MTA Law Working Papers
2020/17.

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

Gábor Mészáros

Magyar Tudományos Akadémia / Hungarian Academy of Sciences
Budapest
ISSN 2064-4515
http://jog.tk.mta.hu/mtalwp

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1. Introduction

It is nearly evident that Hungary is not a constitutional democracy anymore. As in her Blog Post Professor Kim Lane Scheppele emphasised when the Hungarian Government put Act XII of 2020 on Protecting against Coronavirus (the so-called 'Enabling Act') before the Parliament: "*Hungary is on the edge of dictatorship*".[1] However, in order to understand the present situation in depth we should make detailed analysis of the constitutional concerns in Hungary in recent years.

After the regime change in 1989, interesting developments occurred not just on social, political, or economical level but in the legal basis of the society as well. The first period of Hungarian constitutionalism can be described as the era of *Rule of Law* lasting till the elections in 2010 when one political force reached the governing majority with two-thirds of the seats in the parliament. Consequently, in April 2011, i.e. on the first anniversary of the election of 2010, a new constitution – called Basic or Fundamental Law – was promulgated. The second period of Hungarian constitutionalism contains two elections (in 2014 and 2018) which – substamtially influenced by new election rules[2] – resulted again in two-third majority for the governing Fidesz party.

I call this second part of modern Hungarian constitutionalism the *Rule by Law* era because in this decade the governing supermajority used abusive constitutionalism[3] and legislation to consolidate its political power and to undermine democracy. It is also to be noted that this was the period when emergency measures started to leak into the normal legal order. Finally, after the declaration of the state of emergency in order to handle the situation caused by the coronavirus pandemic in 2020 and the simultaneous acceptance of the "Enabling Act" we can talk about the system of *Rule without Law* where the formal constitutional and legal considerations are fading and the main aim of the Government is to hold unconstrained power

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

[2] About the problems and the relevant changes of the new act on elections see: European Commission for Democracy for Law (Venice Commission) and OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR) Joint Opinion on The Act on the Elections of Members of Parliament of Hungary (18 June 2012), available at https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2012)012-e

[3] According to David Landau abusive constitutionalism involves the use of the mechanism of constitutional change – both constitutional amendment and constitutional replacement – in order to create authoritarian or semi-authoritarian regimes. In a result these systems still look democratic from a distance and contain various elements that are no different from liberal democratic constitutions. See: David Landau, "Abusive Constitutionalism," 47 UC *Davis Law Review* (2013), 189-260, at 191.

without even the least sign of constitutionalism. The objective of the present paper is to describe how these final changes altered the basic structure of Hungarian constitutionalism. In the Hungarian illiberal model, the Government aimed to create an emergency regime even in the absence of real threat, to render extra-legal measures more acceptable, and to formally legalize the *Rule without Law* instead of *Rule of Law*. As we will see belowe in detail, extra-legality finally became normality and the values of constitutionalism withered.[4]

2. Backgrounds of Constitutionality and Rule of Law in Hungary

Thie present paper uses the term "constitutionalism" in a way accepting the dominant element of this phenomenon and, consequently, will treat "constitutionalism" as a synonym of "liberal constitutionalism". It is to be noted, however, that in legal theory constitutionalism is also used as the short form of the term "nonliberal constitutionalism"[5] or other preliberal versions of "ancient constitutionalism".[6] It is widely accepted that neither anarchy nor a totalizing concentration of power is consistent with constitutionalism. However, a wide range of constitutionalist politics and political systems may exist between the aforementioned extremities.[7] Nevertheless, a real constitutional system should have – according to Mark E. Brandon –the following three essential elements: the institutions authorized by and accountable to the people, some kind of intention of limited governance and the rule of law.[8] Constitutionalism in a liberal sense means not only regulating state (and governmental) power through rule of law and simultaneous empowerment and restrainment of government action but the separation of powers, truly democratic elections and judicially enforceable rights as well.[9] It is important to note that – with or without a written constitution – constitutionalism has a close relationship with liberalism due to the aim of protecting individual rights against the state.[10]

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[4] Gábor Mészáros, "COVID-19 flourishes and Hungarian constitutionalism withers", Law against pandemic (10 April 2020), available at https://lawagainstpandemic.uj.edu.pl/2020/04/10/covid-19-flourishes-and-hungarian-constitutionalism-withers/

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

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

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

[8] *Ibid*., 763.

[9] Thio, *op.cit.* note 6, 134.

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

In 1989-1990, after amending the old, Stalin-inspired, so-called Rákosi Constitution of 1949, the legal frameworks of the new Hungarian democracy were created according to the main institutions of constitutionality such as are democratic parliamentary system, representative government, independent judiciary system, ombudsmen to guard fundamental rights and Constitutional Court whose main task was to review the laws for their constitutionality.[11] Hungary was the first country in the region that adopted a new constitution with the amendment of approximately 80 per cent of the clauses of the former Stalinist constitution of 1949. The Hungarian constitutional structure's basic element was an adapted parliamentary system, whereas the Constitution also used the German chancellor-led system with a weak president – elected by the parliament – and a strong prime minister who was the head of the government. The Constitutional Court was considered as the safeguard of fundamental rights, and the body also became the most important institutional guarantee of constitutionalism. In the first two decades, the Court was the real constitutional check on the powers of the parliament and the government.[12] It is true that the established Constitutional Court with its very strong scope of authority "*has taken advantage of its broad powers of review to become the most powerful high court in the world.*"[13] These were the basic elements of Hungarian constitutionalism which lasted for around two decades.

