the government as the sole body to act when an emergency occurs.[56] However, the most controversial issue was that the newly accepted amendment rewrote the rules of the state of danger, the state of emergency, which was in effect during the acceptance of the new regulation. Several of the seemingly few amendments are worth highlighting. First and foremost, following the amendment, the state of danger can no longer be declared in 'the event of a natural disaster or industrial accident endangering life and property' but rather in the event of 'a serious incident endangering life and property', with natural disasters or industrial accidents being only examples of the latter.[57] This change is more than a textual clarification as the government can now, in practice, react to any event that seriously endangers the safety of life and property by means of this special legal order regime (that is, it is not conditional on the occurrence of any event in that it can also be introduced for purely preventive purposes). This, in line with the method described above, seeks to strengthen the government's emergency powers in terms of taking remunerative measures. Perhaps also drawing on the experiences (and the criticisms) of the state of danger declared during the coronavirus epidemic, the Fundamental Law now provides for the extension of the state of

in comparison with which the previous six special legal order regimes (state of national crisis, state of emergency, state of preventive defence, state of terrorist threat, unexpected attack, state of danger) in the Hungarian Fundamental Law was indeed outstanding. See Attila Horváth, 'A különleges jogrend az alkotmányokban [The Special Legal Order in Constitutions]' in Zoltán Nagy and Attila Horváth (eds), *A különleges jogrend és nemzeti szabályozási modelljei* [*The Special Legal Order and its National Regulatory Models*] (Mádl Ferenc Institute 2021) 627.

[55] For more details on this see Gábor Mészáros, 'Rule without Law in Hungary: The Decade of Abusive Permanent State of Exception', 24 January 2022, EUI MWP Working Papers No 2022-01.

[56] Mészáros (n 47) 3.

[57] Fundamental Law, art 51(1) (as in force on 1 November 2022).

danger as an emergency regime itself rather than the government's state of danger decrees. Accordingly, a state of danger may be declared for 30 days,[58] but the government may extend this period based on authorisation by a two-thirds majority vote in the Parliament, provided that the conditions for its declaration are still met. At the same time, the Fundamental Law no longer provides that the government's state of danger decrees remain in force for only 15 days if the Parliament refuses to authorise the government to extend its effect. However, there is still no objective time limit for the extended state of danger.[59] Thus, parliamentary control over state of danger decrees[60] – which has not been functioning in practice anyway, but which previously provided a certain guarantee under the Fundamental Law – has been abolished and the *carte blanche* authorisation of the government to issue extraordinary decrees has become possible under the revised Fundamental Law.

Perhaps the contradiction between the recent crisis management and the content of the explanatory memorandum has become clear also to the readers of this article. Recent experiences – including the government's rule by decree under the state of danger regime, the misguided and ill-timed introduction of restrictive measures, the initial downplaying of the threat posed by the coronavirus, and the abuse of the law during the weeks and months when Hungary was leading worldwide in mortality *per capita* – have confirmed a level of incompetence and legal and political irresponsibility on the part of the government.[61]

This amendment was intended to guarantee exclusively governmental power over crisis management under the Fundamental Law. Naturally, such an amendment would be a clear enough sign of autocratisation; as such, the legislature covertly passed this law by making other modifications concerning the 'Special Legal Orders' chapter of the Constitution. Considering these 'special legal orders' serves no purpose other than to cement the extraordinary power of the government.[62]

In the following sections I will show the state of danger in practice through a unique example, particular to a humanitarian catastrophe or war in a neighbouring country. This example provides ample evidence of the government using emergency powers in violation of the rule of law.

2.4. The evolution of constitutional emergencies: From a pandemic-related state of danger to the state of danger responding to the war in Ukraine

The Fidesz-Christian Democrats coalition won the parliamentary elections on 3 April 2022, resulting in another two-thirds majority in the Parliament.[63] Soon after the victory, the government started to prepare the Tenth

[58] ibid art 51(2) (as in force on 1 November 2022).
[59] ibid art 51(3)–(4) (as in force on 1 November 2022).
[60] Fundamental Law, art 53(3) (as in force on 31 October 2022).
[61] Halmai, Mészáros and Scheppele (n 28).
[62] Mészáros (n 47) 21.
[63] Kim Lane Scheppele, 'How Orbán Viktor Wins' (2022) 33 *Journal of Democracy* 3, 46–47.

