

THE STATE
OF EXCEPTION:
A SPRINGTIME
FOR SCHMITTIAN
THOUGHTS?

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Associate Professor of Comparative Constitutional Law at the UNESCO Chair on Human Rights and Peace, Eötvös Loránd University (ELTE) Faculty of Social Sciences, Budapest
E-mail: kriszta.kovacs@tatk.elte.hu

ABSTRACT

One of the crucial challenges the European community faces today is the abusive practices of introducing and constitutionalising state emergency powers. In the last few years two European Union Members States, France and Hungary, have declared a state of emergency and proposed to amend constitutionally delegated powers to deal with emergencies. The paper asserts that these changes are not identical since there is a difference in the way contemporary France and Hungary regulate, declare, prolong and justify extraordinary measures. The difference lies in the regime applying these emergency measures. Certainly, there are disagreements even within the democratic world on many questions concerning emergency powers. The reason behind this controversy is the fact that Kantians and Lockean think differently on how the rule of law can control politics in abnormal times. However, despite this controversy, there is a consensus within the democratic world that the main purpose of declaring a state of emergency is to restore the democratic legal order and the full enjoyment of human rights. The fate of the 2015 French constitutional amendment bill may illustrate how and to what extent emergency affects the quality of democracy. By contrast, in an authoritative regime, emergency creates special power. Following Carl Schmitt, authoritarians emphasise that the rule of law cannot govern an absolute state of exception. The law in such a situation is based solely on the decision of the sovereign. The recent Hungarian practice of declaring and prolonging a “state of crisis caused by the mass migration” is an example of the abuse of executive power by fabricating friends and enemies of the state. The constitutional amendment on declaring a “state of terrorist threat” also follows the Schmittian tradition: it institutionalises, and what is more, constitutionalises a strong, arbitrary executive power unhampered by legal constraints.

KEYWORDS

constitutionalising the state of emergency, democratic checks, France, permanent state of exception, Hungary

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1. *Introduction*

Government by emergency rule for a long, uninterrupted period, together with the strengthening of constitutional emergency powers, constitutes a new phenomenon in post-1989 Europe. As a response to the November 2015 Paris terrorist attacks, French President François Hollande declared a state of emergency and asked for a constitutional amendment to permanently entrench emergency powers. Because of additional terrorist attacks in December 2016, the French Parliament approved the extension (this time the fifth one) of the state of emergency until July 2017. In late autumn 2017 an Act against terrorism was introduced, which, according to academics¹ made the state of emergency permanent. Hungary has been under a state of emergency since 2015 when Viktor Orbán's government declared "a state of crisis caused by mass migration" in two southern regions and later for the entire territory of Hungary. The state of crisis has been prolonged four times so far and in early 2016 a constitutional amendment was adopted to widen the scope of constitutional emergency powers including special executive powers to deal with emergencies.

Both the European Union and the Council of Europe were being called into action to safeguard democracy against the abusive practice of introducing and constitutionalising state emergency powers. Usually, the European Union bodies defer to the European Council organs as to the standards for declaring a state of emergency and adopting exceptional measures. Interestingly though, there is no specific reference in the European Union Charter of Fundamental Rights and in the "explanations" to the Charter to the "national emergency" provisions of the

* The author is responsible for the choice and presentation of information contained in this article as well as for the opinions expressed therein, which are not necessarily those of UNESCO and do not commit the Organization.

¹ *Banalisation de l'état d'urgence: une menace pour l'Etat de droit*, Libération, 12 juillet 2017. Available at http://www.liberation.fr/debats/2017/07/12/banalisation-de-l-etat-d-urgence-une-menace-pour-l-etat-de-droit_1583331 (accessed on 21/11/2017). More on this, see HAGUENAU-MOIZARD 2017.

European Convention on Human Rights². Council of Europe bodies such as the Venice Commission and the Commissioner for Human Rights have issued opinions³ on the human rights implications of the planned and the already adopted emergency measures. However, these international documents had clear tangible consequences only in the case of France.

In order not to become lost in the jungle of concepts concerning emergency powers, in this article I will differentiate between the state of emergency and the state of exception. The notion of state of emergency refers to public emergencies in democracies, such as national security crises, including terrorist attacks, but also economic catastrophes and natural or technological disasters. During the state of emergency, democratic state institutions function normally, although the distribution of powers is modified in favour of the executive in order to manage the crisis. It is an important principle though that «the executive is not permitted to use emergency powers to make any permanent changes in the legal/constitutional system»⁴.

By contrast, the notion of the state of exception, or *Ausnahmezustand*, as Carl Schmitt called it, refers to a completely abnormal situation, where, according to Schmitt, the continued application of the normal legal rules and rights prevents effective action to end the emergency. «The exception is that which cannot be subsumed: it defies general codification, but it simultaneously reveals a specifically juristic element — the decision in absolute purity»⁵. In this view, the application of the normal legal rules and rights should be suspended by the decision of the sovereign on the ground that the situation is abnormal. The basis of the suspension of the law is the state's «right to self-preservation»⁶.

