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Special Legal Orders: Challenges and Solutions[1]

I. Introduction

There is an emerging interest regarding crisis situations in Europe, caused by both mass migration and terrorist attacks and threats. Each state and the EU itself seek to change laws, including even constitutions, to deal better with challenges, adapt to the new situations, uphold legal and public order, and promote peace and safety in their territory/territories. The mass migration and threat of terrorism we are witnessing nowadays, despite the assertions of some populist politicians such as the Hungarian prime minister, cannot be considered the same phenomenon, and presumably cannot trigger the same constitutional and legislative actions and responses.

Introducing new legislative and other solutions is the responsibility of the constituent and each European state has a unique constitutional basis which provides a normative ground for emergency legislation and measures. Nevertheless, each of them is under the same obligation to adhere to constitutionality and human rights, not to mention obligations stemming from international law and European integration. When the integrity, independence, existence of a state, or its public order and people are in imminent danger, a special legal order may be called for. In such emergency situations, or special legal orders,[2] constitutional democracies function differently than usual; state organs or agencies may be delegated extra power, some competences may be exercised jointly or even separately, or by a newly constituted body, special legislative bodies may emerge, exceptional legal measures may be introduced, law may be suspended, and derogations from international obligations, for example those stemming from ECHR compliance, may be declared.[3] Special legal orders or emergencies are dealt with differently at a constitutional level, based on the particular constitutional history and structure of a state, but this difference should not affect its obligation to remain within the framework of its respective constitution, even when faced with sudden and unforeseeable challenges. Special legal orders, or any special measures in a crisis situation should have a strong constitutional basis; each step taken in an emergency situation should be constitutionally mandated.[4] Even if fast and operational decision-making is required to resolve the crisis situation, this cannot exempt the state from either acting within the frame determined by the constitution. It may also be the case that there has not been a proper constitutional basis for state actions. Even in such a case the state, with a written constitution,[5] cannot be discharged of adjusting the constitution to the new legal order, provided that it is in harmony with international and supranational obligations. Even though this latter is not

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1 The present scientific contribution is dedicated to the 650th anniversary of the foundation of the University of Pécs, Hungary

2 For the purpose of the paper the terms emergency situations, special legal orders, and states of emergency are used interchangeably.

3 See e. g. fundamental rights may be restricted beyond the usual necessity-proportionality test (or other applicable ones).

4 "Even in genuine cases of emergency situations the rule of law must prevail." See Opinion 359/2005, Opinion on the protection of human rights in emergency situations. Adopted Venice Commission at its 66th Plenary Session (Venice, 17-18 March 2006), p. 5, point 13.

5 In a state having an unwritten constitution, or where constitutional provisions on emergency are traditionally few, this may be different. See *David Dyzenhaus*, States of Emergency, in: Michel Rosenfeld/András Sajó (eds.), The Oxford Handbook of Comparative Constitutional Law (Oxford University Press, Oxford 2012).

'elegant' in a constitutional democracy (as in this case an extra-constitutional situation may be created which later would be legitimised by a constitution amendment), it can be accepted that in certain cases the constitution-making or -changing power was not prepared to deal with new kinds of threats, and the existing constitutional framework is simply not adaptable to new situations.

Hungary, since 1989, has had a well-entrenched constitutional regime to deal with special situations. Yet, in August 2015 as a response to the migration crisis, the Government chose to create another 'special situation regime' at sub-constitutional level with a clear disregard for the constitution and international obligations. This was not followed by any proposal to amend the Hungarian constitution, called Fundamental Law, for 'adjustment'. This attitude is a direct consequence of how the state power has been exercised since 2010, when constitutional majority was gained during the election. This was repeated again, in 2014[6], but afterwards this was lost due to the results of some by-elections. As is a well-known fact, the Hungarian government, during spring and summer of 2015, when faced with the massive flow of people, started an internal politically motivated and defensive anti-migration billboard campaign and neglected the fact that people would reach the border and would enter the territory of Hungary in order to reach Western Europe. There were no actions whatsoever taken in order to legally deal with the new situation during spring and summer 2015. Legislative measures (Act CXL of 2015 and Act CXLIII of 2015) were submitted to the Parliament in August and adopted on 4 and 21 September 2015. These acts established a factual and legal closing of borders. By erecting the fence, the border has factually been closed and by adopting modifications to, among others, procedural and criminal laws borders have been legally sealed.

In the newly created crisis situation, known as 'crisis situation caused by mass migration', which does not qualify as a 'special legal order', due process is not properly applied; the institutional independence of the judiciary is questionable; property rights are affected and reservations are made on environmental issues; the law-making competences of the Government are extended.[7] Still, in 2016 there is an ongoing attempt to include another, new type of special legal order, which is[8] completely different from the crisis situation caused by mass migration, into the Fundamental Law in order to fight against terrorism.

It is without doubt that in a constitutional democracy extreme measures need the highest legitimacy possible: the constitution has to sanction them. In the light of the recently adopted new Hungarian – presumably unconstitutional – legal measures on mass migration and the sixth constitutional amendment on terror emergency, it seems to be reasonable to review the recent scholarships on emergency situations and confront it with the constitutional models CEE states, including Hungary, apply. As a result of a brief review of new measures, constitutional backgrounds and their assessment, better under-

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6 *Tímea Drinóczi*, Constitutional Politics in Contemporary Hungary, 1 Vienna Journal of International Constitutional Law (2016) pp 63–98, *Imre Vörös*, Hungary's Constitutional Evolution during the Last 25 Years, 63 Südosteuropa 2|2015, pp. 173-200.

7 Moreover, new criminal offences were created. I do not deal with this in great detail here, as the lack of criminal procedural guarantees is more pertinent to the purpose of the paper, and criminal legislation, in terms of offenses and types and gravity of punishment, is the responsibility of the state and is dependent upon the criminal policy pursued.

8 Using indicative here and now (26 April 2016) is an exaggeration, as the text of the draft modification to the constitution has not been made available to the public. In January 2016, it was revealed that the text of the amendment is classified for 30 years. During the following months there have been negotiations among parliamentary factions but the public could not have access to the text. What is known is it has already been submitted to the Parliament the text of modifications of different Acts but not the Fundamental Law.

standing can be expected regarding special legal orders and the challenges constitutional law of European states may face. Against this background, it can also be assessed, from both constitutional theory and constitutional law perspective, whether CEE constitutions may be considered as models in a certain context, and whether the Hungarian solution in general (on special legal order) and in particular (regarding the new measures introduced in 2015 and 2016) may be considered as an example to be followed, and whether the further development of a mixed or illiberal democracy is experienced in Hungary in the context of 'emergency constitutionalism'.

