

THE TRANSFORMATION OF SPECIAL LEGAL REGIMES IN HUNGARY – IN THE LIGHT OF CRISES

INTRODUCTION

In our study, we present the new amendments to the Fundamental Law of Hungary, which significantly broaden the definition of state of danger.

The reason for the amendment is the ongoing war between Russia and Ukraine, which has led to a humanitarian situation unprecedented since the Second World War and has changed the economic situation in Europe.¹ The aim is essentially to be able to develop effective, rapid national responses to the consequences of international, economic changes.²

The amendment to the Fundamental Law of Hungary allows the Government to declare a state of danger in the event of war, armed conflict or humanitarian disaster in a neighbouring country, so that all necessary means are available to assist, support and accommodate people fleeing the situation, and to prevent the adverse economic effects of the situation and mitigate the consequences.³

In this study, we will describe in detail the changes to the concept of the state of danger following the amendments to the Fundamental Law of Hungary and also when the emergency was introduced in practice. We also discuss the reasons for the 10th amendment to the Fundamental Law and present other types of special legal order

CHANGES TO THE CONCEPT OF THE STATE OF DANGER FOLLOWING THE AMENDMENTS TO THE FUNDAMENTAL LAW OF HUNGARY

1. Original text of the Fundamental Law regarding the concept of a state of danger

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.*

¹ General explanation of the 10th Amendment to the Fundamental Law of Hungary

² General explanation of the 10th Amendment to the Fundamental Law of Hungary

³ General explanation of the 10th Amendment to the Fundamental Law of Hungary

*(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.*

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

In the Fundamental Law of Hungary, which entered into force on 1 January 2012, the state of danger was regulated as presented above.

If we examine the role of the state of danger among the special legal orders, we realize that it is the only case that is not aimed at the armed defence of the state⁵. Therefore, it implies that it is considerably more likely to be applied than the others.

The main rules of the state of danger can be found in the Fundamental Law and the specific rules in the Act CXXVIII of 2011 on the Disaster Management and Amending Certain Related Acts, which is a cardinal law.

Under Article 53 of the Fundamental Law, the Government is empowered to declare a state of danger in the event of natural disaster or industrial accident endangering life and property.

The situations which may fall into these two categories, by way of example, are defined in the Article 44 of the Act CXXVIII of 2011 on the Disaster Management and Amending Certain Related Acts. It includes flooding, inland flooding, snowfall, etc. in the former category; the latter includes the release of hazardous substances and waste, unplanned radioactive spills and other kind of radiation exposure.

The cardinal law, however, not only details the two cases included in the Fundamental Law, but also introduces a new category of threats of different sources, thus complementing the

⁴ For the “official” English translation of The Fundamental Law of Hungary (as in force on 23 December 2020), see: <https://www.parlament.hu/documents/125505/138409/Fundamental+law/73811993-c377-428d-9808-ee03d6fb8178> (access: 18.07.2022)

⁵ dr. Draskovich, E. (2020). A különleges jogrend és a veszélyhelyzet. Infojegyzet 2020/6. https://www.parlament.hu/documents/10181/4464848/Infojegyzet_2020_6_kulonleges_jogrend+%281%29.pdf/f7c3e7e1-9b7d-cb32-3bf2-174e8d25b56c?t=1585507104211 (access: 18.07.2022)

provisions of the Fundamental Law⁶. This includes, for example, a human pandemic or epidemic threat causing a mass outbreak of disease or an animal epidemic.

The Government may, in a state of danger, **adopt** decrees suspending the application of certain Acts, derogating from legal provisions and taking other extraordinary measures, as provided for by a cardinal law.

These decrees remain in force **for a period of fifteen days** only, unless the Government, on the basis of authorisation by the National Assembly, extends those decrees.

However, **if the state of danger is no longer in effect**, these regulations will cease to be in force.

2. The impact of the 9th Amendment on the concept of the state of danger

Article 51

*(1) In the event of a **serious incident endangering life and property**, in particular 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. (never entered into force)*

*(2) A state of danger may be declared for a period of **thirty days**.*

(3) The Government may extend the state of danger on the basis of the authorisation of the National Assembly if the circumstances giving rise to the declaration of a state of danger persist.

*(4) **The National Assembly shall decide on the authorisation** under paragraph (3) by a two-thirds majority of the Members of **the National Assembly** present.*

From the date of promulgation until the 9th Amendment, the article on the state of danger was not affected by the changes, but by that Amendment the Legislature made a **comprehensive change** to the rules of the special legal order.

