



Master of Arts Thesis

Euroculture

August 2022

University of Strasbourg (First semester)

Palacky University of Olomouc (Second semester)

**Is European democracy thriving, doubted or feeble in
the Covid-19 pandemic era? – A comparative study on
emergency laws of France and Hungary**

Submitted by:

Beijen HSU

Contact details (telephone/email):

rubyzsgh113@gmail.com

+33 7 68 55 27 09

Supervised by:

Prof. Dr. Alexandre KOSTKA

Prof. Dr. Gökhan Bacik

Strasbourg, 1 August 2022

(Signature)

A handwritten signature in black ink that reads "Beijen Hsu". The signature is written in a cursive style with a large, sweeping initial 'B'.



MA Programme Euroculture

Declaration

I, Beijen HSU hereby declare that this thesis, entitled “Is European democracy thriving, doubted or feeble in the Covid-19 pandemic era? A comparative study on emergency laws of France and Hungary”, submitted as partial requirement for the MA Programme Euroculture, is my own original work and expressed in my own words. Any use made within this text of works of other authors in any form (e.g., ideas, figures, texts, tables, etc.) are properly acknowledged in the text as well as in the bibliography.

I hereby also acknowledge that I was informed about the regulations pertaining to the assessment of the MA thesis Euroculture and about the general completion rules for the Master of Arts Programme Euroculture.

In case the research process involved participants (especially participants from vulnerable communities and populations), please ensure that the following boxes can be ticked before submitting the thesis, or tick the third box, if not applicable to your project:

I declare that I have obtained the required permission from the relevant ethics committees of the two universities supervising my thesis concerning my research proposal in order to proceed with proposed research involving participants;

I declare that I have obtained informed consent from these participants and that the consent forms are stored lawfully and in accordance with the rules of the two universities supervising my thesis.

The two items above do not apply to this project.

Signed *Beijen HSU*

Date *1. 8. 2022*

I declare that the written (printed and bound) and the electronic copy of the submitted MA thesis are identical.

Abstract

The Covid-19 health crisis was changing European democracy since it hit upon the European continent in 2020. Countries introduced emergency regimes to implement swift and stringent pandemic measures, which at the same time restricted human rights and civil spaces. This thesis sought to discover how emergency powers affect democratic functioning in two specific countries – France and Hungary during the pandemic by looking into their emergency legislations, and a theoretical argument was made: states were using emergency powers to restrain democracy and fundamental rights in the Covid-19 public health crisis. France as a typical democratic country topped the list of European “flaw democracies” in 2021 as emergency measures have crippled democratic freedoms; Hungary also underwent a rollback of democracy due to long-standing emergency regimes and powers granted to the government to rule by decree. I drew from the framework of constitutional emergency powers and grounded my argument on democratic theory. I utilized legal comparison and critical content analysis to investigate how constitutional and statutory emergency regimes have affected public health policy-making and emergency measures. A conclusion was made: with checks and balances on the imposition of emergency states and the power between the executive and the legislative, emergency regimes could be seen as a necessary evil to deal with the health crisis, yet they should never overstep the temporality and proportionality.

Keywords: state of emergency, Covid-19 pandemic, democracy, France, Hungary

Table of Contents

Introduction	1
1. Literature review	6
1.1 What is a state of emergency?	6
1.2 States of emergency in practice in different political systems	10
1.3 Democracy is challenged in a Covid-19-related state of emergency	15
1.3.1 France: a “free” country with “flawed” democracy under a health emergency: France as an example	16
1.3.2 Hungary: authoritarian populism and the power grab through a health risk	19
1.4 Emergency powers cannot restrict all kinds of human rights	22
2. Theoretical framework	26
2.1 States are using the public health emergency to acquire unconstrained powers (WHAT)	26
2.2 Emergency regimes during the Covid-19 health crisis (WHEN)	30
2.3 Emergency laws are used to reduce democratic accountability and human rights (HOW)	32
3. France: emergency laws within the national legislative framework	37
3.1 French legal basis for emergency powers	38
3.2 Types of emergency powers under the constitutional framework	39
3.2.1 Exceptional powers to the president (“pouvoirs exceptionnelles”)	39
3.2.2 State of siege (“L'état de siège”)	41
3.2.3 State of emergency (“L'état d'urgence”)	42
3.3 Covid-19 pandemic within the national legislative framework	43
3.3.1 A “public health emergency” (l'état d'urgence sanitaire) and the Public Health Code	43
3.3.2 Extension of a state of health emergency by Law 2020-546	46
3.4 Normative response to the Covid-19 pandemic and containment measures	46
3.4.1 February 2020 - March 2020: “the nation is at war”	46
3.4.2 March 23, 2020 - July 10, 2020: “Law No. 2020-290” and the state of public health emergency	48
3.4.3 October 17, 2020 - February 16, 2021: second establishment of a state of public health emergency	49
3.5 Emergency powers and parliamentary control	

	51
4. Hungary: emergency laws within the national legislative framework	53
4.1 Hungarian legal basis for emergency states	53
4.2 Types of emergency	55
4.2.1 State of national crisis	55
4.2.2 State of emergency	56
4.2.3 State of danger	57
4.2.4 State of preventive defense	57
4.2.5 State of emergency response to terrorism (State of terrorist threat)	58
4.2.6 Unforeseen intrusion	59
4.3 Covid-19 pandemic within the national legislative framework	59
4.4 Normative response to the Covid-19 pandemic and containment measures	61
4.4.1 March 2020 - June 2020: “Act XII of 2020 on the Containment of Coronavirus”	61
4.4.2 June 2020 - November 2020: “Act LVIII of 2020 on the Transnational Provisions related to the Termination of the State of Danger and on the Epidemiological Preparedness”	62
4.4.3 November 2020 - February 2021: “Act CIX of 2020 on the Containment of the Second Wave of the Coronavirus Pandemic”	64
4.5 Emergency powers and parliamentary control	66
5. Comparison of the implication of emergency laws on democracy and human rights	68
5.1 Parliamentary functions under the emergency state	68
5.2 Legal certainty	70
5.3 Scope of proportionality	72
5.4 Temporality nature	74
Conclusion	76
Bibliography	79

List of Abbreviations / Acronyms

CEE(c)	Central and Eastern European (countries)
Convention	European Convention for the Protection of Human Rights and Fundamental Freedoms
Charter	Charter of the Fundamental Rights of the European Union
ECHR	European Convention on Human Rights
EIDHR	European Instrument for Democracy and Human Rights
EU	European Union
EU MS	European Union Member States
HERA	European Health Emergency preparedness and Response Authority
ICCPR	International Covenant on Civil and Political Rights
IDEA	International Institute for Democracy and Electoral Assistance
NATO	North Atlantic Treaty Organization
NGOs	Non-Governmental Organizations
PHEIC	Public Health Emergency of International Concern
TI	Transparency International
TEU	Treaty on European Union
UDHR	Universal Declaration of Human Rights
UN	United Nations
US	United States
WHO	World Health Organization

Introduction

2020 was a year when all countries found themselves striving to emerge from the Covid-19 maelstrom. Democracy and human rights faced challenges when most countries declared a state of emergency as their initial response to the pandemic.¹ International human rights treaties and watchdogs² have indicated that emergency power without limit may derogate democratic values and civilian freedoms. My research topic will focus on the emergency legal framework under the Covid-19 health crisis and its impact on European democracy and human rights.

Democratic values, human rights, and legal-based orders are within the European Union's rhetoric of shared visions and fundamental interests. However, repressive regimes³ have responded to the pandemic in ways that serve their political interests at the expense of basic freedoms and civil rights. By looking to the Global Democracy Index 2020⁴, the pandemic has caused a severe rollback of democratic freedoms. The ideological distraction of democratization and autocratization has created a diversion in the government's reaction to the pandemic as well. During the initial phase of the virus outbreak, democratic countries in the European Union tended to put loose preventive measures to tackle the spread of the virus. This is because people feared that soaring economic losses would happen if all businesses were shut down and people were under home quarantine. Furthermore, there are governments who decided to go about business as usual. Nevertheless, extensive concerns over public health and

¹ Washington Post, "Coronavirus kills its first democracy," 31 March 2020, <https://www.washingtonpost.com/world/2020/03/31/coronavirus-kills-its-first-democracy/>.

² Freedom House, "Democracy under Lockdown - The Impact of COVID-19 on Global Freedom," 2 October 2020, <https://freedomhouse.org/article/new-report-democracy-under-lockdown-impact-covid-19-global-freedom>.

³ Freedom House, "Democracy during Pandemic", <https://freedomhouse.org/issues/democracy-during-pandemic>. Repressive regimes are defined as countries ruling or controlling people by the use of force or violence, or by laws that put unreasonable limits on their freedom.

⁴ The Economist, "Global Democracy Index 2020," Global Democracy has a Very Bad Year, 2 February 2021, <https://www.economist.com/graphic-detail/2021/02/02/global-democracy-has-a-very-bad-year>.

enormous confirmed cases reported in the first wave and second wave⁵ of the pandemic forced governments to declare a state of emergency and put on stricter pandemic measures, such as restrictions on public gatherings and city lockdowns. This study will investigate two European countries – France and Hungary with a specific focus on their emergency laws and pandemic responses at the judicial level to see how the health crisis was dealt with in the two strikingly different political systems.

This thesis seeks to answer the question: “have emergency powers and government-level pandemic measures affected European democracy?” by investigating “how emergency laws and the declaration of emergency regimes can be harmful to democratic orders and fundamental rights?” A state of emergency is usually imposed as a part of the pandemic countermeasures and has been enforced by many countries as the emergency level accelerated. However, the emergency power can disturb the development of the democratic track in a country because it may turn out to be unconstrained and act outside judicial normality. For example, stricter border controls, city lockdowns, and quarantine measures restrain people's freedom of movement; striking on the spreading of fake/false news can at the same time weaken media and civilians' freedom of speech and expression. In addition, populist leaders have made attempts to expand the executive powers in emergency politics during the pandemic, which provides the opportunity to adopt an unlimited state of emergency. Therefore, this study hypothesizes that “the pandemic has contributed to the erosion of European democracy through emergency powers and pandemic measures.” I will test the hypothesis by observing emergency laws and government policy-making in France and Hungary. Although adopting an emergency state is seemingly democracy-harmful, major European democratic countries still resorted to a wide range of emergency measures as a way to respond to the public health crisis. Governments are authorized by the “extraordinary powers” to order citizens under night curfews and follow strict border rules. Are such emergency powers remaining as a necessary evil or they will drive to the direct end of authoritarianism? In the last part of my thesis, I will provide a conclusion and speculation for future democracy either thriving, diminishing, or changing in the European context.

⁵ The first wave of the Covid-19 pandemic in Europe refers to the public health crisis generated by the coronavirus which happened from mid-March 2020 to late-June 2020; the second wave was reported to have lasted from late-October 2020 to February 2021.

In the first part of this thesis, I would like to explore the definition of an emergency state and investigate if there is a possible correlation between democracy and the declaration of a state of emergency. Emergency by its word means an unforeseen combination of circumstances or the resulting state that calls for immediate action. The essential meaning of “emergency” is an unexpected and usually dangerous situation that calls for immediate actions. The term also includes an exceptional crisis, urgency, and abnormal situations.⁶ In order to adopt measures to confront the Covid-19 pandemic in efficient and rapid ways, the majority of the EU Member States have resorted to “emergency power” and declared a “public health emergency.” This helps states conduct rapid and swift procedures to tackle a sudden risk or crisis by modifying the normal balance of powers between the executive and the legislative powers. In addition, declaring a state of emergency should be based on checks and balances and the full enjoyment of fundamental rights and freedoms. By their very nature, such regimes pose an inherent risk to democracy, and European history demonstrates that a state of emergency can transform a democracy based on rule of law and fundamental rights into a totalitarian, oppressive and aggressive regime.⁷

Secondly, I will provide background on my research focus – France and Hungary in their pandemic measures and normative responses. I choose the two countries because I want to explore if pandemic responses at government and legislative levels are different from ordinary democratic countries to Hungarian controversial hybrid regimes. France, on the one hand, declared a public health state of emergency over the covid in March and October 2020 respectively to give more power to government officials to tackle the virus’ further spread when hospitalization reached nearly its peak. Hungary, on the other hand, has been extending the state of emergency and posing stricter quarantine measures on foreign travelers since its first declaration of an emergency regime. Hungarian Prime Minister Viktor Orbán has been controversially leaning toward anti-democratic reforms. Authoritarian populism has attacked the fundamental principles of democracy by fostering deep hate of “otherness” in a global pandemic and disguising itself under a seemingly democratic device with dangerously

⁶ Silverstein, G.. "emergency powers." Encyclopedia Britannica, February 27, 2020. <https://www.britannica.com/topic/emergency-powers>.

⁷ “The Impact of Covid-19 Measures on Democracy, the Rule of Law and Fundamental Rights in the EU.” European Parliament. [https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/651343/IPOL_BRI\(2020\)651343_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/651343/IPOL_BRI(2020)651343_EN.pdf).

anti-democratic impulses hidden inside.⁸ Populism is established on the idea that there is a corrupted elite (the EU and its organs, in Orbán’s narrative) which invokes popular dissatisfaction with the current state and that power should be restored to the “people.”⁹ The common characteristics of the world’s populism include “skepticism toward established authorities such as mainstream media, journalism and science, an aversion to others or outgroups, anti-global but pro-national interest, searching for order and obedience, and invoking a desire to turn back the clock, while yearning for a strong authoritarian savior to enforce nostalgic ‘better’ times.”¹⁰ The reimposing of emergency powers and amendments of documents relevant to the constitutional state of emergency provide an insight into how government decision-making evolved and how these measures were adjusted to accommodate the countries’ political form.

In the theoretical framework of my thesis, I will perform a legal comparison of emergency laws in two countries with different political systems, namely France and Hungary. This is to find out if there is any difference between their framing of pandemics and to what extent democracy and fundamental rights are limited in their emergency legislative frameworks. Firstly, I will inspect the legislative basis for declaring an emergency state and for conducting extraordinary measures purportedly to contain the virus by performing content analysis on the legal framework. Some government containment measures taken to address the coronavirus pandemic could be considered invasive, and the constitutional content of these measures differs from country to country. Although France and Hungary have detailed rules of emergency states provided in respective constitutional frameworks – all of them have various types concerning external or internal threats, they still react differently in whether to trigger a constitutional state of emergency during the Covid-19 pandemic. Therefore a discourse analysis will be conducted to analyze how constitutional and statutory emergency regimes have affected public health measures and why the emergency laws had implications on democracy and human rights.

⁸ Eunjung Lee and Marjorie Johnstone, “Resisting Politics of Authoritarian Populism during COVID-19, Reclaiming Democracy and Narrative Justice: Centering Critical Thinking in Social Work,” *International Social Work* 64, no. 5 (September 2021): 716–30. <https://doi.org/10.1177/00208728211011627>.

⁹ Frank Graves and Jeff Smith, “Northern Populism: Causes and Consequences of the New Ordered Outlook,” 30 June 2020, *The School of Public Policy Publications*, 2020, available at SSRN: <https://ssrn.com/abstract=3641823>.

¹⁰ Ibid.

Taking into account that emergency measures and legislations regarding the health crisis have been changing to adapt to the pandemic situation, the timeframe of data collected for this paper would be the first year (2020) when the virus reached European territory. Three reasons are given for the timeframe of this article: first is that emergency legislations were more or less taken at the initial phase of the pandemic, which indicated how governments framed the health crisis; second, the pressing and urgent legal issues generated afterward made emergency legislations critical; third is the constant evolution of pandemic-related laws are never exhausted as it will continue to be amended following the severity of impact. As most European countries have found their ways of dealing with the coronavirus after nearly two years since the outbreak, this paper focuses solely on the first year when countries declared a public health emergency and performed extraordinary legislation as their primary actions.

1. Literature review

1.1 What is a state of emergency?

A state of emergency is a circumstance when there are identified external or internal threats to the safety of the citizens of the nation. The main purpose of declaring an emergency regime is to secure governmental reaction in a certain crisis through expanding executive powers and restricting the powers of the parliament. These crises may arise from situations such as an armed force against the state, natural disasters, civil unrest, an epidemic, terrorist attacks, or financial and economic crises.¹¹ Generally speaking, a state of emergency shall conform to International Law, Customary International Law, and domestic legislation in aspects to respect the fundamental rights of the citizens and people under a country's jurisdiction.¹² However, the declaration of an emergency state may suspend normal functions of the state, including parliamentary and judicial review, as well as limit citizens' behaviors regarding the full enjoyment of liberties and human rights. This particular context of permitting states to limit certain fundamental rights is with the proviso that these emergency measures seek to "restore a 'normal' state of affairs with full respect of rights as soon as possible."¹³ A state of emergency is codified by international and regional covenants and treaties, which the state is obligated to follow. From the perspective of the Transnational Institute, three criteria¹⁴ shall be followed to comply with a legitimate state of emergency under the framework of the International Human Rights Law (IHRL): (1) the existence of a public emergency that threatens the life of the nation,¹⁵ (2) an official proclamation of the public emergency, and (3) any measures taken that derogate from a state's obligations under international law must be limited to the extent required by the public emergency, and must not be inconsistent with the state's other obligations or discriminate on the

¹¹ DCAF, "States of Emergency" Backgrounder on Security Sector Governance and Reform, Geneva: DCAF (Geneva Center for the Democratic Control of the Armed Forces), October 2005.

¹² Jane Kilpatrick, "When a Temporary State of Emergency becomes Permanent: France as a Case Study," November 2020, published by Transnational Institute - www.tni.org Amsterdam, November 2020, p.5, https://www.tni.org/files/publication-downloads/france_and_the_states_of_emergency_online.pdf.

¹³ Ibid.

¹⁴ Ibid.

¹⁵ Article 4(1) ICCPR writes "in time of public emergency which threatens the life of the nation," States may take measures to derogate from the Covenant, i.e. to temporarily suspend or adjust their obligations under the treaty, provided a number of conditions are met. This is also enshrined in article 15 European Convention on Human Rights (ECHR) and article 27 Inter-American Convention on Human Rights.

ground of race, color, sex, language, religion or social origin.¹⁶ The Background of States of Emergency by Geneva Center for the Democratic Control of Armed Forces (DCAF) states that there shall be two components of a state of emergency, which are compatible: a legal framework, which consists of the legislative and constitutional basis for the emergency state, and an operational framework, which provides the organizational structure and plans under the emergency. In this case, the legal framework not only includes the dimension of domestic legislation but also international law in the broader definition. Victor V Ramraj and Menaka Guruswamy in the “Routledge Handbook of Constitutional Law” provide a contemporary and post-colonial perspective on emergency power and say although the depth of the social penetration of formal constitutional law differs dramatically around the globe, “the common law approach to emergency powers was historically characterized by the absence of a formal constitutional distinction between ‘ordinary’ and ‘extraordinary’ modes of governance, and by the pre-eminent role of the ordinary courts in policing the limits of the state’s response to extraordinary circumstances.”¹⁷

Emergency powers, which are sometimes called exceptional powers or extraordinary powers¹⁸, are powers assigned to an authority or a person to act in extreme situations and are invoked as a means of resolving a crisis or protecting a political regime.¹⁹ Theoretical debate on emergency rules has been the discussion of a policy-oriented state of emergency and the establishment of an “emergency constitution.” Anna Khakee in her article “Securing Democracy? A comparative Analysis of Emergency Powers in Europe” categorizes the basic arguments of emergency theories into two broad prescriptive stances, the “classical” by Carl Schmitt and “anti-Schmittians.” Emergency theories have been thriving in the discussion of

¹⁶ Derogations of certain human rights are written in article 15 of the European Convention on Human Rights (ECHR), https://www.echr.coe.int/documents/Guide_Art_15_ENG.pdf and in article 4 of the International Covenant on Civil and Political Rights (ICCPR), <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRiCAqhKb7yhsjYoiCfMKoIRv2FVaVzRkMjTnjRO%2Bfud3cPVrcM9YR0iix49nlFOsUPO4oTG7R%2Fo7TSSorhtwUUG%2By2PtslYr5BldM8DN9shT8B8NpbsC%2B7bODxKR6zdESeXKjiLnNU%2BgQ%3D%3D>.

¹⁷ V.V. Ramraj and M. Guruswamy, ‘Emergency Powers,’ in M. Tushnet, T. Fleiner and C. Saunders (eds), “Routledge Handbook of Constitutional Law,” New York: Routledge 2013, p.111.

¹⁸ There are a number of lexicons used to describe the similar meaning of the extraordinary power granted to the government such as “state of emergency,” “state of siege,” “state of alarm,” “martial law,” or “times of war,” forms depending on each state and the time of revoking.

¹⁹ G. Silverstein, “emergency powers,” Encyclopedia Britannica, February 27, 2020, <https://www.britannica.com/topic/emergency-powers>.

political theories before WWII and set out a prominent turning point after 9/11. Carl Schmitt, with a more “pro-authoritarian stance” according to Anna Khakee, asserts that “liberalism and exception cannot be reconciled, in other words, emergencies cannot be foreseen and constrained by law and will always have to yield to authoritarian rule.”²⁰ Giorgio Agamben echoes²¹ Schmitt’s theory of emergency powers’ necessity of falling outside the constitutional order and operating out of the ordinary laws. This argument is also followed by Mark Tushnet who claims “emergency powers, by their very nature extra-constitutional, cannot be controlled by the democratic institutions, but only by a mobilized citizenry, standing up for democracy.” Anna Khakee distinguishes the main debate of the two theoreticians by whether they promote or agree with integrating emergency legislation into a state’s legal system. Bruce Ackermann, taking 9/11 as a lesson learned, argues that building an “emergency constitution” is the best way to minimize the risks set forth by terrorism, and he proposes creating legal boundaries and regulations circumscribing emergency rules in the legal framework.

Because of a growing power granted to the government and the justification of derogation to certain human rights, there is a danger that the emergency power is abused and results in a “constitutional dictatorship.”²² As Bruce Ackerman mentioned in “The Emergency Constitution:” “to avoid a repeated cycle of repression, defenders consider a more hard-headed doctrine—one that allows short-term emergency measures but draws the line against permanent restriction.”²³ Obviously, exploitation of imposing a long-lasting limitation on liberty shall be prevented, yet Bruce Ackerman also noted that “designing a constitutional regime for a limited state of emergency is a tricky business because unless careful precautions are taken, emergency measures have a habit of continuing well beyond their time of necessity. Stephen Thomson and Eric C. Ip in the “Covid-119 emergency measures and the impending authoritarian pandemic” addressed emergency powers, which shall never give license to governments to “cast aside their

²⁰ Anna Khakee, “Securing Democracy? A Comparative Analysis of Emergency Powers in Europe,” *Policy Paper*, Geneva Center for the Democratic Control of Armed Forces (DCAF), p.6.

²¹ Even as a “Schmittian,” Giorgio Agamben does not adopt Schmitt’s argument in pro-authoritarian perspective.

²² DCAF, “States of Emergency” Backgrounder on Security Sector Governance and Reform, Geneva: DCAF (Geneva Center for the Democratic Control of the Armed Forces), October 2005, p.2.

