FREEDOM OF EUROPEAN NATIONAL CONSTITUTIONS TO REGULATE EMERGENCIES

(Comparative study on the Hungarian structure of special legal orders)

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To Nóra, Lili and Petra

CONTENT

PROLOGUE

The original version of this paper was finalised in November 2019 with the aim to be used as a thesis for MA degree in Public International Relations at LUISS School of Government, Rome.

Considering the possibility of publication of the extended version by the Hungarian Society for Military Law and the Law of War as contribution to the research program of the Faculty of Military Sciences and Officer Training at the National University of Public Service, we started a peer-review procedure in 2020, and we finished it in the middle of the COVID-19 pandemic in Europe.

Many thanks for the comments and suggestions made by *Professor András Jakab, Brigadier General Pál Kádár, Associate Professor Lóránt Csink,* and by two colleagues from the department at NUPS, *Ádám Farkas and Roland Kelemen*. Their contributions pushed the draft towards some new security challenges, pushing further from the original descriptive approach.

On the other hand, the timing of the peer-review concluded with the starting point of a new phase in the history of the European relevancy of the emergencies because of an epidemic. Although many experiences from the first half of this year could have built in, their consequence would have overload of the original structure and timeframe focused between 2010-2016. So, the original research targeting the emergencies with violent nature remained unchanged.

INTRODUCTION

The title of this paper might seem controversial, but it shows at least the interaction between different level of actors in national and international sense, also the different conceptualization of the same legal elements of the constitutions where categories mean different perceptions behind. This paper is about special regulations of constitutions dedicated managing circumstances outside the peacetime normality considered by states and international organizations. Emergencies are problematic situations with some shared elements, but inherently with differences pending on traditions of legal systems and uniqueness of the causes hindering the normal functionality.

To understand both levels of reasoning, we should also use *"the term 'special legal order' because (...) 'emergency' has another meaning in the Hungarian constitutional order. The Hungarian regulation in this regard is one of the most detailed ones in Europe"*[1] since 2011. Using both terminologies helps to demonstrate a debate with national and international participants, based on translated texts on topic inherently crosscutting national and international elements.

This paper supposed to answer the research question: *Whether and how did the outside actors limit the freedom of manoeuvre of an EU member state regulating the emergency legal framework between 2010 and 2016?*

[1] Tímea Drinóczi at al, "Formal and Informal Constitutional Amendment in Hungary", *MTA Law Working Papers 2019/18. https://jog.tk.mta.hu/uploads/files/2019_18_Drinoczi_GardosOrosz_PozsarSzentmiklosy.pdf* Note 98, page 17. This paper uses the terminology from the chapter of the Fundamental Law, according to the official translation by the Ministry of Justice. (The distinct term Constitution is used related to Hungary about the earlier Constitution originated from 1949 and generally re-written during the transition of 1989-1990 and amended plenty of times.)

According to our 4-step hypothesis:

1) The national constitutional freedom (margin of appreciation) is the basic starting point, reacting on variable threats and challenges.
2) There is a legalistic level of international argumentation, mostly collected by Council of Europe (CoE)-related institutions, starting from European Court of Human Rights (ECtHR) and summarized by Venice Commission, but referred also by EU.
3) Because of the ad hoc international reactions on events (based on interpretations) the room of manoeuvre is shrinking.
4) Lastly, the dynamic interaction between foreign/defence policy and domestic-based security and the overlaps of the EU and NATO functions contribute to limitations of the national regulatory authorities, facilitated by hybrid concept.[2]

Instead of the sorely legalistic argumentations, the last politically based aspect becomes the key element for nations. The freedom of the constituent seems to be more reduced than some years earlier. We do not share the conspiracy theory based on duplication of constitutional systems by my earlier mentor Professor Pokol,[3] but we claim at least that there are legally controversial situations challenging the operability of states and the legal solutions, even the international categories, or in worst cases, general programs. Professor Marchetti's multi-level government model, presented at the NATO Defense College, also affected our approach, as a broad framework to analyse state - international organizations' – civil society organizations' interactions, where

[2] For comprehensive critique of hybrid concepts see Murat Caliskan, "Hybrid Warfare and Strategic Theory" Apr 25, 2019 https://www.behorizon.org/hybrid-warfare-through-the-lens-of-strategic-theory/

[3] Béla Pokol, "Die graduelle Verdoppelung des Rechtssystems durch Verfassungsgerichtbarkeit", *MTA Law Working Papers 2019/17. https://jog.tk.mta.hu/uploads/files/2019_17_Pokol.pdf*

NGOs are not always in positive roles.[4] From this perspective, the paper is a case study on the different effects of the internationalization of originally restrictive national policies based on a cleavage between government-focused majority parties versus federalist-cosmopolitan opposition.

Combining methodologies of the political and the comparative constitutional legal sciences we wish to research a specific segment of this 2-level interaction with deeper analysis of some possible ways of reasoning. To prove our claim, we compare some expectations of international organizations' programs and critics challenging the elements of the Hungarian constitutional system before and after 2012, and the counter-terrorism-amendment from 2016. We compare Hungarian parliamentary notes and secondary literature with strategic documents and programs of Venice Commission, NATO and the EU.

We compare the Hungarian constitution with the German and French framework as models of the continental written constitutions. This evaluation remains a bit theoretic, because the Hungarian Special legal order (hereafter abbreviated: SLO) chapter was not ever invoked in violent situations,[5] a contrarily to the French regulations. Evaluation of the available legal options is inherently uncertain, but it is part of the complexity of the topic. This paper focuses on the relevant actors' reasoning in public debates between 2010 and 2016, including the adoption of the Fundamental Law of Hungary (hereafter abbreviated: FL) and its sixth amendment. This procedure seems to be a double internationalization: considering

[4]Raffaele Marchetti - Nathalie Tocci, "Conflict society: understanding the role of civil society in conflict", *Global Change, Peace and Security,* 21, 2: 201-17 (2009) http://docenti.luiss.it/rmarchetti/files/2009/06/2009conflict-soc-gcps-proofs.pdf ; Raffaele Marchetti "Mapping Alternative Models of Global Politics", *International Studies Review* (2009) 11, 133–156 http://docenti.luiss.it/rmarchetti/files/2009/02/2009mapmodels-isr.pdf ; and Raffaele Marchetti, "Civil Society and the European Union in Times of Crisis: From Partnership to Threat?", *Outlines of Global Transformations: politics, economics, law*, 10, 1: 106-121 (2017) https://www.ogt-journal.com/jour/article/view/15/14 2017.

