

Emergency Power in Hungary and the COVID-19¹

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Abstract

This paper aims to examine the manifestations and abuses of the exceptionalist legal order in Hungary during the period of the COVID-19 pandemic. Since the refugee crisis of 2015, the Orbán regime has been using the instruments of exceptional governance in a continuous way, which has become more and more pronounced in the context of the crises of recent years, especially the COVID-19 pandemic. In this paper, the author first presents the literature on the state of exception and its use by authoritarian populist regimes. Then, the author will discuss how the Orbán regime employs the tools of exceptional governance in an authoritarian manner, with a particular focus on how the tools of exceptional governance have become part of the constitutional structure. Finally, the author will explain the risks and anti-democratic dangers of the use of extraordinary measures of governance without checks and balances.

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Introduction

This is an era of overlapping emergencies: the climate and ecological disasters, global capitalism's permanent crisis, migration challenges, and the COVID-19 pandemic. Considering the Hungarian political regime, this paper investigates how exceptional measures have been applied and how they have been constitutionally restructured by the authoritarian populist Orbán regime. The author of this paper argues that the main outcome of the exceptional measures is the rise of a new executive power, and it demonstrates how heavily authoritarian regimes rely on several kinds of states of exception. The author also argues that behind the strengthening of the emergency power, there is also the rise of unlimited executive power, which is nothing more than the legal and political fulfilment of the power that the two-thirds majority in the Parliament represents.

The Orbán regime began to transform the system of the special legal order created by the Fundamental Law of Hungary (the country's constitution) and, independently of this, created a structure of extraordinary governance under the Fundamental Law. As a result of the Ninth Amendment to the constitution, the executive branch has jurisdiction over all the legal orders enshrined in it; moreover, since 2015, the Orbán regime has developed exceptional measures of governance tools under the constitution to address different emergency situations (migration crisis, COVID-19, and military conflicts). In the case of the permanent state of exception of the Orbán regime, it can be said that the Orbán administration has used the COVID-19 pandemic to manufacture a political crisis. The paper briefly discusses the impact that the 2022 Hungarian national election campaign and the Russian invasion of Ukraine in February 2022 had on the Hungarian emergency powers. The Orbán regime has thus exploited the possibility of governing using extraordinary measures: by transforming the means at the constitutional level and subordinating the government; moreover, by applying sub-constitutional extraordinary measures without limitations. The COVID-19 pandemic proved to be a turning point: the leaders of the Orbán regime realized that there were great opportunities to use exceptional government measures and tools, which also carried serious societal risks and further distanced Hungary from democracy.

1. Conceptual Framework

1.1 *Authoritarian Populism, Emergency and Exceptional M*

In this paper, the governing and political structure of Hungary after 2010 has been characterized as authoritarian populism, which refers to a specific phenomenon, as the Orbán regime has systematically moved the Hungarian political system from a relatively stable liberal democratic position to a hybrid regime (Levitsky and Way 2002, 2010).² This kind of political system, which contains far more authoritarian than democratic elements, can be characterized as authoritarian populism (Antal 2019). According to Samuel Rogers, "The Hungarian regime has developed a special kind of populism, however, because not only is it nominally democratic, relatively politically stable, possesses authoritarian components such as a broad control of the media and judicial influence, it now has developed the capacity to influence state structures to the extent that the external dimensions of the Hungarian political economy are altered" (Rogers 2019, 3).

² It is precisely because of the complete transformation of the Hungarian political system that the author of this article uses the term "Orbán regime," which suggests that the post-2010 multi-cycle government is not just a series of re-elected governments but can be understood as a political setup built against the liberal democracy of 1989-2010.

The authoritarian populism of the Orbán regime, and thus the system of using exceptional government measures, is rooted in the neoliberalization and Weimarization of Eastern European politics (Antal 2019, 43-73). The unstoppable breakthrough of neoliberalism in the Western part of the Euro-Atlantic world in the 1980s and the former Soviet bloc in the 1990s accelerated a situation similar to that of the 1920s and 1930s – new Weimarization (Morelock 2018, xxviii).³ Neoliberalism requires massive state regulation in conjunction with liberalization, free trade and investments, and a suitable legal framework for capitalist labour. The investigation of the togetherness and collusion of neoliberalism and authoritarian populism dates back to Thatcherism in the late 1970s. In his edited volume, *Critical Theory and Authoritarian Populism*, Jeremiah Morelock (2018) argues that the term authoritarian populism basically refers to prejudice and populism focused mostly on Nazism, but it has a broader meaning and refers to the pitting of ‘the people’ against ‘elites’ in order to have the power to drive out, wipe out, or otherwise dominate those ‘Others’ who are not ‘the people.’ Generally, this involves social movements fuelled by prejudice and led by charismatic leaders who seek to increase the governmental force to combat pluralism. The Orbán regime aims to create permanent enemies and exceptional situations based on prejudice that can only be resolved by a charismatic leader.

