Szente, Zoltán, and Fruzsina Gárdos-Orosz. "Using Emergency Powers in Hungary: Against the Pandemic and/or Democracy?." *Pandemocracy in Europe: Power, Parliaments and People in Times of COVID-19*. Ed. Matthias C Kettmann and Konrad Lachmayer. Oxford: Hart Publishing, 2022. 155–178. *Bloomsbury Collections*. Web. 26 Apr. 2023. <<http://dx.doi.org/10.5040/9781509946396.ch-008>>.

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Using Emergency Powers in Hungary: Against the Pandemic and/or Democracy?

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I. Introduction*

In terms of the political consequences and constitutional implications of the COVID-19 pandemic, the case of Hungary received special attention both in international politics and the media, partly because Hungary was one of the first countries to introduce an extraordinary legal order, and partly because the declared state of danger provided, in principle, unlimited powers for the Government. It made the legal treatment of the COVID-19 pandemic even more interesting in that there is a widespread view among the international public and a significant proportion of the political science and constitutional literature that Hungary has been systematically undermining the rule of law since the 2010 change of government.

It may therefore be of particular interest to see how the extraordinary powers provided by the two emergency situations announced so far have affected the constitutional system and democracy of a country which is frequently characterised as a 'populist',¹ 'illiberal',² 'hybrid'³ or 'semi-authoritarian'⁴ regime. These

*The research is funded by project 129018 FK, The responsiveness of the legal system, funded by the National Research Development and Innovation Office.

¹M Anselmi, *Populism. An Introduction* (Routledge, 2018) 90; G Halmai, 'A Coup Against Constitutional Democracy. The Case of Hungary' in MA Graber, S Levinson and M Tushnet (eds), *Constitutional Democracy in Crisis?* (OUP, 2018) 243; N Walker, 'Populism and constitutional tension' (2019) 17(2) *International Journal of Constitutional Law* 515–35, at 521, 524; T Fournier, 'From rhetoric to action, a constitutional analysis of populism' (2019) 20(2–3) *German Law Journal* 362–81; S Chambers, 'Democracy and constitutional reform: Deliberative versus populist constitutionalism' (2019) 45(9–10) *Philosophy and Social Criticism* 1116–31, at 1117; B Bugarič, 'Central Europe's descent into autocracy: A constitutional analysis of authoritarian populism' (2019) 17(2) *International Journal of Constitutional Law* 597–616.

²C Pinelli, 'Populism and Illiberal Democracies: The Case of Hungary' in Z Sente, F Mandák and Z Fejes (eds), *Challenges and Pitfalls in the Recent Hungarian Constitutional Development. Discussing*

labels are given special weight by the fact that the need to manage and resolve crisis situations is often taken as a source of legitimacy for populist or authoritarian regimes, because an external threat gives populist leaders or autocrats the opportunity to legally break free from the limits of power.⁵ Some authors presume that such politicians sometimes invent or exacerbate a crisis situation themselves, because citizens are more tolerant or even supportive of authoritarian measures in times of crisis that threaten their security.⁶

Below, we present a constitutional analysis of the introduction of the two special legal orders in March and November 2020, the legislative authorisation of the Government to exercise extraordinary powers to fight the coronavirus pandemic, and the emergency decrees of the Government. Our primary intention is to examine how the executive has used the emergency powers during a real crisis situation in a country that has been so frequently characterised as a semi-authoritarian or populist regime.

II. The Constitutional Landscape of Emergency Situations in Hungarian Law

The general elections of 2010 brought about a landslide victory for the conservative parties that had been in opposition for the previous eight years. Owing to the disproportionate election system, the main government party, Fidesz, and its satellite coalition partner, the Christian Democrats, gained a two-thirds parliamentary majority. The new coalition government immediately started to change the constitutional landscape of the country; after they had come to power, in less than a year, they amended the Constitution of 1949/89⁷ 12 times, and adopted a new constitution in April 2011 named the 'Fundamental Law' with the votes of the government party MPs.

the New Fundamental Law of Hungary (L'Harmattan, 2015) 211–19; T Drinóczi and A Bień-Kacała, 'Illiberal Constitutionalism: The Case of Hungary and Poland' (2019) 20(8) *German Law Journal* 1140–66.; R Uitz, 'Can you tell when an illiberal democracy is in the making?' (2015) 13 *International Journal of Constitutional Law* 279–300.

³ A Bozóki and D Hegedűs, 'An externally constrained hybrid regime: Hungary in the European Union' (2019) 25(7) *Democratization*.

⁴ B Bugarič and T Ginsburg, 'The Assault on Postcommunist Courts' (2016) 27(3) *Journal of Democracy* 69–82, at 70.; B Bugarič and A Kuhelj, 'Varieties of Populism in Europe: Is the Rule of Law in Danger?' (2018) 10(3) *Hague Journal on the Rule of Law* 21–33 at 25.

⁵ S Levitsky and D Ziblatt, *How Democracies Die* (Crown Publishing, 2018) 93.

⁶ Levitsky and Ziblatt (n 5) 94, 208, JW Müller, *What Is Populism?* (University of Pennsylvania Press, 2016) 43, S Blombäck, 'Populism as a Challenge to Liberal Democracy in Europe' in A Bakardjieva, EN Bremberg, A Michalski and Lars Oxelheim (eds), *The European Union in a Changing World Order. Interdisciplinary European Studies* (Palgrave Macmillan, 2020) 223.

⁷ Hungary was the only post-communist country in Central and Eastern Europe where, after the defeat of communist rule, no new constitution was adopted. However, during the period of democratic transition, the communist constitution, originally adopted as the Act XX of 1949, was substantially revised by a constitutional amendment (Act XXXI of 1989), which is why it was frequently referred to in this way after 1989.

The new Constitution thoroughly changed the rules on the special legal order, even though it adopted several provisions almost verbatim from the previous one. These provisions are included in a separate part (*special legal orders*). The Fundamental Law defines six different forms of the special legal order⁸ in a unique way in Europe, in particular if we take into account two other emergency situations, the so-called ‘crisis situation caused by mass immigration’,⁹ and the ‘health crisis situation’¹⁰ introduced by legislative measures.

Since the entry into force of the Fundamental Law, the state of danger has been a separate form of special legal order; previously, in similar cases, ie in the event of an emergency caused by a natural or industrial disaster, the more general state of emergency could be declared. According to Article 53 (1) of the Fundamental Law, a state of danger may be declared ‘in the event of a natural disaster or industrial accident endangering life and property, or in order to mitigate its consequences’. It is worth noting that neither the term ‘danger’ nor the definition of the circumstances under which this kind of special legal order can be declared are precise. Beyond this, this type of emergency can only be introduced in the event of a disaster (natural or man-made) that has already occurred (not in the case of a potential danger), and moreover, it must not only ‘endanger’ life and property, but must also have already caused serious damage to them when it occurred. The rules of the special legal orders must be very clear and precise, and should be interpreted narrowly because they provide extraordinary power to the executive and allow unusual restrictions to fundamental rights that otherwise would be unacceptable.