Amendment to the Fundamental Law, which was accepted by the Parliament and entered into force on 24 May 2022. This amendment re-regulated the rules of the state of danger by adding a humanitarian catastrophe or war in a neighbouring country as a prerequisite for a state of danger. The amendment stated that before declaring a state of danger because of an armed conflict, war or humanitarian catastrophe, it is vital that the exceptional situation in the neighbouring country is real and could have a severe economic and humanitarian effect on Hungary. Although the wording of the new provision does not refer to economic impact, it can easily be understood that the emergency measures would be mainly economic-related restrictions. Therefore, even before the pandemic-related state of danger ended on 1 June 2022, the government had declared a state of danger on 25 May 2022, but this time used the new 'humanitarian catastrophe' category.[64] Following this declaration, the Hungarian Parliament again gave a blanket endorsement for the government to rule by emergency decree until 1 November 2022 by accepting Act VI of 2022 on Humanitarian Catastrophe in a Neighbouring Country, which entered into force on 8 June 2022.[65] Although the Ninth Amendment in December 2020 modified the 'Special Legal Orders' chapter of the Fundamental Law (which entered into force in November 2022), the new state of danger rules also includes that a state of danger may be declared upon a humanitarian catastrophe or war in a neighbouring country.[66]

Enacting a state of emergency in response to a humanitarian crisis in a foreign country is unique in modern constitutional democracies. Moreover, deviating from the constitutional emergency provisions to impose an emergency regime is even more uncommon. In this regard it is noteworthy that the government, following the declaration of a new state of danger, issued several emergency decrees which had no relation to the humanitarian situation at hand. Rather than addressing other issues, these decrees were implemented to deal with a growing economic and fiscal crisis.[67] In response to the 'humanitarian crisis', the government has issued almost 200 emergency decrees, which include economic measures such as price controls; state control over certain companies; revised regulations on electricity, natural gas and oil supply; and special measures on important raw materials such as wood.[68] Governmental

[64] Mészáros (n 46) paras 7–13.

[65] https://net.jogtar.hu/jogszabaly?docid=a2200006.tv (in Hungarian)

[66] Article 51(1), the provision currently in effect, still states that 'a state of danger can be declared in the event of an armed conflict, state of war or humanitarian crisis in a neighbouring country; furthermore, in the event of a serious incident – in particular, a natural or industrial disaster – endangering lives and property, or in order to mitigate the consequences thereof, the Government shall have authority to declare a state of danger'.

[67] In his speech, Viktor Orbán proclaimed that the main reasons to declare the new state of danger are those related to economic issues: Viktor Orbán, 'The World is on the Brink of Economic Crises', *RadioFreeEurope-RadioLiberty*, 24 May 2022. https://www.rferl.org/a/hungary-orban-state-of-emergency-ukraine-war-russia/31866003.html.

[68] See, eg, Governmental Decree 260 of 21 July 2022 on the exceptional rules for the use of natural gas; Governmental Decree 287 of 4 August 2022 on the special rules for firewood supplies; or the restrictions on the export of wood-based raw materials by Governmental Decree 294 of 9 August 2022.

Decree 197 of 2022 on Extra-Profit Taxes has been a topic of much debate lately.[69] The government extended the effect of this emergency decree until 2025 (with Governmental Decree 206 of 2023 on 31 May) instead of linking it to the duration of the state of danger.[70] It remains to be seen if the war in the neighbouring country will last long enough to necessitate such a lengthy extension. The emergency decree orders various companies to pay additional taxes retroactively from January 2022. During normal times, imposing retroactive taxes would be unconstitutional; it would also go against the rule of law (and legal certainty) outlined in Article B of the Fundamental Law.[71] Neither the recently amended Article 53 of the Fundamental Law nor the Catastrophe Act grants the government the authority to suspend general constitutional principles, even under a state of emergency. Article 54(2) of the Fundamental Law states that the application of the law cannot be suspended during a state of danger. In such situations the government can only issue decrees authorised by the Act of Catastrophe to suspend specific laws, make exemptions from laws, and take other extraordinary measures. It is worth noting that the war in Ukraine began after January and, as mentioned, the emergency decree requiring companies to pay extra-profit taxes from January was issued under the state of danger stipulated in the new framework of the Fundamental Law, in response to the humanitarian crisis caused by the war.[72] This means that the government again acted outside the constitutional order and even contrary to the 'Special Legal Orders' provisions by retroactively using the emergency regime to tax various companies. Under the framework of the new state of danger rules, the practice of ruling by decree accelerated and, within a year, the government issued almost 200 emergency decrees to bypass Parliament and to suspend the application of specific laws or to derogate from the provisions of laws.[73] Of course, with a two-thirds majority in the Parliament, the government could have used ordinary legislation and implemented the relevant measures in statutes rather than emergency decrees; the packed Constitutional Court would have approved these had they been laws. However, circumventing parliamentary oversight accelerates decision making: there are no 'disturbing' questions from the opposition, and the risk of possible exposure to these measures is absent.