For addressing these issues, the paper is structured as follows. In point II., *David Dyzenhaus'* emergency models are briefly reviewed and confronted with CEE constitutional models and their theoretical background, and, as a result, lessons are drawn from CEE emergency models. It is followed by a summary and critical comments on the regulation of crisis situation caused by mass migration, which is not a special legal order as described by the Fundamental Law but pretends to be without however having at least comparable justification. Point IV. addresses possible solutions that have been available for the Hungarian decision-maker regarding the constitutional and ordinary legislation on both the criticised rules of crisis situation caused by mass migration and terror emergency. The paper concludes in point V. and founds that the models of *Dyzenhaus* show a quite simplified picture, especially in the CEE region because these constitutions entrench emergency situations in a different manner; the constituent powers of CEE states considered the dichotomy of loosening constitutional burdens in emergencies and the need to avoid misusing powers; this technique may be of use for other states when trying to constitutionalise some new defence mechanism against new threats, such as terrorism; the wording of the new Hungarian special legal order connected to terror threats may be an example for other states, however, the method employed should not be followed; neither should the approach of the Hungarian legislator related to the crisis situation caused by mass migration be considered to be used.

II. Emergency situations and models

According to *David Dyzenhaus*, written constitutions may apply either the executive, the legislative or the judicial model of emergency powers, whereas in the case of an unwritten constitution the doctrine of martial law applies. In the executive model, the authority to decide whether there is an emergency and how to best respond is delegated to the executive power. The legislative model requires the legislature to design a legal regime that deals with the questions of 'when to introduce' and 'how to address' emergency situations. In both cases, the judicial power should be part of the process, so a choice needs to be made about the extent to which judicial review can be applied in the emergency situation. If judicial supervision has a large role, an emerging judicial model can be observed.[9] The picture is in fact more colourful than described by *Dyzenhaus*, especially in the post-communist Central and Eastern European (CEE) states which have constitutionally well-entrenched emergency regimes. Against this background, it is interesting to test the models of *Dyzenhaus* mainly in the CEE region.

[9] *Dyzenhaus*, fn. 5, p. 442, 446.

1. Testing models in CEE constitutions

In Western Europe, constitutions have less detailed provisions on emergency situations and they only provide for the attribution of the most important powers and procedures concerning who (which constitutional organ) declares what (which type of special legal order), what kind of majority is applied in decision-making, and what the non-derogable rights are. However, they do not usually make any definition of war, emergency or threats to the state, nation or national security but leave the regulation and declaration of these situations to the legislative (Spain, Italy) or legislative and executive power (France).

Each CEE constitution explicitly or implicitly requires that all the three powers work together.[10] It is usually the parliament that declares a state of war, martial law, or state of emergency. In this process the executive and the president are also involved. Their engagement is greater when the parliament cannot be summoned or function. In this case usually the president declares the situations or a special organ is established with the participation of parliamentarians, government, and in certain cases the president, or constitutional court.[11] Extraordinary measures are usually introduced by the parliament except when it is not able to function; in this case it is again the executive that can act within constitutional limits of time and subsequent parliamentary control. The army is usually employed by parliament, the commander in chief is the president; when immediate action is required or a military decision is urgently needed due to international obligations, it is the government that has a constitutional mandate to decide on the employment of the national army externally. The existence of any kind of emergency situation is time-sensitive; they can be maintained while they are needed. Determining the end of a special legal order is again the responsibility of the most important state organs which jointly govern the state. There are only few exceptions, such as the Czech Republic and Slovakia, where the constitutions provide for only the main competences on declaration of emergency situations and employment of the army, make a short definition of war and leave the details to be decided by the qualified majority of the parliament in a constitutional act. This qualified majority requires the approval of, for instance in the Czech Republic, 3/5 of the deputies and 3/5 of senators.[12]

The enumeration of non-derogable fundamental rights varies in CEE constitutions in terms of the range they cover but they are clearly inspired by Article 15 ECHR and during constitution-making, constituents adapted the main idea behind Article 15 ECHR to

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[10] Just as it is demanded by *Dyzenhaus*; see *Dyzenhaus*, fn. 5, p. 446

[11] E. g. Hungary and Slovakia, see *Marek Domin*, Constitutional mechanisms for eliminating security risks, in: Agnieszka Bień-Kacała/Jiží Jirásek/L'ubor Cibulka/Tímea Drinóczi (eds.), Security in V4 constitutions and political practices (Wydawnictwo Naukowe Uniwersytetu Mikołaja Kopernika, Toruń 2016), pp. 158–159.

[12] See Constitutional Act Nr. 110/1998 Coll. on Security of the Czech Republic, Constitutional Act Nr. 227/2002 Coll. on State Security at the Time of War, state of War, State of Emergency, and State of Crisis (Slovakia). See more in *Jan Filip*/*Pavel Molek*/*Ladislav Vyhnánek*, Governance in the Czech Republic, in: N. Chronowski/T. Drinóczi/T. Takács (eds.), Governmental Systems of Central and Eastern European States (Warsawa, Wolters Kluwer Polska – OFICYNA, 2011), pp. 200–201 and *Ľubor Cibulka*/*Lucia Mokrá*, The Slovak Republic, in: N. Chronowski/T. Drinóczi/T. Takács (eds.), Governmental Systems of Central and Eastern European States (Warsawa, Wolters Kluwer Polska – OFICYNA, 2011), pp. 692–693; *Vera Jirásova*/*Jiží Jirásek*, Concept of security of Czech Republic, in: Bień-Kacała/Jirásek/Cibulka/Drinóczi, Security in V4 constitutions and political practices, fn. 11, p. 65, pp. 73–74; *Martian Giba*, State Security, in: Bień-Kacała/Jirásek/Cibulka/Drinóczi, Security in V4 constitutions and political practices, fn. 11, pp. 125, 129.

their national demands. This is why it is not only the right to life,[13] the prohibition of torture and inhuman or degrading treatment or punishment,[14] and of slavery, and the nullum crimen, nulla poena principle that they established as non-derogable rights in emergency situations, but also prohibition of assimilation (Bulgaria, Serbia), dignity and freedom of thought, conscience and religion (each constitution), family, marriage, rights of the child (Serbia, Poland), and right to citizenship (Serbia, Poland). In Latvia, however, the constitution is silent in this regard and it is only the relevant Act which provides for rules on derogations in emergency situations, which is considered a great deficiency of the Latvian constitution.[15]