The Fundamental Law had previously regulated the state of national crisis, the state of emergency, the state of preventive defence, the state of terrorist threat, the unexpected attack

⁶ Horváth, A. (2020). A veszélyhelyzet közjogi és jogalkotási dilemmái – mérlegen az Alaptörvény 53. cikke. *KÖZJOGI SZEMLE*, 13(4), 17–25.
<http://mfi.gov.hu/wp-content/uploads/2021/01/HorvathA-A-veszelyhelyzet-kozjogi-es-jogalkotasi-dilemmai-MFI-honlapra.pdf> (access: 18.07.2022)

and the state of danger under the special legal order⁷. As a consequence of the amendment, only the state of war, the state of emergency and the state of danger are considered as special legal order.

As regards the declaration of a state of danger, the text planned to enter into force on 1 July 2023 has specified "**serious incident endangering life and property**" as the reason for declaration. This would have been significant as it would have allowed the declaration of a state of danger also in justified cases **which cannot be foreseen at present**⁸. But this turn of phrase **did not ultimately enter into force**, as a result of the following amendment, which I elaborate later.

In addition, a **very important modification** is that, after the entry into force of the amendment, the National Assembly may authorise the extension of a state of danger which may be declared for thirty days, not only the extension of the duration of a Government decree relating to the state of danger, as is currently the case. This decision requires a two-thirds majority of the Members of the National Assembly present.

There has also been a **structural change**, as the state of danger will now be regulated under Article 51 and the other rules in the former Article 53 will remain in the same Article, but under the heading of common rules on special legal order.

3. The 10th Amendment and its reasons

*(1) In the event of **an armed conflict, war or humanitarian disaster in a neighbouring country**, or 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.*

Interestingly, the previously mentioned part of the 9th Amendment was originally due to enter into force on 1 July 2023, but in the meantime the **National Assembly** has also adopted 10th Amendment to the Fundamental Law, which essentially extends the concept of the state of danger in the event of **an armed conflict, war or humanitarian disaster in a neighbouring country**. The amendment proposal originally intended to synchronise the amendments to the

⁷ Mátyás, F. (2020). Kilencedszerre is módosul az Alaptörvény, Jogászvilág. 2020. november 16. <https://jogaszvilag.hu/szakma/kilencedszerre-is-modosul-az-alaptorveny/> (access: 18.07.2022)

⁸ The explanatory note of the bill T/13647, the proposed 9th Amendment to the Fundamental Law <https://www.parlament.hu/irom41/13647/13647.pdf> (access: 18.07.2022)

same articles in two rounds, so that some of them would be adopted the day after the proclamation and the others, including the presented part of the 9th amendment, on 1 July 2023, but the latter date ended up being 1 November 2022.

Which already entered into force on 25 May, is the **previously mentioned addition** to the concept.

THE STATE OF DANGER IN PRACTICE

When the Fundamental Law was originally codified, perhaps even the legislator himself would not have imagined that the practical application of the state of danger would take place so soon. In 2020, however, the emergence of the coronavirus epidemic brought the world into an unforeseen new situation, and with it the application of a general special legal order in Hungary for the first time in the democratic Hungary. From the outbreak of the epidemic to the tenth amendment of the Constitution, there have been two state of emergencies due to the pandemic emergencies and there is currently a state of emergency due to war. The first epidemiological state of danger lasted from 11.03.2020 to 18.06.2020. The second state of danger due to the epidemic was introduced from 04.11.2020, and originally would have been in force until 08.02.2021, but the legislator considered that the state of the epidemic did not allow its termination, so after several extensions it remained in force until 01.06.2022.⁹ A state of danger due to war is in force as of 25.05.2022 and is planned to remain in force until 01.11.2022.¹⁰ The different nature of emergencies is illustrated by the terminology used in the government decrees that put them into effect. In the case of the epidemiological emergency, the legislator used the following wording: *"In order to avert the consequences of the SARS-CoV-2 coronavirus pandemic (hereinafter: coronavirus pandemic), which is a mass epidemic threatening the safety of life and property, and to protect the health and lives of Hungarian citizens, the Government declares a state of danger throughout Hungary."*¹¹ and uses the following wording in the case of the current state of danger: *"The Government declares a state of emergency for the entire territory of Hungary in view of the armed conflict and humanitarian disaster in Ukraine and in order to avert the consequences of these in Hungary"*.¹² The

⁹ Government Decree No. 181/2022 (V.24.) on the lifting of the state of danger declared by Government Decree 27/2021 (I. 29.) on the declaration of a state of danger and the entry into force of emergency measures

¹⁰ Act VI of 2022 on dealing with the consequences in Hungary of an armed conflict or humanitarian disaster in a neighbouring country

¹¹ Government Decree No. 27/2021 (I. 29.) on declaring a state of danger and putting emergency measures into effect

¹² Government Decree No. 180/2022 (V.24.) on the declaration of a state of danger and certain emergency rules in view of an armed conflict or humanitarian disaster in Ukraine and in order to avert the consequences thereof in Hungary

emergency situation gives the Government the possibility to derogate from the general legal order. Changes made under the special legal order have had and are having an impact on the legal system as a whole. This is illustrated by the fact that in the last two years, when entering the largest Hungarian legal database, it has become common practice to see the warning *"IMPORTANT! Certain provisions of the law shall be applied differently during the emergency."*¹³ Below we examine the key issues for each emergency period.