A state of danger may be declared by the Government, according to Article 53 of the Fundamental Law, which endows it with special powers. As part of this, the Government

- may introduce emergency measures defined by cardinal law, and
- may adopt decrees by means of which it may, as provided for by a cardinal act, suspend the application of certain legislative acts, derogate from the provisions of acts, and take other extraordinary measures.

These are special empowerments and apply to the adoption of decisions that the Government would not otherwise be able to make. However, even if the power of emergency legislation is wide-ranging, it is not unlimited. First, it can be exercised only within the framework specified in a cardinal law, that is as a delegated power, and furthermore, the cardinal law itself that gives this special legislative power may cover only the legal provisions necessary to eliminate the consequences of an emergency.

The Government decrees issued at the time of the state of danger may have *contra legem* effects, which means that temporarily they may substitute for effective

⁸In December 2020, the National Assembly adopted the Ninth Amendment to the Fundamental Law which restructured the constitutional rules on special legal orders, establishing three.

⁹See Art 80/A-80/K of the Act LXXX of 2007 (on Asylum).

¹⁰See Arts 228-254/E of the Act CLIV of 1997 (on Public Health).

parliamentary laws. Over time, however, this legal rank of the emergency decrees becomes conditional, because they can remain in force beyond 15 days only with the consent of the National Assembly. Formally, the extension of the temporal effect of emergency decrees is the competence of the Government, but it can be exercised only on the basis of the authorisation of the Parliament. Consequently, in times of a state of danger, the National Assembly is obliged to hold sessions, otherwise it could not control and approve the emergency decrees of the Government. Besides this, the Government's political responsibility to Parliament cannot be suspended, even during a state of danger. In addition, the continuous operation of the National Assembly is not affected by the rules of the special legal order, since Article 54 Section (2) of the Constitution states that 'the application of the Fundamental Law may not be suspended'. The same consequence arises from the fact that in some other cases of special legal orders the Fundamental Law allows the suspension of the operation of Parliament and even determines the circumstances.

The state of danger can be terminated only by the Government, this being, in principle, a constitutional obligation rather than a power, since it is the duty of the Government to cease the special legal order 'if the conditions for its promulgation no longer exist'. Emergency decrees¹¹ issued by the Government at the time of a state of danger automatically cease on the same day the special legal order is terminated, even if Parliament has previously agreed to extend their temporal effect. Nevertheless, the National Assembly may adopt a law(s) with the same content as the repealed Government decree(s) (as happened after the termination of the first state of danger).

III. Declaring the First State of Danger

On 11 March 2020, the Government declared a state of danger in the whole territory of Hungary according to Article 53 of the Fundamental Law due to the disease caused by COVID-19 being 'a mass human pandemic endangering the safety of life and property', and 'in order to protect the health and lives of Hungarian citizens'.¹² The declaration of this kind of special legal order provided the Government with an extraordinary power to respond with emergency decrees to the emergency caused by the pandemic.

The governmental decree declaring the state of danger raised constitutional issues and took several reasons into consideration, but, remarkably, in the absence of a constitutional legal basis, none of the Government decrees issued during this emergency situation met constitutional standards.

First, according to the Fundamental Law, as we have seen, the Government can declare a state of danger only in the event of a 'natural or industrial disaster'

¹¹ It can be observed that the Fundamental Law does not use the term 'emergency decrees' but refers simply to (Government) decrees.

¹² Government decree 40/2020 (III. 11.).

that endangers the safety of the lives and property of the citizens. In the absence of an effective vaccine against COVID-19, and also taking into account the number of documented deaths due to the pandemic, the risk to 'safety of life' can be considered justified. With regard to the rapidity of the spread of infection and its spatial extent, the extension of the state of danger to the whole country can also be corroborated. It also seems clear that the threat to the 'safety of property' is widespread, because, as a result of the coronavirus, a number of companies have ceased or restricted their economic activities, resulting in job losses and significant loss of income or wealth.

However, the state of danger was unconstitutional because it was declared on account of a 'human pandemic causing a mass illness'. In Hungarian law, a human pandemic neither falls within the conceptual scope of a natural disaster, nor can it be interpreted as an industrial catastrophe.¹³ In Hungary, since the democratic transition of the country, the concept of natural disaster has always been understood in the traditional sense, ie as signifying an unavoidable event caused by natural forces, and it was distinguished from other dangers that could also pose a threat to human life, health and the safety of property. Human epidemics have never been classified as natural disasters in law.¹⁴

Human pandemics have not been considered a natural or industrial disaster by the Disaster Management Act¹⁵ which specifies the detailed rules of emergency situations. Although this law contains only an illustrative list of dangers, it classifies 'human epidemic causing a mass illness' or 'threat of an epidemic' in the group of 'other hazards', distinguishing it from natural disasters (as 'natural hazards') and industrial catastrophes (as 'civilizational hazards'). It means that this statutory law, adopted in 2011, did not lead to any new interpretation of natural or industrial disasters (ie, classifying human pandemics as such), but added to them new sources of danger. This makes sense, because this law has a special significance, since it is the cardinal law within the framework of which the Government may use extraordinary measures or decrees in an emergency situation. The Disaster Management Act clearly considers a 'human epidemic causing a mass illness' and an 'epidemic threat' as an 'event' that can serve as a basis for declaring a state of danger. However, this is an arbitrary extension of the circumstances on the basis of which a state of danger can be declared, far beyond the conditions defined by the Fundamental Law, for which Parliament did not have authority.

¹³Notably, epidemics are generally not classified as natural disasters in international scholarship, but there is a significant literature on post-natural disaster epidemics, as there is a strong correlation between the two phenomena (ie, natural disasters often lead to infectious diseases). See, on this, JE Suk, EC Vaughan, RG Cook and JC Semenza, 'Natural disasters and infectious disease in Europe: a literature review to identify cascading risk pathways' *European Journal of Public Health*, ckz111, doi.org/10.1093/eurpub/ckz111.

¹⁴Z Szenté, 'A 2020. március 11-én kihirdetett veszélyhelyzet alkotmányossági problémái' (2020) LXI(3) *Állam- és jogtudomány* 115–39.

¹⁵Act CXXVIII of 2011.

This extension is, therefore, clearly unconstitutional because it goes beyond the definition of the Constitution. It should be noted here that it does not follow from the Fundamental Law that a human pandemic cannot be included in the conceptual scope of natural disasters. However, the Disaster Management Act was not amended correctly, for example by including epidemics in the conceptual scope of a natural disaster, and merely considered the pandemic as a possible reason for the state of danger. As a result, the declaration of the state of danger on 11 March, 2020 did not have any constitutional basis, and, consequently, all emergency decrees issued on the grounds of this declaration, must also be unconstitutional inasmuch as they suspended the application of certain laws, deviated from statutory provisions or enacted other extraordinary measures which, according to the Fundamental Law, are the exclusive statutory subjects. Even if their content did not violate the Constitution, they were formally flawed, because they were based on an incorrect constitutional basis in that, according to the existing constitutional text, a human pandemic could not have been a legitimate reason for declaring a state of danger.