Beyond these generally applied rules, CEE constitutions also set, jointly or independently, some other important guarantees: 1) They contain a proper definition of each situation, such as state of war or state of emergency, as follows: imminent threat to the independence of the state, armed aggression, imminent danger, and general danger that threatens the existence of the state, serious acts of violence endangering life, et cetera.[16] 2) They usually provide that the mandates of the parliament and president are extended until the end of the situation.[17] 3) Constitutions delegate special law-making competence to the executive power in the shape of decrees having the force of law which may replace certain provisions of statutes.[18] An exception here is Bulgaria, where delegation of law-making competences to the executive itself is prohibited due to historical reasons, as there have been cases of abuse by the tsar, the Presidium of the National Assembly, and the State Council of these delegated powers.[19] 4) They stipulate that the introduction of

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[13] For understanding the right to life as the highest value in constitutional democracies, see e. g. the decision of the Polish Constitutional Tribunal on permissibility of shooting down a civil aircraft if it is necessary for state security considerations, and where the aircraft is found to have been used for unlawful acts, in particular as the means of a terrorist attack. Regulation in the abstract review procedure was found unconstitutional on multiple grounds. See decision of the Constitutional Tribunal of 30 September 2008, file nr. K44/07; 126/7/A/2008. English summary: http://trybunal.gov.pl/fileadmin/content/omowienia/K_44_07_GB.pdf.

[14] For the discussion of the absolute nature of this prohibition see e. g., *S. Greer*, Is the prohibition against torture, cruel, inhuman and degrading treatment really "absolute" in international human rights law?, 15 Human Rights Law Review (2015); *Milan Hodas*, Security and other values protected by constitution, in: Bień-Kacała/Jirásek/Cibulka/Drinóczi, Security in V4 constitutions and political practices, fn. 11, pp. 149–153; *A. Jakab*, Breaching constitutional law on moral grounds in the fight against terrorism: Implied presuppositions and proposed solutions in the discourse on 'the Rule of Law vs. Terrorism', ICON (2011) Vol 9 Nr 1.

[15] "The Constitution itself does not regulate possible restrictions on human rights during a state of emergency. Various commentators believe this is a quite fundamental deficiency of the Constitution since it means there is no constitutionally determined difference between the human rights regime in ordinary circumstances and the regime during a state of emergency. Establishing a distinction of this kind would make it possible to assess the restrictions required during a state of emergency." *Daiga Iljanova*, "The Governmental System of the Republic of Latvia, in: Chronowski/Drinóczi/Takács, Governmental Systems of Central and Eastern European States, fn. 12, p. 410.

[16] See e. g., Croatia, Poland, Slovenia, Hungary, Latvia. See also *Lauc, Iljanova*, fn. 15, p. 142; *Agnieszka Bień-Kacała*, Category of security in light of Polish Constitution, in: Bień-Kacała/Jirásek/Cibulka/Drinóczi, Security in V4 constitutions and political practices, fn. 11, pp. 48–49; *Sara Pernuš*, The Governmental System of Republic of Slovenia, in: Chronowski/Drinóczi/Takács, Governmental Systems of Central and Eastern European States, fn. 12, pp. 718–719; *Iljanova*, fn. 15, p. 409.

[17] E. g., Slovenia, Hungary, Poland, Serbia, Croatia, Latvia, Estonia, Bulgaria. See also *Pernuš*, fn. 16, pp. 717–718; *Bień-Kacała*, fn. 16, p. 57.

[18] Each mentioned states in the previous footnote.

[19] *E. Tanchev/M. Belov*, The governmental system of the Republic of Bulgaria, in: Chronowski/Drinóczi/Takács, Governmental Systems of Central and Eastern European States, fn. 12, p. 93.

extra measures and derogation of fundamental rights are limited in time and are subject to parliamentary oversight and control;[20] in the case of Estonia, this oversight is made by the chancellor of justice.[21] 5) In these states, constitutions cannot be suspended or changed[22] and the function of constitutional courts cannot be suspended.[23]

2. Theory behind emergency regimes

The Hungarians *András Jakab* and *Szabolcs Till*,[24] conclude, as others do, that in emergency situations, special constitutional rules need to be adopted which loosen the constitutionally bound actions, but at the same time provide for protection against abuse of power. For them, the major dilemma of law of states of emergency is how to balance the need for 'loosening' and protection against abuse of power, as the goal of law of states of emergency to lead the state and society back to 'normal' constitutional status. For constitutional entrenchment of emergency situations we need to identify the protected legal subject as not each and every provision of a constitution that calls for special protection in emergency situations, but rather the most important values, rights, and self-defence mechanisms. We also need to be aware of the fact that for a proper constitutional design, the likelihood of risk and danger triggering the introduction of emergency situations needs to cross a threshold.[25] It is probably not wise to introduce any special legal order or state of emergency if the threat is not actual or imminent, does not involve the whole or majority of the nation, affect the entire territory of state or parts thereof et cetera,[26] because it could easily lead to an abuse of power. Proportionality is indispensable when determining different types and the scale of special legal orders as well as the delegation of powers. Concentration of powers, if needed, should be applied to the extent that is absolutely necessary for resolving the situation. Balance needs to be maintained between efficiency (the greater the danger, the larger the emergency competences) and fear of abuse of power (the less the danger, the fewer the emergency competences are).[27] Furthermore, I would add that judicial review and interpretation should be an essential part of the management of emergency situations; this does not expressis verbis stem from constitutions even of this region but it follows the logic of constitutional democracy (see following point 3.). This dichotomy, i. e. the claim for efficiency and fear of abuse of

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[20] E. g. Macedonia and also see states in fn. 12. For Macedonia see e. g. *Klaus Schrameyer*, The Republic of Macedonia, in: Chronowski/Drinóczi/Takács, Governmental Systems of Central and Eastern European States, fn. 12, p. 494-495. For Slovakia see *Domin*, fn. 11, p. 157.

[21] *Jüri Põld/Berit Aaviksoo/Rodolphe Laffranque*, Governmental system of Estonia, in: Chronowski/Drinóczi/Takács, Governmental Systems of Central and Eastern European States, fn. 12, p. 276.

[22] E. g., Hungary, Poland, Serbia, Estonia. See also *Bień-Kacała*, fn. 16, pp. 55–56; *Marijana Pajvancic*, Governmental system of Serbia, in: Chronowski/Drinóczi/Takács, Governmental Systems of Central and Eastern European States, fn. 12, p. 626; *Põld/Aaviksoo/Laffranque*, fn. 21, p. 529.

[23] Hungary.