State of danger I: enacted by Government Decree 40/2020 (11.III.), abolished by Act LVII of 2020. During its existence, the Government issued a total of 127 emergency decrees, regulating the most important issues in the fight against the epidemic, including:

- temporarily reintroducing border controls, extending the validity of expiring official documents, banning students from visiting higher education institutions, introducing an exceptional judicial recess, restricting the opening of catering establishments and closing certain establishments to the public, banning access to events and the holding of meetings.¹⁴

State of danger II was introduced by Government Decree 478/2020 (3.XI.), which was replaced by Government Decree 27/2021 (29.I.) from 8 February 2021, which was in force until 31 May 2022. The duration of this emergency is much longer and the epidemic situation itself has changed several times during its existence, so the Government has continued to regulate mainly the above-mentioned subjects, but has also amended them several times in line with the current situation.

One good example for that is the curfew regulation. The curfew was set from 0-5 AM on 3 November 2020¹⁵, modified to 8PM-5AM on 10 November¹⁶, modified again to 10PM-5AM on 27 March 2021¹⁷ and completely abolished on 21 May.¹⁸ Similar examples could be given of other means of epidemic control.

State of danger III was introduced by Government Decree 180/2022 (V. 24.) and is expected to remain in force until 01.11.2022. This is fundamentally different from the previous ones, as it is not introduced due to the epidemic but due to the war in neighbouring Ukraine.

¹³ uj.jogtar.hu (access: 15.07.2022.)

¹⁴ A veszélyhelyzet első kihirdetésének évfordulójára: 365 nap rövid veszélyhelyzeti kronológiája in: <https://jog.tk.hu/blog/2021/03/a-veszelyhelyzet-elso-kihirdetesenek-evfordulojara> (access: 15.07.2022.)

¹⁵ Government Decree No. 479/2020 (XI.3.) on additional security measures to be applied during the state of danger

¹⁶ Government Decree No. 484/2020 (XI.10.) on the second phase of protection measures to be applied during the state of danger

¹⁷ Government Decree No. 144/2021 (III. 27.) on the first stage of the phased lifting of security measures

¹⁸ Government Decree No. 264/2021 (V.21.) amending government decrees regulating security measures to be applied during the state of danger with regard to the fifth stage of the phased lifting of security measures

Accordingly, it can be assumed that the focus of the emergency provisions will also shift from public health issues to humanitarian concerns. An example of this is the regulation on facilitating the care of refugees from Ukraine and their status.¹⁹ However, the current emergency situation has not yet existed long enough to allow long-term trends to be discerned from the Government's legislation.

An interesting situation was that between 25 and 31 May 2022, the two types of emergency coexisted. Logically, however, the Government did not consider the soon-to-be-abolished epidemiological state of danger as the legal basis for its emergency regulations during this period, but the new emergency.

However, it should also be mentioned that a common criticism of the Government's use of the Emergency Ordinance is that it has not been used solely for its original purpose and in accordance with the mandate given, but has also been used to implement other measures not necessarily related to disease control. An example of this is the creation of special economic zones.²⁰ This is a special instrument of territorial development, whereby the Government transfers the right to tax from the previously entitled municipalities to another body. However, the temporary emergency decree was later enacted into law by Parliament and the Constitutional Court did not find the provision unconstitutional.²¹ This situation does not seem to have changed, as the epidemiological state of danger has been replaced by a state of danger due to war. An example of current legislation is the government decree regulating certain aspects of public employment.²²

Once the state of danger is lifted, the government emergency decrees are no longer in force. A decision by Parliament is required to maintain the provisions of these emergency decrees in force. An example of this is Act LVIII of 2020 on transitional arrangements and epidemic preparedness in connection with the end of the state of danger. The Act originally regulated how and for how long the transitional rules should apply after the first emergency has ended. However, it has been amended several times since then, and provisions have been included for measures taken during subsequent emergencies. The Act specifies how derogations from certain

¹⁹ Government Decree No. 246/2022 (VII.8.) on simplification of certain social security benefits for Ukrainian citizens during the state of danger

²⁰ Government Decree No. 136/2020 (IV.17.) on the designation of a special economic zone in the municipality of Göd

²¹ Act LIX of 2020 on the special economic zone and amending certain related acts

²² Government Decree No. 247/2022 (VII. 11.) on the duration of public employment during the state of danger

other legislation are to be made, in some cases by setting a specific time limit²³, in others by referring generally to the existence of an emergency.²⁴

Emergency decree legislation affected not only central government but also local governments. Under the measures introduced during the first (epidemiological) emergency, mayors were empowered to adopt municipal decrees independently, without the need for a representative body. There are some obvious parallels between central government and local government regulation.

