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Hungarian Abuse of Constitutional Emergency Regimes – Also in the Light of the COVID-19 Crisis

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Hungarian Abuse of Constitutional Emergency Regimes – Also in the Light of the COVID-19 Crisis

(as of 30 April 2020)

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Abstract

This paper belongs to a wider project I have been conducting with Professor Agnieszka Bień-Kacała on illiberal constitutionalism. Therefore, this paper has two distinct but interrelated and unevenly discussed focuses: how the emergency power can be abused even in a constitutionally well-equipped emergency regime (primary focus), and whether the actual abuse and misuse of these powers have effectuated any changes in Hungarian illiberal constitutionalism until 30 April 2020 (consequential result).
The constitutions of the Central and Eastern European (CEE) region, including the Hungarian Fundamental Law, exemplify a judicial or constitutional model for emergencies and emergency powers. This paper claims that Hungary could exemplify how to be constitutionally well equipped to deal with emergencies and still able to abuse them. It concludes that the abuse and misuse of constitutional emergency regimes, in Hungary, have two layers: the actual abuse of emergency powers, be those extra-constitutional (the "crisis situation caused by mass migration" since 2015) or (partially) non-constitutional (COVID-19 crisis, 2020), and the abusive regulation of emergencies and powers (2015, 2016, 2020) by bypassing constitutional procedures and resorting to secrecy, including the non-transparency of decisions and vague drafting. The paper holds the view that – as long as we do not see what the Government does at the end of the COVID-19 crisis and how all the emergency measures and other illiberal actions taken in and before 2020 add up – Hungary continues with its illiberal constitutionalism.

Keywords: emergency, emergency legislation, normal-time tools, COVID-19 crisis, "crisis situation caused by mass migration", "state of danger", "state of terrorist threat", abuse, Hungary, illiberal constitutionalism

I. Introduction

1. The context

This paper belongs to a project I have been conducting with Professor Agnieszka Bień-Kacała on illiberal constitutionalism.[2] Therefore, the paper has two distinct but interrelated and unevenly discussed focuses. It is primarily engaged with the discussion of how emergency powers have been abused in Hungary. As a consequential effect, it can also contribute to the exploration of whether the actual abuse and misuse of these powers effectuated any changes in the illiberal Hungarian constitutionalism until 30 April 2020.

Those interested in the broader context might wish to have a look at our edited book,[3] articles,[4] book chapters,[5] conference presentations,[6] and blog posts.[7] In these publications, we

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[2] National Science Centre, Poland, 2018/29/B/HS5/00232, "Illiberal constitutionalism in Poland and Hungary".
[3] T Drinóczi and A Bień-Kacała, eds, Rule of Law, Common Values and Illiberal Constitutionalism: Poland and Hungary within the European Union (Routledge 2020, forthcoming).
[4] T Drinóczi and A Bień-Kacała, 'Illiberal constitutionalism – the case of Hungary and Poland', 20 *German Law Journal* (2019) 1140-1166; T Drinóczi and A Bień-Kacała, 'Extra-legal particularities and illiberal constitutionalism. The case of Hungary and Poland', *Hungarian Journal of Legal Studies* 59, No 4, pp. 338–354 (2018); T Drinóczi and A Bień-Kacała, 'The "DNA" of Illiberal Constitutionalism: Failure of Public Law Mechanisms and an Emotionally Unstable Identity. A Hungarian and Polish Insight', *Percorsi Costituzionali* (2020, forthcoming).
[5] T Drinóczi and A Bień-Kacała, 'Illiberal constitutionalism in Hungary and Poland: The case of judicialization of politics' in A Bień-Kacała, et al., eds, *Liberal Constitutionalism – Between Individual and Collective Interests* (Toruń, 2017), https://repozytorium.umk.pl/handle/item/4861 73-108.

explain how we conceptualize illiberal constitutionalism, what we think about the value orientation and the emotional and historical trajectories of Hungarians (and Poles) that have facilitated the emergence and consolidation of illiberal constitutionalism, how the COVID-19 pandemic could change our current regime. Below, I summarize our views.

'Illiberal constitutionalism' has been established and consolidated in Hungary and Poland by capturing constitutions and constitutionalism. The 'capturing' mechanism appears through the manner in which the constitutional changes are implemented, political and legal constitutionalism is theorized, and constitutional/national identity is interpreted. It is also present in the relativization of the rule of law, democracy and human rights, the constitutionalization of populist nationalism, identity politics, new patrimonialism, clientelism, and corruption. Illiberal constitutionalism is viewed as the functioning of a public power that upholds the main constitutional structure but lacks a normative domestic constitutional commitment to constraints on public power, even while, to a certain extent, it remains within the boundaries set by EU law and politics, as well as international minimum requirements. In these states, all elements of constitutional democracy, such as the rule of law, democracy, and human rights, are observable, yet none prevails in its entirety. In our view, illiberal constitutionalism is not the opposite of liberal constitutionalism and does not equal with authoritarianism. Consequently, constitutional democracy still exists, but its formal implementation outweighs its substantial realization. That, in turn, serves the fulfilment of the populist agenda and further consolidates the new regime, which creates a vicious circle. Development of illiberal constitutionalism, and, consequently, the failure of public law mechanisms, is also fuelled by the emotional attitudes that have evolved throughout the histories of the two nations. These non-legal aspects of Hungarian and Polish illiberalism, which seem to be embedded in the national identity constructions, find support in different fields of social sciences. It thus seems that the need for strong autocratic leadership and these nations' receptivity to populism, and, as a result, the unavoidable failure of public law mechanisms, have been influenced by historical particularities and emotional trajectory. If it is indeed the case, constitutional identity may have been built in a way that, to a certain extent, has been pre-determined and which has led to the current situation of illiberalism.

Against this background, I am discussing the issue of use, abuse, and misuse of emergency powers in Hungary.

2. Introduction to constitutional emergencies and Hungary

The constitutions of the Central and Eastern European (CEE) states exemplify a judicial or constitutional model for the treatment of emergencies and emergency powers.[8] When

[6] A former version of 'The "DNA" of Illiberal Constitutionalism: Failure of Public Law Mechanisms and an Emotionally Unstable Identity. A Hungarian and Polish Insight' is accessible at researchgate and academia.edu.

[7] T Drinóczi and A Bień-Kacała, 'Illiberal Constitutionalism at Work: The First Two Weeks of COVID-19 in Hungary and Poland', VerfBlog, 2020/3/31, https://verfassungsblog.de/illiberal-constitutionalism-at-work/. For a further insight on Poland from April, 2020 see, A Bień-Kacała, 'Polexit is Coming or is it Already Here? Comments on the Judicial Independence Decisions of the Polish Constitutional Tribunal', *Int'l J. Const. L. Blog,* Apr. 28, 2020, at: http://www.iconnectblog.com/2020/04/polexit-is-coming-or-is-it-already-here-comments-on-the-judicial-independence-decisions-of-the-polish-constitutional-tribunal

[8] Besides this model, there are also the legislative and the executive model; on them, see, e.g., D Dyzenhaus, 'States of Emergency', in M Rosenfeld and A Sajó, eds., *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, Oxford, 2012) 442–462; J Ferejohn and P Policastro, "The law of the exception: a typology of emergency powers" 2 *ICON* (2004) 210–239; H Kelsen, "Wer soll der Hüter der Verfassung sein?" *Die Justiz* VI/11-12. 1930–1931; C Schmitt, *Der Hüter der Verfassung* (JCB Mohr, Tübingen, 1931); M Tushnet, "Emergencies and the Idea of Constitutionalism" in M Tushnet (ed), *The Constitution in Wartime:*

regulating emergencies, the constituent powers of most CEE states have duly considered their past[9] and the dichotomy between lessening constitutional burdens in emergencies and the need to avoid the abuse of power. They contain rigorous and detailed rules – just as it has been demanded by scholars, the Venice Commission, policy papers, and constitutional legislators, as well.[10] Accordingly, these rules cover the "who does what in which kind of emergency and for how long" question. They provide for the prohibition on the suspension of the constitution and the functioning of the constitutional court and specify human rights derogations. They also require the observance of the principles of temporality and functionality, necessity and proportionality, legality, continuity, and constitutionality, i.e., constitutional review.
The Hungarian Fundamental Law (FL) certainly adopts this model. The constitutional emergency model is located in a separate part of the constitution and called "special legal order".[11]

Nevertheless, since 2015, the Hungarian Government has reacted to the challenges of migration (2015) and terrorism (2016) by instituting two new emergencies. In March 2020, as a response to the COVID-19, it, based on a broad interpretation, activated an existing constitutional emergency regime called "state of danger". In 2015, the ordinary legislative power enacted rules governing the "crisis situation caused by mass migration", while a constitutional amendment introduced a new category of emergency, known as the "state of terrorist threat" in 2016. Both emergencies are responses to actual and existing threats, whose presence in Hungary, however, has been exaggerated.[12] The "crisis situation caused by mass migration" does not qualify as a "special legal order" under the FL as it still does not incorporate it. However, it seems to mirror a "special legal orders" as it rules on the deployment of the army and human rights derogation. On the other hand, the scope and structure of the category "state of terrorist threat" may be an example for other states to follow if they wish to constitutionalize the actions they intend to take in fighting terrorism. Nevertheless, it is suggested that the Hungarian constitutional amendment process, with its hasty and non-transparent nature, and to a certain extent, vague drafting formulations, should not be viewed as a role model. Bypassing constitutional emergency rules, developing and operating a new emergency regime (2015) and creating an unlimited authorization, both in

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Beyond Alarmism and Complacency (Duke University Press, Durham, NC, 2005); On Hungary, until 2016, T Drinóczi, "Special legal orders; challenges and solutions" 4 *Osteuropa Recht* (2016) 420–437; and until 2018, see more in T Drinóczi, 'Central and Eastern European constitutional formulas: the abuse and observance of constitutions in times of emergency', THE 10TH IACL-AIDC World Congress 2018; Workshop Abuse of the Constitution in Times of Emergency, https://www.researchgate.net/publication/335762469_Central_and_Eastern_European_constitutional_formulas_the_abuse_and_observance_of_constitutions_in_times_of_emergency.

[9] See, e.g., the Hungarian revolution in 1956 and the martial law of Jaruzelski in Poland in 1981.

[10] See, e.g., B Ackermann, "The Emergency Constitution", *Faculty Scholarship Series Paper 121*, http://digitalcommons.law.yale.edu/fss_papers/121 1029–1091; Venice Commission, "Emergency power, science and technique of democracy" No 12 (1995), CDL-STD (1995) 012; A Khakee, "Securing democracy? A comparative analysis of emergency powers in Europe" (Geneva Centre for the Democratic Control of Armed Forces 2009), https://www.files.ethz.ch/isn/99550/PP30_Anna_Khakee_Emergency_Powers.pdf; Opinion on the draft constitutional law on "Protection of the nation" of France, adopted by the Venice Commission at its 106th Plenary Session (Venice, 11–12 March 2016); and O Duhamel, "Terrorism and Constitutional amendment in France", 1 *European Constitutional Law Review* (2016) 15.