Michael Hardt and Antonio Negri argue that the separation of war from politics was a fundamental goal of modern political thought and practice among both liberal and non-liberal political theorists (Hardt and Negri 2004). This consensus has collapsed, and authoritarian populist regimes are introducing the kinds of permanent states of exception as elaborated by Giorgio Agamben (Agamben 1998, 2005). As Michael Head stated: “The early years of the twenty-first century have seen increasing resort to emergency-type powers or claims of supra-legal executive authority, including by the Western countries regarded as the world’s leading democracies” (Head 2016, 1). Due to the COVID-19 pandemic and global social crises, the rise of emergency powers defines this time more than ever.

The solid contours of war have disappeared; moreover, war and peace are merged to some extent, and the developing emergency powers remarkably indicate these tendencies. Authoritarian populist regimes sense these trends and prefer using the emergency measures of government. These systems are using the power of the penal state to create political enemies and annihilate them as modern forms of *homo sacer* (Agamben 1998). The emergency measures and the modern forms of deprived social groups, as contemporary *homo sacer*, have become the main accompanying parts of the authoritarian populist regimes of this time. In this sense, it was not the COVID-19 crisis and the crisis management of these regimes that increased the risk of authoritarianization in Hungary since the authoritarian turn had already commenced earlier, and the exceptional government measures only contributed to the evolving autocracy. In this paper, it is argued that authoritarian crisis management was based on the never-ending exceptional government even before the COVID-19 pandemic. The conditions for Hungarian authoritarian rule already existed prior to the pandemic and were used to define how the government would respond to it. The use of the COVID-19 pandemic was simply the next level of exceptional government in Hungary. During the pandemic, the Hungarian Prime Minister, Viktor Orbán, relied on the exceptional government that has been

³ The term “Weimarization” refers, on the basis of the inter-war experience of the German Weimar Republic, to the strengthening of far-right parties and the drastic weakening of moderate pro-democracy parties, as a result of the economic, political, and constitutional crisis (Morelock 2018, xiv–xix).

in place since the refugee crisis of 2015, and the pandemic merely shaped the new contours of the exceptional measures.

Authoritarian populism is the use of exceptional measures for the sake of maintaining political power, and the COVID-19 crisis gave a new rise to this phenomenon. According to Agamben (2014), there is a seminal transformation in conjunction with the idea of government, “which overturns the traditional hierarchical relation between causes and effects. Since governing the causes is difficult and expensive, it is safer and more useful to try to govern the effects” (Agamben 2014). As will be explained below, in the case study of Hungary, authoritarian populist regimes use objective crises (wars, public health, migration) for their own political purposes and engage in internal, subjective crisis management where the resolution and treatment of social problems caused by objective crises are not important. Thus, as Agamben puts it, the main political objective is the permanent management of crises, to maintain and rule the exceptional situation without any real social objectives.

Authoritarian populist regimes have started to manage the effects of a crisis that they themselves created, and this is a considerable change. Agamben described this situation in the following way:

The ancient regime aimed to rule the causes; modernity pretends to control the effects. And this axiom applies to every domain, from economy to ecology, from foreign and military politics to the internal measures of police. We must realize that European governments today gave up any attempt to rule the causes, they only want to govern the effects. (Agamben 2014)

The exceptional or the putative exceptional situations offer the authoritarian populist regimes a convenient opportunity to criminalize certain political groups and claim that these groups are enemies and that regimes protect people from these enemies that they themselves created. This is a situation where the normal sets of governance are replaced by police forces, and the normal becomes exceptional where anything is conceivable (Antal 2019, 29-30).

1.2 The Structure of Emergency Measures in the Hungarian Fundamental Law

Regarding governance using exceptional measures, there are two possible paths. The first is the use of exceptional measures as defined by a constitution, and the second is the introduction of exceptional legal regimes under a constitution. The distinction is crucial because, in the case of exceptional governance measures enacted by a constitution, the rules can provide the legislature and courts with strong control over the executive branch of government that uses these exceptional instruments. At the same time, exceptional measures of government under the constitution are, in all respects, the exclusive prerogative of the executive power. The Orbán regime, as will be demonstrated in the next section, has defined governance by extraordinary measures by introducing exceptional states under the Fundamental Law from 2015 onwards. However, recent amendments to the constitution have completely redrawn the structure of the Hungarian special legal order.

The Orbán regime has treated the emergency measures as priorities since their inception, but the shift of the governmental system to extraordinary instruments had not yet begun in 2010, since the Orbán regime basically created the everyday practice of governing by extraordinary measures in the context of the refugee crisis of 2015 and the subsequent COVID-19 pandemic. The new Fundamental Law, adopted in 2011 and having entered into force on January 1, 2012, significantly redefined the exceptional measures: it introduced the terminology of the “special legal order” and unified the previous, rather fragmented rules. In Hungary, the constitution of the former state socialist regime, Act 20 of 1949, formally remained in force after the fall of the communist regime.