Given that the cause of the emergency was the epidemic, it was natural that the focus of the regulated subjects was also on epidemic control at local level. There is no question of double regulation, of course, as the areas already regulated by the Government within its own powers were not and could not have been affected by local government regulations, but were regulated alongside them, supplementing them. Typical of the subjects covered were social and economic assistance to businesses and families in difficulty (e.g. cash benefits, housing help).

This includes an interesting phenomenon, the so-called "trashcan legislation". The central government has 'devolved' the adoption of probably unpopular measures to local governments, so that they bear the harmful consequences. A typical example is the compulsory wearing of masks.

The parallel is not only in the issues covered by the epidemiological protection, but also in the fact that local authorities have been criticised for the same reasons as the Government in relation to the emergency regulation, i.e. for not using the possibilities provided by the special legal order in accordance with the mandate and for the original purpose. An example of this is the way in which District VI of Budapest changed its coat of arms and flag and District V changed its local building regulations. An important and visible difference, however, is that in these cases the issue is one of expediency and not explicitly constitutional.²⁵

For more than two years now, we have been living in a virtually permanent state of danger. At the moment, as long as this situation persists, it is impossible to say what the long-term legal consequences of this period will be. The abolition of the special legal regime is an indispensable precondition for a thorough and complete analysis of the changes caused by this unprecedented

²³ For example Article 25 of Act LVIII of 2020

²⁴ For example Article 41 of Act LVIII of 2020

²⁵ Kristóf B. Cseh, Bálint Bodó, Kata Budai, Borbála Dombrovsky, Péter Ferge, Lili Gönczi, János Nagy & Zsolt R. Vasas: Law-making in the time of emergency: the case of Budapest Metropole and its districts In: Hoffman, István; F., Rozsnyai Krisztina; Nagy, Marianna (szerk.) *Urbanisation and Local Government(s)*, Maribor, Szlovénia : Lex Localis (2021) 177 p. pp. 165-177. , 13 p

period in the history of modern Hungary and the mark it will leave on the Hungarian legal system as a whole.

JUSTIFICATION OF THE 10TH AMENDMENT TO THE FUNDAMENTAL LAW OF HUNGARY

Compared to other constitutions, the Fundamental Law of Hungary contains a transparent and straightforward chapter on special legal order.²⁶ According to the Government, the reform of special legal regimes in the Fundamental Law of Hungary was inevitable and this view was supported by the required majority of the National Assembly; thus, the ninth amendment was accepted on December 22, 2020. It significantly rewrote the chapter on special legal order to make the regulation of special regimes more up-to-date and appropriate in the light of the challenges we had faced earlier. The pandemic made decision-makers realize that special legal order is not only an abstract regulation in the Fundamental Law but an integral part of our legal system. However, the extraordinary situation highlighted some aspects of special legal order that were inconsistently regulated. For instance, the terminology and the extraordinary measures regulated in the Act CXXVIII of 2011 on Disaster Management were inconsistent with the terminology of special legal regimes in the Fundamental Law.²⁷ To eliminate the obstacles of effective crisis management, one of the main innovations was that the new regulation made the Government the only organization to have the power to issue decrees on special legal regimes.²⁸ According to the explanation, in the Hungarian constitutional system, the Government seems to be the most capable organization to handle such issues in a timely manner, and to make operatively, politically, and legally effective decisions.²⁹ Another important change made in order to reach the aforementioned goals was the reduction of the number of special legal regimes from six to three.³⁰ These were the central guidelines when accepting the ninth amendment, and it was set to enter into force on July 1, 2023.

²⁶ Attila Horváth: Összegzés – A különleges jogrend az alkotmányokban. In: Zoltán Nagy; Attila Horváth: A különleges jogrend és nemzeti szabályozási modelljei. Mádl Ferenc Összehasonlító Jogi Intézet (2021), p. 631.

²⁷ Viktória László: A hatályos magyar szabályozás és a koronavírus-járvány első hulláma idején kihirdetett veszélyhelyzet során bevezetett kormányzati intézkedések vizsgálata. In: Katonai Jogi és Hadijogi Szemle 9 (1): pp. 43–76.

