NEMZETI KÖZSZOLGÁLATI EGYETEM
VÉDELMI-BIZTONSÁGI SZABÁLYOZÁSI ÉS KORMÁNYZÁSTANI KUTATÓMŰHELY

VÉDELMI-BIZTONSÁGI SZABÁLYOZÁSI ÉS KORMÁNYZÁSTANI MŰHELYTANULMÁNYOK

2024/12.

SZABOLCS PÉTER TILL – KÁROLY RIMASZOMBATI:

First impressions of the Hungarian Defence and Security Regulation Reform Focusing on Special Legal Order in Practice - Possible Further Developments

Rólunk

A műhelytanulmány (working paper) műfaja lehetőséget biztosít arra, hogy a még vállaltan nem teljesen kész munkák szélesebb körben elérhetővé váljanak. Ezzel egyrészt gyorsabban juthatnak el a kutatási részeredmények a szakértői közönséghez, másrészt a közzététel a végleges tanulmány ismertségét is növelheti, végül a megjelenés egyfajta védettséget is jelent, és bizonyítékot, hogy a később publikálandó szövegben szereplő gondolatokat a working paper közzétételekor a szerző már megfogalmazta.

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Szabolcs Péter TILL–Károly RIMASZOMBATI

FIRST IMPRESSIONS OF THE HUNGARIAN DEFENCE AND SECURITY REGULATION REFORM FOCUSING ON SPECIAL LEGAL ORDER IN PRACTICE - POSSIBLE FURTHER DEVELOPMENTS[1]

Introduction

"Obviously, even the same tool might be reasoned in a different way when measuring the possible effects of different security challenges." [2]

About 10 months ago, we examined the experiences and perspectives of the Ninth and Tenth Amendments to the Fundamental Law of Hungary affecting the domestic regulation of special legal order. In connection with that study, the present inquiry compares the operational experiences of special legal order based on the Hungarian defence and security regulation reform with the forecast development possibilities and directions after nearly two years.

The previous study set up ten aspects over the course of the scrutiny, based on which it evaluated the experiences of the first year of the reform. With another ten months behind us, it makes sense to check this methodology: not all of the 10 aspects and problems originally specified have become real practical challenges, and in addition to the shift in the relative importance of the previously forecast interpretation domains, new interpretation dimensions have also appeared.

The purpose of this research paper is to update the results of the previous study through evaluating the second year of the defence and security reform. One of the referential points for this assessment is the EU Commission Staff Working Document on the 2024 Rule of Law Report, Country Chapter on the rule of law situation in Hungary.[3]

Seemingly, the regulation of the defence and security reform has come to a standstill, since the Act XCIII of 2021 on the Coordination of Defence and Security Activities (hereinafter: Vbö.) has not been amended since the summer of 2023.

Compared to this, the Thirteenth Amendment to the Fundamental Law of Hungary is already in the process of entering into force in the related areas of regulation, and the institution of the

[1] "TKP2021-NVA-16 has been implemented with the support provided by the Ministry of Culture and Innovation of Hungary from the National Research, Development and Innovation Fund, financed under the TKP2021-NVA funding scheme."

[2] Szabolcs Péter TILL–Károly RIMASZOMBATI: The 9th and the 10th Amendment to the Hungarian Fundamental Law / Special Legal Order versus Emergencies - a Hungarian Perspective; *Védelmi-Biztonsági Szabályozási és Kormányzástani Műhelytanulmányok* 2023/8.; 8.

[3] With the number of SWD(2024) 817 final, Brussels 24.7.2024. The scope and page numbering of English version (hereafter: 2024RoLHunRepEn) and of Hungarian translation (hereafter: 2024RoLHunRepHu) are partially different.

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Prime Minister's Chief National Security Advisor has been integrated into the decision-making system as a key actor.

In addition to regulatory developments, the Constitutional Court's public law dogmatics-forming activity has been intensified, as a result of decisions based on each other, an emphasis on the limitation of rights competing with the original regulatory goal was also developed.

All of this have confirmed the hypothesis according to which, in addition to the regulatory activity, the role of the public law judiciary can also become decisive in terms of the implementation of the defence and security reform, so the Constitutional Court can also have a meaningful impact on the development of the system, although the rule of law country report did not reach that conclusion.[4]

The fact that the Constitutional Court, instead of protecting only the framework based on fixing the range of constitutional interpretation, reached the point of annulling the first rule of an emergency government decree, changed the scope of the legislator qualitatively.

The interpretation of the Constitutional Court derived a distinct limitation standard of necessity and proportionality for emergency situations declared for different reasons: at the same time, it also established a competing constitutional interest in relation to lasting environmental consequences which may be limited.

There was also a shift in another element of reasoning: in addition to the possible restrictions of fundamental rights, the Constitutional Court also departed from the previous special legal order reasoning in relation to the expectation of sufficient preparation time, expanding the application of the peacetime expectation system.

The issue of the rule of law and legal security gained an explicit extension in the argumentation: the nature of the emergency regulation became only one of the considerations in terms of the previously confirmed possibility of immediate applicability and was no longer evaluated by the board as a determining circumstance.