[11] Art 48-54 FL, under the heading of Special legal order within the chapter on the State.

[12] The migration crisis had its peak in 2015, and, in reality, Hungary, fortunately, has not experienced and terror attacks – which view is not shared by political propaganda, which puts an equation mark between migration with terrorism.

time and subject matter, in 2020,[13] should not be followed, either. This paper explores why Hungary could exemplify how to be constitutionally well equipped to deal with emergencies but still able to abuse these regimes. It also identifies the layers of the abuse of constitutional emergency regimes but still claims that Hungary features illiberal constitutionalism.[14] For an informed reconsideration, we shall see the synergy of the Government's decisions about the termination of the emergency and all related fields and other actions taken in 2020 and before.

The paper is structured as follows: the regional constitutional emergency model is reviewed in section II. Section III is dedicated to the discussion of the Hungarian constitutional design called "special legal order". The next section (IV) explores how migration and terrorism and their (both real and imagined) threat lead to the abuse of constitutional regime and drafting principles. Section V investigates how the real COVID-19 crisis is managed by activating one of the constitutional emergency regimes, called "state of danger", and what implications it has on the state of illiberal constitutionalism. The paper concludes with point VI.

II. The constitutional model of emergency powers – the CEE regional approach

The constitutional treatment of emergencies in the CEE region is based on functionality and temporality. It is expected to be able to overcome the threat, which is viewed as exceptional and re-establish the normal functioning of the regular government. There should be a threshold of risk and danger, which has to be crossed before an emergency is declared.[15] It is not wise to announce any emergency if the threat is not actual or imminent, does not involve the whole or the majority of the nation, or does not affect the entire territory of the state or parts thereof, etc.[16] Otherwise, it could easily lead to an abuse of power. This dichotomy, i.e., the claim for efficiency and the fear of abuse of power, explains the level of elaboration found in constitutional texts in the CEE region. Generally speaking, the higher the fear of abuse of power, the more detailed the constitutional regulations on emergencies.[17] Therefore, what is to be avoided with these elaborated constitutional rules is the destabilization of the existing order.

The greatest danger a state and its population can be is the war or revolution, a coup d'état, a national disaster, a catastrophe, and, as we can now experience a highly contagious pandemic. In each case, different types of emergencies can be introduced. It is usually done by the parliament if the danger is severe and involves armed attack; these are usually called "state of war" or "martial law".[18] When there is a non-armed threat,[19] usually, a so-called "state of

[13] Coronavirus Act 2020, https://hungarianspectrum.org/2020/03/21/translation-of-draft-law-on-protecting-against-the-coronavirus/

[14] Drinóczi and Bień-Kacała, n. 4 (2019).

[15] A Jakab and Sz Till, "A különleges jogrend" [The special legal order], in Trócsányi László and Schanda Balázs (eds), *Bevezetés az alkotmányjogba; Az Alaptörvény és Magyarország alkotmányos intézményei* [*Introduction to constitutional law, The Fundamental Law and constitutional institutions of Hungary*] http://www.tankonyvtar.hu/hu/tartalom/tamop425/2011_0001_548_Alkotmanyjog/ch18.html

[16] For other conditions, see Opinion 359/2005 in the context of international obligations and the wording of the Hungarian constitutions, Slovenian or Croatian constitutions. See also the relevant chapters in N Chronowski, T Drinóczi and T Takács, eds, G*overnmental Systems of Central and Eastern European States* (Wolters Kluwer Polska – OFICYNA, Warsawa, 2011) written by N Chronowski, T Drinóczi, J Petrétei on Hungary, Z Lauc and S Ivanda on Croatia, and Pernuš respectively.

[17] Jakab and Till, ibid.

[18] The CEE constitutions contain proper definitions of, for example, "state of war" or "state of emergency", as follows: an imminent threat to the independence of the state, armed aggression, imminent danger, a general danger that threatens the existence of the state, severe acts of violence endangering life, etc. See, e.g., Croatia, Poland, Slovenia, Hungary, Latvia. A Bień-Kacała, "Category of security in light of Polish Constitution" in A

emergency" is declared by the executive power with a subsequent parliamentary approval and oversight. The CEE constitutions name these situations national disaster and catastrophe,[20] "other danger threatening life and health",[21] or social peace.[22] The Estonian constitution is the only one that rules on a state of emergency that is to be introduced to "prevent the spread of an infectious disease".

Constitutions usually provide for common rules applicable to each type of emergencies. Each CEE constitution[23] explicitly or implicitly requires that all three state power work together.[24] It is usually the national parliament that declares a state of war, martial law, or state of emergency. The executive and the president are also involved in this process. Their engagement is more significant when the national parliament cannot be summoned or function. In this case, the president usually declares the emergency, or a unique organ will be established with the participation of members of the parliament, government, and, in some instances, the president or constitutional court. The examples for this latter one is Hungary and Slovakia.[25] The design is slightly different in Poland, where it is the president who announces "martial law" and "state of emergency" on request of the government. The regulation on the introduction of any emergency shall subsequently be submitted to the Sejm.

The existence of any kind of emergency is time-sensitive, precisely because they are dangerous for constitutionalism. Emergencies can be maintained as long as they are needed, or for a definite period. In the former case, determining the end of an emergency is the responsibility of the state organ involved in its declaration, like in Hungary. The Polish "state of emergency" can be announced only for a definite period, but no longer than 90 days. Its extension may be made once only for a period no longer than 60 days and with the consent of the Sejm. A "state of natural disaster" can be introduced for no longer than 30 days and can be extended only with the consent of the Sejm.[26] This time-sensitivity is generally stipulated by other CEE constitutions as well, with the exceptions of the Czech Republic and Slovakia – but it does not mean that the constitutional guarantees would be less binding or severe. Their constitutions provide for only the main competences regarding the declaration of emergency, the deployment of the army, and a brief definition of war. They leave the details to be decided by a qualified majority of the parliament in a constitutional act. This qualified majority requires the approval of, for instance, in the Czech Republic, 3/5 of the deputies, and 3/5 of senators.[27]

Bień-Kacała et al, eds., *Security in V4 constitutions and political practices* (Wydawnictwo Wydziału Prawa I Administracji Uniwersytetu Mikołaja Kopernika, Toruń, 2016) 48–49; S Pernuš, "The Governmental System of Republic of Slovenia" in Chronowski and Drinóczi and Takács, eds., n 16, 718–719; D Iljanova, "The Governmental System of the Republic of Latvia" in Chronowski and Drinóczi and Takács, eds., n 16, 409.

[19] CEE constitutions usually contain one or more of the crisis from the list above.

[20] Explicitly: Estonia, Poland, Hungary, Croatia, Serbia; implicitly: Bulgaria, Slovenia.

[21] Czech Republic.

[22] Lithuania.

[23] Drinóczi, n 8 (2016) 420–437.

[24] Just as is demanded by Dyzenhaus. See Dyzenhaus, n 8, 446.

[25] M Domin, "Constitutional mechanisms for eliminating security risks" in A Bień-Kacała et al, eds, n 17, 158–159.

[26] These two Polish measures can affect a part or the whole territory of the state.

[27] See Constitutional Act Nr 110/1998 Coll on Security of the Czech Republic, Constitutional Act Nr 227/2002 Coll on State Security at the Time of War, State of War, State of Emergency, and State of Crisis (Slovakia). See further in J Filip, P Molek, and Ladislav Vyhnánek, "Governance in the Czech Republic" in Chronowski and Drinóczi and Takács, eds., n 16, 200–201; and L Cibulka and L Mokrá, "The Slovak Republic" in Chronowski, T Drinóczi and Takács, eds., n 16, 692–693; V Jirásova and J Jirásek, "Concept of security of Czech Republic" in Bień-Kacała, et al, eds., n 17, 65, 73–74; M Giba, 'State Security', in Bień-Kacała, et al, eds, n 17, 125, 129.

During any kind of emergency, without exceptions, mandates of national parliaments, and presidents, local governments are to be extended until the end of the emergency, or even more. In Poland, for instance, these mandates are prolonged for 90 days after the termination of the crisis. Constitutions also provide for the immediate/as soon as possible election of the new representative body after the termination of the emergency, and the need for continuous operation of the elected bodies, especially parliaments. New elections cannot be held during the crisis.[28] In some states, there is a ban on holding a referendum on the introduction of any type of emergency.[29]

In the case of war or martial law, extraordinary measures are usually introduced by the parliament, except when it is not able to function; in the latter case, the executive can act within the time limits set by the constitution and under subsequent parliamentary control. The army is usually deployed by the parliament; the commander-in-chief is the president; when immediate action is required, or a military decision is urgently needed due to international obligations, the government has a constitutional mandate to decide on the deployment of the army outside of the state's borders.
In non-armed threat imposed emergencies, it is usually the executive power, either the government or the president that is constitutionally authorized to act, with a periodical and subsequent parliamentary oversight. However, it is not a general rule, as, for instance, in Poland, such a power may be exercised only by the president and only during a martial law if the parliament is not able to sit.
The emergency measures are typically limited in time. The Hungarian emergency measures lose their temporal effect by the end of the particular emergency, or the elapse of the time-period stipulated by the FL for the particular emergency. The Czech Republic can have emergency governance only for 30 days. These measures can be adopted under a special authorization regime, stemming from the constitution itself. Constitutions also delegate special law-making competence to the executive power[30] in the shape of decrees that have the force of law because they may derogate from statutes.[31]

The enumeration of non-derogable fundamental rights varies in CEE constitutions in terms of the range they cover, but they are inspired by Article 15 of the European Convention on Human Rights (ECHR).[32] During their respective constitution-making processes, drafters adopted the main idea behind Article 15 ECHR to their national requirements.[33] It is why it is