The liberal democracy created by the constitutional amendment of 1989 basically regulated the following main forms of special legal order at the constitutional level: state of national crisis (in the event of war or danger of war; Article 19 Section [3] [h]);⁴ state of emergency (in the event of armed actions aimed at overturning constitutional order or at the acquisition of exclusive control of public power; Article 19 Section [3] [i]);⁵ state of danger (in the event of natural disasters that endanger the lives and property of citizens; Article 19 Section [3] [i]).⁶ In 1993, the category of “unexpected attack” was added to existing forms of special legal order (Article 19/E).⁷ Moreover, in 2004, another new form, the state of preventive defence (Article 35 Section [1] [m]),⁸ has been incorporated into the Constitution of 1949.

After 2010, the Fundamental Law created five types of special legal orders (Nagy and Horváth, 2022), and a new one was added in 2016. The “state of national crisis” is the most serious form of extraordinary measure, which allows for the widest range of deviation from the normal legal order: the National Assembly shall declare a state of national crisis and set up a National Defence Council in the event of the declaration of a state of war or an imminent danger of armed attack by a foreign power (danger of war) (Article 48 and 49). The second form concerns domestic conflicts: the National Assembly shall declare a “state of emergency” (Article 48 and 50) in the event of armed actions aimed at subverting the lawful order or at exclusively acquiring power, and in the event of serious acts of violence massively endangering life and property, committed with weapons or with instruments capable of causing death.⁹ In the event of a danger of external armed attack or in order to meet an obligation arising from an alliance, the National Assembly shall declare a “state of preventive defence” for a fixed period of time, and shall simultaneously authorize the government to introduce extraordinary measures laid down in a cardinal act (Article 51). In 2016, the Sixth Amendment of the Fundamental Law incorporated the fifth extraordinary situation called “state of terrorist threat” into the Fundamental Law (Article 51/A), which is a direct and abusive application of extraordinary measures to the migration crisis. The next form is about the “unexpected attack” of external armed groups into the territory of Hungary: until the decision on the declaration of a state of emergency or state of national crisis, the government shall be obliged to take immediate

⁴ The National Assembly “...in the event of a state of war or imminent threat of armed attack by a foreign power (threat of war), declare a state of emergency and establish a Defence Council” Article 19 Section (3) (h).

⁵ The National Assembly “...declares a state of emergency in the event of armed acts intended to overthrow the constitutional order or to seize exclusive power, serious acts of violence, whether armed or not, or a disaster or industrial accident, which threaten the safety of life and property on a massive scale” Article 19 Section (3) (i).

⁶ The Government “takes the necessary measures to avert a natural disaster or its consequences which threatens the safety of life and property... and to protect public order and public security” Article 35 Section (1) (i).

⁷ “In the event of an unexpected invasion of the territory of Hungary by external armed groups, the Government shall take immediate action to avert an attack or to protect the territory of the country with national and allied air defence and air defence forces, in order to protect constitutional order, the security of life and property, public order and public safety, in accordance with the defence plan approved by the President of the Republic, with forces commensurate with the attack and prepared for it, until the decision to declare a state of emergency or a state of emergency” Article 19/E.

⁸ The Government “may, following the initiation of the proclamation of a pre-emptive state of defence, introduce measures other than those provided for in the laws affecting the functioning of the public administration, the Hungarian Defence Forces and law enforcement agencies” Article 35 Section (1) (m).

⁹ Article 50: “(1) The Hungarian Defence Forces may be deployed during a state of emergency if the use of the police and the national security services proves insufficient. (2) During a state of emergency, if the National Assembly is prevented from acting, the President of the Republic shall decide on the utilisation of the Hungarian Defence Forces under paragraph (1). (3) During a state of emergency, the extraordinary measures laid down in a cardinal Act shall be introduced by the President of the Republic in a decree.”

action (Article 52).¹⁰ Last, but not least in the event of a natural disaster or industrial accident endangering life and property, or in order to mitigate its consequences, the government shall declare a “state of danger” (Article 53). This demonstrates that even before the turning point of the refugee crisis, the Hungarian government was the main constitutional actor with the highest authority in the vast majority of special legal orders.

2. Authoritarian Application of Emergency Measures in Hungary: Overlapping State of Exception

After 2015, the Orbán regime chose to deal with the various crises (migration, COVID-19) not within the constitutional framework analyzed in this paper but by creating a system of extraordinary governance below the constitutional level. The Orbán governments have not primarily enacted exceptional legal orders contained in the Fundamental Law but have essentially used Parliament to gain broad powers to manipulate exceptional legal orders.

