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ZOLTÁN NAGY – ATTILA HORVÁTH (EDS.)

EMERGENCY POWERS IN CENTRAL AND EASTERN EUROPE

From Martial Law to COVID-19

STUDIES OF THE FERENC MÁDL INSTITUTE / 1

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Contributors

Editors

Nagy Zoltán
Head of Department of Public Law, Ferenc Mádl Institute of Comparative Law, Hungary
Professor, Faculty of Law, University of Miskolc, Hungary

Horváth Attila
Senior Researcher, Ferenc Mádl Institute of Comparative Law, Hungary
Senior Lecturer, Faculty of Public Governance and International Studies, National University of Public Service, Hungary

Authors

Petar Bačić (Chapter 4)
Professor, Faculty of Law, University of Split, Croatia

Béres Nóra (Chapter 2)
Researcher, Ferenc Mádl Institute of Comparative Law, Hungary
Assistant Lecturer, Faculty of Law, University of Miskolc, Hungary

Sibilla Buletsa (Chapter 11)
Professor, Faculty of Law, Uzhhorod National University, Ukraine

Fegyveresi Zsolt (Chapter 8)
Researcher, Ferenc Mádl Institute of Comparative Law, Hungary
Senior Lecturer, Department of Law, Sapientia Hungarian University of Transylvania, Romania

Hojnyák Dávid (Chapters 5 and 12)
Researcher, Ferenc Mádl Institute of Comparative Law, Hungary
Assistant Lecturer, Faculty of Law, University of Miskolc, Hungary

Horváth Attila (Chapters 6 and 12)
Senior Researcher, Ferenc Mádl Institute of Comparative Law, Hungary
Senior Lecturer, Faculty of Public Governance and International Studies, National University of Public Service, Hungary

Marko Ivkošić (Chapter 4)
Associate Professor, Faculty of Law, University of Zagreb, Croatia

Marinkás György (Chapter 3)
Researcher, Ferenc Mádl Institute of Comparative Law, Hungary
Assistant Professor, Faculty of Law, University of Miskolc, Hungary

Ivan Milić (Chapter 9)
Assistant with Doctorate, Faculty of Law, University of Novi Sad, Serbia

Nagy Zoltán (Chapters 6 and 12)
Head of Department of Public Law, Ferenc Mádl Institute of Comparative Law, Hungary
Professor, Faculty of Law, University of Miskolc, Hungary

Németh Zoltán (Chapter 7)
Researcher, Ferenc Mádl Institute of Comparative Law, Hungary

Slobodan Orlović (Chapter 9)
Professor, Faculty of Law, University of Novi Sad, Serbia

Szentpáli-Gavallér Pál (Chapter 8)
Researcher, Ferenc Mádl Institute of Comparative Law, Hungary

Szinek Csütörtöki Hajnalka (Chapters 5 and 10)
Researcher, Ferenc Mádl Institute of Comparative Law, Hungary

Szinek János (Chapter 10)
Researcher, Ferenc Mádl Institute of Comparative Law, Hungary

Trócsányi László (Chapter 1)
Professor and Rector, Károli Gáspár University of the Reformed Church, Hungary

Ungvári Álmos (Chapter 12)
Researcher, Ferenc Mádl Institute of Comparative Law, Hungary

Katarzyna Zombory (Chapter 7)
Senior Researcher, Ferenc Mádl Institute of Comparative Law, Hungary

Reviewers

Arsen Bačić
Professor, Faculty of Law, University of Split, Croatia
Member of the Croatian Academy of Sciences and Arts

Jiří Jirásek
Associate Professor, Faculty of Law, Palacký University Olomouc, the Czech Republic

Kádár Pál
Head of the Research Group on Defence Security Regulation and Governance Studies, National University of Public Service in Budapest, Hungary

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Professor, Department of Constitutional Law and Human Rights, University of Rzeszów, Poland

Raisz Anikó
Associate Professor, Faculty of Law, University of Miskolc, Hungary

Sztranyiczki Szilárd
Associate Professor, Department of Law, Sapientia Hungarian University of Transylvania, Romania

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Preface

"The circumstances that endanger the safety of nations are infinite, and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed"

(Alexander Hamilton)

Although more than 200 years have passed since Alexander Hamilton, a Founding Father of the United States completed his essay on the necessity of government,[1] his finding still holds in many respects. The global crisis triggered by COVID-19 shed light on the exceptional situations in which governments may need to be empowered to take actions that they would not normally be permitted, in order to maintain or restore the integrity of the state and public safety and protect their citizens. Emergency powers are often regarded as a neglected field of constitutional law since most European countries rarely have to face crises or threats that cannot be managed under normal operating conditions.

It would be not an overstatement to say that the pandemic was a milestone in the history of emergency powers. It was quite obvious from the very beginning that national responses have varied considerably, which may be attributed to the apparent differences between the legal frameworks of the various countries. As this book points out, each country struggled to find the proper legal response for the crisis and some of them were even forced to cross existing legal frameworks, whilst seeking a balance between legality and efficiency.

The basic goal of this volume is twofold: On the one hand, readers are provided with an in-depth analysis and comparison of the systems of emergency powers of eight Central and Eastern European countries, paying special attention to the states of exception declared in the previous decades; on the other hand, the book is devoted to discussing the constitutional law aspects of the responses for COVID-19 crisis, highlighting the relevant legal and

1 Alexander Hamilton: *Federalist Papers #23, The Necessity of a Government as Energetic as the One Proposed to the Preservation of the Union. The Federalist: A Collection of Essays, Written in Favour of the New Constitution, as Agreed upon by the Federal Convention*, September 17, 1787. Available at: https://avalon.law.yale.edu/18th_century/fed23.asp (Accessed: 15 June 2022)

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political debates, dilemmas and viewpoints surrounding the pandemic up until June 2021. Although the viewpoint of the book is primarily based on constitutional law, we also deal with the COVID-19 pandemic as an economic crisis, comparing the fiscal and monetary measures of crisis management.

The first chapter of the book is devoted to the theoretical issues of the state of emergency, focusing on the justification of emergency powers; meanwhile the second and third chapters revolve around the international aspects of the COVID-19 crisis and the coordinating role of the European Union, respectively. The country chapters offer an in-depth analysis of the legal framework of emergency powers and emergency regimes, covering the constitutional law aspects of COVID-19 crisis.

Fiscal and monetary policies, introduced by the national governments to mitigate the pandemic-triggered economic crisis, are also touched upon. The last chapter makes an attempt to compare the legal framework of the emergency powers and outline the aspects of constitutional law related to the COVID-19 crisis.

As the pandemic and debates on the state of emergency will be in the limelight for years, we sincerely hope that our book may be of great interest for researchers, scholars, and experts, serving as a valuable contribution for further research.

June 2022

The Editors

The Theoretical Questions of Emergency Powers

TRÓCSÁNYI LÁSZLÓ

1. Introduction

The outbreak and rapid spread of COVID-19 made it necessary to institute emergency powers in many parts of the world, which had been largely a theoretical or academic matter for a long time and far removed from the reality of everyday life. Many countries' leaders have compared the pandemic to a war because of its sweeping public health consequences.[1] Although the analogy is obviously misleading in international law terms, it nevertheless highlights the specificity of the administrative response to a pandemic and how the traditional order of state organization and functioning is not well suited to the successful prevention and remedying of a global health threat. The need to control the pandemic, and in particular to control the overload on healthcare systems while preserving the viability of economy,[2] justified the introduction of systems of state organization and operation not common in

1 Among the world leaders likening the threat posed by the pandemic to a state of war are Chinese President Xi Jinping (http://www.xinhuanet.com/english/2020-02/11/c_138771934.htm); French President Emmanuel Macron (https://www.reuters.com/article/us-health-coronavirus-macron-restriction/we-are-at-war-france-imposes-lockdown-to-combat-virus-idUSKBN2133G5); former US President Donald Trump (https://www.whitehouse.gov/briefings-statements/remarks-president-trump-vice-president-pence-members-coronavirus-task-force-press-briefing-5/); and Hungarian Prime Minister Viktor Orbán (http://abouthungary.hu/blog/pm-orban-in-an-exclusive-interview-our-war-plan-against-the-coronavirus-is-about-ensuring-that-hungary-continues-to-function). (All accessed: December 15, 2020).

2 Ferenc Horkay Hörcher (2020), in "*Politikafilozófia járvány idején*" ["Political philosophy during an epidemic"], pointed out that political power must navigate between two extremes, Scylla and Charybdis, and find the lesser of two evils.

Trócsányi László: Professor and Rector, Károli Gáspár University of the Reformed Church, Hungary

Trócsányi, L. (2022) 'The Theoretical Questions of Emergency Powers' in Nagy, Z., Horváth, A. (eds.) *Emergency Powers in Central and Eastern Europe*, pp. 19-31. Budapest: Ferenc Mádl Institute of Comparative Law; https://doi.org/10.47079/2022.znah.epicaee.1_2

peacetime.[3] In 2020, the idea of emergency powers that had been the subject of theoretical legal debate for several decades became part of everyday life in Europe and elsewhere. This context was the impetus for this book to examine the exceptional state action taken in the interest of the common good.

An indispensable part of a comparative law volume intended to provide a comprehensive treatment of the state of emergency is the study and presentation of the general theoretical issues surrounding the emergency powers. It must present and discuss the place of emergency powers in the constitutional system, if only because Hungary's history is replete with bad memories of the exceptional exercise of power separated from constitutional traditions. Therefore, before we examine the specific legal provisions of certain European and non-European countries' states of emergency and other special legal regimes, it is worthwhile to outline the fundamental theoretical issues of emergency powers. What are the historical roots of the exercise of exceptional powers, and why might such an exercise of powers become necessary in constitutional systems? When did exceptional powers appear in and become part of constitutional law? What justifies their introduction, and what are the basic conditions for their application? What is their function, and what interests or values do they protect? These are the fundamental questions that this study seeks to examine.

This chapter's exploration and discussion of the origins of the state of emergency, its state-theoretical background, and its justifiability are intended to improve readers' understanding of the volume's comparative law sections. To this end, the present chapter examines the historical roots of emergency powers, then considers the theoretical issues of its definition and applicability. It discusses justifications for implementing emergency powers and the values it protects, then offers a conclusion.

2. Historical Roots and Ideological Development

The idea of invoking exceptional powers that temporarily replace the conventional functioning of the state and the customary decision-making order in response to a disruptive external or internal cause is not a new phenomenon in the history of state theory. The ancient Greeks studied the nature of power and the functions of the exercise of power in the Athenian democracies.[4] Aristotle examined the decision-making aspects of the exercise of power were already and concluded that threat response is more effective when power is concentrated

3 For a comparative study of the special legal regimes introduced in some European countries in response to the coronavirus pandemic, see Ungvári and Hojnyák, 2020.

4 Trócsányi, 2014, p. 33.

in the hands of one or a few individuals because oligarchies can make decisions faster than democracies.

Similar to the Athenian democracy, ancient Rome's system of government included a permanent magistrate and an extraordinary magistrate (*magistratus extraordinarii*) concentrating the central powers. The extraordinary magistrate was appointed for a fixed term to solve a specific problem. The extraordinary magistrate was a "dictator," a former consul appointed during an emergency by the current consul with the consent of the Senate, endowed with the full powers of the state for up to six months.[5] The dictator was authorized to suspend rights and legal processes and marshal military and other forces to deal with a specific threat to the republic, such as an invasion or insurrection. When the specific threat had been neutralized, he was expected to step down. His powers were removed, his orders terminated and their legal effects ended, and the *status quo ante* was restored.[6] The institution of the Roman dictatorship is the prototype for most modern models of accommodation.[7]

Following the ancient Greek and Roman precedents, in those periods of state history when the limitations of state action by law were relative or based on absolute sovereignty, the need for the exercise of exceptional sovereignty or the creation of emergency powers did not arise. In those governments, the exercise of sovereign power was not limited enough to require the establishment of exceptional situations. The regulation of emergency powers gained new meaning through the principle of the separation of powers, the principle of the State subject to the rule of law, the recognition of fundamental rights, and the enforcement of the hierarchy of legal sources.[8] Accordingly, questions of the exceptional exercise of power appeared in the constitutional theories associated with the modern civil state. For example, John Locke's conception was that in exceptional situations, the power derived from sovereignty could be exercised for the benefit of the community, even against the law. In his interpretation, the exercise of exceptional power was combined with the pursuit of the common good.[9]

In line with this, modern-day state theories on civic transformation can be divided into two major groups. The first group holds that the exercise of exceptional power is a phenomenon outside the law, and the second group holds that the rule of law (constitution) must prevail, even in the exercise of exceptional power. Carl Schmitt, a famous representative of the first group, argued that situations requiring the exceptional exercise of power could not be

5 Földi and Hamza, 1996, pp. 19–23.
6 Ferejohn et al., 2004, p. 212.
7 Gross, 2011, pp. 334–335.
8 Farkas, 2020a, pp. 324–325.
9 Locke, 1999

foreseen and consequently cannot be defined by law.[10] Schmitt defined the state of exception as the point where the opposition between the norm and its realization reaches its greatest intensity.[11] Friedrich Koja shared a similar view, arguing that an exceptional situation is one that cannot be dealt with effectively or at all by legal means.[12] According to Schmitt, the utmost function of constitutions is to define who can exercise exceptional power in special situations. This is (and can be) no other than the sovereign, who can decide when the State is in a special situation and exercise the exceptional power to avert the threat and restore "normalcy." These two different decisions (determination and action) are taken by the exerciser of sovereignty, for whom the conditions and content of power are not bound by law. In Schmitt's interpretation, the depositary of sovereignty is a power of political origin, neither bound by law nor derived from it.[13] Schmitt justifies this thesis by arguing that the sovereign has the power to suspend positive law—that is, the exceptional exercise of power is divorced from law.[14] His idea of the state of exception can be seen as a distinctly national idea in which the sovereign has ultimate responsibility for the continuing existence of the state, which ultimately gave the sovereign permission to set aside constitutional rules to act directly to cope with the threat.[15]

Others, like Albert V. Dicey, express the opposite view, the Anglo-Saxon conception of law. Dicey considers the exceptional exercise of power to be part of the law and subject to ex post judicial review.[16] Accordingly, sovereign power can only be exercised in accordance with the rule of law.[17] A similar position was taken by Schmitt's contemporary, critic Hans Kelsen, who denied the existence of a sovereign outside the law. In Kelsen's view, the state and the law are not separate because in the state legal order, hierarchical legal norms necessarily derive their validity from each other and ultimately from the basic norm. According to his reading, the exercise of power bypassing this hierarchical legal order is invalid.[18]

During the First World War, Robert Hoerni based the right of necessity (*droit de nécessité*) on the decision rendered on December 14, 1915, by the Lausanne Federal Court, which ruled that the government was not bound by the constitution because of exceptional, extraordinary circumstances (*circonstances exceptionnelles*). Exceptional circumstances cannot be determined

10 Carl Schmitt wrote, "The exception, which is not codified in the existing legal order, can at best be characterized as a case of extreme peril, a danger to the existence of the state, or the like. But it cannot be circumscribed factually and made to conform to a preformed law." (Schmitt, 2005, p. 6).

11 See Agamben, 2005, pp. 33–36.

12 Koja, 2003, p. 797.

13 Schmitt, 1992

14 In these situations, the state essentially abandons the general order and establishes a specific new order, a kind of alternative legal order. For more detail, see Kelemen, 2020a, pp. 189–190.

15 Scheppele, 2004, pp. 1021–1022.

16 Dicey, 1902.

17 Mészáros, 2017, pp. 36–38.

18 Kelsen, 2001

in advance, so their constitutional regulation is not possible. The legitimate self-defense of the State is based on natural law.[19] This view was opposed by Léon Duguit, who believed that the exercise of power based on emergency was illegal.[20] Nevertheless, he could accept the use of ordinance-making instead of legislation, subject to the following conditions:

war, armed conflict, general strike by civil servants

the parliament cannot meet or would be significantly delayed

ordinance legislation is approved ex post by the parliament as soon as it has the opportunity.[21]

Georg Jellinek was also able to accept the government's exceptional exercise of power on the condition that the parliament subsequently legitimized the measure adopted in an emergency. According to Raymond Carré de Malberg, a derogation from the constitution is illegal, and if it were made in view of an exceptional situation, it would be tantamount to a *tacitus* amendment of the constitution.[22]

In practice, beyond the debates on state theory, the constitutions resulting from civic transformation had to respond to specific situations posing defense and security challenges. This was unlike previous eras, primarily because the hierarchy of legal sources, the separation of powers, and the function of checks and balances made the state structure more complex and the operation of the state and its decision-making more difficult and time-consuming. Therefore, the practical implementation and the constitutional concept of public emergency that allow for the exercise of exceptional powers and the operation of the state in ways other than normal to protect the common good and the public interest is linked to the adoption of the codified constitutions in the 19th century. With the separation of powers and the legalization and control of the executive, the exercise of exceptional powers became an integral part of the constitutional order. The Anglo-Saxon and continental (German and Austrian) models of the exercise of power took root at this time. One milestone was the Act on Exceptional Powers of 1869, which also applied in the Kingdom of Hungary.[23] After a long evolution, these precedents were established before the adoption of the first Hungarian Act dealing with exceptional powers in 1912. That law, which was designed to protect "the interests of the state," was praised for its guarantees and careful formulation by such Hungarian eminent law professors as Pál Angyal, Illés Edvi, and László Búza.[24]

19 Hoerni, 1917
20 Duguit, 1923
21 Saint-Bonnet, 2001
22 Saint-Bonnet, 2001
23 For more detail, see Kelemen, 2020b, pp. 43–76.
24 For more detail, see Kelemen, 2020c, pp. 96–106.

Since the second half of the 20th century, a state of emergency in constitutional systems may be promulgated under the conditions laid down in the country's constitution to avert a threat endangering people, the State, and the constitutional order if the traditional order of the State and ordinary law are not sufficient to do so.[25] This "constitution-centered" conception sees the emergency powers as part of constitutionalism. In contrast, "state-centered" conception puts sovereignty first and holds that positive law cannot limit the state's actions in exceptional situations.[26] The adoption and growth of the constitution-centered conception allows the exceptional exercise of emergency powers, like fundamental rights or judicial review, to serve as a kind of constitutional guarantee in governance.[27] It is both a broader mandate for governance and a constitutional guarantee.[28]

The exercise of exceptional powers is not recognized in all national constitutions, but is nevertheless considered part of the legal order in many countries under customary constitutional law.[29]

3. Definition and Applicability of Emergency Powers

The exercise of exceptional powers and the introduction of a state of emergency always presuppose a special situation. A special situation can be a violent phenomenon, such as an external or internal armed conflict or even a cyberattack; a natural disaster or industrial disaster, such as a flood or an epidemic; or an economic or social crisis. *Emergency* is a quite elastic concept. Alexander Hamilton described the difficulty of defining the term in advance:

> *It is impossible to foresee or to define the extent and variety of national exigencies, and the correspondent extent and variety of the means which may be necessary to satisfy them. The*

25 Lóránt Csink, among others, concluded that the introduction of a state of emergency and the state's operation under it was not justified by the phenomenon (special situation) but by the danger (Csink, 2017, pp. 8–9.). See also Chowdhury, 1989

26 András Jakab and Szabolcs Till distinguished between the legal nature of "constitution-centered" and "state-centered" conceptions of the exercise of power (Trócsányi and Schanda, 2014, pp. 470–471).

27 Friedrich Koja wrote that a state of emergency is a constitutional state and not a state of unconstitutionality (Koja, 2003, p. 799).

28 In line with this, András Zs. Varga argued that currently the exercise of power by the state is constitutionally and internationally regulated by law, so the exercise of power has become prescriptive (normative) (Varga, 2015, pp. 11–12).

29 For example, there have been unsuccessful attempts in Switzerland to regulate the exceptional legal order at the constitutional level, but the exercise of exceptional powers is nevertheless considered part of the legal order in certain cases (Kley, 2020).

circumstances that endanger the safety of nations are infinite, and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed.[30]

Thus, specific situations can be typified but not exhaustively defined because they are constantly evolving over time. Many phenomena previously considered serious threats are no longer or as much of a threat because of advances in science and technology.[31] Most constitutional documents differentiate among several types of emergencies.[32] However, a common feature of all special situations is that they require immediate and rapid state intervention and crisis management.

Two of the most important questions in the context of emergency powers are which special situations justify the declaration of a state of emergency and who can make this determination. Under most constitutional schemes, the authority to invoke an emergency regime is shared by the executive and legislative branches of government. However, the exact point of equilibrium varies with the type of emergency and the general constitutional culture of a given jurisdiction.[33] The goal is to strike an appropriate and tenable balance between the threat of erroneous empowerment of the state and the threat of erroneous disempowerment of the state.[34]

The Hungarian legal literature on the relationship between the special situation, the special legal order, and the nature of the special legal order presents several different theoretical conceptions. One popular conception takes as its starting point the dichotomy of freedom and security, whereby a state of emergency is a situation where state security is seriously threatened. The State guarantees security using special rules created within the framework of a special legal regime at the expense of fundamental rights: some freedoms must be (temporarily) sacrificed.[35] The threat is reflected in the definition that exceptional powers can be exercised when a country is in an exceptional situation because of an external or internal threat.[36] According to other views, so-called "situations of constitutional danger" justify the declaration of a state of emergency. A special legal order allows the creation of rules that weaken the effectiveness of the constitutional obligations to act but also protect

30 Gross, 2011, p. 336.
31 For more detail, see Csink, 2017. As Gross and Ní Aoláin pointed out that "Drafters of constitutions cannot possibly anticipate all future exigencies, nor can they provide detailed and explicit arrangements for all such occasions. Thus, constitutional emergency provisions…must use broad and flexible language that sets general frameworks for emergency rule" Gross and Ní Aoláin, 2006, p. 66.
32 For classifications, see: Gross and Ní Aoláin, 2006, pp. 333–336.
33 Gross and Aoláin, 2006, p. 339.
34 Gross, 2004, p. 30.
35 Csink, 2017, pp. 8–9.
36 Bódi, 2016, p. 45.

against possible abuses of these weakened obligations.[37] This view was used as the starting point for the view that emergency powers were essentially established as a legal regulatory framework to ensure the functioning of the State in emergency situations, the maintenance of its sovereignty and constitutional order, and the security of life and property of citizens.[38] In comparison, the interest of positions based on a functional approach is the extent to which the emergency powers support the functioning of the State and its defense efforts.[39] Accordingly, the state of emergency is seen as an instrument of crisis management, a stage in the dynamic process of crisis management determined by decisions under public law when the crisis can no longer be effectively managed under the normal legal order.[40]

Thus, a "state of emergency" can be described as a kind of "immune response" in which the temporary unconventional functioning of the state recognizes a pathogen (the threat underlying the special situation) and activates its response. Emergency powers provide a remedy for a crisis or threat that cannot be addressed quickly enough by the conventional functioning of the state. The specific characteristics of the state of emergency include its temporal limitations[41] and its protective character, which seeks to restore the traditional functioning of the state as soon as possible. Accordingly, the state of emergency not only marks an unconventional state operation, but is the last element in the State's (self-) defense toolbox.[42] The eminent legal scholar Győző Concha considered the state of emergency and the exceptional exercise of power as a natural necessity, a necessary part of statehood, and a means to protect the state or society and maintain public order.[43] In his reading, the exercise of exceptional power is indispensable to counter the ever-emerging threats around the world. The only differences between national regimes are who has the power to declare a state of emergency and the extent of the authority of the person exercising the exceptional power.[44]

A precondition for the application of the state of emergency (and a guarantee limiting its duration) is that the danger or crisis to be overcome threatens the community as expressed

37 Jakab and Till, 2014, p. 466.

38 Lakatos, 2014

39 Pál Kádár wrote that the essence of the special legal order is that, compared to normal peacetime operations, some state bodies or persons are given additional powers, and the rights of other persons or bodies are restricted to resolve a crisis situation (Kádár, 2014, p. 6.).

40 Keszely, 2017

41 This is in line with Móric Tomcsányi's apt formulation that exceptional power is always temporary and thus exceptional. The legislature, under the influence of exceptional circumstances, only temporarily transfers the exercise of its powers to other government bodies for the duration of the emergency and within the limits of the constitution; when the exceptional circumstances cease, the exceptional decrees cease to be valid. This temporary character is also one of the characteristics of the exceptional power. See also Farkas, 2020a, pp. 329–330.

42 Farkas, 2020b, pp. 26–28.

43 Concha, 1905, p. 386.

44 Farkas, 2020a, pp. 329–330.

in the constitution; it must be accepted that public intervention is needed to avert the threat, but traditional interventions would be insufficient. This provides the *ultima ratio* for dealing with the threat or crisis with special powers and a state of emergency.[45] Finally, a further criterion complementing the limited application of the state of emergency, as reflected in the exceptional nature of the exercise of power, is its temporary nature.

4. Justifying a State of Emergency: The Values It Protects

Academic literature describes two primary justifications for constitutional provisions for emergency powers. The first justification is that standard republican institutions suitable for protecting liberties can be cumbersome, which makes them ill-suited to the rapid decision-making necessitated by emergency situations; thus, special institutions are needed to preserve the republic itself. The second justification is the need to protect or insulate the regular operations of the legal system from what takes place in emergency circumstances. This justification is based on the notion that there should be provisions for two legal systems—one that operates in normal circumstances to protect rights and liberties and one suited to dealing with rapidly evolving emergency circumstances.[46] As mentioned in the previous section, one of the key constitutional law questions concerning emergency powers in the states following the rule of law is what constitutes a "special situation" that justifies the exceptional exercise of power. The dual nature of the emergency powers is noteworthy. On the one hand, it can enhance efficiency and timeliness by concentrating policymaking and legislative processes and partially unblocking the strict enforcement of the hierarchy of legal sources. On the other hand, it leads to the restriction of the very fundamental rights that the State is sworn to uphold.

However, in this context, it is necessary to stress that while the former is the reason for introducing a state of emergency, the latter can at most be an inevitable corollary. In other words, the exercise of exceptional powers is intended to avert or deal with unpredictable crisis situations that cannot be resolved adequately by adhering strictly to the complex, cumbersome, time-consuming, and often contentious traditional system.[47] They require more effective protective measures, immediate decision-making, and faster State interventions.[48]

45 Farkas, 2020a, p. 323 and p. 339. A similar principle is adopted in the case law of the European Court of Human Rights. See Mészáros, 2016, p. 208.

46 Ferejohn, 2004, pp. 233–234.

47 Accordingly, in Zoltán Magyary's view, the parliamentary system is only suitable for governing in peaceful conditions; in times of threat, more effective decision-making means are required (Magyary, 1942, p. 206).

48 For details on the relationship between the crisis and the special legal regime period, see Keszely, 2017.

This rapid state action presupposes a weakening of the division of powers and the limits of the hierarchy of legal sources. Accordingly, it is apt to use the analogy of the state of emergency as legitimate protection of the rule of law or constitutionalism, referring to its *ultima ratio* character.[49] The exceptional exercise of power and the introduction of a state of emergency may be justified by a serious threat to the existence of the State, the constitutional order, or society. In such cases, the State's traditional functioning may be suspended in proportion to the scale of the threat until that threat has been effectively addressed. In addition, the exceptional exercise of power, like the institution of legitimate protection, cannot be outside the law (or the Constitution) but is limited since certain constitutional guarantees, such as purpose limitation or constitutional review, remain valid during this period.

The restriction of certain fundamental rights cannot be an aim in itself, only a necessary means of averting a threat and thus an inherent part of a state of emergency. The reason for declaring a state of emergency must not be to restrict fundamental rights but to mobilize a rapid and effective state intervention. Moreover, by analogy with the situation of legitimate protection where the threat precipitating the state of emergency threatens the Constitution or the values it expresses, the exercise of exceptional powers has the direct and indirect function of protecting rights. The direct rights-protecting function of the emergency powers is manifested in its requirement that some rights must be temporarily limited to ensure the continued protection and strengthening of the most valuable rights. It gives priority to the protection of certain rights recognized in the constitution. For example, in times of an epidemic, it imposes restrictions on the right of assembly, freedom of religion, or freedom of movement to protect human life and health by slowing or preventing the rapid spread of a deadly virus. At the same time, the exercise of exceptional powers and a state of emergency also have an indirectly protective function, insofar as the exceptional public power measures must be aimed at averting the threat and restoring the traditional constitutional order as soon as possible—including the full exercise of the fundamental rights and freedoms recognized therein. In other words, the transitional nature of a state of emergency is intended to ensure the exercise of the full spectrum of constitutional rights.

Therefore, the emergency powers that are part of a constitution have an indispensable protective role in constitutional systems. By averting threats to statehood, constitutional order, and society, they ultimately safeguard the values expressed in the constitution. This necessary function of protecting values is the main contemporary justification for the exceptional exercise of emergency powers.

49 See Farkas, 2020a, p. 338.

5. Conclusion

The chapter outlined the ideological and historical foundations and the modern emergence, function, and justifications of the exercise of emergency powers. In this latter context, it is worth recalling the words of Ferenc Deák, who once said that a state of siege is a sad necessity; God save the country if it takes place; but a condition even more serious than a state of siege is when there is no law to regulate it and when, instead of the law of siege, arbitrariness appears.[50] An important theoretical conclusion here is that emergency powers, which date back to the Classical period past and are universal in contemporary constitutional cultures, represent a constitutional achievement of guaranteed importance for preserving national constitutional values.

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50 Quote from Ferenc Deák's speech of December 6, 1868, in the debate on the jurisdiction of military courts. See: Greguss, 1868, p. 380 cited by Farkas, 2020a, pp. 328–329.

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International Aspects of the COVID-19 Health Crisis with Special Regard to Human Rights

BÉRES NÓRA

1. Introduction

This chapter provides an overview of the most significant international aspects of the COVID-19 pandemic, focusing primarily on states of emergency and human rights. After presenting the pandemic as a health and economic crisis, the chapter offers a comprehensive analysis of the derogation clauses of two human rights treaties: Article 15 of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, hereafter, ECHR or Convention)[1] and Article 4 of the International Covenant on Civil and Political Rights (hereafter, ICCPR or Covenant).[2] These two treaties were selected because of their impact on the development of European and universal human rights laws and their importance as models for other human rights treaties, such as the European Social Charter (ESC)[3] and

1 European Convention on Human Rights, opened for signature November 4, 1950, E.T.S. No. 005, entered into force September 3, 1953. More rights are granted by additional protocols to the Convention (Protocols 1 (E.T.S. No. 009), 4 (E.T.S. No. 046), 6 (E.T.S. No. 114), 7 (E.T.S. No. 117), 12 (E.T.S. No. 177), 13 (E.T.S. No. 187), 14 (C.E.T.S. No. 194), 15 (C.E.T.S. No. 213), and 16 (C.E.T.S. No. 214)).

2 International Covenant on Civil and Political Rights, opened for signature December 19, 1966, 999 U.N.T.S. 171, and 1057 U.N.T.S. 407, entered into force March 23, 1976.

3 European Social Charter (revised), opened for signature May 3, 1996, E.T.S. No. 163, entered into force July 1, 1999. Article 30 of ESC provides the following:
1. In time of war or other public emergency threatening the life of the nation any Contracting Party may take measures derogating from its obligations under this Charter to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.
2. Any Contracting Party which has availed itself of this right of derogation shall, within a reasonable lapse of time, keep the Secretary-General of the Council of Europe fully informed of the measures taken and the

Béres Nóra: Researcher, Ferenc Mádl Institute of Comparative Law, Hungary
Assistant Lecturer, Faculty of Law, University of Miskolc, Hungary

Béres, N. (2022) 'International Aspects of the COVID-19 Health Crisis with Special Regard to Human Rights' in Nagy, Z., Horváth, A. (eds.) *Emergency Powers in Central and Eastern Europe*, pp. 33-70. Budapest: Ferenc Mádl Institute of Comparative Law; https://doi.org/10.47079/2022.znah.epicaee.1_3

the American Convention on Human Rights (Pact of San José, hereafter, ACHR).[4] The Central European states examined thoroughly in this book are parties to both of these human rights treaties, so their obligations under international human rights laws should be explained.

	ECHR			ICCPR		
	Ratification	**Deroga-tions**	**COVID-19 Derogations**	**Ratification**	**Derogations**	**COVID-19 Derogations**
Austria	September 3, 1958	–	–	September 10, 1978	–	–
Croatia	November 6, 1996	–	–	October 12, 1992 (succession)	–	–
Czech Republic	February 21, 1991	–	–	February 22, 1993 (succession)	–	–
Hungary	November 6, 1990	–	–	January 17, 1974	–	
Poland	November 26, 1991	–	–	March 18, 1977	February 1, 1982	–
Romania	October 7, 1993	March 18, 2020 April 3, 2020 April 15, 2020 April 22, 2020 April 28, 2020 May 4, 2020 May 13, 2020 May 15, 2020 May 15, 2020		December 9, 1974	March 20, 2020 April 21, 2020 May 14, 2020	

reasons therefore. It shall likewise inform the Secretary-General when such measures have ceased to operate and the provisions of the Charter which it has accepted are again being fully executed.

3. The Secretary-General shall in turn inform other Contracting Parties and the Director-General of the International Labour Office of all communications received in accordance with Paragraph 2 of this article.

4 American Convention on Human Rights, opened for signature November 22, 1969, 1144 U.N.T.S. 123, entered into force July 18, 1978. Article 27 of the ACHR provides the following:

1. In time of war, public danger, or other emergency that threatens the independence or security of a State Party, it may take measures derogating from its obligations under the present Convention to the extent and for the period of time strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law and do not involve discrimination on the ground of race, color, sex, language, religion, or social origin.

2. The foregoing provision does not authorize any suspension of the following articles: Article 3 (Right to Juridical Personality), Article 4 (Right to Life), Article 5 (Right to Humane Treatment), Article 6 (Freedom from Slavery), Article 9 (Freedom from Ex Post Facto Laws), Article 12 (Freedom of Conscience and Religion), Article 17 (Rights of the Family), Article 18 (Right to a Name), Article 19 (Rights of the Child), Article 20 (Right to Nationality), and Article 23 (Right to Participate in Government), or of the judicial guarantees essential for the protection of such rights.

3. Any State Party availing itself of the right of suspension shall immediately inform the other States' Parties, through the Secretary-General of the Organization of American States, of the provisions the application of which it has suspended, the reasons that gave rise to the suspension, and the date set for the termination of such suspension.

	ECHR			ICCPR		
	Ratification	Deroga-tions	COVID-19 Derogations	Ratification	Derogations	COVID-19 Derogations
Serbia	April 3, 2003	April 7, 2020		March 12, 2001 (succession)	March 13, 2003	–
Slovakia	February 21, 1991	–	–	May 28, 1993 (succession)	–	–
Ukraine	November 9, 1995	June 9, 2015	–	November 12, 1973	June 5, 2015 November 27, 2015 July 6, 2016 January 23, 2017 November 26, 2019	–

Table 1
Ratifications of and Derogations from the ECHR and the ICCPR by Central European State
Source: Author's compilation

As for the relevance and the topicality of the chapter's subject matter, in times of the most severe health crisis of the last hundred years[5] it is no exaggeration to say that issues related to states of emergency are extremely timely. Since the beginning of the COVID-19 pandemic, many states in Europe and worldwide, have declared states of emergency; human rights need exceptional highlights in the shadow of such global health threats.

2. An Unprecedented Emergency: The COVID-19 Crisis as a Health, Economic, and Human Rights Crisis

2.1. The COVID-19 Crisis as a Health Crisis

This is not the first time the international community has responded to a pandemic. However, the COVID-19 pandemic is certainly the most challenging health crisis in recent decades. On January 30, 2020, Director-General Tedros Adhanom Ghebreyesus of the World Health Organization (WHO) declared the COVID-19 outbreak a public health emergency

5 See the WHO website for more details [Online]. Available at: https://www.who.int/health-topics/coronavirus#tab=tab_1 (Accessed: May 5, 2021).

of international concern, the highest level of alarm applied by the WHO.[6] Since then, as a specialized agency of the United Nations (UN), the WHO has sought to overcome the multifaceted hurdles posed by the pandemic. States have turned to the WHO for guidance on handling this previously unknown disease. The WHO responded to the public health emergency with several initiatives, including (i) starting health crisis engagement and delivering supplies;[7] (ii) sharing clear, accurate, and useful information;[8] (iii) implementing pandemic strategies on public health measures;[9] (iv) offering humanitarian assistance for countries contending with humanitarian crises exacerbated by the pandemic;[10] (v) conducting scientific collaboration and global research;[11] and (vi) developing tools to fight the virus, such as diagnostics, therapeutics, and vaccines.[12]

During its 74th session, the UN General Assembly adopted key resolutions to tackle the health crisis: (i) a comprehensive and coordinated response to the COVID-19 pandemic;[13] (ii) a united response against global health threats (combatting COVID-19);[14] and (iii) international cooperation to ensure global access to medicines, vaccines, and medical equipment to address COVID-19.[15] UN system entities have worked together to effectively support countries respond to the pandemic and its impacts under the clear leadership of the WHO.

6 WHO Director-General's statement on IHR Emergency Committee on Novel Coronavirus (2019-nCoV) [Online]. Available at: https://www.who.int/director-general/speeches/detail/who-director-general-s-statement-on-ihr-emergency-committee-on-novel-coronavirus-(2019-ncov) (Accessed: December 16, 2021).

7 A live digital platform behind the scenes for more effective and transparent country response [Online]. Available at: https://www.who.int/news-room/feature-stories/detail/a-live-digital-platform-behind-the-scenes-for-more-effective-and-transparent-country-response (Accessed: December 16, 2021); COVID-19 Supply Chain System [Online]. Available at: https://www.who.int/emergencies/diseases/novel-coronavirus-2019/covid-19-operations (Accessed: December 16, 2021).

8 A year without precedent: WHO's COVID-19 response [Online]. Available at: https://www.who.int/news-room/spotlight/a-year-without-precedent-who-s-covid-19-response (Accessed: December 16, 2021).

9 2019 Novel Coronavirus (2019-nCoV): Strategic Preparedness and Response Plan [Online]. Available at: https://www.who.int/publications/i/item/strategic-preparedness-and-response-plan-for-the-new-coronavirus (Accessed: December 16, 2021).

10 United Nations Office for the Coordination of Humanitarian Affairs [Online]. Available at: https://www.unocha.org/story/un-issues-103b-coronavirus-appeal-and-warns-price-inaction (Accessed: December 16, 2021).

11 R&D Blueprint and COVID-19 [Online]. Available at: https://www.who.int/teams/blueprint/covid-19 (Accessed: December 16, 2021); A Coordinated Global Research Roadmap [Online]. Available at: https://www.who.int/publications/m/item/a-coordinated-global-research-roadmap (Accessed: December 16, 2021).

12 The Access to COVID-19 Tools (ACT) Accelerator [Online]. Available at: https://www.who.int/initiatives/act-accelerator (Accessed: December 16, 2021).

13 UNGA A/74/L.92 (10 September 2020); see also UN Comprehensive Response to COVID-19. Saving Lives, protecting Societies, Recovering Better [Online]. Available at: https://www.un.org/sites/un2.un.org/files/un-comprehensive-response-covid-19-2021.pdf (Accessed: 16 December 2021).

14 UNGA A/74/L.57 (14 April 2020).

15 UNGA A/74/L.56 (8 April 2020).

2.2. The COVID-19 Crisis as an Economic Crisis

COVID-19 has significantly affected the global economy and brought about an unprecedented economic crisis, causing the biggest stock price collapse since 2008. However, by the end of 2020, even though coronavirus cases were still increasing, a partial economic recovery began thanks to economic aid packages and fast-developed vaccines; stock markets returned to and even surpassed pre-crisis levels.

The UN COVID-19 Response and Recovery Fund (hereafter, the Fund) was a major source of economic aid packages. The Fund is a UN inter-agency mechanism established by the UN Secretary-General to help support low- and middle-income member countries to respond to the pandemic and its impacts, including an unprecedented socioeconomic shock.[16] The Fund was built on three pillars: (i) tackling the health crisis; (ii) focusing on the pandemic's social impact, economic response, and recovery; and (iii) helping countries recover. The Fund's operation is based on shared responsibility, global solidarity, and urgent action for people in need. The financial requirements of the Fund were projected at US$2 billion, with US$1 billion needed in the first nine months of operation. (These requirements will be reviewed because of the pandemic.) The Fund complements WHO's Strategic Preparedness and Response Plan.

The UN Economic and Social Council (ECOSOC) and its subsidiary bodies immediately shifted focus to address the impacts of the COVID-19 pandemic and find policy solutions to its devastating effects.[17] The core of the ECOSOC's pandemic response has been promoting a robust multilateral response guided by global solidarity, with the longer-term view of ensuring the realizations of the Sustainable Development Goals (SDGs). The 2030 Agenda and the SDGs have been the most viable roadmap for recovery and building resilience.[18]

Recognizing that pandemic policies are also economic policies, and there could be no durable end to the economic crisis without an end to the health crisis, the International Monetary Fund (IMF) set proposal targets for defeating COVID-19: (i) vaccinating at least 40% of the population in all countries by the end of 2021 and at least 60% by the first half of 2022; (ii) tracking and insuring against downside risks; and (iii) ensuring widespread testing and tracing, maintaining adequate stocks of therapeutics, and enforcing public health measures

16 The Secretary-General's UN COVID-19 Response and Recovery Fund [Online]. Available at: https://unsdg.un.org/sites/default/files/2020-04/COVID19-Response-Recovery-Fund-Document.pdf (Accessed: December 16, 2021).

17 ECOSOC's response to COVID-19 [Online]. Available at: https://www.un.org/ecosoc/sites/www.un.org.ecosoc/files/files/en/2020doc/ECOSOC-and-COVID-19-compilation-of-actions.pdf (Accessed: December 16, 2021)

18 Sustainable Development Goals [Online]. Available at: https://sdgs.un.org/goals (Accessed: December 16, 2021).

in places with low vaccine coverage.[19] Besides its proposal targets, the IMF's actions have been focused along several tracks. First, it focused on emergency financing. It temporarily doubled the access to its emergency facilities (the Rapid Credit Facility and the Rapid Financing Instrument) to meet the increased demand for financial assistance from member counties during the crisis. Second, it focused on grants for debt relief. Its Catastrophe Containment and Relief Trust extended debt-service relief related to IMF obligations to 29 of its poorest and most vulnerable member countries, covering the debts falling due between April 2020 and mid-October 2021. Third, it focused on bilateral debt relief. The IMF managing director and the president of the World Bank recognized the heavy burden the crisis was having on low-income countries. Therefore, on March 25, 2020, they called on bilateral creditors to suspend debt service payments from the poorest countries. On April 15, 2020, the G20 agreed to suspend repayment of official bilateral credit from the poorest countries until the end of 2020 (since extended until the end of 2021). Fourth, they focused on calls for a new Special Drawing Rights (SDR) allocation of US$650 billion. In April 2021, the International Monetary and Finance Committee called on the IMF to make a comprehensive proposal on a new SDR general allocation of US$650 billion to help meet the long-term global need to supplement reserves and enhance transparency and accountability in SDR reporting and use. Fifth, they focused on enhancing liquidity. The IMF approved a short-term liquidity line to strengthen the global financial safety net. Sixth, they focused on adjusting existing lending arrangements. The IMF augmented existing lending programs to accommodate urgent new needs arising from the pandemic, thereby channeling existing resources toward the cost of medical supplies, equipment, and virus containment. Seventh, they focused on providing policy advice. The IMF monitors economic developments and the impact of the pandemic at the global, regional, and country levels. Thus, it has recommended policies to overcome the crisis, protect the most vulnerable, and set the stage for economic recovery. Finally, it focused on capacity development. In response to the pandemic, the IMF has provided real-time policy advice and capacity development to over 160 countries to address urgent issues, such as cash management, financial supervision, cybersecurity, and economic governance.[20]

The World Bank Group has also taken steps to contain the spread and impact of COVID-19. It mounted the largest crisis response in its history to help developing countries strengthen their pandemic response. Since the start of the COVID-19 crisis, the World Bank Group has committed over US$157 billion to fight the impacts of the pandemic. The funds

19 IMF Staff Discussion Note: A Proposal to End the COVID-19 Pandemic [Online]. Available at: https://www.imf.org/en/Publications/Staff-Discussion-Notes/Issues/2021/05/19/A-Proposal-to-End-the-COVID-19-Pandemic-460263 (Accessed: December 16, 2021).

20 The IMF Response to COVID-19 [Online]. Available at: https://www.imf.org/en/About/FAQ/imf-response-to-covid-19#Q1 (Accessed: December 16, 2021).

committed between April 2020 and June 2021 included over US$50 billion worth of International Development Association resources on grant and highly concessional terms.[21] The World Bank Group has tailored its support to countries' pandemic-related health, economic, and social shocks, helping over 100 developing countries save lives and detect, prevent, and respond to COVID-19. The World Bank Group made US$20 billion available to developing countries to finance the purchase and distribution of COVID-19 vaccines. It also supported the Africa Vaccine Acquisition Task Team initiative to provide desperately needed vaccines to the continent. The World Bank Group's three-stage crisis response—relief, restructuring, and resilient recovery—has focused on four main areas: (i) saving lives; (ii) protecting poor and vulnerable people; (iii) ensuring sustainable business growth and job creation; and (iv) strengthening policies, institutions and investments.[22]

2.3. The COVID-19 Crisis as a Human Rights Crisis

COVID-19 has also caused a human rights crisis as more states have declared states of emergency than ever before. Domestic laws cover the regulation of states of emergency.[23] The matter of which conditions constitute a state of emergency is also a matter of the national legislatures' choice under the national jurisdiction.[24] However, the limitation of fundamental rights has inherently close ties with derogation from human rights treaties;[25] therefore, it has significant international aspects.[26]

It is necessary to explain the distinction between the limitation of and the derogation from human rights. Generally speaking, human rights treaties apply double terminology. On

21 World Bank Group's $157 Billion Pandemic Surge Is Largest Crisis Response in Its History [Online]. Available at: https://www.worldbank.org/en/news/press-release/2021/07/19/world-bank-group-s-157-billion-pandemic-surge-is-largest-crisis-response-in-its-history (Accessed: December 16, 2021).

22 The World Bank Group's Response to the COVID-19 (Coronavirus) Pandemic [Online]. Available at: https://www.worldbank.org/en/who-we-are/news/coronavirus-covid19 (Accessed: December 16, 2021).

23 Jurisprudence uses many terms for crises and emergencies, including "public emergency," "state of emergency," "state of siege" (Argentina, Bolivia, Colombia), "state of alarm" (Spain), "economic state of emergency" (Nicaragua), "state of war" (Finland), "state of national necessity" (Madagascar), and "special legal order" (Hungary). This chapter uses the term of "state of emergency" as a generic category, except when international human rights treaties expressly provide different terminology. On the versatile terminology, see UN Doc. A/45/40, Vol. I, § 219; UN Doc. A/57/40, Vol. I, § 34 (Argentina); UN Doc. A/52/40, Vol. I, § 204 (Bolivia); UN Doc. CCPR/C/SR.222, § 3 (Colombia); UN Doc. CCPR/C/SR.142, § 5 (Spain); UN Doc. CCPR/C/SR.442, § 7 (Nicaragua); UN Doc. CCPR/C/SR.170, § 84 (Finland); UN Doc. CCPR/C/SR.83, § 27 (Madagascar).

24 For instance, while European countries with a civil law system apply the model of a "dichotomy," the United States follows the so-called "monist" approach. Mészáros, 2016, p. 37.

25 "Covenant," "convention," or "charter" are the most commonly used specific terms used for international human rights instruments. This chapter, in accordance with the law of treaties, uses "treaty" as a general term referring to all of them. Kende et al., 2014, pp. 174–176.; Kovács, 2016, pp. 103–105.

26 Svensson-McCarthy, 1998, pp. 22–31.

the one hand, they stipulate "peacetime" limitations as a manifestation of the non-absolute nature of human rights and the sensitive balance between the interests of the individual and the public.[27] Concerning the treaties analyzed in this chapter, many ECHR and ICCPR rights are subject to expressed or implied limitations. The scope of these limitations is specified in the texts of these treaties and determined by their interpretation by state parties the European Court of Human Rights (ECtHR), and the Human Rights Committee (HRC). Consistent with this, limitations can be permanent.[28] The ECHR and the ICCPR allow substantial scope for state parties to respond to a crisis or emergency by limiting specific rights rather than derogating from them.[29] On the other hand, these human rights treaties also provide the possibility of derogating.[30] Thus, no equal sign can be put between limitations and derogations. The right to derogation means that state parties to these human rights treaties have a temporary opportunity to exempt them from their international obligations in times of emergency. The derogation of a right or an aspect of a right is its complete or partial elimination as an international obligation,[31] and the primary consequence of exercising this right is that the derogating state may not be held responsible for violating the relevant provisions of such a human rights treaty. At the same time, derogations from absolute rights are prohibited even in times of emergency (more detail is provided on this later).

Rather than hard-and-fast boundaries between limitations and derogations, there seems to be an overlap with similar principles (e.g., proportionality and nondiscrimination) being applicable. However, derogation from some ECHR and the ICCPR obligations in emergency situations is legally distinct from limitations allowed even in normal times under several provisions of the ECHR and the ICCPR. The logic of the ECHR and the ICCPR is that states should limit rights rather than derogate from them if possible.[32]

The crisis brought about by the COVID-19 pandemic has required most of the states worldwide to take extraordinary measures to protect the health and well-being of their populations. However, emergency powers should be exercised within the parameters provided by international human rights laws—particularly the ECHR and the ICCPR—as far as Europe and the states examined in this book are concerned. These treaties acknowledge that states may need additional powers to address exceptional situations. Such powers should be time-bound and temporary and aim to restore a state of normalcy as soon as possible. The derogation of certain civil and political rights is only allowed under specific situations of emergency that

27 Daes, 1983, p. 183.
28 McGoldrick, 2004, p. 383.
29 Kiss, 1980, p. 290.
30 Gárdos-Orosz, 2018, pp. 29–30.
31 Higgins, 1976, p. 281.
32 McGoldrick, 2004, p. 384.

"threaten the life of the nation." Some safeguards must be put in place, including the respect of some fundamental rights that cannot be suspended under any circumstances.

At the same time, states can adopt exceptional measures to protect public interests that may restrict certain human rights even without formally declaring states of emergency. These restrictions must meet the requirements of legality, necessity, proportionality, and nondiscrimination. Derogation from human rights treaties remains off the table. The latter might be one reason for states' reluctance to rely on derogation clauses. According to recent statistics issued by the Council of Europe (CoE) in 2020, Article 15 (derogation clause) of the ECHR fell under the category of "other articles of the Convention" for violations by article.[33] The COVID-19 pandemic caused a turning point, though.[34] In March 2020, ten state parties to the ECHR notified the Secretary-General of the CoE of their decision to use Article 15 of the Convention: Albania, Armenia, Estonia, Georgia, Latvia, the Republic of Moldova, North Macedonia, Romania, Serbia, and San Marino. To date, only nine other state parties to the Convention (Albania, Armenia, France, Georgia, Greece, Ireland, Turkey, Ukraine, and the United Kingdom) have relied on their right to derogation.[35]

Despite the "derogation wave" generated by the pandemic, applying limitations still seem more appealing for ECHR state parties than triggering Article 15. Recent applications reaching the ECtHR relating to the COVID-19 health crisis are instructive. Although these cases have raised questions under a several provisions of the Convention (the right to life, the prohibition of torture and inhuman or degrading treatment or punishment, the right to liberty and security, the right to a fair trial, the right to respect for private and family life, freedom of thought, conscience and religion, freedom of expression, freedom of assembly and association, the protection of property, and freedom of movement), no case related to concerned the derogation of Convention rights. There were two probable reasons for this: the relatively small number of pandemic-related Article 15 derogations and the relatively short period of time the few derogations were in effect. Nine of the ten derogations were no longer in effect; Georgia retained its notified pandemic-related derogations until January 1, 2022.[36]

For the cases reaching the ECtHR in the context of the COVID-19 pandemic, the abovementioned statement seems to be true: no cases were related to derogations, but many related to the limitation of Convention rights.

33 See more details on the CoE website [Online]. Available at: https://www.echr.coe.int/Documents/Facts_Figures_2020_ENG.pdf (Accessed: May 10, 2021)

34 Halpern, 2020, pp. 1–15; Lebret, 2020, pp. 1–15.

35 See more details on the CoE website [Online]. Available at: https://www.echr.coe.int/Documents/FS_Derogation_ENG.pdf (Accessed: May 10, 2021).

36 Notification JJ9254C Tr./005-280 (June 30, 2021) Communication related to the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 5).

Procedural aspects	
Article 34 Victim status	*Le Mailloux v. France* (no. 18108/20)—*inadmissible* The application amounted to an *actio popularis*.
Article 35(1) and (3) Exhaustion of domestic remedies	*Zambrano v. France* (no. 41994/21)—*inadmissible* Inadmissible for several reasons, including (1) the failure to exhaust the domestic remedies and (2) it amounted to an abuse of the right to individual application
Substantial aspects	
Articles 2–3 Right to life, prohibition of torture	*Feilazoo v. Malta* (no. 6865/19)—*Chamber judgment, March 11, 2021* Additional quarantine after the isolation period in immigration detention amounted to the violation of Article 3 (prohibition of inhuman or degrading treatment). *Ünsal and Timtik v. Turkey* (no. 36331/20)—*inadmissible* Compatibility of the conditions of detention; manifestly ill-founded application *Hafeez v. the United Kingdom* (no. 14198/20)—*pending* Risk of life imprisonment without parole and inadequate conditions of detention due to the COVI-19 pandemic in case of extradition to the United States *Maratsis and Others v. Greece* (no. 30335/20) and *Vasilakis and Others v. Greece* (no. 30379/20)—*applications communicated to the Greek government on February 25, 2021* Detention of HIV-positive prisoners in the context of COVID-19 *Fenech v. Malta* (no. 19090/20)—*complaints communicated to the Greek government on April 16, 2021* Detention on remand on suspicion of murder; suspension of criminal proceedings for three months; several unsuccessful applications for bail *Vlamis and Others v. Greece* (no. 29655/20) and four other applications (nos. 29689/20, 30240/20, 30418/20 and 30574/20)—*application communicated to the Greek government on April 16, 2021* Detention in prison and lack of preventive measures *Rus v. Russia* (no. 2610/21)—*application communicated to the Romanian government on June 11, 2021* COVID-19 infection while in prison *Riela v. Italy* (no. 17378/20)—*application communicated to the Italian government on May 5, 2021* Absence of adequate medical treatment for the applicant's multiple diseases and inadequate protection from the risk of contracting COVID-19 *Faia v. Italy* (no. 17378/20)—*application communicated to the Italian government on May 5, 2021* Incompatibility of the applicant's medical condition and serious disability with detention in a correctional facility; inadequate protection from the risk of contracting COVID-19

Article 5 Right to liberty and security	*Fenech v. Malta*—*see above under right to life and prohibition of torture* *Terheş v. Romania* (no. 49933/20)—*inadmissible* The case concerned the lockdown ordered by the Romanian government in the spring of 2020 to tackle the COVID-19 pandemic, which entailed restrictions on leaving one's home.
Article 6 Right to a fair trial	*Association of orthodox ecclesiastical obedience v. Greece* (no. 52104/20)—*see below under freedom of religion* *Avagyan v. Russia* (no. 36911/20)—*pending* Instagram comment saying no real cases of COVID-19 in the region where the applicant lived; disseminating untrue information; sentenced to a fine *Bah v. the Netherlands* (no. 35751/20)—*inadmissible* This case concerned the impossibility for the applicant, a Guinean national, to be heard in immigration detention appeal in person or by teleconference or videoconference due to initial infrastructure problems in COVID-19 pandemic. *Khokhlov v. Cyprus* (no. 53114/20)—*application communicated to the Cypriot government on February 10, 2021* This application concerned the applicant's ongoing detention since October 2018 for the purpose of his extradition to Russia to stand trial. *Ait Oufella v. France* (no. 51860/20) and three other applications—*application communicated to the French government on September 13, 2021* These four applications concerned pre-trial detentions extended automatically without any decision by a judge in the context of emergency legislation at the start of the COVID-19 pandemic.
Article 8 Right to respect for private and family life	*D.C. v. Italy* (no. 17289/20)—*October 15, 2020 (decision—striking out)* The applicant complained that the Italian authorities had not taken provisional and urgent measures to ensure the maintenance of the family tie with his five-year-old daughter during the confinement. *Thevenon v. France* (no. 46061/21)—*application communicated to the French government on October 7, 2021* The case concerned mandatory vaccination for certain professions.

Article 9 Freedom of religion	*Spînu v. Romania* (no. 29443/20)—*application communicated to the Romanian government on October 1, 2020* Moral and religious assistance to prisoners was interrupted. *Association of orthodox ecclesiastical obedience v. Greece* (no. 52104/20)—*application communicated to the Greek government on February 25, 2021* This case concerned the prohibition on collective worship in the context of COVID-19. *Magdić v. Croatia* (no. 17578/20)—*application communicated to the Croatian government on May 31, 2021* Alleged breach of freedom of religion, assembly, and movement.
Article 10 Freedom of expression	*Avagyan v. Russia* (no. 36911/20)—see above, right to a fair trial
Article 11 Freedom of assembly and association	*Communauté genevoise d'astion syndicale (CGAS) v. Switzerland* (no. 21881/20)—*application communicated to the Swiss Government on September 11, 2020* This case concerned the ban on demonstrations in the context of the COVID-19 pandemic. *Magdić v. Croatia* (no. 17578/20)—*see above under freedom of religion*
Protocol No. 1, Article 1 Protection of property	*Toromag, s.r.o. v. Slovakia and four other applications* (nos. 41217/20, 41253/20, 41263/20, 41271/20, and 49716/20)—*applications communicated to the Slovakian government on December 5, 2020* Closing of fitness centers for four months to prevent of the propagation of the COVID-19; pecuniary damages incurred and loss of future income
Protocol No. 4, Article 2 Freedom of movement	*Magdić v. Croatia* (no. 17578/20)—*see above under freedom of religion*

Table 2
The ECtHR and the COCID 19 Health Crisis: Table of Cases
Source: Author's compilation

Human rights treaties usually have a derogation clause that enables state parties to unilaterally derogate from some of their substantive obligations under the respective treaty. Derogation clauses are of great significance to the general integrity of these treaties and the protection of human rights in times when individuals might be especially vulnerable to authoritarian actions by the state.[37] Not every human rights treaty provides a derogation clause.

37 Harris et al., 2018, pp. 823–824.

Universal	1.	ICCPR (1966)		Derogation clause: Article 4(1)–(3)	**Absolute rights:** Article 6: Right to life Article 7: Prohibition of torture or cruel, inhuman, or degrading treatment or punishment Article 8(1)–(2): Prohibition of slavery, slave trade, and servitude Article 11: imprisonment/contractual obligations Article 15: *Nullum crimen sine lege*, *nulla poena sine lege* Article 16: Recognition of everyone as person before the law Article 18: Freedom of thought, conscience, and religion
	2.	ICESCR (1966)		–	–
Regional	3.	European	ECHR (1950)	Derogation clause: Article 15(1)–(3)	**Absolute rights:** Article 2: Right to life Article 3: Prohibition of torture Article 4: Prohibition of slavery and forced labor Article 7: No punishment without law
	4.		Revised ESC (1996)	Derogation clause: Part V Article F	–
	5.	American	ACHR[38] (1969)	Derogation clause: Article 27	**Absolute rights:** Article 3: Right to judicial personality Article 4: Right to life Article 5: Right to humane treatment Article 6: Freedom from slavery Article 9: freedom from *ex post facto* laws Article 12: Freedom of conscience and religion Article 17: Rights of the family Article 18: Right to a name Article 19: Rights of the child Article 20: Right to nationality Article 23: Right to participate in government Judicial guarantees essential for the protection of such rights

38 On the American approach, see Nugraha, 2017, pp. 200–201.

Regional	6.	Arabic	Revised Arab Charter on Human Rights[39] (2004)	Derogation clause: Article 4(1)	**Absolute rights:** Article 5: Right to life Article 8: Prohibition of torture Article 9: Prohibition of medical or scientific experimentation Article 10: Prohibition of slavery and trafficking in human beings Article 13: Right to a fair trial Article 14(6): Entitlement to a competent court and right to lawful detention Article 15: *Nullum crimen sine lege, nulla poena sine* lege Article 18: Imprisonment for debts Article 19: *Ne bis in idem* Article 20: Right to human dignity of detainees Article 22: Recognition as a person before the law Article 27: No one may be arbitrarily or unlawfully prevented from leaving any country Article 28: Right to seek political asylum Article 29: Right to nationality Article 30: Right to freedom of thought, conscience, and religion
	7.	African	ACHPR (1981)	–	–

Table 3
Derogation Clauses in Human Rights Treaties: First and Second Generation of Human Rights
Source: Author's compilation

3. Article 15 of the ECHR

As with domestic law, drafting the concept of "public emergency" under human rights treaties can be challenging. It might be even more challenging at the international level than at the national level, considering the high number of ratifications needed to enter the treaty into force. The high number of ratifications always necessitates a comprehensive compromise among the states that is not easy to achieve.

The derogation clauses in the draft provisions of a treaty cannot be too extensive, which would greenlight states' abuses, nor too restrictive, which would exclude reasonable scenarios

39 League of Arab States, Revised Arab Charter on Human Rights, May 22, 2004, entered into force March 15, 2008.

such as wars, terrorism, natural disasters, industrial accidents, mass demonstrations, or pandemics as grounds for a state of emergency. The concept of "public emergency" needs to achieve a delicate balance between the rule of law and the lack of foreseeability.[40] Consider this from the International Law Association:

> [State of emergency] is neither desirable nor possible to stipulate in what particular type or types of events will automatically constitute a public emergency within the meaning of the terms; each case has to be judged on its own merits taking into account the overriding concern for the continuance of a democratic society.[41]

Incorporating this doctrine into a treaty subjects it to legal requirements, a goal consistent with the emphasis on legalism in international conventions. The general objective of human rights treaties of providing a minimum level of protection is also at the core of the state of emergency provisions in the ECHR and the ICCPR.[42] Even though the ICCPR was opened for signature 16 years later than the ECHR, Article 4 of the UN Draft Covenant on Human Rights (which later became Article 4 of the Covenant) had served as the basis for Article 15 of the Convention.[43] To analyze the derogation clause of the ECHR, we need to get acquainted with the text of this provision. Article 15 of the Convention provides the following:

> 1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.
> 2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (Paragraph 1) and 7 shall be made under this provision.
> 3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary-General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary-General of the

40 As Alexander Hamilton wrote, "It is impossible to foresee or to define the extent and variety of national exigencies and the correspondent extent and variety of the means which may be necessary to satisfy them. The circumstances that endanger the safety of nations are infinite, and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed" (Hamilton, 1960, p. 153).

41 Gross, 1998, p. 439.

42 Van der Sloot, 2014, p. 322.

43 *Travaux préparatoires* on Article 15 of the ECHR, Appendix I, p. 10 [Online]. Available at: https://www.echr.coe.int/LibraryDocs/Travaux/ECHRTravaux-ART15-DH(56)4-EN1675477.pdf (Accessed: May 5, 2021).

Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.

Under exceptional circumstances, Article 15 affords state parties to the ECHR the possibility of derogating from their obligation to secure certain rights and freedoms under the Convention in a temporary, limited, and supervised manner. The underlying policy is to provide for limited noncompliance to obviate the need for more far-reaching limitations of human rights. In the absence of such a legal safety valve, states might hesitate to join the ECHR or might attach more significant reservations to their accession.[44]

The application of the derogation clause of the Convention must meet the following substantive and procedural criteria: (i) the right to derogate can be invoked only in time of war or other public emergency threatening the life of the nation (Article 15 (1)); (ii) a state party to the Convention may take measures derogating from its obligations under the ECHR only to the extent strictly required by the exigencies of the situation (Article 15 (1)); (iii) any derogations may not be inconsistent with the state's other obligations under international law (Article 15 (1)), as previously mentioned; (iv) certain rights under the ECHR do not allow any derogation (Article 15 (2)): Right to life (Article 2), prohibition of torture and inhuman or degrading treatment or punishment (Article 3), prohibition of slavery or servitude (Article 4), the rule of "no punishment without law" (Article 7), abolishing death penalty in peacetime (Article 1 of Protocol No. 6) and in all circumstances (Article 1 Protocol No. 13), and the right not to be tried or punished twice (the *ne bis in idem* principle) (Protocol No. 7);[45] (v) the state party to the Convention availing itself of this right of derogation must keep the Secretary-General of the CoE fully informed (Article 15 (3)).

While Article 15 (1)–(2) stipulates the substantive requirements, Article 15 (3) enshrines a procedural one. For the very first time, these criteria were explicitly formulated by the ECtHR in *Lawless v. Ireland*:[46]

[T]he Government of any High Contracting Party has the right, in case of war or public emergency threatening the life of the nation, to take measures derogating from its obligations under the Convention other than those named in Article 15, Paragraph 2, provided that

44 Schreuer, 1982, p. 115.

45 The effect of Article 15(2) (and the corresponding nonderogation clauses in Protocol 6, Protocol 7, and Protocol 13) is that the rights to which they refer continue to apply during any time of war or public emergency, irrespective of any derogation made by a contracting state. See Gárdos-Orosz, 2020, p. 8.

46 Suspected of being a member of the Irish Republican Army, the applicant alleged that he had been held from July–December 1957 in a military detention camp in Ireland without being brought before judge during the relevant period. For the facts of the case, see *Lawless v. Ireland* (no. 3.), 1961. See also Lorz, 2003, pp. 88–90.

such measures are strictly limited to what is required by the exigencies of the situation and also that they do not conflict with other obligations under international law.[47]

3.1. Article 15 (1): The Terms of Valid Derogations

As pointed out above, Article 15(1) sets out three substantial requirements for a valid derogation from the Convention: (i) there must be a time of war or other public emergency threatening the life of the nation; (ii) the measures taken in this context must not go beyond the extent strictly required by the exigencies of the situation; and (iii) the measures taken in this context must not be inconsistent with the state's other obligations under international law.

3.2. Article 15(1): "In Time of War or Other Public Emergency Threatening the Life of the Nation"

It is for the ECtHR to interpret the ECHR and each element of Article 15, including what can constitute "war" or "public emergency."[48] Although the Court has thus far never been required to interpret the concept of "war" under the Convention, presumably any substantial violence or unrest short of war would likely to fall within the scope of a "public emergency threatening the life of the nation." Besides, the term "war" in Article 15(1) is not problematic because a close reading of the language of Article 15(1), with special attention to the phrase "other public emergency," supports the proposition that "war" is meant to be one example of a "public emergency" justifying derogations.

In the first case regarding Article 15 of the ECHR, *Greece v. the United Kingdom*,[49] the British government invoked a state of emergency on the territory of Cyprus, then part of its empire, although this was disputed by Greece. The European Commission of Human Rights argued that "the government concerned retains, within certain limits, its discretion in appreciating the threat to the life of the nation," a discretion that it held to be subjected to critical European supervision. The customary meaning of "public emergency" was scrutinized in *Lawless v. Ireland*:

> [A]n exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed.[50]

47 *Lawless v. Ireland* (no. 3.), 1961, § 22.
48 Harris et al., 2018, p. 829.
49 *Greece v. the United Kingdom*, 1958, § 136.
50 *Lawless v. Ireland* (no. 3.), 1961, § 28. In *Lawless v. Ireland*, the majority agreed that there were no grounds for limiting the meaning of the phrase "in time of war" to cover only a total war. Thus, it could also cover less comprehensive war situations providing they threatened the life of the nation. El Zeidy, 2003, p. 283.

What should a crisis or an emergency be like? A crisis or an emergency should be actual and imminent. It was established in *Ireland v. the United Kingdom*[51] and in *Aksoy v. Turkey*[52] that even a crisis or an emergency that concerns only a particular region of a state could amount to a "public emergency threatening the life of the nation."[53] With regard to actual or imminent, under international law, a state of emergency of a preventive nature is not justified. Therefore, it is not acceptable for states to derogate from human rights to face possible exceptional situations that have not yet arisen. The emergency must be present or at least imminent.[54] This was also clarified by the European Commission of Human Rights in the "Greek case":[55]

> [W]ith regard to the actual or imminent character of the emergency, it imposes a limitation in time, that is to say, the legitimacy of a derogation undertaken at a certain date depends upon there being a public emergency, actual or imminent at that date.[55]

Additionally, it was also formulated in the "Greek case" that the crisis or emergency (i) must be actual or imminent; (ii) its effects must involve the whole nation; (iii) the continuance of the organized life of the community must be threatened; and (iv) the crisis or danger

51 To combat what the respondent government described as "the longest and most violent terrorist campaign witnessed in either part of the island of Ireland," the authorities in Northern Ireland had exercised from August 1971 until December 1975 a series of extrajudicial powers of arrest, detention, and internment. The United Kingdom government sent the CoE's Secretary-General six derogation notices concerning those powers during that period. The Irish Government argued that the extrajudicial measures of deprivation of liberty were not fully compatible with Article 15 and breached Article 5 (right to liberty and security) of the ECHR. See the facts of the case: *Greece v. the United Kingdom*, 1958.

52 Since 1985, serious disturbances had raged in southeastern Turkey between the security forces and members of the PKK. At the time the ECtHR examined the case, ten of the eleven provinces of that part of Turkey had been subjected since 1987 to emergency rule. The applicant alleged that his detention in 1992 on suspicion of aiding and abetting PKK terrorists had been illegal. The Turkish Government stated that there had been no violation of Article 5 (right to liberty and security) of the ECHR considering Turkey's derogation notification in 1990 in accordance with Article 15 of the ECHR. They argued that the public emergency in southeastern Turkey had threatened the nation. That assertion was not disputed by the applicant, although he asserted that it was a question for the ECHR organs to address. See the facts of the case: *Aksoy v. Turkey*, 1996.

53 *Ireland v. the United Kingdom*, 1978, § 205; *Aksoy v. Turkey*, 1996, § 70.

54 Oraá, 1992, p. 27.

55 On April 21, 1967, a revolutionary (military) government overthrew the regime in Greece. The following month the new government informed the CoE's Secretary General, under Article 15 of the ECHR, that they had suspended certain rights under the Greek Constitution. In their application, the Danish, Norwegian, Swedish and Dutch governments alleged that the Greek government had violated number of ECHR provisions and that it had not been shown that the conditions laid down in Article 15 for derogation measures had been fulfilled. Greece argued that the European Commission of Human Rights was not competent to examine the situation under Article 15 on the ground that it could not control the actions by which a revolutionary government maintained itself power. See the facts of the case: *Denmark, Norway, Sweden and the Netherlands v. Greece*, Commission Report, 1969.

must be exceptional in that the normal measures permitted by the ECHR for the maintenance of public safety, health, and order were plainly inadequate.[56] In *Khlebik v. Ukraine*, when a derogation had been made, the ECtHR declined to assess whether the situation in question was covered by a valid derogation on the grounds that the parties to the proceedings before it had not so requested.[57]

In connection with the duration of the crisis or of the emergency, the Court has never explicitly incorporated the condition of temporariness. Moreover, it demonstrated that the meaning of "public emergency" within Article 15(1) might last for many years—as was asserted *A. and Others v. the United Kingdom*[58] in terms of the security situation after the September 11, 2001 (hereafter, 9/11), terrorist attacks committed by al Qaeda against the United States.[59]

In deciding whether a "public emergency" existed or not, the ECtHR basically deferred to the assessment of national authorities in *Ireland v. the United Kingdom*:

> [I]t falls in the first place to each Contracting State, with its responsibility for "the life of [its] nation," to determine whether that life is threatened by a "public emergency."[60]

The rationale behind the Court's reasoning was that national authorities were, in principle, better placed than an international judge to assess both the presence of such an emergency and the nature and scope of the derogations necessary to avert it. The latter means state parties to the Convention have considerable discretion when deciding the existence of a "public emergency."[61] However, the domestic margin of appreciation might be accompanied by ECtHR supervision.[62] At the same time, national authorities' assessments are not unlimited. In the "Greek case," based on the evidence before it in the case brought against Greece in response to the "colonels" coup in 1967, the European Commission of Human Rights found that there was no public emergency that justified the derogation made.[63] It is noteworthy

56 *Denmark, Norway, Sweden and the Netherlands v. Greece*, Commission Report, 1969, § 153; Harris et al., 2018, p. 830.

57 *Khlebik v. Ukraine*, 2017, § 82.

58 *A. and Others v. the United Kingdom*, 2009, § 178.

59 The British government contended that the events of 11 September 2001 demonstrated that al Qaeda-inspired international terrorists "had the intention and capacity to mount attacks against civilian targets on an unprecedented scale," and that "their fanaticism, ruthless and determination" made it difficult for the state to prevent such attacks. See the facts of the case: *A. and Others v. the United Kingdom*, 2009.

60 *Ireland v. the United Kingdom*, 1978, § 207.

61 Criddle and Fox-Decent, 2012, pp. 71–73.

62 *Mehmet Hasan Altan v. Turkey*, 2018, § 91; *Brannigan and McBride v. the United Kingdom*, 1993, § 43.

63 *Denmark, Norway, Sweden and the Netherlands v. Greece*, Commission Report, 1969, §§ 159–165, 207.

that there was no dispute on the existence of a "public emergency" in the abovementioned cases concerning Northern Ireland and southeast Turkey, whereas the existence of a "public emergency" was disputed in detail in the "Greek case" on the attempted derogation by the military government in Greece.

As far as valid reasons for a "public emergency" are concerned, terrorism serves as a classic example. In *Ireland v. the United Kingdom*,[64] terrorism in Northern Ireland met the threshold of "public emergency," as the Court asserted:

Particularly far-reaching and acute danger for territorial integrity of the United Kingdom, the institutions of the six counties [Northern Ireland] and the lives of the province's inhabitants.[64]

Other cases where terrorism also proved to be a valid basis for a "public emergency" were *Aksoy v. Turkey*[65] and the Kurdistan Workers' Party's terrorist activity in southeastern Turkey; *A. and Others v. the United Kingdom*[66] and the imminent threat of serious terrorist attacks in the United Kingdom after 9/11; and *Mehmet Hasan Altan v. Turkey*[67] and the attempted military coup in Turkey in 2016.

3.3. Article 15(1): "Measures…to the Extent Strictly Required by the Exigencies of the Situation"

"Strictly required" suggests a test more demanding than "necessary" under other articles of the ECHR, which requires that states show a pressing social need for their measures of limitation.[68] Under the international and especially the European approaches, national states have considerable discretion in interpreting and applying the rights and doctrines incorporated in the treaties. This latitude in judgment was attributed to them even with regard to invoking the state of necessity. This is evident in the special position of Article 15 of the ECHR, which does not speak of measures that are "necessary," a phrase used in other articles of the Convention (among others), regarding the limitation of the rights to privacy and the freedom of speech; instead, it holds that they must be "strictly required."[69]

As noted in *Ireland v. the United Kingdom*,[70] the limits on the Court's review powers are "particularly apparent" where Article 15 of the ECHR is concerned. Nonetheless, states do

64 *Ireland v. the United Kingdom*, 1993, §§ 205, 212.
65 *Aksoy v. Turkey*, 1996, § 70.
66 *A. and Others v. the United Kingdom*, 2009, § 181.
67 Turkey continued to detain the applicant despite a January 11, 2018, order from Turkey's Constitutional Court for his release for alleged support of the 2016 attempted military coup. *Mehmet Hasan Altan v. Turkey*, 2018, §§ 91–91.
68 Harris et al., 2018, p. 838.
69 Van der Sloot, 2014, pp. 322–323.
70 *Ireland v. the United Kingdom*, 1978, § 207.

not enjoy unlimited freedom in this respect. The ECtHR is entitled to rule on whether states have gone beyond the "extent strictly required by the exigencies" of the situation. The Court established that the existence of a "public emergency threatening the life of the nation" must not serve as a pretext for limiting freedom of political debate; measures taken should seek to protect the democratic order from the threats to it; and efforts should be made to safeguard the values of a democratic society.[71]

When assessing whether a state has gone beyond what is "strictly required by the exigencies of the situation," the ECtHR gives appropriate weight to factors such as the nature of the rights affected by the derogation, the circumstances leading to it, and the duration of the emergency situation[72] (e.g., whether ordinary laws would have sufficed to address the dangers posed by the public emergency,[73] whether the measures taken were a genuine response to an emergency situation,[74] whether the measures were used for the purpose for which they were granted,[75] whether judicial control over the measures was practicable,[76] etc.) All these factors are normally considered not retrospectively but on the basis of the "conditions and circumstances reigning when [the measures] were originally taken and subsequently applied."[77] Notwithstanding, in *A. and Others v. the United Kingdom*[78] the ECtHR ruled that regardless of whether there was a public emergency, the Court was not precluded from considering information that came to light subsequently.[79]

In *Baş v. Turkey*,[80] a judgment delivered in 2020, the ECtHR also addressed considerations that the application of Article 15 gradually becomes less forceful and relevant as a "public emergency threatening the life of the nation," while still persisting, declines in intensity. The Court asserted that the exigency criterion must be applied more stringently with the passage of time. In another judgment delivered in December 2020, *Pişkin v. Turkey*,[81] the Court pointed out that even in the framework of a state of emergency, the fundamental principle of the rule of law had to prevail.

71 *Mehmet Hasan Altan v. Turkey*, 2018, § 210.
72 *Brannigan v. McBride v. the United Kingdom*, 1993, § 43; *A. and Others v. the United Kingdom*, 2009, § 173.
73 *Lawless v. Ireland* (no. 3), 1961, § 36; *Ireland v. the United Kingdom*, 1978, § 212.
74 *Brannigan v. McBride v. the United Kingdom*, 1993, § 51.
75 *Lawless v. Ireland* (no. 3), 1961, § 38.
76 *Aksoy v. Turkey*, 1996, § 78.
77 *Ireland v. the United Kingdom*, 1978, § 214.
78 *A. and Others v. the United King*dom, 2009, § 177.
79 In that case, the ECtHR noted the bombings and attempted bombings in London in July 2005, which took place years after the notification and derogation in 2001.
80 This case concerned the attempted military coup in Turkey in 2016. *Baş v. Turkey*, 2020, § 224.
81 *Pişkin v. Turkey*, 2020, § 153.

3.4. Article 15(1): "Other Obligations Under International Law"

The third part of Article 15(1) concerns "other obligations under international law." It reinforces the general principle of Article 53[82] of the Convention and is addressed by the ECtHR of its own motion, if necessary,[83] even if only to observe that it has not found any inconsistency. Not surprisingly, relevant case law of the Court demonstrates Article 4 of the ICCPR was analyzed in light of "other obligation under international law" most of the time.

In *Brannigan and McBride v. the United Kingdom*, the ECtHR rejected the applicant's submission that an official proclamation was a requirement for a valid derogation under Article 4 of the ICCPR,[84] and the absence of that proclamation meant the United Kingdom's derogation was not consistent with its obligations under international law. In that case, the Court found that it was not its role to seek to define authoritatively the meaning of the terms "officially proclaimed" under Article 4 of the ICCPR.[85] In *Marshall v. the United Kingdom*,[86] the applicant referred to the decision of the HRC that the emergency provisions in Northern Ireland were "excessive," arguing that the withdrawal of the derogation made under Article 4 of the ICCPR should be envisaged. However, the ECtHR rejected this argument, stating that it found nothing in the references to suggest that the government of the United Kingdom must be considered in breach of its obligations under ICCPR by maintaining its derogation after 1995.

3.5. The Procedural Criterion of Article 15(3): Notification Requirements

Besides its substantive elements, the derogation clause of the ECHR adds a procedural one. Article 15(3) of the Convention enshrines an obligation for availing states parties to keep the Secretary-General of the CoE fully informed. The primary purpose of that part of Article 15 is to make the derogation public. The ECHR is a system of collective enforcement, and through the Secretary-General, the other state parties to the Convention are also become informed of the derogation. Resolution 56(16) of the Committee of Ministers provides that

82 ECHR Article 53: "Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a party."

83 *Lawless v. Ireland* (no. 3), 1961, § 40.

84 In its relevant part, Article 4(1) of the ICCPR provides the following: "In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed […]."

85 *Brannigan v. McBride v. the United Kingdom*, 1993, §§ 67–73.

86 *Marshall v. the United Kingdom*, 2001, pp. 11–12. The applicant in *Marshall v. the United Kingdom* questioned the continuing validity of the derogation, saying it would normally infringe Article 15(3). The applicant argued that by this stage there was no longer a genuine "public emergency" for the purposes of Article 15(1), given the significant improvement in the security situation in Northern Ireland at the time. The application was rejected at the admissibility stage by the ECtHR. Harris et al., 2018, p. 836.

any information transmitted to the Secretary-General in pursuance of Article 15(3) must be communicated by the Secretary-General to other state parties as soon as possible.[87]

In *Cyprus v. Turkey*,[88] the European Commission of Human Rights ruled that in the absence of an official and public notice of derogation, Article 15 does not apply to the measures taken by the respondent state. To meet the threshold of notification, the state concerned must write a letter on all relevant measures, attach copies of the legal texts under which the emergency measures would be taken, and explain their purpose.[89] The question of whether a notification by a state complies with the formal requirements provided by Article 15(3) will be examined by the ECtHR *motu proprio*, even if it has not been contested by any of the other parties.[90]

In *Brannigan and McBride v. the United Kingdom*, the Court also emphasized that Article 15(3) implied a requirement of permanent review of the need for emergency measures.[91] Interestingly, the latter case regarded the same emergency measures as *Brogan and Others v. the United Kingdom* five years earlier. In that latter case, the government had not invoked a state of emergency. Subsequently, the ECtHR considered the derogation from certain liberties protected by the ECHR as a violation. Instead of revoking these measures, the British government left them intact and tried to legitimize them by relying on the state of emergency. Consequently, there was a huge delay in the notification of the emergency measures to the Secretary-General. Nevertheless, the Court ruled that the notification in 1988 regarding measures that entered into force in 1974 did not exceed the reasonable period of time since they were qualified as emergency measures only later on.[92]

4. Article 4 of the ICCPR

As Angelika Siehr notes, "Article 4 is a key provision of the International Covenant on Civil and Political Rights and its implementation is a touchstone for the crucial question whether human rights are taken seriously in the most critical situations."[93] The *travaux préparatoires* of the ICCPR reveal that by June 1949, the United Nations Commission on Human Rights had

87 *Greece v. the United Kingdom*, 1958, § 158.
88 The case concerned the situation in Northern Cyprus after the 1974 Turkish invasion and the de facto separation of the Mediterranean island. *Cyprus v. Turkey*, 1983, §§ 66–68.
89 *Lawless v. Ireland* (no. 3), 1961, § 47; *Denmark, Norway, Sweden, and the Netherlands v. Greece*, Commission Report, 1969, § 81 (1)–(2).
90 *Aksoy v. Turkey*, 1996, §§ 85–86.
91 *Brannigan and McBride v. the United Kingdom*, 1993, § 54.
92 *Brogan and Others v. the United Kingdom*, 1988, § 48; Van der Sloot, 2014, p. 329.
93 Siehr, 2004, p. 545.

adopted Article 4, practically in its final version. The ECHR, adopted the following year, borrowed the derogation clause from the draft Covenant,[94] resulting in the similar wording of both clauses.[95] The ICCPR also expressly recognized that there could be emergency situations in which derogation from ICCPR rights could be justified. In terms of historical experience and international practice, that is a realistic view.[96]

Before starting the detailed analysis, it is useful to cite Article 4 of the ICCPR in full:

> 1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the State Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.
> 2. No derogation from Articles 6, 7, 8 (Paragraphs 1 and 2), 11, 15, 16, and 18 may be made under this provision.
> 3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other State Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.

Under the ICCPR system of protection for human rights, Article 4 of the Covenant is of great significance for two reasons. One, it allows for a state party unilaterally to temporarily derogate from a part of its obligations under the ICCPR. Two, Article 4 subjects this very measure of derogation and its material consequences to a specific regime of safeguards.[97]

94 It is not only the ECHR that was inspired by the draft covenant of the United Nations Commission on Human Rights. The ACHR also borrowed the definition from the draft covenant for its own derogation clause (Article 27). For more detail on the drafting process of the ACHR, see Raisz, 2009, pp. 19–23.

95 Oraá, 1992, p. 221.

96 See Meron, 1987, pp. 50–55.

97 In 2001, the HRC issued a general comment on whether state parties could narrow human rights in cases of emergency by derogating from their treaty obligations in accordance with Article 4 of the Covenant. United Nations, ICCPR, Human Rights Committee, General Comment No. 29, States of Emergency (Article 4), adopted at the 1950th meeting on July 24, 2001, CCPR/C/21/Rev.1/Add.11. (hereafter: General Comment No. 29), p. 2.

Before a state party moves to invoke Article 4 of the Covenant, two fundamental criteria must be met: (i) the situation must amount to a public emergency that threatens the life of the nation (as under the ECHR); and (ii) the state party must have officially proclaimed a state of emergency. The latter requirement, a different element compared to the ECHR, maintains the principle of legality and of rule of law.[98]

When proclaiming a state of emergency with consequences that could entail derogation from any provision of the ICCPR, states must act within their national constitutional laws that govern such proclamations and the exercise of emergency powers. Then, it is the task of the HRC to monitor the laws in question with respect to whether they enable and secure compliance with Article 4.[99] To allow the HRC to perform its task, state parties to the Covenant have to submit their reports under Article 40,[100] providing sufficient and precise information about their practice in the field of state of emergency.

4.1. Substantive Requirements: Article 4(1) and Article 4(2)

a) Article 4(1): Public Emergency that Threatens the Life of the Nation

The existence of a situation amounting to a "public emergency that threatens the life of the nation" is a fundamental condition that must be met before a state party invokes Article 4 of the Covenant. Because there has thus far been no attempt by the HRC to provide an abstract definition of or criterion for a "public emergency," we have to use examples to outline

98 For an interpretation of the limbs of Article 4 of the ICCPR, see American Association for the International Commission of Jurists, Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights [Online]. Available at: https://www.icj.org/wp-content/uploads/1984/07/Siracusa-principles-ICCPR-legal-submission-1985-eng.pdf (Accessed: December 10, 2021).

99 Lamm, 2018, pp. 117–127.

100 Article 40 of the ICCPR:

1. The State Parties to the present Covenant undertake to submit reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made in the enjoyment of those rights: (a) Within one year of the entry into force of the present Covenant for the States Parties concerned; (b) Thereafter whenever the Committee so requests.

2. All reports shall be submitted to the Secretary-General of the United Nations, who shall transmit them to the Committee for consideration. Reports shall indicate the factors and difficulties, if any, affecting the implementation of the present Covenant.

3. The Secretary-General of the United Nations may, after consultation with the Committee, transmit to the specialized agencies concerned copies of such parts of the reports as may fall within their field of competence.

4. The Committee shall study the reports submitted by the States Parties to the present Covenant. It shall transmit its reports, and such general comments as it may consider appropriate, to the States Parties. The Committee may also transmit to the Economic and Social Council these comments along with the copies of the reports it has received from States Parties to the present Covenant.

5. The State Parties to the present Covenant may submit to the Committee observations on any comments that may be made in accordance with Paragraph 4 of this article.

this concept. What constitutes a "public emergency that threatens the life of the nation" under the Covenant?

As with Article 15 of the ECHR, not every disturbance or catastrophe qualifies as a "public emergency" under Article 4(1) of the ICCPR. For example, during international and domestic armed conflicts, the rules of international humanitarian law apply to prevent the abuse of a state's emergency power besides Article 5(1)[101] of the Covenant. At the same time, wars are clearly included in the "implied" cases of public emergency, even though the notion of war per se was not included in Article 4 because of this argument:

> The Covenant should not envisage, even by implication, the possibility of war, as the United Nations was established with the object of preventing war.[102]

If state parties to the ICCPR consider invoking Article 4 in situations other than an armed conflict, they have to carefully consider the justification, explaining why such a measure is necessary and legitimate in the circumstances. While economic circumstances per se might not justify a derogation, their consequences might. The case of Ecuador demonstrated a derogation on the basis of a state of emergency declared for the country's entire territory. Ecuador adopted measures to address the adverse consequences of the economic crisis affecting the republic, which had created a situation of serious internal unrest. The state of emergency was lifted after one week.[103]

A "public emergency" must threaten the life of the nation as a special criterion under Article 4(1). Reference to "life of the nation" was preferred to terms referring to the "people" because of doubts about whether or not the latter expression denoted all people or just some of them. As previously mentioned, in *Lawless v. Ireland*, the ECtHR considered that the natural and customary meaning of "public emergency threatening the life of the nation" was sufficiently clear. The threat to the "life of the nation" could be to the physical population,[104] its

101 Article 5 (1) of the ICCPR:
Nothing in the present Covenant may be interpreted as implying for any State, group, or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.

