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The Hungarian Constitutional *Court's* practice on restrictions of fundamental rights during the special legal order (2020–2023)

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ABSTRACT

The paper deals with the practice of the Hungarian Constitutional Court regarding the restrictions of fundamental rights during the state of danger between 2020 and 2023. The state of danger – which is a type of special legal order in Hungary – was first introduced in March 2020 due to Covid-19. The rules of the Fundamental Law related to the special legal order reserve the Government the opportunity of broader restrictions on certain fundamental rights than in a normal legal order. It was the first period when the Constitutional Court could have established its practice and defined its own role in a special legal order, since the democratic transition in Hungary. The need for the interpretation of the constitutional rules on special legal order never applied before has posed a significant challenge to the Constitutional Court. The paper first examines the development of the constitutional rules on special legal order situations since the democratic transition, then reviews the most important parts of the Constitutional Court's practice on the cases related to the restrictions of fundamental rights in special legal order with a focus on the elements of the test used for checking the constitutionality of the challenged items of legislation.

KEYWORDS

Special legal order; State of danger; Hungarian Constitutional Court; Restriction of fundamental rights

1. Introduction

On 11 March 2020, the Hungarian Government declared a state of danger in order to mitigate the consequences of the human epidemic endangering life and property, for the protection of health and life of Hungarian citizens.[1]

Although several other EU countries have introduced special legal order in response to the health crisis caused by the Covid-19,[2] there have been numerous domestic and foreign criticisms on how Hungary has handled the pandemic (Cheesman, 2023; Drinóczi & Bień-Kacała, 2020; Győry & Weinberg, 2020; Horváth, 2020; Kovács, 2022; Mészáros, 2022; Nagy & Horváth, 2022a; Urbanovics et al., 2021).[3]

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The present article addresses one of the criticised issues, the restrictions of fundamental rights in the special legal order and examines the practice of the Hungarian Constitutional Court (CC) in the period of state of danger between 2020 and 2023. The special legal order provisions of the Fundamental Law (FL) provide the possibility for the Government to impose broader restrictions on fundamental rights in times of emergency.

This was the first time since the democratic transition of Hungary that the CC had been able to develop its practice – and define its role – in a special legal order on the national level. Besides the novelty of the situation, a further challenge was that it soon became clear that the special legal order would not last for a short period of time, measurable in weeks or months – at the time of writing this paper, it has been in force for three years, albeit with interruption – although from 25 May 2022, the reason for the declaration of a state of danger is the armed conflict and humanitarian disaster on the territory of Ukraine.[4] In these three years, a number of questions arose in which the CC had to take a position. The inherent difficulty/challenge/uncertainty/beauty – perhaps all of this together, depending on the perspective that we look at it from – is first and foremost that the special legal order, by its nature, reshapes the state's decision-making structures, (more abstractly), the system of the separation of powers. One of the best indicators of the mode and dimension of the transformation affecting the CC is the extent to which the enforcement of fundamental rights is changed. This can be assessed by the nature of the modification of the standards on fundamental rights restrictions, which requires the study of the constitutional framework on the one hand, and the relevant CC practice on the other.

The article reviews the evolution of the special legal order regulations, the system of special legal order defined in elaborate detail, what is more, practice has proven that in way too much detail, by the FL, the most important elements of the new practice of the CC, with special regard to the elements of the analysis of the constitutionality of the fundamental rights restrictions and the problems and challenges arising from them.

2. Changes in the normative framework of the special legal order in Hungary

2.1. Model(s) for special legal order regulation

The decision-makers' insecurity and disposition to over secure the political system as possible during the democratic transition also manifested itself in the constitutional design of the special legal order,[5] which explicitly marginalised the Government in the case of the two most serious special legal orders.[6]

This situation has been changed significantly by the FL and its sixth, ninth and tenth amendments. These did away with the solution that blurred the boundaries between the branches of powers[7] by November 2022 and made the Government the sole crisis manager.

One of the boldest innovations of the FL (2011) was the revision of the special legal order, but the change was more formal and structural (the name, location and scope changed)[8] than substantive (the FL retained the logic of the previous special legal

order regulation, assigning different special legal orders to different threats, while clarifying the rules).

An important change is that the FL more accurately distinguished between the conditions required for the declaration of a state of emergency and a state of danger, thus eliminating the earlier overlaps (Kádár, 2021). Also, it regulated the decrees adopted in the state of danger by the Government declaring that those decrees shall remain in force only for fifteen days, unless the Government, on the basis of the authorisation of the Parliament, extends their force.[9] Five years after the adoption of the FL, the Parliament adopted its sixth amendment, which introduced the state of terrorist threat as the sixth special legal order.[10] The main argument for the Government's reasoning was that the new types of security challenges could not be adequately addressed by the previous responses given by the special legal order.

The next important stage in the development of special legal order regulation was the ninth amendment of the FL in December 2020, which radically changed the rules applied in special legal order but the amendments only entered into force from November 2022. According to the reasoning of the ninth amendment, the aim of the reform was to establish 'a more modern and efficient system, based on the experience of crisis management in the recent years and one that may adapt better to the changing security environment'. The amendment replaces the previous six special legal orders with only three categories: state of war, state of emergency and state of danger.[11] For the present article, the changes related to the state of danger are relevant, so we only focus on those in details. 'The Government may declare a state of danger in the event of an armed conflict, war situation or humanitarian catastrophe in a neighbouring country, or a serious incident endangering life and property, in particular a natural disaster or industrial accident, and in order to eliminate the consequences thereof'.[12]

Thus, in the amendment, natural disasters and industrial accidents are only used as examples, while the state of danger can also be declared in the case of other grave incidents. A further change is that the amendment introduces a timeframe (30 days) for the state of danger, which was missing from the previous regulation.[13]