My paper is divided into two parts. The first focuses on the following question: When is it justified to declare a state of emergency under the European standards? To answer this question, I explore the defining characteristics of a state of emergency. The second part concentrates on the Schmittian concept of the state of exception. I argue that the view of Carl Schmitt serves as the intellectual basis for the Hungarian declaration and prolongation of state of exception and the constitutionalisation of the unhampered executive power of the prime minister. The paper concludes that in the case of emergency there are only two options: the state either remains a temporarily modified constitutional democracy, or it is not a constitutional democracy at all.

² PEERS 2004, 157-158.

³ COMMISSIONER FOR HUMAN RIGHTS 2015; VENICE COMMISSION 2016.

⁴ FERREJOHN, PASQUINO 2004, 211.

⁵ SCHMITT 2005, 13.

⁶ SCHMITT 2005, 12.

2. State of Emergency

According to the writer and human rights advocate H. G. Wells, «the primary objective of every sane social order is to dismiss fear from human life»⁷. Certainly, the desire for security is an understandable one. Political communities, therefore, bind themselves in their sane moments «with constitutional rules to guard against future temptation [...] (that) appears typically in the guise of an “emergency”»⁸. It is often assumed that the executive is best positioned to act effectively in public emergencies. It has the authority, the competence, the necessary information and the infrastructure to handle the crisis, which often demands a speedy and firm decision. The legislative power is not able to act promptly, therefore sometimes only the executive is in the position to make the necessary decision. However, as speed and flexible executive action may come at high cost to rights and liberties, there is an understandable concern for personal liberty.

A challenge for a democracy is to establish modes of governance that can effectively defeat security threats while preserving personal rights and liberties as much as possible. One of the primary duties of the state is to sustain personal liberties and protect the individual from any human rights abuse. Historical examples show, however, that grave human rights violations tend to occur in emergent democracies. It was difficult to find the proper balance between the public interest of security and the liberty rights of the individuals when the IRA terrorised Great Britain and the ETA terrorised Spain after 1978.

There is a consensus within the democratic world that exceptional situations may demand exceptional measures. Special (economic, political, environmental, etc.) circumstances might warrant temporary suspensions of constitutional guarantees, in such cases where the very survival of the constitutional democracy is at stake. However, there are disagreements in the democratic world on many questions concerning emergency powers. In particular, Kantians and Lockeans⁹ think differently on how the rule of law can control politics in abnormal times¹⁰. Kantians believe that the law can and should control emergencies, therefore they emphasise the *substantive requirements* for declaring and extending a state of emergency. They recognise that emergent governmental action usually restricts constitutional right, tradition, or practice. But they insist that emergent governmental action should always respect the basic value of constitutional democracy: the equal dignity of human beings¹¹. They think that the basic longing

⁷ Cited by SMITH 2015, xliii.

⁸ FINN 1991, 5.

⁹ The most influential modern moral theories are utilitarianism and Kantianism.

¹⁰ DYZENHAUS 2012, 444.

¹¹ MURPHY 1995, 183.

to live with dignity is universal, and that is what should be protected even in cases of public emergencies.

While Kantians focus more on the substantive aspect, Lockeans stress the importance of the *procedural checks* on declaring and extending a state of emergency. They find that without institutional guarantees (e.g. legislative power, judiciary, and international organs) there is too great a temptation for abuse of executive power. John Locke's idea of prerogative serves as the basis of this argument. Locke defines the king's prerogative as «nothing but the power of doing public good without a rule»¹². Locke holds that the prerogative is the «power to act according to discretion for the public good, without the prescription of the law and sometimes even against it»¹³. But it is important to emphasise that the very aim of this prerogative of the executive to act outside of the ordinary law is to protect the constitutional order. Furthermore, the prerogative might be located within the constitution. Hence, it is constrained by the legal principles on which the democratic public and social life is based. These substantive and procedural requirements are mirrored in today's international documents, which list the guarantees against possible abuses when declaring or prolonging a state of emergency.

2.1. *Substantive requirements*

After the Second World War, international human rights documents, such as the European Convention on Human Rights (ECHR), were supported and ratified by the European states as a protection against the possible return of fascism or other forms of totalitarianism. But these very documents permit democratic states, in exceptional circumstances, to deviate from some of their obligations if without temporary restrictions threats to human rights cannot be effectively fought against¹⁴. For instance, under Article 15 of the ECHR, Member States may derogate from their obligations to secure certain rights and freedoms under the Convention. The ECHR makes a distinction between derogable and non-derogable rights. Some convention rights do not allow for any derogation. No derogation from the right to life in peacetime¹⁵ shall be made by states. Even in a public emergency situation a state must not apply torture or other forms of inhuman or degrading treatment¹⁶. The ECHR prohibits any derogation with respect to the prohibition of slavery and servitude¹⁷, and the *nullum crimen, nulla*

¹² LOCKE 1823, 178.

¹³ LOCKE 1823, 176.

¹⁴ VENICE COMMISSION 2010, 7.

¹⁵ *McCann and Others v. The United Kingdom*, Judgment of 27 September 1995, para 147.