In the recent past, two main forms of states of exception evolved in the Hungarian political regime: (1) the authoritarian governments created a permanent state of exception based on the case of the migration crisis of 2015; (2) parallel with the further escalation of the migration crisis, the Orbán administration introduced an overlapping set of states of emergencies for the COVID-19 pandemic (see Table 1). It has been argued that the Orbán government used the state of exception for the migration and COVID-19 crises in an authoritarian way to maintain and reinforce its political power. This does not mean that the extraordinary measures and instruments to tackle and address the global climate and ecological crisis should be given up. Here, the author of this paper proposes that there is a need for democratic control over the extraordinary measures that would be introduced in the context of the global climate and ecological crises. It is becoming increasingly difficult to establish a democracy-based state of exception because the executive power based on authoritarian populism has begun to replace the rule of law with the extraordinary measures mentioned above.

Table 1: The forms of state of exceptions in Hungary (2015-2023) (Source: Antal 2022a, 124)

The overlapping state of exceptions (2015-2023)

¹⁰ Article 52: “(1) In the event of an unexpected incursion of external armed groups into the territory of Hungary, until the decision on the declaration of a state of emergency or state of national crisis, the Government shall be obliged – if necessary, in accordance with the armed defence plan approved by the President of the Republic – to take immediate action using force proportionate to and prepared for the attack, to repel the attack, to defend the territory of Hungary with domestic and allied readiness forces of the air defence and air forces, in order to protect lawful order, life and property, public order and public safety“

Emergency caused by mass immigration		Coronavirus-related state of exception		Health crisis emergency	
<i>Timetable</i>	<i>Regulation</i>	<i>Timetable</i>	<i>Regulation</i>	<i>Timetable</i>	<i>Regulation</i>
From September 15, 2015, local application	Modification of the act LXXX of 2007 on asylum Decree of government 269/2015	1 st wave: from March 11, 2020 to June 18, 2020	Decree of government 40/2020 Empowerment Law 1: act XII of 2020	From June 18, 2020 to December 18, 2020	Act CLIV of 1997 on healthcare system Decree of government 521/2013
From March 9, 2016, entered into force at national level		2 nd wave: from November 3, 2020 to February 8, 2021	Decree of government 478/2020 Empowerment Law 2: act CIX of 2020		
It has been prolonged several times (until September 7th, 2023)		3 rd wave: from February 22 2021	Decree of government 27/2021 Empowerment Law 3: act I of 2021		

2.1 *The Refugee Crisis as a “Tailored State of Exception”*

The two-thirds majority of Fidesz in 2010 is rooted in the party’s populist attitude and commitment towards “law and order” (Haney 2016, 353). At the center of the emerging authoritarian populist regime is nationalism based on blaming and criminalizing others and otherness. The penal nationalist crime control is not only focused on protecting the people but also on defending the nation against external and internal groups. Haney stresses that in Eastern Europe, “the response to the migrant crisis also reveals, for penal nationalists punitiveness has become the basis of national sovereignty – it is as if being ‘soft’ on punishment will mean a loss of national independence and autonomy” (Haney 2016, 357). The exceptional politics started with the refugee crisis of 2015 and the biopolitical hate campaign unfolded in the following ways: biological demonstration of the “enemy”; hate campaign on the streets; the fencing of the border and moving beyond the migrant crisis; the campaign against Brussels, NGOs, George Soros, and inner enemies. In Hungary, the refugee crisis did not cause a serious social and political challenge, however, the government was able to create a long-lasting, exceptional situation without any real danger (Antal 2019, 116-121).

The Orbán administration, using the migration crisis, introduced and prolonged the state of exception in legal terms (Antal 2019, 113-121; Antal 2020; Antal 2021a). Following the clashes at the southern border of Hungary, the government committed to creating the most secure basis for

the moral panic caused by the government. Therefore, the modification of the Act LXXX of 2007 on Asylum of September 15, 2015, introduced a new kind of state of emergency called the “emergency caused by mass immigration.” The executive power has full authority over the state of exception; it can be ordered by a government decree overall or in a specific territory of Hungary. The government declared a state of crisis caused by mass immigration in two southern counties of Hungary on September 15, 2015, by the decree of government 269/2015 (Hungarian Government 2015). By doing so, the government introduced a state of exception without any real bases and centralized every related exceptional power. The government extended the local state of exception to the nationwide level by the decree of government 41/2016 (Hungarian Government 2016) and the emergency caused by mass immigration has been continuously prolonged until September 2023 (Table 1). There are overlapping states of exceptions because the exceptional measures induced by the refugee crisis have been merged with the state of exception due to the COVID-19 pandemic.