After the period of 30 days expires, the Government may extend the state of danger by the votes of two-thirds of the present Members of the Parliament. The Government decree approved in a state of danger remains in force until the end of the state of danger, or until it is repealed by the Parliament.[14]

The conflict in Ukraine has shown that the ninth amendment to the FL did not take into account all types of possible threats which could not be handled adequately by the interventions ensured by the normal legal order. The tenth amendment to the FL approved in May 2022 further extended the concept of state of danger, declaring, by reforming the ninth amendment of the FL under vacatio legis, that a state of danger may be declared also 'in the event of an armed conflict, war situation or humanitarian catastrophe in a neighbouring country, or a serious incident endangering life and property'.[15]

2.2. Changes regarding the separation of powers

The experience of the three decades following the democratic transition has shown that the frequency and number of challenges to the state and society that cannot be efficiently addressed by normal legal order instruments (the Yugoslav Wars, the migrant crisis, the

threat of epidemics, the oil and fuel supply crisis) have significantly increased. This phenomenon has been adequately dealt with neither by the Constitution nor the FL provisions on special legal orders, despite the fact that they have been immensely detailed, especially because of the many different types of special legal orders.

Despite the numerous types, there was still a number of situations that could not be addressed by any of the special legal order instruments, and even further legislative acts (e.g.: Act XII of 2020 on the containment of coronavirus) were needed for efficient protection and control beyond the pre-determined framework (the FL, the Disaster Management Act[16]). The ninth amendment of the FL intended to respond to these challenges and problems, improving the previous legislation by simplifying it, while maintaining the guarantee elements. It formally increased the role of the Government in the special legal order, as it stated that the Government may issue decrees in all special legal order situations, in a general form, thus abolishing the former Defence Council and removing the right of President of the Republic to issue decrees.[17] The ninth amendment affects the separation of powers not only by increasing the role of the Government but also by the additional guarantees that it introduces. The amendment states that 'during the period of special legal order, the Government shall be obliged to take every measure to guarantee the continuous operation of the National Assembly'.[18]

As an additional guarantee, the amendment obliges the Government to take all measures to ensure the continued functioning of the CC.[19] The reform also introduces the Government's duty to inform the President of the Republic, the Speaker of the National Assembly, and the relevant standing committee of the National Assembly about the decree issued under the rules governing the special legal order during the special legal order.[20]

3. Restrictions of fundamental rights at special legal order

The reform of the special legal order chapter of the FL, which entered into force in 2022, also affected the rules on the restrictions of fundamental rights. However, the introduced changes were of a formal nature: the content of the backbone of the regulation remained unaltered, but were only renumbered. As the relevant decisions on merits of the CC had been published only before the reform entered into force, they contain the pre-reform numbering of the relevant provisions of the FL. As the primary aim of the study is to outline the CC's perception on its role and its place in the separation of powers by describing certain landmark decisions, in the following parts the study will thus follow the previous numbering of these decisions but will also refer to the new numbering at their first occurrence.

Compared to the Constitution,[21] the FL has defined a narrower list of fundamental rights that cannot be suspended or restricted even in a special legal order. The FL provides unconditional protection only to the right to life and human dignity, to the specifically defined prohibitions linked to the right to human dignity (prohibition of torture, inhuman and degrading treatment and punishment, etc.) and to certain guarantees of the right to a fair trial (presumption of innocence, right of defence, principle of nullum crimen/nulla poena sine lege, principle ne bis in idem).[22] As in the previous Constitution, the FL made it possible for the extent of the restriction of fundamental rights to exceed the normal legal order restriction (necessity-proportionality test) in a special legal order,

and even provided for the possibility of suspending fundamental rights. However, the FL also contains some additional guarantees as compared to the Constitution, as it extends the prohibition of suspending the application of the FL and of restricting the operation of the CC to all special legal order.[23]

These rules give the legislator a broad mandate by allowing the suspension of fundamental rights but they also give the CC – within its authentic power of constitutional interpretation – a considerable latitude, at least 'at first sight'. We can assess how the CC has interpreted its own role and to what extent it has let the legislator to exercise its right of discretion by answering the following questions[24]:

(a) Does the possibility of suspending fundamental rights give the Government a blank cheque?
(b) What does the prohibition on restricting the operation of the CC mean?
(c) If it does not give such a mandate, what is meant by the turn of phrase 'beyond the extent': can it be objectified by some test?
(d) The phrase 'in special legal order' does not refer to types of sources of law but to a period: how should the constitutionality of sources of law which are not related to the special legal order period be assessed?

4. Responses of the Constitutional Court

The CC has gradually, but basically rapidly, developed its practice on the above-mentioned issues in relation to the restriction of fundamental rights in the context of the special legal order. The importance of this legal development could be considered as substantial as the reform made by the CC when the FL entered into force: it developed the framework of a fundamentally new constitutional regime.

Just as in 2012 the CC was able to find reference points in its experience of 1990–2011 to develop a new practice, it could rely on its previous decisions in the state of danger – also considering the changes deriving from the new normative framework. In what follows, we will review the framework developed by the CC along the lines of the issues identified above.

4.1. Interpretation of the possibility of the suspension of fundamental rights

Decision of the CC 15/2021 (V. 13.) marked a milestone in the interpretation of the possibility of suspension of fundamental rights in special legal order.[25] As in this case the challenged legislation[26] had to be compared with Article VI(3) of the FL, which provides access and dissemination of data of public interest, which is not among the exceptions mentioned in Article 54(1), Article 54(1) had to be applied. The CC has declared that the teleological interpretation of the FL implies that, although the state of national crisis allows for the adoption of extraordinary measures, the Constitutionalist did not intend to authorise the legislator of the special legal order either to introduce a restriction of fundamental rights that is unconnected to the combating of the danger or to restrict certain fundamental rights more than the exceptional circumstances justify. Unlimited or unrestrictable power is inherently contrary to the spirit of the FL, even in a special legal order. Thus,

it does not result from the FL that even all fundamental rights can be automatically suspended in times of a state of danger, with the exception of the right to life and dignity, the prohibition of torture and criminal law guarantees.[27] Further decisions of the CC in the context of state of danger have confirmed this position,[28] it is therefore clear that the CC did not back down on the basis of the phrase of Article 54(1) allowing the complete suspension of fundamental rights. It should be emphasised, however, as Tünde Handó pointed out in her dissenting opinion,[29] that this decision did not invoke Article 54(2) of the FL, which prohibits restrictions on the operation of the CC, supporting its position.