¹⁶ *Aksoy v. Turkey*, Judgment of 18 December 1996, para 62. confirmed in *Öcalan v. Turkey* (no. 2), Judgment of 18 March 2014, paras 97-98.

¹⁷ *Rantsev v. Cyprus and Russia*, Judgment of 7 January 2010, para 283.

*poena*¹⁸ principles. In addition, the ECHR prohibits in absolute terms the death penalty¹⁹ and the violation of the *ne bis in idem*²⁰ principle. Other rights may be subject to derogation, like for instance freedom of expression²¹, the freedom of association²², and the right to personal liberty²³ in order to more effectively safeguard human security for all. But even in this case, the Member States should convince the European Court of Human Rights (ECtHR) that the derogation is justified and that the Convention right restriction during a period of derogation was necessary and proportionate to the aims to be achieved²⁴.

Under Article 15 (1) of the ECHR a derogation is justified in such cases where the very survival of the nation is at stake and to the extent strictly required by the exigencies of the situation²⁵. The ECtHR accepts that the following characteristics must present in order for a situation to qualify as a state of emergency. The danger to the life of the nation must be actual or imminent, and the threat should be capable of undermining the democratic regime itself. Organised community life must be threatened, and there should be something which is sufficiently grave and imminently threatens the life of the whole nation²⁶. Since the text of Article 15 is based on Article 4 of the ICCPR²⁷, the ECtHR follows the standpoint of the Human Rights Committee on emergency issues, which emphasises, that «not every disturbance or catastrophe qualifies as a public emergency which threatens the life of the nation, [...] even in wartime, the situation must be really serious before it can be considered as a threat to the life of the nation»²⁸.

Although the Court's case-law has not explicitly incorporated the requirement that the emergency be temporary²⁹, other Council of Europe bodies, such as the Venice Commission, underline that the crisis or danger must be exceptional and provisional in order to qualify as a state of emergency. Thus, an ever-present risk of a terrorist attack is not sufficient to justify a permanent state of emergency. This is because Member States «may be inclined, under the pretext of a state of emergency, to use their power of derogation [...] to a larger extent than is justified by the exigency of the situation»³⁰.

¹⁸ Article 15.2 of the ECHR.

¹⁹ *Al-Saadoon and Mufdi v. The United Kingdom*, Judgment of 2 March 2010, para 118.

²⁰ Protocols 6 and 13, and Article 4.3 of Protocol 7.

²¹ *Sürek v. Turkey*, Judgment of 8 July 1999, para 64.

²² *Herri Batasuna and Batasuna v. Spain*, Judgment of 30 June 2009, para 94.

²³ *A. and Others v. The United Kingdom*, Judgment of 19 February 2009.

²⁴ VENICE COMMISSION 2006, 3; O'BOYLE 2016, 13.

²⁵ EUROPEAN COURT OF HUMAN RIGHTS 2017b, 1.

²⁶ VENICE COMMISSION 2006, 4.

²⁷ EUROPEAN COURT OF HUMAN RIGHTS 2017a, 5.

²⁸ HUMAN RIGHTS COMMITTEE 2001.

²⁹ EUROPEAN COURT OF HUMAN RIGHTS 2017b, 6.

³⁰ VENICE COMMISSION 2006, 4; VENICE COMMISSION 2016, 18.

According to these substantive international standards, human rights represent the “rule” and derogation is the “exception”; the above substantive requirements thus significantly narrow the pool of possible situations which can qualify as a state of emergency.

2.2. Procedural requirements

In addition to the substantive requirements, there are built-in institutional controls for declaring a state of emergency. First of all, the legislative power may serve as a check on the executive. The legislative power usually has a say on declaring, extending and scrutinising the state of emergency. For instance, many domestic constitutions in Europe require the prior consent of the legislative power to declare a state of emergency³¹, and normally Parliament is the body with the authority to extend the state of emergency. Furthermore, in some democratic countries, like for instance in Germany, Italy or France, the Parliament “scrutinises” and “assesses” the implementation of a state of emergency. As the Venice Commission rightly puts it, the question of who should end a state of emergency, when and how, cannot be left to the judgement of an executive which is exercising increased powers. It is a question for Parliament; hence the need for parliamentary life to continue throughout a state of emergency³².

The control of the legislative power is crucial, but insufficient. In all the above-mentioned historical examples, Great Britain and Spain dealt with domestic terrorism by delegating powers to executives by ordinary legislative means. These measures are supposed to remain temporary; however, practice shows that occasionally, as happened in Great Britain with respect to the Defence against Terrorism Acts, the measures become permanent. In such cases, the ordinary judiciary and constitutional courts can serve as control organs³³. Once a state of emergency is declared, some constitutional guarantees are limited, some rights could even be suspended, and the normal constitutionally ordained power-sharing gives way to expanded executive powers until the crisis is overcome. In such circumstances, the independent judiciary is in the position to decide posteriorly on the scope and duration of the state of emergency, as well as on the proportionality of the special measures adopted. Therefore, constitutional review of emergent laws and governmental decrees and the posterior judicial review of the emergent governmental actions are essential³⁴. Certainly, in order to go to court, there should

³¹ For instance, Germany, Spain, Greece, Portugal, Finland, Latvia, Lithuania, Slovakia, Romania, Ireland, Croatia, etc. VENICE COMMISSION 1995, 12-15.