[5] On the contrary the Article 53 about state of danger was already invoked because of a Danube-flood in 2013 first.

programs and limitations both. Without formal modification of international documents, the international organizations became more effective reacting on challenges also pushed by local activists. We should also measure the legal systems against perceptions and expectations of different actors because their programs have effects on an EU-member, NATO allied country's practice. The blurred lines between intra-state policies and inter-state security might have consequences at constitutional systematic level.

Being both a military person and part of the broad regulatory framework causes an attitude to keep neutrality by focusing on possible obstacles to find solutions for the constitutional framework of the FL, searching for inconsistencies, but without an anti-executive bias.[6] The history of these elements of the Hungarian constitutions shows, that there is a trend also not to invoke emergency measures. From this perspective: balancing between possibilities without choosing always the short-cut option is part of the good governance, although emergency measures are connected typically with rule of law. However, even participation at such debate might be an academic activity with possible misuse by politically active, biased participants, as part of the *lawfare* concept, causing legitimacy or de-legitimising the framework.

So, Part I will focus on the terminology and the historical background causing the characteristics of this segment of the Hungarian constitutional system. Part II will evaluate the reasoning style of some international actors, leading to comparisons and conclusions at Part III. In general, we wish to reduce our scope on the real constitutional institutions of emergencies, so alternative conceptualizations connecting peacetime regulations, like migration-issues are out of our research, although they effected at least the perceptions in the constitutional debates. On the other hand, they are already part of a further debate about the blurred lines

[6] A standard approach from the opposition is a collection of international worst case scenarios using the absolutistic methods at the time of the French revolution, misuse of the martial law in US soil or failed regulatory attempt of Article 48 of the Weimar Constitution. They all might have been bad solutions as tools, but the shared reason behind them remained a valid question to be answered on a better way. A state does not have a luxury not to react on vital security challenges.

between SLO-related measures versus tightened peacetime regulations, as an anteroom-scenario.[7]

[7] See the "Total Defence" concept of some Nordic countries, as comparisons https://warsawinstitute.org/swedish-total-defence/ and https://www.regjeringen.no/contentassets/5a9bd774183b4d548e33da101e7f7d43/support-and-cooperation.pdf.

PART I
HUNGARIAN READINGS

1.1. From History to definitions: characteristics of a constitutional system

There is a not enough deeply researched body in the written constitutions, which supposed to save the spirit of constitutionalism when the circumstances do not allow the manageability of the state. The paradoxical logic of such regulations is about a combination of reduced individual freedoms and modified structures from the state side, focused on a toolbox with reduced level of checks and balances to avoid a status of a failing/failed state. The topic as such is balancing between necessity and affordability where neither a "*vetocracy*" nor an authoritarian state are ideal options. The first one means the missing effectiveness of the state to react timely on the threats and challenges inside or outside, or even with mixed nature, the second one might fail the end state by sacrifice of rule of law. Both perspectives regularly criticize the balancing act, where the *status quo ante* is typically not manageable.

Although the topic is full of ethical and legal dilemmas, it seemed to have secondary importance without practical relevance in the recent history. However, elements of the topic appeared in practice of other states, France and the US included after years of Western luxury of *"out of history"*, typically in form of counter-terrorism, with ongoing debates on misusing the aims of the regulation.

This paper is part of a longer research started 10 years ago. A legal professor asked the author to supervise his "poorly civilian" ideas regarding the military-related elements of the former

Constitution,[8] later he asked for co-writing about dogmatic structures of the SLO chapter of the FL from 2011. This paper[9] became the first chapter explaining the structure and key institutions of this system for legal students. In 2012, it seemed to be a marginal element of a broader conversation on the adoption of a new constitution without genuine participation of the opposition, where legitimation was more in processual sense. By that time, the topic seemed to be poorly national, latent and theoretical.

On the other hand, an emergency-close situation caused partly the unique supermajority-situation by 2010: in 2006, the social-liberal government used disproportionate police force against (predominantly non-violent) protesters on the streets of Budapest.[10] Although police used some military equipment weapons included, at least the idea to use military force was rejected, as a key element of the post-transition national tradition. Finally, almost all elements of the earlier constitutional system, including the structure of emergencies became part of FL with limited changes, but without consent of the opposition, which lost his needed percentage of MP-s to block the constitutional reforms.

From the time of the transition, we inherited categories covering war-like situations, extended violent domestic acts and catastrophes. Constitutional amendment was relatively easy by bipartisan agreements for 2/3 supermajority, but limitations of the executive power dominated without real intent to invoke any

[8] András Jakab (ed), *Az Alkotmány kommentárja*, Századvég Budapest, 2009. IX.
[9] András Jakab – Szabolcs Till, *A különleges jogrend*, In: *Bevezetés az Alkotmányjogba; Az Alaptörvény és Magyarország Alkotmányos Intézményei,* edited by László Trócsányi – Balázs Schanda, HVG-ORAC Budapest, 2012 429-453
[10] Highlighted by the Speaker of the Parliament at the opening of the debate on FL. 22/03/2011 https://www.parlament.hu/web/guest/iromanyok-elozo-ciklusbeli-adatai?p_p_id=hu_parlament_cms_pair_portlet_PairProxy_INSTANCE_9xd2Wc9jP4z8&p_p_lifecycle=1&p_p_state=normal&p_p_mode=view&p_auth=SJotvtRJ&_hu_parlament_cms_pair_portlet_PairProxy_INSTANCE_9xd2Wc9jP4z8_pairAction=%2Finternet%2Fcplsql%2Fogy_naplo.naplo_fadat%3Fp_ckl%3D39%26p_uln%3D76%26p_felsz%3D13%26p_szoveg%3D%26p_felszig%3D13

emergency measures.[11] Later, at the time of Balkan wars further alternative joined the Constitution in 1991 to cover limited size-forces from abroad, making also possible an interpretation to cover also 9/11-like situations[12] 10 years later. We used coordinated amendments of the constitution and act on home defence. The termination of conscription for peacetime combined with time-consuming precautionary measures expected by NATO (already as part of the new security challenges-paradigm) caused the fifth distinct term. Finally, FL modified only the structure of five categories at the differentiation of national crises caused by disasters versus violent acts.