102 UN Doc. A/2929, ch.5, §§ 35–47; UN Doc. A/5655, §§ 37–56.

103 UN Doc. A/56/40, Vol. I, § 33. There was a similar derogation in 1999, UN Doc. A/55/40 Vol. I, § 30.

104 In 2001, Guatemala derogated on the basis of 78 extremely dangerous prisoners escaping from a maximum-security prison because numerous Guatemalan citizens had acted as witnesses in their trials or filed complaints against them. Those citizens were said to be subject to threats and intimidation by the escaped prisoners. UN Doc. A/56/40, Vol. I, § 34.

territorial integrity,[105] or the state organs function.[106] However, the specific crisis or emergency could be geographically limited and still affect the whole population. In 2001, Sudan justified the extension of a state of emergency by the "exceptional circumstances prevailing in some regions" of the country considered to represent a serious threat to the stability and security of the country.[107] In 2002, Peru derogated on the basis of a state of emergency in the province of Arequipa.[108]

b) Article 4(1): The Existence of the Emergency Shall Be Officially Proclaimed

The second fundamental criterion that has to be satisfied before Article 4 of the Covenant can be invoked is that a state of emergency must have been officially proclaimed.[109] This condition protects the principles of legality and the rule of law when they are most needed.[110] The specific aims of this element are maintaining transparency, preventing arbitrary derogations, and reducing de facto emergencies.[111]

Article 4 of the ICCPR does not specify which state organ should proclaim a state of emergency. In practice, it is a matter for the executive or the legislature. HRC case law demonstrates that states are asked how a "public emergency" is officially proclaimed, who is entitled to make the proclamation, on what grounds, and by what procedures.[112] Was the official proclamation of a state of emergency a precondition to the constitutionality or legality of the measures taken thereunder?[113] Particular attention has been directed to the circumstances that permit the proclamation of a public emergency—for example, political, social, economic factors, or natural disasters.[114]

Article 4 of the ICCPR has been considered in a number of the HRC's views under the Optional Protocol of the Covenant.[115] Many of those views concerned the situation in Uruguay in the 1970s and 1980s, where multiple violations of rights under the ICCPR were alleged. The communications generally concerned the application of "prompt security measures" under

105 In 1999, Namibia derogated on the basis of a state of emergency in the Caprivi region, which it submitted threatened the life of the nation and the constitutional order. UN Doc. A/55/40, Vol. I, § 29.

106 See Symposium, The Siracusa Principles on the Limitation and Derogation Provisions in the ICCPR, 7 Human Rights Quarterly, 1 (1985).

107 UN Doc. A/57/40, Vol. I, § 32.

108 UN Doc. A/57/40, Vol. I, § 35.

109 Oráa, 1992, pp. 34–57.

110 General Comment No. 29, States of Emergency (Article 4).

111 McGoldrick, 2004, p. 396.

112 UN Doc. CCPR/C/SR.29, § 6 (Tunisia).

113 UN Doc. CCPR/C/SR.170, § 58 (Finland).

114 UN Doc. CCPR/C/SR.84, § 11 (Madagascar); UN Doc. CCPR/C/SR.258, § 48 (Italy); UN Doc. CCPR/C/SR.222, § 3 (Colombia).

115 Optional Protocol to the International Covenant on Civil and Political Rights, opened for signature December 16, 1966. 999 U.N.T.S. 171, entered into force March 23, 1976.

the state of emergency in Uruguay. Uruguay has often made general reference to the state of emergency in its submissions. The established approach of the HRC is exemplified by its view in *Ramirez v. Uruguay*:

> The Human Rights Committee has considered whether any acts and treatment, which are prima facie not in conformity with the Covenant, could for any reason be justified under the Covenant in the circumstances. The Government has referred to provisions of Uruguayan law, including the Prompt Security Measures. However, the Covenant (Article 4) does not allow national measures derogating from its provisions except in strictly defined circumstances, and the Government has not made any submissions of fact or law to justify such derogation. Moreover, some of the facts referred to above raise issues under provisions from which the Covenant does not allow derogation under any circumstances.[116]

This view clearly indicates that the HRC will consider ex officio the possible application of Article 4 even when the state party does not specifically rely upon it.[117]

c) Article 4(1): Limited to the Extent Strictly Required by the Exigencies of the Situation

It is also common in Article 4 of the ICCPR and Article 15 of the ECHR that they set forth a fundamental requirement that such emergency measures are limited to the "extent strictly required by the exigencies of the situation," which criterion is related to the duration, geographical coverage, and material scope of these emergency measures. In practice, this will ensure that no provision of the Covenant, however validly derogated from, will be entirely in applicable to the behavior of a state party.[118] Even though derogation from some ICCPR rights under Article 4 is clearly distinct from the limitations applicable even in normal times, the principle of proportionality also appears at the derogation clause through the obligation to limit any derogations to the "extent strictly required by the exigencies of the situation." The principle of proportionality requires that state parties to the Covenant provide careful justification for their decision to proclaim a state of emergency and for any specific measures based on such a proclamation.

116 UN Doc. A/35/40, 121, § 17.

117 The HRC did not consider the possibility of derogation being a justification in *De Polay v. Peru*, UN Doc. A/53/40, Vol. II, Annex XI, F (trial by faceless judges, instituted to prevent judges from being targeted by terrorist groups, violated Article 14 of the ICCPR (fair trial)). The HRC expressed the same view in its Concluding Observations on Peru in 1996, see UN Doc. A/51/40, Vol. I, §§ 350, 363.

118 McGoldrick, 2004, pp. 407–408.

Concerning the standpoint of the HRC, the possibility of restricting certain Covenant rights is generally sufficient, even during a crisis or emergency, and no derogation from the ICCPR would be justified by the exigencies of the situation in question.[119] Therefore, state parties must provide careful justification not only for their decision to proclaim a state of emergency but also for any specific measures based on such a proclamation. If the limitation of the relevant rights would be sufficient, then derogation from them would not be justified, according to the HRC:

> If States purport to invoke the right to derogate from the Covenant during, for instance, a natural catastrophe, a mass demonstration including instances of violence, or a major industrial accident, they must be able to justify not only that such a situation constitutes a threat to the life of the nation, but also that all their measures derogating from the Covenant are strictly required by the exigencies of the situation. In the opinion of the Committee, the possibility of restricting certain Covenant rights under the terms of, for instance, freedom of movement (Article 12) or freedom of assembly (Article 21) is generally sufficient during such situations and no derogation from the provisions in question would be justified by the exigencies of the situation.[120]

The principles of proportionality and necessity were applied in *Silva v. Uruguay*, where the HRC considered the situation on the assumption that a state of emergency existed in Uruguay. It expressed the view that even on that assumption it could not see

> [W]hat ground could be adduced to support the contention that, in order to restore peace and order, it was necessary to deprive all citizens, who as members of certain political groups had been candidates in the elections of 1966 and 1971, of any political rights for a period as long as 15 years. This measure applies to everyone, without distinction as to whether he sought to promote his political opinions by peaceful means or by resorting to, or advocating the use of, violent means. The Government of Uruguay has failed to show the interdiction of any kind of political dissent is required in order to deal with the alleged emergency situation and pave the way back to political freedom.[121]

119 General Comment No. 29, States of Emergency (Article 4), p. 3.
120 General Comment No. 29, States of Emergency (Article 4), p. 5.
121 UN Doc. A/36/40, 130.

Here, the HRC assessed the actions of the state party in terms of the necessity and proportionality of the measures applied. The onus is on the state party to justify its measures in those terms. On the basis of the foregoing, the HRC expressed the view that the prohibition on the complainants unreasonably restricted their rights under Article 25[122] of the ICCPR; therefore, the state party was under an obligation to take steps to enable the citizens to participate again in the nation's political life.

d) Article 4 (1): Non-Discrimination

One spectacular distinction from Article 15 of the ECHR is that Article 4(1) of the ICCPR provides that one of the conditions necessary to justify any derogation from the Covenant is that the measures taken do not involve discrimination solely on the ground of race, color, sex, language, religion, or social origin. Although Article 26[123] of the ICCPR and other nondiscrimination-related provisions of the Covenant are not listed under Article 4(2), there are elements of nondiscrimination that cannot be derogated from under a public emergency.

Criticism has been directed at national provisions that appear to violate this. For example, Article 23(3)(d) of the Constitution of Barbados was objected to because it allowed distinctions to be made in terms of a public emergency on some prohibited grounds.[124] Only measures that discriminate "solely" on the prohibited grounds are excluded. Intentional or direct discrimination is covered, but not measures that indirectly impact particular groups.[125] The grounds of prohibited discrimination are shorter than those in Article 2 of the ICCPR (the general guarantee of ICCPR rights). The omitted grounds are "political or other opinion," "national origin," "property," "birth," and "other status." The absence of a reference to "other status" (as in Articles 2 and 26 of the ICCPR) means that the enumerated grounds of discrimination are exhaustive.[126]

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122 Article 25 of the ICCPR:
Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:
(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
(c) To have access, on general terms of equality, to public service in his country.

123 Article 26 of the ICCPR:
All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

124 UN Doc. CCPR/C/SR.265, § 6 (Barbados). See also the second periodic report of Barbados, UN Doc. CCPR/C/42/Add. 3, pp. 4–5.

125 Higgins, 1976, p. 287.

126 UN Doc. A/2929, Ch. 5, § 44.

e) Article 4(1): Other Obligations Under International Law

Article 4(1) also sets forth a substantive criterion of derogation, similar to Article 15 of the ECHR, and enshrines that no measures derogating from the provisions of the Covenant may be inconsistent with the state party's other obligations under international law, especially humanitarian law.[127] These obligations under international law encompass not only treaties but also other sources of international law such as customary law or general principles of civilized nations.[128]

In terms of humanitarian law and nonderogable rights, safeguards related to derogation are based on the principle of legality and rule of law inherent in the ICCPR as a whole. Therefore, some elements of the right to a fair trial (only a court may try and convict a person for a crime, presumption of innocence, etc.) are explicitly guaranteed under international humanitarian law during an international or noninternational armed conflict. Therefore, the HRC found no justification for derogation from these guarantees during emergency situations and was of the opinion that the principle of legality and rule of law required that fundamental elements of the right to a fair trial must be respected, even during a state of emergency.[129] The HRC's reasoning in General Comment No. 29 was based on two pillars: (i) the Committee drew a parallel between human rights standards applicable in times of emergency and international humanitarian law applicable during armed conflicts; and (ii) the notion of derogation (within the meaning of Article 4 of the Covenant) was mirrored in other international legal concepts (such as international crimes and jus cogens[130]).[131]

f) Article 4(2): Nonderogable Rights

Article 4(2) of the ICCPR explicitly provides that no derogation may be made from absolute rights under the Covenant under any circumstances. These absolute rights are these: (i) the right to life (Article 6); (ii) the prohibition of torture or cruel, inhuman, or degrading punishment or medical or scientific experimentation without consent (Article 7); (iii) the prohibition of slavery, slave trade, and servitude (Article 8 (1)–(2)); (iv) the prohibition of imprisonment because of inability to fulfill a contractual obligation (Article 11); (v) the principle of legality in the field of criminal law (Article 15); (vi) the recognition of everyone as a person before the law (Article 16); and (vii) the freedom of thought, conscience, and religion (Article

127 Under the term "humanitarian law," the 1949 Geneva Conventions and their three Additional Protocols must be met. For an overview, see the website of the International Committee of the Red Cross [Online]. Available at: https://www.icrc.org/en/doc/war-and-law/treaties-customary-law/geneva-conventions/overview-geneva-conventions.htm (Accessed: 5 May 2021).

128 General Comment No. 29, States of Emergency (Article 4), p. 4.

129 General Comment No. 29, States of Emergency (Article 4), p. 6.

130 On *jus cogens*, see Csapó, 2020, pp. 25–43.

131 Oliver, 2004, p. 406.

18). The same applies to Article 6 of the Second Optional Protocol to the Covenant[132] that enshrines the abolition of death penalty.

These abovementioned rights became nonderogable just by being listed under Article 4(2) of the ICCPR. At the same time, the qualification of a right as absolute or nonderogable under the Covenant does not mean that no limitations could ever be justified. It only demonstrates that the possibility of limitations is independent of derogation. The enumeration of nonderogable rights under Article 4(2) is not identical with but related to certain human rights obligations bearing the status of peremptory norms of international law (*jus cogens*),[133] such as the prohibition of torture or cruel, inhuman, or degrading treatment or the prohibition of slavery, slave trade, and servitude. Nevertheless, some other rights of the Covenant (not peremptory norms) were also included in the list of nonderogable provisions by interpretation of the Committee because it can become under no circumstances necessary to derogate from these rights even during a crisis or emergency.

4.2. Procedural Requirement: Article 4(3): Notification of Derogation

In addition to substantial criteria, there is also a procedural precondition for the derogation from human rights under the ICCPR; when state parties to the Covenant resort to their power of derogation under Article 4, they commit themselves to a regime of international notification. The HRC has consistently referred to the requirements of Article 4(3) of the ICCPR and stressed that they are not a "mere formality."[134]

The notification of the UN Secretary-General is of a paramount importance for two reasons: (i) the discharge of the HRC's functions, particularly in assessing whether the measures taken by the state party were "strictly required by the exigencies of the situation"; and (ii) the permission of other state parties to monitor compliance with the provisions of the Covenant. The requirement of immediate notification applies equally to the termination of derogation. These obligations have not always been respected. State parties have failed to notify other state parties through the UN Secretary-General of a proclamation of a state of emergency and the resulting measures of derogation from one or more provisions of the Covenant. State parties have also been known to neglect to submit a notification of territorial or other changes in the exercise of their emergency powers. Sometimes, the existence of a state

132 Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming the Abolition of the Death Penalty, opened for signature December 15, 1989, 1642 U.N.T.S. 414, entered into force July 11, 1991.

133 According to Articles 53 and 64 of the 1969 Vienna Convention, the concept of *jus cogens* or "peremptory" norms means that states may not derogate by treaty arrangement from these norms. See the Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, 1155 U.N.T.S. 331, entered into force January 27, 1980.

134 UN Doc. CCPR/C/SR.469, § 19 (El Salvador); UN Doc. CCPR/C/SR.355, § 24 (Uruguay).

of emergency and the question of whether a state party has derogated from provisions of the ICCPR have come to the attention of the HRC only incidentally in the course of the consideration of a state party's report. The HRC emphasizes the obligation of immediate international notification whenever a state party takes measures derogating from its obligations under the Covenant. The duty of the HRC to monitor the law and practice of a state party for compliance with Article 4 does not depend on whether that state party has submitted a notification.[135]

Although states send derogation notices to the UN Secretary-General, the notices are then sent to the relevant treaty bodies. The HRC notes that compliance with Article 4(3) permits other state parties to monitor compliance with the provisions of the Covenant. They could do this by an interstate application under Articles 41 and 42 of the ICCPR. However, this has never occurred. In practice, the significance of the derogation notices for the HRC has been in relation to the reporting procedure and Optional Protocol of the ICCPR.

5. Concluding Remarks

This chapter provided a brief analysis of the multifaceted COVID-19 crisis, including its health and economic aspects; the crisis management of the WHO, UN, IMF, and World Bank Group; and the human rights aspects of the pandemic. It primarily focused states of emergency. The complexity of the coronavirus crisis necessitates our careful attention to human rights issues.

A comparison of the derogation clauses of the ECHR and the ICCPR identifies the following consequences as the most significant ones. The uncanny resemblance between Article 15 of the Convention and Article 4 of the Covenant is not coincidental. As *travaux préparatoires* of the ECHR have demonstrated, the draft version of the ICCPR's derogation clause, adopted in 1949, served as an example during the codification of Article 15. Thus, these human rights treaties are closely linked, and these strong ties show up in the interpretation of these provisions.

Case law from the ECtHR (or occasionally the European Commission of Human Rights in older case analyses) and the HRC can help with the authentic interpretation of the Convention and the Covenant. The research elaborated in this chapter established the following prepositions.

Considering the relevant case law, the number of Article 15 (ECHR) and Article 4 (ICCPR) derogations and cases have been small compared to other articles (e.g., Articles 3 or 6 of the

135 General Comment No. 29, States of Emergency (Article 4), p. 7.

Convention). Given the leeway offered them by peacetime limitations, governments would rather limit than derogate—especially in cases of internal disorder, where there is a risk that the government's opponents will use an emergency derogation as evidence of the effectiveness of their campaign against the authorities. However, state parties to the ECHR and ICCPR usually find enough flexibility in the treaty standards to accommodate any exceptional measures for public emergency purposes. Thanks to this leeway, they simply apply peacetime limitations instead of invoking Article 15 (ECHR) and Article 4 (ICCPR) even in time of public emergency.

Derogations from human rights work as a last resort, and only exceptional circumstances might support their application. The ECtHR and the HRC both consider limiting human rights as a "default" tool, even in times of crisis or emergency, so derogations might only be done when limitations are no longer sufficient. Due consideration must be given to the principles of legality, necessity, and proportionality (and nondiscrimination under the ICCPR) when limiting human rights at the time of public emergency. *Legality* means that the limitation must be "provided by law," which must not be arbitrary or unreasonable; it must be clear and accessible to the public. *Necessity* means that the limitation must be imperative to protect one of the permissible grounds stated in the ECHR or the ICCPR and must respond to a pressing social need. *Proportionality* means that the restriction must be proportionate to the interest at stake; it must be appropriate to achieve its protective function; and it must be the least-intrusive option among those that might achieve the desired result. Finally, the principle of nondiscrimination under the Covenant means that no restriction can discriminate or be contrary to international human rights law provisions.

It is a very delicate task for the ECtHR and the HRC to assess whether a respondent state correctly and in good faith identified the conditions for a "public emergency." Therefore, it is not astonishing that the case law of the ECtHR demonstrates that states enjoy a wide margin of appreciation in deciding the existence of a "public emergency" under Article 15, which has led some to question the effectiveness of Strasbourg review in this context. In only one instance (the "Greek case") has the European Commission of Human Rights disagreed with a respondent state about the very existence of a "public emergency." At the same time, the states' wide margin of appreciation can be accompanied by international supervision. Nevertheless, the ECtHR has a very sensitive role in Article 15 cases, since any review by the Court gives necessarily green light to criticisms that it re-evaluates crisis decisions by governments with the comfort of a hindsight.

When may a state party to the ECHR or the ICCPR validly derogate? What are the similarities between these human rights treaties' derogation clauses? As the first element of the definition, the crisis or emergency must be actual and present or at least imminent; no preventive measures are acceptable under these treaties. The crisis or emergency must also affect the

whole population of the respective state and threaten the continuance of organized life. The last criterion is connected with the *ultima ratio* nature of state of emergency: normal measures are not adequate anymore, so exceptional steps must be taken. It is also crucial that a "public emergency" be strictly required by the exigencies of the situation. The language of both Article 15 of the ECHR and Article 4 of the ICCPR imply that "strictly required" means a higher threshold than simple necessity. Even though states' margin of appreciation is wide when it comes to establishing the existence of a "public emergency," it is not unlimited.

What are the key elements of a strictly required public emergency? These are the nature of the rights affected, the circumstances leading to the derogations, the duration of the emergency, the genuine nature of the state's response, the purpose of the measures, and the possibility of judicial control over the measures taken. Of course, these factors do not make up an exhaustive list, as demonstrated by the ECtHR in *Baş v. Turkey* in 2020, where the Court ruled that the exigency criterion should be applied more stringently with the passage of time as intensity of the emergency declines.

It is also common in Article 15 of the ECHR and Article 4 of the ICCPR that both treaties have a procedural element under their derogation clause—specifically, the notification of the CoE and UN secretaries-general. The aim of the notification obligation is to make the derogation public. As collective systems dedicated to the protection of human rights, other state parties need to be aware of the derogations made by other state parties. In *Cyprus v. Turkey*, the European Commission of Human Rights established the essential nature of this requirement and ruled that in the absence of an official and public notice of derogation, Article 15 does not apply to the measures taken by the respondent state.

Although the final text of Article 15 of the ECHR was based on the draft version of Article 4 of the ICCPR, the articles differ on some points. For example, the ICCPR holds that notification must be sent "immediately" after the proclamation of the state of emergency, and the notice of revocation of the emergency measures must take place "on the date on which it terminates." The ECHR lacks such time indications. Additionally, the ICCPR further requires an indication of the rights derogated from by the emergency measures, whereas the ECHR uses the more general phrase that the Secretary-General must be "fully informed." The criterion of nondiscrimination only shows up in the provisions of the Covenant. It is also a remarkable that the lists of nonderogable rights differ. The "list" of the Covenant is longer. The ECHR lists these so-called absolute rights: the right to life; the prohibition of torture or inhuman or degrading treatment or punishment; the prohibition of slavery or servitude; the rule of "no punishment without law"; the abolition of the death penalty; and the right not to be tried or punished twice. The ICCPR lists these so-called absolute rights: the right to life; the prohibition of torture or cruel, inhuman, or degrading punishment or medical or scientific experimentation without consent; the prohibition of slavery, slave trade, and servitude; the

prohibition of imprisonment because of inability to fulfill a contractual obligation; the principle of legality in the field of criminal law; the recognition of everyone as a person before the law; the freedom of thought, conscience, and religion; and the abolition of death penalty. Finally, Article 4(1) of the ICCPR holds that the state of emergency must be officially proclaimed. Article 15 of the ECHR lacks such a requirement.

Based on these findings, the essential nature of human rights treaties in time of state of emergency cannot be disputed. The analyzed treaties, the ECHR and the ICCPR, through the interpretation of the ECtHR and the HRC, outline a clear and comprehensive framework applicable for the sake of protection of human rights when individuals get into especially vulnerable situations and become subjects of state-of-emergency regulations in their country. Case law on the international supervisory bodies demonstrates that, in accordance with national constitutional law, states enjoy broad discretion over the field of "martial law." At the same time, case law also warns these states to comply with international human rights standards at the same place as domestic law when declaring a state of emergency.

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Dealing with the COVID-19 Pandemic on the EU level: Introducing the "Web of Competencies" Theory

MARINKÁS GYÖRGY

1. A glance at the SLO rules of the EU law

1.1. A new challenge

By the spring of 2020, it became clear that dealing with the novel coronavirus (COVID-19) pandemic – the focus of attention of the public and politicians at the national and EU levels since January – was not restricted to the field of 'protection and improvement of human health'[1] where the EU has no competence at all to make legally binding decisions or to enforce them accordingly. The pandemic threatened the population's health, but it also posed a serious threat to the balance of national budgets and the economy.[2] Thus, it also threatened the functioning of the Single Market. Therefore, the EU institutions, spearheaded by the European Commission, proposed several action plans and issued recommendations on how to maintain the proper

1 As specified by Article 6 of the Treaty on the Functioning of the European Union (TFEU), (OJ C 326, 26.10.2012, p. 47–390).

2 This involved reallocating significant amounts within the individual state budgets to cover the direct costs of fighting against the pandemic (e.g., buying medical and protective equipment) and the indirect cost in the form of state subsidies to avoid the total eclipse of the economy and rapidly rising unemployment. All these costs had to be covered during a period when states were also facing reduced tax revenues. For details, see the IMF's analysis, Pragyan Deb et al., 2020.

Marinkás György: Researcher, Ferenc Mádl Institute of Comparative Law, Hungary
Assistant Professor, Faculty of Law, University of Miskolc, Hungary

Marinkás, Gy. (2022) 'Dealing with the COVID-19 Pandemic on the EU level: Introducing the "Web of Competencies" Theory' in Nagy, Z., Horváth, A. (eds.) *Emergency Powers in Central and Eastern Europe*, pp. 71-95. Budapest: Ferenc Mádl Institute of Comparative Law; https://doi.org/10.47079/2022.znah.epicaee.1_4

functioning of the Single Market and secure the prevalence of the basic freedoms, including people's free movement—to the extent that the Founding Treaties allowed them to do so.

This chapter focuses on the provisions of those Founding Treaties, aimed initially at maintaining the functioning of the single market, suited to tackling the problems caused by the COVID-19 pandemic. The Commission, focusing on the rule of law, scrutinized the measures brought by the member states to handle the pandemic, including the special legal order (SLO), provided it was promulgated. In this regard, the COVID-19 pandemic incited a long-lasting debate that will not be elaborated on in this chapter. The pandemic also accelerated some already slow but ongoing processes, such as the adoption of digital technologies in decision-making. The EU institutions had to adapt to the new situation in zero time. This chapter discusses the effectiveness of this adoption.

1.2. The lack of competences of the EU to regulate the SLO

Based on the Founding Treaties of the European Union,[3] the adoption of constitutional and statutory rules on SLO falls within the exclusive competence of Member States. The EU and its institutions lack any competence to bring legally binding decisions in this field.[4] However, the picture is complex. First, we can see tendencies in the regulation[5] even though EU law is silent on the matter. It contains no provisions on whether regulation could be contained by constitutional provisions or whether a "single" statute is enough.[6] Second, while enforcing the legal acts of the European Union enacted within the framework on the war on terror, which might require the curtailment of basic rights, the member states have to obey the basic rights guaranteed by the EU law and the case law of the Court of Justice of the European Union (CJEU).

1.3. CJEU case law on curtailing basic rights in exceptional situations

The predecessor of the European Union, the European Economic Community, was established to achieve economic goals. The establishing treaty[7] contained no references to human

3 The consolidated version of the Treaty on European Union (OJ C 326, 26.10.2012, p. 13–390) and the TFEU.

4 The so-called "one million signatures for a Europe of solidarity," among other efforts, led to an EU-level state of emergency rule, although the proposal restricted this "state of emergency" to cases of state bankruptcy in the Euro zone. See CJEU Press Release No. 93/17 on the judgement delivered in the C-589/15. *P. Alexios Anagnostakis vs. Commission* case (Luxembourg, 12 September 2017)

5 The fact that most legal system authorize the parliament to promulgate an SLO is one such tendency. See Till, 2019; Ságvári, 2016; Kelemen, 2019, pp. 9–34.

6 As an ample example in the case of the UK the requirement of constitutional regulations would be simply beyond interpretation regarding the fact that the country lacks any written constitution.

7 The Treaty establishing the European Economic Community (Rome, 25 March 1957)

or basic rights.[8] The protection of basic rights was elaborated on in the case law of the Court of Justice of the European Communities (CJEC), now the CJEU.[9] The Maastricht Treaty[10] was the first founding treaty to contain any reference to basic rights, which were later elaborated on by the Treaty of Amsterdam.[11] Based on the provisions of the Founding Treaties, the fundamental rights guaranteed by the European Convention on Human Rights (hereafter, ECHR)[12] constitute general principles of EU law based on constitutional traditions common to the member states.[13]

A written catalogue of basic rights was still missing, however. Later, these basic rights were embodied under the Charter of Fundamental Rights of the European Union (hereafter, Charter).[14] The Charter was not universally welcomed, however. First of all, those who were against empowering the Charter with legal binding force were not few in number,[15] secondly until 2006 the CJEU itself abstained from making any reference to the Charter.[16] Ultimately, it was the Treaty of Lisbon[17] that finally empowered the Charter with legally binding force, declaring that "[the Charter] shall have the same legal value as the Treaties." The rights guaranteed by the Charter overlap significantly with the rights guaranteed by the ECHR. Considering the special characteristics of the EU law (e.g., the rights related to EU Citizenship), in some aspects, the Charter provides enhanced protection compared to the ECHR. [18]

Paragraph (1), Article 51, of the Charter states the following:

> The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law.

This is further elaborated on in Paragraph (2) of Article 51:

8 Some of its provisions seemed to be "induced by a care for human rights" (e.g., the rules against gender discrimination in employment). However, these provisions were intended to serve economic interests rather than human rights.
9 For details, see Kiss, 2010
10 Maastricht Treaty (OJ C 191, 29.7.1992, pp. 1–112).
11 Amsterdam Treaty (OJ C 340, 10.11.1997, pp. 1–144).
12 European Convention on Human Rights (Rome, November 4, 1950) ETS No. 005.
13 See TFEU Declaration A/1.
14 Charter of Fundamental Rights of the European Union (OJ C 326, 26.10.2012, pp. 391–407)
15 Defeis, 2012, p. 1211.
16 This was first cited in Paragraphs 4 and 31 of the judgement of 27 June 2006 brought in the C-540/03 *European Parliament v. European Commission* case.
17 The Lisbon Treaty (OJ C 306, 17.12.2007, pp. 1–271.)
18 Marinkás, 2013, p. 103.

> The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties.

The Founding Treaties do not contain any provisions on the SLO. Thus, the rights guaranteed by the Charter may only be invoked during a period of SLO, if the member state promulgated the SLO to assure the enforcement of EU law (e.g., to fight terrorism).

In relation to the COVID-19 pandemic, curtailing two basics rights—namely the right to peaceful assembly and the right to freedom of expression, as guaranteed by the Charter—incited heated social, political, and legal debates. In case of the preceding, the proportionality of the force used by certain member states' police authorities against the otherwise peaceful assemblies was at stake.

Article 12 of the Charter guarantees the right to peaceful assembly. When COVID-19 started to spread in Europe, all 27 member states curtailed citizens' right to peaceful assembly to some extent, although the measures varied in scope and strictness. These restrictions were fully reasonable and justified to protect and promote public health. However, this is only one aspect that must be considered in situations involving curtailing basic rights.[19] The rules of social distancing cannot outweigh the right to peaceful assembly or exclude any other consideration since it clearly related to the principle of proportionality. Only three member states introduced a differentiated regulation: Denmark, the Czech Republic, and the Netherlands. The Netherlands repealed its differentiated regulation on April 28, 2020, and promulgated a general and undifferentiated regulation in its place, following the lead of the other member states.

The restrictions were scrutinized at the national level by some member states' constitutional or other higher courts. The Federal Constitutional Court of Germany *(Bundesverfassungsgericht)*, in accordance with its permanent case law,[20] delivered a decision on 15 April 2020[21] stating that considerations based on public health could not outweigh the right to assembly. France's quasi-constitutional court, the French Council of State,[22] rendered a similar decision. It held that the statutory ban on any assembly held by more than ten people was unconstitutional.[23] The Slovenian Constitutional Court[24] delivered a decision in August 2020

19 Civil Liberties Union for Europe and Greenpeace European Unit: Locking Down Critical Voices: How Governments' Responses to the COVID-19 Pandemic Are Unduly Restricting Civic Space and Freedoms Across the EU (September 2020), pp. 11–14.

20 Kommers, 2007.

21 *BVerfG, Beschluss der 1. Kammer des Ersten Senats vom* April 15, 2020. 1 BvR 828/20.

22 *Conseil d'État*.

23 *Conseil d'État, statuant au contentieux,* Nos. 440846, 440856, 441015 (13/06/2020).

24 *Ustavno sodišče Republike Slovenije (USRS).*

that reasons that serve as a basis for special measures had to be reviewed weekly for necessity and proportionality.[25] While there were no court proceedings in Belgium, the belated lifting of the restrictions on the right to assembly in July 2020 was clearly an issue. Shops had been allowed to reopen in May and bars and restaurants in June, as soon as the number of confirmed cases started to drop. [26]

Legislation was not the only target of dispute. Enforcement also came under fire, primarily because of the uncertain legal framework or the authorities' inconsistent application of the laws. One example of the statutory framework's ambiguity was the Cypriot legislation banning any assembly where the participants gathered in "great number" but provided no guidance on what that expression means. Similarly problematic examples of imprecise legislation were the Irish and the Dutch regulations, which seemed to give discretionary power to the police, allowing them to ban any assembly they thought might violate the pandemic rules. Statements by the French police exemplify problems with the inconsistent application of the laws. They initially stated that units would not disperse the assemblies organized by the Black Lives Matter movement, even though the assemblies technically violated the then-valid rules on assembly. However, the police forces usually broke up such crowds by force, which in numerous cases ended with clashes between the police forces and protestors. The Swedish police[27] were also accused of disproportionate use of force.[28]

Article 11 of the Charter guarantees the freedom of expression and information. The right includes the duty to respect the diversity of mass media and the freedom that makes this diversity possible. Restricting the right to freedom of expression must be based on a cogent reason, such as preventing the spread of misinformation. As Josep Borrel, the High Representative of the European Union, wrote, "[misinformation] in times of the coronavirus can kill."[29] In the first months of the pandemic, the spread of misinformation and pseudoscientific allegations was so rampant that the World Health Organization (WHO) called this phenomenon an "infodemic."[30] Leaving aside the obvious role of social media and many people's predilection for rumormongering, the rapid spread of misinformation was promoted by two

25 *Ustavno sodišče Republike Slovenije*, U-I-83/20 (27. 8. 2020).
26 Civil Liberties Union for Europe and Greenpeace European Unit, 2020, p. 7.
27 *Civil Liberties Union for Europe and Greenpeace European Unit*, 2020, pp. 14–15.
28 For a detailed introduction of the theory on using police force, see Lee, 2020, p. 247.
29 European Commission, "Coronavirus: EU Strengthens Action to Tackle Disinformation" (Press Release, June 10, 2020, Brussels). [Online]. Available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1006 [Accessed: April 2, 2021].
30 WHO, "Working Together to Tackle the 'Infodemic'" (June 29, 2020) [Online]. Available at: https://www.euro.who.int/en/health-topics/Health-systems/digital-health/news/news/2020/6/working-together-to-tackle-the-infodemic [Accessed: 2 April 2021].

factors.[31] One, the SARS-CoV-2 virus causing the pandemic was a novel coronavirus, so not much was known about it. This understandably incited panic among much of the lay population. Two, even scientists familiar with similar health threats could not predict with much accuracy how rapidly the virus might spread or mutate and the probable outcomes. The lack of specific understanding of the COVID-19 coronavirus made it hard to distinguish information from misinformation in the early months of the pandemic. Governments had to accept that misinformation could undermine citizens' trust in their governments and make them less cooperative, drastically reducing the efficiency of the governmental measures. Thus, it was vital to fight misinformation.

However, the restrictions imposed by some member states proved unnecessary or disproportionate. The European Commission noticed the "infodemic" phenomenon and issued a joint communication based on the 2018 *Action Plan against Disinformation*[32] entitled *Tackling COVID-19 Disinformation: Getting the Facts Right*.[33] This joint communication informed the member states about tackling misinformation effectively while adhering to the principles of necessity and proportionality. The problem was reconciling people's right to health and the general enforcement of public health requirements with the right to the freedom of expression. As the European Commission remarked, the task was impeded by the rampant spread of fake news, pseudoscientific allegations, conspiracy theories, and misleading information on health, which are not necessarily unlawful.[34] The "infodemic" phenomenon is mostly rooted in ignorance and confusion caused by the sheer volume of information available, although it can gain momentum from parties pushing political agendas. The European Commission recommended organizing effective information campaigns to tackle the spread of misinformation.

Conspiracy theories and hate speech are another problem.[35] Both can jeopardize human health, shatter the coherence of societies, and lead to violence and social turmoil. Similarly, selling fraudulent "miracle cures" and committing cybercrimes using the COVID-19 themes as bait are also harmful and need state intervention. Finally, misinformation campaigns, which are frequently directed or sanctioned by governments of countries outside the EU, can

31 A comprehensive examination of social media's role unprecedented ability to instantly spread information—and misinformation—worldwide and fuel the "infodemic" is beyond the scope of this chapter.

32 European Commission, "Action Plan against Disinformation." (December 5, Brussels), JOIN (2018) 36 final.

33 European Commission, "Tackling COVID-19 Disinformation: Getting the Facts Right." (June 10, 2020, Brussels). JOIN (2020) 8 final.

34 This author's opinion is that if all incidents of spreading misinformation were illegal, most Facebook users could be indicted.

35 From its beginning, the pandemic incited as rise in hostility and violence toward persons perceived to be Chinese. See: FRA, 2020, pp. 33–35

also cause serious harm. Such campaigns aim to further disrupt and polarize the societies of EU member states and aggrandize the government driving the misinformation campaign.[36]

To summarize, the European Commission emphasized the need to distinguish between legal, but harmful and unlawful content. It is also necessary to determine intent—that is, whether the content was meant to deceive and cause damage to the public or gain economic benefit. If someone was acting in good faith, did not know the information to be false or potentially harmful, had no malicious intentions, but shared misinformation with family, friends, or online contacts, that disinformation sharing probably falls outside the scope of criminal behaviour. In contrast, when someone knowingly shares false or potentially harmful misinformation that might constitute a criminal act.

In some member states, such acts were already labelled criminal acts before the COVID-19 pandemic. Other member states (e.g., Hungary[37]) introduced new rules to criminalize the spread of misinformation. The European Commission cautioned against enacting laws that defined these as crimes using overly broad terms and applying disproportionate penalties, warning that they might constrain sources' willingness to speak to journalists, lead to self-censorship, and raise concerns about freedom of expression.[38] Although the European Commission referred to the novel provisions of the Hungarian criminal code, it also raised concerns in its Working Document attached to the *2020 Rule of Law Report*.[39] A 2020 Civil Liberties Union for Europe and Greenpeace European Unit report revealed that other member states had also failed to strike a fair balance between the protection of the society as a whole and basic rights of expression. The document spotlighted the Romanian government's measures, which gave the government censorship rights, as the most egregiously disproportionate. Based on the report, several governments (including in Western Europe and Eastern Europe) restricted the journalists' rights by applying "preliminary filters." They also identified positive examples: the French and Polish governments developed efficient cooperation with companies providing search engines to tackle misinformation.[40]

36 See the position of the EU institutions regarding the offers made by China and Russia.

37 Paragraph (2) of Section 337 of the Hungarian Criminal Code (Act C of 2012) was inaugurated by Act XII of 2020.

38 COM JOIN (2020) 8 final, 3–4, pp. 12–14.

39 Commission Staff Working Document (September 30, 2020, Brussels). SWD (2020) 316 final. Country Chapter on the Rule of Law Situation in Hungary, Accompanying the Document 2020 Rule of Law Report: The Rule of Law Situation in the European Union, p. 17.

40 Civil Liberties Union for Europe and Greenpeace European Unit, 2020, pp. 19–22.

1.4. SLOs in the context of the rule of law: Statements from the European Commission

As mentioned earlier, the European Commission scrutinized the measures introduced by the member states with respect to the rule of law.

From the early spring of 2020, all the EU member states introduced some kind of statutory measures to handle the threat caused by the COVID-19 pandemic, from moderate SLOs to states of emergency to large-scale lockdowns.[41] Two member states (Romania and Lithuania) even suspended the application of certain articles of the ECHR based on the provisions of Article 15, claiming that the state of emergency rendered it necessary. The necessity of introducing an SLO became the subject of political debates in several member states.[42] For example, pandemic rules embroiled Hungary in the long-standing debate about the rule of law situation, which the author intentionally strives to avoid. In March, the European Commission stated its desire to scrutinize the Hungarian SLO rules. One month later Věra Jourová, vice-president of the European Commission for Values and Transparency, declared that the Hungarian SLO rules introduced in spring 2020 did not infringe on EU law.[43] In the country-related working documents[44] attached to the 2020 Rule of Law reports, the European Commission raised concerns regarding the SLO rules of several member states, not just Hungary. In Romania, the constitutional court[45] took the view[46] that the high fees imposed on those who broke the quarantine rules were unconstitutional "given that, as they restricted or affected fundamental rights and freedoms of the citizens or fundamental institutions of the State, they had to be adopted through a law as a formal act of Parliament and not through government emergency ordinances

41 As an example, the Cypriot government was empowered to adopt measures to tackle the COVID-19 pandemic. The government dispensed with promulgating a state of emergency but applied the law on contagious diseases. See the Commission Staff Working Document (September 30, 2020, Brussels). SWD (2020) 312 final. Country Chapter on the Rule of Law Situation in Cyprus, Accompanying the Document 2020 Rule of Law Report: The Rule of Law Situation in the European Union.; See furthermore: Ungvári and Hojnyák, 2020

42 Council of Europe, Notifications under Article 15 of the Convention in the Context of the COVID-19 Pandemic. [Online]. Available at: https://www.coe.int/en/web/conventions/full-list/-/conventions/webContent/62111354 [Accessed: 2 April 2021].

43 Wanat and Eder, 2020; Kirst, 2020.

44 Commission Staff Working Document (30 September 2020, Brussels). SWD (2020) 317. Country Chapter on the Rule of Law Situation in Malta, Accompanying the Document 2020 Rule of Law Report: The Rule of Law Situation in the European Union; Commission Staff Working Document (30 September 2020, Brussels). SWD (2020) 300 final. Country Chapter on the Rule of Law Situation in Belgium, Accompanying the Document 2020 Rule of Law Report: The rule of law situation in the European Union.

45 *Curtea Constituțională a României*.

46 *Curtea Constituțională a României*, Decision 152/2020 (6 May 2020). See also Commission Staff Working Document (September 30, 2020, Brussels). SWD (2020) 322 final. Country Chapter on the Rule of Law Situation in Romania, Accompanying the Document 2020 Rule of Law Report: The Rule of Law Situation in the European Union.

(GEOs)." The court system of the Czech Republic was actively weighing the constitutionality of GEOs and other legal instruments against the rule of law: it repealed several instruments.[47] The Czech government decree that ordered the state of emergency stood up to the scrutiny, however. There were also positive examples. The European Commission found that Ireland's legislation aimed at tackling the COVID-19 pandemic remained within the framework of general rules.[48]

Most member states revised their assessment of the need for SLOs in June 2020, and most repealed theirs in the same month. However, several member states maintained an elevated level of awareness. For example, while Hungary repealed its state of emergency, it introduced a state of epidemiological preparedness[49] on the 18 June 2020.[50] These moderate forms of SLOs were mostly criticized because they (i) did not serve legal certainty and (ii) concealed the ability of governments to govern by decrees. The French, Dutch, and Hungarian rules were criticized on these grounds. The rules introduced by Luxembourg were tried before the highest judicial level because of the provisions related to the mandatory hospitalization of people displaying COVID-19 symptoms.[51]

The release was reversed during the autumn of 2020: more member states introduced restrictions. The Hungarian government did so on 4 November 2020. [52] The new restrictions did not trigger as much criticism as in the springtime.

The first application seeking a preliminary ruling in connection with an SLO situation was filed with the CJEU on 28 May 2020.[53] In essence, the domestic court asked whether the Italian legislative decree that promulgated the SLO and the subsequent one that extended its validity constituted an infringement of national courts' independence and the principle of fair trial, considering that the legislative decrees resulted in the shutdown of the judicial system and prevented the national court from rendering decisions. Furthermore, they questioned whether the legislative decrees constituted an infringement of the right to human dignity, the right to liberty and security, the right to equality before the law, the right to non-discrimination, the right to fair and just working conditions, and the right to freedom of

47 Commission Staff Working Document (30 September 2020, Brussels). SWD (2020) 302 final. Country Chapter on the Rule of Law Situation in the Czech Republic, Accompanying the Document 2020 Rule of Law Report: The Rule of Law Situation in the European Union.

48 Commission Staff Working Document (Brussel, 30.09.2020. SWD (2020) 306 final. Country Chapter on the Rule of Law Situation in Ireland, Accompanying the Document 2020 Rule of Law Report: The Rule of Law Situation in the European Union.

49 *Járványügyi készültség*.

50 Government Decree 283/2020 introducing a state of epidemiological preparedness (in force since 18 June 2020)

51 FRA, 2020, 16

52 Government Decree 478/2020 on the declaration of the state of emergency

53 C-220/20, *XX v. OO* case (date of submission: 28 May 2020)

movement and residence as guaranteed by the Charter. In its decision of 10 December 2020,[54] the CJEU dismissed the application. The author expected as much in light of CJEU case law.[55] The CJEU's reasoning emphasized that the statement of facts of the proceeding before the national court—namely, a procedure stemming from a traffic incident—did not have any cross-border elements and no EU law was applied in the proceeding. Regarding the second decree, the CJEU was not convinced by the national court's reasoning that the Italian regulations on traffic were enforcing EU directives. The European Commission as a Coordinator of Restrictions Imposed by Member States on the Basic Freedoms of the Single Market

2. The competences of the EU in the pandemic situation

The initial measures made by the EU to tackle the COVID-19 pandemic attracted several criticisms. Some labelled them as "disillusioning." Others accused the EU of leaving its member states in the lurch[56] and praised China and Russia for their expressions of hope and support.[57] In Italy, "Euroskepticism" started to rise, which was not surprising, given the situation that evolved in the first months of 2020.[58] The Euroskepticism also started to grow in France and Germany, to a smaller extent.[59]

Setting aside the intense emotions, we can see that the provisions of the Founding Treaties tied the hands of EU institutions. Interpreting—and in some cases re-contextualizing—them took time. Based on the concerning provisions of the Founding Treaties (e.g., Article 5 of the TEU on the principle of conferral and Article 6 of TFEU guaranteeing the competence to the EU to carry out actions to support, coordinate, or supplement the member states' actions to protect and improve human health), the EU's possibilities for fighting a pandemic were limited. The EU was not empowered by the Founding Treaties to bring any binding decisions. The existing competencies of the EU were based on Article 168 of the TFEU (public health) and Decision 1082/2013/EU[60] in accordance with Paragraph (1) of Article 168

54 C-220/20, *XX v. OO* case, the Order of the CJ of 10 December 2020

55 Somssich, 2018

56 Wojtyczka, 2020

57 Given what we know, the million-dollar question is whether this "support" was really an act of selflessness. See "Tackling COVID-19 Disinformation: Getting the Facts Right" and the document of the European Parliamentary Research Service "COVID-19 Foreign Influence Campaigns: Europe and the Global Battle of Narratives" by Naja Bentzen.

58 Scazzieri, 2020

59 Tidey, 2020

60 Decision No 1082/2013/EU of the European Parliament and of the Council of 22 October 2013 on serious cross-border threats to health and repealing Decision No 2119/98/EC Text with EEA relevance (OJ L 293, 5.11.2013, p. 1–15).

of the TFEU: "Union action…shall complement national policies." Paragraph (7) of the Article clearly states that "Union action shall respect the responsibilities of the member states for the definition of their health policy and for the organization and delivery of health services and medical care." The latter is echoed by the phrase "medical treatment under the conditions established by national laws and practices" in Article 35 of the Charter. The abovementioned Decision 1082/2013/EU promoted the exchange of experiences and best practices among the member states and elaborated on the compatibility of national strategies for preventing threats to human health.[61]

Thus, it is clear that as a basic rule pandemic prevention is the competence of the member states, and the EU lacks both the competence and the resources to organize health services and medical treatment. However, the EU soon left behind its initial attitude of hesitation and realized that it owned a "web of competence" (Purnhagen et al.[62]) and began acting with more determination. It then became clear that the EU had broad competences to fight the COVID-19 pandemic.[63] However, these competences are found outside the provision on promoting human health.[64] Accordingly, actions of the EU to 'support, coordinate or supplement' aimed at 'protection and improvement of human health' shall be approached from the functioning of the Single Market. Based on Paragraph (1) of the TFEU, the EU has the competence to "adopt the measures for the approximation of the provisions laid down by law, regulation, or administrative action in member states which have as their object the establishment and functioning of the internal market." These measures might directly or indirectly "serve the protection and improvement of human health."[65] Based on Paragraph (3) of the Article, the measures mentioned in Paragraph (1) expressly protect or improve human health. This means that once new scientific facts came to light, the EU was obliged to correct its measures on the approximation.[66] For example, should the EU learn of evidence that the coronavirus could spread on food packaging, it would be obliged to revise its rules on food packaging. Furthermore, the EU is entitled to adopt incentive measures. For example, it can set achievement goals for tackling the coronavirus as a threshold to call certain financial resources from the EU budget. Purnhagen et al., citing *Procureur du Roi v. Dassonville*[67] and *Mary Carpenter v.*

61 European Commission Crisis Preparedness and Response. [Online]. Available at: https://ec.europa.eu/health/preparedness_response/overview_hu [Accessed: 2 April 2021]

62 Purnhagen, 2020

63 Purnhagen, 2020, p. 303.

64 Purnhagen, 2020, p. 303.

65 See C-376/98 *Federal Republic of Germany v. European Parliament and the Council of the European Union* (the "tobacco advertisement case"), Judgement 5 October 2000.

66 See the C-491/01 British American Tobacco case.

67 C-8/74 *Procureur du Roi v. Dassonville*, Judgment of 11 July1974.

Secretary of State for the Home Department,[68] argued that the EU owned competences to coordinate the measures of member states that at first glance lacked any cross-border elements, such as school lockdowns and curfew ordinances. Purnhagen et al. further argued that the latter could hinder cross-border commuters in reaching their working places. They provided a list of examples on the possible coordinating role of the EU. These "predictions" were later proved right.

Since Decision 2019/98/EC[69] was adopted, the EU has coordinated pandemic surveillance of the member states several times. In this field, both the European Centre for Disease Prevention and Control (ECDC), established in 2005,[70] and the Early Warning and Response System (EWRS), consisting of the European Commission and the competent health authorities of the member states, successfully overcame the obstacles. The latter provided the framework for the member states to coordinate the exchange of intensive therapy beds and properly trained personnel based on demand and supply.[71] The European Commission guidelines of 3 April 2020[72] provided detailed rules on the cross-border reallocation of medical services. Among other things, it called on the member states to dispense with the application of certain legal acts of the EU[73] and "take a pragmatic approach for patients requiring urgent care […]"[74]

Secondly, the EU encouraged the member states to adopt unified passenger screening rules, including body temperature measurements. The legal basis is provided by Articles 168 and Paragraph (2) of Article 100 of the TFEU and the regulation on the common rules in the field of civil aviation security,[75] adopted based on the two TFEU articles.[76]

68 C-60/00 *Mary Carpenter v. Secretary of State for the Home Department*, Judgment of 11 July 2002.

69 Decision No 2119/98/EC of the European Parliament and of the Council of 24 September 1998 setting up a network for the epidemiological surveillance and control of communicable diseases in the Community (OJ L 268, 3.10.1998, p. 1–7) (no longer in force).

70 Regulation (EC) No. 851/2004 of the European Parliament and of the Council of 21 April 2004 establishing a European Centre for Disease Prevention and Control (OJ L 142, 30.4.2004, pp. 1–11).

71 See the webpage of the German Foreign Ministry for information on how the German hospitals provided care for Italian and Dutch patients. German Federal Foreign Office, "How Germany is Helping Europe in the COVID-19 Crisis" (24.03.2020). [Online]. Available at: https://www.auswaertiges-amt.de/en/aussenpolitik/europa/maas-corona-europe/2328352 [Accessed: 2 April 2021]

72 European Commission, Guidelines on EU Emergency Assistance on Cross-Border Cooperation in Healthcare related to the COVID-19 crisis. (COM 2020/C 111 I/01, 2020.04.03.)

73 Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ L 166, 30.4.2004, p. 1–123); Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 on the application of patients' rights in cross-border healthcare (OJ L 88, 4.4.2011, p. 45–46)

74 COM 2020/C 111 I/01, para. 4

75 Regulation (EC) No 300/2008 of the European Parliament and of the Council of 11 March 2008 on common rules in the field of civil aviation security and repealing Regulation (EC) No 2320/2002 (Text with EEA relevance) (OJ L 97, 9.4.2008, p. 72–8)

76 For detailed analysis, Angyal, 2011

Thirdly, the EU has the competence to provide financial support for its member states through the structural funds, even though the EU budget is small compared to the GDP of the EU 27.[77] Based on Articles 180 and 181 of the TFEU, the EU has the competence to finance medical research, including vaccine development. In this field, Purnhagen et al. articulated a "prediction" that later proved correct: the European Commission issued its Communication "Preparedness for COVID-19 Vaccination Strategies and Vaccine Deployment' on the 15 October 2020.

Furthermore, based on Paragraph (1) of Article 122 of the TFEU, "the Council, on a proposal from the Commission, may decide, in a spirit of solidarity between member states, upon the measures appropriate to the economic situation in particular if severe difficulties arise in the supply of certain products…." Based on Paragraph (2): "Where a member state is in difficulties or is seriously threatened with severe difficulties…the Council, on a proposal from the Commission, may grant, under certain conditions, EU financial assistance to the member state concerned."

Finally, the European Commission has the competence to allow an exemption from the prohibition of state aids, and it has not been afraid to use it during the COVID-19 pandemic.

2.1. Restrictions on the free movement of goods

Regarding the export bans imposed on influenza vaccines,[78] it is worth starting *in medias res* with the introduction of restrictions imposed by member states on medical equipment and medications to illustrate how the rules of the Single Market influence aspects of life. In accordance with the preceding points, the EU lacks the competence to bring any legally binding measure to pandemic prevention. However, as the European Commission reiterated in its communication of 13 May 2020 called 'Coordinated Economic Response to the COVID-19 Outbreak,"[79] the abovementioned medical equipment and medications are goods within the meaning of the Founding Treaties, Accordingly, the rules of the Single Market—namely, the free movement of goods—apply. Furthermore, the European Commission took the view that the restrictions imposed by the Member States did not adequately consider the integrated nature of the supply chains and the possibility that the goods might not reach the destinations

77 Marinkás, 2020; Marinkás, 2018

78 Since the demand for influenza vaccines increased during the autumn of 2020, those member states with a surplus stock (Germany, Belgium, and others) imposed export bans. See Portfolio.hu: Magyarország egyelőre nem kap több influenza elleni vakcinát. 2020. október 29. [Online]. Available at: https://www.portfolio.hu/gazdasag/20201029/magyarorszag-egyelore-nem-kap-tobb-influenza-elleni-vakcinat-454966 [Accessed: 2 April 2021]

79 European Commission, Coordinated economic response to the COVID-19 Outbreak (COM/2020/112 final), Brussels, 13.03.2020.

where they were most needed. The European Commission stated that the restrictions on the export of medical equipment contradicted the principle of proportionality and the European Commission would treat them accordingly.[80] As Purnhagen et al. remarked, this could be interpreted as the reversion of the traditional approach of the basic rights and exemptions. That is, instead of letting the Member States exercise the rights guaranteed by Article 36 of the TFEU to restrict basic rights (e.g., restricting the free movement of medical equipment), the EU restricts its own Member States from exercising their right to provide the prevalence of the basic rights and ensure that the medical equipment reaches its destination.[81]

The vulnerability of the road freight sector and supply chains soon became evident: by April 2020, the volume of road freight transport dropped by 50% in Spain, by 46% in France, and by 37% in Italy compared to April 2019, seriously damaging the economy.[82] The slowdown had two basic causes. First, once "nonessential" branches of the economy were shut down, the demand for road freight transport was drastically reduced. Second, there were supply shortages since some drivers simply went home, fearing that border closures would strand them in a foreign country without any income. However, the demand and supply found a state of balance throughout the year. The supply oriented itself to branches of the economy where there was demand. However, only entrepreneurs with a greater scope of clients could afford to lose a client here and there. Smaller entrepreneurs with fewer clients had far less flexibility and smaller safety nets.[83] The economic losses were serious: based on estimations published in June 2020,[84] it would take about €75 billion to restore this sector.

On 23 March 2020, the European Commission in connection with its 'Guidelines for border management measures to protect health and ensure the availability of goods and essential services'[85] the European Commission adopted its communication on green lanes.[86] The communication's basic points were that the continued functioning of the supply chains had to be secured and supply shortages avoided. Along with providing advice on protecting the road

80 COM (2020) 112, para. 3.1.

81 Purnhagen, 2020, 304; See: COM (2020) p. 112.

82 The author's interpretation of the chapter verified the founders' idea that the interconnectedness of economic interests makes cooperation of the member states inevitable. A war against a virus rather than a war among states virus was enough to verify the basic concept.

83 The state of Europe's road freight market – 4 key insights from Sixfold's Covid-19 map by Transport Intelligence, May 5, 2020. [Online]. Available at: https://www.ti-insight.com/briefs/the-state-of-europes-road-freight-market-4-key-insights-from-sixfolds-covid-19-map/ [Accessed: 2 April 2021]

84 van Marle (2020)

85 European Commission, Covid-19 Guidelines for border management measures to protect health and ensure the availability of goods and essential services. Brussels (COM (2020) 1753 final), 16.03.2020.

86 European Commission, Coronavirus: Commission presents practical guidance to ensure continuous flow of goods across EU via green lanes. Brussels, 23 March 2020 IP/20/510

freight transport workers' health, the European Commission called on the member states to let the transport vehicles pass the borders without any extreme measures. The Commission stated that vehicles should not have to spend more than 15 minutes at the borders regardless of the type of goods they carried.[87]

On the 28 October 2020 the European Commission issued another communication to further develop the green lanes during the second wave of the coronavirus.[88] They stated that the previously set objectives were still valid and urged the Member States to introduce and maintain an electronic administration and examination system. As the Commission noted, some of the Member States had already done so during the first COVID-19 wave. Referring to Point 19b of the 13 October 2020 Recommendation of the Council,[89] the Commission reiterated that road freight industry workers should be considered "essential workers" by every authority of every Member State; that would free them from any quarantine requirements while they were performing their "essential" tasks.

2.2. Restrictions imposed on the free movement of persons

The free movement of persons (the original wording says "the free movement of workers") is another crucial point guaranteed by several provisions of the Founding Treaties and other primary EU legal sources, such as Paragraph (1), Article 45, of the TFEU, the "Schengen acquis,"[90] and other secondary legal sources (e.g., Directive 2004/38/EC[91]). As with other basic rights, the Member States maintained their right to impose restrictions "on the grounds of public policy, public security, or public health" and reintroduce border control, although only temporarily. As Purnhagen et al. predicted in April 2020, the EU found its competencies to coordinate the measures of the Member States. What they wrote became a reality in the autumn of 2020 when the EU introduced unified rules on the classification of member states according to the pandemic situation and the restriction of travel and border closures.

87 Regarding the fact that in March 2020 – even 10-15 km – long queues were a quite wide-spread phenomenon at the borders, this goal may be interpreted as ambitious.

88 European Commission, Upgrading the Transport Green Lanes to Keep the Economy Going During the COVID-19 Pandemic Resurgence. Brussels, (COM (2020) 685 final) 28.10.2020.

89 Council Recommendation (EU) 2020/1475 of 13 October 2020 on a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic (OJ L 337, 14.10.2020, p. 3–9)

90 Schengen Agreement (14 June 1985); The Schengen Convention (19 June 1990)

91 Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [...] OJ L 158, 30.4.2004, p. 77–123

The European Commission in its guidelines of 16 March 2020 reiterated that although Paragraph (1), Article 25, of the Schengen Borders Code[92] allowed Member States to "re-introduce border control…for a limited period of time,"[93] the medical checks (e.g., body temperature controls) did not require such drastic measures. Actually, reintroducing border controls might result in unnecessary congestion on the borders that would cause the virus to spread more rapidly.[94] It might also increase the economic harm.[95] Should the Member States choose to reinstall border control, cross-border commuters working in the essential sectors should be able to cross the borders.[96] Furthermore, the member states should pay attention to the rules stated in *Reinhard Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* (the "Gebhard case")[97]—namely, that national measures that hinder the exercise of fundamental freedoms (i) must be applied in a non-discriminatory manner; (ii) must be justified by imperative requirements in the general interest; (iii) must be suitable for achieving the objective they pursue; and (iv) must not go beyond what is necessary to attain the goal.[98]

On 13 May 2020, when the pandemic situation seemed to be improving, the European Commission issued its guidelines[99] for tourists, travellers, and entrepreneurs. The guidelines contained detailed instructions on preventive health measures that had to be implemented before the travel restrictions could be lifted. To re-launch tourism and travel and inform those wishing to travel, the European Commission launched its Re-open Europe platform.[100] However, the different measures introduced by the different member states (e.g., different rules on quarantine; the inconsistent application of red, orange, and green country codes; the uncoordinated border closures[101]) hindered the free movement of persons, posing an issue that had to be solved at the EU level.

92 Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) (OJ L 77, 23.3.2016, p. 1–5)

93 In accordance with Article 27 of the Schengen Codex, before doing so, Member States are obliged to inform both the other Member States and the European Commission.

94 C (2020) 1753 final, paras. 18–25

95 Meninno and Wolff, 2020

96 C (2020) 1753 final, paras. 18–25

97 See C-55/94 *Reinhard Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*, Judgment of 30 November 1995, para. 37

98 For more information on the Gebhard, see European Commission, "Guide to the Case Law of the European Court of Justice on Articles 49." [Online]. Available at: https://ec.europa.eu/docsroom/documents/22543/attachments/1/translations/en/renditions/native [Accessed: 2 April 2021]

99 European Commission, "Tourism and Transport: Commission's Guidance on How to Safely Resume Travel and Reboot Europe's Tourism in 2020 and Beyond." (Press Release, Brussel, 13 May 2020 (IP/20/854)

100 https://reopen.europa.eu/hu [Accessed: 2 April 2021]

101 Nicolás, 2020

In its proposal of 4 September 2020[102] at the European Commission's urging, the Council adopted the Recommendation on a Coordinated Approach to the Restriction of Free Movement in Response to the COVID-19 Pandemic'.[103] The recommendation[104] was adopted on 13 October 2020 called 'Recommendation on a Coordinated Approach to the Restriction of Free Movement in Response to the COVID-19 Pandemic' Although Member States – in accordance with the provisions of the Founding Treaties – retained the right to reinstall border controls or to completely close the borders, the recommendation – in its paras 8-12 – set the criteria that Member States have to take into consideration, when they decide to impose restrictions on the free movement of persons, namely the number of new cases, the proportion of positive test results, and the proportion of tests done compared to the population. The Recommendation also obligated the Member States to provide the necessary data for the ECDC to determine their COVID-19 classification. Paragraphs 14–16 required the Member States to inform the other Member States and the European Commission of any planned restrictions or measures to simplify the preliminary coordination.

2.3. Easing to secure the freedom to provide services

The freedom to provide services is guaranteed by Article 56 of the TFEU, and its definition is contained by Article 57. Based on Article 58 on the field of transport (as a kind of service), Title VI of the TFEU applies. The provisions of Paragraph (1), Article 169, which transfers competences to the EU, has to be considered. Paragraph (2) of the Article says this:

> The Union shall contribute to the attainment of the objectives referred to in Paragraph 1 through: (a) measures adopted pursuant to Article 114 in the context of the completion of the internal market; (b) measures which support, supplement and monitor the policy pursued by the Member States.

In modern economies, approximately two-thirds of the GDP is produced by the service sector. Tourism, transport, accommodation, catering, free time activities, and culture—all of which were hit severely by the virus—were all provide 10% of the EU's GDP.[105] Therefore, the

102 European Commission, Proposal for a Council Recommendation on a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic (COM/2020/499 final)

103 Council Recommendation (EU) 2020/1475 of 13 October 2020 on a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic (Text with EEA relevance) (OJ L 337, 14.10.2020, p. 3–9)

104 European Commission, (EU) 2020/1475 of 13 October 2020 "Council Recommendation on a Coordinated Approach to the Restriction of Free Movement in Response to the COVID-19 Pandemic." (Text with EEA relevance) (OJ L 337, 14.10.2020, pp. 3–9).

105 See Press Release IP/20/854 cited above.

European Commission also issued recommendations affecting those sectors. In their guidelines of 13 May 2020, the European Commission paid attention to passenger transport as an inevitable component of tourism. Based on EU law, in the case of service or travel package cancellations, travellers could choose between reimbursement, or a voucher. Since the economic consequences of the pandemic imposed severe hardships on tour operators, the European Commission acknowledged clients' right to reimbursements but favoured vouchers, which they considered a good compromise for both tour operators and clients. The European Commission also set consumer protection rules for the vouchers.

While the European Commission's proposal helped mitigate the economic consequences, long-term reforms will be needed rather than hastily improvised solutions. The presidential agenda of Germany, the then-president of the Council of the European Union, considered the long-run mitigation of the economic consequences of the coronavirus and the economic recovery as a top priority. In accordance with it, the then-trio issued a common statement[106] on 12 October 2020 which foresaw the revision and reform of the current consumer protection rules.

The European Commission and the Council were not the only entities that provided guidelines and advice to economic operators and the population. Various EU agencies did the same. The European Union Aviation Safety Agency (EASA) issued guidelines concerning the conditions on safe travel. The European Consumer Centre (ECC) provided advice to consumers and merchants on protecting themselves from the ever-spreading online frauds related to the coronavirus,[107] educating merchants and consumers about the perpetrators' favourite scams and methods.[108] In March[109] and April[110] 2020, the European Commissioner for Justice at the time, Didier Reynders, sent a letter to several internet provider platforms, social media providers, and search engine and web-shop operators asking their help in removing false and fraudulent COVID-19-related content from their platforms in accordance with the common points of the Consumer Protection Cooperation Network (CPCN).[111] Procedural Adoption by EU Institutions of Changes in Work Conditions

106 Joint Paper of the Trio Partners Germany, Portugal and Slovenia. Consumer protection in Europe Lessons learned from the COVID-19-pandemic (12.10.2020) [Online]. Available at: https://www.bmjv.de/SharedDocs/Downloads/DE/News/PM/161020_Joint_Trio_Paper.pdf;jsessionid=E0B61E2E3B831A3CAD5DB88467CB37A2.2_cid334?__blob=publicationFile&v=1 [Accessed: 2 April 2021]

107 The issue was already addressed by the European Commission in the document labelled JOIN (2020) 8 final.

108 Scams related to COVID-19. Actions of the Consumer Protection Cooperation Network (CPC) on rogue traders during the COVID-19 outbreak. [Online]. Available at: https://ec.europa.eu/info/departments/justice-and-consumers/justice-and-consumers-funding-tenders/funding-areas/consumer-programme-cp/enforcement-consumer-protection/scams-related-covid-19_hu [Accessed: 2 April 2021]

109 "Covid 19 Scams: Letter to Platforms" (March 2020).

110 "Covid 19 Scams: Letter to Platforms" (April 2020).

111 Consumer Protection Cooperation Network (CPCN).

3. Procedural adoption by EU institutions of changes in work Conditions

Most EU institutions faced a serious challenge during the spring of 2020.[112] The procedural rules of the European Central Bank (ECB) and the European Court of Auditors (ECA) had already enabled online meetings and written decision-making well before COVID-19. Therefore, the pandemic did not seriously hinder their functioning. However, five other institutions found themselves in a more complicated situation. The European Parliament (EP) was hit most severely. Preventive distancing interfered with discussions of different views, the quintessence of the institution's function, because although decisions had to be made as quickly as possible, the EP's multi-party online meetings too often ended in chaos, with hundreds of online attendees weighing in at the same time. Thus, the EP had to restrict the length of the meetings and members' speeches,[113] which infringed the principles of democracy and publicity specified by Article 15 of the TFEU. They also could not immediately find a suitable substitute for raising hands during the voting.[114]

The Council of the European Union was also not prepared to function in the virtual space. Although Article 12 of its rules of procedure[115] enabled then to use the so-called "written procedure…on urgent matters [or in] special circumstances," the unanimous decision of either the Commission or the Committee of the Permanent Representatives of the Governments of the Member States to the European Union (COREPER) is needed in every single case. Travel restrictions hindered the permanent representatives and their deputies from meeting in Brussels, so the Commission decided to suspend in-person meetings for a month starting from 23 March 2020[116] and delegate decision-making to the levels of COREPER I and II.[117] The decision, which did not exclude the possibility of prolongation, was subject to long debate, since some saw the processes as another instance when community-level decision-making prevails over classic intergovernmental decision-making. In other words, the decision on whether the centrum of pandemic control should be in Brussels or in the 27 capitals was placed

112 Herszenhorn and Wheaton, 2020

113 Bodson, 2020, p. 2.

114 The Rules of Procedure of the European Parliament 2019–2024 (9th parliamentary term), Article 25 (Point 9), Article 178, Article 187 (Point 1), Article 237 (Point 2). [Online]. Available at: https://www.europarl.europa.eu/doceo/document/RULES-9-2021-01-18_EN.pdf [Accessed: 2 April 2021]

115 Council Decision of 1 December 2009 adopting the Council's Rules of Procedure (2009/937/EU) (OJ L 325, 11.12.2009, p.35)

116 Council Decision (EU) 2020/430 of 23 March 2020 on a temporary derogation from the Council's Rules of Procedure in view of the travel difficulties caused by the COVID-19 pandemic in the Union. (OJ L 88I , 24.3.2020, p. 1–2)

117 The Legal Service of the Council had to determine the scope of application of this solution. See: Council of the European Union, 'Summary Record – Permanent Representatives Committee – 20 and 22 April 2020', 7709/20 CRS CRP 20, Brussels, 7 May 2020, 2.

in the context of sovereignty, making the legal debate a political one. To secure their right to say the last word, the governments put into writing that before the COREPER meetings, the competent ministers had to reconcile their views through an informal, preliminary video call. Furthermore, the Hungarian, Polish, and Slovenian governments attached a statement[118] to the decision emphasizing its transitional nature.[119]

The European Council also did not modify its rules of procedure,[120] which allow only limited written decision-making under Article 7. As a further consequence of not modifying the procedural rules, based on the grammatical interpretation of Article 4 of the rules of procedure, holding negotiations and issuing concluding observations were only possible in the presence of the heads of state or governments. As a conciliatory proposal, the heads of state or governments held video calls and instead of issuing the concluding observations of the European Council, the president of the European Council issued the concluding observations. This empowered the then-president and expanded the manoeuvring room,[121] which was surely not what the heads of state or governments wanted. The then-president issued his concluding observations in his own name, circumventing the long negotiations on documents' wording and message that usually preceded the concluding observations of the European Council.[122]

On 26 March 2020 the head of states or governments issued a declaration[123] providing a draft on how to fight the coronavirus pandemic. The idea of using and incorporating the possibilities provided by the development of technology and telecommunications into the rules of procedure of the European Commission had emerged as early as 2010. However, this was only realized ten years later during the COVID-19 pandemic.[124] Although the written decision-making procedure had been allowed earlier, the provisions for joining through telecommunication devices were novel.

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118 Ibid footnote 115, 2.

119 This chapter's author argues that both the euphoria of Benjamin Bodson and the concerns of the member states' governments were ill-grounded. The permanent representatives and their deputies were ambassadors in the sense of international law. Thus, the appointing government has the unlimited right to recall them without a reason should the government think its ambassador has failed to fully represent its interests. For details, see General Secretariat of the Council, Council's Rules of Procedure, and Comments on the Council's Rules of Procedure. 2016, p. 119. [Online]. Available at: https://www.consilium.europa.eu/media/29824/qc0415692enn.pdf [Accessed: 2 April 2021]

120 Rules of procedure of the council (OJ L 325, 11.12.2009, p. 36–61)

121 Charles Michel (Assumed office 1 December 2019)

122 Herszenhorn and Wheaton, 2020

123 Joint statement of the members of the European Council, 26 March 2020. [Online]. Available at: https://www.consilium.europa.eu/media/43076/26-vc-euco-statement-en.pdf [Accessed: 2 April 2021]

124 Commission Decision (EU, Euratom) 2020/555 of 22 April 2020 amending its Rules of Procedure C/2020/3000 (OJ L 127I, 22.4.2020), pp. 1–2.

The "e-Curia" system enabling the electronic submission of documents[125] was introduced in 2018.[126] However, neither the Court of Justice (CJ) nor the General Court (GC) is allowed to hold trials online. Thus, both the presentation of the advocate generals' opinions and the trials had to be postponed. Articles 31 and 53 of the Statute of the CJEU[127] and Articles 79, 88, and 200 of the Rules of Procedure of the CJ[128] state that the abovementioned acts must be held "in open court." Articles 109 and 118 of the Rules of Procedure of the GC[129] provide the same. Since the rules of procedure of the CJ and GC are silent on the matter of trials held via electronic communications system, they had no choice, but to postpone the abovementioned acts. Similarly, newly appointed judges and advocate generals have to be sworn in publicly, so the swearing in of the new CJ advocate general on 23 March 2020, via electronic communication raised some concerns[130] that it violated the Statutes of the CJEU and Article 4 of the CJ's Rules of Procedure.[131]

4. Summary

This chapter discussed the lack of EU competencies related to pandemic management or SLOs. As a basic rule, these areas fall within the competence of the member states. However, the COVID-19 crisis re-contextualized the provisions of the founding treaties. After an initial period of hesitancy, EU institutions and organs realised if they approached the issues caused by the pandemic from the perspective of the Single Market and viewed the competencies of the EU were viewed as a "web of competencies," they could help the Member States provide the necessary medical equipment and protect their economies from collapse. They could achieve this by coordinating the four basic freedoms at the EU level and, if necessary, by curtailing the rights of the Member States to impose restrictions on the basic freedoms. The creation of the green lanes system, recognizing the road freight traffic employees as "essential" and

125 E-Curia is a platform operated by the CJEU that provides the parties or the national courts (in cases of preliminary ruling procedures) to exchange documents electronically.

126 Decision of the Court of Justice of 16 October 2018 on the lodging and service of procedural documents by means of e-Curia; Decision of the General Court of 11 July 2018 on the lodging and service of procedural documents by means of e-Curia.

127 Treaty on the Functioning of the European Union (OJ C 326, 26.10.2012, pp. 47–390): Protocol No. 3. On the Statute of the Court of Justice of the European Union. (OJ C 202., 7.6. 2016., pp. 210–229).

128 Rules of Procedure of the Court of Justice (OJ L 265, 29.9.2012, pp. 1–42).

129 Rules of procedure of the General Court (OJ L 105, 23.4.2015, pp. 1–6).

130 Court of Justice of the European Union, Press Release No. 34/20: "Entry into Office of a New Advocate General at the Court of Justice," Luxembourg, 23 March 2020. [Online]. Available at: https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-03/cp200034en.pdf [Accessed: 2 April 2021]

131 Alemanno and Stefan, 2014

allowing their free movement, and unifying the colour-classification system of the member states also helped achieve this goal.

The chapter also discussed the issue of restricting certain basic rights with special regard to the freedom of peaceful assembly and the right to the freedom of expression. Actions to curtailing these rights must fairly balance the right of the population to the best attainable health with individual freedoms. The chapter introduced the relevant rule of law reports from the European Commission, the case law of certain member states' constitutional courts, and the reports of certain NGOs. Generally speaking, few member states succeeded in finding the golden mean among the abovementioned rights. Typically, they declared the proportional restriction of one or another right. The two most common problems were using health considerations to restrict the freedom of assembly without any differentiation and the disproportionate restriction of the right to freedom of expression. The latter was mostly related to efforts to reduce the spread of misinformation.

Finally, the chapter discussed how EU institutions and organs adapted to the situation created by the pandemic by revising their procedural rules to enable negotiations and decision-making via electronic means. The adoption went smoothly only for the ECB and the COE, whose procedural rules enabled the use of electronic telecommunication devices well before the COVID-19 pandemic. The other institutions struggled to adapt their procedures to comport with their legal guidelines and the principle of democracy. For the Council, the legal dispute over electronic meetings induced a political debate. For the EP, the issue of democratic values were called into question. The final and proper setting of these issues are still pending.

In summary, although they were initially slow to react, the EU institutions found ways to tackle the issues induced by the pandemic and to help the member states effectively by interpreting or reconceptualising the provisions of the founding treaties. Similarly, they realized the switch to electronic communication devices, although deficiencies remain.

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The Croatian "Emergency Constitution" on Test

PETAR BAČIĆ – MARKO IVKOŠIĆ

1. Regulation of the states of emergency in the Constitution of the Republic of Croatia

Like many other European ex-socialist countries at the end of the 1980s and the beginning of 1990s, Croatia began its complete economic and political transformation with radical constitutional changes. The starting point in the process of acceptance of "new democratic values"—primarily the rule of law, constitutionalism, and human rights—was the adoption of the first democratic Constitution of the Republic of Croatia on December 21, 1990.[1] Since its adoption, the Constitution of the Republic of Croatia has been amended on five occasions, following two distinct procedures: according to its provisions the constitution can be amended either by the Croatian parliament or by the voters directly in a referendum.[2] Both of these

1 Following its adoption, the Croatian parliament passed the Decision on the Promulgation of the Constitution of the Republic of Croatia on December 22. As the original text of the Constitution was adopted and promulgated just before Christmas, it is sometimes also referred to as the "Christmas Constitution." See Constitution of the Republic of Croatia, Official Gazette *Narodne Novine* No. 56/1990.

2 When amending the constitution, the Croatian parliament follows a procedure stipulated in its part IX, Art. 147–150. On the other hand, procedure for amending the constitution in a referendum is laid down in its Art. 87. according to which a referendum may be called by the Croatian parliament (Art. 87 par. 1), as well as by the president of the republic (though only at the proposal of the government and with the counter-signature of the prime minister; Art. 87 par. 2). Consequently, a referendum on a proposal for the amendment of the Constitution (i.e., a referendum on constitutional changes, complete or partial) may be called by the Croatian parliament or by the president of the republic. Nevertheless, constitutional (as well as legislative) referendum may also be initiated through the institute of citizens' initiative—in accordance with Art. 87 par. 3 of the Constitution, the Croatian parliament shall call a referendum on all issues that may be put to a referendum by the parliament or the president of the republic "when so demanded by ten percent of all voters in the Republic of

Petar Bačić: Professor, Faculty of Law, University of Split, Croatia
Marko Ivkošić: Associate Professor, Faculty of Law, University of Zagreb, Croatia
Bačić, P., Ivkošić, M. (2022) 'The Croatian "Emergency Constitution" on Test' in Nagy, Z., Horváth, A. (eds.) *Emergency Powers in Central and Eastern Europe*, pp. 97-127. Budapest: Ferenc Mádl Institute of Comparative Law; https://doi.org/10.47079/2022.znah.epicaee.1_5

procedures have been employed so far. Thus in 1997, 2000, 2001, and 2010, the Constitution was amended in the Croatian parliament. Each of these revisions had different important objectives, such as strengthening the constitutional guarantees of human rights, altering a semi-presidential system of government with a parliamentary one, instituting a unicameral parliament, creating a basis for Croatia's membership in the European Union, etc. However, the constitutional change in 2013 was a result of the first national referendum to amend the constitution, pursuant to a popular initiative (in accordance with the results of referendum, the definition of marriage as a union for life between a woman and a man was included in the constitution).3 The 1990 Constitution text regulated states of emergency in several provisions. While the constitution's revisions amended the original emergency provisions, especially in 2000 regarding the decision-making powers originally concentrated within the institution of the President of the Republic,[4] there are significant similarities in comparison with current constitutional articles that regulate states of emergency.

As far as the current regulation of the states of emergency in the Croatian constitution is concerned, one could firstly point out that the Croatian constitutional framework for emergency situations in general follows the pattern by which nation–states, almost as a rule, incorporate provisions in their constitutional documents that allow for recourse to a state of emergency. Adoption of certain emergency measures is enabled to protect the state and its citizens in the event of a crisis threatening the security of the state, the functioning of its institutions, and the physical existence of its population, such as war, terrorist attacks, major natural disasters, epidemics, etc. Though there are different types of situations that are usually considered as emergencies,[5] as well as numerous related classifications,[6] and considering that various constitutions use different terms for emergency situations (state of emergency, state of siege, state of alarm, state of exception, martial law, etc.), constitutional emergency norms usually enable the government to restrict or suspend certain constitutionally guaranteed

Croatia". The citizens' initiative in Croatia was not part of the original 1990 Constitution, but was introduced later with constitutional changes in 2000.

3 See the Constitution of the Republic of Croatia, Official Gazette *Narodne Novine* No. 85/2010 (consolidated text), 05/2014.

4 Thus B. Smerdel, emphasizing goals of strengthening the constitutional guarantees of democratic development and parliamentary democracy and preventing the concentration of authority, summarizes the profound constitutional reform of 2000: "For this reason the whole system of government was altered in order to check and supervise the president of the republic within the model of parliamentary government" (Smerdel, 2017, p. 197).

5 Noting that the list of such situations is not complete, J. Omejec lists the following cases that are usually considered as emergencies in the doctrine: "1) War, i.e., the imminent danger of war; 2) rebellions, riots and similar internal movements on a larger scale, which may occur in a particular social and political system of the country; 3) major natural disasters, such as catastrophic earthquakes, floods, forest and other fires, epidemic diseases that affect humans (but also flora and fauna), as well as, in recent times, exceptional conditions caused by atomic radiation" (Omejec, 1996, p. 173).

6 See further: Ferejohn and Pasquino, 2004, pp. 210–239.

rights and freedoms, as well as institutional mechanisms of checks and balances, and to concentrate decision-making in central government bodies.[7] Such emergency provisions, which generally allow governments to take those actions that will, in the end, terminate the temporary state of exception and restore a state of normalcy, can be found in some of the most influential constitutions of modern constitutional democracies, such as Art. 16 of the French constitution (1958),[8] upon which the original 1990 Croatian constitution was partially modeled. Such are also two valid provisions of the Constitution of the Republic of Croatia that directly regulate emergency measures, of which the first is Art. 17, which stipulates the following:

> (1) Individual constitutionally guaranteed freedoms and rights may be restricted during a state of war or any clear and present danger to the independence and unity of the Republic of Croatia or in the event of any natural disaster. Such restriction shall be decided upon by the Croatian parliament by a two-thirds majority of all members of parliament or, if the Croatian parliament is unable to convene, at the proposal of the government and with the counter signature of the prime minister, by the President of the Republic.
> (2) The extent of such restrictions must be appropriate to the nature of the threat, and may not result in the inequality of citizens with respect to race, colour, gender, language, religion, or national or social origin.
> (3) Even in cases of clear and present danger to the existence of the state, no restrictions may be imposed upon the provisions of this Constitution stipulating the right to life, prohibition of torture, cruel or degrading treatment or punishment, and concerning the legal definitions of criminal offences and punishment, and the freedom of thought, conscience, and religion.

7 Bulmer, 2018, p. 6 *et passim*.

8 *Constitution du 4 octobre 1958;* (Version mise à jour en janvier 2015); Article 16 [State of Emergency] (1) When the institutions of the republic, the independence of the nation, the integrity of its territory, or the fulfillment of its international commitments are under grave and immediate threat and when the proper functioning of the constitutional governmental authorities is interrupted, the president of the republic takes the measures demanded by these circumstances after official consultation with the prime minister, the presidents of the Assemblies, and the Constitutional Council. (2) He informs the nation of these measures by a message. (3) These measures must be prompted by a will to ensure within the shortest possible time that the constitutional governmental authorities have the means of fulfilling their duties. The Constitutional Council is consulted with regard to such measures. (4) Parliament meets *ipso jure*. (5) The National Assembly may not be dissolved during the exercise of emergency powers. (6) After thirty days of the exercise of such emergency powers, the matter may be referred to the Constitutional Council by the president of the National Assembly, the president of the Senate, sixty members of the National Assembly or sixty Senators, so as to decide if the conditions laid down in paragraph one still apply. It makes its decision by public announcement as soon as possible. It carries out *ipso jure* such an examination and makes its decision in the same manner after sixty days of the exercise of emergency powers or at any moment thereafter. Constitutional text available at: https://www.assemblee-nationale.fr/connaissance/constitution.asp

In addition, in the provisions of Art. 17 that regulates situations in which constitutionally guaranteed human rights and freedoms may be restricted and in doing so it ensures for special standards to be observed, the Constitution of the Republic of Croatia also regulates state of emergency and the enactment of exceptional measures in Art. 101 that allows for the enactment of presidential decrees with the force of law:

> (1) During a state of war, the President of the republic may issue decrees with the force of law on the basis and within the limits of the powers conferred thereto by the Croatian parliament. If the Croatian parliament is not in session, the President of the republic shall be authorized to issue decrees with the force of law in order to regulate all issues imposed by the state of war.
> (2) In the event of a clear and present danger to the independence, integrity, and existence of the state, or when government bodies are prevented from performing their constitutional duties, the President of the republic may, at the proposal of the prime minister and subject to his/her countersignature, issue decrees with the force of law.
> (3) The president of the republic shall submit decrees with the force of law to the Croatian parliament for approval as soon as the latter is in a position to convene.
> (4) If the president of the republic fails to submit any such decree to the Croatian parliament for approval in compliance with paragraph (3) of this Article, or is the Croatian parliament fails to approve it, the decree with the force of law shall cease to be valid.
> (5) In the cases specified in paragraphs (1) and (2) of this Article, the president of the republic shall be entitled to call a session of the government and to preside thereover.

Even though the Croatian constitution does not use the exact term of "state of emergency" (*izvanredno stanje*), according to its Art. 17 par. 1 there are three types of such extraordinary situations: 1) state of war (*ratno stanje*); 2) any clear and present danger to the independence and unity of the Republic of Croatia (*neposredna ugroženost neovisnosti i jedinstvenosti države*), or 3) the event of major natural disaster (*velike prirodne nepogode*):

> (1) Individual constitutionally guaranteed freedoms and rights may be restricted during a state of war or any clear and present danger to the independence and unity of the Republic of Croatia or in the event of any natural disaster….[9]

9 Consolidated text of the Constitution of the Republic of Croatia in English is available at the official website of the Croatian parliament: https://www.sabor.hr/en/constitution-republic-croatia-consolidated-text

According to provisions of the Croatian constitution, the determination of the existence of war depends on a special procedure: it is the Croatian parliament that decides on war and peace in accordance with Art. 81,[10] while the president of the republic according to Art. 101(3) shall, pursuant to a decision of the parliament, declare war and conclude peace. Apart from war, other two types of emergency situations regulated by Art. 17 of the Constitution do not have to be declared explicitly. Nevertheless, as it regards the state of clear and present danger to the independence and unity of the republic, it is important to recall the fact that such state may encompass various forms of imminent danger for state and regime, both of internal and external origin, including serious danger of war, or even *de facto* state of war although it was not declared. Namely, the vast majority of modern wars were not formally declared, including the war in Croatia fought between 1991 and 1995.[11]

Furthermore, Art. 101 par. 2 stipulates the fourth type of extraordinary situation – it is the event in which the government bodies are prevented from regular performing of their constitutional duties (*tijela državne vlasti su onemogućena redovno obavljati svoje ustavne dužnosti*): "(2) In the event of a clear and present danger to the independence, integrity and existence of the state, or when the government bodies are prevented from regularly performing their constitutional duties, the president of the republic may…". Consequently, Art. 101. differentiates between three extraordinary situations: first, the state of war (par. 1); second, immediate danger to the independence, unity, and existence of the state; and third, when the government bodies are prevented from regularly performing their constitutional duties (par. 2). It also follows from the aforementioned provision in Art. 101 par. 2 that these two situations are basically set as alternative conditions i.e., that the existence of clear and present (immediate) danger to the state does not necessarily mean that government bodies are prevented from performing their constitutional duties. Furthermore, the formulation "government bodies" does not necessarily exclusively imply the Croatian parliament, but it encompasses

10 Constitution of the Republic of Croatia, Article 81: The Croatian parliament shall: decide on the adoption of and amendments to the constitution; adopt laws; adopt the central budget; decide on war and peace; adopt documents expressing the policy of the Croatian parliament; adopt the National Security Strategy and the Defence Strategy of the Republic of Croatia; exercise civilian oversight of the armed forces and security services of the Republic of Croatia; decide on alterations of the borders of the Republic of Croatia; call referenda; conduct elections, appointments and dismissals in conformity with the constitution and law; supervise the work of the government of the Republic of Croatia and other holders of public offices reporting to the Croatian parliament, in conformity with the constitution and law; grant amnesty for criminal offences; and perform any such other tasks as may be specified by the constitution.

11 This was rightfully pointed out by B. Smerdel: "Though in this case there is no formal state of war in the legal sense, it is possible that there is a war threat or a situation in which the war is actually being waged against the republic though it hasn't been formally declared. One should also take into account the fact that in years after the II. World War most wars that have been fought were never declared. Not even the Homeland War (as the war in Croatia is often referred to; op. PB) in which the Republic of Croatia was defended 1991–1995 was formally declared" (Smerdel, 2013, p. 306).

all bodies of government.[12] It is interesting to point out that all four types of emergencies were enacted already in original text of the Constitution adopted in 1990.[13]

Whether they refer directly to state of emergency or be it they stipulate various types of exceptions or dangers, constitutional provisions that regulate extraordinary emergency circumstances confer specific powers on different institutions, disrupting the usual mechanism of separation of powers and allowing concentration of decision-making powers especially in hands of the executive. Extension of powers of the executive branch and prompt activation of the so-called crisis management mechanism, which is today probably included in the agenda of nearly every administrator, are consequences of the attack on regime, state institutions, and endangerment of the lives of citizens. As it regards the example of the Republic of Croatia, the constitutional norms in Articles 17 and 101 demonstrate that the competence of enacting emergency measures is divided between the legislative and executive branch of government. First, in situations where the measures restrict individual constitutionally guaranteed freedoms and rights, it is the legislative body, i.e., the Croatian parliament, that has the exclusive power to enact such measures as long as it is able to convene. Such decision must be passed by a two-thirds majority of all members of parliament. The president of the republic is authorized to act only if the Croatian parliament is unable to convene and upon the previous proposal of the government and with the counter signature of the prime minister. Second, in accordance with Art. 101, the president of the republic is authorized to issue decrees with the force of law, but on the ground and within the limits delegated by the Croatian parliament. Only if the parliament is not session, the president of the republic is authorized to regulate all issues required by the state of war.