³² VENICE COMMISSION 1995, 24.

³³ In the case of the British Defence against Terrorism Act not the courts, but special commissions were employed to monitor the executive, see FERREJOHN, PASQUINO 2004, 229.

³⁴ Michael O’Boyle argues that suspension of habeas corpus «creates a presumption of

be an effective mechanism for suing the government for its conduct. And even in such a case, judicial review does not guarantee that human rights violation will not occur³⁵. Furthermore, courts sometimes show too much deference to the executive until the moment of perceived danger passes³⁶.

In addition to domestic checks, therefore, international supervision might be important in ensuring that emergency laws are not abused. Certainly, it is for the state to decide on the introduction of a state of emergency and on the derogation of certain rights and liberties. However, the state should persuade the international forum that introducing a state of emergency in a given case is justified. For instance, the ECtHR has declared itself competent to consider emergency situations. Hence, a vital procedural safeguard is that Council of Europe Member States should inform the Secretary General of the Council of Europe about the state of emergency measures taken, on the Convention rights derogations and the reasons therefor.

The case of France may illustrate how emergency measures are tested by domestic and international fora. In November 2015 large-scale terrorist attacks took place in and around Paris. As a response to these attacks, French President François Hollande declared a state of emergency via three decrees³⁷. In order to lengthen a state of emergency beyond twelve days a statute was needed in France; therefore, the presidential decrees were followed by the Act 2015-1501 of 20 November 2015, which extended the state of emergency by three months and amended the Act 55-385 of 3 April 1955 on the state of emergency. As a safeguard against abuse of executive power, the French legislative organs established a “continuous watch” with the task of controlling permanently the implementation of the state of emergency. In addition, the Constitutional Council delivered judgments on the constitutionality of some parts of the Act of 3 April 1955 on the state of emergency as in force following the enactment of the Act of 20 November 2015. The Constitutional Council reviewed and upheld house arrest as constitutional, arguing that a state of emergency can be declared in situations when there is an imminent danger and only those persons may be placed under house arrest for whom «there are serious grounds to consider his or her behaviour may constitute a threat for public security or order»³⁸. Later, the

disproportionality and therefore illegality». O’BOYLE 2016, 5.

³⁵ In the United States after the 9/11 attacks limitless detentions with torture approved by the executive. The courts subsequently cut back these powers by holding that Guantanamo detainees have the right to habeas corpus. *Boumediene v. Bush*, 553 U.S. 723 (2008).

³⁶ ACKERMAN 2006, 60-63. For instance, the United States Supreme Court in the case of *Korematsu v. the United States*, 323 U. S. 214 (1944) upheld the curfew and internment orders against individuals of Japanese descent during the Second World War.

³⁷ Décret n° 2015-1475, Décret n° 2015-1476, Décret n° 2015-1478 du 14 novembre 2015.

³⁸ Decision no. 2015-527 QPC of 22 December 2015. Available at: <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2015/2015-527-qpc/version-en-anglais.146959.html> (accessed on 21/11/2017).

Constitutional Council held that temporary closure of concert halls and theatres, pubs and places of meeting of any kind was in accordance with the Constitution³⁹.

In addition to the domestic checks, international fora also played a significant role. Soon after the 2015 November terrorist attacks, France informed the Secretary General of the Council of Europe about the emergency measures adopted. Since the state emergency was prolonged, France lodged a further information note⁴⁰ according to Article 15. The French authorities argued in the vaguely formulated⁴¹ notification that the terrorist threat was of a lasting nature; therefore, some necessary measures might involve derogation from the obligations under the ECHR. Although the ECtHR has not yet delivered judgements on the compatibility with the ECHR of the adopted special measures, the Venice Commission had the possibility to review some pieces of the emergency legislation.

In November 2015, the French President proposed a draft constitutional law on the “protection of the Nation” to enshrine the state of emergency law in the constitution and to revoke the French nationality of citizens if they are convicted of terrorism. Many questioned the controversial proposal’s compatibility with European standards, and the Venice Commission was asked to form an opinion⁴² on the draft law. The Venice Commission welcomed the constitutionalisation of the state of emergency but called on the French authorities to amend the adopted constitutional text in order to avert the risk that the constitutional system for a state of emergency would be applied too widely, and in favour of the majority in power. The Commission stressed that the constitutional text should include not only the possibility of declaring the state of emergency, but also the «formal, material and time limits which must govern such regimes»⁴³.

The French authorities did not change the text, and the President withdrew the constitutional amendment altogether. Consequently, in the French case Parliament and domestic judges acted as safeguards against the abuse of executive power. Furthermore, the procedure of a consultative body like the Venice Commission served effectively as an international control mechanism.

3. *State of Exception*

The previous section discussed how democracies and international organs, first

³⁹ Decision no. 2016-535 QPC of 19 February 2016. Available at: <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2016/2016-535-qpc/version-en-anglais.147082.html> (accessed on 21/11/2017).