Late 2014, debating the draft PhD thesis[13] we considered separating the emergency issues from other constitutional elements, targeting directly the defence forces. At the end of the debate, it remained inside the research. Since February 2015, almost all papers by the author evaluate different elements of the SLO, believing more and more that at a certain moment a government should use the SLO chapter, contrary to the last 30 years' experience. The national history seemed to avoid it, producing a sophisticated legal framework, which is organized according to the differentiated causes and measured effects, to keep the restrictions as proportionate as possible.

[11] Ádám Farkas, "Szemléletváltást védelmi aspektusban!" *Pázmány Law Working Papers* 2015/18 Note 4 page 9 http://d18wh0wf8v71m4.cloudfront.net/docs/wp/2015/2015-18_Farkas_.pdf

[12] About critics of both comparisons Constitution vs FL and constitutional level regulations vs act on home defence see two articles written by Gábor Sulyok, "A terrorcselekmény elkövetéséhez használt polgári légi jármû lelövésének nemzetközi jogi és alkotmányjogi megítélése" *FUNDAMENTUM* 2004/3. 30-56. http://fundamentum.hu/sites/default/files/05-3-03.pdf; and *A terrorcselekmény elkövetéséhez használt polgári légi jármű lelövésének alkotmányjogi megítélése az új szabályozási környezetben*, In *A terrorizmus elleni küzdelem aktuális kérdései a XXI. Században,* edited by Bartkó Róbert 35-60 https://dfk-online.sze.hu/images/egyedi/terrorizmus%20k%C3%B6tet/sulyok.pdf

[13] Szabolcs Till, "Shifting emphases of the Hungarian constitutional framework on defence from the democratic transition to the new Constitution, Synopsis", Budapest 2015 https://edit.elte.hu/xmlui/bitstream/handle/10831/30386/POLDI_Tezisek_EN_TillSz_EDIT.pdf?sequence=2&isAllowed=y

On the other hand, the journey from purely theoretical structures to threat-based alternatives might have caused an over-complicated system with danger not to be manageable as a timely limited reaction. The FL constructed a too complex system, answering earlier regional situations when the globalized world produced different type real threats under time pressure. The debate started to become more vital,[14] when the threat perceptions caused at least two draft-amendments of the FL:

- the first one in 2015, dedicated to mass-migration-related threat-perceptions, failed at constitutional level,
- a contrarily, countering the terrorist-threat after some major attacks in EU capitals, reached the needed support from one opposition party to become the sixth amendment of the FL in 2016.

Two different cases, two opposing solutions related to perceived new-type security challenges with less military focus. The 2016 debate[15] in the Parliament focused on possible events and the use of military force against terrorism. Because of the non-participation of the social-liberal opposition at the debates, a next round of publications appeared with approaches based not only on different constitutional examples but also on some Western theoretical works challenging the whole idea of emergency measures inside a constitutional system. Earlier it was out of the scope because the FL kept the earlier institutions.[16]

[14] Tímea Drinóczi, "Central and Eastern European constitutional formulas: the abuse and observance of constitutions in times of emergency", *Conference Paper* 2019, https://www.researchgate.net/publication/335762469_Central_and_Eastern_European_constitutional_formulas_the_abuse_and_observance_of_constitutions_in_times_of_emergency

[15] https://www.parlament.hu/web/guest/iromanyok-elozo-ciklusbeli-adatai?p_p_id=hu_parlament_cms_pair_portlet_PairProxy_INSTANCE_9xd2Wc9jP4z8&p_p_lifecycle=1&p_p_state=normal&p_p_mode=view&p_auth=YJtR15B3&_hu_parlament_cms_pair_portlet_PairProxy_INSTANCE_9xd2Wc9jP4z8_pairAction=%2Finternet%2Fcplsql%2Fogy_irom.irom_adat%3Fp_ckl%3D40%26p_izon%3D10416

[16] Draft of the FL, 14/03/2011, T/2627 signed by 261 MPs, 34, https://www.parlament.hu/irom39/02627/02627.pdf

The first line of this new reasoning was to avoid a bad government using emergency measures via international organizations questioning the regulations. The option for the re-structured chapter became contrasted with the inherently limited legitimacy of the FL in a topic, which includes the danger of possibly misuse. The emergency measures are inherently about the partial sacrifice of some rule of law instruments to save the constitutional system if unique circumstances deeply challenge it. Proportionality is a key element if the reaction from the state's side is necessary. This debate inherently had an international standards-based element of the argumentation.

At this phase, our further publication[17] focused on possible use of different types of emergency measures as a sequence of actions or simultaneously, compared to some international agreements and challenged by hybrid-impetus. Core of the reasoning was about overlapping resilience-projects of NATO and the EU, which should have consequences on use of military. Until the possible domestic effects of extraterritorial events became part of the real life-conversations massively, reflection by constitutional amendments seemed to be without prompt political effects. After that turning point, even the system of the SLO chapter based on the post-WW2 German *Grundgesetz* is not a taboo anymore. Broadening the focus inspired the current research on

- overlaps of international and national conceptualization of the causes and the emergency-toolkit, and
- the different paradigms of the relevant international actors at more practical, interpreted level.