²³ Bruce Ackerman, “The Emergency Constitution,” *The Yale Law Journal*, March 2004, Vol.113, No.5, p.1030, <https://www.jstor.org/stable/4135710>.

obligations to uphold fundamental rights and liberties or to be under scarcely disputable moral, and legal obligations to take seriously the burdens imposed on affected individuals, such as losses of personal freedom, of income, and of privacy, discrimination, stigmatization, and excessive stress.”²⁴ The abuse of emergency power can also encompass a remaining status of emergency states for years even when the emergency no longer exists or emergency measures that are not proportionate to the crisis faced. Therefore, in addition to the measurement of impact on citizens’ rights, the European Convention on Human Rights (ECHR) and the International Covenant on Civil and Political Rights (ICCPR) stipulate principles that must be respected during a state of emergency, which are temporality, proportionality, legality, intangibility, the official declaration of the emergency state, and the presentation of an identical exceptional threat.²⁵

The relationship between the state of emergency and democracy is intertwined and has mutual effects, and it is shown in the recent Covid-19 pandemic response. Magnus Lundgren, Mark Klamberg, Karin Sundström, and Julia Dahlqvist in “Emergency Powers in Response to COVID-19: Policy Diffusion, Democracy, and Preparedness” have proved their hypothesis that states of weak democratic institutions are more likely to declare a state of emergency compared to democracies or autocracies.²⁶ This pointed to the classical debates of democratization and the rule of law. Because emergency states have certain similarities and traits of autocracy or authoritarian governance as they all pose restrictions on democratic and civil spaces, extreme autocracies may enjoy state-of-emergency-equivalent powers without having to declare an actual state of emergency. And strong democratic institutions, on the other hand, receive stronger restraints from electorates and find it costly to overturn the principles of liberal governance. So robust democracies and autocracies were less likely to invoke a state of emergency in response to the pandemic because of the ability of

²⁴ Stephen Thomson, Eric C Ip, COVID-19 emergency measures and the impending authoritarian pandemic, *Journal of Law and the Biosciences*, Volume 7, Issue 1, January-June 2020, Isaa064, p.3, <https://doi.org/10.1093/jlb/Isaa064>. Originally cited from L.M. Henry, “An Overview of Public Health Ethics in Emergency Preparedness and Response in A.C.” Mastroliaanni, J.P. Kahn and N.E. Kass (eds), *The Oxford Handbook of Public Health Ethics*, New York, Oxford University Press 2019, 767–773, 770.

²⁵ DCAF, “States of Emergency” Backgrounder on Security Sector Governance and Reform, Geneva: DCAF (Geneva Center for the Democratic Control of the Armed Forces), October 2005, p.2.

²⁶ Magnus Lundgren, Mark Klamberg, Karin Sundström, and Julia Dahlqvist, “Emergency Powers in Response to COVID-19: Policy Diffusion, Democracy, and Preparedness,” *Nordic Journal of Human Rights*, Vol. 38, 2020, Issue 4, 7 May 2021, p.305-318, <https://doi.org/10.1080/18918131.2021.1899406>.

states to handle the pandemic.²⁷ An article “ The Impact of Covid-19 measures on Democracy, the Rule of Law and Fundamental Rights in the EU” by the Thin Tank “European Parliamentary Research Service (EPRS)” noticed that exceptional measures adopted in the EU Member States in fighting against Covid-19 have raised concerns in the functioning of national parliaments and of the judiciary; freedom of movement; freedom of expression and of the media; freedom of assembly; privacy and data protection; asylum; prisons; discrimination and vulnerable groups; other issues of relevance for Art. 2 TEU.²⁸

1.2 States of emergency in practice in different political systems

The design of the mechanism of the self-preserving impulse of the law itself is found in ancient communities, which usually allows a special power to be undertaken in situations of internal danger or external threat. The constitutional concept of limiting the power of the parliament by an exceptional power dates back to ancient Rome. The Roman Senate could appoint a dictator to exercise unrestrained power for a period of fewer than 6 months in order to deal with a crisis. This was not to replace or destroy the existing system, but to conserve and save it. This exceptional power given to the ruler also allowed a democratic country to leverage a more totalitarian resolution to the direct threat. Niccoló Machiavelli revived the provisions of the ancient emergency power and brought them into the modern era²⁹, in which he defended the assignment of the extraordinary power to the ruler was to save the existing political institutions. The conviction that a constitutional system required the ability to cope with an unexpected condition or a potential threat was embraced by the 17th-century philosopher John Locke and Jean-Jacques Rousseau. John Locke, who believed in legislation serving the function of announcing general rules and launching punishments for the people who offended it, made his judgment of exceptional powers. He divided political power between an executive and legislature, each having independent fiduciary trusts to act for

²⁷ Ibid.

²⁸ Ottavio Marzocchi, “The Impact of Covid-19 Measures on Democracy, the Rule of Law and Fundamental Rights in the EU,” EPRS: European Parliamentary Research Service, 23 April 2020, <https://www.europarl.europa.eu/cmsdata/207125/Final%20version%20of%20the%20Briefing%20note.pdf>.

²⁹ DCAF, “States of Emergency” Backgrounder on Security Sector Governance and Reform, Geneva: DCAF (Geneva Center for the Democratic Control of the Armed Forces), October 2005, p.2.

the public good.³⁰ Locke argued that the executive had a prerogative power to make exceptional decisions in emergencies.³¹ Jean-Jacques Rousseau in his famous writing “Social Contract (1762)” explained that the state has the authority to suspend or restrict fundamental freedoms in emergencies. Compared to John Locke’s theory, Rousseau released the dictator from legal constraints on his power while the former perceived executive power had remained subject to natural law.³²

The emergency powers came into contemporary sight for reasons that the powers were invoked more than 200 times in the Weimar Republic (1919-1933) of Germany after WWI. Emergency powers in modern democracies were not able to repeat the success of the original Roman model as they have been abused.³³ The practice of making explicit provisions for the assignment of extraordinary power to the executive during a crisis was essential in the Weimar Constitution. Article 48 of the constitution of the Weimar Republic allows the president to rule by decree once the article is invoked. The extraordinary power came into effect so frequently because it aimed at sustaining the constitution itself and combating social and domestic problems, most importantly the economic failure after the military defeat. However, these provisions allowed Hitler to seize and consolidate his power in 1933 as he further insisted on the executive acting beyond the limit of the constitution if liberal democracy itself is to survive.³⁴

The emergency measures enacted in the Weimar Republic actually aided the rise to power of the Nazi regime. Lessons drawn from the previous mistakes, the 1968 German Emergency Act, which was later composed into multiple parts of the German constitution, or the Basic Law, had regulated the state of emergency. The 1968 Acts

³⁰ David Jenkins, “The Lockean Constitution: Separation of Powers and the Limits of Prerogative,” *McGill Law Journal*, Volume 56, Number 3, April 2011, p. 543–589. <https://doi.org/10.7202/1005132ar>.

³¹ Tuckness, Alex, "Locke's Political Philosophy," *The Stanford Encyclopedia of Philosophy* (Winter 2020 Edition), Edward N. Zalta (ed.), <https://plato.stanford.edu/archives/win2020/entries/locke-political/>.

³² Marc de Wilde, “Silencing the laws to save the fatherland: Rousseau’s theory of dictatorship between Bodin and Schmitt,” *History of European Ideas*, 2019, 45:8, 1107-1124, DOI: 10.1080/01916599.2019.1661265.

³³ David Stasavage, “Democracy, Autocracy, and Emergency Threats: Lessons for Covid-19 from the Last Thousand Years,” *International Organization Online Supplement*, 2020, p.10, doi:10.1017/S0020818320000338.

³⁴ G. Silverstein, "emergency powers," *Encyclopedia Britannica*, February 27, 2020, <https://www.britannica.com/topic/emergency-powers>.

defined four different plans of emergency states: state of defense, states of tension, internal emergency, and natural disaster. A state of defense is invoked when there is a military attack, while the state of tension remains an intermediate stage before a state of defense. An internal emergency is announced when the existing democratic order is at risk. When a state of emergency is called upon and the powers of the parliament are restricted, the parliamentarian will be reduced to a “skeleton assembly,” which means a “Joint Committee” is formulated by two-thirds of legislators from the lower house, the Bundestag, and one-third of legislators from the upper house, or the Bundesrat.³⁵ Modern Germany and France continue conducting constitutionally defined emergency powers and assign the powers to the executive, but also empower a constitutional court to check any abuse.

The United States calls a state of emergency for reasons of a natural disaster, civil unrest, domestic or terrorist attacks, a medical pandemic or epidemic, and biosecurity risk. Furthermore, the state of emergency exists at different levels of government, including local, state, and federal jurisdictions. The US constitution provides limited emergency power, allowing for the suspension of an ordinary judicial process when it is deemed an immediate threat to the safety of the citizens. The scale of which emergencies are called depends on the circumstances and the plans needed in place to tackle the further risk. Local emergencies are called by the mayor and most of those are to deal with natural disasters and relief efforts. A higher level of state of emergency can occur when declared by the governor of the state as a preliminary step to receiving federal aid to sustain recovery. Declarations at a federal or national level of emergency can employ agencies such as the US military, and trickle down to the day-to-day life of civilians.³⁶ But this authority is granted to Congress rather than to the president. The concern about the need for emergency powers was raised due to the attack on New York City on Sep.11, 2001, and the battle against terrorism in the last two decades, and thus it led to the statutes delegating power to the executive. US’ attitude toward leveraging emergency powers as a way to tackle future crises turned aggressive in its fight against terrorism after 9/11, compared to most European countries as they have become cautious in declaring emergency regimes after the notorious

³⁵ Ben Knight, “What is a State of Emergency in Germany?” March 19, 2020, DW.com. <https://p.dw.com/p/3ZjpN>.

³⁶ Cristina Van Orden, “state of emergency,” <https://militarybenefits.info/state-of-emergency/>.

history of Nazi Germany. Due to the different perceptions of exceptional powers in crises, the US tends to revoke unilateralist and presidential powers.³⁷ The most recent state of emergency in the US was declared in response to the spread of the coronavirus.

A more controversial emergency regime was revoked and renewed several times in France as they prolonged it for two years after the Paris terrorist attacks happened on 13 November 2015. Since the 9/11 attacks, many states have resorted to a “war on terror” narrative to frame violent terrorist actions. A state of emergency has been extended by the French government until a new security law was promulgated. Although the state of emergency was brought to an end in November 2017, several aspects of the emergency state were made permanent into the new law against terrorism³⁸. Principal provisions of the new anti-terrorism law allow local prefects to search every individual or car in concerts or sports events to establish “protection parameters.” Other security measures such as enhancing the government’s decision on closing worship places when terrorism, hatred, or discrimination is promoted, and police forces tracking and monitoring individuals who are of “particularly serious threat.” These kinds of inspections and searches are extended to any places that are believed to be frequented by terrorist suspects upon authorization by the judge. Apart from the citizens, the provision of the new anti-terrorism law also allows the government to investigate public servants within certain positions that may be at risk of being radicalized by means of intercepting the wireless communications.³⁹ While the state of emergency is embedded in the French constitution, the temporality of its nature makes it far from the normal state of affairs. However, the state of emergency was extended five times in this case, making it permanent to some extent with some emergency measures being codified into the ordinary law. Amendments to legislation concerning security and the criminal code were made to equip administrative authorities to carry through checks and surveillance out of traditional legal limits, especially on

³⁷ Kim Lane Scheppele, “Law in Time of Emergency: States of Exception and the Temptations of 9/11,” 29 October 2004, available at SSRN: <https://ssrn.com/abstract=611884>.

³⁸ Law No. 2017-1510 of 30 October 2017 Reinforcing Domestic Security and the Fight Against Terrorism (“*Loi No. 2017-1510 du 30 octobre 2017 renforçant la sécurité intérieure et la lutte contre le terrorisme*”), available at: <https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000035932811>.

³⁹ For a detailed explanation of provisions of Law No.2017-1510, see “France: State of Emergency Officially Ends as New Security Measures Come Into Force,” Library of Congress, <https://www.loc.gov/item/global-legal-monitor/2017-11-29/france-state-of-emergency-officially-ends-as-new-security-measures-come-into-force/>.

Muslims and vulnerable groups. However, the lack of judicial review on these powers was heatedly debated for the jeopardization of the principles of proportionality and the prohibition of discrimination.⁴⁰ Jane Kilpatrick in her article “When a Temporary State of Emergency becomes Permanent: France as a Case Study” argue that “by incorporating any derogations from rights and freedoms that were previously justified by a state of emergency into ordinary law, the application of these limits is no longer checked by the administrative judge.”⁴¹ This has also laid a wide public discussion when the government took prudence in deciding whether to declare again a constitutional emergency regime while the coronavirus arrived in French territory in 2020.

In Hungary, emergency powers were considered by some as exploited and overused because of their frequency of being proclaimed and the duration of the emergency regime, which was usually extended several times by government decrees. In September 2015 following the great influx of migrants and refugees to Hungary, the nation declared a “crisis situation caused by mass immigration” in order to tackle problems created by asylum-seeking and to preserve its culture, identity, and Christian traditions.⁴² The state of migration crisis had been stretched out for a five-year length by every six months when the previous emergency state was about to expire, and such declaration was under a loose constitutional authorization, which allows the government to “exercise powers which are not expressly conferred by-laws on another state body.”⁴³ The same constitutional provision⁴⁴ was also used by the government as a basis to declare “a state of danger” during the first outbreak of the coronavirus. The state of migration crisis targeting refugees, Muslim migrants, and stateless people was

⁴⁰ Jane Kilpatrick, “When a Temporary State of Emergency becomes Permanent: France as a Case Study,” November 2020, published by Transnational Institute - www.tni.org Amsterdam, November 2020, https://www.tni.org/files/publication-downloads/france_and_the_states_of_emergency_online.pdf.

⁴¹ Ibid, p.16.

⁴² Declared by Government Decree 269/2015, Hungary announced a “Crisis Situation Caused by Mass Immigration and Establishing the Rules related to the Declaration, Maintenance and Termination of the Crisis Situation. See details in “A Facade of Legality: Covid-19 and the Exploitation of Emergency Powers in Hungary,” p.19, International Commission of Jurists, February 2022, available at <https://www.icj.org/wp-content/uploads/2022/02/Hungary-A-Facade-of-Legality-legal-briefing-2022-EN-G.pdf>.

⁴³ Ibid. p.19.

⁴⁴ Article 15(1) states that: “The Government is the general means of executive power; its tasks and competencies shall encompass all that is not expressly conferred by the Fundamental Law or any other legislation under the competence of another body.” Constitution of 2011, version pre-December 2020 amendments available at: [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF\(2021\)046-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF(2021)046-e).

considered as Viktor Orbán’s rhetoric of “outside threats” and decade-long power grab to make the nation an “illiberal democracy.” Several EU Member States have expressed “deep concern” that the long-term emergency regime and purported emergency measures would risk violating the rule of law, democracy, and fundamental rights.⁴⁵

1.3 Democracy is challenged in a Covid-19-related state of emergency

A “regime” is taken as a solution to the identified societal problems. Different regime types responded to the Covid-19 pandemic with diversified mechanisms. David Stasavage in his article “Democracy, Autocracy, and Emergency Threats: Lessons for COVID-19 from the Last Thousand Years” compares different challenges democratic countries and autocracies are facing when dealing with the Covid-19 health emergency and find out autocratic countries face fewer hurdles when carrying out actions but information of the emergency was usually suppressed. On the other hand, information is transparent in democratic countries, however, it is hard to take decisive actions, and the proposition of emergency powers sometimes leads to their abuse.⁴⁶ Following Linz’s approach to an authoritarian system, Alon, Farrell, and Li elaborate that an authoritarian regime should cover conceptions such as limited political pluralism, a legitimacy through appeals to emotion and a regime that serves as a solution to the existing societal problems, and suppression of anti-regime sentiments.⁴⁷ Without lengthy checks and balances in the policy process and media debates of public information, authoritarian regimes tend to process decisions with speed and decisiveness. In democratic settings, they explain, there are four elements that democracy must include⁴⁸: firstly, voters can be sufficiently represented through fair elections; secondly, citizens’ participation in the political system; thirdly, the protection of human rights of the citizens; and lastly, the enforcement of rule of law and equality. This definition is far from the “pure” Athenian democracy, though, it fits the contemporary democratic settings and the discussion in

⁴⁵ Laura Livingston, “Understanding Hungary’s Authoritarian Response to the Pandemic,” April 14, 2020, <https://www.lawfareblog.com/understanding-hungarys-authoritarian-response-pandemic>.

⁴⁶ David Stasavage, “Democracy, Autocracy, and Emergency Threats: Lessons for Covid-19 from the Last Thousand Years,” *International Organization Online Supplement*, p.15, 2020, doi:10.1017/S0020818320000338.

⁴⁷ Ilan Alon, Matthew Farrell, and Shaomin Li, “Regime Type and COVID-19 Response,” *FIIB Business Review*, p.153, 2020, *Fortune Institute of International Business*, available at DOI: 10.1177/2319714520928884.

⁴⁸ *Ibid.*

terms of a democratic dichotomy. In conclusion, do regime types such as democracy, authoritarianism, and autocracy, compete in cost-effective emergency measures taken in tackling the health crisis? Alon, Farrell, and Li argue that the decisive nature of authoritarian systems or even dictatorships did not contribute to less health and economic costs that are proportionate to their rapid actions and efforts.⁴⁹

Democracy and any regime need to be assessed and evaluated its quality, according to Diamond and Morlino in their article “The Quality of Democracy: An Overview. Democracy, at a minimum, shall require: 1) universal, adult suffrage; 2) recurring, free, competitive, and fair elections; 3) more than one serious political party, and 4) alternative sources of information.⁵⁰ In addition to democracy, he thinks it is vital to define the “quality” of it because talking of “good” or better democracy implies knowing what democracy is. Once a country meets all above the basic norms, it should be tested whether the country is ideally democratic by three dimensions: “political and civil freedom,” “popular sovereignty,” which means the control over public policies and the officials who make them, and “political equality.”⁵¹

1.3.1 France: a “free” country with “flawed” democracy under a health emergency: France as an example

According to the Global Freedom Status of 2021 provided by Freedom House, France earned a score of 38/40 for the country’s political rights and 52/60 regarding civil liberty, with an overall score of 90/100 and a status of “free” country.⁵² Reviewing last year’s developments, Freedom House remarked the French political system “features vibrant democratic processes and generally strong protections for civil liberties and political rights, although the governments had curtailed constitutional protections of personal freedom in response to terrorist attacks, anti-Muslim activism, and anti-migrant sentiment.”⁵³ The global freedom status was made upon a calculated score

⁴⁹ Ibid, p.157.

⁵⁰ Larry Diamond & Leonardo Morlino, “An Overview,” *Journal of Democracy*, 2004, vol. 15, no. 4, October 2004, p. 20-31.

⁵¹ Ibid.

⁵² France: Freedom in the World 2021, Freedom House, available at: <https://freedomhouse.org/country/france/freedom-world/2021>.

⁵³ Ibid.

of political rights and civil liberties from the previous year; and most countries have been scored lower during the pandemic years because a democracy crisis was detected for governments engaging in abuse of power, silencing their critics, and shuttering political institutions' function to protect public health.⁵⁴ France as a long-standing democratic country is no exception. Although French people were able to perform their political rights and turn out voting in the pandemic era due to adjustments to polling practices for the 2020 local elections and the further legislation passed to facilitate proxy voting and mail voting, the function of government under the public health emergency regime was not considered operating with transparency or consistency, especially in respects of the decision-making process and the lack of preparedness.⁵⁵ Civil liberties received curtails in aspects of freedom of expression and freedom of assembly as a result of Covid-19-related emergency measures and lockdowns. For one thing, the media were not able to cover protests and demonstrations against police dispersal of public gatherings, and journalists were prohibited from access to refugee camp evacuations.⁵⁶ And in June 2020, the Council of State declared an unconstitutional restriction on public gatherings for it was deemed disproportionate to the public health crisis, and excessive police forces were used to silence protesters. For another, individual freedom of expressing personal views might be under surveillance according to three government decrees issued in December 2020 to extend the collection of information on political militants and activists.⁵⁷ In addition, a decree declared in March 2020 also enabled extended pretrial detention with little oversight in judicial and criminal matters. Last but not least, the restrictions on preventing the spread of coronavirus had disproportional and discriminatory effects on marginalized groups, taking the Islamic community, migrant society, and poorer departments for example, which had higher reported cases and punishments of breaching emergency rules than the rest of the population.

⁵⁴ More information on “The Impact of Covid-19 on the Global Struggle for Freedom,” Special Report 2020, Democracy under Lockdown, Freedom House, available at: <https://freedomhouse.org/report/special-report/2020/democracy-under-lockdown>.

⁵⁵ Ibid.

⁵⁶ This incident happened in December 2020 when two journalists tried to film footage of the evacuation of the refugee camps in the North and Pas-Calais departments.

⁵⁷ The information collecting, according to Freedom House, including the compiling of information of the families and underage children, health records, and activities on social media. More information on <https://freedomhouse.org/country/france/freedom-world/2021>.

According to the Economic Intelligence Units (EIU) annual reports on 2020, France topped the list of “flawed democracies” in Europe owing to “the restrictions on freedom of movement, including multiple lockdowns and early national curfews.”⁵⁸ France as a democratic country, has been fighting the fourth wave of coronavirus infections with multiple opposition and objections. When the pandemic first stroke the nation in March 2020, President Macron announced in a solemn speech that the Nation was ‘at war’, using a war terminology close to that of President Hollande after the terrorist attacks in Paris in November 2015.⁵⁹ The French government in October 2020 declared a public health state of emergency over Covid-19 when confirmed cases surged; the previous declaration of a public health state of emergency was just a few months ago when its medical capacity was nearly at its peak.⁶⁰ Tough measures taken by the central government and executive authorities to contain the spread of the virus include a night curfew, mandatory mask-wearing, and school closure. Later, the government’s vaccine policy met with a domestic outcry in various aspects from the inefficiency of injection since the country’s commencement of the Covid-19 vaccination in December 2020 to demonstrations against the recently-approved compulsory vaccination bill. Countries with older democratic traditions show a proportion of discontentment no smaller than “younger democracies” in Europe. In France, there is even an anti-establishment discourse and the emergency of a “scientific populism.”⁶¹ The erosion of democracy and the derogation of fundamental rights existed before the pandemic hit the European territory. The covid-19 pandemic added complexity to the development of democracy as countries leveraged a powerful executive force to restrain civilian space, and the fear of an emergency regime started to grow.

⁵⁸ FRI, “Pandemic helped roll back democratic freedoms globally in 2021: EIU study,” February 13, 2022, <https://www.rfi.fr/en/international/20220213-pandemic-helped-roll-back-democratic-freedoms-globally-in-2021-eiu-study-france-flawed-democracy>.

⁵⁹ Zeynep Or, Coralie Gandré, Isabelle Durand Zaleski and Monika Steffen. “France’s response to the Covid-19 pandemic: between a rock and a hard place.” *Health Economics, Policy and Law* (2021), page 1 of 13 doi:10.1017/S1744133121000165

⁶⁰ Benoit Van Overstraeten, and Christian Lowe. “France declares public health state of emergency over COVID-19.” (Paris) Reuters. October 15, 2020. <https://www.reuters.com/article/us-health-coronavirus-france-emergency-idUSKBN26Z2PQ>.

⁶¹ Sophia Russack (ed.), “The effect of Covid on EU democracies,” European Policy Institutes Network (EPIN), 2021, p.3.

1.3.2 Hungary: authoritarian populism and the power grab through a health risk

The rising of conservative and autocratic movements in East and Central Europe has proved the long-held democratic value in the EU is being challenged. Populist leaders and extremist parties wield influence over critical issues within nations. Voices questioning the European Union, its system, and the performance of its bureaucracy have never stopped; and countries, where Euroscepticism is deeply rooted, are facing even harsh situations to maintain democratic liberties. Hungarian Prime Minister Viktor Orbán has chipped away at the country's democratic systems mainly by changing election laws and insisting on anti-critical media coverage of the government. With long-held powers by the illiberal populist leader, Hungary has observed a democratic backsliding in the past decade. Viktor Orbán defended himself from pursuing anti-democratic reforms, but approaching an "illiberal democracy."⁶² Hungary, compared to other countries within the European Union, has displayed an authoritarian trend and a gradual democratic decay. Lee and Johnstone in their article "Resisting Politics of Authoritarian Populism during COVID-19, Reclaiming Democracy and Narrative Justice: Centering Critical Thinking in Social Work" noted a strong political force of populism globally, and pointed out that the politics of "authoritarian populism" during the pandemic has a trait of "right-wing post-truth" discourse⁶³, which means authoritarian leaders claimed to "liberate the people from objective facts"⁶⁴ with an alternative reliance on the appeals to emotions or beliefs. The appeal to emotion is to create an enemy or threat to secure its politics, in other words, to fortify fear politics; and Coronavirus has been the best target when countries build fear politics. Even before the Covid-19 pandemic, there had been the anti-immigrant rhetoric and the discourse of the refugee crisis threatening national security existed to generate emotional anxiety. In addition, authoritarian populism attacks critical thinking and scientific-evidence-based policy and increases policing, surveillance, and border control, which resemble the

⁶² Full text of Viktor Orbán's speech at Băile Tuşnad (Tusnádfürdő) of 26 July 2014, <https://budapestbeacon.com/full-text-of-viktor-orbans-speech-at-baile-tusnad-tusnadfurdo-of-26-july-2014/>.