⁴⁰ EUROPEAN COURT OF HUMAN RIGHTS 2017b, 2.

⁴¹ MILANOVIC 2015.

⁴² VENICE COMMISSION 2016.

⁴³ VENICE COMMISSION 2016, 15.

and foremost the Council of Europe, respond to public emergencies based upon the theories of Immanuel Kant and John Locke. There are rival concepts, however, which argue that any attempt to legalise an abnormal situation is doomed to failure. Notably, the view of Carl Schmitt has served as the intellectual basis for modern authoritarians⁴⁴ who speak of an absolute state of exception, where the sovereign is legally uncontrolled and can go beyond the rule of law in the name of public good. The second part of this paper discusses the example of Hungary, which has been in a permanent state of exception for years.

Carl Schmitt is the main representative of the view that a state of exception (*Ausnahmezustand*) is a lawless void when there is an order, but the order is not a normative, rather a factual one, where «the state remains, whereas law recedes»⁴⁵. This order is constituted by the sovereign's decision and the «sovereign is he who decides on the exception»⁴⁶ and on «whether the constitution needs to be suspended in its entirety»⁴⁷. The state of exception creates special power: the sovereign decides both when there is a state of exception and how best to respond to that situation. And that decision for Schmitt is one which is based on the consideration of who is a friend and who is an enemy of the state⁴⁸.

In the Hungarian case, the government decided for itself the friend-enemy distinction. The Fidesz-Christian Democratic government elected in 2010 won two-thirds of the seats in the Hungarian parliament, which gave it the power to change the constitution at will. In 2011, the governing coalition unilaterally adopted a new constitution⁴⁹ by referring to the consequences of the 2008 global economic crisis and the “paralysed nature” of the then constitutional bodies of Hungary. The 2008 economic crisis and the high level of public debt of the country served as enemies of the state, together with the opposition parties, first and foremost the formerly governing socialists, whom the government labelled as communists. Nevertheless, there is no sign in the text that the new constitution, called the Fundamental Law, was assumed to be an interim (emergent) constitution. Moreover, the Fundamental Law does not provide for suspension of constitutional rights in times of economic crisis. Thereby even the Fundamental Law admits that in times of financial crisis keeping constitutional rules is not impossible⁵⁰.

In 2015, the Hungarian government found a new enemy, when state officials began treating asylum seekers as enemies, labelling them as “illegal migrants”; and

⁴⁴ TÓTH 2013, 21ff.

⁴⁵ SCHMITT 2005, 12. According to Dyzenhaus, Carl Schmitt radicalised John Locke's idea on the prerogative. DYZENHAUS 2012, 443-444.

⁴⁶ SCHMITT 2005, 5.

⁴⁷ SCHMITT 2005, 7.

⁴⁸ SCHMITT 2007, 26.

⁴⁹ TÓTH 2017, 386.

⁵⁰ KOVÁCS 2014, 5.

the government uses the “mass immigration” as a justification for introducing emergency measures. As a first step in “fighting the migrants” the government launched a countrywide campaign. A national consultation on “illegal immigration” and terrorism was launched and Hungarian language billboards were displayed which read: “If you come to Hungary, you have to keep our laws!” or “If you come to Hungary, you shouldn’t take the jobs of Hungarians!”⁵¹ Later, a governmental decree declared a list of “safe countries of origin” or “safe third countries” from which asylum applications can use an accelerated procedure,⁵² and amendments⁵³ provided for the erection of a fence on the southern border. Within a few months, razor-wire border fences were built, and new laws made the crossing of the closed border without proper papers illegal, criminalising illegal entry to the country. The new laws allowed the government to set up “transit zones” within sixty meters of the national borders for processing applications for entry to Hungary⁵⁴. Asylum seekers (including children) are automatically detained⁵⁵ in the transit zones without any available legal remedies. Moreover, the government has started to transfer⁵⁶ asylum seekers from open reception facilities to the transit zones so that each and every asylum seeker will be within the transit zones.

Similarly to the fate of the former “enemies” of the state, the government made reference to the asylum seekers when starting to introduce emergent measures. Based upon a very vague constitutional authorisation⁵⁷ it declared “a state of crisis caused by mass migration” in two southern regions of Hungary⁵⁸, allowing it to shut down roads and speed up asylum court cases. Later legal provisions⁵⁹ were adopted to enact the “state of crisis caused by mass migration” and to make it possible to renew the state of crisis indefinitely at six-month intervals.

⁵¹ See the English language official government website. Available at: <http://www.kormany.hu/en/prime-minister-s-office/news/national-consultation-to-be-launched-on-illegal-immigration> (accessed on 21/11/2017). *Hungary’s poster war on immigration*, BBC News, 14 June 2015. Available at: <http://www.bbc.com/news/world-europe-33091597> (accessed on 21/11/2017).

⁵² Governmental Decree 191/2015 on the national list of safe countries of origin and safe third countries.

⁵³ Act CXXVII of 2015 on the establishment of temporary border security closure and on amending acts related to migration.

⁵⁴ More on these laws, see SCHEPPELE 2016, 3 ff.