In 2011, the newly appointed two-third majority accepted the new one-party constitution of Hungary called the Fundamental Law. This was the symbolic moment when Hungary lost the values of the 'Rule of Law Revolution'[14] of 1989 and became an illiberal democracy (or

[11] Kriszta Kovács - Gábor Attila Tóth, "Hungary's Constitutional Transformation," (7) *European Constitutional Law Review* (2011), 183-203, at 184.
[12] *Ibid*. 185.
[13] Antal Örkény – Kim Lane Scheppele, "Rules of Law: The Complexity of Legality in Hungary," in Martin Krygier and Adam Czarnota (eds.), *The Rule of Law after Communism* (Routledge, New York, 1999), 59.
[14] This term reflects on the fact that after the political transition in 1989 Hungary was one of the first country which provided all the institutional elements of constitutionalism such as the separation of powers and the constitutional guarantees of fundamental rights. This meant the transforming of the Stalin-inspired 1949 Rákosi Constitution into a 'rule of law', one which document became the basic element of the so-called 'constitutional revolution'. The first element of this process was the constitutional amendment of 1989 which already inserted new content into the old framework. As Gábor Halmai asserted the "*other decisive element of the new constitutional system was a very strong judicial review power.*" The first Constitutional Court led by the Chief Justice László Sólyom, followed an activist approach in the interpretation of the Constitution (laid down in the concept of the 'invisible constitution') which finalized the 'revolution under the rule of law' process [the Judgment 11/1992. (III. 5.) of the Hungarian Constitutional Court]. See Gábor Halmai, "A Coup Against Constitutional Democracy," in Mark A. Graber, Sanford Levinson and Mark Tushnet (eds.), *Constitutional Democracy in Crisis?* (Oxford University Press, Oxford, 2018), 243-244. This process is very similar with the 'post-sovereign' or 'pacted constitution-making' process happened in Spain (1970s) and in South Africa (1990s). These terms were used by: Andrew Arato, "Post-Sovereign Constitution-Making in Hungary: After Success, Partial Failure, and Now What?," 26 *South African Journal of Human Rights* (2010), 19-44 and Michel Rosenfeld, *The Identity of the Constitutional Subject* (Routledge, New York, 2010).

constitutionalism[15]) after the 'Constitutional Counter-Revolution' started in 2010.[16] As we will see, although the new Fundamental Law created a sui generis emergency framework which was unambiguously a positive development in a rule of law point of view, this was the first step when exception has started to leak into normalcy.[17] To understand this process, it may be useful to revise the problem of emergencies and the theories which themselves were also affected by the Hungarian model.

3. Special Legal Orders and the Fundamental Law

The basic problem with state of emergencies in constitutional democracies is that responses to an emergency often result in expansion of governmental powers and restrictions of constitutional democratic values such as are the rule of law, separation of powers, and, probably most importantly, individual rights and liberties. As Clinton Rossiter wrote decades ago: "*in time of crisis a democratic, constitutional government must be temporarily altered to whatever degree is necessary to overcome the peril and restore normal conditions*."[18] This simply means that "*the government will have more power and the people fewer rights*."[19] According to Oren Gross, emergencies "*present constitutional systems with critical substantive, institutional, and*

[15] According to Tímea Drinóczi and Agnieszka Bien-Kacala a populist political majority can transform a liberal constitutionalism to an illiberal one, by capturing the constitution and constitutionalism with legal means such as formal and informal constitutional change and paralyzing the constitutional court. Illiberal constitutionalism is built in states that have already experienced liberal constitutionalism, and "*are supported by the misunderstood concept of political constitutionalism, relying heavily on the emotional components of national identity*" such as Poland or Hungary. See: Tímea Drinóczi and Agnieszka Bien-Kacala, "Illiberal Constitutionalism: The Case of Hungary and Poland," 20 *German Law Journal* (2019), 1140-1166, at 1141.

[16] This term describes the current Hungarian constitutional system which was a result (and is also a model case) of constitutional backsliding from a liberal democratic system to an illiberal autocratic regime. The new constitutional order with the new constitution enacted in April 2011based on the votes of one political bloc alone with the aim to keep the opposition at bay. The Fundamental Law's 'constitutional order' with the already enacted cardinal laws do not respect the separation of powers and the guarantees of fundamental rights therefore the whole system cannot be considered a constitutional democracy anymore. In this system the institutions of a constitutional state such as the judicial councils, regular and constitutional court(s), ombudsman etc. still exist meanwhile with a limited power. It is also recognizable that there is a list of fundamental rights in the constitution but – because of the lack of independent judiciary and constitutional court – the institutional guarantees of human rights are endangered. See: Halmai, *op.cit.* note 14, 245-247, 255.