[28] E.g., Slovenia, Hungary, Poland, Serbia, Croatia, Latvia, Estonia, Bulgaria. See also Pernuš, n 17, 717–718; Bień-Kacała, n 17, 57.
[29] Eg., Estonia, Latvia,
[30] An exception is Bulgaria, where the delegation of law-making competences to the executive itself is prohibited for historical reasons. The Tzar, the Presidium of the National Assembly, and the State Council used to abuse these delegated powers. E Tanchev and M Belov, 'The governmental system of the Republic of Bulgaria', in N Chronowski, T Drinóczi and T Takács, eds., n 16, 93.
[31] E.g., Slovenia, Hungary, Poland, Serbia, Croatia, Latvia, Estonia, Bulgaria.
[32] See, e.g., "Guide on Article 15 of the Convention – Derogation in time of emergency", Council of Europe/European Court of Human Rights, 2016, http://www.echr.coe.int/Documents/Guide_Art_15_ENG.pdf.
[33] Amidst the COVID-19 crisis, by 6 April 2020, 8 countries, including Estonia, Latvia, and Romania from the CEE region, have notified the Secretary-General of the Council of Europe of their derogations from the ECHR. K Istrefi, 'Supervision of Derogations in the Wake of COVID-19: a litmus test for the Secretary-General of the Council of Europe', https://www.ejiltalk.org/supervision-of-derogations-in-the-wake-of-covid-19-a-litmus-test-for-the-secretary-general-of-the-council-of-europe/; S Molloy, 'COVID-19 and Derogations Before the European Court of Human Rights', *VerfBlog,* 2020/4/10, https://verfassungsblog.de/covid-19-and-derogations-before-the-european-court-of-human-rights/

not only the right to life,[34] the prohibition of torture and inhuman or degrading treatment or punishment,[35] and of slavery, and the *nullum crimen, nulla poena* principle have been established as non-derogable rights in emergencies, but many others, too. For example, the prohibition of assimilation (Bulgaria, Serbia), the protection of dignity and freedom of thought, conscience and religion (each constitution), family, marriage, the rights of the child (Serbia, Poland), and the right to citizenship (Serbia, Poland). In Latvia, however, the constitution is silent in this regard, and only the relevant Act provides for rules on derogations in emergencies, which is considered a significant deficiency of the Latvian constitution.[36] It is not only the above-mentioned introduction of extra measures but also the derogation from fundamental rights that are limited in time and are subject to parliamentary oversight.[37]

In the CEE states, constitutions have employed a judicial model with a detailed constitutional design, even if, in some cases, the detailedness covers only the armed threat imposed emergencies, e.g., in the Polish Constitution. According to this model, constitutions cannot be suspended or changed,[38] the constitutional rules on the emergency are not to be modified,[39] the operation of constitutional courts cannot be suspended,[40] the president of the constitutional court is involved in decision-making bodies,[41] the constitutional court decides on the constitutionality of the introduction of the emergency.[42] Constitutions emphasize temporality, cooperation, purpose-orientation, necessity, and proportionality, along with constitutionality and legality, and continuous operation of state organs, including the judiciary and constitutional courts, as well. Some decisions of the legality of restrictive measures introduced as a response to the COVID-19 crisis have already been delivered.[43]

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[34] See, e.g., the decision of the Polish Constitutional Tribunal of 30 September 2008, file nr K44/07; 126/7/A/2008. An English summary is available at http://trybunal.gov.pl/fileadmin/content/omowienia/K_44_07_GB.pdf (civil aircraft must not be shot down even if it seems to be necessary for state security).

[35] For the discussion of the absolute nature of this prohibition, see, e.g., S Greer, 'Is the prohibition against torture, cruel, inhuman and degrading treatment really "absolute" in international human rights law?', 15 *Human Rights Law Review* (2015); M Hodas, "Security and other values protected by constitution" in Bień-Kacała et al, eds, n 17, 149–153; A Jakab, 'Breaching constitutional law on moral grounds in the fight against terrorism: Implied presuppositions and proposed solutions in the discourse on 'the Rule of Law vs. Terrorism', 1 *ICON* (2011) 58–78.

[36] "The Constitution itself does not regulate possible restrictions on human rights during a state of emergency. Various commentators believe this is quite a fundamental deficiency of the Constitution since it means there is no constitutionally determined difference between the human rights regime in ordinary circumstances and the regime during a state of emergency. Establishing a distinction of this kind would make it possible to assess the restrictions required during a state of emergency." D Iljanova, 'The Governmental System of the Republic of Latvia', in Chronowski and Drinóczi and Takács, eds., n 16, 410.

[37] E.g., Macedonia. K Schrameyer, 'The Republic of Macedonia', in N Chronowski, T Drinóczi and T Takács, eds., n 16, 494–495. For Slovakia, see Domin, n 23, 157. In the case of Estonia, this oversight is carried out by the Chancellor of Justice. J Põld, B Aaviksoo and R Laffranque, 'Governmental system of Estonia', in Chronowski, Drinóczi and Takács, eds., n 16, 276.

[38] Eg, Hungary, Poland, Serbia, Estonia. See also Bień-Kacała, n 10, 55–56; M Pajvancic, 'Governmental system of Serbia', in Chronowski, Drinóczi and Takács, eds., n 16, 626; Põld, Aaviksoo and Laffranque, n 35, 529.

[39] Estonia, Lithuania

[40] Eg, in Hungary.

[41] See the contribution of the Hungarian President of the Constitutional Court in the Defence Council, which has to be established when the "state of national crisis" is declared.

[42] Slovakia.

[43] On April 23, Prague's district court declared four of the health minister's coronavirus regulations unlawful (on the freedom of movement and retail trade). These measures, however, did not base on the crisis law but the health protection law. https://www.dw.com/en/covid-19-restrictions-eased-in-the-czech-republic-long-live-freedom/a-53262812.

III. Constitutional emergency regimes in the Hungarian FL

The FL lists and elaborates on six different emergencies, and, as mentioned, contain rules on the most critical questions, such as 'Who introduce What kind of emergency measures and When?', 'Who is in charge?' and 'What can and cannot be done?'. It requires temporality, continuity and constitutionality, legality, and proportionality and necessity. The FL also allows a more severe restriction of fundamental rights, but, at the same time, lists the non-derogable human rights, as well.

1. What to be declared?

The "state of national crisis" is to be declared in the case of war or danger of war, while the "state of emergency" is designed for dealing with coup d'état-type and revolution-type crises. The "state of preventive defense" means a danger of external armed attack; it can also be declared when an obligation arising from an alliance shall be met. The most temporary emergency is the "unexpected attack by external armed groups into the territory of Hungary" because it is to be introduced until the decision is made on the declaration of a "state of emergency" or "state of national crisis". The fifth is the "danger of crisis" to be declared in the case of natural disaster or industrial accident endangering life and property, which was activated on 11 March 2020.[44] The sixth is the "state of terrorist threat" was inserted into the FL by the Sixth Amendment in 2016; it can be introduced in the case of a significant and direct threat of a terrorist attack or actual terrorist attack. Undoubtedly, by incorporating the state of terrorist threat into the constitutional text, Hungary has broken fresh ground in a constitutional design concerning emergencies.

Acts of Parliaments have detailed regulations on emergencies, such as, e.g., the Act on national defense and armed forces (2011), or when discussing the current epidemic, the Act on catastrophes (2011). These statutes elaborate on the notion of the particular emergency, stipulates procedural, substantial, and organizational rules applicable in an emergency. They thus combine regulations that apply in "peace" and their respective emergencies.

2. Who declares emergencies and who acts during emergencies?

The FL explicitly indicates the agents who act in a particular emergency. In situations of the gravest danger (the first three types enumerated above[45] and the "state of terrorist attack"), the FL distinguishes between those agencies declaring the emergency and those exercising emergency powers. The "state of national crisis" and a "state of emergency" is introduced by the Hungarian Parliament, which, only in a "state of national crisis", must set up the National Defense Council. In a "state of national crisis", it is the National Defense Council that exercises parliamentary powers and deploys the military even in Hungarian soil,[46] and makes other military-related decisions. In the case of a "state of emergency", the Hungarian army, based on a parliamentary decision,[47] may only be deployed in Hungary only if the actions of the police and the national security services prove to be insufficient. As can be seen, the categories "state of preventive defense" and "unexpected attack" are also connected to armed conflicts. In contrast, the category of "state of danger" is declared when serious national or

[44] It worth noting that these five were the constitutional institutions of the former Constitution, which were copied to the FL in 2011. The FL structures them and provides for a more detailed regulation.
[45] "State of national crisis", the "state of emergency", and the "state of preventive defense".
[46] In peacetime, the national army must not be deployed on Hungarian soil.
[47] If the Parliament is prevented from making the mentioned decisions, the President of the Republic must do so.

industrial danger threatens. In these situations, it is the Government that is entitled to declare these situations and deals with them accordingly.

Agencies exercising emergency powers in any of the above-mentioned crises are authorized by the FL to take extraordinary measures that may conflict with national laws. However, these measures cannot suspend the FL, their effect is limited in time, and their subject matter has to stay within the authorization given in their implementing Act, as stipulated explicitly by the FL for each type of emergencies. Measures introduced in emergencies lose their temporal effect with the termination of the crisis, except for the initial measures of the government in the "state of terrorist threat" (15 days), "state of preventive defense" (60 days), and in the case of "state of danger" (15 days). In these latter cases, the Government, within the framework of the implementing Act, can deteriorate from and suspend statutory provisions in a government decree. In a of "state of danger" their temporal effect (15 days) can be extended with the consent of the Parliament. The FL, however, does not have any more explicit criteria for the temporal effect of the extended measures.

3. Observation of emergency-related and universal principles by the FL

Temporality is observed in the FL when it demands that a "special legal order" shall be terminated by the state organ entitled to introduce it when the conditions for its declaration no longer exist. It also applies to measures introduced during emergencies, e.g., the above-mentioned 15 days rule for the temporal effect of decrees issued in the "state of danger".
The criterion of legality is ensured by the *ex-ante* existence of the implementing statute, based on which the emergency measures can be issued.[48] These are cardinal Acts, i.e., as per the FL, they were adopted by the 2/3 majority of the Parliament.
The FL assures continuity and constitutionality as the constitution cannot be suspended; the operation of the Constitutional Court (CC) cannot be restricted. The FL does not allow the termination of the Parliament's mandate only in the "state of national crisis" and the "state of emergency". It also provides for the parliamentary oversight over the executive.
The FL requires the application of proportionality when it comes to the declaration of an emergency and the irregular restrictions of fundamental rights. In emergencies, the exercise of fundamental rights – except for the right to human life and dignity, prohibitions concerning life and biomedical issues,[49] and due process and criminal law guaranties[50] – may be suspended or restricted beyond the extent (necessity and proportionality) specified in the FL.[51]

Against this background, we can assess the responses the Hungarian political decision-maker gave to different types of challenges: migration, terrorism, and the human pandemic. As said, before 2020, one so-called emergency has been extra-constitutionally activated, and another was designed as a new emergency regime of the FL. Both of them raise concerns for constitutionalism. So does the COVID-19 crisis triggered activation of the "state of danger".[52]

IV. The abuse of emergency regimes until the COVID-19 crisis

Hungary exemplifies how the constitutional regime can be bypassed in the name of politically generated fear, and how the elaboration of a constitutional regime can potentially be

[48] See, e.g., the mentioned Acts on the national defense and catastrophes.
[49] Art III FL.
[50] Art XXVIII (2) to (6) FL.
[51] Art I (3) FL.
[52] Drinóczi and Bień-Kacała, n. 7.

exploited. As noted above, Hungary, since 2015, has drafted two new emergencies. The "crisis situation caused by mass migration" does not qualify for a "special legal order" under the FL, but it, without the usual constitutional guarantees, operates like such order as far as the "deployment" of the army and fundamental right issues are concerned. The "state of terrorist threat", which was introduced to the FL in 2016, befits the constitutional regulatory scheme. However, its adoption falls short of the transparency and inclusivity required of a constitutional amendment and may facilitate abuse of power over the army.