⁵⁵ The ECtHR in the case of *Ilias and Ahmed v. Hungary*, Judgment of 14 March 2017 held the detention unlawful.

⁵⁶ The Hungarian Helsinki Committee requested the ECtHR to apply interim measures in the case of some children and women and the Court granted it. See <http://www.helsinki.hu/en/hungary-law-on-automatic-detention-of-all-asylum-seekers-in-border-transit-zones-enters-into-force-despite-breaching-human-rights-and-eu-law/> (accessed on 21/11/2017).

⁵⁷ Under Article 15 (1) of the Fundamental Law «the Government shall exercise powers which are not expressly conferred by laws on another state body».

⁵⁸ Governmental Decree 269/2015 on declaring a state of crisis caused by mass migration and on the rules in connection with the declaration, continuation and termination of the state of crisis (in counties Bács-Kiskun and Csongrád).

⁵⁹ Act CXLII of 2015 on the amendment of the Act LXXX of 2007 on Asylum.

Accordingly, the state of crisis was first extended to four more counties⁶⁰. This extension would have expired in March 2016 but in that month a new decree⁶¹ was adopted to declare “a nationwide state of crisis caused by mass migration” for another six months, allowing tougher measures for police and the army to patrol borders and search for illegal migrants throughout the country. In September 2016, the nationwide state of crisis was further extended⁶² until March 2017. As a justification, the Minister of the Interior argued⁶³ that Slovenia, Croatia and Serbia had implemented extraordinary measures on their borders allowing entry only under Schengen regulations. In the Minister’s view, it was uncertain what reactions these measures could create from the refugees and “illegal migrants” who were already in these countries. Later, the state of crisis has been further extended until September 2017⁶⁴ and recently until March 2018⁶⁵ without any justification whatsoever.

Since the government has declared and prolonged the state of crisis caused by mass migration, a European Union Council Decision⁶⁶ was adopted introducing a quota system for the distribution and settlement of asylum seekers and migrants among Member States. In response, the Hungarian Parliament adopted an Act⁶⁷ calling on the Hungarian government to initiate an action for annulment against the Council Decision before the EU Court of Justice. Accordingly, the EU Council Decision was challenged⁶⁸ by the Hungarian State before the Luxembourg court. Later the European Commission opened an infringement procedure against Hungary⁶⁹ concerning its asylum legislation. In response, in early 2016 the

⁶⁰ Governmental Decree 270/2015 on declaring a state of crisis caused by mass migration in counties Baranya, Somogy, Zala and Vas and on the rules in connection with the declaration, continuation and termination of the state of crisis.

⁶¹ Governmental Decree 41/2016 on declaring a state of crisis caused by mass migration to the entire territory of Hungary and on the rules in connection with the declaration, continuation and termination of the state of crisis.

⁶² Governmental Decree 272/2016 on the amendment of the Governmental Decree 41/2016.

⁶³ *Europe’s Refugee Crisis: Hungary Declares State of Emergency Over Migrants*, NBC News. Available at: <http://www.nbcnews.com/storyline/europes-border-crisis/europe-s-refugee-crisis-hungary-declares-state-emergency-over-migrants-n534746> (accessed on 21/11/2017).

⁶⁴ Governmental Decree 36/2017 on the amendment of the Governmental Decree 41/2016.

⁶⁵ Governmental Decree 247/2017 on the amendment of the Governmental Decree 41/2016.

⁶⁶ EU Council Decision 2015/1601 on establishing provisional measures in the area of international protection for the benefit of Italy and Greece.

⁶⁷ Act CLXXV of 2015 on acting against the compulsory settlement quota system in defence of Hungary and Europe.

⁶⁸ Case C-643/15 - Slovak Republic and Hungary v Council of the European Union, Judgment of the Court of 6 September 2017. None of the pleas in law put forward by Slovakia and Hungary was accepted by the Court.

⁶⁹ European Commission Press Release. Available at http://europa.eu/rapid/press-release_IP-15-6228_en.htm and http://europa.eu/rapid/press-release_IP-17-1285_en.htm (accessed on 21/11/2017). The Commission has found the Hungarian legislation in some instances to be incompatible with EU law,

Government called for a referendum that would allow the electorate to vote on the following question: «Do you want the European Union, without the consent of Parliament, to order the compulsory settlement of non-Hungarian citizens in Hungary?» Connected to this a new poster campaign was launched; billboards were displayed all over Hungary which read (in Hungarian): «Let's send a message to Brussels, so that they can understand it as well». At the top of the billboard, the text said «Referendum 2016 against compulsory settlement»⁷⁰. The aim of the referendum was to win approval of the people to maintain the permanent state of exception. Although the prime minister claimed a victory, since nearly 98 per cent of those who took part supported the government's call, because of the low turnout the referendum was invalid.

Shortly afterwards, the prime minister personally proposed⁷¹ a constitutional amendment to put the “results” of the referendum into the Fundamental law, so that Hungary alone can determine asylum policy. The argument for adopting the constitutional amendment was that it would be necessary in order to manage the adverse results from the migration crisis, including also threats of terrorism⁷².