[24] *András Jakab*/*Szabolcs Till*, A különleges jogrend, in: *Trócsányi László*/*Schanda Balázs*, szerk., Bevezetés az alkotmányjogba; Az Alaptörvény és Magyarország alkotmányos intézményei, http://www.tankonyvtar.hu/hu/tartalom/tamop425/2011_0001_548_Alkotmanyjog/ch18.html.

[25] *Jakab/Till*, fn. 24.

[26] For other conditions see Opinion 359/2005 in the context of international obligations and wording of the Hungarian constitutions, Slovenian or Croatian constitutions. See also relevant chapters in: Chronowski/Drinóczi/Takács, Governmental Systems of Central and Eastern European States, fn. 12, written by *Nóra Chronowski, Tímea Drinóczi, József Petrétei, Zvonimir Lauc and Stipe Ivanda, Sara Pernuš*. For the Hungarian constitutional wording see point III.2.

[27] *Jakab/Till*, fn. 24.

power explains the level of elaboration of constitutional texts in the CEE region. Generally speaking, the greater the fear of abuse of power, the more detailed the constitutional regulations on emergency situations, as is the case in Hungary.[28] Derogation of human rights may also be necessitated in a state of emergency. Depending on the constitutional history of a state, and the balancing attitude described above, constitutions may allow derogation of more or less fundamental rights and may prescribe non-derogable provisions. Nevertheless, balancing values (efficiency, normativity) is a meaningful exercise only in a constitutional democracy.

3. Emerging judicial model?

Dyzenhaus writes about an emerging judicial model which does not have a traceable sign. Constitutions from the Western and Southern European regions, with the exception of Germany which due to its history has an elaborated chapter on emergencies,[29] usually do not even refer to any contribution of judicial power (which in this context includes constitutional courts) in deciding or managing emergency situations or reviewing laws made thereof. This is instead a peculiarity of post socialist constitutions but the constitutional entrenchment in this respect is not that visible. What CEE constitutions do is prohibit the suspension of both the constitution and the operation of the constitutional court, and involve the president of the constitutional court in decision-making bodies.[30] This means that each measure taken during an emergency situation is subject to constitutional review.

Extraordinary measures necessarily appear in the shape of normative acts, as constitutional courts have competence to review normative and not individual acts. The main reasoning behind the constitutional requirement of issuing decrees with the force of law is twofold and probably not necessitated only by the need for judicial review. One of the reasons is that executive power is more operative in times of danger than the legislative, and parliaments may not be able to convene but the country needs to be managed. The second is that only laws (including statutes and decrees) may regulate important social affairs and fundamental rights; only statutes can impose obligations on citizens and rule on their rights. Due to this consideration and the need for operative management, special legal sources are applied in emergencies: decrees issued by executive power have the force of law and as such are able to replace regulations stipulated in statues. The replacement is limited by time and by the constitution itself, which must not be suspended.

That is why judicial, or rather, constitutional review exists. Returning to the models, the judicial model is an existing, though not yet experienced phenomenon of CEE constitutions. Nevertheless, following the logic of constitutionalism, the idea expressed by *Jakab* and *Till*, and the general role of constitutional courts (the defence of the constitution), it can plausibly said that constitutional or judicial review is in theory a constituent element of any emergency situation. It is in theory only, as we have not yet experienced such a scenario and we do not know how constitutional mechanisms established for states of emergency would actually work.

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[28] *Jakab/Till* (fn. 24) explains the elaborate features of the Hungarian constitutional regulations by the influence of events of 1956 in Hungary and 1981 in Poland where *General Jaruzelski* declared state of emergency to defeat political opponents, the Balkan war, and the fear that the losers of the first democratic parliamentary election in Hungary (1990), who was supposedly the state party, wanted to regain power with military force.

[29] Chapter Xa, State of Defense, Grundgesetz (=Abschnitt Xa GG: Verteidigungsfall).

[30] See the contribution of the Hungarian President of the Constitutional Court in the Defence Council which has to be established when the situation of national defence is declared.

4. Lessons to be learnt from CEE constitutions

Bearing in mind the reasons and submitted texts of the failed French constitutional amendment in spring 2016,[31] much can be learned from the CEE constitutions in respect to how emergency situations are regulated at a constitutional level. These constitutions aim at guaranteeing as fast and effective recovery from crisis as possible and avoiding any abuse of power capable of turning the state into an autocracy or dictatorship with the misuse of (armed) power. After the terrorist attacks of November 2015, the President of France declared a state of emergency.[32] A constitutional amendment was prepared that sought to constitutionalise the state of emergency, as it is not regulated in the 1958 Constitution. According to the French Constitution, emergency powers are attributed to the President,[33] and based on decisions of the Constitutional Council from 2015 and 2016 it is not excluded at all that the legislative power provides a state of emergency regime. It is covered by an Act of 1955 as amended in 2015.[34] This French attempt is clear evidence that constitutional democracies need constitutional regulations, mandates to act, and accurate constitutional guarantees in the event of threats and danger.

If one reads the constitutional regulations of CEE constitutions regarding emergencies carefully one realises that, however elaborated they seem from a comparative perspective, they are constructed to defend the state from aggression (war) in the sense of international law and some internal threats and dangers; covering loosely formulated but imminent dangers, attempted coup d'état, revolution, and natural and industrial disasters. What they are not equipped with is methods to constitutionally deal with new dangers, such as the threat of terrorism. The more entrenched the constitution is in terms of emergency situations, powers et cetera, the less scope the government has in freely addressing new challenges. The less constitutional guarantees there are, the more opportunities. The executive has to make operative actions, after which it may feel that constitutionalisation of these possibilities, powers, measures and procedures, et cetera, are necessary, as was the case in France.

In the case of Hungary, its well-entrenched constitutional arrangements regarding emergencies have already shown its illiberal nature and tendency towards abusive constitutionalism. In its attempts to cope with the flow of migrants during the summer of 2015, Hungary developed a new crisis situation without any constitutional basis and in spring of 2016 this was introduced countrywide, again without a clear constitutional mandate and without meeting legal requirements of the state own law adopted in September 2015. Full assessment of this series of decisions and actions of the Hungarian political decision-makers is still awaited but it seems that the Hungarian constitution does not provide an effective limitation on the state power exercised, even in peacetime. This case is not

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[31] For this and its evaluation see Opinion No. 838/2016, Opinion on the draft constitutional law on „Protection of the nation" of France, Adopted by the Venice Commission at its 106th Plenary Session (Venice, 11-12 March 2016), and *Olivier Duhamel*, Terrorism and Constitutional amendment in France, European Constitutional Law review (2016) 12, pp. 15 doi: 10.1017/S1574019616000067.