[17] I use the emergency (or exception)/normalcy dichotomy which reflects on a healthy operation of state of emergencies. If it is no longer possible to separate them from each other it is accepted to talk about a "permanent state of emergency". See Oren Gross, "Chaos and Rules: Should Responses to Violent Crisis Always Be Constitutional?," 112 *Yale Law Journal* (2003), 1011-1134, at 1089-1095. On "permanent state of emergency" see: Giorgio Agamben, *State of Exception* (University of Chicago Press, Chicago-London, 2005, trans. Kevin Attell)

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

[19] *Ibid*. 5.

jurisprudential challenges".[20] However, balancing between the necessities of crisis and individual rights can be really complicated. In liberal democracies, constitutions are limiting the executive power's ability to respond "*effectively and efficiently to emergencies*."[21] It is up to the constitutional systems to find a way how to handle emergencies and defend the state and the democratic regime in parallel with ensuring constitutional guarantees to prevent constitutional backsliding in the long term.

In the light of the above-mentioned idea, it is widely accepted that there are legalist and extralegalist answers to the question how to respond to emergencies. The legalists argue that emergencies must be handled by entirely legal responses, though these responses might well be different from those of normal times. Legalists think that this is the only way to preserve constitutionalism and the rule of law. The so-called extralegalist[22] position is of the opinion that serious emergencies need to be handled with measures outside the law.[23] However, the extralegal theory can be separated from dictatorship because its main aim is to defend the integrity of law from bringing emergencies into it. According to these theories, the real threat to the legal order is the aftermath of the accommodation to emergencies, when there is a possibility that extra-legal measures become the ordinary law itself. This theory is in direct connection with Carl Schmitt's declaration about the sovereign "*who decides on the exception*."[24] The sovereign is standing outside the legal order, because he is the only one who can handle the emergency by using the exception which is the only way to restore normalcy.[25] However, Schmitt wasn't the only legal theorist who had his own idea on the nature of emergencies and on the question of how to handle a crisis in constitutional democracies. His intellectual opponent was Hans Kelsen with his legalist ideas (expressed around the popularly

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[20] Oren Gross, "Emergency Powers", in Mark Tushnet, Mark A. Graber and Sanford Levinson (eds.), *The Oxford Handbook of the U.S. Constitution* (Oxford University Press, Oxford, 2015) 785.
[21] *Ibid*., 785.
[22] It is also acceptable to use the term 'exceptionalist view', which accepts that legal norms apply only in ordinary situations, while in a real crisis these rules are not in effect at such times. Therefore, emergency measures do not violate human rights and the rule of law. See Nomi Claire Lazar, *States of Emergency in Liberal Democracies* (Cambridge University Press, New York, 2013), 3. Meanwhile there are a lot of arguments about this thesis and many scholars assert that the rule of law is designed for normal as well as special times. They accept that the law cannot be law if it allows exceptions in it. About these later phenomenon see: William E. Scheuerman, "Rethinking Crisis Government," 9 (4) *Constellations* (2002), 492.; Michael Ignatieff, *The Lesser Evil: Political Ethics in an Age of Terror* (Princeton University Press, Princeton, 2004), 25.; David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (Cambridge University Press, Cambridge, 2006), 7.
[23] About the legal and extralegal emergencies see: Kim Lane Scheppele, "Legal and Extralegal Emergencies," in Keith E. Whittington, R. Daniel Kelemen and Gregory A. Caldeira (eds.), *The Oxford Handbook of Law and Politics* (Oxford University Press, Oxford, 2013), 165-166.
[24] Carl Schmitt, *Political Theology: Four Chapters on the Theory of Sovereignty* (University of Chicago Press, Chicago, 2005, trans. George Schwab) 5. The original, German version first published in 1922 and then republished after 1934 when the Nazi regime finally consolidated the dictatorship with the assistance of Schmitt's ideology by using emergency powers.
[25] Scheppele, *op.cit.* note 23, 171.

accepted "basic norm"[26]) which can be used in the theory of the state of emergencies as well.[27] According to Kelsen, the "*hierarchical structure of the legal order of the State is roughly as follows: Presupposing the basic norm, the constitution is the highest level within national law*."[28] This idea has a direct link with the principle of legitimacy meaning that legal norms "*remain valid as long as they have not been invalidated in the way which the legal order itself determines."*[29] But this principle fails to hold true in case of a revolution which "*occurs whenever the legal order of a community is nullified and replaced by a new order in an illegitimate way.*"[30] The "*decisive criterion of a revolution is that the order in force is overthrown and replaced by a new order in a way which the former had not itself anticipated*."[31] These are the basic elements of Kelsen's "revolutionary legality"[32] which leads to the idea that the constitutional system is a united normative legal order, it is not acceptable to use political order to overthrow the legal (constitutional) order. If it still happens this means not just the overthrow of the constitutional order but a new constitution.