1. "Crisis situation caused by mass migration"

In its attempts to cope with the flow of migrants during the summer of 2015,[53] Hungary developed a new emergency.[54] It was, however, not implemented until the end of that summer because the regulatory framework was adopted only in September of 2015. Therefore, no action was taken during the spring of 2015 to address the actual flow of people through regulatory means. Instead, at that time, the Hungarian Government started an internal, politically motivated, and defensive anti-migration billboard campaign, and held a so-called "national consultation".[55] The Government finally took regulatory action in late 2015. In August, amending bills[56] were submitted to the Parliament, which adopted them on 4 and 21 September 2015. These Acts led to both the *factual* and the *legal* closure of Hungary's borders. By erecting a fence at the Southern (Schengen) border of Hungary, the border was *de facto* closed, and so-called transit zones were created for detention purposes. Furthermore, by adopting modifications to, amongst others, procedural criminal law, the borders were also sealed *de jure*. These laws delineate the content of the "crisis situation caused by mass migration". Its content would easily make it one of the "special legal orders" of the FL, but it was not intended to make the part of the FL. Therefore, the "crisis situation" should not behave like one of the "special legal orders". This "crisis situation" should not permit the uncontrolled exercise of some powers and even more severe human rights restrictions that are allowed in constitutional emergencies. Nevertheless, it still does, regardless of some corrections. Some parts of the legal framework of the "crisis situation caused by mass migration" are unconstitutional and would raise serious concerns even if the crisis were regulated as one of the "special legal orders" of the FL, as shown below.

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[53] Illegal border crossings increased from 2,024 (July 2014) to 16,626 (summer 2015). Source: the Hungarian police.

[54] The "crisis situation caused by mass immigration". See T Drinóczi and Á Mohay, 'Has the migration crisis challenged the concept of the protection of the human rights of migrants? The case of Ilias and Ahmed v. Hungary', in E Kużelewska, A Weatherburn, and Dariusz Kloza, eds, *Irregular migrations as a challenge for democracy* (Intersentia 2018) 97-112.

[55] On the "national consultation", see http://www.kormany.hu/download/9/a3/50000/Nemzetikonzultacio_mmkorrnel.docx. The "National consultation" does not equal with the consultation process applied in the drafting process of legislation. It is a mere political institution that is used for legitimizing already decided political goals. The questionnaire on migration and terrorism (2015) successfully combined the fear of losing employment and heightened security threats by implying their interconnectedness. Under these circumstances, it is not surprising that, according to the Spring 2016 Global Attitudes Survey, many Europeans were concerned with security and the economic repercussions of the refugee crisis, but Hungarians more than any, despite their not having been attacked and Hungary has not having been either the chosen destination of most refugees or a Mediterranean country. R Wike, B Stokes, and K Simmons, "Europeans Fear Wave of Refugees Will Mean More Terrorism, Fewer Jobs. Sharp ideological divides across EU on views about minorities, diversity and national identity", http://www.pewglobal.org/files/2016/07/Pew-Research-Center-EU-Refugees-and-National-Identity-Report-FINAL-July-11-2016.pdf, 3. It was not Hungarian society that initially demanded special legislation dealing with migration; rather, it was fuelled by political intention. It is thus not surprising that this theme has been one of the major topics of the governing party's election campaign leading up to the parliamentary elections of 2018.

[56] Act CXL of 2015 and Act CXLIII of 2015.

1.1. The principles of legality, functionality, temporality, and constitutionality

The "crisis situation caused by mass migration" may be declared, as a general rule,[57] if the number of asylum seekers arriving in Hungary exceeds an average of 500 per day over a month, an average of 750 per day over two consecutive weeks, or an average of 800 per day over a week. Additionally, the same "crisis situation" may be declared if a situation poses a direct threat to public safety and the maintenance of law and order in a settlement, or which poses an immediate threat to public health.[58] The relevant governmental decree on this situation remains in force for a maximum period of six months; its term may be extended if the circumstances that gave rise to it persist.

Since the entry into force of the Act establishing the "crisis situation caused by mass migration", the crisis situation has not been canceled but extended to the entire country from time to time. In September 2019, it was also extended, even though none of the conditions for its extension have been met since 2016. The governmental decision on the expansion of the "crisis situation" does not offer any reasoning, and its rationality cannot be checked on time.[59] It terminated in March 2020, and, as it has become a practice, it was extended. The government claimed that, considering the flow of migrants from Turkey[60], only this way could the safety of Hungarians be guaranteed in the midst of the COVID-19 pandemic. Apparently, in April 2020, Hungary is under a double emergency regime: "state of danger" due to the COVID-19 pandemic, and "crisis situation caused by mass migration", due to the "migration threat".

It is warning that the Government does not acknowledge the actual end of the migration crisis and terminates the "crisis situation caused by mass migration" because it claims that it will lift the "state of danger" when the COVID-19 crisis is over. The Minister of Justice in April 2020 argued that the end of the COVID-19 crisis would objectively be determined also by the international community; therefore, it would not entirely rest only on the government to decide.[61] Numbers on the inflow of people is, however, also objective – which does not bother the Government. On the other hand, while the fear from migration, created mostly artificially, could be used for political purposes, i.e., the Government does everything it can against the threat without risking anything; COVID-19 is real and demands effective responses. It can, thus, be speculated that the timely termination of the emergency might in the interest of the Government.

When the "crisis situation" was extended for the first time in March 2016 to the entire country, the Hungarian Helsinki Committee (Budapest) asked the Police and the Immigration Office to make public the otherwise "data of public interest"[62] that they used to justify the

[57] For more specific rules, see http://www.kormany.hu/en/prime-minister-s-office/news/government-declares-state-of-crisis-due-to-mass-migration-in-two-counties.

[58] This last provision will be applicable, particularly if a disturbance or violence occurs at a reception center or any other facility serving as a shelter for foreigners in a settlement or on its outskirts. As can be seen, it is quite a vague definition.

[59] See, e.g., https://www.helsinki.hu/alsaghelyzet-ez-nem-valsaghelyzet-sajat-torvenyet-is-megserti-a-kormany/

[60] On the one hand, see: https://www.bbc.com/news/world-europe-51707958; https://www.nytimes.com/2020/03/13/world/europe/turkey-greece-border-migrants.html

[61] https://www.welt.de/politik/ausland/article207175133/Judit-Varga-Ungarn-tut-nur-das-was-alle-in-Europa-tun.html

[62] Act CXII of 2011 on Informational Self-determination and Freedom of Information

extension. The authority declined, claiming that these data were classified for ten years.[63] Finally, the issue of secrecy versus accessibility was resolved by the Ministry of Justice one year later, in April 2017. The Ministry ordered the authorities to provide the data requested because, as stated in its long-overdue though properly argued letter, the interest in the classification of the data was outweighed by the public interest in access to information. According to this document,[64] the number of irregular migrants (illegally entering into Hungary) between 15 September 2015 (the entry into force of the law) and 4 March 2016 (last available data before the request for information arrived) was as indicated in Table 1. It is also a relevant data that in 2018 there were 11 times fewer actions taken by border control than in 2017 and 81 times less than in 2015.[65]

Table 1

	Total	**Per day**
15 September–31 December 2015	189,720	1,762.2
1–31 January 2016	502	16.1
1–29 February 2016	2,290	78.9
1 January–4 March 2016	3,379	52.79

Source: http://www.helsinki.hu/wp-content/uploads/valsag_anonim.pdf

It is interesting to note that the authorities did not take any proactive action as regards the realization of the right to information or to justify the actions of the Government: they did not provide any data that were not included in the request. A similar attitude was present concerning the sharing of data on the geographic spread of the coronavirus in March 2020.[66]

1.2. Principles of constitutionality, necessity, and proportionality

In the wake of the legislative action in 2015, the Criminal Procedure Act (CPA 1998) was also modified. As a result, it rendered the following provisions of the CPA inapplicable to migrants who attempt to enter the territory of Hungary illegally when the "crisis situation caused by mass migration" is in force. First, providing a translation of the indictment and the court's ruling or parts thereof relating to the convicted person. Second, the CPA exemption rules on minors, which, in a regular criminal procedure, would involve the necessary guarantees a legal system has to provide for a child. These are as follows: taking the age of the accused into consideration; the involvement of a teacher in the proceedings as a lay member of the court; limited pre-trial detention; when deciding on the execution of the sentence, the judge deciding on its place and method, taking the accused's age into account; in correctional facilities, minors being separated from adults; and the waiving of a trial not being an option. An amendment already in 2017 removed this exemption rule on minors and also provided for a mandatory presence of a defense attorney. These rules have been maintained by the new CPA 2017, which is in effect since 1 July 2018. It also refined the translation rules: now, the defendant can waive of translation, i.e., it must be provided.

Nevertheless, between 2015 and 2017/2018, the new criminal procedural rules restricted and violated due process rights. It is questionable if, for instance, the right to human dignity and the right to defense is adequately ensured in the "crisis situation caused by mass migration"

[63] Magyar Helsinki Bizottság, "Tíz évre titkosították, miért is van most válsághelyzet" ["The reason for the crisis situation has been classified for ten years"] (5 April 2016), http://helsinkifigyelo.blog.hu/2016/04/05/tiz_evre_titkositottak_mitol_is_van_most_valsaghelyzet.
[64] http://www.helsinki.hu/wp-content/uploads/valsag_anonim.pdf.
[65] https://www.helsinki.hu/alsaghelyzet-ez-nem-valsaghelyzet-sajat-torvenyet-is-megserti-a-kormany/
[66] See in point V. 1.

when no translation is provided, and the accused is just the object of the state's actions. The exclusion of rules on minors certainly affects human dignity and their right stipulated in the FL in harmony with the UN Convention on the Rights of the Child. Moreover, such exclusion is discriminatory as we cannot find any objective reason for unequal treatment. As said, even if the "crisis situation caused by mass migration" were to be considered as a "special legal order" (which is not the case), the potential for the violation of the human dignity of the child could have been legitimately raised.