[32] It was also accompanied by the note for derogation of rights enlisted in ECHR and ICCPR, as required by international law. This paper does not deal with the deprivation of nationality issue. See more on this in the Opinion referred above.

[33] It may happen when the institutions of the Republic, the independence of the Nation, the integrity of its territory or the fulfilment of its international commitments are under serious and immediate threat, and where the proper functioning of the constitutional public authorities is interrupted. State of siege is regulated by another Article.

[34] Opinion, p 5.

of abusive constitutionalism,[35] but pure unconstitutionalism committed either deliberately or through ignorance. The intent however does not matter, what does is the legitimate fear that this might be another step towards illiberalism. To justify this opinion, I present the most relevant provisions of the new laws and the constitutional framework in which they were adopted. As a conclusion I compare constitutional and legislative measures justifying my above statement.

III. Hungary – a disputable solution: crisis situation caused by mass migration

As mentioned above, the crisis situation caused by mass migration does not qualify for a special legal order under the Hungarian Fundamental Law, as it is not enumerated as such in the constitution. However it seems to behave as one, in terms of the employment of the army and derogation of human rights. While doing so, the new crisis situation lacks the justification of constitutional theory and practice as well as constitutional and other guarantees. The discrepancy is not recognised at either a political or scholarly level, but I think that it can be seen as another example of how a mixed democratic/liberal and non-democratic/illiberal state functions and reinforces its new system, either deliberately or ignorantly, step by step.

1. Crisis situation caused by mass migration

Pursuant to laws submitted to the Parliament in August and adopted in September 2015, a crisis situation caused by mass migration may be introduced if the number of asylum seekers arriving in Hungary exceeds an average of 500 per day over a month, an average of 750 per day over two consecutive weeks, or an average of 800 per day over a week. One may also be declared if the number of migrants in the transit zones exceeds an average of 1,000 per day over a month, an average of 1,500 persons per day over two consecutive weeks, or an average of 1,600 persons per day over a week. Additionally, a state of crisis due to mass migration may be declared if a situation related to migration emerges which poses a direct threat to public safety and the maintenance of law and order in a settlement, or poses a direct threat to public health. This last provision will be particularly applicable if a disturbance or violence occurs at a reception centre or any other facility serving to shelter foreigners in a settlement or on its outskirts. It is the duty of the chief commissioner of police and the head of the asylum authority to monitor these conditions, and to notify the Government of their emergence or cessation. The Government is the body responsible for declaring a state of crisis due to mass migration for the entire territory of Hungary or parts thereof. The relevant decree remains in force for a maximum period of six months, but its term may be extended if the circumstances which gave rise to it persist.[36]

Pursuant to the modified Act on Military of 2015, in a crisis situation caused by mass migration, the Hungarian army participates in defending borders, implementing measures necessary to deal with mass migration, and conflict situations directly jeopardizing the

[35] *David Landau*, Abusive constitutionalism (April 3, 2013). UC Davis Law Review, Fall 2013, available at SSRN: http://ssrn.com/abstract=2244629.

[36] The text is the translation of the rules introduced by Act CXL of 2015, it is available at http://www.kormany.hu/en/prime-minister-s-office/news/government-declares-state-of-crisis-due-to-mass-migration-in-two-counties.

order of the borders with an authorization to use weapons.[37] Performing this task, the military operates under the Act on Police, they act under the command of their own military superiors and they cannot take away any competences from police officers, they simply assist and facilitate the task of police, one of which is the defence of borders.

The modification of the Criminal Procedure Act (CPA, Act XIX of 1998) rendered the following rules of the CPA inapplicable: translation of the indictment or its parts relating to the accused person into their mother tongue, national, or regional language, which has to be submitted to the court along with the original indictment; translation of the court's ruling or decision or parts relating to the convicted person into mother tongue, national, or regional language, which also has to be delivered to the person concerned; rules regarding minors. The latter in a regular procedure would cover the following: taking the age of accused into consideration; involvement of a teacher in the court proceedings as a lay member of the court; limited pre-trial detention; when deciding the execution of the sentence, judge decides on its place and method taking age into account; in correctional facilities, minors are separated from adults; and waiving of trial is not an option.

As a result of changes of other laws,[38] the right to legal remedy is no longer fully respected: there is no right to refer to new facts and circumstances in the process of appeal and decisions are not automatically suspended in the case of appeals. This means that applicants are effectively forced to leave the territory before the time limit for lodging an appeal expires, or before an appeal has been heard. Moreover, in judicial review of decisions rejecting an asylum application, a personal hearing of the applicants is optional; judicial decisions are taken by court secretaries/trainee judges (a sub-judicial level) which arouses the suspicion that institutional judicial independence is lacking. The situation is even more complicated as the involvement of court secretaries/trainee judges in judicial decisions is permitted by the Fundamental Law itself. Due to the extra work-load of courts, new judges are transferred; some of them however are not nominated for an indefinite time. Transfer of judges, just like that of cases, is within the discretionary competence of the President of the National Office for the Judiciary.

2. Constitutional provisions on special legal orders

The Hungarian Fundamental Law clearly defines and differentiates between the normal and abnormal functioning of the state in terms of employing and controlling military forces as well as the limitation of fundamental rights. The main tasks and duties of the police, national security services and military are regulated at the constitutional level.[39]

The main relevant Fundamental Law provisions are as follows: Article 45 determines the main responsibilities of the armed forces, which are the military defence of the independence, territorial integrity and borders of Hungary, performing collective defence and peacekeeping tasks arising from international treaties, as well as carrying out humanitarian activities in accordance with the rules of international law. Article 46 stipulates the core duties of the police and the national security services: the police undertake the pre-

[37] The Act CXIII of 2011 on the Hungarian army enumerates the tasks of the army and differentiates them as activities undertaken with or without the authorization of using weapons. In these situations however they are not obliged to use lethal power and if they do so, they have to act proportionally.

[38] http://www.ekint.org/ekint_files/File/menekultugyi%20valsaghelyzetben%20a%20birosagok.pdf, http://europa.eu/rapid/press-release_IP-15-6228_en.htm.

[39] This is discussed in *Tímea Drinóczi/Lóránt Csink/István Sabjanics*, Hungarian constitutional law and interpretations of security, in: Bień-Kacała/Jirásek/Cibulka/Drinóczi, Security in V4 constitutions and political practices, fn. 11, pp. 177–199.

vention and investigation of criminal offences, the protection of public security, public order, and the order of state borders. The national security services protect the independence and lawful order of Hungary, and the promotion of its national security interests.