In the issue of commercial supplies, a sanction based on a provision that has already been repealed was also banned in ongoing cases, in addition to the fact that parallel justifications and dissenting opinions were also published regarding the justification of the Constitutional Court's intervention.

The consequence of all this was in the practice of emergency regulation, goal-boundedness gained a stricter interpretation from operational point of view. However, all of this did not result in the Constitutional Court reviewing the necessity of the state of danger itself, as the Constitutional Court had referred the latter question to the Parliament's exclusive political discretion.

Compared to the initial assessments of the previous study: [5]

[4] 9/2024. (IV. 30.) CC decision is not mentioned in the country report despite its conclusions 2024RoLHunRepEn 31 and 2024RoLHunRepHu 35-36, although the conceptualization has already started with 3004/2024. (I. 12.) CC decision on the rejection of the judicial initiative.

[5] TILL–RIMASZOMBATI ibid 4-7.

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- the different nature of the state of danger declared due to two types of reasons, COVID crisis management and war spillover effects, was also evaluated in relation to the permissible means of intervention,
- the way in which the regulations are brought into force and the principle of observing the rules has again become an aspect that can be examined,
- possible extension of emergency regulations and the regulatory methodology of interventions were thematized both in terms of form and content,
- on the other hand, the methodology and direction of criticism by both the opposition and EU institutions of special legal order interventions has not developed, but
- in the first semester of 2024, two law faculties held a conference on the war specific as well as complex constitutional, administrative and international legal contexts of special legal order crisis management.[6]

Compared to the hypothesis of the study on the first year, in the practice of the second year, a slightly more complex regulatory scope can be observed and evaluated from the point of view of governmental potentials. At the same time, the detailed exploration of this room to manoeuvre necessitates an all-embracing revision of the previous examination aspects, while preserving the structure and method of the previous study. In doing so, the authors also reflect on some additional evaluative suggestions.

Point No. 1 Current trends:

> *"As from 1 November 2022 the regulation almost returned to the starting point with the **extended and renewed three categories** of state of war, state of emergency and state of danger. The first two alternatives may be declared by the supermajority of the Parliament, and the last one by the Government with the possibility to be extended by authorisation of a reduced supermajority (two thirds of parliamentarians participating in the ballot). Nonetheless, the length of the text of this chapter in the Fundamental Law became even longer than it earlier was."*[7]

The basic system of the special legal order and the related quasi-special legal order (quasi-SLO) did not change in the second year in effect of the defence and security reform: in the course of conceptual separation, we must consider the 3 cases under the Article 48 of the Fundamental Law of Hungary as special legal order alternatives, on the other hand, the quasi-SLO cases are the crisis management tools of the peace period.

[6] https://hadijog.hu/karoli-konferencia/ ; https://hadijog.hu/kulonleges-jogrendi-konferencia/
[7] TILL–RIMASZOMBATI ibid 8.

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The fundamental difference between the two categories is that the reference point of limitations is the extraordinary standard of special legal order deviation, or the standard restrictions of general fundamental rights during peacetimes. However, in the case of the limitability of fundamental principles, there are no two different constitutional standards, so they have a similar framework as absolute rights.

A parallel application of the examples of the two categories can be continuously experienced, blurring the distinction between special legal order and quasi-SLO is, however, a recurring element of critics based on a methodological error.[8]

Since the Tenth Amendment of the Fundamental Law of Hungary substantially modified the regulatory concept of the Ninth Amendment after the 2022 parliamentary elections, both in terms of the conceptual system of the state of danger and the date of entering into force, two periods in 2022 became significant turning points:

- while at the end of May, the state of danger for the purpose of managing the COVID crisis and *wartime state of danger*[9] was temporarily in effect in a parallel way,
- the deadline of November 1, 2022 as the date of the defence and security reform's entry into force, only applied in terms of the scope of the latter category.

The state of danger for the purpose of COVID crisis management can thus be separated from the implementation phase of the defence and security reform.

From the latter point of view, however, segmentation arguments appearing in the practice of the Constitutional Court can be highlighted as a crucial development of the year 2024, in addition to the unchanged emphases of the regulation.

While maintaining the assessment that the Tenth Amendment of the Fundamental Law of Hungary pushed the threshold of special legal order significantly lower, among the cases of quasi-SLO, the regulatory element according to which the regulation of health crisis situations according to the Health Act,[10] which is part of the concept of *action of coordinated protection* , was given a particularly different light by being also automatically enforced in a special legal environment.

The consequence of this regulation is that in the framework of a "*wartime state of danger*", health crisis management rules will automatically continue to operate (despite the lack of a real health crisis), while in the case of an emergency due to COVID the problem of justification originally could not have arisen.

[8] "They should be measured against different constitutional scale: quasi-SLOs are limited by normal peacetime rules in Paragraph (3) of Article I, the toolkit of special legal order situations has an extended "necessity and proportionality" test in Paragraph (2) of Article 52." TILL–RIMASZOMBATI ibid 10.