The emergency based on the migration crisis is a tailored one because it has been declared without any valid social danger; this is why the biological demonstration of the fabricated “enemy” was crucial for the administration. At the beginning of the migration crisis, between September 1-5, 2015, thousands of refugees gathered outside Keleti railway station in Budapest (BBC 2015). The refugees at Keleti were handled in an inhuman and unacceptable way, and they were supported only by Hungarian and international NGOs. In the field of discursive politics, the government aimed to rule the communication sphere from the beginning, using the phrases “migrant” and “migration with economic purpose” (this phrase was used by the Orbán administration, stirring chauvinistic emotions and moral panic) instead of using the term “refugees” (Gerő and Sik 2020). Moreover, the representatives of the Orbán government denied that the migration crisis had been caused not just by economic factors but, first of all, by humanitarian disasters, civil war, and climate change. The Hungarian anti-refugee campaign reached its peak with the fencing of the Hungarian border. In 2015, the Hungarian Government built a barrier on its border with Serbia and Croatia (The Guardian 2016). The razor wire has become the biopolitical symbol of the Hungarian government’s hate campaign. This type of handling of refugees does not comply with European regulations. Moreover, the biopolitical aim of the government is to keep away refugees with their inhuman treatment of them (Rodgers and Kallius 2015). The government interpreted the migration issue as a potential danger of terrorism. Moreover, it created a new state of exception by the amendment of the constitution with the Sixth Amendment, adopted on June 14, 2016, by the votes of Fidesz-KDNP and the radical right party Jobbik. This new regulation authorized the Parliament to declare at the initiative of the government a “state of terrorist threat.” The hate campaign did not stop with the refugee crisis, and the government started to create and manage other crises based on the circulation of anger and hate. This required new enemies and the populist weapon turned against Brussels, Hungarian human rights NGOs, George Soros, and other inner “enemies.” The government had legalized the state racism maintained since 2015, and the Seventh Amendment, enacted on June 28, 2018, constitutionalized this scheme. The Amendment declared that no “foreign population” shall be settled in Hungary, and it claimed that the protection of the constitutional identity and Christian culture of Hungary shall be an obligation of every organ of the state. With this new regulatory direction and mandate, the administration has laid down some constitutional basis for the xenophobia and the everlasting politics of hatred (Antal 2022b).

2.2 *The COVID-19 Crisis and the Persistence of Exceptional Governance*

The global pandemic crisis has thoroughly rewritten Orbán's original political plans for the next general election of 2022 (Antal 2020). The Orbán administration did not expect such a crisis to

evolve and spread the way it did. Orbán was able to change his political strategy and take the pandemic seriously. At first, given that Orbán did not know exactly how devastating the crisis would be, the government tried to continue the exceptional measures enacted for the refugee situation. On March 6, 2020, Orbán spoke of migration and coronavirus as equal challenges (Orbán 2020a); moreover, on March 10, he argued “there is a clear link between illegal migration and the coronavirus epidemic” (Orbán 2020b). There was a tipping point after that as Orbán and his communication strategists perceived the fear of the Hungarian people and the fractions behind the government, and this proved to be crucial because people recognized there was no link between immigration and the pandemic. Nevertheless, Orbán found the political potential of the pandemic and started to manage it in a militaristic fashion. The Prime Minister saw higher political risk in economic, rather than in epidemiological, consequences. Orbán argued that “We should fight against this crisis by not giving up our goals...the workfare economy and the possibility of a proud life” (Orbán 2020c). The main explanation for the new state of exception is the class compromise behind the Hungarian political system.

In line with the waves that have unfolded since the outbreak of the COVID-19 crisis, the Hungarian government has declared three states of exception due to the pandemic: March 11, 2020 (government decree 40/2020 declaring a state of emergency),¹¹ November 3, 2020 (government decree 478/2020 declaring a state of emergency),¹² February 8, 2021 (government decree 27/2021 declaring a state of emergency).¹³ Each extraordinary period was associated with the so-called “Empowerment Laws,” which are special authorizations of the incumbent Hungarian government by the Parliament that includes an authorization to implement long-term governance by decrees. The Fundamental Law otherwise provides the government with the possibility of governing by decree, but this is severely time-limited: decrees are only valid beyond 15 days if the Parliament authorizes the government to extend the decrees before the expiration of the 15 days. The Empowerment Laws eliminate these constitutional limitations. The first Empowerment Law (Act 12 of 2020)¹⁴ ensured unlimited access to governing by decree, and it was repealed on June 18, 2020. A time limit has been incorporated into the second and third laws (Act 109 of 2020 and Act 1 of 2021),¹⁵ which granted the government special rights for 90 days. Due to this empowerment, the government is entitled to suspend the application of certain laws, deviate from statutory provisions, and take other extraordinary measures, such as restricting mass events, visits to institutions, and increasing border control. Moreover, during the first wave of the pandemic, the government proclaimed a special form of a state of exception called “health crisis emergency” and it was in force until December 18, 2020, but then it was not re-promulgated.