There are the two sides of the coin: until the threat-perceptions became at least partly determined by policy-level instruments by some international actors, others may evaluate a legally-written constitutional system based on some broad ideas

[17] Szabolcs Till, "A különleges jogrendi kategóriarendszer egyszerűsítésének jövőbeli esélyei", *Iustum Aequum Salutare* XIII. 2017. 4. 55–75 http://ias.jak.ppke.hu/hir/ias/20174sz/05_TillSz_IAS_2017_4.pdf

with different readings, using generalized case-law principles, without a mainstream, internationally accepted "school-solution".

1.2. Definition of the researched topic's elements / possible categories

Behind the debate about the textual level of the FL there is

- a hidden debate about the possible amendment of some basic values by the constituency or by the Constitutional Court informally,[18] and
- an open debate about securitization:[19] the different actors challenge each other's threat-perceptions and their hidden intents.

According to the governments' reading prompt reactions are needed caused by terrorist acts and other perceived threats. According to the reading of the opposition, these perceptions are subjective and manipulated, and at the end of the day, the real aim is to empower the state above the needed level. There are debates pending on the different constitutional systems with a spectrum from the normal (peacetime) regulations to different labels of emergency measures caused

- by different war-like scenarios abroad,
- inside the states by different level of non-international armed conflicts, or
- by natural and human-caused disasters.

This classical structure of the categories might be combined with an effect-based approach, focusing more on consequence than on causes, moving the possible number or extended interpretation of the concepts towards further alternatives:

[18] See Drinóczi at al, ibid

[19] Péter Tálas, "A terrorveszélyhelyzet-diskurzus margójára," *Stratégiai Védelmi Kutatóközpont NÉZŐPONTOK* 2016/1. https://svkk.uni-nke.hu/document/svkk-uni-nke-hu-1506332684763/svkk-nezopontok-2016-1_.original.pdf

- the war-analogy might be combined with different new threats from cyber to terrorism towards mass migration or climate change, and
- the concept of hybrid warfare might relativize the distinctive elements of the categories.

Finally, even an exact legal terminology, as an expectation of the rule of law might became an obstacle of the state-level reaction, as some disadvantages were used opportunistically just below the threshold of an armed attack, like mass movements of local minorities were orchestrated and sponsored from outside in 2014 and they might even be combined with strategic terrorist attacks. The general problem with "red lines" is similar: new technical methods might challenge the threshold by violations without precedents causing disagreements about the interpreted situations, blocking the decision making of a government or even an international institution. If an organisation is supposed to react in a limited number of hours, an unclear situation tests the system, where the actors measure their individual gains and losses. They might be extremely different and multi-level.

In the theory of the constitutional legal legitimacy,[20] a constitution should be drafted outside of rapid changes and based on as broad consensus as possible. Emergency measures supposed to empower the governments to be able to react as quickly as possible to reduce the consequences of the negative events, typically without knowing enough relevant circumstances under time-pressure. Information might be a key enabler, but how to gain it, is a balancing act between self-restrictions caused by ideas of rule of law and the consideration of the necessity. If too subjective perceptions overwhelm it, even factually true considerations might cause overreactions. The classical example is 9/11: having the innovative

[20] Lóránt Csink, "Mikor legyen a jogrend különleges?" *Iustum Aequum Salutare* XIII. 2017. 4. 7–16. http://ias.jak.ppke.hu/hir/ias/20174sz/01b_Csink_IAS_2017_4.pdf About further principles and values behind see Lóránt Csink and Johanna Fröhlich, "A HAINING-ELV Az alkotmány identitása, stabilitása és változtathatósága", *Iustum Aequum Salutare* XII. 2016. 4. 21–32. http://ias.jak.ppke.hu/hir/ias/20164sz/03_Csink_Frohlich_IAS_2016_4.pdf

use of airplanes as weapons and some low scale Anthrax-letters simultaneously might have caused a combination of the perception about a mixed use of both methods, leading to explanation of illegal "techniques" by state organs. Although this consideration was very remote from the Hungarian reality, inside the threat-perception caused some interpretations and later amendment of the categories at least.

Since 2011, one new category joined the SLO chapter reflecting on the European terrorist attacks of 2015. In general, the chapter is one of the most detailed ones dedicated to the topic in Europe, but comparable with and partly based on the German constitutional regulations. The elements of the chapter differentiate on the foreign versus domestic origin of the threats not manageable according to the normal procedures of peacetime regulations and on possible use of weapons. There is a further effect-based element to keep the reactions as proportionate as possible. They are in general reflective in nature, with some elements of preparations. According to the current version, there are six defined categories in the chapter:

Foreign origin	**Domestic origin**
state of national crisis[21]	state of emergency[22]
unexpected attack[23]	state of danger[24]
state of preventive defence[25]	
state of terrorist threat[26] (after 2016)	

[21] Article 48 (1) a): *"declaration of a state of war or an imminent danger of armed attack by a foreign power (danger of war)"*

[22] Article 48 (1) b): *"armed actions aimed at subverting the lawful order or at exclusively acquiring power, and in the event of serious acts of violence massively endangering life and property, committed with weapons or with instruments capable of causing death"*

[23] Article 52 (1): *"unexpected incursion of external armed groups into the territory"*

[24] Article 53 (1): *"a natural disaster or industrial accident endangering life and property, or in order to mitigate its consequences"*

[25] Article 51 (1): *"danger of external armed attack or in order to meet an obligation arising from an alliance"*

[26] Article 51/A (1): *"significant and direct threat of a terrorist attack or in the event of a terrorist attack"*

There is also an inherent margin of consideration for the government which regulations to apply or suggest, because

- some differentiations are relative ("serious", "massively endangering", imminent versus normal danger, "significant and direct threat"),
- many of them are pending on missing pieces of information ("external armed groups", "aimed at subverting", "unexpected incursion", threat of a terrorist attack), or even
- became extended by interpretation (like the unexpected attack after 9/11).