This concept also leads to the viewpoint that there is no legal space outside the law. After World War II, most constitutions used this idea when they accepted the legalist framework and enacted "emergency constitutions" into the legal order. The above-mentioned theory was the legal basis for the Hungarian Fundamental Law's Special Legal Order, too. The Fundamental Law – as we will see – follows a so-called "suspension model"[33], which means that the constitution gives the government (or executive bodies) the power to dissolve parliaments for various reasons. Alternatively, the constitution gives the executives the power to act on their own in case the legislature is not in sessions. Meanwhile, there is one exception under the Hungarian "suspension model" and this is the "state of danger",' which emergency does not exclude the functioning of the Parliament. In this way, the "state of danger" became a "partition-styled model"[34] suggesting that normalcy and emergency are functioning in the same way. This concept also contains the threat that the emergency may become the norm. As I'll show, this

[26] See Hans Kelsen, *General Theory of Law and State* (Harvard University Press, Cambridge, 1949, trans. Anders Wedberg), 115-122.
[27] This debate was not the only relevant one between these two scholars of Weimar Germany. It is also a well-known debate on the guardians of the constitution. See: Hans Kelsen, "Wesen und Entwicklung der Staatsgerichtsbarkeit (1927)", in Peter Häberle (Hg), *Verfassungsgerichtsbarkeit* (Wissenschaftliche Buchgesellschaft, Darmstadt, 1976) and Carl Schmitt, *Der Hüter der Verfassung* (Duncker & Humblot, Berlin, 1996)
[28] Kelsen, *op.cit.* note 26, 124.
[29] *Ibid*., 117.
[30] *Ibid*., 117.
[31] *Ibid*., 117.
[32] Scheppele, *op.cit.* note 23, 172.
[33] *Ibid*., 175.
[34] *Ibid*., 177-178.

process already started years ago, the extra-legal responses to the coronavirus were only the bitter end of a long-lasting period.

The Fundamental Law created a *sui generis* state of emergency chapter, called "Special legal order", which contains the descriptions of the state of national crisis[35], state of emergency[36], state of preventive defence[37], unforeseen intrusion[38], state of danger[39], and the emergency response to terrorism. This latter chapter was a result of a countrywide campaign against the mass migration in 2015, which line of events finally resulted in an amendment of the Fundamental Law.[40] The new chapter aimed to fulfil the requirements of the constitution to protect citizens and democratic institutions especially in situations that threaten the life of people and the security of the state. Meanwhile, the special law's ultimate goal was to guarantee the return to ordinary law and order.[41] To fulfil this aim the Fundamental Law has opted to regulate these issues in a very detailed manner. However, this approach is not unique within the European constitutionalism.[42]

Article 54 of the Fundamental Law also represents the common rules relating to special legal order such as are the possibility to suspend or restrict fundamental rights beyond the extent of

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

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

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

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

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

[40] About the concerns of the necessity of this amendment see: Gábor Mészáros, "The Hungarian Response to Terrorism: Blank Check for the Government," 154 *Studia Iuridica Auctoritate Universitatis Pecs Publicata* (2016), 129-142.

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

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

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

Although the Fundamental Law has a unified emergency powers system, the Hungarian Parliament also used ordinary legislation, which contained extra-legal measures to deal with the so-called emergencies such as the newly founded "mass migration crisis" unknown within the Fundamental Law's relevant rules. Because of this so-called refugee crisis, the Hungarian Parliament adopted two acts on 4 and 21 September 2015 which enabled to proclaim the "emergency caused by immigration", without using the Fundamental Law's emergency mechanism. Consequently, lot of emergency restrictions could be used without the constitutional guarantees, and that the state of emergency started to leak into the regular constitutional order.[43]

4. Constitutional concerns to the responses to COVID-19

Soon after the official declaration of the first infection by the new coronavirus, the Government declared a state of emergency using Article 53 of the Fundamental Law by the Decree 40/2020 (III. 11.)[44]. The first paragraph of Article 53 allows the Government to declare a state of danger and to introduce emergency measures – defined in an implementing act[45] – in case of a natural or industrial disaster endangering lives and property or to mitigate the consequences thereof. During a state of danger, the Government may issue decrees empowered – under an implementing act – to suspend the application of certain laws or derogating from the provisions of laws, and to take other extraordinary measures.[46] Nevertheless, this decree of the Government shall remain in force for fifteen days only, except if the Government – based on

[43] Mészáros, *op.cit.* note 40, 135-137.
[44] The Hungarian version of the declaration of state of danger can be find at: https://magyarkozlony.hu/dokumentumok/6ddbac40c788cb35b5bd5a5be4bb31294b59f9fc/megtekintes
[45] The Act CXXVIII of 2011 on emergency management and the amendment of certain relevant laws
[46] Second paragraph of Article 53 of the Fundamental Law of Hungary

an authorization from Parliament – extends the effect of the decree. It also seems evident that upon the termination of the state of danger the decree of the Government should cease to affect. It seems clear that the Fundamental Law is granting the opportunity to declare this kind of state of emergency and the implementing act is responsible for regulating the relevant emergency measures to be used in a state of danger. According to the Fundamental Law, there are only two relevant situations that would result in a state of danger: natural and industrial disasters. Human epidemic is not involved in the listing of the constitution, although the relevant implementing act, the Act CXXVIII of 2011 concerning disaster management and the amendment of certain relevant laws extends the cases by "other dangers" phase in Article 44, which allows to declare a state of danger to protect the health and life of citizens when a human epidemic jeopardizes human life and property and causes mass infections. Consequently, the Act overwrote the Fundamental Law's specification of the relevant cases and enabled the declaration of a state of danger by using a provision of the Act instead of the Fundamental Law. For the Fundamental Law, this provision is unconstitutional. The state of danger can be declared by the Government by decree, and in it is also possible for the Government to use temporary nullification measures – can be found in the Act on emergency management – but this later Act cannot ease the taxation of the Constitution, although it is constitutional to explain what does natural and industrial disaster[47] mean. The Hungarian emergency rules on a constitutional level simply cannot ensure the possibility to declare a state of danger regarding human pandemic, because neither natural nor industrial disasters contain this phenomenon according to the relevant rules of the implementing act.