In the first period of the COVID-19-related state of exception, it became clear that the government would have all the political power and control over legal instruments with the renewal of the state

¹¹ Government decree 40/2020, Hungarian National Law Repository. Accessed January 30, 2023. <https://njt.hu/jogszabaly/2020-40-20-22>

¹² government decree 478/2020, Hungarian National Law Repository. Accessed January 30, 2023. <https://njt.hu/jogszabaly/2020-478-20-22>

¹³ Government decree 27/2021, Hungarian National Law Repository. Accessed January 30, 2023. <https://njt.hu/jogszabaly/2021-27-20-22>

¹⁴ Act 12 of 2020, Hungarian National Law Repository. Accessed January 30, 2023. <https://njt.hu/jogszabaly/2020-12-00-00>

¹⁵ Act 109 of 2020, Hungarian National Law Repository. Accessed January 30, 2023. <https://njt.hu/jogszabaly/2020-109-00-00> and Act 1 of 2021, Hungarian National Law Repository. Accessed January 30, 2023. <https://njt.hu/jogszabaly/2021-1-00-00>

of exception. Instead, Orbán chose the option of enacting emergency powers without restrictions and ruling by decrees, meanwhile, the opposition was blamed for the lack of national unity. The Enabling Law was necessary for Orbán, not just for the restriction of the opposition but also to strengthen the social base of the government majority (Antal 2021, 2022). This demonstrated that providing direct help for the working class was far from a priority for Orbán. The administration has always been much more afraid of the economic consequences of the pandemic than its epidemiological ones. Neoliberal and state-capitalist approaches have primarily been imposed after 2010 through such actions as the strengthening of the private health sector, a withdrawal of funds from public health, and the downsizing of the epidemiological administration (Dorit 2021). The Orbán regime has used government power to weaken public health services, putting Hungarian society in an unheard-of situation in terms of the COVID-19 outbreak. The “embedded” neoliberal atmosphere remained essential from the outbreak of the COVID-19 pandemic, with most of the government’s economic measures being focused on protecting businesses and capital instead of protecting the workers. Moreover, the government introduced a new “Slave Act” in the event of an epidemiological emergency by providing employers with a freely ordered 24-month working time frame (meaning that anyone can be required to work overtime through telework at any time) (Eşençay 2020). Meanwhile, the business circles close to the government received large sums of public funds, and the government started to carry out its neoliberal healthcare reforms. Before the epidemic peaked, nearly 36,000 hospital beds had been emptied and seriously ill people and their families were put into a desperate position. It is also important to note that the same harsh realpolitik characterized the Orbán regime's treatment of NGOs; as with its handling of the political opposition, the government saw the COVID-19 pandemic as an opportunity to attack NGOs (Kövér, Antal and Deák 2021).

During the second wave of the COVID-19 crisis, strict restrictions were introduced including a curfew between eight o’clock in the evening and five o’clock in the morning, restricted opening hours for shops and other businesses, online learning for universities and secondary school students in grade nine and above, restaurant closures, and the holding of sporting events without spectators (The Mayor 2020). For the Orbán administration, helping businesses close to the government was more important than protecting workers affected by the epidemic. Furthermore, instead of addressing the health and social crisis affecting Hungarian society, the government continued the cultural war against the University of Theatre and Film Arts in Budapest (Euronews 2020) as well as envisioning the latest amendment to the Fundamental Law, which is a clear attack on LGBTQ communities, and proposed the same-sex and single parents adoption ban (BBC 2020). This shows that the government has abused the exceptional situation and used the mandate not to address the social and political crisis but to further consolidate Orbán's regime.

The experiences of the three waves of the pandemic demonstrated that the Hungarian PM perceived the political risk in economic rather than epidemiological terms, so he introduced measures to protect the economy first, not the workers. This fact explains why the Hungarian government relied on the exceptional legal regime, even when all epidemiological measures could have been imposed under normal circumstances. Introducing the exceptional measures, Orbán argued the following: “We should fight against this crisis by not giving up our goals...the workfare economy and the possibility of a proud life.” (Orbán 2020c). Nevertheless, Orbán has discovered the political potential of the pandemic and begun to manage it in such a way as not to mitigate the negative social effects of objective crises but to broaden the scope of executive power. The state of emergency put new powers into the hands of Orbán and, at the same time, it offered new

opportunities in conjunction with the debate on climate change. Orbán recognized the political opportunities that exceptional governance offered in terms of overlapping crises and used the experience from the migration crisis to address the COVID-19 pandemic.