Critics might consider them as vaguely defined in a more critical sense, questioning all the circumstances, the authorities, and the possible decisions.[27]

Theoretically, the problem relates to the ability of a state to react at least at two levels: the decision-making should be timely and safe; on the other hand, international legal regulations both define and limit its freedom and responsibility to save peoples' life. The toolkit is available at state level, but they are not usable against some actions or some types of actors. The state should react because of its responsibility. A new challenge means comparing general-level concepts' limitations and available options of analogies challenged by new arguments.

However, security challenges might not be single acts only; they are mostly series of connected events. Emergency measures seem to be better suited for this second option than to stop a single procedure because there is not enough time to invoke not-peacetime regulations to break the causality chain. A SLO might regulate preventing a planned event or mitigating the consequences: if mathematical algorithms can model disasters, it makes sense to invoke an emergency preventively to use better the available time for preparation. On the other hand, a single event by surprise always might happen.

The subjective part of this governmental decision-procedure based on perceptions of different dangers, possible enemies, and

[27] Drinóczi at al, 17-18

evaluation of the ongoing events. Until hidden information might give a reasoning for a surprising event, it might define the answer from stateside. Hybrid threats on the other hand challenge the identification of the events: the aims and the connections between different type single events might cause cumulative effects by synchronisation. If the hybrid concept is accepted, it multiplies both the uncertainties and possible mistakes caused by subjectivity.

1.3. Elements of reasoning at the Parliamentary debates (retrospective analysis 1)

From the perspective of this research, two Hungarian parliamentary debates are significant in the researched period. One of them is the original debate about the LF, where a limited segment focused on the problem. The shorter debate leading to the sixth amendment focused on the comparison of the structure of the SLO versus the new security challenges. Although there are some shared elements, the two situations were significantly different:

- in 2011 the supermajority was enough to decide without opposition's agreement, in 2016 at least one opposition party's support was needed for the amendment;
- the governing coalition of FIDESZ and Christian Democratic Parties mixed the responsibilities and roles of the governmental authorities and the MPs, but both procedures seemed to be politically led with support of governmental bureaucracy;
- the Socialist Party decided to remain outside the procedures consequently,
- the green-liberal LMP commented from the margins of debates, considering ways to influence,
- the originally right-wing Jobbik Party participated both times and even supported the second proposal, despite their constant anti-NATO and anti-EU approach,
- activity of MPs outside of factions was both times significant, representing further alternatives.

The second debate was about the possibility and need of the new constitutional category, the state of terrorist threat. The situation was significantly different from the first debate, because here the parliamentary phase followed closed-doors faction-negotiations, which was typical before the period of supermajority. These political negotiations concluded without a formal agreement, but with significant modifications on the draft proposal. The government side evaluated it as positive compromise but LMP challenged its details and independent MPs outside the negotiations the procedure itself.

Jobbik's support based on the simplistic *"not all migrants are terrorists, but all terrorists have migrant background"*-paradigm.[28] The position of LMP was more special, because their possible support would have made extra-legitimacy to the FL in general. According to the majority reading, FIDESZ followed the suggestions of the LMP by re-drafting, but according to them, they should have amended one of the five original categories. LMP argued against the new category although they found the causes partially valid:

- first not covered situations should be shown,
- preventing terrorist at preparation phase is needed,
- limitations of individual rights should remain necessary and proportionate, and limited also by the verified purpose,
- the time available for the government's action before the supervision by parliamentarians should be as short as possible, and lastly
- extension of the time limits should be pending on ascending majority-requirement.[29]

[28] https://www.parlament.hu/web/guest/iromanyok-elozo-ciklusbeli-adatai?p_p_id=hu_parlament_cms_pair_portlet_PairProxy_INSTANCE_9xd2Wc9jP4z8&p_p_lifecycle=1&p_p_state=normal&p_p_mode=view&p_auth=WbOvWIxB&_hu_parlament_cms_pair_portlet_PairProxy_INSTANCE_9xd2Wc9jP4z8_pairAction=%2Finternet%2Fcplsql%2Fogy_naplo.naplo_fadat%3Fp_ckl%3D40%26p_uln%3D149%26p_felsz%3D42%26p_szoveg%3D%26p_felszig%3D42

[29] https://www.parlament.hu/web/guest/iromanyok-elozo-ciklusbeli-adatai?p_p_id=hu_parlament_cms_pair_portlet_PairProxy_INSTANCE_9xd2W

This structure is close to the Ackerman's model from 2004, reflecting on the US Patriot Act,[30] as an innovative liberal alternative balancing between the requirement for immediate effective governmental action and reduced limitations of human rights. According to him, special constitutional regulations should be prepared to react on game-changer events, because *"self-conscious design of an emergency regime may well be the best available defense against a panic-driven cycle of permanent destruction"*[31]. Speciality of the new-type terrorism is not challenging the state by an existential threat but causing both a *"physical threat to the population and the political threat to the existing regime"*[32] because of the probability of a second strike. In an apocalyptic scenario of invasion or revolutionary domestic conspiracy, *"limiting the scope of emergency powers"* makes less sense than in post-terror trauma, when reassurance is the key to symbolize the exceptionality of the breached sovereignty.[33]

On the other hand, Socialist-LMP MPs filed a bipartisan amendment-draft simultaneously. According to this alternative,[34] the armed forces could have helped the police to prevent or interrupt a terrorist act, or to manage the consequences and to capture the perpetrators. Positioning this option outside the framework of the emergency measures would have broadened the use of military without time-constrains limited by the aim only. It might have kept higher human rights provisions, but without opening further possibilities to the state organs, would have challenged more the peace-based normality.

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[30] Bruce Ackerman, "The Emergency Constitution", *Faculty Scholarship Series*. 121. (2004). https://digitalcommons.law.yale.edu/fss_papers/121

[31] Ackerman ibid 1030.

[32] Ackerman ibid 1039.