The original text of the Fundamental Law contained a detailed set of prescriptions for the state authorities to respond to an emergency. It specified five instances (state of national crisis, state of emergency, state of war, state of preventive defence, unexpected attack)⁷³ that allowed special measures to be enforced for national security reasons. The constitutional text contained an exhaustive list of those situations when the country was disturbed or endangered, but did not provide for suspension of constitutional rights in other situations.

The new constitutional amendment, called the Sixth Amendment of the Fundamental Law⁷⁴, included Article 51/A on the “state of terrorist threat” in the constitution. It provides for special emergency powers in case of a high threat of terrorist attack. The government may request Parliament to declare a state of terrorist threat after a terrorist attack or during a period of high threat of terrorism. However, the government can start exercising emergency powers as soon as it makes the request for Parliament to declare the state of emergency. It is for the government to decide on how to respond to the emergency: it may pass decrees that

specifically, with the Asylum Procedures Directive and the Directive on the right to interpretation and translation in criminal proceedings as well as the EU Charter of the Fundamental Rights.

⁷⁰ *Migrant crisis: The smugglers' route through Hungary*, BBC News, 25 May 2016. Available at: <http://www.bbc.com/news/world-europe-36368580> (accessed on 21/11/2017).

⁷¹ Viktor Orbán's speech in which he claimed a referendum victory. Available at: <http://www.miniszterelnok.hu/orban-viktor-sajtotajekoztatoja-a-nepszavazas-eredmenyhirdetese-utan/> (accessed 21/11/2017).

⁷² More on this see KOVÁCS 2016.

⁷³ Starting with Article 48, like in the constitution of the Weimar Republic of Germany, which according to Carl Schmitt granted unlimited power to the president (SCHMITT 2005, 11.).

⁷⁴ Sixth Amendment of the Fundamental Law, adopted on June 14, 2016.

can deviate from the laws on the public administration, on the Hungarian Defence Force, on the police, or on the national security agencies. The measures introduced by the government remain in force until Parliament decides to declare a state of terrorist threat but for a maximum fifteen days. During this period even the army can be used to assist the police and the national security guard.

In connection with the Sixth Amendment, the parliamentary majority altered several statutory provisions. Act LVII of 2016 amended the laws on the police, national security services and defence in connection with the new emergency situation, providing specific authorisation to those forces to use new powers in the event of a terror threat. The amendment to the defence legislation lay down the measures the government can introduce after requesting Parliament to declare a state of terrorist threat. These include, for instance, the imposition of curfew, traffic restrictions, prohibition of organising events and demonstrations in public spaces, evacuation of the population, stricter border controls and increased control of the internet, letters, and baggage and mail traffic. The government may rule on overtime in public administration, and on filling posts in public administration, in defence management, and the Hungarian Defence Force. The government may also introduce military air traffic control and deploy defence forces as well as law enforcement forces to protect the country and the critical infrastructure of public services. After Parliament has proclaimed a terrorist threat situation, the above measures can also include a measure requiring a permit to the travel to, across, or out of certain parts of the country⁷⁵.

Subsequently, between 2015 and 2017, laws were amended, adopted, the referendum was held and even the Fundamental Law was changed in order to maintain the permanent state of exception in Hungary. Furthermore, the state of terrorist threat was added to the constitution and defined as a special legal order. The new instance is broader than the French constitutional amendment would have been, although Hungary has not seen terror attacks within its borders yet. And although the government in a demagogic⁷⁶ way has connected the issue of migration with the problems of terrorism, the country is not a target destination of asylum-seekers, and the militant fundamentalism is absent.

The constitutional amendment contradicts the European standards on regulating emergencies in many ways. First, the “terrorist threat” is a very vague notion; its interpretation is up to the government. And as the prime minister put it, «All terrorists are basically migrants»⁷⁷. Accordingly, a Syrian EU resident,

⁷⁵ See e.g. the English language official government website. Available at: <http://www.kormany.hu/en/news/parliament-has-incorporated-state-of-terrorism-threat-into-fundamental-law> (accessed on 21/11/2017).

⁷⁶ TÓTH 2015.

⁷⁷ ‘All the terrorist are migrants’, «Politico», 23/11/2015. Available at: <http://www.politico.eu/article/viktor-orban-interview-terrorists-migrants-eu-russia-putin-borders-schengen/> (accessed on 21/11/2017).

Ahmed H, who took part in 2015 Röszke unrest, has been convicted of committing an “act of terror”⁷⁸. In Röszke on the Hungarian-Serbian border, a violent clash happened between migrants and the Hungarian authorities one day after Hungary closed its border and tightened migration laws. Frustrated refugees tried to enter Hungary, throwing empty water bottles and stones at the police; the police responded with water cannon and tear gas. Ahmed admitted in court that he was involved in stone-throwing, and the court of first instance sentenced him to ten years in prison⁷⁹.

Second, although the government should request that Parliament declare the “state of terrorist threat”, the government can introduce emergency measures as soon as the request is made. Furthermore, it is not clear what happens if Parliament refuses to declare a state of terrorist threat within 15 days by a two-thirds vote.