2.3 Constitutional Restructuring of Exceptional Measures

Using the experience of governing through extraordinary measures under the Fundamental Law, the Orbán regime has completely reshaped the system it created in 2012 (Nagy and Horváth 2022). According to the Fundamental Law Article 53 section (1): “During the period of special legal order, the Government may adopt decrees by means of which it may, as provided for by a cardinal Act, suspend the application of certain Acts, derogate from the provisions of Acts and take other extraordinary measures.”¹⁶

The Ninth Amendment of the Fundamental Law, enacted in December 2020,¹⁷ reduced the previously mentioned types of special legal order: state of war, state of emergency, and state of danger. In the event of a declaration of war or a danger of war, external armed attack, an act with an impact equivalent to an external armed attack, an imminent danger of either, or the performance of a collective defence obligation arising from an alliance, the National Assembly may declare a state of war. According to the Fundamental Law Article 49, Section (3): “During a state of war, the Government shall exercise the powers delegated to it by the National Assembly, and shall decide on the deployment of the Hungarian Defence Forces abroad or within Hungary...”¹⁸ In the event of an act aimed at overthrowing or subverting the constitutional order, at exclusively acquiring power, or a serious unlawful act massively endangering life and property, the National Assembly may declare a state of emergency. Under Article 51, Section (1), the Fundamental Law states: “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.”¹⁹

Under the Ninth Amendment to the Fundamental Law, the new structure of extraordinary government would have entered into force on July 1, 2023, however, the 10th Amendment to the Fundamental Law brought this forward to November 1, 2022. Moreover, it introduced a state of danger due to armed conflict, war, or humanitarian disaster in a neighbouring country. Under the new constitutional regime, the government had power over all constitutionally exceptional measures without any checks and balances.

According to the Venice Commission, in all three cases (state of war, state of emergency, and state of danger), the government will have “a central role (instead of the National Defence Council in the case of the state of national crisis; and instead of the President of the Republic in the case of the state of emergency). The reason is that after the promulgation of the special legal order, it is

¹⁶ Fundamental Law, Hungarian National Law Repository. Accessed January 30, 2023. <https://njt.hu/jogszabaly/2011-4301-02-00>.

¹⁷ Ministry of Justice. 2023. “Ninth Amendment to the Fundamental Law of Hungary.” *The Fundamental Law of Hungary*. Accessed March 30, 2022. <https://njt.hu/jogszabaly/en/2011-4301-02-00>.

¹⁸ Fundamental Law, Hungarian National Law Repository. Accessed January 30, 2023. <https://njt.hu/jogszabaly/2011-4301-02-00>.

¹⁹ Fundamental Law, Hungarian National Law Repository. Accessed January 30, 2023. <https://njt.hu/jogszabaly/2011-4301-02-00>.

necessary to ensure fast, operative and responsible decision-making in both the political and the legal sense, for which the Government appears to be suitable in the Hungarian constitutional system” (Venice Commission 2021, 8).

3. Consequences: The Dangers of Unlimited and Elastic Emergency Measures

Despite the easing of restrictions related to the pandemic, with the government's proposal, the National Assembly extended the state of emergency until September 2021. At the same time, according to current plans, the mass migration crisis will be in effect until September 7, 2023. The Orbán government has extended the overlapping states of exceptions. According to the regulation, the exact time when the government is entitled to recall the state of emergency depends on the executive power itself (Antal 2021b, 2022a). The National Assembly still does not have any authority to control the exceptional measures. In fact, due to the two-thirds majority, the Parliament does not form a counterweight against the government. The administration proposed a law not just recalling the state of emergency but creating temporary regulation, which will produce a new form of state of exception. The government authorized itself to declare the medical state of exception through a decree. This new emergency measure remained totally uncontrolled by the legislature and will be under the exclusive jurisdiction of the executive power. Under the circumstances of the medical state of exception, *inter alia*, the operation and opening of shops, the sale and consumption of certain products, the use of health services, people-to-people contact, passenger traffic, freight transport, the operation of all institutions and events, and any other activities which may contribute to the spread of an epidemic, may be restricted or prohibited by government decree. The application of certain laws may even be suspended by the government, or it can deviate from certain legal provisions. Literally, this means that the Orbán government will have legal authority to establish a state of emergency without the authorization of Parliament. This means that there is no need to accept a new Enabling Act and the legislature does not have any legal or political authority regarding the extraordinary measures. The administration has created a kind of state of emergency that can be activated anytime without any prior authorization – the normal legal and political order has become peremptory fluid.

Behind the endless and overlapping state of exceptions, there is also a rise in the unlimited executive power (Antal 2019, 35-41); contemporary authoritarian populist regimes can be equipped with extraordinary government measures, which means managing the crisis that they created. Following Agamben (2005, 2014), this phenomenon can be called the “permanent state of exception.” COVID-19 is a global epidemiological crisis, and the Hungarian executive power has found a way to create a new political crisis based on the pandemic. The theory of a state of exception's first and isolated appearance was Carl Schmitt's book *Dictatorship*, originally published in 1921 (Schmitt 2014). There was a rise in debate on the state of exception between 1934 and 1948 because of the collapse of European democracies; discourse on the state of exception unfolded within the framework of constitutional dictatorship. The debate was maintained by Article 48 of the Weimar Constitution, which granted emergency powers to the president of the Reich (Head 2016). In the framework of Schmitt's “lengthening shadow” (Head 2016, 1), the state of exception and constitutional dictatorship are inseparable. In 1926, Schmitt summarized his definition on dictatorship:

Dictatorship is the exercise of state power freed from any legal restrictions, for the purpose of resolving an abnormal situation – in particular, a situation of war and rebellion. Hence two decisive

elements for the concept of dictatorship are on one hand the idea of a normal situation that a dictatorship restores or establishes, and on the other the idea that, in the event of an abnormal situation, certain legal barriers are suspended in favor of resolving this situation through dictatorship. (quoted in Hoelzl and Ward 2014, xxiii)

Schmitt distinguishes the two types of dictatorship in conjunction with the regulation of the state of emergency; on the one hand, “a dictatorship that, despite all its extra-legal authorization, remains within the prescriptions of a constitutional order and in which the dictator is constitutionally mandated (commissary dictatorship); and on the other hand, a dictatorship in which the whole existing legal order is rendered obsolete and a completely new order is intended (sovereign dictatorship)” (quoted in Hoelzl and Ward 2014, xxiv). If commissary dictatorship is about the continuous extension of the state of exceptions, sovereign dictatorship prevails now as the constitutional system seized and institutionalized by a sovereign dictator. In his *Political Theology*, Schmitt argues that “sovereign is he who decides on the exception” (Schmitt 2005, 5); in this sense, ultimate sovereignty means a constitutionalized dictatorship. Contemporary authoritarian populist regimes and leaders are convinced that there is a core need to reformulate and acquire political sovereignty. In this sense, authoritarian populism can be seen as a rise of the executive power; this attempt has been reinforced by the COVID-19 crisis.

At the early stage of the pandemic, Agamben warned of the “disproportionate response” in conjunction with COVID-19 and argued that “what is once again manifested is the tendency to use a state of exception as a normal paradigm for government. The legislative decree immediately approved by the government ‘for hygiene and public safety reasons’ actually produces an authentic militarization...” (Agamben 2020). The dangers indicated by Agamben, including the abuse of government overreach, proved to be real, and the Orbán regime was able to perpetuate the exceptional situation.

However, Agamben was heavily criticized for not considering the pandemic a serious enough threat: “Agamben thus fears that exceptional measures pushed through today are dangerously disproportionate. If the reader thinks that makes Agamben sound like coronavirus denialists such as Bolsonaro or Trump, then I must confess they are right. Just like these authoritarian leaders sacrifice global health to their own egos, it seems like Agamben dangerously underestimates the threat the coronavirus poses” (Christaens 2020). On the one hand, an unprecedented social and health catastrophe has occurred. On the other hand, it has produced a tremendous political effect, and as the Hungarian case study confirms, exceptional and emergency-type measures and unlimited executive power of authoritarian regimes all re-emerged.

The invasion launched by Vladimir Putin against Ukraine has demonstrated that the Orbán regime's exceptional governance induced by the refugee crisis and pandemic is not at all necessary for everyday governance. Even in the campaign leading up to the 2022 elections, the Orbán regime did not renounce emergency law and order, and with the outbreak of the Russia-Ukraine war in February 2022, it did not introduce new exceptional measures but kept in force and relied on the previous ones. The refugee crisis, the pandemic, and the Russo-Ukrainian war have made it clear that the Orbán regime is not interested in solving social and political crises but in managing the fear, chaos, and uncertainty that arise from them. In the context of the war, Orbán has given the impression that the opposition supports Hungary's involvement in the conflict, that it endangers the Hungarian people and that only the government can and will prevent such a threat posed by political aspirations that run counter to the government. The official government communication insists that

“Hungary’s united opposition is jeopardizing the security of the Hungarian public by making irresponsible remarks in connection with the war in Ukraine, and their economic policies would compromise their livelihoods.” (About Hungary 2022).²⁰ Since 2015, the authoritarian populist Orbán regime has used the tools of emergency governance in a highly manipulative way, essentially blurring the line between normal and exceptional. As Michael Head puts it: “Emergency is an inherently ‘elastic’ concept, open-ended and politically manipulable. From the 1933 Reichstag Fire, seized upon by Hitler to justify decree-making power, to the false claims of ‘weapons of mass destruction’ utilised by the US and its allies to invade Iraq in 2003, governments have inflated or fabricated pretexts for supposedly pre-emptive emergency measures” (2016, 246). Democracy's future depends on whether it can be freed from the grip of the state of exception.

One of the most significant democratic concerns about the Orbán regime's use of the special legal order is the government's reliance on extraordinary measures not covered by the Fundamental Law. Instead, the regime applies such extraordinary governance measures, which have no constitutional constraints. The Orbán regime has thus exploited the legitimate possibility of governing by extraordinary measures in two ways: by transforming the means at the constitutional level and subordinating the government, moreover, the application of sub-constitutional extraordinary measure without limits.

²⁰ What makes this statement interesting is that it comes from Fidesz’s Communications Director István Hollik and that it was published on the *About Hungary* website – the official English-language site of the Hungarian Government. All this shows how intertwined government and party relations have become in the Orbán regime.

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