Using armed forces in a state of danger is also highly questionable. The use of military forces in a state of emergency is controversial because military operates under different sets of procedures and expectations than civil authorities do, specifically it has the "right" to shoot or even kill those who just look like an enemy, it can use overwhelming violence even if doing so kills innocent civilians (at least as long as the destruction of innocent lives is proproportionate with the military goals). In summary, military authorities are much broader than the law

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

enforcement possibilities of non-militarian authorities.[48] By now, the Hungarian Government put military commanders as heads of every hospitals; moreover, military commanders were already inserted into more than 140 so-called strategic companies[49]. The essential problem with these measures is is the lack of any constitutional or legal authority to justify these changes. Although it is possible to use armed forces to handle disasters effectively[50], neither the Fundamental Law nor the relevant Act enables the use of military in the manner described above.

This issue becomes even more controversial if we take into consideration that the relevant rules of the ordinary legal system have various options to prevent and control the spread of infectious diseases and epidemics and to increase human and social resistance to infectious diseases. According to the Title 6 (Epidemiology) of the Act of 1997 on Health , the health authority may limit the rights of individuals to exercise personal liberties, may limit the rights of patients, may mandate natural and legal entities as well as unincorporated entities to tolerate or take the measures defined in the Act if the health service declares mandatory epidemic management measures that may limit the rights of patients. The Sections 63-70 of the Act ensure special measures such as isolation, epidemiological observation, quarantine, and epidemiological surveillance. According to these sections, it is possible to use special measures such as isolating infectious persons (in their home, place of residence, or a separate ward for infectious diseases in an inpatient facility or designated healthcare institution). Those people who are suffering from certain infectious diseases specified in the Minister of Health Decree shall be isolated and treated exclusively in a ward for infectious diseases in an inpatient facility or designated healthcare institution. And those who have been in contact with someone suffering from an infectious disease and who are assumed to be in the incubation period for the disease may be placed under epidemic observation or quarantine for infectious diseases defined in the appropriate Minister of Health Decree. During the period in which a person has been placed under epidemiological observation, he may be restricted in pursuing his occupation, his right to maintain contacts, and his right to freedom of movement. Meanwhile, the quarantine is defined as observation or isolation based on tightened and special requirements, that shall occur at a venue stipulated for such purposes. Furthermore, it is also possible for the health authority to determine an epidemic hazard or the presence of an epidemic. In case of an epidemic the

[48] Eric A. Posner – Adrian Vermeule, *Terror in the Balance – Security, Liberty, and the Courts* (Oxford University Press, New York, 2007) 249.
[49] https://www.reuters.com/article/us-health-coronavirus-hungary-military/hungary-to-deploy-military-personnel-to-140-state-companies-during-pandemic-idUSKBN2161C8
[50] Act CXXVIII of 2011 Second paragraph Article 45

operation of all institutions, programs or activities that can promote the spread of the epidemic, travel by persons, or the transport of live animals or commodities from one region to another, personal contacts between persons in one region and persons in another region, visiting at healthcare facilities, leaving certain areas, the sale and consumption of certain foods, the consumption of drinking water and the keeping of certain livestock may be restricted or prohibited[51]. Moreover, a decree by the health authority under these measures may be executed immediately, even if a legal remedy is sought. According to Section 228 of this Act, it is further possible to declare a "Disaster Medical Care" when an incident of sudden occurrence endangers, or disrupts lives, corporal integrity, and health of citizens, or jeopardize the functioning of health care providers to such magnitude that may lead to a disequilibrium between the demand for health care and the locally available capabilities., Further, the decree calls for collaboration of health authorities, healthcare providers as well as other central and local government agencies. Based on the considerations described in detail above, there are already various options that could have been useful in handling the threat of the coronavirus crisis in Hungary. Most importantly, these options were and are available in the Hungarian legal system without using state of emergency measures.