This norm would clearly be undermined if the Court waived to review the rules restricting fundamental rights referring to the possibility of suspending fundamental rights. Subsequent decisions raising this problem of the restriction of fundamental rights have already invoked Article 54(2).[30]

4.2. The prohibition on the restriction of the operation of the Constitutional Court

As the importance of this prohibition has already been explained in the previous section, now we will focus on another related issue. According to Article 54(2) of the FL, the operation of the CC may not be restricted in a special legal order. The prohibition is apparently clear but the author of the FL has left open the question of what the restriction is prohibited in relation to. There are two possible solutions, both of which can be argued for: the first one is that the prohibition of restriction applies to all restrictions, even those that apply in the normal legal order. It can be reasoned by the concept deriving from the constitution-centred approach of the special legal order (Jakab & Till, 2019, pp. 435–459), which aims to counterbalance the concentration of power caused by the special legal order with a more intensive protection of fundamental rights than the general one. Csink (2017) formulates this as the central idea of the special legal order, according to which strong powers require proportionately strong control (p. 15).

The other solution is based on the assumption that the limits and restrictions of the normal legal order also prevail in a special legal order. This approach primarily sees the prohibition of obstacles to the operation of the CC in Article 54(2). The undoubted advantage of this approach is that it avoids the questions raised by the undefined concept of restriction: in an abstract approach, even an allocation of powers is a restriction, since it only authorises the body to which it is addressed, even the CC, to perform only predetermined tasks (cf. the freedom of the CC deriving from the function of being the principal organ for the protection of the FL declared by Article 24(1) of the FL and the limits on other powers under Article 24 (2) of the FL and Act CLI of 2011 on the CC (e.g. the exclusion of preliminary norm control of decrees)).

This idea may also be continued in the direction of the petitioners' entitlement: is the absence of actio popularis a restriction in the case of the individual powers? If the first interpretation is approved, a clear answer to these questions must also be given, considering the guarantee of the operability of the CC and the need to respect the modified order of the separation of powers.

Beyond the theoretical questions, there is a constitutional norm whose restrictive nature can be easily justified in the light of the regulatory technique of the rule-exception, this is Article 37 (4) of the FL, according to which as long as government debt exceeds half

of the total gross domestic product, the CC may within its preliminary norm control, posterior norm control, norm control and constitutional complaint powers review the Acts on the central budget, the implementation of the central budget, central taxes, duties and contributions, customs duties and the central conditions for local taxes for conformity with the FL exclusively in connection with the rights to life and human dignity, to the protection of personal data, to freedom of thought, conscience and religion, or the rights related to Hungarian citizenship, and it may annul these Acts only for the violation of these rights. The CC shall have the unrestricted right to annul Acts having the above subject matters as well, if the procedural requirements laid down in the FL for making and promulgating those Acts have not been met. The essence of the rule under Article 37(4) is therefore to prohibit the exercise of certain powers provided for by the FL to the CC.

The legal question of Decision of the CC 3234/2020 (VII.1.) was to decide on the suitability of the substantive examination whether a tax law norm, which is subject to the restriction of public finance powers under Article 37 (4) of the FL, but which is included in a special legal order, complies with Article XIII of the FL.

The CC resolved the issue primarily through standard legal reasoning[31] but made it clear that the restriction of public finance powers also applies to decrees issued on the basis of Article 53(2) of the FL (from 1 November 2022: Article 53(1)) in general: in a state of danger. This was confirmed – now stating, expressis verbis, the quasi-legal nature of special legal order decrees – by Decision of the CC 3214/2023 (V.5.).[32] Among the possible interpretations of Article 54 (2) of the FL, the Court chose that the operation of the CC cannot be restricted in comparison with the normal legal order, namely, the CC cannot extend its jurisdiction beyond the limits of the normal legal order, not even in a special legal order.

4.3. Answers to the questions

The greatest development in the CC's practice on the restriction of fundamental rights in special legal order can be observed in the selection and development of the test to be applied. The source of the problem is that Article 54(1) of the FL – in addition to the already described suspension – allows more restrictions of fundamental rights in a special legal order than the level defined in normal legal order.

The first stage of the evolution is represented by Decision of the CC 15/2021 (V.13.), analysed above in another aspect, which declared that Article 54(1) of the FL basically implies the application of the test described by Article I(3), taking into account the circumstances which led to ordering the state of danger. Accordingly, the CC examined the triad of a legitimate goal, necessity, and proportionality regarding the challenged legislation. The epidemic situation as a circumstance justifying the ordering of a special legal order appeared in all three studied aspects, albeit rather concisely: the legitimate goal is to combat the epidemic, the disclosure of data of public interest hinders the fight against the epidemic, so the extension of the deadline for the execution of the request is justified, necessary and not disproportionate.[33] Such a reasoning should be applied for any circumstances even in a normal legal order.