[9] Simplified concept to shape the meaning of the of state of danger extended according to the Tenth Amendment of the Fundamental Law applied to Hungarian consequences of the Russian-Ukrainian war. Summary of its scope according to the rule of law country report: "The Government extended until November 2024 the 'state of danger' declared by the Government on 25 May 2022 'in view of the armed conflict and humanitarian catastrophe in Ukraine and with a view to averting their impact on Hungary'". 2024RoLHunRepEn 31.

[10] Act CLIV of 1997 on Healthcare Art 228. Paragraphs (1) and (3).

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An automatic applicability rule resulted in a justification of necessity and proportionality moving away from the goal of intervention.

Point No. 2 New type security challenges:

> *"…the Fundamental Law may not be suspended in times of special legal order either, however, since acts might be modified according to normal procedure at emergency situations, too, even the Fundamental Law might be amended according to the regular procedure, although it is precluded from laws (as basic of them) according to Article T."*[11]

All subsequent amendments to the Fundamental Law of Hungary since the Ninth Amendment have been adopted in an emergency regulatory environment, specifically in state of danger. While the Tenth Amendment directly affected the system of special legal order in terms of the date of coming into force and the emergency threshold, the subsequent amendments affected the implementation framework of specific measures at the first view.

The Eleventh Amendment basically affected the framework and terminological classification of the county-based local government organization system, in addition to merging the dates of the elections of the Members of the European Parliament and local government elections, therefore its defence and security role can be classified as marginal.

The Twelfth Amendment moved the regulatory framework concerning soldiers from the level of acts to government decrees by also expressly excluding the possibility of a trade union operating in the Hungarian Armed Forces. This regulatory technique can be evaluated as an opposite direction to the special legal order element of defence and security reform, but it can be interpreted as having a parallel effect, as it ultimately resulted in the generalization of emergency regulatory elements and the regulatory level as a peacetime regulatory solution. This solution is an extended realization of the logic of out-of-force and regulatory transition laws,[12] ultimately by implementing a higher level of management of security challenges in the national defence sector at the expense of the level of legal restrictions. The completion of collective tasks prevails at the cost of suppressing individual interests.

The Thirteenth Amendment also affects the applicability of military tools: regarding military activities and troop movements, the regulation at constitutional level is significantly simplified by referring the focal elements of the subject area to the level of cardinal laws, however, the

[11] TILL–RIMASZOMBATI ibid 9.

[12] Some temporary emergency provisions are driven out of force, however, some of them are subsequently incorporated in a statute.

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obligation to keep certain elements within the competence of the Parliament and the Government's freedom to make all decisions in state of war remain unchanged.

At the same time, an indirect consequence of the amendment concerning the forty-seventh article of the Fundamental Law is that the only specific constitutional occurrence of the defence and security terminology will expire on November 1, 2024, on the second anniversary of the reform's entry into force.

In the second year of application of defence and security reform, the constitutional imprint of security challenges appeared in two respects in a substantial simplification of the rules ensuring the application of the national defence tool system.

All of this also means that, in addition to an economic segment that appeared in the justification of the Tenth Amendment to the Fundamental Law, the range of military interpretation also expanded further with new instruments appearing in the discretionary range of special legal order and quasi-SLO crisis management.

In contrast to the effect of the Tenth Amendment to the Fundamental Law of Hungary, the Twelfth and Thirteenth Amendments provide a possibility of raising the threshold of special legal order in the context of the war subtype of the state of danger by omitting the publishment in practical application.

In the trend of all this can also be evaluated as a return to the original regulatory concept according to the Ninth Amendment of the Fundamental Law, even with continuously prolonged *wartime state of danger* in force.

Point No. 3 Different systems of legal categories:

> *"There is **no unified or common international system of emergency-related constitutional categories**, only some similarities can be traced. The related human rights' agreements and their judicial review is much more about **limitation and examples of failed considerations** than about successful problem-solving, although, at least from a governmental perspective, the second would be the key question. The relevant human rights cases are **borderline questions connected to changing standards**, rather considering local political background much more than focusing on crisis-management."*[13]

[13] TILL–RIMASZOMBATI ibid 10.

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In the second year of the application of the defence and security reform, three topics emerged in the course of the constitutional debates in terms of the inviolacy of fundamental rights and related constitutional principles.

An issue that can be compared with systemic and international parallels offers the possibility and expediency of further unifying the special legal order system, creating only one category instead of three. In that regard, the primary element of public law debates was exposed in the comparison of a state of danger and a state of war.

In the course of this, one of the findings of the discussion with Professor Lóránt Csink was[14] that the conditions for the restrictions imposed by special legal order and the introduction of specific obligations are not uniform: while the distinct governmental power of promulgation separates a state of danger from a state of emergency and state of war, from the point of view of the latter period, the permissibility of instituting compulsory military service is a unique feature.

The organization of elections and the exercise of the right to vote can also be interpreted in an international comparison in the context of separating different categories of special legal order: in a state of danger, it is possible to have – and they were really held – parliamentary elections, local government elections and even elections of Members of the Parliament of the European Union in several countries, but these could not have been held in a state of war or state of emergency framework, since in those contexts extending mandates is the constitutional procedure to be followed in a manner comparable to the Ukrainian presidential example.