⁶³ Eunjung Lee and Marjorie Johnstone, "Resisting Politics of Authoritarian Populism during COVID-19, Reclaiming Democracy and Narrative Justice: Centering Critical Thinking in Social Work," *International Social Work* 64, no. 5, September 2021, p.721, <https://doi.org/10.1177/00208728211011627>.

⁶⁴ Objective facts here mean the coercion by technocrats, experts, scientific evidence, or scientific consensus.

devices of the ordinary authoritarian regime. These mechanisms have been made the most of during the health crisis.

Lee and Johnstone claimed that “the election of authoritarian leaders has become one of the biggest social challenges because it seeks to undermine people’s rights and basic democracy.”⁶⁵ The idea was proved in the re-election of Europe’s longest-serving prime minister securing another 4-year term in office in the 2022 national election. Since 2010, Viktor Orbán has been controversially authoritarian as reports⁶⁶ indicated his manipulations of parliamentary votes and control of media and public institutions. Led by Viktor Orbán, the Fidesz party was blamed for “fraudulent elections,⁶⁷” which involves hollowing out the in advance by depriving the newly elected government/parliament of power competence, the prosecutor's office in Fidesz’s legally or illegally leveraging state powers in advocating the regime through de facto involvement of advertising channels, and shoring up powers with majority seats in the parliament. The opposition parties, even though they were brought together and formed a coalition of six to make their voices major, could not successfully beat Orbán’s campaign by simply targeting his decision on shunning Pfizer vaccines in favor of Russian Covid vaccine Sputnik V.⁶⁸ Umut Korkut, a professor in International Politics, Glasgow Caledonian University, argues that the six-party opposition will not be able to overshadow Orbán’s campaign but only persuade voters toward that a multi-party is not

⁶⁵ The idea was initially brought forward by Rory Truell in “The Future of Social Work and Its Crucial Role in Shaping Democracy,” *International Social Work*, 2018. Lee and Johnstone echoed this idea and gave further explanation.

⁶⁶ Bálint Magyar, Bálint Madlovics, “Hungary 2022: Election Manipulation and the Regime’s Attempts at Electoral Fraud,” CEU Democracy Institute, <https://democracyinstitute.ceu.edu/articles/balint-magyar-and-balint-madlovics-election-manipulation-and-electoral-fraud-hungary>.

⁶⁷ Definitions given by the CEU Democracy Institute, a “fraudulent election” or “manipulation of election” is not merely an election that is “free but not fair” or falsifying the vote count; the 2022 Hungarian vote involved an electoral fraud plus four folded contest: hollowing out the elections in advance by depriving the newly elected parliament and government of power competence, sabotaging the will of the electorate by the regime’s unilateral rewriting of the electoral system in its own interest, legal and illegal use of state power in support of the regime through the de facto involvement of supposedly independent state media, advertising channels, and public institutions, and systematic creation of the possibility of classic electoral fraud, in the advantage of the party. Details available at <https://democracyinstitute.ceu.edu/articles/balint-magyar-and-balint-madlovics-election-manipulation-and-electoral-fraud-hungary>.

⁶⁸ Umut Korkut, “Viktor Orbán: Hungary’s controversial authoritarian prime minister secures yet another term in national election,” published 4 April 2022, available at: <https://theconversation.com/viktor-orban-hungarys-controversial-authoritarian-prime-minister-secures-yet-another-term-in-national-election-180466>.

a viable resolution to the problems they face, and turn them straight to the continuing support for the government that has existed for over a decade. The only thing Orbán does is to carry out its narrative of “protecting the country from outside threats” and its political campaign on promising stability in a time of uncertainty.⁶⁹ The main effects of the “authoritarian populism” were its attack on the fundamental principles of social work and democracy by fostering deep hate of “Others,” and the politics of authoritarian populism has shifted the focus from “people to “problems” during the Covid-19.⁷⁰ Populism has two essences: an idea that there exists a corrupt elite and people’s dissatisfaction of the current state, and a belief that “the people” should reclaim the power from the state. Therefore, populism presents itself with an illusion of a seemingly democratic device, which often “hides dangerously anti-democratic impulses which can stray into authoritarianism.”⁷¹ Orbán’s anti-immigration stance and hostile policies toward L.G.B.T.Q. groups are examples of the narrative of “otherness.” Although these policies have apparently deviated from the democratic system and have received criticism from most Western European countries, Eurosceptic politicians still embrace his appeal and the proportion is enlarging. Authoritarian populism focuses on national interests and takes anti-globalization as their forefront, however, the contagious effect of the authoritarian populism trend, as given by Lee and Johnstone, is global as it corroborates one another and creates a bigger meta-discourse.⁷²

Lee and Johnstone argued that authoritarian populism has been reinforced through political responses to Covid-19, which reduced democratic freedoms and civil liberties across the world.⁷³ In December 2021, the Hungarian authorities declared again the extension of a Covid-19-related state of emergency, under which situation, measures such as conditional international travel with an accepted certificate issued by the EU or Hungarian government is required, coupled with strict 10-day quarantine at the

⁶⁹ Ibid.

⁷⁰ Eunjung Lee and Marjorie Johnstone, “Resisting Politics of Authoritarian Populism during COVID-19, Reclaiming Democracy and Narrative Justice: Centering Critical Thinking in Social Work,” *International Social Work* 64, no. 5, September 2021, p.716, <https://doi.org/10.1177/00208728211011627>.

⁷¹ Ibid, p.717, originally cited from Graves F. and J. Smith, “Northern Populism: Causes and Consequences of the New Ordered Outlook,” The School of Public Policy Publications, 2020. The author notes that the authoritarian meta-narrative speaks to those with less education, who rely less on reason and evidence and more on moral certainty and order.

⁷² Ibid, p.719.

⁷³ Ibid, p.717.

residential addresses or government-designated facilities.⁷⁴ Fears grow as the possibility of a permanent state of emergency is enhanced and the expanding power will move the country toward authoritarianism or a repressive regime. T. Ginsburg and M. Versteeg in their article “Can Emergency Powers Go Too Far?”⁷⁵ explained the same concern and it was echoed by Stephen Thomson and Eric C. Ip again as they wrote: “as governments attempted to deal with the many adversities that the pandemic presents, there are alarming regressions toward authoritarian governance.”⁷⁶ Stephen Thomson and Eric C. Ip think the authoritarian governance was shown in the name of public health intervention and was achieved by combinations of governmental and administrative overreach, the adoption of excessive and disproportionate emergency measures, override of civil liberties, failure to transparent decision-making, and the suspension of effective democratic control. For example, the Hungarian Government was allowed to “suspend the enforcement of existing laws, depart from statutory requirements, and implement additional extraordinary measures by decree.” And they think the enactment of the Hungarian “Act on the Containment of Coronavirus” by the National Assembly was the most draconian introduction of emergency powers in Europe because there was no sunset clause and it removed the governmental action from effective parliamentary control. They remarked “these legislative measures are neither necessary nor proportionate, marking an authoritarian turn in Hungarian governance.”⁷⁷

1.4 Emergency powers cannot restrict all kinds of human rights

In most countries, the constitution always allows the declaration of states of emergency if the constitution or the authorities it creates are endangered by internal unrest or foreign attacks. In some cases, an emergency state can be used as a rationale for suspending rights and freedoms, even those guaranteed under the constitutions. This

⁷⁴ “Hungary: Authorities extend COVID-19 state of emergency through to June 1 2022.” December 16, 2021. Crisis 24. <https://crisis24.garda.com/insights-intelligence/intelligence/risk-alerts/wip10011900736/hungary-authorities-extend-covid-19-state-of-emergency-through-to-june-1-2022-update-35>.

⁷⁵ T. Ginsburg and M. Versteeg, Can Emergency Powers Go Too Far?, 7 April 2020, Tablet, available at https://www.tabletmag.com/sections/news/articles/coronavirus-emergency-powers-constitutional-rights?fbclid=IwAR1ZVEiCpx36SDhTIF3qOMlqZfJJu_wRm4KAzHPmn6tf0HjY3EsyMm0wk2w.

⁷⁶ Stephen Thomson and Eric C. Ip, “Covid-19 Emergency Measures and the Impending Authoritarian Pandemic,” *Journal of Law and the Biosciences*, p.3, doi:10.1093/jlb/ljaa064.

⁷⁷ Ibid, p.22.

means the effects of declaring a state of emergency on human rights and freedoms shall be monitored and regulated by laws, with specific checks and safeguards of these rights of each civilian. Article 4(1) of the International Covenant on Civil and Political Rights, indicates derogation from the provision of the Covenant, which shall be of an exceptional and temporary nature. Before invoking article 4, two fundamental conditions⁷⁸ must be met: firstly, the situation must amount to a public emergency that threatens the life of the nation; secondly, the State party must have officially proclaimed a state of emergency. In addition, states may only take derogating measures to the extent strictly required by the exigencies of the situation and which are not inconsistent with their other obligations under international law.⁷⁹

International covenants and regional treaties are the backbones of basic human rights. Non-derogable rights, or absolute rights, are rights that are recognized universally under the international human rights legal framework. At the international level, according to the General Comment on Article 4 of the ICCPR, “Article 4 of the Covenant is of paramount importance for the system of protection for human rights under the Covenant. On the one hand, it allows for a State party unilaterally to derogate temporarily from a part of its obligations under the Covenant. On the other hand, article 4 subjects both this very measure of derogation, as well as its material consequences, to a specific regime of safeguards.”⁸⁰ Even though states are permitted to derogate from certain obligations of the ICCPR and human rights, Article 4(2) explicitly prescribes that no derogations can be made of the following rights:

- right to life⁸¹;
- prohibition on torture, cruel, inhuman or degrading treatment⁸²;
- prohibition of slavery, slave-trade and servitude⁸³;

⁷⁸ General Comment on Article 4. States of emergency (article 4). International Covenant on Civil and Political Rights (CCPR). CCPR/C/21/Rev.1/Add.11. 31 August 2001. <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRiCAqhKb7yhsjYoiCfMKoIRv2FVaVzRkMjTnjRO%2Bfud3cPVrcM9YR0iix49nlFOsUPO4oTG7R%2Fo7TSsorhtwUUG%2By2PtslYr5BldM8DN9shT8B8NpbsC%2B7bODxKR6zdESeXKjiLnNU%2BgQ%3D%3D>.

⁷⁹ Ibid.

⁸⁰ Ibid.

⁸¹ Article 6, ICCPR.

⁸² Article 7, ICCPR.

⁸³ Article 8(1)(2), ICCPR.

- prohibition on imprisonment on the basis of inability to pay a contractual obligation⁸⁴;
- principle of legality in the field of criminal law⁸⁵;
- right to recognition as a person before the law⁸⁶; and
- freedom of thought, conscience and religion⁸⁷.

At the regional level, the proclamation of non-derogable rights is enshrined in the European Convention on Human Rights (ECHR) with very similar provisions. Article 15⁸⁸ specifies the protection of certain rights from derogation in times of emergency, and Article 15, paragraph 1, states the notion of a public emergency or an exceptional threat:

“In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.”⁸⁹

Paragraph 2, Article 15, specifies that no derogation from Article 2 (the right to life), except in respect of deaths resulting from lawful acts of war, or from Articles 3 (the prohibition of torture and other forms of ill-treatment), 4(1) (the prohibition of slavery or servitude) and 7 (no punishment without law) shall be made under this provision.⁹⁰

Democratic values and fundamental rights are also embedded in the European Union and the values it promotes. The critical values on which the European Union is founded are enshrined in Article 2 of the Treaty of European Union. They are: respect

⁸⁴ Article 11, ICCPR.

⁸⁵ Article 15, ICCPR.

⁸⁶ Article 16, ICCPR.

⁸⁷ Article 18, ICCPR.

⁸⁸ The text of Article 15 of ECHR is based on the draft Article 4 of the United Nations draft Covenant on Human Rights, which later became Article 4 of the International Covenant on Civil and Political Rights (ICCPR).

⁸⁹ Article 15(1), ECHR.

⁹⁰ “Guide on Article 15 of the European Convention on Human Rights: Derogation in time of emergency,” European Court of Human Rights, updated on 31 December 2021, https://www.echr.coe.int/documents/Guide_Art_15_ENG.pdf.

for human dignity, freedom, democracy, equality, the rule of law, and respect for human rights, including the rights of persons belonging to minorities. Respecting people's rights is one of the EU's basic obligations, and these rights must be respected by the EU when applying policies, by the EU institutions, and by each of the Member States.⁹¹ Fundamental human rights values, in most cases, are enshrined in a nation's constitution and protected under the system's normal function. At the same time, the application of emergency measures derogating from human rights obligations shall be subject to strict requirements and stringent principles of defining the need of entering an emergency regime in an attempt to prevent any power abuse.

⁹¹ "Protecting Fundamental Rights within the Union." European Parliament. <https://www.europarl.europa.eu/about-parliament/en/democracy-and-human-rights/fundamental-rights-in-the-eu>

2. Theoretical framework

2.1 States are using the public health emergency to acquire unconstrained powers (WHAT)

States of emergency or the kind have been a compelling force for the constitution to sustain and self-preserve when the system itself is at stake by unprecedented threats. This mechanism, in history, has given the state a chance to use little-restrained powers as a tool to limit human rights and deviate from the normal state of affairs. With a specific timeframe, this thesis argues that some states leverage emergency powers to limit the regular function of democracy and fundamental rights during the Covid-19 health crisis. The discussion of emergency powers in the two country cases - France paralleled to Hungary - is three-folded: the first part deals with the legal basis of emergency states, the second part discovers states' normative framing of the "ad hoc and ex novo" Covid-19 health emergency, and the third part reviews the impact on democracy and human rights aspects. To examine the nature of emergency power, this thesis uses the constitutional theory of state power and builds up arguments from the observation of the constitution that serves as the legal basis of emergency powers. Carl Schmitt argues that sovereignty is "he who has the power to decide on the state of emergency." This thesis basically agrees with Schmitt's theory in the following aspect: "the unpredictability of national threats made it impossible to regulate emergency powers, and sovereign's emergency powers would be unconstrained and unbound as he may act outside judicial normality."⁹²

The observation of emergency powers in a country's legislative framework provides hints on the redistribution of state powers and the actors of the revoke, extension, and termination of emergency states. The normal exercise of state powers in democratic countries should be a balance of the executive (the government) and the legislative (the parliament), however, emergency powers altered the powers within a state's architecture by making the government more prominent. According to the Venice Commission, the enhanced powers of the executive should be regulated with provisions on its temporal exercise and parliaments should present themselves to

⁹² European Parliamentary Research Service, "States of emergency in response to the coronavirus crisis: Normative response and parliamentary oversight in EU Member States during the first wave of the pandemic," December 2020, p.4.

approval/disapproval. Furthermore, parliaments should continue their function and oversight over the acts, no matter during the emergency or ex-post.⁹³

Past discussions on emergency theory focus on the United States post 9/11 context with particular attention given to the war on terrorism. This thesis seeks to discover the interaction of the Covid-19-related emergency law and its effect on democracy and human rights by initially looking into the actual legal basis for emergency powers. As Anna Khakee has pointed out in her article “Securing Democracy? A Comparative Analysis of Emergency Powers in Europe,” the US, Canada, and Israel tend to leverage emergency powers as a tool to combat terrorism while European countries have a considerably different perspective on constitutional regulation of emergency powers. For example, most Western European countries contain very little on emergency powers; on the other hand, countries with unpleasant experiences with emergency powers and those with authoritarian history choose to have detailed constitutional rules to be applied in emergencies, especially Germany, Greece, and Central and Eastern Europe.⁹⁴ By looking into the legal basis of emergency laws, some countries have emergency power that is integrated into the constitutions; others have adopted emergency powers largely external to the legal framework; still others perform a dual track of emergency rules. Emergency regimes with a constitutional base are usually taken at a more serious level (Hungary for example); and emergency law stems from statutory law is considered a lighter mechanism (France for example). A “state of emergency” in this thesis, in a broad sense, refers to the emergency situation which is indicated in Article 15(1) of the European Convention on Human Rights (ECHR) that clarifies as a “...war or other public emergency threatening the life of the nation...” In a narrow sense, a state of emergency is only a sort of emergency regime revoked under a specific circumstance provided in a nation’s constitution, which usually concerns the external or internal military threat of a nation.

The observation of emergency powers in a country’s legislative framework also provides implications on whether there exists a special constitutional framing of public health emergencies. Let alone the Schmittean debate on the emergency powers being conceived of as extra-constitutional, it is widely accepted to date that most countries

⁹³ Ibid, p.8.

⁹⁴ Anna Khakee, “Securing Democracy? A Comparative Analysis of Emergency Powers in Europe,” *Policy Paper*, Geneva Center for the Democratic Control of Armed Forces (DCAF), p.8.

from the EU-27 embed emergency regulations to some extent into the constitution.⁹⁵ However, European constitutions differ in terms of their contents of emergency regulations, and the definition of “threats” also varies. In some countries, they solely focus on more “classical” threats such as foreign invasion and conventional warfare, while others include industrial incidents, natural disasters, or serious threats to the constitutional order.⁹⁶ Therefore this creates another question: provided that the emergency powers are regulated explicitly in the constitution, whether to revoke and which type of emergency regime is correspondent to the current health crisis? The suitability and correspondence of activating an emergency in response to the coronavirus in the first phase became the initial problem states faced during the first wave of the pandemic. For those constitutions equipped with an emergency clause, some chose not to activate one because of multiple concerns; one of them is the imbalance of power distribution between the executive and the parliament. The study of the nature of exceptional powers of the state is to discover the constitutional / legal power to decide on the declaration of a state of emergency and whether it requires a wholesale suspension of the law.⁹⁷ Under the exercise of the exceptional powers, government officials may implement procedures to protect or provide care for the affected population until the threat has diminished. Stephan Thomson and Eric C. Ip in their article “Covid-19 emergency measures and the impending authoritarian pandemic” called this administration a “constitutional pandemic” that is rising in tandem with the public health emergency powers and is the regression of governance to authoritarianism. “This ‘pandemic’ is constitutional because emergency powers, when abused, pose a grave challenge to the overarching objective of modern constitutionalism to limit state power in order to preserve liberty.”⁹⁸ They argued that three domains in which authoritarian governance has manifested most significantly are: the restrictions on personal movement, surveillance, and regression in healthcare ethics. In addition, the

⁹⁵ According to the European Parliamentary Research Service, “States of emergency in response to the coronavirus crisis: Normative response and parliamentary oversight in EU Member States during the first wave of the pandemic,” December 2020, 17 out of 27 Member States of the EU have constitutional emergency clauses suitable to respond to a pandemic, but not all of them chose to activate it.

⁹⁶ Ibid, p.8.

⁹⁷ Lars Vinx, "Carl Schmitt", The Stanford Encyclopedia of Philosophy (Fall 2019 Edition), Edward N. Zalta (ed.), <https://plato.stanford.edu/archives/fall2019/entries/schmitt/>.

⁹⁸ Stephen Thomson and Eric C Ip, “COVID-19 emergency measures and the impending authoritarian pandemic,” *Journal of Law and the Biosciences*, Volume 7, Issue 1, January-June 2020, Isaa064, <https://doi.org/10.1093/jlb/ljaa064>.

health crisis is a pretext for the enactment of excessive and disproportionate emergency measures, and the administrative overreach exists not only in more authoritarian / semi-authoritarian⁹⁹ regimes but also in liberal democracies. Attila Antal in “Hungary in state of exception: authoritarian neoliberalism from the Austro-Hungarian monarchy to the Covid-19 crisis” dives deeper into the emergency state in Hungary specifically. He sets out that the authoritarian nature of neoliberalism¹⁰⁰ has been fortified to an unprecedented extent due to the authoritarian turn of the state, and Covid-19 has unfolded this situation. The fundamental tool of Hungarian authoritarian neoliberalism is the permanent state of exception that overrules the normal legal and political norms and the exceptional measures enacted in response to the health crisis.¹⁰¹ Lee and Johnstone, focusing on the same issue of authoritarian populism during Covid-19 from a perspective of social work and the rights of marginalized groups, elaborate that “political responses to Covid-19 across the world have reinforced this authoritarian populism which has significantly reduced democratic freedoms and civil liberties, expanded psychological and physical borders and increased xenophobia or racism globally.”¹⁰² They pointed out emergency measures including the reinforced surveillance and border control were tools for authoritarian populists, xenophobic or nationalists to keep at bay “the others” who are deemed as threats.

Therefore, a hypothetical conclusion can be withdrawn: state powers given by the health emergency – no matter in liberal democracies or in more authoritarian countries – were changing the constitutional balance of the executive and the legislative by redistributing more power to the government, and excessive emergency measures with multiple restrictions on civil liberties created another worrisome situation of less democracy and more authoritarian governance.

⁹⁹ Here it referred to semi-authoritarian jurisdictions such as Cambodia and the Hong Kong Special Administrative Region of the PRC. And the liberal democratic countries referred to France and the United Kingdom.

¹⁰⁰ Antal argued that the democratic institutionalization has crashed in the 2008//2009 financial crisis and in the authoritarian turn of the Orbán regime in 2010. The authoritarian populism set the history of Hungarian neoliberalization in 2019.

¹⁰¹ Attila Antal, “Hungary in State of Exception: Authoritarian Neoliberalism from the Austro-Hungarian Monarchy to the Covid-19 crisis,” 15 May 2022, Lanham, Maryland: Lexington Books, ISBN: 1793652287.

¹⁰² Eunjung Lee and Marjorie Johnstone, “Resisting Politics of Authoritarian Populism during COVID-19, Reclaiming Democracy and Narrative Justice: Centering Critical Thinking in Social Work,” *International Social Work* 64, no. 5 (September 2021): 716–30. <https://doi.org/10.1177/00208728211011627>.

2.2 Emergency regimes during the Covid-19 health crisis (*WHEN*)

In the year 2020 when the coronavirus arrived in most European countries, governments responded by either launching an emergency regime or performing emergency measures under statutory laws. The different framing of an “emergency” under the national legislative structure played a role in the normative response.

Emergency within the European region comes in multiple forms, from disease outbreaks to political conflicts and natural disasters. The covid-19 health crisis has revealed again how vulnerable every continent in the world is when dealing with pandemics, which can have a long-term impact on personal health, society, and economies. More than 20,000 signals and warnings of potential health threats are detected in the European region every year according to the World Health Organization (WHO). And every typical year, disasters and emergencies are causing an estimated €10 billion economic loss and hundreds of death or severe illness.¹⁰³ A “Public Health Emergency of International Concern (PHEIC)” is defined by the WHO as:¹⁰⁴

“an extraordinary event which is determined to constitute a public health risk to other states through the international spread of disease and to potentially require a coordinated international response. This definition implies a situation that is

- serious, sudden, unusual or unexpected;
- carries implications for public health beyond the affected state national border; and
- may require immediate international action.”

WHO Director-General Tedros Adhanom Ghebreyesus gave his remark on the outbreak of the Covid-19 as unprecedented and said, “the only way we will defeat this outbreak is for all countries to work together in a spirit of solidarity and cooperation.”¹⁰⁵

¹⁰³ “About health emergencies in the European Region.” Health emergencies. World Health Organization Regional Office for Europe. <https://www.euro.who.int/en/health-topics/health-emergencies/pages/about-health-emergencies-in-the-european-region>.

¹⁰⁴ “What is a public health emergency of international concern?” Emergencies: International health regulations and emergency committees. World Health Organization. 19 December 2019. <https://www.who.int/news-room/questions-and-answers/item/emergencies-international-health-regulations-and-emergency-committees>.

¹⁰⁵ “... We have witnessed the emergence of a previously unknown pathogen, which has escalated into an unprecedented outbreak, and which has been met by an unprecedented response.” WHO Director-General’s statement on IHR Emergency Committee on Novel Coronavirus (2019-nCoV). 30 January 2020. [https://www.who.int/director-general/speeches/detail/who-director-general-s-statement-on-ihr-emergency-committee-on-novel-coronavirus-\(2019-ncov\)](https://www.who.int/director-general/speeches/detail/who-director-general-s-statement-on-ihr-emergency-committee-on-novel-coronavirus-(2019-ncov)).