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

5. Exception became the norm: the "Enabling Act"

After the declaration of a state of danger, the Hungarian Government issued more than seventy decrees until 1 May 2020, and used ordinary legislation to handle the situation. The most controversial was the Act XII of 2020 on Protecting against the Coronavirus (hereinafter: "Enabling Act")[52] which was accepted by 2/3rd of the Parliament on Monday 30 March and was signed by the president within two hours without a veto, which even reflects on this own on the state of the so-called Hungarian constitutionalism. This "Enabling Act" gave the

[51] See Section 74 of the Act of 1997 on Health

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

Government free rein to govern directly by decree without the constraint of existing law. It also allowed suspending the enforcement of certain laws, departed from statutory regulations and implemented additional extraordinary measures by the degree in addition to the extraordinary measures and regulations outlined in Act CXXVIII of 2011 concerning disaster management and the amendment of certain relevant laws. It is widely accepted that enabling acts are the "*most common vehicle(s) of emergency governance*"[53] by delegating a substantial body of legislative power to the executive which has the authority to invoke crisis laws discretionally within the framework of pre-existing statutory law. This also means that – theoretically – the government or the executive branch can govern during the crisis entirely through the enabling of ordinary law.[54] However, the Hungarian "Enabling Act" lacks constitutional entitlement. According to the Fundamental Law, it is the Government's authority to issue decrees which may suspend the application of certain laws or to derogate from the provisions of laws, and to take other extraordinary measures. The role of the Parliament is only to give the authorization for the Government to extend the effect of the decree. There is no constitutional authority to enact new laws concerning the state of danger. Therefore, the Parliament has no authority to accept exceptional laws because the Government has its limited power to use special measures – which are defined in the implementing act[55] – according to the Fundamental Law. So, if the Parliament enacts a new law that de facto overwrites the provisions of the Fundamental Law, it is unconstitutional because this act amends the constitution without complying with the formal prescriptions.

Moreover, there are other aspects which arouse great constitutional concerns. According to the second and third paragraph of Article 53 of the Fundamental Law, during a state of emergency, the Government may issue decrees and suspend the application of certain laws or may derogate from the provisions of laws. These measures shall remain in force for fifteen days except the Government extend of these, based on the authorization of the Parliament. This later regulation is one of the most relevant ones according to all special legal orders because this guarantees that emergency powers will be available to the government for a well-defined short period of time. After all, emergency legislation should not extend beyond the termination of the state of danger.[56] It is widely accepted that in a constitutional democracy where in some cases there are

[53] Scheppele, *op.cit.* note 23, 174.
[54] *Ibid*., 174-175.
[55] See Act CXXVIII of 2011 concerning disaster management and the amendment of certain relevant laws Article 45-49. These measures: the Government may depart from the ordinary rules related to the national budget; may issue a decree which can be issued by the major or the municipal clerk in normal times; may differ from exact general rules of administrative proceedings and services.
[56] Oren Gross, *op.cit.* note 17, 1089.

transition periods between normalcy and exception the emergency period must be followed by return to normalcy[57] and must be as brief as possible while avoiding to "*spill over into the restored normalcy*."[58] The aim of the "Enabling Act" was mainly to give the authorization from the Parliament to extend the temporal authority of the measures done by the Government. Nevertheless, the Act has gone beyond this constitutional task. According to the first paragraph of Section 2 of the "Enabling Act," the Government may use extra-legal measures in addition to the extraordinary measures and regulations outlined in Act CXXVIII of 2011 on emergency management and the amendment of certain relevant laws. This rule overwrites the mentioned Act without the amendment of it, although the Parliament cannot suspend the application of certain laws or cannot derogate from provisions of laws in a state of danger.[59]

Nevertheless the most controversial element of the Act is the first paragraph of Section 3 which gives the Government an unconstraint power to use exceptional measures by authorizes the Government to extend the effect of the decrees until the end of the emergency. However, this later decision can also be made by the Government itself, so future decrees automatically get the authorization for extending its effect until this same body make it clear that the human pandemic or the threat of epidemic is over. According to this provision, the state of danger may be a determining element in Hungary for a long time. It isn't only an unfounded concern: the Prime Minister on 1 May 2020 was already warning of potential second coronavirus wave in October-November by mentioning "*(t)he virus has not gone away, we have only won some time … We have to prepare for a second wave (of the epidemic) in October-November.*"[60] The main concern is that the Hungarian Government also used so-called emergencies to strengthen its power and to maintain the pretence of continuous threat when in 2015 a new law passed by the Parliament which gave the power to the Government to declare a "state of mass migration" and to detain asylum seekers, punish the NGOs who are helping them and use new standards for rejecting asylum seekers. The Parliament used ordinary legislation, which contained extra-legal measures to deal with the so-called emergency the "mass migration crisis", but this is unknown in the Fundamental Law's relevant rules. Furthermore, the real serious problem with it is the

[57] Christopher D. Gilbert, "There Will Be Wars and Rumours of Wars: A Comparison of the Treatment of Defence and Emergency Powers in the Federal Constitutions of Australia and Canada," 18 *Osgoode Hall Law Journal* (1980), 307-335, at 320-324.
[58] Gross, *op.cit.* note 17, 1090.
[59] As I've already mentioned according to the Second paragraph of Article 53 of the Fundamental Law these measures may be taken by solely the Government with the restrictions that the extra-legality shall remain in force for fifteen days and the protentional extension depend on the authority of the Parliament.
[60] See: Krisztina Than, "Hungary PM warns of potential second coronavirus wave October-November", *Reuters* (1 May 2020), available at https://www.reuters.com/article/us-health-coronavirus-hungary-orban-idUSKBN22D4L5

present situation that we can hardly find any legal remedy included into the process, comparing it with the Special Legal Order Article in the Fundamental Law of Hungary which means that emergency restrictions could be used without the constitutional guarantees.[61] After nearly five years, these emergency powers were renewed continuously through to the present day, although the criteria were not fulfilled for a long time and one can hardly see refugees in Hungary at all. It is, therefore, a real concern that the current (unconstitutionally declared) state of danger will be the next permanent emergency prolonged for an indefinite time.[62]