For our topic, the reason why the CC decided to apply the normal legal order test is of particular importance. According to the reasoning, this interpretation derives from Article

54(4) of the FL, according to which the detailed regulations to be applied under a special legal order shall be laid down in a cardinal law.[34] One of these laws is the Disaster Management Act,[35] whose Article 51/A (2) introduced for Covid-19 declares that the Government may exercise its powers – to the extent necessary, in proportion to the goal to be achieved – for preventing, addressing, eradicating the human epidemic, as well as for preventing and eliminating its harmful effects. It also follows from the subjective teleological interpretation that the legislator requires that the government decree approved in a state of danger should be necessary for averting the danger and it should also be proportionate to the danger. The amicus curiae brief presented by the Minister of Justice also treats it as evidence that the extraordinary measure must be necessary for overcoming the emergency and proportionate to the objective pursued.[36] The decision thus provided an interpretation of the phrase 'beyond the extent' of Article 54(1) of the FL based on a cardinal law provision. Two criticisms can be made in this regard: on the one hand, the logic of interpreting the FL through a lower-level legal source, even if the approval of the quoted cardinal law was authorised by Article 54(4) of the FL, is contrary to the hierarchy of legal sources. This extradites the FL to the interpretation of the legislator, and indirectly gives the opportunity to the legislative power to create de facto constitutional norms. The solution presented in the decision renders the FL vulnerable to the legislative power. The FL must be interpreted according to its own norms and in the light of the decisions of the CC. The constitutional interpretation can be transmitted to lower-level sources of law, so even a cardinal law cannot determine the interpretation of the FL. On the other hand, it cannot be ignored that the identification of the special legal order test with the normal legal order test either renders the mandate given by Article 54(1) of the FL empty – if it does not allow a derogation from the limitation standard under Article I(3) – or unpredictable – if it allows a derogation from the normal legal order test but does not specify the criteria and the extent of the derogation.[37] This is contrary to the function of the tests used for judging fundamental rights (and other constitutional questions), which is to make the decision of the CC as objective and verifiable as possible (Somody et al., 2018, p. 58).

The next step in defining the type of test to be applied was decision of the CC 23/2021 (13 July), in which the Court broke with its previous position and, while formally retaining the criteria of the ordinary legal order test (Erdős, 2021, pp. 83–87; Pozsár-Szentmiklósy, 2021, pp. 9–12), significantly modified the criteria of necessity and proportionality. Regarding necessity, the Court pointed out that in the examination of constitutionality, the CC cannot examine the expediency of the restrictions but it can examine whether the rule restricting a fundamental right is justified in the spirit of protection against danger. In the course of the examination, the CC must ascertain whether the challenged legislation is suitable for preventing or mitigating the circumstances that require the introduction of the special legal order. If the appropriateness of the measure is not justified, the suspension and the restriction of the fundamental right does not fulfil the requirements of Articles 54(1) and I(3) of the FL.[38] Differently from decision 15/2021 (V.13.), it was no longer a requirement that the legislator must choose the most moderate intervention, it is sufficient that the measure applied is suitable for the containment, eradication or mitigation of the consequences of the epidemic situation. Regarding proportionality, decision of the CC 23/2021 (VII.13.) drew attention to the importance of temporality: from the point of view of proportionality, temporality is of particular

importance: the longer the period of suspension of the exercise of a fundamental right, the stronger justification is required for maintaining the restriction. The legislator must recurrently consider – as it does in other cases – the collision between the exercise of the fundamental right and the achievement of the epidemiological objectives and, where the epidemiological objectives permit, allow at least partial exercise of the fundamental right.[39]

Judge Ildikó Hörcherné Marosi, who drew up a concurring opinion to the decision, disagreed with the reinterpretation of proportionality and its limitation to the control of the revision made by the legislator, she argued that it has to be examined regarding the proportionality test whether the importance of the objective pursued and the level of infringement of fundamental rights caused in order to achieve it are in reasonable proportion to each other. Even in a state of danger, the legislator is obliged to choose the least restrictive means to achieve the given objective, i.e. the restriction must not exceed the level that is strictly necessary to achieve the constitutionally justifiable objective in the state of danger.[40]

Judge Péter Szalay presented a consistent concurring opinion, declaring that on the one hand, the extent of the restriction of the fundamental rights may exceed what is strictly necessary to achieve the objective pursued in order to avert the consequences of the emergency; on the other hand, the suspension of the exercise of the fundamental rights may also restrict the essential substance of the fundamental rights. However, Article 54(1) does not give exemption from that rule of Article I(3) which declares that a fundamental right may be restricted only in proportion to the aim pursued. The CC may therefore also examine the purpose of a measure restricting a fundamental right in a special legal order, in a state of danger, that is, it may examine whether it is intended to avert the disaster (and its consequences) and the proportionality of the restriction.[41]

In her dissenting opinion, Judge Ágnes Czine would have gone further in the proportionality requirements: 'In my opinion, a regulation is compatible with Article I (3) and Article 54 of the FL which does not establish a general ban but defines the aspects which the organ authorising an assembly must consider and may adapt its decision to the current health risks during the considered period of the epidemic situation'.[42]

Judge Miklós Juhász presented a contradictory position in his concurring opinion to the above-mentioned concurring opinions and dissenting opinion. He agreed with the steps of the new test but he emphasised that the aspect of periodic legislative review in the context of proportionality is not derived from Article I(3) but from Article 53(3) of the FL. The time limitation on emergency regulation is clearly laid down in the first phrase of Article 53(3) of the FL. In my view, the second phrase of Article 53(3) of the FL, formulated as an exception, in view of the function of the special legal order, implies a legislative obligation to ascertain whether the restriction of rights is justified at reasonable intervals. Following this argument, what the CC may examine is not the result of the legislator's discretion but the fact that the legislator has exercised discretion.[43] In addition to this, the concurring opinion also points out the practical arguments in favour of the marginalisation of the meaning of the proportionality test in a normal legal order: after the imposition of a special legal order, there is a constitutional presumption that the occurrence of circumstances giving rise to the special legal order (e.g. loss of territory, loss of sovereignty, mass mortality, illness, loss of property) would be more detrimental than the sacrifices required to overcome these consequences, even a restriction of

fundamental rights. Thus, any restriction of rights in a special legal order – except the rights declared as exceptions in Article 54(1) of the FL – must be proportionate by virtue of the FL. The logic of the concurring opinion that can be applied to a state of danger is thus that if the CC has recognised the suitability of a measure for the eradication or mitigation of an epidemic situation – and thus for the protection of the right to life and health – then no stronger fundamental right can be presumed against it, so the proportionality test becomes functionless.[44]

