

# Emergency Regulations Entailing a Special Case of Norm Collision Revisiting the Constitutional Review of Special Legal Order in the Wake of the COVID-19 Pandemic<sup>1</sup>

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## **Abstract**

*This contribution will interpret conflict between an emergency order and an ordinary law as a special case of norm collision and will revisit the constitutional review of such cases through this lens. First, the theoretical framework of emergencies will be taken into account, and then, based on the relevant constitutional case law of Austria, Germany, Hungary, Romania and Slovenia delivered during the recent public health emergency, a comparative analysis will investigate the most popular techniques to outline the scope of emergency regulation. Finally, based on this research, a three-step analysis will be proposed for constitutional courts to approach such issues by taking into account either the theoretical, the formal and the substantial aspects of the case. Apart from highlighting the role of constitutional review to establish the objective limits of emergency regulations, we also aim at giving additional weight on the formal and the theoretical prongs of the assessment of extraordinary state interferences, which have been consistently underestimated in our sense.*

**Keywords:** constitutional law; norm collision; hierarchy of law; emergency; constitutional review; Covid-19 pandemic.

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## 1. Introduction

11<sup>th</sup> of March 2020 marks the date for declaring one of the biggest challenges the world has to face during the first decades of the 21st century.<sup>5</sup> After some relatively peaceful decades despite all crises entailing huge social and economic development, an unprecedented pandemic seems to stir up everything that had been considered as consolidated and reconciled. As it has impacted almost every segment of our daily lives, the Covid-19 pandemic posed various risks and also many possible reconsiderations of the elaborated pyramid of legal sources,<sup>6</sup> regardless whether public health emergency has been officially declared or not.

Although the fact that the intensity of the epidemic decreased considerably, the long-term impact of the public health emergency will remain with us, and we are still at the initial stage to assess these consequences even in the legal field. Amongst several other crucial aspects, the constitutional frameworks of emergencies have been also concerned, since the lack of sufficient constitutional resilience enlightened the uncertainties of the extraordinary constitutional mechanisms. During the decades preceding the Covid-19 pandemic, these sections of the constitutional documents have been relatively little researched. Not only the public health emergency, but also the series of various recent crises including the financial crisis in 2008, the migration crisis in 2015, and the Ukrainian war as well as other emerging armed conflicts in Africa and Latin-America raised the attention to the emergency legal orders. Amongst others in certain countries like in Hungary, different forms of emergencies have been in force since 2015.<sup>7</sup>

The constitutional scholarship has provided deeper understanding of numerous general and country-specific short-comings of emergency regulations.<sup>8</sup> One main challenge is to allocate the exact rank of emergency orders within the constitutional hierarchy of norms, which would determine the precise scope of these orders, within which emergency decrees may prevail over ordinary rules.<sup>9</sup> Currently, national constitutions delimit the scope of emergency orders through various manners,<sup>10</sup>

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<sup>5</sup> The World Health Organization (hereinafter referred to as: WHO) made its assessment that COVID-19 can be characterized as a pandemic on 11 March 2020. See further: [www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19--11-march-2020](http://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19--11-march-2020).

<sup>6</sup> Philip Norton: *Global Legislative Responses to Coronavirus*. The Theory and Practice of Legislation. vol. 8. (3): 2020, 237-238.

<sup>7</sup> Kovács Kriszta: *Hungary's Struggle: In a Permanent State of Exception*, VerfBlog, 2016/3/17, [verfassungsblog.de/hungarys-struggle-in-a-permanent-state-of-exception/](http://verfassungsblog.de/hungarys-struggle-in-a-permanent-state-of-exception/),

<sup>8</sup> For example, please see: Tom Ginsburg, Mila Versteeg: *Binding the Unbound Executive: Checks and Balances in Times of Pandemic*, International Journal of Constitutional Law, vol. 19. 2021. 1498–1535.

<sup>9</sup> Lübke-Wolff Gertrude: *Rechtsstaat und Ausnahmerecht: Zur Diskussion über die Reichweite des § 34 StGB und über die Notwendigkeit einer verfassungsrechtlichen Regelung des Ausnahmezustandes*, Zeitschrift für Parlamentsfragen, Vol. 11, No. 1, 1980, 110–125.

<sup>10</sup> These elements are usually combined in the constitutions even within the same provisions. For examples please see: Constitution of Austria, art. 18. (5), [constitutionnet.org/sites/default/files/Austria%20\\_FULL\\_%20Constitution.pdf](http://constitutionnet.org/sites/default/files/Austria%20_FULL_%20Constitution.pdf); The Basic Law of the Federal Republic of Germany art. 115e (2), art. 115g, [www.gesetze-im-internet.de/englisch\\_gg/englisch\\_gg.html](http://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html); Constitution of Romania art. 115. (6):

however, neither of these methods deemed to be sufficiently clear to describe the legitimate area of emergency regulation, which generated extensive legal and political debates also in the shadow of the global pandemic.<sup>11</sup> We interpret the conflict between emergency orders and ordinary laws as a special case of norm collision, where at first, the applicable law shall be identified before the consideration of the merits. We accept the definition of Gholiagha and his co-authors, that norm collisions mean instances in which actors claim that two or more norms provide conflicting or incompatible expectations about appropriate behaviour.<sup>12</sup>

The legitimacy of emergency measures forms an essential precaution to tackle unprecedented challenges effectively, and the elaboration of a coherent standard for the constitutional review of emergency decrees might contribute remarkably to enhance legal embeddedness of these measures.<sup>13</sup> To further this ambition, we will conceptualize the concurring narratives examining the inherent character of emergency decrees and their relationship with ordinary laws. Then, constitutional case laws from five Central-European countries will be discussed: Austria, Germany, Hungary, Romania and Slovenia will demonstrate the issues raised in the practice, while important relevant rulings will be also mentioned from other countries. Finally, the constitutional conclusions will be derived: our overall research finding provides that taking into account the inherently case-dependent character of the analysis, the theoretical framework of emergencies elaborated by distinguished legal scholars should receive more weight during the conceptualization of emergency orders; while the formal requirements of emergency measures shall be also highlighted preceding the substantial examination of these state interferences. Apart from this, constitutional amendments might be necessary to adapt the constitutional frameworks to the needs of the post-Covid period by clarifying the acceptable scope of emergency regulation.

## 2. Methodology

Our contribution will be based on an interdisciplinary approach of the subject matter: the aspects of legal theory, constitutional studies and comparative assessments would be combined, which have been rarely used by this integrated manner. First, the concept of emergency decrees will be understood more deeply on the ground on the existing literature of legal theory to present the arguments for describing the relationship between emergency orders and ordinary laws.<sup>14</sup>

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[www.constituteproject.org/constitution/Romania\\_2003.pdf?lang=en](http://www.constituteproject.org/constitution/Romania_2003.pdf?lang=en); Fundamental Law of Hungary art. 52. (2), art. 53. (1), [www.parlament.hu/documents/125505/138409/Fundamental+law/](http://www.parlament.hu/documents/125505/138409/Fundamental+law/).

<sup>11</sup> Riberi Pablo: *When the Center Lies Outside the Figure: Republic, Imbalance of Powers and Emergencies* in José María Serna de la Garza (coordinator), *Covid-19 and Constitutional Law* (Universidad Nacional Autónoma de México, 2020) 33-40.

<sup>12</sup> Gholiagha, S., Holzscheiter, A., & Liese, A. (2020). *Activating norm collisions: Interface conflicts in international drug control* *Global Constitutionalism*, 9(2), 290-317.

<sup>13</sup> Ernst-Wolfgang Böckenförde: *Ausnahmerecht und demokratischer Rechtsstaat*. In Hans J. Vogel, Helmut Simon, Adalbert Podlech (eds.), *Die Freiheit des anderen*: Festschrift für Martin Hirsch. Baden-Baden: Nomos, 1981, 259–272.