[33] Ackerman ibid 1037.

[34] Draft of the 6th amendment of the FL, 07/06/2016, T/11024 signed by LMP and MSZP MPs, https://www.parlament.hu/irom40/11024/11024.pdf

Finally, was the debate significantly new in comparison to the 2011 debate's segment? According to the reasoning of the majority draft[35] and some comments from government's side, obviously, reflecting on attacks and role of the military in Paris or Brussels and in general, on perceived threats. The "new security challenges" paradigm appeared already earlier but as abstract category and without real focuses.

Although *tabula rasa*-inspiration led to the FL in 2011 in general, continuity dominated at least the researched SLO chapter. The emergency measures-part became concentrated, but some related tasks of the military remained outside the chapter, if they were available in peacetime also. It means that the Article dedicated to the Armed Forces regulates disaster-related task bridging peace and state of danger, and international tasks are further separated symbolizing, that normal foreign missions are considered when the state works according to the peacetime regulations. Even there is a third group of regulations dedicated to national defence and disaster-relief-related obligations of the citizens, connected with some elements of the SLO, but inside the *Freedom and Responsibility* chapter, balancing the fundamental rights with responsibilities. This codified structure is according to the dominant element of the articles' content, and not necessarily according to the international relevancy: the *Decisions on participation in military operations* subtitle mentions only NATO and the EU initiatives, as privileged procedures belonging to the executive branch instead of the Parliament, which keeps the critical aspects of sovereignty. It is justified by the principles of international legal obligations and operability.

On the other hand, the focus of the SLO chapter is on the possibility to suspend or restrict classical principles of constitutionalism valid for peacetime normality. The shared logic behind the typology defined

– reasons for initiation/declaration,

[35] Draft of the 6th amendment of the FL, 26/04/2016, T/10416 signed by 6 FIDESZ / Christian Democrats MPs, 3 https://www.parlament.hu/irom40/10416/10416.pdf

- organs with decision-making authority and possible substitution,
- the exceptional methods of government, focused on not-practicable peacetime competences,
- extended competences for effectivity, and
- guaranteed limitations as ban of suspending the FL or limiting the Constitutional Court and absolute rights.[36]

Only a limited percentage of the speeches mentioned even some perceived threats or considered any issues outside the peacetime framework. The key threat-related issues were[37]:

- 3 level of sustainability: of natural resources, eco-financial and demographical,
- heritage of the past home-defence straggles, the lost sovereignty under occupation and cultural identity,

all these reflected also[38] by elements of the security environment, on a bit postmodern way.

[36] Draft of the FL, 14/03/2011, signed by 261 MPs, 61-62 https://www.parlament.hu/irom39/02627/02627.pdf

[37] https://www.parlament.hu/web/guest/iromanyok-elozo-ciklusbeli-adatai?p_p_id=hu_parlament_cms_pair_portlet_PairProxy_INSTANCE_9xd2Wc9jP4z8&p_p_lifecycle=1&p_p_state=normal&p_p_mode=view&p_auth=SJotvtRJ&_hu_parlament_cms_pair_portlet_PairProxy_INSTANCE_9xd2Wc9jP4z8_pairAction=%2Finternet%2Fcplsql%2Fogy_naplo.naplo_fadat%3Fp_ckl%3D39%26p_uln%3D76%26p_felsz%3D13%26p_szoveg%3D%26p_felszig%3D13 and https://www.parlament.hu/web/guest/iromanyok-elozo-ciklusbeli-adatai?p_p_id=hu_parlament_cms_pair_portlet_PairProxy_INSTANCE_9xd2Wc9jP4z8&p_p_lifecycle=1&p_p_state=normal&p_p_mode=view&p_auth=DderTElF&_hu_parlament_cms_pair_portlet_PairProxy_INSTANCE_9xd2Wc9jP4z8_pairAction=%2Finternet%2Fcplsql%2Fogy_naplo.naplo_fadat%3Fp_ckl%3D39%26p_uln%3D79%26p_felsz%3D56%26p_szoveg%3D%26p_felszig%3D56

[38] https://www.parlament.hu/web/guest/iromanyok-elozo-ciklusbeli-adatai?p_p_id=hu_parlament_cms_pair_portlet_PairProxy_INSTANCE_9xd2Wc9jP4z8&p_p_lifecycle=1&p_p_state=normal&p_p_mode=view&p_auth=SJotvtRJ&_hu_parlament_cms_pair_portlet_PairProxy_INSTANCE_9xd2Wc9jP4z8_pairAction=%2Finternet%2Fcplsql%2Fogy_naplo.naplo_fadat%3Fp_ckl%3D39%26p_uln%3D76%26p_felsz%3D29%26p_szoveg%3D%26p_felszig%3D29

A contrarily, in Jobbik's reading

- the law and order were missing practices, connected with challenges of gipsy-integration,[39]
- the EU versus national constitutional freedom issue was opened, mentioning the primacy of European Law in constitutional sense,[40]
- the secondary importance of the constitution became generalized even further, based on the limiting effect of the Franco-German tandem on the smaller states.[41]

The debate was mostly reflective in nature, using the examples of depth crisis[42] and industrial mud-catastrophe from 2010[43]. Only emphases were different between the majority parties

[39] https://www.parlament.hu/web/guest/iromanyok-elozo-ciklusbeli-adatai?p_p_id=hu_parlament_cms_pair_portlet_PairProxy_INSTANCE_9xd2Wc9jP4z8&p_p_lifecycle=1&p_p_state=normal&p_p_mode=view&p_auth=SJotvtRJ&_hu_parlament_cms_pair_portlet_PairProxy_INSTANCE_9xd2Wc9jP4z8_pairAction=%2Finternet%2Fcplsql%2Fogy_naplo.naplo_fadat%3Fp_ckl%3D39%26p_uln%3D76%26p_felsz%3D21%26p_szoveg%3D%26p_felszig%3D21