Finally, there are two more constitutional provisions—Arts. 7 and 100—which are of special significance in the context of the possible application of emergency measures. Namely, pursuant to the provisions of Art. 94 par. 3, the president of the republic is responsible for

12 Emphasizing that there is an agreement on such interpretation among Croatian constitutional lawyers, Đ. Gardašević refers to following authors: Smerdel and Sokol, Ustavno pravo, Narodne novine, Zagreb, 2009.; Bačić A., Odredbe o stanju nužnosti' u Ustavu Republike Hrvatske iz 1990. godine, Zbornik radova Pravnog fakulteta u Splitu, no. 34/45-46, 1997. p. 49-50. See Gardašević, 2010, p. 352.

13 1990 Constitution, Official Gazette *Narodne Novine* No. 56/1990; Article 17 par. 1 [Special Restrictions in State of Emergency] (1) During a state of war or an immediate danger to the independence and unity of the republic, or in the event of some natural disaster, individual freedoms and rights guaranteed by the constitution may be restricted. This shall be decided by the Croatian parliament by a two-thirds majority of all representatives or, if the Croatian parliament is unable to convene, by the president of the republic…; Article 101 par. 1 [Decrees] (1) The president of the republic passes decrees with the force of law and takes emergency measures in the event of a state of war or an immediate danger to the independence and unity of the republic, or when government bodies are prevented from regularly performing constitutional duties. During the time the president of the republic is making use of such powers, the House of Representatives may not be dissolved…..

the defense of the independence and territorial integrity of the Republic of Croatia.[14] In accordance with provisions of Art. 100 the president is commander-in-chief of the armed forces of the Republic of Croatia (par. 1), he appoints and dismisses military commanders in compliance with law (par. 2), and, as already pointed out, declares war and concludes peace on the basis of the decision of the Croatian parliament (par. 3).; further, in the event of an immediate danger to the independence, integrity, and existence of the Republic of Croatia, the president of the republic may, with the countersignature of the prime minister, order the employment of the armed forces even if a state of war has not been declared (par. 4). On the other hand, Art. 7, which regulates the position and role of the armed forces in its par. 10, stipulates that under the circumstances specified in Articles 17 and 101 of the Constitution, the armed forces may, if necessitated by the nature of a threat, be deployed to assist the police and other state bodies. In accordance with Art. 7 par. 11, the armed forces may also be deployed to assist firefighting and rescue operations and surveillance and protection of the rights of the Republic of Croatia at sea.[15]

Presidential decrees with the force of law are subject to special conditions, both in terms of consultations with the president of the government, and the fact that they are subject to his counter-signature (meaning that it is de facto co-decisioning), as well as regarding the obligation of submitting decrees to the Croatian parliament for approval. There is a difference regarding the latter obligation. If parliament is not in session, it must be done as soon as it is in a position to convene. Otherwise, i.e., if the parliament is in session, presidential decrees must be submitted for parliamentary approval without delay. In the absence of such approval, the decree with the force of law shall cease to be valid.

Standing orders of the Croatian parliament that govern the internal organization and parliamentary procedure contains a separate section, Part 14, which includes Articles 289–293, regulating the work of parliament during a state of war or in conditions of clear and present danger to the independence and unity of the Republic of Croatia.[16] These provisions,

14 Constitution of the Republic of Croatia, Article 94 (1): The president of the Republic of Croatia shall represent and act on behalf of the Republic of Croatia at home and abroad. (2) The president of the republic shall ensure the regular and balanced functioning and stability of government. (3) The president of the republic shall be responsible for the defense of the independence and territorial integrity of the Republic of Croatia.

15 Constitution of the Republic of Croatia, Art. 7, par. 10 and 11: (10) Under the circumstances specified in Articles 17 and 101 of the Constitution, the armed forces may, if necessitated by the nature of a threat, be deployed to assist the police and other state bodies. (11) The armed forces of the Republic of Croatia may also be deployed to assist firefighting and rescue operations and surveillance and protection of the rights of the Republic of Croatia at sea…."

16 Standing orders of the Croatian Parliament, Official Gazette *Narodne novine* no. 81/13, 113/16, 69/17, 29/18,53/20, 119/20: Decision of the Constitutional Court of the Republic of Croatia, 123/20; consolidated text in English available at: https://sabor.hr/sites/default/files/uploads/inline-files/Croatian-Parliament-Standing-Orders_Consolidated-Text_November-2020.pdf

among other, regulate relations toward the government and the president of the republic, and establish procedures concerning situations of impossibility to convene parliament.[17]

2. Limitations of fundamental rights

Living in a community implies that the absolute freedom of its members cannot exist. It is exactly through adoption of the *sub lege libertas* principle, which altogether determines the space and limits of human activities, that the very existence of the community is made possible. The idea of limiting freedom *per se* must therefore find its place in the constitution and the law of the land in general. In that sense, the concept of restricting rights and freedoms must be placed on equal footing with the definition of freedom itself.[18] The exercise of human rights can conflict with each other or with collective interests. To guarantee the equal rights and freedoms of others, as well as to ensure the realization of the interests of the community, it must be possible to impose limitations of human rights and fundamental freedoms.[19] States are therefore entitled to balance interests and limit some rights if necessary. All of the above applies both in normal circumstances of the life of the state and society, as well as in extraordinary situations when even more severe restrictions and derogations can be justified. Moreover, that is inherent to the state of emergency as its very notion is based on two requirements—the concentration of powers, and limitations to rights and freedoms.[20]

States of emergency are therefore always accompanied by legal possibilities of limiting or even suspending certain human rights and fundamental freedoms. Specific normative form of rationalization of individual freedom limits are derogative clauses, included both in numerous national constitutions as well as in some of the most important international human rights treaties—the United Nations International covenant on civil and political rights (ICCPR, 1976), the Council of Europe European convention for the protection of human rights and fundamental freedoms (ECHR, 1953), and the Organization of American States American convention on human rights (ACHR, 1978). Nonetheless, there is always an extensive or more restrictive catalog of non-derogable rights, i.e., list of those fundamental rights that in no case may be suspended. For example, the ACHR catalog of non-derogable rights (Art. 27) is longer than that of the ICCPR (Art. 4) and the ECHR (Art. 15). In fact, three abovementioned international treaties mention four of the same rights: the right to life, the prohibition of

17 The Parliament Standing Order in this part were amended in October 2020; see Ch. 4 for more information.
18 See Bačić A., 2004, p. 74.
19 See Smerdel, 2017, pp. 228–229.
20 Gardašević, 2010, p. 36.

torture and other forms of inhuman or degrading treatment or punishment, the prohibition of slavery, servitude, and forced labour (and related forms of bondage), and finally, prohibition of *ex post facto* (retroactive) criminal law. Each of those treaties requires from its state parties a formal notification of any derogations made, which implies notifying on the respective treaty regime i.e. which rights have been suspended, indicating the reasons for the derogation, and notifying it when the derogation is definitely terminated. Derogative clauses strive to balance the requirements of the state of emergency and respect for human rights guarantees in other ways as well, particularly by emphasizing requirements for non-discrimination and proportionality of measures. Each derogatory measure must be rationally justified, and it must be in the extent i.e. appropriate to the specific situation.[21]

As already pointed out in previous chapter, Article 17 of the Croatian constitution provides that during a state of war or an immediate threat to the independence and unity of the republic, or in the event of major natural disasters, individual constitutionally guaranteed human rights and freedoms may be restricted. Such derogation shall be imposed by the Croatian parliament by a two-thirds majority of all members. Therefore, the power of deciding upon restrictions on human rights during emergency circumstances is primarily vested in hands of the parliament, i.e., it is exclusive as long as the parliament is able to convene. On the other hand, the corresponding power of the president is of a subsidiary nature. Namely, only in case that the Parliament is unable to convene, such restriction may be decided by the president of the republic, acting at the proposal of the government, and with the counter-signature of the prime minister. The legal force of such restrictions is equivalent to provisions of the constitution. In normal circumstances, laws that elaborate constitutionally guaranteed human rights and fundamental freedoms, also referred to as "organic laws," are passed by a majority vote of all representatives (Art. 83). However, in emergency situations that usually demand severe restrictions of rights and freedoms, such parliamentary decisions must be passed by a two-thirds majority of all representatives, which is also a majority required for amending the constitution (though they are not adopted according to a special procedure of constitutional revision).[22] In

21 On derogative clauses in international human rights treaties, see Bačić P., 2003, pp. 359–370.

22 The legislation on protection of national minorities has to be passed by a two thirds majority vote and also falls into category of organic laws. According to Articles 82 and 83 of the Constitution, the Croatian passes three kinds of laws: 1) ordinary laws, passed by a majority vote provided that a majority of deputies is present at the session; 2) organic laws that elaborate constitutionally guaranteed human rights and fundamental freedoms, the electoral system, the organization, authority and operation of government bodies and the organization and authority of local and regional self-government, passed by a majority votes of all deputies; 3) organic laws that regulate the rights of national minorities, passed by a two thirds majority vote of all deputies. Furthermore, the Constitution also establishes category of constitutional laws, which must be passed according to the procedure for the amendment of the Constitution itself and therefore outranks organic laws in the legislative hierarchy. The Constitution denotes two acts as constitutional laws: the Constitutional Law on the Constitutional Court (Art. 132), and the Constitutional Law on Implementation of the Constitution (Art. 151).

Croatian legal thought, it is also widely adopted that extraordinary emergency decrees enacted by the executive, i.e., by the president of the republic at the proposal of the government and with the counter-signature of the prime minister, have a legal force equivalent to provisions of the constitution.[23]

When deciding upon restrictions on human rights and fundamental freedoms, both the parliament and the president of the republic must adhere to important criteria that are set out in the Constitution. The first criterion relates to the principle of proportionality – the constitution explicitly demands that the extent of such restrictions must be appropriate to the nature of the threat. The second criterion relates to the non-discrimination principle – such restrictions must not result in the inequality of citizens with respect to race, colour, sex, language, religion, or national or social origin. Respective constitutional norms do not stipulate which are the rights that may be subject to restrictions. However, Par. 3 of Art. 17 suggests that it could apply to all rights and freedoms except those for which the constitution provides special protection, namely: right to life, prohibition of torture, cruel or degrading treatment or punishment, legal definitions of criminal offences and punishment, and freedom of thought, conscience, and religion. Restrictions upon enumerated rights cannot be imposed at all, not even in cases of clear and present danger to the existence of the state. In that sense, these rights are absolute.

3. State of emergency in practice

The events that followed the adoption of the 1990 Constitution, starting already from its drafting process, significantly determined the first few years of post-socialist constitutionalism in Croatia. Resolving of the issue on an appropriate role of government bodies in the state of emergency was significantly influenced by the war in Croatia that lasted from 1991 to 1995.[24] The war was never officially declared. One of the results of aggression against Croatia was consolidation of the strong constitutional position of the president of the republic (presidential powers were later significantly and comprehensively limited in constitutional reform of 2000). The head of the executive was given considerable powers, including executive emergency prerogatives. According to Art. 101. par. 1, the president of the republic was authorized to pass decrees with the force of law and to enact emergency measures in the event of a state of war or an immediate danger to the independence and unity of the republic, or when

23 These decrees are also sometimes referred to as decrees with constitutional force; Lauc and Ivanda, 2011, p. 136. See also Smerdel, 2013, pp. 69–70.; Bačić A., 2004, p. 284; Gardašević, 2010, pp. 354–355.

24 See, for example, Bjelajac and Žunec, 2009, p. 231-270.

government bodies are prevented from regularly performing constitutional duties. During the time the president of the republic is making use of such powers, the House of Representatives may not have been dissolved. Further, par. 2 obliged the president of the republic to submit decrees with the force of law for approval to the parliament as soon as it is able to convene. President of the republic was also empowered to autonomously decide on the necessary restrictions of constitutional rights and freedoms according to Art. 17, but exclusively under the condition that the parliament was unable to convene.[25]

In 1991 a number of decrees with the statutory force were enacted by the President, out of which more than twenty regulated highly sensitive matters such as organization and work of judiciary, police activities, criminal acts, social security, public gatherings, etc. Furthermore, some emergency decrees included restrictions of constitutional rights and freedoms. Conformity with the constitution of those decrees was challenged before the Constitutional Court on several grounds: no state of emergency was previously officially introduced as a prerequisite for issuing decrees; the parliament was in session the entire time, meaning that president was not authorized to enact measures; and finally, that some measures had retroactive effect, as they came into power on the day of the issuing. In the procedure of constitutional review, the Constitutional Court in its Decision of June 24, 1992, rejected all applicants' complaints and found presidential decrees to be in conformity with the Constitution. The Court in its reasoning did not engage in extensive elaboration of its standpoints. Instead, it rather shortly concluded the following: presidents' constitutional power of enacting emergency decrees is not limited, and consequently all segments of legislative jurisdiction of the parliament may be regulated; the president independently decides on the existence of a state of emergency, on which no specific decision is needed; the constitutional prohibition of retroactivity does not cover presidential decrees, but rather extraordinary circumstances that completely justify their coming into force on the day of the issuing. Interestingly, as it regards the most problematic question, i.e., the obvious fact that the president issued decrees while the parliament was in regular session, although the constitution strictly prohibits such action, the Court remained practically silent. It only stated that the parliament later approved the presidential decrees.

Such passive, rather deferential position of the Croatian Constitutional Court during the first few years of post-socialist constitutionalism may partially be justified by war circumstances, the gradual adjustment of judges to new constitutional values such as the rule of law and the separation of powers, as well as the fact that the executive branch exerted a significant political pressure on the judiciary. However, in years that followed, the Constitutional Court

25 See footnote 13.

managed to strengthen its position, to develop its interpretational capacity and to eventually establish itself as the guardian of the constitution.[26] Though it is worth pointing out that in the Republic of Croatia, except for the war and the *de facto* state of clear and present danger to the independence and unity of the republic, the state of emergency was never officially introduced, such an assessment of Constitutional Court's operation is generally valid both in extraordinary situations as well as in ordinary times.

4. Experiences of COVID-19 from the aspect of constitutional law

In the search for legitimate actions to combat the pandemic, a state of emergency in Croatia was not declared. In the same time, as we shall demonstrate further in text, it was the executive branch, i.e., the government in first place, that took the initiative from the very beginning.[27] The first official case of COVID-19 was reported in the city of Wuhan (PR China) on December 31, 2019, while the World Health Organization (WHO) declared that the coronavirus outbreak constitutes a public health emergency of international concern already on January 30, 2020.[28] Although in late January there were still no recorded COVID cases in Croatia (the first case was reported on February 25), the Croatian government adopted certain precautionary measures related to the pandemic, including the proposition on creating a special central body with the aim of coordinating all public services in the event of a coronavirus outbreak.[29] Pursuant to the Law on Civil Protection System that regulates Croatian civil protection framework,[30] the Civil Protection Headquarters of the Republic of Croatia was established on February 20 as an expert operational body and the minister of the interior (who was also acting vice president of the government at the time) was appointed chief of the Headquarters. Furthermore, the chief of the Civil Protection Directorate (operating under the Ministry of the Interior) was appointed as his deputy, while the director of the Croatian Institute of Public Health became a new member of the Headquarters, ensuring both direct supervision of its operation by the government and an institutional connection with the public health system.[31] With the Decision issued on March 11, the minister of health de-

26 See further in Bačić P., 2010, pp. 386–424.

27 See Plenković, 2020.; Omejec, 2020.; Abramović, 2020.; etc.

28 See the official WHO webpage: https://covid19.who.int

29 See the official webpage of the Croatian government: https://vlada.gov.hr/vijesti/ministarstvo-zdravstva-osniva-se-nacionalni-krizni-stozer-zbog-koronavirusa/28676

30 Law on Civil Protection System, Official Gazette 82/15, 118/18, 31/20.

31 Koprić, 2020, p. 3. As an additional point worth mentioning here, local and county civil protection headquarters were also formed and included in anti-pandemic combat mainly through monitoring and implementation tasks.

clared a COVID-19 epidemic in the Croatian territory pursuant to the Law on the Protection of the Population from Infectious Diseases.[32] Thus the Croatian government, just like executive branches in most other countries, expeditiously took charge in adopting measures aiming to prevent the spread of disease.

The Croatian parliament soon amended its aforementioned normative framework. The Law on Civil Protection System was amended on March 19, 2020, in an expedited procedure, giving the Civil Protection Headquarters very broad powers to adopt decisions and guidelines to manage the pandemic. Headquarters almost immediately started adopting different emergency measures based on the recent amendments of the Law on Civil Protection System, i.e., its newly added Art. 22a[33] that, among other, authorizes it to make "decisions and instructions" that will be implemented by the civil protection headquarters at regional and local levels. Such measures may be enacted in the event of "special circumstances" that imply unpredictable situations which cannot be put under effective control and in which the "the life and health of citizens" are endangered.[34] Further, the Law on the Protection of the Population from Infectious Diseases was amended on April 18, again in an urgent procedure, authorizing the Civil Protection Headquarters to enact special security emergency epidemiologic measures, which are otherwise ordered by the Minister of Health. Amendments covered the situation of an epidemic of an infectious disease or a threat of such epidemic in relation to which the WHO has also declared a pandemic or epidemic or a threat. Headquarters, in that case, must act in cooperation with the Ministry of Health and the Croatian Institute for Public Health, all under direct supervision of the government. Anti-epidemic measures in question are, for example, quarantines, travel bans, restrictions of movement, as well as new security measures of self-isolation, i.e., the isolation of persons in their own homes or in other appropriate spaces. In practice, it was Civil Protection Headquarters that enacted all such measures.

The executive response to pandemic led by the Croatian government provoked lively public debate in which several problematic issues were highlighted and challenged before the Constitutional Court. First, such actions provoked criticism based on the argument that, according to law, only the minister of health (and not Headquarters) was authorized to order emergency

32 Law on the Protection of the Population from Infectious Diseases, Official Gazette 79/07, 113/08, 43/09, 130/17, 114/18, 47/20.

33 Law on Amendment to the Law on Civil Protection System, Official Gazette 31/20, Art 22a: (1) In the event of special circumstances that imply an event or a condition which could not have been predicted and could not be affected, which endangers the life and health of citizens, property of greater value, significantly damages the environment, economic activity or causes significant economic damage, the Civil Protection Headquarters of the Republic of Croatia makes decisions and instructions implemented by the civil protection headquarters of local and regional self-government units. (2) The decisions and instructions referred to in paragraph 1 of this Article shall be made for the protection of the life and health of citizens, the preservation of property, economic activity and the environment and the harmonization of the treatment of legal persons and citizens.

34 See Decision on restrictions…. adopted on March 19, 2020, Official Gazette 32/20,

measures. Second, since the constitutional emergency framework was not activated, the COVID-19 crisis was managed through the legislative framework, i.e., anti-epidemic procedures foreseen by the Law on Civil Protection System and Law on the Protection of the Population from Infectious Diseases. Both laws that served as the basis for conducting decisions and enacting different measures aimed to prevent the spread of the virus were adopted following procedure stipulated by Art. 16 of the Constitution which – unlike Art. 17, which regulates the emergency regime and provides for laws concerning human rights restrictions to be passed by a two-thirds majority – enables the restriction of human rights and fundamental freedoms in normal circumstances, following standard legislation making procedure provided for specific kind of laws.[35] Decisions adopted by Civil Protection Headquarters were followed by serious complaints of illegality due to faulty legal entitlement, excessive use of "legislative" powers, overall lack of transparency and accountability, etc.[36] The government was repeatedly accused of retroactively giving legality to those measures, as well as for not declaring a state of emergency through the majority it controls in the parliament. Consequently, a number of related constitutional complaints and constitutional review proposals were submitted.

Deciding on the merits concerning aforementioned and similar objections, the Constitutional Court in its Decision of September 14, 2020, *inter alia* confirmed that the executive body (Civil Protection Headquarters) that adopted decisions on restrictions of human rights and freedoms with the aim of containing the pandemic was legally entitled to adopt such measures based on the legislative framework created by the Croatian parliament (Law on Civil Protection System, Law on the Protection of the Population from Infectious diseases). Headquarters had the legal authority to take anti-epidemic measures and their aim – protection of the health and life of citizens by preventing and suppressing the spread of the COVID-19 epidemic/pandemic – is legitimate. The Constitutional Court also held that, as Headquarters operate directly under the supervision of the government, decisions adopted by Headquarters are undoubtedly subject not only to the control of executive, legislative, and judicial authority; they are subject to Constitutional Court review as well. However, according to the Court, in the process of adopting measures to prevent the spread of the virus, Headquarters remained within the limits of its powers as prescribed by the Constitution.[37]

35 Constitution of the Republic of Croatia, Official Gazette 85/2010 (consolidated text), Art. 16: (1) Freedoms and rights may only be restricted by law in order to protect the freedoms and rights of others, the legal order, and public morals and health. (2) Any restriction on freedoms and rights shall be proportionate to the nature of the need for such restriction in each individual case.

36 Decisions enacted by the Civil Protection Headquarters of the Republic of Croatia aiming to prevent the spread of coronavirus are available at: https://civilna-zastita.gov.hr/odluke-stozera-civilne-zastite-rh-za-sprecavanje-sirenja-zaraze-koronavirusom/2304.

37 See Decision of the Constitutional Court in cases no. U-I-1372/2020, U-I-1999/2020, U-I-2075/2020, U-I-2233/2020, U-I-2161/2020, U-I-2234/2020, 14. 9. 2020., Official Gazette 105/2020.

Furthermore, the Constitutional Court of the Republic of Croatia confirmed that the Croatian parliament may adopt derogatory measures based on two constitutional grounds: – Art. 16 in ordinary times, and Art. 17 in emergency situations. However, it is not up to the Constitutional Court to assess whether the parliament should in certain extraordinary circumstances activate Art. 17, regardless of the fact are those circumstances specifically enumerated in that constitutional norm – in fact, to decide whether the COVID-19 pandemic qualifies as a "major natural disaster," or such derogatory measures could be adopted in application of Art. 16 that allows restrictions of rights and freedoms in normal times. The choice between the application of Article 16 or Article 17 is in the exclusive domain of the Croatian parliament as a legislative body, since such decision is transferred to it by the Constitution.[38] Hence, the fact that disputed laws and measures were not enacted based on Art. 17 of the Constitution does not make them unconstitutional.[39]

The Constitutional Court confirmed its standing in several later cases. One of those cases concerned the amendments of the Local Elections Act allowing for postponement of local elections by the government in the event of special circumstances that include an unforeseeable event or situation which currently endangers the legal order; the life, health or safety of the population; and of property of significant value (in fact, that solution is very similar to the one introduced by the Law on Civil Protection System).[40] Furthermore, the Court held that such restriction does not limit the general voting right of voters in local elections nor the right to local self-government which these voters exercise through the election of members of the local representative body. The elections are only postponed while the "special circumstances" last.[41] The other case in which the same standing is confirmed concerns the competence of Headquarters to regulate working hours in catering industry. Namely, the Hospitality and Catering Industry Act was amended in March 2020 in a way that basically the same "special circumstances" clause was added. The Constitutional Court upheld the constitutionality of the amended act, confirming the legal authority of Headquarters as well as the legitimate aim of anti-epidemic measures that in this case, *inter alia*, restricted certain aspects of free enterprise and proprietary rights.[42] Furthermore, the Constitutional Court in numerous other cases decided upon constitutionality of different anti-epidemic measures such as restrictions on public gatherings, sport activities, mandatory wearing of face protection masks, etc.

It is evident that the Constitutional Court decided supportively of the executive and legislative approach towards the anti-pandemic combat in prevailing majority of cases. However,

38 Ibid., par. 27.
39 Three judges gave dissenting opinions, while other two judges gave concurring opinions.
40 See footnote 32.
41 Decision of the Constitutional Court in case no. U-I-1925/2020, September 14, 2020.
42 Decision of the Constitutional Court in case no. U-I-2162/2020, September 14, 2020.

one of those rare examples when it took the opposite stance regards the constitutional review proceedings of the Standing Orders of the Croatian parliament.[43] Namely, Standing Orders were amended in October 2020 to facilitate the special functioning of parliament in circumstances of an epidemic of an infectious disease. The amended article, among other things, limited the number of members of parliament (MPs) who can attend a session of parliament and shortened their debating time limits, while it also provided that meetings of working bodies may be held and broadcasted by using electronic means, that voting as well can be done electronically, etc. However, the Constitutional Court decided to struck down the amendment, emphasizing that, though the newly proposed measures have a legitimate aim which is to protect the health and lives of MPs by preventing and combating the spread of the COVID-19 epidemic/pandemic, any restriction to the exercise of the rights and duties that belong to MPs according to the Constitution must be objectively and reasonably justified; since that was not the case here, the Court decided to repeal the amendment.[44]

43 Decision of the Constitutional Court in case no. U-I-4208/2020, October 20, 2020.

44 Standing Orders of the Croatian Parliament, Article 293b (1): If an infectious disease epidemic, a risk of an infectious disease epidemic or an infectious disease pandemic is declared by the competent authority pursuant to a special law, parliament shall continue its work in accordance with the provisions of the Constitution of the Republic of Croatia and these Standing Orders. (2) The presidency of parliament may decide, in accordance with the decision of the competent authority determined by a special law, on the commencement and termination of the special proceedings of parliament in the cases referred to in paragraph 1 of this Article and shall notify members of parliament thereof. (3) A session of parliament may be held in other rooms of parliament other than the session hall, or outside parliament, if so decided by the presidency of parliament. (4) The presidency of parliament shall determine in which rooms a session will take place, how many members of parliament may be present in each of the rooms in accordance with the epidemiological measures in force and shall define the adequate proceeding. (5) When distributing seats among political groups in the rooms where a session is held, the presidency of parliament shall adhere to the proportionality principle and allocate seats in a manner that corresponds with the share of each political group in the total number of members of parliament. (6) For the purpose of calculating the number of members of parliament who will be present in the rooms where a session is held, all members of parliament who do not belong to a political group shall exceptionally be considered as a political group. If the speaker and all the deputy speakers of parliament are unable to chair a session of parliament for justified reasons referred to in paragraph 1 of this Article, the Speaker of parliament shall designate which members of parliament will chair the session and in which order, applying Article 31 of these Standing Orders. (7) Members of parliament shall speak in the debate for no longer than five minutes and representatives of political groups for no longer than ten minutes. (8) The sponsor of an act or the representative designated by the sponsor, may deliver an introductory speech at the beginning of the debate and a speech at the end of the debate which shall not exceed 20 minutes. (9) A representative of the government, when not the sponsor, may deliver an introductory speech at the beginning of the debate no longer than ten minutes, while each time when given the floor to provide individual explanations during the debate, his/her time shall be limited to five minutes. (10) If a recess is requested in line with the provision of Article 248 of these Standing Orders, the chair may grant a recess that may not exceed five minutes. (11) Meetings of working bodies of Parliament may be held and broadcast by using electronic means, audio and/or video conferencing. (12) Members of parliament who, for justified reasons referred to in paragraph 1 of this Article, cannot be present in the hall where the session is held, shall be enabled to debate and vote by using electronic means, audio and/or video conferencing, as decided upon by the presidency of parliament. (13) Regarding any matter not specifically regulated by this Article, other provisions of these Standing Orders shall apply accordingly.

5. COVID-19 as an economic crisis: Fiscal and monetary measures of crisis management

5.1. Sectoral aid to the economy

a) General

An important operational role in the implementation of direct assistance measures to the economy has been assigned to the Croatian Employment Service (the Employment Service). Within the program of active employment policy from March 2020 until today, the Office has implemented two measures to help the economy: a) Support for job preservation in crisis activities affected by coronavirus (Support) and b) Reduction of working hours (SRV). These measures were designed and implemented based on regular active employment policy measures regulated by a separate legislative instrument, the Civil Obligations Act,[45] and in accordance with the strategic plans and programs of the government of the Republic of Croatia.[46]

It was strategically decided to pay support to employers who were required to pass it on to workers, whether it was the first or the second measure. An employer who meets the prescribed publicly announced conditions would enter into a special contract with the bureau based on which the aid was paid, either for the preservation of jobs or for the reduction of working hours. The balance sheet assets of such employers increased by the amount of paid aid, and they were obliged to prove to the office based on individually concluded contracts that the aid was "redirected" to the salaries of a specific number of employees for a specific period, i.e., must be shown in the cost items for the salary of an individual worker. As the received aid increases the scope of the employer's balance sheet assets, and the employer is not obliged to return them to the office, the peculiarity and asymmetry of mutual obligations is noticeable. The measures should be viewed in the light of the public law restrictions on free enterprise, and the aid paid can be said to be a kind of compensation for the imposed entrepreneurial prohibitions. Certain economic activities, such as catering, tourism, transport, etc., were nearly paralyzed, which inevitably affected labor relations and increased the number of unemployed, while in some sectors, such as informatics, communications, construction, etc., employment increased due to pandemics.[47] The measures have mitigated

45 Labor Market Act, Official Gazette, no. 118/2018 (hereinafter, ZTR).

46 *Arg. ex* art. 34 of the ZTR.

47 Economic Trends, 9/10, 2020, Croatian Chamber of Commerce, p. 5. Available at: https://www.hgk.hr/documents/gospodarska kretanja091020.pdf (Accessed: May 5, 2021).

the increase in the number of unemployed in vulnerable sectors. Unlike some European countries, such as the Federal Republic of Germany or Austria,[48] the Republic of Croatia did not decide to pay a certain percentage of the difference in company income for the same months in the business year before the pandemic, but the support was directed exclusively through active employment policy measures. Both measures concern only employees of employers whose business has deteriorated or been prevented by public law measures.

The conditions and methods of using the funds for the implementation of active employment policy measures in the purview of the Employment Service are adopted, based on Article 36, paragraph 1 of the Labor Market Act, by the Administrative Council of the Employment Service. Due to budget planning and work plans, it was established that he this would occur in December for the following year. The conditions contain an introduction, legislative basis, glossary, active employment policy measures by interventions, general conditions, description of measures by interventions.[49] The measures are classified according to the type of activity and intervention and financial support and are adjusted to the EUROSTAT classification of labor market policies. They are structured in seven main measures and eight sub-measures. The manner of implementation of the conditions and the manner of use of funds shall be determined by a contract between the Employment Service and the user of funds.[50]

b) Support for the preservation of jobs in crisis activities affected by the coronavirus (COVID-19)

Support for the preservation of jobs in activities affected by the pandemic regulatesthe purpose for the measure, the target groups of employers, the target groups of workers, the duration, the amount of the subsidy, the method of selecting beneficiaries, the criteria for selecting beneficiaries, the method of submitting applications and documentation, the obligations of employers, the obligations of the institute, and the payment of funds.[51]The aim of the measure is to preserve jobs for employers whose economic activity has been disrupted due to a special circumstance caused by the coronavirus. Every employer, regardless of the legal form in which it is established, is obliged to keep business books in accordance with the regulations governing accounting. The exact extent of the disruption of the economic activity

48 On the complex structure of economic assistance measures in Germany and Austria, see: https://www.bmwi.de/Redaktion/DE/coronahilfe.html and https://www.aws.at/corona-hilfen-des-bundes/ (Accessed: May 15, 2021).

49 The general conditions for the use of active employment measures in 2021 have been made public and can be found at the link https://mjere.hr/katalog-mjera/opci-uvjeti-mjere-aktivnog-zaposljavanja-2021/.

50 *Arg. ex* art. 36 para. 2 of the ZTR.

51 The conditions and ways of using funds for the implementation of active employment policy measures for 2021 are published on the website of the Office.

of an individual employer can be seen from those business books. However, the aid measure does not authorize the beneficiary to request the payment of the difference, or part of the difference, which is shown in the company's books as a reduction in economic activity within a certain period. On the contrary, it is exclusively dependent on the number of workers and an employer whose business scope has been reduced because of public law measures can only claim support for each individual worker.

To adapt to the new economic situation, on April 2, 2020 the government of the Republic of Croatia adopted a package of measures to help the economy during the coronavirus epidemic, which included provisions on another group of measures to help the economy due to the coronavirus epidemic. Timely and particularly significant measures to help the economy, the implementation of which is the responsibility of the Ministry of Finance and the Ministry of Labor and Pensions, include: a) increasing the amount of support in the sectors affected by coronavirus to HRK 4,000; b) exempting employers who use job support sectors affected by coronavirus from the costs of their contributions, c) exempting, fully or partially, all taxpayers who are banned from working, or if their work is disabled or significantly hindered, from paying public benefits due during April, May and June 2020, and d) postponing the payment of value added tax until the issued invoices are collected.

During the second half of 2020 and the first half of 2021, in accordance with the evolution of the epidemiological situation and economic trends, the board of directors of the employment bureau made decisions on aid for the preservation of jobs, which, due to its short application, were tied to the corresponding month.

5.2. Contract for the award of support for the preservation of jobs in activities affected by coronavirus (COVID-19)

Based on the Active Employment Policy Measures program, the Employment Service is authorized to grant subsidies for the preservation of jobs. They are, based on the provision of Art. 36, paragraph 2 of the Labor Market Act, are awarded to those employers who enter into a special contract with the Employment Service. That public entity fully decides on the form and content of the Contract for the award of support for the preservation of jobs (hereinafter: the Contract). Determining the conditions and ways of using the funds for the implementation of active employment policy measures, the Management Board of the Employment Service drafted a list of contractual clauses. The content of the contract thus formed is unchangeable, and co-contractors do not have the possibility of individual negotiation on a particular contractual provision nor can they point out their proposals in terms of narrowing or expanding the proposed content of the contract. The contract is concluded for the purpose of preserving jobs, i.e., to achieve the public interest; and its conclusion is regulated

by compulsory public law provision of Art. 36 para. 2 of the Labor Market Act, *prima facie*, that one should ask whether it is a legal private business, a legal business of public law, or an administrative contract.

In concreto, the Employment Service does not issue an individual administrative act deciding on someone's request. Moreover, the compulsory provision of Article 36, paragraph 3, explicitly stipulates that the granting of aid within the framework of active employment policy measures is not an administrative matter. As the mentioned contract cannot be classified under the public law regime of administrative contracts, which is confirmed by the recent administrative court practice,[52] it is clear that it is a private law contract. As both contractors are not traders, nor are they part of the relationship between consumers and traders, this is not a commercial or consumer contract, but a civil law contract. From its features, it is possible to determine its legal nature, which is important not only for filling its legal gaps but also for the correct interpretation of its provisions.

The contract form was designed by the Employment Service, so it is a standard (formal or standardized) contract. Given the urgency of measures to support entrepreneurs who have been prevented or hindered from working and the number of contracts that the Employment Service had to conclude with employers, it was necessary to prepare a standard contract form that will be used to conclude numerous contracts. The number of employees and the time period for which the benefit is paid are adjusted to the individual employer who is obliged to provide accurate data on employees. It is clear from the content of the contract that the contractors are mutually committed to specific actions. The primary contractual obligations of the Employment Service are the payment of support to the employer's giro account in a certain amount for each employee in monthly installments for the recognized period and the supervision of whether the employer uses the funds earmarked or pays salaries in accordance with the attached employment contracts. The primary obligations of the employer are: a) to pay the salary to the employee for whom the benefit was paid in accordance with the employment contract, rulebook, collective agreement or special regulation; b) to submit to the Employment Service evidence of salary for the previous month no later than the fifth of the current month; c) to submit to the Employment Service the necessary documentation for the purpose of control; d) to retain the number of workers for whom the support has been paid, unless there is a reduction in the number of workers due to justified reasons.

52 The Administrative Court in Zagreb, in two cases, in the decision Business number: Usug-2/19-6, dated 2 July 2020 and in the decision business number: Usug-1/19-6, dated July 6, 2020, takes the position that these are contracts concluded on the basis of a program of active employment policy measures within the competence of the Bureau and they are not administrative contracts. The dissatisfied party (in this case, the plaintiff), and as it is a potential dispute regarding the concluded civil law contracts, may seek possible protection of their rights before the regular civil court.

The basic features of the Agreement are consensus, causality, commutativity, and collectability. The contract is created by the consent of the will of the contracting parties, the purpose of its conclusion is to preserve jobs, and at the time of its conclusion, mutual actions and party roles are known. In billing contracts, one party compensates for the benefits it receives from the other party. It is clear that the cash benefit paid to an employer is a determined benefit that is reflected in an increase in his assets. The company (employer)[53] is obliged to direct the received support by paying it to the employee through a proportional part of the salary. However, it is precisely this proportional part of the salary that increases the assets of that company because, in the absence of support, it would be forced to pay the entire salary from the source of its own or external capital. However, the contract includes toll legal transactions, so the question of what compensation the employer provides for the acquired benefit, which is reflected in the increase of his property, should be answered in the affirmative: Namely, the obligation to pay the salary to the employee is completely independent of the contract on the grant of preservation of jobs, and the duty to submit evidence and documentation for control could not be considered as a proportionate counteraction of the employer. Therefore, the only question that remains open is whether the obligation to retain the number of workers can be qualified as an obligation, which in turn obliges the other party to pay the agreed support. Reciprocity does not exist in the typical contractual sense of complete bilateral obligation (synalagmatics), because the employer to whom the money is paid does not commit to any action to the Employment Service, but undertakes to retain workers in the specified period. This fulfills the purpose of the said measure of payment of aid for the preservation of existing jobs in activities that are endangered by administrative measures of public authorities. Although the contract differs from the classic model of toll legal transaction, in which there are obviously mutual exchanges of performance and counter-performance, or benefits that the contractors want to achieve with the contract, it is still correct to classify it as toll contracts because it will make it easier to apply the rules, its interpretations, the liability for material and legal defects, and the termination of the contract, which applies to all named collection contracts. Such classification strengthens the characteristics of toll contracts—for example, deviation from the informality of the contract is possible only based on a legal provision or the express will of the contractor; in addition to primary contractual obligations, there are secondary obligations in the form of liability for material and legal defects. If the obligation of the employer to keep the workers were to be exempted, the agreement would be uncollected, because it would contain only the obligation of the public entity to pay the support. The obligation to retain workers is realized for the purpose of payment of support.

53 Although the support measure is most often used by employers organized in the form of a company, it should be noted that the addressees of these measures are also artisans, family farms, and sports associations.

The worker is protected from receiving a business-related termination of the employment contract, and at the same time the Employment Service is financially relieved because the worker will not become the addressee of receiving unemployment benefits precisely for the purpose of paying the support.

A public entity enters into a contract and pays support precisely with the aim of "making it difficult" for the employer to terminate the employment contract, except for justified reasons.[54] The suspicion that the contract has elements of an employment contract is dispelled, because refraining from terminating the employment contract is not compatible with that contract, and the same can be said for the suspicion of connection of an element of the contract in which the Employment Service has "the right to control other contractual obligations" account. It is a specific *sui generis* contract that regulates property relations and achieves a balance between the property interests of the employer and the public entity. Without this contract and the support paid to the employer under it, many workers would lose their jobs and become candidates for receiving unemployment benefits. Precisely because the contract contributes to the preservation of jobs, it can be said that they achieve a balance of property interests of the contractor. The mutual exchange of performance and counter-performance is not as direct as in the case of "classic" civil or commercial contracts, because failure to act or omission of dismissal of employees is a negative action of the employer that may indirectly affect the Employment Service: if the employer violates the contractual obligation and dismisses the employee, such action will directly affect the Employment Service only in the event that the employee, as an unemployed person, registers for it for the benefit of the unemployed. This fact, as well as the fact that employers are financed by state public funds or the European Union, do not deprive the treaty of the character of a property relationship, so, *rerum natura*, the general principles of law and appropriate dispositive provisions of the law of obligatory relations apply to it.

Conclusion of the contract

The Employment Service has published on its website a public call for the use of active employment policy measures in the form of Aid for the preservation of jobs in activities affected by COVID-19. The invitation is addressed to all employers who can be organized as a company, artisans, family farmers (OPG),[55] but also natural persons who are self-employed

54 In Art. 3. paragraph 3, Contracts for the granting of support for the preservation of jobs, exhaustively list the justifiable reasons for reducing the number of workers: expiration of fixed-term contracts, termination of employment contracts at the request of workers, personal termination, retirement, and dismissal for misconduct.

55 The structure and operation of family farms are regulated by the Family Farming Act, Official Gazette No. 29/18.

and who are insured on that basis and are liable to income tax. Therefore, a natural person or legal person as an employer should perform an economic activity and be liable to pay income tax. All other business entities that perform activities in eligible sectors and are subject to income tax are also considered employers. Target groups of employers are sectorally divided by specific activities. Regardless of which activity they perform, it is determined that the right to support can be exercised by micro-entrepreneurs, i.e., employers who employ less than ten employees as well as employers who cannot perform the activity in accordance with the Decisions of the Civil Protection Headquarters (national, county, local self-government units), and who are closed by a decision of the Headquarters or are as suppliers business related to such employers.

The public call for the use of active employment policy measures published electronically on the website of the Employment Service is not an offer or a general offer in terms of the provisions of Art. 253, paragraphs 1 and 254 of the Civil Obligations Act. It does not contain the essential components of the contract, nor can it be read from the sender's will to enter into a contract on the basis of which an unspecified addressee (employer) as a bidder could accept the published conditions by a mere statement. The public invitation announced the assumptions and conditions under which the offer of those employers to submit a bid for concluding a contract and who submit a request for support under the published conditions, will be accepted. Therefore, a public invitation should legally qualify as an invitation to make an offer under published conditions in accordance with the provision of Art. 256 paragraph 1 of the Civil Obligations Act. With it, the Employment Service invites addressees who meet the criteria from the public invitation to submit a bid for concluding a contract in the form of a request for the use of support. A specific employer who wants to be paid support is obliged to request the use of support and clearly state the number of workers for whom support is requested and the period for which it is requested, and attach the documentation specified in the public invitation, i.e., the invitation to make an offer under published conditions. Such a correctly sent request addressed to the Employment Service is an offer because it contains the basic elements of individualization necessary for the creation of the contract and mirrors the sender's (employer's) *animus contrahendi* (Article 253, paragraph 1 of the Civil Obligations Act). Such a legal qualification, however, does not give the employer complete certainty that the support will be paid to him, because the one who invites the offer to be made under the published conditions is not unconditionally obliged to accept every offer. Without the acceptance of the offer, the contract on granting support for job preservation cannot be created as a necessary legal basis for a valid and legal payment of support. Namely, the sender of the invitation to submit a bid may reject the bid for concluding a contract for justified reasons and he may also do so because of unjustified reasons or without a valid reason. He cannot be forced to sign a contract by a lawsuit, but he can be forced to do so on the basis of the provision

of Art. 256, paragraph 2, of the of the Civil Obligations Act, hit the sanction of compensation for damages if it unfoundedly rejects the offer. *In concreto*, this is not a normal civil or commercial transaction and it can hardly be compared that the Employment Service refuses to enter into a contract if the bid is submitted in accordance with the published conditions, invoking the said authority not to accept the bid or not to enter into a contract with the bidder. Any selective treatment of individual employers would not only undermine and jeopardize the achievement of legal policy objectives to help the economy, but would violate the provisions on the duty of indiscriminate conduct of public entities, provisions on competition protection, etc. As a public entity implementing active employment policy measures is not in the role of an ordinary bidder who could unreasonably reject the bid referring to the provision of Art. 256, paragraph 2 of the Law on Obligations, it can be said in principle that every correctly fulfilled and sent offer must be accepted due to the legal and political goals of assistance to the economy and due to public law regulations that frame the actions of the Employment Service. *A contrario*, an unfounded rejection of a bid authorizes the bidder to stand up with a claim for damages. The extent of the damage thus caused should be measured not only by the tenderer's actual cost of submitting the tender, but also by the amount of support for each worker duly requested by the employer.

Determining the moment at which a contract is concluded is important for several reasons. This time is relevant for assessing the existence of a lack of will in concluding the contract, the ability to conclude the contract, since then the rights and obligations between the contracting parties arise.[56] Also, this time can be decisive for the fate of the legal transaction in case one of the contractors goes bankrupt, fulfillment of the contract. At the time that it is assessed whether some acquired rights should be recognized, it can be decisive for the occurrence of tax liabilities, etc. The contract is concluded, based on the provision of Art. 262, paragraph 1 of the Civil Obligations Act, when the user/bidder receives a statement from the bidder that he accepts the bid (the so-called acceptance theory). At that moment, offer and acceptance cease to be individual and separate manifestations of the will and become a contract, i.e., they become their common thing. Acceptance of a bid by which the Employment Service as a bidder declares that it accepts a bid in concreto can be manifested in two ways. The first and usual way is a statement in the form of a notification of the approved request or consent to the offer sent to the employer by the Employment Service (employee or advisor of the Employment Service). The statement or manifestation of the will of the bidder and the bidder is made electronically in different places, so it is a matter of concluding a contract among those present. The moment of perfection of the contract is not affected by the fact

56 For more on this, see Barbić, 1980, p. 66.

whether the bidder read the e-mail or whether he found out about the acceptance, but the decisive objective moment in which the bidder could find out the content of the bid, and that is the logical second in which the bidder received notification that the application for support is approved, i.e., the offer is accepted. This moment is regulated in detail in special legislative instruments that regulate electronic commerce, e.g., an electronic signature or electronic document.[57] The contract is concluded at the moment when the bidder receives acceptance of the bid, provided that the acceptance is received at the moment when it is received by the computer or provider or server of the bidder, or when the acceptance message became available to the recipient.[58] If this notification arrived at the e-mail address of the bidder after the expiration of working hours, it should be assumed that the contract was concluded on the first following day.[59]

Another way of expressing the will of the offerer is the implicit action of paying the funds to the account of the employer.[60] Then the relevant moment of concluding the contract is the day when the funds were transferred to the employer's account, regardless of when the employer found out about it. Since then, the amount paid has become part of the balance sheet assets of the employer, which he freely disposes of. However, on the basis of the concluded contract with the Employment Service, the employer is obliged to direct the said payment to the "items" of the salary cost for workers.

Protection of rights and liability for breach of obligations under the Contract

In any contractual relationship, the contractors may validly and duly fulfill their contractual obligations. *A contrario*, either party may breach a contractual obligation, either by non-performance, by improper performance or delay. Violation of the contractual obligations of one contracting party authorizes the other party, faithful to the contract, to stand up for damages, unilaterally terminate the contract or activate a specially contracted or legal authority related to breach of contract—for example, contractual penalty or the right of retention. The rules of contractual liability are elaborated within the corpus of classical contract

57 Electronic Commerce Act, Official Gazette, no. 173/03, 67/08, 36/09, 130/11, 30/14, 32/19. Law on Electronic Document, Official Gazette, no. 150/05. Regulation (EU) no. Regulation (EU) No 910/2014 of the European parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93 / EC, Official Journal of the European Union L 257/73. (this regulation replaced the previous Electronic Signature Act, which was in force until August 17, 2017).

58 *Arg. ex* art. 15 of the Electronic Commerce Act.

59 Namely, the consultant of the institute as a person who processes the received application for support or decides on the acceptance of support can work overtime and due to the expanded scope of work send electronically a notification of approval of support or consent to the offer in the evening. In such circumstances, it should be assumed that the contract was concluded on the first following day (Barbić, 1980, p. 66).

60 *Arg. ex* art. 262 para. 2 of the Civil Obligations Act.

law, so they also apply to this agreement. However, the question arises whether there are any deviations from these rules or whether there are any special rules of liability arising from the agreement itself. From the previous analysis of its content, determination of its legal nature and characteristics, a negative answer can be seen. The very fact that the office has published on its website special substantive and procedural legal rules or conditions under which each applicant (employer/bidder) should submit is irrelevant. Namely, contractual liability is not affected by the rules published by the office on its website, for example, that the employer may object to the submitted notification on the assessment of the request within eight days of receiving the notification sent to the Central Office of the Employment Service.[61]

When it was established that the office had paid the support without a valid basis or the applicant did not meet the set conditions, in practice the employer was usually obliged to make a refund in installments or installments through out-of-court settlements. If the employer does not agree to such a settlement, which is exceptional in practice, proceedings will be initiated before the competent court. If the Employment Service refuses to conclude the contract or rejects any objection, employers may seek legal protection before the competent court by filing a lawsuit against the Employment Service.

In the event of a breach of contract, the faithful may use means provided by the general rules of the law of obligations. The Civil Obligations Act does not contain a provision that explicitly states and defines all presumptions of liability for damage, but our doctrine and jurisprudence agree that the general presumptions of liability in our law: subjects, harmful action, damage, causation, and wrongfulness, and up to liability for damage can only come if all these assumptions are met cumulatively.[62] The general rules on non-contractual liability for damages apply accordingly to liability for breach of contract.[63] According to the rules on non-contractual liability, which are applied by analogy to contractual liability, as a rule, any illegal action (the breach of contractual obligations) is liable according to the principles of subjective presumed liability.[64] This means that the guilt of the debtor for breach of contract is rebuttably presumed, and the mildest form of guilt, simple negligence.[65] The debtor acted with ordinary negligence if he or she did not use the attention of a good businessperson.

61 The central office is obliged to respond to the complaint within 10 days. The most common reasons for filing a complaint are: meeting the conditions of falling turnover, number of workers, exceeding the deadlines for submitting applications, belonging to eligible employers, workers meet the criteria of the target group, performing an acceptable activity, etc.

62 For more on this, see Klarić and Vedriš, 2014, p. 583 *et seq*. On the necessity of cumulative fulfillment of the stated assumptions, see the decision of the Supreme Court of the Republic of Croatia: VSRH Rev-635/08 of September 8, 2009.

63 Art. 349, the Civil Obligations Act.

64 Arg. ex art. 1045. ZOO. General rules on the subjective breach of contract are the rule, but objective liability is also extremely possible when specifically provided by law.

65 Arg. ex art. 10 para. 1 and 2 of the Civil Obligations Act.

Namely, although employers do not necessarily have to be traders, for example, a sports association or a family farm, this criterion in assessing due diligence should be applied equally to both parties. Irrespective of whether the employer is a craftsman or operates in the form of a company or some other form, he is obliged to approach the conclusion of the contract and fulfill the contractual obligations with the care of a good businessperson. The institution in this regard, should not enjoy the privilege of reducing attention (the attention of a good host) or bear the burden of increased attention (the attention of a good expert).

With regard to the amount of damages, the creditor is entitled to compensation for ordinary damages and lost profits.[66] However, if the contract is breached intentionally, through gross negligence or fraud, the creditor is entitled to the entire damage, both foreseeable and unforeseeable damage.[67] If the creditor or the person for whom he is responsible has contributed to the occurrence or amount of damage, or aggravation of the debtor's position, the compensation is proportionally reduced because then it is a shared responsibility, and it is provided by the rule that the party alleging breach of contract reasonable measures to reduce the damage caused by that violation, otherwise the other party may request a reduction in compensation.[68]

The debtor is released from liability for damage if he proves that he could not fulfill his obligation, that he was late in fulfilling the obligation due to external, extraordinary, and unforeseen circumstances arising after the conclusion of the contract that he could not prevent, eliminate, or avoid (force majeure).

If, after concluding the agreement, the Employment Service subsequently learns about the facts that would have an impact on the realization of the support, it is authorized to terminate it unilaterally, and to undertake activities to collect the claim from the employer. The question remains whether the Employment Service may do so because the requested documentation has not been submitted to it or the employer is late in doing so. In the case of minor breaches of contractual provisions, termination should be avoided as the most radical sanction and more lenient solutions should be sought, as the question of the validity of such termination arises.

5.3. Shortening working hours (SRV)

The SRV measure has been in force since June 1, 2020. The conditions and methods of using the funds for the implementation of the SRV measure prescribe the objectives of the measure, target groups of employers, target groups of workers, duration of the measure, amount of support for reducing working hours, submission of requests, obligations of

66 Art. 1089, Civil Obligations Act.
67 Art. 346, paragraphs 1 and 2 of the Civil Obligations Act.
68 Art. 346, paragraphs 4 and 347 of the Civil Obligations Act.

contracting parties.[69] The aim of the SRV measure is to preserve jobs among employers whose work has been temporarily reduced due to a special circumstance caused by the coronavirus. The addressees or target group of the measure are employers who perform economic activity and employ ten or more workers. Micro-entrepreneurs employing less than ten workers did not address these measures.

The SRV measure applied to all workers, regardless of whether they are employed for a definite or indefinite period of time, who are employed by employers from the target group of employers. However, it did not apply to workers who were "owners, co-owners, founders, board members, directors, or procurators" of the company (employer). It was determined that the threshold for participation in the share capital of the company in the amount of 25% is the threshold for the use of the measure. Namely, a member of the company who is also an employee of the company and is a shareholder in a company that exceeds the prescribed threshold cannot use the benefits of this support, while a worker who has a share below the prescribed limit is classified as a target group. Workers who are also members of the supervisory or management board as employee representatives may use this measure. As the company law governing relations in capital companies does not provide for the possibility that the management of capital companies consists of employee representatives, employees who are also members of the management of joint stock company (d.d.) and limited liability company (d.o.o.), or its procurators are not the addressees of the SRV measure.

The state financial assistance is awarded for the temporary introduction of full-time work of workers lasting less than the monthly fund of hours, but not less than 70% of the monthly fund of hours, in the amount of up to HRK 2,800 per month net per worker. The value of the amount of net compensation for part-time work is calculated according to the formula: up to HRK 4,000 (€530) divided by the monthly fund of full-time hours for the month for which support is requested, multiplied by the number of hours for which support is provided.[70]

The basic criterion when applying for part-time support is the expected decline in the total monthly working hours of all employees employed by the employer on a full-time basis in the month for which support is requested by at least 10%. In addition to the basic criterion, the employer must prove the connection between the impact of the COVID-19 epidemic on business and the expected decline in the total monthly working hours fund. This connection is evidenced by the decrease in revenue/receipts in each month for which support is requested of at least 20% compared to the same month last year and one of the following reasons: a)

69 Conditions and ways of using funds for the implementation of the SRV measure are publicly published on the institute's website: https://mjera-orm.hzz.hr/skracivanje-radnog-vremena/.

70 A table on the amounts of co-financing depending on the number of working hours and the percentage of working time can be found in the SRV (Reduction of working hours) support document itself and is its integral part. It is publicly available on the Institute's website.

decrease in orders by terminating or amending the contract with the buyer/customers on the fall of orders for the month for which support is requested; b) inability to contract new jobs during the COVID-19 epidemic; c) impossibility of delivery of finished products or contracted and paid raw materials, raw materials, machines, tools, and d) impossibility of new orders of raw materials, raw materials, tools and machines necessary for work.

6. Summary

The COVID-19 pandemic with its far-reaching socioeconomic consequences undoubtedly represents a crisis of historic proportions. Spreading around the world rapidly and with unexpected intensity, it created a sort of global state of emergency and it forced both states and the international community to make prompt and drastic moves. Since the outbreak began at the end of 2019, or in March 2020 when the WHO declared the pandemic, until today, living in *de iure* or *de facto* state of emergency became a reality for the citizens of almost all the countries in the world. For legal theory that primarily requires reflection on numerous and different measures by which public authorities responded to the pandemic threat with the aim to protect the society, while these actions almost without exception included severe limitations of human rights and fundamental freedoms. It is therefore understandable that such measures opened many problematic questions, and exposed weak spots in crisis management mechanisms and procedures of nation states as well as of the international community.

Complex problems connected with "constitutionalism under extreme conditions" constitute permanent topics of interest for scholars of comparative constitutional law. The global alert caused by pandemic reminded us of some old questions, and it also opened numerous new questions concerning changes that affect public law in times of extraordinary pressure on constitutions and constitutional law, as well as on other branches of law.[71] Emergency measures must have provisional character, while the existence of threat must be real. Combating the pandemic, some states declared the state of emergency, while others—the Republic of Croatia being one of them—avoided to do so, opting instead to act on basis of previously existing normative framework, mostly public health legislation that already contained certain crisis management mechanisms.

Emergency situations require taking any action deemed necessary to protect national security, maintain law and order, and protect citizens' lives and properties, enabling state authorities to respond effectively to imminent danger and to restore normal conditions.[72]

71 Albert and Roznai, 2020, pp. 1–13.
72 Bulmer, 2018, p. 6 *et passim*.

Therefore it can be concluded that the purpose of such measures is in fact conservative as they are aimed to eliminate the threat to the system and restore it to its previous state. Furthermore, it means that executive bodies are not permitted to use emergency powers in order to permanently change the elements of constitutional system. Such belief was traditionally placed among essential components of a liberal constitutional democratic government.[73]

Constitutionalism in extreme conditions functions in different ways. Comparative overviews of constitutional and legal frameworks for dealing with emergency situations, delegation of legislative and overall decision-making power to the executive, as well as of actual executive responses in situations that constitute clear and present danger for the state and the preservation of its population, such as the recent one necessitated by the COVID-19 pandemic, offers answers to the questions that stress the necessity of prompt and effective response to imminent danger at all levels of governance, while also noting the perilous challenges for democratic societies inherent in states of emergency.

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73 Ferejohn and Pasquino, 2004, pp. 210–239.

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Dimensions of emergency powers in the Czech Republic

HOJNYÁK DÁVID – SZINEK CSÜTÖRTÖKI HAJNALKA

1. Regulation of the emergency powers in the Czech Republic

The regulation of the emergency powers in the Czech Republic can be found solely at a constitutional level. Apart from a state of war, the Czech constitutional system did not contain emergency power provisions. However, the Constitutional Act No. 110/1998 Coll., regarding the Security of the Czech Republic as amended[1] and adopted in 1998, filled this gap in the constitutional regulation. The Act on state security provides an exhaustive list of and comprehensive regulations for special legal regimes in the Czech Republic.

It is important to emphasize that the Czech constitutional system consists of the Constitution of the Czech Republic[2] and several special Acts, called the Constitutional Acts.[3] Pursuant to the provisions of the Constitution, the Constitutional Acts are an integral part of the Czech constitutional system. While the general rules of the emergency powers can be found at a constitutional level, the peacetime rules for preparing for a special legal regime and the rules for crisis management are laid down in the regular Acts.

1 *Ústavní zákon č. 110/1998 Sb., o bezpečnosti České republiky* (hereinafter referred to as the Constitutional Act on state security). The adoption of Constitutional Acts requires the vote of three-fifths majority (qualified majority) in the Chamber of Deputies of the Czech Parliament, and a three-fifths majority (qualified majority) of the senators of the Upper House of the Parliament of the Czech Republic [Article 39 (4) of the Constitution].

2 *Ústavní zákon č. 1/1993 Sb., Ústava České republiky* (hereinafter referred to as the Constitution)

3 Article 112 (1) of the Constitution

Hojnyák Dávid: Researcher, Ferenc Mádl Institute of Comparative Law, Hungary
Szinek Csütörtöki Hajnalka: Researcher, Ferenc Mádl Institute of Comparative Law, Hungary
Hojnyák, D., Szinek Csütörtöki, H. (2022) 'Dimensions of emergency powers in the Czech Republic' in Nagy, Z., Horváth, A. (eds.) *Emergency Powers in Central and Eastern Europe*, pp. 129-147. Budapest: Ferenc Mádl Institute of Comparative Law; https://doi.org/10.47079/2022.znah.epicaee.1_6

1.1. Cases of special legal regimes

In the Czech legal system, specific cases of emergency powers include state of emergency, condition of threat to the state, and a state of war.[4]

a) State of emergency

Pursuant to the Constitutional Act on state security, the government may declare a state of emergency in cases of natural catastrophe, ecological or industrial accidents, or other dangers that threaten life, health, property, domestic order, or security to a significant extent.[5] The state of emergency can be considered a flexible provision as it includes the term "other danger." The specific reason for ordering a state of emergency does not have to coincide with pre-recorded events; however, it must be comparable to the suitability of jeopardizing the protected value.[6]

A state of emergency may be ordered for the entire state or for specified parts.[7] It may be ordered by the government; however, the Chamber of Deputies of the Parliament of the Czech Republic[8] must be immediately informed, which may annul the decision of the government.[9] It is important to note that according to the regulation of the Constitutional Act on state security, at the time of declaring a state of emergency, the government is obliged to determine the fundamental rights to be restricted and the extent of the restriction.[10] However, a special legal regime may be ordered only in accordance with the Charter of Fundamental Rights and Freedoms of the Czech Republic,[11] which lays down rules for the restriction of fundamental rights and freedoms.[12] A state of emergency may last for a maximum of 30 days and may be extended with the prior consent of the Chamber of Deputies.[13] However, the government or the Chamber of Deputies may decide to annul a state of emergency before the expiration of

4 The official Czech translations of the emergency powers are as follows: *nouzový stav* – state of emergency, *stav ohrožení státu* – condition of threat to the state, *válečný stav* – state of war.
5 Article 5 (1) of the Constitutional Act on state security.
6 For more information on this subject see Rychetský et al., 2015
7 Article 2 (2) of the Constitutional Act on state security
8 The Parliament of the Czech Republic is a bicameral chamber parliament, which consists of the Chamber of Deputies of the Parliament of the Czech Republic *(Poslanecká sněmovna Parlamentu České republiky)* (hereinafter referred to as the Chamber of Deputies of the Parliament or the Chamber of Deputies) with 200 members, and the Senate of the Parliament of the Czech Republic *(Senát Parlamentu České republiky)* with 81 senators.
9 Article 5 (4) of the Constitutional Act on state security
10 Sládeček, 2020, p. 273.
11 *Listina základních práv a svobod* (hereinafter referred to as the Charter or Charter of Fundamental Rights and Freedoms).
12 Article 6 (1) of the Constitutional Act on state security
13 Article 6 (2) of the Constitutional Act on state security

the specified period.[14] It is important to note that a state of emergency may not be declared due to a strike held for the protection of rights or of legitimate economic and social interests.[15] It is noteworthy, that the reasons for a concrete possibility of restriction of fundamental rights in case of a state of emergency remains unclear, since it is the least severe form of special legal regime.[16]

An immediate state of emergency may be considered a special, accelerated form of state of emergency. The Prime Minister may declare a state of emergency if a delay presents a danger. Within 24 hours of the announcement thereof, the government must either ratify or annul the decision.[17] Nevertheless, the Chamber of Deputies may subsequently annul this measure.

b) Condition of Threat to the State

According to the Constitutional Act on state security, if the state's sovereignty, territorial integrity, or democratic foundations are directly threatened, the Parliament may, on the government's proposal, declare a condition of threat to the state.[18] In contrast to a state of emergency, a condition of threat to the state lacks a demonstrative list of possible threats; only the "object of protection" is regulated.[19] There are no provisions for the restriction of fundamental rights during this time of a special legal regime. However, the Czech scientific literature interprets the provisions of the Constitutional Act on state security[20] as provisions creating civil obligations. Based on this reasoning, citizens shall be involved in ensuring the security of the state, which may be seen as an obligation to tolerate the restriction on fundamental rights.[21]

A condition of threat to the state can only be ordered on the motion of the government with absolute majority of the votes in the Chamber of Deputies and the Senate of the Parliament.[22] A condition of threat to the state, similar to a state of emergency, can be ordered for the entire country or for certain parts.[23] For the duration of a condition of threat to the state or a state of war, the government may request that the Parliament to deal with government bills in shortened debate. The Chamber of Deputies must adopt a resolution on such bills within 72 hours of submission and the Senate within 24 hours of transmittal by the Chamber of Deputies. If the Senate does not give its view within that period, the bill is deemed as adopted.[24]

14 Article 6 (3) of the Constitutional Act on state security
15 Article 5 (2) of the Constitutional Act on state security
16 Klíma, 2009, p. 877.
17 Article 5 (3) of the Constitutional Act on state security
18 Article 7 (1) of the Constitutional Act on state security
19 Pavlíček et al., 2011
20 Article 3 (2) of the Constitutional Act on state security
21 Vaníček, 2001, p. 264.
22 Article 7 (1)-(2) of the Constitutional Act on state security
23 Article 2 (2) of the Constitutional Act on state security
24 Article 8 (1)-(2) of the Constitutional Act on state security

For the duration of a condition of threat to the state or a state of war, the President of the Republic does not have the right to overturn the statutes adopted in a shortened debate.[25] In addition, the government may not submit a bill for amendment to a Constitutional Act for shortened debate. It should be emphasized that the Constitutional Act on state security contains no provisions for the termination of a condition of threat to the state, except if the declaration contains a deadline for the special legal regime.[26] The body entitled to terminate a condition of threat to the state will be the Parliament.[27]

c) State of War

The rules concerning a state of war were laid down both in the Constitution and in the Constitutional Act on state security. The Parliament decides on the declaration of a state of war, if the Czech Republic is attacked, or if such is necessary for the fulfillment of its international treaty obligations regarding collective self-defense against aggression.[28] The concurrence of an absolute majority of all Deputies and Senators is required for the adoption of a resolution declaring a state of war, a resolution granting assent to sending the armed forces outside the territory of the Czech Republic or the stationing of the armed forces of other states within the territory of the Czech Republic, or a resolution concerning the Czech Republic's participation in the defensive systems of an international organization of which it is a member.[29] However, neither the Constitution nor the Constitutional Act on state security determines who or which body can initiate the procedure for the declaration of a state of war. Under the provisions of the Constitution Act on state security, a state of war can only be ordered for the entire country. From the wording of the Constitution, we can deduce the *ultima ratio* nature of a state of war, since it can only be ordered if less intensive measures, such as declaring a state of emergency or a condition of threat to the state, are not appropriate or not sufficient to achieve the desired goal.[30] As in the case of a state of emergency and a condition of threat to the state, the government may initiate a shortened debate on bills submitted to the Parliament, and the President of the Republic cannot overturn the adopted laws.

25 Article 8 (3) of the Constitutional Act on state security
26 Article 8 (4) of the Constitutional Act on state security
27 Stejskal, 2017, p. 34.
28 Article 43 (1) of the Constitution
29 Article 39 (3) of the Constitution
30 Article 2 (1) of the Constitutional Act on state security

1.2. Common rules for emergency powers

If during a period of a state of emergency, a condition of threat to the state, or a state of war, the conditions in the Czech Republic do not permit elections as per the deadline prescribed for regular electoral terms, the deadline may be extended by statute, for no longer than six months.[31] When the Chamber of Deputies is dissolved, the Senate shall decide on the extension or termination of a state of emergency, the declaration of a condition of threat to the state, or a state of war. In addition, it will decide on the Czech Republic's participation in defensive systems of international organizations. Furthermore, the Senate shall be competent to give consent to sending the armed forces of the Czech Republic outside the territory or to the stationing of the armed forces of other states within the territory of the Czech Republic, unless such decisions are reserved to the government.[32] The decision to declare a state of emergency, a condition of threat to the state, or a state of war shall be made public by means of mass media and be promulgated like a regular Act.[33]

It can be summarized that according to the Constitutional Act on state security, in case of a state of emergency and a condition of threat to the state, the government will be empowered to develop the necessary measures.[34] The Constitutional Act on state security also regulates the functioning of the National Security Council of the Czech Republic.[35] According to the statutes of the Security Council, its board has nine permanent members, chaired by the Prime Minister, while the board's vice presidents are the Deputy Prime Minister and Minister of the Interior.[36] The board also includes the Ministers of Defense, Foreign Affairs, Finance, Industry and Trade, Transport, Health, and Agriculture.[37] The meetings may be attended by the Speaker of the Chamber of Deputies, the Speaker of the Senate, ministers who are not permanent members of the Security Council, the administrative authorities, representatives of local and regional governments, and other experts.[38] The task of the Security Council is to prepare all the proposals specified by the government that are necessary for the protection of

31 Article 2 (1) of the Constitutional Act on state security
32 securityArticle 2 (1) of the Constitutional Act on state security
33 Article 12 of the Constitutional Act on state security
34 Article 5 and Article 7 of the Constitutional Act on state security
35 National Security Council of the Czech Republic *(Bezpečnostní rada státu České republiky)*, hereinafter referred to as the Security Council. The detailed rules related to the operation of the Security Council are laid down in the statutes of the board, which are set out in the first annex of the Decree of a Government no. 544/2014. The statute has been amended several times in recent years, most recently by the Decree of the Government no. 692/2018.
36 Article 3 (1)-(3) of the Statutes of the Security Council. It should be noted that the current Deputy Prime Minister of the Czech Government and the Minister of the Interior are the same person, Jan Hamáček.
37 Article 3 (4) of the Statutes of the Security Council
38 Article 9 (2) of the Statutes of the Security Council

the security of the state. Concerning this, the Constitutional Act on state security also declares that the President of the Republic is entitled to participate in the meetings of the Security Council and has the right to request a report from the Security Council and discuss with its members any matter within its decision-making competence.[39] Although the President of the Republic is given additional powers in relation to the Security Council, the President's neutral role can be observed in relation to emergency powers. The President of the Republic is the Commander-in-Chief of the Armed Forces who appoints and promotes generals. However, the countersignature of the Prime Minister or a member of the government appointed by the Prime Minister is required for the validity of his decisions.[40] It is important to mention that the government may set up a Central Crisis Staff[41] to deal with crisis situations, as a part of the Security Council and function as one of its organizational units. The Central Crisis Staff is founded on the Prime Minister's decision for the primary task of submitting proposals for the Security Council and supporting the government to resolve crises.

Thus, we can see that during a state of emergency and a condition of the threat to the state, the government is empowered to deliver measures to resolve the crisis. As for a state of war, neither the Constitution nor the Constitutional Act on state security has any provisions about the body entitled to govern.[42]

1.3. State of danger – an extraordinary situation; not considered a special legal regime

In addition to the above-discussed special legal regimes, the Czech law operates the category of "state of danger,"[43] regulated in Act No. 240/2000 Coll. on Crisis Management and on Amendments to Certain Acts. However, legal literature on the subject matter considers a state of danger as the fourth type of special legal regime in the Czech Republic. The authors justify this finding on the one hand by the fact that the constitutional regulation in the case of a state of war and a condition of threat to the state is rather incomplete and not clear, and on the other hand, the constitutional regulation of the emergency powers are not considered exclusive in this matter.[44] For these reasons, we consider it reasonable to describe the state of danger along with the triple division enacted in the Constitutional Act on state security in cases of a special legal regime.

39 Article 9 of the Constitutional Act on state security
40 Article 63 (1) c), g) and Article 3 of the Constitution
41 In Czech language: *Ústřední krizový štáb*
42 Regarding the Czech emergency powers, see also Mareš and Novák, 2019; Kelemen, 2019, pp. 9–35.; Clement, 2020, pp. 207–234.; Khakee, 2009, pp. 32–40.
43 *Zákon č. 240/2000 Sb., o krizovém řízení a o změně některých zákonů* (hereinafter referred to as the Act on crisis management)
44 Kudrna, 2017, p. 163.

A state of danger may be ordered as an emergency measure if people's lives, health, property, or the natural environment are at risk that cannot be prevented by the regular measures of the administrative authorities, regional and local authorities, and integrated rescue system units. However, the intensity of the threat is significant.[45] A state of danger can be ordered for the whole territory[46] or a specific part by the regional governors; however, in the case of the capital, Prague, the mayor may order a state of danger. Regional governors should immediately inform the government, the Ministry of the Interior of the Czech Republic, neighboring regions, and any region that may be affected by the threat.[47] A state of danger may be ordered for up to 30 days; however, regional governors can extend the duration with the consent of the government.[48] The decision of declaring a state of danger must define the crisis measures required to deal with the danger and the scope of these measures.[49] The Act on crisis management stipulates that if it is not possible to eliminate the threat by ordering a state of danger, the regional governors must immediately invite the government to declare a state of emergency. The measures ordered by the regional governors shall cease to have effect on the date of the declaration of a state of emergency unless the government decides otherwise. The crisis measures that remain in force shall be deemed to be measures made by the government.[50] The regional governors or the government may decide to terminate a state of danger before the expiration of the specified period; however, the government may terminate a state of danger even if the conditions set out in the decision declaring a state of danger are not met.[51]

2. Restriction of fundamental rights during a special legal regime

Under the Constitution, fundamental rights and freedoms are protected by the judiciary,[52] thus, guaranteeing the highest level of protection to fundamental rights in the Czech Republic. The Charter of Fundamental Rights and Freedoms *(Listina základních práv a svobod)*[53] which is part of the Czech constitutional order, is a key source of law on this matter as it sets

45 Act on crisis management, Section 3 (1).
46 The Czech Republic is administratively divided into 13 regions and the capital, Prague. The regional governors and the mayor of Prague will be, hereinafter, referred together as regional governors.
47 Section 3 (3) of the Act on crisis management
48 Section 3 (4) of the Act on crisis management
49 Section 3 (2) of the Act on crisis management
50 Section 3 (5) of the Act on crisis management
51 Section 3 (8) of the Act on crisis management
52 Article 4 of the Constitution
53 For more information, see Husseini et al., 2020

out the rules applicable to the restrictions on fundamental rights and freedoms.[54] The Charter declares that obligations can only be imposed by a form of an Act with respect for fundamental rights and freedoms.[55] In addition, restrictions on fundamental rights may only take place in accordance with the Charter, must preserve their essential elements, and must not be used for purposes other than those stipulated in the relevant Act.[56]

According to several scientific papers on the subject,[57] the introduction of an extraordinary measure in a democratic state governed by the rule of law requires the coexistence of several conditions. The most relevant ones are exceptionality, legality, proportionality, purposefulness, inviolability of the foundations of the constitutional order, the existence of control mechanisms, and respect for obligations arising from international law.[58]

The Constitutional Act on state security is very concise regarding the restriction of fundamental rights as it only lays down provisions in relation to a state of emergency. According to the Constitutional Act on state security, at the time of declaring a state of emergency, the government is obliged to determine the fundamental rights to be restricted and the type or extent of the restrictions.

Regarding the restriction of fundamental rights during a special legal regime, the most important source of law is the Act on crisis management, which sets out, in detail, each measure that may be imposed. It must be emphasized that the legislation explicitly regulates only restrictive measures that can be imposed during a state of emergency or a condition of threat to the state. The second chapter of the Act on crisis management regulates the powers of the government and other bodies, particularly of the Ministries of the Interior, Health, Transport, Industry and Trade, and the municipalities, cities, and the local governments with extended powers, and the Czech National Bank (hereinafter referred to as the Central Bank). The Act on crisis management also regulates the powers of the Security Council and the Central Crisis Staff. Given the limitations of the present paper, only the most important measures that can be ordered by the government are presented.

During a state of emergency and a condition of threat to the state, only the following fundamental rights may be limited for the time and to the extent necessary:

— the right to personal integrity and the inviolability of private dwellings
— property rights and rights of use of natural and legal persons
— the right to free movement and housing (for areas at risk or affected by a crisis)

54 Stejskal, 2017, p. 47.
55 Article 4 (1) of the Charter
56 Article 4 (2) and (4) of the Charter, for more, see Orava, 2015, p. 54.
57 Concerning this, see Dienstbier, 2016, pp. 26–30.; Klíma, 2012; Ramraj and Guruswamy, 2011, pp. 91–95.; Scheppele, 2010, p. 178.
58 Dienstbier, Derka and Horák, 2020, p. 421.

— the right of assembly (in areas at risk or in crisis)
— the right to conduct a business (in the context of activities that could jeopardize, disrupt, or potentially impede the effective implementation of crisis measures)
— the right to strike, if it could lead to the interruption or impossibility of rescue and liquidation work.[59]

The Act on crisis management also exhaustively lists the measures that the government may order during a state of emergency. This category includes, in particular, the following restrictive measures: evacuation of persons or property from a specified area; prohibition of entry, stay, and movement of persons to specified areas; and ordering mandatory work.[60] The government has the right to take measures during a state of emergency to protect state borders and ensure the stay of foreigners or stateless persons, and, in this respect, deploy the armed forces to ensure the implementation of the crisis measures. In addition, the government may impose bans on the management of public funds and payment transactions during a state of emergency.[61]

The Act on crisis management sets out measures that may be ordered during a condition of threat to the state. A majority of these measures can be ordered during a state of emergency as well.[62] However, the Act emphasizes that in addition to the measures already mentioned in connection with a state of emergency, the government may restrict the entry of persons to the country who have not obtained Czech citizenship; restrict the possession of firearms and ammunition; and control the trade of the explosives, nuclear materials, ionizing radiation sources, hazardous chemicals, biological materials, and genetically modified organisms.[63]

3. Practical cases of promulgation of a special legal regime

We find practical examples of a state of emergency, while a condition of threat to the state and a state of war have not been declared till date.[64] However, within the scope of these examples, we distinguish between cases where a state of emergency was assigned to the entire

59 Section 5 of the Act on crisis management
60 Section 6 (1) of the Act on crisis management
61 Section 6 (3) of the Act on crisis management
62 On this point, the Act on crisis management refers to the measures that may be ordered in a state of emergency, which are set out in Section 6 (1) and (3) and Section 7.
63 Section 7 of the Act on crisis management
64 For the first time in the history of Czechoslovakia, which was established in 1918 and split into the Czech Republic and Slovakia in 1993, a state of war was formally declared during World War II. In 1941, Edvard Beneš, the emigrating Czechoslovak president, declared that Czechoslovakia was at war with Nazi Germany and Hungary, as these two countries had violated the sovereignty of the Czechoslovak state.

country, and where it was ordered to specific parts of the state. In the following cases, a state of emergency was ordered to a specific part:

— The floods of August 2002 led to a crisis in several regions of the country, which posed a significant threat to people's lives, physical integrity, and security of property in the affected regions. As a result, former prime minister, Vladimír Špidla declared a state of emergency for five regions.[65]
— The floods of April 2006 led to the government declaring a state of emergency in seven regions.[66]
— The hurricane of January 2007 led to the government declaring a state of emergency.[67]
— The floods of June 2013 resulted in the government declaring a state of emergency in six regions and the capital, Prague.[68]

It is evident from these cases that a state of emergency was declared during natural disasters, which endangered people's lives, integrity, and security. The resolutions of the government or the Prime Minister precisely define the fundamental rights to be restricted and their extent. For example, the right to property, free movement and residence, and assembly were restricted to the extent necessary to deal with the crisis. The right to conduct a business or to continue a business were also restricted if the holder of that right endangered, disrupted, or hindered the implementation of the crisis measures. There are no public debates, court judgments, or decisions of the Constitutional Court of the Czech Republic[69] in connection with the above-mentioned cases.

For the first time in the history of the modern-day Czech Republic, a state of emergency was introduced for the whole territory in 2020 in connection with the coronavirus pandemic.[70] During the initial phase of the pandemic, the Minister of Health introduced emergency measures based on the provisions of Act no. 258/2000 on the protection of public health.[71] Following this, on March 12, 2020, the government introduced a special legal regime

65 *Rozhodnutí předsedy vlády č. 373/2002 Sb.* (Resolution of the Prime Minister no. 373/2002.). A state of emergency lasted from August 12, 2002 to August 22, 2002.
66 *Rozhodnutí vlády č. 121/2006 Sb.* (Resolution of the government no. 121/2006). A state of emergency lasted from April 2, 2006 to April 19, 2006.
67 *Rozhodnutí vlády č. 11/2007 Sb.* (Resolution of the government no. 11/2007). A state of emergency lasted from January 25, 2007 to February 5, 2007.
68 *Rozhodnutí vlády č. 140/2013 Sb.* (Resolution of the government no. 140/2013). A state of emergency lasted from June 2, 2013 to June 28, 2013.
69 *Ústavní soud České republiky* (hereinafter referred to as Constitutional Court or the Czech Constitutional Court).
70 Hojnyák and Ungvári, 2020, pp. 125–128.
71 Section 80 (1) g) legally authorizes the Minister of Health to establish emergency measures *(mimořádné opatření)* in the event of an epidemic, while section 69 (1) lists the types of measures that may be ordered in the event of an epidemic or imminent threat thereof.

and declared a state of emergency for the entire country.[72] According to the Constitutional Act on state security, the government may declare a state of emergency in cases of natural catastrophe, ecological or industrial accidents, or other dangers that, to a significant extent, threaten life health, property or domestic order, or security. During a state of emergency, three types of legal instruments were used to deal with the consequences of the pandemic: Acts, government measures (resolutions of the government), and emergency measures issued by the Minister of Health.

The declaration of a state of emergency gave the government emergency powers to adopt rapid and effective measures to deal with the coronavirus pandemic and restrict fundamental rights.[73] A state of emergency was ordered for a maximum of 30 days. Post two extensions, the state of emergency finally ended on May 17, 2020 after 66 days; however, maintaining increased hygiene and health standards was made mandatory. The second wave outbreak was predicted by experts in October 2020. Unfortunately, it arrived much earlier than expected, prompting the government to declare a state of emergency again on October 5, 2020, which was extended several times and remained in force until February 14, 2021. On the following day (February 15, 2021), the government declared a state of emergency once again, which lasted for 12 days, until February 26, 2021. A fourth state of emergency was put in force from February 27, 2021 to April 11, 2021. However, since then, until the closing of this manuscript, the Czech government has not declared any more special legal regimes.[74] Certain public debates arose in this regard. Several relevant cases came to light, focusing on the alleged unconstitutional measures of the government and the violation of the rule of law. The complaints brought to the Constitutional Court were regarding the introduction of emergency powers and seeking the annulment of government measures. These complaints referred, in particular, that a state of emergency was ordered in an unconstitutional manner and the provisions of the restriction of fundamental rights, in several cases, were incompatible with the criteria of proportionality and were not in accordance with the Constitution and the provisions on the restriction of the fundamental rights contained in the Act on crisis management.[75] In the present paper, we briefly describe the following cases.

On March 26, 2020, a Czech lawyer, David Zahumenský filed a constitutional complaint with the Czech Constitutional Court. He based his complaint on the opinion that the declaration of a state of emergency was not in line with the constitutional order and did not respect the fundamental human rights requirements. As a result, Zahumenský demanded

72 Sova, 2020, p. 298.
73 Venice Commission, 2020, IV.D. 55. and 58.
74 Syllová, 2020, pp. 19–21.
75 Hojnyák and Ungvári, 2020, pp. 134–136.

the annulment of these measures. The Constitutional Court rejected the complaint for several reasons:[76]

- regarding the resolution of the government to declare a state of emergency, the Constitutional Court has no jurisdiction to judge its constitutionality
- in case of crisis measures, the complaint was not submitted by the entitled person
- for measures of the Minister for Health, the complaint was rejected because certain measures of the Minister had already been repealed.

Following the unfavorable decision of the Constitutional Court, Zahumenský and his wife appealed to the European Court of Human Rights. Zahumenský's wife, Vendula Zahumenský, on behalf of her husband, just before filing the complaint to the Constitutional Court, filed a lawsuit with the Municipal Court of Prague on March 17, 2020,[77] in which she objected to certain measures issued by the Minister of Health, certain crisis measures issued by the government, and the government decision to declare a state of emergency. In her complaint, she demanded the annulment of the measures. The Municipal Court of Prague dismissed the lawsuit on April 28, 2020. As a result, Zahumenský and his wife filed a complaint with the Supreme Administrative Court of the Czech Republic seeking the annulment of the decision of the Municipal Court of Prague. Their application was rejected.[78]

On April 23, 2020, the Municipal Court of Prague annulled four emergency measures taken by the Czech Minister of Health in connection with the coronavirus pandemic, which restricted the free movement of citizens and the pursuit of their business and economic activities.[79] According to the court, the measures were illegal because no minister had the right to take them. Such decisions can be made solely by the government under the Act on crisis management.[80]

During the second wave, the Constitutional Court rejected two more constitutional complaints[81] in November 2020 on formal grounds regarding imposing a state of emergency and restrictive measures. According to the information available on the official website of the Constitutional Court, the complaints were not submitted by authorized persons and were, therefore, rejected for formal reasons.[82]

76 Decision of the Constitutional Court of the Czech Republic no. ÚS 8/20.
77 Case no. 10 A 35/2020.
78 Verdict no. 2 As 141/2020.
79 Hejč, 2020, p. 185.
80 Růžička, 2020, p. 549.
81 Decisions of the Constitutional Court of the Czech Republic no. ÚS 99/20 and no. ÚS 100/20
82 In this regard, see the announcement on the official website of the Constitutional Court of the Czech Republic: www.usoud.cz/aktualne/ustavni-soud-odmitl-dve-stiznosti-proti-usnesenim-vlady-o-vyhlaseni-nouzoveho-stavu-ao-prijeti-krizoveho-opatreni (Accessed: 15 December 2020)

4. Economic effects of the coronavirus pandemic: fiscal and monetary tools for crisis management

Like other countries of the world, the economic crisis resulting from the coronavirus pandemic had serious economic consequences in the Czech Republic. In the following section, we briefly analyze the fiscal and monetary measures ordered by the state to mitigate the effects of the economic crisis.[83]

The main macroeconomic indicators in the Czech Republic changed because of the coronavirus pandemic. The table below compares the macroeconomic data for 2019, which was unaffected by the pandemic, with 2020, the first year of the pandemic.

The Czech Republic	2019	2020
Growth of the real GDP (Percentage change compared to the previous year)	3.0 %	−5.8 %
General government gross debt (As a percentage of GDP)	30.3 %	38.1 %
Balance of the central budget (As a percentage of GDP)	0.3 %	−6.2 %

Table 4
Macroeconomic analysis of the Czech Republic (2019–2020)
Source: Authors' compilation based on data provided by the Czech Statistical Office[84] and Eurostat[85]

As can be seen from the statistics, the economic growth[86] in the Czech Republic has fallen sharply due to the coronavirus crisis. Meanwhile, the government debt to GDP ratio[87] increased by almost 8%, while the budget-to-GDP ratio,[88] after a minimum budget surplus of 0.3% in 2019, exceeded by 6%. In 2020, the Parliament amended the central budget deficit three times, eventually raising the original deficit target of CZK 40 billion to a record CZK 500 billion. Therefore, it can be concluded that the deteriorating economic data is a consequence

83 The list of economic measures ordered by the government can be found at the official website of the Government of the Czech Republic: https://www.vlada.cz/en/media-centrum/aktualne/measures-adopted-by-the-czech-government-against-coronavirus-180545/#economic (Accessed 31 May 2021)

84 The database of the Czech Statistical Office is available in English at https://www.czso.cz/csu/czso/ari/notification-of-government-deficit-and-debt-2020-first-notification-data-notified-by-eurostat (Accessed 31 May 2021)

85 The Eurostat database is available at https://ec.europa.eu/eurostat/en/web/main/data/database (Accessed 31 May 2021)

86 According to Eurostat, the real GDP growth compared to the EU-27 was 1.6% in 2019 and −6.1% in 2020.

87 According to Eurostat, the ratio of general government gross debt to GDP in the EU-27 was 77.5% in 2019, while it was 90.7% in 2020.

88 According to Eurostat, the central budget deficit in the EU-27 was -0.5% in 2019 and -6.9% in 2020.

of the economic effects of the coronavirus pandemic and the crisis measures taken to mitigate them. However, these macroeconomic data show that the Czech economy was more resilient to the negative impact of the financial crisis during the analyzed period compared to the average economic performance of the 27 Member States of the European Union.

The Czech National Bank took important monetary policy measures to mitigate the effects of the crisis and support the Czech economy. One of the first decisions was to cut key interest rates in several steps. To strengthen the stability of the financial market, the Act on the Czech National Bank was also amended, which relaxed the restrictions on open market transactions. As a result of the amendment, which was in line with the regulations of the European Central Bank, the central bank was allowed to trade in assets with a term of more than a year and make transactions with banks, credit unions, and other organizations (such as insurance and pension companies or other institutional investors). In addition, the Central Bank reduced the countercyclical capital buffer for Czech exposures and issued a recommendation to banks and insurance and pension companies to refrain from paying dividends or other measures that could jeopardize the financial and economic resilience of individual institutions during the crisis.