<sup>14</sup> David Dyzenhaus: *Schmitt v. Dicey: Are States of Emergency Inside or Outside the Legal Order?* 2006.

Then, with the help of formal dogmatic analysis of relevant constitutional cases mostly from Austria, Germany, Hungary, Romania and Slovenia, the most popular techniques of restricting the scope of emergency laws as well as the weaknesses of these methods will be illustrated through practical examples. We are fully aware of the fact, that the diversity of constitutional regimes and the differences between tackling extraordinary challenges through legal means may raise a number of difficulties in terms of the comparative aspect, nevertheless, the fundamental constitutional issues raised are almost the same in our view, even regardless of the declaration of state of emergency, or the lack of such a step.<sup>15</sup> Since the far-reaching restrictions of fundamental rights ordered either by the legislative or by the executive power entailed identical constitutional challenges in diverse contexts, therefore, we would rely on the functionalist strand of comparative research.<sup>16</sup> We selected the Central-European countries with the most extensive constitutional court case law during the public health emergency for the comparison, however, the political context, for instance, the political tendencies in Hungary,<sup>17</sup> Romania<sup>18</sup> and Slovenia<sup>19</sup> were not taken into account.

As the third main element, based on the analysed case law, and the possible ways of argumentation concerning the character of emergency regulations, some orientations will be put forward how to draft interpretative frameworks and constitutional amendments reconsidering the scope of emergency orders.<sup>20</sup>

Our main added value to the existing literature would be to describe the relationship between emergency orders and ordinary laws as norm collisions, as a consequence, greater weight is expected to be given to the identification of the applicable law, should the constitutionality of an emergency measure be contested. Apart from this, two alternative ways will be suggested to incorporate our findings into national constitutions: the explicit hierarchy of the legal sources, or the emergency clauses of the constitutions should be subject to thorough amendments to increase the resilience of legal systems during future emergencies.

### 3. Literature review

During states of emergency, at the root of the problem is, on the one hand, the lack of clarity as to the identity of the decision-maker in such situations and the legal

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<sup>15</sup> Tom Ginsburg, Mila Versteeg: *The bound executive: Emergency powers during the pandemic* International Journal of Constitutional Law, Volume 19, Issue 5, December 2021, Pages 1498–1535, [doi.org/10.1093/icon/moab059.1514](https://doi.org/10.1093/icon/moab059.1514).

<sup>16</sup> Michaels, Ralf: *The Functional Method of Comparative Law. The Oxford Handbook of Comparative Law*. Oxford, Oxford University Press, 2006, 339-382.

<sup>17</sup> Zoltán Szente, *The myth of populist constitutionalism in Hungary and Poland: Populist or authoritarian constitutionalism?* International Journal of Constitutional Law, Vol. 21, ed. 1, 2023, 127–155.

<sup>18</sup> Teodora Elena Grapa, Andreea-Alina Mogoș: *The Spectacle of “Patriotic Violence in Romania: Populist Leader George Simion’s Mediated Performance*. Media and Communication, Vol 11, No 2 (2023)

<sup>19</sup> Marko Lovcic: *Between EU-Phoria and EU-Phobia – Populism in Slovenia*. <http://trulies-europe.de/?p=602>.

<sup>20</sup> The necessity of such amendments have been already argued by Mark Tushnet. Please see: Mark Tushnet: ‘Emergencies and the Idea of Constitutionalism’. in Mark Tushnet (ed): *The Constitution in Wartime: Beyond Alarmism and Complacency* (Duke University Press, 2005), 49.

limits of the decision-maker's power.<sup>21</sup> On the other hand, the relationship between ordinary laws and the measures taken in exceptional circumstances produce also meaningful factors of uncertainty.<sup>22</sup> One should keep in mind that the special legal order may therefore impose far-reaching restrictions on the exercise of particular fundamental rights,<sup>23</sup> so a task with paramount importance appears here for the constitutional literature to clarify both theoretically and doctrinally the coverage to which the government's additional powers may extend in such situations and what circle of legislation may be overridden by a government decree issued under the special legal order.<sup>24</sup>

In the legal literature, two major approaches justify special legal order measures, the first one advocating the primacy of sovereign power and the second one the primacy of the rule of law (*rule-of-law approach* and *sovereignty approach*).<sup>25</sup> The primacy of sovereign power was established by Carl Schmitt, who argued that exceptional circumstances cannot be fully regulated in the legal system because they are linked to unforeseeable social events or natural phenomena.<sup>26</sup> The constitution can therefore only provide a general definition of who is sovereign, i.e. who is entitled to act in a special state of emergency. The sovereign is exempt from legal constraints, since it is the sovereign who is entitled to decide on the necessity to introduce a special legal regime to deal with or defend against an unforeseen exceptional situation.<sup>27</sup> Schmitt was therefore convinced that the state (politics) took precedence over law especially in case of emergencies,<sup>28</sup> the sovereign's exceptional power therefore has a political, not a legal, origin, clearly distinguishable from ordinary legal order.<sup>29</sup>

Loveman also argued, that the term special legal order implies that it shall be seen as a separate legal order, which is clearly distinguishable from the ordinary one.

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<sup>21</sup> Ernst-Wolfgang Böckenförde: *Die Krise in der Rechtsordnung: der Ausnahmezustand*. In Krzysztof Michalski (ed.): *Über die Krise*. Stuttgart: Klett-Cotta, 1986, 183-191.

<sup>22</sup> Christian Bjørnskov, Stefan Voigt: *This time is different? On the use of emergency measures during the corona pandemic*. European Journal of Law and Economics vol. 54, 2022, 63–64.

<sup>23</sup> Audrey Lebet: *COVID-19 pandemic and derogation to human rights*. Journal of Law and the Biosciences, vol 7. ed. 1. 2020.

<sup>24</sup> Natalia Varlamova: *Lockdown as a response to the COVID-19 pandemic: analysis in the context of the European Convention on Human Rights* Vestnik of the St. Petersburg University of the Ministry of Internal Affairs of Russia, volume 2020, ed. 3, 15.

<sup>25</sup> Magnus Lundgren, Mark Klamberg, Karin Sundström, Julia Dahlqvist: *Emergency Powers in Response to COVID-19: Policy Diffusion, Democracy, and Preparedness*. Nordic Journal of Human Rights. 2020, 38:4. sz., 305 - 318.

<sup>26</sup> Anter Andreas, Verena Frick: *Der verdrängte Carl Schmitt. Ernst-Wolfgang Böckenfördes Diagnostik des Ausnahmezustandes*. In Rüdiger Voigt (ed.). *Ausnahmezustand: Carl Schmitts Lehre von der kommissarischen Diktatur*. Baden-Baden: Nomos, 2013, 128–143.

<sup>27</sup> Oren Gross: *The Normless and exceptionless exception: Carl Schmitt's theory of emergency powers and the "norm-exception" dichotomy* (Cardozo Law Review, vol. 21 2000.) 1825.

<sup>28</sup> Carl Schmitt (1931). *Die Staatsrechtliche Bedeutung der Notverordnung, insbesondere ihre Rechtsgültigkeit*. in: Carl Schmitt: *Verfassungsrechtliche Aufsätze aus den Jahren 1924–1925: Materialien zu einer Verfassungslehre*. Berlin: Duncker & Humblot, 1958, 262.

<sup>29</sup> Carl Schmitt (1916). *"Diktatur und Belagerungszustand: Eine staatsrechtliche Studie"*, *Zeitschrift für die gesamte Strafrechtswissenschaft*. in: Schmitt Carl: *Staat, Großraum. Nomos: Arbeiten aus den Jahren 1916–1969*. Berlin: Duncker & Humblot, 1995, 23.