The army, called the Hungarian Defence Forces (HDF), is a centralised, subordinated armed force of the state under civil authority, similar to other states.[40] Non-professional competences, such as control and oversight regarding the armed force are assigned to the Parliament, the Government and the President of Hungary by the Fundamental Law. Decisions on the employment of the HDF in defence of the country is an exclusive competence of the Parliament, which must be delivered with the support of 2/3 majority of MPs present. In engagements required by the need to fulfil obligations stemming from the state's NATO and EU membership, the decision-making body with sole authority is the Government due to its faster decision-making potential. In this case, as well as when the Government authorizes special peace-keeping or humanitarian missions which are not considered as a military operation, the other two involved parties of democratic control and oversight must be notified. According to the Fundamental Law, the head of state of Hungary is the commander-in-chief of the HDF.

The Fundamental Law recognises the following situations when special legal order can be declared: state of national crisis (state or danger of war), state of emergency, state of preventive defence, unexpected attack, and state of danger. There are quite detailed rules in the Fundamental Law (the Constitution also contained such provisions) in this respect, regulating the 'when to introduce', 'who is in charge' and 'what can and cannot be done' questions during these situations. These regulations are primarily due to historical precedent; during the transition the opposition intended to prevent the state-party from regaining power through using armed forces.[41] In the Fundamental Law a separate chapter is dedicated to the 'Special Legal Order', under the heading of 'State' which deals with the above questions and contains common rules applicable in these crisis situations:

> state of national crisis (state or danger of war): the event of the declaration of a state of war or an imminent danger of armed attack by a foreign power (danger of war)
>
> state of emergency: the event of armed actions aimed at subverting the lawful order or at exclusively acquiring power, or in the event of serious acts of violence endangering life and property on a massive scale, committed with arms or with objects suitable to be used as arms.

If the Parliament is able to, it must declare these situations and set up a National Defence Council in a state of national crisis. If the Parliament is prevented from taking such decisions, the President of the Republic has the responsibility to do so. In the state of national crisis, it is the National Defence Council that exercises the powers of the Parliament and deploys the military abroad or within Hungary, or decides on their participation in peacekeeping, their humanitarian activity in a foreign operational area, or on their stationing abroad.

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[40] It is organized on a voluntary basis in peacetime, and during the state of preventive defence and national crisis both on voluntary and compulsory military service. Art. 35(1) of the Act on defending homeland, Defence Force and measures of special legal order.

[41] See note 27 and *Szente Zoltán/Jakab András/Patyi András/Sulyok Gábor*, 19. § [Az Országgyűlés hatáskörei], 19/A. § [Az Országgyűlés akadályoztatása különleges állapotokban]', 19/B. § [Rendkívüli állapot], 19/C. § [Szükségállapot] [19. § [Competences of the National Assembly], 19/A. § [Hinderence of the National Assembly in special situations], 19/B. § [State of national crisis], 19/C. § [State of emergency]] In Jakab András (szerk.): Az Alkotmány kommentárja [Commentary of the Constitution] (Budapest, Századvég 2009), pp. 531–660.

In the case of state of emergency, the Hungarian Defence Forces may only be deployed if the actions of the police and the national security services prove to be insufficient. This decision is made by the Parliament or by the head of state if the former is unable to convene and make decisions.

State of preventive defence and unexpected attack are connected to armed conflicts, whereas state of danger is introduced when serious national or industrial danger threatens – defined as follows:

> State of preventive defence: in the event of a danger of external armed attack or in order to meet an obligation arising from an alliance, the Parliament shall declare a state of preventive defence for a fixed period of time, and shall simultaneously authorise the Government to introduce extraordinary measures laid down in a cardinal Act. The period of the state of preventive defence may be extended.
>
> Unexpected attack: 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 immediately take action using forces proportionate to and prepared for the attack, to repel the attack, to defend the territory of Hungary with domestic and allied emergency air defence and aviation forces, in order to protect lawful order, life and property, public order and public security.
>
> State of danger: in the event of a natural disaster or industrial accident endangering life and property, or in order to mitigate the consequences thereof, the Government shall declare a state of danger, and may introduce extraordinary measures laid down in a cardinal Act.

Common rules of special legal order are as follows: exercise of fundamental rights – with the exception of the right to human life and dignity, prohibitions concerning life and biomedical issues,[42] and due process and criminal law guarantees[43]– may be suspended or restricted beyond the extent specified in Article I(3)[44] which stipulates the general necessity and proportionality test. Application of the Fundamental Law may not be suspended, and the operation of the Constitutional Court may not be restricted. A special legal order shall be terminated by the state-organ entitled to introduce the special legal order if the conditions for its declaration no longer exist. The detailed rules to be applied under a special legal order have to be laid down in an Act adopted by the 2/3 majority of MPs; which means that in order for a particular special legal order to be implemented there has to be a particular Act governing the actual implementation of the situation.

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[42] Art. III Fundamental Law (FL): No one shall be subject to torture, inhuman or degrading treatment or punishment, or held in servitude. Trafficking in human beings shall be prohibited. It shall be prohibited to perform medical or scientific experiment on human beings without their informed and voluntary consent. Practices aimed at eugenics, the use of the human body or its parts for financial gain, as well as human cloning shall be prohibited.

[43] Art. XXVIII(2) to (6).

[44] Art. I(3) FL.

3. Concerns

After carefully reading the modifications, it is questionable whether the state power still acts within its constitutional limits. Or, if it does not do so, we need to consider what shall be done, how the constitution needs to be changed in a non-abusive way or how laws need to be changed to be in harmony with existing constitutional regulations.

a) Situation

The constitutionality and rationality of the newly introduced provisions for a crisis situation caused by mass migration can justifiably be questioned due to the fact that there is no explicit constitutional authorisation relating to this kind of crisis situation, and the entire structure of the Fundamental Law is a closed one in terms of special legal orders. Legislature and executive need to act within the constitutional framework and should not create a new situation which acts like a new special legal order. Consequently, this crisis situation caused by mass migration cannot be considered a new special legal order to which the constitutional rules of Special Legal Order apply. That is why excessive limitations of fundamental rights are not justified on the basis that they have been restricted due to special situations. Besides, these rights may belong to non-derogable categories which cannot be restricted even under special legal order. It also follows that the crisis situation in itself – without proper constitutional foundation – cannot justify restriction of fundamental rights as being outside the scope of special legal order and including non-derogable rights, the generally recognised tests of necessity and proportionality stipulated in Article I of the Fundamental Law have to be applied.

b) Derogations

New criminal procedural rules seem to be restricting and violating due process rights. It is questionable if, for instance, the right to human dignity and right to defence are properly ensured in the crisis situation caused by mass migration when there is no translation provided and the defendant is just an object of the state's actions; s/he has neither means nor knowledge to get properly involved in the proceedings. As for the rights of minors the exclusion of some rules applicable to other minors who are not affected by the crisis situation, certainly affects the rights of the child, stipulated in the Fundamental Law in harmony with the New York Convention on the protection of the child as well as the right to dignity. Moreover, such exclusion is discriminatory as we cannot find any objective reason for non-equal treatment. As has already been said, even if the crisis situation caused by mass migration is considered as a special legal order (which is not the case), the potential for the violation of human dignity of the child can legitimately be raised.