IV. The First Authorisation Act

A. The Scope of Authorisation and the Legislative Guarantees

On 30 March 2020, Parliament adopted an Act on protection against the coronavirus pandemic.¹⁶ The purpose of the statutory act as stated in its preamble was to ensure that the Government could take any emergency measures necessary ‘to prevent and manage the consequences of the human pandemic of COVID-19 in 2020’ (hereinafter: the Authorisation Act). To this end, Parliament gave its prior consent to any emergency decree beyond the scope of measures specified in the Disaster Management Act by stating that the Government must use this authorisation only for a specific purpose, to the extent necessary and proportionate to the aim pursued. In addition to confirming Government decrees issued since the declaration of the state of danger, the Act also authorised the Government to extend the temporal effect of all subsequent emergency decrees until the end of the emergency.

The Act contained several safeguarding provisions. On the one hand, it stipulated that the Government must regularly inform Parliament of the measures taken on the basis of the authorisation, and, on the other hand, the National Assembly reserved its power to withdraw this special empowerment.

Finally, it laid down particular rules to avert the danger and manage the consequences of the pandemic. For example, it postponed the holding of by-elections and national and local referendums until the end of the emergency. In addition, the

¹⁶ Act XII of 2020.

Authorisation Act added a new kind of crime, that of ‘obstruction of the protection against the pandemic’, with accompanying punishments, to the Criminal Code, and amended the previous Article on the dissemination of scaremongering, clarifying its wording and supplementing it with a new statement of facts on scaremongering in a special legal order, as any action ‘which is likely to impede or thwart the effectiveness of the defense’. The Act classified some of its own parts as ‘cardinal’.¹⁷

B. Constitutional Concerns of the Act

The Act raises several constitutional issues.¹⁸

First, Article 2 of the Authorisation Act, which provides an unlimited authority for the Government to issue emergency decrees, is unconstitutional. This Article expressly states that its authorisation confers a special legislative power ‘beyond the exceptional measures and rules specified in the Disaster Management Act’. Pursuant to Article 53 Section (2) and Article 54 (4) of the Fundamental Law, the National Assembly has the right to define the framework of such regulations in a cardinal Act, as had been done in the Disaster Management Act. Parliament may change, narrow, or expand the frames defined by this Act. However, the National Assembly has no constitutional power to refrain from defining the legislative framework of the emergency power of the Government; otherwise the use of extraordinary powers by the Government cannot be evaluated by Parliament in its compulsory control function. The Authorisation Act, however, did precisely this; referring only to the purposefulness of emergency decrees, which is nothing more than a repetition of the relevant constitutional text in other words. It did not specify which emergency measures could be taken beyond what was required by the Disaster Management Act. The unlimited power of the delegated legislation is particularly striking in the light of the fact that Parliament waived ex-post control of all emergency decrees.

Secondly, Article 3 Section (1) of the Authorisation Act must also be qualified as contrary to the Fundamental Law; it authorised the Government to extend the scope of emergency decrees until the end of the state of danger. In this way, the Hungarian legislature really did ‘commit suicide’: it waived the right to the subsequent control of emergency decrees in such a way that made the exceptional authorisation an irrevocable process. Although the Act ostensibly reserved the right of the National Assembly to revoke this blanket authorisation ‘before the end of the emergency’ (Article 3 Section (2)), it – intentionally or accidentally – forgot to provide protection for this guarantee. For example, the authorisation

¹⁷ The ‘cardinal acts’ form a special group of acts of Parliament. The adoption or amendment of this kind of law requires the votes of two-thirds of the members of the National Assembly present.

¹⁸ See, on this, Szente (n 14) 115, 132; T Drinóczi and A Bień-Kacala, ‘COVID-19 in Hungary and Poland: extraordinary situation and illiberal constitutionalism’ (2020) 8(1–2) *The Theory and Practice of Legislation* 171–92.

of the Government did not preclude the amendment of the Act on the National Assembly, which ensures the continuous operation of the Parliament, or even the modification of the Authorisation Act. Consequently, the Government could theoretically exclude the operation of Parliament with its own emergency decrees. This extraordinary power of the Government was limited only by the Fundamental Law to the extent that it contains provisions on the date of the next general election (no later than in 2022), ie the authorisation did not cover the postponement or cancellation of the next parliamentary elections.

Thirdly, the Act was also unconstitutional in that it authorised the Government to extend the temporal effect of emergency decrees without any limit or parliamentary control. As has been noted above, the Government decrees issued during the state of danger may remain in effect beyond 15 days only with parliamentary approval. The Authorisation Act extended this special authority to emergency decrees to be made in the future, that is, it granted the authority in advance. However, the extension of the temporal effect of legislation that has not yet been enacted is conceptually flawed, as the temporal effect of legislation that has not yet started cannot be extended.

Fourthly, it is also questionable from a constitutional point of view that Parliament consented to extend the validity of all emergency decrees issued by the Government from the promulgation of the state of danger until the adoption of the Act, in a single package, without any investigation. Although the Fundamental Law does not explicitly stipulate that the Parliament should give its consent to each emergency decree separately, the only meaning and function of this constitutional provision is to ensure continuous parliamentary control over the extraordinary measures. A general approval, without any examination of the necessity, proportionality or effectiveness of these extraordinary measures, renders the whole parliamentary procedure meaningless. As the subsequent parliamentary control of emergency decrees is a constitutional obligation, the Parliament obviously cannot waive it. Any constitutional omission of the National Assembly cannot be defended in itself, but is especially serious if it results in giving a blank authority to the exceptional power of the Government during a special legal order, in other words, resigning from any control. There can be no acceptable reason for this, in particular when, as in this case, Parliament is otherwise sitting continuously, that is, it is able to perform its tasks and functions.

V. Crisis Management with Government Decrees

A. On the Nature of the Decrees

Between 11 March and 18 June 2020, in the almost 100 days of the state of danger, 149 Government decrees based on the Fundamental Law and on the Authorisation Act were issued over 'the entire territory of Hungary for the elimination of the

consequences of the human epidemic endangering life and property and causing massive disease outbreaks, and for the protection of the health and lives of Hungarian citizens' or 'for the protection of the national economy'.¹⁹ In this period, 94 ordinary Government decrees were enacted, so 61.32 per cent of the Government's activity was based on the emergency situation, which means that a broad and extensive regulation was adopted to deal with the state of danger.²⁰ Until the first Authorisation Act, the Government decrees were primarily issued for introducing emergency, immediate and temporary measures to prevent and slow down the spread of the COVID-19 pandemic within the country. The normative content of these Government decrees designated the strategy and means used by the Government for the entire duration of the first months of the emergency. As was originally described in Government decree 41/2020 of 11 March 2020 on the declaration of the state of danger, the major restrictions on liberty in this period were related to the control of borders, and other free movement restrictions, such as the obligatory 14-day quarantine, the closing of many state and private institutions (schools, restaurants, swimming pools, etc), social distancing and the ban on gatherings including assemblies, as in many other European countries. Most of these rules were temporal in nature, with some of them declared only for some days or for special occasions such as Easter. In the worsening economic and social situation caused by the restrictions on liberty, the Government introduced extraordinary measures in order to help individuals and firms, for example within the framework of the Economy Protection Action Plan,²¹ which were beneficial for many market players. Debate focused more on the extent of these Government measures and less on their necessity.