However, the framework of the divergence needs to be defined in normative and theoretical terms, since the special legal order does not establish a definitive alternative to the normal legal order, but only a relative and temporally limited one. Moreover, the legal instruments of the special legal order are both *limited* and *seemingly unlimited*, since the legislator, endowed with exceptional powers, can do almost anything once constitutional guarantees are respected.<sup>30</sup>

The opposite position was taken by Hans Kelsen, who denied the existence of a sovereign outside the law. Kelsen's starting point is positivist in origin, so in his theory the state and the legal sphere are not separate entities, but the state is equal to the legal order. This view excludes the concept of a political actor acting outside the legal order and possibly abusing his power: action outside the legal order would render the measures taken invalid. Proponents of constitutional-centred theory<sup>31</sup> argue that mandates granted on the basis of law outside the positive legal order can lead to abuses. For them, therefore, the argument is always based on the written constitution, which excludes the existence of a state power that precedes law.<sup>32</sup>

In contrary to Carl Schmitt, Hermann Heller argued that it is not so much the state of emergency, but rather the state of social and political stability which defines the sovereign.<sup>33</sup> Contrary to Kelsen, Heller argued that because power is needed in order to intervene in the conditions of modern society, to gain control of the power causes inequalities. For Heller, the essence of the concept of law is that law implements political and social principles by turning them into legal provisions.<sup>34</sup> The legal order is therefore not equal to a pure set of norms (without principles as Kelsen stated), because ethical and political principles are integrated into the legal norms themselves - through their application.<sup>35</sup> It follows from all this, that during a special legal order there does not exist - at least in Heller's theory - a purely legal and a purely political order parallel to each other, but separate from each other. This means that, similarly to Hans Kelsen, Heller kept emergency responses within the legal order,<sup>36</sup> while he also accepted the idea to merge the sovereign under normal and exceptional circumstances.<sup>37</sup>

<sup>30</sup> Brian Loveman: *The Constitution of Tyranny: Regimes of Exception in Spanish America*. University of Pittsburgh Press, 1993. 5-21.

<sup>31</sup> Hans Kelsen: *Reine Rechtslehre*. Mohr Siebeck, 2017. 38-39.

<sup>32</sup> Jakab András: *German Constitutional Law and Doctrine on State of emergency. Paradigms and dilemmas of a traditional continental discourse*. German Law Journal Vol. 7 ed. 5. 2019. 455.

<sup>33</sup> Dyzenhaus, David. *The Nature and Structure of the State*. Cardozo Law Review. 18: 1139. See also: Jacobson, Arthur J; Schlink, Bernhard, eds. (2000). *Weimar: a Jurisprudence of Crisis*. Berkeley: U California P. pp. 265–79; Wilkinson, Michael A. (2016): *Authoritarian Liberalism in Europe: A Common Critique of Neoliberalism and Ordoliberalism*. Critical Sociology. 43 (7-8):2.

<sup>34</sup> Heller distinguished the „legal propositions” (*Rechtssätze*) from the “legal fundamental principles” (*Rechtsgrundsätze*). Legal proposals are merely the judicial surface of political actors who try to translate political and ethical principles into the language of law. Heller, Hermann *Bemerkungen zur staats- und rechtstheoretischen Problematik der Gegenwart* (1929), in H. Heller, *Collected works*, ed. M. Draht et al., vol. 2, Leiden, Sijthoff, 1971, p. 249-278, here: p. 275.

<sup>35</sup> Heller, Hermann: “Die politischen Ideenkreise der Gegenwart (1926)”, in H. Heller, *Collected works*, ed. M. Draht et al., vol. 1, Leiden, Sijthoff, 1971, pp. 267-412, here: p. 375.

<sup>36</sup> Heller, Hermann (1927). *Die Souveränität. Ein Beitrag zur Theorie des Staats- und Völkerrechts*. Berlin – Leipzig: Walter de Gruyter & Co.

<sup>37</sup> Dyzenhaus, David (2015) *Kelsen, Heller and Schmitt: Paradigms of Sovereignty Thought*. Theoretical

In addition to this, Giorgio Agamben<sup>38</sup> identifies two main points on the legality of the state of exception. The first point holds that the special legal order forms an integral part of positive law „because the necessity that grounds it is an autonomous source of law”.<sup>39</sup> The second school of thought interprets the exceptional situation as essentially a situation outside the law. The circumstances that threaten security are infinite, and therefore a full constitutional control mechanism may not be constructed.<sup>40</sup> According to Agamben, an exceptional, special legal order is not equal to the written legal order, but a lawless space, in other words, a „zone of anomie”.<sup>41</sup> It is not the equivalent of a dictatorship, where laws continue to be made and applied (albeit undemocratically), but one in which the law is rather completely emptied of its content aimed at privileging sovereign violence at all costs.<sup>42</sup>

Jakab also interprets the emergencies within the legal order and argues for the maintenance of the key legal features during these periods,<sup>43</sup> however, he acknowledges that constitutional checks and balances may not be fully effective in practice in the context of state of emergency. Grogan adds to this argument, that the dominance of the executive is not inherently a problem if the authorities are under democratic control.<sup>44</sup> By contrast, Ginsburg and Versteeg consider that only the executive power has the decisiveness, information and speed to respond to crisis situations, and therefore other branches of government cannot effectively constrain it.<sup>45</sup>

In summary, we dully acknowledge the competing legitimate alternatives, however, we share the views of Hans Kelsen, that emergency periods shall be bridged within the legal order, and the sovereign during emergencies shall be equivalent to those during ordinary periods. As a consequence, we agree with the integration of emergency orders to the existing hierarchy of legal sources, however, objective limitations on the

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Inquiries in Law 16.2.; Malkopoulou, Anthoula (2020) *Hermann Heller on politics: discipline, sphere and activity*, History of European Ideas, 46:4, 393-404.; LAGI, Sara. (2020), *State and Sovereignty: Some reflections on Hermann Heller as interpreter of the Weimar crisis*, Cahiers d'Agora : revue en humanité, n°3 (ISSN 2608-9157).; Meyer, Klaus: “Hermann Heller. Eine biographische Skizze (1967)”, in Ch. Müller and I. Staff (ed.), *Der soziale Rechtsstaat. Gedächtnisschrift für Hermann Heller 1891-1933*, Baden-Baden, Nomos, 1984, pp. 65-87.

<sup>38</sup> According to Agamben, the state of exception is a modern institution, with roots going back to the French Revolution. Stephen Humphreys: *Legalizing Lawlessness: On Giorgio Agamben's State of Exception*, European Journal of International Law, Volume 17, Issue 3, 1 June 2006, pp. 677–687.

<sup>39</sup> Giorgio Agamben: *State of Exception*. (Translated by Kevin Attell. University of Chicago Press, 2005), 36.

<sup>40</sup> Agamben (2005) 27.

<sup>41</sup> Ibid 50 – 51.

<sup>42</sup> See further: Humphreys (12. lj.)

<sup>43</sup> Jakab András: *German Constitutional Law and Doctrine on State of emergency. Paradigms and dilemmas of a traditional continental discourse*. German Law Journal Vol. 7 ed. 5. 2019. 453-477.

<sup>44</sup> Joelle Grogan: *COVID-19, The Rule of Law and Democracy. Analysis of Legal Responses to a Global Health Crisis*. Hague Journal on the Rule of Law (2022) 14: 349 – 369.