In the latter case, certainly, an extended period of legitimacy is debatable, but at the same time, in war or civil war conditions, the expectation of a fair election procedure would be excessive and unrealizable. Constitutional interests must be measured against each other, which necessarily leads to the expectation of an implementation with compromises.

In constitutional practice, however, the most significant shift of the second year was a reasoning given by the Constitutional Court, which, based on a comparison of the long-term effects of an environmental rule of exemption with the short-term goal of special legal order regulation, led to the exclusion of a special legal order restriction of environmental protection interests, destroying at the same time the reasoning based on proportionality and necessity where an emergency rule of exemption could not be supported by any purpose.[15]

Although the annulled partial rule may seem marginal in terms of the content of the regulation, from the point of view of the Constitutional Court's review of special legal order frameworks, the precedent is of such significance at system level that it should also have been mentioned in the 2024 rule of law country report of the European Union Commission.

[14] See the detailed assessment in Till Szabolcs Péter: Gondolatok az Alaptörvény kilencedik és tizedik módosítása, valamint a védelmi szabályozás reformja hatásairól; *Védelmi-biztonsági Szabályozási és Kormányzástani Műhelytanulmányok* 2023/11. 4-5. based on Csink's problem statement (Csink Lóránt: Mikor legyen a jogrend különleges? *Iustum Aequum Salutare* 2017/4. 16.).

[15] See: 9/2024. (IV. 30.) CC decision on the application of different rules necessary to secure firewood requirements during the state of danger, regarding on the determination of the unconstitutionality of Section 1 (2) point a) of 287/2022 (VIII. 4.) Government Decree, its retroactive annulment, and the exclusion of its application.

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Overall, it can be concluded that, based on the comparison of the Ninth and Tenth Amendments to the Fundamental Law of Hungary, in the year under review, a framework for constitutional adjudication was ultimately formed, which allows for a differentiated evaluation of the features of special legal order, taking into account the purpose of promulgation, while at the same time allowing to move away from the precedents of COVID-19 emergency prior to the defence and security reform.

The binding force of earlier precedents is relativistic, and the Constitutional Court has room to maneuver in terms of maintaining requirements independent of particular circumstances and including individual variables.

In this way, the comparability of internationally identifiable situations and intervention tools will be maintained without, at the same time, developing a standardization of a special legal category system or an international unification trend for the conditions and procedures of its promulgation.

> *„The 2023 Rule of Law Report noted that the Government continued to use its emergency powers extensively, which undermines legal certainty and affects the operation of businesses in the single market (…) In this way, the Government can override Acts of Parliament. Several emergency measures adopted in the reporting period might have an impact on the business environment, while others do not seem to be related to the 'state of danger'. Parliamentary oversight of individual emergency measures is weak. Stakeholders reported that the Constitutional Court cannot ensure the effective and timely review of emergency measures and that the extensive and prolonged use of the Government's emergency powers has undermined legal certainty."*[16]

The cited statements are based on summaries of summative evaluations, in ongoing cases, typically in the interpretation of an affected party. In our opinion, conclusions should be based on closed cases. Although the wording is partially prudent, the depth of parliamentary supervision is primarily a consequence of a pro-government constitutional majority, and the evaluation of the Constitutional Court part shows an ignoration of the development of special legal order dogmatics, and the limit of extension – contrary to the demand for a fixed term – is of purely political quality.

The lack of detection of the trend by the Constitutional Court is such a counter-factual methodological error that can only be explained by an excessive reliance on the proposals of opposing NGOs,[17] but given its fundamental importance, it also undermines the tenability of the 2023 country report's findings.[18]

[16] 2024RoLHunRepEn 30-31.

[17] "Joint contribution from Amnesty International Hungary and eight other CSOs for the 2024 Rule of Law Report, p. 74; contribution from Eötvös Károly Policy Institute for the 2024 Rule of Law Report, p. 38." 2024RoLHunRepEn 31. footnote 222.

[18] 2023 Rule of Law Report, Country Chapter on the rule of law situation in Hungary 31.

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Point No. 4 Modified roles of the relevant actors:

> *"A new system should draw a line between roles belonging to **the decision side or the corrections side**. It is obvious, that the new system is timelier and **more effective**, even more transparent than the overcomplicated earlier regulation. Whether co-decision makers and corrective powers **are effective and efficient** enough, seems to have been debated for a long time, illustrated well by precedents of the Constitutional Court. The intent of the 9th Amendment was to balance governmental efficiency with broader judicial review."*[19]

As we already pointed out in the quotation from our last year's article, the separation and strengthening of political and legal control had been a basic goal of Fundamental Law amendments concerning the defence and security reform, however, that was primarily aimed at defining the borderlines on the regulatory side.

On the contrary, the Constitutional Court has become an active participant, moving beyond the indirect intervention method based on the definition of constitutional interpretation range.