Social matters, protection of the economy and security were the focus of the governmental decisions and many of the decrees allowed alterations from the regular statutory rules in order to create a better legal environment for comprehensive protection. In May, proceeding towards the end of the first state of danger, by and large the Government lifted or eased restrictions by various decrees. Apart from some outstanding examples of the misuse and abuse of the emergency powers (see below), the Government acted in accordance with its authorisation and used its power to diminish or eliminate the disadvantages caused by the epidemic. The outstanding examples show, however, that when in some cases the Government measure was not necessary to achieve legitimate goals, or when the action was not proportionate to the aim pursued, there were neither institutional nor procedural barriers to these actions; it was impossible to strike down such a decree or at least claim its unconstitutionality effectively within the state organisation.

¹⁹ As stated in the preambles to these decrees.

²⁰ L Rác gives a detailed analysis of all Government decrees in *Rendeleti kormányzás és különleges jogrend*. In F Gárdos-Orosz and V Lőrincz (eds), *Jogi diagnózisok* (L'Harmattan, 2020).

²¹ See the official summary of the programme at abouthungary.hu/news-in-brief/coronavirus-update-pm-orban-announces-five-new-economy-protection-programs/.

From the perspective of constitutional (and rule of law) standards, we have identified objectionable measures, and classified them into three groups based on their flaws: those which suffer from a lack of necessity, a lack of proportionality, and a lack of normative clarity. Subsequently, we describe how far the Constitutional Court was able to progress in the constitutional review of emergency measures.

B. The Lack of Necessity

In some cases, although the decree's preamble contained the usual reference to the state of danger and the necessity of diminishing loss of life, health or wealth, the Government decree or some of its provisions could in fact hardly be justified by the need to take effective steps in such a situation. It is one of the requirements of the necessity-proportionality test of rights-limitations, as contained in Article I Section (3) of the Fundamental Law, that the measures imposed should not only serve a legitimate, constitutional goal but should also be factually able to achieve that legitimate goal. The means should be strictly related to the legitimate end.²² The Government is therefore not completely free to choose adequate measures to reach the legitimate aim pursued. The rationally reasoned and factually based adequacy is subject to constitutional control in any of its forms.

From this point of view, one of the most disturbing decrees refers to the introduction of special economic zones.²³ Under this regulation, industrial establishments of significant regional economic importance could be qualified as special economic zones by the Government. The business taxes paid by the companies on such territories are transferred from the local authorities to the county local authorities. In fact, this implies an expropriation of a very large income from the municipalities in whose territories these economic zones are located. While many additional tasks in the fight against COVID-19 were distributed to local authorities,²⁴ the necessity of reorganising the ownership of the real estate used by these important investments and the new tax rules introduced in accordance with this does not seem to be necessary to achieve a better protection against COVID-19. The county authorities, unlike the local authorities in Hungary, do not, as yet, have significant competencies in organising a public response to a pandemic.

Immediately after the adoption of the decree, another decree declared one particular area in the city of Göd, where there was a large industrial plant, a special economic zone. It is worth noting that it is an exceptionally extraordinary measure

²² F Gárdos-Orosz, 'Alapjogok korlátozása' in J András (ed), *Az alkotmány kommentárja* (Századvég, 2009).

²³ Government decree 135/2020 of 17 April 2020.

²⁴ I Balázs and I Hoffman, 'Közigazgatás koronavírus idején, A közigazgatási jog rezilienciája' (Administrative law in times of coronavirus – the resilience of the administrative law), *MTA Law Working Paper* 2020/21.

that had never occurred before. The municipality of Göd is an opposition-run local authority, whereas the county level authority has a governing party majority. The opposition-led local authority submitted a constitutional complaint²⁵ to the Constitutional Court claiming that the decree violates the local authority's right to property and, furthermore, is discriminative in nature. The Court has not yet decided on the case. In a related case concerning the constitutionality of the general decree that made it possible to create these special economic areas, 59 opposition MPs turned to the Constitutional Court in an abstract ex post facto review procedure, also claiming that the decree violates international treaties. The Constitutional Court refused to examine the case on the merits, because the time of its effectiveness had passed, and the decree was not in force in October at the time of the decision.²⁶

The Government decree 128/2020 of 17 April 2020 ordered the state supervision of Kartonpack, a public company, as a company of strategic importance in the defence against COVID-19, and replaced the company's directors and supervisory board members. Although the Government decree 128/2020 has become ineffective,²⁷ the transitional rules²⁸ extended the application of its provisions until 15 August 2020 at the latest. This small but public company could not affect the efficacy of the defence against the virus, so it was unnecessary to intrude upon the existing private law relations, something which was needed in order to settle long-lasting disputes between the different owners, one of which is the Hungarian state. A constitutional complaint was not initiated in the case, because the situation did not make it possible, as it was not in the interest of the new management appointed to contest this rule.

By decree 233/2020 of 26 May 2020 the asylum procedure was incorporated into the state of danger and prolonged by Act LVIII on transitory measures. Those present on Hungarian territory or at the border crossing points cannot apply for asylum in Hungary and are directed to the nearest Hungarian embassy. There is a separate decree that defines precisely at which embassies the statement of intent to make an application for asylum can be submitted. Following the submission of a statement of intent, authorities may conduct remote interviews before issuing a single-entry permit to make an application for asylum. It is no longer possible to apply for asylum on Hungarian territory, nor at the border crossing points. This is another example of unnecessary measures where Government policy does not follow the goals of the emergency. To outsource the beginning of the procedure is not relevant to the question of how to fight the virus, but rather ties in with the general refugee policy of the Government.

²⁵ IV/00839/2020 CC decision.

²⁶ 3388/2020 (X. 22.) CC decision.

²⁷ In accordance with Art 53(4) of the Fundamental Law.

²⁸ Act LVIII on transitory measures, Art 162.

C. Disproportionate or Discriminatory Measures

Besides the above examples of the ultra vires decrees and the lack of effective control, we find legal measures in this period which are in line with the goal of fighting against the effects of the virus but are not proportionate with this goal.