<sup>45</sup> „Referring to the classic theorist of emergency rule, conventional accounts describe crisis governance as “Schmittian” and “post-Madisonian,” characterized by an unbound executive that faces few, if any, legal constraints.” Tom Ginsburg, Mila Versteeg: *The bound executive: Emergency powers during the pandemic*. International Journal of Constitutional Law, Vol. 19, Issue 5, December 2021, pp. 1498-1535, [doi.org/10.1093/icon/moab059](https://doi.org/10.1093/icon/moab059).

scope of emergency regulations shall not be overstepped as will be demonstrated by the following section.

#### 4. Research

We analysed constitutional courts' cases primarily from Austria, Germany, Hungary, Romania and Slovenia. This geographical coverage is broadened by some decisions from other jurisdictions (Kosovo, Portugal), but only if their cases have a significant added value to our study. Based on our comparative research, we identified some objective constitutional limits of emergency regulation, to be reviewed under the formal prong of the constitutional review as a prerequisite of valid emergency orders.

As far as we are concerned, these objective limits may rely on

- 1) the area of law concerned,
- 2) the fundamental rights affected,
- 3) how the emergency regulation interferes into the competences of either the legislative or the executive power.<sup>46</sup>

**4.1.** Starting with the first group, (particular areas of law are set as objective limits) one can easily argue that some regulatory topics deserve additional protection from amendments by exceptional legal norms.<sup>47</sup> For example, criminal law represents the deepest encroachments of the fundamental rights, where *nullum crimen sine lege constitutes a key principle*.<sup>48</sup>

**4.1.1.** In the practice of the Hungarian Constitutional Court the question has been raised whether the Hungarian Government has got power to establish a new crime on action against misuse of COVID vaccination certificate during the public health emergency.<sup>49</sup> Without a doubt in normal legal order the Hungarian Parliament has competence to render this in an act and the Hungarian Government is not empowered to do so through adopting a governmental decree. The Hungarian Fundamental Law also provides the principle of *nullum crimen sine lege*,<sup>50</sup> however, the substance of such a general principle should be crystallized through its individualized application. Governmental decree complies with the condition of "without laws" but does not satisfy the phrase "without acts". The Hungarian Constitutional Court rejected the constitutional complaint as the allegedly unconstitutional law has been repealed and its

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<sup>46</sup> It has to be noted that we sorted out the cases in such a way to pair only to one group taken into account their content. Many cases could have been discussed under more than one group out of the 3 we identified above. We are aware that our classification may have remained arbitrary to certain degree.

<sup>47</sup> Ernst-Wolfgang Böckenförde: *The Repressed State of Emergency: The Exercise of State Authority in Extraordinary Circumstances* in: Ernst-Wolfgang Böckenförde: *Constitutional and Political Theory: Selected Writings*. Oxford University Press, 2017. 108-113.

<sup>48</sup> Stefan Glaser: *Nullum Crimen Sine Lege*. *Journal of Comparative Legislation and International Law*, vol. 24, no. 1, 1942, 29–37; Jerome Hall: *Nulla Poena Sine Lege*, *The Yale Law Journal*, vol. 47. ed. 2. 1937. 165-193.

<sup>49</sup> 3325/2022. (VII. 21) ruling of the Constitutional Court of Hungary.

<sup>50</sup> Fundamental Law of Hungary Article XXVIII Para 4 No one shall be held guilty of any criminal offense on account of any act which did not constitute a criminal offense under Hungarian law or - within the meaning specified by international treaty or any legislation of the European Union - at the time when it was committed.



applicability to the petitioner was no longer an option. Thus, the ultimate question remains open: the phrase “sine lege” means “without acts” or “without laws” under the scope of the Hungarian constitution in special legal order, however, we stress that the text of the Hungarian Fundamental Law contains “without law”. Yet the textual interpretation should be supplemented by other methods of interpretation such as teleological.

**4.1.2.** Two cases from Portugal cannot be neglected when the principle of *nullum crimen sine lege* under special legal order is discussed. The main question of the first Portuguese case<sup>51</sup> was that of determining whether the executive branch has the constitutional power, under a state of emergency,<sup>52</sup> to increase the maximum and minimum punishment envisaged by the Penal Code for certain crimes. The Portuguese Constitutional Court argued that during states of emergency, The government can adopt measures that restrict citizens’ rights, except for certain fundamental rights, as long as the principle of proportionality is observed.<sup>53</sup> The referred act also establishes the crime of disobedience during a state of emergency, and it submits this crime to a special regime that differs from that of criminal law.<sup>54</sup> The Portuguese Constitutional Court concluded that the state of emergency confers part of the legislative competences to the executive power, and that the impugned government regulation respected the principle of proportionality, therefore, its constitutionality was upheld. In addition, it was stated that the executive operates as an extraordinary legislator for reasons of expediency. If one were to draw the opposite conclusion, no emergency power could possibly exist, since such a power operates by its very nature within the area of basic freedoms also reserved to parliamentary statute; that would render the entire regime of states of exception in the Portuguese Constitution virtually inoperative and nonsensical.<sup>55</sup>

**4.1.3.** The second Portuguese case<sup>56</sup> was submitted by a private entrepreneur in the hospitality business who was brought to trial for felony disobedience based on the above-mentioned governmental decree since he kept his establishment open during the curfew period. The court argued that the Portuguese Constitution exclusively allocates jurisdiction over criminal law to the legislative power, but the challenged decree refers to the Penal Code (adopted by the parliament) when it mentions the felony. Therefore, the criminal decree was not issued by the executive alone, a reference to an act was necessary and sufficient to comply with the constitutional scope of legislative competence.<sup>57</sup>

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<sup>51</sup> Portuguese Constitutional Court Ruling 352/2021 27 May 2021.

<sup>52</sup> Act 44/86.

<sup>53</sup> Act 44/86. in Portugal on state of emergency.

<sup>54</sup> Decree 2-B/2020 extended the state of emergency in Portugal and determined that the penalty for citizens disobeying instructions of the authorities should be aggravated, by adding 1/3 more time to the minimum and maximum penalty.

<sup>55</sup> English summaries of the case 352/2021 27 of May of 2021 can be read via these links: TC > Jurisprudence > Summaries > Summary 352/2021 (tribunalconstitucional.pt); Maíra Tito, case note: Portugal, Constitutional Court, 27 May 2021, Acórdão 352/2021 – Processo 397/2020 | Covid-19 Litigation (covid19litigation.org).

<sup>56</sup> Portuguese Constitutional Court Ruling 868/2021 11 October 2021.

<sup>57</sup> Maíra Tito, case note: Portugal, Constitutional Court, 11 October 2021, Acórdão 868/2021 – Processo 937/2020 | Covid-19 Litigation (covid19litigation.org).

**4.1.4.** *Nullum tributum sine lege* has similar weight in tax law as the previous principle in the criminal law.<sup>58</sup> The Hungarian Parliament may impose taxes nationwide, but in special legal order the Hungarian Government is authorized to levy taxes through governmental decree. The Hungarian Constitutional Court stated that such a governmental decree on taxes shall be considered as a *quasi*-act when the constitutional review has been done.<sup>59</sup> This means that from formal legal point of view governmental decree equals parliamentary act in tax matters in Hungarian special legal order.<sup>60</sup> As a consequence, the Hungarian Government has power to impose taxes by its own competences during emergencies.

**4.2.** The second and endless group of objective limitations are constituted by fundamental rights affected by emergency orders. Curfews and contact restrictions adopted almost in all over the world changed the private and social life directly and severely. Rearrangement to our “normal life” which was get used to before the world pandemic has been slow and incomplete so far. On this ground, we highlight the cases as to the sphere of private and family life. This covers the right to contact people meaning that individuals shall be able to interact with other people including formal legal relationships (fundamental right to marriage and family) and informal contacts as sub-part of the general right of personality. Latter sub-part guarantees that meetings with other people are not entirely prevented by law and that the individual is not forced into loneliness.