It is also important to note that while the Government started to use emergency legislation, the Parliament was continuously in session[63] and accepted bills which will remain ordinary laws even in case the emergency is over.[64] Of course, many of these ordinary laws can hardly be concerned as effective responses against the pandemic.[65] Furthermore, there are various ongoing drafts that can have nothing to do with the pandemic, e.g. – the one to ban gender change in the birth register after a person has transitioned from one sex to another as an adult.[66] These are clear signs suggesting that the threshold between emergency and normalcy faded[67] and one can hardly find any remnant of constitutionality and the rule of law. The emergency finally became a tool in the hand of the Government already using sovereign power. Without a strict legal framework, it is also possible for the Government to give sui generis meaning for

[61] Mészáros, *op.cit.* note 40, 136-137; Mészáros Gábor, "A 'militáns demokrácia' esete a tömeges bevándorlás okozta válsághelyzettel" [The Case of 'Militant Democracy' with the State of Mass Migration], 60 (4) *Állam és jogtudomány* (2019), 43-55.

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

[63] https://www.parlament.hu/en/web/house-of-the-national-assembly/covid-info

[64] See for example Section 10 of the Act of 2020 on Protecting against the Coronavirus which was amending the Act C of 2012 on the Criminal Code and created two new crimes in the ordinary legal system. According to these new enactments anyone who publicizes false or distorted facts that interfere with the successful protection of the public – or that alarm or agitate that public – could be punished by up to five years in prison. Anyone who interferes with the operation of measures been taken to fight the pandemic could also face a prison sentence.

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

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

[67] A clear sign that exceptional measures are becoming the norm is that the Government also used emergency decree in relation of Mother's Day. See: Government's Decree 160 of 2020 (29 April 2020) on The Opening Hours of Florist's on Mother's Day, available at https://magyarkozlony.hu/dokumentumok/f0af7acaf20930c3760fe972027d11171ddde335/megtekintes (at the homepage of the National Gazette, Hungarian)

various threats and use them as a blank check solely for political advantage. What mentioned a few years ago is even more true now than then: "*(i)f a regulation makes possible for one branch of power to use the exceptional powers abusively the rule is odd and could hardly compliance with the principle of legality and the rule of law."*[68]

6. Conclusion

Based on Hans Kelsen's theory, modern constitutional democracies are constructing emergency powers with the assumption of separating normalcy from emergency, therefore use emergency measures separated from ordinary rules.[69] These regulations aim to assure that extra-legal measures can be used solely in extraordinary times, therefore these "unconstitutional measures" – in the meaning of the ordinary legal order – are separated from normalcy. The state of emergencies used against the threat of coronavirus – especially in the case of Hungary – raised again the important question: is it possible to make bright-line distinctions between normalcy and state of emergency in an era when emergency government is becoming the norm?[70] Nevertheless, we cannot forget that the rule of law remains a core element of security because it is a misleading and "*dangerous illusion to believe one can 'protect' liberal democracy by suspending liberal rights and forms of government. Contemporary history abounds in examples of 'emergency' or 'military' rule carrying countries from democracy to dictatorship with irrevocable ease.*"[71] We hoped that we've already learned the meaning of Paul Wilkinson's words. The reality is that the border between democracy and dictatorship is at least as thin as the one between normalcy and exception. Contrary to the detailed emergency regime in the Hungarian Fundamental Law, the well-known idea of Carl Schmitt became relevant anew: "*It is precisely the exception that makes relevant the subject of sovereignty, that is, the whole question of sovereignty*."[72] It seems that formal legalism meaning that pre-established general norms can cover all possible situations[73] – emergencies included – losing the present battle. At this point one should remember what Schmitt argued about the legalist view: emergencies

[68] Mészáros, *op.cit.* note 40, 142.
[69] See Oren Gross, "The Normal Exception," in Mark A. Graber, Sanford Levinson and Mark Tushnet (eds.), *Constitutional Democracy in Crisis?* (Oxford University Press, Oxford, 2018), 585.
[70] Oren Gross and Ní Aoláin, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (Cambridge University Press, Cambridge, 2006), 171-243.
[71] Paul Wilkinson, *Terrorism and the Liberal State* (New York University Press, New York, 1986, 2nd edition), 122-123.
[72] Schmitt, *op.cit.* note 24, 6.
[73] See John P. McCormick, "Schmittian Positions on Law and Politics?: CLS and Derrida," 21 *Cardozo Law Review* (2000), 1693-1722; David Dyzenhaus, "'Now the Machine Runs Itself': Carl Schmitt on Hobbes and Kelsen," 16 *Cardozo Law Review* (1994), 1-19, at 10-14.

demand measures from the states that are inconsistent with the rule of law, and constitutional emergency power clauses like Weimar's Article 48 or the Hungarian Fundamental Law's Special Legal Order regularly fail.[74] Meanwhile – again according to Schmitt – the "*specific political distinction to which political actions and motives can be reduced is that between friend and enemy*."[75] This enemy-friend dichotomy related to the exceptionalism "*has an especially decisive meaning which exposes the core of the matter. For only in real combat is revealed the most extreme consequence of the political grouping of friend and enemy.*"[76]

According to the "revolutionary model of emergency regimes"[77] embracing a sovereign dictatorship, one can recognize the core element which is in the idea of the dichotomy. It seems evident that the basic element of this political power can be found in the human realm, both the "enemy" and the "friend" are human beings. It is the paradox of the concept of sovereignty that the present enemy which enabled the using of sovereign dictatorship is so small that we cannot see it with our own eyes. Possibly the Hungarian constitutionalism was so weak that it also becomes invisible to our eyes.