Immediately after the declaration of the state of danger, a Government decree effectively put the hospital system under military management. Military commanders as 'hospital commanders' were placed in hospitals, and they make management decisions in a hierarchical military structure that reaches up to the Government, according to Article 45 of the Fundamental Law.²⁹ The use of the military in companies of strategic importance was quite unusual and apparently disproportionate to the situation existing in spring 2020 in Hungary; it surprised public opinion as, according to Article 45 of the Fundamental Law, the primary function of the Hungarian military is to protect the territory of the Hungarian state, the independence of the state and the border and to commit itself to peacemaking and ensuring international military cooperation. None of its major goals are related to fighting against a pandemic; therefore, even if lawful, because a state of danger was declared on 11 March based on the (unconstitutional) qualification that the 'epidemic is a natural disaster' and Article 45 Section (3) of the Fundamental Law allows the military to take part in the prevention of disasters and in the relief and elimination of their consequences, it seemed to be disproportionate for precisely the same reasons as with the declaration of the state of danger.³⁰

The Government decree 179/2020 of 4 May 2020 was also disproportionate because it postponed the procedures and suspended the decisions for the disclosure of public data until the end of the state of danger. Furthermore, public bodies do not have to answer individual claims in cases in which the information is published on the Internet in a general form. Additionally, in cases in which providing the information would prevent the authority from performing its duties, it can refuse to provide the information until 45 days have elapsed (which can be extended by 45 days with due reason). This applies instead of the usual 15-day deadline for access to public data.

The Government initiated tax breaks, including for a number of small businesses, and specific tax breaks for affected sectors such as tourism, and introduced reduced rates for certain social security taxes for employers. According to the reasoning of the Government decree, in order to successfully complete the Economy Protection Action Plan and to receive income for the Epidemic Fund,

²⁹ Government decree 72/2020 of 29 March 2020. See a more detailed analysis in C Győry and N Weinberg, 'Emergency Powers in a Hybrid Regime. The Case of Hungary' (2020) *Theory and Practice of Legislation* 329–53.

³⁰ I Vörös, a former member of the Constitutional Court of Hungary warns of this in: I Vörös, 'A felhatalmazási törvénytől az egészségügyi válsághelyzetig és tovább' in F Gárdos-Orosz and V Lőrincz (eds), *Jogi diagnózisok* (L'Harmattan, 2020).

banks and other credit institutions were ordered to pay extra taxes according to Government decree 108/2020 of 14 April 2020 to contribute to dealing with the pandemic. The Government also imposed a special tax on retail companies. This was formulated in such a way that it disproportionately affects large international corporations, and does not apply to Hungarian-owned smaller corporations. This raises discrimination concerns as well; these are questions of competition law and state aid law which are decided by the European Commission. EU decisions, however, have not yet been made regarding these national protectionist tax policies.³¹

It is also typical of the discriminatory measures that certain interest groups received exemptions from the general rule, including in subject areas of minor interest. Some sports activities, for example, received exemptions from the general framework, while Decree 116/2020 of 15 April 2020 enacted a quite restrictive ban on gatherings, affecting assemblies.

The problems of non-proportionate or discriminatory rulings were not explored by review procedures; therefore these – at the moment – are simply concerns raised in constitutional scholarship³² and also in the media and public discourse. The constitutional review was initiated in the case of the prolongation of the access to public information, but the Constitutional Court waited and then refused to examine the case on the merits, because the rule was no longer valid at the time of the decision.³³ It is a procedural problem of the constitutional review in the state of danger that the statutory deadlines for the procedures have not adapted to the rapid regulatory activity necessary in such an exceptional situation. If the procedure is not amended by shortening the deadlines by Government decree, as happened in Hungary, the Constitutional Court can avoid making timely decisions in sensitive cases.

D. Legal Certainty Problems

While the number of decrees is high, not all of them are original legislation; many are amendments of earlier decrees, some of which needed to be amended because of the evolving situation, while others simply corrected drafting mistakes. The quality of these decrees varies. Some are extremely poorly drafted, which can be attributed to the urgency of the situation. In some cases it is clear that the

³¹ M Papp, M Varju, 'Tax policies and populism', manuscript, submitted to *the Journal of Central and East European Law* special issue forthcoming in 2021.

³² C Győry and N Weinberg, 'Emergency Powers in a Hybrid Regime. The Case of Hungary' (2020) *Theory and Practice of Legislation* 329–53; T Drinóczi, 'Hungarian Abuse of Emergency Regimes, also in the light of the COVID-19 Crisis', *MTA Law Working Papers* 2020/13; I Balázs and I Hoffmann, 'A közigazgatási jog rezilienciája – koronavírus idején' in F Gárdos-Orosz and V Lőrincz (eds), *Jogi diagnózisok* (L'Harmattan, 2020).

³³ 3413/2020. (XI. 26.) CC decision.

political decision was taken quickly and the draft was transformed into law too fast, without much attention being given to the legal formulation.³⁴ However, in this hurried law-making activity, the problems were sometimes not only those of poor codification.

Although Government decrees were mostly adopted to control the situation, in some cases the Chief Medical Officer as an administrative authority played an important role in order to avoid legal uncertainty, although, at the same time, this caused legal uncertainty on a more general level.

As the first 15 days of the Government decree issuing the state of danger expired some days before 1 April when the Government received the authorisation from the Parliament to extend the temporal effect of its emergency decrees, the Hungarian state reacted with a normative order to solve this problem issued by the Chief Medical Officer that kept in force all emergency measures for these intervening days, by overstepping the textual interpretation of its competencies.

In another emblematic case, specific rules on the operation of the justice system were imposed, such as an extraordinary ‘justice break’.³⁵ A ‘justice break’ is a period when courts do not sit, apart from adjudicating urgent matters, such as cases of custody. The decree ordering the break due to COVID-19 failed to include regulations governing the procedural consequences of such a break; therefore the situation was completely uncertain. It was not clear whether the break affected deadlines and other administrative matters. Access to justice became unstable for some days, so the head of the National Office of the Judiciary quickly issued a normative order regulating these matters.³⁶ The problem is again that under Hungarian law this type of internal regulation only relates to personnel in the justice system, and does not address ordinary citizens. The Government finally resolved the situation with a decree issued two weeks later, the longest and most exhaustive of all decrees issued.³⁷

As far as legal uncertainty is concerned, temporality is a crucial question. While in most cases it was clear that the rearrangement of certain questions was temporary, in other questions the new measures were not only prolonged by Act LVIII on transitory measures until August or until the end of the year, but due to the declaration of the new health emergency situation and later the second state of danger, strict temporality became a quite abstract concept. Many of the health protection measures and the social and economy protection measures are still valid in some form and if we have learnt the lessons of democracy in 2020 we can easily expect the introduction of a new emergency situation after the pandemic is over to allow the Government to freely rebuild and rearrange the economy and

³⁴ See, for further analysis, Györy and Weinberg (n 32).

³⁵ Government decree 45 /2020 of the 15 March 2020. Section (1).