Regardless of what the Hungarian Government thinks about these "emergency measures", which are clearly unconstitutional, their logic is followed at neither supranational nor international level. The European Commission found the Hungarian legislation (from 2015) to be incompatible with EU law, that is, the Asylum Procedures Directive (Directive 2013/32/EU) and the Directive on the right to interpretation and translation in criminal proceedings (Directive 2010/64/EU), and opened an infringement procedure in 2015. In 2017, it dropped the investigation on the translation rules but still found inadequacies, in particular, concerning the implementation of the Asylum Procedures Directive, the Directive on Return (2008/115/EC), Reception Conditions (2013/33/EU), and several provisions of the Charter of Fundamental Rights.[67]
Even if they are not closely related to the "crisis situation", they are migration-related laws and, as such, cannot be left unmentioned. Stop Soros Law (2018), which criminalizes activities in support of asylum applications and further restricts the right to request asylum,[68] and the other Act on foreign-funded NGOs (2018)[69] have also been challenged before the CJEU. Advocate General, in this latter case, concludes that this piece of legislation is incompatible with EU law because it restricts the free movement of capital and violates several fundamental rights.[70]

As for the implementation of the asylum laws, also the ECtHR condemns Hungary. In 2017, it found a violation of the ECHR in the case of *Ilias and Ahmed.*[71] Ilias and Ahmed were detained illegally and then forced to return to Serbia without the examination of their reasons for seeking asylum.[72] The Grand Chamber, on the request of the Government, re-examined the case in 2019 and, based on a newly developed test, found that the detention was not unlawful. Therefore, the applicants' right to liberty and security had not been infringed. It, however, upheld that authorities had violated the applicants' fundamental rights by failing to properly examine the consequences they would be facing in case of their expulsion to Serbia.[73] The Hungarian Minister of Justice opined that the judgment is in favor of the

[67] http://europa.eu/rapid/press-release_IP-15-6228_en.htm. See also other procedures on the asylum law, https://ec.europa.eu/commission/presscorner/detail/HR/IP_17_5023.
[68] https://ec.europa.eu/commission/presscorner/detail/en/IP_19_4260
[69] European Commission v Hungary, Case C-78/18.
[70] P Bárd, 'The Hungarian "Lex NGO" before the CJEU: Calling an Abuse of State Power by its Name', VerfBlog, *2020/1/27*, https://verfassungsblog.de/the-hungarian-lex-ngo-before-the-cjeu-calling-an-abuse-of-state-power-by-its-name/
[71] *Ilias and Ahmed v Hungary* (Application no 47287/15), judgment, 14.03.2017. Drinóczi and Mohay, n. 54.
[72] Act CXL of 2015. https://www.helsinki.hu/en/ilias-ahmed-ecthr-grand-chamber-ruling/ The applicants claimed that Hungary had violated their rights under Article 3 (prohibition of inhuman or degrading treatment – in relation to reception conditions in the transit zone), Article 5 (the right to liberty and security – in relation to the rules on leaving the transit zone) and Article 13 (right to an effective remedy) of the ECHR.
[73] 21 November 2019. For analysis and critic of the ruling, see https://www.helsinki.hu/en/ilias-ahmed-ecthr-grand-chamber-ruling/. For a comparison of the two judgments, see https://www.echr.coe.int/Documents/Press_Q_A_Ilias_and_Ahmed_Hungary_ENG.pdf

government, and its border control is sovereign and legitimate,[74] so no actions, including the inadequate provision of food in the detention centers, should be criticized. Between August 2018 and March 2020, the ECtHR issued 18 emergency decisions and ordered the Hungarian government to give food to migrants in detention in the transit zone at the southern Hungarian border.[75] In 2019, the European Commission opened new infringement for non-provision of food in transit-zones.[76] According to the Hungarian Helsinki Committee, in November 2019, about 180 children are detained in the transit zones, and over the past two past years, more than 1,700 detainees were minors.[77]

1.3. Agency: "deployment" of the military on Hungarian soil

Under the *modified Act on the Military of 2015*, in a "crisis situation caused by mass migration", armed Hungarian military forces may be used to assists the police in protecting and keeping order at the borders. In performing this task, the military operates under the Act on Police, but under the command of their military superiors, and simply assist and facilitate police operations. However, the "deployment" of the military within the territory of the state is *expressis verbis* excluded by the FL, with only one exception: in a "state of emergency", the military may be deployed if police cannot maintain peace and order. Moreover, it is the constitutional duty of the police to protect the state borders.[78] A joint reading of Articles 45(1)[79] and 50(1)[80] FL does not support the power given by the Act to the military. It is doubtful that there are enough guarantees or that it is constitutionally legitimate for the 2015 Act to render military staff operating in Hungary under the scope of the Act on Police without supporting rules in the constitution. The same question also arises in connection with the "state of terrorist threat" and the "state of danger".[81]

2. The Sixth Amendment – designing a new emergency: the devil is in the detail

The Hungarian political decision-makers decided to address terror threats, as well. In this case, however, they opted for amending the FL by introducing a new type of "special legal order".

The draft of the Sixth Amendment of the FL was not made available in January 2016 when discussions began. What the general public could see was the debate on the content of the amendment in the political discourse. This version did not get the political support needed during the drafting process. The opposition claimed that the draft used vague language concerning the circumstances under which the new "state of terrorist threat" can be declared, it lacked the essential checks and balances and allowed the deployment of the army in the

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[74] https://hungarytoday.hu/hungary-confining-migrants-to-transit-zone-not-unlawful-says-european-court-of-human-rights/

[75] https://www.ecre.org/hungary-continued-starvation-tactics-continued-interim-measures/?fbclid=IwAR3sMUchN7Aai4x8KxvjAGKohQfYJzMLUDZCuyGcRSlnbwJXOI6tCN0l9y4, https://www.helsinki.hu/en/echr_eighth_interim_measure_denial_of_food/

[76] https://ec.europa.eu/commission/presscorner/detail/en/IP_19_4260

[77] https://www.helsinki.hu/en/ilias-ahmed-ecthr-grand-chamber-ruling/

[78] Art 46(1) FL.

[79] Hungary's armed forces shall be the Hungarian Defence Forces. The core duties of the Hungarian Defence Forces shall be the military defense of the independence, territorial integrity, and borders of Hungary, the performance of collective defense and peacekeeping tasks arising from international treaties, as well as the carrying out of humanitarian activities by the rules of international law.

[80] Should the use of the police and the national security services prove insufficient, the Hungarian Defence Forces may be used during a state of emergency.

[81] See point 2 below and point V.5.

territory of Hungary. A revised version of the draft, which again could not be found on any government website, was submitted to Parliament at the end of April 2016.[82] The Hungarian Parliament adopted it without any modification as the Sixth Amendment.

The text in Article 51/A on the "state of terrorist threat" seems to be in line with the internal logic of the chapter on "special legal order". This Article is, however, somewhat more vaguely worded compared to the provisions on the other types of emergencies. For instance, contrary to the definitions applied to other "special legal orders", Article 51/A covers not only the occurrence of the actual danger but also its probability (threat), which is usually sufficient only in the case of the gravest threats: "danger of external armed attack" or "danger of war". The "state of terrorist threat" does not necessarily pose an equal danger. This difference may explain why two further problems should be pointed out. First, there is no efficient oversight of special decrees issued by the Government in the period between the initiation of the declaration of the "state of terrorist threat" in Parliament and its actual introduction by Parliament. The Government is only obliged to inform the President and the competent parliamentary committee about the measures issued. Similar rules are found in connection with the "state of preventive defense" (e.g., the danger of external armed attack), which, one might think, poses a greater danger and requires more immediate action, which may not be the case with a "state of terrorist threat". Second, the army can be deployed within the territory of Hungary, provided that the police and national security agencies cannot resolve the situation, from the date of the proposal to introduce the "state of terrorist threat". Similar provisions can be found in connection with a "state of emergency" (coup d'état and revolution). Again, though, there are significant differences between these two situations. The first is the nature of the problem that justifies the introduction of these emergencies. The second is the fact that the army is deployed during a "state of emergency" when so decided by the Parliament, or by the President if it is incapacitated, whereas, in a "state of terrorist threat", the army can be deployed between the date of the request of the Government and the decision taken by Parliament to introduce the "state of terrorist threat". The Article does not specify who can deploy the army; the sentence is formulated in the passive.[83] It creates an easier way to control the army: the Government proposes the introduction of the "state of terrorist threat", claiming a significant and direct threat of an attack, which it keeps secret for national security reasons, and the insufficiency of police forces, and takes direct control over the army. Otherwise, deployment would require the support of a two-thirds majority of the Parliament.
All of these are mere theoretical assumptions, as this emergency has never been activated, unlike the "state of danger", which is the response to the COVID-19 crisis.

V. COVID-19 and the "state of danger"

The virus was first detected in Hungary on 4 March 2020. When we compare the timeline of governmental responses,[84] we could say that the Hungarian Government moved relatively

[82] http://www.parlament.hu/irom40/10416/10416.pdf.
[83] Art 51/A(5): "The Hungarian Defence Forces may be deployed while the measures referred to in paragraph (3) are in force and during a state of terrorist threat if the use of the police and the national security services proves insufficient."
[84] It seems that the reaction time of governments is around ten days, except in countries whose leaders does not take the pandemic seriously, like Brazil (T Bustamante and EP Neder Meyer, 'Bolsonarism & Covid-19: Truth Strikes Back', Int'l J. Const. L. Blog, Mar. 24, 2020, at: http://www.iconnectblog.com/2020/03/bolsonarism-and-covid-19-truth-strikes-back/) or decided, first, to choose another epidemiological response, like the UK, which has been criticized by the WHO (https://www.bbc.com/news/uk-51683428.html, https://www.cambridge-news.co.uk/news/uk-world-news/coronavirus-who-government-uk-strategy-17924466). Italy declared national state of emergency on 31 January (D Tega and M Massa, 'Fighting COVID 19 – Legal Powers and Risks: Italy',

fast, which, however, was not without controversies.[85] When the "state of danger" was declared (11 March 2020), the number of those infected was 13; when the restrictions on schools, shops, state borders, schools, etc. were introduced on 16 March, the number of the infected was still low (36), and two of them had been cured. The restriction on movement was decided on 28 March, when the number of the infected was 256 (the cured: 34, the dead: 11). The spread of the virus slowed down by the beginning of April; it stayed below the European average. The reasons could be the low number of tests (37,326, on 15 April; 76,331 on 1 May), the testing protocol (it is only done if symptoms are shown), the latent infected, and governmental measures that have been introduced in an early stage. The spread had accelerated by mid-April.[86] The prime minister announced, at the end of April, that the restrictive measures would be gradually softened up starting with the first week of May.

The situation caused by the COVID-19 pandemic is dynamic and has provoked a harsh political fight with no hope for collaboration between the majority and the opposition. At the same time, the governing party has not forgotten about trying to take political advantage of the crisis.

1. Events around the declaration of the "state of danger"

The spread of the virus to Hungary, already in March 2020, prompted the population to exercise unprecedented social distancing, as advised by WHO and governmental bodies, made parents concerned about the spread of the coronavirus in schools and people demanded the possibility to stay at home (home-office), while many had been left without an income. It has had a continued effect on every aspect of life, without an exception. The primary aim of the Government was to avoid mass disease (as the health care system cannot deal with it). Legal restrictions on everyday life have been introduced gradually, as the infection spread. Hungary[87] gradually closed theatres, cinemas, stores (excluding food stores), and restaurants. As a result, restaurants can be open until 3 pm. Students cannot attend schools and universities, but services are provided in the form of distance learning, which requires internet access and equipment. Borders are closed for passenger traffic; Hungarians can return home from abroad, but health check and the necessary precautionary measures are required. A humanitarian corridor is opened for nationals of neighboring countries of Hungary. There is a radical limitation on outside activities.