²⁸ Article 11 of the 9th Amendment to the Fundamental Law of Hungary

²⁹ Explanation of the 9th Amendment to the Fundamental Law of Hungary. Available: <https://magyarkozlony.hu/dokumentumok/05c2f41386bbedff9aa3ea808a0e1296fd193469/letoltes>

³⁰ Article 11 of the 9th Amendment to the Fundamental Law of Hungary

At the time of accepting the 9th Amendment, no one could see that a war was about to start in our neighbor country, Ukraine. The codification of the 9th Amendment relied on some of the experiences gained during the pandemic and was not based on the imminent danger of war. The general explanation of the 10th Amendment states that the economical and humanitarian effects of the ongoing war between Russia and Ukraine made it necessary for the constituent power to extend the possibility of declaring state of danger in case an ongoing war or a humanitarian crisis in a neighbor country if they have serious effects on Hungary. The Russian-Ukrainian war caused a humanitarian crisis unprecedented since World War II and at the same time changed the economic situation in Europe. Hence, Hungary must be able to effectively handle the humanitarian disaster and the rapid international economic changes. It is the responsibility of Hungary to take care of refugees fleeing from the war, minimizing the negative effects of the war on our economy and to protect its citizens from harmful economic changes. These reasons justify the need for a new Amendment to the Fundamental Law to enable the Government to declare a state of danger; thus, making it easier to avert the emerging negative economic effects and its consequences, as well as to prepare the country to have every necessary tool available when needed for the support of refugees.

Since the aim of this new amendment is to react to an urging situation, the substance of the amendment, namely that in the event of an armed conflict, war situation or humanitarian catastrophe in a neighboring country, or a natural disaster or industrial accident endangering life and property, and in order to mitigate the consequences thereof, the Government shall declare a state of danger, and may introduce extraordinary measures laid down in a cardinal Act, entered into force on May 25, 2022.³¹ However, since this is a modification of the regulation of state of danger which is also affected by the ninth amendment that have not yet entered into force, the ninth amendment shall be modified before entering into force. Moreover, the two new amendments shall enter into force at the same time, on November 1, 2022.³² Although the official explanation does not include any specific reason but only repeats the text of the amendment, the reason why the 9th amendment will enter into force at an earlier date is basically that it would be inconsequent if it entered into force on July 1, 2023, while being essentially connected to the 10th amendment. Additionally, according to Attila Horváth, the 9th Amendment was set to enter into force considerably late after its acceptance.³³ Thus, bringing

³¹ Article 1 of the 10th Amendment to the Fundamental Law of Hungary

³² General explanation of the 10th Amendment to the Fundamental Law of Hungary

³³ Attila Horváth: A különleges jogrend fejlődése Magyarországon a kilencedik Alaptörvény-módosítás tükrében. In Zoltán Nagy et al.: A különleges jogrend és nemzeti szabályozási modelljei. Mádl Ferenc Összehasonlító Jogi Intézet (2021), 131.

to an earlier the date of its entry into force is reasonable and can be justified, especially in the light that the 9th Amendment was published in the official gazette of Hungary on December 22, 2020.³⁴ This means that there is almost 2 years between publishing and entry into force, making enough preparation time for adapting the new regulation.

While the necessity of the timing of the new amendments is comprehensible, there are other inconsistencies of the codification. The tenth amendment is based on the fact that there is an ongoing war in our neighbor country and the modification is necessary because the Government can declare a state of danger in case of a war in a neighboring country, thus we can effectively take care of refugees and can avoid negative economic impacts of the war. This justification is especially interesting in the light of the ninth amendment which stated that the endeavor of the reform is to provide a thorough, more modern, and adaptive regulation which can be used in the ever-changing national and international situation and hence to our security policy based on the experiences of crisis management of the last periods. Yet, the new amendment seems to undermine the intention of the ninth amendment which suggested that it provided a universal solution for special legal regime regulation.

The justification of the tenth amendment states that we need a new regulation for yet another crisis. Even though the 9th amendment reduced the number of special legal regimes and tried to comprise them in 3 specific legal regimes, it seems that the codification was not thorough enough in the light of the current events. If it is essential that the Government can declare state of danger in case there is a war in a neighboring country of Hungary, then it should have been included in the former amendment, had it been codified as effectively as described by its official explanation. Nonetheless, the need for the 10th amendment can mean two things: either the ninth amendment was not efficient enough as lawmakers described it, or it was well efficient, but this would mean that the tenth amendment is unnecessary. Either way, we have the face the fact that these two things contradict each other; therefore, we have to examine the facts in the official explanation of the 10th amendment.