The third stage of the development of the test on the restriction of the fundamental rights in a special legal order is decision of the CC 27/2021 (XI.5.), in which the Court has already examined Article 53(3) of the FL instead of the proportionality test for establishing the requirements of periodic review. The decision is peculiar because the CC assessed the challenged legislation on the basis of the necessity-proportionality test optimised for the prohibition of discrimination. Although this test did not reach the proportionality stage, the CC conducted the test part focusing on temporality.[45] This demonstrates that the clarification of the specific legal basis of the temporality test can also contribute to a higher level of legal protection.

Decision of the CC 3128/2022 (IV.1.) summarised the results of the development of the special legal order test, describing its steps of evolution in relation to the general test other than the special (public interest, reasonableness) test as follows: on the basis of the test on the restriction of fundamental rights under Article 54(1) of the FL, it is to be examined whether:

- there has been an intervention to the fundamental right in question,
- the restriction of fundamental right has a legitimate aim,
- the restriction of fundamental right is suitable for achieving the legitimate aim, and, subject to Article 53(3) of the FL, whether
- the legislature has periodically ascertained whether the maintenance or extension of the restriction is justified.[46]

4.4. Interpretation of the phrase 'special legal order' of the Fundamental Law

While the above-mentioned practice on the restriction of fundamental rights in special legal orders has been expanded and become more and more specific, the CC has examined the constitutionality of a number of norms that were not related to the elimination of the epidemic. In these cases, the CC applied the normal legal order test on the restriction of fundamental rights. Even though it may seem obvious, the grammatical interpretation of Article 54(1) of the FL results in the opposite, as it refers to the 'rules applied in a special legal order' and not the 'rules of a special legal order'. It therefore clearly refers to a certain period, and does not distinguish either by the type of the source of law, or by the relationship with the special legal order. In our view, the CC was correct in not applying the test under Article 54(1) in cases which were not related to the state of danger. The reason for this is, however profoundly the epidemic has transformed our lives, a relevant part of the legislation approved during this period has not been related to epidemiological control. In the case of legislation regulating such legal relationships, the application of the normal legal order test on fundamental rights, which ensures a more rigorous analysis, provides a higher level of legal protection, and may therefore be approved.

However, regulations that do not take the form of government decrees in a state of danger and ones that contribute to epidemic control may emerge – these are primarily laws with regard to the regulation of fundamental rights on the statutory level. There is no provision in the FL that would exclude the Parliament from legislation on epidemic control. This is also confirmed by Act XII of 2020 on the containment of coronavirus, as Article 10 thereof has transformed the statutory provisions of the Criminal Code on scaremongering. The modified Article 337 (2) of the Criminal Code declares: a person who, during the period of a special legal order and in front of a large audience, states or disseminates any untrue fact or any misrepresented true fact that is capable of hindering or preventing the efficiency of protection is guilty of a felony and shall be punished by imprisonment for one to five years. Its compatibility with the FL was assessed by Decision of the CC 15/2020. (VII.8.) on the basis of the special legal order test specified by Article 54 (1). It is remarkable that according to the Reasoning, the special legal order is a special part of constitutional law, a right to deal with periods lacking of peace or periods differing from the ordinary times of state functioning, using an increased range of means. […] In times of a special legal order, the protection against situations giving rise to such a situation is based on the FL. It cannot therefore be stated that it is unnecessary to prevent communications which could hinder or thwart that defence.[47] Thus, the CC emphasised the temporary nature of the special legal order and it took into account the purpose of the legislation, its relation to the special legal order at the same time.

The CC, neither in the quoted decision nor in its other decisions of the last two years, has developed a single system of a defined set of criteria on the basis of which it could decide whether to apply either the normal legal order test or the special legal order test to a case. The establishment of such a system could render the aspects of the examination of those items of legislation whose legal source does not clearly indicate which legal order it falls under,[48] more predictable and thus, the introduction of such a system would be reasonable. Among the criteria of this test, priority must be given to the definition of the purpose of the rule under scrutiny. That purpose will be presented in the reasoning of the legislator or in the preamble, or it could be revealed from the subject-matter of the legislation.

5. Challenges posed by questions of legal science

Initially, the focus of the control of the coronavirus epidemic was on social distancing and later, with the emergence of vaccines, on the vaccination programme. There were different attitudes towards vaccination not only in society but also inside the smaller communities. If we study these different attitudes, the two most extreme groups were those who sought to get access to the vaccine (and its subsequent doses) as soon as possible, while the other group was explicitly opposed to getting vaccinated. The situation of the former group was clearly resolved by the vaccination programme, taking into account the aspects of participation in the control of the epidemic and the potential health risks, and no constitutional concerns arose. The Government sought to influence the citizens belonging to the other group and convince them to take up the vaccination. For this purpose, various incentive campaigns, and rules to exert pressure have been introduced, which have been challenged by numerous constitutional complaints filed to the CC. The first of these regulations was about the benefits attached to immunity certificates