A proposal of enabling an EU emergency response mechanism to take the partial decision on declaring a health emergency and coordinating EU-27 national plans to tackle the pandemic was later brought upon in the second half of the year 2020. However, upon the first wave of the Covid-19 outbreak on the European continent in March 2020, the European Commission was not given the power to declare an EU-level public health emergency but just rely on the WHO to declare such an emergency. This was because EU states have traditionally been reluctant to give powers to Brussels on this issue¹⁰⁶, as pointed out by Reuters in one of their reports in November 2020.

In addition, the problem of defining Covid-19 as an “emergency” is divergent because it relates to the emergency state level every country will take. Under Article 15 of the ECHR and its interpretation and of the European Court of Human Rights’ case-law¹⁰⁷, the natural and customary meaning of “public emergency threatening the life of the nation” is clear and refers to “an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organized life of the community of which the State is composed.” The interpretation of Article 15 of the ECHR also notes that “the Court’s case-law has never, to date, explicitly incorporated the requirement that the emergency be temporary and, indeed, the cases demonstrate that it is possible for a ‘public emergency’ within the meaning of Article 15 to continue for many years.”¹⁰⁸ Without a universal requirement and definition of when should a nation should revoke a public emergency, especially during the time of a global coronavirus pandemic, entering into an emergency state is merely a mechanism at the state’s disposal.

While some countries have resorted to the constitutional emergency level, which is perceived as the toughest and with risks of crippling the normal function of democracy, others chose to revoke a statutory-level emergency regime, and still others replied to the public health risk with special laws within the existing legislative

¹⁰⁶ Francesco Guarascio, “In blow to WHO, EU seeks powers to declare health emergencies,” Reuters, 11 Novemver 2020, <https://www.reuters.com/article/health-coronavirus-eu-reform-int-idUSKBN27R277>.

¹⁰⁷ Originally from “Lawless v. Ireland (no. 3),” 1961, § 28. See “Guide on Article 15 of the Convention – Derogation in time of emergency,” European Court of Human Rights, last updated on 31.12.2021, p.6, https://www.echr.coe.int/documents/Guide_Art_15_ENG.pdf.

¹⁰⁸ “Guide on Article 15 of the Convention – Derogation in time of emergency,” European Court of Human Rights, last updated on 31.12.2021, p.6, https://www.echr.coe.int/documents/Guide_Art_15_ENG.pdf.

framework and perform lighter mechanisms. Therefore, it is worth noting how the Covid-19 pandemic is perceived in different countries before diving into their actual pandemic measures.

2.3 Emergency laws are used to reduce democratic accountability and human rights (HOW)

Emergency powers are closely related to the constitutions that grant this exceptional power. Most countries in the world have set out laws in emergency times within their constitutional framework.¹⁰⁹ Victor V Ramraj and Menaka Guruswamy note that modern constitutionalism has formalized and institutionalized the principles limiting the power of the sovereign within a professional bureaucratic state, and the emergency powers can pose a serious challenge to it by limiting state powers. However, “unwritten political and social norms still play an important role in constraining government, even in times of emergency, in ways that are not always apparent on an exclusively positivist or normative account of law.”¹¹⁰ The declaration of a state of emergency or the kinds may suspend certain normal functions of government, may alert citizens to alter their normal behavior, or may authorize government agencies to implement emergency preparedness plans as well as to limit or suspend civil liberties and human rights.¹¹¹ Firstly, emergency powers have influences directly on the constitutional aspect and may restrict certain functions of democracy. Secondly, the reduction of democracy and the enlarging emergency power may have a synergy effect on human rights. The protection of fundamental rights and the preservation of the democratic society are intertwined in many aspects as a reason that human rights are only ensured in democratic political contexts. A constitutional dictatorship may be generated out of the abused emergency laws, causing a stepback of democracy and derogation of human rights. Therefore, it is

¹⁰⁹ In EU-27, 24 Member States have constitutions that provide for the possible declaration of an emergency state. However, not all of them applied to the health emergency. European Parliamentary Research Service, EPRS, “States of emergency in response to the coronavirus crisis,” Table-2 Member States with emergency state clauses in their constitutions, p.19,20. [https://www.europarl.europa.eu/RegData/etudes/STUD/2020/659385/EPRS_STU\(2020\)659385_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2020/659385/EPRS_STU(2020)659385_EN.pdf).

¹¹⁰ V.V. Ramraj and M. Guruswamy, ‘Emergency Powers,’ in M. Tushnet, T. Fleiner and C. Saunders (eds), “Routledge Handbook of Constitutional Law,” New York: Routledge 2013, p.110.

¹¹¹ “States of Emergency.” Backgrounder. Security Sector Governance and Reform. October 2005. https://www.files.ethz.ch/isn/14131/backgrounder_02_states_emergency.pdf.

inevitable to discuss unrestricted emergency power and its impact on democracy and human rights as wholesome.

Significant norms and standards related to democracy and human rights are embodied in the 1948 Universal Declaration of Human Rights (UDHR). Article 21(3) states that “The will of the people shall be the basis of the authority of government; this will be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.”¹¹² The links between democracy and human rights are interdependent, intricate, mutually supportive, and symbiotic. This is because a functional democracy that accommodates diversity, promotes equality, and protects individual freedoms is increasingly becoming the best bet against the concentration of power in the hands of a few and the abuse of human rights that inevitably results from it.¹¹³

To evaluate the influence of a country’s emergency laws on democracy, the parliament’s ratification of an emergency state and its check-and-balance is a vital mechanism that helps to guard and preserve democracy, together with the role of the judicial system. Particular attention needs to be given to the parliamentary role in declaring, extending, and terminating an emergency state through the observation of the legal basis of the emergency laws, which sets out the accountability and power distribution of the president, the executive, and the parliament during the exceptional situation. For instance, whether an emergency state is declared directly by the government (with the authorization given by the parliament or not) or by the national council through statutory laws? Most legal systems do not provide sole authority on the decision of declaring a state of emergency and require parliamentary ratification and executive justification with qualified votes.¹¹⁴ Furthermore, because an emergency state usually allows the government to rule by decree, whether the parliament is able to carry out normal functions during an emergency is a key factor in determining how much

¹¹² The Universal Declaration of Human Rights (UDHR) of 1948. Art. 21(3).
<https://www.un.org/en/about-us/universal-declaration-of-human-rights>.

¹¹³ Massimo Tommasoli. “Democracy and Human Rights: The Role of the UN.” September 2013. ISBN: 978-91-86565-89-3.
<https://www.idea.int/sites/default/files/publications/democracy-and-human-rights-the-role-of-the-united-nations.pdf>.

¹¹⁴ DCAF, “States of Emergency” Backgrounder on Security Sector Governance and Reform, Geneva: DCAF (Geneva Center for the Democratic Control of the Armed Forces), October 2005, p.3.

impact the emergency power has on normal democracy; these normal functions include the continued parliamentary meeting, parliamentary oversight, and judicial review of the normative response and emergency measures. In some countries, different categories of emergency states are performed according to the risk type (domestic or external / whether there is a need to revoke military forces, etc.) and even receive different-leveled parliamentary overview. Last but not least, the duration of the emergency regime and whether there exists a sunset clause for the emergency law and decree are also decisive in the preservation of democracy. Under a state of emergency, a nation may put restrictions on its economic, civil, or political activities due to this extraordinary circumstance, for example, by neutralizing political opponents or postponing elections. In this case, the emergency power may give reasons for the government to pursue self-serving purposes that are usually hard to achieve under normal circumstances, especially by means of a ruling by decree, and eventually pose a risk to democracy. Most countries and the constitutions allow the parliament to perform reviews at regular intervals to suspend or terminate the states of emergency when the risk no longer prevails to avoid long-lasting emergency regimes. To assess whether a country's emergency law and the execution of emergency power are corrupt or not, one can observe the *post hoc* accountability powers of parliament,¹¹⁵ which needs to be reassured in the emergency legal framework.

To figure out how the states may use states of emergency as a tool to reduce human rights and assess the impact of emergency powers on them, this thesis provides a perspective from the legal aspect by performing reviews on the constitution and states normative responses. As specified in Article 15 of the ECHR and Article 4(2) of the ICCPR, the emergency power should never step over the non-derogable rights, for instance, that everyone has the right to life, liberty, and security of person,¹¹⁶ and no one shall be held in slavery or subjected to torture are not ought to be derogated from¹¹⁷. Jane Kilpatrick addresses the conditions of derogating from the obligation of the ICCPR in her article and remarks: “states are permitted to unilaterally derogate from some

¹¹⁵ Ibid. These powers, according to the DCAF, are to conduct inquiries and investigations on the execution of emergency powers and to assess the government's behavior with an eye to identifying lessons learned for future emergencies.

¹¹⁶ The Universal Declaration of Human Rights (UDHR) of 1948. Art. 3.

¹¹⁷ The Universal Declaration of Human Rights (UDHR) of 1948. Art. 4, 5.

obligations under international covenants, but only temporarily, in exceptional circumstances, and only according to specific safeguards.¹¹⁸ Compared to the non-derogable rights, the emergency laws may enable the states to limit some human rights under an emergency situation, and this contributes to the discussion of this thesis.

Rights that are subject to some derogation measures might be:

- freedom of movement that is given to everyone to reside, leave and return to any country;¹¹⁹
- Freedom of peaceful assembly allowing everyone to join assembly and association without being compelled.¹²⁰
- Right to education as it contributes to the full development of the personality of a human being.¹²¹
- Freedom of expression and religion allows people to express their opinions and to manifest their religions in public.¹²²
- no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence.¹²³

These fundamental rights of individuals, which shall be ensured and empowered by the constitution in normal state affairs, can be at risk if it is overshadowed by the emergency powers. As Covid-19 raged on, even democratic governments have resorted to excessive surveillance, and discriminatory restrictions on personal freedoms, such as freedom of movement and assembly. Oppressive governments further sought arbitrary or violent enforcement of these restrictions by police and non-state actors.¹²⁴ When more and more countries declared emergency regimes and put on extraordinary measures to combat the virus, there were worldwide concerns that these measures are actually deviating from the development of human rights in the long term. Even though

¹¹⁸ Jane Kilpatrick, “When a Temporary State of Emergency becomes Permanent: France as a Case Study,” November 2020, published by Transnational Institute - www.tni.org Amsterdam, November 2020, p.5, https://www.tni.org/files/publication-downloads/france_and_the_states_of_emergency_online.pdf.

¹¹⁹ Art. 13 UDHR, Art. 12 ICCPR.

¹²⁰ Art. 20 UDHR, Art. 21 ICCPR.

¹²¹ Art. 26 UDHR

¹²² Art. 18, 19 UDHR, Art.19 ICCPR.

¹²³ Ibid. Art. 12.

¹²⁴ Freedom in the World 2022. Democracy Under Siege. Freedom House.

these rights are subject to be restrained, states are not allowed to disrespect these rights at will. On the opposite, the derogation of human rights shall be carefully analyzed and negotiated with the state parties¹²⁵. This is because there is a danger that the nation may leverage the condition to implement unwarranted restrictions on human rights and civil liberty and result in a “constitutional dictatorship¹²⁶,” for instance, there has been a tendency that some countries to maintain states of emergency for decades even after the original reason for its proclamation has dissolved. With a focus on emergency laws in response to the Covid-19 pandemic, this thesis seeks to discover whether the state uses emergency powers to limit democracy and fundamental rights. Under a state of emergency, the existing political forms are suspended or have to make concessions to the emergency state of a nation. By investigating emergency laws and normal responses, we try to find out if there is any clue of performing unhindered by timely legal checks to the extraordinary powers and the agencies during the public health crisis.

¹²⁵ For example, in any cases of derogation from the ECHR, the state must inform the Secretary-General of the Council of Europe of the measures and the reasons it has taken for.

¹²⁶ A constitutional dictatorship is a system or subsystem of a constitutional government that bestows on a certain institution the right to make binding rules, directives, or decisions and supply them to concrete circumstances unhindered by timely legal checks to their authority. Levinson, Sanford. *Constitutional Dictatorship: Its Dangers and Its Design*. Minnesota Law Review. 94. 2010.

3. France: emergency laws within the national legislative framework

In the EU-27, the majority of Member States enacted either a constitutional state of emergency or a statutory emergency regime to establish a mechanism in response to the coronavirus pandemic in the first year. A minority of Member States enabled governments to adopt containment measures through the special or ordinary legislation.¹²⁷ France, for example, has declared a statutory emergency regime instead of a constitutional regime to address the health risk. A statutory emergency regime usually lasts a duration from 10 days to 90 days among the EU MS¹²⁸ and is generally renewable. Hungary, however, has put on a dual track of a constitutional emergency and a statutory regime to tackle the coronavirus pandemic.

In this chapter, a legal comparison of French and Hungarian emergency laws will be conducted. Emergency powers are usually embedded in the constitutions, and if not exhaustive, statutory laws provide further explanations. So I rely on the constitution itself, the country's healthcare legislation, public reports, and academic reviews regarding emergency regimes to investigate the emergency legal framework and generate the following conclusion. Firstly, the constitution of France and Hungary provide the legal basis as follows: defining a state of emergency, the power authority and the exceptional situations to declare an emergency regime and the power exercises of the legislative and the government during this time. Secondly, in both constitutional contexts of France and Hungary, emergency regimes are proclaimed according to the constitutional categorization of different emergency situations and the time of activating it, such as an external armed threat, an internal political turmoil, or natural disasters. Thirdly, the Covid-19 pandemic is perceived differently at each nation's legislative levels as an emergency or a health risk, which had affected the level of declaring an emergency regime. For instance, France launched an unusual state of "public health emergency" via a new law under the Public Health Code; the Hungarian government, on the other hand, declared a paralleled "state of danger" at the constitutional level and a lighter mechanism "state of medical crisis" according to the Health Care Act. In

¹²⁷ During the first wave of the coronavirus crisis in Europe, which lasted from March 2020 to mid-June 2020, 19 EU MS resumed to emergency regimes and 8 MS adopted containment measures through the special or ordinary laws.

¹²⁸ European Parliamentary Research Service, "States of emergency in response to the coronavirus crisis: Normative response and parliamentary oversight in EU Member States during the first wave of the pandemic," December 2020, p.I.

addition, the Covid-19-related normative responses in both countries have enabled the government to rule by decree and issue measures, which tended to limit freedom and the normal function of democracy. Therefore, the extent of parliamentary control over government decrees and emergency measures that are taken purportedly responding to the health risk shall not be overlooked in regard to evaluating the impact of these mechanisms on democracy and fundamental rights.

3.1 French legal basis for emergency powers

Constitutional framework of emergency situations in France is regulated in the French Constitution (1958) and the primary law. The need to deal with an exceptional situation, such as the existence of a domestic public disorder or external threat, may be fulfilled by virtue of launching a constitutional emergency state. This includes the state of siege, the state of emergency, or exceptional powers to the president, according to applicable circumstances.

France, instead of issuing any constitutional emergency regime, declared a statutory regime in response to the first wave of the Covid-19 pandemic in March 2020. Statutory regimes are considered as legal regimes provided in primary law in the field of health or civil protection and that allow the adoption of a range of predetermined measures of an exceptional character to contain situations such as a health crisis.¹²⁹ France decided not to assert a constitutional regime because, on the one hand, the state of siege and the exceptional powers to the president— both are emergency states listed under article 36 and article 16 respectively in the constitution – presupposed dealing with the existence of external violence or armed threat that requires the presidential powers to ensure the independence and the integrity of the state. On the other hand, a state of emergency, which provides a basis for emergency measures taken by the government under certain circumstances such as tackling social unrest or public calamity, is, however, arguably not suitable or can be applied to the health risk like the coronavirus. In other words, France may in principle declare a constitutional state of emergency, but the pandemic does not fall specifically into any of the categories or notions. As a result, the declaration of a statutory regime becomes a suitable legislative tool at the government’s disposal. Under the statutory framework, France has declared a

¹²⁹ Ibid, p.25.

state of public health emergency created *ad hoc* and *ex novo* to tackle the spread of the first wave of coronavirus by Law No. 2020-290 of 23 March 2020.¹³⁰

Statutory regimes generally consist of arrangements derogating from ordinary judicial making processes in order to accelerate fast normative production and create the legal basis for entrusting the executive or specific authority to adopt containment measures. This means a statutory regime may lead to decision-making procedures that deviate from the usual legislative manner. Overall, the statutory regime, compared to the constitutional state of emergency, is believed to be with containment measures that are less invasive and a lighter emergency mechanism.

3.2 Types of emergency powers under the constitutional framework

There are three provisions of emergency powers in France: “exceptional powers to the president,” which is constitutional-instituted; “state of siege,” which is stated in the constitution and in the defense Code (*Code de la défense*), and the “state of emergency,” which is regulated originally in the 1955 “*Loi instituant un état d’urgence*” and later foreshadows the constitution. In addition to their diverse origins, the three emergency powers have received different intensities of institutional check and balance, for example, the state of siege and the state of emergency received more systemic counter-balance while the exceptional powers granted to the president are less framed by it.

3.2.1 Exceptional powers to the president (“*pouvoirs exceptionnelles*”)

Article 16 of the French Constitution (1958) has granted the president an exceptional power in specific events as follows:

“Where the institutions of the Republic, the independence of the Nation, the integrity of its territory or the fulfillment of its international commitments are under serious and immediate threat, and where the proper functioning of the constitutional public authorities is interrupted, the President of the Republic shall take measures required by these circumstances, after formally consulting the Prime Minister, the Presidents of the Houses of Parliament and the Constitutional Council.”¹³¹

¹³⁰ LOI n° 2020-290 du 23 mars 2020 d'urgence pour faire face à l'épidémie de covid-19. See explanation in Chapter 3.3.

¹³¹ Article 16, “Constitution of October 4, 1958,” English website of the French National Assembly, *Assemblée Nationale*,

A serious and important threat to the independence and the integrity of the nation, which interrupts the regular functioning of the constitutional public power will activate the exceptional power to the president. The exceptional power entitles the president to issue emergency measures to tackle the above-mentioned risks. Before taking necessary measures, the President shall consult the Prime Minister, the presidents of both chambers and the Constitutional Council for opinion, though, in theory, the opinions of these institutions are not binding to the decision of the French president.

Under the exercise of such powers, exceptional measures shall be introduced by the president for the constitutional public authorities to carry out their duties and react in a swift and efficient manner to tackle the risk, and the Constitutional Council shall be informed of these measures. The exceptional powers may be invoked for a period of 30 days; and before retrieving the powers from the president, an examination of whether the situation persists and the proportionality of the use of the exceptional powers shall be performed by the Constitutional Council.¹³² Apart from the other types of emergency that yield most powers to the government (or the military authorities and the executive branch), the exceptional powers give the president a *carte blanche* of legislative and executive power. Therefore, this type of emergency power appears to receive less systemic counter-balance and wider powers.¹³³ The same article of the constitution states that during the exercise of such emergency powers, the parliament shall sit as of right, and the National Assembly shall not be dissolved. This means the president can grip the exceptional power even when the parliament is functioning and the normal structure of government sustains. Therefore, the Council of State (*Conseil d'État*) has doubted the elements of Article 16 for any necessary alterations to the system after the constitutional review. And because exceptional powers to the president are considered hard-regulated and formidable, this led to the combination of two emergency powers: the state of emergency and the state of siege for more checks and balances and for the

<https://www2.assemblee-nationale.fr/langues/welcome-to-the-english-website-of-the-french-national-assembly>.

¹³² “After thirty days of the exercise of such emergency powers, the matter may be referred to the Constitutional Council by the President of the National Assembly, the President of the Senate, sixty Members of the National Assembly or sixty Senators, so as to decide if the conditions still apply.” Article 16, “Constitution of October 4, 1958,” English website of the French National Assembly, *Assemblée nationale*, <https://www2.assemblee-nationale.fr/langues/welcome-to-the-english-website-of-the-french-national-assembly>.

¹³³ Anna Khakee, “Securing Democracy? A Comparative Analysis of Emergency Powers in Europe,” *Policy Paper*, Geneva Center for the Democratic Control of Armed Forces (DCAF), p.23-24.

protection of human rights.¹³⁴ The exceptional powers were once activated by President Charles de Gaulle in 1961 in reaction to the Generals' putsch (*Putsch des généraux*)¹³⁵. Under the declaration of this exceptional state, the Head of State has total discretion to make decisions in emergency situations according to the Council of State.

3.2.2 State of siege (“*L'état de siège*”)

A state of siege shall be declared by the government under the immediate threat of a foreign war or an armed insurrection. As regulated in Article 36 of the French Constitution and Article L2121-1 of the *Code de la défense* (defense Code), a state of siege must be decreed in the Council of Ministers and with the presidential signature. It can only be implemented on part of the territory so the decree shall specify the territory to which it applies.¹³⁶ The proclamation of a state of siege shall remain for a period of 12 days, and it may be prolonged if authorized solely by the parliament. The declaration of a state of siege implies a transfer of certain powers from the civilian to the military authority and the policing force with an eye to maintaining public order.

The major effect of declaring a state of siege is the power transfers to military and police authorities to carry out emergency measures such as restrictions on freedom of movement and assembly of civilians, censorship on press media, and police search of peoples' houses at any time. Certain rights may be limited or suspended under this circumstance. Police powers are increased while judicial powers in criminal law cases and in cases where the military authorities are being undermined.¹³⁷ The state of siege was created in its current form by the law of April 3, 1878, and was once declared during the First and Second World Wars but has yet to be proclaimed by the Fifth Republic.

¹³⁴ Ibid.

¹³⁵ Also known as the Algiers putsch of 1961, was a failed coup d'état intended to force French President Charles de Gaulle not to abandon French Algeria.

¹³⁶ “L'état de siège ne peut être déclaré, par décret en conseil des ministres, qu'en cas de péril imminent résultant d'une guerre étrangère ou d'une insurrection armée. Le décret désigne le territoire auquel il s'applique et détermine sa durée d'application.” Article L2121-1, Code de la Défense, available in Légifrance at: https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000006539784.

¹³⁷ Anna Khakee, “Securing Democracy? A Comparative Analysis of Emergency Powers in Europe,” *Policy Paper*, Geneva Center for the Democratic Control of Armed Forces (DCAF), p.22.

3.2.3 State of emergency (“*L’état d’urgence*”)

The state of emergency was regulated in *Loi n° 55-385 du 3 avril 1955 relative à l’état d’urgence*, or the Law of 1955 Related to the State of Emergency, which later predated the constitution. Under Article 1 of the *Loi n° 55-385 du 3 avril 1955 relative à l’état d’urgence*, it states the events of declaring a state of emergency and where it can have effects. A state of emergency shall be proclaimed by a decree of the Council of Ministers¹³⁸ over all of the French territory or in a part of the country including the non-metropolitan (France *départements et régions d’outre-mer*) in events of imminent danger due to serious assaults on the public order or in situations that can be linked to a public calamity.¹³⁹ Resemble the state of siege, a state of emergency could be prolonged if authorized by the parliament at a set and definitive length after the initial 12 days of proclamation. The government decree issued during a state of emergency enables the Minister of Interior and local or regional authorities to carry out emergency measures, such as restricting public gatherings, imposing curfews and house arrests for any possible weapons seizure, press media censorship, or limiting other conducts that disturb the public order. The parliament must be informed of the measures taken by the government and may request further information on those at its disposal.

There are similarities between a state of siege and a state of emergency, for example, they both restrict partial enjoyment of human rights such as the freedom of movement, limited public gatherings, and restrained freedom of media. Furthermore, government authorities may close public spaces and set up security zones in response to the breach of public order. Different from the number of times of the activation of the state of siege, the state of emergency has been issued several times in French history.¹⁴⁰ The most recent declaration of a state of emergency was to respond to the terrorist attack in Paris in 2015, which had been extended four times until the adoption of the

¹³⁸ Article 2, *Loi n° 55-385 du 3 avril 1955 relative à l’état d’urgence* (Law of 1955 related to the state of emergency). <https://www.legifrance.gouv.fr/loda/id/JORFTEXT000000695350/>.

¹³⁹ “L’état d’urgence peut être déclaré sur tout ou partie du territoire métropolitain, des départements d’outre-mer, des collectivités d’outre-mer régies par l’article 74 de la Constitution et en Nouvelle-Calédonie, soit en cas de péril imminent résultant d’atteintes graves à l’ordre public, soit en cas d’événements présentant, par leur nature et leur gravité, le caractère de calamité publique.” Article 1, *Loi n° 55-385 du 3 avril 1955 relative à l’état d’urgence* (Law of 1955 related to the state of emergency). <https://www.legifrance.gouv.fr/loda/id/JORFTEXT000000695350/>.