The case law of the Federal Constitutional Court of Austria tells us that there is a thin margin of discretion what encroachment amounts to constitutionality or unconstitutionality and the depth of the legal documentation on which the legislation is based can be a decisive factor in the rule of law. One could argue, that even though Austria avoided the official introduction of a state of emergency, the applied measures and their legal background are substantially equivalent to constitutional concepts classified elsewhere as public emergency.<sup>61</sup> In chronological order in the first two cases the private life and the freedom of movement prevailed over the restrictions in Austria. On the contrary, the claims were rejected in the last two cases.

**4.2.1.** The first case<sup>62</sup> was about the “residence rules” by the regional regulation of the President of the Land of Tyrol based on the Covid-19 Measures Act. Person without residence in Tyrol could not stay there anymore, and further, an administrative sanction issued to the person who did not comply with this precautionary measure. The claimant, Swiss national without a residence in Tirol, challenged the order to leave Tyrol and its linked sanction. The Austrian Constitutional Court upheld the claim because the challenged provision was not sufficiently documented. This hinders the court from controlling the underlying reasons for the adopted precaution and to legally

<sup>58</sup> Adam S. Dampc: *Nullum Tributum Sine Lege: Der Steuerrechtliche Bestimmtheitsgrundsatz Im Deutsch-Polnischen Rechtsvergleich*. Tectum Verlag, 2022.

<sup>59</sup> 3214/2023. (V. 5.) ruling of the Hungarian Constitutional Court.

<sup>60</sup> Note that this interpretation directly refers to Article 37 Para 4 of the Fundamental Law of Hungary which provides for the limitation of the competences of the Hungarian Constitutional Court.

<sup>61</sup> *Verfassungsblog.de/rule-of-law-lacking-in-times-of-crisis/*.

<sup>62</sup> Austria, Federal Constitutional Court, 25 February 2021, V570/2020-13.

review the challenged rule. On the top of this, the court declared that the Covid-19 Measures Act neither authorized a general entry ban nor a requirement directed at all non-residents of Tyrol to leave the territory without delay.<sup>63</sup>

**4.2.2.** In the second case<sup>64</sup> the Covid-19 Measures Act gave authority to the competent federal Minister to issue regulation prohibiting the entry of persons into certain places on public health grounds. Mandatory distance of at least 1 meter from another person, limitations on the opening hours of restaurants, limitations on the use of cars with non-cohabiting persons and the obligation to wear a face mask when entering a closed space; these were few of the measures of the “re-opening rules”. An infringement of these obligations was sanctioned with a fine. The claimant was accused of having committed an offense in May 2020 close to midnight in Vienna. When entering a public place, the claimant did not maintain a minimum distance of one meter from another person with whom he was not living in the same household. The Constitutional Court upheld the claim because the competent Minister did not base the regulation on documents and records. This lack of documents made it impossible to understand the reasons why the specific measures were adopted.<sup>65</sup>

**4.2.3.** In the third case,<sup>66</sup> 3G<sup>67</sup> regulation encompassed in the Covid-19 re-opening ordinance was challenged. Its purpose was to tackle with the specific risk posed by the recreation and entertainment industry because discotheques, clubs, and dance clubs, for example, lead to increased interactions between people. The claimant of the case, who was not vaccinated, tried to enter a discotheque by showing a neutralizing antibodies certificate and the security guard denied the access. The Federal Constitutional Court rejected the claim because the ordinance was grounded on well-founded records and documentation. Based on the reported figures and data the court has considered the combination of the Delta variant and night life as a risky environment, capable to further the spread of Covid-19. Therefore, more precautionary measures for discotheque were due to a combination of a mix of young people with a low vaccination rate and the increased particles in the air caused by loud talking, singing, and dancing.<sup>68</sup>

**4.2.4.** Fourthly,<sup>69</sup> the 5<sup>th</sup> Covid-19 protection regulation provided that all persons without a 2G<sup>70</sup> certificate, showing that they were either vaccinated or had recovered from Covid-19, could only leave their home for purposes linked to basic personal needs or for work purposes, where no other option is available. The claimant of the case did not have 2G certificate. Due to the regulation, the claimant's contacts

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<sup>63</sup> Rebecca Berto, case note: [www.covid19litigation.org/case-index/austria-federal-constitutional-court-v5702020-13-2021-02-25](http://www.covid19litigation.org/case-index/austria-federal-constitutional-court-v5702020-13-2021-02-25).

<sup>64</sup> Austria, Federal Constitutional Court, 16 June 2021, V34/2021 ua (V34/2021-12, V136/2021-11).

<sup>65</sup> Rebecca Berto, case note: [www.covid19litigation.org/case-index/austria-federal-constitutional-court-v342021-ua-v342021-12-v136-2021-11-2021-06-16](http://www.covid19litigation.org/case-index/austria-federal-constitutional-court-v342021-ua-v342021-12-v136-2021-11-2021-06-16).

<sup>66</sup> Austria, Federal Constitutional Court, 3 March 2022, V231/2021-15.

<sup>67</sup> Geimpfte, Genesene, Getestete. Vaccinated, recovered, or tested.

<sup>68</sup> Rebecca Berto, case note: [www.covid19litigation.org/case-index/austria-constitutional-court-v2312021-15-2022-03-03](http://www.covid19litigation.org/case-index/austria-constitutional-court-v2312021-15-2022-03-03).

<sup>69</sup> Austria, Federal Constitutional Court, 17 March 2022, No. V294/2021.

<sup>70</sup> Geimpfte, Genesene. Vaccinated, recovered.

with her family were reduced, moreover, her leisure and cultural activities, were no longer possible, further, she could not book any accommodation for her planned short holiday. The Federal Constitutional Court has been aware of the severe encroachment of the right of family and private life, however, interferences with the exercise of this right are allowed insofar they are provided by law and are necessary to protect other constitutional rights. The decrease in the spread of COVID-19 and the prevention of the breakdown of the medical care system are public objectives. At the time of the challenged provisions' implementation, the infection rate of Covid-19 increased steadily, consequently, no milder restriction was effective in limiting the spread according to the court. For this reason, the court evaluated the restriction as based on careful analysis of the public health situation and as proportionate to the aim pursued by the legislature.<sup>71</sup>

**4.2.5.** Series of Slovenian cases are also worth-contemplating. The “kick off case” in Slovenia<sup>72</sup> was about an action on the constitutionality of several government ordinances on Covid-19 and of Article 39 of the Communicable Diseases Act that authorised the government to prohibit or restrict the movement and gathering of people.<sup>73</sup> The Slovenian Constitutional Court established that the legislature granted the government an overly wide authority by introducing restrictive measures under Article 39 of the Communicable Diseases Act. The legislature by this article left the executive the power to assess many important factors such as 1) the intensity of interference with fundamental rights which it should perform; 2) the duration of such interference, 3) in which public places and under which circumstances the gathering of people should be prohibited. The Slovenian Constitutional Court recalled that a blanket authorization is inconsistent with the constitutional order and concluded that article 39 of the Communicable Diseases Act and the ordinances which legal bases derives from the previous article were inconsistent with the freedom of movement and the right of assembly and association. What makes this decision a must read is how the Slovenian Constitutional Court balanced the respective fundamental rights with the facts of the epidemic. The court gave two months to the legislator to remedy the established inconsistency with the two fundamental rights. Until such inconsistency was remedied the challenged provisions were to continue to be applied.<sup>74</sup> The Slovenian Constitutional Court applied the same (two-month-gap) technique for instance in the

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<sup>71</sup> Rebecca Berto, case note: [www.covid19litigation.org/case-index/austria-constitutional-court-no-v294-2021-2022-03-17](http://www.covid19litigation.org/case-index/austria-constitutional-court-no-v294-2021-2022-03-17).