First of all, according to the official explanation, “the ongoing war between Russia and Ukraine made it necessary for the constituent power to extend the possibility of declaring state of danger in case an ongoing war or a humanitarian crisis in a neighbor country if they have serious effects on Hungary.” According to available data, Moldova is the only other foreign country that has

³⁴ Magyar Közlöny 2020/285. Available: <https://magyarkozlony.hu/dokumentumok/39c159f76bc2bf29e090c0966f0941963ffab3f9/megtekintes>

declared a state of danger due to the Russian-Ukrainian war.³⁵ Aside from Moldova, there isn't another country that declared the necessity of special legal order due to the Russian-Ukrainian war. At this point it is worth noting that since 1989, Hungary had to deal with similar situations, when a war is going on in a neighboring country. The Yugoslav wars that lasted more than 10 years between 1991 and 2001, imposed a real security threat on Hungary, as well as had very serious economic and humanitarian effects on it, and yet no special legal order was introduced during that time. This raises the question: if the Government could manage the situation during that period without special legal order, why would we need to use a special legal regime now; moreover, we don't just need to use one, we had to amend the Fundamental Law to enable the Government to declare a state of danger, which indicates how unprecedented this move is. In conclusion, the official explanation of the 10th amendment is insufficient to support that there is a need for the amendment since it doesn't create a universal solution for possible crisis situations. The amendment can be used to declare a state of danger again and continue to govern the country with emergency powers which has become the new normal since the pandemic. However, these actions raise concerns since they can lead to the exploitation and abuse of emergency powers. The International Commission of Jurists have concluded that emergency powers have been abused by the Government during the pandemic to fulfil the Government's political objectives and undermine the rule of law.³⁶ Similarly, the 10th amendment creates a new opportunity for possible abuse of special legal order. After all, we shouldn't forget that a state of danger in an appropriate situation, when used properly, has a serious meaning and message to the people; however, if the new normal is constant state of danger, then the meaning and value of special legal regimes will depreciate, and it can have unpredictable effects in case of a real, serious state of danger in the future.

THE CHANGES OF THE SYSTEM OF THE SPECIAL LEGAL ORDERS IN HUNGARY

The next section of our study is about the changes of the special legal orders in Hungary regarding the 9th and 10th amendments of the Fundamental Law of Hungary. This part includes

³⁵ <https://www.reuters.com/world/europe/moldovan-parliament-votes-60-day-state-emergency-after-russia-invades-ukraine-2022-02-24/>

³⁶ A Facade of Legality: COVID-19 and the Exploitation of Emergency Powers in Hungary. International Commission of Jurists. 2022. Available: <https://www.icj.org/wp-content/uploads/2022/02/Hungary-A-Facade-of-Legality-legal-briefing-2022-ENG.pdf>

the rules of the special legal regimes before the latest amendments, the types and rules of the special legal regimes after the modifications, and the comparison of the regimes.

The Fundamental Law of Hungary regulates the special legal orders from Article 48 to Article 54. It contains six types of regimes:

In the order of the statute, the first is the state of national crisis. This special legal order shall be declared in the event of the declaration of a state of war or an imminent danger of armed attack by a foreign power. In case of the state of national crisis, the National Defence Council needs to be set up.³⁷ This body is responsible for the leadership of the country in an extraordinary event. The Council has multiple rights as it exercises the powers delegated to it by the National Assembly, the powers of the President of the Republic and the powers of the Government. Furthermore, the body can decide on the deployment and other specific activities of the Hungarian Defence Forces, on the deployment of foreign armed forces in Hungary and on the introduction of extraordinary measures laid down in a cardinal Act, moreover, can adopt decrees which for example suspend the application of certain Acts. The members of the Council are the Prime Minister, the ministers, the Speaker of the National Assembly, the leaders of parliamentary groups, and the Chief of the Defence Staff. The president of the body is the President of the Republic.³⁸

The second one is the state of emergency, which shall be declared in two instances: in the event of armed actions aimed at subverting the lawful order or at exclusively acquiring power; or in the event of serious acts of violence massively endangering life and property committed with weapons.³⁹ During the state of emergency the National Assembly remains continuously in session. The ensuring of safety is the task of the police and the national security services as a main rule; however, the Hungarian Defence Forces can be deployed by the National Assembly if the mentioned bodies' performance is insufficient. In the event of state of emergency, the President of the Republic has the power to introduce extraordinary measures laid down in a cardinal Act, for instance suspend the application of certain Acts.⁴⁰

The state of national crisis and the state of emergency have common rules. Both special legal orders require the two-third majority of the members of the national assembly. If the National Assembly is prevented from making such decisions, the President of the Republic has special rights. The President of the Republic shall declare the state of war, the state of national

³⁷ Article 48 (1) a) of the Fundamental Law of Hungary

³⁸ Article 49 (1)-(4) of the Fundamental Law

³⁹ Article 48 (1) b) of the Fundamental Law

⁴⁰ Article 50 (1) and (3) of the Fundamental Law

crisis and the state of emergency, furthermore, can set up the National Defence Council. (The fact, that the National Assembly is prevented from making decisions is unanimously decided by the Prime Minister, the President of the Constitutional Court, and the Speaker of the National Assembly. They also decide whether the declaration of a state of war, state of national crisis or state of emergency is justified.)⁴¹