The most significant measure of the Czech government to protect the labor market was the introduction of the "Antivirus program."[89] The Antivirus program followed the *Kurzarbeit* scheme. The aim of this program was to financially support the payment of the wages of employees in companies affected by the coronavirus pandemic, depending on the extent of the effect. Under Antivirus "A" program, companies that were forced to shut down due to the restrictive measures received wage subsidies. The state paid wages to 80% of the workers. Under Antivirus "B" program, the state provided wage subsidies to companies whose activities were significantly limited by the pandemic. The state took over 60% of employees' wages. In addition, the state provided wage subsidies to sole proprietors in the form of a one-off amount of CZK 25,000. The COVID I-II-III loan programs were also launched by the state in cooperation with the Czech-Moravian Guarantee and Development Bank. The interest-free loan program was available to sole proprietors and small and medium-sized enterprises affected by the pandemic.

As the crisis made it difficult to meet tax obligations, several tax relief measures were introduced at the state level. A detailed description of tax relief measures would be beyond the scope of this work; therefore, we only present the most important measures. The government extended the regular deadline for filing tax returns for both natural and legal

89 For more information on the Antivirus program, see the information issued by the Ministry of Labour and Social Affairs of the Czech Republic: https://www.mpsv.cz/documents/20142/1443715/03_04_2020_ENG_Antivirus.pdf/ (Accessed 31 May 2021)

persons. However, the late submission of corporate tax returns or late payment of other tax obligations were not sanctioned by the state. In addition to tax simplifications, tax breaks were introduced for certain types of taxes. As the economic crisis had a negative impact on the budgets and finances of local governments, mainly due to lost or significantly reduced tax revenues, an Act was passed to provide financial support to the local governments.

According to the aforementioned Act, each municipality was eligible for a CZK 1,200 bonus per habitant, which debited the central budget of almost CZK 13 billion. Another important measure was the imposition of a credit moratorium, extended to both banks and non-bank credit providers. Under the credit moratorium, the debtors may, at their discretion, request a suspension of payments for a period of three or six months. The debtors could use this possibility until October 31, 2020. The debtors were obliged to declare to the creditor that they were unable to pay because of the negative economic impact of the coronavirus pandemic. They even did not have to prove the validity of the declaration. Debtors were also protected by the imposition of an eviction moratorium, which was used by tenants who could not pay their rent.

5. Summary

The table below summarizes the most important characteristics of the emergency powers in the Czech Republic.

	State of emergency	**Immediate state of emergency**	**Condition of threat to the state**	**State of war**
Level of regulation	Constitutional (Constitutional Act on state security)			Constitutional (the Constitution and the Constitutional Act on state security)
Reasons for ordering	– Natural or ecological catastrophe or industrial accidents – Any other danger that threatens life, health, property or domestic order, or security to a significant extent.		If the state's sovereignty, territorial integrity, or democratic foundations are directly threatened.	– If the state is attacked. – If such is necessary for the fulfillment of international treaty obligations on collective self-defense against aggression.

	State of emergency	Immediate state of emergency	Condition of threat to the state	State of war
Ordered by	The government, but the Chamber of Deputies may repeal the decision.	The Prime Minister but must be approved by the government within 24 hours; however, the Chamber of Deputies may repeal the decision.	At the motion of the government, an absolute majority of both Chambers of the Parliament.	An absolute majority of both Chambers of the Parliament.
Authorized body	The government	The government, Security Council		No provisions
Practical cases	Yes, see the section titled *Practical cases of promulgation of a special legal regime.*	It has not been ordered so far.		
Other exceptional situations	State of danger (regulated by the Act on crisis management)			

Table 5
Summary of the emergency powers in the Czech Republic
Source: Authors' compilation

The general rules for the emergency powers can be found only in the Constitution and the Constitutional Act on state security. The Czech system of emergency powers identifies three special legal regimes – state of emergency, condition of threat to the state, and state of war. However, an immediate state of emergency may be considered as a special, accelerated form of state of emergency. For each category, the legislation, adequately and precisely, records the occurrence of conditions and threats that may lead to one of the special legal regimes. In addition, the category of a state of danger appears in the Czech legal regulation, which can be considered as the fourth emergency power. The state of danger, under the Act on crisis management, may be suitable for dealing with a crisis arising from an extraordinary event. During a state of danger, special rights are granted to the state and the local government bodies to deal with the extraordinary situations. Therefore, the state of danger has a close connection with special legal regimes.

Our research shows the dominance of the legislative power, since a condition of threat to the state or a state of war may be ordered by the Parliament, while for a state of emergency and an imminent state of emergency, the Parliament may subsequently annul the decision of the

government or the Prime Minister. The government is the authorized governing body, during a state of emergency and condition of threat to the state; however, the Security Council also appears as a consultative, decision-preparing body during condition of threat to the state. The Security Council, a permanent working group of the government, consists of the Prime Minister and ministers appointed by the government, and its main duty is to prepare the proposals defined by the government necessary to protect the state. However, a shortage of regulation can be observed regarding a state of war as neither the Constitution nor the Constitutional Act on state security stipulate an authorized person or body as in charge. Regarding emergency powers, the role of the President of the Republic is neutral, and the President's powers are limited.

The restriction of fundamental rights during a special legal regime may only take place in accordance with the Charter of Fundamental Rights and Freedoms, which is part of the Czech constitutional order and lays down the rules for the restriction of fundamental rights. The detailed rules are enacted in the Act on crisis management, which specifically sets out the scope for the restriction of the fundamental rights. The Act on crisis management also sets out the form and extent of the restriction, however, only in relation to a state of emergency and a condition of threat to the state.

A condition of threat to the state and a state of war have not been ordered till date. There are several examples of a state of emergency in the Czech Republic. The most recent, national-wide state of emergency was declared four times due to the coronavirus pandemic, and public-political debates have arisen in relation to this event.

As is evident from the above discussion, the Czech legal framework of the emergency powers presents a transparent and clear regulation. The Czech legislation sets out different kinds of threats that could be reasons for ordering a special legal regime, leaving no doubt the special legal regime to be ordered in case of specific occurrences or extraordinary situations. This is also confirmed by the fact that the principle of gradation clearly applies to special legal regimes, based on the intensity of the threat. However, it should be noted, that the Czech regulation on emergency powers is deficient in many aspects, including the shortcomings already mentioned in relation to a state of war.

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The (too?) complex regulation of emergency powers in Hungary

NAGY ZOLTÁN – HORVÁTH ATTILA

1. Regulation of the special legal order system

1.1. Constitutional and legal background

Unlike a number of former communist states, Hungary, for various reasons, decided not to adopt a new constitution during the democratic transition in 1989–1990 or the first parliamentary term. Instead of drafting an entirely new constitution, the old communist *Constitution of 1949* (hereinafter Constitution) was *formally* retained, although it was completely amended in 1989 and 1990. Taking into account the extensiveness of the amendments (almost every single provision of the Constitution had been replaced), it is no exaggeration to say that materially, a new constitution was born during the transition. One of the most remarkable changes was the introduction of detailed, albeit dispersed, provisions on the special legal order (SLO) system; before the transition, the Constitution included only some vague provisions regarding war and other dangers seriously threatening the security of the state. Under the amendments of 1989, three categories of SLO were set up:

- *state of national crisis* in the event of war or danger of war;
- *state of emergency* in the event of armed actions aimed at overturning constitutional order or at the acquisition of exclusive control of public power; and
- *state of danger* in the event of natural disasters that endanger the lives and property of citizens

Nagy Zoltán: Head of Department of Public Law, Ferenc Mádl Institute of Comparative Law, Hungary
Professor, Faculty of Law, University of Miskolc, Hungary
Horváth Attila: Senior Researcher, Ferenc Mádl Institute of Comparative Law, Hungary
Senior Lecturer, Faculty of Public Governance and International Studies, National University of Public Service, Hungary

Nagy, Z., Horváth, A. (2022) 'The (too?) complex regulation of emergency powers in Hungary' in Nagy, Z., Horváth, A. (eds.) *Emergency Powers in Central and Eastern Europe*, pp. 149-187. Budapest: Ferenc Mádl Institute of Comparative Law; https://doi.org/10.47079/2022.znah.epicaee.1_7

(However, it must be noted that the Constitution itself did not use the term 'special legal order', which means there was no comprehensive legal term for such situations, although the literature referred to them as 'qualified situations'. For the sake of simplicity, we use the term SLO throughout this manuscript.)

A few years later, the Constitution was completed with a new fourth SLO, which may be described as the '*unexpected attack*' category, although neither the Constitution nor other laws used this term. According to the explanatory memorandum of the 1993 constitutional amendment, the Constitution had no provision regarding the actions to be taken in the event of an unexpected incursion of external armed units (e.g. guerrilla groups) into Hungarian territory or intentional violation of the country's airspace.[1] The aim of this amendment was to fill this gap so as to avoid the declaration of other, more serious SLOs (i.e. a state of national crisis).

In 2004, another new SLO to introduce a *state of preventive defence* was incorporated into the Constitution. Lawmakers justified the addition, citing the inadequacy of the Constitution in terms of handling security threats not reaching the level of a state of national crisis.

The Constitution was replaced by the *Fundamental Law* (FL), which was adopted in 2011 and entered into force on 1 January 2012.[2] The FL re-regulated the system of SLO and introduced the term 'special legal order', which is a comprehensive term currently embracing no less than six (only five at the time of the adoption of the FL) different emergency situations. Contrary to several European constitutions, the FL belongs to the type that devotes a separate part to emergency powers. It is a telling fact that excluding the National Avowal (which serves as the preamble of the FL) and the Closing and Miscellaneous Provisions, the FL consists of four parts,[3] one of which is dedicated to SLOs. Bjørnskov and Voigt defined an emergency constitution as '*the set of formal legal provisions encoded in the constitution that specify who can declare an emergency, under which conditions an emergency can be declared, who needs to approve the declaration, and which actors have which special powers once it has been declared […]*'.[4] From this point of view, it is striking how perfectly the SLO part of the FL fits into this definition, acting as a 'constitution within the constitution'.

As Horváth has pointed out, the SLO part of the FL has at least three unique features that distinguish it from the constitutions of other EU member states.[5] First, the FL distinguishes between no less than six types of SLOs, which is presumably a 'world record'. Second, the SLO

1 To highlight the context of the amendment, it must be noted that during the Yugoslav Wars in the early 1990s, armed groups and fighter aircrafts occasionally violated the territory of Hungary (Keszely, 2017, p. 84.).

2 The Hungarian term *Alaptörvény* may be translated either as *Fundamental Law* or *Basic Law*.

3 These are *Foundation* (basic provisions), *Freedom and Responsibility* (fundamental rights and obligations), *The State* (provisions on the basic organs of the state) and *Special Legal Order*.

4 Bjørnskov and Voigt, 2018, p. 103.

5 Horváth, 2021, pp. 640–641.

part of the FL is unusually lengthy and currently consists of almost 11,000 characters, which is more than 10% of the whole text. Third, even the term 'special legal order' (*különleges jogrend*) is worth a deeper look. Although the official translation of the FL uses this term, the phrase 'special legal regime' would be even more expressive, implying that once an SLO has been declared, the state 'leaves the traditional democratic framework',[6] while the constitutional constraints become more relaxed and fundamental changes take place in the functioning of the state (allocation of powers and competencies, range of potential measures, etc.). However, SLO should not be considered as a dictatorship, as it provides only a temporary authorisation for the 'crisis manager' to overcome a certain type of crisis. Apart from the FL, there are only a few constitutions that include a comprehensive legal term connoting a 'special legal order'.[7]

Although the FL includes a number of provisions on SLO, more detailed regulation can be found at the sub-constitutional level. Two laws deserve special attention in this regard: the Act on National Defence[8] (NDA) and the Act on Disaster Management (DMA).[9] The former devotes a whole chapter (IX) to the extraordinary measures that may be introduced in the event of a state of national crisis, state of emergency, state of preventive defence, state of terrorist threat, or unexpected attack. The DMA lists natural disasters or industrial accidents that may trigger the declaration of a state of danger, and also includes the extraordinary measures that the Government can resort to in order to overcome the danger (Chapter V). According to the FL, both these laws qualify as the so-called 'cardinal acts'.[10]

1.2. The six types of special legal order

As mentioned previously, the FL regulates six different types of SLOs. In this section, we present the relevant provisions of the FL and briefly evaluate and compare them.

a) State of national crisis *(rendkívüli állapot)*[11]

A state of national crisis is unequivocally the most serious form of SLO, which allows the widest range of deviation from the normal legal order.

6 Gerencsér, 2015, p. 307.

7 As the chapter on Poland of the current book notes, the Polish Constitution uses the term *stany nadzwyczajne (extraordinary states)*, which is the overall label of various SLOs.

8 Act CXIII of 2011 on National Defence and the Hungarian Defence Forces, and on Measures to be Introduced in the Special Legal Order

9 Act CXXVIII of 2011 on Disaster Management and Amending Certain Related Acts

10 According to FL Article T) para. (4), 'Cardinal Acts shall be Acts, the adoption and amendment of which requires the votes of two thirds of the Members of the National Assembly present'.

11 Although the official English translation of the FL uses the term *state of national crisis*, the literal translation for the Hungarian term *rendkívüli állapot* is *extraordinary state*.

Article 48[12]
(1) The National Assembly:[13]
a) shall declare a state of national crisis and set up a National Defence Council in the event of the declaration of a state of war or an imminent danger of armed attack by a foreign power (danger of war);
[...]
(2) For a state of war to be declared, peace to be concluded or to declare the special legal order referred to in paragraph (1) [i.e. state of national crisis and state of emergency], the votes of two thirds of the Members of the National Assembly shall be required.
(3) If the National Assembly is prevented from making such decisions, the President of the Republic shall have the right to declare a state of war, to declare a state of national crisis and set up the National Defence Council, or to declare a state of emergency.
(4) The National Assembly shall be deemed to be prevented from making such decisions if it is not in session and convening it is made impossible by insurmountable obstacles caused by shortage of time or the events resulting in a state of war, a state of national crisis or state of emergency.
(5) The Speaker of the National Assembly, the President of the Constitutional Court and the Prime Minister shall unanimously decide whether the National Assembly is prevented from acting and the declaration of a state of war, state of national crisis or state of emergency is justified.
(6) As soon as the National Assembly is no longer prevented from acting, it shall at its first sitting review whether the declaration of a state of war, state of national crisis or state of emergency was justified, and decide on the legality of the measures adopted. For such decisions, the votes of two-thirds of the Members of the National Assembly shall be required.

As can be seen, a state of national crisis shall be declared, as a general rule, by the Parliament. However, under certain circumstances, the Parliament may be unable to make a proper decision, wherein the President of the Republic shall have the right to declare a state of national crisis. To avoid the abusive circumvention of the Parliament, the FL stipulates a number of guarantees regarding the declaration of a state of national crisis. On the one hand, the FL clearly specifies when the Parliament shall be deemed incapable of making a proper decision. On the other hand, the Speaker of the National Assembly, the President of

12 The title of FL Article 48 reads as follows: 'Common rules for the state of national crisis and the state of emergency'. Thus, this article includes provisions that are valid for both these SLOs.
13 The official name of the Hungarian Parliament is *Országgyűlés*, which may be translated as *National Assembly*. We use the term '*Parliament*' and '*National Assembly*' interchangeably.

the Constitutional Court, and the Prime Minister shall unanimously decide on the issue of the Parliament's incapability. Even if one of these three persons disagree on whether the Parliament is incapable of making a decision or the declaration of a state of national crisis is justified, the President of the Republic shall have no right to declare this SLO. Finally, it is worth mentioning that if a state of national crisis is declared by the President of the Republic, the Parliament, at its first sitting, would review the justification of the declaration and decide on the legality of the measures adopted.

The extraordinary nature of a state of national crisis is reflected even in the set-up of the National Defence Council (NDC), which is a unique body entrusted with a wide range of powers to enable it to overcome a national crisis.

> *Article 49*
> *(1) The President of the National Defence Council shall be the President of the Republic, and its members shall be the Speaker of the National Assembly, the leaders of parliamentary groups, the Prime Minister, the ministers and – in a consultative capacity – the Chief of the Defence Staff.*
> *(2) The National Defence Council shall exercise:*
> *a) the powers delegated to it by the National Assembly,*
> *b) the powers of the President of the Republic,*
> *c) the powers of the Government.*
> *(3) The National Defence Council shall decide:*
> *a) on the deployment of the Hungarian Defence Forces abroad or within Hungary, on their participation in peacekeeping, on their humanitarian activity in a foreign operational area, or on stationing them abroad,*
> *b) on the deployment of foreign armed forces in Hungary or departing from the territory of Hungary, or on stationing them in Hungary,*
> *c) on the introduction of extraordinary measures laid down in a cardinal Act.*
> *(4) The National Defence Council may adopt decrees by means of which it may, as provided for by a cardinal Act, suspend the application of certain Acts, derogate from the provisions of Acts and take other extraordinary measures.*
> *(5) Upon the termination of the state of national crisis, such decrees of the National Defence Council shall cease to have effect, unless the National Assembly extends those decrees.*

The unusual character of the NDC is reflected in its composition that includes the head of the state, the members of the Government, and some representatives of the Parliament. As Jakab and Till note, the lack of voting rights in the case of the Chief of the Defence Staff may be justified by the principle of civil control: the Hungarian Defence

Forces shall be under civilian control both in peace and war.[14] The other special feature lies in its competencies as the NDC apparently does not conform to the principle of separation of powers since it possesses executive and certain legislative powers at the same time.[15]

The extraordinary measures mentioned in Article 49 are regulated by the NDA. The NDC may take special measures regarding defence administration (e.g. modifying the regulation of military service), public administration (e.g. modifying and extending the competencies of certain authorities), public order (e.g. limiting or suspending postal and electronic communication services), public safety (e.g. restricting traffic and citizen movements), judicial system (e.g. modifying the regulations on criminal procedure or civil procedure, setting up new courts and public prosecutor's offices), and economic and material service obligations (e.g. restricting foreign trade, ordering the performance of work for national defence purposes). It is also noteworthy that during a state of national crisis, adult male Hungarian citizens with domicile in Hungary are obliged to perform military service.[16]

b) State of emergency *(szükségállapot)*

While a state of national crisis may be declared in the event of war or an imminent danger of war, a state of emergency may be triggered by domestic conflicts.

> *Article 48*
> *(1) The National Assembly:*
> *[...]*
> *b) shall declare a state of emergency in the event of armed actions aimed at subverting the lawful order or at exclusively acquiring power, and in the event of serious acts of violence massively endangering life and property, committed with weapons or with instruments capable of causing death.*

According to this definition, a state of emergency may be declared under circumstances such as riots, rebellion coups d'état, and civil war. It must be emphasised that the wording of the FL uses expressions in plural (armed actions, serious acts of violence), which means that a single event (e.g. an assassination) may not serve as the basis for declaring a state of emergency.

14 Jakab and Till, 2020, p. 446.
15 Cf. Farkas and Kádár, 2016, p. 306; Petrétei, 2015, pp. 34–44.
16 FL Article XXXI para. (3)

Article 50
(1) The Hungarian Defence Forces may be deployed during a state of emergency if the use of the police and the national security services proves insufficient.
(2) During a state of emergency, if the National Assembly is prevented from acting, the President of the Republic shall decide on the utilisation of the Hungarian Defence Forces under paragraph (1).
(3) During a state of emergency, the extraordinary measures laid down in a cardinal Act shall be introduced by the President of the Republic in a decree. By means of his or her decree, the President of the Republic may, as provided for by a cardinal Act, suspend the application of certain Acts, derogate from the provisions of Acts and take other extraordinary measures.
(4) The President of the Republic shall inform the Speaker of the National Assembly without delay of the extraordinary measures introduced. During a state of emergency, the National Assembly, or, if it is prevented from acting, the committee of the National Assembly dealing with national defence issues shall remain continuously in session. The National Assembly or, if it is prevented from acting, the committee of the National Assembly dealing with national defence issues may suspend the application of the extraordinary measures introduced by the President of the Republic.
(5) Extraordinary measures introduced by means of decrees shall remain in force for thirty days, unless the National Assembly or, if it is prevented from acting, the committee of the National Assembly dealing with national defence issues extends them.
(6) Upon the termination of the state of emergency, such decrees of the President of the Republic shall cease to have effect.

It must be noted again that a state of national crisis and a state of emergency have some common rules (see Article 48 of FL quoted above). Thus, our previous comments on this article are applicable even for a state of emergency.

While the NDC becomes the 'power centre' in the case of a state of national crisis, the President of the Republic acts as the 'crisis manager' in a state of emergency. Contrary to the normal legal order, the SLO empowers the President with legislative authority to adopt decrees through which they may introduce extraordinary measures laid down in the NDA. The scope of these possible extraordinary measures is somewhat narrower than that of the measures allowed in a state of national crisis, although the overlap is still significant.

Since no state of emergency has been declared so far, Hungary does not have any experience with this SLO. However, it seems to be a rather unusual arrangement for the President of the Republic, who possesses merely symbolic and representative power and is not involved in daily politics under normal circumstances, to be empowered with direct decision-making authority. As we outline later, the Ninth Amendment of the FL abolished this 'crisis manager' role of the President.

c) State of preventive defence *(megelőző védelmi helyzet)*

A state of preventive defence is considered to be a precursor to a state of national crisis.[17]

Article 51

(1) In the event of a danger of external armed attack or in order to meet an obligation arising from an alliance, the National Assembly shall declare a state of preventive defence for a fixed period of time, and shall simultaneously authorise the Government to introduce extraordinary measures laid down in a cardinal Act. The period of the state of preventive defence may be extended.
(2) The votes of two-thirds of the Members of the National Assembly present shall be required for the special legal order referred to in paragraph (1) to be declared or to be extended.
(3) After initiating the declaration of a state of preventive defence, the Government may, by means of decrees, introduce measures derogating from the Acts affecting the operation of public administration, the Hungarian Defence Forces and law enforcement organs, and shall continuously inform the President of the Republic and the standing committees of the National Assembly vested with its relevant functions and powers. The measures thus introduced shall remain in force until the decision of the National Assembly on the declaration of a state of preventive defence but for no longer than sixty days.
(4) During a state of preventive defence, the Government may adopt decrees by means of which it may, as provided for by a cardinal Act, suspend the application of certain Acts, derogate from the provisions of Acts and take other extraordinary measures.
(5) Upon the termination of the state of preventive defence, such decrees of the Government shall cease to have effect.

Contrary to a state of national crisis, this SLO may be declared even if the danger of an external armed attack is not imminent. Another distinction lies in the nature of the danger of the attack: while a state of national crisis is related to an imminent danger of armed attack by a *foreign power* (i.e. foreign state), a state of preventive defence may be declared even in the event of a threat by a formal international organisation or an informal organisation (e.g. a terrorist organisation).[18]

The scope of these possible extraordinary measures is somewhat narrower than that of measures allowed in a state of national crisis. During a state of preventive defence, the National Assembly may require adult male Hungarian citizens with domicile in Hungary to perform military service.[19]

17 Farkas, 2020, p. 368.
18 Jakab and Till, 2020, p. 453.
19 FL Article XXXI para. (3)

d) State of terrorist threat *(terrorveszélyhelyzet)*

The state of terrorist threat was the only SLO that was not enacted in the original text of the FL. The Parliament incorporated this SLO through the Sixth Amendment of the FL in 2016. According to the explanatory memorandum of the amendment, lawmakers cited new types of security challenges that could not be dealt with effectively by the existing SLOs. Politicians and even scholars were divided over whether it was essential to raise the terrorism threat to a constitutional rank. The Government was clearly in favour of enacting the new SLO, arguing that none of the five existing SLOs were suitable for coping with a terrorist threat or attack.[20] In contrast, the larger part of the opposition voted against enacting the state of terrorist threat SLO, claiming that the current legal framework was adequate in terms of guaranteeing the safety of citizens; therefore, a new SLO was unnecessary.[21] Some scholars argue that a terrorist attack could have been brought within the scope of either the current form of a state of emergency[22] or a slightly revised form of a state of emergency.[23]

As for the regulation of a state of terrorist threat, the FL reads as follows:

Article 51/A

(1) In the event of a significant and direct threat of a terrorist attack or in the event of a terrorist attack, the National Assembly shall, at the initiative of the Government, declare a state of terrorist threat for a fixed period of time, and shall simultaneously authorise the Government to introduce extraordinary measures laid down in a cardinal Act.

(2) The votes of two-thirds of the Members of the National Assembly present shall be required for the special legal order referred to in paragraph (1) to be declared or to be extended.

(3) After initiating the declaration of a state of terrorist threat, the Government may, by means of decrees, introduce measures derogating from the Acts concerning the organisation, the operation and the performance of activities of public administration, the Hungarian Defence Forces, the law enforcement organs and the national security services, as well as those laid down in a cardinal Act, and shall continuously inform the President of the Republic and the standing committees of the National Assembly vested with its relevant functions and powers.

20 Simicskó, 2016, pp. 105–106. As the author points out, there are a number of arguments against dealing with the threat of a terrorist attack or an actual terrorist attack by introducing a state of emergency. Inter alia, he claims that the wording for a state of emergency ('armed actions' [in plural], 'serious acts of violence massively endangering life and property' [in plural as well]) presumes more than one action. He also takes the view that a state of emergency is not suitable for the pursuit of immediate actions.

21 For details on the reasoning at the parliamentary debates see Till, 2020, pp. 24–35.

22 Mészáros, 2017a, pp. 128–129. The author argues elsewhere (2017b) that enacting the SLO state of terrorist threat neither serves the principle of the rule of law nor offers better protection against terrorism.

23 Ősze, 2018, pp. 40–41.

The measures thus introduced shall remain in force until the decision of the National Assembly on the declaration of a state of terrorist threat but for no longer than fifteen days.
(4) During a state of terrorist threat, the Government may adopt decrees by means of which it may, as provided for by a cardinal Act, suspend the application of certain Acts, derogate from the provisions of Acts and take other extraordinary measures.
(5) The Hungarian Defence Forces may be deployed while the measures referred to in paragraph (3) are in force and during a state of terrorist threat if the use of the police and the national security services proves insufficient.
(6) Upon the termination of the state of terrorist threat, such decrees of the Government shall cease to have effect.

As can be seen, this SLO may be triggered even for a (significant and direct) threat of a terrorist attack, which raises concerns among some experts, who claim that the article is somewhat vague compared to the provisions in the other types of SLO. As Drinóczi notes, there is no efficient oversight of special decrees issued by the Government in the period between the initiation of the declaration of a state of terrorist threat by Parliament and its actual introduction.[24] After reviewing several European constitutions, Ságvári pointed out that tailoring the SLO to terrorism is not in line with European practice.[25]

e) Unexpected attack *(váratlan támadás)*

As mentioned earlier, the Constitution regulated this SLO, but did not include the term 'unexpected attack'. (According to some viewpoints, unexpected attack as such shall not exist, only insufficient intelligence or assessment.[26]) In contrast, the FL expressly uses this term. The current regulation is as follows:

Article 52
(1) In the event of an unexpected incursion of external armed groups into the territory of Hungary, until the decision on the declaration of a state of emergency or state of national crisis, the Government shall be obliged – if necessary, in accordance with the armed defence plan approved by the President of the Republic – to take immediate action using force proportionate to and prepared for the attack, to repel the attack, to defend the territory of Hungary with domestic and allied readiness forces of the air defence and air forces, in order to protect lawful order, life and property, public order and public safety.

24 Drinóczi, 2020, p. 15.
25 Ságvári, 2016
26 Till, 2019, [25]

(2) The Government shall forthwith inform the National Assembly and the President of the Republic of its action taken under paragraph (1).
(3) In the event of an unexpected attack, the Government may introduce extraordinary measures laid down in a cardinal Act, and may adopt decrees by means of which it may, as provided for by a cardinal Act, suspend the application of certain Acts, derogate from the provisions of Acts and take other extraordinary measures.
(4) Upon the termination of the unexpected attack, such decrees of the Government shall cease to have effect.

In order to distinguish an unexpected attack from a state of national crisis, it must be emphasised that the latter may be declared if the attacker is identified and is a foreign state. In the absence of either condition, an unexpected attack may be the only possible solution.[27] In light of the expression 'until the decision on the declaration of a state of emergency or state of national crisis', an unexpected attack is an expressly temporary SLO, whose rationale is to treat armed incursions beneath the threshold of war.[28]

Unexpected attack is a unique SLO in terms of its activation since there is no formal provision on declaration, contrary to the other five SLOs. Instead of a declaration, the Government is obliged to take immediate actions, as demonstrated above.

f) State of danger *(veszélyhelyzet)*

Unlike the former SLOs, a state of danger is related to natural disasters or industrial accidents and is considered to be the most moderate SLO.

Article 53
(1) In the event of a natural disaster or industrial accident endangering life and property, or in order to mitigate its consequences, the Government shall declare a state of danger, and may introduce extraordinary measures laid down in a cardinal Act.
(2) In a state of danger, the Government may adopt decrees by means of which it may, as provided for by a cardinal Act, suspend the application of certain Acts, derogate from the provisions of Acts and take other extraordinary measures.
(3) The decrees of the Government referred to in paragraph (2) shall remain in force for fifteen days, unless the Government, on the basis of authorisation by the National Assembly, extends those decrees.

27 Jakab and Till, 2020, p. 445.
28 Till, 2019, [28]

(4) Upon the termination of the state of danger, such decrees of the Government shall cease to have effect.

State of danger is the only SLO that may be declared by the Government and for which detailed regulation is enacted in the DMA (not in the NDA). Compared to the NDA, the DMA allows a narrower range of extraordinary measures. As for the duration of a state of danger, the current regulation makes a distinction between the real duration of the state of danger on the one hand and the force of the decrees of the Government on the other. While there is no provision on the duration of the state of danger, the government decrees (adopted in regard to the state of danger) shall remain in force for 15 days (unless extended on the basis of authorisation by the Parliament). The latter provision ensures parliamentary oversight of the extraordinary measures introduced by the Government.

The following table summarizes the differences between the six types of SLOs.

<table>
<tr><th></th><th>Under what circumstances?</th><th>Who declares?</th><th>Who is entitled to take emergency measures?</th></tr>
<tr><td>State of national crisis</td><td>– in the event of declaration of a state of war
– or an imminent danger of armed attack by a foreign power (danger of war)</td><td rowspan="2">– Parliament (with the votes of two-thirds of MPs)
– President of the Republic if the Parliament is prevented from making such decisions</td><td>National Defence Council</td></tr>
<tr><td>State of emergency</td><td>– armed actions aimed at subverting the lawful order or at exclusively acquiring power
– serious acts of violence massively endangering life and property</td><td>President of the Republic</td></tr>
<tr><td>State of preventive defence</td><td>– danger of external armed attack
– fulfil an obligation arising from an alliance</td><td rowspan="2">Parliament (with the votes of two-thirds of MPs present)</td><td rowspan="4">Government</td></tr>
<tr><td>State of terrorist threat</td><td>– a significant and direct threat of a terrorist attack
– in the event of a terrorist attack</td></tr>
<tr><td>Unexpected attack</td><td>– unexpected incursion of external armed groups into the territory of Hungary</td><td>(no declaration – the Government is obliged to take immediate actions)</td></tr>
<tr><td>State of danger</td><td>– natural disaster or industrial accident endangering life and property</td><td>Government</td></tr>
</table>

Table 6
Special legal orders in Hungary
Source: Authors' compilation

1.3. Quasi-SLOs

Although the FL regulates no fewer than six types of SLO, the Hungarian legal system includes a number of other crisis situations that do not qualify for SLO, although their basic goal is to overcome a certain type of crisis through special provisions. Among what we call quasi-SLOs, the so-called crisis situation caused by mass immigration is unambiguously the one that requires a deeper look since it has triggered a host of legal concerns among both domestic scholars and international organisations. It must be emphasised that this crisis situation is not covered by the FL; thus, it does not qualify as a 'real' SLO. Instead, the topic was inserted into the Act on Asylum in 2015.[29] A crisis situation may be declared (for the entire territory or defined areas of Hungary) by the Government based on a ministerial recommendation made at the behest of the National Commander of the Police and the head of the refugee authority.[30] As the explanatory memorandum of the law claims, '[t]he Government is unable to give a proper response to the mass immigration of foreigners – or only with a significant delay – in the current Hungarian legal framework. It is therefore appropriate to introduce the concept of a "crisis caused by mass immigration"'. The memorandum further notes that '[t]he declaration of this crisis situation entails a departure from the general rules of the legal system'. Once a crisis due to mass immigration is declared, special (more rigorous) rules apply to third-country citizens irregularly entering and/or staying in Hungary as well as to asylum seekers.

Criticism on the crisis situation is two-fold. Some argue that '[t]his "crisis situation" should not permit the uncontrolled exercise of some powers and even more severe human rights restrictions that are allowed in constitutional emergencies. Nevertheless, it still does, regardless of some corrections'.[31] According to other evaluations, regulation of mass immigration may be compared to a militant democracy, since extraordinary provisions are enacted in the normal legal order, while aiming to maintain the formal framework of the principle of rule of law.[32] Meanwhile, the duration of the crisis situation caused by mass immigration has been very controversial. The Government declared a crisis situation in September 2015

29 Act LXXX of 2007 on Asylum, Chapter IX/A. According to 80/A. §, a crisis situation caused by mass immigration can be declared, *for example,* if the number of those arriving in Hungary and seeking recognition exceeds
a) 500 people a day as a month's average, or
b) 750 people per day as the average of two subsequent weeks, or
c) 800 people per day as a week's average

30 Act LXXX of 2007 on Asylum, 80/A. § para (2)

31 Drincózi, 2020, p. 10.

32 Mészáros, 2019a

and renewed it every six months regardless of the actual migration situation. Thus, the crisis situation had somewhat perpetuated for more than five years.

Among international critics, Felipe González Morales, the Special Rapporteur on the human rights of migrants (UN Human Rights Council), argued that the Hungarian Government's declaration of a migrant 'crisis' does not correspond to reality and has led to human rights violations.[33] The UN High Commissioner for Refugees[34] and the Commissioner for Human Rights (Council of Europe) also expressed concerns about Hungary's measures affecting access to asylum.[35]

In addition to the crisis caused by mass immigration, the military crisis situation is also a kind of quasi-SLO. It is a state of domestic military alertness and may be declared by the Government on the recommendation of the Minister of Defence in order to (1) prepare for the impact of disturbances evolving in neighbouring countries, which directly threatens the security of Hungary, or (2) prepare for the fulfilment of the obligations related to Articles 4 and 5 of the North Atlantic Treaty.[36] This concept was enacted in 2018 in response to the Russo-Ukrainian War.[37] Once a military crisis situation is declared, the Government may, among other actions, call for increasing military preparedness or strengthening the control of state borders.

Lastly, the state of medical crisis is also of significant importance, especially in light of the COVID-19 pandemic. The state of medical crisis is enacted in the Health Care Act[38] (HCA), and its main rationale (as explained in Section 4) is to stipulate special provisions for certain health care emergency situations.

1.4. New constitutional and legal framework from 2023

In December 2020, the Parliament passed the Ninth Amendment of the Fundamental Law, which significantly amended the regulation of the SLO system.[39] (However, these new provisions will enter into force much later, on 1 July 2023.) The most spectacular change concerns the number of types of SLO, with the current six types to be reduced to three: state of

33 OHCHR, 2019
34 UNHCR, 2021
35 CoE, 2019
36 NDA 21/A. §
37 Jakab and Till, 2020, p. 1043.
38 Act CLIV of 1997 on Health Care, Chapter XIV
39 Although one would presume that the re-regulation of the SLO was provoked by the COVID-19 pandemic, this premise does not represent reality. The idea of comprehensive reform of the SLO emerged well before the pandemic in Hungary.

war, state of emergency, and state of danger. The provision on state of war *(hadiállapot)* reads as follows:

> *In the event of*
> *a) declaration of war situation or a danger of war,*
> *b) external armed attack, an act with an impact equivalent to an external armed attack, or an imminent danger of either of them, or*
> *c) the performance of collective defence obligation arising from an alliance,*
> *the National Assembly may declare a state of war.*[40]

As is evident from the provision, the new definition of state of war 'incorporates' the current state of national crisis, state of preventive defence, and unexpected attack. It is noteworthy that the new provision includes the expression *'an act with an impact equivalent to an external armed attack'*. As the explanatory memorandum stresses, this may include even a serious cyber attack, which, from the aspect of the sovereignty of the state, may be considered to be on par with an armed attack.

The definition of a state of emergency underwent minor changes:

> *In the event of*
> *a) an act aimed at overthrowing or subverting the constitutional order or at exclusively acquiring power, or*
> *b) a serious unlawful act massively endangering life and property,*
> *the National Assembly may declare a state of emergency.*[41]

As it can be seen, the terms 'armed', 'violence', and 'weapons' have been omitted from the text. Thus, the preconditions for the declaration of a state of emergency have become less rigid.

The new provision on the state of danger reads as follows:

> *In the event of a serious incident endangering life and property, in particular a natural disaster or industrial accident, and in order to eliminate the consequences thereof, the Government may declare a state of danger.*[42]

40 FL Article 51 para. (1) (enters into force on 1 July 2023)
41 FL Article 50 para. (1) (enters into force on 1 July 2023)
42 FL Article 51 para. (1) (enters into force on 1 July 2023)

The newly inserted term 'in particular' makes it clear that beyond natural disasters and industrial accidents, other events may also trigger the declaration of a state of danger. Contrary to the current regulation, the new one stipulates the duration, that is, a state of danger may be declared for 30 days.[43] On the basis of authorisation by the National Assembly, the Government may extend a state of danger.[44]

The amendment also affects the competencies of the Government, stipulating that '[d]uring the period of [the] special legal order, the Government may adopt decrees by means of which it may, as provided for in a cardinal Act, suspend the application of certain Acts, derogate from the provisions of Acts and take other extraordinary measures'.[45] This would mean that the Government acts as the 'crisis manager' regardless of which SLO is declared. This implies that the NDC ceases to exist, and the central role of the President of the Republic in the state of emergency is cancelled. As the explanatory memorandum notes, once an SLO has been declared, it is necessary to provide quick, operative, and responsible decision-making in both the political and legal sense for which the Government appears to be suitable. In order to ensure parliamentary oversight, the amendment lays down that '[t]he National Assembly may repeal a decree adopted by the Government during the period of, and in accordance with the rules related to [the] special legal order'.[46]

The comprehensive reform of the SLO affects the relevant laws, mainly the NDA and the DMA. At the time of completion of this manuscript, the National Assembly had passed a new law,[47] which aims to bring a new and more complex approach regarding defence and security policy. From the aspect of the current book, one of the most significant changes concerns the extraordinary measures that may be taken by the Government once an SLO has been declared. Contrary to the current regulation, the new law does not stipulate an itemised list of extraordinary measures. Instead, the law provides a general authorisation for the Government, enabling it to take any extraordinary measures to ensure that the life, health, person, property, and rights of the citizens are protected, and to guarantee the stability of the national economy.[48] This new approach obviously gives more leeway to the Government, while imposing more responsibility as well.

43 FL Article 51 para. (2) (enters into force on 1 July 2023)
44 FL Article 51 para. (3) (enters into force on 1 July 2023)
45 FL Article 53 para. (1) (enters into force on 1 July 2023)
46 FL Article 53 para. (3) (enters into force on 1 July 2023)
47 Act XCIII of 2021 on the Coordination of Defence and Security Activities (HDSA) (enters into force on 1 July 2023)
48 HDSA 80. §

2. Restrictions on fundamental rights

Concerning restrictions on fundamental rights, the FL lays down the so-called general necessity-proportionality test, which defines the substantive and formal criteria for imposing constraints on fundamental rights. The provision reads as follows: 'A fundamental right may only be restricted to allow the effective use of another fundamental right or to protect a constitutional value, to the extent absolutely necessary, proportionate to the objective pursued and with full respect for the essential content of that fundamental right'.[49] As Gárdos-Orosz concludes, the constitutional rules on restricting fundamental rights and resolving any conflict of fundamental rights are generally in line with the general principles of international law and the theory of law.[50]

Once any type of SLO has been declared, a special provision shall govern the constraints on fundamental rights. According to the part on SLO in the FL, '[u]nder a special legal order, the exercise of fundamental rights – with the exception of the fundamental rights provided for in Articles II and III, and Article XXVIII (2) to (6) – may be suspended or may be restricted beyond the extent specified in Article I (3)'.[51] The exceptions are the following:[52]

- right to life and human dignity (including the prohibition of torture, inhuman, or degrading treatment or punishment)
- certain criminal law-related fundamental rights: presumption of innocence, right of defence in criminal proceedings, principle of *nullum crimen/nulla poena sine lege* and principle of *ne bis in idem*

As discussed earlier, both the NDA and the DMA allow the 'crisis manager' (i. e. the person or body who is authorised to take extraordinary measures – the NDC, the President, or the Government) to introduce extraordinary measures that may seriously affect a wide range of fundamental laws (e.g. restrictions on free movement, right of assembly, freedom of expression). However, such restrictions may be justified by the special provision quoted above. Although the special provision of Article 54 para. (1) may seem to be somewhat limitless since it has no formal criteria regarding the extension of the restriction, one should bear in mind that, according to the FL, protection of fundamental rights shall be the primary obligation of

49 FL Article I para. (3)
50 Gárdos-Orosz, 2020, [39]
51 FL Article 54 para. (1)
52 As Gerencsér notes, the FL allows less exceptionality in restriction of fundamental rights than the 1989 Constitution did (Gerencsér, 2015, pp. 319–320.). For example, the latter did not allow the restriction of freedom of movement or freedom of religion, both of which may be quite reasonable in certain emergeny situations.

the state.[53] Since Hungary has had little experience with SLO, apart from its handling of the COVID-19 pandemic, there is a gap in case law from either the Constitutional Court or other courts.

3. SLO in practice

Fortunately, Hungary has had little experience with SLOs before COVID-19. In the past three decades, the state of danger has been the only SLO to have ever been introduced. This type of SLO has been declared 15 times due to flooding and/or inland water overflow (the last time in 2013) and one time due to the so-called Kolontár red sludge disaster, a serious industrial accident that occurred in 2010.[54] The states of danger related to flooding and/or inland water overflow usually lasted for one or two weeks and had a limited geographic scope (one or more counties or certain sectors of the river bank). The state of danger declared because of the red sludge disaster lasted for almost nine months.

In each case, the rationale for the introduction of the state of danger was to increase the power of the disaster management authorities to overcome the disaster. On the one hand, the government decrees issued with respect to the state of danger provided a legal base to modify and expand the competencies of the authorities and to involve the Hungarian Defence Forces in disaster recovery. On the other hand, the state of danger allowed the authorities to implement extraordinary measures regulated by the DMA, such as restricting traffic and citizen movements, banning events and assemblies in public spaces, and implementing temporary relocation of residents. In the case of the red sludge disaster, the state of danger also entitled the Government to place the concerned company liable for the accident under state control and to appoint a commissioner to manage the company. It must be pointed out that these measures had no legal ground under the 'normal' legal order; it was the SLO that constructed this legal base.

Although the state of danger is the only SLO that has ever been introduced in Hungary, the possibility of declaration of state of emergency has also emerged in some cases, albeit just

53 FL Article I para. (1)

54 The disaster, which is considered to be one of the greatest ecological catastrophies of Hungary, took place at an alumina plant in western Hungary. On 4 October 2010, the northwestern corner of the dam of reservoir number 10 collapsed. As a result of the breach, one million cubic metres of red sludge flooded the surrounding territory, including the lower sections of the village of Kolontár and the town of Devecser. Ten people died, and 150 people were injured.

theoretically, and not in a serious form.[55] While the flooding and/or inland water overflow crises were obvious cases in that there was no question that a state of danger was the only SLO that could have been declared, the red sludge disaster was slightly different in this regard. The then in-force Constitution enabled the Parliament to declare a state of emergency (beyond serious internal crises) even in the event of a natural or industrial disaster that posed great danger to the lives and property of citizens on a mass scale.[56] The regulation on the state of danger in the Constitution was as follows: 'The Government shall take the measures necessary to limit and alleviate the consequences of natural disasters that endanger the lives and property of citizens and to maintain public order and safety'.[57] As can be seen, at the constitutional level, industrial disasters fell under the state of emergency category, while natural disasters might trigger either a state of emergency or a state of danger. However, the legal framework was more complicated (and incoherent as well) as the then in-force law on civil defence allowed an industrial accident to be the basis for the declaration of a state of danger as long as it did not reach the level of a state of emergency.[58] Taking account of this legal framework, the Government decided to declare the red sludge disaster as a state of danger, which is a less serious type of SLO than the state of emergency.[59] In other words, the treatment of the consequences of the red sludge disaster was based on the regulation of the state of danger, contrary to the provisions of the Constitution, as some experts argued.[60] (It must be emphasised that this equivocal regulation [industrial and natural disasters might trigger either a state of emergency or a state of danger] ceased to exist thanks to the FL, which brings both natural disasters and industrial accidents under the state of danger category.)

4. The COVID-19 experience from the aspect of constitutional law

Although the first COVID-19 cases in Hungary were reported only on 4 March 2020, the Government had already formed an operational task force (corps) responsible for the defence

55 The first case was the so-called taxi blockade in 1990. Protesting against the hefty increase in the price of petrol, taxi drivers and private carriers blocked roads first in Budapest and then nationwide, paralysing traffic for three days. The second instance was in 2006, when then prime minister Gyurcsány Ferenc's famous 'we lied' speech was leaked, causing a nationwide political crisis, mass protests, and rioting. The third case was the red sludge disaster, which was obviously an industrial accident.

56 Constitution 19. § para. (3) i)

57 Constitution 35. § para. (1) i)

58 Act XXVII of 1996 on Civil Defence 2. § para. (2)

59 Cf. Farkas and Till, 2016, p. 65. As Kádár emphasises, a state of emergency may be declared when the lives and property of citizens face grave endangerment *on a mass scale*, while a state of danger may be declared even on the grounds of a local crisis with limited scope (Kádár, 2011, p. 95.)

60 Till, 2019, [23]

against COVID-19, headed by the Minister of Interior, on 31 January. The Government declared a state of danger for the entire country on 11 March via a government decree,[61] which entered into force immediately after its promulgation. The decree itself was rather short, indicating that further decrees would include extraordinary measures related to the state of danger and that the Government would continually review the necessity of the existence of the state of danger.

The immediate declaration of the state of danger generated fierce debates on the legality of the declaration. To highlight the constitutional and legal background, let us quote one more time the relevant provision of the FL: 'In the event of a natural disaster or industrial accident endangering life and property, or in order to mitigate its consequences, the Government shall declare a state of danger […]'. Although the official translation of the FL uses the term 'natural disaster', this phrase does not perfectly reflect the Hungarian term 'elemi csapás', which may be literally translated as 'elemental strike'. Now let us examine the DMA, which defines state of danger as a state defined in Article 53 of the FL, which may be triggered especially by the following events:

a) Natural disasters ('elemental strikes') or dangers originating from nature, especially floods, inland water overflow, earthquakes, etc.
b) Natural accidents or dangers originating from civilisation (e.g. non-planned radioactive spill)
c) Other hazards, especially human pandemics causing a mass disease outbreak, accidental pollution of surface water, groundwater depletion from drinking water abstraction, etc.

It should be noted that there is an obvious inconsistency between the FL and the DMA in that the FL allows the declaration of a state of danger only in the case of natural disasters or industrial accidents (itemised, closed list), while the DMA extends this list to a third element, i.e. 'other hazards'. Immediately after the declaration of a state of danger in light of the COVID-19 situation, a debate evolved over whether a human pandemic may be considered a natural disaster. Some were in agreement[62] as the DMA is quite unambiguous in this regard since a pandemic is classified under 'other hazards', rather than under natural disasters. However, some scholars have contended that the DMA was (and still is) in conflict

61 Government Decree 40/2020 (III. 11.) on the declaration of state of danger

62 For example, Orbán Balázs, Deputy Minister of the Prime Minister's Office, claimed that the pandemic obviously qualifies as an elemental strike. He referred to the 'ten plagues of Egypt' in the Bible, three of which were a kind of mass disease (Orbán, 2020).

with the FL.[63] Since none of the entitled organs/persons have initiated a challenge so far, the Constitutional Court has not reviewed the conformity of the DMA with the FL.

In addition to the debate on the conformity between the DMA and the FL, the justification for the declaration of the state of danger was also challenged. According to some viewpoints, it was unnecessary to declare a state of danger since the pandemic situation could have been managed under the 'normal' legal order based on the special provisions of the HCA.[64] On the one hand, the HCA has a number of provisions on epidemiology (e.g. isolation, epidemiological surveillance, restriction or prohibition of the operation of all institutions, programmes or activities that can promote the spread of epidemics), all of which aim to prevent and control the spread of infectious diseases and epidemics and to increase human resistance to infectious diseases.[65] On the other hand, the law defines the so-called state of medical crisis[66] (related to the quasi-SLOs discussed previously), which may be declared by the Minister for Health in the case of a usually unexpected event that endangers or damages the life, physical integrity, or health of citizens, or the functioning of health care institutions, and which requires the cooperation of public health bodies, health care institutions, and other state and municipal bodies. Beyond that, a state of medical crisis may be declared even in the case of a public health emergency of international concern, as defined in the International Health Regulations. Once a state of medical crisis has been introduced, the rights of patients specified in the HCA may be limited, and other special provisions may apply.

Notwithstanding the special provisions of the HCA, we believe that the COVID-19 crisis could not have been handled effectively within the framework of the HCA. First, COVID-19 is not merely a medical crisis given that the economic, social, and labour market effects of the pandemic are tremendous. Second, we argue that the special provisions of the HCA have not been 'designed' to manage a pandemic that paralyses the entire country for several months. To illustrate that with an example, the HCA lays down that '[i]n case of an epidemic, the operation of all institutions, programs, or activities that can promote the spread of the epidemic, may be restricted or prohibited'.[67] Since universities are obviously institutions, they could have been closed according to the literal interpretation of the law. However, it would have been unrealistic and contrary to the rationale of the law if a sub-governmental authority (the Chief Medical Officer) would have ordered the closure of every higher educational institution even for a half year.

63 Szente, 2020; Horváth, 2020
64 Mészáros, 2019b; Lattmann, 2020
65 HCA 56–74/A. §
66 HCA Chapter XIV
67 HCA 74. § para. (2) a)

It was clear from the beginning that the pandemic would not be overcome within a short period of time. As discussed earlier, the FL does not specify any concrete time span for either SLO in what is a unique feature. Instead, the FL states that a special legal order shall be terminated by the organ entitled to introduce the order if the conditions for its declaration no longer exist.[68] Subsequently, there was no legal time span for the state of danger declared on 11 March. Nevertheless, the force of the decrees issued by the Government under its emergency powers is limited: these decrees shall remain in force for 15 days ('sunset clause'), unless the Government, on the basis of authorisation by the National Assembly, extends those decrees.

Accordingly, the Government was forced to obtain the authorisation of the Parliament so as to be able to extend the application of the decrees adopted with respect to the state of danger. The cabinet submitted a legislative proposal to the Parliament on 20 March in which it asked for authorisation to rule by decree for an indefinite period of time. The crucial provision of the law reads as follows: 'On the basis of Article 53(3) of the Fundamental Law, the National Assembly authorises the Government to extend the applicability of the government decrees under Article 53 (1) and (2) of the Fundamental Law adopted in the state of danger until the end of the period of state of danger'. Thus, instead of seeking authorisation from the Parliament on a weekly basis, the Government's intention was to obtain approval for every future decree *in advance*.[69] This idea immediately raised intense political conflicts between the Government and the opposition. It must also be noted that the Government was pressed for time as the first decrees related to the state of danger would have ceased to have effect by 26 March without an extension. To accelerate the legislative procedure, the Government asked the Parliament to derogate from the provisions of the Rules of Procedure of the National Assembly. Since this derogation required the votes of at least four-fifths of the MPs present, the Government, which had only a two-thirds majority in Parliament, needed the support of a significant part of the opposition. However, the opposition, with the exception of some MPs, refused to vote for the derogation since they could not accept the idea of parliamentary authorisation for an indefinite period of time, which they considered to be akin to giving a 'blank cheque' to the Government. The opposition parties pushed for a 90-day deadline to be included in the law for authorisation, but the Government insisted on the indefinite period of time. Its main argument for the unlimited authorisation was the uncertainty caused by the pandemic, i.e. it was not clear if the Parliament would be inquorate or hold any session at all due to the epidemic.

68 FL Article 54 para. (3)
69 Cf. Győry and Weinberg, 2020, pp. 339–340.

Since the Government failed to secure the four-fifths majority, the Parliament was not allowed to derogate from the provisions of the Rules of Procedure. As a consequence, the law (titled Coronavirus Act; hereinafter CVA I)[70] was passed only on 30 March; thus, the government decrees issued before 15 March ceased to have effect. For instance, the Government issued a decree right after the declaration of the state of danger (11 March) to introduce several extraordinary measures (e.g. ban on indoor events with more than 100 visitors and outdoor events with more than 500 visitors; prohibition on students from attending higher educational institutes).[71] As CVA I was passed only on 30 March, these extraordinary measures ceased to have effect on 27 March. Theoretically, the Government could have issued new decrees with the same extraordinary measures, but that would have been a clear misuse of the FL. In order to uphold the validity of some of these extraordinary measures, the Chief Medical Officer issued a so-called normative decision on 26 March, which, inter alia, prohibited foreign citizens from entering Hungary (with some exceptions) and students from attending higher educational institutes.[72] However, even this action proved to be controversial from the perspective of constitutional law. First, according to the Act on Law-making, the Chief Medical Officer had no authority to issue normative decisions.[73] Second, it is untenable that a governmental officer may make a decision that profoundly affects a wide range of citizens. Nevertheless, it must be stressed that the action of the Chief Medical Officer was a temporary solution to fill the 'regulation gap' between 27 and 31 March. Right after the promulgation of CVA I, the Government issued new decrees in which it reintroduced these prohibitions.[74] In this case, there was no misuse since the Government took this action based on the 'general' authorisation of the Parliament.

Coming back to CVA I, the evaluation of the law was highly controversial. While the Government accused the opposition parties of hindering the containment of the epidemic, the opposition argued that by passing CVA I, the Parliament had given up regular control over the actions of the Government, which could now rule by decree, virtually unconstrained. In response, the Government claimed that CVA I provided a suitable guarantee since the law enabled the National Assembly to withdraw the authorisation before the end of the period of

70 Act XII of 2020 on the Containment of Coronavirus (elsewhere often mentioned even as Authorisaton Act)

71 Government Decree 41/2020 (III. 11.) on the measures to be taken during the state of danger declared for the prevention of the human epidemic endangering life and property and causing massive disease outbreaks, for the elimination of its consequences, and for the protection of the health and lives of Hungarian citizens

72 For the text of the decision see https://koronavirus.gov.hu/cikkek/az-orszagos-tisztifoorvos-tilto-es-kotelezo-hatarozata-jarvanyugyi-helyzetre-tekintettel (Accessed 10 March 2021).

73 Act CXXX of 2010 on Law-making 23. § para. (1)

74 Government Decree 81/2020 (IV. 1.) on extraordinary measures relating to the state of danger declared for the protection of health and lives and for the restoration of national economy

state of danger.[75] However, this 'general' authorisation without a concrete end date (though revocable) generated widespread criticism among domestic and foreign scholars.[76]

Apart from the authorisation aspect, CVA I had another controversial element; it changed the rules of the Criminal Code on scaremongering, inserting a new provision as follows: 'A person who, during the period of special legal order and in front of a large audience, states or disseminates false or distorted facts in such a way that is capable of hindering or obstructing the efficiency of the protection efforts is guilty of a felony and shall be punishable by imprisonment for one to five years'. Some civil organisations claimed that these stricter rules impose further restrictions on freedom of expression and freedom of speech.[77] As Bencze and Győry concluded, the equivocal elements of the new law go against the constitutional requirement stemming from the rule of law principle that laws that oblige ordinary citizens shall be clear and understandable. They also argued that this can have a chilling effect on the reporting of factual information about the pandemic.[78]

However, the Constitutional Court ruled that the new criminal law regulations on scaremongering, to be applied during the implementation of the SLO, are not in conflict with the FL.[79] According to the petitioner who submitted the constitutional complaint, the new regulation restricts the right to freedom of speech and provides a completely unpredictable and wide space for arbitrary application of the law; furthermore, it is incomprehensible and leaves the addressees of the norm in uncertainty. In its decision, the Constitutional Court found that scaremongering according to the disputed statutory provision concerns a narrow scope of communications: it prohibits the communication of knowingly false or distorted facts to the general public, but only if it is performed during the period of the SLO, in a manner suitable for hindering defence. However, the prohibition is only applicable to stating knowingly false or distorted facts; it does not apply to critical opinions. The threat under criminal law therefore does not extend to untrue information if the perpetrator was unaware of its nature. Considering the above-mentioned aspects, the Constitutional Court rejected the constitutional complaint.

75 CVA I 3. § para. (2). However, as Győry and Weinberg (2020, p. 340.) point out, this provision provided no legally enforceable guarantees.

76 For example, CVA I was compared to Hitler's *Ermächtigungsgesetz* of 1933 (Halmai, 2020) and evaluated as a 'creeping Coronavirus coup' (Bartha, 2020).

77 Hungarian Helsinki Committee, 2020, p. 9; Hungarian Civil Liberties Union, 2020

78 Bencze and Győry, 2021

79 Decision no. 15/2020. (VII. 8.) of the Constitutional Court. For an English summary of the decision, see http://public.mkab.hu/dev/dontesek.nsf/0/BD83430C4D2A942AC125855E005C4028?OpenDocument&english (Accessed 25 March 2021). For an evaluation of the decision, see Koltay, 2020, and for a more critical perspective, see Drinóczy, 2021.

The state of danger was terminated on 18 July 2020.[80] Simultaneously, CVA I was repealed and the 'general' authorisation ceased to exist. The FL stipulates that upon the termination of a state of danger, government decrees issued under its emergency powers shall cease to have effect in consideration of the due process of law, but it was crucial to sustain the effect of most of these decrees. Therefore, the Parliament passed the so-called Transitional Act[81] encompassing a number of provisions of the government decrees. Furthermore, the Transitional Act incorporated a new concept called 'epidemiological preparedness' into the HCA. Once a state of medical crisis has been declared, epidemiological preparedness enables the Government to introduce various measures (e.g. restrictions on opening hours of shops, restrictions on movement of citizens) without declaring a state of danger. While terminating the state of danger, the Government simultaneously declared a state of medical crisis and epidemiological preparedness.[82] These quasi-SLOs still provided large room for manoeuvre for the Government, although not as large as that provided by the state of danger.

As the second wave of COVID-19 became increasingly intense, the Government declared a state of danger again in early November 2020.[83] Bearing in mind that the decrees of the Government, if not extended, remain in force for only 15 days, the cabinet was forced again to obtain parliamentary authorisation. The Parliament granted general authorisation (just like at the end of March, as outlined above), but this time with a significant difference. Contrary to the unlimited authorisation stipulated in CVA I, the new law (hereinafter CVA II) passed on 10 November 2020 restricted its own term of validity for 90 days after promulgation.[84] As the 90-day-term expired on 8 February 2021, CVA II was automatically repealed. However, this did not mean the final termination of the state of danger since the Government introduced the SLO on 29 January for the third time.[85] This decree entered into force on 8 February and was still in force at the time of completion of this manuscript. The government decree was soon followed by a law[86] (hereinafter CVA III) through which the Parliament again granted general authorisation for the Government to rule by decree. Originally, the authorisation was valid for 90 days, but was prolonged on 18 May 2021; it will remain in force until 15 days after

80 Government Decree 282/2020. (VI. 17.) on the termination of the state of danger declared on 11 March 2020
81 Act LVIII of 2020 on the Transitional Rules and Epidemiological Preparedness related to the Cessation of the State of Danger
82 Government Decree 283/2020. (VI. 17.) on introducing a state of epidemiological preparedness
83 Government Decree 478/2020. (XI. 3.) on the declaration of state of danger
84 Act CIX of 2020 on the Containment of the Second Wave of Coronavirus 5. §
85 Government Decree 26/2021. (I. 29.) on the termination of the state of danger declared by Government Decree 478/2020. (XI. 3.)
86 Act I of 2021 on the Containment of Coronavirus

the start of the autumn parliamentary session (effectively September 2021).[87] (However, the Government may decide to end the state of danger before that.)

Beyond the issues of authorisation and prolongation, the restrictions on access to data of public interest also provoked political and legal debates. Government decrees[88] allowed public bodies to extend the deadline for responding to public interest data requests to 45 days, which could be prolonged again by an additional 45 days (instead of the original 15 + 15 days), if complying with the request within 15 days was likely to jeopardise the performance of public tasks in relation to the state of danger. As the Country Memorandum of the Council of Europe noted, government representatives felt this extension was necessary since public bodies (including hospitals) were not trained to provide information during a pandemic and required extra time.[89] An opposition MP submitted a petition to the Constitutional Court, seeking annulment of the government decree since the right of access to data of public interest and the public interest in the transparent use of public funds cannot be restricted for the purpose of achieving epidemiological objectives in such a way that they are completely emptied. While the court ruled that the decree is not in conflict with the FL, it also laid down that the regulation remains within the constitutional scope of interpretation provided the data controller does not invoke the state of danger in general terms, but actually demonstrates that the concerned public task would have been at risk if it were forced to respond to the data request within the time limit set by the Act on the Right to Information Self-Determination.[90]

Finally, two additional restrictions may have raised rule of law concerns. At the beginning of the second wave of the pandemic (November 2020), the Government declared a ban on initiating local or national referendums[91] and suspended the right to assemble,[92] making it impossible to hold any public assembly, protests, or political demonstrations. The absolute ban on assemblies was in force for more than a half year and was partly lifted only at the end of May 2021 as part of the fifth stage of the phasing out of protection measures. The ban on initiating referendums remained in force at the time of completion of this manuscript.

87 Act XL of 2021 on the Amendment of Act I of 2021 on the Containment of Coronavirus

88 Government Decree 179/2020. (V. 4.) on the deviation from certain provisions on data protection and data requests during the state of danger; Government Decree 521/2020. (XI. 25.) on the deviation from certain provisions on data requests during the state of danger. In addition to the extension of the deadline, the decrees also disallowed the oral or personal submission of public interest data requests.

89 CoE, 2021, section 14

90 Decision no. 15/2021. (V. 13.) of the Constitutional Court. For an English summary of the decision, see http://public.mkab.hu/dev/dontesek.nsf/0/52D7D58B7355E709C125867200613717?OpenDocument&english (Accessed 10 April 2021).

91 Government Decree 483/2020. (XI. 5.) on transitional provisions relating to by-elections during the period of state of danger

92 Government Decree 484/2020 (XI.10.) on the second phase of protective measures during emergency 5. § para. (1)

5. COVID-19 as an economic crisis: fiscal and monetary measures of crisis management

5.1. Hungarian fiscal policy amidst the epidemiological state of emergency

As a result of the pandemic-driven economic crisis, fiscal policy has been facing the double challenge of declining revenue and rising expenditure, so the fiscal improvement plan needs to examine both segments. On the revenue side, the crisis has contributed to a decline in tax revenues, rise in unemployment, and fall in consumption due to lagging investments, among other things. On the expenditure side, there has been an increase in spending due to higher subsidies. At the same time, the budget is being restructured by transfers and structural changes, which are reflected in the amendments to the Budget Act. Since 2008, Hungary has set frugal public finances and responsible fiscal policy as its goal. The fundamental goal of the fiscal policy has been the stabilisation of public debt in the long run.[93] Government deficit is related to government debt, which is created by financing the deficit.[94] Strengthening fiscal discipline is a necessary step because the level of public debt has been rising steadily due to the significant level of general government deficit.[95]

The implementation of the basic legislation and budgetary procedure underscore the importance of public debt in the system. Thus, the whole budgetary management process is focused on the objective of continuously reducing public debt, or at least preventing an increase in public debt, so as to achieve the optimal level of debt in the long term (50% of GDP). Thus, the public debt policy has become the core aspect of fiscal policy.[96]

Obviously, there might be exceptional situations or serious problems arising from unavoidable external causes that could affect the fiscal improvement plan, for which the FL allows a derogation from the strict rules (permanent decline of the national economy, restoration of the national economic balance, etc.). The Act on the Economic Stability of Hungary[97] (hereinafter Stability Act) interprets the rule on economic crisis broadly by stating that any situation in which the real value of the annual gross domestic product decreases must be interpreted as a permanent and significant decline in the national economy. In this case, the Stability Act allows the general government deficit to exceed

93 Act LXXV of 2008 on Cost-effective State Management and Fiscal Responsibility
94 Vígvári, 2005, pp. 175–178.
95 Sivák, Szemlér and Vígvári, 2013, pp. 49–51. In 2006, the general government deficit was 9.4% of the GDP.
96 Kovács, 2016, pp. 320–326.
97 Act CXCIV of 2011 on the Economic Stability of Hungary

3% of the gross domestic product and the government debt ratio to decline.[98] Therefore, the pandemic-driven economic crisis justifies a departure from the public debt rule. An increase in public debt in the event of an economic crisis is natural, as state overspending and higher subsidies widen the budget deficit. The utilisation of additional resources is more important than the size of the deficit because if the budget money is spent efficiently, it will lay the foundation for not only recovery from the economic crisis but also future economic growth.[99]

The Act on Public Finances[100] provides a solution to the unfavourable development of the central budget amidst the implementation of extraordinary measures aimed at executing governmental tasks and ensuring balanced budget management. The previous legislation was supplemented by the legislature with transitional measures with respect to the state of danger. The legislature conferred a wide range of powers on the Government, allowing budget expenditures not included in the budget law and the imposition of extraordinary payment obligations. The provision on the special legal order relaxes the regulation of public burden. Thus, it is possible to deviate from the strict procedural and substantive rules establishing payment obligations, with law determining the extent of deviation necessary to reverse the economic downturn and restore balance.[101]

Fiscal instruments can be divided into tax instruments on the revenue side of the budget and aid instruments on the expenditure side. Some of the instruments have already been introduced in 2020, while others will not enter into force until 2021 and will have an impact only from that date. In terms of the mechanism of action, aid instruments have a faster influence on the economy. Meanwhile, tax instruments have a long-term effect on economic operators with a few exceptions, such as the introduction of a new tax. The economic problems caused by the crisis necessitated an amendment to the 2020 budget.[102] In the framework of economic protection measures, legislators redeployed budget appropriations in the order of several trillion HUFs with which two separate funds were established in the budget. This will be carried forward to the 2021 annual budget year for epidemiological expenditure and economic protection.[103] This move is justified by the fact that the epidemiological state of danger did not cease in 2020 and is expected to have an impact on both the economy and the budget in 2021. Economic projections indicate a significant

98 Stability Act 7. §

99 Gazdasági válság 2020: A modern monetáris elmélet lesz a megoldás? (https://elemzeskozpont.hu/gazdasagi-valsag-2021-modern-monetaris-elmelet-lesz-megoldas, accessed 10 April 2020).

100 Act CXCV of 2011 on Public Finances 40. §

101 Stability Act 38/A. §

102 Government Decree 92/2020. (IV.6.) on the derogations applicable to the central budget of Hungary for the year 2020 during the period of state of danger

103 Act XC of 2020 on the Central Budget of Hungary for 2021

positive change in economic growth in 2021. Still, the fulfilment of the forecasts depends on how long the epidemiological state of danger will last in 2021.[104] Currently, it appears that the emergency situation will continue to dominate society and the economy in the first half of 2021.

In addition to the transfers to the subsystem of the central budget, legislative amendments to the municipal subsystem have also been made. The purpose of the amendments was two-fold: transferring resources, such as the car tax income, to the central budget, while imposing restrictions on municipal fees and tax reductions through which the Government provides indirect support to entrepreneurs and individuals.

Economic independence is an essential condition for local government autonomy, as reinforced by both constitutional provisions and the European Charter of Local Self-Government.[105] Resource regulation is closely related to the performance of public tasks.[106] Although the state has gradually taken over local government functions, making them increasingly centralised, local governments are still responsible for basic public services for which local government revenues are essential.[107] However, the state of danger due to the pandemic has superseded these principles, and the state is seeking to centralise resources and reallocate them towards the containment of the coronavirus outbreak and economic protection. As a result, municipalities are finding themselves in a difficult situation, as they may not be able to perform urban management tasks to an adequate standard and could face social problems as a consequence. The Government is trying to correct this situation by automatically re-examining the lack of resources for smaller municipalities and for larger municipalities on a case-by-case basis. In doing so, the Government is trying to assert a kind of balancing mechanism by withdrawing funds from better-off municipalities and redirecting resources to worse-off municipalities. The economic crisis will certainly leave a capacious mark on the management of both the state and local governments.

Three main provisions will have a significant impact on local government management:

— redirection of the motor vehicle tax to the central budget,
— amended business tax, and
— restrictions on municipal fees

104 Jackson et al., 2020, pp. 5–13. According to various projections (IMF, World Bank, OECD), the economic growth will be between 2.8% and 5.2% in 2021.
105 Lentner, 2017, pp. 136–137.
106 Horváth M., Péteri and Vécsei, 2014, pp. 121–123.
107 Horváth M., 2014, pp. 185–188.

In addition, the rules and measures taken in the context of budgetary management and the economic crisis can in general be divided into the following areas:[108]

— job preservation and job creation,
— support for priority sectors and domestic businesses,
— support for families, and
— maintenance of the security of supply

Preserving jobs and creating new ones has been a priority in government programmes. As a result of the decrease in demand, employers have been forced to lay off workers or reduce their working hours. The Government has introduced a grant of up to 70% of the net wages lost due to shortened working hours. Furthermore, in the priority sectors, employers are exempted from making social security contributions, while employee contributions are exempted for pension and have been reduced to the legal minimum for health insurance premium. A 2-percentage point reduction in the social tax contribution has also been implemented to promote employment through tax relief. Special payment facilities and tax reduction options are available for employers, such as the temporary abolition of labour market contributions. For some companies operating in priority sectors (tourism and hospitality, health care, and food industry, among others), the Government applies tax breaks and tax exemptions (for small taxpayers and small business taxpayers).[109] Emphasis is being placed on support for investment and technological development with a view to creating jobs. The Government is prioritising environmental protection. Industries with strong growth potential in the future, such as artificial intelligence and quantum technology, are receiving increased attention, as are sectors that have been affected by the economic crisis. To ensure a stable supply of human resources, government programmes are providing support for retraining and further training. In addition to supporting housing investments, the Government is providing families with a moratorium on loan repayments. In addition, child care allowances, child care fees, and child-raising support benefits, which were scheduled to expire, have been extended for the duration of the state of danger.

Thus, the support policy focuses on retaining jobs in the short term, but does not increase benefits for the unemployed. This is a continuation of the economic policies of recent years, which have prioritised growth in employment but not given much importance to jobseekers. The labour shortages of recent years justify this approach, but during the pandemic-driven

108 Convergence Programme of Hungary 2020–2024 (https://ec.europa.eu/info/sites/info/files/2020-european-semester-convergence-programme-hungary_en.pdf, accessed 10 April 2021)
109 Act CXLVII of 2012 on the Fixed-Rate Tax of Low Tax-Bracket Enterprises and on Small Business Tax

economic crisis, it would be expedient to at least temporarily increase both the amount and duration of unemployment benefits.

In an emergency, the smooth provision of public services is of paramount importance, and in the exercise of social interest, the functioning of certain enterprises may be subject to state supervision. Public services that are under state or municipal control or indirect ownership are easier to enforce in the public interest in the event of an emergency compared to services offered by undertakings independent of the public sector. However, the operation of such enterprises may be brought under state supervision during an emergency, as was the case in 2020 for undertakings of national economic importance.[110]

5.2. Monetary policy in the economic crisis

In addition to fiscal policy, monetary policy supports the economic policy objectives.[111] Monetary policy is independent of fiscal policy, but since the two systems are interlinked, proper coordination is the cornerstone of the success of the monetary and fiscal policy.[112] The Act on Hungarian National Bank[113] (hereinafter MNB Act) stresses that the central bank supports the Government's economic policy without jeopardising its primary objective.[114] To implement the monetary policy, the central bank has a wide range of tools at its disposal, which can influence the supply of and the demand for money and credit. These instruments can be considered traditional central bank instruments. However, the previous economic crisis[115] has already brought about new trends in the monetary policy of the world's leading central banks. Academic literature points out that new elements have been added to the toolbox of central banks, whose role in managing the economic crisis has significantly increased. The interest rate cut below zero, which is a conventional instrument, no longer has a sufficient effect. Thus, some central banks have announced securities purchase programmes, thereby increasing money market liquidity.[116] During the 2008 crisis, the European Central Bank used the acceptance of corporate loan claims as collateral, which became an important tool in euro area monetary policy even after the crisis.[117]

110 Lentner and Cseh, 2020, p. 4. As the authors point out, so-called military management groups operate at 71 companies of strategic importance. For the role of the state in the public sector, see Lentner and Molnár, 2020, pp. 1–6; Lentner, 2015, pp. 763–783.
111 Nagy, 2006, pp. 239–270.
112 Sivák and Vígvári, 2012, pp. 204–205.
113 Act CXXXIX of 2013 on the National Bank of Hungary
114 According to the MNB Act 3. § para (1), the primary objective of the National Bank of Hungary shall be to achieve and maintain price stability.
115 Nagy, 2020, pp. 85–88.
116 Lentner, 2019, pp. 184–185.
117 MNB, 2020

Amidst the current crisis, central banks have further expanded their instrument system in terms of not just volume. The US Federal Reserve System (FRS) acted swiftly in response to the economic crisis, announcing a quantitative easing in addition to interest rate cuts without a budget. The FRS has purchased government bonds, real estate-based mortgages, and corporate bonds as part of its asset purchases.[118] The National Bank of Hungary (MNB) also changed its monetary policy tools to mitigate the effects of the economic crisis. In its summary of the COVID-19 crisis, the MNB sets out in detail the objectives of the monetary policy and the instruments allocated to it.[119]

The MNB divided the assets into three areas based on the objectives:

— providing liquidity,
— more flexibility in short-term yields, and
— assets affecting long-term returns

To increase liquidity, the central bank uses new instruments. The MNB has expanded the range of its collateral framework with corporate loans, i.e. claims on large companies. As a result, capital debts of more than one billion HUF covered by Hungarian law may be included as collateral. Furthermore, MNB funds have become available to investment funds, thus allowing them to borrow from the central bank while the units are covered (units of denominated securities and real estate funds). A long-term central bank loan instrument has also been introduced to ease financial market tensions. Thus, the MNB's secured loan with a maximum maturity of five years and a minimum interest rate at the central bank base rate is intended to ensure stability in the financial market. The provision concerning the reserve requirement also increased liquidity. The MNB has suspended the reserve requirement and will not apply any legal consequences in the event of non-compliance.[120]

To make short-term yields flexible, the central bank reintroduced the one-week deposit facility and made the interest rate corridor symmetrical. The central bank base rate became the centre of the interest rate corridor flanked by the overnight deposit rate on one side and the overnight one-week secured loan interest rate on the other. This provided flexibility for monetary transmission.

The introduction of instruments affecting long-term yields also served to increase liquidity. The central bank relaunched the Bond Funding for Growth Scheme (BGS) as a new programme called the Funding for Growth Scheme Go! (FGS Go!), which further expanded the financing

118 https://elemzeskozpont.hu/gazdasagi-valsag-2021-modern-monetaris-elmelet-lesz-megoldas (Accessed 15 April 2021)
119 The outline of the monetary policy toolbox is based on MNB, 2020.
120 MNB Act 19–20. §

of domestic enterprises. This means beneficial financing, but it may not bring entirely new liquidity, so they can replace their previous loans with new loans that have better terms.[121] By modifying the Growth Bond Program,[122] the central bank eased the conditions so that exposure to a group of companies increased by 50 billion HUF and the term of the bonds changed to 20 years. These included the introduction of the long credit lines and the asset purchase programme, which were discussed previously. The central bank has also revamped the current government securities and mortgage bond purchase programme. Within the framework of the mortgage bond purchase programme launched in 2018 and restarted in 2020, the MNB purchases fixed-rate mortgage bonds issued in Hungarian forints on the primary and secondary markets; these bonds have a residual maturity of at least one year and are publicly traded on the Budapest Stock Exchange. Thus, in addition to traditional monetary policy instruments, the central bank uses other assets to increase liquidity in the money market.

6. Summary

In light of the Venice Commission's opinion concerning the FL, the part on SLOs appears to be generally in line with European standards.[123] Nevertheless, drawing on 351 constitutions (both current and defunct), a cluster analysis carried out by Bjørnskov and Voigt found that three particular constitutions poorly fit into any family of constitutions: the emergency provisions of the present constitutions of Germany (the 1949 constitution as amended in 1968), Hungary, and Montenegro are structurally different from most other emergency constitutions.[124] As we have demonstrated, the Hungarian regulation of emergency powers has some particular features. Not only is the length of the SLO part of the FL unusual, but the six different types of SLOs are spectacular as well. Obviously, one cannot define the 'ideal' number of types of SLOs. Some suggest that a regulation with more SLO categories may prevent government 'overreaction',[125] while others claim that too many (partly overlapping) categories make the legal framework overly complicated, triggering legal and political debates.[126] As *Alexander Hamilton* warned almost a quarter century ago, '[t]he circumstances that endanger the safety of nations are infinite, and for this reason no constitutional shackles can wisely be imposed

121 Palócz and Matheika, 2020, p. 586.
122 For the details, see https://www.mnb.hu/monetaris-politika/novekedesi-kotvenyprogram-nkp (Accessed 20 April 2021).
123 Venice Commission, 2011, section 137.
124 Bjørnskov and Voigt, 2018, pp. 117–118.
125 Cf. Jakab, 2009, p. 635.; Till, 2017, p. 73.
126 Cf. Drinóczi and Bien-Kacala, 2020, p. 191.

on the power to which the care of it is committed'.[127] Perhaps we may agree with Hamilton in that respect as it seems to be an implausible task to create permanently new SLO categories for every potential risk and threat; however, the previous amendments to the Constitution and the FL exactly followed this method. As we have noted, the Ninth Amendment of the FL is a turning point in this regard since it simplifies the overall picture by setting up three, more inclusive SLO categories. Furthermore, the Hungarian regulation is special because of the lack of a general 'power centre' during the execution of an SLO. As outlined above, the NDC, the President of the Republic, and the Government may act as a 'crisis manager' depending on the type of SLO declared. The Ninth Amendment of the FL introduces a significant change by giving the Government a central role regardless of which SLO is introduced.

As for the constitutional law aspects of the COVID-19 crisis, Hungary faced both domestic and international criticism for the 'general' authorisation granted by CVA I. Some of the concerns proved to be unfounded since the Government did not use this broad authorisation to the extent that many had feared. As Győry and Weinberg concluded, though this authorisation was arguably abused by the Government to a certain extent, it was not employed to turn the country into an overtly autocratic state.[128] Apart from authorisation and rule by decree issues, a number of legal controversies emerged during the COVID-19 crisis. As the Deputy State Secretary for Public Law Legislation noted self-critically, the Hungarian legal system was not prepared to handle the uncertainty stemming from the pandemic, and the provisions of the DMA were hardly suitable for managing the containment of COVID-19.[129] Due to the unprecedented epidemiological crisis, the Government was forced to equilibrate between legality and efficiency, which inevitably provoked disputes on both the political and legal aspects of the emergency powers.

Finally, it must be emphasised once again that the constitutional and legal framework of the SLO system will undergo a fundamental change from July 2023.[130] The new regulation obviously gives more leeway to the Government in emergency situations, which may trigger even more political and legal debates. However, we also hope that Hungary will not be urged to 'test' this new regulation in the forthcoming decades.

127 *The Federalist* no. 23. is cited by Gross, 2004, pp. 8–9. Hamilton's essay is available at https://guides.loc.gov/federalist-papers/text-21-30#s-lg-box-wrapper-25493336 (Accessed 5 May 2021)

128 Győry and Weinberg, 2020, p. 330.

129 Salgó, 2020, p. 9.

130 Well after the time of completion of this manuscript, the Tenth Amendment of the FL (May 2022) made it possible to declare state of danger not only in the event of 'a serious incident endangering life and property, in particular a natural disaster or industrial accident', but also in the case of 'an armed conflict, war or humanitarian disaster in a neighbouring country'. This amendment would clearly allow the Government to declare a state of danger due to the ongoing war in Ukraine.

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To introduce or not to introduce? Regulation of the state of emergency under the 1997 Polish Constitution vs the COVID-19 pandemic

KATARZYNA ZOMBORY – NÉMETH ZOLTÁN

1. Regulation of constitutional emergency regimes

1.1. How are public emergency regimes regulated in the constitution?

The Constitution of the Republic of Poland, adopted on April 2, 1997[1] (hereinafter the Constitution), provides for a regime applicable if the proper functioning of the state requires extraordinary action (Chapter XI, Articles 228-234 of the Constitution). Pursuant to Article 228 of the Constitution, in situations of particular danger, if ordinary constitutional measures are inadequate, any of the following extraordinary measures (*stany wyjątkowe*) –the Polish term for public emergency – may be introduced – a martial law (*stan wojenny*), a state of exception (*stan wyjątkowy*), or a state of natural disaster (*stan klęski żywiołowej*).[2] Beyond the scope of Chapter XI lies the state of war, which, contrary to the definition of extraordinary measures,

1 The Constitution of the Republic of Poland adopted on April 2, 1997

2 In the present chapter, the authors use the term "public emergency," as laid down in Article 4 of the International Covenant on Civil and Political Rights, and the expression "extraordinary measures," which is the Polish term for constitutional emergency regimes (known as the special legal order in the Hungarian legal system) interchangeably.

Katarzyna Zombory: Senior Researcher, Ferenc Mádl Institute of Comparative Law, Hungary
Németh Zoltán: Researcher, Ferenc Mádl Institute of Comparative Law, Hungary
Zombory, K., Németh, Z. (2022) 'To introduce or not to introduce? Regulation of the state of emergency under the 1997 Polish Constitution vs the COVID-19 pandemic' in Nagy, Z., Horváth, A. (eds.) *Emergency Powers in Central and Eastern Europe*, pp. 189-220. Budapest: Ferenc Mádl Institute of Comparative Law; https://doi.org/10.47079/2022.znah.epicaee.1_8

refers to external relations of the country, and can be declared in the event of armed aggression against Poland or when an obligation of common defense against aggression arises by virtue of international agreements.[3]

Extraordinary measures are not a new institution in the Polish legal system. Special legal regimes were envisaged in the 1921 and 1935 Constitutions of the newly-independent Polish state.[4] They were also provided for in the provisional constitution adopted in 1947 at the beginning of the communist era in Poland.[5] During the communist regime, the introduction of extraordinary measures was envisaged in the Constitution of the Polish People's Republic, adopted in 1952.[6] Emergency regimes were also regulated in the Small Constitution of 1992, adopted after the fall of communism, which preceded the Constitution in force.[7] The regulation of public emergency regimes in these variants differed in their definition of extraordinary measures; however, the general idea remained the same, implying a possibility to depart from the regular constitutional order as an emergency and threat response.

Extraordinary measures have been known to the Polish constitutional framework for 100 years during which it has been implemented several times. Nonetheless, in public discussion and collective memory of the Polish nation, the notion of public emergency is almost exclusively associated with the 1981 introduction of the martial law. The events encompassing the period between December 13, 1981 to July 22, 1983, when the communist government declared public emergency to counter political opposition, constitute one of the most infamous periods of Polish history. The egregious abuses of human rights at this time cast long shadows over present-day discussions about emergency regimes. Therefore, since the adoption of the 1997 Constitution, the provisions for the introduction of extraordinary measures have remained dormant, and the discussions about the possibilities of introducing public emergency have been inherently cautious and abstract in nature. However, the COVID-19 outbreak, and the unprecedented circumstances it engendered, prompted a heated discussion regarding the constitutional regime of extraordinary measures in concrete terms.

As mentioned before, the 1997 Polish Constitution distinguishes three types of extraordinary measures. They range from the least burdensome regime (the state of natural disaster) to the regime that allows for the most far-reaching and long-lasting restrictions on fundamental rights (the martial law). Common characteristics of all three types of extraordinary measures include:

3 See Article 116 paras. 1 and 2 of the Constitution.

4 Act of March 17, 1921 on the Constitution of the Republic of Poland; Constitutional Act of April 23, 1935.

5 The Constitutional Act of February 19, 1947 concerning the organization and powers of the supreme organs of the Republic of Poland

6 Constitution of the Polish People's Republic adopted on July 22, 1952

7 The Constitutional Act of October 17, 1992 on the mutual relations between the legislative and executive institutions of the Republic of Poland and on local self-government

— the temporary modification of the regular competences of the public authorities stemming from the principle of the separation of powers, and the enforcement of the position of the executive branch
— the curtailment of individual freedoms and rights
— the simplification of the law-making procedures and introduction of new sources of law[8]

In addition, the Constitution sets out several rules that need to be observed while introducing extraordinary regimes. These include the exceptional nature of extraordinary measures, the principle of legality, the principle of proportionality, the purpose of limitation, the inalterability of the Constitution and the election laws, and the continuity of the terms of elected offices.

The principle of exceptional nature, set forth in Article 228 para. 1 of the Constitution, states that extraordinary measures may be introduced in situations of danger if ordinary constitutional measures are insufficient. The Constitution does not specify which situations shall be considered "particular danger," leaving a margin for the executive branch to evaluate the circumstances. They shall be examined together with the provisions pertaining to a given type of extraordinary regime (Articles 229, 230, and 232 of the Constitution) to apply the most appropriate measures.[9] However, in each case, the prerequisite for the introduction of the extraordinary measures, given their *ultima ratio* nature, is the inadequacy (insufficiency) of the regular constitutional mechanisms.

The principle of legality (Article 228 para. 2 of the Constitution) requires that the extraordinary measures be introduced by means of a regulation anchored in a statute, and properly promulgated.[10] The Constitution does not provide a self-standing, autonomous legal basis for the introduction of an extraordinary regime. Consequently, stemming from the rule of legality is the obligation for the legislator to regulate extraordinary measures at the sub-constitutional level. The scope of such regulations shall cover the principles governing the public authorities during public emergency, and the extent of limitation on individual freedom and right.

The principal of proportionality and the limitation of purpose, both stipulated in Article 228 para. 5 of the Constitution, declare that the actions undertaken due to the introduction of an extraordinary measure shall be proportionate to the degree of threat, and shall be intended to achieve the swiftest restoration of normal functioning of the state. The rule of purpose limitation corresponds to the general principle that make extraordinary measures temporary in nature.

8 Radziewicz, 2021a; Tuleja, 2020, p. 10.
9 Radziewicz, 2021a
10 Such regulation, introducing public emergency regime, might cover issues that are subject to statutory regulation in normal circumstances, see more Radajewski, 2018, pp. 133–146.

The principle of the inalterability of the acts, the very foundation of the Polish legal system, is laid down in Article 228 para. 6 of the Constitution. It declares that during the period of extraordinary measures, the Constitution, the elections to the lower (the *Sejm*) and higher chamber (the *Senat*) of the parliament, the elections to organs of local government, and the presidential electoral law shall not be subject to change. The principle also applies to the statutes of extraordinary measures. It is closely intertwined with the rule of continuity of the terms of elected offices (Article 228 para. 7 of the Constitution), which states that during public emergency, and within 90 days following the termination of this period, the term of office of the *Sejm* may not be shortened, and the elections to the parliament, organs of local government, and presidential elections cannot be held. Therefore, the term of office of these organs shall be appropriately prolonged. The Constitutional Court has emphasized that the reason underlying the postponement of the elections during extraordinary regime is twofold. These provisions are intended to ensure undisturbed operation of the supreme state organs in times of danger, and they are envisioned to protect citizens' right to free and universal elections.[11] The principle of universal elections can be observed only in conditions that ensure a complete freedom to express the will of the voters.

The detailed regulations for the three extraordinary regimes, anchored in the Constitution, are laid down in the following statutes: Act of April 18, 2002 on the State of Natural Disaster (hereinafter: Act on Natural Disaster),[12] Act of June 21, 2002 on the State of Exception (hereinafter: Act on the State of Exception),[13] Act of August 29, 2002 on Martial Law and the Powers of the Supreme Commander of the Armed Forces, and on his Subordination to the Constitutional Authorities of the Republic of Poland (hereinafter: Act on Martial Law).[14] In addition, the Act of November 22, 2002 on Compensation for Losses resulting from the Limitations of Freedoms and Human Rights during the Period of Extraordinary Measures (hereinafter: Act on Compensation) confers on those who incur material losses due to the curtailment of the fundamental rights, therefore, can claim compensation from the State Treasury.[15] All of the aforementioned acts were adopted in a regular legislative procedure,[16] since the Constitution does not create a separate category of legislation or lawmaking procedure for even important systemic problems, such as public emergency regimes.