[69] One of the most remarkable debates was between Ryanair and the Hungarian government: Balázs Cseke, Gábor Tenczer and Andrea Horváth Kávai, 'Ryanair and the Hungarian Government Face Off about Extra Profit Tax', *Telex*, 10 June 2022, https://telex.hu/english/2022/06/10/ryanair-and-the-hungarian-government-face-off-about-extra-profit-tax.

[70] Daily Tax Report, 'Hungary Gazettes Decree Amending Extra-Profit Taxes for Various Industries, *Bloomberg Tax*, 7 June 2023, https://news.bloombergtax.com/daily-tax-report-international/hungary-gazettes-decree-amending-extra-profit-taxes-for-various-industries.

[71] Article B(1) of the Fundamental Law states that 'Hungary shall be an independent and democratic State governed by the rule of law'.

[72] Mészáros (n 46) para 4.

[73] By 4 January 2024, 124 emergency decrees has been accepted by the government under the framework of the 'humanitarian state of danger'. The number was calculated by using the Wolters Kluwer Új Jogtár database, https://uj.jogtar.hu/#topicload/db/1/id/20040205.x16.

3. Conclusion

During normal times, legality constrains political judgments for those who govern through the law. In theory, authority based on the legality of the law (and the people's belief in the legality of the rule of law) also means that lawmakers may expect that the law, with its authority, can rule without severe concerns from the populace because they respect the absence of arbitrariness of this law in conformity with legality.[74] However, unexpected acts of violence or protracted crises are exceptional situations, which can pose a challenge not only for the state and society but also for the ordinary legal order. It is also difficult to determine, on the one hand, whether it is sufficient to address the situation under the regular the legal order, and, on the other hand, if not, from which exact point in time and for how long it is possible to apply the special restrictions of rights. However, suppose some kind of 'sovereign' has the authority to violate or even suspend the law to preserve the state during an emergency. As Schmitt argued:[75]

> He (the sovereign) decides whether there is an extreme emergency as well as what must be done to eliminate it … he stands outside the normally valid legal system, he nevertheless belongs to it, for it is he who must decide whether the constitution needs to be suspended in its entirety.

This reflects the essential question of legality under exceptional times. Crises may provide the executive body with the power to enact emergency decrees that would, under normal circumstances, fall within the scope of the legislative power,[76] which illustrates the constant threat of how emergencies can damage democratic values nowadays.[77] It does not mean that the executive cannot exercise discretionary powers. However, there should be constitutional limits to ensure the legality of these actions and prevent the abuse of executive power.[78] Modern constitutions have procedural requirements and substantive restrictions to fulfil this task. These restrictions become more critical when the executive acts under an emergency regime.

Throughout the years, many scholars have discussed the place of the state of exception within a constitutional order. The most remarkable debate to describe the relationship between the constitution and exception

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

[75] Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (University of Chicago Press 2005) 7.

[76] Greene (n 4) 21.

[77] Carolan Eoin, 'Democratic Accountability and the Non-Delegation Doctrine' (2011) 33 *Dublin University Law Journal* 220.

[78] András Sajó and Renáta Uitz, *The Constitution of Freedom: An Introduction to Legal Constitutionalism* (Oxford University Press 2017) 312.

unquestionably occurred during the Weimar era. Hans Kelsen's Identity Thesis[79] focused on state subordination to the legal order and can be understood as a modern concept of the rule of law. Even before his emigration, Kelsen – a neo-Kantian and a student of Rudolf Stammler – had already established the foundations of the theory known as the 'pure theory of law'. This was based on the idea of a hierarchical normative order in which one can eventually reach the basic norm, the '*Grundnorm*', which does not need a higher norm to validate it. According to Kelsen, the *Grundnorm* is simply presupposed and can be understood as the historically first constitution, which should be obeyed by everyone. His theory basically eliminated all extra-legal elements from the law.[80] So, in Kelsen's understanding, the law would be universally valid for all situations.[81]