¹⁴⁰ 1955 during the most important decolonization war with Algeria, 1984 in New Caledonia, and 2005 for the civil riots in the suburbs of Paris and other cities in France.

2017 anti-terrorism law.¹⁴¹ The long-held situation of an emergency state received nationwide criticism because it created a *de-facto* permanent emergency regime for almost two years.¹⁴² This has also contributed a factor for the government to ponder whether the nation should declare an emergency state again to deal with the first outbreak of the coronavirus in 2020.

3.3 Covid-19 pandemic within the national legislative framework

3.3.1 A “public health emergency” (*l'état d'urgence sanitaire*) and the Public Health Code

Even though the French Constitution frames special circumstances that allow the issue of a state of emergency, France did not withstand the possibility to apply any emergency state to the Covid-19 health crisis. In addition, it preferred a lighter mechanism than the constitutional mechanism in the first wave of the pandemic for the latter is perceived as too repressive. On 23 March, 2020, French Parliament adopted “Law No. 2020-290 on urgent measures” (*LOI n° 2020-290 du 23 mars 2020 d'urgence pour faire face à l'épidémie de covid-19*) under the statutory framework of the Public Health Code. And the Council of Ministers later declared¹⁴³ a nationwide “public health emergency” by decree for two months. This additional law has empowered the executive to act by ordinance on certain objectives. And because there was no previous provision for the state of emergency and Covid-19 was considered a specific case for its unprecedented existence, Article 4 of Law No. 2020-290 declared directly a two-month length of the state of public health emergency (instead of one month in case of the ordinary state of emergency):

¹⁴¹ Law No. 2017-1510, or the new anti-terrorism legislation.

¹⁴² European Parliament, “States of emergency in response to the coronavirus crisis: Situation in certain Member States,” June 2020, available at: [https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/649408/EPRS_BRI\(2020\)649408_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/649408/EPRS_BRI(2020)649408_EN.pdf).

¹⁴³ Article 2, Law No.2020-290 of 23 March 2020 (*LOI n° 2020-290 du 23 mars 2020 d'urgence pour faire face à l'épidémie de covid-19*), available at: <https://www.legifrance.gouv.fr/loda/id/JORFTEXT000041746313/>.

*“Par dérogation aux dispositions de l'article L. 3131-13 du code de la santé publique, l'état d'urgence sanitaire est déclaré pour une durée de deux mois à compter de l'entrée en vigueur de la présente loi.”*¹⁴⁴

If the state of public health emergency shall be prolonged, it is the legislator who may decide, and it should be done by another law with the possibility beyond one-month length.

The Public Health Code (*Code de la santé publique*) provides a legal basis for the above law and the following sanitary measures, including emergency financial and electoral measures. The Minister of Health is entitled to take proportionate and appropriate actions “in the event of a serious health threat requiring emergency action”¹⁴⁵ by Article L3131-1 of the Public Health Code; and Article L3131-12 states that “a [public health] emergency can only be declared ‘in the case of a public health catastrophe that puts the population's health in danger due to its serious nature.’”¹⁴⁶ According to Article L3131-19, a public health emergency state shall be declared by decree in the Council of Ministers, on the report by the Health Minister defended by *de facto* and *de jure* justifications.¹⁴⁷

¹⁴⁴ Article 4, Law No.2020-290 of 23 March 2020 (*LOI n° 2020-290 du 23 mars 2020 d'urgence pour faire face à l'épidémie de covid-19*), available at: <https://www.legifrance.gouv.fr/loda/id/JORFTEXT000041746313/>.

¹⁴⁵ Article L3131-1, Code de la santé publique : Chapitre Ier bis : Etat d'urgence sanitaire, “En cas de menace sanitaire grave appelant des mesures d'urgence, notamment en cas de menace d'épidémie, le ministre chargé de la santé peut, par arrêté motivé, prescrire dans l'intérêt de la santé publique toute mesure proportionnée aux risques courus et appropriée aux circonstances de temps et de lieu afin de prévenir et de limiter les conséquences des menaces possibles sur la santé de la population.” https://www.legifrance.gouv.fr/codes/section_lc/LEGITEXT000006072665/LEGISCTA000006171181/20-03-24/#LEGISCTA000041748550.

¹⁴⁶ Article L3131-12, Code de la santé publique : Chapitre Ier bis : Etat d'urgence sanitaire, “L'état d'urgence sanitaire peut être déclaré sur tout ou partie du territoire métropolitain ainsi que du territoire des collectivités régies par les articles 73 et 74 de la Constitution et de la Nouvelle-Calédonie en cas de catastrophe sanitaire mettant en péril, par sa nature et sa gravité, la santé de la population.” Council of Constitution, <https://www.conseil-constitutionnel.fr/en>.

¹⁴⁷ Provided by Article L. 3131-19, the justifications can be scientific data that a Council of Ministers' decision is grounded. Here makes a difference between the general state of emergency (regulated under Law 55-385) and the public health emergency state, which is the former requires no specific justifications.

Article 38 of the French Constitution¹⁴⁸ provides that, in order to implement its program, the government may issue orders/ordinances after being granted with authorization by the parliament. These orders/ordinances shall be issued in the Council of Ministers after consultation with the Council of the State (*Conseil d'État*) and may be ratified in explicit terms after the ratification bill succeeds to table before parliament by the date set by the enabling law. The same idea for any amendment of orders, they should be amended solely by the act of parliament under the framework of the statute law.

From the perspective of the ordinary law, the Public Health Code allows the Prime Minister to take on measures¹⁴⁹ during a state of a public health emergency, which are limited to ten and can include provisions such as restriction of people's mobility or the movement of any means of transportation, isolation of individuals, or even contemporary price control and requisition of certain products or services necessary for combating the public health catastrophe. The Prime Minister may issue decrees¹⁵⁰ that set up details of those restrictive measures as well while, as any decree, they may be challenged before the usual administrative courts. Generally speaking, a public health emergency can be declared for a period of one month and may be extended by a law that sets the duration by parliamentary votes after the consultation of the Committee of Scientists.¹⁵¹ The Committee of Scientists is a scientific advisory board composed of doctors and experts in infectious diseases and epidemiology, and it plays a role in providing recommendations for the government's decisions on pandemic measures. When the time shall a public health emergency cease to exist, it should be terminated by the Council of Ministers before its expiry. Most recently, attention is given to the adoption of a public health emergency that must be strictly proportional to the public health risks faced and can end in no time when the situation no longer

¹⁴⁸ The Government may, for the execution of its program, ask Parliament for authorization to take by ordinance, for a limited period, measures which are normally within the domain of the law. Article 38, French Constitution of October 4, 1958, English version provided by Constitutional Council is available at: https://www.conseil-constitutionnel.fr/sites/default/files/as/root/bank_mm/anglais/constiution_anglais_oct_2009.pdf.

¹⁴⁹ Article L. 3131-15, Code de la santé publique.

¹⁵⁰ Ibid.

¹⁵¹ Article L. 3131-19. See also Decision no. 2020-800 DC of 11 May 2020 "Law extending the public health state of emergency and rounding out its provisions" by the Council of Consitution, <https://www.conseil-constitutionnel.fr/en/decision/2020/2020800DC.htm>.

persists or meet no condition of an emergency. Furthermore, the Council of State is responsible for ensuring that the measures are appropriate, necessary, and proportionate to the health objective they are pursuing.

3.3.2 Extension of a state of health emergency by Law 2020-546

The extension of the “additional” Law 2020-290 – which was made specifically for the Covid-19-related power organizations of authorities – is subject to judicial review. The Constitutional Council accepted the submission of the law on extending the length of the state of emergency on 9 May 2020. An extension of the state of public health emergency was finally made under Law No. 2020-546 (*LOI n° 2020-546 du 11 mai 2020 prorogeant l'état d'urgence sanitaire et complétant ses dispositions*) on 11 May 2020 and would last the effect until 10 July 2020¹⁵². Instead of declaring by a government decree, the extension of a Covid-19-related state of public health emergency was declared by virtue of the operation of another law.

3.4 Normative response to the Covid-19 pandemic and containment measures

During the first wave of the Covid-19 pandemic, French major policy response was a full lock-down that revealed insufficient preparedness for the disease and a lack of provisions for healthcare. Policy measures responding to the second wave of the pandemic evolved into a strategic one with broader considerations of the nation's socio-economic conditions.¹⁵³

3.4.1 February 2020 - March 2020: “the nation is at war”

The first Covid-19 patient in French territory was reported on 24 January and the first fatality was noticed on 15 February, both of which had connections tracing back to Chinese traveling history. Although several clusters of contamination of coronavirus were detected, it was still early for the government to assess the impact of public health, economy, and society. A national consensus around strong measures had been established regarding the situation unfolded. However, no policy framework was

¹⁵² Following the Public Health Law and same as the previous Law 2020-290, the state of public health emergency may be terminated in advance by decree of the Council of Ministers with the opinion of the Committee of Scientists.

¹⁵³ Zeynep Or et al, “France's response to the Covid-19 pandemic: between a rock and a hard place,” *Health economics, policy, and law* vol. 17,1 (2022): 14-26. doi:10.1017/S1744133121000165.

prepared at this time period to combat the fast spread of the virus until it reached a high peak later in mid-March. Policy measures from 23 February, when the government launched the first-stage action, until 11 March were composed of travel restrictions, self-quarantine, and the ban on public gatherings with the purpose of stopping the introduction of coronavirus on the national territory.¹⁵⁴

On 12 March, President Macron announced the nation is “at war¹⁵⁵” in a public speech addressing the challenge of the health crisis. Following this public announcement, social restrictions had been imposed by the government.¹⁵⁶ The French Minister of Health adopted the first pandemic-related decree and measures on March 14 on the basis of Article L3131-1 of the Public Health Code, which regulated the competencies of public health authorities. The ministerial decree of 14 March¹⁵⁷ prohibited public access to activities and gatherings with more than 100 people in closed or open areas. Following decrees also ordered travel restrictions across the Schengen Area’s internal borders and the closure of nurseries and educational institutions. According to the press release¹⁵⁸ by the Ministry of the Interior, the French border was closed from 18 March following the Act of 11 March on travel restrictions. A mass lockdown¹⁵⁹ and closure of stores and public facilities were put on from 18 March onwards “until further notice” together with fines and sentences in prison for rule

¹⁵⁴ Ibid.

¹⁵⁵ This terminology resembled President François Hollande’s speech in 2015 in responding to the terrorist attack in Paris, where a state of emergency was called upon to secure public order.

¹⁵⁶ France 24, “Macron announces 15-day lockdown in French ‘war’ on coronavirus,” 16 March 2020, available at: <https://www.france24.com/en/20200316-live-france-s-macron-addresses-nation-amid-worsening-coronavirus-outbreak>.

¹⁵⁷ Order of March 14, 2020 on various measures relating to the fight against the spread of the covid-19 virus (Arrêté du 14 mars 2020 portant diverses mesures relatives à la lutte contre la propagation du virus covid-19), available at: <https://www.legifrance.gouv.fr/loda/id/JORFTEXT000041722917/>.

¹⁵⁸ France Diplomacy, Travel Restrictions and Implementation of Public Health Measures at Borders - Press release issued by the Ministry of the Interior, the Ministry for Europe and Foreign Affairs and the Ministry for Solidarity and Health, available at: <https://www.diplomatie.gouv.fr/en/coming-to-france/coming-to-france-your-covid-19-questions-answered/coronavirus-statements/article/travel-restrictions-and-implementation-of-public-health-measures-at-borders>. The travel ban remained effect as the extension of the state of public health emergency until June 2020.

¹⁵⁹ Decree No.2020-260 (Décret n° 2020-260 du 16 mars 2020 portant réglementation des déplacements dans le cadre de la lutte contre la propagation du virus covid-19) has ordered the compulsory confinement of all citizens for at least two weeks.

breakings. Priority was set to save more lives by stopping the spread of coronavirus, however, it was achieved at high social and economic costs.

3.4.2 March 23, 2020 - July 10, 2020: “Law No. 2020-290” and the state of public health emergency

The “Law No. 2020-290 on urgent measures” of March 23 created a novel state of public health emergency and specified powers and competences of authorities during this statutory emergency regime. The state of public health emergency then was declared by the Council of Ministers by decree. The Prime Minister was entitled to implement specific measures with regard to combating the spread of coronavirus and issue decrees in health issues. This was considered a more centralized and top-down mechanism than former responses while decision-making at local (*département*) or municipal levels different from the national emergency legislations were prohibited.

During the first phase of the Covid-19 pandemic in France, decree No. 2020-293 was claimed on 23 March with restrictive measures of the freedom of movement, lockdowns, price control of certain goods and products necessary to address the health disaster, and the closure of public establishments, except for those offering essential goods and services.¹⁶⁰ Due to the legislative hierarchy, Law No.2020-290 gave the government permission to use ordinances to adapt the French legislation, for example, the government decree may concern the limitation of termination of employment, which rights shall be protected in the labor law, to mitigate the effects of the decline in labor activities due to the pandemic and to facilitate a more flexible contract. Another example is given to the economic and business measures, in which the government may step in company laws to assist financially or permit the postponements of small businesses’ payments to their employees and rents to withdraw the interrupted economic activities by the pandemic. The government had adopted 25 ordinances covering various issues solely on 25 March.

The first lockdown was brought to an end on 11 May, and the prolongation of the state of public health emergency was made on the same day by Law No.2020-546. Provisions related to the extension of the state of public health emergency were

¹⁶⁰ Decree No 2020-293 dated 23 March 2020, available in French at <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000041746694&categorieLien=id>.

validated by the Constitutional Council helping to deal with challenges following the first lockdowns and to launch new IT tools to ease the spread of the Coronavirus.¹⁶¹ Amendments of certain public health provisions¹⁶² related to the emergency regime were adopted; these include the adjustments of unintentional criminal liability in Criminal Code, the completion of the Prime Minister's power to regulate by decree, the limit on the access of transport, services and goods needed to combat the virus, and the insertion of quarantine measures and isolation maintenance for persons traveling from specific territories.

A state of public health emergency was lifted on 10 July with Law No.2020-856 of 9 July 2020 organizing the end of the state of public health emergency,¹⁶³ which provided arrangements for the exit of this emergency. A “transitional regime” for ending the first state of public health emergency was launched, which allows the Prime Minister and the Prefects to take measures at their disposal when needed to curtail any revived spread of the virus. Although Covid-19 cases were under control¹⁶⁴ as a result of the imposition of the first lockdown, any health arrangements, including nationally or regionally reimposing a state of public health emergency, could be taken at any time if the health condition in France deteriorated.

3.4.3 October 17, 2020 - February 16, 2021: second establishment of a state of public health emergency

A rapid increase of Covid-19 cases appeared in October, making a surge back in hospitalization and a heavy burden on the medical system. As hard-pressed by the

¹⁶¹ “Presentation of Law No. 2020-546 of 11 May 2020 extending the state of public health emergency and supplementing its provisions,” 18 May 2020, available at: <https://www.gide.com/en/news/covid-19-presentation-of-law-no-2020-546-of-11-may-2020-extending-the-state-of-public-health>.

¹⁶² Amendments of the provisions mentioned are as follows: Article L.3136-2 of the Public Health Code concerning the application of Article 121-3 of the Criminal Code in the crisis situation that justifies the public health emergency; Article L.3131-15 of the Public Health Code concerning the measures taken by the Prime Minister to order the requisition of persons, goods and services; Article L.3131-15 of the Public Health Code specifies the arrangements of quarantine duration, places, monitoring and restrictions.

¹⁶³ “LOI n° 2020-856 du 9 juillet 2020 organisant la sortie de l'état d'urgence sanitaire,” available at: <https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000042101318/>.

¹⁶⁴ Official figures showed that the situation in France is now judged to be “under control” as the number of cases had dropped from 7,000 people in intensive care in April to less than 1,000 people per day. <https://www.connexionfrance.com/article/French-news/Covid-19-coronavirus-epidemic-now-under-control-in-France-Top-scientist-Professor-Jean-Francois-Delfraissy>.

scientific committee, France re-established a state of public health emergency to last at least until February 2021. In mid-November, France had the prevailing number of confirmed cases of Covid-19 over the European territory.¹⁶⁵ Prime Minister Jean Castex said in public that France was in the midst of the second wave of the virus.

Regarding Article L.3131-13 of the Public Health Code, the second implementation of a state of public health emergency was declared by Decree No.2020-1257 of 14 October 2020 on declaration of the state of public health emergency¹⁶⁶ from 17 October 2020 on a national scale. A reimplement of mass lockdown began from 30 October 2020 to 15 December 2020 followed by a curfew from 6 pm to 6 am until 15 January 2021. Closures of public schools, theaters, and museums were reintroduced while pensions and imprisonment were executed on offenders. On 14 November, Law No.2020-1379 further extended the state of public health emergency until 16 February 2021 and authorized various measures for managing the health crisis.¹⁶⁷ In general, the law broadened the scope of medical tests included in the collection of personal data by information systems in the contexts of patient monitoring and contact tracing.¹⁶⁸ In addition, the law authorized the government takes measures by ordinance to restore the application of the provisions taken during the first wave of the pandemic, particularly those relating to the procedures before administrative and judicial courts, employment laws, and public aid to severely impacted companies. The law set up new mechanisms to protect businesses closed due

¹⁶⁵ According to the French Public Health Agency, France in mid-November had one of the highest prevalence of Covid-19 in Europe, with more than 2 million confirmed cases.

¹⁶⁶ “*Décret n° 2020-1257 du 14 octobre 2020 déclarant l'état d'urgence sanitaire,*” available at: <https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000042424377>.

¹⁶⁷ The second establishment of the state of public health emergency was extended twice by two separated laws in November 2020 and February 2021 respectively. “*LOI n° 2020-1379 du 14 novembre 2020 autorisant la prorogation de l'état d'urgence sanitaire et portant diverses mesures de gestion de la crise sanitaire,*” available at: <https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000042520662>. An additional “*LOI n° 2021-160 du 15 février 2021 prorogeant l'état d'urgence sanitaire*” declared on 16 February 2021 extended again the state of public health emergency until 1 June 2021. Also available at: https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000043134078?init=true&page=1&query=loi+2021-160&searchField=ALL&tab_selection=all.

¹⁶⁸ “Presentation of Law No. 2020-1379 of 14 November 2020 authorizing the extension of the state of public health emergency and introducing various measures to manage the health crisis,” 20 November 2020, Guide Loyrette Nouel, <https://www.gide.com/en/news/covid-19-presentation-of-law-no-2020-1379-of-14-november-2020-authorising-the-extension-of-the>.

to lockdowns with measures favoring payment of invoices and so on.¹⁶⁹ At the same time, the transitional regime launched by Law No.2020-856 9 July 2020 organizing the end of the (first) state of health emergency would be extended until 1 April 2021 to the entire country after the second state of public health emergency ended in February.¹⁷⁰

In conclusion, during the first and the second wave of the pandemic, the French public health authority was able to conduct uniformly nationwide emergency measures through the declaration of public health emergency.¹⁷¹ However, the consensus on imposing a lockdown was fractured, and it highlighted the bureaucracy in the communications between the Ministry of Health and local authorities and showed structural frictions between the central government and the prefectures. This had generated effects on the following year's pandemic strategies, which, in people's opinion, lacked coherence for not being nationwide anymore but adapting to regional pandemic conditions.

3.5 Emergency powers and parliamentary control

It is believed that parliamentary oversight over French statutory regimes during the pandemic was comparatively intense. The declaration and extension of a state of public health emergency are subject to parliamentary approval. This is to say, the creation of the state of public health emergency was made by virtue of law (Law No.2020-290), and the length was set up specifically for a period of two months and may only be extended by the legislator and through a new law.¹⁷² Even upon the state of public health emergency being lifted, it is required to end via statutory law. However, it is not stringent enough to say that the declaration of the state of public health emergency was subject to French judicial review – if not constitutional control¹⁷³ – because the

¹⁶⁹ The government had issued a decree applicable retroactively to 17 October 2020 specifying the eligibility criteria for companies.

¹⁷⁰ Ibid.

¹⁷¹ Compared to the other waves of the pandemic in the years 2021 and 2022, the government only introduces measures at regional levels.

¹⁷² In the French case, the Covid-19-related emergency state is declared by the law itself, not by a government decree such as the case in Hungary.

¹⁷³ As noted by the Venice Commission, the authority did not refer the law declaring a state of public health emergency (Law No.2020-290) to the Constitutional Council, which is the sole authority to control law before its enactment. The prior control procedures are stated in Article 61-1 of the Constitution, specifically referring to statutory provisions that might infringe the rights or freedoms guaranteed by the

declaration itself was via law and therefore was excluded from judicial challenge. The emergency measures adopted during the emergency state, on the other hand, are subject to judicial review.

The parliamentary oversight of the French executive is based on two folds of checks and balances – the proportionality of emergency measures taken and the impacts on human rights. During the declaration of a state of public health emergency in France, the legislative yielded powers to the executive to act by ordinance on certain matters. This was achieved by the introduction of Law No.2020-290 which gave a power structure to the competent authorities. The Prime Minister was able to issue decrees and emergency measures and the executive was granted authorization to use ordinances to adapt the legislative framework during the state of public health emergency. Under Article L3131-13 of the Public Health Code, both the National Assembly and the Senate must be informed of the measures adopted and may request further information at any time.

In regard to the possibility of limiting fundamental rights during the public health emergency, on the one hand, the measures taken may be appealed before the administrative judge, as stated in Article L3131-18 of the Public Health Code. In addition, the French Constitution provides the basis for parliamentary control over governmental orders. In other words, the government can issue orders/ordinances containing temporary measures within the limits of Article 38 of the French Constitution while the parliament can ratify the orders within three months of their publication. In most situations the orders are made by the Council of Ministers after consultation with the Council of State and enter into force as soon as they are published, however, the parliament shall pass the ratification bill before the fixed date of the enabling law or the orders will become null or void. This means the orders shall only be ratified expressly by the parliament. Furthermore, once the order came into effect, there is no other chance for the orders to be modified except by law in matters which are within the legislative domain.¹⁷⁴

Constitution. The law concerning the prolongation of the state of public health emergency (Law No.2020-546), on the opposite, was submitted to the Constitutional Council, which rendered the decision no. 2020-800 DC of 11 May 2020, available at <https://www.conseil-constitutionnel.fr/en/decision/2020/2020800DC.htm>.

¹⁷⁴ Article 38, Constitution du 4 octobre 1958, English version available at: https://www.conseil-constitutionnel.fr/sites/default/files/as/root/bank_mm/anglais/constiution_anglais_oct_2009.pdf.

4. Hungary: emergency laws within the national legislative framework

4.1 Hungarian legal basis for emergency states

In exceptional situations, the state may operate under special rules recognized in the Hungarian constitutional framework. The 2011 Hungarian Constitution, or the Fundamental Law of Hungary, provides a legal basis for the emergency powers. Listed under Articles 48-54 of the Fundamental Law prior to the amendments in December 2020¹⁷⁵, the constitution allows six typical “special legal orders” applicable in a declared crisis, which are: state of national crisis (Article 49), state of emergency (Article 50), state of preventive defense (Article 51), emergency response to terrorism (Article 51/A), unforeseen intrusion (Article 52), and state of danger (Article 53).

On 11 March 2020, the Hungarian government declared the first state of danger in combating the coronavirus pandemic with Government Decree 40/2020¹⁷⁶. According to the Fundamental Law, a state of danger shall be declared by the government - unlike the other special legal orders that are called upon by the parliament - in the event of a natural disaster or industrial accident endangering the life and property of the civilians.¹⁷⁷ The Hungarian constitution (2011) allows such special legal order to be governed by “cardinal acts.” These acts may refer to legislative acts adopted by a two-thirds majority in the National Assembly. For instance, in a state of danger, as the Hungarian government has ordered three times in combating the coronavirus up until 2021, the cardinal law the Fundamental Law referred to here are: Act No. CXXXVIII of 2011 concerning disaster management and amending certain related acts (hereafter: “Disaster Management Act”) and Act XII of 2020 on the Containment of Coronavirus (hereafter: “Coronavirus Containment Act”). Entitled by the Disaster Management Act and provisions describing scopes of issue¹⁷⁸ that the government may promulgate

¹⁷⁵ The Ninth Amendment to the Fundamental Law was adopted by the Hungarian Parliament on 15 December 2020 and came into force on 23 December 2020.