<sup>72</sup> Constitutional Court of the Republic of Slovenia, 13 May 2021, Decision U-I-79/20. Subsequent cases belonging to this series: U-I-155/20 and U-I-50/21.

<sup>73</sup> Article 39 provides for the rule that the measures determined by the Communicable Diseases Act cannot prevent the spread of certain infectious diseases in the State, and that therefore the Government can also impose: (1) the determination of the conditions for travelling to a state in which there exists a possibility of infection with a dangerous communicable disease and for arriving from these states; (2) the prohibition or limitation of the movement of the population in infected or directly jeopardised areas; (3) the prohibition of the gathering of people in schools, cinemas, bars, and other public places until the threat of the spread of the communicable disease passes; (4) the limitation or prohibition of the sale of individual types of merchandise and products.

<sup>74</sup> Tatiana Shaburova, case note: <https://www.covid19litigation.org/case-index/slovenia-constitutional-court-republic-slovenia-decisi-on-u-i-7920-2021-05-13>.

“distance learning” case<sup>75</sup> and in the “lockdown” case.<sup>76</sup>

**4.3.** Third group of cases (interferences of competences of the parliament and the government) contains one issue but from two aspects.

**4.3.1.** The orthodox aspect is when the government – for an interim period – attracts competences from the parliaments to avert dangers in a situation beset with uncertainties.<sup>77</sup> In the first German case<sup>78</sup> representing this issue, before the so-called federal pandemic emergency brake (see below) was adopted, the government of Thuringia issued an ordinance on special containment measures to combat COVID-19 based on an expansive blanket clause in federal legislation. The ordinance introduced far-reaching contact restrictions and made non-compliance punishable by fine. The issue was whether it was compatible with the requirement of a parliamentary decision to allow the executive to issue statutory instruments determining which measures should be imposed to combat the pandemic, rather than having such decisions taken by the parliamentary legislator itself. A parliamentary group in the Thuringian state parliament challenged this ordinance before the Thuringian Constitutional Court, which referred the case to the German Federal Constitutional Court. The referral was declared inadmissible due to lack of sufficient grounds of referral.<sup>79</sup> The Federal Constitutional Court argued, that it might be permissible for the executive to issue an ordinance imposing mandates and prohibitions aimed at averting danger to the public on the basis of a legislative blanket clause for an interim period, but that the same might not apply if the ordinance subjected non-compliance to fines because stricter specificity standards arise from the German Basic Law with regard to the latter.<sup>80</sup>

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<sup>75</sup> Constitutional Court of the Republic of Slovenia, 16 September 2021, Decision No. U-I-8/21.

<sup>76</sup> Constitutional Court of the Republic of Slovenia, 7 October 2021, Decision No. U-I-155/20.

<sup>77</sup> Ittai Bar-Simann-Tov, et al: *Measuring Legislative Activity during the Covid-19 Pandemic: Introducing the ParlAct and ParlTech Indexes*. International Journal of Parliamentary Studies, 2021, 1 (1), 115-118.

<sup>78</sup> Bundesverfassungsgericht Order of 18 October 2022 1 BvN 1/21.

<sup>79</sup> Note that Article 100 Para 3 of German Basic Law states if the constitutional court of a State, in interpreting this Basic Law, proposes to derogate from a decision of the Federal Constitutional Court or of the constitutional court of another State, it shall obtain a decision from the Federal Constitutional Court.

<sup>80</sup> Elena Buoso, case note: [www.covid19litigation.org/case-index/germany-federal-constitutional-court-bverfg-1-bvn-121-2022-10-18](http://www.covid19litigation.org/case-index/germany-federal-constitutional-court-bverfg-1-bvn-121-2022-10-18)

In addition, the Constitutional Court of the Republic of Kosovo offers us relevant cases to the orthodox aspect. Case 5 May 2020, No. 61/20 has to be highlighted. 30 Members of the Parliament challenged the constitutionality of four decisions related to the establishing of certain quarantine zones in Kosovo and issued by the ministry of health concerning COVID-19. It was concluded by the court that the ministry of health exceeded the authorizations established by an act. The interference with the right to freedom of movement of citizens was not prescribed by law. Tatiana Shaburova, case note: Kosovo (Serbia), Constitutional Court of the Republic of Kosovo, 5 May 2020, No. 61/20 | Covid-19 Litigation ([covid19litigation.org](http://covid19litigation.org)). Another decision from Kosovo (Constitutional Court of the Republic of Kosovo, 31 March 2020, No. 54/20) is also worth mentioning. The challenged Decision imposed a number of restrictions on the entire territory of the Republic of Kosovo to prevent and control the spread of COVID-19 and its transmission. The Constitutional Court has emphasized that no law or legal provisions used as a legal basis for issuing the challenged decision authorized the Government to limit in a general way in the whole territory of the Republic of Kosovo, to all citizens and without a fixed deadline: the right of movement and circulation; the right to privacy; and the right of gathering. Tatiana Shaburova, case note: Kosovo (Serbia), Constitutional Court of the Republic of Kosovo, 31 March 2020, No. 54/20 | Covid-19 Litigation ([covid19litigation.org](http://covid19litigation.org)).

**4.3.2.** The unorthodox aspect covers when the parliament distracts competences from the executive. The second German case<sup>81</sup> represents this problem to a certain degree. In this decision of the German Federal Constitutional Court the constitutional complaints were unsuccessful regarding curfews and contact restrictions in the Fourth Act to Protect the Population During an Epidemic Situation of National Significance (federal pandemic emergency brake). The challenged measures provided, that if the number of new Covid-19 infections per 100 000 inhabitants within seven days were to exceed the threshold of 100 persons in a given city or district on three consecutive days, the measures would apply in that locality with effect from the second day thereafter. Similarly, if the seven-day incidence rate in a city or district fell below 100 new infections per 100 000 inhabitants on five consecutive working days, the brake ceased to apply in that locality with effect from the second day thereafter. The federal pandemic emergency brake provided for contact restrictions<sup>82</sup> and curfews.<sup>83</sup> The constitutional complaints alleged for many infringements. We stress the technique applied in the legislation. The measures did not violate the constitutional guarantee of individual legal protection afforded to the persons concerned, although they were designed as a self-executing statutory provision that required no administrative implementation in individual cases. Self-executing statutory provision means that the rule enacted by the parliament is effective and enforceable directly without any acts of the executive. The German Federal Constitutional Court rejected the claims. The restrictive substance of the challenged measures was necessary, suitable and proportionate under the German Basic Law. The protection of life and health and the maintenance of the proper functioning of the healthcare system prevailed over the fundamental right to family, marriage and contacting people, while the self-executive character of the federal emergency brake was not amounted to an unconstitutional parliamentary interference to the executive domain.

**4.3.3.** Outright appearance of the unorthodox aspect comes up in the practice of the Romanian Constitutional Court.<sup>84</sup> The complaint was submitted by 50 Romanian parliamentarians and alleged that the decision of the Romanian Parliament<sup>85</sup> to amend and supplement the decision of the Government to declare state of alert<sup>86</sup> was unconstitutional. The Romanian Constitutional Court upheld the claim. The question was whether the legislative competence of the Romanian Government from the interference of the Parliament is safeguarded by the Romanian constitution in the given case. The court argued that the interference of the parliament on a specific act of the

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<sup>81</sup> Bundesverfassungsgericht Order of 19 November 2021 1 BvR 781/21, 1 BvR 889/21, 1 BvR 860/21, 1 BvR 854/21, 1 BvR 820/21, 1 BvR 805/21, 1 BvR 798/21.