[40] https://www.parlament.hu/web/guest/iromanyok-elozo-ciklusbeli-adatai?p_p_id=hu_parlament_cms_pair_portlet_PairProxy_INSTANCE_9xd2Wc9jP4z8&p_p_lifecycle=1&p_p_state=normal&p_p_mode=view&p_auth=SJotvtRJ&_hu_parlament_cms_pair_portlet_PairProxy_INSTANCE_9xd2Wc9jP4z8_pairAction=%2Finternet%2Fcplsql%2Fogy_naplo.naplo_fadat%3Fp_ckl%3D39%26p_uln%3D76%26p_felsz%3D23%26p_szoveg%3D%26p_felszig%3D23

[41] https://www.parlament.hu/web/guest/iromanyok-elozo-ciklusbeli-adatai?p_p_id=hu_parlament_cms_pair_portlet_PairProxy_INSTANCE_9xd2Wc9jP4z8&p_p_lifecycle=1&p_p_state=normal&p_p_mode=view&p_auth=hKeEA8dZ&_hu_parlament_cms_pair_portlet_PairProxy_INSTANCE_9xd2Wc9jP4z8_pairAction=%2Finternet%2Fcplsql%2Fogy_naplo.naplo_fadat%3Fp_ckl%3D39%26p_uln%3D78%26p_felsz%3D12%26p_szoveg%3D%26p_felszig%3D12

[42] https://www.parlament.hu/web/guest/iromanyok-elozo-ciklusbeli-adatai?p_p_id=hu_parlament_cms_pair_portlet_PairProxy_INSTANCE_9xd2Wc9jP4z8&p_p_lifecycle=1&p_p_state=normal&p_p_mode=view&p_auth=SJotvtRJ&_hu_parlament_cms_pair_portlet_PairProxy_INSTANCE_9xd2Wc9jP4z8_pairAction=%2Finternet%2Fcplsql%2Fogy_naplo.naplo_fadat%3Fp_ckl%3D39%26p_uln%3D76%26p_felsz%3D53%26p_szoveg%3D%26p_felszig%3D53

[43] https://www.parlament.hu/web/guest/iromanyok-elozo-ciklusbeli-adatai?p_p_id=hu_parlament_cms_pair_portlet_PairProxy_INSTANCE_9xd2Wc9jP4z8&p_p_lifecycle=1&p_p_state=normal&p_p_mode=view&p_auth=SJotv

and the Jobbik, but they mostly strengthened each other. Controversially, they also mentioned the possibility of a parallel complain-procedure at international institutions by opposition parties,[44] instead of the parliamentary debates.

On the second day of the debate, a re-structuring of the time-horizon appeared starting from the traditions of the past, connected with current constitutional trends and future-oriented approach of sustainability. The majority coalition claimed to produce a stable and modern constitution,[45] even supporting the European mainstream constitutional trends symbolized by shared sovereignty.[46] In sum, the majority seemed to be pro-EU and supporting the new constitution, Jobbik challenged both. They even questioned the defensive role of NATO in general and threatened with the possible role of EUGENDFOR in 2006-like situations, suggesting a general ban of use of foreign police forces against demonstrators.[47]

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[44] https://www.parlament.hu/web/guest/iromanyok-elozo-ciklusbeli-adatai?p_p_id=hu_parlament_cms_pair_portlet_PairProxy_INSTANCE_9xd2Wc9jP4z8&p_p_lifecycle=1&p_p_state=normal&p_p_mode=view&p_auth=SJotvtRJ&_hu_parlament_cms_pair_portlet_PairProxy_INSTANCE_9xd2Wc9jP4z8_pairAction=%2Finternet%2Fcplsql%2Fogy_naplo.naplo_fadat%3Fp_ckl%3D39%26p_uln%3D76%26p_felsz%3D69%26p_szoveg%3D%26p_felszig%3D69

[45] https://www.parlament.hu/web/guest/iromanyok-elozo-ciklusbeli-adatai?p_p_id=hu_parlament_cms_pair_portlet_PairProxy_INSTANCE_9xd2Wc9jP4z8&p_p_lifecycle=1&p_p_state=normal&p_p_mode=view&p_auth=r3bulISS&_hu_parlament_cms_pair_portlet_PairProxy_INSTANCE_9xd2Wc9jP4z8_pairAction=%2Finternet%2Fcplsql%2Fogy_naplo.naplo_fadat%3Fp_ckl%3D39%26p_uln%3D77%26p_felsz%3D8%26p_szoveg%3D%26p_felszig%3D10

[46] https://www.parlament.hu/web/guest/iromanyok-elozo-ciklusbeli-adatai?p_p_id=hu_parlament_cms_pair_portlet_PairProxy_INSTANCE_9xd2Wc9jP4z8&p_p_lifecycle=1&p_p_state=normal&p_p_mode=view&p_auth=r3bulISS&_hu_parlament_cms_pair_portlet_PairProxy_INSTANCE_9xd2Wc9jP4z8_pairAction=%2Finternet%2Fcplsql%2Fogy_naplo.naplo_fadat%3Fp_ckl%3D39%26p_uln%3D77%26p_felsz%3D72%26p_szoveg%3D%26p_felszig%3D72

[47] https://www.parlament.hu/web/guest/iromanyok-elozo-ciklusbeli-adatai?p_p_id=hu_parlament_cms_pair_portlet_PairProxy_INSTANCE_9xd2Wc9jP4z8&p_p_lifecycle=1&p_p_state=normal&p_p_mode=view&p_auth=hKeEA8dZ&_hu_parlament_cms_pair_portlet_PairProxy_INSTANCE_9xd2Wc9jP4

When evaluating the threats in general, a FIDESZ MP highlighted the trends according to the textbooks: reduced danger of inter-state wars, rising significance of inter-ethnic conflicts, terrorism and natural disasters.[48] Other MPs predicted the debate determining the migrant versus refugee distinctions[49] or the role of mass-manipulation of information[50] also, without connecting these topics with the SLO chapter, only considering some tasks of the military forces. Jobbik challenged the international agreement-based tasks,[51] which the majority evaluated as a balanced system between national and international task-elements.[52] The law and

