# The Theoretical Questions of Emergency Powers

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## 1. Introduction

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

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

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

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

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

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

## 2. Historical Roots and Ideological Development

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

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

4 Trócsányi, 2014, p. 33.

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

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

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

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

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

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

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

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

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

11 See Agamben, 2005, pp. 33–36.

12 Koja, 2003, p. 797.

13 Schmitt, 1992

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

15 Scheppele, 2004, pp. 1021–1022.

16 Dicey, 1902.

17 Mészáros, 2017, pp. 36–38.

18 Kelsen, 2001

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

war, armed conflict, general strike by civil servants

the parliament cannot meet or would be significantly delayed

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

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

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

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

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

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

## 3. Definition and Applicability of Emergency Powers

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

37 Jakab and Till, 2014, p. 466.

38 Lakatos, 2014

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

40 Keszely, 2017

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

42 Farkas, 2020b, pp. 26–28.

43 Concha, 1905, p. 386.

44 Farkas, 2020a, pp. 329–330.

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

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

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

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

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

46 Ferejohn, 2004, pp. 233–234.

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

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

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

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

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

49 See Farkas, 2020a, p. 338.

## 5. Conclusion

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

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

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