It is also important to note that Carl Schmitt's idea of the state of exception has found its way into Hungary. According to Schmitt, a sovereign of a nation has a main task to define who is the friend and who is the enemy[78] and the exception is what allows him to strike out against the enemy "*with the rationale that he is protecting the friend*".[79] As we have seen the state of danger became a tool in a way that it can be used to ignore or defeat the so-called (political) enemies. The 'Enabling Act's' scope is broad and emergency powers can be used to "*guarantee for Hungarian citizens the safety of life and health, personal safety, the safety of assets and legal certainty as well as the stability of the national economy*."[80] With this doubtful constitutional authority, the Government used extra-legal measures to take revenge on opposition-led municipalities for last October's municipal elections when the opposition won in numerous important cities including important districts in Budapest and the post of the mayor of several big cities such as are Budapest, Pécs, Miskolc or Szeged. In this framework, the Government issued Decree 135/2020 which made possible to establish special economical areas in the

[74] William E. Scheuerman, "States of Emergency," in Jens Meierhenrich and Oliver Simons, *The Oxford Handbook of Carl Schmitt* (Oxford University Press, Oxford, 2016), 547.
[75] Carl Schmitt, *The Concept of the Political* (Rutgers University Press, New Brunswick, 1976, trans. George Schwab), 26.
[76] *Ibid*., 37.
[77] See John P. McCormick, *Carl Schmitt's Critique of Liberalism: Against politics as Technology* (Cambridge University Press, New York, 1997), 133-141.
[78] Schmitt, *op.cit.* note 75.
[79] Kim Lane Scheppele, "Law in a Time of Emergency: States of Exception and the Temptations of 9/11," 55 *Scholarship at Penn Law* (2004), 1-75, at 68.
[80] See Section 2 of the Act XII of 2020 on Protecting against Coronavirus

territory of the municipalities. where the local industry tax – which is one of the main sources of income in the level of local government – can be gathered not by the municipalities but by the central governmental budget. With Decree 136/2020 the Government promptly established such area in the town of Göd which has an opposition mayor and where a Samsung factory is located. Consequently, the town is losing around 1/3 of its yearly budget.[81] These actions can be hardly interpretable as necessary measures to handle the emergency. Constitutionally, state of emergency is temporary by definition and "*special legal order and the restrictions on fundamental rights should not last longer than necessitated by the conditions which triggered the declaration of emergency, and should aim to restore constitutional normalcy*."[82] The measures taken to handle the epidemic can hardly correspond with these principles, especially if we are taking into account that the Hungarian ordinary legal system already contains measures which could have been effective without the declaration of a state of emergency.

This very development means that one can hardly find the principle of legality and the rule of law behind these actions. It is more proper to refer Schmitt's idea on commissarial and sovereign dictatorship.[83] The key element of the former one is the commissarial dictator with basic elements to be found in the Roman republican tradition. This dictator is appointed by a higher political authority and has the main task to eliminate the enemies during a crisis that threatens the survival of the regime.[84] In order to achieve this goal, the dictator may suspend the existing legal order to remove the threat and to restore the normal conditions.[85] However, the dictator not only suspends the existing legal order but operates outside of it as well.[86] And – according to Kalyvas – while the sovereign dictatorship also a type of delegation its main task is to establish "*a new political and legal order ... (which) signifies the radical beginning of a new regime that cannot be reduced or tracked back to any anterior procedure, set of rights, legal structure, or fundamental laws.*"[87] Finally, Carl Schmitt arrived in Hungary and the main concern isn't related solely to the question of the constitutionality of emergency measures taken by the Government. The main question is, unfortunately, more political: is the system in Hungary more similar to the commissarial or the sovereign type of dictatorship.

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

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

[83] Carl Schmitt, *Die Dictatur* (Duncker und Humblot, Berlin, 1994), 137.

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

[85] Schmitt *op.cit.* note 83, xvi.

[86] Kalyvas *op.cit.* note 84, 89.

[87] *Ibid*., 90.

MTA Law Working Papers

Kiadó: MTA Társadalomtudományi Kutatóközpont

Székhely: 1097 Budapest, Tóth Kálmán utca 4.

Felelős kiadó: Boda Zsolt főigazgató

Felelős szerkesztő: Körtvélyesi Zsolt

Szerkesztőség: Hoffmann Tamás, Kecskés Gábor, Szilágyi Emese

Honlap: http://jog.tk.mta.hu/mtalwp

E-mail: mta.law-wp@tk.mta.hu

ISSN 2064-4515