<sup>82</sup> Private gatherings in public or private spaces were permitted only if they were attended only by members of one household plus one other person including any children under the age of 14 belonging to that person's household. The provision exempted a few gatherings.

<sup>83</sup> Persons were prohibited from venturing outside residential homes between 10 p.m. and 5 a.m. The provision contained some exemptions as well.

<sup>84</sup> Decision no. 672 of 20 October 2021 of the Constitutional Court of Romania.

<sup>85</sup> Decision no. 5/2020 of the Parliament of Romania.

<sup>86</sup> Decision no. 394/2020 of the Government of Romania regarding the declaration of the state of alert and the measures that apply during its duration to prevent and combat the effects of the COVID-19 pandemic.

government, intended for the implementation of the law, signifies an interference of the legislative power in the secondary regulatory power for the execution of the laws, which belongs exclusively to the government.<sup>87</sup> The Parliament cannot exercise its power of legislative authority in a discretionary manner, at any time and under any conditions, by adopting laws to create the framework in which to encroach on the constitutional powers that belong, exclusively, to other branches of the state.<sup>88</sup> The parliamentary control cannot extend over the normative content of the government's decisions, in the sense of approving, amending or rejecting them. Such an intervention would radically change the concept of parliamentary control. The government's legal acts which are administrative in their traditional nature, are under judicial rather than parliamentary control. Therefore, the court found that the amendment made by the Parliament regarding the normative content of the government's decision impermissibly changes the constitutional relations between the two branches and violates also the domain of judicial control. The amendment by the Parliament establishes a hybrid act without any constitutional basis, created only by a confusion of powers regarding the parliament and the government.<sup>89</sup>

## 5. Discussion

**5.1.** As previously mentioned, if the relationship between emergency orders and ordinary laws is described as a special case of norm collision, one could construct a three-step analysis to reconsider the constitutional review of such controversies. In the subsections below, based on the illustrated research, at first, the three main stages of our proposed interpretative framework will be outlined, then, regulatory techniques will be put forward to precise the relevant constitutional orientations.

**5.1.1.** If one look for the applicable law when an emergency order and an ordinary law colludes, the first phase requires the consideration of the legal scholarship as well as the relevant constitutional references in the given country to classify emergency regulations as sources of law. In this component, we take the view that emergency responses shall remain within the borders of the legal order, and the same sovereign is entitled to enact normative rules during exceptional periods as during ordinary ones. As a consequence, emergency regulations shall be integrated to the existing hierarchy of ordinary legal sources, however, proper adaptive tools would be necessary to facilitate this integration.

**5.1.2.** Amongst these tools of adaptation, under the second prong of the analysis, the formal requirements of enacting emergency regulations shall be examined. Under this prong, three main elements shall be reviewed in our sense. On the one hand,

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<sup>87</sup> For more details please see: Cătălin-Silviu Săraru: *Regulation of Public Services in the Administrative Code of Romania: Challenges and Limitations*. 2023 1 (18) Access to Justice in Eastern Europe 69-83, <https://doi.org/10.33327/AJEE-18-6.1-a000110>.

<sup>88</sup> For more details please see: Camelia Stoica, Marieta Safta: *Legislative initiative of citizens in Romania and at the European level*. Acta Iuridica Hungarica, vol. 55. ed. 2. 2014. 163-173.

<sup>89</sup> Diana Ungureanu, case note: [www.covid19litigation.org/case-index/romania-constitutional-court-romania-no-672-2021-10-20](http://www.covid19litigation.org/case-index/romania-constitutional-court-romania-no-672-2021-10-20).

the already elaborated technical requirements of lawmaking should be still enforceable during emergency periods, for instance, the Slovenian Constitutional Court abrogated certain emergency orders because these rules were not fully published in the Official Gazette.<sup>90</sup> On the other hand, the justification of exceptional measures might be also assessed: whether the reasons of extraordinary state interference was sufficiently compelling to underline far-reaching measures. Thirdly, the objective constitutional limitations on emergency regulations should be taken into account. As argued under the fourth section, such objective limitations may be phrased by three different manners: by the identification of some protected subject matters; by the additional protection of particular fundamental rights; and by the safeguard of parliamentary or executive competences. Under the formal prong of the analysis, the respect of these objective limitations should be considered before the assessment of the merits.

**5.1.3.** In the final instance of the interpretative process, the implemented emergency measure shall be evaluated as regard its necessity and its proportionality to the aim pursued, or other tests applicable to emergency orders shall be scrutinized to decide, whether the impugned extraordinary measure met with the substantial constitutional standards. In our view, this is the most elaborated part of the analysis up to date, therefore, this article does not discuss the details of the substantial prong unless extremely necessary to show the underestimation of the previous two steps of the interpretative framework. On the ground of this three-stage model, one could decide, whether an emergency order is entitled to overrule an ordinary law in a concrete case.

**5.2.** After having enumerated the tools of interpretation at our disposal, we turn now to the points of reference stemming from codified constitutional norms. Those limits should be mentioned expressly by the constitutional text, which should not be overstepped by emergency orders. Constitutions tend to designate certain safeguards which should prevail even during emergency periods, therefore, shall not be outlawed by emergency regulations. Nevertheless, one can easily claim that the current version of these clauses are not sufficiently elaborated, just overbroad references to a narrow group of fundamental rights or certain subject matters stand at our disposal.

It turned out during public health emergencies even from the constitutional case law that constitutions left more questions opened than closed regarding the legitimate scope of emergency regulations. To mention concrete examples from the countries examined more closely, the Fundamental Law of Hungary just declares, that emergency decrees could amend certain acts and impose additional limitations on fundamental rights.<sup>91</sup> On the contrary, In Austria, overbroad clauses on special legal order were neglected,<sup>92</sup> no official state of emergency has been declared, public health measures were based on exceptional authorizations beyond the ordinary legal order.<sup>93</sup> In our view,

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<sup>90</sup> Constitutional Court of Slovenia, U-I-445/20, December 3. 2020.

<sup>91</sup> Fundamental Law of Hungary, art. 52. (3) and art. 53. (1): [www.parlament.hu/documents/125505/138409/Fundamental+law/](http://www.parlament.hu/documents/125505/138409/Fundamental+law/).

<sup>92</sup> Constitution of Austria, art. 18. (3)-(5): [constitutionnet.org/sites/default/files/Austria%20\\_FULL\\_%20Constitution.pdf](http://constitutionnet.org/sites/default/files/Austria%20_FULL_%20Constitution.pdf).

<sup>93</sup> Karl Stöger: *Austria: Legal Response to Covid-19*. The Oxford Compendium of National Legal Responses to Covid-19. [oxcon.ouplaw.com/display/10.1093/law-occ19/law-occ19-e28](http://oxcon.ouplaw.com/display/10.1093/law-occ19/law-occ19-e28).



the emergency sections of constitutions may render the limits of emergency regulation through three different regulatory manners, which still exist at the moment, however, constitution drafters have not used these options consciously, while the scholarship has not distinguished these three alternatives.

**5.2.1.** Firstly, the constitutional provisions from emergencies may determine certain regulatory matters, whose arena should be protected from emergency decrees. In this sense, general clauses are not sufficiently foreseeable, the constitutional text should determine those statutory subjects on which emergency orders should not regulate. One shall stress again the importance of explicit topical orientations such as criminal law and the fundamental principles of the taxation. These are just exemplificative suggestions, the main recommendation here is to establish a coherent concept from those fields of statutory law which should not be relativized regardless of the evolving external pressure.