(immunity cards): those who took up the vaccination or gained immunity through recovery from the Covid-19 disease had access to certain services.[49] The legislation was challenged, inter alia, by referring to the violation of the principle of non-discrimination. Dealing with these issues, the CC had to carry out a group formation to assess them. In the relevant Decision of the CC 27/2021 (XI.5.), the key question was whether the circumstances entitling to immunity of the challenged legislation have an appreciable positive (public) health effect: at least the first vaccination or having been infected by Covid-19. If these are suitable for reducing the risk of infection, the transmission of the infection or, in the event of infection, the risk of serious complications of the disease leading to hospitalisation or even death, the immunity certificate holders' situation is not equal to that of those who are not entitled to the immunity certificate.[50] At this point, it became essential to include various scientific issues – biological, virological and medical – in the arguments of the CC in order to be able to judge the efficiency and safety of the vaccination and having been infected with Covid-19 in relation to the control of epidemics. Several difficulties have been posed by the fact that the CC is not a court that can review the facts of a case and that it does not have the expertise to judge such technical issues. The problem was resolved by the CC by referring to the relevant part of decision of the CC 39/2007 (VI.20.) on the constitutionality of compulsory childhood vaccines. In spite of the fact that decision of the CC 39/2007 (VI.20.) concerned the compulsory vaccination of children in a normal legal order, in a period not directly threatened by an epidemic, while in the case of the regulation on the immunity certificate, the CC had to examine a regulation on the de iure not compulsory vaccine for adults in a special legal order, in the period of an epidemic, the problem related to the CC's assessment of scientific issues was equivalent in both cases, so the analogy can be established.

According to the retrospective assessment of decision of the CC 39/2007 (VI. 20.), the Court took a great stride forward when it dared and was able to exceed the examination framework of jurisprudence and clearly expressed that it needed arguments of natural sciences in order to be able to assess the constitutionality of a legal construct (Zeller, 2021, p. 721). However, the decision of 2007 went further than the use of mere scientific findings, as the Court declared that in order to resolve constitutional problems related to scientific knowledge, something that goes beyond scientific positions is needed, a broader analysis is required. At this examination, the CC took into account the 'prevailing scientific paradigm' at the time, for example, relying on the relevant documents of the World Health Organisation (WHO).[51] In our opinion, instead of answering technical questions on a purely scientific basis – mostly with the help of experts – the appeal to a more abstract 'dominant scientific worldview', which one can get familiar with from legal policy documents that are based on scientific grounds but have a different quality, was a solution of great importance because the scientists' positions are not necessarily consistent, and are typically even diverse in relation to certain new phenomena. There are competing views and scientific doubts about health interventions, including vaccines. The decision of the CC 39/2007 (VI.20.) clearly states that the CC cannot be a forum for deciding these scientific issues, it is beyond its competence. The wisdom of this abstention can already be demonstrated by the fact that if the CC had heard an expert, it would not only have been alien to its functioning but would have determined the decision on the subject by the choice of the expert, since an expert's position on the subject must be known – for example, whether such position is pro- or anti-vaccination. In contrast,

there are reasons to suppose that an international organisation such as the WHO synthesises the competing views and develops its position on the basis of their scientific merits. It also publishes its conclusions and recommendations on the subject in a manner which is easy for the lay person to understand. The 'dominant scientific paradigm' is thus suitable to become the basis for legal reasoning. It should be noted that, of course, the WHO is not infallible but it's taking a mistaken view is much more improbable than the CC's making a mistake, which is lay in epidemiological matters. Another parallel is that the CC's professional responsibility extends as far as providing as broad a picture as possible of the existence of a 'dominant scientific paradigm', and if the content of this paradigm is subsequently found to be wrong, the CC can therefore be held responsible neither morally nor professionally.

It is not surprising that in 2021, the Court continued to rely considerably on the reasoning followed by Decision of the CC 39/2007 (VI.20.), which enabled it to conclude, on the basis of the relevant documents of the WHO, the Organisation for Economic Cooperation and Development (OECD), the Council of Europe and the European Union, that 'on the basis of today's prevailing scientific paradigm, the WHO and other global institutions are campaigning for the widest possible vaccination, because vaccination is capable of containing the epidemic and mitigating its negative social and economic effects'.[52] Several further decisions of the CC have adopted this reasoning on the appropriateness of the vaccination programme, it has become a key element of the CC's practice in examining the compatibility of the restrictions of fundamental rights related to the uptake of anti-C vaccinations with the FL.[53] In particular, since both the modified test in a special legal order period – determined by Article 54(1) of the FL – and the normal legal order test on the restriction of fundamental rights applicable for the fundamental rights determined as exceptions under the same Article, include the examination of appropriateness, so this is inevitable, even in a state of danger.

6. Conclusions and vision

Based on the above overview, it can be confirmed that the CC's role perception in a special legal order reflects the standpoints declared in Decision of the CC 23/2021 (VII.13.): 'The CC is the supreme body for the protection of the FL (Article 24 (1) of the FL). It cannot take over the task and responsibility of epidemic protection from the Government, its task is to protect the FL, including individual rights'.[54]

By not giving the legislator a blank mandate for emptying fundamental rights referring to the possibility of their suspension, the CC has preserved its role as a constitutional guardian and has given meaning to the provision of the FL that prohibits restrictions on its operation even in a special legal order. The CC strengthened this approach further by using the special legal order test only for those items of legislation approved in a special legal order which were concretely related to epidemic control. By gradually modifying the test to apply in a special legal order, the CC has developed a slightly less rigorous test but one which ensures that the legislator cannot use the special legal order legislation for a purpose unrelated to the elimination of the circumstance giving rise to its imposition and to reducing its consequences, or for undertaking a task which requires expertise that the Government does not possess, or one that withdraws the chance of rapid intervention by the Government.