According to the critical assessment, the parliamentary control over the provisions of decrees issued in a state of danger is insufficient, since – unlike the period of COVID crisis management – there is no real and actual parliamentary information base and debate, despite an obligation of the government to provide information stipulated in the Fundamental Law.

All of this is obviously related to the fact that the governing parties have a constitutional majority in the Parliament, which at the same time precludes the use of the opposition's veto weapon in order to force consensus on content.

Although, according to typical criticisms, the constitutional control is not efficient enough either, it does not prevent the members of parliamentary opposition from submitting petitions to the Constitutional Court, disputing either the question of necessity and proportionality, or, more generally, of the regulatory authorization and purposefulness.

Since, according to a repeated evaluation by the European Commission, the government uses its regulatory authorization in an expanded interpretation, ultimately the situation automatically links an incorrect assessment to the issue of public law invalidity, obligation of ex post facto annulment because of lacking authorization. If any violation of goal-boundedness can be stated, *ex tunc* annulment can be initiated before the Constitutional Court.

[19] TILL–RIMASZOMBATI ibid 11.

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We have already pointed out that the Constitutional Court ruled out any intervention regarding the necessity of a state of danger evaluating an extension clearly as a matter of political discretion of the required parliamentary majority and the Government. The quantity and scope of special legal order decrees issued or in force in a given period is not a question that can be constitutionally overridden. On the other hand, the contextual justification of specific measures can be constitutionally questioned, which leads to a substantive review.

A demarcation between political control and legal overriding as well as the constitutional obligation of government support for the latter was a requirement of the Ninth Amendment of the Fundamental Law, the implementation of which is the subject of continuous criticism from the opposition.

Using the analogy of hardware versus software, however, this criticism of the institutionalized regulatory system can be confined to the practice of implementation, which is ultimately proven by the continuity of Constitutional Court submissions and their additional arguments referring back to precedents.

Point No. 5 Aims of special legal order as a legal toolbox:

> *"We strongly believe that the system of SLO is not a panacea, it is much more **an optional toolbox to solve the actual security challenges** and repair their effects in a bit extended way. On the other hand, although it is **supposed to de-escalate** the situation, it might boost the challenges **towards different types of challenges, or broader magnitude**. Two mistakes might appear at the phase of decision:*
> *• the first is not to introduce special legal order when it is needed, and*
> *• the second is to overreact the situation.*
> *Typical political questions, without shortcut answers."*[20]

Since the two-step entry into force of the defence and security subject area was implemented in the course of the Ninth and Tenth Amendments of the Fundamental Law, Hungary has practically been operating continuously under the scope of emergency regulations. Presumably, however, the Constitutional Court's assessment of the situation is realistic in that there are significantly fewer examples of restrictions on fundamental rights than there were during the period of COVID crisis management. The intensity of intervention is significantly higher from the point of view of the day-to-day administrative operation of the country, and especially from the point of view of financial constitutionality.

[20] TILL–RIMASZOMBATI ibid 12-13.

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Although the Constitutional Court also ruled out the scope of its legal interpretation to limit a possible extension of a state of danger, the mere political majority conditions and the financial consequences of the EU's rule of law expectations cannot in themselves force a termination of *wartime state of danger*, since from among the triggers since February 2022 several elements can be listed as aggravated than as a reason settled.

In that context, the dilemma of temporality, the accusation of an emergency state form, and a situation of permanent exceptionalism are becoming more and more stressful in addition to a tightening trend of goal-boundedness. A constant element of criticisms is that a widely used emergency tool system has become self-serving, although while creating evidence they do not go beyond the level of statements and circular references. In contrast to a one-time annulment decision element of the Constitutional Court, EU court intervention took place in a quasi-SLO case, in the context of the management of the migration crisis.

In point [39] of 3004/2024. (I. 12.) CC decision on the rejection of the judicial initiative, the Constitutional Court assessed as the essence of special legal order that

> *"... due to the purpose of the special legal order, the legislative scope of the Government is greater than in a normal legal order, for the reason that the measures necessary to avert the threat to society and the state, and to mitigate its consequences, as much as possible can be carried out with greater efficiency."*

"Overriding" laws is therefore a condition serving as a conceptual element, and not evidence of alleged government abuse. It is therefore a tool and not an end in itself.

Point No. 6 Connection of special legal order situations and quasi-SLOs:

> *"From national constitutional legal perspective, the key difference between special legal order and a quasi-SLO regime is that restrictions are measured against Article 52 Paragraph (2) of the Fundamental Law or against the peacetime requirement of Article I. Paragraph (3). These levels are different at least from the perspective of the possibility to suspend some of the rights (compared to restrict only) and to restrict them even beyond peacetime limits. We should also add to that comparison that some obligations, connected typically to military service are dedicated to specified SLO-related time limits and aims only."*[21]

[21] TILL–RIMASZOMBATI ibid 14.

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A long-lasting simultaneity of the migration crisis and *wartime state of danger* highlights the core of the goal-boundedness problem: not all quasi-SLO interventions can be attached to the special legal order crisis management toolkit of necessity and proportionality.