Contrary to Kelsen, Schmitt stressed that 'all law is situational law'[82] and highlighted the importance of the sovereign's decision. The exceptional situation raises the opportunity for the 'sovereign'. The exception, which is 'more interesting than the rule',[83] is the moment of the 'sovereign' who can decide and distinguish friends from enemies. As Schmitt asserted, to understand the nature of the rule of law and juridical order, we have to understand sovereignty, which is possible through the exception.[84] For Schmitt, the sovereignty of men is more important than the sovereignty of law.[85] His ideas on the sovereign decision are very relevant to the current topic: 'for a legal system to make sense, a normal situation must exist, and he is sovereign who definitely decides whether this normal situation actually exists'.[86] In Hungary, constitutional guarantees and the temporality of emergency powers are formally there. Still, the main motivations behind using emergency powers were not to preserve the democratic order and values through maintaining extra legality for a limited period. Instead, exceptional measures were used to establish a new legal and political order, where rule by decree is the defining legal mechanism. As we have experienced over the past few years, emergency measures support political ambitions in Hungary rather than serve to protect adequately against a real threat. Today, we can hardly figure out which actions taken by the government are 'ordinary' and which are 'emergency' measures.[87] It also seems that this story is not just about the misuse of emergency measures but is more likely about the abuse of the rule of law.

This style of emergency government even lacks the substance of 'exceptionalism', which is based on the claim that ordinary rules can hardly apply during exceptional times. According to Lazar, responsibility and responsible

[79] Hans Kelsen, *General Theory of Law and State* (Harvard University Press 1949).
[80] Hans Kelsen, *Pure Theory of Law* (University of California Press, 1967) 193–211.
[81] Tracy B Strong, 'Foreword' in Schmitt (n 75) 17.
[82] Schmitt (n 75) 13.
[83] Schmitt (n 75) 15.
[84] Strong (n 81) 21.
[85] George Schwab, 'Introduction' in Schmitt (n 75) 3–16.
[86] Schmitt (n 75) 13.
[87] Halmai, Mészáros and Scheppele (n 35) para 23

government mean that political leaders act on behalf of their citizens[88] and not solely for their political benefit. With the various emergency regimes, the Hungarian government can wield unlimited power without parliamentary control by pointing to the threat of mass migration, an epidemic, or an undefined humanitarian crisis. In this way, 'the dictator', after suspending the existing legal order, has finally started to act outside the constitution. As I have shown, emergency powers are used in an abusive manner. The aim of emergency decrees is not to handle a valid crisis but instead to bypass parliamentary scrutiny by maintaining a model of rule by decree.

Recently, the government used emergency decrees contrary to its one-party constitution, as seen during the Covid-19 pandemic, and even amended the Constitution to maintain the opportunity to rule by decree. Albeit there are institutional guarantees and formal emergency rules implemented into the Constitution, the executive, on the one hand, addresses the crisis *contra legem* in that it acts contrary to the constitutional emergency rules; on the other hand, the executive uses new emergency laws that are unequivocally unconstitutional. Emergency powers used by the Hungarian government in recent years have also 'crossed the threshold'.[89]

Unfortunately, legality and the rule of law no longer constrain executive power in Hungary; instead, formal legality has become a tool for strengthening executive power. Although, during the last 12 years, the Hungarian government has maintained a convenient two-thirds majority in the Parliament, which enables amendment of the Fundamental Law of Hungary solely by the governing parties, it uses this power to ensure the possibility of ruling by decree without adequate parliamentary control of these actions. Therefore, the Hungarian government uses emergency powers contrary to the rule of law. However, it is not the exact same situation we experienced during the Weimar era before the Second World War. At that time, the 'sovereign' created a lawless void and acted outside the law. Now, the Hungarian government uses the law but with opportunistic variability, and it has changed so often that one can hardly track its trajectory. The motivation is clear: day-to-day political needs have overturned the importance of constitutional democracy and the rule of law. However, as described by Fuller, 'a law that changes every day is worse than no law at all'.[90] The emergency powers in Hungary change the law every day.

[88] Lazar (n 5) 20.

[89] This reflects that the public may more readily accept the declaration of a 'low-level' state of emergency. However, this also means that these types of emergency can be considered not so severe and, therefore, may undermine the basic notion that emergencies correspond to serious threats. It could be dangerous in a way that some emergency regimes can be accepted, and people may think that exception is equal to normalcy. Therefore, governments can introduce more strict measures than necessary, so 'crossing the threshold' could be much easier for them, on the one hand, and more dangerous for the rule of law, on the other; see Oren Gross and Fionnuala Ní Aoláin, *Law in Times of Crisis* (Cambridge University Press 2006) 45–46.

[90] Lon L Fuller, *The Morality of Law* (Yale University Press 1963) 37.

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