¹⁷⁶ Hungary, Governmental Decree no. 40/2020 on declaring state of danger (40/2020. (III. 11.) Korm. rendelet veszélyhelyzet kihirdetéséről). 11 May 2020. https://njt.hu/translated/doc/J2020R0040K_20200326_FIN.pdf.

¹⁷⁷ See more details about the declaration of a state of danger below in chapter 4.2.2.

¹⁷⁸ Act No. CXXXVIII of 2011, or the Disaster Management Act, concerning disaster management and amending certain related acts. This Act declares that disaster management is a national matter and it is the duty of the State. This Act shall be applied, in order to prevent disasters in the territory of Hungary, to human activities threatening with disaster, in case of danger, disaster, and if prevention is necessary

decrees, the declaration of a state of danger allows the government to adopt decrees to suspend certain applications of acts, derogate from the provisions of acts, or take other extraordinary measures. Such government decrees, though, are ruled under a limited duration of 15 days, and no longer than the state of danger exists until their confirmation by the parliament. The Disaster Management Act describes in more detail certain disasters that the government shall deal with under the state of danger, e.g. floods, inland waters, extreme weather events, consequences of industrial accidents, and human or animal epidemics. Covid-19 falls into the category of a natural disaster in this act, and the purpose of declaring a state of danger is to eliminate the disaster in order to neutralize the consequences.

The Coronavirus Containment Act adopted by the Hungarian National Assembly provides the basis for the government to adopt further measures specifically within the Covid-19 pandemic. This includes an extension of the validity of a government decree, which normally remains in force for 15 days if granted with the authorization by the National Assembly.¹⁷⁹ The act does not specify an exact date until which authorization is granted, though. Certain extraordinary measures are taken to “a proportionate and necessary extent, during the state of danger ‘to ensure that the life, health, person, property and rights of citizens are protected, and to guarantee the stability of the national economy.’”¹⁸⁰ Furthermore, the Coronavirus Containment Act entitles the government to order the extension of the applicability of state-of-danger related emergency measures until the end of its termination, such as complementing the Penal Code on rules of obstructing the containment of the pandemic and penalties on scaremongering. Under such circumstances, certain fundamental rights may be limited, with exceptions of those that are non-derogable. Application of the Hungarian Constitution itself may not be suspended by any special legal order, however, and nor may the operation of the Constitutional Court be restricted. If the conditions for the special legal order no longer exist, the governmental organ that introduced it shall retrieve it. Upon the termination of the state of danger, the government decree will be repealed.

against the harmful effects of a disaster.
<https://www.informea.org/en/legislation/act-no-cxxviii-2011-concerning-disaster-management-and-amending-certain-related-acts>.

¹⁷⁹ See the Act XII of 2020 on the Containment of the Coronavirus (Coronavirus Containment Act).

¹⁸⁰ Ibid. Article 2(1).

A state of emergency exists in the Hungarian constitutional framework, however, it was not activated during the Covid-19 pandemic because this special legal regime and relative special measures are taken parallel with the operation of the National Defense Council in dealing with armed and unlawful accession to power.

4.2 Types of emergency

4.2.1 State of national crisis

A state of national crisis is declared by the parliament in the event of a state of war or in danger of war, namely an imminent danger of armed attack by foreign powers. When declaring a state of national crisis or a state of war, a voting majority of over two-thirds of all members of parliament is required, which makes it the highest level of emergency that refers especially to mobilization for military defense.¹⁸¹ A National Defense Council is therefore established by the parliament and chaired by the President of the Republic. Composed of the Speaker of Parliament, the floor leaders of the political parties represented in parliament, the Prime Minister, the ministers, and the Chief of Staff of the Hungarian Armed Forces, the National Defense Council shall exercise the rights of the president and the government power as delegated by the Parliament.¹⁸²

The National Defense Council decides on the use of armed forces within Hungary and abroad for purposes of participation in peace-keeping missions, humanitarian operations in foreign threats, and the stationing of armed forces in a foreign country. During a state of national crisis, the National Defense Council has the power to issue decrees to suspend the application of certain laws or derogate from the provisions of laws, and to take other extraordinary measures as defined in an implementing act. Upon the termination of the state of national crisis, the decrees of the National Defense Council shall cease to have effect unless Parliament extends their effect.

¹⁸¹ Venice Commission - Observatory on emergency situations. Hungary. Available at: <https://www.venice.coe.int>.

¹⁸² Articles 49(1)-(2), Constitution of 2011, version pre-December 2020 amendments available at: [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF\(2021\)046-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF(2021)046-e).

4.2.2 State of emergency

Within the framework of the Hungarian Fundamental Law before the 2020 Amendments, a state of emergency can be declared in the event of “actions aimed at the overthrowing of the constitutional order or at the exclusive acquisition of power, and of serious mass acts of violence threatening life and property.¹⁸³” And these actions are especially committed in an armed manner. The president is entitled to exercise powers and to rule by decree as well as to launch extraordinary measures defined by an implementing act. “In such a decree, the President of the Republic may suspend the application of certain laws, derogate from provisions of laws, or take additional emergency measures.¹⁸⁴” During a state of emergency, the parliament can be halted from its action, and if that is the case, the Standing Defense Committee of Parliament¹⁸⁵ shall remain in session and exert its powers to suspend the application of the emergency measures introduced by the president.¹⁸⁶ Armed forces may be invoked by the parliament during a state of emergency if the police forces and national security services fail to control the situation at hand, however, under the circumstance that the parliament is prevented from acting, the president will decide on whether to use the national armed forces.¹⁸⁷ The decree of the president ceases its effect upon a state of emergency terminating. The Standing Defense Committee of Parliament will act on behalf of the parliament to monitor emergency measures and the effective period of the ruling by decree, which lasts for thirty days, if the ordinary parliament is suspended.¹⁸⁸

¹⁸³ Ibid. Article 50.

¹⁸⁴ Ibid. Article 50(3).

¹⁸⁵ The National Assembly of Hungary normally forms a system of standing committees and decides which committees to operate. The scope of responsibility of standing committees is adjusted to the structure of government. Standing committees are parliamentary bodies that initiate measures, express opinions and proposals, make a final decision in cases set down in the law and in the provisions of the Rules of Procedure, and participate in monitoring the work of the government. See also “The Hungarian National Assembly and the office of the Hungarian National Assembly” via <https://www.parlament.hu/web/house-of-the-national-assembly/about-standing-committees>.

¹⁸⁶ Ibid. Article 50(3).

¹⁸⁷ Ibid. Article 50(1), (2).

¹⁸⁸ Ibid. Article 50(5), (6).

4.2.3 State of danger

A state of danger¹⁸⁹ (*veszélyhelyzet*) is a special legal order included in the Fundamental Law, which may only be declared and may only be terminated by the government. A state of danger is declared “in the event of a natural or industrial disaster endangering lives and property, or in order to mitigate the consequences thereof.”¹⁹⁰ The declaration of a state of danger allows the government to introduce emergency measures defined in an implementing act, which therefore provides a legal basis for the country to act in response to the Covid-19 health crisis. Unlike the other special legal regimes specified by the constitution, a state of danger does not address immediate threats from any armed forces to the nation but minimizes the consequences of a natural disaster or an industrial accident. Apart from a state of emergency, a state of danger grants emergency power to the executive (which the “government” is referred to), instead of the president, to issue decrees empowered to suspend the application of certain laws and to take extraordinary measures.¹⁹¹ A normal state of danger remains in force for fifteen days, and the decree of the government expires upon the termination of it, except for the situation extended by the parliament’s authorization. The state of danger had been activated several times in Hungarian history; the most recent state of danger was made in the flooding of the river Tisza in 2001, and in some towns affected by the ecological catastrophe caused by a reservoir failure in 2010.

4.2.4 State of preventive defense

In the event of an imminent threat of an external armed attack or in order to meet an obligation arising from a military alliance, the state of preventive defense shall be announced by the parliament. After the parliament initiates the state of preventive defense, the government is entitled to introduce special measures specified in an implementing act regarding operating subordinate bodies such as public administration, the military forces, and the law enforcement agencies. This is to mobilize essential subordinate bodies to carry out their duties and respond promptly to armed invasions or threats in connection with the country’s commitment to an alliance treaty without

¹⁸⁹ In some documents, this emergency state might be translated as “state of extreme danger.”

¹⁹⁰ Constitution of 2020. Article 53(1).

¹⁹¹ Ibid. Article 53(2).

delays. The government may issue decrees empowered to suspend the application of certain laws or derogating from the provisions of laws and to take other extraordinary measures during a state of preventive defense, including the mobilization of the Hungarian Armed Forces. After putting forward a motion for the state of preventive defense, the president and the competent standing committees of parliament shall be informed by the government of these measures on an ongoing basis. Such measures would remain in force until parliament's decision on the declaration of a state of preventive defense, in any case for no longer than sixty days.¹⁹² The duration of the state of preventive defense may be extended subject to a majority of two-thirds votes of the members of the parliament present. Upon termination of the state of preventive defense, the government decrees shall cease to have effects.¹⁹³

4.2.5 State of emergency response to terrorism (State of terrorist threat)

The state of terrorist threat shall be declared by the parliament in response to a major imminent threat of terrorist attacks. In the event of any unexpected invasion of external armed groups into the territory of Hungary, the Fundamental Law entitles the government to take immediate actions to ward off these external armed forces and defend the nation. After having put forward a motion for declaring a state of terrorist attack, the government has the power to introduce emergency measures, which would remain in force until the parliament's decision on the declaration of a state of terrorist attack, in any case for no longer than fifteen days. Same as the state of preventive defense, the declaration (and the extension) of a state of terrorist attack shall be subject to a majority of two-thirds of the votes of members of parliament in attendance. During such an emergency state, the parliament shall authorize the government to introduce emergency measures specified in a cardinal law, which also empowers the government to issue decrees to suspend the application of certain laws or derogate from the provisions of laws. Decrees of the government shall cease to have an effect upon the termination of the state of emergency response to terrorism, however, the duration of the emergency state may be extended. The aim of this temporary state is to make the government competent in promptly responding to aggressions threatening the nation with an eye to protecting law and order, life and property, public order, and public safety. The state of terrorist threat is the internal security equivalent of the state of

¹⁹² Ibid. Article 51(3).

¹⁹³ Ibid. Article 51(4)-(5).

preventive defense, which both create an opportunity to use the military forces in case of police and national security services are insufficient in controlling the situation at hand.¹⁹⁴

4.2.6 Unforeseen intrusion

An unforeseen intrusion is an event that the national territory is subject to any foreign armed invasion, and in such an event, the government can take immediate actions and plan defense forces as commensurate with the gravity of the attack. The use of forces shall be approved by the president, and will be taken swiftly prior to a declaration of a state of emergency or a state of national crisis. The event of an unforeseen intrusion will enable the government to implement emergency measures by decree upon informing the president and the parliament in order to maintain the law and order and to protect the security of lives and property of the citizens. The government may also suspend the application of certain laws or derogate from the provisions of laws.¹⁹⁵

4.3 Covid-19 pandemic within the national legislative framework

The Coronavirus-related emergency regime in Hungary was taken as a state of danger by its name under the Fundamental Law and was complemented with the Act XII of 2020 on Coronavirus Containment. The state of danger in Hungary was declared by 40/2020. (III. 11.) Government Decree¹⁹⁶ together with emergency measures when the first two confirmed cases of Covid-19 appeared in Hungary in March 2020. Hungary has constitutional emergency clauses applicable to health emergencies, which it activated in order to respond to the first wave of the Covid-19 pandemic. After the termination of the first declaration of the state of danger, it chose to impose a lighter mechanism for the consecutive six months – the state of medical crisis. In the first year

¹⁹⁴ Ibid. Article 51/A.

¹⁹⁵ Constitution of 2020. Article 52.

¹⁹⁶ Government Decree 40/2020 (III. 11.) on the Declaration of State of Danger. [https://ils.hu/storage/covid-19/en/Government%20Decree%2040-2020%20\(III.11.\)%20State%20of%20Danger.pdf](https://ils.hu/storage/covid-19/en/Government%20Decree%2040-2020%20(III.11.)%20State%20of%20Danger.pdf).

of coronavirus arriving in the Hungarian territory, the nation had declared a state of danger twice¹⁹⁷ and a state of medical crisis with hundreds of emergency decrees.¹⁹⁸

The Hungarian government declared a state of “medical crisis/emergency” (*egészségügyi válsághelyzet*) for three months successively when the first state of danger was terminated. Apart from the special legal orders specified in the Fundamental Law, a state of medical crisis is an institution regulated by the act on healthcare and runs apparently outside the constitutional framework. Strictly speaking, the state of medical crisis is a statutory emergency regime governed by the Act CLIV of 1997 on Health Care (hereafter: “Health Care Act”). Although Hungary chose to take on a combination of a constitutional state of emergency and a statutory emergency regime, the two regimes did not occur simultaneously but one followed the other in an escalating mode. The declaration of a state of medical crisis depends on the discretion of the government as the Health Minister may give advice on putting the mechanism in place; it shall be called upon specifically by the minister responsible for healthcare. The Health Care Act CLIV of 1997 defines a health crisis (emergency) as a sudden change in health that, in the absence of urgent medical care, would endanger the patient’s life, or result in a severe or permanent health impairment.¹⁹⁹ It is an event, usually unexpected, which endangers or damages the life, physical integrity, health of the citizens, or the functioning of healthcare institutions, which requires the cooperation of public health bodies, healthcare institutions, and other state and municipal bodies.²⁰⁰

Duration of a state of medical crisis usually stays for six months and can be prolonged for any length of time after the initial period without even the mere theoretical possibility of parliamentary control.²⁰¹

¹⁹⁷ By April 2022 when this thesis was written, Hungary had declared three times of state of danger with extensions until 31 May 2022 and a medical crisis with extensions three times, each consecutive 6 months, until June 18, 2022.

¹⁹⁸ International Commission of Jurists (ICJ). “A Facade of Legality: Covid-19 and the Exploitation of Emergency Powers in Hungary.” February 2022.

¹⁹⁹ Act. CLIV of 1997 on Health. Section 3. (i). <http://www.patientsrights.hu> > dokumentumletoltes.

²⁰⁰ Venice Commission. “Observatory on emergency situations.” Hungary. <http://www.venice.coe.int>.

²⁰¹ Emese Pásztor. “Rule of law ‘light’: The ‘state of medical emergency’ in Hungary.” September 18, 2020. <https://www.boell.de/en/2020/09/18/rule-law-light-state-medical-emergency-hungary>.

4.4 Normative response to the Covid-19 pandemic and containment measures

4.4.1 March 2020 - June 2020: “Act XII of 2020 on the Containment of Coronavirus”

On March 11, 2020, the Government of Hungary declared a “state of danger” for the first time and the ruling majority in the parliament decided to adopt an emergency regime that granted excessive regulatory powers to the government. Later in the month, the “Act XII of 2020 on the Containment of the Coronavirus”²⁰² was adopted by the parliament and brought into force to extend the authorization that the constitution provides to the government to rule by decree in a state of danger. Under the Coronavirus Containment Act, the government may acquire a *carte blanche* mandate without any sunset clause to override any Act of Parliament, which affects the state of danger in two aspects: the length of effectiveness of government decrees and the issue area a government decree may concern. Before the Coronavirus Containment Act, a government decree issued during a state of danger normally lasted for 15 days and could only sustain into force if authorized by the parliament. However, government decrees remained in force until the termination of the state of danger as indicated in the Coronavirus Containment Act. In addition, the government decree could only concern issues listed in the Disaster Management Act in the ordinary law before the commencement of the Coronavirus Containment Act, but the latter granted complete freedom for the government to act in issue areas as it wished. For example, a government decree may suspend the application of any act of parliament, derogate from the provisions of Acts and take other extraordinary measures by means of decree in order to guarantee for citizens the safety of life and health, personal safety, the safety of assets and legal certainty, as well as the stability of the national economy.²⁰³ From March 30 to the end of the first state of danger, over 150 governmental decrees were issued, and some of them violated personal freedom or even the EU laws. The government has leveraged the powers entitled by the Coronavirus Containment Act to restrain the fundamental rights of the citizens.

²⁰² The Act XII of 2020 on the Containment of the Coronavirus was adopted by the Hungarian Parliament and came into force on 30 March 2020.

²⁰³ “Overview of Hungary’s Emergency Regimes Introduced due to the Covid-19 Pandemic.” Hungarian Helsinki Committee. January 1. 2022. P.3.

On June 16, another “Act LVIII of 2020 on the Transnational Provisions related to the Termination of the State of Danger and on the Epidemiological Preparedness²⁰⁴” (hereafter: “Transitional Act”) was launched with regard to the termination of the state of danger, which the government brought to an end two days later. When the state of danger, which was also the legal basis for the Coronavirus Containment Act, was terminated, over 150 special emergency government decrees announced lost their effects. Instead, the Transnational Act appeared into force, and within which the legal framework applicable in a state of danger and in a state of medical crisis was fundamentally amended.

4.4.2 June 2020 - November 2020: “Act LVIII of 2020 on the Transnational Provisions related to the Termination of the State of Danger and on the Epidemiological Preparedness”

When the emergency state was brought to an end on June 18, 2020, government decrees were no longer effective. However, through an amendment of the Hungarian Fundamental Law, several decrees were transformed into ordinary statutory law and remained in force, including a regular transition of the extraordinary measures which were taken during the state of danger. Under the name of preparing for a possible next wave of the Covid-19 pandemic, these acts paralleled with the ordinary laws have extended the executive power of the government. The parliament passed the Transitional Act and introduced provisional measures for “epidemic readiness.” The government then declared a “state of medical crisis” for six months.²⁰⁵

The Transitional Act provided the government with excessive powers and significantly crippled constitutional safeguards by fundamentally altering the legal framework regarding the state of danger and the state of medical crisis. First of all, the scope of the decrees the government may issue during a state of danger, of which the government gained a *carte blanche* mandate from the previous Coronavirus Containment Act during the first state of danger, was verbatim written into the Disaster

²⁰⁴ Act No. LVIII of 2020 on Transitional Rules related to the Termination of State of Danger and on Epidemiological Preparedness was published in the Hungarian Official Gazette on June 17, 2020, and entered into force on 18 June 2020. Also on 18 June 2020, two implementing decrees entered into force introducing detailed rules. <https://wipolex.wipo.int/en/legislation/details/20079>.

²⁰⁵ 283/2020. (VI. 17.) Government Decree on the introduction of epidemiological preparedness. <https://net.jogtar.hu/jogszabaly?docid=a2000283.kor>.

Management Act. Together with the function of a state of danger embedded in the Fundamental Law, the government may suspend the application of any act of parliament, derogate from the provisions of acts and take other extraordinary measures by means of decrees under the name of guaranteeing for citizens' safety of life and health, personal safety, the safety of assets and legal certainty, and the stability of the nation's economy.²⁰⁶ This means the list of the scope of decrees now became open-ended, and the provisions became automatically applicable whenever the government declares a state of danger. Secondly, although the Coronavirus Containment Act has been repealed by the parliament, the 15-day effectiveness of government decrees plus an authorized extension from the parliament to the government have been amended into the regulatory legal framework. The government decrees may remain in force if granted authorization from the parliament until the termination of a state of danger. In addition, a state of danger according to the Transitional Act should be terminated by the government if the conditions for its declaration no longer prevail. Overall, the Coronavirus Containment Act's stipulation was rewritten practically into the Disaster Management Act and other ordinary statutory norms.

Other amendments were made targeting the rules in the Health Care Act and the state of medical crisis. Different from a state of danger, which is among the six special legal orders specified in the Fundamental Law, a state of medical crisis does neither allow the government to suspend the application of or derogate from the provisions of acts of parliament nor to restrict fundamental rights beyond the permissible content in ordinary situations. The Transitional Act, however, still profoundly widens the government's role effect in a state of medical crisis on adopting decrees and restrictive measures. For instance, government decrees remain in force until the end of the state of medical crisis without any parliamentary approval required. In addition, the initial state of medical crisis lasting for a six-month effective period, in general, may be extended indefinitely if the condition for order remains. The government may order epidemiological measures or provisions specified by an act of parliament during a state of medical crisis to deal with issues²⁰⁷ listed in the Health Care Act according to the

²⁰⁶ Ibid.

²⁰⁷ The scope of issues the government may launch a decree was listed in Article 232/D (1) of the Act CLIV of 1997 on Health Care.

Transition Act. The government ordered a state of medical crisis on June 18, 2020, and it had remained in force three times consecutively after the previous one expired.²⁰⁸

It is worth noting that according to an overview report by Hungarian Helsinki Committee on Hungary's emergency regimes in the Covid-19 pandemic, the Transitional Act transformed many provisions of the government decrees into the ordinary legislative framework that is not transitional at all.²⁰⁹ For example, certain sections in the Transitional Act deal with provisions remaining in force unless amended or revoked by the president or by the parliament, or those remaining in force for a specific defined date. This has resulted in more power yielded to the government and the executive branch.

4.4.3 November 2020 - February 2021: “Act CIX of 2020 on the Containment of the Second Wave of the Coronavirus Pandemic”

On November 3, 2020, Hungary declared again a state of danger²¹⁰ for the elimination of the consequences of the SARS-CoV-2 coronavirus pandemic causing massive disease outbreaks endangering life and property, and for the protection of the health and lives of Hungarian citizens. The parliament adopted Act CIX of 2020 on the Containment of the Second Wave of the Coronavirus Pandemic²¹¹ (hereafter: “Second Coronavirus Containment Act”) along with the government's declaration of the second state of danger. As a result of the Transitional Act, a *carte blanche* mandate to the government in a state of danger has been written into the Disaster Management Act and also extends its applicability to the Second Coronavirus Containment Act. Within the framework of this act, government decrees are no longer limited by the Fundamental Law in an effective period of a minimum of 15 days unless granted with authorization by the parliament as written in Section 2(1) of the Second Coronavirus Containment Act:

²⁰⁸ Up until when this thesis is written, the state of medical crisis and the respective government decrees sustain in effect and will continue to be in force until 18 June 2022 foreseeably.

²⁰⁹ Hungarian Helsinki Committee, “Overview of Hungary's Emergency Regimes Introduced due to the Covid-19 Pandemic,” January 1, 2022, p.4-5.

²¹⁰ Government Decree 478/2020 (3 November) on the declaration of state of danger, http://jogszabalykereso.mhk.hu/translated/doc/J2020T0109P_20201111_FIN.pdf.

²¹¹ The Act CIX of 2020 on the containment of the second wave of the coronavirus pandemic was adopted by the Hungarian National Assembly on 10 November 2020 and came into force on 11 November 2020.

“On the basis of Article 53(3) of the Fundamental Law, the National Assembly authorizes the Government to extend the applicability of the government decrees under Article 53(1) and (2) of the Fundamental Law adopted during the period of the state of danger until this Act is repealed.²¹²”

The government may also extend the force of future, not-yet-adopted special decree if authorized by the parliament. However, different from the duration of effect of government decrees regulated in the previous Coronavirus Containment Act, which has no sunset clause, the Second Coronavirus Containment Act provides a limitation to it, that is, the government may extend the force of decrees adopted during the state of danger for 90 days from its promulgation.²¹³ Therefore, the government decrees would remain in force until 8 February 2021 as the Second Coronavirus Containment Act foresees its own cease of effect.

On 17 December 2020, Hungary further extended the state of medical crisis for another 6 months until 18 June 2021. When the Second Coronavirus Act, which laid down rules in connection with the second state of danger lost force on 8 February 2021, the government terminated the state of danger²¹⁴. And on the same day, the government ordered two decrees after each other and declared the third state of danger²¹⁵. Despite the sunset clause for decrees issued during a state of danger, 70 government decrees were re-entered into force following the parliament adoption of Act I of 2021 on the Containment of the Coronavirus Pandemic (“Third Coronavirus Containment Act”)²¹⁶ and sustained to have effect as the state of danger brought further by the parliament adopting a bill and approving the extension to it until 30 May 2022.