VerfBlog, 2020/3/23, https://verfassungsblog.de/fighting-covid-19-legal-powers-and-risks-italy/). The Czech Republic, where the first case was reported on 1 March 2020, introduced emergency on 12 March 2020 (https://www.statista.com/statistics/1104327/czechia-coronavirus-covid-19-new-cases/, https://home.kpmg/xx/en/home/insights/2020/04/czech-republic-government-and-institution-measures-in-response-to-covid.html). Spain declared emergency on 14 March, 2020 but introduced certain restricted measures earlier; the first case in mainland was detected on 25 February. In Kenya, the first case was reported on 6 March, and on 15 March, President Uhuru Kenyatta introduced severe restrictions, which resulted in, for instance closing universities (https://www.norway.no/contentassets/11be8d5a755f4807b40b498ec3a5ca17/press-statement-by-he-15.03.pdf).

[85] These controversies might have rooted in undecidedness and hesitation: when the state of danger was declared (11 March, Wednesday), the Government did not talk about closing elementary and high schools until 13 March (Friday) when the prime minister changed what he said in the morning (no schools will be closed) and, in the evening, announced that schools would be closed from 16 March (Monday).

[86] www.koronavirus.gov.hu; http://abouthungary.hu/news-in-brief/coronavirus-heres-the-latest/ https://atlatszo.hu/2020/04/03/koronavirus-hirado-magyarorszagon-feltunoen-lassan-terjed-a-jarvany-a-halalozasi-arany-magas/; https://atlo.team/koronamonitor/

[87] Drinóczi and Bień-Kacała, n 7.

Despite the law on banning meetings, the Parliament continues its activities as sessions are not to be considered gatherings.[88] Transmission from the Hungarian Parliament became limited: journalists do not have permanent entry passes any longer (they are allowed to enter on a daily basis), they have to be healthy (although how this is checked remains unknown), and are encouraged to listen to the online transmission instead of personally attending parliamentary sessions. The public is informed through daily press conferences from the Operational Corps – a body helping the prime minister to manage the crisis. Since March 19, these are broadcast instead of taking place physically. Journalists can submit their questions beforehand; they either receive an answer or they do not. In the case of anti-government media, it is usually a "not". In the beginning, the Operational Corps repeatedly did not answer questions concerning the public statistical data on the geographic range of the virus and did not give proper justification. They argued that the protection of privacy demands secrecy. This was despite the fact that only statistical data was requested; moreover, the personal medical data of those in statutory confinement has become public information. Those infected have to put a red document indicating the fact of the infection on their door in a clearly visible place. The government's position has already been reconsidered, and, in April, they started to provide the data.

Courts, prosecutors' offices, and public notaries are operating under a special regime. They took an extraordinary break to avoid physical contact and, later, started to perform their activities remotely. The implementation of "judicial social distancing", however, has a bearing on due process rights.[89]

There is a restriction of movement, which does not ban leaving home for doing "essential" activities, since 28 March for 15 days, which, in April, was extended to an unlimited period. Its necessity is weekly reviewed.

The number of the infected, the cured, and those who succumbed is growing,[90] so does the number of unemployed people and bankrupt firms. Therefore, the Government has introduced financial and tax-related measures to ease the economic impact of the crisis, have made decisions to keep the state and the economy functioning.

The legal basis of all of these actions was the declaration of the "state of danger" on 11 March 2020.[91] Since then, the Government issued the above-mentioned measures in the form of governmental decrees, as per the FL. In an effort to comply with the FL rules on the temporal effect of emergency decrees, the Government, before the expiry of these decrees (15 days), had submitted the "authorization bill".[92] This Bill became the Coronavirus Act 2020. To facilitate its adoption on time, the Government also requested a fast track procedure that combines accelerated process and deviation from other rules of the House. The fast track procedure, therefore, requires 4/5 majority of votes. The opposition did not support the fast track adoption; thus, the Bill could only be passed on March 30.

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[88] The Parliament „must has sessions even during wartime". https://www.portfolio.hu/gazdasag/20200311/koronavirus-peldatlan-donteseket-hozott-meg-ma-a-magyar-kormany-418965. It seems that the FL rule on the banning of termination of the Parliaments mandate in those two emergencies is interpreted correctly, with the rule of *plus semper in se continet quod est minus.*

[89] More on it, see below at point 5.

[90] https://koronavirus.gov.hu/, https://www.gov.pl/web/koronawirus/wykaz-zarazen-koronawirusem-sars-cov-2

[91] 40/2020. (III.11) Korm.rend. a veszélyhelyzet kihirdetéséről [Government Decree 40/2020 on the declaration of the state of danger], http://njt.hu/translated/doc/J2020R0040K_20200311_FIN.pdf

[92] https://hungarianspectrum.org/2020/03/21/translation-of-draft-law-on-protecting-against-the-coronavirus/

In the following points, I summarise the constitutional implications of the above process (point 4), the declaration of the "state of danger" (point 2), the Coronavirus Act (point 3), and the emergency governance by decree (point 5). I also offer an explanation of why the Hungarian crisis is being managed like this, and what else could have been done – provided that Hungary still accommodated "normal" constitutionalism (point 6).

2. The activation of the constitutional emergency regime

Article 53 of the FL says that the "state of danger" can be declared in the event of a natural disaster [*elemi csapás*] or industrial accident endangering life and property, or to mitigate its consequences; it does not provide further explanation. The FL does not refer *expressis verbis* to a human pandemic, either – constitutions usually do not mention it. It appears only in the corresponding Act on catastrophes (2011) under its heading of "state of danger". Under this heading, the Act groups events that can trigger Article 53 FL in three categories – i) "natural disaster [*elemi csapás*], natural dangers"; ii) "industrial accident, civilizational dangers"; iii) other dangers – and provides for exemplificative lists. It includes "human pandemic" under category iii). As per the FL, the Act also contains the subject matters relating to which the extraordinary measures and decrees can be issued in the "state of danger", with which the content of the governmental decrees introduced in the first weeks does not correspond precisely. It is discussed below.

At the moment, there are five readings of the activation of Article 53 of the FL. The first is the opinion of the Government, which claims that the declaration of the emergency is constitutional, and each measure has been necessary. The second claims that normal-times measures could have been adequate to manage the defense against COVID-19.[93] The third argues that the Act – already in 2011 – unconstitutionally expanded the meaning of the FL; therefore, the Government declared the emergency without a constitutional ground – it is viewed as another sign of dictatorship.[94] Along this train of thought, there is a fourth opinion. It also claims the unconstitutional expansion of the FL definition but acknowledges the necessity of the deviation from the too closed system of constitutional emergency regimes. At the same time, they call for respecting constitutional principles and the reconsideration of the regulatory depth of the constitutional emergency regime.[95] Based on the actual threat of COVID-19 and the management of the crisis in the first four weeks, and the constitutional and statutory design of defense against human pandemics, I still think that the actions of the Hungarian government simply show the business-as-usual functioning of illiberal constitutionalism.[96]

The Act on catastrophes, which is to be applied in a constitutional emergency, similarly to the Act on the health care ruling on pandemics under the regular legal order, are not designed for managing anything similar to COVID-19. This virus is, unlike floods and ordinary flu, not

[93] G Halmai and KL Scheppele, 'Orbán is Still the Sole Judge of his Own Law', *VerfBlog,* 2020/4/30, https://verfassungsblog.de/orban-is-still-the-sole-judge-of-his-own-law/

[94] G Halmai, 'How COVID-19 Unveils the True Autocrats: Viktor Orbán's Ermächtigungsgesetz', Int'l J. Const. L. Blog, Apr. 1, 2020, http://www.iconnectblog.com/2020/04/how-covid-19-unveils-the-true-autocrats-viktor-orbans-ermachtigungsgesetz/; A Schiffer, 'Különleges jogbizonytalanság [Extraordinary legal uncertainty]', https://mandiner.hu/cikk/20200313_kulonleges_jogbizonytalansag (13 March 2020), KL Scheppele, 'Orbán's emergency', https://hungarianspectrum.org/2020/03/21/kim-lane-scheppele-orbans-emergency/, https://verfassungsblog.de/pandemic-as-constitutional-moment/

[95] Cs Tordai, 'A közjog határai a járványveszély idején [Limits of public law during pandemic]', https://igyirnankmi.atlatszo.hu/2020/03/16/a-kozjog-hatarai-a-jarvanyveszely-idejen/ (16 March 2020).

[96] Drinóczi and Bień-Kacała, n 7.

restricted to a specific location or a specified period. It is also highly contagious without a vaccine, unlike regular flu or other infectious diseases Hungary could encounter.
There are arguments that adequate crisis management could have been performed based on the ordinary legal regime, such as the Act on health care (1997). It is a debate which, most probably, cannot be resolved at all – as the emergency was declared and measures that were deemed necessary to keep pace with reality have been issued. Under a regular regime, when a statutory-based "pandemic crisis" (Act on health care) should have been declared, the following normal-times tools could have been used: statutes, ordinary governmental decrees, and the possibility of the Chief Medical Officer to issue rules. The Chief Medical Officer would have led the fight against COVID-19 – in this case. Fast responses were, however, needed in every sphere of life, especially during the first phase of the pandemic. Nevertheless, the normal legislative process takes time, governmental decrees need to respect legal hierarchy, and the Chief Medical Officer can act only within the framework of the Act on health care. It is highly questionable if, exclusively based on this Act, some measures could have been introduced at all. For instance, whether education institutions could have been closed, changes in the working environment, and the practice of courts could have been allowed, and certain economic measures, e.g., on the use of PIN codes and loans,[97] could have been introduced. Again, there was a massive popular demand and need for these - the law caught up.

Therefore, it can be argued that neither the Act on catastrophes (with the constitutional emergency) nor the Act on health care (as a normal-time measure) was *de facto* fit for the COVID-19 crisis management purposes. Nevertheless, again, considering the gravity of the pandemic, the changes it caused, and the statutory design explained above would make us conclude that *de jure*, declaring the "state of danger" seemed to be the only available option. It needs to be added that not even the opposition rejected the idea of declaring an emergency.