³⁶ Orders of the Head of the National Office of the Judiciary Nrs. 35 (III.15), 36 (III.16.), 37 (III.17.), 38 (III.17.), 40(III.24.), 42 (III.26), 47(IV.1.) of 2020.

³⁷ See, in more detail, Györi and Weinberg (n 32); see also Government decree 74/2020 of 31 March 2020.

society without the usual institutional oversights, which are considered to be not too effective anyway.³⁸

E. The Role of the Constitutional Court

In the state of danger, the Constitutional Court remained in session, following the constitutional provision that the Constitutional Court cannot be suspended in any state of exception.³⁹ Thus, the Constitutional Court is positioned to rule on the constitutionality of Government decrees or of the Authorisation Act or of the Act on the transitory measures, upon proper motions (ie, not *ex officio*). Whether this control could be effective is unclear and debatable, as the Constitutional Court is widely known to be deferential to the Government, especially in the extraordinary situations such as the financial crisis, migration issues etc;⁴⁰ however, it is the only forum where constitutional review can be initiated.

First, the lack of proper motions in many of these outstanding matters is indicative, although in some cases there is a procedural (partly competence) burden of the review. So far, the Constitutional Court has not brought any decisions assessing Government emergency acts as unconstitutional, but it has already stated in one of its decisions, in general terms, that the Government should decide on the necessity of the regulative measures in this situation and the Constitutional Court is not qualified and therefore not authorised to review any related decision.

One case that the Constitutional Court examined on the merits concerned a Government decree which classified the intention to extend the Central European Press and Media foundation to be of national strategic importance. The motion claimed that defining this exceptionally protected merger as of 'strategic importance' was against the concept of plural media communications. The Constitutional Court found the decree constitutional, stating that the Government can freely decide on the necessity of qualifying such an action as of strategic importance for the defence against the pandemic situation.⁴¹

In another case the Constitutional Court decision was also quite deferential, but it drew attention to the dangers of a new piece of legislation, and therefore stated – in a constitutional requirement with binding force – how to interpret it. At the beginning of the state of danger, Parliament adopted an amendment to the Criminal Code on scaremongering, the essence of which was that these rules should become more severe during a pandemic and other dangers. The motion claimed that the new regulation restricts the freedom of speech disproportionately and is uncertain, as it does not concretely define the conduct which is against the

³⁸ Z Szente, *The Constitutional Law in Hungary* (Kluwer International, 2021).

³⁹ Art 54 Section (2) of the Fundamental Law.

⁴⁰ Z Szente and F Gárdos-Orosz, *New challenges to Constitutional Adjudication in Europe* (Routledge, 2018).

⁴¹ 16/2020. (VII. 8.) CC decision.

law. This new rule is contrary to the former practice of the Court and the constitutional requirements of the criminal law. The Constitutional Court ruled in its decision that the provision is not to be annulled because it has a constitutional meaning. The Court said that it is a constitutional requirement that the criminal act, or scaremongering, can only be committed in a case in which the perpetrator makes a statement which he/she knows is incorrect, or which is explained tentatively in an incorrect manner, and which is thus capable of hindering or preventing the defence against the pandemic. This is the only constitutional interpretation of the new rule according to the Constitutional Court.⁴² Although this decision did not strike down the amendment as required by the petitioner, according to experts in penal law the constitutional requirement was convincingly sufficient because penal law doctrine does not allow an extensive interpretation of the provision.⁴³

There were no other substantive reviews⁴⁴ of major relevance regarding this period of the first state of danger, which is a telling demonstration of the operation of Hungarian democracy and the relevance of the possibility of the constitutional review in practice.

VI. The Management of the Legal Consequences of the Emergency Situation

During the state of danger, which lasted for about four months, several members of the Government indicated the possibility that some of the provisions made under the special legal order had worked so well that they should be maintained after the emergency. This was a somewhat surprising argument, since legislation enacted during a special legal order specifically reflects, in principle, extraordinary circumstances and solutions. Nevertheless, these ideas were largely realised when Parliament adopted in June an act which enacted a number of emergency provisions as statutory law.

Just before the adoption of this law, Parliament passed Act LVII of 2020 on the abolition of the state of danger. It is notable that the title of this Act is misleading because the National Assembly did not actually terminate the special legal order (as this is the exclusive power of the Government under the Fundamental Law) but merely asked the Government to do so. It is worth adding that the bill was submitted by the Government, so in fact the Government itself suggested to Parliament that it call on the Government to end the special legal order. Beyond this, the

⁴² 15/2020. (VII. 8.) CC decision.

⁴³ I Ambrus: A koronavírus járvány és a büntetőjog, MTA Law Working Papers 7:5, 1–22., 22, (2020) 13–14.

⁴⁴ There were two other cases in which the Constitutional Court refused to examine the case on the merits, because the Government decree was no longer in force at the time of the decision. One concerned the alteration of the Labour Code (3326/2020 (VIII. 5) CC decision, upon a motion initiated by 52 MPs), and the other the so-called vehicle tax (3234/2020 (VII. 1.) initiated by 54 MPs).

Act only expresses its intention to repeal the Authorisation Act, but it contains, in a very confusing way, two different dates for this: on the one hand, it says that the Authorisation Act ceases when the state of danger ends (a point in time defined by the Government), but on the other hand, it states also that this date will be determined by an individual resolution of the Prime Minister promulgated in the Official Gazette. Although this contradictory regulation had no practical effect, it clearly illustrates the constitutional confusion over the handling of the state of danger. It also shows the complete subordination of the legislature to the executive, which went so far that the date of the repeal of an act of Parliament that provided extraordinary powers for the Government was determined by the individual decision of the Prime Minister. Indeed, this is how it happened: the Government declared the end of the state of danger from 18 June,⁴⁵ and the Prime Minister on the same day issued his own resolution determining the date of the termination of special legal order accordingly.⁴⁶

Notwithstanding, another act of Parliament, the Act on the transitional rules related to the abolition of the state of danger and the declaration of the new health crisis situation,⁴⁷ has had much greater significance. This law is expected to have important and longstanding effects on the legal system. As a matter of fact, this Act is a 'super salad law' of great length (having 410 articles) and diverse subject matters (amending dozens of laws), but without any internal coherence.

The provisions of this Act can be classified into three groups. First, it contains a number of technical rules by providing, in particular, for the legal consequences of the specific legal order for various legal relationships. Thus, for example, it has extended the debtors' payment moratorium prescribed by an emergency decree until the end of the year, allowed delays for tax obligations, maintained certain exemptions and benefits, and lifted some restrictions (eg, by-elections and referendums can once again be held and initiated). From a constitutional point of view, most of these rules have become necessary in order to ensure legal security, as well as to return to the normal legal order. Among them, the only objectionable measures are those which granted financial advantages for certain economic activities without objectively defined criteria; the Act simply enumerates the economic sectors or activities entitled to legal advantages (the list covers, for example, breweries or wine-makers, but not language teachers).