²¹² Act CIX of 2020 on the Containment of the Second Wave of the Coronavirus Pandemic (translated), http://jogszabalykereso.mhk.hu/translated/doc/J2020T0109P_20201111_FIN.pdf.

²¹³ Ibid, Section 5, “This Act shall enter into force on the day following its promulgation and shall be repealed on the 90th day following its promulgation.”

²¹⁴ Government Decree 26/2021. (I.29.). “Terminating the state of danger under Government Decree 478/2020 (3 November) on the declaration of state of danger,” https://njt.hu/translation/J2021R0026K_20210209_FIN.pdf.

²¹⁵ Government Decree 27/2021. (I.29.).

²¹⁶ The government may keep respective decrees in force for a 15-day duration according to the Fundamental Law, that is, government decrees would expire on 22 February. So the parliament adopted the Third Coronavirus Containment Act on 22 February, which also entered into force on the same day.

4.5 Emergency powers and parliamentary control

Covid-19 measures adopted at the national level in most cases shall be overseen by a nation's parliamentary institutions, and the government in charge has a duty to provide parliament with information on which measures are taken. Parliamentary control over emergency powers in Hungary belongs to the National Assembly. During the initial phase of declaring a state of danger, the Hungarian National Assembly did not play a decisive role but had to give authorization to the extensions of the emergency state. According to Article 53²¹⁷ of the Fundamental Law, the declaration of the state of danger and related emergency measures remain effective for 15 days unless the parliament issues authorizations for the extensions. In addition, detailed regulations to be applied under any of the special legal orders shall be laid down in an implementing act²¹⁸, in the case of Covid-19 the Coronavirus Containment Act. This provides a parliamentary oversight over the emergency regime. The National Assembly also has the power to revoke the authorization of any government measures adopted and annul the authorization granted to the government to extend the applicability of decrees during a state of danger. And the government shall regularly inform the National Assembly of measures it takes and continue the Constitutional Court during the state of danger.

Due to the nature of temporality of a constitutional state of emergency, the exceptional circumstances should not be taken as an excuse to introduce long-standing emergency regimes. Most European Union Member States which declared a constitutional state of emergency in response to the coronavirus have resorted to parliamentary authorization to extend the emergency state either *ex-ante* or *ex-post* with a maximum extension period of one month²¹⁹, except for the case in Hungary. The Coronavirus Containment Act adopted by the parliament on 30 March 2020 authorized the extension of the state of danger without any specific deadline. Given the theory of power division of the government and the legislature, the need to limit the extension

²¹⁷ “The decree of the Government under Paragraph (2) shall remain in force for fifteen days, except if the Government - on the basis of an authorization from Parliament - extends the effect of the decree.” Article 53(3), Constitution of 2011, version pre-December 2020 amendments available at: [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF\(2021\)046-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF(2021)046-e).

²¹⁸ 54(4), Constitution of 2011.

²¹⁹ European Parliamentary Research Service, “States of emergency in response to the coronavirus crisis: Normative response and parliamentary oversight in EU Member States during the first wave of the pandemic,” December 2020, p.36.

period of an emergency state gives the parliament equitable oversight powers to evaluate the content of governmental powers and to assess the evolution of the pandemic. Even with the arguable deadline-free Coronavirus Containment Act, the National Assembly of Hungary may still wage parliamentary influence by withdrawing the authorization for the act for extending the state of danger in the first wave of coronavirus pandemic.

Furthermore, changes and amendments to the ordinary laws in responding to a pandemic seem necessary later in the Covid-19 crisis in Hungary. A legislative reform targeting the constitutional state of emergency was brought up by the parliament when the first declaration of the state of danger was about to be lifted.²²⁰ With an eye to dealing with the possibility of future acceleration of health risks, the parliament had adopted Act LVIII of 2020 on 16 June to tackle transitional regulations and entrust the government to prepare epidemiological readiness.

²²⁰ Ibid, p.44.

5. Comparison of the implication of emergency laws on democracy and human rights

This part of the thesis seeks to find legal evidence of democracy and human rights restricted under the Covid-19 health emergency regime in a four-folded discussion: the parliamentary function, legal certainty, the scope of proportionality, and temporal limitation; and compares if the emergency legislations work parallelly with safeguarding human rights.

5.1 Parliamentary functions under the emergency state

Parliamentary oversight over the emergency regimes in France and Hungary was different in its intensity as a result of the emergency regime types they resorted to. Constitutional emergency refers to those states of emergency provided by the constitution, and on the contrary, statutory regimes refer to those regimes provided by statutory laws rather than in the constitution, and which regulate the type of emergencies and powers attributed to the authorities concerned in an organic manner.²²¹ Both France and Hungary have state of emergency clauses in their constitutions, however, Hungary has a constitutional emergency state applicable to health emergencies (state of danger) while France lacks a constitutional emergency state applicable to health emergencies. Therefore, a state of emergency provided in the constitution was effectively declared in Hungary during the Covid-19 pandemic. In addition, both countries declared or implemented a statutory regime during the first wave of the pandemic. Besides Hungary, there were the other EU Member States that declared both a constitutional emergency state and a statutory regime. Hungary's phasing out of the state of danger also meant the introduction of the "state of epidemiological preparedness," and the country had altered between a constitutional emergency regime and lighter statutory management.

In most cases of European Union Member States, declaring a statutory regime generally received less parliamentary control compared to a constitutional regime, which is considered a stronger mechanism in responding to the health crisis. Whether the emergency mechanism is perceived as strong or light can be measured by its impact

²²¹ European Parliamentary Research Service, "States of emergency in response to the coronavirus crisis: Normative response and parliamentary oversight in EU Member States during the first wave of the pandemic," December 2020. P.10

on democracy and human rights, in which parliamentary oversight plays a crucial role. The impact can be observed by the normal function of the parliament, such as the continuation of regular parliamentary meetings, during the extraordinary situation, and the parliament engaging in authorization, extension, and termination of states of emergency defined by the constitution serve as indicators. In principle, constitutional emergency regimes receive more checks and balances of relative emergency measures, however, both France and Hungary have multiple types of emergency states according to different kinds of exceptional situations, and certain inspections of emergency powers also diversify. The French system, for example, combines two major models of constitutional checks and balances, one is the state of siege and the state of emergency, which tends to be well-regulated in the protection of human rights, and the other is the exceptional powers to the president, which receives little counter-balance.²²²

Although constitutional emergency regimes receive more parliamentary oversight and constitutional counterbalance than statutory regimes. France under the state of public health emergency is an exception from those imposing a statutory regime because it exercised stronger parliamentary oversight over the declaration and extension of this emergency regime. For example, the sessions of parliament had not been suspended²²³ during the emergency state adopted, and neither did the Constitutional Council and the Council of State, according to the observatory on emergency situations by the Venice Commission. In addition, the state of public health emergency was launched by statutory laws, and the extensions were also made out of legislative procedures. However, the RFI (Radio France Internationale) challenges the idea of France securing more space for democracy with more parliamentary participation. An article from the RFI said France's pandemic measures specific to the restriction on freedom of movement, including multiple lockdowns and early national curfews pushed back the country's democracy, echoing the Economic Intelligence Unit (EIU) indicating that France's democracy score fell to 7.99 from 8.12 in 2019. "The annual democracy

²²² Anna Khakee, "Securing Democracy? A Comparative Analysis of Emergency Powers in Europe," *Policy Paper - No.30*, Geneva Centre for the Democratic Control of Armed Forces (DCAF), 2009, p.22, ISBN 978-92-9222-098-3.

²²³ Except for the parliamentary proceedings suspended at the end of February until 23 March due to municipal elections.

index ‘sheds light on continued challenges to democracy worldwide, under pressure from the coronavirus pandemic and increasing support for authoritarian alternatives.’”²²⁴

On the contrary, when Hungary chose to end the constitutional emergency and entered into a state of medical crisis, it was achieved by a government decree.

5.2 Legal certainty

In general, the legislation underpinning the declaration of a state of emergency allowed governments to put on restrictions on fundamental rights. Article 4(1) ICCPR writes that “in time of public emergency which threatens the life of the nation,” states may take measures to derogate from the Covenant, i.e. to temporarily suspend or adjust their obligations under the treaty. And Article 15 of the ECHR regarding the derogation in time of emergency also indicates that “the right to derogate can be invoked only in time of war or other public emergencies. Once a public emergency suffices to be defined as an extreme circumstance, as the prerequisite, derogating measures may be applied. This means states are allowed to eligibly restrict certain human rights given that some conditions²²⁵ are met, which are: respect for non-derogable rights, measures taken to the extent required by the exigencies of the situation, and derogations may not be inconsistent with international law. In addition, it is well-accepted that a derogation to certain fundamental rights under Article 5 of the European Convention on Fundamental Rights²²⁶ and a possible violation of Article 4 of the International Covenant on Civil and Political Rights should be communicated respectively to the Council of Europe’s Treaty Office and to the Secretary-General of the United Nations.

Main restrictions of human rights under the French state of public health emergency concerned mostly the freedom of movement, freedom of assembly, and the freedom of undertaking an activity, in particular, economic activities such as the closure

²²⁴ Rfi, “Pandemic helped roll back democratic freedoms globally in 2021: EIU study,” 13 February, 2022, <https://www.rfi.fr/en/international/20220213-pandemic-helped-roll-back-democratic-freedoms-globally-in-2021-eiu-study-france-flawed-democracy>.

²²⁵ Regarding the conditions set in Article 15 of the ECHR, see “Factsheet – Derogation in time of emergency,” Press Unit, European Court of Human Rights, February 2022, https://www.echr.coe.int/documents/fs_derogation_eng.pdf.

²²⁶ Article 5 of the European Convention on Fundamental Rights concerns the right to liberty and security, in which it states “Everyone has the right to liberty and security of person. No one shall be deprived of his liberty.”

of establishments, the shut down of businesses, and access to employment as a result of invasive measures of lockdowns and curfews. However, according to a report by the Venice Commission, there has not been a notification under Article 15 of the ECHR by France as laws and pandemic measures adopted under the state of public health emergency did not contain the general provisions on derogations from human rights.²²⁷ On the other hand, French administrative jurisprudence has reaffirmed that freedom is the rule and police restriction the exception²²⁸ since the beginning of the 20th century. This has also become the constant case law in French judgments. In addition, Article 34²²⁹ of the French Constitution states that laws are established concerning the guarantee of fundamental rights of citizens and the exercise of public freedoms, however, the maintenance of public orders suffices the circumstances and necessities for freedoms to be limited, and the power of limitation of freedoms belongs to the legislators. It remains controversial what justifies the taking of such restrictive policy measures during the Covid-19 pandemic and what conditions that govern these power takes.

Article 54²³⁰ of the Fundamental Law of Hungary (2011) gives a provision of common rules and the restriction of human rights under the recognized six special legal regimes. Paragraph (1), Article 54 clarifies that “ under special legal order, the exercise of fundamental rights - other than those laid down in Articles II and III²³¹, as well as in Paragraphs (2)-(6) of Article XXVIII²³² - may be suspended, or restricted beyond the

²²⁷ Venice Commission - Observatory on emergency situations. www.venice.coe.int.

²²⁸ "La liberté est la règle et les restrictions de police, l'exception" Corneille, commissaire du gouvernement (government commissioner) in the conclusion of the Baldy judgment of August 10, 1917.

²²⁹ “Statutes shall determine the rules concerning civil rights and fundamental guarantees granted to citizens for the exercise of their civil liberties.”

²³⁰ Constitution of 2011, Articles 54, version pre-December 2020 amendments available at: [https://www.venice.coe.int/webforms/documents/?pdf=CDL-REF\(2021\)046-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-REF(2021)046-e).

²³¹ Article II and III of the Fundamental Law (version pre-December 2020 amendments) concern respectively the right to life and human dignity and the prohibition of torture and inhuman treatments.

²³² Paragraphs (2)-(6) of Article XXVIII of the Fundamental Law (version pre-December 2020 amendments) concern the rights of innocent presumption before the final court decisions and the right to defend oneself at all stages of criminal proceedings.

extent defined by Paragraph (3) of Article I²³³.” Hungary, under the state of danger in response to the pandemic, allowed certain fundamental rights - with a number of exceptions regarding non-derogable rights - to be suspended or restricted under an implementing act.²³⁴ The government is entitled to adopt decrees as provided by a cardinal act (or implementing act or enabling act) of parliament, which provides for the possible suspension or limitation of fundamental rights beyond the limits of the fundamental rights check. Although the fundamental rights that are perceived as an international obligation are applied, there are domestic and international criticisms of such act for it has granted the government broad powers without a time limit, especially the rules applied to limit scaremongering, which may also be used to restrain freedom of expression. An analysis from the Prague Office of the Heinrich Böll Foundation²³⁵ supported this argument and indicated that the problems related to the state of danger and the implementing acts are primarily of a Hungarian constitutional nature and the suspension of a wide range of fundamental rights is justified by the government, however, the government measures taken were contradictory to this nature. It also pointed out that measures taken to limit fundamental rights by the Hungarian government during the statutory regime “state of medical crisis” are legal-questionable because they were implemented outside of any special legal order but under the framework of the 1997 Health Care Act. This is arguably correct because the Transitional Act after the first state of danger extended government decrees and amended the emergency measures into ordinary laws, which allowed decrees that limited fundamental rights to remain in effect even outside of special legal orders

5.3 Scope of proportionality

Generally speaking, compared to the state of emergency declared in 2015 in combating the terrorist attacks in Paris, France this time with the state of public health emergency

²³³ “... A fundamental right may only be restricted in order to enforce another fundamental right or to protect a constitutional value, to the extent that is absolutely necessary and proportionate to the objective pursued,” Paragraphs (3) of Article I of the Fundamental Law (version pre-December 2020 amendments).

²³⁴ “The detailed regulations to be applied under a special legal order shall be laid down in an implementing act.” Article 54(4).

²³⁵ Domokos Lazar, “A state in danger - special legal order introduced in Hungary,” Prague Office of the Heinrich Böll Foundation, 1 April 2020, <https://cz.boell.org/en/2020/04/01/state-danger-special-legal-order-introduced-hungary>.

regime seemed to work with proportionality and adequate judicial review. For example, in aspects of pandemic measures and ordinances, which were under review by the court and administrative tribunals under normal conditions when a state of public health emergency was ongoing. The Venice Commission of the Council of Europe also confirmed that constitutional checks and balances on legislative provisions in the emergency regimes were carried out by the Constitutional Council on a usual basis.²³⁶

Hungary stands almost the opposite of France because the Coronavirus Containment Act allows more interference with fundamental rights, for example, the excessive powers given to the government in regard to criminal offenses on disinformation. Decision-makers in Hungary defended themselves by saying the Coronavirus Containment Act only supplements the Penal Code with rules in order to cover the communication of deliberately false statements in front of a large audience. However, there were still wide concerns from the European Union as the President of the European Parliament has required the European Commission to examine the conformation of Article 2 of the Treaty on European Union.²³⁷ In this regard, the European Commission noted that “the criminalization of stating or spreading false information related to the crisis in the new provision of the Hungarian Criminal Code is not clearly defined and is accompanied by strict sanctions. This raises concerns as regards legal certainty and may have a chilling effect on freedom of expression, reducing the space for democratic debate and the opportunities for citizens to be informed and hold the authorities to account.”²³⁸ An article from Tablet Magazine commented that Hungary has taken advantage of the health crisis to build an “illiberal democracy.” With the emergency measures brought by the pandemic, Orbán may “suspend the operation of any law, and has the new power against those who publicize

²³⁶ Ibid.

²³⁷ Article 2 of the Treaty on European Union states that the EU is "founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities".

²³⁸ “Petition No 0377/2020 by Ferenc Tibor Zsák (Hungarian) on Covid-19 and the risk of violations of fundamental rights in Hungary,” Committee on Petitions, European Parliament, 17 March 2020, p.4, https://www.europarl.europa.eu/doceo/document/PETI-CM-696627_EN.pdf.

false or distorted facts that interfere with public protection.²³⁹” Despite that violation of the quarantine order faced long-term imprisonment, “most disturbing these measures have no end date.”²⁴⁰ The Prague Office of the Heinrich Böll Foundation also marked the Coronavirus Containment Act as “ill-tailored” in regard to the imprisonment of scaremongering. Similar to the Coronavirus Containment Act, the government was given the power to restrict civilian rights during the state of medical crisis and to ban the operation of any institution and facility that could possibly help the spread of the disease.” It raised concerns over the functioning of the vital constitutional court, parliament, and judicial court as these institutions halted their normal functions to contain the epidemiological threat. The lack of safeguarding the democratic institutions was in plain sight, let alone the ensuring of exercising the freedom of assembly, the freedom of movement, or other fundamental rights.

5.4 Temporality nature

French public opinions on the temporal state of public health emergency were divergent. Some²⁴¹ compared it to the 2015 state of emergency, which lasted for almost two years and were criticized for creating a permanent constitutional emergency regime, and argued that the functioning of the public health emergency regime seemed to have been terminated without delay when the pandemic situation no longer sufficed. However, some scholars have criticized such normalization of the emergency regime, although aims at eradicating the pandemic, will result in making exceptional situations permanent, just like Marie-Laure Basilien-Gainche’s remarks in the academic forum *Verfassungsblog* on constitutional matters: this (the normalization of the emergency regime) could be observed from the reimposing of a state of public health emergency and the further extension of this exceptional regime month after month. The emergency regime offering escalating power to the executive was so intense that it could diminish rights and personal liberties. On the other hand, the government’s emergency measures have expended legal insecurity by constantly modifying previous measures. For

²³⁹ Tom Ginsburg and Mila Versteeg, “Can Emergency Powers Go Too Far?” *Tablet Magazine*, 7 April 2020, https://www.tabletmag.com/sections/news/articles/coronavirus-emergency-powers-constitutional-rights?fbclid=IwAR1ZVEiCpx36SDhTlf3qOMlqZfJJu_wRm4KAzHPmn6tf0HjY3EsyMm0wk2w.

²⁴⁰ *Ibid.*

²⁴¹ Venice Commission - Observatory on emergency situations - France. www.venice.coe.int

example, following Decree No. 2020-1257 on the declaration of the second state of public health emergency on 14 October 2020, Decree No.2020-1262 issued on 16 October prescribed necessary emergency measures within this framework; however, this decree was later amended for eleven times to meet the need of the pandemic situation, sometimes toward fortifying the restrictions on human rights.²⁴²

Hungary has switched between a constitutional emergency “state of danger” and a statutory regime “state of medical crisis.” Although the latter seemed to be launched after the former terminated, the mechanism of writing special decrees into the statutory norms has made the emergency state eternity. Two steps were helping the emergency state in Hungary to last without a specific legal limit: First is the Coronavirus Containment Act. It enabled the government to override the provisions of acts of parliament (the Disaster Management Act for e.g.) without a sunset clause until the end of the state of danger and widened the scope of contents of issuing decrees. In other words, it not only extended the time of effect but also expanded the width of its application. Second, the Transitional Act which commenced to have effect after the termination of the state of danger had brought upon government decrees to remain effective in statutory norms even after they should have expired. This created more powers for the executive, and as the Hungarian Helsinki Committee pointed out²⁴³, many provisions of the emergency government decrees are not transitional at all, including those remaining in force unless later amended or revoked by the parliament. The European Commission also noted that the duration of the “state of danger” in Hungary was not predefined and the government had discretionary power to terminate it and to declare a “state of medical crisis” swiftly after that. So emergency powers granted to the government were considered more extensive than those adopted in the other EU Member States, in light of the combined effect of broadly defined powers and the absence of a clear time limit.²⁴⁴

²⁴² Marie-Laure Basilien-Gainche, “French Response to COVID-19 Crisis: Rolling into the Deep,” Power and the Covid-19 pandemic, *Verfassungsblog on Matters Constitutional*, 18 March 2021, <https://verfassungsblog.de/french-response-to-covid-19-crisis-rolling-into-the-deep/>.

²⁴³ “Overview of Hungary’s Emergency Regimes introduced due to the Covid-19 Pandemic,” Hungarian Helsinki Committee,” updated of 25 May 2021, p.4, https://helsinki.hu/en/wp-content/uploads/sites/2/2021/05/HHC_Hungary_emergency_measures_overview_25052021.pdf.

²⁴⁴ “Petition No 0377/2020 by Ferenc Tibor Zsák (Hungarian) on Covid-19 and the risk of violations of fundamental rights in Hungary,” Committee on Petitions, European Parliament, 17 March 2020, p.3, https://www.europarl.europa.eu/doceo/document/PETI-CM-696627_EN.pdf.

Conclusion

Emergency powers and emergency states are embedded in French and Hungarian constitutions, however, they might also serve as an excuse for countries to deviate from democracy and the normal counter-balance of the executive and the legislative. Countries can take up powers from the parliament because the excessive powers are redistributed to the government under the emergency regime; the country will end up approaching an illiberal and authoritarian regime. The main argument in this thesis: “states are using emergency powers to limit democracy and fundamental rights in the Covid-19 pandemic” is arguably proved in the inspection of the French and Hungarian emergency legal frameworks. The analysis can be concluded in three folds:

First, emergency legislations formulated during the health crisis have actually resorted to different legal hierarchies. Within a broad term of state of emergency, countries decided whether to resort to an emergency regime at which scale during the Covid-19 health crisis. The Constitution of France regulates three categories of emergency regimes, however, none of them were invoked during the Covid-19 pandemic in 2020, for reasons that there was no emergency type that could refer to the epidemiological crisis, as well as the lesson-learned fear of a long-standing state of emergency, might happen again. Instead, a statutory “state of public health emergency” was applied through the legislative procedure as a result. On the contrary, Hungary was one of the EU countries that declared a constitutional emergency early in March 2020 when the Covid-19 pandemic hit the first wave in Europe because the Hungarian constitution provided suitable provisions for health-crisis-related emergencies. The Hungarian Fundamental law has six types of emergency, within which the “state of danger” was declared to facilitate government responses to diseases or natural disasters. At the same time, Hungary also alternated between the constitutional state of danger and the “state of medical crisis” at the statutory level at six-month intervals.

Second, although both France and Hungary introduced a statutory regime for a certain period of time in containing the virus, the government measures received checks and balances to different degrees. The constitutional level of emergency regimes means extensive check and balance on the related measures because they usually pose greater impacts on democracy and fundamental rights as the government is entitled to derogate from certain obligations of the international human rights framework. France, however,

has involved more stringent parliamentary participation in forging pandemic measures compared to Hungary in a statutory emergency regime. In addition, the Hungarian government was criticized to have loaded verbatim decrees and emergency measures into the constitutions and statutory laws, for the emergency states would subsist in disguise.

Lastly, any emergency regime is far from perfect, especially in regard to the temporality of emergency states, which was questioned by both scholars and the public in France and Hungary. Since the pandemic lasted uncertain in length and was hard to measure in the scope of impact when the legislator/government tried to introduce an emergency state, it required inspection and reevaluation on a rolling basis. This is to avoid the emergency laws to become open-ended.

I find it is worth discussing that the imposition of the emergency regime, which entitled to the imbalance of powers between the executive and the legislative for the sake of saving democracy and the constitutional system is actually a crooked way to serve the purpose. If democracy is the normality, the prone-authoritarian emergency regime should be abnormal and temporal. It is tricky that states and regimes introduce an abnormal and, usually the other way around, method to correct themselves and go back to the normal state. Democracy and liberal society, should it be the “normalcy,” shall be able to retrieve itself from precarious situations and solve social problems, then why the possible constitutional authoritarianism may exist from within? It could be said that the option of converting the democratic regime into an emergency regime is also the freedom enjoyed by the democratic society, however, democratic progression is thus doomed to be challenged because it is unavoidable for people to take the centralized emergency power as a ready-made panacea. Some say the emergency power is a necessary evil for the democratic states to sustain and react to emergencies such as the Covid-19 health crisis; I would partly agree. On the dark side, emergency states unpleasantly restrain citizens’ rights and human rights, which is a far cry from democratic development. On the bright side, states of emergency, if conducted properly in terms of legal certainty, temporal limitation, and proportionality, have self-proved to work effectively to implement decrees and measures and reduce the harm caused by uncertain crises to the least. That said, citizens have rights as well as obligations to the nation and society they belonged, and sometimes it is obligatory to narrow down individuals’ civil space in order to serve the public welfare. The restriction of human

rights and the probable erosion of democracy are the inevitable side-effects of emergency states, however, they should never overshadow the efficacy of maintaining a stable society during a health pandemic.