11 The Constitutional Court, ruling of May 26, 1998, Case no. K 17/98.

12 Act of April 18, 2002 on the State of Natural Disaster

13 Act of June 21, 2002 on the Emergency State

14 Act of August 29, 2002 on Martial Law and the Powers of the Supreme Commander of the Armed Forces, and on his Subordination to the Constitutional Authorities of the Republic of Poland

15 Act of November 22, 2002 on Compensation for Losses resulting from the Limitations of Freedoms and Human Rights during the Period of Extraordinary Measures.

16 See Article 120 of the Constitution

1.2. Types of public emergency regimes

a) Martial law (*stan wojenny*)

The institution of martial law, that first appeared in the 1921 Constitution, is the most restrictive of all the extraordinary measures provided for in the 1997 Polish Constitution. According to Article 229 of the Constitution, it can be declared in the case of external threats to the state, acts of armed aggression against the territory of Poland, or when an obligation of common defense against aggression arises by virtue of international agreement. Each of these preconditions may constitute a separate ground for the introduction of the martial law, provided that it represents a grave and real threat to the territorial integrity of Poland or its sovereignty, or endangers the life of its inhabitants.[17] Such situation can, most commonly, result from a hostile attitude of another state or an armed aggression. The constitutional regulations are further elaborated in the Act on Martial Law. It specifies that external threats to the state, including those caused by terrorist or cyberspace activities, shall be considered deliberate actions to undermine the independence of Poland, the integrity of its territory, or its economic interests, or prevent or seriously disrupt the normal functioning of the state.[18] The preconditions for the introduction of martial law bear a close resemblance to those prescribed for the declaration of a state of war,[19] therefore, it is not easy to draw a clear demarcation between these two regimes.[20]

The state of martial law can be declared by the president of Poland at the request of the Council of Ministers.[21] This power is exercised in the form of a regulation and stems from the constitutional principle according to which the president shall safeguard the sovereignty and security of the state, and the inviolability and integrity of its territory.[22] The request of the Council of Ministers is an essential formal requirement for the introduction of martial law by the president. The president may comply with the request or reject it.[23] The presidential regulation shall specify the reasons for the introduction of the extraordinary regime, the area on which it is to be declared, and the scope of restrictions on human rights.[24] The

17 Radziewicz, 2021b

18 Article 2 paras. 1 and 1a of the Act on Martial Law

19 See Article 116 of the Constitution.

20 A declaration of war may be followed by the introduction of extraordinary measures, however, not necessarily, see also Skrzydło, 2013a; Prokop, 2002, pp. 33–34.

21 Article 229 of the Constitution, Article 2 para. 1 of the Act on Martial Law. The Council of Ministers of the Republic of Poland, presided by the Prime Minister, is the executive decision-making body of the Polish government (the Cabinet).

22 Articles 126 para. 2 and 142 para. 1 of the Constitution

23 Article 3 para. 1 of the Act on Martial Law

24 Article 3 para. 2 of the Act on Martial Law. Pursuant to Article 229 of the Constitution, the state of martial law can be introduced on the entire territory or only on specific parts.

presidential decision resulting in the introduction of martial law is subject to subsequent review by the parliament. The Constitution requires the president to submit the regulation to the *Sejm* within 48 hours of signing it.[25] The *Sejm*, by an absolute majority of votes taken in the presence of, at least, half the statutory number of deputies, may revoke the presidential regulation.

The procedure to end the state of martial law is similar to its introduction and requires a regulation of the president issued at the request of the Council of Ministers.[26] Martial law may be lifted if the reasons for its introduction no longer apply, and normal functioning of the state can be restored. Both the introduction and the termination of the martial law must be notified to the United Nations Secretary-General and to the Secretary General of the Council of Europe.[27]

b) State of exception (*stan wyjątkowy*)

The state of exception, provided for by Article 230 of the Polish Constitution, appeared in Polish law in the 1921 Constitution. Unlike the martial law, which refers to external circumstances, the state of exception can be declared in domestic situations, including a threat to the constitutional order of Poland, to the security of its citizens, or to the public order. Each condition, on its own or in conjunction with others, may form grounds for the introduction of the state of exception. The threat to the constitutional order needs to threaten the entire democratic statehood ruled by law and implementing the principles of social justice, such as a *coup d'état* or a secession of a part of the territory.[28] Regarding the security of the Polish citizens or public order, several forms of social unrests may justify the introduction of the exceptional state, such as large-scale protests caused by deepening economic and financial crisis.[29] According to the Act on the State of Exception, which elaborates the constitutional framework, the need to declare the state of exception might arise *inter alia* as a consequence of terrorist or cyberspace activities.[30] The state of exception can be declared on the entire territory or on specific parts of it.

Procedural requirements for the introduction of the state of exception are similar to those prescribed for martial law. This regime may be declared by the president of

25 Article 231 of the Constitution, similarly: Article 3 para. 1 of the Act on Martial Law
26 Article 8 para. 1 of the Act on Martial Law
27 Article 2 para. 2 of the Act on Martial Law
28 Radziewicz, 2021c. See also the general principles underlying the Polish statehood, stipulated in Article 2 of the Constitution.
29 Radziewicz, 2021c
30 Article 2 para.1 of the Act on the State of Exception

Poland on request of the Council of Ministers.[31] The presidential regulation on the introduction of the state of exception shall specify the reasons for the introduction of such extraordinary measures, the area on which it is to be declared, as well as the scope of restrictions on human rights and the duration of the state of exception. However, unlike the martial law with regard to which the Constitution does not set a time-limit, the state of exception can be introduced for a maximum of 90 days.[32] It can be extended by the president only once, for a maximum of 60 days, if the reasons for its introduction have not ceased to exist, and the normal functioning of the state cannot be restored.[33] Such extension of the state of exception requires the consent of the *Sejm*. The presidential decision for the introduction of the state of exception, or its prolongation, is subject to review by the parliament, as the Constitution requires the regulation to be submitted to the *Sejm* within 48 hours of signing.[34] The *Sejm*, by an absolute majority of votes taken in the presence of, at least, half the statutory number of deputies, may revoke the presidential regulation.

As a rule, the state of exception expires upon the lapse of the time for which it was introduced. However, if the reasons for its introduction have ceased to exist and the normal functioning of the state can be restored, the president, at the request of the Council of Ministers, may lift the emergency regime before the lapse of the specified time.[35] Both the introduction and the expiry of the state of exception must be notified to the United Nations Secretary-General and to the Secretary General of the Council of Europe.[36]

c) State of natural disaster (*stan klęski żywiołowej*)

The state of natural disaster, unlike the martial law and the state of exception, does not have a longstanding tradition in Poland. It first appeared as a separate extraordinary regime in the 1997 Constitution, and its regulations differ in several respects from that of the martial law and the state of emergency. Contrary to martial law and the state of emergency, the state of natural disaster is not political in nature. It implies a random event, not caused intentionally by human activity.[37] According to the coherent wording of the Constitution and the Act on Natural Disaster, the state of natural disaster can be declared to

31 Article 230 of the Constitution, similarly: Artcile 2 para. 1 of the Act on the State of Exception
32 Article 3 para. 1 of the Act on the State of Exception
33 Article 3 para. 1 of the Act on the State of Exception. Article 5 para. 1 of the Act on the State of Exception
34 Article 231 of the Constitution, similarly: Article 3 para. 1 of the Act on the State of Exception
35 Article 5 para. 2 of the Act on the State of Exception
36 Article 7 of the Act on the State of Exception
37 Complak, 2014; Skrzydło, 2013b

prevent or to eliminate the effects of natural catastrophes or technological failures, which bear characteristics of a natural disaster.[38]

A state of natural disaster may be declared on the entire territory or on specific parts of it where the natural disaster occurred, where its effects took place, or where it is supposed to take place.[39] The duration of this extraordinary measure must not exceed 30 days; however, it may be extended with the consent of the *Sejm*. The power to declare a state of natural disaster is vested entirely in the Council of Ministers, which may introduce such extraordinary measures on its own or at the request of a competent *voivode*.[40] The regulation of the Council of Ministers shall specify the reasons for the introduction of the state of natural disaster, the area to which it shall apply, its duration, and the necessary limitations to the fundamental rights and freedoms being placed.[41] The state of natural disaster can be lifted by the Council of Ministers before the end of the specified time, if the reasons for its introduction no longer apply.[42]

1.3. Quasi- public emergency regimes

The jurisprudence of the Polish Constitutional Court, together with the Polish legal doctrine, present an exhaustive catalogue of extraordinary measures stemming from the Constitution which comprises the martial law, the state of exception, and the state of natural disaster.[43] No other extraconstitutional regime can be considered as public emergency within the meaning of the Constitution. As the Polish Constitutional Court has observed, it would be contrary to the Constitution if an emergency situation expected to occur in the

38 Article 232 of the Constitution, similarly, Article 2 of the Act on Natural Disaster. Article 3 of the Act on Natural Disaster provides for the relevant definitions: (i) natural disaster: a natural catastrophe or a technical failure, the effects of which threaten the life or health of a large number of people, property in large sizes, or the environment in large areas, whose assistance and protection can be effectively undertaken only with the use of extraordinary measures, in cooperation with various bodies and institutions, as well as specialized services and formations operating under uniform leadership; (ii) natural catastrophe: an event related to the action of natural forces, in particular, atmospheric discharges, seismic tremors, strong winds, intense precipitation, long-term occurrence of extreme temperatures, landslides, fires, droughts, floods, ice phenomena on rivers and sea, lakes and water reservoirs, mass occurrence of pests, animals, or plant diseases, human infectious diseases, or by the action of another element of nature, (iii) technical failure: a sudden, unforeseen damage or destruction of a building, technical device, or system of technical devices causing a break in their use or a loss of their properties. A natural disaster or a technical failure can also be caused by events in cyberspace and acts of a terrorist nature.

39 Article 4 para. 1 of the Act on Natural Disaster

40 Article 5 para. 1 of the Act on Natural Disaster

41 Article 5 para. 2 of the Act on Natural Disaster

42 Article 6 para 2. of the Act on Natural Disaster

43 The Constitutional Court, ruling of April 21, 2009, Case No. K 50/07; decision (order) of March 6, 2001, Case No. S 1/01. See also: Radziewicz, 2021a; Kardas, 2020, p. 12, Tuleja, 2020, p. 15.

course of the "normal" functioning of the state is regulated at a sub-constitutional level in the characteristics of the "extraordinary measures."[44] Nevertheless, the Polish law provides for some institutions that may be activated in response to crises, however, do not call for public emergency. These include the institution of crisis management and the state of epidemic or epidemic threat.

The Polish crisis management system is regulated by the Act of April 26, 2007, on Crisis Management (hereinafter: Act on Crisis Management).[45] According to the definition laid down in Article 2, crisis management is the activity of public administration bodies and an element of national security management, which consists of preventing crisis situations, preparing to take control over them through planned activities, reacting in the event of crisis situations, eliminating their effects, and restoring resources and critical infrastructure. The case-law of the Constitutional Court indicates that a "crisis situation" lies within the normal functioning of the state and, as such, shall not be confused with the constitutional extraordinary measures.[46] However, such situations, too, require public authorities and Armed Forces to take special measures to eliminate or reduce threats and to effectively monitor the situation. Therefore, the crisis management system is an important element to ensure national security and should be considered complementary to the regulation on public emergency.[47]

The Council of Ministers is the public authority responsible for crisis management at the central level.[48] The prime minister is responsible for determining the list of tasks and procedures and the public authorities, and the execution of crisis management.[49] The obligations arising from the membership of the North Atlantic Treaty Organization need to be taken into account. In addition, the Act on Crisis Management regulates the responsibilities in connection with crisis management at a regional level (in *voivodships*, *powiats*, and *gminas*).[50]

The rules of conduct during a state of epidemic threat or a state of epidemic are regulated in the Act of December 5, 2008, on Preventing and Combating Infections and Infectious Diseases in Humans (hereinafter: Act on Infectious Diseases).[51] Within the Act on Infectious Diseases, "the state of an epidemic threat" means a legal situation introduced in a given area in connection with the risk of an epidemic that may require preventive measures,

44 The Constitutional Court, ruling of April 21, 2009, Case No. K 50/07. See also: Tuleja, 2021a
45 Act of April 26, 2007 on the Crisis Management
46 The Constitutional Court, ruling of April 21, 2009, Case No. K 50/07; ruling of July 3, 2012, Case No. K 22/09.
47 The Constitutional Court, ruling of April 21, 2009, Case No. K 50/07.
48 Article 7 para. 1 of the Act on Crisis Management
49 Article 7 para. 4 of the Act on Crisis Management
50 Respectively: provinces, districts, and communes/municipalities. See Articles 14–19 of the Act on Crisis Management
51 Act of December 5, 2008 on preventing and combating infections and infectious diseases in humans

while "the state of epidemic" is a legal situation in connection with an epidemic that require anti-epidemic and preventive measures to minimize the adverse effects.[52]

If an epidemic threat or an epidemic occurs in *voivodeship*, then the state of epidemic threat or the state of epidemic is declared by the *voivode* on the entire *voivodeship* or a part of it, at the request of the Regional Sanitary Inspector.[53] If more than one *voivodeship* is impacted, the state of epidemic threat or epidemic state is announced by the Minister of Health upon consultation with the Minister of Public Administration, at the request of the Chief Sanitary Inspector.[54] Both the state of epidemic threat and the state of epidemic must be declared by way of a regulation. The Act on Infectious Diseases requires such regulation to be immediately promulgated in the appropriate official journal. Additionally, the *voivode* is obliged to inform the citizens about the obligations arising from such regulation in a customary manner.[55] The Act on Infectious Diseases provides for the possibility to impose temporary limitations on individual rights and freedoms, such the freedom of movement and assembly, put restrictions on the marketing and use of certain items or food products, or on the functioning of specific institutions or workplaces.[56] The freedom of economic activity may also be curtailed. However, neither the state of epidemic threat nor the state of epidemic is provided for in the Polish Constitution as the legal ground for limiting human rights beyond the general limitation clause set forth in Article 31 para. 3 of the Constitution.[57] Unless one of the constitutional public emergency regimes has also been declared, any restrictions on fundamental rights and freedoms shall be evaluated in accordance with the principles applicable during the normal functioning of the state.

2. Limitations of fundamental rights

In the 1997 Polish Constitution, fundamental rights and freedoms are enumerated in Chapter II, which begins with an enunciation of the general principles. Article 30, which is concerned with the source of the fundamental rights, declares that "the natural and inalienable dignity of the human being constitutes the source of the freedoms and rights of man and citizen. It is inviolable, and its respect and protection are the obligation of public

52 Article 2 points 22-23 of the Act on Infectious Diseases
53 Article 46 para. 1 of the Act on Infectious Diseases
54 Article 46 para. 2 of the Act on Infectious Diseases
55 Article 46 paras. 5–6 and Article 46b of the Act on Infectious Diseases
56 Article 46 para. 4 of the Act on Infectious Diseases
57 Gajda, 2020, p. 19; Kardas, 2020, pp. 13–14.

authorities."[58] Nonetheless, the constitutional rights and freedoms are not absolute in nature and may be subject to certain limitations, both in time of public emergency and during the normal functioning of the state.

The general rules governing the restriction of human rights and freedoms are laid down in Article 31 para. 3 of the Constitution (the general limitation clause) and are supplemented by several right-specific limitation clauses, which must be read together with the general principles. According to the general limitation clause, which applies to the entire catalogue of constitutional rights, any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute and only when it is necessary in a democratic state to protect security, public order, the natural environment, health, public morality, or the freedoms and rights of others. The restrictions must not infringe upon the essence of the rights. Therefore, in normal situations, derogation of human rights is not permissible and the enjoyment of the rights are limited only to the extent that they do not violate the essence of the rights. The Constitution lays down the principle of proportionality, which requires that the scope of interference with the constitutional rights shall be proportionate to the public interest protected by such measures. The Polish Constitutional Court applies a three-part test of proportionality to assess the lawfulness of the restrictive measures, which requires the criteria of suitability, necessity, and proportionality *sensu stricto* be met.[59] According to the proportionality test, any restrictions on constitutional guarantees must be suitable to achieve the objective pursued and necessary to achieve that objective, provided no less restrictive alternative is available and all the burdens imposed and the benefits thereof are balanced.[60]

The Constitution sets out special rules for the limitation of human rights in times of public emergency (see Article 233 of the Constitution). In line with international standards, it permits the public authorities to derogate constitutional rights and freedoms when extraordinary measures are in force.[61] While laying down the rules of conduct during public emergency, the Constitution reiterates the principle of proportionality; however, its interpretation and application differs from that of the normal situation. Article 288 para. 5 states that actions undertaken due to the introduction of extraordinary measure and

58 Article 30 of the Constitution. On the human rights protection under the 1997 Constitution, see e.g., Cholewinski, 1998, pp. 236-291.

59 For the relevant case-law of the Polish Constitutional Court see e.g.: ruling of December 19, 2002, Case No. K 33/02; ruling of October 3, 2000, Case No. K 33/99; ruling of April 11, 2006, Case No. SK 57/04; ruling of November 4, 2014, Case No. SK 55/13.

60 See more: Śledzińska-Simon, 2020; Tuleja, 2021b; Garlicki and Wojtyczek, 2016

61 See, e.g., Article 4 of the International Covenant on Civil and Political Rights, UN General Assembly resolution 2200A (XXI) of December 16, 1966; Article 15 of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) of November 4, 1950

the curtailment of individual guarantees must be proportionate to the degree of threat and intended to achieve the swiftest restoration of conditions for the normal functioning of the state. The higher the level of threat, the more far-reaching the restrictions may be; however, a lowering of threat must lead to removal or, at least, diminishing of the restrictions imposed.[62]

The specific rule of proportionality and its "softer standards" for restriction of human rights in time of public emergency do not apply to the most essential human rights. The limitation of such rights, albeit possible, must meet the requirements specified in the general limitation clause, which include *inter alia* the requirement of non-interference with the essence of the rights.[63] Therefore, these rights can be referred to as non-derogable rights.

The list of non-derogable rights varies depending upon the type of emergency regime. During the martial law and the state of exception, the guarantees relating to human dignity, citizenship, the protection of life, the prohibition of torture and inhumane treatment, the ascription of criminal responsibility, the access to a court, the protection of private life, the freedom of conscience and religion, the right to a petition, and parental and children's rights are non-derogable.[64] Restrictions upon these rights must respect the general limitation clause, while restrictions on any other rights is possible under the requirements set out in Article 228 para. 5 and Article 233 para. 2 (non-discrimination on the grounds of race, gender, language, belief, social origin, birth, or property).

In case of a state of natural disaster, the Constitution provides a list of derogable rights, allowing the application of "softer standards" under Article 228 para. 5 and derogation with respect to the following guarantees: the freedom of economic activity, personal freedom, the inviolability of the home, freedom of movement and residence within Poland, the right to strike, ownership rights, freedom to choose an occupation, the right to safe and hygienic conditions of work, and the right to rest.[65] All other rights are considered non-derogable during a natural disaster. Any restriction upon such rights shall be imposed in accordance with the general limitation clause (Article 31 para. 3), which does not allow the interference with the essence of the rights in accordance with the general anti-discrimination clause (Article 32 para. 2 of the Constitution).

62 Florczak-Wątor, 2020, p. 18.
63 Florczak-Wątor, 2021; see also Jabłoński, 2016, pp. 186–187.
64 Article 233 para. 1 of the Constitution
65 Article 233 para. 3 of the Constitution

3. Public emergency regimes in practice (except for COVID-19)

Since the adoption of its first constitutional regulation on emergency regimes in 1921, Poland has not resorted to extraordinary measures often. Public emergency was introduced a few times during the interwar period, in connection with various internal events (e.g., the assassination of a president in 1922 and *coup d'état* in 1926) and external threats (the German attack on Poland in 1939).[66]

The most infamous case of public emergency in Poland took place under the non-democratic regime. In December 1981, a state of martial law was imposed by the communist government "due to the threat to the vital interests of the state and nation."[67] The Military Council of National Salvation (*Wojskowa Rada Ocalenia Narodowego*) was formed to put an end to the anti-communist demonstrations and to suppress the opposition by force and significant curtailment of individual freedom. The military *junta* was headed by the First Secretary of the Polish United Workers Party, General Wojciech Jaruzelski. Although ruled unconstitutional by the Polish Constitutional Court in 2011, the lawfulness and necessity of the 1981 martial law remains a subject of social and historical controversy. The premises and circumstances of the martial law have raised intense public discussions for years and remain unclear to this day.[68]

The institution of martial law, not included in the original text of the 1952 Constitution of the People's Republic of Poland, was added in 1976 by a constitutional amendment. Para. 2 of the amended Article 33 provided that the Council of State may declare martial law, in part or in the entire territory of the Polish People's Republic, if it is required for the defense or security of the state.

The 1981 martial law was introduced with several acts issued by the Council of State on December 12, 1981, which took effect on December 13, 1981. These included the decree on the martial law,[69] the resolution on the introduction of martial law for state security, the decree on special proceedings of crimes and minor offenses during martial law,[70] and the decree on the transfer of certain crimes to the jurisdiction of military courts and the change in the system of military courts and military organizational units of the Public Prosecutor's Office of the People's Republic of Poland during martial law.[71] The acts of the Council of States were

66 Socha, 2013, pp. 205-209.
67 Resolution of December 12, 1981 on the introduction of martial law for reasons of state security
68 On 1981–1983 Martial law in Poland, see, e.g., Paczkowski and Byrne, 2008; Polak, 2016.
69 Decree of December 12, 1981 on the martial law.
70 Decree on special proceedings in cases of crimes and minor offenses during the period of martial law
71 Decree on the transfer of certain crimes to the jurisdiction of military courts and on the change in the system of military courts and military organizational units of the Public Prosecutor's Office of the People's Republic of Poland during martial law

subsequently confirmed by the *Sejm* in the Act of January 25, 1982, on Special Legal Regulations During the Period of Martial Law.[72]

The reasons for the imposition of martial law were specified in the resolution of the Council of State of December 12, 1981. These implied a threat to the vital interests of the state and the nation and referred to the need "to counteract the further collapse of social discipline and to create effective protection of peace and public order, as well as to ensure strict compliance with the law and respect for the principles of social coexistence." It is claimed to be beyond doubt that the protection of domestic sovereignty and the socialist regime was the reason for the introduction of the 1981 public emergency.[73] However, whether the protection of domestic sovereignty through martial law was in conformity with the 1952 Constitution remains controversial.

The 1952 Constitution empowered the Council of State to issue decrees only between parliamentary sessions, outside which the decision was to be taken by the *Sejm*.[74] However, at the time the martial law was declared, the Sejm was in session; therefore, the lawfulness and constitutionality of the decrees became questionable, even though they were subsequently confirmed by an act of parliament. The Polish Constitutional Tribunal, in its judgment of March 16, 2011, found that two of the decrees of the Council of State violated the principle of the rule of law set forth in Article 7 of the 1997 Constitution in connection with Article 31 para. 1 of the 1952 Constitution that allowed the Council of State to decree while the *Sejm* was not in session.[75] In addition, the Constitutional Court established an infringement of Article 15 para. 1 of the International Covenant of Civil and Political Rights, which prohibits punishment based on retroactive application of the law. The decrees issued by the Council of the State on December 12, 1981, were, beyond doubt, retroactive in nature. Their provisions stipulated that the decrees entere into force on the day of their publication in the official gazette, with the retroactive effect from the date of their adoption.[76] The violation of the principle *lex retro non agit* was also due to the fact that the official journal where they were promulgated, as a prerequisite for their enactment, was backdated.[77] Some authors disagree with the Constitutional Tribunal scrutinizing the constitutionality of the acts that had lost their binding force. It has been pointed out that such conduct, too, amounts to a breach of non-retroactivity.[78]

72 Act of January 25, 1982 on special legal regulations during the period of martial law

73 Eckhardt, 2012, pp. 183–184.

74 1952 Constitution of the Polish People's Republic, Article 31 para. 1.

75 The Constitutional Court, ruling of March 16, 2011, Case no. K 35/08. The following two acts were deemed unconstitutional: the Decree of December 12, 1981 on martial law and the Decree on special proceedings in cases of crimes and minor offenses during martial law.

76 See Article 61 of the Decree of December 12, 1981 on the martial law and Article 25 of the Decree on special proceedings in cases of crimes and minor offenses during martial law.

77 Mażewski, 2013, p. 125.

78 Zdziennicki, 2013, p. 178.

The 1981 martial law was lifted in 1983. Earlier, it was suspended due to the adoption of the Act of December 18, 1982, on the amendment of the Act on Special Legal Regulations During the Period of Martial Law.[79] However, this suspension was tantamount to continuing the emergency regime with less severe restrictions on the fundamental rights.[80] The "suspended" martial law continued to be in force until the Council of the State's resolution of July 20, 1983, on the abolition of martial law.[81]

Under the democratic rule since 1989, Poland has not witnessed any public emergency regimes.[82] Nevertheless, the possibility was considered multiple times, mainly in the face of severe floods in 1997, 2001, and 2010, entailing a threat to the life and health of Polish citizens, and massive material damage.[83] Such events, classified as natural disaster, confronted the Polish authorities with the dilemma of introducing a state of natural disaster. Eventually, no constitutional emergency regime was triggered, which indicated that the Polish regulation on extraordinary measures does not encourage its practical application. This is associated with a distrustful attitude toward the extraordinary measures and with legal uncertainties regarding the premises, conditions, and consequences of public emergency.[84] In 2010, a natural disaster occurred ahead of the presidential elections, a situation that repeated in 2020 during the COVID-19 pandemic. This gave rise to further political considerations in view of the principle of the continuity of the terms of the elected offices, which require that elections to be postponed during public emergency, and the term of office to be prolonged.[85]

4. Experiences of COVID-19 from the aspect of constitutional law

The government's response to the outbreak of the coronavirus pandemic in March 2020 was prompt and decisive. It triggered an increased activity of executive bodies and the adoption of several protective and restrictive measures under the 2008 Act on Infectious Diseases, and the newly adopted Act of March 2, 2020 on Special Solutions Related to Preventing, Counteracting, and Combating COVID-19, Other Infectious Diseases, and Crisis Situations

79 Act of December 18, 1982 on the amendment of the Act on special legal regulations during the period of martial law
80 Eckhardt, 2012, p. 88.
81 Resolution of July 20, 1983 on the abolition of martial law
82 As of the time of this manuscript (June 2021)
83 Brzeziński, 2013, p. 34.
84 Brzeziński, 2013, p. 35.
85 Brzeziński, 2013, pp. 41–43.

Arising Therefrom (hereinafter: the COVID Act).[86] Soon after the outbreak of the pandemic, the Polish government realized that the existing procedures, envisaged in the 2008 Act on Infectious Diseases to cope with epidemics in general terms, were inadequate to meet the scale of the threat, hence, the adoption of a COVID-specific act.[87]Adopted on March 2, 2020, it entered into force on March 8, 2020 (patient zero with COVID-19 was reported on March 4, 2020).

On March 13, 2020, the state of epidemic threat was declared in Poland through a regulation issued by the Minister of Health.[88] It was cancelled on March 20, 2020, and a state of epidemic was announced through another ministry regulation.[89] The state of epidemic threat and, subsequently, the state of epidemic served as the legal anchor for the government's response throughout the COVID crisis in Poland as none of the extraordinary regimes were invoked. While declaring the state of epidemic threat and the state of epidemic, the Ministry of Health imposed severe restrictions on the fundamental rights and freedoms with the purpose of limiting the spread of COVID-19. The restrictions concerned the freedom of movement, assembly, and religion. Later, further extensive limitations in various areas of activity were implemented by the Council of Ministers.[90] As a result of an amendment introduced by the COVID Act, a blank authorization appeared in the Act on Infectious Diseases, which enabled the Cabinet to adopt secondary legislation, restricting human rights and fundamental freedoms with the view to counter the epidemic threat or the epidemic.[91]

The legal framework of the crisis management adopted by the Polish government during the COVID-19 pandemic has been widely discussed. Several issues have been identified that require deeper consideration from the point of view of constitutional regulations. The government's decision to not declare a state of natural disaster sparked a heated discussion on the premises for the introduction of extraordinary measures. The question was prompted as to whether, and to what extent, public authorities enjoy margin of appreciation in deciding upon the introduction of public emergency. In addition, several concerns were expressed

86 Act of March 2, 2020 on Special Solutions Related to Preventing, Counteracting, and Combating COVID-19, Other Infectious Diseases, and Crisis Situations Arising Therefrom

87 Zubik and Łukowiak, 2020, pp. 175–176.

88 Regulation of the Ministry of Health of March 13, 2020 on the announcement of the state of epidemic threat on the territory of the Republic of Poland

89 Regulation of the Ministry of Health of March 20, 2020 on the announcement of the state of epidemic on the territory of the Republic of Poland

90 See, e.g., Regulation of the Council of Ministers of March 31, 2020 on the establishment of certain restrictions, orders, and bans in connection with the state of epidemic; Regulation of the Council of Ministers of November 26, 2020 on the establishment of certain restrictions, orders, and bans in connection with the state of epidemic; Regulation of the Council of Ministers of May 6, 2021 on the establishment of certain restrictions, orders, and bans in connection with the state of epidemic

91 See Articles 46a and 46b of the Act on Infectious Diseases, added by the COVID Act

about the scope of restrictions on the constitutional freedoms and rights, in terms of their consistency with the general limitation clause prescribed by the Constitution for any limitations taking place within "ordinary" circumstances. The fact that such restrictive measures were adopted by means of a secondary legislation also gave rise to doubts about the constitutional principle that required imposed limitations upon human rights by a statute before public emergency is announced. Furthermore, the question was prompted as to the liability of the state for losses resulting from the restrictions on business activity during the COVID-19 pandemic. As will be discussed below, the Constitutional Tribunal was confronted with a request to scrutinize the provisions of the Civil Code relevant to the liability of the public authorities. It must be mentioned that during the COVID-19 pandemic, presidential elections were due to be held in Poland. Therefore, the continuity of the terms of the elected offices, being one of the leading principles governing the extraordinary measures, became a subject of constitutional debate.

4.1. The government's discretion to declare public emergency

The wording of the 1997 Polish Constitution *prima facie* leads to the conclusion that the Constitution allows for, but does not mandate, the introduction of extraordinary measures.[92] However, many authors concur that the executive authorities, although enjoy a wide margin of discretion in determining whether there are indications to declare public emergency, do not have complete freedom of exercising the discretion.[93] According to this point of view, Article 228 para. 1 of the Constitution, in fact, imposes an obligation upon the authorities to declare extraordinary measures once the conditions of public emergency are met. Thus, the executive authorities are obliged to issue a regulation for the most fitting emergency regime to safeguard the constitutional order of the state, and the rights and freedoms of its citizens. It is argued that the unprecedented situation caused by COVID-19 called for the introduction of the state of natural disaster. The COVID-19 pandemic must be considered both a natural disaster and a natural catastrophe, according to the definitions provided in Article 3 para. 1, points 1 and 2 of the Act on the State of Natural Disaster. Some authors claim that the state of natural disaster should have been declared by the Council of Ministers on March 12, 2020,

92 See, e.g., Article 228 para. 1 of the Constitution: "In situations of particular danger, if ordinary constitutional measures are inadequate, any of the following appropriate extraordinary measures may be introduced: martial law, a state of exception, or a state of natural disaster." or Article 232 of the Constitution: "In order to prevent or remove the consequences of a natural catastrophe or a technological accident exhibiting characteristics of a natural disaster, the Council of Ministers may introduce, for a period no longer than 30 days, a state of natural disaster in a part of or upon the whole territory of the State."

93 See, e.g., Florczak-Wątor, 2020, pp. 8–9; Kardas, 2020, pp. 10–11; Tuleja, 2020, pp. 8–10.

along with the announcement of the state of epidemic threat.[94] Since nothing prevents the simultaneous introduction of public emergency and the state of epidemic threat or epidemic, such a conduct would have provided for better protection of individual rights and freedoms. This view is further supported by the fact that countering the pandemic is an obligation of the public authorities, set forth in explicit terms, in Article 68 para. 4 of the Constitution.[95] In order to effectively face the challenges posed by the COVID-19 pandemic, the government needed to resort to restrictions beyond those allowed under the general limitation clause in Article 31 para 3. of the Constitution. This clearly indicates that the regular constitutional measures were not sufficient; therefore, the situation called for the introduction of public emergency.[96]

In the nationwide debate on the government's response to COVID-19, the Supreme Court of Poland took the opposite stand. While hearing an election dispute related to the 2020 presidential elections, the Supreme Court ruled that it remains entirely within the discretion of public authorities to decide whether extraordinary measures shall be introduced.[97] According to the court, the Council of Ministers had no obligation to introduce a state of natural disaster, as long as there was a possibility to counter the pandemic with regular measures, provided for in the 2008 Act on Infectious Diseases, such as the state of epidemic threat or the state of epidemic. A similar standpoint was presented by some authors who claimed that public authorities were under no obligation to declare public emergency, even if there were circumstances that justified such measures.[98] These considerations are rooted in the principle of the exceptional nature of public emergency, whereby, such regimes shall be used only as a last resort. Since the introduction of the extraordinary measures is a radical and far-reaching response, public authorities are obliged to refrain from adopting such measures if possible.

Regardless of different standpoints, it is evident that the Council of Ministers did not formally resort to the constitutional provisions allowing for the introduction of extraordinary measures. The state of epidemic threat and the state of epidemic, declared on March 13, 2020, and March 20, 2020, respectively, do not qualify as extraordinary measures (public emergency) within the Constitution. This observation is of particular importance and relevance in the debate on the legality of restrictions imposed by the government to combat the COVID-19 pandemic.

94 Florczak-Wątor, 2020, p. 8.
95 According to Article 68 para. 4 of the Constitution, public authorities shall combat epidemic illnesses and prevent the negative health consequences of degradation of the environment.
96 Tuleja, 2020, p. 8.
97 The Supreme Court, decision of July 28, 2020, Case No. I NSW 2849/20.
98 Szmulik and Szymanek, 2020, p. 31.

4.2. Restrictions of human rights during COVID-19 pandemic

The Polish Constitution lays down rules for limiting fundamental rights and freedoms, both in regular times and in times of public emergency. During the normal functioning of the state, restrictions on human rights are permissible if they comply with the general and right-specific limitation clauses provided in the Constitution (see above). During public emergency, however, Article 31 para. 3 of the Constitution is no longer the default for restricting human rights and freedoms, and the Constitution allows for more extensive interference. Therefore, the key issue is to determine the precise legal regime to introduce and enforce. Since no extraordinary measures were evoked during the COVID-19 pandemic in Poland, the conduct of the state organs needs to be assessed under the general rules applicable in regular times , from the point of view of human rights limitations.

The restrictions on the fundamental rights, to counter the COVID-19 pandemic, were put in place by the Polish government through regulations (i.e., secondary legislation), while the general limitation clause requires primary legislation. The regulations issued by the Minister of Health on March 13 and March 20, 2020, announcing the state of epidemic threat and the state of epidemic, imposed several restrictions on the freedom of movement, assembly, and publicly professing religion. The questionable remains whether the 2008 Act on Infectious Diseases, which makes it possible for the Ministry of Health and the Cabinet to limit fundamental rights in a regulation,[99] complies with the requirements set out in Article 31 para. 3 of the Constitution. In 2020, several cases were filed by Polish citizens who sought legal remedy against the decision of the public authorities to impose fine for the violation of the restrictive measures (e.g., ban on free movement or the mandatory mask-wearing). In these individual cases, Polish administrative courts examined the constitutionality of the regulations through which restrictions were imposed.[100] According to the courts, restrictions to human rights can be put in place, exclusively, by means of the primary legislation and must observe the principles stipulated in the general and specific limitation clauses provided in the

99 See Article 46 para. 4 and Articles 46a and 46b of the Act on Infectious Diseases.

100 See, e.g., Voivodship Administrative Court in Warsaw, ruling of January 12, 2021, Case No. VII SA/Wa 1545/20 (concerning mandatory mask-wearing), Voivodship Administrative Court in Warsaw, ruling of January 28, 2021, Case No. VII SA/Wa 1515/20 (concerning the ban on free movement), Voivodship Administrative Court in Warsaw, ruling of February 2, 2021, Case No. VII SA/Wa 1761/20 (concerning mandatory distancing measures), Voivodship Administrative Court in Gdańsk, ruling of January 28, 2021 r., III SA/Gd 703/20 (concerning the ban on free assembly), Voivodship Administrative Court in Gliwice, ruling of January 12, 2021, Case No. II SA/Gl 421/20 (concerning mandatory quarantine). While examining the constitutionality of the governmental regulations, the courts referred to Article 178 para. 1 of the Constitution, which states that "judges, within the exercise of their office, shall be independent and subject only to the Constitution and statutes." Therefore, it shall be assumed that the authority of the courts, including administrative courts, covers the review of the constitutionality and legality of such a regulation that constitutes a basic act in an individual case.

Constitution, unless extraordinary measures were in force. Imposing limitations in lower legislation in regular times is a breach of the Constitution, in particular, the principle of legality. Therefore, the government regulations do not constitute valid and legitimate grounds for limiting citizens' rights; thus, the decisions of the sanitary authorities imposing fines for non-compliance with the COVID restrictions were cancelled by the administrative courts.

Although nearly all the courts expressed a consistent and concurring view on the subject, a different approach was also applied. One of the courts while hearing an appeal against a fine for violation of the ban on conducting economic activity found the restrictions legitimate and compatible with the Constitution.[101] According to the court, during the times of pandemic, existing rules should be interpreted in a way to protect citizens, as much as possible, against "the behavior of highly irresponsible entities who do not comply with the regulations aimed at mitigating the threat in the entire country." The court reminded that the obligation of public authorities to counter the pandemic stems directly from Article 68 para. 4 of the Constitution and corresponds to everyone's right to protection of health set out in Article 68 para. 1. According to the court, the sanctions were based on the provisions of the 2008 Act on Infectious Diseases, while the government regulation of March 31, 2020, prohibiting entrepreneurs from pursuing business activities in specific areas, provided for a detailed implementation of the statutory provisions. Since the imposition of the fine was found statutory and lawful, the appeal was overruled.

As mentioned earlier, the restrictions upon fundamental rights must meet three requirements – suitability, necessity, and proportionality *sensu stricto*. It is argued that the restrictions during the COVID-19 pandemic, such as the total ban on free assembly, do not pass the regular proportionality test under Article 31 para. 3 of the Constitution.[102] Furthermore, since no emergency regime was put into operation, the public authorities were bound by the prohibition of infringing upon the essence of the rights stemming from the general limitation clause. Nevertheless, several measures introduced by the Minister of Health and the Council of Ministers amounted to a derogation of the constitutional guarantees. For example, the regulation of the Minister of Health on March 24, 2020, introduced a general ban on assembly, including assemblies organized by churches,[103] while the regulation of the Council of Ministers issued on March 31, 2020, established a general prohibition on personal movement, except for essential needs, and entirely prohibited entrepreneurs from several branches from pursing

101 Voivodship Administrative Court in Bydgoszcz, ruling of November 17, 2020, Case No. II SA/Bd 834/20 (concerning the ban on conducting economic activities).

102 Florczak-Wątor, 2020, p. 18; Gajda, 2020, pp. 23–26; Tuleja, 2020, p. 17.

103 Regulation of the Minister of Health on March 24, 2020, amending the regulation on the announcement of the state of epidemic on the territory of the Republic of Poland

economic activities.[104] Without questioning the need for restrictions to limit the spread of the coronavirus, several authors concurred that imposing such far-reaching measures could have been lawfully done within the framework of one of the constitutional emergency regimes.[105]

4.3. Liability of the state for damages

The economic losses incurred because of the limitation of the fundamental rights during the public emergency can be compensated by the State Treasury.[106] The compensation can be claimed even if the conduct of the state was lawful and necessary. However, during the COVID-19 pandemic, the Polish government did not resort to extraordinary measures; therefore, the provisions of the Act on Compensation did not apply. Thus, the economic losses could be compensated according to the regular regime under Article 77 para. 1 of the Constitution, which offers compensation for any harm done by any action of the public authorities contrary to law. It should be noted that every court is entitled to declare the restrictions imposed in response to the COVID-19 pandemic as unlawful in accordance with 417^1 para. 1 of the Civil Code.[107] Since judges are independent and subject only to the Constitution and statutes (Article 178 of the Constitution), in individual cases, the courts may autonomously rule on the constitutionality of the governmental regulations by virtue of which the restrictions were imposed.[108]

Several months after the outbreak of the pandemic, two separate cases were brought before the Constitutional Court for it to scrutinize the constitutionality of 417^1 para. 1 of the Civil Code.[109] One of them was filed by the Prime Minister and the other one by the Speaker of the *Sejm* on the grounds that it is contrary to the Constitution that the Civil Code does not provide for an explicit requirement and only the Constitutional Court has the power to declare unconstitutionality for the purpose of claiming compensations. At the moment of writing, the cases were still pending before the Constitutional Court; its outcome may have a large bearing on the practical implementation of the compensation scheme under 417^1 para. 1 of the Civil Code. However, regardless of what the judicial body declares as the unlawfulness of a normative act, in compensation cases against the state, the burden of proof will rest with

104 Regulation of the Council of Ministers on March 31, 2020 on the establishment of certain restrictions, orders, and bans in connection with the state of epidemic

105 Gajda, 2020, p. 25; Florczak-Wątor, 2020, p. 15; Zubik and Łukowiak, 2020, p. 177; Drinóczi and Bień-Kacała, 2020, p. 190.

106 Article 228 para. 4 of the Constitution, similarly Article 2 para. 1 of the Act on Compensation.

107 Act of April 23, 1964 on Civil Code. Article 417^1 para. 1 of the Civil Code states that "If the damage has been inflicted by issuing a normative act, one may demand its redress after it has been acknowledged in an appropriate proceeding that this act contradicts the Constitution, a ratified international treaty, or a statute."

108 Tuleja, 2020, p. 17; Florczak-Wątor, 2020, p. 19.

109 Cases No. K 18/20 and 21/20.

the citizen (the claimant) to demonstrate the reality and extent of the damage and the causal link between the damage and the adoption of unlawful restrictive measures.[110]

4.4. The 2020 presidential election

Every five years, the Polish citizens elect their President in universal, equal, and direct elections. The President is the supreme representative of the Republic of Poland and the guarantor of the continuity of the state authority.[111] In 2020, the presidential election was scheduled for May 10; two months after the outbreak of the COVID-19 pandemic. Due to the outbreak, elections were not held on that day, and a new election date was scheduled for June 28, 2020, with a second round on July 12, 2020.[112] A newly-adopted law on June 2, 2020, was the legal basis governing the 2020 presidential elections, which provided for the possibility of postal voting, in addition to in-person voting.[113] Postal voting was first introduced in Poland with a 2014 amendment to the Electoral Code[114] and was applied during the 2015 parliamentary and presidential elections. In 2018, postal voting was limited to citizens with disabilities. However, the Act of March 31, 2020,[115] together with several pandemic-related measures, amended the Electoral Code and broadened the possibility for postal voting to include citizens in quarantine and those over 60 years of age.

It has been widely commented that the amendments adopted by the Polish legislator in response to the COVID-19 pandemic altered the key aspects of the electoral legal framework shortly before the scheduled elections.[116] According to the case-law of the Polish Constitutional Court, no significant changes to the electoral law can be introduced during the 6-month period of "legislative silence" before the date of the elections, except for extraordinary circumstances of an objective nature.[117] Nevertheless, the Supreme Court of Poland, in its resolution of August 3, 2020, recognized the validity of the presidential elections.[118] In its argument,

110 See more: Strugała, 2021, pp. 26–32.

111 See Articles 126 and 127 of the Constitution.

112 The National Electoral Commission, in its Resolution no. 129/2020 of May 10, 2020, confirmed the inability to hold voting for candidates of the presidential election on the due date. According to the National Electoral Commission, the effect thereof was equivalent to the impossibility to vote due to an absence of the candidates, whereby, Article 293 para. 3 of the Electoral Code provides for the possibility of ordering a new election.

113 Act of June 2, 2020 on the special regulations for general elections of the President of the Republic of Poland ordered in 2020 the possibility of postal voting

114 Act of January 5, 2011 on the Electoral Code

115 The Act of March 31, 2020 on the Amendment of the Act on Specific Solutions Related to the Prevention and Control of COVID-19, Other Infectious Diseases, and Crisis Situations

116 See, e.g., Zubik and Łukowiak, 2020, p. 178; OSCE, 2020, p. 1; Serowaniec and Witkowski, 2020, p. 167.

117 For the relevant case-law of the Constitutional Court, see, e.g., ruling of November 3, 2006, Case No. K 31/06; ruling of October 28, 2009, Case No. Kp 3/09; ruling of July 20, 2011, Case No. K 9/11.

118 The Supreme Court, resolution of August 3, 2020, Case No. I NSW 5890/20. The Supreme Court is the competent authority to rule on the validity of the presidential election according to Article 129 para. 1 of the Constitution.

the Supreme Court acknowledged that the state of epidemic, together with the fact that the elections could not be held within the constitutionally appointed time, can be considered "extraordinary circumstances of an objective nature," as referred to by the Constitutional Court. According to the Supreme Court, the amendments to the electoral law extended the possibility of participating in elections during the pandemic, in particular, by postal voting, which provided for a fuller exercise of the electoral rights of the Polish citizens (Article 62 of the Constitution). Furthermore, it ensured a better implementation of the principle of democracy (Article 2 of the Constitution) and the continuity of the state authority (Article 126 of the Constitution). The Supreme Court was of the view that it was the duty of the state to hold elections that had not taken place in due time without further delay. This opinion is shared by some Polish authors who argue that amendments to the electoral law were necessary to make the presidential elections possible during the COVID-19 pandemic.[119] The failure to hold the presidential election, despite such legislative measures, might have been considered a threat to the constitutional order of the state, which would have called for the introduction of the state of exception under Article 230 para. 1 of the Constitution.

Another issue, widely discussed in connection with the 2020 presidential election, was the principle of the continuity of the terms of the elected offices, applicable in times of extraordinary measures. Since no emergency regime was in force, there were no legal obstacles to order and pursue presidential election. Nevertheless, it is expressed that extraordinary measures should have been imposed and the elections should have been postponed to focus all human and financial resources on combating the pandemic, and mitigating its effects.[120] Some authors argue that there were political reasons for the Polish government not declaring public emergency and can be explained by the fear of the then incumbent President of losing electoral support due to postponement.[121]

5. COVID-19 as an economic crisis: fiscal and monetary measures of crisis management

The Polish government tried to mitigate the negative economic effects caused by the COVID-19 pandemic with a package of measures called the anti-crisis shield (*tarcza*

119 Szmulik and Szymanek, 2020, pp. 33–36.

120 Matczak, 2020, p. 350; Serowaniec and Witkowski, 2020, p. 169.

121 Zubik and Łukowiak, 2020, p. 177; Drinóczi and Bień-Kacała, 2020, p. 190; Bała, 2020, p. 87. Similar comments were made regarding the government's decision avoiding the introduction of public emergency in 2010; the then-governing party is today's parliamentary opposition, Piękoś, 2021, pp. 67-68.

antykryzysowa). The anti-crisis shield[122] was a set of acts made by, for example, the Ministries of Development, Family, Labor, and Social Policy, and Finance. While some existing solutions were expanded, completely new support mechanisms were also introduced for workers and entrepreneurs. The anti-crisis shield consisted of five pillars:

— employee safety
— business financing
— strengthening health care
— strengthening the financial system
— public investment program

The Polish anti-crisis shields were created in several forms and for different areas. The government's first policy response to the pandemic was the "Anti-Crisis Shield"[123] Program 1.0, which aimed to protect jobs, support private enterprise, and provide for public investment. The second shield, "2.0 Incentive Program," provided financial assistance to entrepreneurs and farmers. The third (Shield 3.0) government package included a wide range of economic measures, including for private sector entrepreneurs and the public sector. The "Shield 4.0" package was approved in June 2020 to offset the negative effects of the previous program. Subsequently, additional shield packages were adopted under Shield Measures 5.0 and 6.0. The table below shows the date of each shield, its content, and its purpose.[124]

Name of the shield	Support purpose	Date of implementation	Duration
Shield 1.0	Co-financing the salaries of employees (contractors) in the event of economic shutdown or reduced working hours, co-financing of workers' salaries (entrepreneurs) for micro, small, and medium-sized enterprises. One-off downtime payment to cover the costs of running a micro-enterprise. (PLN 5000)	March 31, 2020	3 months
Shield 2.0	Incentive program for entrepreneurs and farmers	April 2020	–

122 Website of the Government of the Republic of Poland: https://www.gov.pl/web/family/we-got-it-president-signs-an-anti-crisis-shield (Accessed: 10 June 2021)

123 Roberts and Chmielowski, 2020, p. 3.

124 Information and service website for entrepreneurs: https://www.biznes.gov.pl/pl/firma/sprawy-urzedowe/chce-przestrzegac-przepisow-szczegolnych/tarcze-antykryzysowe-aktualne-wsparcie-dla-przedsiebiorcow (Accessed: 5 July 2021)

Name of the shield	Support purpose	Date of implementation	Duration
Shield 3.0	It included a wide range of economic measures, including for the private sector entrepreneurs and the public sector	May 2020	–
Shield 4.0	Co-financing the salaries of employees (contractors).	June 24, 2020	3 months
Industrial shield	Co-financing the salaries of employees (contractors) from selected industries.	April 26, 2021	3 months
Shield 5.0	Measures for travel agencies, travel agents, and tour guides	October 15, 2020	3 months
Shield 6.0	Additional incentives for non-agricultural industries	Since December 30, 2020	3 months

Table 7
System of anti-crisis shields in Poland
Source: Authors' compilation

It is worth dividing the packages into two parts as different measures were required during the first and the subsequent waves of the pandemic. The International Monetary Fund (IMF) Country Reports, published on its website, also provide an adequate summary of the economic measures adopted by Poland to mitigate the negative economic effects of the coronavirus pandemic.

During the first wave of the pandemic, the new regulation aimed, *inter alia*, to limit the extent of the adverse market effects resulting from the SARS-CoV-2 virus outbreak.[125] The new regulation significantly changed the scope of the rights and obligations of the companies operating in Poland.[126] Shield 1.0 package, designed to alleviate the first wave of the pandemic, was signed on March 31, 2020, by the President of Poland. The package included:

— amendment to the Act on Special Solutions for the Prevention, Compensation, and Combating of COVID-19 (separate legislation)[127]
— the law for granting state aid for the rescue or restructuring of entrepreneurs (new opportunity policy)

125 IMF – Policy responses to COVID-19 https://www.imf.org/en/Topics/imf-and-covid19/Policy-Responses-to-COVID-19#P (Accessed: 5 May 2021)
126 Mezykowski, Korzeniewski and Koryzma, 2020
127 Act of March 31, 2020 amending the Act on Special Solutions for the Prevention, Compensation, And Combating of COVID-19, Other Infectious Diseases, And Crisis Situations, together with other acts

— the Act Amending the Development Institution System (PFR) Act[128]

The fiscal policy response to the first wave of the pandemic was significant. It is estimated at PLN 116 billion (5.2% of the GDP). New business loan guarantees and micro-credits were estimated at PLN 74 billion (3.3% of the GDP). In addition, the Polish Development Fund financed a PLN 100 billion (4.5% of the GDP) liquidity program for businesses. Most of the measures have expired, except the PFR liquidity loan program for large corporations. The main measures are:

— Additional funds for hospital equipment
— Wage subsidies for employees and self-employed persons of the enterprises concerned. Businesses, regardless of size, could apply for three months of support in the event of redundancies or reduced working hours. This subsidy covered social security contributions and ranged from 50-90% of the minimum wage for each worker, depending on the turnover decline in 2020.
— A new liquidity guarantee fund, offering guarantees for loans taken out by medium and large companies
— Additional loans for micro-enterprises
— Deadline for payment of social security contributions postponed or the obligation to pay cancelled. For micro-enterprises, with up to nine employees, social security contributions were covered by the budget for three months. For companies with 10-49 employees, 50% of the social security contributions were covered by the budget.
— The 2019 tax returns could be adjusted to deduct the 2020 losses from the 2019 taxable income
— Support was provided to parents of young children facing school closures
— A three-month "solidarity allowance" for those who lost their jobs after March 15, 2020
— The amount of unemployment benefits was increased by 39% in the first 90 days of unemployment
— To support local tourism and families with children, a tourist voucher was introduced, providing a one-time PLN 500 voucher for all children eligible for the Family 500+ allowance, which had to be spent in hotels or tourist events in Poland
— A new COVID fund of PLN 100 billion. The fund is overseen by the Prime Minister; however, the resources are transferred to various ministers and institutions involved

128 Act of March 31, 2020 amending the Act on Development Institution Syste. Website of the Government of the Republic of Poland: https://www.gov.pl/web/finanse/ustawy-tarczy-antykryzysowej-z-podpisem-prezydenta (Accessed: 5 June 2021)

in combating the consequences of the pandemic. The fund generates its income by issuing bonds guaranteed by the State Treasury
- Investment tasks managed by local governments up to PLN 12 billion will be provided by the COVID fund until the end of 2022
- An interest-subsidized bank loan was provided to ensure the financial liquidity of the entrepreneurs affected by the economic crisis
- The Polish Development Fund provided liquidity loans and grants to micro, small, medium-sized, and large enterprises. The total value of the program was PLN 100 billion
- The permit for foreign workers was extended to continue residence and work in Poland

In response to the second wave of the pandemic, the Shield 6.0 package was announced on November 4, 2020, and signed by the President on December 15, 2020.[129] The main measures of the shield are contained in Article 1 of the law promulgating it:
- Co-financing fixed costs for SMEs in the industries most affected by the restrictions
- A description of the grants to micro-enterprises and SMEs affected by the new health restrictions and the repayable part of the PFR liquidity loans, if their revenues decrease by at least 30% on an annual basis between March 2020 and March 2021
- Continuation of minimum guarantees for SMEs and liquidity guarantees for large companies
- Continuation of job support in the form of breaks and reduced working hours
- Exemption of industries affected by restrictions from social security contributions
- Second Chance Policy: Co-financing restructuring of enterprises by the Industrial Development Agency
- Leasing co-financing in the transport sector
- PLN 500 voucher for each teacher to cover the cost of IT equipment for distance learning

Preliminary government estimates put the fiscal cost of the anti-crisis measures at 4-4.5% of the GDP in 2020.[130] In addition to the government shield measures, the National Bank of

129 Act of December 9, 2020, amending the Act on Special Solutions for the Prevention, Compensation, And Combating of COVID-19, Other Infectious Diseases, And Crisis Situations, together with other acts (Ustawa z dnia 9 grudnia 2020 r. o zmianie ustawy o szczególnych rozwiązaniach związanych z zapobieganiem, przeciwdziałaniem i zwalczaniem COVID-19, innych chorób zakaźnych oraz wywołanych nimi sytuacji kryzysowych oraz niektórych innych ustaw), Journal of Laws [Dz. U] of 2020, item 2255.

130 IMF – Policy responses to COVID-19 https://www.imf.org/en/Topics/imf-and-covid19/Policy-Responses-to-COVID-19#P (Accessed: 5 June 2021)

Poland (NBP) used monetary and financial means to help the affected economic operators. Since March 2020, the NBP has gradually reduced the key interest rate by 140 basis points to 10 basis points.[131] The NBP provided liquidity to banks, reducing the required reserve ratio from 3.5% to 0.5%. It also purchased Polish treasury securities on the secondary market and on April 8, 2020, expanded the eligible securities with those guaranteed by the State Treasury. In addition, it introduced a program to finance corporate bank lending. By May 26, 2021, the NBP had purchased PLN 133.8 billion (5.8% of 2020's GDP) in treasury and government-guaranteed securities on the secondary market. Furthermore, the 3% systemic risk buffer for bank capital requirements was repealed.

The Polish Financial Supervision Authority (PFSA, *Komisja Nadzoru Finansowego*[132]) announced measures for the provisioning and reclassification of loans to existing SMEs/micro-enterprises, which allowed the effects of the credit losses to be spread over a longer period. Flexibility was provided in the ways that banks met capital and liquidity requirements, and the PFSA accepted the treatment of the National Development Bank (BGK) guarantee for meeting the "special collateral" condition.

In addition, the Polish Banking Association proposed a voluntary deferral of loan payments for up to three months for the borrowers.

6. Summary

The 1997 Polish Constitution provides for three types of public emergency, which can be declared in situations where regular constitutional mechanisms prove to be inadequate. The common characteristics of all three types of public emergency include the enforcement of the position of the executive branch and the restrictions on or derogation of individual freedoms and rights. The emergencies allow regime with the most far-reaching and long-lasting interference with fundamental rights (the martial law) to the least burdensome regime (the state of natural disaster). The three types of extraordinary measures have been regulated, in detail, at the sub-constitutional level (2002 Act on Martial Law, 2002 Act on the State of Exception, and 2002 Act on Natural Disaster). The catalogue of the types of public emergency stemming from the Constitution is exhaustive. Nevertheless, the Polish law only provides for institutions that can be activated in response to crisis situations, but does not call for the introduction of

131 Interest rate: https://www.nbp.pl/homen.aspx?f=/en/dzienne/stopy.htm (Accessed: 1 June 2021)

132 Website of the Polish Financial Supervisory Authority: https://www.knf.gov.pl/en/MARKET/Coronavirus_Information_for_supervised_entities (Accessed: 1 June 2021)

public emergency, such as the state of epidemic or epidemic threat, or the institution of crisis management.

In Poland, the discussion on public emergency is inherently associated with the tragic events of 1981. This may partially explain why, in face of the outbreak of the COVID-19 pandemic, the Polish government opted for a crisis management framework that did not entail public emergency – the state of epidemic threat and, subsequently, the state of epidemic. The overall assessment of the government's response to COVID-19, however, gives rise to several difficulties. Questions arise regarding the legality and constitutionality of the adopted measures and their legal consequences. While the premises for the introduction of a state of natural disaster were met, no constitutional emergency regime was officially triggered. Therefore, all the measures taken to counteract the COVID-19 pandemic were considered a part of the regular functioning of the state, which does not allow the derogation of the fundamental rights, or the use of secondary legislation to limit them. The case-law of Polish courts indicate that the scope of pandemic-related restrictions, and the manner of their imposition, did not comply with the constitutional standards applicable to the limitations implemented in regular circumstances.

The Polish government and the Central Bank have sought to mitigate the negative effects of the economic crisis caused by the coronavirus pandemic with detailed and comprehensive packages. Interventions have been made in several areas to restart the economy as smoothly as possible. The Polish measures focused mainly on enterprises and sought to save surviving enterprises with a significant state budget contribution. The anti-crisis shield package, gradually building up, supported both economic operators and individuals in recovering from the crisis. However, some of the negative economic effects will only occur in the future, whereby, new measures may be needed.

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Where is the "Special Legal Order" Heading in Romania?

SZENTPÁLI-GAVALLÉR PÁL – FEGYVERESI ZSOLT

1. Constitutional and statutory regulation, types of special legal order

1.1. Types of special legal order

In the Romanian legal system, the constitution (adopted in 1991, amended in 2003)[1] does not dedicate a separate chapter to the issue of the special legal order, but certain sections of the chapter on the president of Romania provide for such situations. Additional special legal rules are regulated in different laws. With regard to the latter regulations, specific regulatory solutions will also be presented later, outlining the related constitutional court practice.

In the constitution[2] there are the state of siege and the state of emergency, as exceptional measures, and it regulates mobilization and the state of war as a response to an armed attack on the country. The state of siege and the state of emergency are governed by the same emergency government ordinance,[3] and the rules for mobilization and the state of war are

1 As Attila Varga points out, during the successful constitutional amendment in 2003 and the unsuccessful attempts to amend the constitution in 2011 and 2013, the possibility and necessity of adopting a new constitution arose as an alternative to revising the constitution (albeit only as a theoretical debate) (Varga, 2019, p. 83).

2 Constitution Art. 73, points f and g

3 Emergency Ordinance No. 1 of 1999 on the State of Siege and the State of Emergency (Siege Government Ordinance), see: Dima, 2020.

Szentpáli-Gavallér Pál: Researcher, Ferenc Mádl Institute of Comparative Law, Hungary
Fegyveresi Zsolt: Researcher, Ferenc Mádl Institute of Comparative Law, Hungary
Senior Lecturer, Department of Law, Sapientia Hungarian University of Transylvania, Romania

Szentpáli-Gavallér, P., Fegyveresi, Zs. (2022) 'Where is the "Special Legal Order" Heading in Romania?' in Nagy, Z., Horváth, A. (eds.) *Emergency Powers in Central and Eastern Europe*, pp. 221-246. Budapest: Ferenc Mádl Institute of Comparative Law; https://doi.org/10.47079/2022.znah.epicaee.1_9

laid down by law.[4] The constitution and the main sources of law[5] adopted under it therefore distinguish between:

— states of siege and states of emergency as the highest types of emergency for which the president of Romania and the parliament have fundamental powers;[6]
— an emergency situation for which the government has basic authority; and
— a state of alert that presupposes a lower level of emergency.

A state of siege *(starea de asediu)* refers to measures of an extraordinary, political, military, economic, social, or other nature, which, in certain territorial–administrative units or throughout the country, address a threat to sovereignty, independence and territorial integrity of the state, and which may end in mobilization.

A state of emergency[7] *(starea de urgență)* refers to measures of an extraordinary, political, economic, and public order, which is taken in certain territorial administrative units, or throughout the country, in the following cases:

— in the event of a serious, current, or imminent threat to national security or constitutional democracy;
— in the event of unavoidable or occurring disasters which make it necessary to prevent, limit or remedy their consequences.

The legal framework for measures to address the protracted epidemic situation was reconsidered through Act 55 of 2020,[8] i.e., instead of general rules, the legislature created specific rules specifically for the coronavirus epidemic, which law also created the concept of the state of alert *(starea de alertă)*: it is a system of measures for a special situation of exceptional magnitude and intensity, which is temporary and proportionate to the current or future severity of the situation, and which is necessary for protecting life, health, the environment, and important material, and it can also be ordered at the local, county, or national level under the authority of the government for up to 30 days, and can be extended for additional 30-day periods.[9]

4 Act No. 355 of 2009 on the Order of the Partial or Full Mobilization of the Armed Forces and the State of War (Armed Forces Act)

5 The sources of law cited are: the 21st Emergency Government Ordinance of 2004 on the National Emergency Management System; Ordinance 88 of 2001 on the Establishment, Organization and Operation of Community Public Services for Disaster Management; and Act 203 of 2015 on Defense Planning.

6 Pursuant to Article 61 of the constitution, the parliament consists of the House of Representatives and the Senate, these two chambers take their decisions in separate sessions: "They operate independently, like unicameral parliaments" (Varga, 2019, p. 352). Article 65 of the constitution does not exhaustively list the cases in which the two houses meet together; e.g., approval of a presidential decree on a state of siege or a state of emergency.

7 Cf.: Tănăsescu, 2020, pp. 191–192.

8 Act 55 of 2020 on certain measures to prevent and combat the COVID-19 epidemic

9 See, e.g., 1065/2020 Government Decision, which extended the state of alert by 30 days from December 14.

According to the basic rules of the state of siege and the state of emergency, the president of Romania may by presidential decree order the state of siege or the state of emergency throughout the country or in certain administrative units.[10] The decree must be signed by the prime minister, and will be published immediately in the Official Gazette of Romania.[11] No later than five days after the promulgation of the decree, the president of Romania will ask parliament to approve the measures.[12] According to the constitution,[13] if the parliament does not hold a session, the parliament is considered to be convened by law within a maximum of 48 hours from the introduction of the state of siege or state of emergency and will function for the entire duration of the announced special legal order. Even in times of a state of siege or state of emergency, parliament emerges as a counterweight to the executive branch, which itself exercises control over the decree of the head of state[14] and its implementation and plays a key role in maintaining proportionality between the measures and the reasons for them. Parliament approves the decree in a joint sitting. If the state of siege or state of emergency is not approved by the parliament, the president of Romania shall immediately revoke the decree and the ordered measures shall cease.

A state of siege can be ordered for up to 60 days and a state of emergency for up to 30 days. With the consent of parliament, the state of siege or emergency may be extended in accordance with these time limits, and may be extended or reduced territorially. If the state of emergency ceases before the end of it, the special legal order can be revoked by decree and with the prior approval of the parliament. A state of siege or emergency may be ordered and maintained only to the extent of the reasons for it and in compliance with Romania's obligations under international law.[15] Within 60 days of the end of the state of siege or state of emergency, the president of Romania shall inform parliament of the reasons for the situation, the measures taken, and the possibilities of avoiding similar situations in the future.

An emergency situation *(situația de urgență)* is an exceptional, non-military event which, due to its size and intensity, endangers the life and health of the population, the environment, important material and cultural assets, and requires integrated management, additional resources and integrated management of the assets involved.

10 Cf: Presidential Decree No. 2020/195 on the state of emergency (COVID Decree), which is based on the fact that a semi-presidential system of government has developed in Romania following the change of regime. For more information, see Veress, 2006, pp. 299–311.

11 The mandatory content of the decree are: the reason, area, duration of the state of siege or state of emergency, the measures to be taken immediately, the designation of fundamental rights and obligations that are restricted, the designation of the military and civilian authorities that implement the decree and their powers and other necessary provisions.

12 The COVID Decree was approved by Parliament Decision 2020/3.

13 Constitution Art. 93

14 Kormányhatáskörök és parlamenti ellenőrzés rendkívüli állapot esetére az Európai Unió tagországaiban, 2016, p. 37.

15 The regulation introduced by Act 453 of 2004 (Government Ordinance on State of Siege, 3.1 Art.).

In the event of mobilization *(starea de mobilizare)* or a state of war *(starea de război)*, parliament shall continue to function for the duration of those special legal orders or, in the absence of a session,[16] within 24 hours of their declaration,[17] shall be deemed to have been convened by law; the term of office of the president of Romania may be extended by an organic law in the event of war or disaster.[18]

The constitution cannot be amended during a period of state of siege or state of emergency, nor during a period of war.[19]

With regard to special legal orders, there is an important law: the Act on the National Defense, which,[20] in addition to preparing the population for defense and defining the rights and obligations of citizens in the preparation of the country's defense, also regulates military service rules. The Act on the Suspension of Compulsory Military Service and the Introduction of Voluntary Military Service in connection with military service also contains special rules regarding the special legal order.[21]

With regard to a state of war, a significant law is the Act on the Supreme Defense Council,[22] which regulates the council's organization and operation, and also sets out the obligations and powers of the authority. The National Security Act,[23] which holds that the moral duty of citizens is to contribute to the realization of national security,[24] i.e., to the maintenance of social, economic, and political stability. And this, according to the law, is threatened, among many others, by acts against state sovereignty, the provocation of war or civil war, an armed act aimed at weakening the state and acts of terrorism.[25] The coordination of the measures necessary from the point of view of national security is the task[26] of the Supreme Defense Council *(Consiliul Suprem de Apărare a Țării)*. In addition, important legislation for the special legal order are regulations and decisions that define the tasks of the competent ministries. These are usually legislation setting out the organizational and operational rules of a particular ministry.

16 Constitution Art. 89
17 Constitution Art. 92
18 Constitution Art. 83
19 Constitution Art. 152.
20 Act 446 of 2006 on national defense
21 Act 395 of 2005 on the Suspension of Compulsory Military Service and the Introduction of Voluntary Military Service
22 Act No. 415/2002 on the organization and functioning of the supreme council of defense of the country
23 Act No. 51 of 1991 on National Security Art. 2 (National Security Act)
24 It is also important to highlight the national security system in view of the fact, that Péter Tálas rightly states in relation to Romania that "the subjective approach to security, the perception of threat, is significantly detached and far from objective security" (Tálas, 2016, p. 43.).
25 National Security Act Art. 3
26 National Security Act Art. 6

In preparation for special legal order the role of non-defense ministries can be stated in peacetime that according to the constitution the government,[27] as the custodian of the executive power, ensures the implementation of the country's domestic and foreign policy and general administration.[28] Furthermore, as set out in the Law on the Organization and Functioning of the Government and Ministries, it ensures the balanced functioning of the economy and society, and the promotion of national interests.[29] Under the governance program, the government exercises a state power function among many other tasks to ensure public order and national security rules.[30] The government consists of the prime minister, two deputies, and 18 ministers.[31]

The mobilization of the armed forces and the state of war are governed by a separate law. Mobilization involves the elaboration and preparation in peacetime of measures in various political, economic, social, administrative, diplomatic, legal, and military fields and their application in the event of a serious threat to the sovereignty, integrity, and democratic principles of the state.[32] A state of war is a set of extraordinary measures that a state can take to exercise its right to self-defense, mostly in the political, economic, social, administrative, diplomatic, legal, and military fields.[33] Mobilization can be partial or complete, depending on whether it affects the state, as well as the apparatus as a whole.[34] During both mobilization and state of war, fundamental rights can only be restricted in accordance with the constitution.[35] Mobilization and the order of a state of war are carried out in accordance with the provisions of the constitution. All this presupposes cooperation between the president and parliament, as the decree of the president of Romania on mobilization and the state of war is approved or refused by parliament.[36] The management of the national mobilization system, which includes the related infrastructure and resources in addition, is the responsibility of the parliament, the president, the Supreme Defense Council, the government, and other authorities of the state. An indispensable institution is the Supreme Defense Council, which, as an autonomous administrative authority, unanimously organizes and coordinates activities related to national defense and participation in initiatives related to national security, maintaining international security, collective defense within military alliances, and maintaining

27 Romanian government website: https://gov.ro/ro/guvernul/cabinetul-de-ministri (Accessed: 16 November 2020).
28 Constitution Art. 102
29 Administrative Code Art. 14
30 Administrative Code Art. 1, section (5)
31 Administrative Code Art. 18; Government Resolution No. 31/2020
32 Armed Forces Act Art. 1
33 Armed Forces Act Art. 2
34 Armed Forces Act Art. 3
35 Armed Forces Act Art. 4
36 Armed Forces Act Art. 5–7

or restoring peace.[37] Pursuant to the Law on the Supreme Defense Council, the Supreme Defense Council proposes a national security and military strategy for Romania and, at the request of the president, proposes and analyzes a state of siege and state of emergency, mobilization of the armed forces and state of war in connection with its promulgation.[38]

The constitution provides for responsibilities in the field of national defense, according to which the president of Romania is the commander of the armed forces and chairs the Supreme Defense Council.[39] With the prior consent of parliament, it may announce the partial or general mobilization of the armed forces. Only in exceptional cases may the president's decision be subsequently submitted to parliament for approval within a maximum of five days of the decision being taken. In the event of an armed attack on the country, the president of Romania will take steps to fight off the attack and bring it to the attention of parliament without delay. If parliament does not hold a sitting, it shall be deemed convened by law within 24 hours of the outbreak of aggression.[40]

1.2. The role of central administration in relation to the special legal order

The Ministry of National Defense is primarily responsible for coordinating measures in exceptional situations and in preparation for them, but other ministries also have competencies in relation to the special legal order. The government itself is involved in the management of the national mobilization system,[41] which includes the management of resources and infrastructure.[42]

With regard to the government, it is worth mentioning that the countersignature of the prime minister is necessary for the president to order an exceptional measure. In addition to the Ministry of National Defense, the Ministry of the Interior has more serious responsibilities in relation to the special legal order. The basic tasks of the Ministry of the Interior include the fighting terrorism, illegal migration, and the fight against cybercrime, as well as the development of civilian crisis prevention and management training through its specialized administrative bodies.[43] The Emergency Government Ordinance on the organization

37 Constitution Art. 119

38 Law no. 415/2002 on the organization and functioning of the supreme council of defense of the country Art. 4

39 Constitution Art. 92

40 Kormányhatáskörök és parlamenti ellenőrzés rendkívüli állapot esetére az Európai Unió tagországaiban, Országgyűlés Hivatala Közgyűjteményi és Közművelődési Igazgatóság Képviselői Információs Szolgálat, 2016, p. 36–37. [Online]. Available: https://tinyurl.hu/SsjG/ (Accessed: 14. January 2020).

41 Armed Forces Act Art. 11

42 Armed Forces Act Art. 12

43 See the website of the Romanian Ministry of the Interior: https://www.mai.gov.ro/despre-noi/atributiile-ministerului-afacerilor-interne/ (Accessed: 12 December 2020)

and operation of the Ministry of the Interior states, that it is responsible for ensuring civil protection and crisis management, as well as the border protection system,[44] the literature notes that county bodies have also a decisive role in crisis management.[45] It also develops the implementation of the strategic requirements for the police and public security forces in peacetime, emergency situation and war, and ensures inter-ministerial coordination on the state border.[46] According to the Siege Government Ordinance, the Ministry of the Interior is responsible for coordinating the measures taken during a state of emergency in the event of a threat to the constitutional order.[47] During a state of emergency, the Minister of the Interior, his deputy and the officials approved by them, are authorized to issue a military ordinance *(ordonanță militară)*,[48] depending on whether the state of emergency covers the entire territory of the country or only certain administrative units.[49] The Directorate-General for Emergencies *(Inspectoratul General pentru Situaţii de Urgenţă)* under the authority of the Ministry of the Interior is responsible for taking measures to prevent and deal with various emergencies. In the course of its operation, it monitors and assesses the causes of emergencies, informs the population, provides them with preventive education, and provides evacuation measures in the event of danger to persons and certain goods.

The role of the Ministry of Foreign Affairs is mainly to prevent special legal orders by contributing to international initiatives to develop peaceful relations and cooperation between states and promoting[50] Romania's national interests on the international stage. The decree on the organization and operation of the Ministry of Justice[51] provides for a Ministerial Committee for Emergencies[52] among the permanent working organizations at ministerial level, which, as a delegated body at ministerial level, plays a role in supporting crisis prevention and crisis management. In the course of its activities, it develops crisis management regulations, assesses crisis situations, envisages appropriate measures, supervises the use of the necessary (human, material, and financial) resources. and informs the National Crisis Management Committee through the Emergency Directorate-General.[53] The Ministry of Economy, Enterprise, and Tourism, in accordance with the decision on its operation and organization, ensures disaster response and civil protection measures, the identification, designation and

44 Ordinance No. 30 of 25 April 2007 on the organization and operation of the Ministry of the Interior (Hereinafter: Decree of the Ministry of the Interior) Art. 1
45 Cf.: Meltzer, Stefanescu and Ozunu, 2018, p. 2.
46 Decree of the Ministry of the Interior 3. Art., point (b) subpoints 5 and 10
47 Siege Government Ordinance 18. Art. Section (1)
48 Cf.: Țăgorean, 2020, p. 84.
49 Siege Government Ordinance Art. 23. point 2
50 Decision No. 16/2017 on the organization of the Ministry of Foreign Affairs Art. 1
51 Decree on the organization and operation of the Ministry of Justice
52 Ministerial Committee for Emergency Situations *(Comitetul ministerial pentru situații de urgență)*
53 Decree on the organization and operation of the Ministry of Justice Art. 26–28

protection of critical infrastructure at national and EU level, in the economic field makes a proposal to the Supreme Defense Council, participates in the work of inter-ministerial committees on issues related to national security, emergency management, civil protection, and critical infrastructure protection.[54] The Ministry of Transport and Infrastructure is responsible for emergency management.[55] The Ministry of Development, Administration, and Public Works contributes to the development of crisis management measures at central and local level and ensures the functioning of the operational center in the event of an emergency.[56] The minister of health takes the necessary measures to prevent and deal with emergencies caused by epidemics and infectious diseases.[57]

Depending on the evolution of the emergency, the president may, with the consent of parliament, extend the duration of the state of emergency and extend or limit its scope. As a general rule, the state of siege and the state of emergency cease on the date specified in the decree on their order or extension, but in the event of premature cessation of the situation giving rise to the special legal order, the exceptional measure may be terminated in the decree.[58] In the course of exceptional measures (see above), military ordinances may be issued, the violation of the provisions of which entails civil or criminal liability.[59] The determination of those entitled to issue a military ordinance, both in a state of siege and a state of emergency, depends on whether it covers the entire territory of the country or only a specific part of the country. In the event of a state of siege imposed on the entire territory of the country, the minister of defense or the chief of staff and, in some districts, the commanders of the territorial units, are entitled to issue a military ordinance. In a state of emergency, the minister of the interior or his/her deputy; in a state of siege for the county, police chief inspectors and other officials authorized by the deputy are entitled to issue military ordinances.[60] However, even in times of a state of siege and state of emergency, the exercise of fundamental rights and freedoms may be restricted only as necessary, in proportion to the situation on which the special legal order is based, with the consent of the minister of justice.[61]

With regard to exceptional measures, the powers of the president of Romania are quite strong, but parliament's controlling role will not—in theory—end. According to the National

54 Decision No. 315/2021 on the operation and organization of the Ministry of Economy, Entrepreneurship and Tourism Art. 4
55 Decision no. 370 of April 1, 2021, on the organization and functioning of the Ministry of Transport and Infrastructure Art. 3
56 Decision no. 477/2020 on the organization and functioning of the Ministry of Public Works, Development and Administration Art. 5
57 Act 95 of 2006 on Health Care Reform Art. 25. Section (2)
58 Siege Government Ordinance Art. 15–16
59 Siege Government Ordinance Art. 27
60 Siege Government Ordinance Art. 23
61 Siege Government Ordinance Art. 4

Defense Act, national defense matters are decided by the president with parliamentary authorization.

In times of war, decisions are taken by the Supreme Defense Council, with an obligation to inform parliament, which must meet no later than 24 hours after declaring a state of war, and this will remain until the end of the war (the 24-hour time limit is only mentioned in the constitution). Army headquarters is responsible for operations and is the commander of military operations in peacetime and crisis situations (Crisis Center). In peace, crisis and war, the minister of national defense represents the ministry vis-à-vis other ministries and government bodies, as well as other administrative authorities, and also coordinates co-operation.

2. Issues related to restriction of fundamental rights

There are two levels of the restriction of fundamental rights in the Romanian constitution. The constitution contains a general clause restricting fundamental rights, according to which the exercise of certain rights or freedoms may be restricted only by law, if necessary for reasons of national security, public order, public health or morals, protection of citizens' rights and freedoms, criminal proceedings, prevention of the consequences of a natural disaster or an extremely serious disaster.[62] It further provides that this restriction may be imposed only if necessary. The measure must be proportionate to the situation and must be applied in a non-discriminatory manner, without undermining the existence of a right or a freedom.

The system of constitutional conditions that can be deduced from the general restriction clause is the following:

1. The only means of restricting a fundamental right or freedom is the law. The Romanian constitutional order allows the government to legislate at the statutory level, in exceptional cases, which regulation does not tolerate delays (the so-called emergency government ordinance government ordinance, in Romanian: *ordonanţe de urgenţă*). The emergency government ordinance will enter into force upon its publication, but must be approved by parliament afterwards; it may approve, adopt, or reject such a regulation without amendment. The question is, can a restriction of a fundamental right or freedom be made by an emergency government ordinance? The issue was resolved by the 2003 constitutional amendment,[63] which introduced the provision that emergency government ordinances may not be adopted

62 Constitution Art. 53
63 Constitution Art. 115

in the field of constitutional laws; they must not affect the status of fundamental state institutions, constitutional rights, freedoms and obligations, or voting rights; and may not impose coercive measures on the transfer of certain assets to the public domain. Consequently, an emergency government ordinance that restricts constitutional rights or freedoms (fundamental rights or freedoms) is unconstitutional. Legislative norms adopted before the constitutional amendment were also recognized as a means of restricting a fundamental right or freedom.[64] This is how two groups of government ordinances were formed:

— with government ordinances adopted after the constitutional amendment, it is not possible to restrict the fundamental right by a government ordinance;
— on the other hand, government ordinances restricting a fundamental right or freedom adopted before the constitutional amendment may contain a restriction of a fundamental right or freedom in a constitutional manner.[65]

2. Restrictions of a fundamental right or freedom may be justified on grounds of national security, public order, public health or morals, the protection of citizens' rights and freedoms, criminal proceedings, the prevention of the consequences of a natural disaster, or a major disaster. Related to this, the constitutionality of two pieces of legislation has been established, because, although they restrict access to information, the restrictions are enforced by law for the sake of national security, within the framework of the constitution.[66] Incidentally, according to the interpretation of the Constitutional Court, the concept of national security also has an economic content: the macroeconomic and financial stability of the Romanian state is a matter of national security.[67]

3. As regards the extent of the restriction, the constitution stipulates as a general requirement that the restriction be constitutional only if it meets the following criteria:

— the restriction is necessary (classified here by the Constitutional Court's practice that the restriction must be temporary);[68]
— the restriction is proportionate to the situation giving rise to it;
— the restriction is applied in a non-discriminatory manner;
— the restriction must not affect the existence of a fundamental right or freedom, and consequently only the exercise of a fundamental right or freedom may be restricted.

64 The Romanian Constitutional Court adopts decisions *(decizii)* when examining constitutional issues, therefore the term decisions of the Constitutional Court is abbreviated as DCC. See DCC 1994/75, DCC 1994/139.
65 DCC 2005/148.
66 Constitution Art. 53., DCC 2006/766.
67 DCC 2006/855.
68 DCC 1994/75, DCC 1994/139, DCC 1992/6.

There is another related limitation of the constitution:[69] fundamental rights and freedoms or their guarantees cannot be abolished by an amendment to the constitution, consequently, a law amending the constitution may also be unconstitutional if it would impair fundamental rights or freedoms.[70] The judicial practice of the constitutional Court has clarified that this system of restriction applies only to fundamental rights and freedoms and not to any individual right. Thus, for example the following do not constitute a fundamental right or freedom: the transport of goods of any weight on public roads;[71] the activities of the insolvent debtor;[72] someone receives an additional absence fee before his/her leave, because in this case it is a subjective right established by a separate law and not a fundamental right,[73] whereas the right to pay is a fundamental right, suspension or postponement of payments.[74]

Another level of constitutional restriction of fundamental rights is the so-called restriction of individual fundamental rights and freedoms. The constitution makes explicit reference to the possibility of restriction in many fundamental rights. In addition, the constitution explicitly states in the case of several fundamental rights that its exercise and provision is possible within the framework specified by law or in accordance with the conditions of law. It is important to note, that in cases, where the text of the constitution itself recognizes in further legislation the possibility for the legislator to determine the conditions for the exercise of a fundamental right or freedom,[75] there is no need to examine the system of conditions established by the general restriction clause, as the clause is a general rule over which the provisions on individual fundamental rights or freedoms, including the possibility of restrictions, take precedence. Obviously, there must be consistency between the constitutional rules governing each fundamental right or freedom and the statutory detailed legislation setting out the conditions and limits for the exercise of the right.

Restrictions on fundamental rights during a state of siege and a state of emergency are governed by common rules, which prohibit:

— restriction of the right to life, except where the death is the result of an act committed in compliance with the law of war;
— inhuman or degrading treatment;

69 Constitution Art. 152
70 Ibid
71 DCC 2004/11.
72 DCC 2001/223.
73 DCC 2005/214.
74 Constitution Art. 53., DCC 2005/148.
75 For example according to Constitution Art. 25, domestic and foreign freedom of movement is guaranteed, but the conditions for exercising this right are laid down by law; similarly, in the case of administrative litigation, the right of a person who has been harmed by the authority in his legitimate interest to go to court may be limited by law. For example Act 554 of 2004 on administrative jurisdiction excludes from judicial review military acts and acts issued by public authorities in their relations with parliament (Art. 5).

— conviction for an offense not classified as a criminal offense under national or international law;
— restriction of free access to justice.

It is clear from the norm that these fundamental rights cannot be restricted during a state of siege or a state of emergency, in these times, it is therefore possible to restrict certain fundamental rights and freedoms, subject to the exceptions discussed above and under the conditions laid down in the constitution.[76] It is important to note here that the original wording of the legislation generally allowed for a restriction of a fundamental right, without setting any conditions, in complete disregard of the cited article of the constitution.[77] According to Emergency Government Ordinance No. 34 of 2020 on the amendment of the state of siege government ordinance, the transparency of administrative decision-making and social consultation rules can be avoided in the case of draft legislation on these conditions, this amendment under the Constitutional Court was found unconstitutional, so the state of siege government ordinance was not amended.[78] In times of state of siege or state of emergency, the rules on transparency of administrative decision-making and social consultation shall not apply to draft legislation which is a consequence of the introduction of such states.[79]

During a state of siege[80] the following measures, which may also be used to restrict fundamental rights, may be taken:

— closing the border or increasing the intensity of controls;

76 Constitution Art. 53

77 Ibid. (Original version of the relevant text: "In times of state of siege and state of emergency, the fundamental rights and freedoms provided for in the constitution may be restricted with the consent of the Minister of Justice, in proportion to the gravity of the reasons for their order and only if necessary." This unconstitutional condition was abolished by Act 453 of 2004.)

78 DCC 2020/152. See Dănișor, 2020

79 Regulation introduced by Emergency Government Ordinance 34 of 2020

80 According to the regulation, the military and civilian authorities have the right to: order the mandatory periodic deposit of firearms and explosives in the public domain; restrict freedom of movement; restrict the right of assembly; allow or prohibit demonstrations, marches; remove any person whose presence is not justified from the sites affected by the state of siege or state of emergency; register and remove persons/refugees; information relating to a state of siege or a state of emergency, other than natural disasters, may be disclosed only with the permission of the military authorities; the audiovisual and print media must give priority to the publication of announcements by military authorities; may temporarily order the closure of service stations, catering establishments, or other public places; they may temporarily prohibit the distribution of printed press products or prohibit the broadcasting of radio and television programs; order military custody of various facilities; take measures to rationalize food and other basic commodities; may adopt military ordinances under the terms of a ordinance ordering a state of siege or a state of emergency; may prohibit road, rail, sea, river, and air transport; mobilize reserve soldiers.

— increasing the production activities of companies involved in the production of military products;
— providing priority for military transport; and
— confiscation of goods.
— In a state of emergency the following measures, which may also constitute a restriction on fundamental rights, may be taken:
— to give priority to transport for defense purposes;
— closing the border or increasing the intensity of controls;
— confiscation of goods.

In times of state of emergency, public authorities, public institutions, businesses, and the general public are obliged to apply the relevant legislation and to comply with the measures ordered.

The regulations[81] on the emergency situation and the state of alert do not contain provisions restricting fundamental rights and freedoms, but the regulation stipulates that special legal situations may be handled only with respect for fundamental rights and freedoms. Consequently, an emergency situation occurs during a state of siege, the restriction of a fundamental right may be required, whereas an emergency situation during a state of alert does not allow the restriction of a fundamental right. The regulation does not specifically address *health emergency situations*, because the Romanian legislature considers the legal institution of the *state of alert* to be appropriate for dealing with the health emergency. The public health system is responsible for preventing epidemics, ordering epidemiological states of alert, and controlling epidemics. Measures concerning situations caused by epidemics (e.g. ordering quarantines) are referred to in the scope of the Ministerial Decree by law.[82] There is only one legal provision that is worth mentioning: public authorities may also approve the use of unauthorized drugs during an epidemic. [83]

From a constitutional point of view, it is interesting how the above provisions work in practice. The Siege Government Ordinance is not suitable for dealing with an epidemiological emergency. It was drafted late, compared to the adoption of the constitution, and its content

81 Ordinance 21 of 2004 on the National Emergency Management System, as well as Government Ordinance No. 88 of 2001 on the Establishment, Organization, and Operation of Community Public Services for Disaster Management

82 Act 95 of 2006 on Health Care Reform (Reform Act) Art. 5–6, 25. The second part of Art. 25 Section (2) of the Act is unconstitutional according to DCC 458/2020, i.e., the conditions for the establishment of quarantine are to be determined by law, the forms, procedures, and restriction of fundamental rights cannot be regulated by ministerial decree.