The second group of legal provisions contain or prolong restrictions of rights. Thus, the Act introduced a two-step asylum procedure until the end of 2020. Under the new rules, asylum seekers have to inform, in person, the National Directorate-General for Alien Policing that they intend to enter Hungary in order to submit an application for asylum. In case of approval, the asylum authority may designate accommodation for the asylum-seeker in a closed host institution.

⁴⁵ Government decree 282/2020 (VI. 17.).

⁴⁶ Prime Ministerial Resolution 41/2020 (VI. 17.).

⁴⁷ Act LVIII of 2020.

Another provision of the Act empowers the Government to determine special rules for staying at the venue of public assemblies or demonstrations.

Finally, there is a number of rules that appear to exploit the special circumstances of the post-emergency situation to promote other policy aims.

During the period of the state danger, as we described above, it attracted widespread attention that a private company, the Kartonpack Company, was placed under direct state supervision, following which the government commissioner appointed to head the company dismissed the members of its governing bodies. The Act on the transitory provisions abolished direct state control, but the previous management could not return to its duties. Other provisions have extended the validity of final building, installation and demolition permits, which expired during the state of danger, for another year. Compared to the four-month-long period of the special legal order, this is a very generous advantage, which can probably be explained by the intention to support Government investment projects, or the fact that the construction industry is a priority in Government policy. The measures necessary for the protection of companies based in Hungary were also included in the scope of the protection against the COVID-19 pandemic. According to these rules, the competent minister has to be notified about the most important decisions taken by the companies classified by the Government as 'strategic companies' (primarily in the energy, transport and telecommunication sectors) by 30 June 2021. In fact, these decisions (including the sale, transformation, merger or division of these companies, or the acquisition of an ownership share of over 10 per cent in such a company) need to be approved by the minister. Although a ministerial ban can be challenged in court, the minister's discretion is so wide-ranging (he or she decides in the interest of the state) that judicial protection is of no more than symbolic importance.

The Government exploited the opportunity offered by the management of the consequences of the pandemic by introducing the so-called health crisis situation immediately after the termination of the state of danger. This new legislation has resulted in a quasi-special legal order outside the Constitution, allowing the Government to restrict basic rights and overruling acts of Parliament by decrees without constitutional obstacles.

By amending the 1997 Act on Public Health,⁴⁸ Parliament stated that 'the government, on the proposal of the National Chief Medical Officer, and on the basis of the initiation of the Minister, may declare a health crisis situation in a Government decree if it is necessary in the event of an epidemiological emergency', or 'in any event, usually unexpected, which endangers or damages the life, physical integrity or health of the citizens or the operation of healthcare providers'. In addition, such a health crisis situation may be promulgated 'in the event of any circumstance which seriously and directly impedes the provision of the healthcare

⁴⁸ Act CLIV of 1997.

of the population', provided that the provision of care to the population 'would be disproportionately difficult'.

In this situation, the Government can take almost any measure that could be previously used only under the special legal order. Thus, it may limit or prohibit:

- the operation of any institution, the attendance and organisation of events and activities which may contribute to the spread of the epidemic;
- the operation and opening hours of shops;
- domestic and international travel;
- public transport;
- the transportation of livestock or goods.

In addition, the Government may prescribe lockdowns and quarantine, may issue orders relating to the sale, consumption, or purchase of certain foodstuffs and products, the consumption of drinking water, the supply of medicines and medical aids and the procedure for accessing health services. For specific purposes, it may use the help of the army and the police, and it can put military commanders in charge of hospitals.

The health crisis situation may last up to six months, but may be extended by the Government as many times as it wants, provided that the conditions for its promulgation are met.

The new legislation does not contain any guarantees against the abuse of this extremely wide-ranging empowerment. Although the National Chief Medical Officer must continuously monitor the existence of the conditions of the health crisis situation and, if these conditions are no longer met, he or she has to initiate a request to the Minister to propose to the Government that the health crisis situation be repealed, the Government has full discretionary power to assess whether the conditions are met or not. Only the Health Committee of the National Assembly must be informed about the prolongation of the health crisis situation, and while these emergency measures may, to a large extent, take the form of individual decisions, neither Parliament nor the Constitutional Court may control them.

The Government immediately took advantage of this opportunity when, in parallel with the termination of the state of danger, it introduced the health crisis situation⁴⁹ until 18 December 2020 and prolonged it by six more months until mid-2021.

The new legislation introducing the health crisis situation would have been justified by the need not to declare a special legal order with almost unlimited authorisation of the executive power, but instead to supply more narrowly tailored instruments and tools to eliminate specific risks such as a human epidemic. However, the legal construction of the health crisis situation raises some constitutional concerns.

⁴⁹ Government decree 283/2020. (VI. 17.).

Whereas the state of danger is a form of the special legal order defined in the Constitution, the health crisis situation is based on a statutory authorisation and therefore, in principle, can be declared by the executive power as part of the normal legal order. In terms of the scope of the authorisation, a health crisis situation differs from a state of danger only in that the Government decrees and measures issued under this empowerment can only be taken to avert health risks, while in special legal orders the Government can generally derogate laws (in the areas, for example, of economic or social policy). In fact, this newly-established health crisis situation, as has been noted above, is a quasi-special legal order with the possibility of extensive, extraordinary restrictions of fundamental rights, liberties and properties, but without any constitutional authorisation. The Government's authority in such a situation, for example as far as the restriction of fundamental rights is concerned, goes far beyond what is usual and acceptable in the normal legal order. Beyond this, the necessary conditions of the declaration of a health crisis situation are too general and vague, which hardly provides a legal basis for any control body to override the Government's decision concerning it.

Based on past experience, the unchecked power of the Government to declare and abolish the health crisis situation is also troubling. It is worth noting that since 2016, the Government has consistently maintained another, also extra-constitutional, quasi-special legal order, the crisis situation caused by mass immigration, so that its legal conditions (eg, the number of immigrants arriving in the country) have not been met for years.

Nonetheless, as the situation caused by the COVID-19 became more severe from the fall of 2020 and the Government also had to handle the unfolding economic crisis, the authorisation provided by the new health crisis situation was no longer sufficient.

VII. State of Danger Reloaded

A. The Context

The second state of danger was declared in a much more serious situation than the first had been in March. When the Government first declared the special legal order in spring 2020, there were only a total of 13 identified infected people in Hungary, and no confirmed deaths had occurred due to COVID-19. In contrast, when the second state of danger was introduced on 2 November, there were approximately 64,000 infected individuals in the country and the daily mortality rate was around 80–90.⁵⁰ While the introduction of the first state of danger actually

⁵⁰ The source of this data is the official Government site www.koronavirus.gov.hu.

served to prevent the spread of the pandemic, or at least to prepare for the impending health crisis, in the meantime, society had learned to live with the pandemic, and the legal empowerment provided by the health crisis situation may have been sufficient. However, the reason for the declaration of the second special legal order in late autumn was presumably to reduce the economic downturn; at least the key phrase in the governmental campaign which ran in summer and early fall was that 'life can't stop'. In support of this, the Government organised a 'national consultation',⁵¹ the unsubstantiated results of which allegedly proved that the majority of the population also opposed the introduction of stricter rules (especially social distancing or school closures).