The dilemmas of deciding on technical issues were intensified during the coronavirus epidemic, there were so many different and controversial views, convictions and beliefs regarding the efficiency and safety of vaccines and the epidemic has involved significant social consequences, especially fears and the psychological burden caused by restrictions.[55] While childhood vaccines are decades old, the development of vaccines against the coronavirus has been a superhuman task. The number of people affected by the vaccination programme was several times higher than the number of children vaccinated with a certain vaccine in a given year, so the doubts about vaccines have been stronger and their impact more massive. Therefore, the CC was greatly helped by the fact that the 'dominant scientific paradigm' regarding the vaccines and the entire epidemic control protocol had been well elaborated and widely accepted by the time when the CC had to start to apply it as a basis for its reasonings, in previously unforeseen circumstances, and in the context of a rapid judgment.[56] As was indicated in the introduction, in May 2022, the Government introduced a state of danger on the basis of the war in Ukraine, instead of the threat of an epidemic. Although this has resulted in the uninterrupted application of this form of special legal order, it is de iure a new state of danger. The new basis for the special legal order must necessarily have an impact on the CC's practice of judging the restrictions of fundamental rights. However, this can only be seen as a vision, since until completing this manuscript, the CC had only issued refusals in cases in which the legislator had also referred to the conflict in Ukraine.[57] Another peculiarity of these cases is that the challenged items of legislation – such as the caps on retail pricing of fuel and the extra profit tax on airlines – were enacted by the Government during the state of danger declared due to the epidemic. The CC will certainly face a challenge in its examination of the constitutionality of the special legal order rules approved in the state of danger related to the war in Ukraine, even if it maintains its system on restrictions of fundamental rights developed for the special legal order. We believe that a deviation from this may also be justified by the different indications of special legal orders: while the epidemic crisis posed an imminent threat to the lives and health of millions of people, a war in a neighbouring country is unlikely to show such a close link with any fundamental right. However, the discretion to restrict fundamental rights exceeding the level of the normal legal order justified by the epidemic, available to the legislator, was legitimate precisely because of the protected fundamental rights (life, health).

The CC will either maintain the test developed for the state of danger introduced for the epidemic crisis, or it will apply a stricter one, it must apply the exam on suitability. And as we have pointed out in the context of the practice on vaccination, the part of the exam on suitability based on a non-legal argument is the most significant one. In the case of vaccines, this appeared as an epidemiological and health issue relating to which the scientific paradigm was relatively easy to identify. In the case of the government decrees approved in the actual state of danger and raising mainly economic questions of suitability (e.g. the capping of retail prices of staple foods to control inflation), such a coherent paradigm is unlikely to be found.

The CC will have to strike a sensible balance in order to maintain its substantive function of law protection but it will assume the difficult task of deciding on the jurisprudential issues outside the law.

Notes

1. Government Decree 40/2020 (III. 11.) on the declaration of state of danger. This was the 17th time since the democratic transition of 1989–1990 that the Government has declared a state of danger.
2. Venice Commission Opinion 995/2020 (https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2020)018-e download: 09/06/2023).
3. Most of the criticisms concerned the necessity and constitutionality of ordering the state of danger. The harmony of the declaration of the state of danger with the FL might have been questioned related to Covid-19, since according to Article 53(1) of the FL, the only reason for such a declaration shall only be 'the event of a natural or industrial disaster endangering lives and property', whereas a human epidemic certainly cannot be interpreted as an industrial disaster and it could be identified as a natural disaster only in a very broad interpretation.
4. Government Decree 180/2022 (V. 24.) on declaring a state of danger due to the armed conflict and humanitarian catastrophe in the territory of Ukraine, and in order to eliminate the consequences of these in Hungary and on certain state of danger rules.
5. One sign of this was that several types of qualified legal order were established. However, the over-regulation led to a failure to cover all the types of threat that the country faced with, e.g. because of the Yugoslav Wars the introduction of the phrase of 'unexpected attack by foreign armed unit' became necessary in 1993 (Jakab, 2009, p. 665), what was the predecessor of the later 'unexpected attack' declared by the FL.
6. Under the constitutional arrangements introduced after the democratic transition, the Government had a mathematical majority in the Defence Council, which was to be set up in the case of a state of national crisis and which exercised the powers conferred on it by the Parliament, the powers of the President of the Republic and the powers of the Government (Jakab, 2009, p. 649).
7. For the regulation on special legal order between 1990 and 2012 see Mógor and Horváth (2009) and Ganey (1997).
8. The FL introduced the term 'special legal order', providing the previously missing coherent terminology for the subject of regulation. The previous Constitution regulated the special legal order in a fragmented way, in the chapters on the Parliament and the Government, while the FL dedicates a single and proper section to the special legal order and codifies the relevant provisions in a much detailed manner (in almost one and a half times greater length) than the Constitution. For more details on the changes, see: Nagy & Horváth (2022b).
9. FL, Article 53 (4).
10. FL, Article 51/A.
11. FL, Article 48.
12. FL, Article 51 (1).
13. FL, Article 51 (2).
14. FL, Article 53 (3).
15. Tenth amendment of FL, Article 3.
16. Act CXXVIII of 2011 on disaster management and amending certain related acts
17. FL, Article 53 (1).
18. FL, Article 52 (3).
19. FL, Article 52 (4).
20. FL, Article 53 (2).
21. The Constitution protected more than ten fundamental rights, including freedom of religion and the right to social security (Jakab, 2011, p. 301).
22. FL, Article 54 (1) – after 1 November 2022 Article 52 (2).
23. FL, Article 54 (2) – after 1 November 2022 Article 52 (1,4).
24. The list does not aim to be exhaustive but only to list the most important aspects.
25. Several previous decisions have dealt with different aspects of the state of danger, but the problem addressed by the subtitle was first discussed meaningfully by Decision of the CC 15/2021 (V.13.).

Among the previous decisions, it is worth mentioning Decision of the CC 8/2021 (III. 2.3.), which examined the conformity of the establishment of the Göd Special Economic Zone with the FL but its subject, due to a very complex regulatory concept, was not only a government decree approved in a state of danger, but also a law approved in a normal legal order. The CC decision was adopted in a period of normal legal order, so the Court did not proceed from Article 54(1) of the FL. Government Decree 92/2020 (IV. 6.) on the different rules of the central budget of Hungary for 2020 related to the state of danger was also a product of special legal order. Article 4 of this decree withdrew 40 per cent of the motor vehicle tax from the municipalities, which had previously been a central tax assigned to the municipalities. The constitutionality of this regulation was examined by Decision of the CC 3234/2020 (VII.1.), which, however, did not examine the petitioner's fundamental rights argument concerning Article XIII(1) of the FL, due to the restriction of power stipulated by the Article 37(4) of the FL.