83 Reform Act Art. 5–6., 25, 703

was shaped by the historical experience of "miners' walks".[84] As mentioned earlier, the Siege Government Ordinance contains an explicit provision that the restriction of fundamental rights may take place in accordance with the constitution,[85] namely that the exclusive means of restriction is the law, i.e., the restriction is the exclusive parliamentary competence. This approach may be partially relaxed by the fact that the Siege Government Ordinance is a statutory decree and includes the possibility of restricting certain fundamental rights.[86] Thus, the situation can be interpreted as meaning that the statutory level of a restriction is fulfilled by a statutory decree, the decree only imposes on the situation of the specific restrictions according to these legal provisions.[87]

A presidential decree ordered as a result of the COVID-19 pandemic[88] lists in detail the fundamental rights to be restricted: the right to free movement, the right to private life, the inviolability of residence, the right to education, the freedom of assembly, the right to private property, the right to strike and economic freedom are restricted by the decree, but these also include rights (such as the right to education) for which the Siege Government Ordinance does not provide a legal basis (nor does it regulate in principle the possibility of restricting the right to education), the Venice Commission found that the issuance of this decree constituted a measure of government.[89] The COVID Decree, on the other hand, orders all educational institutions to suspend their activities for the duration of the state of emergency.[90] There is also no doubt that the parliamentary Decision No. 3 of 2020 approving the presidential decree is neither a law, nor a decree, so in Romania there are concerns about the constitutionality of the restrictions on fundamental rights introduced by the decree under the constitution,[91] especially with regard to fundamental rights and freedoms where the possibility of restriction is not indicated by statutory regulation. There has also been expressed an opposite professional opinion, according to which the head of state may discretionarily restrict fundamental

84 In Romania, after the regime change, the post-communist political power deployed miners in the Zil Valley in 1990 against opposition movements. After the 1977 mining movement in Zil Valley, based on social demands but with anti-regime potential, communist secret services joined the local mining leaders. Mainly because of this, they were called to Bucharest to disband the opposition movement. Two mining missions also took place in January and February 1999, when miners made social demands and protested the conviction of Miron Cozma, a mining leader sentenced to prison for his role in the two "miners' walks." Armed forces were deployed against the miners, and the regulation is based on this historical experience.

85 Constitution Art. 53

86 Cf. Stănăsescu-Sas, 2020, p. 25.

87 This is where the problem that has already been mentioned becomes important: the 2003 Amendment to the Constitution prohibited the restriction of a fundamental right or freedom by a government ordinance, but previous restrictions, such as those adopted in 1999, remained in force.

88 Cf. Ceslea, 2020

89 Venice Commission, 2020, p. 13.

90 COVID Decree Art. 49

91 Constitution Art. 53

rights and freedoms due to ex-post parliamentary control,[92] i.e., according to this opinion, ex-post parliamentary approval of a decree ordering a state of siege or state of emergency meets constitutional requirements. Rather, the argument serves to ensure the functioning of the entire legal architecture, because the examination of the logical unity of the regulation and the consistent application of the constitutional criteria do not lead to this result of interpretation.[93] Moreover, the lowest level of restriction on fundamental rights and freedoms is the scope of military ordinances (issued by the Minister of the Interior and countersigned by the prime minister) and which also introduced important restrictions under the COVID-19 presidential Decree.[94]

Consequently, the statutory regulation of the state of siege and the state of emergency and the practical application of the rules based on the rule of law are not without problems, mainly because the regulation contained in the Siege Government Ordinance is inaccurate and insufficient. The state of siege should have been clearly defined in the Siege Government Ordinance regarding the rights that can be restricted and the maximum extent of the restriction, especially in a state of siege or a state of emergency, so that it can be specified by presidential decree and thus special legal order. The current practice is thus problematic due to the rule of law and not in line with the expectations of the current constitution.

It is also a matter of concern, as it includes restrictions on fundamental rights and freedoms, that the legislation on the status of military personnel and police officers has been amended by an emergency government ordinance, certain provisions of this decree[95] (a statutory decree), for example, the right to suspend or make compulsory paid or unpaid leave infringes the fundamental and constitutional[96] right to social security at work.[97] While,

92 Apostol Tofan, 2014, p. 148.

93 Constitution Art. 53

94 These restrictions include: closure of catering facilities (FirstMilitary Ordinance); prohibition of cultural, scientific, artistic, religious, sports, and entertainment events in enclosed spaces (FirstMilitary Ordinance); prohibition of events in open spaces of more than 100 people (First Military Ordinance); suspension of flights to Spain and Italy (First Military Ordinance) and extension of the ban to other states (Third Military Ordinance, Fifth Military Ordinance, Seventh Military Ordinance), suspension of international passenger transport (Seventh Military Ordinance); ordering home quarantine (First Military Ordinance); prohibition of dental services other than emergency interventions (Second Military Ordinance); closing of shops and malls (Second Military Ordinance); border closure for non-EU or non-EEA nationals (Second Military Ordinance); a maximum of eight people may attend a baptism, wedding, or funeral (Second Military Ordinance); introduction of curfew (exception: work, acquisition of basic necessities, urgent health needs, agricultural work) (Third Military Ordinance); Curfew for persons over 65 between 11 am and 1 pm (Third Military Ordinance); ordering quarantine for all persons entering the territory of Romania (Third Military Ordinance); quarantine of the city of Suceava and eight municipalities (Sixth Military Ordinance), quarantine of the city of Țăndărei (Seventh Military Ordinance), etc.

95 Emergency Government Ordinance No. 36 of 2020

96 Constitution Art. 53, 115

97 Constitution Art. 41

for example, a restriction of liberty may indeed be justified in a state of siege or a state of emergency, its legal basis under the constitution[98] should still be provided by law and not by an emergency government ordinance. Moreover, the statutory decree justified the need for more precise regulation, on the grounds that the relevant laws were insufficient and did not contain provisions for a state of siege and a state of emergency. With regard to the judicial practice on the state of siege and the state of emergency, up to the date of closing the manuscript, there are ongoing proceedings in the first instance, such as challenging the legality of banning religious events under Military Ordinance No. 1.

De lege ferenda, a law regulating the issue of restriction of fundamental rights should be clearly and completely regulated in accordance with constitutional requirements, utilizing the experiences of the pandemic.

3. Management of COVID-19

In addition to the constitutional issues already discussed above, mention should be made of the emergency situation *(situaţia de urgenţă)*, which is defined in the Emergency Government Ordinance on the Crisis Management System as an extraordinary event of a non-military nature affecting human life or health, the environment, it endangers material goods and cultural values, and thus urgent measures must be taken to restore normal conditions. In the event of a health crisis, Romania has three levels of crisis management systems: national, county and local. Appropriate crisis management operational centers have been set up at all three levels to share information, consult in a feedback loop, assist decision-making in its preparation, and cooperate with other bodies.

The National Committee for Emergencies, an inter-ministerial body operating at the national level,[99] performs complex tasks in the field of emergency management. The committee consists of decision-making members, experts and experts delegated by the ministries. The committee operates under the direct authority of the minister of the interior.[100]

The Civil Protection Act[101] sets out the measures required to protect the population, equipment, cultural property and the environment in the event of war or disaster, and

98 Constitution Art. 53, 115

99 See the website of the European Commission: https://civil-protection-humanitarian-aid.ec.europa.eu/what/civil-protection/national-disaster-management-system/romania_en (Accessed: January 30 2020)

100 The composition of the committee is as follows: chair: minister of the interior; vice chair: state secretary of the ministry of the interior; members: one secretary of state or senior representatives of central state institutions from each relevant ministry; advisers: one or two experts or specialists from each ministry and central state body.

101 Act 481 of 2004 on Civil Protection

provides for emergency planning in the event of a crisis or war. It is worth mentioning that the law may deviate from the rule of inviolability of permanent residence and stay, for example, in order to prevent the spread of an epidemic. As already mentioned, the minister in charge of the Ministry of Health shall take the necessary measures to prevent and deal with emergencies caused by epidemics and infectious diseases.[102] No general ministerial decree on epidemiology was issued in Romania, only because of the COVID-19 pandemic was set out a decree by the minister of health[103] on quarantine, it contains the rules for coronavirus testing, and was amended in 2020. Compared to the previous rules, the ministerial decrees do not introduce new restrictions on fundamental rights, they only detail the content of the restrictions from a medical point of view.

The legal framework for measures to address the protracted epidemic situation was reconsidered through Act 55 of 2020,[104] i.e., instead of general rules, the legislator created rules specifically for the coronavirus epidemic. Instead of maintaining a state of emergency, there was a state of alert in Romania, and even during this period, the law restricted certain fundamental rights. Restrictions must be temporary in nature, and the law prescribes the principle of gradation for the implementation of restrictions, and declares that the purpose of restrictions is to protect life and health. This law also created the concept of the state of alert: it is a system of measures for a special situation of exceptional magnitude and intensity, which is temporary and proportionate to the current or future severity of the situation and which is necessary for protecting life, health, the environment, important materials, and it can also be ordered at the local, county, or national level under the authority of the government for up to 30 days and can be extended for additional 30 day periods.[105] The law allows for temporary evictions from infected areas during a state of alert, ordering home quarantine, restriction of the right of assembly, restriction or prohibition of cultural, scientific, religious, or sporting events, restrictions on freedom of movement, closure of specific areas, quarantine of settlements or areas, restriction of transport services, temporary closure of border crossings, restricting the operation of institutions or undertakings; restriction of catering establishments, suspension of shopping centers, mandatory mask-wearing, mandatory epidemiological screening when entering institutions and enterprises, working time can be modified, the exercise of the right to strike may be temporarily prohibited in priority economic areas, online education can be introduced.

102 Reform Act Art. 25, Section (2)

103 Ordinance No. 414/2020 on the introduction of a quarantine measure for those affected by an international public health emergency caused by a COVID-19 infection and laying down measures to prevent and limit the consequences of the outbreak

104 Act 55 of 2020 on certain measures to prevent and combat the COVID-19 epidemic

105 See e.g., 1065/2020, government decision, which extended the state of alert by 30 days from December 14.

The state of emergency was introduced on March 16, 2020, for 30 days and extended for another 30 days on April 14, 2020. At the moment of closing the manuscript, there is a state of alert in Romania, which has been extended for another 30 days from May 15, 2021.[106]

4. COVID-19 as an economic crisis

COVID-19 has caused a shock in all Member States of the European Union, including Romania. The impact of the economic crisis caused by the pandemic did not equally affect the various economic sectors and companies. To reduce the effects of economic damage caused by the pandemic, the Romanian government adopted several economic protection measures in 2020 affecting the budget focused on two fundamental questions: to help combat the pandemic, and to support economically and socially affected populations and sectors.

The total cost of support measures related to COVID-19 was 4.85% of GDP in 2020. Impact of measures to combat the pandemic in relation to the general budgetary balance was 3.65% of GDP, of which 0.4 percentage points are funded by EU sources. To overcome the negative impacts caused by the pandemic, in 2020, the government adopted an emergency government ordinance on economic, fiscal, and budgetary measures,[107] it was limiting the negative effects of the COVID-19. A series of measures have been adopted which firstly aimed at supporting the public health sector and, secondly, to remedy the negative impacts caused by the restriction of different socioeconomic activities. To support small and medium-sized enterprises (SMEs), the amended emergency government ordinance[108] enabled the government to support enterprises with financial difficulties. Under the amendments, as part of the state-guaranteed loan program, up to 10 million slopes for investments in troubled companies, up to 5 million slopes to finance the turnover. The state guarantees up to 80% of the recruited loan instead of the previous 50%. Micro- and small enterprises may receive 1 million and 500,000 LEI loans to provide capital for investments or the financing of the turnover, and the state guarantees

106 At the beginning of 2021, the number of cases per day stagnated around 3000, the third wave of the COVID-19, with 6000 infections per day, broke out in March, so austerity measures were introduced, from 14th of March the start of the curfew changed from 11 pm to 10 pm. As of March 25, where the infection index exceeded four thousandths, from Friday to Sunday, the curfew started at 8 pm rather than 10 pm till 5 am, the stores were closed at 6 p.m., when the infection index decreased below 3.5 thousandths, these new restrictions were dissolved. In the settlements with an infection index higher than 7.5 thousandths, the austerity measures were in force (the country territory was classified in green, yellow, ad red categories). Due to the improvement of data, mitigation was introduced from May 15, 2021. With the exception of a few exceptional cases (e.g., markets), the mandatory wearing of masks has been abolished, and the night curfew has been lifted. The second phase of mitigations begins on June 1.

107 No. 29/2020 Emergency Government Ordinance on some economic and fiscal-budgetary measures

108 No. 110/2017 Emergency Government Ordinance on the support program of SMEs

90% of the loan. For both loan constructs, from the date of credit agreement (after March 21, 2020), the state granted a 100% interest rate subsidy until March 31, 2021. The maximum duration of funding for investment loans is 120 months, and 36 months for loans to finance the capital. In the framework of a state-guaranteed loan program extended to large companies, the value of state-guarantees was 12.48 billion (1.20% of GDP), while it was estimated at 28.10 billion (2.52 % of GDP) for 2021.

Legal persons with financial difficulties who have the risk of insolvency may be asked to reschedule their budget obligations according to emergency government ordinance,[109] the March 31, 2020, deadline was set out in another emergency government ordinance[110] in October 30, 2020, and after several amendments, in 2021, a new regulation[111] extended this deadline until January 31, 2022.

During the state of emergency and for 30 days thereafter, according to an emergency government ordinance[112] no default interest or rate may be charged on tax liabilities due to the state; however, enforcement of tax arrears has been suspended or not commenced, except for those made in criminal court cases, the deadline was extended until December 25, 2020, by another emergency government decree.[113] It can be observed that the government did not decide to suspend the tax liability, but sought to eliminate the negative effects caused by late payments.

Under the additional economic support measures of an emergency government decree,[114] SMEs that had to suspend all or part of their activities due to the state of emergency could apply for public utility services in possession of an emergency certificate issued by the ministry of the economy, energy, and the environment, and the postponement of the deadline for payment of rent for registered offices and secondary residences. The provision has been extended to a number of professions directly affected by the measures taken by the authorities in relation to COVID-19, such as notaries, bailiffs, general practitioners, and dentists' offices with a maximum of 20 employees. The above provision has also been applied to national sports federations and sports clubs in so far as their activities have been directly affected by the actions of the authorities.

Parliament passed a law[115] in March 2020 that provides paid days off for one parent to set up child custody during the period of temporary closure of educational institutions. By

109 No. 6/2019 Emergency Government Ordinance on the establishment of fiscal facilities)
110 No. 29/2020 Emergency Government Ordinance
111 No. 19/2021 Emergency Government Ordinance
112 No. 29/2020 Emergency Government Ordinance
113 No. 181/2020 Emergency Government Ordinance
114 No. 29/2020 Emergency Government Ordinance
115 Law no. 19/2020 on the granting of free days to parents to supervise children, in the case of temporary closure of educational units

law, a parent can claim paid leave from the employer, if the job cannot be done from home or telework, and if the child is under the age of 12, and the age limit for people with disabilities is 26. Paid leave is salaried to one parent who is entitled to 75% of the salary, for this period, but the amount may not exceed 75% of the average gross wage. Paid leave may not be deducted by the employer from the period of paid annual leave under the Labor Code. The amounts thus paid by the employer shall be reimbursed by the state until the end of the financial year in question. Wage subsidies provided in this way are subject to tax and contributions.

Under the regulation,[116] which entered into force on March 31, 2020, the wages of workers sent on "compulsory leave" due to the COVID-19 are taken over by the state during the state of emergency and provided by the ministry of the Labor Unemployment Benefit Fund. The wage subsidy is 75% of the employee's gross monthly salary, however, the amount may not exceed 75% of the gross average wage, these are subject to tax and contributions. Under the last amendment to the emergency government ordinance of December 2020, the state will provide wage subsidies to businesses in difficulty until June 30, 2021. Another emergency government ordinance[117] provided tax incentives (bonification) to support the activities of enterprises. Thus, it provided that the so-called large taxpayers would receive a 5% discount, while the other taxpayers would receive a 10% discount if they paid their profit or income tax for the first quarter of the year by the set deadline. A law adopted the emergency government ordinance, and also extended the tax credit to the payment of profit and income tax for the second and third trimesters.[118]

The regulation of August 2020[119] allowed companies whose turnover fell by at least 10% compared to the same month of 2019 during the state of emergency to introduce a reduction in working time of up to 50% (*Kurzarbeit*). Taxable and contributory benefits are reimbursed to the employer in arrears from the unemployment benefit fund.

From January 1, 2017, the legal regulation[120] introduced a sector-specific flat tax for catering businesses (e.g., hotels etc.). When determining the rate of a specific tax, several factors need to be taken into account (e.g., the capacity of the restaurant). Taxes must be paid

116 Emergency Government Ordinance no. 30/2020 for amending and completing normative acts, as well as for the establishment of measures in the field of social protection in the context of the epidemiological situation determined by the spread of SARS-COV-2 coronavirus.

117 Emergency Government Ordinance no. 33/2020 on some fiscal measures and the modification of normative acts

118 Law no. 54 of May 14, 2020, for the approval of the Government Emergency Ordinance no. 33/2020 on some fiscal measures and the amendment of some normative acts

119 Emergency Government Ordinance no. 132/2020 on support measures for employees and employers in the context of the epidemiological situation determined by the spread of SARS-COV-2 coronavirus, as well as to stimulate the increase in employment

120 Law no. 170/2016 on tax of specific activities

by taxpayers half-yearly in two equal installments. Due to the COVID-19, the legislation[121] exempted catering companies from the obligation to pay a sector-specific tax for 90 days from April 25, 2020, and set a deadline of October 25 for the tax return and payment obligation for the first half of the year. However, the measures restricting the catering industry remained in force, the government extended this exemption by two emergency government ordinances,[122] so that companies engaged in the catering industry will enjoy a tax exemption in the first half of 2021.

Measures taken to address the negative economic situation caused by the epidemic had an impact on general government revenues and expenditures, including on the development of the central budget and the increase in government debt. Measures affecting revenues include: tax relief for economic operators, introduction of payment deferrals, granting of income tax incentives for profit tax for micro-enterprises, accelerating VAT refunds. Expenditure was affected by the following measures: wage subsidies (wage subsidies granted at the initiative of the employer for the temporary suspension of an individual employment contract; subsidies for the wages of employees with a fixed-term contract of no more than three months; staff risk allowances; and civil servants' wage allowances), expenditure on medicines, medical equipment, and other health products needed to diagnose and treat patients infected with COVID-19.

While in Romania, the general government deficit in 2019 was 4.4% of the GDP[123] and the government debt was 35.3% of the GDP, it closed the fiscal year 2020 with a deficit of 101.92 billion LEI, which corresponds to 9.79% of the GDP, while government debt accounted for 47.3% of the GDP at the end of the year. The reasons for the excessive deficit are the measures taken to combat the severe economic downturn, the COVID-19 pandemic and its economic and social consequences. Investment costs, tax breaks, and the cost of controlling the epidemic to boost the economy amounted to 4.45% of the GDP.[124]

Romania's budget for 2020 has been affected by the the COVID-19 on both the revenue and the expenditure side, falling revenues and increased expenditures have forced the government to amend the budget three times. These amendments took into account the effects

121 Emergency Government Ordinance no. 99/2020 on some fiscal measures, the modification of normative acts and the pronation of some deadlines

122 Emergency Government Ordinance no. 226/2020 on some fiscal-budgetary measures and for the amendment and completion of some normative acts and the pronation of some deadlines; Emergency Government Ordinance no. 19/2021 on some fiscal measures, as well as for the amendment and completion of some normative acts in the field of taxation

123 The European Commission launched an excessive deficit procedure against Romania in spring 2020 for exceeding the 3% budget deficit.

124 The data come from the Ministry of Finance's report on the macroeconomic situation for 2021. https://sgg.gov.ro/new/wp-content/uploads/2021/02/Raport-buget-2021.pdf (Accessed: 28 April 2021).

of the COVID-19 pandemic on the health system and the economy, the measures taken by the government to deal with the crisis, the decrease in revenue and the increase in expenditure. While the budget adopted in January 2020 set the deficit target at 3.6% of the GDP, this is 6.7% of the GDP due to the April budget amendment and 8.6% of the GDP due to the August amendment, then, after the last revision in November, it changed to 9.1% of the GDP.

The economic impact of the COVID-19 has also affected local government budgets and management. The most important sources of revenue for local governments are local taxes (e.g., land and building taxes), pursuant to one of the measures in 2020, the deadline for the payment of these taxes for 2020 was extended to March 31, and the new payment deadline was set for June 30, 2020.[125] The introduction of deferrals of payments had a significant impact on local government finances, and several amendments to already adopted local government budgets were inevitable. Municipal revenues are supplemented by amounts redistributed from personal income tax and sales tax paid to the central budget in accordance with the provisions of the law.[126] The budget law provides for amounts redistributed from sales tax and personal income tax, this law fixed the reallocation by algorithm, which over the past few years has been overridden by budget laws several times. The 2020 Budget Act, followed by its first amendment, only modified the allocation algorithm, not taking away resources from local governments. In 2020, the government amended the sum of the amounts redistributed from local sales tax to local governments twice, in favor of local governments.

The primary objective of the National Bank of Romania (*Banca Națională a României*, NBR) is to ensure and maintain price stability, which is the best contribution of monetary policy to sustainable economic growth.[127] In 2020, the NBR adopted several measures aimed at mitigating the negative effects of COVID-19 on the population and Romanian companies. The NBR has taken all necessary measures to ensure the smooth operation of payment and settlement systems to ensure, that commercial and financial transactions operate normally. In March 2020, the board of directors of the NBR cut the key interest rate by 50 basis points from 2.5% to 2%, this meeting also decided to narrow the interest rate corridor around the base rate, reducing its limits to ± 0.5% from the previous ± 1%, and this was aimed at reducing interbank interest rates. The interest rate on the Lombard loan was lowered by the NBR to 2.5% from the previous 3.5%. The lower value of the interest rate corridor remained unchanged at 1.5%. The board of directors of the NBR reduced the base rate, the Lombard loan interest rate, and the floor of the interest rate corridor by 25 basis points in May 2020 and again by 25 basis

125 According to the provisions of the Tax Act 2015, persons who pay their real estate and motor vehicle tax for the current year by March 31 will receive a 10% discount. With the amendment, the possibility to take advantage of the 10% discount remained until June 30.

126 Law no. 273/2006 on local public finances

127 Law no. 312/2004 on the Statute of the National Bank of Romania

points in August. In January 2021 the NBR's board of directors reduced the base rate, the Lombard loan interest rate and the lower interest rate floor by another 25 basis points. The reason of the further reduction is that it contributes to stimulating the economy.

The NBR also decided to buy government securities in an active repo transaction to ensure the liquidity of credit institutions, encouraging commercial banks to restructure loans and extend the maturity of repayment installments, thus reducing the burden on households and businesses. The central bank also initiated the purchase of LEI-denominated government bonds from the secondary market. Through these purchases, the central bank provides liquidity to the financial system indefinitely to support the economy.[128]

5. Summary

In the Romanian regulation in force there are four types of special legal order (state of siege, state of emergency, mobilization and state of war). A significant feature is that in the Romanian regulation—in a special way—it is possible to create a military ordinance and an emergency government ordinance.[129]

The marked role of the president is clearly visible in each of the Romanian types of special legal orders. A dominant feature is the fact that the role of the president is strongly emphasized in Romania, as exemplified by the fact that according to the rules of state of siege and state of emergency, the president of Romania has the right to order a state of siege or a state of emergency in certain territorial–administrative units by presidential decree.

It is important to reiterate here that, due to COVID-19, the Romanian legislation has introduced—as a special regulation—the concept of *state of alert* by law.

The following table serves to illustrate the essence of the Romanian regulation.

	State of siege, state of emergency	**Mobilization, state of war[130]**
Level of regulation	Constitution, laws, and decrees	
Reasons of ordering	– Current or inevitable danger threatening the sovereignty or territorial integrity of the state – Serious, current or inevitable danger threatening national security or constitutional democracy	– An armed attack on the country

128 See the website of the central bank: https://www.bnr.ro/Masurile-BNR-in-contextul-situatiei-generate-de-epidemia-COVID-19-21312-Mobile.aspx (Accessed: 29 April 2021).

129 Cf.: Szabó–Horváth, 2012, p. 403.

130 Cf.: Kelemen, 2020, pp. 211–213.

	State of siege, state of emergency	Mobilization, state of war[130]
Ordering of the special legal order	President (in cooperation with parliament)	
Authorized	President	
In practice	State of emergency: once *(2020: COVID-19)*	Not ordered.
An extraordinary situation that is not a special legal order	Emergency situation, state of alert	

Table 8
Emergency regimes in Romania
Source: Authors' compilation

The above leads to the conclusion that the Romanian regulation is *transparent*.

It has already been mentioned above that the law on healthcare reform does not regulate health emergencies separately, because the Romanian legislator considers the legal institution of the state of emergency to be appropriate for dealing with health emergencies.[131] The tasks of the public healthcare system include the prevention of epidemic situations and the ordering of epidemiological alerts and the control of epidemics, but the law refers to measures for emergencies caused by epidemics within the scope of a ministerial decree.[132] There is only one legal provision worth mentioning: public authorities may also approve the use of unauthorized drugs during an epidemic.[133]

From a constitutional point of view, it is interesting how the above provisions work in practice. The state of siege government ordinance is not suitable for dealing with an epidemiological emergency, which is why it was justified to create a separate legal regulation, but in addition, the development of uniform, precise regulations would be justified in the future.

During the pandemic, a series of decisions of the Constitutional Court dealt with the issue of restriction of fundamental rights, so the Constitutional Court corrected the often hasty measures of the government, which were not integrated into the legal order.[134] The Constitutional Court has found, for example, that legislation imposing penalties for violating the curfew in a state of emergency is unconstitutional (because they are linked to restrictions on fundamental rights and can therefore only be prescribed by law and not by a government

131 Cf.: Till, 2017, pp. 73–75.
132 Reform Act Art. 5–6, 25
133 Reform Act Art. 5–6, 25., 703
134 Cf.: DCC 2020/152, DCC 2020/157., DCC 2020/397., DCC 2020/457., DCC 2020/458., DCC 2020/581. See: Dănișor, 2020. and Nițu–Nițu, 2020

ordinance);[135] that the quarantine obligation specified in an emergency government ordinance or ministerial decree is unconstitutional (restriction of a fundamental right requires legal regulation); that the declaration of a state of alert did not require the approval of parliament, as a legal institution established at a sub-constitutional level and the executive could exercise this power within the constitutional framework; and stated that an emergency government ordinance extending the term of office of mayors and councilors (municipal representatives) is unconstitutional, because such an extension can only be ordered by law.

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135 This meant the illegality of about 300,000 infringement fines imposed (Ursuța, 2020).

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Serbian Legal Disharmony During the COVID-19 Pandemic

SLOBODAN ORLOVIĆ – IVAN MILIĆ

1. Introduction

The state of emergency has always been a demanding topic for constitutional lawyers and scholars who study constitutional law. The ongoing COVID-19 pandemic (2020–2022) has rendered this topic extremely relevant. Worldwide, the public has seen the pandemic as a sudden, unexpected *vis major,* a black swan event fraught with unknown knowns, unknown unknowns, and a subset of known knowns.[1] In the sociological sense, the pandemic is in every way a disaster—an event (or a series of events) harming or killing a significant number of people or otherwise severely undermining our daily lives in civil society. [2]

All the states acknowledging the pandemic faced challenges to their legal systems' function. In this state of emergency, governments attempted to combine their responsibility for the people with the public adherence to established rules, a balancing act that signifies the constitutive role states play in protecting society. The Serbian people respected the temporary containment measures (e.g., closing schools, banning large public gatherings, etc.) with unconditional acceptance of the need to protect society as a whole. The civil society (or the family) cannot act alone in this situation; it needs the State.[3] Because governments facing

1 Perić-Dilgenski, 2020, p. 627. Philosopher-epistemologist Nassim Nicholas Taleb coined the phrase "black swan event" to describe how what we know to be true changes with the acquisition of new knowledge, just as Europeans once "knew" that all swans were white—until explorers discovered black ones in Australia (Taleb, 2007).

2 Mitrović, 2020, pp. 612–613.

3 Tsekeris and Zeri, 2020, p. 499.

Slobodan Orlović: Professor, Faculty of Law, University of Novi Sad, Serbia
Ivan Milić: Assistant with Doctorate, Faculty of Law, University of Novi Sad, Serbia
Orlović, S., Milić, I. (2022) 'Serbian Legal Disharmony During the COVID-19 Pandemic' in Nagy, Z., Horváth, A. (eds.) *Emergency Powers in Central and Eastern Europe*, pp. 247-277. Budapest: Ferenc Mádl Institute of Comparative Law; https://doi.org/10.47079/2022.znah.epicaee.1_10

exceptional threats must respond quickly, they necessarily operate in a gray zone as they balance freedoms with health and security concerns. However, considerations of rights must be part of the (rapid) policy-making process.[4]

In many countries, changes in the legal systems rested to some degree on the "isolationist" ethic[5] and concerned, above all, the enactment of measures (acts) derogating from the normal regime of human rights. The extent of the derogations varied. In some countries, restrictions on human rights were moderate, not drastically different from ordinary circumstances. In others, they were strict, with temporary but complete suspensions of some human rights (e.g., freedom of movement in complete lockdowns). Of course, over time, all countries have adapted their measures to the circumstances. Hence, the topic of modifications to the legal system has regained its relevance globally.

The modification of legal systems has raised numerous questions needing answers. The central legal question from which all other questions derive is whether state authorities and holders of public powers have acted constitutionally and legally in their pandemic responses. The answer given by various constitutional courts has been both affirmative and negative, depending on the country. In some countries, including Serbia, the courts waited for the crisis to settle down and the state of emergency to ease (or end) before considering the constitutionality of the government's actions. The second set of questions relating to the legal system and the COVID-19 pandemic are essentially factual or non-legal. They primarily relate to the science of the pandemic (e.g., epidemiology, equipment and practices for protection and prevention, etc.) from the perspective of assessing what human rights restriction measures should be introduced and when to achieve the desired goal of containing the pandemic and saving human lives.

For Serbia, modifying the legal system meant introducing highly restrictive measures limiting human rights (among the strictest in Europe). The strict measures had a basis in the Constitution. However, in some cases, the constitutional limits of human rights derogation were overridden, and the Constitutional Court, as guardian of the Constitution and human rights, failed to weigh in with a timely response. Specifically, there was a mass practice of unauthorized public authorities and others restricting human rights. Those orders and acts commonly remained in force until newer, likewise unconstitutional acts replaced them.

Finally, the third set of questions relates to the misinterpretation of human rights and their "adaptation" to needs and circumstances. There were many instances of human rights violations relating to trials (directness, etc.), prohibitions of retroactivity, and the principle of *ne bis in idem*,

4 Macfarlane, 2020, p. 299.

5 Lockdowns, quarantines, and other epidemiological measures introduced around the world to prevent the virus transmission have been pushed by a peculiar "isolationist" ethic aimed at saving both human lives and health systems (Janković, 2020, p. 1008.).

res iudicata, and others. These violations undermined legal certainty and left citizens feeling threatened not only by the deadly contagion but also by their own leaders and communities.

2. Regulation of the state of emergency

2.1. How the Constitution regulates the state of emergency

In the Republic of Serbia, "state of emergency" (*vanredno stanje*) is a constitutional category—the most relevant provisions regulating it are enshrined in the Constitution. The Serbian Constitution also regulates the state of war (*ratno stanje*), another formal state of necessity. There is also a legal category for third form of crisis: the emergency situation (*vanredna situacija*). The State declares an emergency situation for natural disasters, extraordinary events, or dangers to the people, environment, or property, both localized and nationwide. The main difference between a state of emergency and an emergency situation is the degree of perceived danger. A state of emergency would be declared for a grave threat that will cause a greater departure from the ordinary state functions than an emergency situation. Emergency situations could be declared for specific dangers, not just the risks and threats of disasters and emergencies.[6]

Provisions on the state of emergency are found in Part Eight of the Constitution ("Constitutionality and Legality").[7] The same part regulates the state of war.[8] Provisions relating to the state of emergency are also found in two other constitutional articles. The provisions on parliamentary decision-making mandate that the National Assembly, by the majority vote of all deputies (at least 126 of 250), "shall declare and call off the state of emergency" (otherwise, laws are adopted by a "relative majority" of at least 64 votes).[9] The Constitution regulates in detail the derogation from human rights in the states of emergency and war.[10]

The state of emergency is regulated differently by the 2006 and 1990 Constitutions. The differences stemmed from the need to regulate the state of emergency more precisely and establish additional human rights guarantees. The 2006 revision was intended to restrict the almost-unlimited rights of the executive branch (the president of the Republic) during a crisis. Under the 1990 Constitution, the president could unilaterally declare a state of emergency and adopt (all) acts and measures required by that state, in accordance with the Constitution and law (Article 83, Paragraph 8) when circumstances arose that endangered the security

6 Jugović, 2012, p. 240.
7 Article 200 of the Serbian Constitution
8 Article 201 of the Serbian Constitution
9 Article 105 of the Serbian Constitution
10 Article201 of the Serbian Constitution

of the state, human rights, or the operation of state authorities. The 2006 Constitution distinguished between the state of war and the immediate threat of war. The newer Constitution also determined (defined) when a state of emergency could be declared: "When a public danger threatens the survival of the state or its citizens." The public danger must be of such high intensity that the very continuance of the State is at stake. The law prescribes declaring an emergency situation for public dangers of lesser intensity.

The theory underlying the constitutional distinction holds that a state of emergency regulated by the supreme law must strike a balance between two values:(1) the urgent need to preserve the society and state as effectively as possible in situations of crisis and (2) the need to prevent any abuses of power; minimize sacrifices of liberty and legality; and respect the inviolability of human rights.[11] The state of emergency is an extraordinary, exceptional situation that can affect any state, temporarily disrupting the normal constitutional order due to unpredictable circumstances that undermine fundamental social values.[12]

Some legal scholars have criticized the constitutional solution for its inadequate determination of "public danger"[13] and the preconditions for declaring one,[14] which could result in the abuses of power during a crisis. Nevertheless, it would be impossible to provide an entirely precise and complete list of conditions for declaring a state of emergency. Emergencies are, by their nature, unpredictable. Endeavoring to create such a list would be "an unattainable aim that would contradict the institutional logic of that legal order" that must retain some degree of flexibility to preserve its usefulness. The institution of the state of emergency should encompass all the unpredictable circumstances that might endanger the regular functioning of the constitutional order.[15]

In Serbian law, distinguishing between a state of emergency and an emergency situation is challenging but possible using the formal criteria. The former is a constitutional category, and the latter a legal one. Different bodies or authorities are empowered to declare them. The legislative branch declares a state of emergency, and several different bodies could declare an emergency situation. According to the substantive (content) criterion, the emergency situation constitutes a lower-level emergency state.[16]

11 Simović and Avramović, 2010, p. 252.
12 Simović and Avramović, 2010, p. 252.
13 Marković, 2006, p. 77.
14 Venice Commission, Opinion no. 405/2006, 2007, p. 20.
15 Simović, 2020, p. 4. The constitution-makers used the formulation provided for in the ECHR: derogation from human rights is allowed in a "public emergency threatening the life of the nation" (Article 15, Paragraph 1)
16 Jugović, 2012, p. 241. See Simović and Avramović, 2012, pp. 503–516. Under the Act on Disaster Risk Reduction and Emergency Management (2018), an emergency situation is declared when the risks, threats, and consequences of a disaster are of lower intensity and cannot be prevented nor eliminated through the regular activity of the relevant authorities and services (Article 38).

With its recent decision, the Constitutional Court further defined the state of emergency by determining its constitutive elements: (1) constitutional condition: "public danger threatening the survival of the state or its citizens"; (2) object of protection: "state or its citizens"; (3) means or mechanisms of protection: "measures derogating from the constitutionally guaranteed human and minority rights"; and (4) aim: effectively overcoming a public danger and urgently restoring the normal constitutional order.[17]

Overall, the efforts of the Serbian Constitution writers to regulate the institution of a state of emergency were sound in principle since they provided an alternative way to proclaim a state of emergency if the Parliament were unable to convene. That solution should minimize any abuses and provide democratic legitimacy for the declaration of a state of emergency while allowing prompt and efficient decision-making.[18]

2.2. The state of emergency at the sub-constitutional level

The Republic of Serbia has no law in place governing the state of emergency; it is regulated only by the Constitution. There is also no law on the state of war except the Defense Act, which governs the legal regime in wartime and some issues concerning the state of emergency. That Act defines both the state of emergency and the state of war. Extending the constitutional definition, the state of emergency is defined as "the state of public danger wherein the survival of the state is threatened and comes as a consequence of military or nonmilitary challenges, risks, and threats to security."[19] Given that the state of war has not been defined by the Constitution, it had to be done by the law: "the state of danger wherein the external armed actions endanger the sovereignty, independence, and territorial integrity of the country, or the peace in the region, and which requires mobilization of forces and means for defense."[20]

The third category of the modifications to the legal system on the emergency situation is a legal category, with its legal frame comprising several laws.[21] The laws governing the state of emergency-related issues can be termed "ordinary," as they are enacted through the standard legislative procedures of the Parliament. Serbia has no category of organic laws (cardinal law); rather, the Constitution recognizes all laws as having equal legal force. (There is one constitutional law for enforcing the Constitution and one "special" law, still pending enactment, concerning the autonomous provinces of Kosovo and Metohija). In a state of emergency, regulations

17 Constitutional court – IUo-42/2020 (May 21, 2020).
18 Simović, 2020, p. 5.
19 Article 4, Paragraph 1, item 6, of the Defense Act
20 Article 4, Paragraph 1, item 7, of the Defense Act
21 "Emergency situation" has been identically defined in the laws: Act on Public Health, Act on Protection of the Population from Infectious Diseases, Act on Disaster Risk Reduction and Emergency Management.

having the force of law are enacted, practically replacing the everyday legal provisions. Those regulations establish different rights and obligations than those in the ordinary legal order.

2.3. Various types of the state of emergency

There are three different emergency statuses identified in the Constitution and Serbian law. A "state of emergency" is declared if the competent authority assesses that a public danger threatens the survival of the state or its citizens. The danger must pose a threat to the public good or public interests, not private or individual interests. The public danger must be of such large scale that it threatens the survival of the State and its citizens. Thus, the state of emergency is the most severe form of crisis—a public danger threatening the existence of the State and the lives of citizens. A less severe form of crisis would be declared an "emergency situation." If the danger persists or spreads and the imposed measures produce no results, that would trigger the declaration of a state of emergency. Finally, there is the "state of war," a crisis typically caused by external armed actions.

Legally, it is possible to declare more than one these three at the same time. Practically speaking, there would be no need to declare the states of war and emergency concurrently because the two are equal in terms of their potential for restricting human rights under the Constitution. However, "state of emergency" and "emergency situation" are not equal. In 2020, Serbia declared a state of emergency countrywide due to the COVID-19 pandemic, with an emergency situation concurrently being declared by several local governments (towns and municipalities). In these instances, the local governments lacked clear criteria for declaring emergency situations. They mainly used the number of COVID-19 infections to assess whether the situation should be declared an emergency situation. Thereafter, the emergency situations remained in force despite the varying number of infections.

The authority to declare the states of emergency and war rests with the National Assembly.[22] The Serbian Constitution does not prescribe who proposes the declaration of these states of necessity; the law does so. Interestingly, states of emergency and war can be declared on a proposal of the same subjects despite their differing threats to the State and the citizens—aggression and public danger. The proposal is submitted jointly by the president of the Republic and the Government on the receipt of the defense minister's report on the risk and threat assessments and information on the current of expected consequences. The president of the Republic and the Government can propose that a state of emergency be declared for an entire state territory or just a part of it (the same is not possible for the state of war).[23] The third form of legal system

22 Serbian Parliament (*Narodna skupština*)
23 Articles 87–88 of the Defense Act

modification, the emergency situation, can be declared by the Government (countrywide), a provincial government (e.g., the autonomous province of Vojvodina), or a municipal president or mayor, all on the proposal by a special body of an "emergency management headquarters."[24]

Serbia has an alternative constitutionally provided authority to introduce a state of emergency: the National Assembly. However, with its being a cumbersome body of 250 MPs, its forte is not rapid decision-making. Thus, it is not well suited to handling emergencies such as the spread of infectious disease or escalating war actions. Therefore, the writers of the Constitution provided alternatives for who could declare the states of emergency and war. Individual office holders, the respective presidents of the Republic, the National Assembly, and the Government, can make a joint decision on the declaration of the states of emergency or war when the National Assembly cannot convene. Serbian law does not set the criteria for assessing whether the National Assembly can convene. However, the Constitutional Court views the matter as a factual rather than a legal question, considering it sufficient for the president of the Parliament to issue a notification of the Assembly's inability to convene the "competent authorities," which happened during the COVID-19 pandemic.[25]

A state of emergency can be declared for a maximum period of 90 days, which can be extended for not more than 90 days, limiting the maximum duration to 180 days.[26] The same subject is empowered both to declare and extend a state of emergency. The duration of the state of war is not limited since it would be impossible to predict how long war or the threat of war might last. There is also no need for specific decisions regarding its extension.

The power to enact measures during the states of emergency and war lies with the same authority that decides on their declaration, meaning either the National Assembly or the prime minister jointly with presidents of the Republic and the Assembly. The allowed exception to this rule refers to enacting measures in the state of emergency: if the Assembly cannot convene, the Government enacts these measures with the co-signature of the president of the Republic.

This setup indicates that during a declared crisis, the competencies of the legislative authority grow if it can convene. If not, the executive branch's power grows and the legislative branch's power declines. This is a commonplace occurrence in times of crisis since the Parliament generally cannot respond as swiftly or efficiently to circumstances because of its size and procedural rules.

The Constitution makes no provisions for creating a separate body during a state of emergency. However, following the declaration of the COVID-19 pandemic, the Government

24 Article 39 of the Act on Disaster Risk Reduction and Emergency Management

25 Constitutional court – IUo-42/2020.

26 The decision on the declaration of a state of emergency due to the COVID-19 epidemic (March 15, 2020) did not specify the duration of the emergency regime; it was terminated by a subsequent decision (May 6, 2020).

established the Crisis Response Team as an advisory body. (The law provides for the existence of Republic, provincial, and local emergency management headquarters).

The legislative and executive authorities in the states of emergency and war have several powers. They can declare and revoke those states, enact measures (acts) derogating from constitutionally guaranteed rights, and confirm or suspend those measures. These measures are legal acts that have the force of laws (decrees with the force of law) and hence the power to amend existing laws. Factually, this ability modifies the legislative procedure in that a law can be amended by enacting a new law or through a regulation having the force of law being enacted in a procedure other than the legislative one. This practice is only possible during the states of emergency or war.

Serbia has no detailed procedural provisions on enacting measures during the states of war and emergency. The Government session passes decrees out of the state of necessity and other acts in line with the Rules of Procedure. These actions are usually proposed by the relevant ministry (e.g., police or health), which might seek opinions or proposals from the Crisis Response Team or appropriate institutions (e.g., security services, clinical centers, etc.). There have been no more specific provisions on the enactment of measures in the state of war by the presidents of the Republic, the Assembly, or the Government), nor are there any concerning the manner of decision-making on the states of emergency or war if the Assembly cannot meet. This raises the following procedural questions: (1) are decisions adopted by a majority vote (at least two) or a unanimous vote (all three); (2) must all three presidents vote or can two presidents make a decision; and (3) how is a decision made if any of the three is prevented from deciding or is discharged from office? None of these questions has been decided because the precipitating circumstances have not yet arisen, but a legal gap remains to be addressed.

To prevent the state of emergency from becoming repressive and nondemocratic under the guise of preserving the existence of the State and its citizens, the Constitution sets out certain limits for the "disruption of powers" in favor of the executive power. The executive branch is empowered to make decisions only upon confirmation of the Parliament's inability to convene. The impossibility of the deputies to assemble must be reliably established (this question is not regulated, assumingly from the Speaker). The next guarantee is that measures restricting human rights in the state of emergency must last no longer than 180 days, and the National Assembly must approve measures passed by the executive organs. The same applies to the decision to declare a state of emergency. Additionally, measures enacted in the state of war are also subject to confirmation by the Parliament as soon as that organ convenes. Crucial guarantees are the constitutional limitations relating to the departure from the ordinary regime of human rights. The enumerated human rights (absolute rights) cannot be limited, but all other rights are subject to restriction only to the extent necessary or to the minimum extent possible.

2.4. Quasi-state of emergency

As an example of a quasi-state of emergency, we can consider the restriction of a human right during the COVID-19 epidemic despite the Constitution forbidding such restriction. The Constitution provides absolute protection of the freedom of religion; even in times of emergency or war, freedom of religion cannot be limited on the grounds of crisis circumstances. Therefore, derogation from this freedom is not allowed if the constitutionally set conditions are not met (e.g., the protection of lives, health, morals, security, and others, under Article 43). However, freedom of movement and assembly are not absolute rights under the Constitution. Thus, during a state of emergency (e.g., at times during the COVID-19 pandemic), certain movements and gatherings could be legally restricted (temporarily). Nevertheless, some people considered the COVID-19 restrictions to be a violation, in a form of limitation[27], of the freedom of religion because they were prevented from performing certain rites on-site at religious facilities during holidays (e.g., some Christians were upset that the preventive measure kept them from special services on Easter).

The following sections will discuss other examples of a quasi-state of emergency measures during the COVID-19 pandemic at the lower and local levels involving the actions of lower-tier authorities such as ministers, municipal presidents, local crisis management headquarters, and even completely unauthorized individuals (e.g., green market managers).

3. Limitations of fundamental rights

3.1. Limitations of fundamental rights generally

The constitutional system of human rights limitations rests on two mechanisms. One involves human rights for which no derogation is possible in either ordinary or extraordinary circumstances. Some constitutional rights (e.g., the right to life, dignity, and personality development, the inviolability of physical and mental integrity, and others) are legally inviolable. Other constitutional rights can be limited but only temporarily and only on the grounds set out in the Constitution (e.g., to protect the citizen security, morals, life, health, and others). These limitations are generally enforced in accordance with the law. There are 17 human rights distinguished as additionally protected even during the states of emergency or war. That additional constitutional protection means that their legal protections always remain, even in

27 The Serbian Constitution does not allow a restriction of a freedom of religion in a state of emergency (see Article 202).

times of emergency or war. The same reasons apply for their limitations (if any are allowed by the Constitution) whether or not a state of emergency or war has been declared.

The Constitution states that authorized subjects may "prescribe measures." This seems to suggest that in the states of emergency and war, anyone might enact measures (legal acts) under certain circumstances to ensure the survival of the state and its citizens. However, we have seen that there are clear limits, both temporal and spatial, for derogations from the ordinary regime of human rights.

3.2. Limitations of fundamental rights during a state of emergency

This section will describe the limitations of fundamental rights during a state of emergency from the general to the specific. More general are those constitutional provisions that govern the beginning and end of measures limiting fundamental rights; more specific are those concerning individual human rights.

Human rights derogation measures are valid until a decision has been adopted to terminate them. Their maximum duration is 180 days. In addition, the measures automatically cease to be valid when the state of emergency or war is terminated. The Constitution provides another guarantee for the constitutionality and fundamental human rights protection. If the National Assembly is not the entity enacting the measures derogating from human rights in the state of emergency, it must confirm those measures as soon as it can convene. If the Assembly is in session, it must confirm the measures within 48 hours of their enactment or the measures cease to be valid.

The Government has a duty to submit the enacted measures for confirmation to the Assembly. If it fails to do so, the measures cease to be effective within 24 hours of the commencement of the first Assembly session (when it is possible to hold it). The same detailed constitutional provisions on the confirmation of measures do not exist for the state of war; the provision is only made for the Assembly to confirm the measures jointly adopted by the presidents of the Republic, Assembly, and Government when they can convene.

The Constitution defines the limits of the restriction of fundamental human rights in general terms for states of emergency and war. Derogation from the human rights guaranteed in the Constitution is permissible only to the extent it is necessary. This implies that if less restrictive means can achieve same the purpose as the rights limitation, a more stringent limitation or suspension (temporary revocation) will not be imposed. For example, if the purpose of a limitation could be achieved by an overnight lockdown, a 24-hour prohibition of movement would not be introduced. The next condition is that human rights derogation measures are not discriminatory; they cannot make distinctions among the citizens based on race, sex, language, religion, national affiliation, or social origin.

Moreover, there are also quite specific constitutional limits for the enacting authorities in the states of emergency and war. The Constitution provides a list of 17 nonderogable human rights in states of crisis. Those rights include the right to life, dignity, a court trial, citizenship, and other personal rights.[28] Simply put, the emergency state does not alter these rights, and their legal status does not change during times of war or emergency. Thus, some rights can never be limited or suspended because the Constitution does not make such provisions, such as the right to life. There is no death sentence under ordinary or state of emergency circumstances. However, others rights can be limited based on the grounds specified in the Constitution, not based on the declared state of emergency or war. For example, freedom of expression can be restricted only to the extent necessary to protect the rights and reputations of others, court authority, and others, as prescribed in the Constitution.[29] The declaration of a state of emergency or war does not in itself constitute permissible legal grounds for limiting the freedom of expression. The necessity for its restriction must be clearly reasoned in the spirit of basic constitutional values.

A state of emergency was in effect in Serbia from March 15–May 6, 2020, because of the COVID-19 pandemic. During that period, the legal system was subject to changes and human rights to restrictions, not only by governmental decrees having the force of laws but also by bylaws enacted by ministers and other office holders. The Constitutional Court received many initiatives to review the constitutionality and legality of specific acts (decisions, orders, rules).

The Constitutional Court was also asked to review the constitutionality of the decision the declare a the state of emergency issued by the presidents of the Republic, the Assembly, and the Government. Its decision (IUo-42/2020) was that the three presidents acted in compliance with the Constitution. However, it dismissed the initiatives for the constitutional review of that decision and presented its views in the reasoning statement as if it had rendered the decision on the act's merits (upholding or rejecting the declaration). In another decision (IUo-45/2020, from October 28, 2020), the Court established that some articles of the two Government decrees adopted in the state of emergency were inconsistent with the Constitution and the confirmed international treaty. The Constitutional Court held that those provisions violated human rights in that the principles *ne bis in idem* and *res iudicata* had been infringed. On the basis of the two decrees, both misdemeanor and criminal proceedings were conducted for the same factual circumstances, with the result that citizens were held liable in respect of the same act for both a misdemeanor and a criminal offense.

28 Articles 23–26, 28, 32, 34, 37–38, 43, 45, 47, 49, 62–64, and 78 of the Serbian Constitution
29 Article 46 of the Serbian Constitution

4. The state of emergency in practice

Until the COVID-19 pandemic, the Republic of Serbia had (formerly, the jurisdiction of Yugoslavia) had not declared a state of emergency state of emergency since ratifying the Constitution of 2006. Its first such declaration on March 15, 2020, raised many legal doubts. Darko Simović enumerated some of the most essential issues:

- The emergency state was introduced before the proclamation of the epidemic in the territory of Serbia (the state of emergency was declared on March 15 and the epidemic on March 19) and seemed sudden given the mild restrictive measures in place at the time.
- The Serbian Constitution does not specify an epidemic as "threatening the survival of the state or its people," calling into question the constitutionality of declaring a state of emergency due to the virus.
- The timing of the state of emergency was problematic given the parliamentary elections having been scheduled for April 26, 2020; the elections could not have been postponed without the proclamation of the state of emergency, nor could they be held under the restrictions.
- Declaring a state of emergency was seen as a political move by the minister of defense rather than a health-related decision.
- The National Assembly was unable to convene to confirm the state of emergency, which meant that for a month and a half, the Government, along with the president of the Republic, determined without any supervision the human rights derogation measures; of the 250 deputies, only eight asked the Parliament to convene, suggesting that the Parliament agreed to its own marginalization.
- The declaration of a state of emergency did not include a specific duration, contrary to the constitutional authorities' obligation to ensure the termination of the state of emergency as soon as possible.[30]

Given that the highest legislative and executive state authorities have been constitutionally conferred the right to limit human rights, a concerning fact was the silence and inactivity of the Constitutional Court regarding the state of emergency due to the COVID-19 pandemic. The Constitutional Court is the one authority that could control the measures issued by the executive power and protect citizens' rights. The body's inaction aroused public distrust, as people doubted the constitutionality of numerous acts, including the declaration

30 Simović, 2020, pp. 9–11.

of a state of emergency, the Order Restricting and Prohibiting Movement, the decree on misdemeanor violations of that Order, and trial by Skype.[31]

Serbia's regulations to contain COVID-19 have been undergoing daily changes.[32] Special health regulations have been adopted by competent authorities but also by people with no competence in epidemiology or public health. There have been numerous problems with prescribing and applying special health regulations.

There have been two specific periods for the special health regulations in the Republic of Serbia: the period under the state of emergency and the period after the state of emergency was lifted. During the state of emergency was instated because of COVID-19, the Government, with a co-signature of the president of the Republic, generally enacted regulations providing for special health rules. Those regulations also defined the measures derogating from human rights. The measures primarily referred to restrictions on the freedom of movement, entry to or exit from the Republic of Serbia, prohibitions on leaving specific institutions, quarantine measures, facility closure, and similar matters. However, some measures were prescribed at the local level, with these primarily relating to the orders from the local emergency management headquarters. With measures to contain and prevent the spread of COVID-19 also having been enacted locally (at town or municipality level), it was difficult to incorporate all the special health regulations that had been or were still in force. Additionally, it was difficult for citizens to know which special measures were in force, such as curfews.

4.1. Paradoxes during the state of emergency

Determining what was allowed or forbidden in the Republic of Serbia during the state of emergency was next to impossible for anyone who was not a legal scholar. Legal certainty was low during the state of emergency and remained elusive after its lifting. State officials often provided misleading information through the media, suggesting that specific actions were permitted while they were legally prohibited. There were also instances of citizens who trusted the state officials acting contrary to the existing special rules only to be punished by the courts when their behaviors were classified as misdemeanors.

The Constitution of the Republic of Serbia makes it a rule that laws and other general acts become effective no earlier than the eighth day after they are published. It provides exceptions allowing their earlier entry into force only on particularly justified grounds determined at the time of their adoption.[33] During the epidemic, and particularly the state of emergency,

31 Marinković, 2020, pp. 148–149.
32 These regulations were the *lex specialis* for COVID-19.
33 Article 196, Paragraph 4, of the Serbian Constitution

this exception was valid precisely in respect of regulations' entry into force. They generally entered into force from the moment they were published in the *Official Gazette of the Republic of Serbia*. This meant that citizens had little time to familiarize themselves with new regulations and frequently were unaware the regulations had changed.

The situation was even worse for the regulations adopted at the town or municipality level, which were primarily orders from the emergency management headquarters. According to the emergency management headquarters, in some towns and municipalities, special rules of conduct applied that had been or were still in force. These rules and measures could refer to special local health regulations. For example, some local self-government units limited the working hours of hospitality facilities, mandated wearing masks in open public spaces, etc. Some emergency management headquarters imposed fines (misdemeanors) for breaches of the orders, despite having no authority to do so. Some towns and municipalities published their orders on the respective websites of the local emergency management headquarters and some in their official gazettes. However, many of the local orders were not published anywhere, leaving the citizens unaware of changes in the rules. In any case, emergency management headquarters cannot instate such bans and restrictions in case of infectious disease epidemics because it is not within their competence.

Some local self-governments declared an emergency situation (e.g., Belgrade and Novi Sad)[34] because of COVID-19. Thus, some legal issues arose with special health regulations applicable in those local self-government units. Concerned citizens drew the Citizen Protector's attention to the inadequate dissemination of information on the imposed measures and their implementation, which led to breaches of those same measures and the initiation of court proceedings. The Protector of Citizens concluded that it would be appropriate that competent public authorities provided citizens, particularly those from vulnerable social groups, with complete and understandable information by directly addressing the citizens and using the public information means to prevent the spread of fear and panic among the citizens.[35]

Failure to comply with "special health regulations" qualifies as a criminal offense or a misdemeanor, but that was not explicitly regulated. The same act (e.g., curfew violation) could either as a criminal offense or a misdemeanor.[36] A greater problem emerged because the adopted health regulations allowed two penal proceedings to be conducted for a single

34 See Decision on Declaring the Emergency Situation in the Territory of the City of Belgrade and Decision on Declaring the Emergency Situation in the Territory of the City of Novi Sad

35 See "Special Report on the Activities of the Protector of Citizens During the State of Emergency," Belgrade, 2020

36 For more details, see Milić, 2021, pp. 97–114.

act committed (criminal proceedings and misdemeanor proceedings). The bylaws[37] included a provision that curfew violation could be subject to the initiation and completion of a misdemeanor proceeding, even if proceedings against the perpetrator had already been instituted or were ongoing for a criminal offense comprising the same elements as the misdemeanor, regardless of the prohibition from Paragraph 3 of Article 8 of the Misdemeanor Act. It is legally unacceptable for bylaws to make such a provision and to have the act itself prescribe the violation of the law. Therefore, the enacting authorities of that bylaw (the Government, with the president of the Republic as a co-signatory) were aware that they were violating the act of higher legal force.[38]

These bylaws (and others) were in breach of the Constitution of the Republic of Serbia which prescribes that no one can be prosecuted or punished for a criminal offense after having been acquitted or convinced by a final judgment or for which the charges had been rejected or the proceeding suspended by a final judicial decision. Nor may judicial decisions be revised to the detriment of the defendant in proceedings on extraordinary legal remedies. The same prohibitions apply to all other proceedings conducted for other acts punishable by law.[39] This legal set-up was also subject to review by the Constitutional Court, which decided that such provisions in the special bylaws had not, at the time of their being in force, been consistent with the Constitution and the confirmed international treaty.[40] Now, a question undoubtedly arises of the compensation for damages to persons who suffered losses due to the implementation of unconstitutional regulations. This situation has not yet been resolved – it means that court's procedures not finished yet.

Special rules, restrictions, and prohibitions of movement (curfews) applied for elderly persons, although these constantly changed during the state of emergency. Persons aged 65 or over (or 70 or over, depending on the location) could leave their residences only for a limited number of hours and only to purchase food or supplies. This discriminatory treatment was justified by the high rates of mortality from COVID-19 for the elderly; limiting their exposure was intended to reduce their risk. However, this regulation was fraught with issues. First, restricting vulnerable people's movements to certain hours could not be effective unless the "curfew" ensured that the vulnerable people would not be in contact with those considered less vulnerable; however, other people were allowed to move freely and potentially infect

37 Decree on the Misdemeanor of Violation of the Order of the Minister of the Interior Restricting and Prohibiting the Movement of Persons in the Territory of the Republic of Serbia (*Official Gazette of the Republic of Serbia*, no. 39/2020) and Decree on Measures During the State of Emergency (*Official Gazette of the Republic of Serbia*, nos. 31/2020, 36/2020, 38/2020, 39/2020, 43/2020, 47/2020, 49/2020, 53/2020, 56/2020, 57/2020, 58/2020, and 60/2020.)

38 For some legal issues see Milič, 2021, pp. 246–256.

39 Article 34, Paragraph 4, of the Serbian Constitution

40 See Constitutional Court Decision, no. IUo-45/2020

those vulnerable people. Second, what about the elderly's other critical needs, such as hospital or doctor visits? Third, what were the psychological consequences of the imposed isolation of vulnerable people? Finally, how does this special treatment not differ from discrimination?

4.2. Right to fair trial, freedom of movement, and freedom of religion

During the state of emergency, the Serbian courts were strict about imposing sanctions for violations of special health regulations. In the first such judgment, a defendant who breached the self-isolation measures was given the maximum imprisonment sentence of three years.[41] This judgment seemed to give other courts in Serbia permission to impose strict penalties to persons for violating the special health regulation. Many State officials made media statements calling for the courts to impose harsh sanctions for such violations. While their statements should h=not have swayed the courts, that was not always the case. The Criminal Procedure Code explicitly prescribes the conditions for imposing detention. This should ensure logical and consistent proposals from the public prosecutor and the orders from the court for detention if certain statutory conditions are met. However, in the state of emergency, the Ministry of Justice recommended that the public prosecutor's offices seek detention for all persons who violated the self-isolation measures.[42] Many detained persons made plea agreements with the public prosecutor's office admitting to the criminal offense, and the court accepted those agreements. In addition to being criminally sanctioned, the defendants were all to be recorded in the criminal register and could face legal consequences because of the conviction. However, many of those detained persons had not committed a criminal offense because (1) at the time their alleged crimes, violating the self-isolation measures was not legally recognized as a crime; (2) the violations related to regulations that were inconsistent with the Constitution and laws; or (3) the authorities issuing the regulations were not competent to issue or implement special health regulations.

The persons who violated the health regulations were detained, contrary to positive regulations, in three special "detention units."[43] Regardless of their having violated special health regulations and having been ordered detention, those persons should have been tested for coronavirus infection before being referred to the respective detention units and appropriate health measures taken toward them. However, it is impossible to obtain reliable data on whether that occurred.

41 See https://www.podunavlje.info/dir/tag/nepostupanje-po-zdravstvenim-propisima-za-vreme-epidemije/ (Accessed: April 19, 2021).

42 See https://www.mpravde.gov.rs/sr/obavestenje/29543/poostravanje-sankcija-za-lica-koja-prekrse-mere-samoizolacije-.php (Accessed: March 10, 2021).

43 See, Milić, 2020, pp. 89–105.

After lifting the state of emergency, the public prosecutor's office abandoned criminal prosecution against some persons. The court rendered the acquittal judgments when it found that the defendants did not break the law by violating special health regulations. It seems likely that the convicted persons who entered into plea bargain agreements would have been freed from their alleged criminal liability if their cases had been delayed until after the state of emergency was lifted. In that eventuality, the courts' determination that the regulations did not meet the Constitution's conditions meant they should not have been held criminally liable.

During the emergency, defendants were allowed[44] to take part in the main hearing without being physically present in the courtroom by us using technical means for image and sound transmission (the so-called Skype trial). This solution was not in line with the Criminal Procedure Code. The bylaw enacting authority failed to recall the Constitution of the Republic of Serbia's[45] position that any person charged with a criminal offense and available to the court has the right to be tried in the presence of the accusers and cannot be punished without the opportunity to a hearing and a defense.[46]

The adoption of special regulations also affected the performance of religious rites. Pursuant to the Constitution of the Republic of Serbia,[47] everyone has the freedom to manifest their religion or religious beliefs. This includes practicing religious rites, attending worship services or teachings individually or with others, and manifesting religious beliefs in private or public. However, the freedom to manifest one's religion or beliefs can be limited by law as necessary in a democratic society to protect the lives and health of people, the morals of democratic society, citizens' freedoms and rights guaranteed by the Constitution, and public safety and order or to prevent causing or inciting religious, national, or racial hatred. In respect of this constitutional protection, it is possible to draw two key conclusions: (1) freedom to manifest one's religion or

44 See Regulation *Uredba o načinu učešća optuženog na glavnom pretresu u krivičnom postupku koji se održava za vreme vanrednog stanja proglašenog*, March 15, 2020, *Official Gazette of the Republic of Serbia*, no. 49/2020

45 See Article 33 of the Serbian Constitution

46 The Constitutional Court has received multiple initiatives to institute the review of constitutionality and legality of acts adopted during the COVID-19 epidemic. The initiatives against the Decree on Measures During the State of Emergency (*Official Gazette of the Republic of Serbia*, no. 31/20) and the Decree on Misdemeanor of Violation of the Order of the Minister of the Interior Restricting and Prohibiting the Movement of Persons in the Territory of the Republic of Serbia (*Official Gazette of the Republic of Serbia*, no. 39/20) were accepted, and these acts declared partially unconstitutional (Constitutional Court decision no. IUo-45/2020 of October 28, 2020). The provisions of Article 2 of the Decree on Misdemeanor…and those of Article 4d, Paragraph 2, of the Decree on Measures… provided that for certain offenses for not observing the prohibition of movement, a misdemeanor proceeding may be instituted and completed despite the offender's already having been a subject to a criminal proceeding for a criminal offense comprising the elements of that misdemeanor. The Constitutional Court established that this violated the prohibition from Paragraph 3 of Article 8 of the Misdemeanor Act, the constitutional and legal principle of *ne bis in idem*, and the International Covenant on Civil and Political Rights and the ECHR (Article 4 of Protocol no. 7).

47 See Article 43 of the Serbian Constitution.

beliefs can be limited by law—and, therefore, not also by an act of a lower legal force; (2) this limitation can be imposed only for the reasons explicitly defined in the Constitution.

Pandemic regulations must consider the constitutional protections of the performance of religious rites. The Government rendered a conclusion[48] with the following recommendations to churches and religious communities for the duration of the state of emergency and the pandemic to efficiently contain the virus and prevent the endangerment of people's lives and health: (1) perform the rites in religious facilities and open spaces without in-person attendance by the congregations; (2) perform funeral-related rites with only the minimum number of people present, observing of the prescribed preventive (e.g., masks, social distancing). In all respects, this Conclusion was a mere recommendation, not binding on anyone. However, it nevertheless affected "some persons" as if it had been mandatory, particularly because many state officials made frequent statements advising this way of performing the religious rites.

The Conclusion did not solve the problem of exercising religious rites during the pandemic. Some towns and municipalities prohibited religious rites involving groups of people within homes,[49] while churches and religious communities were ordered to perform them in compliance with all epidemiological measures.[50] There were also such orders in towns or municipalities allowing the performance of worship services within religious facilities by the clergy without the presence of the congregation.[51] These bans and restrictions were prescribed by local emergency management headquarters who lacked the authority to do so. This suggests that those respective orders violated the Serbian Constitution.

In addition to some health regulations being inconsistent with the Constitution, there were also specific restriction or prohibition measures imposed that were inconsistent with Serbian law. These measures primarily concerned special health regulations lacking a legal basis law or those implemented by public authorities lacking the legal power to impose such restrictions. The Serbia has a law in place that regulates the protection of the population from infectious diseases, the Act on the Protection of the Population against Infectious Diseases.[52]

48 Government Conclusion no. 53-2868/2020, *Official Gazette of the Republic of Serbia*, no. 43 of March 27, 2020.

49 See http://www.malizvornik.info/?p=15750&lang=lat (Accessed: May 5, 2021)

50 See http://www.loznica.rs/cms/mestoZaUploadFajlove/Naredba%200%20ukidanju_20200427_0001.pdf (Accessed: May 5, 2021)

51 See https://www.tvinfobosilegrad.co.rs/vesti/drustvo/3670-u-dimitrovgradu-zabranjeno-obelezavanje-zadusnica (Accessed: May 5, 2021).

52 This law governs the protection of the population against infectious diseases, including the specific health issues. It defines the infectious diseases that endanger the health of the population of the Republic of Serbia and the prevention and containment of which are of general interest to the Republic of Serbia. It also defines the implementation of epidemiological surveillance and monitoring measures, the manner of their implementation, and provision of funds for their implementation, enforcement controls, and other issues relevant to protecting the population against infectious diseases.

The legal basis for prescribing measures in the period of the epidemic is found in this law. However, during the epidemic, some of the measures prescribed had no basis in this Act: the mandatory quarantine measure (self-isolation at home for infected persons), the duty to identify yourself as an infected persons, the ban on infected persons visiting social welfare institutions, and others. The regulations were revised and amended on two occasions in 2020[53] make it possible to prescribe measures that would otherwise be illegal.

In Serbia, many persons were subject to motions for instituting misdemeanor proceedings for violating special health regulations, with the misdemeanor warrants issued by public authorities and individuals without the authority to do so.[54] Legally, only sanitary inspectors had been considered legally competent to prosecute (and issue warrants for) the misdemeanor offenses of violating epidemiological measures. However, Serbia did not have enough sufficient sanitary inspectors, so the communal police often handled this. It means, they unlawfully prosecuted and issued warrants for persons who violated the special health regulations. Even after the illegality of the communal police's was made public, the practice continued for more than half a year. That was one reasons for the amendments to the Act on the Protection of the Population against Infectious Diseases to broaden the scope of the powers of communal police. Currently, communal police officers have the same specific authority as sanitary inspectors to prosecute the misdemeanor offense of not complying with special health regulations in an epidemic. Although this legal amendment was justified by the shortage of sanitary inspectors, that begs the question of whether every public authority should have only those powers for which it is "competent" since, by the logic of the amended law, everyone can do everything—even if they have no understanding of science, epidemiology, or even the law.[55] The potential for abuse is worrisome.

5. Experiences of COVID-19 from the perspective of constitutional law

Considering the pandemic and the danger it poses to the population, it is logical for the State to enact regulations aimed at containing the virus. Indisputably, the Constitution of the Republic of Serbia and particular laws also allow the adoption of special regulations to prevent and contain infectious disease, but only by authorized bodies or individuals following a legally stipulated procedure. Naturally, there are limitations to this.

53 It refers to these laws: Act on Amendments to the Act on Protection of the Population from Infectious Diseases (*Official Gazette of the Republic of Serbia*, no. 68/2020, and later no. 136/2020).

54 For the legal consequences of misdemeanor sanctions see, Ristivojević and Milić, 2021, pp. 99–100.

55 See Milić, 2021a, pp. 253–271.

We must emphasize that specific limitations and prohibition measures prescribed in the state of emergency in the Republic of Serbia were noncompliant with the Constitution and particular laws. Even after the state of emergency had been lifted, some of the measures continued to be prescribed against the law or by unauthorized bodies or individuals.

The enacting bodies considered the enactment of the special health regulations to contain the infection justified. As a rule, the epidemiological situation justified every enacted special health regulation. However, the adoption of some special health regulations that imposed specific prohibition or limitation measures was not justified. Only after Serbia introduced the state of emergency did it declare, a few days later, COVID-19 an infectious disease epidemic. Logically, they should have done these in the opposite order because the declaration of an epidemic would justify the declaring a state of emergency.

The state of emergency in Serbia was introduced when the number of infected persons was still insignificant. The same was true for the so-called curfew and other measures. This raises questions about the justification of the imposed prohibition and limitation measures. Given that the National Assembly was unable to meet during the state of emergency, it had no legislative activities to that end. Instead, the rules of conduct were being ordained by the legal acts lower by force than law. Therefore, in Serbia, the rules of conduct in the state of emergency were primarily regulated by bylaws, and that practice being continued even after the state of emergency was lifted. We still see the rules of conduct applicable during the epidemic being predominantly regulated by bylaws. There is no doubt that the process of amending and adopting bylaws is simpler than passing laws, and efforts to react quickly are commendable given the rapidly changing epidemiological circumstances. However, bylaws should not be used to regulate rules of conduct that should otherwise be regulated by laws.

5.1. Measures with common and narrow impacts

It is extremely difficult to account for all the measures prescribed in Serbia from the point when COVID-19 was pronounced an infectious disease epidemic. Some measures affected the entire population of Serbia, while others affected only specific groups.

The measure that most affected all Serbian citizens was the "restriction and prohibition of movement of persons"—the so-called curfew. This measure was unconstitutional[56] because it was prescribed by the minister of the interior,[57] who lacked the authority to issue such

56 See Simović, 2020, p. 17.

57 *Naredba o ograničenju i zabrani kretanja lica na teritoriji Republike Srbije*, *Official Gazette of the Republic of Serbia*, no. 34 of March 18, 2020; no. 39 of March 21, 2020; no. 40 of March 22, 2020; no. 46 of March 28, 2020; and no. 50 of April 3, 2020.

an order. According to the Constitution of the Republic of Serbia,[58] when the National Assembly is not able to convene, measures derogating from human and minority rights may be prescribed by the Government in a decree co-signed by the president of the Republic. Therefore, the curfew could have been prescribed legally only by the joint action of the Government of the Republic of Serbia and the president of the Republic as a co-signatory, which it subsequently did once authorities of public administration "realized" that the measure ordained by the minister was unconstitutional. Although the minister's order had been enacted contrary to the Serbian Constitution, many Serbian citizens were subjected to criminal or misdemeanor prosecution, convicted, and punished. The Constitution stipulates[59] that any decree derogating from human and minority rights that the National Assembly did not issue must be submitted by the Government to that body for confirmation within 48 hours of its adoption—as soon as the National Assembly is able to convene. Otherwise, the derogation measures cease to be valid 24 hours from the commencement of the first session of the National Assembly held after the declaration of the state of emergency. The National Assembly confirmed the decrees passed by the Government with the president as a co-signatory during the state of emergency declared on March 15, 2020[60]; however, it did not and could not have confirmed the interior minister's order.

There were also other regulations, decrees, and orders (and even unpublished quasi-legal acts) that restricted the rights and freedoms of specific persons, such as persons in social care institutions (the so-called homes for the elderly). The minister of health issued the Order Prohibiting Visits and Restricting Movement in the Facilities of Residential Care Institutions for the Elderly,[61] which banned visits to all social care institutions accommodating elderly persons while also prohibiting the care homes' residents from leaving. Not only was the issuing process inconsistent with the law, but the Order's enactment meant that elderly people in care homes were "deprived of their liberty" for over a year. The Order has undergone revisions and amendments. As of March 2022, persons within social care institutions can receive visitors who are fully vaccinated against COVID-19 and meet other specific conditions.[62]

During the state of emergency, all persons deprived of liberty were prohibited from receiving visitors and leaving detention institutions for any reason. While this prohibition

58 See Article 200 of the Serbian Constitution

59 See Article 200 of the Serbian Constitution

60 See the law *Zakon o potvrđivanju uredaba koje je Vlada uz supotpis predsednika Republike donela za vreme vanrednog stanja*, *Official Gazette of the Republic of Serbia*, no. 62 of April 29, 2020.

61 See the Order *Naredba o zabrani poseta i ograničenju kretanja u objektima ustanova za smeštaj starih lica*, *Official Gazette of the Republic of Serbia*, no. 28 of March 14, 2020; no. 66 of May 7, 2020; no. 87 of June 19, 2020; and no. 7 of February 3, 2021

62 For details on vaccination, see Ristivojević, 2020, p. 196.

might seem justified, the problem was that it was impossible to precisely identify who made that decision or the start and end date of its validity because it was not published anywhere.

Particularly unacceptable in legal terms is that the emergency management headquarters in some local self-governments were ordaining various bans and limitations while lacking the authority for doing so. There was also a portion of the prohibition measures prescribed by green market directors, social welfare center directors, people involved with enforcing criminal sanctions, and others.

5.2. Changes on various issues (immigrants, elections, media freedoms, etc.)

Over the past few years, various amended regulations and concluded international agreements have made the Republic of Serbia a final destination state for many immigrants. Serbia has several asylum and reception centers housing large numbers of immigrants. During the state of emergency, several special health regulations were adopted, exclusively applicable to them. Two are described below.

1. The Government, by means of a decree[63] co-signed by the president of the Republic, made it possible for the Ministry of the Interior to essentially seal the reception and asylum centers by closing all the approaches to open spaces or facilities and preventing the refugees from leaving without special permission. The decree also ordered the mandatory stay of specific persons or groups within specified spaces or facilities (migrant reception centers and the like). Supervision and security were increased at the facilities to (temporarily) prevent the free movement and self-initiated departure of persons who might be carrying the COVID-19 virus—although the refugees were not tested to see whether they were infected, because it was not obligatory. In exceptional and justifiable cases (e.g., visits to physicians), asylum-seekers and other immigrants were allowed to leave the asylum and reception center for a specified period of "leave" with special permission from the Commissariat for Refugees and Migration of the Republic of Serbia.
2. The minister of health adopted the Order Restricting the Movement on Approaches to Open Spaces and Facilities of Migrant Reception Centers and Asylum Centers,[64] banning access to open spaces or facilities of migrant reception and asylum centers. In other words, no one was allowed in or out without special permission, and even

63 *Uredba o merama za vreme vanrednog stanja*, *Official Gazette of the Republic of Serbia*, nos. 31/2020, 36/2020, 38/2020, 39/2020, 43/2020, 47/2020, 49/2020, 53/2020, 56/2020, 57/2020, 58/2020, and 60/2020

64 See the Order *Naredba o ograničenju kretanja na prilazina otvorenom prostoru i objektima prihvatnih centara za migrante i centara za azil*, *Official Gazette of the Republic of Serbia*, no. 66/2020.

> then, the time was limited. This Order had no valid legal grounds. It undoubtedly limited the refugees' freedom of movement and, like the interior minister's so-called curfew Order, was not (nor could it have been) confirmed by the National Assembly.

The introduced state of emergency and the epidemiological situation in Serbia also impacted the election for deputies in the National Assembly. On March 4, 2020, the president of the Republic adopted a Decision[65] calling for the elections for deputies to the National Assembly to be held on June 21, 2020. However, a state of emergency was in force at that time, along with a variety of other special health regulations (e.g., a ban on entries into the country, the so-called curfew, and other measures). Many of these regulations precluded a safe, free, and fair election. Therefore, the Republic Electoral Commission adopted a Decision[66] to immediately suspend all electoral activities related to the election of National Assembly deputies until the state of emergency was lifted. The same Commission adopted, on May 11, 2020, the Decision[67] to resume the implementation of electoral activities in the process of election of deputies to the National Assembly, while the president of the Republic amended the Decision on the elections to the effect of scheduling the elections for 21 June 2020.[68] Ultimately, the elections were delayed by seven weeks.

Media freedom is guaranteed under the Constitution,[69] which stipulates that no censorship applies in the Republic of Serbia. However, a competent court is allowed to prevent the dissemination of information and ideas through media to the extent necessary in a democratic society to prevent calls for a violent overthrow of the constitutional order or a violation of the territorial integrity of the Republic of Serbia; warmongering or instigation to direct violence; advocacy of racial, ethnic, or religious hatred; and discrimination, hostility, or violence. Despite this constitutional regulation, the Government has attempted to restrict reporting on the true situation and consequences of COVID-19. It adopted a Conclusion[70] empowering the Crisis Response Team for Infectious Disease Containment, headed by the prime minister, to be the sole entity responsible for informing the public about the extent of the crisis. Thereafter, all pandemic-related communications—deaths, infections,

65 See the Decision *Odluka o raspisivanju izbora za narodne poslanike*, *Official Gazette of the Republic of Serbia*, no. 19 of March 4, 2020, and no. 68 of May 10, 2020

66 *Rešenje o prekidu svih izbornih radnji u sprovođenju izbora za narodne poslanike Narodne skupštine, raspisanih za*, April 26, 2020. *Official Gazette of the Republic of Serbia*, no. 32 of March 16, 2020

67 See the Decision *Rešenje o nastavku sprovođenja izbornih radnji u postupku izbora za narodne poslanike Narodne skupštine, raspisanih za*, March 4, 2020, *Official Gazette of the Republic of Serbia*, no. 69 of May 11, 2020

68 See the Decision *Odluka o izmeni Odluke o raspisivanju izbora za narodne poslanike*, *Official Gazette of the Republic of Serbia*, no. 68 of May 10, 2020

69 Article 50 of the Serbian Constitution

70 Government Conclusion no. 53-2928/2020, *Official Gazette of the Republic of Serbia*, no. 48 of March 28, 2020

hospitalizations, and the like—collected by city mayors, municipality presidents, commanders of emergency management headquarters, healthcare institutions, and others had to be submitted to the Crisis Response Team. The Conclusion[71] labeled as "misinformation" all unofficial information shared with the public about health measures, treatments, or epidemiological data, and warned that there would be legal consequences for any other party providing such information. This Conclusion caused widespread discontent among the media, nongovernmental organizations, opposition-party representatives, individuals. Thousands of medical personnel even mounted a petition demanding the release of accurate data. The widespread pushback seems to have been the main reason that the Conclusion remained in force for less than a week.[72]

The Crisis Response Team did not exist at that time in the formal and legal sense, giving rise to the question of how it could be possible for a formally and legally nonexistent body to have any power. It wasn't until October 29, 2020, that the Government adopted the Decision Setting Up the Crisis Response Team for the Containment of Infectious Disease COVID-19.[73] The Decision set up the Crisis Response Team's formal and legal existence, giving it the specific powers it has used to issue recommendations, statistics, and daily press releases to the media. An unofficial team doing the same work had actually been doing the same work before then, but legally it did not exist because it had not been formed by the Government. State officials have stated that the Crisis Response Team was formed even before October 29 by a Government Conclusion, but that Conclusion was never published anywhere.[74]

6. COVID-19 as an economic crisis: fiscal and monetary crisis measures management

The COVID-19 pandemic is destroying the global economy in an unprecedented manner. Serbia has not been immune from this, partly due to its still-developing economy compared to developed countries.[75] Under the Serbian Constitution, funds for financing the powers held by the Republic of Serbia, autonomous provinces, and local self-government units come from

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72 The Government adopted the Conclusion no. 53-3010/2020, *Official Gazette of the Republic of Serbia*, no. 50 of April 3, 2020, which repealed the Conclusion on restricted reporting.

73 *Odluka o obrazovanju Kriznog štaba za suzbijanje zarazne bolesti* COVID-19, *Official Gazette of the Republic of Serbia*, no. 132 of October 30, 2020

74 See Milić, 2021a, pp. 253–271.

75 Mugano, 2020, p. 738.

taxes and other revenues established by law. The obligation to pay taxes and other duties is general and based on the economic capacity of taxpayers.[76]

The disastrous epidemiological situation continued in Serbia for nearly two years, with unsurprising economic consequences for both the State and Serbian citizens. For the State, economic consequences were reflected primarily in the reduction or (non)collection of revenues from taxpayers who were financially unable to pay their debts because of the pandemic (e.g., illness, job loss or furlough, etc.). The State adopted regulations to postpone the payment of some tax liabilities for a specified time[77] and temporarily exempted specific types of goods from customs duties.[78] (For example, companies doing humanitarian work or donations were exempted from paying VAT and value-added taxes.) Those decisions have undoubtedly affected national, provincial, and local budgets. At the same time, the State also had to spend money on efforts to prevent the spread of infections and contain the pandemic, including constructing COVID-hospitals, purchasing vaccines, and providing financial assistance to citizens.

To alleviate the economic consequences of the pandemic, the Republic of Serbia set up a Coordination Body to implement the Program of Economic Measures to Reduce Negative Effects of COVID-19 Infectious Disease Pandemic and to Support the Economy of the Republic of Serbia.[79] Its tasks included coordinating the implementation, addressing open questions, making decisions, and proposing economics-related measures to the Government. The president of the Coordination Body is the minister of finance.

For citizens, the economic consequences were particularly severe for those in healthcare and specific industries dependent on travel, such as hospitality, tourism, and related services. Citizens engaged in these industries were almost entirely prevented from working during the state of emergency. Further, while it is difficult to give even an approximate account of the proportion of people in Serbia who work in the gray zone (without a contract with the employer), those people have also suffered severe economic consequences in the pandemic. "Public sector" employees seem to have suffered the least economically (so far).

Many Serbian citizens (and small- and medium-sized companies that agreed not to fire more than 10% of their employees) were granted financial support to mitigate the economic

76 Article 91 of the Serbian Constitution

77 See the Decree *Uredba o postupku i načinu odlaganja plaćanja dugovanog poreza i doprinosa u cilju ublažavanja ekonomskih posledica nastalih usled bolesti* COVID-19, *Official Gazette of the Republic of Serbia*, no. 156 of December 25, 2020

78 See the Decision *Odluka o uslovima za izuzimanje od plaćanja carinskih dažbina za određenu robu*, *Official Gazette of the Republic of Serbia*, no. 48 of March 31, 2020

79 See the Decision *Odluka o obrazovanju Koordinacionog tela za sprovođenje Programa ekonomskih mera za smanjivanje negativnih efekata prouzrokovanih pandemijom zarazne bolesti* COVID-19 *i podršku privredi Republike Srbije*, *Official Gazette of the Republic of Serbia*, no. 52 of April 7, 2020

consequences of the pandemic. In March 2020, the Republic of Serbia committed to giving its adult (18+) citizens residing in Serbia a one-time financial aid grant of €100 (in dinars), although a month later, this was changed to benefit only pensioners and welfare recipients.[80] Another special law[81] was adopted that gave citizens two disbursements of €30 (in dinars). Private sector businesses were allowed to exercise specific fiscal benefits and receive direct payments from the budget of the Republic of Serbia.[82] Loan programs were expanded in some sectors (e.g., agriculture).[83] The State also gave grants to some sporting organizations since their events had to be postponed.[84]

The Constitution of the Republic of Serbia forbids discrimination[85] direct or indirect, on any grounds, including race, sex, nationality, social origin, birth, religion, political or other beliefs, property status, culture, language, age, or mental or physical disability. However, it also states that it is not discriminatory for the Republic of Serbia to introduce specific measures to achieve the full equality of individuals or a group of individuals in a substantially unequal position compared to other citizens. Additionally, Serbia's Anti-Discrimination Act[86] defines "discrimination" and "discriminatory treatment."[87] In this context, we need to

80 Legal basis for this payment was in this Decree: *Uredba o formiranju privremenog registra i načinu uplate jednokratne novčane pomoći svim punoletnim državljanima Republike Srbije u cilju smanjivanja negativnih efekata prouzrokovanih pandemijom bolesti* COVID-19 *izazvane virusom* SARS-CoV-2, *Official Gazette of the Republic of Serbia*, no. 60/2020. The Decree was adopted by the Government with the President of the Republic as a co-signatory. Later it was revised; see "*Vučić: Malu izmenu o isplati 100 evra uveli smo slušajući tajkune koji ne žele tu pomoć*," *Danas*, April 24, 2020 https://www.danas.rs/vesti/politika/vucic-malu-izmenu-o-isplati-100-evra-uveli-smo-slusajuci-tajkune-koji-ne-zele-tu-pomoc/ (Accessed: March 13, 2022).

81 *Zakon o Privremenom registru punoletnih državljana Republike Srbije kojima se uplaćuje novčana pomoć za ublažavanje posledica pandemije bolesti* COVID-19 *izazvane virusom* SARS-CoV-2, *Official Gazette of the Republic of Serbia*, no. 40 of April 22, 2021

82 See the Decree *Uredba o fiskalnim pogodnostima i direktnim davanjima privrednim subjektima u privatnom sektoru i novčanoj pomoći građanima u cilju ublažavanja ekonomskih posledica nastalih usled bolesti* COVID-19, *Official Gazette of the Republic of Serbia*, no. 54 of April 10, 2020, and no. 60 of April 24, 2020

83 See the Decree *Uredba o finansijskoj podršci poljoprivrednim gazdinstvima kroz olakšan pristup korišćenju kredita u otežanim ekonomskim uslovima usled bolesti* COVID-19 *izazvane virusom* SARS-CoV-2, *Official Gazette of the Republic of Serbia*, no. 57 of April 16, 2020

84 See the Decree *Uredba o utvrđivanju Programa finansijske podrške sportskim organizacijama u otežanim ekonomskim uslovima usled pandemije* COVID-19 *izazvane virusom* SARS-CoV-2, *Official Gazette of the Republic of Serbia*, no. 144 of November 27, 2020

85 Article 21 of the Serbian Constitution

86 *Zakon o zabrani diskriminacije*, *Official Gazette of the Republic of Serbia*, no. 22 of March 30, 2009.

87 This means any unjustified differentiation or unequal treatment or omission (exclusion, limitation, or preferential treatment) in relation to individuals or groups, members of their families, or persons close to them, overt or covert, on the grounds of race; color; ancestry; citizenship; national affiliation; ethnic origin; language; religious or political beliefs; sex, gender identity, or sexual orientation; property status; birth; genetic characteristics; health, disability, marital, or family status; previous convictions; age; appearance; membership in political, trade union, or other organizations; and other actual or presumed personal characteristics. See Article 2 of the Anti-Discrimination Act.

examine two measures concerning the financial incentives to persons vaccinated against COVID-19.

In 2020, the Republic of Serbia saw a change in the legal regulation of public immunization when the National Assembly supplemented the Act on the Protection of the Population against Infectious Diseases. Thus, the legal basis was set for the health minister to recommend or even mandate immunizations for all persons or specific categories of persons in the event of an infectious disease epidemic. To contain the spread of COVID-19 caused by the SARS-CoV-2 virus, the Republic of Serbia recommended extraordinary immunization against COVID-19 throughout the population.[88] To encourage those who were reluctant, the State offered financial incentives:

1. They offered financial aid to all individuals who received the vaccine to encourage broader vaccinations rates[89]; approximately 80% of a population must be vaccinated to achieve the herd immunity threshold for the new variants of COVID-19. All citizens of the Republic of Serbia aged 16 or above who received at least one dose of the COVID-19 vaccine by May 31, 2021, were entitled to payment of 3,000 dinars as a reward for their contribution to preventing its spread. The Medicines and Medical Devices Agency of Serbia issued the medical use permit confirming the vaccine's safety, efficacy, and quality.
2. They granted employed persons the right to salary compensation (100% of the salary compensation base granted to employees) who were vaccinated against COVID-19 but still caught it and had to miss work because of it. The compensation was also given to people for whom a COVID-19 vaccination was medically contraindicated. In both cases, the employees needed to provide a physician's medical report on their temporary inability to work and appropriate certificates from competent health institutions.[90]

This provision of financial assistance could be justified by its inarguable contribution to protecting the population and upholding citizens' constitutional right to health. However, some people questioned whether this discriminated against persons who did not want to get vaccinated out of fear, lack of trust (in the science, the State, vaccines in general, e.g.,), or some ideological stance. (Serbia has a mandatory childhood immunization policy for many vaccine-preventable diseases such as measles, rubella, mumps, rotavirus, etc.)