B. The Declaration of the Second State of Danger and the New Authorisation Act

Due to the exacerbation of the coronavirus pandemic, the Government declared the state of danger again on 3 November 2020.⁵² The spread of the pandemic and the increase in the mortality rate justified this step. Nevertheless, since this Government decree relies on the same constitutional foundations and has a largely similar content as on the first occasion, it shares its constitutional problems too. This is not changed by the fact that the Disaster Management Act has, in the meantime, been amended,⁵³ because the amendment only confirmed the unconstitutional parts of the Act. Thus, for example, it extends the reasons for the declaration of state of danger provided by the Fundamental Law to human epidemics which cause a mass illness that endangers the safety of life and property. Since Article 53 Section (1) of the Fundamental Law has not changed, this extension explicitly goes far beyond the cases defined by the Constitution in which this kind of special legal order could be declared. The Government decree again declared the state of danger for an indefinite period, and only stated that it would keep the need for the special legal order under review.

Interestingly, neither this Government decree nor subsequent decrees put an end to the health crisis situation declared in the summer, so this is in force in parallel with the special legal order.

Just a few days later, Parliament passed a new Authorisation Act,⁵⁴ with more or less the same content as before. The National Assembly again relinquished the compliance of its constitutional obligation to review governmental emergency decrees, and, through this law, approved, without any scrutiny, any Government

⁵¹ National consultations are general surveys organised by the Government. The results of the surveys do not have any legal effect. The survey on the coronavirus pandemic has been the ninth national consultation since 2012.

⁵² Government decree 478/2020 (XI. 3.).

⁵³ Act LVIII of 2020.

⁵⁴ Act CIX of 2020.

decrees issued since the introduction of the second state of danger, and any subsequent decrees the Government deems necessary to adopt in the future.

In assessing the current state of Hungarian democracy, it is important to be aware that the parliamentary opposition, which had often protested in the past against the unlimited empowerment of the Government provided by the first Authorisation Act, this time voted unanimously for the same authorisation. Although the Act again included a stipulation that it could revoke the authorisation for the fully-fledged emergency management, its own preamble justified the necessity of this Act by stating that ‘the session of the National Assembly may be suspended due to the second wave of the coronavirus pandemic’. Yet, this time too, Parliament did not provide any constitutional guarantee for its own continuous functioning.

In summary, in autumn 2020, from a constitutional point of view, the new declaration of the state of danger and the adoption of the second Authorisation Act was enacted in the same unconstitutional manner as had occurred in March. The only significant difference is that this time, the temporal effect of the parliamentary authorisation does not depend on the decision of the Government, but has been set at 90 days.

When the temporal effect of the second Authorisation Act expired, the Government, although not obliged to do so, terminated the special legal order declared in November 2020,⁵⁵ but immediately re-proclaimed it with another Government decree⁵⁶ without any deadline (and a new Authorisation Act).

In addition, it is worth noting that, in December 2020, the National Assembly passed the Ninth Amendment to the Fundamental Law which provides indirect evidence of the constitutional flaws of the practice of applying a special legal order which seeks to remedy the constitutional problems of the first two declarations of the state of danger. According to the modification, the Government may, in the future (from 2023), declare a state of danger in a case of ‘a serious incident endangering the safety of life and property’, and a human epidemic is no longer excluded from this list, as events such as natural or industrial disasters are only examples of reasons for a declaration of state of danger. In addition, the state of danger can only be declared for thirty days, after which the Government can extend its duration only with the authorisation of the National Assembly.

VIII. Conclusions

While it could be argued that the extraordinary power of the Government is not unlimited because Parliament has stipulated that it can revoke the full authorisation

⁵⁵ Government decree 26/2021. (I. 29.).

⁵⁶ Government decree 27/2021. (I. 29.).

at any time and, moreover, the Constitutional Court is constantly functioning and able to review the constitutionality of emergency decrees, in practice, Parliament did not control the emergency measures and the Constitutional Court has been silent on almost all constitutional issues despite the constitutional objections raised and explained in this chapter.

It is true that the Constitutional Court cannot act *ex officio* in such matters, that is, if a constitutional review of a piece of legislation is not initiated by an authorised body, it is completely toothless, but even when opposition MPs initiated the procedure, the Court refused to take the case on the merits, with reference being made to procedural obstacles. However, it is questionable whether the Court, which consists exclusively of members supported by the government majority, could oppose any serious intention of the Government, even if it had a formal opportunity to do so.

Parliament's inactivity is even more problematic, as the legislature has failed to perform its constitutional duty to control the executive branch in both states of danger, although the extraordinary power of the Government would have justified a strict parliamentary oversight. It is worth noting that in Hungary, Parliament was in continuous operation and had an active legislative programme during both special legal orders (in 2020 the National Assembly passed more laws than in the previous two years), yet it kept itself removed from the management of the health crisis caused by the coronavirus. Under such circumstances, when the legislature is working continuously without any hindrance, the extraordinary law-making power of the executive branch is questionable, but even if it is acceptable given the speed and flexibility of governmental decision-making, failure to exercise parliamentary scrutiny of emergency decrees cannot be defended for any reason.

It seems that the often-voiced assumption of political and constitutional studies that semi-authoritarian regimes prefer to use extraordinary powers in times of crisis can be justified in the case of Hungary. As a matter of fact, the outbreak of the COVID-19 pandemic in March 2020 in Hungary led to the possibility of a continuous, long-term quasi state of emergency with almost unlimited Government rule and very weak if not non-existent institutional control mechanisms, both in law and in practice with the introduction of the new health crisis situation. Furthermore, the Ninth Amendment to the Fundamental Law made it easier to declare a state of emergency as a special legal order too. It is important to remember that the pandemic has indeed caused a serious health and economic crisis that requires special instruments to be managed. However, even such a serious situation does not justify the evasion of the fundamental constitutional rules and a waiver of the constant parliamentary and judicial control of the executive branch authorised to exercise extraordinary power.

The Government's populist policy making has exploited the well-known effect by which when the people 'panic' they support policies that are unwise

and excessive'.⁵⁷ As we have described, in this situation the Government prepared the legal system for a long-term state of exception, institutionalising certain extraordinary powers and instruments, which provide wide-ranging empowerment for the executive even under normalcy, in the ordinary constitutional order. All these are in contrast with the exceptional nature of the special legal orders, which should have the function to act 'only to resolve the emergency and restore the normal legal order'.⁵⁸

⁵⁷ EA Posner and A Vermeule, 'Accommodating Emergencies' (2003) 56(3) *Stanford Law Review* 609.

⁵⁸ J Ferejohn and P Pasquino, 'The law of the exception: A typology of emergency powers' (2004) 2(2) *International Journal of Constitutional Law* 223.