While a possible declaration of a national defence crisis according to Section 107 of Act CXL of 2021 on National Defence and the Hungarian Armed Forces can be substituted by temporary and permanent government decrees of a *wartime state of danger*, and health crisis management rules are valid from the beginning due to legal automatism, the general procedure of *action of coordinated protection* was not applied, in contrast to a continuous extension of the migration crisis.

Assuming that *wartime state of danger* will have to be brought out of force at some point, the legally regulated instrument system of the quasi-SLO toolbox will at that moment be confronted with the closed nature of the legal lists, in contrast to the flexibility of the means of intervention in the special legal order framework.

If the hypothesis above is true, the consequence of that may be a need to supplement the quasi-SLO toolkit within out-of-force and transitional legislation, or to partially expand it into a general peacetime rule, indirectly relieving the need for special legal order diversion.

Within the framework of the national defence constitutional reform, the Twelfth and Thirteenth Amendments to the Fundamental Law can also be identified as the first sectoral examples of the above likely trend.

Point No. 7 Limitations of special legal order, altered checks and balances:

> *"An **SLO in force and lacking derogation** of rights at the same time means two different points of reference. Restrictions introduced in a state of danger but without derogation that was caused by COVID-19 or by effects of a neighbouring war **are measured against SLO standards of the Hungarian Fundamental Law but against peacetime standards of the European Convention on Human Rights**. Two **different standards** might cause opposing considerations about necessity and proportionality."*[22]

The seventh thesis of the previous study did not have a relevant consequence or example in the practice of the second year, although with an overlap between the two review processes, it is

[22] TILL–RIMASZOMBATI ibid 15.

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conceivable that the international legal or European legal procedures have not yet reached the decision-making phase.[23]

At the same time, the fact that the arguments in the 2024 rule of law country report do not go beyond the repetition of the 2023 arguments in relation to special legal order experiences cautions: the depth and breadth of the intervention has been criticized, but the book of examples is at the same time linked to the lists of complaining NGOs, not to court decisions, so the assessment is not convincing.

From one point of view, however, examples of the possibility of diverting the reference point have repeatedly arisen: here, however, the permanence of the reference system reminds us of the argument of fundamental rights that cannot be limited. The special legal order enforcement of peacetime standards and systems of arguments can also be suggested in relation to the enforcement of constitutional principles: the special legal order framework only diverts the fundamental right's consideration, there is no normative basis for an additional limitation of constitutional principles. While all of this was an additional argument from the point of view of limiting the right to protect the environment, it became a recurring reference to the constitutionality of the sufficient preparation time, which is part of the theory of rule of law and legal security.

While in the case of 3078/2024. (III. 1.) CC decision[24] on the rejection of the judicial initiative about three months and five board meetings were enough to reject the petition, in the case of the 3323/2024. (VII. 29.) CC decision[25] on the establishment of the unconstitutionality of the legal provision, raising more complex problems, required four board meetings, but almost two years. In the first case, only parallel justifications appeared, in the second, dissenting opinions were also published, so the reasoning of the Constitutional Court was partly divided.

Although both decisions ultimately confirmed the possibility of immediate implementation in exceptional cases, in the context of special legal order regulations - in contrast to the rejection argument developed during the COVID period - it evaluated the objective possibility of legal compliance and the issue of being sanctionable as issues comparable to state intervention for the sake of public supply security. It can thus be compared with the efficiency interest that

> *"…there should be enough time: 1) to get to know the text of the legislation; 2) to prepare for the application of the legislation, which does not include preparation for the economic consequences; 3) to decide how to adapt to the provisions of the law."* [26]

Another relevant element is that the subsequent decision deemed the sanction of banning commercial activity to be incompatible with the regulation's inherently attainable product expansion goal, and therefore ruled out court application in all cases. At the same time, the

[23] One of the footnotes of the EU country report refers to ongoing cases: "The Commission has brought infringement procedures against certain emergency measures considered incompatible with EU law (e.g. INFR(2021)2158, INFR(2022)4009, INFR(2022)4108)." 2024RoLHunRepEn 31. footnote 219.
[24] 3078/2024. (III. 1.) CC decision on the rejection of a judicial initiative
[25] 3323/2024. (VII. 29.) CC decision on establishing the unconstitutionality of a legal provision
[26] 3078/2024. (III. 1.) CC decision [38] and 3323/2024. (VII. 29.) CC decision [122]

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amnesty provision entered into the system for the first two weeks after the introduction and the fine repayment obligation imposed were evaluated as positive circumstances, although they were regulated afterwards.

In the end, the Constitutional Court therefore separated itself from COVID precedents in a second reasoning system, evaluating the need for direct intervention as a less compelling aspect in the case of *wartime state of danger*. Therefore, an intervention point of substantive review with a reference to the rule of law, but with a procedural legal aspect, was also formed, in addition to the aspect of substantive comparison of environmental protection interests.

Another peculiarity is that in the case of the 3323/2024. (VII. 29.) CC decision only a few days' delay in submission saved the Constitutional Court from having to review the constitutionality of the defence and security reform as a whole and the limitation system of Vbö. including the 180-day extension rule.