In the event of a danger of external armed attack (or to meet an obligation arising from an alliance) the Government can declare the third kind of the special legal orders, precisely the state of preventive defence. It may be declared by the two-third majority of the National Assembly for a fixed period of time, and may be extended, as well. As a consequence of the state of preventive defence, the Government has the power to take extraordinary measures laid down in a cardinal Act and even can suspend the application of certain Acts or derogate from the provisions of Acts. In other words, during the state of preventive defence, the Government's rights are similar to the rights of the President of the Republic in the event of state of emergency. These measures remain in power for sixty days at most, or until the end of the state of preventive defence.⁴²

The Fundamental Law also incorporates the state of terrorist threat. The National Assembly have the authority to declare this kind of special legal order for fixed period of time in two situations. The first one is in the event of a concrete terrorist attack, and the second one is in the event of a significant and direct threat of a terrorist attack. As the previous ones, this special legal order also requires two-third majority of the Parliament. With the declaration of state of terrorist threat, the National assembly simultaneously empower the Government to announce extraordinary measures (laid down in a cardinal Act). These extraordinary measures remain in force until the end of the state of terrorist threat, or for fifteen days.⁴³

The fifth special legal order of the Fundamental Law is the unexpected attack. It is more specific (in two aspects) than the preceding ones. Firstly, it doesn't require the declaration by any state organs. In other words, the regulations of the unexpected attack automatically enter into force if external armed groups unexpectedly invade the territory of Hungary. Secondly, the usage of the rules of unexpected attack are obligations for the Government, and not just an opportunity, as in case of other special legal orders. These obligations are "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,

⁴¹ Article 48 (2)-(5) of the Fundamental Law

⁴² Article 51 (1)-(4) of the Fundamental Law

⁴³ Article 51/A (1)-(3) of the Fundamental Law

in order to protect lawful order, life and property, public order and public safety”.⁴⁴ The actions can be taken until the declaration of a state of national crisis or state of emergency. These measures remain in power until the end of the unexpected attack.⁴⁵

And finally, the state of danger can be declared in the event of natural disaster or industrial accident endangering life and property, or in order to mitigate its consequences.⁴⁶

The 9th and 10th amendments will be in effect from 1st September, 2022.

Due to the amendments the system of the special legal orders highly changes. These will be regulated from Article 48 to Article 56. Most of the regimes will simply get out of the Fundamental Law or will be incorporated into other types of special legal orders. In consequences of the amendments there will be three kinds of special legal orders: state of war, state of emergency and state of danger.

The state of war is separated into three cases. “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”.⁴⁷ Compared to the state of national crisis, the state of war is more extensive as it includes the regulations of the (former) state of preventive defence and in a certain sense, the regulations of the state of unexpected attack. Specifically analysed, Article 49 (1) a) matches to the cases of the former state of national crisis, Article 49 (1) b) similar to the event of unexpected attack and to the first turn of state of preventive defence, and finally, Article 49 (1) c) is roughly equal to the second turn of the state of preventive defence. Also, an immense difference is that the previous National Defence Council will be completely removed from the Fundamental Law. Instead of the National Defence Council, the Government shall exercise the authorities delegated to it by the Parliament, and inter alia it shall decide on the deployment of the Defence Forces.⁴⁸ All things consider, due to the consequences of the amendments, the Government will have nearly the same purviews during the state of war as the former National Defence Council. However, the amendments incorporate a great change regarding the President of the Republic. Now, before the modifications, the President of the Republic can be the president of the National Defence Council, can suspend the application of certain Acts, can take extraordinary measures, and so on, which means it has a cardinal rule in the special legal

⁴⁴ Article 52 (1) of the Fundamental Law

⁴⁵ Article 52 (1) and (4) of the Fundamental Law

⁴⁶ Article 53 (1) of the Fundamental Law

⁴⁷ Article 49 (1) of the Fundamental Law (effective date: 1st September 2022)

⁴⁸ Article 49 (3) of the Fundamental Law (effective date: 1st September 2022)

regimes. Compared to the latest amendments, they reduce the President's authorities. It will have rights only in a specific event, precisely if the National Assembly is prevented from making decisions, and even these rights are less than before.⁴⁹