Decision of the CC 15/2020 (VII.8.), to which we will return from another aspect, examined a legal fact and referred to the fact that the CC acted by applying Article 54(1) of the FL (See Reasoning [48]).

26. Article 1 of Government Decree 521/2020 (XI. 25.) on the derogation from certain data request provisions, which extended the deadline for the execution of requests on data of public interest.
27. Decision of the CC 15/2021. (V. 13.) Reasoning [33]-[34].
28. Decision of the CC 23/2021. (VII. 13.) Reasoning [25], Decision of the CC 27/2021. (IX. 5.) Reasoning [75].
29. Decision of the CC 15/2021. (V. 13.), dissenting opinion of Judge Tünde Handó [56].
30. Decision of the CC 23/2021. (VII. 13.), Reasoning [25], decision of the CC 27/2021. (XI. 5.), Reasoning [75].
31. The CC emphasized that 'the motor vehicle tax closely linked to the one established within the scope of the Budget Law […] is a central tax'. This is important because Article 37(4) of the FL refers to 'laws' and not other sources of law, but in a normal legal order, regulations have already been found to be a source of law under Article 37(4), precisely because of their close connection with the subject-matter of the law (decision of the CC 22/2013 (VII.19.), Reasoning [8]-[9]). An alternative approach, leading to the same result, could have been for the CC to rely on the law-breaking power of special legislative decrees, thus inferring that the 'laws' turn of Article 37(4) of the FL could also mean special legislative decrees. This interpretation is found in the parallel reasoning of Ildikó Hörcherné Marosi, the parallel reasoning of Miklós Juhász, the parallel reasoning of Péter Szalay and the parallel reasoning of Zs. András Varga.
32. In the present case, we are dealing with a rule belonging to the scope of law concerning the central budget, which, under a special legal regime, was not enacted by the Parliament but by the Government, in accordance with the FL. Therefore, despite its formality, a regulation with such content must be considered as a budgetary rule of the Budget Law, which is covered by Article 37(4) of the FL and which is included in the closed list of the limit of powers set out therein (decision of CC 3214/2023 (V.5.), Reasoning [55]).
33. Decision of CC 15/2021. (V.13.), Reasoning [39]-[42].
34. After 1 November 2022, Article 52, para (5).
35. Law CXXVIII of 2011.
36. Decision of CC 15/2021. (V.13.), Reasoning [35].
37. Lóránt Csink represents a contradictory opinion: 'the existence of the rules of a special legal order cannot be justified from the point of view of enforceability of fundamental rights (Csink, 2017, p. 14).
38. Decision of CC 23/2021. (VII.13.), Reasoning [28]
39. Decision of CC 23/2021. (VII.13.), Reasoning [34].
40. Decision of CC 23/2021. (VII.13.), concurring opinion of Judge Ildikó Hörcherné Marosi [45].
41. Decision of CC 23/2021. (VII.13.), concurring opinion of Judge Péter Szalay [53].
42. Decision of CC 23/2021. (VII.13.), dissenting opinion of Judge Ágnes Czine [66].

43. Decision of CC 23/2021. (VII.13.), concurring opinion of Judge Miklós Juhász [49].
44. The decision was accompanied by a number of dissenting opinions but they do not refer to the selection of the test to be applied, therefore they will not be presented.
45. Decision of the CC 27/2021 (XI.5.), Reasoning [95]: The modified structure of the separation of powers of the special legal order, in particular Article 54 (2) of the FL, results in a transformation of the constitutional limits. Therefore, on the basis of the test developed in decision of the CC 23/2021, the CC assesses the aspect of temporality (whether the legislator has fulfilled its obligation to periodically ascertain whether the maintenance or the extension of the restriction is justified) in the framework of the test established by Article 54(1) of the FL, even if the examination of the challenged legislation does not reach the stage of the proportionality test. This follows from Article 53(3) of the FL, which provides that 'The decree of the Government under Paragraph (2) shall remain in force for fifteen days, except if the Government – on the basis of an authorization from Parliament – extends the effect of the decree.'
46. Decision of the CC 3128/2022. (IV.1.), Reasoning [163].
47. Decision of CC 15/2020. (VII.8.), Reasoning [48].
48. The only case in which it is possible to decide, on the basis of a formal analysis, which restriction test should be applied is that of the government decree approved in state of danger.
49. See the regulations of Government Decree 484/2020 (XI.10.) on the second phase of protective measures applicable during the period of state of danger.
50. Decision of CC 27/2021. (XI.5.), Reasoning [79].
51. This approach was later followed by the CC in other cases not related to epidemics and vaccination. For example, in decision of the CC 3292/2017 (XI.20.), it assessed the health impact of e-cigarettes relying on various recommendations, framework conventions and other legal policy documents of the WHO and the European Union.
52. Decision of CC 27/2021. (XI.5.), Reasoning [88].
53. Decision of CC 3537/2021. (XII.22.), Reasoning [53]; Decision of CC 3128/2022. (IV.1.), Reasoning [157].
54. Decision of CC 23/2021. (VII.13.), Reasoning [33].
55. Decision of CC 27/2021. (XI.5.), Reasoning [71].
56. The President of the CC has ordered that the cases relating to epidemic control be dealt with priority over others.
57. Decision of CC 3076/2023. (II. 16.), Decision of CC 3077/2023. (II. 16.) and Decision of the CC 3214/2023. (V. 5.)

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