Point No. 8 Necessary and proportional restriction of individual rights:

> *"To sum up this point, instead of strict predictions, broader definitions and theoretical considerations have been incorporated, because – according to the Venice Commission on a French case from 2016 – "…it is hard to predict and describe an emergency situation exactly; a degree of vagueness in the definition would thus appear unavoidable.""*[27]

It has still been a typical remark on the approach about vagueness of concepts,[28] although because of the applied state of danger the security situation at least has not worsened according to the experience of the second year of the defence and security reform.

Although, according to the quote above, the Venice Commission proved to be understanding when partially easing the strictness of the wording in the course of establishing the tool system intended to deal with newly emerging security challenges, the criticism of the domestic government consistently omits the evaluation of security challenges as relevant elements. Conceptually, the point of reference is the limitability level during a period of general peace, the unnecessary and disproportionate characteristic of government intervention, and the self-serving feature of the special legal order framework in itself is assumed.

The value added by the practice of the Constitutional Court in the past year in the discussion of limitation versus suspension of fundamental rights is much more significant, the starting point of which is the principle of prescribing the slightest appropriate limitation.

[27] TILL–RIMASZOMBATI ibid 18. Report 7. quoted from Opinion On the Draft Constitutional Law On "Protection Of The Nation" Of France CDL-AD(2016)006

[28] Gábor MÉSZÁROS, Rule Without Law in Hungary: The Decade of Abusive Permanent State of Exception; Max Weber Programme MWP 2022/01 10.

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3004/2024. (I. 12.) CC decision on the rejection of the judicial initiative, starting from point [56] through the comparison of points [52] and [57] separated the methodology of the review of the constitutionality of restrictions in *wartime state of danger* from the period of COVID-19 emergency before the defence and security reform regarding the following points of view:

- common elements are the scrutiny of interference with any fundamental right, consideration of the legitimacy of the goal of intervention and the appropriateness of the limitation of a fundamental right to achieve a legitimate goal;
- at the same time, a title-specific unique moment is the new type of proportionality comparison between the disadvantages caused by any restriction and the positive consequences of achieving the goal, which replaces the focus on a temporality review.

Overall, from a methodological point of view, the system of criteria of the Constitutional Court is much more convincing than the reasoning of the EU commission's working document.

Point No. 9 Differentiation between theoretical toolbox and practical application:

> *"Activation only entails that certain emergency measures can in general be taken if the concrete situation so necessarily requires, and application, in turn, means that the measure is taken. The distinction is important because the principles of necessity and proportionality are specified differently in these two stages."*[29]

A demarcation between the possibility of introducing restrictions according to the framework and the specifically enacted and applied special legal order rules can be considered a distinction built into public law practice, which is also proven by the interpretability of the hardware / software analogy referred to. It is another matter that the occurrence of software errors at system level will ultimately affect the usability of hardware as well.

If, however, the destruction of just one element of special legal order measures actually challenged goes beyond keeping government practice in line by imposing the requirements of constitutional interpretation range, ultimately the emergence of constitutional reasoning in the regulatory segment can be considered proven.

In that regard, the most important element is the evaluation of the goal-boundedness according to 9/2024. (IV. 30.) CC decision: in the event that it is overturned, an irreparable formal defect of the governmental decree can also be evaluated as an automatic consequence.

In addition, the Constitutional Court also evaluated such comprehensive frameworks as the method of bringing the defence and security reform into effect, the adequacy of restriction

[29] CDL-AD(2020)014-e Report - Respect for democracy, human rights and the rule of law during states of emergency: reflections - taken note of by the Venice Commission on 19 June 2020 by a written procedure replacing the 123rd plenary session 8. Para 34.

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frameworks in Vbö., regarding the fundamental rights, the validity of the period of entering into force in special legal order circumstances, in all cases - apart from the prioritized environmental protection exception - the regulations are deemed to be justified.

As an inverse conclusion, however, it is likely that an exceptionality of the annulment refers to the incorporation of constitutionality considerations into the preparation of governmental regulations.

In the practice of emergency legislation, the expectation of being bounded to a goal resulted in a stricter interpretation than would necessarily have followed from the framework of the regulation.

Point No. 10 Systematic evaluation of the new regulation:

> *"We believe that our points successfully showed many considerations regarding the desired end state of this complex reform. Its elements might be challenged, but the overall status shows a more effective system, which is supposed to be able to manage different, even brandnew security challenges, as well. So, the criticism is much more about "How" and less about "What"."*[30]

On the one hand, there is the freedom of interpretation provided by constitutional and statutory rules, an alleged uncertainty of concepts, the possibility of a range of discretion regarding their boundaries, which is complemented by the exclusion of constitutional review regarding the introduction and necessity of special legal order.

If, from the latter point of view, only political review is possible, ultimately the international level of politics takes over the role of parliamentary review, when the latter does not work in practice.