**5.2.2.** Secondly, the constitution may focus on the protection of fundamental rights during emergencies, two regulatory tools might be available for this purpose. On the one hand, an exclusive list of fundamental rights may be found in the constitution which shall not be derogated even during public health emergencies. On the other hand, the constitution may orient the legislation and the interpretation, what kind of standards should be followed during the introduction of emergency measures restricting fundamental rights. To set concrete examples, the current Fundamental Law of Hungary refers just to the possibility to restrict certain fundamental rights beyond generally acceptable limits;<sup>94</sup> while the Romanian Constitution in principle excludes the restriction of fundamental rights imposed through emergency state interventions with special highlight on right to vote.<sup>95</sup>

**5.2.3.** Thirdly, the emergency regime may prevent the executive and also the Parliament from neglecting those laws and fundamental constitutional principles, which shall be crucial for the protection of parliamentary competences vis a vis the executive. In the meantime, governmental space of manoeuvre might be also entitled to be protected from undue parliamentary interventions like demonstrated by the case law of Romania and Germany.

In sum, the current constitutional clauses from emergency decrees provide several invaluable elements from these norms, and to clarify their relationship with ordinary legal sources. However, the available tools for this target has not been used purposively to foster this goal, therefore, a more conscious and robust approach seems to be necessary to avoid legitimacy deficit behind emergency measures.<sup>96</sup> Either the emergency sections or the enumeration of the legal sources might be amended in the constitutions to reduce the uncertainties around this matter.

If we take a cursory glance on the five countries from which we have selected

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<sup>94</sup> Fundamental Law of Hungary, art. 52. (3): [www.parlament.hu/documents/125505/138409/Fundamental+law/](http://www.parlament.hu/documents/125505/138409/Fundamental+law/).

<sup>95</sup> Constitution of Romania art. 115. (6): [www.constituteproject.org/constitution/Romania\\_2003.pdf?lang=en](http://www.constituteproject.org/constitution/Romania_2003.pdf?lang=en).

<sup>96</sup> Lars Vinx: *Hans Kelsen's Pure Theory of Law: Legality and Legitimacy* (Oxford University Press, 2007), 170.

most of the examined constitutional case law, one can draw the conclusion that the insufficient constitutional orientation from emergency regulations caused serious implications during the recent public health emergency. In Austria, where no official state of emergency has been declared, the Government put in place quick countermeasures against the epidemic with immediate parliamentary approval received within 24 hours without substantial debate or supervision.<sup>97</sup> As regard Germany, the federal structure of the country resulted in various protective mechanisms on the member state and the municipal level, however, the statutory framework of emergency should have been amended in March 2020 to establish the term of epidemic with national concern.<sup>98</sup> The constitutional validity of Hungarian public health emergency was also doubted by several commentators;<sup>99</sup> moreover, the emergency measures of the Fundamental Law has been revised three times since the beginning of the global pandemic, which shows the huge uncertainties around this matter.<sup>100</sup> In Romania, emergency decrees may be also amended outside from extraordinary periods in case of urgency, but these shall not amend the Constitution.<sup>101</sup> Last but not least, Slovenia also rejected the official declaration of state of emergency, nevertheless, numerous contested measures with undoubtedly exceptional character have been implemented.<sup>102</sup>

In most of the countries, the relevant rules are fragmented and their allocation within the constitution is not reasonable. Moreover in Hungary, where a separate subchapter is devoted to emergencies, the unclear and overbroad wording of emergency clauses undermine the credibility of extraordinary measures.<sup>103</sup> Based on these findings, one may rely on the idea to simplify the emergency rules of national constitutions by grouping them into one subsection, and the legitimate scope of emergency regulation should be outlined precisely either in the emergency section or amongst the hierarchy of legal sources.

## 6. Conclusions

Our contribution aimed to give certain new insights to academic scholarship dealing with constitutional review of emergency regulations especially in the light of the growing significance of exceptional legal orders. The global pandemic increased the interest of the constitutional literature in assessing the role of emergency provisions in

<sup>97</sup> Michael Goldhammer: „Rechtsstaat statt Ausnahmezustand. Zur Logik von gerichtlicher Vollkontrolle und Rücknahme in der Pandemie“ *Zeitschrift für öffentliches Recht*. Vol. 77. ed. 1. 2022. 93-96.

<sup>98</sup> [Verfassungsblog.de/critique-and-crisis-the-german-struggle-with-pandemic-control-measures-and-the-state-of-emergency/](https://verfassungsblog.de/critique-and-crisis-the-german-struggle-with-pandemic-control-measures-and-the-state-of-emergency/).

<sup>99</sup> [Verfassungsblog.de/hungary-and-the-pandemic-a-pretext-for-expanding-power/](https://verfassungsblog.de/hungary-and-the-pandemic-a-pretext-for-expanding-power/).

<sup>100</sup> [Telex.hu/english/2022/05/24/the-tenth-modification-of-the-fundamental-law-approved-by-parliament](https://telex.hu/english/2022/05/24/the-tenth-modification-of-the-fundamental-law-approved-by-parliament).

<sup>101</sup> Art. 115. (6) of the Constitution of Romania, [www.constituteproject.org/constitution/Romania\\_2003.pdf?lang=en](http://www.constituteproject.org/constitution/Romania_2003.pdf?lang=en).

<sup>102</sup> Zagorc, Saša; Bardutzky, Samo: Business as Usual, but to the Unusual Extremes: Slovenia and Covid-19, *VerfBlog*, 2020/4/26, <https://verfassungsblog.de/business-as-usual-but-to-the-unusual-extremes-slovenia-and-covid-19/>.

<sup>103</sup> Gárdos-Orosz Fruzsina: ‘COVID-19 and The Responsiveness of the Hungarian Constitutional System’ in José María Serna de la Garza (coordinator), *Covid-19 and Constitutional Law* (Universidad Nacional Autónoma de México, 2020) 157-165

promoting the resilience of legal systems, which is more important nowadays than ever before. Apart from the public health challenges, other cumulative crises also mean risk factor for the integrity of constitutional and legal frameworks, therefore, the significance of safeguards in this respect could not be overestimated.<sup>104</sup>

In such an era when emergency periods are usually considered as ordinary situations,<sup>105</sup> emergency decrees shall be also seen as integral parts of the constitutional design, however, this integration would result in facade outcome without the implementation of adaptative tools of interpretation and appropriate techniques of constitutional regulation. Our conducted research aimed at enriching the existing literature with some ideas supporting this adaptation.

If the constitutional rank of emergency orders is surrounded by huge uncertainty, this would affect legal security on a systematic level, which may entail additional rule of law concerns strengthening the existing ones. The constitutional regulation of emergencies differs considerably from country to country, however, the same issue lies at the background: in case of events entailing severe public concern, certain constitutional actors, usually governments may receive authorization to implement far-reaching state interventions through the enactment of emergency decrees. The addressee of the authorization, the manner of adopting these decrees, and their scope might be further questions for extensive professional discourse, our purpose was just to revisit traditionally little researched and underestimated dogmatic issues concerning the constitutional review of emergency decrees.

Obviously, broad margin of movement should be left for the executive power during emergencies to tackle effectively the serious challenges raised; however, the constitutional precision of emergency regulation would not narrow this flexibility, just would develop the accountability of emergency measures with the exclusion of numerous constitutional concerns. During the period of cumulative crises, the state authorities have special responsibility to make necessary arrangements for the protection of public interest, however, the justifiable limits of these extraordinary interventions shall be also set by carefully tailored terms. Our contribution hopefully took some minor steps towards this direction.

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<sup>105</sup> Anna Lührmann - Bryan Rooney: *Autocratization by Decree: States of Emergency and Democratic Decline*. The Varieties of Democracy Institute, Gothenburg, 2020. Working Paper Series. [www.v-dem.net/media/publications/wp\\_85.pdf](http://www.v-dem.net/media/publications/wp_85.pdf).

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