88 See the Order *Naredba o sprovođenju vanredne preporučene imunizacije protiv* COVID-19, *Official Gazette of the Republic of Serbia*, no. 155 of December 24, 2020

89 See the Decree *Uredba o podsticajnim merama za imunizaciju i sprečavanje i suzbijanje zarazne bolesti* COVID-19, *Official Gazette of the Republic of Serbia*, no. 46 of May 7, 2021

90 See Government Conclusion no. 53-4228/2021, *Official Gazette of the Republic of Serbia*, no. 46 of May 7, 2021.

Economic support measures were also prescribed by some local self-governments. For example, at its session of January 29, 2021, the City Council of the City of Novi Sad adopted a Decision on granting financial assistance (100,000 dinars per deceased person) to the families of the citizens from the territory who died of COVID-19 and were buried in the same territory.[91]

The National Bank of Serbia also adopted some pandemic-relief measures.[92] (The National Bank of Serbia is constitutionally recognized as the central bank of the Republic of Serbia, although it remains independent and under the supervision of the National Assembly.) The measures it prescribed largely involved deferrals in meeting payment obligations, such as these:

1. Lessors were required to offer lessees a suspension of debt payments (moratorium).[93]
2. Banks were required to offer their debtors (natural persons, farmers, entrepreneurs, and companies) a suspension of debt payments (moratorium).[94]

These measures were only temporary. However, that does not mean that the State was inactive in enacting or revising specific regulations concerning the budget or tax liabilities. For example, on November 12, 2020, it adopted the Act Amending the Act on the 2020 Budget of the Republic of Serbia.[95] Its Explanatory Memorandum clarified that its adoption was in direct response to the epidemiological situation.[96] In 2021, there were also revisions and amendments to the Act on the 2021 Budget of the Republic of Serbia, in part because of the current epidemiological situation.

7. Summary

Since the Republic of Serbia declared the epidemic of COVID-19 (ongoing), its legal rules have changed significantly. It declared a "state of emergency," and some local self-governments concurrently declared "emergency situations." The Republic of Serbia had no legislation

91 See http://www.novisad.rs/obaveshtenje-o-podnoshenju-zahteva-za-dodelu-pomotshi-porodicama-preminulih-gradjana-od-zarazne-bole (Accessed: May 5, 2021).

92 Article 95, Paragraph 1, of the Serbian Constitution

93 See the decision *Odluka o privremenim merama za davaoce lizinga u cilju očuvanja stabilnosti finansijskog sistema*, *Official Gazette of the Republic of Serbia*, no. 33 of March 17, 2020

94 See the decision *Odluka o privremenim merama za očuvanje stabilnosti finansijskog sistema*, *Official Gazette of the Republic of Serbia*, no. 33 of March 17, 2020

95 *Zakon o izmenama i dopuna Zakona o budžetu Republike Srbije za* 2020, *Official Gazette of the Republic of Serbia*, no. 135/2020

96 See *Explanatory Memorandum to the Act* (2020), https://www.pravno-informacioni-sistem.rs/SlGlasnikPortal/mml/viewAct/12260 and https://tinyurl.com/548s3zx6 (Accessed: February 10, 2021)

in place to act as the *lex specialis* for COVID-19. However, various bodies enacted regulations in response to changing circumstances and new information, building up a set of new laws on rights and obligations in the time of the epidemic.

The Constitution of the Republic of Serbia stipulates who has the authority to declare a state of emergency and when and through what procedure they may do so. However, during Serbia's state of emergency, some measures derogating from constitutionally guaranteed human rights were subsequently found to violate the Constitution and certain protected rights. While it is difficult to single out the most egregious of these, an obvious contender would be the so-called curfew constraining people's freedom of movement.

Although the state of emergency in the Republic of Serbia was lifted in May 2020, terminated, special rules applicable to the state of the epidemic remained in force, such as the Act on the Protection of the Population against Infectious Diseases and a variety of bylaws, as well as local decisions made by both authorized and unauthorized bodies. The abundance of bylaws has contributed to the impression that Serbia now governs its rules of conduct only through a handful of laws. The Constitutional Court has declared a number of the special regulations unconstitutional, and many are currently being reviewed for constitutionality and legality.

This chapter also highlighted some of the problems with many of the special regulations. First, some were enacted by bodies with no authority to enact such regulations (e.g., the so-called curfew). Second, some were applied from the date of their publication in the *Official Gazette*, leaving many citizens unaware that there had been a new or revised measure enacted (and some were not published at all). The overall effect was that most citizens found it extremely difficult to know which rules applied at any given time, especially since state officials often reported conflicting information to the media. Third, some local self-governments (emergency management headquarters) enacted their own regulations that remained unpublished and illegally prescribed misdemeanors for violations of those ever-changing regulations.

At the start of the pandemic, Serbia had an insufficient number of sanitary inspectors, who once were the only ones authorized to enforce laws and special regulations for containing an infectious disease. Therefore, less-qualified entities were given the same authority (e.g., national and communal police). This meant that the police could initiate misdemeanor proceedings and issue misdemeanor warrants against violators of the special regulations—even when it was often impossible to know what regulations were in effect and the regulations themselves were not legal because of the enactors' lack of authority or incorrect procedure. Thus, the courts have had to suspend many misdemeanor proceedings and determine compensation for those falsely charged.

Many people breached various special regulations (willingly or unwittingly). Of these, many were detained, and others convicted and punished in criminal or misdemeanor proceedings. The courts imposed strict penalties during the state of emergency, and some of the proceedings were later deemed unlawful (e.g., trial by Skype). Interestingly, there was very little attention paid at the time to questions of the constitutionality or legality of various special regulations. (Similarly, few have examined the negative consequences of applying those disputed regulations.) Eventually, legal scholars and others began to openly question the special laws' constitutionality and legal basis, especially the regulations involving unauthorized bodies or improper procedures. Once this debate surfaced, many of the special regulations were amended to make them lawful. However, these changes did not undo the negative effects of the improper regulations.

Ultimately, unconstitutional and illegal acts could lead to considerable costs to the State in the material sense if it is determined that citizens and legal entities that suffered losses because of such regulations are entitled to compensation.

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The multi-level regulation of the traditional and the exceptional emergency powers in Slovakia

SZINEK JÁNOS – SZINEK CSÜTÖRTÖKI HAJNALKA

1. Regulation of the special legal regime in Slovakia in general

In Slovakia, the general rules concerning the emergency powers are laid down in the Constitution of the Slovak Republic, while the specific rules were enacted in the constitutional act No. 227/2002 Coll. on the state security in the time of war, state of war, exceptional state and the emergency state as amended.[1] The constitutional act on state security can be considered as an equivalent to a "crisis constitution act" in the Slovak Republic, as it plays an important and decisive role in the protection of the sovereignty of the state.[2] According to Svák et al., the constitutional act on state security is a special act applicable directly in times of war or another emergency situation.[3]

While the constitution regulates the issue of emergency powers in a rather succinct way,[4] the constitutional act on state security provides an exhaustive list and precise definitions of the different types of emergency powers. The conditions for the promulgation of a special legal regime, the particular procedure of promulgation, the territorial and temporal scope of

1 Constitutional act No. 227/2002 Coll. on the state security in the time of war, state of war, exceptional state and the emergency state as amended. Hereinafter referred to as the constitutional act on state security.

2 Škrobák, 2020

3 Svák, Cibuľka and Klíma, 2013, p. 97.

4 The constitution contains only two empowering provisions on the regulatory requirements of the special legal regime. Pursuant to Article 51 (2) of the constitution: "The conditions and extent of restriction of the fundamental rights and freedoms and the extent of duties in a time of war, a state of war, an exceptional state or an emergency state shall be laid down by a constitutional law". The second provision can be found in Article 102 (3): "Conditions for declaring war, declaring a state of war, declaring an exceptional state, declaring an emergency state and the manner of exercising public authority during war, a state of war, an exceptional state, shall be laid down by a constitutional law".

Szinek János: Researcher, Ferenc Mádl Institute of Comparative Law, Hungary
Szinek Csütörtöki Hajnalka: Researcher, Ferenc Mádl Institute of Comparative Law, Hungary
Szinek, J., Szinek Csütörtöki, H. (2022) 'The multi-level regulation of the traditional and the exceptional emergency powers in Slovakia' in Nagy, Z., Horváth, A. (eds.) *Emergency Powers in Central and Eastern Europe*, pp. 279-302. Budapest: Ferenc Mádl Institute of Comparative Law; https://doi.org/10.47079/2022.znah.epicaee.1_11

a particular special legal regime, as well as the restriction of certain fundamental rights and the related obligations have been enacted in the constitutional act on state security in detail. The constitutional act on state security also regulates the specific emergency powers of certain constitutional bodies.

Regarding the relevant Slovak legislation, it is important to point out, that the constitutional system in Slovakia consists of not only the constitution itself but the constitutional system also includes numerous constitutional acts. For this reason, the Slovak scientific literature on the subject matter describes the constitution as so-called *polylegal*.[5] Therefore, the constitutional acts are also forming an integral part of the constitutional order of Slovakia: these special constitutional acts can be adopted or amended by a three-fifths majority of all members of the parliament (qualified majority).[6]

The legal hierarchy and the relationship between the constitution and the constitutional acts were examined by the Constitutional Court of the Slovak Republic as well. In this context, the Constitutional Court pointed out that the supreme law of Slovakia is the constitution; its adoption or amendment requires a qualified majority. However, from a formal point of view, the Slovak hierarchy of sources of law makes no distinction between the constitution and constitutional acts.[7] As a result, the constitutional acts are therefore undoubtedly having the same legal force in this respect as the constitution itself.[8]

The rules on emergency powers in Slovakia have been laid down solely at a constitutional level. However, there are other cases in the Slovak legal system which are not considered as traditional special legal regimes or emergency powers, however, they have a similar effect, and should be used for similar reasons. These non-traditional special legal regimes cases are regulated on the level of simple acts.[9]

1.1. The specific cases of the special legal regime

In accordance with the provisions of the constitutional act on state security, the particular cases of the emergency powers in Slovakia are war *(vojna)*, state of war (*vojnový stav*), exceptional state (*výnimočný stav*), and state of emergency *(núdzový stav)*.[10]

5 Giba et al., 2019, p. 76.
6 Article 84 (4) of the constitution
7 The decision of the Constitutional Court of the Slovak Republic, no. I. ÚS 39/93.
8 Giba et al., 2019, p. 75.
9 It is important highlighting that, in the Slovak legislation concerning the cases of special legal regime regulated on the constitutional level the legislature uses the term "status" *(stav)*, while the term "situation" *(situácia)* is used in connection with the non-traditional cases of the special legal regime, thereby facilitating the correct application of the law following the classification of cases.
10 The translations are the official translations of the specific types of emergency powers (special legal regimes).

a) War

According to Slovakian scientific literature on the subject, war, as a special legal regime, can be defined as a set of state measures through which the functioning of the state and the local authorities, private enterprises can be controlled or their functioning can be limited by the state.[11] According to the constitutional act on state security, the declaration of war falls under the authority of the president of the Slovak Republic, who makes a decision by resolution of the National Council of the Slovak Republic.[12] As a condition for declaration of war, the constitutional act on state security specifies two specific cases. War can be declared if the Slovak Republic is attacked by a foreign power violating its security, with or without sending a message of war, or if the Slovak Republic enters into war to fulfill its obligations arising from international contractual relations.[13] War can only be declared for the entire territory of the country. The constitutional act on state security also defines the duration of the war: the war is a period from the day of its declaration until the day of the conclusion of the peace.[14] In the event of such a special legal regime, depending on the severity of the events, the fundamental rights and freedoms may be restricted to the extent and for the necessary period in the whole or part of the territory of the Slovak Republic. The maximum number of obligations and restrictions on fundamental rights and freedoms[15] that can be imposed during the war are listed exhaustively in the constitutional act on state security.

b) State of war

In Slovakia, the president has the right to declare a state of war. The president may act on the proposal of the government. To declare this type of special legal regime, certain conditions must be met, such as a direct threat related to the message of war, or if the country is threatened by a direct attack by a foreign power without declaring war against Slovakia.[16] With regard to the declaration of a state of war, the president has discretion, as he has the right to reject the government's proposal at any time.

The state of war extends to the entire territory of the country.[17] In connection with the state of war, the fundamental rights and freedoms may be restricted, and obligations may be imposed in the whole state or part of the territory of the Slovak Republic, depending on the

11 Šimák, 2005, p. 37.
12 *Národná rada Slovenskej republiky*. Hereinafter referred to as the parliament.
13 Constitutional act on state security, Article 2 (1)
14 Constitutional act on state security, Article 2 (5)
15 For more scientific literature regarding the restriction of fundamental rights and freedoms in Slovakia see for example Benedik, 2017 and Skurka, 2021.
16 Constitutional act on state security, Article 3 (1)
17 Constitutional act on state security, Article 3 (2)

severity of events.[18] The maximum extent of obligations and restrictions that may be imposed are listed exhaustively in the constitutional act on state security.

c) Exceptional state

The president may declare an exceptional state based on a proposal from the government, but only if there is an imminent threat of a terrorist attack or street riots, or if these events have already occurred. Street riots, as defined by law, are a kind of widespread conduct that is accompanied by acts of violence against public authorities, the looting of shops or warehouses, other acts of violence against private property, or another massive acts of violence that seriously threaten the public safety. In this case, an exceptional state may be declared if the restoration of public safety through the usual intervention of the authorities or the use of other legal instruments proves ineffective.[19] Comparable to a state of war, the president has discretion regarding the declaration of an exceptional state, as he or she also has the right to reject the government's proposal.

Compared to war and a state of war, there is an important difference in the territorial scope of an exceptional state. While war and a state of war must be ordered for the entire territory of Slovakia, for an exceptional state, the scope of the declaration is limited to the physical territory affected, which also may be the whole state. The duration of the exceptional state may not exceed 60 days. The exceptional state may be extended for 30 days further if new circumstances arise that are directly related to the causes of the declaration of this type of a special legal regime. The criteria of necessity and proportionality must also be considered during the renewal of the exceptional state.[20]

d) State of emergency

The fourth category of emergency powers enacted in the constitutional act on state security is the state of emergency, which may be declared by the government. In contrast to the other three types of the special legal regime already analyzed above, the subsequent approval of the declaration by the president or the parliament is not required. A state of emergency can be ordered if an extraordinary event endangering human life and health occurs, or it is an imminent danger of occurrence of these events.[21] These extraordinary events can be related to different kinds of epidemics; damage to natural environmental features or other significant material objects; or damage to real estate caused by natural disasters, industrial

18 Constitutional act on state security, Article 3 (3)
19 Constitutional act on state security, Article 4 (1)
20 Constitutional act on state security, Article 4 (2)
21 Hojnyák and Ungvári, 2021, pp. 310–311.

disasters, transportation accidents, or other operational accidents.[22] The territorial scope of the declaration of the exceptional state and the state of emergency are identical, with the difference that the territorial scope of the exceptional state is limited to the affected area, which may be the entire state. The state of emergency may be declared for the time necessary, but its declaration shall not exceed 90 days.[23]

By the amendment of the constitutional act on state security effective from December 29, 2020, the legislature refers to the experiences gained during the pandemic situation caused by COVID-19. According to this amendment, during a pandemic situation, the state of emergency may be extended by a maximum of 40 days, even repeatedly, to the extent and for the necessary time. It means in general, that the state of emergency can be prolonged unlimited times. However, the extension of the state of emergency must be approved by the parliament within 20 days of the first day of the extension. In that case, if the parliament does not give its consent to the prolongation, the extended state of emergency shall end on the day on which the government does not accept the proposal to express its consent to the extension. The re-declaration of a state of emergency also requires the consent of the parliament if 90 days have not elapsed since the end of the state of emergency declared for the same reasons.[24]

Comparing the exceptional state and the state of emergency, the most fundamental differences relate to the nature of the situation. For an exceptional state, the threat is an attack on the protected interests of individuals or groups of people, while in case of a state of emergency, the constitutional regime reacts to a threat caused by force majeure, or a threat explicitly not caused by the intentional conduct of any person or group of persons. The state of emergency, therefore, responds to an objective situation. Another significant difference is that while the president may declare an exceptional state on the basis of a proposal of the government, the state of emergency may be declared by the government itself.[25] In an exceptional state and a state of emergency, there is a common point related to ensuring the legality of its promulgation. According to the constitution in both cases, the Constitutional Court of the Slovak Republic can decide on the lawfulness of the promulgation.[26]

To summarize the four types of special regimes[27] in Slovakia, the protection of the external sovereignty of the state basically requires the promulgation of war or a state of war, while the protection of the internal security of the state the promulgation of an exceptional state or a state of emergency is the appropriate choice.

22 Constitutional act on state security, Article 5 (1)
23 Sepeši, 2020
24 Pirošíková, 2021, pp. 2–10.
25 Škrobák, 2020
26 Kelemen, 2020, p. 219. For further information, see: the constitution, Article no. 129 (6)
27 Burdová, 2011, p. 57.

1.2. The constitutional bodies and the common rules on emergency powers

The constitutional act on state security specifies the general rules and the functioning of the constitutional bodies in detail. Such constitutional bodies are the government, ministries, central bodies, district offices, local governments, and self-governments on the county level. The Parliamentary Council of the Slovak Republic *(Parlamentná rada Slovenskej republiky)* and the Security Council of the Slovak Republic *(Bezpečnostná rada Slovenskej republiky)* are also key constitutional bodies in this respect.

The Parliamentary Council is established by the constitutional act on state security in order to carry out the specific functions of the parliament during the war, state of war, and exceptional state. However, there are certain exceptions among the exceptional powers of the Parliamentary Council.[28] The Parliamentary Council is a very special and exceptional body, which exercises the powers of the parliament if the parliament is obstructed for any reason.[29]

The Security Council is created by the constitutional act on state security as well. The Security Council has different responsibilities during a special legal regime from those in peacetime.[30] In times of war, states of war, and states of emergency, if the government is obstructed, the Security Council shall perform its functions. However, the Security Council shall substitute the government in general, the council cannot amend the program for government, request for a vote of confidence, or exercise general amnesty. The operation and the responsibilities of the Security Council during peacetime are regulated by Act No. 110/2004. Coll. on the Functioning of the Security Council During Peacetime.[31] The structure of the council is also defined by the aforementioned Act. According to this, the subdivisions of the Security Council are the county security councils and the district security councils.

The constitutional act on state security declares, that the resolutions on the message of war and the conclusion of peace, declaration of a state of war, declaration of exceptional state and state of emergency, restriction of fundamental rights and freedoms, and imposing obligations, as well as the decisions of the government on emergency measures, decisions of the Parliamentary Council and decisions of the Security Council should be immediately

28 For the exhaustive list of the aforementioned exceptions, see the constitutional act on state security, Article 7 (2)

29 Giba et al., 2019, p. 74.

30 During peacetime, the Security Council operates as an advisory body to the government. In sphere of its authority, it participates in the development and operation of the security system of the Slovak Republic, fulfills international security obligations, and assesses the security situation at home and abroad; prepares proposals for the government to maintain the security of the state and also takes measures to prevent crisis situations.

31 Act No. 110/2004 Coll. on the Functioning of the Security Council During Peacetime

published in the Slovak print media, aired in radio channels and television broadcasts, and also immediately shall be published in the National Gazette of the Slovak Republic.

The constitutional act on state security regulates the issue of elections due in time of war, state of war, and exceptional state. The act also regulates the cases of the right to get compensation from the state in connection with the ordered special legal regimes, and the calculation of the statutory time limits and limitation periods.[32]

1.3. Irregular emergency powers: crisis situation and emergency situation

In addition to the four types of special legal regimes, two additional categories appear in the Slovak legal regulation, which are not part of the system of the emergency powers. These are the crisis situation (*krízová situácia*) and the emergency situation (*mimoriadna situácia*). However, the emergency situation should not be confused with the state of emergency, which is a type of a special legal regime.

The provisions of the crisis situation are laid down in Act No. 387/2002 Coll. on the state management in the time of crisis situations out of the time of war and the state of war as amended.[33] According to Slovak law, a crisis situation is a situation in which the security of the state is damaged or endangered, and the authorized constitutional bodies shall declare an exceptional state, a state of emergency, or emergency situation.[34] The act on crisis situations also sets out the administrative bodies for crisis management, namely which are the government, the Security Council, ministries and central bodies, the National Bank of Slovakia, the District Security Council, the District Office, the District Security Council, and municipalities. As can be seen from this list, there is a slight overlap between the crisis management bodies and constitutional bodies. It should also be noted that the government may also establish a Central Crisis Staff *(Ústredný krízový štáb)* chaired by the minister of the interior of the Slovak Republic to deal with crisis situations. The detailed rules related to the operation of the Central Crisis Staff are enacted in the statutes of the board, which shall be approved by the government.[35]

The Act No. 42/1994 Coll. on the civil protection of population as amended[36] defines the emergency situation as a period of endangerment or the result of a period following an emer-

32 Constitutional act on state security, Article 11

33 Act. No. 387/2002 Coll. on the state management in the time of crisis situations out of the time of war and the state of war as amended

34 Act on crisis situations, Section 2, point a)

35 The Statutes of the Central Crisis Staff in the Slovak language can be downloaded from the website of the government Office of the Slovak Republic. [Online.] https://tinyurl.com/vdee4xc (Accessed: May 25 2021)

36 Act No. 42/1994 Coll. on the civil protection of population as amended

gency that has a negative impact on human life, people's health, or property.[37] The act on civil protection also defines different types of emergencies, including elemental disasters, accidents, natural catastrophes, public health emergencies, and terrorist attacks. In the event of an emergency, different types of measures may be taken to save the lives, health, or property of the people; to reduce the risk of a threat; or to take other action to prevent the spread and consequences of the emergency.[38]

The act on civil protection aims to protect the lives, health, and property of citizens in the event of an emergency, and to define the rules of procedure of public bodies and the roles and responsibilities of natural and legal persons.[39] In the field of civil protection, Slovak law gives general duties to the government, while the minister of the interior of the Slovak Republic is entrusted with preparatory, coordination, implementation, and control duties.

2. Provisions restricting fundamental rights during a special legal regime

According to the constitution, the Slovak Republic is a sovereign, democratic state, governed by the rule of law;[40] regarding legal certainty and justice, special emphasis is placed on the protection of certain fundamental rights, which are the subject of its regulation.[41]

Furthermore, Article 2 of the constitution enshrines an important relationship between the holders of state power and other subjects of law, which forms one of the basic pillars of the rule of law. A constitutional maxim applies to state authorities: "What is not allowed is forbidden." Accordingly, state bodies must act solely based on the constitution, within its scope, and their actions shall be governed by procedures laid down by law.[42] Citizens have different a constitutional maxim: "What is not forbidden by law is allowed." This is expressed in the constitution in the provision that everyone may do what is not forbidden by law, and no one may be forced to do what the law does not enjoin.[43] These two articles together form an effective legal basis for a system of protection for all persons against negative state action.[44,45]

37 Act on civil protection, Section 3 (1)
38 Act on civil protection, Section 3 (1)
39 Píry, 2020
40 The Constitution, Article 1 (1)
41 Skurka, 2021
42 The Constitution, Article 2 (2)
43 The Constitution, Article 2 (3)
44 Skurka, 2021
45 For more information, see the decision of the Constitutional Court of the Slovak Republic, no. II. ÚS 62/99.

In the Slovak Republic, fundamental rights shall be guaranteed to everyone regardless of sex, race, color of skin, language, belief or religion, political affiliation or other conviction, national or social origin, nationality or ethnic origin, property, descent, or any other status. No one shall be aggrieved, discriminated against or favored on any of these grounds.[46]

Regarding provisions restricting fundamental rights during a special legal regime, it is important to reiterate that the general provisions on restricting fundamental rights and freedoms have been declared in the constitution. Although the constitution provides guarantees the protection of fundamental rights, it does not address the issue of their limitation during a special legal regime.

The constitution enshrines, as a general guarantee, the freedom of the individual, and the equality of the individual in dignity and rights. The constitution also declares that fundamental rights and freedoms are irrevocable, inalienable, imprescriptible, and irreversible,[47] and these rights cannot be eliminated; furthermore, the constitution also guarantees the universality of fundamental rights and freedoms.

The Slovak Constitution contains only two empowering provisions for the establishment of detailed rules for the emergency powers. However, the constitution does not provide further information on the subject of the empowering provisions.[48] Based on the empowerment specified in the constitution, the constitutional act on state security exhaustively lists the permissible level of restriction on fundamental rights and freedoms, and also specifies the range (levels) of fundamental rights and obligations that may be restricted in specific cases. Following the structure of the act, after the introductory provisions, each of the fundamental rights and obligations that can be restricted are exhaustively listed and defined for each type of the special legal regime.

With regard to the four special legal regime situations, while at war or a state of war, the restrictions on the exercise of fundamental rights and freedoms can only be determined for the extent and for the time required, depending on the severity of the events in the state. In the meantime, in case of an exceptional state or a state of emergency, the regulations allows for the restriction of fundamental rights depending on the severity of the threat. As in the modern history of Slovakia, only the state of emergency has been declared, so at this point we will not analyze all types of the restrictions of the fundamental rights in case of every special legal regime; we will only analyze the restriction of the fundamental rights during a state of emergency.

46 The Constitution, Article 12 (2)
47 The Constitution, Title II (Fundamental rights and freedoms), Article 12 (1)
48 Kelemen, 2019, p. 29.

During a state of emergency, certain fundamental rights may be restricted, while complying with the principles of necessity and proportionality, but their restriction is only possible in accordance with the constitution.[49] The restricting provisions of the fundamental rights during a state of emergency are exhaustively listed in the constitutional act on state security.[50]

Many types of restrictive measures can be imposed on an area affected by a state of emergency or imminent threat, such as evacuation of persons, conducting mandatory work, use of private premises for military purposes, prohibition of the use of vehicles, restrictions on the delivery of letters, restrictions on free movement. The right of assembly, the right to strike, and the right to freedom of expression may be also restricted during the state of emergency.[51]

The possibility of the restrictions on fundamental rights allowed by the constitution was also seized by the Slovak government during the epidemic situation caused by COVID-19.[52] With regard to the restriction of fundamental rights, it is necessary to briefly present and analyze Act No. 355/2007 Coll. on protection, promotion and development of public health and on change and amendment to some acts in wording of later regulations.[53] Under this act, the Public Health Authority of the Slovak Republic, as the administrative authority competent in the field of public health, is entitled to introduce certain measures at its discretion.[54] These measures taken by the Public Health Authority are authorized explicitly by the Slovak Constitution.[55]

However, this competence of the Public Health Authority has been subject of a number of public debates.[56] Given the unprecedented situation in which the world found itself seemingly overnight, the Slovak authorities did not have established procedures in place to fight this extraordinary situation. Responding to this situation, the Slovak parliament amended the act on public health, which was signed by President Zuzana Čaputová without delay. The purpose of the amendment of the act was to resolve inconsistencies in the precautionary measures made by the Public Health Authority of the Slovak Republic in response to the coronavirus epidemic. However, after signing the amendment of the act, the president forwarded it to the Constitutional Court to examine certain provisions of the act, as in her opinion the

49 The Constitution, Title II, Article 13 (2)
50 The Constitution, Article 51 (2)
51 For further information see the constitutional act on state security, Article 5 (3)
52 See for example the Resolution of the government no. 693/2020 issued on 28 October 2020
53 Act No. 355/2007 Coll. on protection, promotion, and development of public health and on change and amendment to some acts in wording of later regulations. Hereinafter referred to as the Act on public health.
54 For detailed explanation on this subject-matter see Kukliš, 2021, pp. 141–154.
55 Act on public health, Section 48 (4)
56 For further explanation see: Havelková, 2020, p. 15.; Havelková, 2020; Dobrovičová, 2020

provisions of the act that exclude persons affected by precautionary measures were unconstitutional. The Constitutional Court of the Slovak Republic approved Čaputová's petition, and as a result, suspended the disputed legislation, and then forwarded the text of the petition re-consideration.[57]

3. Emergency powers in practice, except for COVID-19

Of the special legal regime cases analyzed in previous chapters, no war, state of war, or exceptional state has been declared in Slovakia so far. However, some examples can be found of the declaration of state of emergency. This special legal regime has been declared three times in Slovakia's modern history, two of which can be linked to the coronavirus epidemic.[58]

For the first time, Slovakia declared a state of emergency by issuing the decree of government no. 421/2011 due to a serious deficiency in the healthcare system. The declaration of the state of emergency was primarily aimed at ensuring proper operation of the healthcare system in the country and banning certain groups of workers (mainly the medical staff) from exercising their right to strike. In November, the cabinet of the president agreed to declare a state of emergency at fifteen state-run hospitals in Slovakia where an overwhelming majority of protesting hospital doctors rejected an offer of a €300 pay rise and refused to withdraw their resignation notices that take effect on December 1. Former Health Minister Ivan Uhliarik also announced that the state of emergency will not apply to doctors who did not submit resignation notices and that the salaries of doctors who have resigned but are forced to work will not be reduced as it had originally been announced. The Medical Trade Unions Association pointed out, at the end of September 2.411 doctors had submitted their resignation notices in 34 hospitals across Slovakia. The Medical Trade Unions Association has made four demands to the government in order to avoid a situation like this in the future. The demands were to observe the Labour Code, to change the system of healthcare funding, to stop the transformation of hospitals into joint-stock companies, and to increase wages of healthcare employees.[59]

57 See the press release no. 51/2020 of the Constitutional Court of the Slovak Republic: https://www.ustavnysud.sk/documents/10182/107844303/TS_51_2020/c96cb026-932e-4f15-8043-391be7018367 (Accessed: December 2 2020)

58 Regarding this, see the website of the Ministry of Health of the Slovak Republic: https://www.health.gov.sk/Clanok?vyhlasenie-nudzoveho-stavu-v-zdravotnickych-zariadeniach (Accessed: December 14 2020).

59 You can read more about the situation: https://spectator.sme.sk/c/20041805/slovakia-declares-state-of-emergency-at-15-state-run-hospitals.html (Accessed: May 27 2021)

4. Experiences of COVID-19 from the aspect of the state of emergency

Due to the epidemic caused by the new type of coronavirus,[60] the Slovak government decided to declare a state of emergency effective March 16, 2020.[61] However, originally, the scope of this type of special legal regime was limited to the healthcare system.

As already stated in the previous chapters, the constitutional act on state security links the possibility of promulgation of the state of emergency to the occurrence of an event or series of events that endanger human life, or it is an imminent danger to human life, peoples' health, or property. According to the constitutional act on state security, it may be an event related to a pandemic (epidemic) situation, or damage to a natural or built environmental feature or other real estate caused by a natural disaster, catastrophe, industrial disasters, or other operational accident.[62] An important feature of a state of emergency is that fundamental rights and freedoms may be restricted. Following this general definition, the act on state security lists exhaustively the fundamental rights and freedoms that can be restricted. The constitutional act on state security thus does not restrict fundamental rights *arising from the constitution*, but essentially authorizes the restriction of fundamental rights under the constitutional act on state security. In addition, it is absolutely necessary to emphasize that the declaration of a state of emergency does not in itself have a general restrictive effect, and it does not constitute a restriction on all fundamental rights and freedoms—it only creates the opportunity for a restriction.[63] Even before the state of emergency was ordered, the government declared an emergency situation for the entire territory[64] of the state.[65] However, the emergency situation is not a special legal regime in Slovakia.

The Slovak government, in response to the coronavirus epidemic, first introduced a countrywide emergency situation, then a few days later decided to introduce a special legal regime in form of a state of emergency.[66] Both, the emergency situation and the state of emergency were formally declared by a resolution of the government.[67]

60 Venice Commission, 2020, p. 39.
61 Resolution of the government no. 114/2020.
62 Constitutional act on state security, Section 5 (1)
63 Drgonec, 2012, p. 76.
64 The declaration of the emergency situation was based on provisions of the Act on civil protection. In Slovakia, the state of emergency was declared one day after the COVID-19 pandemic declared by the director-general of the World Health Organization on March 11, 2020.
65 Resolution of the government of the Slovak Republic no. 111/2020. Pursuant to Section 8 of the Civil Protection Act, the government was entitled to order an emergency situation.
66 Hojnyák and Ungvári, 2021, p. 311.
67 Jančát et al., 2020

In Slovakia, during the first wave[68] of the coronavirus epidemic, the state of emergency was declared for the maximum possible duration (90 days).[69] As a result of the second wave of the coronavirus epidemic, the Slovak government has also decided to introduce a state of emergency similar to during the first wave. This measure was ordered on October 1, 2020, for 45 days.[70] In this case, the emergency situation was introduced along with the state of emergency.[71] As the second wave of the coronavirus epidemic was observed in November 2020, the government needed to extend the emergency for another 45 days on November 11.

An amendment of the constitutional act on state security came into force on December 29, 2020.[72] As a result, the possibility of extending the duration of the state of emergency from 90 days by a further 40 days can be extended an unlimited number of times. Accordingly, the government extended the duration of the state of emergency[73] throughout the Slovak Republic for a period of 40 days, from December 29, 2020, until February 7, 2021.[74]

After that period, the Slovak government saw the need to maintain the state of emergency, extending it from February 8, 2021, for another 40 days.

Beginning March 20, 2021, the government again extended the state of emergency in Slovakia by 40 days. However, the thirty days were not expected to expire (it would have ended on May 28, 2021), the Slovak government on the basis of the improving pandemic situation decided, to end the special legal regime on May 14, 2021.[75]

Finally, on April 1, 2021, the Slovak Parliament approved the extension of the state of emergency. In justification of the resolution, the government warned that the more aggressive COVID-19 mutation would continue to endanger the lives and health of citizens and that there was an imminent threat of the further spread of the coronavirus. The government has also warned that despite the improving number of cases, the epidemiological situation remains fragile and premature mitigation of measures could lead to a worsening of the situation. As

68 The main measures adopted to deal with the coronavirus epidemic (during the first wave) have also been compiled by the European Parliamentary Research Service. For further information, see https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/652002/EPRS_BRI(2020)652002_EN.pdf (Accessed: December 14, 2020).

69 Constitutional act on state security, Section 5 (2)

70 Decision of the government no. 366/2020.

71 In this case, the Slovak government introduced the state of emergency only for 45 days instead of 90 days.

72 The amendments of the constitutional act on state security is available in the Slovak language on the following link: https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2020/414/20201229.htm (Accessed: May 27, 2021).

73 See the Resolution of the government of the Slovak Republic no. 807/2020. Available at (in Slovak language): https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2020/427/20201229 (Accessed: May 27, 2021).

74 Skurka, 2021

75 This happened right after the parliament adopted the amendment of Act No. 179/2021 on economic mobilization. This Act may be the more appropriate alternative to the emergency. As a result, the Cabinet has the means to take economic mobilization measures without declaring a state of emergency.

a result, the state of emergency was also extended on April 29, 2021.[76] The state of emergency was abolished seven months after its introduction. However, the emergency situation, which was introduced in March 2020, is still in force.

As the state of emergency introduced in March 2020 was affecting the healthcare system, the state of emergency introduced in October 2020 and the following period was a general kind of state of emergency.

Here it is necessary to briefly describe the public debates that have arisen regarding the declaration of a state of emergency in greater detail.

As previously mentioned, in 2011, the simultaneous dismissal of more than a third of the doctors working in Slovak hospitals shocked the Slovak government, and as a result, the government decided to order the state of emergency to combat the situation. The emergency declared in the resolution of the government was aimed at ensuring continuous healthcare and banning doctors from exercising the right to strike.[77] In connection with this case, several constitutional court decisions were born. The specific cases were examined not in connection with the promulgation of a special case of legal order (in this case, the state of emergency), but in connection with the prohibition of forced labor, during which the Slovak Constitutional Court did not find any unconstitutionality. The declaration of a state of emergency was then made only in March and October 2020, in connection with the outbreak of the coronavirus epidemic.[78]

In October 2020, Deputy Prosecutor General Viera Kováčiková submitted a motion concerning the state of emergency to the Constitutional Court of the Slovak Republic. The submitted compliant was made in connection with the constitutionality of the resolution adopted by the government. In addition, a group of members of parliament also appealed to the Constitutional Court concerning the declaration of the special legal regime. The Constitutional Court ruled that the state of emergency declared with effect from October 14 was in line with the Slovak Constitution, and that the declaration of the state of emergency violated neither the constitution nor the constitutional act on state security. The Constitutional Court ruled that the declaration of a state of emergency was not unconstitutional, nor that extending its scope to the entire territory of the country was unconstitutional. According to

76 See the press release on the website of the Ministry of Interior of the Slovak Republic. Available at: https://www.minv.sk/?tlacove-spravy&sprava=nudzovy-stav-na-slovensku-predlzeny-o-dalsich-30-dni (Accessed: May 12, 2021).

77 It should be noted that the legislature regulates only in the case of a state of emergency that it cannot be declared to prevent the exercise of the right to strike.

78 Grešš, 2021

the Constitutional Court, the government had complied with all the formal requirements for declaring a state of emergency.[79]

Also, in October 2020, the general prosecutor's office (GPO) stated that the Slovak Public Health Authority had violated the law regarding the imposition of precautionary measures during the first wave of the coronavirus epidemic. For this reason, the GPO sent a warning to the Public Health Authority of the Slovak Republic. The infringement was mainly based on the fact that, after the declaration of the emergency situation and the state of emergency, the Public Health Authority no longer had sufficient power to order precautionary measures, and the legal form of the introduced measures was not appropriate. The GPO recommended that the Public Health Authority take the necessary measures without delay to prevent future violations of existing legislation. It is also clear from the warning received by the Slovak Public Health Authority that the prosecutor general did not object to the introduced measures but to the way (the legal form) in which they were adopted.[80]

We can also find a good example on the subject matter from the year 2021, as on May 31, 2021, the Constitutional Court of the Slovak Republic ruled on the constitutionality of the measures adopted on May 17, and the 40-day extension of the emergency proposed by the SMER-SD political party and Prosecutor General Maroš Žilinka. The Constitutional Court of the Slovak Republic had to rule within 10 days of the reception of the petitions, which resulted in the two petitions being joined and forwarded for further proceedings. In its decision, the Constitutional Court of the Slovak Republic stated that it considered that the risk of an epidemic existed throughout Slovakia and, as a result, endangered the lives and health of individuals.[81] "The government, therefore, had the relevant facts for the adoption of the contested decision and also had the appropriate legal basis, which arises from the constitutional act on state security," according to Judge-Rapporteur Martin Vernarský.[82]

Even with the petition of the prosecutor general, who raised fundamental objections to the ban on national antigen testing or travel abroad for leisure purposes, the Constitutional Court upheld the constitutionality of the measures. "The Constitutional Court has concluded that the only criterion for assessing restrictions on fundamental rights and freedoms in an emergency is their necessity in relation to the seriousness of the threat and that the restrictions imposed meet that criterion. The test is a condition for the application of the exception

79 Grešš, 2021

80 The press release of the News Agency of the Slovak Republic is available at the following link: https://www.tasr.sk/tasr-clanok/TASR:20201006TBB00246 (Accessed: November 10 2020)

81 For more information see the decision of the Constitutional Court of the Slovak Republic no. PL. ÚS 2/2021.

82 Pravda: Vládou predĺžený núdzový stav je v súlade s ústavou, rozhodol ÚS. Available at: https://spravy.pravda.sk/domace/clanok/583013-plenum-ustavneho-sudu-rokuje-o-ustavnosti-predlzenia-nudzoveho-stavu/ (Accessed: May 27 2021)

to the curfew and thus de facto contributes to the fulfilment of the necessity criterion introduced by the constitutional law," Martin Vernarský stated.[83]

Judges Jana Laššáková, Miroslav Duriš, and Peter Straka dissented with the decision of the Constitutional Court, both on the statement and on the court's reasoning.[84]

5. COVID-19 as an economic crisis: Fiscal and monetary measures of crisis management

In Slovakia, a country of 5.4 million inhabitants, the state's quick response to the pandemic situation in the first wave led to only 28 deaths.[85] This remarkable performance was due to the quick response, and the high level of compliance of the general public, and of course, the overall effectiveness of the measures taken was high. As a result, Slovakia occupied the last place among European states, but the impact of the measures were still severe.

The first economic measures that followed thereafter were focused on mitigation of economic consequences on companies and individuals caused by the spread of the coronavirus. After the stabilization phase, the measures are aimed at restoring economic growth by strengthening the sustainability of public finances and strengthening economic stability. In the first quarter of 2020, the GDP shrank by 3.9%, which was one of the largest drops in Europe. Unemployment increased by 2% and was expected to grow further.[86]

As for the labor market, temporary agency workers and workers on fixed-term contracts belong to some of the most affected groups.[87] The employees working on work agreements outside of the regular employment contract were also poorly protected against job loss.[88] The government tried to provide support for the employers to preserve workplaces.[89] Employers were divided into two groups, distinguishing between those who closed and those who maintained their workplaces. For the first group, each employee got wage compensation up to

83 Pravda: Vládou predĺžený núdzový stav je v súlade s ústavou, rozhodol ÚS. Available at: https://spravy.pravda.sk/domace/clanok/583013-plenum-ustavneho-sudu-rokuje-o-ustavnosti-predlzenia-nudzoveho-stavu/ (Accessed: May 27 2021)

84 See the press release of the News Agency of the Slovak Republic (TASR): https://www.tasr.sk/tasr-clanok/TASR:20210331TBB00432 (Accessed: 27 May 2021).

85 Hovet and Heinrich, 2020

86 See the Worldometer's statistics on COVID-19. Available at: https://www.worldometers.info/coronavirus/ (Accessed: May 15 2021).

87 Confederation of the Trade Unions of the Slovak Republic's statement before the tripartite meeting on May 18, 2020. Available at: https://hsr.rokovania.sk/2020-/ (Accessed: 27 May 2021).

88 Slovak Labour Code distinguish between fixed term contract which is regular employment contract but set on specific time period and work agreement contract, which is designated for smaller jobs (up to 20 hours per week, for a maximum of one year, or for maximum 300 hours per year).

89 For detailed description on the measures taken by the government see: Križan, 2020

80% of the average wage, up to a maximum of €1,100, while in the second group, the level of support of the government varies banded.[90] However, these employers are not eligible for the special rescue packages during the epidemic period, as they are designed to help employers and workers in difficulty in all states to maintain labor market balance. A more significant improvement in employment and wages is not expected until the second half of 2021. In addition, a more significant slowdown in price growth is expected. The main reasons also include a decline in regulated energy prices and weaker consumer demand. Acceleration of price development is expected only with a more dynamic recovery of economic activity in 2022.[91]

5.1. Budgetary supports to mitigate the impact of the crisis

In February 2021, the parliament approved several financial measures to mitigate the negative impacts on taxpayers due to the pandemic situation. The Slovak Tax Code was amended as well, so the government can by means of regulation determine the conditions for waiving the imposition of tax penalties, the so-called tax amnesty.

The approved measures are aiming to regulate the tax deductibility of expenses on testing for the detection and prevention of COVID-19 for income tax purposes, exempt employee´s benefit in kind in connection with COVID-19 testing from taxation, liberalize the conditions for applying the tax bonus on a dependent child, and to introduce the temporary application of a zero VAT rate to selected protective equipment.[92] On February 6, 2021, an amendment to Act no. 67/2020 Coll. on certain emergency measures concerning the spread of the dangerous contagious human disease COVID-19 as amended,[93] published under number 47/2021 Coll. came into effect. This amendment states that the expenses incurred by employers or taxpayers with incomes from business or another self-employed activity during the pandemic period for testing the COVID-19 are considered tax-deductible. The tax expenses also include expenses disbursed to relatives of employees[94] or to a taxpayer with incomes from business or another self-employed activity, who live in the same household with them. The tax expenses also include expenses of a taxpayer disbursed on testing natural persons who perform an activity for the taxpayer in the place of his business.[95] The conditions for the application of a tax

90 For more: Hrecska-Kovács, Kovács and Csirszki, 2020
91 Grešš, 2021
92 Balogová, 2021
93 For the full text of Act No. 67/2020 (in English language) see: https://www.nbs.sk/_img/Documents/_Legislativa/_BasicActs/EN_672020-96.pdf (Accessed: 20 May 2021)
94 The amendment of the Act on certain emergency measures, Section 24ab (2)
95 The amendment of the Act on certain emergency measures, Section 24ab

bonus on a dependent child for 2020 were also amended with effect from February 6, 2021. If the taxpayer has not reached the required minimum amount of taxable incomes from his own performed activity for the purposes of applying of tax bonus (€3.480 for 2020), he may also include in up to the amount of incomes received within active labor market measures and grants from the ministry of culture and pandemic sick-leave and pandemic nursing benefit.

On February 6, 2021, an amendment to the Tax Code was published under no. 45/2021 Coll. entered into force. The amendment to the act was approved by the parliament in a simplified legislative procedure at the end of January 2021. This amendment introduces a new competency for the government of the Slovak republic which allows setting conditions by regulation for the termination of tax arrears corresponding to the unpaid penalties, as well as the conditions under which the imposition of a penalty can be waived. This will apply to all types of penalties in relation to all taxes.[96]

5.2. Short-term economic forecast of economic trends[97]

The Slovak economy contracted by about 6% in 2020. After a rebound from the bottom, a dynamic recovery should take place in 2021, and GDP growth should accelerate above 5%. In this and the following years, economic growth is expected to reach 5.6%, with a slight slowdown to 4.8% in 2022 and 3.7% in 2023. However, uncertainty persists stemming from further epidemiological developments.

With the situation improving in 2021, investment is expected to resume if there are favorable financial conditions and growing demand. The overall investment demand should be supported by the increased absorption of EU funds from the current program framework as well as the start of the absorption of funds from the recovery program. In the medium term, investment in the automotive industry, as well as funding from the EU structural and reconstruction funds, will have a positive impact. As for Slovakia's foreign trade relations, in 2021 foreign demand should continue to grow in a dynamic trend, which should be reflected in further growth in the export performance of the Slovak economy.[98] After the drop in GDP in 2020, the projected GDP should increase in 2021 and reach pre-crisis levels in the third quarter of 2021, and even surpass it in the fourth quarter of 2021. Because of the slump in consumer demand together with decreased energy prices, the inflation in 2020 decreased from the pre-crisis level of 2.8 in 2019 and should reach 0.3% in the first quarter of 2021 (Figure 2).

96 The amendment to the Tax Code published under no. 45/2021 Coll., Article I (2)

97 This part is based on the report of the National Bank of Slovakia—Medium-Term Forecast, 1Q-4Q 2020. Available online: https://www.nbs.sk/sk/publikacie/strednodoba-predikcia (Accessed: May 28 2021).

98 Grešš, 2021

The decreasing trend from 2020 should reach its bottom in this quarter, and since the second quarter, the inflation should increase slightly to 0.9%. However, this development will be in line with the development of the real GDP, when the GDP should increase by 1.4% and 3.1% in the third and fourth quarters of 2021 compared to a base fourth quarter of 2019. Therefore, the real GDP development should surpass the rate of inflation. The unemployment rate increased in 2020, however it is projected to increase even further in the first two quarters of 2021 reaching 8% in the second quarter. However, due to possible positive improvements in the pandemic situation, the rate is projected to decline in the second half of 2021, but not reaching the pre-crisis level of the end of 2019.[99]

External trade relations should also improve with projected increase in the value of both exports and imports through the whole year 2021. Numbers also show that intra-EU exports should comprise 46.7–47.5% of total Slovak exports with an increasing trend, while the intra-EU imports should compose 27.2% of total Slovak imports in all four quarters of 2021.[100]

Based on forecasts and the willingness of the Slovak population to vaccinate themselves,[101] the economic development in 2021 is predicted to return to the pre-crisis level of 2019, at least in GDP growth, which is projected to be higher in the third and fourth quarter of 2021 than in fourth quarter of 2019.[102] Inflation should remain below 2% for the whole year, which is well below the average inflation of 2019 at 2.8%.[103] Because of a rather significant increase in the unemployment rate in 2020 due to the pandemic, unemployment is expected to rapidly increase. In the first quarter of 2021, the unemployment in Slovakia was 7.1%.[104] A positive development is projected also for external relations with the values of both exports and imports increased in all four quarters of 2021. Overall, the year 2021 should be a year of economic recovery and another boost for the Slovak economy in case the pandemic situation improves significantly and no more radical measures (such as complete lockdown) will have to be imposed compared to 2020.[105]

99 Grešš, 2021
100 Grešš, 2021
101 See the website of the Representation of the European Commission in Slovakia: https://ec.europa.eu/slovakia/news/aky_je_aktualny_postoj_europanov_specialne_slovakov_k_ockovaniu_proti_covid_19_zvysuje_sa_ochota_slovakov_zaockovat_sa_vysledky_eurobarometra_sk (Accessed: May 28 2021).
102 Muller and Merriman, 2021
103 See the website of the Representation of the European Commission in Slovakia: https://ec.europa.eu/slovakia/news/jarna_hospodarska_prognoza_2021_vyhrnme_si_rukavy_sk (Accessed: May 17 2021).
104 Based on data provided by the Statistical Office of the Slovak Republic. Available at: https://bit.ly/3hFlJME (Accessed: May 17 2021).
105 Grešš, 2021

6. Summary

In Slovakia, the rules on the special legal regime are enacted at the constitutional level. These relevant provisions on emergency powers can be found exclusively in the constitution and in the constitutional act on state security. While the constitution contains only the general provisions on emergency powers, the constitutional act on state security lays down detailed regulations for each type of special legal regime.

The Slovak legislation distinguishes four categories of special legal situations: war, state of war, exceptional state, and state of emergency. In addition, the categories of the crisis situation and the emergency situation also appear in the field of crisis management. Neither the crisis situation nor the emergency situation belong to the classical type of special legal regime situations; however, the aim of these measures is to fight against the exceptional situations that occurred in the state as well. The provisions of the crisis situation are enacted in the act on civil defense, and the provisions of the emergency situation can be found in the act on crisis situations.

The president may decide on the declaration of war on the resolution of the parliament. The right to decide on the declaration of a state of war and a state of emergency is also concentrated in the hands of the president, who may on the proposal of the government consider the possibility of declaring these types of special legal regimes. The state of emergency can be declared by the government itself. If the parliament is obstructed during war, a state of war, or an exceptional state, the Parliamentary Council will be established based on the provisions of the constitutional act on state security. The Parliamentary Council exercises the general powers of the parliament; however, the following cases, which are listed in the constitutional act on state security, are considered to be exceptions to this. On this basis, the Parliamentary Council:

- may not amend the constitution, the constitutional acts, the act on elections, the act on political parties, and the act on referendums,
- may not recognize the binding force of an international treaty,
- may not propose a referendum on the dismissal of the president, and may not decide to call a referendum, and
- may not initiate charges against the president.

The Security Council is also established by the constitutional act on state security, which in the event of obstruction of the government during war, a state of war, or an exceptional state, performs the governments' general functions. The Security Council has different responsibilities in times of special legal regime versus in times of peace. While during a special legal regime, the operation of the Security Council is regulated by the constitutional act on state security, in peacetime, the Act on Functioning of the Security Council is in effect.

The table below summarizes the most important information about the Slovak emergency powers.

	War *(vojna)*	**State of war** *(vojnový stav)*	**Exceptional state** *(výnimočný stav)*	**State of emergency** *(núdzový stav)*
Level of regulation	constitutional (the constitution and the constitutional act on state security)			
Reasons for introducing the special legal regime	an attack of foreign power with or without a declaration of war or the Slovak Republic enters into war to fulfill its obligations arising from international contractual relations	the state is in imminent danger of war or the country is threatened by a direct attack by a foreign power without declaring war	terror attack or street riots or there is an imminent danger of the above happening	an event endangering human life and health has occurred or imminent threat of its occurrence
Ordering body	the president on the basis of a resolution of parliament	the president on the proposal of the government	the president on the proposal of the government	government
Practical cases	Has never been announced so far.			See the section "Experiences of COVID-19 from the aspect of the state of emergency"
Cases not covered by a special legal regime	crisis situation *(krízová situácia)* emergency situation *(mimoriadna situácia)*			

Table 9
Emergency regimes in Slovakia
Source: Authors' compilation

In respect of the restriction of fundamental rights, it can be stated that the constitution only formulates certain fundamental guarantees concerning the fundamental rights; however, the constitution does not regulate their restriction during the period of a special legal regime. During such a regime, based on a general authorization by the constitution, the constitutional act on state security exhaustively lists the permissible level of restriction on

fundamental rights and the range of and obligations that may be introduced during special legal situations.

With regard to the practice of the emergency powers, it should be noted that in the modern history of the Slovak Republic, only the state of emergency has been declared. Two of these examples can be linked to the breakout of the coronavirus epidemic in the year 2020.

Concerning the financial issues of the pandemic situation it can be seen, that the impacts of the measures made by the government had severe effect on the economy of the state. A positive development is projected in all four quarters of 2021, in both exports and imports. Overall, the year 2021 should be a year of economic recovery and another boost for the Slovak economy in case the pandemic situation improves significantly and no more radical measures will have to be imposed compared to 2020.

In Slovakia, the regulation of the special legal regime is at a constitutional level, and the constitutional act on state security adequately fixes certain specific rules for instituting a special legal regime. The constitutional act on state security exhaustively and transparently lists the fundamental rights that may be restricted in the case of the introduction of a special legal regime. It can be also seen, that based on the intensity of the threat, the principle of gradation clearly prevails in the regulation. This assures the democratic functioning of the state during an extraordinary situation.

According to the constitution, the Constitutional Court of the Slovak Republic may decide on the lawfulness of the promulgation of a special legal regime, thereby ensuring the constitutionality of the special legal regime. A specific feature of the Slovak regulation is that in the Slovak legal order there are special categories (crisis situations and emergency situations) that are not considered traditional special legal regimes but are very similar to them. It can be seen from the practice, that the crisis management during COVID-19 was also based on the parallel use of the state of emergency, which is a special legal regime with the crisis situation, which is an irregular form of the emergency power in Slovakia. Based on experiences gained during the COVID-19, it can be seen that the crisis situation serves as an additional measure to the state of emergency.

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Legal Regulation of the Special Legal Regimes in Ukraine

SIBILLA BULETSA

1. Introduction

The Constitution of Ukraine (CU) in Art. 92[1] stipulates that the legal regime of martial law and state of emergency and zones of ecological emergency are determined exclusively by the laws of Ukraine.

According to N.P. Kharchenko, a "legal regime" is a special procedure for the legal regulation of social relations, carried out through a system of variably combined legal means, to streamline them.[2] Yu P. Zhvanko understands a "special legal regime" as a kind of (specific) procedure of legal regulation caused by special circumstances, endowing public authorities with special powers that are manifested in the establishment of temporary legal means aimed at eliminating those circumstances on which their application was based.[3] Klymenko notes that a special legal regime is used when an existing danger threatens national interests, if there is no way to overcome the danger other than through the introduction of special legal regimes, state authorities, local governments, and military commands.

The views of the majority of scientists agree that the use of administrative and legal modes is associated with special language (citations) in public activity and social life, which underpin their extraordinary nature.[4]

1 Constitution of Ukraine, (June 28, 1996) no. 254к/96-ВР
2 Kharchenko, 2018, p. 26.
3 Zhvanko, 2019, p. 47.
4 Klimenko, 2017, p. 83.

Sibilla Buletsa: Professor, Faculty of Law, Uzhhorod National University, Ukraine
Buletsa, S. (2022) 'Legal Regulation of the Special Legal Regimes in Ukraine' in Nagy, Z., Horváth, A. (eds.) *Emergency Powers in Central and Eastern Europe*, pp. 303-342. Budapest: Ferenc Mádl Institute of Comparative Law; https://doi.org/10.47079/2022.znah.epicaee.1_12

There are two grounds for the introduction of extreme regimes: the factual basis (a phenomenon that is included in the relevant list) and the legal basis (the relevant act of state power).[5] The introduction of any special regimes is regulated by the Code of the Civil Protection of Ukraine (CCP).[6] The civil defense of Ukraine is a state system of governing bodies, forces, and means created to organize and ensure the protection of the population from the consequences of emergencies of a human-instigated, natural, sociopolitical, or military nature.

There are four levels of functioning of the state civil protection system in Ukraine:

5 Kuznichenko, 2011, pp. 47–49.

6 Code of Civil Protection of Ukraine (October 2, 2012) no. 5403-VI

Types and definitions of regimes	**Mode of daily operation** is introduced in a normal industrial, radiation, chemical, seismic, hydrogeological, hydrometeorological, human-caused, and fire conditions and in the absence of epidemics, epizootics, and epiphytosis.	**High alert mode** is introduced in case of a threat of emergency by decision of the Cabinet of Ministers of Ukraine, the Council of Ministers of the Autonomous Republic of Crimea, regional authorities, Kyiv or Sevastopol city state administrations, for a single state civil protection system in full or in part for some of its territorial subsystems increased readiness.	**Emergency situations** also arise during the liquidation of the consequences of emergencies.	**A state of emergency,** which aims to ensure the safety of citizens in case of natural disasters, accidents and catastrophes, epidemics, and epizootics, as well as to protect the rights and freedoms of citizens, a constitutional order is issued in the event of mass violations or attempts to seize power by violence in Ukraine.
In this mode, the following activities are carried out:	– Observation and control over the state of the environment, the situation at potentially dangerous objects and adjacent territories. – Development and implementation of measures to prevent emergencies, ensure the protection of the population, and reduce possible material losses. – Creation and renewal of material reserves to eliminate the consequences of the emergency situation. – Constant forecasting of the situation, the deterioration of which can lead to an emergency situation.	– All measures of day-to-day operations, plus: strengthening of monitoring and control over the situation at potentially dangerous objects, as well as the situation, and forecasting the possibility of an emergency situation and its scale. – Implementation of measures to prevent emergencies, and protect the population and territories. – Bringing available forces and means to a state of heightened readiness. – With a high alert being introduced in the rest of Ukraine, these are more preventive measures, which primarily concern public authorities, local governments, law enforcement agencies and rescuers, respectively. – Strengthening security in places with large crowds, subways in particular.	– Organizing the protection of the population and territories. – Organizing work connected with the localization or liquidation of the consequences of an emergency situation. – Ensuring the sustainable functioning of economic facilities and prioritizing the livelihoods of the affected population. – Constantly monitoring the state of the environment, etc.	– Establishment of a special regime of entry and exit, as well as restrictions on the freedom of movement. – Restricting movement of vehicles and their inspection. – Strengthening the protection of the public order and the facilities that ensure the livelihood of the population, as well as the activities of possible objects of the national economy. – A ban on meetings, rallies, street marches and demonstrations, sports, and other mass events. – A ban on strikes.

Table 10. The state civil protection system in Ukraine.
Source: Author's compilation

2. Martial law regime

2.1. The concept of martial law

Martial law (*viys'kovyy stan*) is established during hostilities. The concept of "martial law" is defined simultaneously in two laws of Ukraine: "On the legal regime of martial law" [7] and "On the defense of Ukraine."[8] According to Art. 1 of these two laws, martial law is a special legal regime imposed in Ukraine, or in certain localities, in case of armed aggression or threat of attack, or a danger to Ukraine's independence or its territorial integrity, and provides the relevant state authorities, military commands, military administrations, and local government bodies with the powers necessary to avert the threat, repel armed aggression and ensure national security, eliminate the threat to the independence of Ukraine, protect its territorial integrity, as well as temporary, threatened, restriction of constitutional human and civil rights and freedoms and the legitimate interests of legal entities—while indicating the duration of these restrictions. "War," one of the primary types of military conflict,[9] is defined an organized armed struggle between states, social classes, and so on, including "hybrid warfare."[10]

2.2. Legal regulation of the procedure of establishing martial law in Ukraine

According to the laws "On the defense of Ukraine" and "On the legal regime of martial law," it should be noted that the president of Ukraine (PU) has the authority to decide on the imposition of martial law in Ukraine or its localities only in case of threat of attack, danger to the independence of Ukraine, this is required by the provisions of paragraph 20 of the first part of Art. 106 of the CU, which regulates the procedure for deciding on the imposition of martial law in Ukraine or in certain localities.[11] The PU is empowered, if there is a threat of attack or danger to the independence of Ukraine, to make decisions regarding 1) general mobilization; 2) partial mobilization; 3) the imposition of martial law in Ukraine; 4) the imposition of martial law in some of its localities.

The procedure for imposing martial law in Ukraine or in certain localities thereof must be submitted to the PU for consideration by the National Security and Defense Council of Ukraine. If a decision is made on the need to impose martial law in Ukraine or in certain

7 On the legal regime of martial law (June 12, 2015) no. 389-VIII.
8 On the defense of Ukraine (December 6, 1991) no. 1932-XII.
9 On the national security of Ukraine (June 21, 2018) no. 2469-VIII.
10 Topolnitsky and Tychna, 2019, p. 93.
11 Topolnitsky and Tychna, 2019, p. 95.

localities, the PU shall issue a decree and immediately apply to the Verkhovna Rada, the parliament of Ukraine (VRU) for its approval, and simultaneously submit the relevant draft law. The VRU convenes for a two-day session without convening and considers the issue of approving the decree of the PU on the imposition of martial law in Ukraine or in certain localities thereof. The decree of the PU approved by the VRU must be immediately announced through the mass media or otherwise promulgated together with the law and will enter into force at the same time. The period of martial law begins with the date and time of the beginning of martial law, which are established by the decree of the PU upon the imposition of martial law, and ends with the date and time of cancellation (termination) of martial law.

The decree of the PU on the imposition of martial law states:

— the justification of the need to impose martial law;
— the boundaries of the territory in which martial law is imposed, the time of introduction and the period for which it is imposed;
— the tasks of the military command, military administrations, state authorities, and local self-government bodies regarding the introduction and implementation of measures of the legal regime of martial law;
— the task of the subjects of civil protection to bring the unified state system of civil protection, as well as its functional and territorial subsystems into readiness to perform the tasks assigned in a special period; and
— an exhaustive list of the constitutional rights and freedoms of citizen, which are temporarily restricted with the imposition of martial law, indicating the term of these restrictions, as well as temporary restrictions on the rights and legitimate interests of legal entities.

It should be noted that under martial law, it is prohibited:

— To change the CU;
— To change the Constitution of the Autonomous Republic of Crimea;
— To hold elections for PU, as well as elections to the VRU, the *VR* of the Autonomous Republic of Crimea, and local self-government bodies;
— To hold all-Ukrainian and local referendums; or
— To hold strikes, mass rallies and actions.

Therefore, during martial law, the powers of the PU, the VRU, the Cabinet of Ministers of Ukraine (CMU), the commissioner of the VRU for human rights, as well as courts, prosecutors of Ukraine, bodies conducting operational and investigative activities, pre-trial investigation and bodies whose units carry out counterintelligence activities cannot be terminated. In case of expiration of the term of office of the PU during martial law, his powers shall be extended

and may not be limited to the assumption of office of the newly elected PU, elected after the abolition of martial law. In case of expiration of the term of office of the VRU during martial law, its powers shall be extended until the day of the first sitting of the first session of the VRU elected after the abolition of martial law.

During Ukraine's independence, martial law was imposed once. The procedure of establishing such a decision took four years. Namely, on April 15, 2014, the VRU adopted the Law of Ukraine,[12] which determines the status of the territory of Ukraine temporarily occupied as a result of armed aggression of the Russian Federation, establishes a special legal regime in this territory; determines the peculiarities of state bodies, local governments, enterprises, institutions, and organizations in this regime; the observance and protection of human rights and freedoms of citizens; as well as the rights and legitimate interests of legal entities.

Then recognized the temporarily occupied territories of certain districts, cities, towns, and villages in the Donetsk and Luhansk regions, in which in accordance with the Law of Ukraine[13] a special order of local self-government was introduced until all illegal armed formations, Russian occupation troops, their military equipment, as well as militants and mercenaries were withdrawn from the territory of Ukraine and full control of Ukraine was restored on the state border of Ukraine.

In its appeal[14] Ukraine remains the object of military aggression by the Russian Federation, which it carries out, inter alia, through the support and provision of large-scale terrorist attacks (par. 1 of the appeal); the VRU recognizes the Russian Federation as an aggressor state and calls on Ukraine's international partners to recognize the Russian Federation as an aggressor state that fully supports terrorism and blocks the activities of the UN Security Council, which threatens international peace and security, and the so-called DNR and LNR[15] to be recognized as a terrorist organizations (paragraphs 6 and 8 of the Appeal).

12 On ensuring the rights and freedoms of citizens and the legal regime in the temporarily occupied territory of Ukraine (April 15, 2014), no. 1207–VII.

13 About the special order of local government in separate areas of Donetsk and Luhansk areas (September 16, 2014), no. 1680–VII.

14 Appeal to the United Nations, the European Parliament, the Parliamentary Assembly of the Council of Europe, the NATO Parliamentary Assembly, the OSCE Parliamentary Assembly, the Guam Parliamentary Assembly, and national parliaments of the world, on the recognition of the Russian Federation as an aggressor state, (January 27, 2015), no. 129-VIII.

15 DNR—*Donets'ka narodna Respublika* (Donetsk People's Republic)—is unrecognized and self-proclaimed terrorist quasi-state formation established by field commanders and pro-Russian separatist political leaders in the territory of certain districts of the Donetsk region of Ukraine occupied by the Russian Federation. LNR—*Luhans'ka narodna Respublika* (Luhansk People's Republic)—according to Ukrainian and world jurists, is a fictitious quasi-state terrorist group, the self-proclaimed puppet regime established by the Russian Federation in the occupied territory of certain districts of the Luhansk region of Ukraine.

Subsequently, the VRU approved the text of the Statement of the VRU[16], in par.1 of item 1 which states that the armed aggression of the Russian Federation against Ukraine began on February 20, 2014. The PU by decree[17] approved the Military Doctrine of Ukraine, which recognized and recorded the fact of armed aggression of the Russian Federation against Ukraine.

Three years later, the *Verkhovna Rada's* appeal was officially accepted again[18] which states that on November 25, 2018, the Armed Forces of the Russian Federation carried out an armed attack on the Ukrainian naval boats Berdyansk and Nikopol, and the tugboat Yani Kapu," which carried out a planned sea crossing from the port of Odessa to the port of Mariupol in compliance with current multilateral and bilateral international agreements and navigation rules. Such actions of the Russian Federation are an act of armed aggression against Ukraine.

Thus, the martial law in Ukraine in accordance with paragraph 20 of Part 1 of Art. 106 of the CU, the Law of Ukraine "On the legal regime of martial law," the PU issued a Decree "On the imposition of martial law in Ukraine" from November 26, 2018, no. 393 / 2018, paras. 1, 2, was imposed in Ukraine from 2:00 pm on November 26, 2018, for a period of 30 days to 2:00 pm on December 26, 2018. Military command[19] together with the Ministry of Internal Affairs of Ukraine, other executive bodies, and local self-government bodies, was ordered to introduce and implement the measures and powers provided by the Law of Ukraine "On Martial Law" necessary to ensure Ukraine's defense, public safety and state interests. Martial law was imposed in Vinnytsia, Luhansk, Mykolaiv, Odessa, Sumy, Kharkiv, Chernihiv, as well as the Donetsk, Zaporizhia, and Kherson regions, and the internal waters of the Ukraine Azovo-Kerchen area.[20] It was also decided that the actions of the Russian Federation against the ships of the Naval Forces of the Armed Forces of Ukraine, which had serious consequences,

16 On the statement of the Verkhovna Rada of Ukraine, "On repelling armed aggression of the Russian Federation and overcoming its consequences" resolution of the Verkhovna Rada of Ukraine (April 21, 2015), no. 337–VIII.

17 On the decision of the National Security and Defense Council of Ukraine, "On the new version of the military doctrine of Ukraine" (September 2, 2015), no. 555/2015.

18 On the Address of the Verkhovna Rada of Ukraine to the United Nations, the European Parliament, the Parliamentary Assembly of the Council of Europe, the NATO Parliamentary Assembly, the OSCE Parliamentary Assembly, the Guam Parliamentary Assembly, and national parliaments of the world, in connection with the next act of aggression against Ukraine (November 26, 2018), no. 2632–VIII.

19 General staff of the Armed Forces of Ukraine, command of the Armed Forces of Ukraine, operational commands, commanders of military units, units of the Armed Forces of Ukraine, State Border Guard Service of Ukraine, State Special Transport Service, State Service for Special Communications and Information Protection of Ukraine, National Guards of Ukraine, the Security Service of Ukraine, the Foreign Intelligence Service of Ukraine, and the Department of State Protection of Ukraine.

20 Case no. 420/6911/18, https://reyestr.court.gov.ua/Review/81362395 (Accessed: 15 June 2021)

constitute a crime of armed aggression and fall under paragraphs "c" and "d" of Art. 3 of UN General Assembly Resolution 3314 (XXIX), December 14, 1974.[21]

Confirmation of the aggression of the Russian Federation is also traced in the decisions of the courts of Ukraine. For example, a plaintiff appealed to the court to establish the fact that has legal significance, citing the fact that he has been called since April 2015 to mobilize the Armed Forces on the basis of the presidential decree no. 15 from January 14, 2015 through May 2017 under the contract he served in the military as part of the 25th separate motorized infantry battalion held the position—mechanic—driver, has the rank of junior sergeant. In the period from December 12, 2015, to September 27, 2015, from February 22, 2016, to May 17, 2016, from June 13, 2016, to July 19, 2016, from September 20, 2016, to October 31. In 2016, from January 31, 2017, to March 7, 2017, the directly took part in hostilities in eastern Ukraine. As a result of armed aggression and military conflict, which was initiated by the Russian Federation against Ukraine, he was injured on June 30, 2016, near the village of Troitske in the Luhansk region. The court satisfied the claim in full and established the legal fact of injury to the plaintiff in the performance of military service on June 30, 2016, near the village of Troitske in the Luhansk region, due to the armed aggression of the Russian Federation against Ukraine.[22]

The specificity of Russia's aggression against Ukraine is Russia's unconditional violation of the system of basic international legal agreements, large-scale damage, significant duration of the conflict and the actual conduct of the war without declaring it, using conspiracy rules and masking its actions by Russia. According to Art. 1 of the law of Ukraine "On the defense of Ukraine"[23] any of the following actions is considered armed aggression against Ukraine:

(a) invasion or attack of the armed forces of another state or group of states on the territory of Ukraine, as well as occupation or annexation of part of the territory of Ukraine;

(b) blockade of ports, coast or airspace, violation of communications of Ukraine by the armed forces of another state or group of states;

(c) an attack by the armed forces of another state or group of states on the military land, naval or air forces or civilian naval or air fleets of Ukraine;

21 On the decision of the National Security and Defense Council of Ukraine, "On emergency measures to ensure the state sovereignty and independence of Ukraine and the imposition of martial law in Ukraine": Decree of the PU, 26.11.2018 no. 390/2018.

22 Case no. 592 / 3395/19 Proceeding no. 2-o / 592/104/19 https://reyestr.court.gov.ua/Review/81555130 (Accessed: 15 June 2021)

23 "On the Defense of Ukraine (1991)

(d) sending by another state or on its behalf to armed groups of regular or irregular forces that commit acts of use of armed force against Ukraine, which are of a serious nature;
(e) the actions of another state (states) that allow its territory, which it has made available to a third state, to be used by that third state (states) to commit the acts referred to in subparagraphs (a) and (d);
(f) the use of units of the armed forces of another state or group of states that are on the territory of Ukraine in accordance with international agreements concluded with Ukraine against a third state or group of states, other violation of the terms of such agreements, or the continuation of these units on the territory of Ukraine agreements.

The fact of aggression and attack of the Russian Federation on Ukraine was stated in the decisions of domestic courts, in particular in the verdict of the Sviatoshynsky District Court of Kyiv of March 18, 2019, in the case no. 759/16863/16-k, etc. Yet, it states that the Russian authorities decided to start planning and preparing for an aggressive war against Ukraine from the territory of the Autonomous Republic of Crimea, and also established the fact of blocking and seizing state authorities, military, and civilian infrastructure in the Autonomous Republic of Crimea.[24] The Russian–Ukrainian *"hybrid"* war is taking place in Ukraine, given that a *"hybrid"* war is a special type of armed conflict in which hostilities play a secondary role, with the aim of imposing freedom on the enemy by using various forms of force.[25]

In some localities in Ukraine where martial law has been imposed, the military command together with military administrations (in case of their formation) may introduce and carry out the following measures of the legal regime of martial law:

(1) to establish an enhanced protection of important objects of the national economy and objects that ensure the livelihood of the population, and to introduce a special regime of their work (the list of objects is approved by the CMU);
(2) to raise, in the manner prescribed by the Constitution and laws of Ukraine, the issue of banning the activities of political parties, public associations, if it is aimed at eliminating the independence of Ukraine, forcibly changing the constitutional order, violating the sovereignty and territorial integrity of the state, undermining its security, illegal seizure of state power, propaganda of war, violence, incitement of inter-ethnic, racial, or religious hatred, or encroachment on human rights and freedoms or public health;

24 Unified state register of court decisions, http://reyestr.court.gov.ua/Review/80519617 (Accessed: 15 June 2021)
25 Topolnitsky and Tychna, 2019, p. 94.

(3) to establish military and apartment conscription of individuals and legal entities for the accommodation of servicemembers, law enforcement agency employees, civil defense servicemembers, evacuated populations, and the accommodation of military units, subdivisions, and institutions;
(4) to establish a procedure for using the fund for the structures for civil protection;
(5) to evacuate the population if there is a threat to their life or health, as well as items of material and cultural value, if there is a threat of damage or destruction, according to the list approved by the CMU;
(6) etc.[26]

Carrying out constitutional reforms in wartime is impossible and doomed to failure. Martial law makes it impossible to ensure the implementation of the provisions adopted in the occupied territories of Ukraine, most citizens are involved in hostilities, and it is impossible to discuss reforms at all levels.[27]

Martial law on the entire territory of Ukraine or in some localities is abolished by a decree of the PU upon a proposal by the National Security and Defense Council of Ukraine, once there is an elimination of the threat to the state independence of Ukraine or its territorial integrity. The VRU may address the PU with a proposal to abolish martial law.

2.3. Restrictions on the rights and freedoms of citizens under martial law

The essence of a martial law regime is to ensure an unimpeded and prompt opportunity to avert the threat, repel armed aggression, and ensure national security, eliminate the threat to the independence of Ukraine, or its territorial integrity, by providing statutory authorities, military command, military administrations, and local governments with certain powers required to do so. As a result, certain constitutional rights and freedoms of citizens may be temporarily (for the period of martial law) restricted. The essence of the restriction of the constitutional rights and freedoms of man and citizen during martial law, in turn, is explained by the peculiarity of the regime of their protection by the state at that time. For example, in peacetime, entry into and search of a dwelling is permitted solely on the basis of a court decision (with a few exceptions), but during martial law, a court decision is not required to enter and inspect a dwelling. Thus, the protection of national security, the independence of

26 About approval of the standard plan of introduction and maintenance of measures of a legal mode of martial law in Ukraine or in its separate localities (July 22, 2015), no. 544.
27 Morozyuk, 2016, p. 58.

Ukraine and its territorial integrity in a state of war prevails over some constitutional rights and freedoms of citizens.

During martial law, to ensure the defense and security of the state, the rights and freedoms of citizens of Ukraine, foreign citizens, stateless persons, the activities of organizations regardless of organizational and legal forms and forms of ownership, the rights of their officials must be restricted. Citizens, organizations, and their officials may have additional responsibilities.[28]

The legal status and restrictions of the rights and freedoms of citizens and the rights and legitimate interests of legal entities under martial law are determined in accordance with the CU[29] and the law.[30] In particular, an exhaustive list of constitutional rights and freedoms of man and citizen, which are temporarily restricted in connection with the imposition restrictions.

According of the decree of the PU,[31] the following constitutional rights and freedoms of man and citizen are restricted during the martial law regime:

(1) The right to inviolability of the home. This includes the possibility of inspecting the housing of citizens and things in it without a court decision on permission for such actions, as well as establishing conscription for service members, law enforcement officers, civil defense personnel, evacuees, and the deployment of military units, subdivisions and institutions.[32]
(2) The right to secrecy of correspondence, telephone conversations, electronic communications, and other correspondence.— This includes the introduction of state regulation of telecommunications, printing companies, publishers, broadcasters, television and radio companies, media, as well as the use of local radio stations, television centers and printing houses for military purposes.
(3) The right to non-interference in private and family life, which includes the right to the protection of confidential information. This includes the possibility of the state to check documents at persons, and in case of need to carry out inspection of things, vehicles, luggage and cargoes, office premises and housing of citizens (Item 7).
(4) The freedom of movement, free choice of place of residence, the right to leave the territory of Ukraine freely—This establishes a special regime of entry and exit, restricts the freedom of movement of citizens, foreigners, and stateless persons, as well as the movement of vehicles and the introduction of curfew; establishes a ban or restriction

28 Nastyuk and Belevtseva, 2009, p. 91.
29 Constitution of Ukraine
30 On the legal regime of martial law, Art. 20
31 On the imposition of martial law, Decree of the PU, (26.11.2018) no. 393
32 On the legal regime of martial law, Art 8

on the choice of place of residence or residence of persons in the territory where martial law is in force; establishes a ban on citizens who are in the military or special records in the Ministry of Defense of Ukraine, the Security Service of Ukraine, or the Foreign Intelligence Service of Ukraine, to change their place of residence without the permission of the military commissar or head of the Security Service of Ukraine or the Foreign Intelligence Service of Ukraine.[33]

(5) The right to freedom of thought and speech, to freely express one's views and beliefs, which includes the right to freely collect, store, use, and disseminate information orally, in writing, or otherwise—at their discretion. The military command has the right to interfere in the editorial policy of television and radio organizations, up to the right to ban the broadcast of certain programs. Journalists are not allowed to take panoramic pictures in the combat zone, and must take pictures in such a way that it is impossible to identify the location of the military and determine the amount of equipment. It is also forbidden to report accurate information about the nature of hostilities, the number of military formations and their weapons, and so on. All this information falls under the definition of state secrets.[34] At the same time, the military command has the right to use local TV and radio channels for military purposes. The military can also interfere in both public and private channels. And the last restriction is a ban on "transmitting information over computer networks."[35]

(6) The right of citizens to assemble peacefully, without weapons and to hold meetings, rallies, marches and demonstrations. The state has the right to prohibit peaceful gatherings, rallies, marches and demonstrations, and other mass events.

(7) Guarantee of inviolability of the right of private property.[36] This allows the deprivation of the right of ownership of individually determined properties in private or communal ownership and which become the property of the state for use under the legal regime of martial law or state of emergency, subject to full reimbursement, made in advance or subsequently. The decision on the compulsory alienation of property is made by the military command. In areas where hostilities are taking place, forced alienation is carried out by the decision of the military command without the consent of such bodies.[37] If the property that was forcibly alienated from legal entities or

33 About approval of the standard plan of introduction and maintenance of measures of a legal mode of martial law in Ukraine or in its separate localities (July 22, 2015), no. 544.

34 On state secrets (January 21, 1994), no. 3855-XII.

35 Figel, 2015, pp. 225, and 227.

36 On the transfer, compulsory alienation or seizure of property under the legal regime of martial law or state of emergency (2012)

37 Some issues of full compensation for property forcibly alienated under the legal regime of martial law or state of emergency, Decree Cabinet of Ministers of Ukraine (October 31, 2012), no. 998.

individuals is preserved after the abolition of the legal regime of martial law, the former owner or his authorized person has the right to demand in court the return of such property under the conditions prescribed by law. A former owner of property that has been forcibly expropriated may request that other property be provided in return, if possible.[38]

Features of compensation for alienated property

(a) preliminary full reimbursement of the value of the forcibly alienated property is made on the basis of a document containing a conclusion on the value of the property on the date of its assessment, which was carried out in connection with the decision on its compulsory alienation.

(b) the following full compensation: the former owner or his authorized person after the abolition of the martial law applies to the military commissariat at the place of alienation of property with a statement, which is accompanied by an act and a document containing a conclusion on the value of property.

(c) return of alienated property—carried out on the basis of court decision that has entered into force if after the abolition of martial law property that was forcibly alienated is preserved, and the former owner or his authorized person insists on the return of property. At the same time, the person undertakes to return the amount of money received by him in connection with the alienation of property, less a reasonable fee for the use of this property;

(8) The right to entrepreneurial activity. The limitation of this right lies in the possibility of the state[39]:

(a) to use the capacities and labor resources of enterprises, institutions and organizations of all forms of ownership for defense, to change the mode of their work;

(b) to regulate the work of telecommunications, printing enterprises, publishing houses, television and radio organizations, organizations, and establishments of culture and mass media;

(c) to prohibit trade in arms, potent chemical and poisonous substances, as well as alcoholic beverages;

(d) to establish a special regime in the production and sale of medicines that contain narcotic drugs, psychotropic substances, and precursors;

38 On the transfer, compulsory alienation or seizure of property under the legal regime of martial law or state of emergency (May 17, 2012) no. 4765-VI.

39 On the legal regime of martial law no. 389-VIII.

(e) to withdraw from enterprises, institutions, and bodies that manufacture training and combat equipment, explosives, radioactive substances and materials, potent chemicals and toxic substances;

(f) to remove from the positions of heads of enterprises, institutions, and organizations for improper performance of their duties;

(9) The right to work. The possibility of introducing compulsory labor for able-bodied persons not involved in work in the field of defense and livelihoods and not reserved for enterprises, institutions, and organizations for the period of martial law to perform work of a defensive nature, and also to eliminate the consequences of emergencies that arise during martial law, and to involve them in martial law in socially useful work meet the needs of the Armed Forces of Ukraine, other military formations, law enforcement agencies, and civil defense forces, ensuring the functioning of the national economy and systems of life support of the population and do not require, as a rule, special professional training of persons.40 Employees involved in the performance of socially useful work, for the time of such work, retain their previous jobs (positions) and remuneration.41 However, it is prohibited to involve youmg people under the age of 16, women with children under three years of age, and pregnant women.

(10) The right to strike. Strikes, mass gatherings and rallies under martial law are prohibited, as well as holding peaceful assemblies, rallies, marches and demonstrations, other mass events.

(11) The right for education. There is no direct prohibition on exercising such a right in the law, but the restriction is the temporary suspension of the state's obligation to provide access to preschool, full general secondary, vocational, higher education in state and municipal educational institutions, etc., precisely because of martial law.

(12) The imposition of martial law cannot be grounds for torture, cruel or degrading treatment, or punishment. Any attempt to use martial law to seize power entails responsibility.42 Part 2 of Art. 64 of the CU stipulates that in conditions of martial law or state of emergency, certain restrictions on rights and freedoms may be established, indicating the term of these restrictions. It should be noted43 that may not be restricted rights and freedoms of all citizens: a) equality of constitutional rights and

40 About the statement of the Order of attraction of able-bodied persons to socially useful works in the conditions of martial law, Resolution of the Cabinet of Ministers of Ukraine, (13.07.2011) no. no. 753

41 About approval of the standard plan of introduction and maintenance of measures of a legal mode of martial law in Ukraine or in its separate localities, 2015.

42 Art. 22 of law no. no. 389–VIII.

43 Part 2 of Art. 20 of the law On the legal regime of martial law

freedoms and equality before the law; b) prohibition of deprivation of nationality and the right to change nationality; c) the inalienable right to life; d) the right to dignity; e) the right to liberty and security; f) the right to housing; g) equal rights and the responsibilities of the spouses in marriage and the family, and equal rights of the child; h) the right to judicial protection; etc.

Thus, Ukraine *de facto* opposes the organized armed struggle of the aggressor—the Russian Federation, though the latter aggressively denies this fact and deliberately avoids using this term at political and diplomatic levels. Today, military experts are in favor of the imposition of martial law in the Donbass, where hostilities continue, noting that without the imposition of martial law it is difficult to control the rear. In case of martial law in certain areas of Ukraine in the rest of Ukraine, a state of emergency is subject to imposition.

3. Legal regulation of the emergency situation and the state of emergency

3.1. The concept and features of the emergency situation

We can talk about the regime of emergency situation (*nadzvychaynoyi sytuatsiyi*) when there are certain restrictions and prohibitions, but the state of emergency is not declared. The emergency situation is introduced on the territory of Ukraine or certain regions by the decision of the Cabinet of Ministers, and is introduced when normal living conditions are violated in a country or region: during human-caused disasters, natural disasters or epidemics, i.e., introduced during emergency situations with serious consequences being forecasted.[44] The rules of emergency legislation are not limited to the function of specifying and detailing general legal norms. For the most part, they formulate mandatory government regulations.[45]

Thus, an emergency situation is a situation in a particular area or business entity, which is characterized by a violation of normal living conditions caused by a catastrophe, accident, fire, natural disaster, epidemic, epizootic, epiphytosis, use of a means of destruction or other dangerous event that caused or may lead to a threat to life or health of the population, a large number of deaths and injuries, significant material damage, as well as the impossibility of

44 Article 14, Code of Civil Protection of Ukraine (2012)
45 Voronina, 2018, p. 11.

living or conducting business in such an area or facility, conducting business on it[46]—for example, the Chernobyl accident caused a drastic change in the lives of 300 thousand people.[47]

It should be noted that the authorities organize several things during the emergency situation: informing the population; continuous control over the development of the emergency situation and monitoring of the epidemic situation; identification of patients and contacts, their isolations and hospitalizations; quarantine regimes, including: ban on mass events; restriction of passenger traffic, closing of borders; designates the supervisor or headquarters responsible for the elimination of the accident, and such headquarters has the right to directly involve any government agencies and forces to overcome the emergency, and may evacuate the population living in the emergency zone.

Also, separately during the emergency situation, authorities organize the suspension of the activities of economic entities located in the emergency zone and the restriction of access of the population to such a zone; the complex of sanitary and hygienic anti-epidemic and medical measures; disinfection of objects and territories, and the special treatment of equipment; enhanced protection of public order; patrolling dangerous objects; attracting the necessary forces and means, and ensuring the work of medical and anti-epidemiological institutions.

According to Art. 71 of the Civil Protection Code,[48] to coordinate the actions of public authorities and local governments, government agencies and civil defense forces, as well as organized and planned implementation of a set of measures and works to eliminate the consequences of emergencies: 1) emergency management points and centers are used; 2) special commissions for emergency response are formed; 3) emergency response managers are appointed. The emergency response manager is appointed to directly manage emergency and other emergency operations in the event of any emergency; 4) emergency response headquarters are formed; 5) the need for civil defense forces is determined; and 6) civil defense forces are involved in the elimination of the consequences of the emergency situation.

An emergency situation is not as severe as a state of emergency. For example, the state of emergency in Donbass was introduced within the legal framework and can serve as a transitional period to a state of emergency: in case of certain military events or if there is a threat to the constitutional order.

Thus, the measures applied during a state of emergency are different from those of a state of emergency, they are less severe.

46 Code of Civil Protection of Ukraine (2012); Basov, 2014, p. 95.
47 Basov, 2014, p. 95.
48 Code of Civil Protection of Ukraine (2012)

3.2. Emergency situation with COVID-19 in Ukraine

In case of danger of spreading infectious diseases of people of a certain territory or in settlements, the authorities apply legal measures, which constitute an extreme legal regime of the relevant emergency situation.[49] Due to the spread of the COVID-19 caused by SARS-CoV-2 in Ukraine, there was established an emergency situation for a single state system of civil protection throughout Ukraine from March 25. 2020 to April 30, 2021, to ensure the sanitary and epidemic well-being of the population in accordance with Art. 14 and part two of Art. 78 of the Civil Protection Code of Ukraine.[50]

The Law of Ukraine[51] determines the legal, organizational, and financial basis of the executive authorities, local governments, enterprises, institutions and organizations aimed at preventing the spread of infectious human diseases, localization and elimination of their outbreaks and epidemics, establishes the rights, duties and responsibilities of legal and of individuals in the field of protection of the population from infectious diseases.

Quarantine is established and revoked by the CMU; the decision to establish quarantine indicates the circumstances that led to it, determines the boundaries of the quarantine area, approves the necessary preventive, anti-epidemic, and other measures, their executors and deadlines, sets temporary restrictions on the rights of individuals and legal entities, had additional responsibilities assigned to them, established grounds and procedures for mandatory self-isolation, stay of a person in the observatory (observation), hospitalization in temporary healthcare facilities (specialized hospitals). Quarantine is established for the period necessary to eliminate an epidemic or outbreak of a particularly dangerous infectious disease. During this period, the modes of operation of enterprises, institutions, and organizations may change, other necessary changes may be made regarding the conditions of their production and other activities.