The fact that the arguments of the opposition representatives' submissions to the Constitutional Court can be paralleled with the elements of NGO proposals in the EU country reports provides an opportunity for several conclusions:

- coordination is not only a crucial moment of the government's crisis management activity, but also of the reactions;
- conceptually, the success of a constitutional court's submission is not excluded;
- if, on the other hand, the same argument can be addressed to different evaluation forums, it can also be described as a phenomenon of forum-shopping, so
- after all, the attitude of decision-makers performing a controlling function regarding the permissibility of regulations and their policy-level attitude in relation to goals plays a decisive role.

[30] TILL–RIMASZOMBATI ibid 20.

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If these conclusions are correct, in addition to recording that criticisms related to the extension of a state of danger seem to be intensifying, the frequency and depth of interventions, at the same time, have not increased, but the example of repealing has been established, ultimately we must again point at the system-stabilizing effect of the defence and security reform at the macro level.

However, as a consequence of forum-shopping, the seventh aspect can only be placed in parentheses, as a latent or interim conclusion, which is at the same time a "time bomb" of evaluation processes: for constitutional, but legally impermissible situations, preparation from a communication point of view is necessary to defend governmental positions, at least in the management of lawfare actions.

However, the criticism of protracted special legal order crisis management as a part of the topic of rule of law seems to have only a momentary illustrative role.

Point No. 11 New relevant dimensions of the evaluation

> *"With the elaboration of the Vbö., the legislator complements the existing sectoral functioning with a framework of effective cooperation, replacing the sectoral delimitation and the overall coordination of the government, making the strengthening of the preparedness and security awareness of society, as well as more efficient management of the normal legal crisis and the special legal order regulation a priority area.*
>
> *The Ninth Amendment to the Fundamental Law and the Vbö. lay the foundations for a reform of defence and security, on which the coordinated development of the various sectors can be built in the coming years, given the foreseeable changes in technology and the security environment."*[31]

Even with the acceptance of the ultimately optimistic assessment of the defence and security reform recorded by authors Kádár and Petruska, a separate examination of the two developments of the year 2024 is reasonable, as these are newly created aspects during the practical implementation of the reform, which, however, also carry systemic consequences.

Although in addition to the specific amendments to the related laws and implementing legislation, the solution can ultimately be justified within the scope of the Government's freedom

[31] Pál KÁDÁR - Ferenc PETRUSKA: Overview of the Reform of Defence-Security Regulation in Hungary; Védelmi-Biztonsági Szabályozási és Kormányzástani Műhelytanulmányok 2024/5 9.

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of organization, a tension can be detected between the invariance of the Vbö. and the institutionalization of the new position of the prime minister's national security adviser as a defining centre of the defence and security system. At the same time, the multi-phase, partly emergency decree implementation of the regulatory process is a possible new example of uncertainty in the reform, as well as of an extended evaluation of goal-boundedness.

Uncertainty can also be demonstrated in the case of the first intervention by the Constitutional Court, which can otherwise be classified as positive at system level: the board evaluated the prohibition of the deterioration of environmental conditions as a general principle (supplemented by the difference in the temporal quality of processes) from which it does not allow exemption even in special legal order.

With that reasoning, a higher level of protection was obtained as compared with the interests of preserving the environment or the limitation of individual rights, or the environmental protection goal as a whole gained preference over all options of special legal order crisis management.

From the point of view of the two possible interpretations it is also important that there is no constitutional rule exempting the interest of environmental protection from restrictions of special legal order, just as there is no normative constitutional basis for the inviolability of criminal law by special legal order regulations.

If implemented, these two proposals would be examples for constitutional judicial activism with the purpose of overruling the government in relation to special legal order practice.

The latter would belong to the reasoning domain of sense of justice rather than legality, despite the provisions of related laws that may seem clear but actually conflicting with the dogmatics of special legal order.

Conclusion

"There were some criticisms in connection with the legislation in special legal order because, in certain cases, there would have been sufficient enough for the normal legislation as well. In these cases, they argued that the problem to be solved was not directly related to the war in Ukraine or was not so urgent and could have been resolved in the normal legal order. Evaluating these is always the responsibility of the incumbent legislature. However, the annulment of overreaching government regulations is a matter for the Constitutional Court. This is not only a theoretical possibility but has also been done in practice in 2024."[32]

[32] KÁDÁR - PETRUSKA: ibid 15.

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Comparing the legislative and constitutional adjudication developments of the first half of 2024 with the elements of the EU feedback, we must point out that the 2024 country evaluation suffered a phase delay in the light of what happened in Hungary.

Although the government did not openly respond to the elements that go beyond the bindingness to the Fundamental Law, which can be demonstrated in the Constitutional Court's overriding argument, a competing assessment methodology of the permissibility of fundamental law restrictions was ultimately created.

What is a positive practical example of the control of the legal system on the one hand, is a factor of uncertainty on the other hand, which ultimately works against normativity and predictability.

The defining issue of the second half of 2024 may thus be the development of proportionality between the permissibility of further extending a state of danger and the necessity of Constitutional Court interventions. At the same time, when returning to normal law and order conditions, some tightening of peacetime rules cannot be ruled out, either, depending on current security conditions.

In that regard criticism of the practice of special legal order based on a simplistic labeling will certainly not help.

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