The state of emergency will be nearly the same as the former one but will slightly differ from it. As well as in the current regulations, the "new" state of emergency shall be declared in the same two situations, however the wording is disparate. Newly, this special legal regime will require the subversion of the constitutional order instead of the lawful order. Other difference is that formerly the state of emergency could be declared in the event of serious acts of violence (massively endangering life and property), but now it changes to serious illegal acts (massively endangering life and property).⁵⁰ As I see it, the change of the terminology of lawful order to constitutional order won't be significant because it refers to the same phenomenon. Even the scientific community uses these phrases as synonyms.⁵¹ As for the modification of 'act of violence' to 'illegal act', the conduct of the perpetrator will be much wider as the act will not need to be violent, just illegal and it is obvious, that a large percentage of illegal acts are not violent. The rule of declaration remains the same, so it stays in the purview of National Assembly (with two-third majority).⁵²

At last, the state of danger will get a more complex definition as it will contain former and new elements as well. As in the current form, it can be declared in the event of a natural disaster or industrial accident endangering life and property (, or in order to mitigate its consequences), but it expands with a new phrase: in the event of armed conflict, war or humanitarian disaster in a neighbouring country.⁵³ The changes of regulation of state of danger are explained below.

CLOSING REMARKS

Looking at the evolution of the text of the Fundamental law of Hungary, it is clear that the concept of state of danger, as well as its interpretation have changed comprehensively and its scope of application broadened massively during the past decade. At the time the Fundamental Law of Hungary entered into force, state of danger was regulated as one of the

⁴⁹ Article 56 (1) of the Fundamental Law (effective date: 1st September 2022)

⁵⁰ Article 50 (1) of the Fundamental Law (effective date: 1st September 2022)

⁵¹ TILL Szabolcs: „Különleges jogrend” in JAKAB András – FEKETE Balázs (szerk.): *Internetes Jogtudományi Enciklopédia* (Alkotmányjog rovat, rovat szerkesztő: BODNÁR Eszter, JAKAB András) <http://ijoten.hu/szocikk/kulonleges-jogrend> (2019). [19]

⁵² Article 50 (2) of the Fundamental Law (effective date: 1st September 2022)

⁵³ Article 51 (1) of the Fundamental Law (effective date: 1st September 2022)

types of the special legal regimes, and it remains to be the case despite the previous restructure of the chapter examined in this article. However, while the Hungarian legislator had originally limited the concept of state of danger to events of natural disaster or industrial accident endangering life and property (and mitigation of the consequences of such events), as the legislation stands at this moment, the concept is extended to various other events (armed conflict, war or humanitarian disaster in a neighbouring country).

It is beyond doubt that many unforeseeable challenges, especially the pandemic and the Russian-Ukrainian war, needed to be handled during the past years that required efficient and immediate reactions and solutions, therefore, the application of the Articles governing state of danger seemed to be justified, the ninth and tenth Amendments to the Fundamental Law of Hungary nevertheless have given rise to debates regarding the necessity, the unprecedentedly wide scope of the concept and the consequences of such rules. The overview given in this article suggests that the concerns and criticisms may be well-founded.

Indeed, considering that the ninth Amendment, which was supposed to provide a modernised legal framework containing a concept of state of danger that would be suitable to be applied to all kinds of challenges, did not enter into force, it is questionable whether the tenth Amendment delivered a consequent, stabile, universal and most importantly, a long-term solution to any and all upcoming crisis situations. It appears that the current tendencies regarding the changing concept of state of danger and the structure of the Chapter governing the types of special legal orders may undermine the stability of the Fundamental Law of Hungary. These issues seem to be rather concerning taking into account that such stability plays a key role in safeguarding the integrity of the Hungarian legal system.

It is also emphasized in the article that the state of danger declared on the 24th May 2022 is not identical to the one that was declared for the first time on the 11th March 2020. Not only did the text of the legal basis for their implementation change, the social-economical background and international political situation are different as well. The challenges that have arisen after the outbreak of the pandemic differ from the ones that were stressed by the Hungarian Government in connection with the Russian aggression. It may be argued that the concept of state of danger has become rather distant from its original purpose and serves different aims. Yet, it still appears as a continuous, uninterrupted phase to citizens. They may find it difficult to distinguish between the different states of danger but also to understand the key differences between the decision-making processes provided by the default rules of the Fundamental law of Hungary and by the Articles governing special legal orders, especially state of danger. Some of the biggest questions regarding the changing concept of state of danger are

whether, legally speaking, these fundamentally different situations shall be treated in the same way (fall under the scope of the same special legal regime), and whether it is indeed justified to extend the concept to events covered by the text of the tenth Amendment.

Therefore, the main findings of the article are that it would be crucial for the legislator to find and stick to a concept of state of danger that is appropriate supports the stability of the Fundamental Law of Hungary the most, underpins the importance of its transparency and comprehensibility towards citizens while being suitable to fulfil its original purpose to enable the Government to implement adequate and rapid measures regarding any arisen challenges.

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