At the request of the relevant chief state sanitary doctor executive authorities and local self-government bodies establish restrictive anti-epidemic measures in case of an outbreak of an infectious disease or an unfavorable epidemic situation in a separate locality, children's, educational or health-improving institution. Restrictions are subject to those types of economic and other activities that may contribute to the spread of infectious diseases.[52]

49 On ensuring the sanitary and epidemiological well-being of the population (February 24,1994), no. 4004-XII

50 About transfer of the uniform state system of civil protection in an emergency mode (March 25, 2020) no. 338-p.

51 On protection of the population from infectious diseases (April 06, 2000), no. 1645-III

52 On protection of the population from infectious diseases (2000)

For example, on March 11, 2020, the Resolution of the CMU no. 211 was adopted[53], which, in accordance with art. 29 of the Law On protection of the population from infectious diseases. From March 12 to April 3, 2020 throughout quarantine was established on the territory of Ukraine[54].

July 22, 2020 Resolution no. 641,[55] established that in order to prevent the spread in Ukraine of acute respiratory disease COVID-19 caused by coronavirus SARS-CoV-2, from August 1 to October 31, 2020 in the Autonomous Republic of Crimea, Vinnytsia, Volyn, Dnipropetrovsk, Donetsk, Zhytomyr Zakarpattia, Zaporizhia, Ivano-Frankivsk, Kirovohrad, Kyiv, Luhansk, Lviv, Mykolayiv, Odesa, Poltava, Rivne, Sumy, Ternopil, Kharkiv, Kherson, Khmelnytsky, Cherkasy, Chernivtsi, Chernihiv regions, Kyiv, further Seva regions) to extend the quarantine established by the resolutions of the CMU on the whole territory of Ukraine.[56]

Depending on the epidemiological situation, all regions will be divided into several zones: green, yellow, orange, and red according to the level of epidemic danger of COVID-19 spread. Adaptive quarantine in Ukraine came into force on February 24, 2021.

Despite the fact that a state of emergency has not been declared in Ukraine, many of the provisions of this regime have already been imposed as part of a quarantine ban called the red zone. The red zone prohibits (and the green, yellow, and orange zones have restrictions on) public transport; visiting educational institutions (except for kindergarten and first grade); shopping malls, cafés, and restaurants; cinemas, theaters, gyms, marketplaces, etc. However, banks, pharmacies, gas stations, veterinary shops, and all grocery stores are allowed to operate.

Interestingly, Resolution 641 does not prohibit the conduct of an election campaign. The Electoral Code of Ukraine stipulates that in the event of martial law or a state of emergency in Ukraine or in certain localities, the election process of national elections and/or the election process of relevant local elections held in these territories or parts thereof shall be terminated by a relevant presidential decree.

For example, in the court decision, the claim of the candidate to the South Ukrainian city council of the Nikolaev area, the head of works on liquidation of consequences of a medical

53 On prevention of the spread on the territory of Ukraine of the acute respiratory disease COVID-19 caused by the coronavirus SARS-CoV-2, Resolution of the Cabinet of Ministers of Ukraine (March 11, 2020) no. 211.

54 On prevention of the spread of acute respiratory disease COVID-19 caused by coronavirus SARS-CoV-2 on the territory of Ukraine, Resolution of the Cabinet of Ministers (May 20, 2020) no. 392.

55 On the establishment of quarantine and the introduction of enhanced anti-epidemic measures in the area with a significant spread of acute respiratory disease COVID-19. caused by coronavirus SARS-CoV-2, Resolution of the Cabinet of Ministers (July 22, 2020), no. 641.

56 On prevention of the spread of acute respiratory disease COVID-19 caused by coronavirus SARS-CoV-2 on the territory of Ukraine, (2020) and on the establishment of quarantine in order to prevent the spread of acute respiratory disease COVID-19 caused by the coronavirus SARS-CoV-2 (2020)

and biological emergency of the natural character connected with distribution of COVID-19 in the city of Yuzhnoukrainskaya recognized as illegal and revoked the order of the head of work to eliminate the consequences of medical and biological emergencies of a natural nature related to the spread of coronavirus COVID-19 in the city of Yuzhnoukrainska.[57]

According to the resolution of the CMU,[58] the level of epidemic danger is determined based on the assessment of epidemic indicators and approved by the decision of the State Commission on Technogenic and Ecological Safety and Emergencies every seven days. The decision to reduce the red, orange and yellow levels of epidemic danger may not be reviewed earlier than 14 days from the date of determination of such level of epidemic danger.

Business entities are also recommended to adjust their work schedule during the quarantine period. Postpone the start of the business day to 10 or later for businesses operating in wholesale and retail trade; repair of motor vehicles and motorcycles; postal and courier activities; temporary accommodation and catering; insurance activities; education; social assistance; arts, sports, entertainment, and recreation.

In addition, local governments develop or adjust public transport routes taking into account the changed work schedules.

In order to reduce the spread of COVID-19, the VRU amended the Code of Ukraine on Administrative Offenses[59] Art. 44-3, "Violation of rules on quarantine of people": violation of rules on quarantine of people, sanitary and hygienic, sanitary and anti-epidemic rules and norms provided by the Law of Ukraine; "On protection of the population from infectious diseases," other legislative acts and decisions of local authorities self-government on the fight against infectious diseases—entails the imposition of a fine on citizens from 17 to 34,000 hryvnia (0.55 cents to €1,093) and officials—from 34 to 170,000 hryvnia (1.09 cents to €5,462). And staying in public buildings, structures, public transport during quarantine without wearing personal protective equipment, including respirators or protective masks that cover the nose and mouth, including self-made—entails a fine of 170 to 255 hryvnia (€6 to €8).[60] There have been many lawsuits for violation of the rules for wearing personal protective equipment (masks), the courts have both satisfied[61] and refused[62] lawsuits.

57 Case no. 400/4461/20 https://reyestr.court.gov.ua/Review/92158402 (Accessed: 15 June 2021)

58 On the establishment of quarantine and the introduction of enhanced anti-epidemic measures in the territory with a significant spread of acute respiratory disease COVID-19 caused by coronavirus SARS-CoV-2: Resolution of the Cabinet of Ministers of Ukraine, (2020)

59 Code of Ukraine on Administrative Offenses (December 7, 1984), no. 8073-X.

60 The tax-free minimum income of citizens is 17 UAH.

61 Case no. 708/48/21 https://reyestr.court.gov.ua/Review/94299847; case no. 344/17508/20 https://reyestr.court.gov.ua/Review/94669931 (Accessed: 15 June 2021)

62 Case no. 746/559/20 https://reyestr.court.gov.ua/Review/94686459; case no. 594/179/21 https://reyestr.court.gov.ua/Review/95484318 (Accessed: 15 June 2021)

It should be noted that violation of the rules and regulations established to prevent epidemic and other infectious diseases, as well as mass non-communicable diseases (poisoning) and control them, if such actions have caused or may have caused the spread of these diseases, is punishable by a fine of 1,000 up to 3,000 non-taxable minimum incomes (*UAH* 17-54 thousand) or arrest for up to six months, or restriction of liberty for up to three years, or imprisonment for the same period. The same acts, if they have caused death or other serious consequences, are punishable by imprisonment for a term of five to eight years.

But unfortunately, the population does not comply with quarantine measures, and the authorities only give a verbal warning to not contribute to the improvement of the situation in Ukraine—e.g., the court rejected the claim of the Ivano-Frankivsk City Council, which filed an administrative lawsuit with the Regional Commission for Technogenic and Ecological Safety and Emergencies of the Ivano-Frankivsk Regional State Administration, requesting the court to declare the defendant's protocol illegal and invalid no. 43 from August 28, 2020, noting that the introduction of the city of Ivano-Frankivsk to the "red" level of epidemic danger, has the effect of restricting rights and freedoms, including the right to respect for private life, the right to free movement and the right to peaceful property ownership.[63]

During the quarantine established by the CMU to prevent the spread of COVID-19, the court at the request of the parties and persons who did not participate in the case, if the court decides on their rights, interests and/or obligations (if they have the right to perform the relevant procedural actions provided by the Civil Procedural Code of Ukraine), renews the procedural deadlines, if it recognizes the reasons for their omission valid and due to restrictions imposed in connection with the quarantine to determine an additional period to accept the inheritance to satisfy in full.[64]

Restriction of certain rights is appropriate in a coronavirus pandemic. In particular, restricting the right to hold rallies and gatherings can prevent the spread of the virus, as large crowds threaten the spread of SARS-CoV-2.

Ukraine, in accordance with the International Covenant on Civil and Political Rights, in the event of a state of emergency, immediately after its imposition, shall notify, through the secretary-general of the United Nations, the state parties to the covenant of restrictions on human rights and freedoms, of citizens who are deviations from the obligations under the International Covenant, and the purpose of these deviations, and the reasons for such a

63 Case court, https://reyestr.court.gov.ua/Review/93297300 (Accessed: 15 June 2021)
64 Case court no. 2/304/877/20 (Accessed: 15 June 2021)

decision.[65] For example, the court decision confirmed that due to restrictions, a person, due to the need to comply with quarantine restrictions and prevent the spread of COVID-19, made it impossible for the plaintiff to apply for inheritance in a timely manner and extended the term for another six months.[66]

In Ukraine, observation is possible—a person will be in a hospital or other institution designated by the local authorities as an observer. With self-isolation, a person determines where one plans to stay for 14 days. Persons aged 60 and older are subject to self-isolation. When crossing the border, a person agrees to self-isolation, and they need to download and register in the mobile electronic service "At Home" and follow the rules of self-isolation. If you refuse to install the mobile application "At Home," the person will be taken to a place of mandatory observation. It should be noted that those people who have twice violated the conditions of self-isolation must be observed in places designated by local authorities. Self-isolation can be curtailed after receiving a negative PCR test result; or after receiving a negative result of the rapid antigen test, conducted after crossing the checkpoints of entry into and exit from the temporarily occupied territories.

In other words, the restriction of the rights of individuals and legal entities for the period of quarantine may be established by a decision of the CMU.

Regarding the introduction of additional measures: the introduction of curfew; checking the documents of citizens, and if necessary, conducting a personal inspection; inspection of things, vehicles, luggage and cargo, office space, and housing of citizens; prohibitions on conscripts and conscripts to change their place of residence without the knowledge of the relevant military commissariat; restriction or temporary prohibition of the sale of weapons, poisonous and potent chemicals, as well as alcoholic beverages and substances produced on the basis of alcohol; temporary seizure of registered firearms and ammunition and ammunition from citizens, and from military enterprises.

It is believed that in contrast to an emergency situation the legal regime of the state of emergency can be an effective tool against the coronavirus pandemic, as it expands the powers of public authorities, which can directly help in combating not only the pandemic but also other emergencies, natural or of human origin. The restriction of human and civil rights and freedoms are disadvantages.[67] The imposition of a threat to the internal security of the state is carried out by introducing a legal state of emergency.

65 The International Covenant on Civil and Political Rights was ratified by the Decree of the Presidium of the Verkhovna Rada of the Ukrainian SSR (October 19, 1973), no. 2148-VIII.

66 Case court no. 452/2393/20 https://reyestr.court.gov.ua/Review/92211193 (Accessed: 15 June 2021)

67 Tsyupka, 2020, p. 98.

3.3. Fiscal and monetary policy measures due to COVID-19 in Ukraine

In 2020, one of the main factors influencing economic processes was the spread of the COVID-19 pandemic. In Ukraine, there are 222 anti-crisis measures in the economic policy to combat the pandemic and ensure sustainable economic growth for two years, such as placing the regime of self-isolation at the discretion of one's doctor in cases of temporary disability; formation of a state fund to attract foreign direct investment in the development of small and medium-sized businesses; the application of non-financial measures of state support of investment activity (providing methodological and consulting support, investor support, promotion, marketing, advertising), etc.[68] The following also is provided for the population: reduction of personal income tax rates during the period of forced self-isolation, non-application of penalties for late payment of utility bills, installment payments for 50% of utility bills for the period from March 2020 to December 2020, cancellation of interest payments for consumer loans for a quarantine period of at least six months, cancellation of payments of basic payments and interest on mortgage loans for a quarantine period of at least six months, etc. For busineses: abolition of fines and penalties for violating the terms of declaring and paying taxes during quarantine, providing direct financial assistance to legal entities, individuals, entrepreneurs, and self-employed persons in activities that have suffered most from the pandemic, tax holidays from the single tax, the land tax, and the property tax for the period of the quarantine, deferral without penalty for up to six months of payment of tax arrears, the decision to collect which was made before March 2, 2020, exemption of citizens-entrepreneurs from accrual and payment of single social contribution (SSC) for the period of quarantine, a moratorium on implementation of measures of state supervision (control), tax inspections, etc.[69].

However, setting priorities for supporting fields/sectors of the economy, the program does not provide a clear definition of the planned amount of financial resources needed for its implementation, which limits the ability of businesses to clearly perceive the receipt of state financial support and planning their own activities. The adoption of the state budget for 2021 provided for the allocation of funds to combat the effects of coronavirus crisis directly to individual budget managers (measures related to vaccination and medical insurance, to combat the effects of coronavirus in schools, etc.). According to the Ministry of Finance of

68 On the Resolution of the State Program of Economic Stimulation to Overcome the Negative Consequences Caused by Restrictive Measures to Prevent the Occurrence and Spread of Acute Respiratory Disease COVID-19 Caused by SARS-CoV-2 Coronavirus for 2020–2022, Resolution of the Cabinet of Ministers of Ukraine, (27.05.2020) no. 534.

69 A comprehensive package of national anti-crisis measures (2020), pp. 32–40.

Ukraine, as of December 31, 2020, UAH 63.7 billion (89%) was used from the Fund for Combating COVID-19.

The economy and the social sphere proved to be the most vulnerable to the consequences of the COVID-2019 pandemic and the crisis caused by it. Governments are trying to mitigate the negative effects of the coronavirus crisis and restore macroeconomic stability through economic policy measures, primarily fiscal and monetary.

Measures of economic policy to counteract the coronavirus crisis and restore macroeconomic stability in Ukraine:

Fiscal policy measures	**Monetary policy measures**
Direct support of farms	Reduction of the refinancing rate
Indirect support of farms	Narrowing the interest rate corridor
Wage subsidies	Changes in reserve requirements
Tax reductions and/or tax benefits	Pledges
Installment of tax debt	Transactions with longer maturity
Credit subsidies/guarantees	Frequency of operations

Table 11
Fiscal and monetary policy measures in Ukraine
Source: Author's compilation

Regarding the Ukrainian experience of using fiscal and monetary policy measures to mitigate the effects of the COVID-2019 pandemic and its coronavirus crisis, the following should be noted. First, the government and regulators are quite active in using economic policy measures in comparison with other countries—both developed and developing ones. Experts acknowledge that the potential for intensive easing of monetary policy in the country is almost exhausted. Second, it is expedient to compare the strength of the influence of fiscal and monetary policy instruments in domestic realities. For the first time in many years, Ukraine's monetary and banking systems proved stable and did not collapse during the crisis. This is due to changes in approaches to monetary policy, the choice of a new monetary regime, strengthening the independence of the National Bank of Ukraine (NBU), etc., during 2014–2019. Even during the current crisis, the National Bank is cautious and committed to macroeconomic stability, rejecting the possibility of using quantitative easing even under political pressure. At the same time, Ukrainian fiscal policy has proved to be weaker than domestic monetary policy, and it concerns a rather limited amount of fiscal stimulus aimed at mitigating the effects of the current crisis—only 2.3% of GDP. The process of restoring the macroeconomic stability disrupted by the COVID-2019 pandemic is likely to be lengthy. Return to pre-crisis levels of GDP will take at least a year. The same amount or more time will

be spent on achieving pre-crisis unemployment and economic growth. The probable duration of recovery depends, first of all, on the strength of a particular national economy and the effectiveness of economic policy measures used.[70]

Thus, fiscal policy measures are aimed primarily at expanding social protection and providing tax and other benefits to all businesses.

In terms of economic indicators, they reflect the depth of the current crisis in Ukraine, namely 7.2% reduction in GDP and 11% growth in unemployment. This is due to the fact that Ukraine is traditionally more vulnerable to economic shocks, and its anti-crisis capabilities are quite modest. The reason is a weak economy, limited financial resources, high dependence on IMF loans, incomplete key reforms, political instability, and so on. However, in the case of coordinated fiscal and monetary policies, as well as the successful implementation of the first stage of vaccination, the second half of 2021 may be marked by partial macroeconomic stabilization. There are two main strategies for combating the spread of the COVID-2019 pandemic and restoring macroeconomic stability: the first strategy is a strategy of severe restrictions. It provides for the introduction of a full lockdown, namely the closure or transition to remote work of all enterprises and institutions whose activities are not critical to ensure the continuity of the country, and limiting business operations only to supermarkets, pharmacies, and strategic enterprises. The second strategy is a soft restraint strategy. Its application involves compliance with social distancing, the prohibition of mass events, the introduction of anti-epidemic measures at enterprises and institutions that work in real time.

The Ministry of Finance of Ukraine in its analytical materials on the disclosure of information on fiscal risks[71] notes that identifying fiscal risks and improving management practices to take into account their impact on budget indicators and taking minimization measures is an important way to increase the sustainability of public finances, ensure macroeconomic stability and the full and timely financing of key government obligations.

In Ukraine, the Ministry of Finance is developing a specific list of measures to reduce specific risks. However, in some sections, these measures are quite general and can be used only as a guide for fiscal policy development. In fact, Ukraine does not use fiscal mechanisms to minimize the negative impact of fiscal risks caused by macroeconomic changes, similar to those operating in the EU.[72]

High scores for 2020 were given to four internal risks associated with the COVID-19 pandemic: 1) significant unemployment due to the return of workers, mass layoffs; 2) mass

70 Krasota and Yarovoy, 2021, p. 2.
71 Ministry of Finance of Ukraine (2020)
72 Kozoriz, 2020, p. 79.

bankruptcy of medium and small businesses; 3) acceleration of inflation; 4) the exponential spread of COVID-19, and the failure of the medical system to stop the pandemic in Ukraine.[73]

Several fiscal and monetary incentives aimed at preserving jobs, incomes, direct subsidies to the poor, etc., were introduced, which together had a positive impact on both the supply and demand side. Meanwhile, even such rational and effective measures could only slightly mitigate the negative effects of coronavirus shock.

The pandemic significantly deepened the imbalance in the financial, budgetary and socioeconomic spheres, which is currently characterized by large external debt (UAH 1,387,805 million); and significant additional social obligations undertaken by the state regarding additional payments to pensions, unemployment benefits, support for individual entrepreneurs, etc. In the budget structure, the share of expenditures on social protection and social security is 31.39% (UAH 76,758.2 million).[74]

In Ukraine, due to the COVID-19 crisis, the the rate of investment is declining. Investors, trying to minimize risks, liquidate their positions in local assets and transfer funds to other countries and safer assets. The key areas on which incentives should be focused are innovative investments to ensure a breakthrough scenario for the development of leading sectors of the economy; support for innovative enterprises and modern forms of integration of science and production (including technology parks); providing preferential operating conditions for newly created businesses, especially small and medium-sized businesses; and the formation of favorable conditions for foreign investors.[75]

The innovations introduced by the Law of Ukraine[76] are an additional normative basis, to which business entities can refer as a basis for the non-fulfillment of obligations and to simplify the procedure for recognizing such circumstances as force majeure. However, simply the existence of quarantine as a special circumstance of life in the country or region is not force majeure, the person must prove the impossibility of fulfilling the obligations under the terms of the contract, namely quarantine.[77]

They note that it is advisable to develop an Economic Recovery Program for 2021–2025, which will complement the existing key strategies and programs of socioeconomic development of Ukraine (education and culture, tourism, hotel and restaurant business, retail, transport, etc.).[78]

73 Ukraine: The Impact of COVID-19 on the Economy and Society, 2020, p. 39.
74 Dragan et al., 2020, p. 8.
75 Dragan et al., 2020, pp. 16-17.
76 On Amendments to Certain Legislative Acts of Ukraine Aimed at Preventing the Occurrence and Spread of Coronavirus Disease (COVID-19) (17.03.2020) no. 530-IX.
77 Zakirova, 2020, pp. 4–10.
78 Bazuljuk et al., 2021, pp. 5–6.

In 2021, Ukraine will be able to count on only minor positive changes, even if a sustained global acceleration is launched. Another economic shock in the short term, Ukraine will be able to avoid. Ukraine's economy in 2020 reached a "stable" low economic dynamic. Thus, in 11 months (cumulatively, since the beginning of the year) there have been declines in industry by more than 7%; in freight turnover, by more than 15%; and in the agricultural sector, bymore than 13%.[79]

3.4. The concept of a state of emergency in Ukraine

The institution of state of emergency (*nadzvychaynyy stan*), as an important element of the state and legal system of Ukraine, is a mandatory component of the national security system of the state. As a means and guarantor of neutralization of emergencies of social, natural, and natural and human-caused disasters, the state of emergency is an instrument that protects the political, economic, and social rights and freedoms of citizens during the introduction of the necessary prohibitions and temporary restrictions.[80]

The term "state of emergency" is usually used in two senses: 1) it corresponds to the English term "emergency," which is interpreted as a sudden or unexpected event that requires immediate action (synonyms: exigency), critical condition (pass), crisis; 2) it corresponds to the international term "a state emergency," which means a state of emergency.[81] "State of emergency" is defined by the legislator as a special legal regime that may be temporarily introduced in Ukraine or in certain localities during emergencies of human or natural origin, whether they could lead to human and material losses, endanger the lives and health of citizens, or in the event of an attempt to seize state power or change the constitutional order of Ukraine by force, and provide the relevant state authorities, military command, and local authorities with the necessary powers to prevent threats and ensure the safety and health of citizens, the normal functioning of the national economy, public authorities and local governments, and the protection of the constitutional order. It also allows temporary, threat-based restrictions on the exercise of constitutional rights and freedoms of a citizen and the rights and legitimate interests of legal entities, indicating the term of these restrictions.[82] A state of emergency is declared in the presence of a real threat to the security of citizens or the constitutional order of the country, the elimination of which is impossible in other ways.

79 Yurchishin, 2021, p. 105.
80 Kovalev et al., p. 187.
81 Kuznichenko and Alexandrovich, 2011, p. 54.
82 On the legal regime of the state of emergency (March 16, 2000). no. 1550-III.

In accordance with paragraph 21 of Art. 106 of the CU, the imposition of a state of emergency, if necessary, is approved by a decree of the PU in Ukraine or in certain localities and approved by the VRU within two days from the moment of the address of the PU. Under conditions requiring immediate measures to rescue the population or prevent the death of a person, a state of emergency may be imposed without warning. The state of emergency in Ukraine or in certain localities may be cancelled by the decree of the PU earlier than the term for which it was imposed, in case of elimination of the circumstances that necessitated the imposition of a state of emergency. Since the state of emergency in Ukraine has a clearly defined period of validity in the legislation, after the expiration of such a period, if the regime has not been extended according to the established procedure, it is automatically cancelled.

In Ukraine, a state of emergency may be imposed in the case of:

1) the emergence of particularly severe emergencies of a human or natural character (natural disasters, catastrophes, especially large fires, the use of means of destruction, pandemics, panzootic, etc.) that threaten the lives and health of large sections of the population;
2) the occurrence of mass terrorist acts, accompanied by the death of people or the destruction of particularly important livelihoods;
3) the occurrence of interethnic and interfaith conflicts, blocking or seizing certain particularly important objects or areas that threaten the safety of citizens and violate normal activities of public authorities and local governments;
4) the occurrence of mass riots, accompanied by violence against citizens, restricting their rights and freedoms;
5) attempts to seize state power or change the constitutional order of Ukraine through violence
6) mass crossings of the state border from the territory of neighboring states; and
7) the need to restore the constitution's law and order and the activities of public authorities.

Executive bodies and local self-government bodies in cooperation with the relevant military command during the state of emergency shall take measures and ensure control over the observance of public order, ensuring the constitutional rights and freedoms of citizens, their security, and the protection of state interests in the relevant territories.

The following measures may be introduced during a state of emergency:

1) the establishment of a special regime of entry and exit, as well as restrictions on freedom of movement in the territory where the state of emergency is imposed;
2) restrictions on the movement of vehicles and their inspection;

3) strengthening public order and facilities that ensure the livelihood of the population and the national economy;
4) prohibition of mass events, except for events prohibited by the court;
5) prohibition of strikes; or
6) forced alienation or seizure of property from legal entities and individuals.

It is noted that the forcible seizure or alienation of property from citizens is related to the illegality of actions, as it can lead to unauthorized seizure.[83]

Additional measures of the state of emergency in connection with emergencies of man-caused or natural nature:

1) temporary or irreversible evacuation of people from places dangerous to living, with the obligatory provision of stationary or temporary housing;
1) rescue formations and military units involved in overcoming emergencies;
2) temporary ban on construction of new, expansion of existing enterprises and other facilities whose activities are not related to the elimination of emergencies or livelihoods and emergency
3) the establishment of quarantine and other mandatory sanitary and anti-epidemic measures;
4) the introduction of a special procedure for the distribution of food and basic necessities;
5) mobilization and use of resources of enterprises, institutions, and organizations, regardless of ownership, to avert danger and eliminate, etc.

To eliminate natural disasters or catastrophes in peacetime, targeted mobilization may be carried out, the scope and timing of which are determined by the decree of the PU on the imposition of a state of emergency, temporarily transfer, or involvement on a voluntary basis of the able-bodied population and vehicles of citizens to perform these works with the permission of the relevant head of rescue operations and subject to mandatory occupational safety is allowed. The involvement of minors and pregnant women in work that may adversely affect their health is prohibited.

Additional measures of the legal regime of the state of emergency in connection with mass violations of public order:

1) introduction of curfew (ban on being on the streets and in other public places without specially issued permits and identity cards at set hours of the day);

83 Yezersky, 2015, p. 135.

2) checking documents of citizens, and if necessary, conducting a personal examination, inspection things, vehicles, luggage and cargo, office space, and housing of citizens;
3) prohibition of conscripts, and conscripts to change their place of residence without the knowledge of the relevant military commissariat; poisonous and potent chemicals, as well as alcoholic beverages and substances produced on the basis of alcohol;
4) temporary seizure of registered firearms and ammunition, military training equipment, explosives, radioactive substances and materials, toxic, and potent chemicals;
5) ban on the production and distribution of information materials, etc.

In a state of emergency, the following is also prohibited:
— change of the CU;
— change of election laws;
— holding of elections of the PU, as well as elections and local self-government bodies;
— holding of all-Ukrainian and local referendums;
— restriction of the rights and powers of people's deputies of Ukraine.

The term of office of the representative bodies of local self-government and the VRU shall be extended for the period of the state of emergency. During the imposition of a state of emergency, compensation is made for damages caused to persons who have lost their homes in connection with circumstances related to the state of emergency, including the work to prevent or eliminate them, in accordance with the law provided housing; persons who have suffered from emergencies, including during emergency rescue operations, are reimbursed for material damage and other necessary assistance is provided on the terms and in the manner prescribed by law; legal entities whose property and resources were used to prevent or eliminate the situations that caused the imposition of a state of emergency shall be reimbursed their full value in the manner prescribed by law. If the property, which was forcibly alienated from legal entities and individuals, is preserved after the abolition of the legal regime of the state of emergency, the former owner or his or her authorized representative has the right to demand the return of such property in court or to demand its replacement.[84]

The introduction of a special legal regime of the state of emergency on the territory of Ukraine is to restrict certain constitutional rights and freedoms of citizens, to establish certain measures aimed at overcoming emergencies in the sociopolitical sphere of society, and guarantees protection of political, economic, and social rights.[85]

84 Voronina, 2015, p. 97.
85 Shkurska, 2020, p. 326.

	Emergency situation	State of emergency
Concepts and types	An emergency situation is a situation on a separate territory (or business entity, water body, etc.), which is characterized by violation of normal living conditions of the population. Its causes can be a catastrophe, accident, fire, natural disaster, epidemic, epizootic (widespread animal disease), epiphytosis (spread of infectious plant diseases over a large area), use of means of destruction, or other dangerous events. Typically, such circumstances lead to a threat to life or health, a large number of deaths and victims, the task of significant material damage, as well as the impossibility of living in such an area or facility (or carrying out economic activities there). Emergency situations can be of four types: human-created, natural, social, or military. Depending on the consequences of the situation and the resources needed to eliminate it, in Ukraine there are four levels of emergency situations: – state – regional – local – over separate objects. Due to the COVID-19 outbreak, a state of emergency has already been declared in several regions of Ukraine.	**A state of emergency** is a special legal regime that may be temporarily introduced in Ukraine or in certain localities thereof, and gives the relevant state authorities, military commands and local self-government bodies in Ukraine the special powers necessary for: prevention of threats and ensuring the safety and health of citizens, normal functioning of the national economy, public authorities and local governments, and protection of the constitutional order. The reason for the introduction of a state of emergency may be: the emergence of emergencies of human or natural occurrences not lower than the national level, which have led or may lead to human and material losses, pose a threat to life and health of citizens; an attempt to seize state power or change the constitutional order of Ukraine through violence.
Legal regulation	The concept is defined by the Code of Civil Protection of Ukraine.	The state of emergency is regulated by the CU and the Law of Ukraine, "On the legal regime of the state of emergency."
Introduction	To introduce an emergency situation, a decision of the CMU is required (Art. 14 of the Civil Protection Code).	To impose a state of emergency, it is first necessary to hold a meeting of the National Security and Defense Council (NSDC), which, accordingly, appeals to the president, the president signs the decree, and the *Verkhovna Rada* approves it.

	Emergency situation	State of emergency
Restrictions	There are no such restrictions in an emergency situation. That is, the state of emergency is more aimed at the authorities to bring their activities in line with such conditions.	When a state of emergency is imposed, the rights of citizens in Ukraine are limited. This is a "temporary, threat-based restriction on the exercise of constitutional rights and freedoms of man and citizen and the rights and legitimate interests of legal entities, indicating the duration of these restrictions" (e.g., compulsory labor).
Terms	There are no such restrictions for an emergency situation.	A state of emergency may be imposed throughout Ukraine for no more than 30 days, and in some areas for no more than 60 days. The state of emergency may be extended by a decree of the PU, but not more than for 30 days and only after the repeated procedure of approval of such a decree in the *Verkhovna Rada* of Ukraine.

Table 12
Distinguishing between an emergency situation and a state of emergency In Ukraine
Source: Author's compilation

4. The environmental emergency zone regime

Environmental emergencies are situations that arise as a result of sudden natural disasters or human-created accidents and are accompanied by great damage. Characteristic features of these situations are high severity of manifestation, significant deviation of environmental indicators from the norm (exceeding the maximum allowable concentrations of pollutants in the hundreds, thousands and even tens of thousands of times); hurricane wind speed; flooding of residential areas (settlements); catastrophic mudflows, etc. Human-created and natural catastrophies are a direct source of threat to lthe ife and health of the population. According to the UN, in most countries of the world natural and human-made disasters cause losses amounting to 2–4% in the world GNP. In Ukraine, only the annual costs of liquidation of the consequences of the Chernobyl catastrophe exceed 2% of the total gross domestic product. On the territory of Ukraine there are 15 operating units of nuclear power plants, 44 large energy facilities, more than 2,500 facilities that use toxic substances, a network of pipelines, including 830 km of ammonia pipeline, 6,000 km of oil pipelines, and 6,700 km of gas pipelines. Potentially dangerous objects include 19 metallurgical, 165 metalworking and machine-building plants, 216 factories and plants of chemical and light industry,

83 large railway junctions, seven hydroelectric power plants, and 74 thermal power plants. Almost 18 million people live in areas of probable contamination with potent toxic substances, and up to two million people in areas of possible catastrophic flooding.[86]

In Ukraine, 140–150 human-caused accidents and catastrophes of regional and state importance occur annually. Their approximate structure is as follows: accidents with emissions of highly toxic substances—4%; fires and explosions—19.5%; traffic accidents—17.7%; accidents with life support systems—17.3%; accidents at radiation facilities—8.4%; accidents with communal systems and treatment facilities—17.3%; emergencies at other types of facilities—15.8%.[87]

The zone of ecological emergency is a separate locality of Ukraine where an ecological emergency has arisen. Environmental emergency—an emergency situation in which a certain area has undergone negative changes in the natural environment that require the application of emergency measures by the state. Negative changes in the environment are the loss, depletion, or destruction of certain natural complexes and resources due to excessive pollution of the environment, the destructive effects of natural forces, and other factors that limit or exclude the possibility of human life and economic activity in these conditions.[88]

In addition, the legal regime of the environmental emergency zone is also defined by the legislature as a special legal regime that can be temporarily introduced in certain areas in case of environmental emergencies, and is aimed at preventing human and material losses, preventing threats to life and health, and the elimination of negative consequences of ecological emergency.[89]

The grounds for declaring a separate area an ecological emergency zone are:

1) significant exceeding of the maximum allowable norms of environmental quality indicators defined by the legislation;
2) the emergence of a real threat to the life and health of a large number of people or causing significant material damage to legal entities, individuals, or the environment due to excessive pollution of the environment, the destructive effects of natural forces or other factors;
3) negative changes that have occurred in the natural environment in a large area and which cannot be eliminated without the application of emergency measures by the state;

86 Koretsky, 2020, pp. 44–45.
87 Ecology and ecological problems in Ukraine: https://infopedia.su/9xeb2a.html (Accessed: 15 June 2021)
88 Article 1 of the Law On the zone of ecological emergency situation (July 13, 2000) no. 1908-III.
89 Article 8 of Law of On the zone of ecological emergency situation (2000)

4) negative changes that have occurred in the natural environment, which significantly limit or exclude the possibility of living and doing business in the relevant territory; and
5) a significant increase in the incidence of the population due to negative changes in the natural environment.[90]

The specified list of signs of ecological damage of the territory is not exhaustive. Indirect or additional criteria may include: land degradation (natural or anthropogenic simplification of the landscape, deterioration, condition, useful properties, and functions of land and other organically related natural components, including waterlogging, flooding or, conversely, land drainage, etc.); destruction of forest complexes as a result of droughts, windbreaks, fires, or pests and diseases; the spread or exacerbation of particularly dangerous infectious diseases of the population, animals, the spread of pests among plants, etc.

It should be noted that one or another factor, source of environmental impact, as well as the effects of human-produced pollution or the destructive effects of natural forces determine the type of affected area and may be grounds for the introduction of a special legal regime.[91]

The legal regime of the environmental emergency zone is a special legal regime that can be temporarily introduced in certain areas in case of environmental emergencies, and is aimed at preventing human and material losses, preventing threats to life and health, and eliminating the negative consequences of environmental emergency situations. It is believed that the ecological emergency has a negative impact on the natural ecosystem, due to natural disasters, anthropogenic impacts, including the spread of viruses and dangerous strains, which threatens to change the normal state or destroy the environment, and directly harmful to the normal human life.[92]

The introduction of the relevant legal regime of the environmental emergency zone provides for the allocation by the state and/or local governments of additional financial and other material resources sufficient to normalize the environmental situation and compensation, the introduction of a special regime of supplies for state needs, implementation of state targeted public works programs.

The most striking example of a zone of ecological emergency in the history of the Soviet Union, and Ukraine in particular, is the Chernobyl accident. For almost a month, the radiation level in Chernobyl was extraordinary. After the construction of the sarcophagus, the

90 Article 5 of Law of On the zone of ecological emergency situation (2000)
91 Bredikhina, 2012, p. 280.
92 Kravchuk, 2018, p. 239.

emissions of radioactive elements decreased sharply, but the contamination by that time covered large areas. One of the most powerful factors influencing the radiological situation in Ukraine is the highly active contamination of the thirty-kilometer zone. Outside this territory, radioactive contamination of various levels (from 0.1 to ≥15 Ci/km^2) affected agricultural land on an area of 4.6 million hectares, which is 12% of the total area of agricultural land in Ukraine. The biggest mistake of the administrative management during the Chernobyl catastrophe was the delayed issuance of a warning to the population about the possibility of infection.[93]

The decision to establish the legal regime of the ecological emergency zone, in order to implement measures to normalize the environmental situation, may impose restrictions on certain activities by establishing a temporary ban on:

1) construction and operation of facilities that pose an increased environmental risk;
2) use in economic and other activities of particularly hazardous substances (chemical, radioactive, toxic, explosive, oxidizing, combustible, biological agents, etc.), plant protection products, the combination of properties and/or features of their condition may degrade the environmental the situation in this area;
3) operation of sanatoriums; and
4) carrying out any other activity that poses an increased environmental risk to humans, flora and fauna and other natural objects.

The change of the legal regime of the ecological emergency zone is carried out in compliance with the requirements established by Art. 6 of the Law. For example, on November 12, 2019, the community of Mariupol petitioned to recognize Mariupol as a zone of ecological emergency and to ensure the appropriate legal regime through systematic uncontrolled emissions by metallurgical enterprises of Metinvest in accordance with the CU and the Law of Ukraine "On the Emergency Zone" but was not accepted.

For example, the constitutional procedure of declaring certain areas an ecological emergency zone was first applied in November 1998 due to a catastrophic flood in the Zakarpattia region, which led to the destruction of a large number of building losses, a significant complication of the environmental situation. At that time, in order to ensure the safety of citizens, provide them with effective assistance and normalize the situation as soon as possible, the Decree of the PU of November 7, 1998, no. 1223/98 "On measures to eliminate the consequences of natural disasters in the Transcarpathian region" was adopted. environmental situation. This decree in accordance with paragraph 31 of Art. 85 of the CU was approved by

93 Biryukova, 2010, p. 241.

the resolution of the Verkhovna Rada of Ukraine dated 10.11.1998 no. 242-XIV, "On approval of the decree of the President of Ukraine on measures to eliminate the consequences of natural disasters in the Transcarpathian region."[94] In 2001 the situation was repeated and Transcarpathia was declared a zone of ecological emergency.[95] It is not possible to determine the time of onset of natural disasters or human-created environmental incidents to avoid them in the future, there is a factor of suddenness. Rapid developments and significant destructive negative consequences are a characteristic feature of accidents, catastrophes, natural disasters that adversely affect the environment, environmental conditions of human life.[96]

A feature of the legislation on the environmental emergency zone is its relationship with the legislation on civil protection. This applies primarily to the part of it (legislation on civil protection), which determines the organizational, financial, and other mechanisms for the implementation of legislation to eliminate the consequences of environmental emergencies. The legislation on civil protection provides for the classification of emergencies of human-caused and natural disasters, which covers all aspects of situations recognized as emergencies, including environmental; the order of organization of emergency rescue and other restoration works in case of natural disaster, accident, or catastrophe with dangerous ecological consequences; requirements for logistical and financial support of measures to eliminate the consequences of emergencies; conditions and procedures for the compensation of victims of natural disasters, accidents, and catastrophes, etc. These, as well as other aspects of the organization of measures to eliminate the consequences of environmental emergencies are regulated by numerous regulations adopted in accordance with the Civil Protection Code of Ukraine of October 2, 2012.[97]

Ensuring the safety of the population in emergencies caused by natural disasters, human-created accidents and catastrophes, as well as the use of modern weapons (military emergencies), is a national task, one that is mandatory for all territorial and departmental authorities, services, formations, and sub objects of management.[98]

The legal regime of the ecological emergency zone may be prematurely terminated by the PU at the proposal of the National Security and Defense Council of Ukraine or at the proposal of the CMU in case of elimination of circumstances that caused the declaration of a separate

94 On measures to eliminate the consequences of a natural disaster in the Transcarpathian region, Resolution of the Verkhovna Rada of Ukraine on Approval of the Decree of the PU (10.11.1998) no. 242-XIV

95 On declaring certain districts of the Zakarpattia region a zone of ecological emergency, decree of the PU (March 15, 2001), 882288-III.

96 Komarnytsky, 2002, p. 14.

97 Komarnytsky, 2018, p. 194.

98 Pazinych, Sitenko and Smirnova, 2018, p. 80.

zone as ecological emergency, for the normalization of the ecological situation on the territory of the ecological emergency zone.

Submissions of the CMU on the early termination of the legal regime of the ecological emergency zone are prepared, considering proposals of local governments and local executive bodies. With the early termination of the legal regime of the zone of ecological emergency, such territory is not considered a zone of ecological emergency.

5. Conclusions

All analyzed extreme regimes are implemented in the field of national security—it is their primary focus. All these regimes are enshrined in the relevant laws of Ukraine. These regimes are aimed at localizing and eliminating the negative factor. They are a legal support for the activities of the state in conditions of real or potential danger and are included in accordance with the intensity of the negative factor on society, which is now perceived in accordance with the laws of Ukraine as an emergency.[99]

The Unified State System of Civil Protection (USSCP) of the population and territories was created to implement state policy aimed at ensuring the security and protection of the population and territories, material and cultural values, the environment from the negative effects of emergencies in peacetime and special periods. In emergencies of various kinds, it is necessary to use a regulatory impact other than that which operates under normal conditions. This restructuring of legal tools takes place with the help of extreme regimes, which in the science of administrative law are called a "special state."

Martial law, a state of emergency and a regime of the zone of ecological emergency, according to the legislation of Ukraine, can be imposed by only one subject—the PU. In all three cases, the PU issues a relevant decree which is approved by the *Verkhovna Rada* of Ukraine, and immediately announced through the media and the civil defense notification system.

The provisions of the CU on the inadmissibility of restricting a number of human and civil rights and freedoms for the imposition of a state of emergency or martial law are based on the requirements of the International Covenant on Civil and Political Rights.

It should be noted that the main areas of crisis management at the level of the business entity are the constant monitoring of financial and economic conditions of the enterprise, the development of new management, financial, and marketing strategies, the reduction of fixed and variable costs, increasing productivity, attracting funding and strengthening staff

99 Kuznichenko, 2011, p. 44.

motivation. Measures of regional or national level include the adjustment of financial, economic, social, scientific, and technical investment; foreign economic policy; the identification and forecasting of internal and external threats to economic stability; the development of a set of operational and strategic measures to overcome negative factors, strengthen control, law, and order, and compliance.

In the 20th century, Ukraine formed a developed industrial complex, which still accounts for a high share in the structure of the economy, covering all types of industrial production. However, the deindustrialization processes, which were initiated by the transformation crisis of 1992–1994 and continue to this day, have led to the destruction of a significant part of Ukraine's production potential and especially its high-tech component. This was largely due to the severance of cooperation with other republics of the USSR in the absence of a full cycle of production within Ukraine. Over the past two years, the decline in production has reached 21.8%, in particular due to hostilities in the east of the country and a decline in the presence of Ukrainian products in traditional markets. The share of industry in gross value added decreased from 25.6% in 2011 to 23.3% in 2015.[100]

Supporting the global goals of sustainable development to 2030 proclaimed by the resolution of the United Nations General Assembly of September 25, 2015, no. 70/1 and the results of their adaptation taking into account the specifics of Ukraine's development set out in the national report "Sustainable Development Goals: Ukraine," ensure compliance goals of sustainable development of Ukraine for the period up to 2030: 1) overcoming poverty; 2) overcoming hunger, achieving food security, improving nutrition and promoting sustainable agricultural development; 3) ensuring a healthy lifestyle and promoting well-being for all at any age; 4) ensuring comprehensive and equitable quality education and encouraging lifelong learning opportunities for all; 5) ensuring sex equality, empowerment of all women and girls; 6) ensuring the availability and sustainable management of water resources and sanitation; 7) ensuring access to inexpensive, reliable, sustainable, and modern energy sources for all; 8) promoting progressive, inclusive and sustainable economic growth, full and productive employment and decent work for all; 9) creating a sustainable infrastructure, promoting inclusive and sustainable industrialization and innovation; 10) reduction of inequality; etc.[101]

Thus, in Ukraine special legal regimes are regulated at the legislative level in the form of codes or laws. Even in the current situation, Ukraine is not imposing a state of emergency to combat the COVID-19 epidemic or martial law in the east, to preserve and keep from restricting human rights.

100 Sustainable Development Goals: Ukraine. National report (2020), p. 74.

101 On the Sustainable Development Goals of Ukraine for the Period up to 2030, Decree of the PU (September 30, 2019), no. 722/2019.

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Summary: Pondering about emergency powers during COVID-19

NAGY ZOLTÁN – HOJNYÁK DÁVID – HORVÁTH ATTILA – UNGVÁRI ÁLMOS

Considering that this volume has three basic points of view, the summary unfolds as follows. First, we compare the legal framework of the emergency powers, focusing on the constitutional level. Next, we outline the aspects of constitutional law about the COVID-19 crisis, highlighting the governments' reactions and the emerging legal problems. Finally, we study the financial and economic background of the COVID-19 crisis, examining the fiscal and monetary measures of crisis management.

1. The constitutional and legal framework of the emergency regimes

1.1. Emergency regimes in the constitutions: weight and categories

According to a recent study by Bjørnskov and Voigt, about 171 constitutions contained at least some emergency provisions in 2013.[1] In another article, the authors pointed out that between 1985 and 2014, 137 countries, that is, about two-thirds of the sovereign states, declared

1 Bjørnskov and Voigt, 2018a, p. 105.

Nagy Zoltán: Head of Department of Public Law, Ferenc Mádl Institute of Comparative Law, Hungary
Professor, Faculty of Law, University of Miskolc, Hungary
Hojnyák Dávid: Researcher, Ferenc Mádl Institute of Comparative Law, Hungary
Assistant Lecturer, Faculty of Law, University of Miskolc, Hungary
Horváth Attila: Senior Researcher, Ferenc Mádl Institute of Comparative Law, Hungary
Senior Lecturer, Faculty of Public Governance and International Studies, National University of Public Service, Hungary
Ungvári Álmos: Researcher, Ferenc Mádl Institute of Comparative Law, Hungary
Nagy, Z., Hojnyák, D., Horváth, A., Ungvári. Á. (2022) 'Summary: Pondering about emergency powers during COVID-19' in Nagy, Z., Horváth, A. (eds.) *Emergency Powers in Central and Eastern Europe*, pp. 343-367. Budapest: Ferenc Mádl Institute of Comparative Law; https://doi.org/10.47079/2022.znah.epicaee.1_13

some form of state of emergency.[2] The article suggests that emergencies may not be extraordinary, and exceptional circumstances are not entirely exceptional.

Studies examining the constitutional framework of a state of emergency often conclude that constitutions differ significantly in terms of the depth, extent, and level of detail with which they deal with emergency regimes.[3] Discussing the causes of divergence is beyond the scope of this summary; however, it is safe to say that historical experiences, and the date and circumstances of the birth of the constitutions are decisive. As Kelemen Roland puts it that the imprints of the historical traditions of the 20th century are to be found on each constitution.[4] Attitudes toward emergency regimes are already diverging as to whether such provisions should have any place in the constitution at all. According to Scheppele, there are basically two positions to deal with threats to the state.[5] As per the "legalists," crises of state must be met with legal responses even if such responses are different than they would be in normal and peaceful situations.[6] However, as per the "extra legalists," "serious crises of state must be met with responses outside the law."[7]

It is to be noted that each of the eight constitutions examined in this volume has provisions for emergency powers. However, it is not as obvious as one might believe since several constitutions (e.g., Austria, Denmark, Norway, and the United States) do not affect states of emergency at all. Thus, the ways in which the examined constitutions deal with emergency powers differ notably. In addition, it can be concluded that all the investigated countries follow the "legalist" standpoint.

2 Bjørnskov and Voigt, 2018b, p. 110.

3 See e. g. Gross, 2004, pp. 6–8.; Scheppele, 2008, p. 166.; Khakee, 2009, pp. 11–12.

4 Kelemen, 2020, p. 211.

5 Scheppele, 2008, p. 165–166. Cf.: Venice Commission, 2020, II.D.22. (The Commission uses the terms "*constitutional*" and "*extra-constitutional*".)

6 The term "special legal order" of the Hungarian Fundamental Law reflects this approach, since a special legal order is a kind of "legal order" (moreover, a legal order regulated by the constitution), even if it is "special".

7 Scheppele, 2008, p. 165.

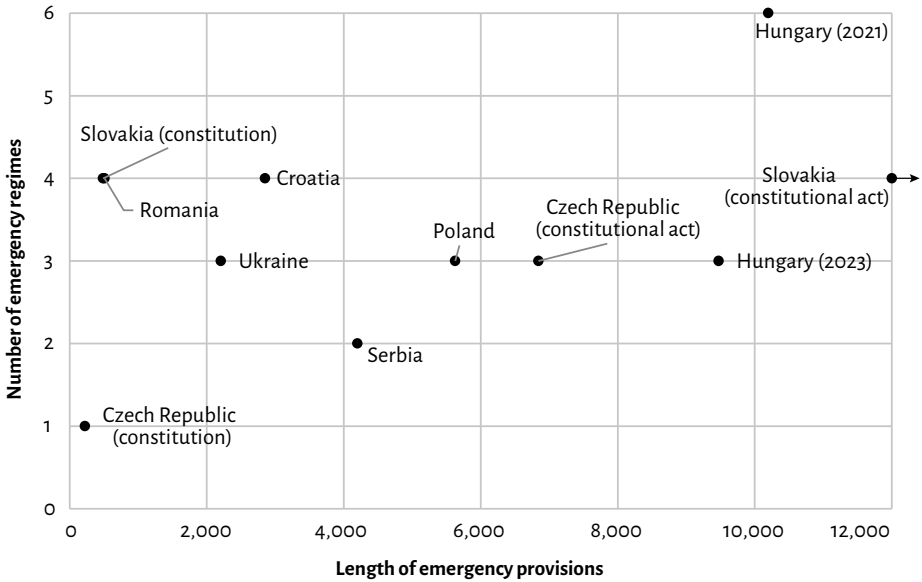

Figure 1. Emergency provisions in the constitutions. Source: Authors' compilation
Note: Based on its length (more than 34,000 characters), the constitutional act of Slovakia would not fit in the figure, therefore, we have placed it on the right side of the scatterplot

In Figure 1, the examined constitutions are placed on a scatterplot of two aspects. The first is the length of the emergency provisions (calculated in characters[8]), while the second is the number of distinct emergency regimes (e.g., state of war, state of emergency) mentioned by the constitution. The scatterplot plastically illustrates the heterogeneity of the examined constitutions and reveals striking differences.

It is worth mapping the position of the emergency provisions within the constitutions. Both the Hungarian Fundamental Law and the constitution of Poland devote a whole part/chapter to this issue, whereas, Croatia and Romania incorporate the emergency provisions in the chapters on the president. The Serbian constitution differs from the others since the regulation is placed in a part titled "Constitutionality and Legality." Unlike these five constitutions, the constitution of Ukraine holds scattered provisions on emergency powers instead of a distinct regulation.

The regulation of emergency powers is unique in the Czech Republic and Slovakia. Both the constitutions make a short reference to the emergency powers; however, a law is dedicated to the state of emergency. As the authors of the country chapters emphasize, these laws are regarded as "constitutional acts," which are an integral part of the constitutional system.

8 The calculations were based on English translations of the constitutions.

As for the extension of the regulation, Figure 1 reveals striking differences. If the constitutional acts of the Czech Republic and Slovakia are excluded, the Hungarian Fundamental Law offers the most detailed regulation, while Poland comes second. It should be noted that the constitutions that deal with emergency powers in a distinct chapter have the most detailed provisions. At the other end of the scale, the constitutions of Czech Republic, Slovakia, and Romania regulate the emergency issue in a succinct way; bearing in mind that the first two countries have a separate constitutional act on state security. The remaining three constitutions – Croatia, Serbia, and Ukraine – take an intermediate position regarding the length of the regulation.

The categories of emergency regimes is the next aspect of comparison. It is obvious that the dangers threatening a state may be diverse in origin (e.g., external armed attack, internal conflicts, natural disasters, etc.) and severity. As Figure 1 demonstrates, the eight countries are far from consistent regulation. The Hungarian Fundamental Law is exceptional since it distinguishes between no less than six types of special legal orders; a "world record." However, the Ninth Amendment of the Fundamental Law reduces the current six types to three (from July 1, 2023).

1.2. *The nature of the emergency regimes*

Table 13 offers a brief overview of the emergency regimes regulated by the constitutions of the eight countries.[9]

<table>
<tr><th colspan="2" rowspan="2"></th><th colspan="4">Reasons for emergency regimes</th></tr>
<tr><th>External armed attack (war)</th><th>Domestic conflict</th><th>Natural disaster</th><th>Others</th></tr>
<tr><td colspan="2" rowspan="2">Croatia</td><td>State of war</td><td rowspan="2"></td><td rowspan="2">Event of major natural disaster</td><td rowspan="2">Government bodies are prevented from performing their constitutional duties</td></tr>
<tr><td colspan="2">Clear and present danger to the independence and unity of the state</td></tr>
<tr><td rowspan="2">Czech Republic</td><td>Constitution</td><td>State of war</td><td>—</td><td>—</td><td>—</td></tr>
<tr><td>Constitutional act</td><td>State of war</td><td>Condition of threat to the state</td><td>State of emergency</td><td>—</td></tr>
</table>

9 It must be noted that the proper translation of the various categories (emergency regimes) is rather challenging, as different English language sources (translation of constitutions, academic literature, governmental announcements etc.) use divergent wordings.

		Reasons for emergency regimes			
		External armed attack (war)	**Domestic conflict**	**Natural disaster**	**Others**
Hungary (2021)		State of national crisis State of preventive defense Unexpected attack	State of emergency	State of danger	State of terrorist threat
Hungary (2023)		State of war	State of emergency	State of danger	—
Poland		Martial law	State of exception	State of natural disaster	—
Romania		State of war mobilization	State of emergency		—
		State of siege			
Serbia		State of war	State of emergency		—
Slovakia	**Constitution**	War State of war	Exceptional state	State of emergency	—
	Constitutional act	War State of war	Exceptional state	State of emergency	—
Ukraine		Martial law	State of emergency		—
				Ecological emergency	

Table 13
Nature of the emergency regimes
Source: Authors' compilation

As can be seen, most emergency regimes fall into three basic categories:
— regimes related to war or external armed attack or threat thereof
— regimes related to domestic conflicts (e.g., riots, rebellions)
— regimes related to natural disasters

Some of the examined emergency regimes may be related to more than one category.

Each constitution deals, or, at least, mentions, emergency regimes related to war and external armed attack (and threat thereof). Most of the constitutions contain only one category for this kind of threat – state of war or martial law – however, the current version of the Hungarian Fundamental Law lays down three special legal orders, according to the nature and degree of the armed attack (and threat thereof). Similarly, the constitution of Slovakia

(and the related constitutional act) distinguishes between war and state of war, while the constitution of Romania encompasses the state of war and mobilization.

Each constitution incorporates a category for domestic conflicts. However, the constitution of the Czech Republic is an exception where the gap is filled by the constitutional act. The Croatian special regime of "clear and present danger to the independence and unity of the state" is different from other regimes as it encompasses various forms of imminent danger for the state, both of internal and external origin. Likewise, the "state of siege" in Romania addresses all the threats to the sovereignty, independence, and territorial integrity of the state.

The third "common" category of emergency regimes is related to natural and industrial disasters. Apart from Romania and Serbia, the constitutions (or constitutional acts) of all the other countries devote a distinct emergency regime for catastrophes. However, for Romania and Serbia, the "state of emergency," in their wording, are broad categories that encompass threats stemming from domestic conflicts and disasters. The "state of emergency" in Ukraine functions similar to Romania and Serbia; nevertheless, the constitution of Ukraine includes "ecological emergency situation" for less severe disasters.

Beyond these three categories, the constitution of Croatia stipulates an emergency regime when "government bodies are prevented from performing their constitutional duties," while the Hungarian Fundamental Law devotes a distinct category for terrorist threat.

It is important to note that most legal frameworks of the analyzed countries include "quasi-emergencies." This refers to those emergency regimes, which do not have constitutional "rank" (i.e., the constitution does not mention them, and they lie within the "normal" functioning of the state), although their basic goal is to overcome a certain type of crisis through special provisions. Table 14 summarizes these quasi-emergencies.

	Quasi-emergency	Note
Croatia	—	—
Czech Republic	State of danger	May be ordered if people's lives, health, property, or the natural environment are at risk; however, the intensity of the threat is not significant
Hungary	Crisis caused by mass immigration	Special (more rigorous) rules apply to third-country citizens irregularly entering and/or staying in Hungary, and to asylum seekers
	Military crisis	Prepare for the impact of the disturbances evolving in neighboring countries or for the fulfillment of NATO obligations
	State of medical crisis	Special provisions for certain health care emergency situations
Poland	Crisis situation	It requires public authorities and armed forces to take special measures to eliminate or reduce threats and to effectively monitor them.

	Quasi-emergency	Note
Poland	State of epidemic threat	Introduced in each area in connection with the risk of an epidemic to take preventive measures
	State of epidemic	Introduced in each area to take anti-epidemic and preventive measures to minimize the effects of the epidemic
Romania	State of alert	Measures for a special situation of exceptional magnitude and intensity, which is temporary and proportionate to the current or future severity of the situation, and which is necessary for protecting life, health, and environment
	Emergency	Non-military event, which, due to its size and intensity, endangers the life and health of the population, the environment, important material, and cultural assets
Serbia	Emergency	Declared due to natural disasters, extraordinary events, or danger to the people, environment, and property in a local self-government
Slovakia	Crisis situation	May be ordered if the security of the state is damaged or endangered, and the authorized constitutional bodies shall declare an exceptional state, state of emergency, or emergency situation
	Emergency	A period of endangerment or period following an emergency that has a negative impact on human life, people's health, or property
Ukraine	—	—

Table 14
Quasi-emergency regimes
Source: Authors' compilation

However, the delimitation of "real" and quasi-emergency regimes is not always clear. For instance, as noted in the chapter on the Czech Republic, the legal literature considers a state of danger as the fourth type of emergency regime although neither the constitution nor the constitutional act on state security mentions this category.

1.3. President, parliament, or government? Shifts in the competencies

While comparing the constitutional framework of the analyzed states of Central and Eastern Europe, it is evident that the roles and competencies of the main actors, i.e., the presidents, the parliaments, and the governments, during a state of emergency varies from one country to another. The important question, "Who decides on introducing an emergency regime?" cannot have a general answer. Table 15 summarizes the regulations on the declaration of emergency regimes.

	Emergency regimes	Declaration	Note
Croatia	State of war	Declared by the president, following a decision of the parliament	—
	Clear and present danger	Not stipulated	—
	Major natural disaster		—
	Government bodies are prevented from performing their constitutional duties		—
Czech Republic	State of war	Declared by the parliament (the concurrence of an absolute majority of all deputies and an absolute majority of all senators is needed)	Not stipulated who may initiate the declaration.
	Condition of threat to the state	Declared by the parliament at the government's request (the concurrence of an absolute majority of all deputies and an absolute majority of all senators is needed)	—
	State of emergency	Declared by the government	Declared by the prime minister if a delay is imminent
Hungary	State of national crisis	Declared by the parliament (the concurrence of two thirds of all deputies is needed)	Declared by the president if the parliament is prevented from making such decisions
	State of emergency		
	State of preventive defense	Declared by the parliament (the concurrence of two thirds of deputies present is needed)	—
	Unexpected attack	No formal provision on declaration	The government is obliged to take immediate action
	State of terrorist threat	Declared by the parliament at the initiative of the government (the concurrence of two thirds of deputies present is needed)	—
	State of danger	Declared by the government	—
Poland	Martial law	Declared by the president at the government's request	The presidential decision is subject to review by the lower chamber of the parliament
	State of exception		
	State of natural disaster	Declared by the government	—

	Emergency regimes	Declaration	Note
Romania	State of war	Declared by the parliament in joint sittings of the two chambers	—
	Mobilization	Declared by the president with the prior consent of the parliament	—
	State of siege	Declared by the president	The presidential decree must be signed by the prime minister and is subject to review by the parliament.
	State of emergency		
Serbia	State of war	Declared by the parliament at the joint request of the president and the government upon the receipt of the defense minister's report	Declared by the president, together with the president of the parliament and the prime minister, if the parliament is not able to convene
	State of emergency		
Slovakia	War	Declared by the president based on a decision of the parliament	—
	State of war	Declared by the president at the request of the government	—
	Exceptional state		—
	State of emergency	Declared by the government	—
Ukraine	Martial law	Declared by the president at the request of the National Security and Defense Council	The presidential decision is subject to review by the parliament
	State of emergency		
	Ecological emergency	Declared by the president at the request of the National Security and Defense Council or the government	

Table 15
Declaration of the emergency regimes
Source: Authors' compilation

Note: for ease of understanding, we used the term
- *"president" for each head of state*
- *"parliament" for each legislative body*
- *"government" for each country's central political executive,*
- *regardless of the proper title of the positions or bodies.*

The exact regulation differs from one country and emergency regime to another. In case of war/state of war/martial law, one may detect two basic procedures. It may be declared:

— by the parliament (Czech Republic, Hungary, Romania, and Serbia – at the joint request of the president and government)
— by the president based on a decision of the parliament (Croatia and Slovakia), the government (Poland), or the National Security and Defense Council (Ukraine)

Although the martial law can be declared without the involvement of the parliament in Poland and Ukraine, the presidential decision is subject to subsequent review by the parliament; therefore, the approval of the legislation cannot be circumvented in these countries, too.

The "severe" emergency regime, which may be triggered by domestic conflicts, shows significant similarities regarding its introduction, especially in Hungary, Poland, Serbia, and Ukraine. Meanwhile, the emergency regime related to natural and industrial disasters (a less "severe" form of emergency) may be declared by the government, even without the consent of the parliament (however, Ukraine and, to a certain degree, Romania are exceptions).

Concerning the role of the presidents, some of the examined countries attach greater importance and give more (emergency) power to the head of the state. This configuration is broadly in line with the general role of the president as stipulated by the constitutions. For example, the Polish constitution lays down that "The President of the Republic shall […] safeguard the sovereignty and security of the State as well as the inviolability and integrity of its territory."[10] Similarly, in Romania "The President of Romania shall represent the Romanian State and is the safeguard of the national independence, unity and territorial integrity of the country,"[11] in Croatia "The President of the Republic shall be responsible for the defense of the independence and territorial integrity of the Republic of Croatia,"[12] and in Ukraine "The President of Ukraine is the guarantor of state sovereignty […]."[13] Evidently, these constitutions empower the presidents to declare the "severe" forms of emergency regimes, at least, most of them do. In contrast, in countries where the president is not portrayed as the guarantor of the sovereignty and/or independence (Czech Republic, Hungary, and Serbia), he/she plays a less significant role in the declaration of emergency regimes. However, this implication is situational, as one may detect counterexamples like Slovakia or the broad competencies of the Hungarian president during a state of emergency).

10 Article 126, para. 2
11 Article 80, para (1)
12 Article 94, para 3
13 Article 102 para. 2

The declaration is just one side of the coin. It should also be investigated that, once an emergency regime has been introduced, who acts as a "crisis manager." According to Ackerman, "The paradigm case for emergency powers has been an imminent threat to the very existence of the state, which necessitates empowering the Executive to take extraordinary measures."[14] His definition clearly underlines the importance of the executive branch. The chapters on the eight countries reinforce that the executive – be it the president or the government – has a crucial role in overcoming the crisis. Once an emergency regime has been declared, the executive is empowered to put through measures that it would not be allowed to do in normal circumstances. Thus, emergency regimes imply a certain shift of competencies in favor of the executive. For example, in Croatia, during a state of war, the president may issue decrees with the force of law on the basis, and within the limits, of the powers conferred thereon by the parliament. In Poland, if the lower chamber of the parliament is unable to assemble during martial law, the president shall, on application of the government, issue regulations having the force of statute. In Hungary, during a state of emergency, the measures laid down in a cardinal act shall be introduced by the president in a decree. (The 2020 amendment to the Hungarian Fundamental Law [enters into force on July 1, 2023] brings a significant change. The new regulation plays down the role of the president, meanwhile the government acts as the "crisis manager" regardless of the declared special legal order.)

The crucial role of the executive, however, does not entail the marginalization of the parliaments. The legislative bodies, on the one hand, in most cases, may disapprove and revoke the presidential/governmental decrees related to emergency measures. On the other hand, the parliaments are often entitled to extend the ongoing emergency regime.

The special bodies related to emergencies are also worth mentioning. The Hungarian National Defence Council, set up solely in a state of national crisis and entrusted with a wide range of powers, is an unmatched body. The Supreme Defence Council in Romania is similar, although it is a regular administrative authority that operates permanently. The National Security Council of the Czech Republic, a consultative, decision-preparing body, acts as a permanent working group of the government, which, in contrast to the earlier two bodies, lacks strong competencies. The Parliamentary Council and the Security Council in Slovakia are similar, to a certain degree, to the Hungarian National Defence Council regarding their basic function (exercising the powers of the parliament and the government, respectively, during the war, state of war, and exceptional state, if they are obstructed for any reason).

14 Ackerman, 2004, p. 1031.

1.4. Emergency regimes in practice

The eight countries examined in this volume had little experience with states of emergency, especially before the COVID-19 crisis. Table 16 summarizes the emergency regimes of the past decades.

	Type of emergency regime	Frequency	Reason
Croatia	State of war	—	—
	Clear and present danger to the independence and unity of the state	—	—
	Major natural disaster	—	—
	Government bodies are prevented from performing their constitutional duties	—	—
Czech Republic	State of war	—	—
	State of emergency	4	Natural disasters
		1	COVID-19
	Condition of threat to the state	—	—
Hungary	State of national crisis	—	—
	State of preventive defense	—	—
	Unexpected attack	—	—
	State of emergency	—	—
	State of terrorist threat	—	—
	State of danger	15	Natural disasters
		1	Industrial accident
		3	COVID-19
Poland	Martial law	—	—
	State of exception	—	—
	State of natural disaster	—	—
Romania	State of war	—	—
	Mobilization	—	—
	State of siege	—	—
	State of emergency	1	COVID-19
Serbia	State of war	—	—
	State of emergency	1	COVID-19

	Type of emergency regime	Frequency	Reason
Slovakia	War	—	—
	State of war	—	—
	Exceptional state	—	—
	State of emergency	1	Deficiency in the health care system
		2	COVID-19
Ukraine	Martial law	1	Tension with Russia
	State of emergency	—	—
	Ecological emergency	2	Natural disasters

Table 16
Emergency regimes in practice
Source: Authors' compilation

In the post democratic transition period, Croatia and Poland have not declared any type of state of emergency. Both these countries relied on ordinary legislation to manage the COVID-19 crisis, without resorting to emergency powers. It is worth mentioning that, contrary to the common belief, officially no emergency regime was introduced during the Croatian War of Independence (1991 to 1995).

The COVID-19 crisis forced both Romania and Serbia to declare states of emergency for the first time in their post-transitional history. Neither country had introduced any emergency regime before the pandemic.

The remaining four countries had triggered their emergency powers before the COVID-19 crisis. The Czech Republic declared a state of emergency four times, each connected to natural disasters (floodings and hurricane), for specific parts of the state. The state of emergency declared due to the COVID-19 was the first one for the entire country. Similarly, natural disaster compelled Hungary to declare a state of danger. This type of special legal order has been declared fifteen times due to flooding and/or inland water overflow, and once due to an industrial accident. While these emergency measures had a limited geographic scope, the government thrice declared a state of danger for the entire country due to the COVID-19.

Slovakia and Ukraine are the only countries that imposed emergency regimes for reasons other than natural disasters or COVID-19. In Slovakia, a state of emergency was declared in 2011 due to a deficiency in the health care system. As mentioned in the chapter on Slovakia, the declaration of the state of emergency was primarily aimed at ensuring proper operation of the health care system and banning certain groups of workers (primarily the medical staff) from exercising their right to strike. Following that, the COVID-19 twice triggered a state of emergency. Ukraine is the only state that has introduced an emergency regime related to war.

A period of martial law was introduced in 2018 in 10 regions of Ukraine due to the increasing tension with Russia. In addition, the environmental emergency zone regime was introduced twice due to catastrophic floods.

One may conclude that natural disasters (primarily floods) and the COVID-19 crisis were the primary reasons of introduction of emergency regimes. There are only three events – industrial accident in Hungary, health care system crisis in Slovakia, and martial law in Ukraine – that do not fall in the categories of natural disasters or COVID-19.

2. Experiences during COVID-19 from the aspect of constitutional law

It may be assumed that the restrictive measures of the states facing similar difficulties due to the coronavirus pandemic would be similar. However, the legal regulations providing a framework for these are different. Regarding the countries examined, there is a discrepancy in terms of whether the emergency measures are ordered at a constitutional or a statutory level. The response of the Czech Republic, Hungary, Romania, Serbia, and Slovakia are similar, whereby, all the five states ordered emergency measures at a constitutional level with a special legal regime to be proclaimed in the event of a disaster, a state of danger (in the case of Hungary), or a state of emergency (in the case of the other countries). In some of the countries – such as the Czech Republic, Hungary, and Serbia – this special legal regime was introduced for the entire state for the first time in modern history.

Although the examined states ordered or extended the special legal regime during the different waves of the coronavirus pandemic, the regulation of the temporal scope of the special legal order shows a varied picture. In the initial phase of the coronavirus epidemic, the minister of health of the Czech Republic introduced emergency measures based on the regulations of the Act on the Protection of Public Health. Later, the Czech government considered it necessary to introduce a special legal regime under the constitution. Thus, a state of emergency was declared for the entire country on March 12, 2020. After two extensions, the state of emergency was terminated on May 17, 2020. However, the special legal regime was reintroduced on October 5, 2020, which was extended several times and was in force until April 11, 2021. In Hungary, a state of danger was entered into force on March 11, 2020. Under the Hungarian constitutional regulations, a special legal order can be terminated by the body that is authorized to introduce it, if the conditions for its announcement are no longer met. Thus, the decree of the Hungarian government did not set a specific time limit for the state of danger. Due to improved situation, at the request of the Hungarian parliament, the government abolished the special legal order on June 18, 2020. However, the government declared a state of medical crisis and epidemiological preparedness, based on the Transitional Act, as a

justification for maintaining a number of measures and restrictions. Due to the subsequent waves of the coronavirus pandemic, after a short period of "normal" legal order, the government, once again, declared a state of danger in early November 2020 and on January 29, 2021. Thus, the state of danger was in effect at the time of completion of this manuscript.

In Romania, the president ordered a state of emergency through a presidential decree on March 16, 2020, and extended it once for a period of thirty days. However, later the legal framework of the Romanian crisis management measures was reconsidered through an Act, which stipulated the state of alert. Thus, a state of alert was introduced in the middle of May 2020 and was extended multiple times. The state of alert was in force in Romania at the time of closing the manuscript. In Serbia, the state of emergency was introduced on March 15, 2020; however, coronavirus was declared as an epidemic four days later, leading to public debates. The declaration of the state of emergency did not specify the duration of the special legal regime, which was terminated by a subsequent decision on May 6, 2020. In Slovakia, a country-wide emergency situation was introduced on March 12, 2020. The Slovak government introduced a special legal regime in the form of a state of emergency only three days later on March 15, 2020. During the first wave of the pandemic, the state of emergency was in effect for 90 days. During the second wave, the Slovak government declared a state of emergency on October 1, 2020, for 45 days. The special legal regime was extended several times due to an amendment to the relevant Constitutional Act. The state of emergency was terminated on May 14, 2021; however the emergency has been in effect since its introduction in March 2020. It is worth noting, that the first state of emergency solely affected the healthcare system, however, the subsequent states of emergency were general in nature.

Thus, for the states that ordered a special legal regime, it can be noted that during the first wave of the coronavirus pandemic, the legal response of the five states was nearly the same. However, several differences could be found during subsequent periods regarding the reintroduction or the extension of the state of emergency. Hungary is the only country examined where the special legal regime was in effect at the time of the completion of this manuscript, while in Romania, a new type of quasi-special legal regime was adopted and ordered.

In contrast, in Croatia, Poland, and Ukraine, the necessary measures were taken based on the categories laid down in statutory regulation. In these states, the restrictive actions were based on the Law on Civil Protection or on the Act on Infectious Diseases. In addition, in Croatia and Poland, these laws were amended to introduce the necessary emergency measures. The constitutions of these three countries stipulate a special legal regime, which can be declared in a crisis such as the coronavirus pandemic – a state of emergency in Croatia and Ukraine, and a state of natural disaster in Poland. In Croatia, the government adopted different measures, such as creating a special central body to coordinate the crisis management, and the minister of health declared a COVID-19 epidemic on the Croatian

territory pursuant to the Law on the Protection of the Population from Infectious Diseases. In Ukraine, an emergency was established from March 25, 2020, to April 30, 2021, to ensure sanitary and epidemic wellbeing of the population, in accordance with the Civil Protection Code. In Poland, protective and restrictive measures were adopted under the Act on Infectious Diseases and, later, under the newly-adopted COVID Act. On March 13, 2020, a state of epidemic threat was declared on the entire territory of Poland by a ministry regulation. It was cancelled on March 20, 2020, and a state of epidemic was announced, which provided the legal framework throughout the health crisis and was in force at the time of completion of this manuscript.

In most of the countries in this study, to control the coronavirus epidemic quickly and effectively, the government was empowered to take emergency measures. In the countries where special legal regime was introduced, regulatory governance took place. Even in Croatia, Poland, and Ukraine, the government could adopt restrictive measures under the statutory legislation. Romania was the only exception where the president restricted the fundamental rights during the state of emergency with presidential decrees.

While the restriction of fundamental rights during peacetime is a constitutional concern, in a situation where the normal functioning of the state is threatened, such as the health crisis caused by the coronavirus pandemic, fundamental rights might be restricted or even suspended to ensure effective management of the pandemic and are, therefore, necessarily impaired. Whether the states analyzed in this work introduced a special legal order or chose to deal with the pandemic within the normal legal framework, it is evident that in all the states, some degree of restriction of fundamental rights was imposed by the state bodies or the persons empowered to deal with the situation.

To implement exceptional measures restricting fundamental rights, it is necessary to identify the constitutional value or fundamental right that requires protection by restricting other fundamental rights. The nature of the coronavirus pandemic made it necessary to protect human life and health, which necessitated unprecedented and significant restrictions on fundamental rights worldwide. However, the constitutionality of a restriction of fundamental rights requires the application of an aptitude screening, a proportionality screening, and a necessity screening. Based on these, a fundamental right restriction may be imposed only to the extent strictly necessary, proportionate to the aim pursued, and respectful of the essential content of the fundamental right, in addition to the legitimate aim pursued. A further general principle of the limitation of fundamental rights is the prohibition on restricting absolute rights. Although exceptional measures to restrict fundamental rights have, in many cases, generated public policy controversies in the states examined, their legality has, in most cases, been in line with both national and international standards of the constitutionality of restrictions on fundamental rights.

Restrictive measures introduced to protect human life and health, that is, public health as a legitimate aim, have affected a wide range of fundamental rights. It is beyond the scope of this paper to provide a taxonomy of the restrictive measures introduced by individual states; therefore, we refer only to the fundamental rights restricted during pandemic management in almost all the states analyzed. These fundamental rights include:

— the right to personal liberty
— freedom of movement and freedom to choose one's place of residence
— the right to assembly
— the right to conduct a business or a commercial activity
— the right to education

Although restrictive measures, equally and generally, affected people's fundamental rights, they also affected the specific rights of certain social groups. In particular, the elderly and children of compulsory school age, for whom several states introduced specific but similar rules (e.g., a time limit for shopping for the elderly and a switch to digital distance learning in education).

Regarding the extent of the restrictions, there was no significant difference between the intensity of the restrictions imposed by the states examined. In addition, all the states introduced and repealed the restrictive measures, and tightened and relaxed them at approximately the same time. The first restrictive measures were imposed at the time of the outbreak of the coronavirus pandemic in March 2020, while their relaxation or repealment took place in May-June 2020. The reintroduction or tightening of restrictions coincided with the second wave of the coronavirus pandemic, that is, in October-November 2020.

There were intense political debates in almost all the states regarding health crisis management and the need for a special legal regime. At this point, it is important to note that in many cases these debates were about the legal issues related to the extraordinary mandate and were often purely political in nature. The present work does not aim to provide a taxonomic list of the subject matter of the debates, but merely refer to the legally-relevant issues that have been the basis of significant legal-political debates in the states, namely:

— the unjustified introduction of a special legal order or the lack thereof
— questions related to the duration of the special legal order and its extension
— disproportionate and unnecessary restrictions on fundamental rights
— excessive emergency powers conferred upon a person or body and their measures, which are unconstitutional or infringe the criteria of the rule of law
— limited room for maneuver of the legislative bodies

The theoretical debates about the legitimacy of the exceptional measures adopted during pandemic management soon took a practical form by resorting to the courts. If we set aside the debates driven purely by political goals and interests and focus only on the legally-relevant issues, we see that, in many states where a special legal order was introduced, although the room for maneuver and control of the legislature was significantly reduced, the role and responsibility of the national constitutional courts, supreme courts, ordinary and administrative courts, and even ombudsmen for controlling restrictive measures was increased. In some states, the courts corrected and, in other cases, annulled extraordinary measures adopted by the government. However, there are examples where the pandemic management strategy was modified without recourse to the courts, simply because of social pressure and criticism from the political opposition.

In the Czech Republic, Hungary, and Serbia, the argument surrounded the constitutionality of the special legal regime. In Hungary, some scholars explained the unconstitutionality of the state of danger based on the inconsistency between the Fundamental Law and the Act on Disaster Management regarding the determination of the events due to which a state of danger may be declared. Additionally, according to some viewpoints, the declaration of a state of danger was unnecessary since the pandemic could have been managed through the special provisions of the Healthcare Act. In the Czech Republic, a constitutional complaint was filed based on the opinion that the declaration of a state of emergency was not in line with the constitutional order and did not respect the fundamental human rights. However, the Czech constitutional court rejected the complaint. The introduction of a state of emergency was also highly criticized in Serbia as the epidemic was not recognized by the Constitution as "threatening the survival of the state or its people." Therefore, according to some viewpoints, the coronavirus pandemic could not be the legal basis for a state of emergency. Meanwhile, in Poland, it provoked lively public debate regarding whether the health crisis be considered a natural disaster or a natural catastrophe to be the ground for the state of natural disaster, according to the Act on the State of Natural Disaster. Therefore, some scholars claimed that the government should have declared the state of natural disaster.

Therefore, we can conclude that the response of each country to the coronavirus pandemic was different, and we cannot concretize a uniform European practice that would serve as a model for a similar crisis, and would be an expected, enforceable mechanism for the states.[15] A uniform European practice is also inconceivable because each state, including all the European state, has a different historical background and, as a result, have different public law-constitutional structures. The special legal order and the associated regulatory

15 See for more details: Hojnyák and Ungvári, 2021

governance, the limited room for maneuver of the legislature, and the restriction of fundamental rights generate serious public policy debates in each country, whereby, none of the national regulations lack the criteria of the rule of law, as indicated by the results of the research conducted in this study for the countries included.

3. Application of economic, fiscal, and monetary instruments during the emergency

The government measures introduced due to the virus and the fear of a pandemic posed serious challenges for the world economy. Economic crises are not new for researchers; however, the current crisis, its emergence, and its related impact are novel in economic history most comparable to a war situation. The biggest challenge is to deal with the situation as the epidemiological emergency causes serious economic and social damage. In fact, there cannot be a perfect decision, just a less bad one. Special legal restrictive measures reduce the spread of the virus and the burden on the health care system; nevertheless, they also cause economic damage and have social and health implications. In any case, in the policy of governments, in addition to the economic arguments, the protection of human life has been expressed, that is, in the event of an epidemic, the protection against the virus is the primary priority, followed only by the reduction of the economic effects, which is made possible by the established social network in developed countries. However, in developing countries, economic crises can claim lives. According to estimates, the number of people suffering from acute hunger could double due to the crisis.[16]

How does this crisis differ from previous crises? The economy is never dormant; it is always changing. It is either in a cycle of economic growth or downturn. However, according to the economic cycle theories, the root causes may be different, and both exogenous and endogenous explanations are important. The current crisis of the coronavirus pandemic was triggered by an external, out-of-farm factor.[17] This is unique in the modern economic history, but it carries the common features of economic crises – investments drop, consumer spending is cut back, unemployment rises, emissions fall, and the GDP drops.[18] These affect countries

16 Botos, 2020, p. 385–388. The author points out that in developing countries people may starve to death due to unemployment caused by the crisis. There are examples of this in economic history, e.g., the 1930s economic crisis. In the context of the current crisis, it is estimated that 420-580 million people could end up in extreme poverty.

17 Samuelson and Nordhaus, 2012, pp. 389–391. The authors point out that external factors could be war, revolution, population movement, and even scientific innovations.

18 Samuelson and Nordhaus, 2012, pp. 388–389.

differently depending on their economic and social state and their economic vulnerability. A good example of this is the previous economic crisis of 2008.[19] However, in the current economic crisis, the literature does not explain the short term effects of the crisis or provide any short-term solutions to the crisis.[20] It is, therefore, clear that this crisis has presented new challenges to economic policy makers. The government's restrictive measures have triggered a reduction in demand and caused supply restrictions in the economy. The supply and demand shocks came together. The administrative constraints imposed on consumption and emissions, and the caution caused by the pandemic have had an impact.[21] However, they have manifested themselves to varying degrees in different areas of the economy.[22] In countries where, for example, tourism makes up a significant part of the national economy, the crisis is more pronounced.[23] Economic policy must, therefore, choose solutions for the recovery from the crisis accordingly.[24]

Among the various trends in economics, there is a significant debate about government intervention.[25] In the modern mixed economy, the role of the government sector is significant; however, its extent and the remedies for market failure continue to be debated. In addition to market failures, the failure of government intervention is also noted in the literature.[26] Fiscal and monetary policy instruments played a powerful role in solving the 2008 economic crisis, which the current governments are trying to apply to the current situation of crisis management without waiting for the self-regulatory mechanisms of the market to take effect.[27]

The economic crisis of 2008 was a major challenge for the Economic and Monetary Union. On the one hand, the European Central Bank's liquidity-enhancing, quantitative easing measures for particular asset purchase programs played a prominent role in the EU crisis management. On the other hand, substantial short-term and sustained systemic measures were taken by the System of Economic Governance in Europe. Preventive and corrective

19 Nagy, 2019, pp. 5–6.
20 Czeczeli et al., 2020, pp. 323.
21 Koppány, 2020, p. 449.
22 Terták and Kovács, 2020, pp. 369–370. Emergency measures for the coronavirus pandemic have hit each sector. The authors point out that accommodation, hospitality, transportation, and retail suffered the greatest losses, along with industry and leisure, arts, and other services.
23 In many areas of the economy, restrictive rules shocked. Airlines, tourism-related hospitality and hotel industries, theatres, the organization of cinemas, concerts, and events faced total restrictive rules. At the same time, other related sectors had to face decline in demand.
24 Muraközy, 2012, pp. 21–44.
25 Muraközy, 2010, pp. 794–795.
26 Stiglitz, 2000, pp. 25–35.
27 Bessenyei, 2020, pp. 181–185.

mechanisms to promote macroeconomic stability were established through intergovernmental treaties.[28]

At the same time, the EU budget was unable to directly deal with the crisis to perform a stabilization function due to the fundamental structural and functional factors.[29] The common budget was balanced with the EU spending its entire revenue from national and common sources.[30] Therefore, in the fiscal policy, the Member States had to face recession. The different public financial position of each Member State gave rise to different fiscal impulses. This increased the diversity between the Member States.

In the current situation, the Member States of the European Union sensed the seriousness of the crisis. However, the varied narratives of the epidemic, which may impact the effective enforcement of economic instruments and dealing with the pandemic, must be considered.[31] The first reaction to the pandemic in 2020 was the imposition of restrictive measures. The introduction of the extraordinary legal order brought closure to the Member States; however, it weakened global international cooperation.

From a budgetary point of view, 2020 marked the end of the EU budget period; therefore, only a small number of resources were available from the EU budget.[32] However, after the first shock, the EU mitigated the economic impact of the pandemic.[33] The biggest step was the Union's joint commitment to borrow and, thus, provide funds to Member States; an unprecedented step.[34] This can be seen as a step toward economic integration, as the Member States stand in economic solidarity by jointly borrowing and agreeing to repay it.[35]

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28 Szegedi, 2019, p. 101. In the decade following the crisis, the EU transformed the European supervisory system for financial markets and began to form a European Banking Union, a complete reform of bailout mechanisms and the deposit insurance system. See Halmai, 2014, 2020a, pp. 277-282. Halmai, 2020b, pp. 259-275.

29 Halmai, 2020a, pp. 20–53.

30 Halász, 2018, pp. 50–54.; p. 149. The author points out that revenues and expenditure had to be balanced in the EU budget so that there was no deficit or surplus planned. If there is a deficit, a budget amendment shall be made to cover it with a loan. According to the legislation, the Commission may table an amendment to the budget if unavoidable, exceptional, or unforeseen circumstances.

31 Shiller, 2020, pp. 9–21. Narrative economics analyzes the role of popular beliefs in economic events. Economic crises and the pandemic created stories that spread like the virus and influenced economic decisions.

32 Szijártó, 2020, pp. 1–13.

33 Balázs, 2020, pp. 5–8. The author points out that, to mitigate the economic impact of the crisis, the restrictive rules on budget deficits and state aid were lifted, and EUR 37 billion was transferred from the Structural Fund to protect against the virus. The European Investment Bank offered investment loans of EUR 200 billion, and the European Commission set up a €100 billion remuneration fund.

34 Csűrös, 2015, pp. 122–155.

35 Botos, 2020, pp. 392-395. The EU has adopted a budget of EUR 750 billion, some of which will be disbursed in the form of aid (EUR 390 billion) while the remaining will supply credit facilities for Member States (EUR 360 billion).

The fiscal policy is affected by the economic crisis and budgetary policy impacts the crisis; thus, the role of the state as an economic regulator is appreciated. The important objectives of the economic policy are to lower unemployment, boost economic growth, stabilize the economy, and lower inflation.[36] With these objectives, the governments are managing the consequences of the crisis and reducing its adverse effects on the economy. The instruments of fiscal policy affect the economy in connection with the budgetary rules. These instruments can be approached from two aspects. One can be a discussion "about both the indirect and direct instruments,"[37] while the other can be about the "assets that affect budget revenues and expenditures."

The crisis had a dual impact on the economies and budgets of the countries analyzed in this study. On the one hand, revenues decreased, while on the other hand, expenditure increased because of the aid programs. As a result, the budget deficit increased, which was made possible by the EU legislation for the EU countries.

The subsidies were applied directly and indirectly and extended to businesses and employees alike. Direct aid assisted small and medium-sized enterprises, and sector-wide support, such as hospitality and tourism, were also noted. The government pandemic provisions forced these undertakings to either close or made their activities impossible that they suspended operations. A significant part of the subsidies were wage subsidies, which reduced the wage burden on businesses and kept a significant part of the workers in employment, thus, reducing unemployment and allowing resurgence. Several states also improved the situation of unemployed workers by increasing unemployment benefits or extending the period of unemployment benefits. However, there was a state that, by subject right, provided one-time subsidies to its local resident citizens.

Indirect aid was introduced in relation to public burdens and was implemented in a variety of forms. Tax payments were extended along with introduction of exemptions and tax cuts. Businesses and individuals alike were aided by the fact that several countries suspended or abolished tax legal consequences in addition to the suspension of tax enforcement. In addition, several countries tried to boost state and municipal investments to supply orders for economic operators.

In addition to fiscal policy, monetary policy played an important role in managing the crisis. Monetary policy increased the amount of money in the economy through active assets and stimulated investment and economic growth by keeping interest rates low. This was further eased by the reduction of the required reserve ratio and the widespread purchase

36 Samuelson and Nordhaus, 2012, p. 570.

37 Simon, 2019, pp. 31–32. The author represents a specific decision related to the budget under direct instruments, while the indirect instruments have an effect without specific intervention, such as taxes.

of government securities by central banks. Businesses in crisis were aided by interest-free loan programs in some countries, and loan moratorium aided both business and residential sectors. Monetary policy implemented a strong increase in liquidity to promote economic growth following the downturn.

In conclusion, in addition to the instruments that have proven beneficial in earlier crises, states used new instruments to mitigate the crisis, in the field of fiscal and monetary policy. These traditional and new tools proved effective in crisis management. Although the authors analyzed the economic instruments with varying depths in each country chapter, each country used similar instruments in their economic policies, except for one or two cases where smaller individual instruments came into play. However, these smaller instruments did not have any significant relations to the major instruments.

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