As for the transfer of judges, there are no criteria of selection, so the case is very similar to the one of transfer of cases after the adoption of the Fundamental Law and the new laws on courts. Rules on the transfer of cases, based on rulings of the ECHR and the Hungarian Constitutional Court, were criticised by the Venice Commission. The Venice Commission claimed that there were no guarantees or criteria on the methodology of how cases, and in this situation judges, are selected. Based on these missing criteria, the realization of the right to impartial trial can be questioned.[45]

[45] As I have explained elsewhere: Transitory Provisions to the Fundamental Law (31 December 2011) and after its partial annulment the Fundamental Law itself, stipulated that in order to guarantee the

Moreover, the European Commission has found the Hungarian legislation to be incompatible with EU law in some instances, for example in connection with appeals and judicial review, specifically, the recast Asylum Procedures Directive (Directive 2013/32/EU) and the Directive on the right to interpretation and translation in criminal proceedings (Directive 2010/64/EU). This is why the Commission has opened an infringement procedure.[46]

c) Employment of army

Last but not least: how can we assess the deployment of the military within the territory of the state when it is expressis verbis excluded by the Fundamental Law and upheld only in the state of emergency situation. Pursuant to the Act, military forces may be deployed with the use of weapons when it assists the police in protecting and keeping order at boarders. It is however the task of the police to protect the state borders;[47] a joint reading of Art 45(1)[48] and 50(1)[49] Fundamental Law does not support at all the power given by the Act to the military. I doubt that there are enough guarantees or it is constitutionally legitimate if the Act renders the military staff operating in Hungary under the scope of the Act on Police without supporting rules in the constitution.

right to justice in a reasonable time and until the balance workload of the judicial system is not settled, it is possible for the President of the National Judicial Office to assign a court outside the general territorial jurisdiction determined by law to proceed in any case. The statutory rules related to this power was examined by the Venice Commission and found problematic. Suggestions were made (establishment of general criteria, regulatory level of criteria, use of expertise, no discretionary power) and neglected: no general criteria or use of expertise is established. Finally, the Fifth Amendment to the Fundamental Law of 2013 withdrew this provision. See Opinion 663/2012 on Act CLXII of 2011 on the legal status and remuneration of judges and Act CLXI of 2011 on the organization and administration of courts of Hungary adopted by the Venice Commission at its 90th Plenary Session (Venice, 16-17 March 2012), available at http://www.venice.coe.int/docs/2012/CDL-AD (2012)001-e.pdf, *Tímea Drinóczi*, Influence of human rights standards? Hungarian style on dialogic interaction, in: Jerzy Jaskiernia, (ed.), Wpływ standardów międzynarodowych na rozwóy demokracjy i ochronę praw człowieka. Tom 3 (Wydawnictwo Sejmowe , Warsawa 2013), pp. 430–440, Drinóczi, loc. cit. n. 5, Vörös, , loc. cit. n. 5.

46 http://europa.eu/rapid/press-release_IP-15-6228_en.htm.

47 Art. 46(1) FL.

48 Hungary's armed forces shall be the Hungarian Defence Forces. Core duties of the Hungarian Defence Forces shall be the military defence of the independence, territorial integrity and borders of Hungary, the performance of collective defence and peacekeeping tasks arising from international treaties, as well as the carrying out of humanitarian activities in accordance with the rules of international law.

49 Should the use of the police and the national security services prove insufficient, the Hungarian Defence Forces may be used during a state of emergency.

IV. Solution?

1. Constitutional amendment or changing laws – mass migration

The Hungarian political decision-maker has two options. It can either adopt a constitutional amendment to adjust the Fundamental Law to the existing legal framework, or it can modify existing laws to restore constitutionality. In the latter, each disputable provision should be scrutinised and decisions should be made concerning their potential constitutionality. As for the constitutional amendment option, due to by-election as a consequence of which it lost its 2/3 parliamentary majority,[50] it is no longer possible for the governing *Fidesz* party to pass its own and exclusive constitutional ideas, but it rather must engage in negotiations with the opposition. It is currently unclear why *Fidesz* did not press for a constitutional amendment regarding the crisis situation caused by mass migration, so it cannot be said with certainty that they deliberately disregarded constitutional consideration, i. e. they deliberately adopted unconstitutional legal measures. However, given the constitutional policy that has been implemented since 2010,[51] suspicion is real that this is another step towards building an illiberal democracy. Nevertheless, even if ignorance is behind this regulatory scheme, the estimate of state of affairs is not better at all as it indicates negligence towards constitutionalism, the rule of law, and human rights. If we consider the fact that a new constitutional amendment is under discussion in the first half of 2016 on the introduction of a new special legal order in order to better fight terrorism, and that the crisis situation caused by mass migration was extended countrywide in March 2016 without informing the public of factors justifying it, ignorance is more probable.

Besides ignorance, secretiveness is another Hungarian phenomenon which needs to be addressed. When the crisis situation was extended to the entire country, the Helsinki Committee (Budapest) asked the Police and Immigration Office to make public data and figures which justify the extension of the crisis situation, as the available data showed that migration significantly slowed down and reduced in numbers and the Helsinki Committee justifiably took the position that statutory preconditions for introducing the crisis situation have not been met. Such data and figures are presumed as public data pursuant to the Act on freedom of information,[52] yet are classified by the authorities, who made the Helsinki Committee submit a petition to the National Data Protection and Freedom of Information Agency.[53] Besides this NGO scrutiny, the ombudsman makes its inquiries as well.

2. Constitutional amendment – terror threats

The Hungarian political decision-maker did not make the draft of the Sixth amendment of the Fundamental Law related to terror emergency accessible in January 2016. The text, which was highly debated at a political level and in the media, and which did not get the necessary political support during the preparatory negotiations, was made available by an MP from the opposition. The main reason of the rejection of the text was that it used very vague language for when the new legal order can be introduced, lacked

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50 In Hungary, constitutional amendments are adopted by 2/3 majority of MPs.