Third, when declaring the state of terrorist threat it is not required that the danger must be really serious in order to be considered as a threat to the life of the nation. Certainly, the existence of such an emergency and threat to the life of the nation is largely a matter for the government to determine. However, as Lord Hoffmann in one of his dissents emphasised, the notion of a threat to the “organised life of the community” includes not only a threat to the physical safety of the nation, but also to its fundamental values: «The real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these»⁸⁰.

Fourth, there are no enforceable checks on the special executive powers. In democracies, the judiciary, including the constitutional courts, play a vital role in times of emergency as a check against excesses, and ultimately as a guardian of the democratic system as a whole. However, because the state of crisis caused by mass migration was not defined in Hungarian law as a “special legal order”, the limitations on the emergency powers presented in the constitution did not obviously apply to it⁸¹. Furthermore, the constitutional amendment itself does not require courts to decide posteriorly on whether the declaration of a state of terrorist threat was justified or on the proportionality of the special measures adopted.

⁷⁸ *Migrant crisis: Clashes at Hungary-Serbia border*, BBC News. Available at: <http://www.bbc.com/news/world-europe-34272765> (accessed on 21/11/2017).

⁷⁹ *How a family man in Cyprus ended up in a Hungarian jail cell accused of ‘terrorism’*. Available at: <https://www.amnesty.org/en/latest/news/2016/11/how-a-family-man-in-cyprus-ended-up-in-a-hungarian-jail-cell-accused-of-terrorism/> (accessed on 21/11/2017).

⁸⁰ Here the Lord referred to the 2001 UK Act on Anti-terrorism, Crime and Security, under which foreign prisoners could be held indefinitely in Belmarsh prison without trial. *A. and Others v. Secretary of State for the Home Department*, [2004] UKHL 56.

⁸¹ SCHEPPELE 2016, 7.

Moreover, the government has tried to evade international checks. Although the state of crisis caused by mass migration has been in place in at least some parts of Hungary since September 2015, Hungary has never registered⁸² its emergency with the Council of Europe as it is required to do under Article 15 of the ECHR. This is problematic, since it creates a *de facto* emergency regime and exactly this is what the notification system under Article 15 (3) of the ECHR as a procedural guarantee aims to prevent⁸³. It also remains a question whether the measures applied are “strictly required by the exigencies of the situation” and “not inconsistent with [...] other obligations under international law” as it is required by Article 15 (1) of the ECHR. Furthermore, the omission of the notification means that Hungary is not entitled to claim derogation when it is brought before the European Court of Human Rights⁸⁴.

Consequently, the Hungarian constitutional amendment does not comply with the substantive and the procedural requirements of declaring a state of emergency. The constitutionalisation of the state of terrorist threat in Hungary has resulted in a “blank cheque” in favour of the executive, making it possible for the government to use emergency powers in an unrestrained and uncontrolled way.

4. Conclusion

There are differences in the way democratic states and authoritative regimes regulate, declare, and justify extraordinary situations. In a democracy, a state of emergency provides only the conditions for exercising otherwise legitimate power. In a case of public emergency, a democratic regime is typically a temporarily modified constitutional democracy, where some constitutional rights are restricted, with the main purpose of the state of emergency being to restore the democratic legal order and the full enjoyment of human rights. Where the system of government is more democratic, it is more likely to comply with the international standards of emergency powers set by the Council of Europe. In 2015, French President François Hollande proposed a constitutional amendment to constitutionalise the state of emergency and to strengthen special executive power in time of emergency. The constitutional amendment bill was highly controversial in France and beyond. The domestic and international institutional checks on the executive power worked well and prevented the amendment from entering into force.

⁸² <http://www.coe.int/en/web/conventions/notifications> (accessed on 21/11/2017).

⁸³ VENICE COMMISSION 1995, 21.

⁸⁴ For instance, should the government had already registered the state of emergency at the Secretariat General, in the above-mentioned Ilias and Ahmed case the agent of the government could have based his argument on the fact that Hungary was in a state of emergency.

By contrast, Hungary has already amended the constitution to include the state of terrorist threat and the country has been in a “state of crisis caused by mass migration” since 2015. The justification of these measures was that due to the migration flow the Hungarian government needed greater room for manoeuvre, unbound by constitutional constraints, to manage the crisis. This argument presupposes that, as a result of the migrant crisis, Hungary is now in an abnormal state where constitutional guarantees have to be limited or suspended; essential powers have to be concentrated in the hands of the prime minister until the crisis is overcome. This paper has revealed how the Hungarian government tends to declare the state of crisis even in the absence of a continued influx of asylum seekers. No other EU Member State has seen fit to declare an emergency because of mass migration so as to deal with the refugee problem, not even states that are the target destination of asylum-seekers.

The Hungarian prime minister uses public emergency situations as pretexts to strengthen the executive power. By emphasising the state’s sovereignty and cultural identity, the government denies asylum seekers even the most basic human rights, labelling them as enemies of the Hungarian state. The constitutional amendment on declaring the state of terrorist threat arguably also follows the Schmittian tradition: it institutionalises, and what is more, constitutionalises, a strong, arbitrary executive power unhampered by legal constraints.

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