3. The Coronavirus Act 2020 – authorization Act implementing the FL

Nevertheless, interestingly enough, whatever position we take on the constitutionality of the declaration of the emergency, it does not matter as it does not alter the constitutional deficiencies of the Coronavirus Act (2020). This Act is the "authorization Act", and it is as controversial as the constitutionality of the activation of the "state of danger".
The Coronavirus Act mainly repeats and implements the FL, e.g., on the CC, the possibility of governmental law-making, including the suspension of and derogation from legislative provisions, the requirement of necessity, and proportionality. The Coronavirus Act does require regular reporting to the Parliament on the measures taken and allows the body to withdraw its infinite authorization, in terms of both time and subject matter, at any time. The parliamentary majority of Fidesz, however, makes this guarantee quite meaningless.
It also does not allow any by-elections and referenda, and the representative body of the local government cannot be dissolved. This rule might be viewed as attacking democracy. Nevertheless, considering the results of the local elections in 2019,[98] it is doubtful that this action was motivated by political ill-will. Besides, this measure is introduced in a crisis (in which social distancing is a rational demand), in a cardinal Act, following the logic of the FL on the termination of the mandate of the other elected body (Parliament shall operate continuously). This restriction is also in line with FL's human rights derogation provision, as far as the subject matter is concerned.

[97] Among the first measures, the Government, e.g., raised the limit of paying with card without inserting the PIN (from 5,000 to 15,000 HUF) and suspended loan payments to banks until the end of the year.
[98] https://icds.ee/local-elections-in-hungary-orban-no-longer-invincible-but-his-party-is-still-the-strongest/

It permanently adds two crimes – violating epidemical confinement and spreading false information during the "state of danger" – to the Criminal Code. From an emergency drafting perspective, both rules are below standard. Both crimes are new ones, which could have been adopted in an ordinary legislative procedure if it had not been urgent to address the issues the Government wanted to address. On the other hand, the application of the second crime is restricted to the "state of danger". As such, it has become a provisional rule in the body of the regular criminal regime. Contentwise, it is primarily the second one that gives rise to suspicion because it is vaguely defined and very complicated at the same time. It most probably will not assist the correct application and might be able to discourage critical opinions, but it may be used against real fake-news, as well. We will see how it will be applied, and to what extent it indeed poses a chilling effect on journalists and academia.

Nevertheless, the Coronavirus Act is unconstitutional on, at least, three grounds. First, it does not observe the 15 days rule of the FL. Second, it legitimizes *ex-post-facto* the decrees that were issued outside of the scope of the Act on catastrophes, i.e., without a proper constitutional ground. Third, it consented to other decrees to be adopted in the future, thus excluding any meaningful parliamentary oversight.
The government argues that the 15 days rule is not applied because, first, no one knows if the Parliament could have sessions at all in the future. On the other hand, they have not introduced or even thought about adding any remote voting or discussion system – unlike other parliaments.[99] Second, they claim that the Parliament can withdraw its authorization at any time – which is true. Still, it requires the Parliament to act – which is contrary to the FL, which ex lege terminates the temporal effect of the decrees after 15 days. The *ex-post* facto consent on the content of the already issued decrees and the future authorization, regardless of the content, jointly serve to create the legal ground for decrees that had been issued outside of the scope of the Act on catastrophes (2011) between the declaration of the emergency (11 March) and the adoption of the Coronavirus Act (30 March). As for the other decrees adopted under the authorization of the Coronavirus Act, this latter serves as an implementing Act, which therefore complies with the constitutional requirement of having a cardinal Act on the emergency *ex-ante*. That is how the Government would argue. Whether we accept or reject this argument depends on our interpretation of the ex-ante rule of the FL and our general assessment of the state of Hungarian constitutionalism. It is a reasonable counter-argument that the Government's opinion disregards the obvious claim that the condition of having an implementing Act *ex-ante* should mean "prior to the declaration of emergency", and that it should actually implement the constitutional provisions, even contentwise. Otherwise, it does not provide any guarantee. Nor there is a guarantee in a political situation in which the governing force has 2/3 majority in the Parliament that has a record of abusing emergency regimes.

The most important question concerning the Coronavirus Act might not be whether certain Articles are cardinal acts or not, or whether indefinite authorization can be withdrawn by a simple or a two-third majority of the Parliament,[100] but whether the Government would be

[99] For an insight into the functioning of parliaments, during the epidemic see Ittai Bar Siman Tov, 'Parliamentary Activity and Legislative Oversight during the Coronavirus Pandemic – A Comparative Overview', https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3566948

[100] G Halmai and KL Scheppele, 'Don't Be Fooled by Autocrats!: Why Hungary's Emergency Violates Rule of Law', *VerfBlog,* 2020/4/22, https://verfassungsblog.de/dont-be-fooled-by-autocrats/. See also the response to this latter blog: D Karsai, 'Let's not fool ourselves either!: Some remarks on Professor Halmai's and Professor Scheppele's blogpost', *VerfBlog,* 2020/4/27, https://verfassungsblog.de/lets-not-fool-ourselves-either/; Halmai and Scheppele, n. 93.

ready to rreissuedecrees without even a formal authorization.[101] It is because, under the Hungarian political and constitutional setting, not even the two-third majority would stop the Government from issuing emergency decrees. Should the authorization be withdrawn, the same content could be reissued in another emergency decree, which then would be in effect for 15 days (according to the FL). For extension, the support of the majority of the Parliament should be asked. The Parliament did not give it, so decrees would be reissued. Right now, however, it seems that the Government observes its idea of its illiberal understanding of the Rule of Law, i.e., illiberal legality[102] and refrains from reissuing emergency decrees (see also the in-between period below).

4. The in-between period

As has been said, the opposition did not agree to discuss the Coronavirus bill on a fast-track process. They would have supported the bill if it had not eliminated the 15 days rule. Moreover, according to their submissions, they would have agreed on a more prolonged temporal effect (even 90 days) – what they wanted to insist on were the actual oversight and limited authorization.[103]
Nevertheless, the Government had to deal with the decrees, whose temporal effect had expired. It could have reissued them – as those who claim that Hungary is under a dictatorship might have expected. Instead, it seemed that it would choose another, less, or not at all, unconstitutional variation. The original idea was first to ask the managing authority of universities and nurseries to extend the break, under their discretion, so that the students can legally be kept away from the premises. Second, the Minister of Interior was to issue an order on the control on the internal Schengen borders. The Minister of Justice and the President of the National Judicial Office would have discussed the extraordinary break at courts. Unfortunately, a purely unconstitutional choice was preferred: On 26 March, the Chief Medical Officer issued a normative decision, which repeated the content of the decrees on universities and the border. Based on merely the Act on health care, this normative decision is illegitimate. The Chief Medical Officer can issue decisions only when there is a declared statutory-based "pandemic crisis", and only within the scope of the Act. As said above, it is not the statute-based "pandemic crisis" but the constitutional "state of danger" is the legal order under which Hungary is being governed. There are some subject matters in which the Act does not authorize them to rule, e.g., entering the country. It was, however, only a temporary measure, as based on the Coronavirus Act, the Government extended the effect of the decrees and, since then, keeps issuing new ones.

Nevertheless, what we can see is a careful "balancing" of illiberal constitutionalism in an emergency – the process observes illiberal legality. The emergency decrees whose temporal effect has expired were not reissued, which would have been blatant unconstitutionality. Instead, another more or less legal solution was chosen – something which is less clearly unconstitutional and could legally be defended as there is a legal basis (Act on health care), and there is a power of the Chief Medical Officer to rule. While keeping pace with reality in the first 15 days, the Government was also eager to create a legal environment, which, according to its understanding, legitimizes the possible unconstitutional but seemingly needed and already issued emergency measures. This effort culminated in the Coronavirus Act, which, as said, also implements the constitution and eliminates the constitutional guarantee of

[101] Halmai and Scheppele fear that it is possible. Halmai and Scheppele, n. 93.
[102] T Drinóczi, 'The European Rule of Law and illiberal legality in illiberal constitutionalism: the case of Hungary', *MTA LWP* 2019/16, https://jog.tk.mta.hu/uploads/files/2019_16_Drinoczi.pdf
[103] The other neuralgic point was the above-mentioned amendment of the Criminal Code.

temporality. Another example of this "balancing" exercise is how the emergency decrees enter into force, which is discussed below.

5. Governing by decrees

The Hungarian Parliament, similarly to the other state authorities, operates under the "danger of crisis". Yet, it still delivers regular legislative activities as emergency "legislation" is conducted through governmental decree as per the Coronavirus Act 2020 voted for on 30 March. It challenges the argument of the Government relating the concern on how long the Parliament can operate. No parliamentary sessions have been rescheduled, and no "remote procedures" have been discussed, while the Government is busy preparing both emergency decrees and regular bills. Many thought that the Coronavirus Act would be a door to dictatorship, as it gives unlimited power to the executive.[104] I think that, instead, it is still about how populist autocrat-led illiberal constitutionalism works. Let us not forget about the supermajority the governing party has in Parliament. So, further concentrating the power (Coronavirus Act), pursuing conservative policies (e.g., refusal of legal recognition of trans people), pleasing oligarchs (e.g., providing real estate free of charge to loyal funds, "outsourcing" higher education), reforming entire sectors (e.g., withdrawing the status of civil servant from those employed in the cultural sector), it is all done by the Acts of Parliament through omnibus legislation[105] or ordinary governmental decrees. Evidently, emergency decrees, especially those on the use of the military, financial matters, and take away or controlling property, could help in the endeavor to build a kind of soft totalitarian regime. But the vast majority of the emergency degrees, so far, have been used for crisis management. Besides, the content of emergency decrees could easily be transformed into statutes with the assistance of the Parliament.[106]

Based on the unspecified authorization of the Coronavirus Act, these decrees cover each aspect of life, including all types of legal procedures, the operation of legal persons, correctional facilities, post offices, child and social care, education at every level, data protection, traffic and transportation, the budget and the economy, the health care, partial restriction of movement and its indefinite extension with a weekly review, military assistance in the implementation of preventing measures, and their presence in hospitals and essential industrial companies, etc.[107]

From a drafting perspective, governmental decrees are "socially distant"[108] decrees, more precisely, "illiberally distant" from the ordinary body of law. Regardless of the indefinite authorization of the Coronavirus Act, the emergency decrees "truthfully" observe this Act and the 15-day rule of the FL. They employ a two-tiered entry into force technique: the decree, except for one provision, comes into force ex nunc. That particular provision, which does not come into force with the decree, enters into force after 15 days, and it is this that extends the temporal effect of the decree as per the Coronavirus Act. Their titles contain the expression of

[104] Halmai and Scheppele, n. 100.
[105] The bills on these issued have been submitted to Parliament. The Coronavirus Act has already been adopted.
[106] This seems to be already happening concerning economy related measures. See, the bills submitted on 21 and 28 of April: https://www.parlament.hu/irom41/10309/10309.pdf, https://www.parlament.hu/irom41/10314/10314.pdf, https://www.parlament.hu/irom41/10217/10217.pdf, https://www.parlament.hu/irom41/10315/10315.pdf.
[107] http://abouthungary.hu/news-in-brief/coronavirus-heres-the-latest/
[108] For the expression, see the presentation of Ronan Cormacain in the webinar organized by the Bingham Centre on 2 April 2020.

the "state of danger"; their authorization provisions refer to the FL and, after its adoption, the Coronavirus Act. The government decrees do not "amend" statutes, they "derogate" from their rules.
No other ways of "social distancing" are, however, applied: emergency governmental decrees are not collected separately on any websites; the usual regime governs their publication and accessibility.[109] It is not easy to find out what the new legal order looks like, as there are many decrees, and they cover all aspects of life (see below). In just the first six weeks, more than 50 decrees were issued. Some of them regulate the same matters; some have a nature of omnibus legislation; others amend the previously published emergency decrees. Being government decrees, they do not go through any formal consultation process, they are drafted in one or two days, and they do not have explanatory memoranda either.