51 See fn. 44 above.

52 Act CXII of 2011 on Informational self-determination and Freedom of Information.

53 http://helsinkifiyelo.blog.hu/2016/04/05/tiz_evre_titkositottak_mitol_is_van_most_valsaghelyset?utm_source=mandiner&utm_medium=link&utm_campaign=mandiner_migracio_201604.

essential checks and balances, and rendered the employment of HDF within the territory of Hungary. Another version of the sixth amendment, which again could not be found on any governmental website, was submitted to Parliament at the end of April.[54] The Parliament adopted it without any modification. This text, as the Sixth Amendment to the Fundamental Law (14 June 2016), seems to be in line with the internal logic of the regulation of special legal order but upholds the following criticised provisions: 1) It does not determine the duration of the new emergency situation, called 'terror emergency' [terrorveszély]. Duration is not specified in other cases of special legal order, but accuracy of definition of emergency situations allows much less uncontrollable discretion. 2) It vaguely defines when the 'danger of terror attack' order is to be introduced: on the proposal of the Government in the case of 'terror attack' or 'direct and significant threat of terror attack'. Contrary to the definition of other situations, it contains not only the occurrence of the actual danger but its probability (threat). Among special legal orders the 'threat' is acknowledged as sufficient condition in the gravest threats: when we are talking about 'danger of external armed attack' or 'danger of war'. 3) Government can issue decrees which suspend the application of statutes even contravening them. Only the president of the republic and the competent parliamentary committee are informed of decrees issued between the proposal of the Government to introduce the 'danger of terror attack' is made and its introduction. The Government is obliged to give information, nothing else. Rules similar to this one are applied in a state of preventive defence, the difference between this and the new 'danger of terror attack' however lies in the formulation of the situation explained above. 4) The Army can be employed within the territory of Hungary, provided that the police and national security agencies cannot resolve the situation, from the date the proposal to introduce the 'danger of terror attack' is made. A similar provision can be found in connection with the state of emergency, but there are huge differences between these two situations. First is the reasoning behind the introduction of the two situations. The second is the fact that the army is employed during a state of emergency when it is decided by the Parliament, whereas the army can be employed from the date of proposal and the decision taken by the Parliament whether or not to introduce it. As the decision requires a 2/3 majority in the Parliament, abuse of army power cannot be excluded, especially when we take the regulatory schemes overviewed into account.

During the parliamentary debate, it was not possible to estimate whether the amendment would get the necessary 2/3 majority. Politically speaking, it would not have been a good strategy to rebut the proposal as it encouraged accusations that the opposition was refusing to defend their fellow citizens and the country. As the amendment is in effect since July 2016, it is now a demonstrable fact that the government does not care about possible unconstitutionalities and strives for its (illiberal) goals without even considering the abovementioned and already articulated[55] constitutional concerns regarding crisis situations caused by mass migration and terror threats.

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[54] http://www.parlament.hu/irom40/10416/10416.pdf.

[55] See points III. and IV. above and the Hungarian Socialist Party's internal document on "Measures necessary to intensify the fights against terrorism (24 January 2016)" [A terrorizmus elleni fellépés fokozása érdekében szükséges intézkedésekről (2016. január 24.)].

3. Reflections and findings

Ignorance, if we can consider the political actions as such, cannot easily been resolved, what would be needed is public data, public discourse and no secrecy when the constitution of the country, fundamental rights, and everyday life and businesses are affected. The best route would be the reconsideration of the disputed rules on crisis situation caused by mass migration, or, less convenient and less probable would be a constitutional amendment in this respect. As for the constitutional amendment regarding terror emergency, the pure existence of political will to constitutionalism a new emergency situation is welcome and shows an awareness of the demands of constitutionalism. However, public consultation should have been needed or at least proper information should have been provided to the public concerning the text of the constitutional amendment under discussion. Reference to secrecy in this regard is unacceptable as it is the basic law of the nation under modification which, as a matter of course, contains only the most essential aspects of defence mechanisms, powers and procedures.

What is however highly suspicious is the unwavering insistence on employing the army within the territory of Hungary in both new crisis situations, instead of strengthening police forces and national security agencies, adoption of necessary financial and criminal law measures, and starting awareness raising at educational and other institutions or through media, et cetera.

V. Conclusion

In this paper I provided an overview of the new crisis situation caused by mass migration introduced in Hungary and the new special legal order named 'terror emergency' within the context of constitutional regulations of CEE states. Reviewing these exposed the fact that the models of *Dyzenhaus* show a quite simplified picture, especially in the CEE region. These constitutions entrench emergency situations in the following manner: definitions of situations are offered, competences are clearly attributed, and emergency measures are limited by time and the constitution itself, including non-derogable fundamental rights, and are subject to parliamentary oversight and constitutional review.

Constitutions can thus be more or less elaborate in regulating emergency situations. As can be seen, CEE constitutions may be exemplary even though the entrenchment they use may have its drawbacks as well. Constituents and constitution-changing powers need to be as cautious as possible and attentive to their own constitutional history and needs. Adequate guarantees are the cornerstone of maintaining (liberal) constitutional democracies. Attention needs to be given to the interdependency of security[56] and freedom as well as that of state and people.

In regulating emergencies, the constituent powers of CEE states considered the dichotomy of loosening constitutional burdens in emergencies and the need to avoid misusing powers. This technique may be of use for other states when trying to constitutionalise some new defence mechanism against new threats, such as terrorism. The wording of the new Hungarian special legal order connected to terror emergency may be an example for other states that wish to constitutionalise actions they intend to make in fighting terrorism. However, the method employed should not be followed. Neither should the approach of the Hungarian legislator related to the crisis situation caused by

[56] New considerations influenced by new but not necessarily national security threats may also call for introduction of changes in the constitutional notion of security. See, *Agnieszka Bień-Kacała*, Concept of security and its types, in: Bień-Kacała/Jirásek/Cibulka/Drinóczi, Security in V4 constitutions and political practices, fn. 11, p. 21.

mass migration be considered as a model. It is, without making any in-depth legal analysis, certainly clear that the legal situation developed in Hungary as a reaction to the phenomenon of mass migration raises serious constitutional concerns which need to be addressed sooner or later by the political decision-maker. It can either be a reconsideration of the current rules concerning crisis situations or a constitutional amendment adjusting the Fundamental Law to the actual legal environment. Nevertheless, the amending powers cannot go so far as to constitutionalise rules which are apparently unconstitutional as violating human rights. It must be evident in the first decade of the 21st century that (mainly internal political) ends shall not justify the means.