Bibliography

Academic publications:

- Ackerman, Bruce. "The Emergency Constitution." *The Yale Law Journal*. March 2004. Vol.113. No.5. p.1029-1091. <https://www.jstor.org/stable/4135710>.
- Afsahi, Afsoun. Beausoleil, Emily. Dean, Rikki. Ercan, Selen A. Gagnon, Jean-Paul. "Democracy in a Global Emergency: Five Lessons from the COVID-19 Pandemic." *Democratic Theory*. Volume 7, Issue 2, Winter 2020: v-xix. <https://doi.org/10.3167/dt.2020.070201>.
- Alon, Ilan. Farrell, Matthew. Li, Shaomin. "Regime Type and COVID-19 Response." May 28, 2020. *FIIB Business Review*. SAGE Journals. <https://doi.org/10.1177/2319714520928884>.
- Antal, Attila. "Hungary in State of Exception: Authoritarian Neoliberalism from the Austro-Hungarian Monarchy to the Covid-19 crisis." May 15, 2022. Lanham, Maryland: Lexington Books. ISBN: 1793652287.
- Bayer, Lily, and Wanat Zosia. "5 Ways the EU's Democracy Crisis Could End," *POLITICO*. August 3, 2021. <https://www.politico.eu/article/five-ways-the-eus-democracy-crisis-could-end/>.
- Bell, David. "Covid-19: Democracy and Hard Choices in Public Health." Covid: The Long Road to Recovery. *BMJ* 2020. June 5, 2020. Doi: 10.1136/bmj.m2090.
- Diamond, L., and L. Morlino. "The Quality of Democracy: An Overview". *Journal of Democracy*, vol. 15, no. 4. October. 2004.
- Goldmann, Matthias. "Human rights and democracy in economic policy reform: the European COVID-19 response under scrutiny." *The International Journal of Human Rights*. 2020. Doi: 10.1080/13642987.2020.1811697
- Graves, Frank and Smith, Jeff. "Northern Populism: Causes and Consequences of the New Ordered Outlook." June 30, 2020. *The School of Public Policy Publications*. SSRN: <https://ssrn.com/abstract=3641823>.
- Guérot, Ulrike and Hunklinger, Michael. "European Democracy after COVID-19." *Democratic Theory*. Volume 7, Issue 2, Winter 2020: 160–165. Doi: 10.3167/dt.2020.070219 ISSN 2332-8894 (Print), ISSN 2332-8908 (Online).
- Karáth, Kata. "Covid-19: Hungary's Pandemic Response May Have Been Worse than the Virus." *BMJ* 371 (November 4, 2020): m4153. <https://doi.org/10.1136/bmj.m4153>.

- Kavanagh, Matthew M. Singh, Renu. 2020. "Democracy, Capacity, and Coercion in Pandemic Response: COVID-19 in Comparative Political Perspective." *J Health Polit Law* 45 (6): 997–1012. <https://doi.org/10.1215/03616878-8641530>
- Kilpatrick, Jane. "When a Temporary State of Emergency Becomes Permanent: France as a Case Study." Transnational Institute. November 5, 2020. <https://www.tni.org/en/stateofemergency>.
- Kovács, Kriszta: Hungary and the Pandemic: A Pretext for Expanding Power, *VerfBlog*, 2021/3/11, <https://verfassungsblog.de/hungary-and-the-pandemic-a-pretext-for-expanding-power/>, DOI: 10.17176/20210311-154209-0.
- Lee E, Johnstone M. "Resisting politics of authoritarian populism during COVID-19, reclaiming democracy and narrative justice: Centering critical thinking in social work." *International Social Work*. 2021;64(5):716-730. doi:10.1177/00208728211011627
- Lundgren, Magnus, Klamberg, Mark, Sundström, Karin, and Dahlqvist, Julia. "Emergency Powers in Response to COVID-19: Policy Diffusion, Democracy, and Preparedness." *Nordic Journal of Human Rights*. Vol. 38. 2020. Issue 4. May 7, 2021. <https://doi.org/10.1080/18918131.2021.1899406>.
- Marzocchi, Ottavio. "The Impact of Covid-19 Measures on Democracy, the Rule of Law and Fundamental Rights in the EU," n.d., 10. LIBE committee Monitoring Group on Democracy, Rule of Law, Fundamental Rights. European Parliament. <https://www.europarl.europa.eu/cmsdata/207125/Final%20version%20of%20the%20Briefing%20note.pdf>
- Molloy, Sean. "Emergency Law Responses to Covid-19 and the Impact on Peace and Transition Processes." Seventh Edinburgh Dialogue on Post-Conflict Constitution-Building. 2020.
- Mtshali, Masi. "Declaring a State of Emergency Has Far-Reaching Effects." *Insights into The Law in South Africa*. Go Legal, August 19, 2021. <https://www.golegal.co.za/state-emergency-effects/>.
- Nadarajan, Devi, Gayathri, Omar, Eunizar, Abella, Benjamin S., Hoe, Pei Shan, Shin, Sang Do, Ma, Matthew Huei-Ming, and Ong, Marcus Eng Hock. "A Conceptual Framework for Emergency Department Design in a Pandemic." *Scandinavian Journal of Trauma, Resuscitation and Emergency Medicine* 28, no. 1 (17 2020): 118. <https://doi.org/10.1186/s13049-020-00809-7>.
- Or, Zeynep, Coralie Gandré, Isabelle Durand Zaleski, and Monika Steffen. "France's Response to the Covid-19 Pandemic: Between a Rock and a Hard Place." *Health*

Economics, Policy, and Law, n.d., 1–13.
<https://doi.org/10.1017/S1744133121000165>.

Ramraj, Victor V and Guruswamy, Menaka, ‘Emergency Powers’ in Tushnet, Mark, Fleiner, Thomas, and Saunders, Cheryl (eds). “Routledge Handbook of Constitutional Law.” New York: Routledge. 2013. ISBN 978–0–415–78220–3 (hbk). ISBN 978–0–203–07257–8 (ebk).

Russack, Sophia. “The Effect of Covid on EU Democracies” in “The Territorial Impact of COVID-19: Managing the Crisis across Levels of Government - OECD.” November 10, 2020, n.d., 38. Accessed December 1, 2021.
https://read.oecd-ilibrary.org/view/?ref=128_128287-5agkkojaa&title=The-territorial-impact-of-covid-19-managing-the-crisis-across-levels-of-government&_ga=2.133047881.638227121.1638362887-1694400404.1638362886.

Scauso, Marcos S, FitzGerald, Garrett, Tickner, Arlene B, Behera, Navnita Chadha, Pan, Chengxin, Shih, Chih-yu, and Shimizu, Kosuke. “Covid-19, Democracies, and (De)Colonialities.” *Democratic Theory*. Volume 7, Issue 2, Winter 2020: 82–93. Doi: 10.3167/dt.2020.070211 ISSN 2332-8894 (Print), ISSN 2332-8908 (Online).

Stasavage, David. “Democracy, Autocracy, and Emergency Threats: Lessons for COVID-19 From the Last Thousand Years.” *International Organization*. International Organization Online Supplement. 2020.
Doi:10.1017/S0020818320000338

Thomson, Stephan and IP, Eric C. “Covid-19 Emergency Measures and the Impending Authoritarian Pandemic.” *Journal of Law and the Biosciences*. Volume 7. Issue 1. January-June 2020. lsaa064.
<https://doi.org/10.1093/jlb/lsaa064>.

Thomson, Stephan and IP, Eric C. “Covid-19 Emergency Measures Are Hurting Democracy Globally.” *American journal of public health*. Vol 110, No.9. September 2020. Doi: 10.2105/AJPH.2020.305816.

Tommasoli, Massimo. “Democracy and Human Rights: The Role of the UN.” Discussion Paper. Stockholm, Sweden: New York: International Institute for Democracy and Electoral Assistance. Office of the Permanent Observer for International IDEA to the United Nations. 2013.

Tuckness, Alex. “Locke’s Political Philosophy.” *The Stanford Encyclopedia of Philosophy*, edited by Edward N. Zalta, Winter 2020. Metaphysics Research Lab, Stanford University, 2020.
<https://plato.stanford.edu/archives/win2020/entries/locke-political/>.

Varvelli, Piotr Buras, Jonathan Hackenbroich, Jana Puglierin, Jeremy Shapiro, Vessela Tcherneva, José Ignacio Torreblanca, Tara Varma, Arturo. “Health Sovereignty: How to Build a Resilient European Response to Pandemics.” European Council on Foreign Relations. ECFR (blog), 29 June 2020. https://ecfr.eu/publication/health_sovereignty_how_to_build_a_resilient_european_response_to_pandemics/.

Wilde, Marc de. “Silencing the Laws to Save the Fatherland: Rousseau’s Theory of Dictatorship between Bodin and Schmitt.” *History of European Ideas* 45, no. 8 November 17, 2019: 1107–24. <https://doi.org/10.1080/01916599.2019.1661265>.

Ypi, Lea. “A Crisis of the Social Contract: Why We Must Transform Our Democracy,” *New Statesman*. July 1, 2020. <https://www.newstatesman.com/politics/2020/07/crisis-social-contract-why-we-must-transform-our-democracy>.

Law and legislative acts:

European Convention on Human rights. European Court of Human Rights. Signed November 4, 1950. https://www.echr.coe.int/documents/convention_eng.pdf.

European Parliament. “Petition No 0377/2020 by Ferenc Tibor Zsák (Hungarian) on Covid-19 and the risk of violations of fundamental rights in Hungary.” Committee on Petitions. March 17, 2020. https://www.europarl.europa.eu/doceo/document/PETI-CM-696627_EN.pdf.

France. Code de la Défense (Version en vigueur depuis le 21 décembre 2004). Legislation. Article L2121-1 December 20, 2004. https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000006539784.

France. Code de la santé publique (Version en vigueur au 24 mars 2020). Legislation. Articles L3131-1 à L3131-11. https://www.legifrance.gouv.fr/codes/section_lc/LEGITEXT000006072665/LEGISCTA000006171181/2020-03-24/#LEGISCTA000041748550.

France. L’Assemblée Nationale. Constitution of October 4, 1958. Constitution. English website of the French National Assembly. <https://www2.assemblee-nationale.fr/langues/welcome-to-the-english-website-of-the-french-national-assembly>.

France. L’Assemblée nationale et le Sénat. LOI n° 2017-1510 du 30 octobre 2017 renforçant la sécurité intérieure et la lutte contre le terrorisme. Legislation. <https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000035932811/>.

- France. L'Assemblée nationale. Loi n° 55-385 du 3 avril 1955 relative à l'état d'urgence (Law of 1955 related to the state of emergency). Legislation. <https://www.legifrance.gouv.fr/loda/id/JORFTEXT000000695350/>.
- France. L'Assemblée nationale et le Sénat. LOI n° 2020-290 du 23 mars 2020 d'urgence pour faire face à l'épidémie de covid-19. Legislation. <https://www.legifrance.gouv.fr/loda/id/JORFTEXT000041746313/>.
- France. L'Assemblée nationale. LOI n° 2020-1379 du 14 novembre 2020 autorisant la prorogation de l'état d'urgence sanitaire et portant diverses mesures de gestion de la crise sanitaire. Legislation. <https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000042520662>.
- France. L'Assemblée nationale. LOI n° 2020-856 du 9 juillet 2020 organisant la sortie de l'état d'urgence sanitaire. Legislation. <https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000042101318/>.
- France. L'Assemblée nationale. LOI n° 2021-160 du 15 février 2021 prorogeant l'état d'urgence sanitaire. Legislation. https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000043134078?init=true&page=1&query=loi+2021-160&searchField=ALL&tab_selection=all.
- France. Le ministre des solidarités et de la santé. Arrêté du 14 mars 2020 portant diverses mesures relatives à la lutte contre la propagation du virus covid-19. Government decree. <https://www.legifrance.gouv.fr/loda/id/JORFTEXT000041722917/>.
- France. Le Premier ministre. Décret n° 2020-260 du 16 mars 2020 portant réglementation des déplacements dans le cadre de la lutte contre la propagation du virus covid-19 (Version abrogée depuis le 24 mars 2020). Government decree. <https://www.legifrance.gouv.fr/loda/id/JORFTEXT000041728476/>.
- France. Le Premier ministre. Décret n° 2020-293 du 23 mars 2020 prescrivant les mesures générales nécessaires pour faire face à l'épidémie de covid-19 dans le cadre de l'état d'urgence sanitaire. Government decree. <https://www.legifrance.gouv.fr/loda/id/JORFTEXT000041746694/>.
- France. Le Président de la République et le conseil des ministres entendu. Décret n° 2020-1257 du 14 octobre 2020 déclarant l'état d'urgence sanitaire. Government decree. <https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000042424377>.
- France. The Council of Consitution. Decision no. 2020-800 DC of 11 May 2020 “Law extending the public health state of emergency and rounding out its provisions. Published on 11 May 2020. <https://www.conseil-constitutionnel.fr/en/decision/2020/2020800DC.htm>.

- Hungary. The Parliament. Fundamental Law (prior to the Ninth Amendment). Constitution. Adopted December 15, 2020. European Commission For Democracy Through Law (Venice Commission). Council of Europe. Strasbourg, June 3, 2021. [https://www.venice.coe.int/webforms/documents/?pdf=CDL-REF\(2021\)046-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-REF(2021)046-e).
- Hungary. National Assembly. “About Parliamentary Committees - House of the National Assembly - Országgyűlés.” The Hungarian National Assembly and the Office of the Hungarian National Assembly. Accessed April 14, 2022. <https://www.parlament.hu/web/house-of-the-national-assembly/about-standing-committees>.
- Hungary. National Assembly. Act. CLIV of 1997 on Health Care. Legislation. Section 3. (i). Adopted December 23, 1997. <http://www.patientsrights.hu/dokumentumletoltes>.
- Hungary. National Assembly. Act No. CXXVIII of 2011 concerning disaster management and amending certain related acts. Legislation. Adopted October 21, 2013. <https://www.informea.org/en/legislation/act-no-cxxviii-2011-concerning-disaster-management-and-amending-certain-related-acts>.
- Hungary. National Assembly. Act XII of 2020 on the Containment of Coronavirus. Legislation. Adopted March 30, 2020. <https://berlin.mfa.gov.hu/assets/77/49/43/cc3672166e33b2cf015ce4371aedef19417c2710.pdf>.
- Hungary. National Assembly. Act No. LVIII of 2020 on Transitional Rules related to the Termination of State of Danger and on Epidemiological Preparedness. Legislation. Adopted June 26, 2020. <https://wipolex.wipo.int/en/legislation/details/20079>.
- Hungary. National Assembly. Act CIX of 2020 on the Containment of the Second Wave of the Coronavirus Pandemic (translated). National law. Adopted November 10, 2020. http://jogszabalykereso.mhk.hu/translated/doc/J2020T0109P_20201111_FIN.pdf.
- Hungary. The Government. Governmental Decree no. 40/2020 on declaring state of danger (III. 11.) (Korm. rendelet veszélyhelyzet kihirdetéséről). Government decree. Adopted May 11, 2020. [https://ils.hu/storage/covid-19/en/Government%20Decree%2040-2020%20\(III.11.\)%20State%20of%20Danger.pdf](https://ils.hu/storage/covid-19/en/Government%20Decree%2040-2020%20(III.11.)%20State%20of%20Danger.pdf).

Hungary. The Government. Government Decree no. 283/2020 on the introduction of epidemiological preparedness(VI. 17.) (Korm. rendelet a járványügyi készség bevezetéséről). Government decree. Adopted July 2, 2020. <https://net.jogtar.hu/jogszabaly?docid=a2000283.kor>.

Hungary. The Government. Government Decree 478/2020 (3 November) on the declaration of state of danger (Engl. translation). Government decree. Adopted November 3, 2020. https://njt.hu/translation/J2020R0478K_20201104_FIN.pdf.

Hungary. The Government. Government Decree 26/2021. (I.29.). “Terminating the state of danger under Government Decree 478/2020 (3 November) on the declaration of state of danger (Eng. translation). Government decree. Adopted January 29, 2021. https://njt.hu/translation/J2021R0026K_20210209_FIN.pdf.

“Universal Declaration of Human Rights.” United Nations. Accessed March 24, 2022. <https://www.un.org/en/about-us/universal-declaration-of-human-rights>.

International Covenant on Civil and Political Rights. UN General Assembly Resolution 2200A (XXI). Adopted December 16, 1966. <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights>.

Official documents and reports:

Binder, Krisztina, Diaz Crego, Maria, Eckert, Gianna, Kotanidis, Silvia, Manko, Rafal, and Del Monte, Micaela. “States of Emergency in Response to the Coronavirus Crisis: Situation in Certain Member States.” EPRS European Parliamentary Research Service Think Tank. European Parliament. May 4, 2020. Accessed May 4, 2022. [https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI\(2020\)649408](https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI(2020)649408).

Crego, Maria Diaz and Kotanidis, Silvia. “States of emergency in response to the coronavirus crisis: Normative response and parliamentary oversight in EU Member States during the first wave of the pandemic.” European Parliament Research Service (EPRS). PE 659.385 –December 2020. DOI:10.2861/892605

General Comment on Article 4. General comment no. 29. State of Emergency (article 4) GE.01-44470 (E) 190901. International Covenant on Civil and Political Rights. August 31, 2001. CCPR/C/21/Rev.1/Add.11. United Nations. <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRiCAqhKb7yhsjYoiCfMKoIRv2FVaVzRkMjTnjRO%2Bfud3cPVrcM9YR0iix49n>

IFOsUPO4oTG7R%2Fo7TSsorhtwUUG%2By2PtslYr5BldM8DN9shT8B8Npb
sC%2B7bODxKR6zdESeXKjiLnNU%2BgQ%3D%3D.

Hungarian Helsinki Office. “Background Note on Act XII of 2020 on the Containment of the Coronavirus.” March 31, 2020.

Hungarian Helsinki Office. “Overview of Hungary’s Emergency Regimes introduced due to the Covid-19 Pandemic.” Update of January 1, 2022.

International Commission of Jurists. “A Facade of Legality: COVID-19 and the Exploitation of Emergency Powers in Hungary.” February 2022.

UNHCR. “Hungarian Act LVIII of 2020 on the Transitional Rules and Epidemiological Preparedness related to the Cessation of the State of Danger.” UNHCR Position. UNHCR, the UN Refugee Agency. June 2020. <https://www.refworld.org/pdfid/5ef5c0614.pdf>.

Online resources:

Basilien-Gainche, Marie-Laure. “French Response to COVID-19 Crisis: Rolling into the Deep.” *VerfBlog*. March 18, 2021. <https://verfassungsblog.de/french-response-to-covid-19-crisis-rolling-into-the-deep/>. DOI: 10.17176/20210318-154150-0.

European Parliament. “Fundamental Rights in the EU.” Accessed March 24, 2022. <https://www.europarl.europa.eu/about-parliament/en/democracy-and-human-rights/fundamental-rights-in-the-eu>.

France Diplomacy, Travel Restrictions and Implementation of Public Health Measures at Borders - Press release issued by the Ministry of the Interior, the Ministry for Europe and Foreign Affairs and the Ministry for Solidarity and Health, available at: <https://www.diplomatie.gouv.fr/en/coming-to-france/coming-to-france-your-covid-19-questions-answered/coronavirus-statements/article/travel-restrictions-and-implementation-of-public-health-measures-at-borders>.

Freedom House. “Democracy under Lockdown.” Accessed March 21, 2022. <https://freedomhouse.org/report/special-report/2020/democracy-under-lockdown>

Freedomhouse.org. “Freedom in the World 2021.Democracy under Siege.” <https://freedomhouse.org/report/freedom-world/2021/democracy-under-siege>.

- Ginsburg, Tom and Versteeg, Mila. "Can Emergency Powers Go Too Far?" *Tablet Magazine*. April 7, 2020. https://www.tabletmag.com/sections/news/articles/coronavirus-emergency-powers-constitutional-rights?fbclid=IwAR1ZVEiCpx36SDhTif3qOMlqZfJJu_wRm4KAzHPmn6tf0HjY3EsyMm0wk2w.
- Gomez del Valle, Alvaro. "The Role of Freedom of Religion or Belief in Tackling the COVID-19 Pandemic." *GC Human Rights Preparedness*. April 29, 2021, <https://gchumanrights.org/preparedness/article-on/the-role-of-freedom-of-religion-or-belief-in-tackling-the-covid-19-pandemic.html>.
- Guarascio, Francesco. "In blow to WHO, EU seeks powers to declare health emergencies." *Reuters*. November 11, 2020. <https://www.reuters.com/article/health-coronavirus-eu-reform-int-idUSKBN27R277>.
- "Hungary Ends State of Emergency." *CMS-Law-Now*. June 22, 2020. Accessed April 14, 2022. <https://www.cms-lawnow.com/ealerts/2020/06/hungary-ends-state-of-emergency>.
- "Hungary Introduces State of Emergency Measures to Address Coronavirus Pandemic." *European Sources Online*. Accessed April 14, 2022. <https://www.europeansources.info/record/hungary-government-adoptst-anti-coronavirus-emergency-measures-set-for-adoption-which-almes-observers-who-fear-it-will-hand-prime-minister-unlimited-power/>.
- Kirry, Antoine F., Bisch, Alexandre, and Tengemann, Philippe. "French Law in Response to the COVID-19 Epidemic." *Debevoise Plimpton*. March 25, 2020. www.debevoise.com.
- Lowe, Christian, and Van Overstraeten, Benoit. "France Declares Public Health State of Emergency over COVID-19." *Reuters*. October 14, 2020. Accessed January 24, 2022. <https://www.reuters.com/article/us-health-coronavirus-france-emergency-idUSKBN26Z2PQ>.
- Mezzadra, Sandro and Stierl, Maurice. "What Happens to Freedom of Movement during a Pandemic?" *OpenDemocracy*. March 20, 2020. Accessed March 21, 2022. <https://www.opendemocracy.net/en/can-europe-make-it/what-happens-freedom-movement-during-pandemic/>.
- Ray, M.. "Euroskepticism." *Encyclopedia Britannica*. June 24, 2016. <https://www.britannica.com/topic/Euroskepticism>.

- Roe, David. "France Enables Extension of Covid Health Emergency, Health Pass to July 2022," RFI. 5, 2021. <https://www.rfi.fr/en/france/20211105-france-enables-extension-of-covid-health-emergency-health-pass-to-july-2022>.
- Silverstein, G.. "emergency powers." *Encyclopedia Britannica*. February 27, 2020. <https://www.britannica.com/topic/emergency-powers>.
- "State of Emergency - an Overview." ScienceDirect Topics. Accessed March 24, 2022. <https://www.sciencedirect.com/topics/social-sciences/state-of-emergency>.
- Transparency International.. "The State of Emergency in Hungary Must Be Limited in Time - Blog." Transparency.org. Accessed April 14, 2022. <https://www.transparency.org/en/blog/the-state-of-emergency-in-hungary-must-be-limited-in-time>.
- Venice Commission. "Observatory on emergency situations." Venice Commission. Council of Europe. <https://www.venice.coe.int/files/EmergencyPowersObservatory/HUN-E.htm>.
- "WHO Director-General's statement on IHR Emergency Committee on Novel Coronavirus (2019-NCoV)." World Health Organization (WHO). Accessed April 15, 2022. [https://www.who.int/director-general/speeches/detail/who-director-general-s-statement-on-ih-er-emergency-committee-on-novel-coronavirus-\(2019-ncov\)](https://www.who.int/director-general/speeches/detail/who-director-general-s-statement-on-ih-er-emergency-committee-on-novel-coronavirus-(2019-ncov)).
- World Health Organization (WHO). "Emergencies: International Health Regulations and Emergency Committees." December 19 2019. Accessed April 15, 2022. <https://www.who.int/news-room/questions-and-answers/item/emergencies-international-health-regulations-and-emergency-committees>.
- World Health Organization (WHO) Regional Office for Europe. "About Health Emergencies in the European Region." Accessed April 15, 2022. <https://www.euro.who.int/en/health-topics/health-emergencies/pages/about-health-emergencies-in-the-european-region>.