Contentwise, they mitigate the legal consequences of the pandemic by avoiding personal contacts and, in turn, expanding the use of ICT tools in every legal sphere where they are applicable. Therefore, for instance, schools and universities undertake digital teaching and can also organize online exams in cases in which it is otherwise not allowed. Deadlines do not expire, so no one, including those involved in criminal procedures, can be adversely affected by the changed circumstances. Justice in civil and administrative cases is provided remotely, without personal presence being required. Judges base their decision on ICT, documents, and written statements. Personal appearance can only be requested in criminal procedures, and it is only granted when it does not breach "quarantine rules". New misdemeanor conducts are stipulated in decrees. Ministerial letters, not a formal source of law, demand the emptying of hospital beds for future COVID-patients. On the other hand, prisoners are not released.
So, sadly, beyond their being formally unconstitutional because of the constitutional deficiencies of the Coronavirus Act, some of the decrees may suffer from substantial unconstitutionality as well – regardless of how they intended to provide for adequate legal background for the changed circumstances. Some of the measures may raise doubts concerning the appropriateness of the legal source (notwithstanding the authorization), proportionality, and the right to due process (principle of directness), and the right of the child, e.g., their right to education. It should imply the right to access teaching materials and receive actual instruction in any form available. However, there are no provisions right now in the legal system to ensure that each student has effective access to them.

Economic and financial measures are also introduced in decrees. Notably, this is the field in which the mid- and long-term uncertainty, lack of cooperation, and the purpose of taking political advantage are palpable, and the intention of bypassing EU law might be present. This latter could have a bearing on the weak constraint power we argue that EU law has in illiberal constitutionalism.[110]
The prime minister said that the economy would soon stop, so it would need to be restarted. Among the first measures, the Government, e.g., raised the limit of paying with credit/debit card without inserting the PIN (from 5,000 to 15,000 HUF) and suspended loan payments to banks until the end of the year. It introduced an economic package (financial protection plan) on 6 April – the opposition and the economists are not satisfied. They claim that the package is "too little" and "too late" (it should have been announced 2-3 weeks before). Besides targeting the vulnerable, the decrees do not take good care of every vulnerability, such as certain types of self-employment, firms, unemployed, and poor people.

[109] See, e.g., magyarkozlony.hu and njt.hu.
[110] Drinóczi and Bień-Kacała, n. 4.

There is a decree which takes away some of the income of local governments, which they are entitled to from parking fees but does not order easing their tasks.[111] Another decree designates "special economic areas," which, subsequently, are being controlled by the county municipalities (where the governing party has a majority) instead of the municipal governments in territories where, for instance, a factory (e.g., Samsung plant) is located. This designation has tax and ownership implications as well: it will be the county, instead of the city, that collects taxes and gains ownership of properties owned by the town. Critics say that there are at least two political intentions behind this measure, which pretends to assists the defense against the economic effects of the pandemic. First, it is used to render the operation of an opposition-led town impossible.[112] Second, the Government wants to support Samsung, even if it needs to disregard the opinions of the residents and bypass EU law on direct state support.[113] Both reasons and the pretense of the Government fits the logic of illiberalism, while bypassing EU law shows the ever-weakening constraining power of EU law. An opposition politician requested the ombudsman to form an opinion about this measure.[114] The ombudsman could initiate a constitutional review, and when it happens, it will be the packed Constitutional Court, which will decide.

Another area of concern is the presence of the military, which seems to be extra-constitutional as it is not the emergency that allows their use. On the other hand, the military is not "deployed", for now. It assists the police, the non-healing related management of hospitals, and provides for the protection of essential infrastructure (with the use of weapons). However, the legal basis for sending them to 140 essential facilities, as planned, and the selection of these essential services are not exactly clear.[115]

6. Why is it like this? What else could have been done?

All of the above might be based on a misunderstood mission of the prime minister, who quickly become the responsible person for managing the coronavirus crisis,[116] and who does so according to a "military plan".[117] It seems to be aligned with illiberal populism that is also characterized with arrogance and a messianic sense of mission.[118]

This latter is what prevents him from cooperating with the opposition, tolerating constitutional oversight, and letting things out of his hand. Government by decrees seems to be about this and crisis management. Even if the Parliament operates normally, there is no apparent will to restore the ordinary legislative power of the Parliament in crisis-related issues. The Government/prime minister thinks that they are the only ones that can adequately address the challenges. They claim that those demand quick responses, which is undeniable. It is also

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[111] https://hungarytoday.hu/coronavirus-orban-economic-protection-plan-extra-pension/; https://dailynewshungary.com/coronavirus-in-hungary-leftist-opposition-government-response-package-too-little-too-late/; https://xpatloop.com/channels/2020/4/coronavirus-hungarian-opposition-critical-of-govts-proposed-economic-measures.html; https://verfassungsblog.de/illiberal-constitutionalism-at-work/

[112] Karsai, n. 100.

[113] https://ec.europa.eu/commission/presscorner/detail/en/IP_19_6078

[114] https://hvg.hu/gazdasag/20200425_Ombudsman_elott_a_godi_kulonleges_gazdasagi_ovezet

[115] In an omnibus legislation bill, the relevant Act is planned to be completely changed. The rules will be applicable to the current crisis as well. It seems that the statutory basis of governmental actions is being created *ex post facto*.

[116] The prime minister created ten action groups on/for: education; constructing mobile hospitals; security of essential companies; international coordination; communication; emergency legal order; financials; rebooting economy; coronavirus research; border control.

[117] https://www.portfolio.hu/gazdasag/20200320/orban-viktor-egy-katonai-akcioterv-szerint-dolgozunk-420773

[118] Drinóczi and Bień-Kacała, n. 4 (2018).

without doubt that the Hungarian legal system is "overregulated". Everything is regulated by statutes; governmental decrees and ministerial decrees implement the statutes; self-regulating bodies have regulations implementing all of the mentioned laws. Those who apply the law need a hard law to be applied. The COVID-19 pandemic, due to its global and highly infectious nature and the primarily used countermeasures, such as social distancing and self-isolation, has hardly left any area of life intact. Therefore, it has demanded immediate and effective responses, which cannot precisely be planned as no one knows when the pandemic will be over. Re-designing the legal system as a response to the COVID-19 crisis seems to be a legitimate need in Hungary. Its method, form, and extent are what remain to be assessed from constitutional, supranational, and human rights perspectives.

This pandemic will not end soon, and it affects all of us. Therefore, after issuing the most vital measures and taking the most necessary steps in the first couple of weeks, the ministries, in a "normal" kind of constitutionalism, could have realized this. They could have started to cooperate with stakeholders and parliamentary factions to develop the statutory base of all the measures, which the Parliament could have even voted for in a fast track procedure. In this way, all the constitutional inadequacies that occurred during the first two weeks could have been remedied. As said, no political forces opposed the declaration of the emergency and the measures of the first two weeks. Nor was the intention of the Government to try to prevent the sudden outbreak of the virus, which would have been catastrophic to the health care system, criticized. On the contrary, in some cases, more severe restrictions are demanded.

IV. Conclusion

I conclude in four points. First, Hungary indeed exemplifies how to be constitutionally well equipped but still able to abuse constitutional emergency and refine them when it seems to be absolutely necessary. That is, however, what can be expected from illiberal constitutionalism. We shall wait and see where Hungary will find itself when the COVID-19 pandemic is over. Depending on how the Prime Minister responds to the factual end of the pandemic and the changes ordinary legislation will make, we will see whether our hybrid regime has indeed turned out to be an authoritarian system.

Second, no matter how detailed a constitution is, not even under the constitutional and judicial model can abusive political regimes be legally prevented from abusing the constitution. During emergencies, the legal framework, including checks and balances and other guarantees, is of the utmost importance. Based on the experiences of the last 30 years and the current crisis, it is found that, in Hungary, the abuse and misuse of constitutional emergency have two layers. The first layer is the actual abuse of emergency powers, be those extra-constitutional (since 2015) or (partially) non-constitutional (2020). The second layer is the abusive regulation of emergencies and powers (all three) by bypassing constitutional procedures and resorting to secrecy, including the non-transparency of decisions and vague drafting. For a constitutional democracy, none of them is less dangerous than the other; for illiberal constitutionalism, it is business-as-usual.

Third, the Hungarian governance by decree illustrates a kind of socially-distant legislation and has a sense of order. As such, notwithstanding its questionable legitimacy and extensive, sometimes disproportionate use, does not seem to have caused much turmoil in the legal system – from a pure drafting technique perspective until the end of April 2020. Emergency measures, as a separate body of laws, can easily be removed from the legal system. The FL only requires another source of law, most probably a decree, in which the Government

declares the end of the "state of danger". From a drafting perspective, and for the sake of legal certainty, it would be more welcome if it also provided for a detailed list of all the decrees that lose their effect. The Coronavirus Act will automatically become inapplicable by the declaration of the end of the emergency. Formally, it can be removed from the legal system by another Act of Parliament. Other rules adopted as a regular amendment to a statute, such as the changes to the Criminal Code in the Coronavirus Act, or other rules on emergency measures, continue to be part of the legal system but could be applied only when a human pandemic emergency is declared.

Lastly, this worldwide pandemic is a test for any type of constitutionalism, and it challenges our way of thinking about them. It makes us reconsider the constitutional design and revisit our understanding of boundaries. It warns us that extraordinary times require extraordinary measures, but not without observing the basic foundations of social co-existence, as well as the core values of constitutional democracy. When a legal system is, notwithstanding its detailed rules on pandemics and constitutional rules on emergencies, unprepared for a COVID-19-type crisis, it is challenging for governments and parliaments to provide adequate responses. They are expected to act quickly and efficiently. They are also required to respect the coherence of the legal system in a situation that no-one could foresee and, at the beginning of which, no-one could precisely predict when it would end, and exactly what human and economic sacrifices will be involved. The Hungarian treatment of COVID-19 crisis reminds us to secure a solid factual basis for our assessment.[119] It also warns us to look, with an open mind, at the whole picture that provides for the social, political, and legal framework of the Hungarian crisis management – which is, so far (April 2020), illiberal constitutionalism.

[119] Similarly, see Karsai, n. 100.

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