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[48] https://www.parlament.hu/web/guest/iromanyok-elozo-ciklusbeli-adatai?p_p_id=hu_parlament_cms_pair_portlet_PairProxy_INSTANCE_9xd2Wc9jP4z8&p_p_lifecycle=1&p_p_state=normal&p_p_mode=view&p_auth=hKeEA8dZ&_hu_parlament_cms_pair_portlet_PairProxy_INSTANCE_9xd2Wc9jP4z8_pairAction=%2Finternet%2Fcplsql%2Fogy_naplo.naplo_fadat%3Fp_ckl%3D39%26p_uln%3D78%26p_felsz%3D80%26p_szoveg%3D%26p_felszig%3D80

[49] https://www.parlament.hu/web/guest/iromanyok-elozo-ciklusbeli-adatai?p_p_id=hu_parlament_cms_pair_portlet_PairProxy_INSTANCE_9xd2Wc9jP4z8&p_p_lifecycle=1&p_p_state=normal&p_p_mode=view&p_auth=r3bulISS&_hu_parlament_cms_pair_portlet_PairProxy_INSTANCE_9xd2Wc9jP4z8_pairAction=%2Finternet%2Fcplsql%2Fogy_naplo.naplo_fadat%3Fp_ckl%3D39%26p_uln%3D77%26p_felsz%3D100%26p_szoveg%3D%26p_felszig%3D100

[50] https://www.parlament.hu/web/guest/iromanyok-elozo-ciklusbeli-adatai?p_p_id=hu_parlament_cms_pair_portlet_PairProxy_INSTANCE_9xd2Wc9jP4z8&p_p_lifecycle=1&p_p_state=normal&p_p_mode=view&p_auth=pDUZN6cl&_hu_parlament_cms_pair_portlet_PairProxy_INSTANCE_9xd2Wc9jP4z8_pairAction=%2Finternet%2Fcplsql%2Fogy_naplo.naplo_fadat%3Fp_ckl%3D39%26p_uln%3D78%26p_felsz%3D88%26p_szoveg%3D%26p_felszig%3D88

[51] https://www.parlament.hu/web/guest/iromanyok-elozo-ciklusbeli-adatai?p_p_id=hu_parlament_cms_pair_portlet_PairProxy_INSTANCE_9xd2Wc9jP4z8&p_p_lifecycle=1&p_p_state=normal&p_p_mode=view&p_auth=01OroyGk&_hu_parlament_cms_pair_portlet_PairProxy_INSTANCE_9xd2Wc9jP4z8_pairAction=%2Finternet%2Fcplsql%2Fogy_naplo.naplo_fadat%3Fp_ckl%3D39%26p_uln%3D79%26p_felsz%3D6%26p_szoveg%3D%26p_felszig%3D6

[52] https://www.parlament.hu/web/guest/iromanyok-elozo-ciklusbeli-adatai?p_p_id=hu_parlament_cms_pair_portlet_PairProxy_INSTANCE_9xd2W

order related questions were answered, based on the values represented by the National Avowal-chapter, behind the technically drafted regulations. The aims were *"the highest possible measure of well-being, justice and liberty, via order"*,[53] paraphrasing the enumeration from the FL.

A further segment of the debate was about the European Union. Many FIDESZ-related European Parliamentarians participated, contrasted by only one former and one active EP member from Jobbik side. They evaluated the EU as *a Janus-face* institution belonging both to foreign and internal affairs.[54] In this context, they highlighted again the cross-border threats of WMD proliferation, international terrorism and regional conflicts,[55] and the balance of military tasks to respond them. In the second phase of the debate, dedicated to suggested modifications the issue of

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53 https://www.parlament.hu/web/guest/iromanyok-elozo-ciklusbeli-adatai?p_p_id=hu_parlament_cms_pair_portlet_PairProxy_INSTANCE_9xd2Wc9jP4z8&p_p_lifecycle=1&p_p_state=normal&p_p_mode=view&p_auth=ETl5VnTM&_hu_parlament_cms_pair_portlet_PairProxy_INSTANCE_9xd2Wc9jP4z8_pairAction=%2Finternet%2Fcplsql%2Fogy_naplo.naplo_fadat%3Fp_ckl%3D39%26p_uln%3D79%26p_felsz%3D24%26p_szoveg%3D%26p_felszig%3D24

54 https://www.parlament.hu/web/guest/iromanyok-elozo-ciklusbeli-adatai?p_p_id=hu_parlament_cms_pair_portlet_PairProxy_INSTANCE_9xd2Wc9jP4z8&p_p_lifecycle=1&p_p_state=normal&p_p_mode=view&p_auth=9VrVMPfk&_hu_parlament_cms_pair_portlet_PairProxy_INSTANCE_9xd2Wc9jP4z8_pairAction=%2Finternet%2Fcplsql%2Fogy_naplo.naplo_fadat%3Fp_ckl%3D39%26p_uln%3D79%26p_felsz%3D116%26p_szoveg%3D%26p_felszig%3D116

55 https://www.parlament.hu/web/guest/iromanyok-elozo-ciklusbeli-adatai?p_p_id=hu_parlament_cms_pair_portlet_PairProxy_INSTANCE_9xd2Wc9jP4z8&p_p_lifecycle=1&p_p_state=normal&p_p_mode=view&p_auth=9VrVMPfk&_hu_parlament_cms_pair_portlet_PairProxy_INSTANCE_9xd2Wc9jP4z8_pairAction=%2Finternet%2Fcplsql%2Fogy_naplo.naplo_fadat%3Fp_ckl%3D39%26p_uln%3D79%26p_felsz%3D120%26p_szoveg%3D%26p_felszig%3D120

information-security appeared as a new segment ,[56] and further elements of the later resilience-concept like preparedness of institutions, natural resources like water, soil, forests and air, with food-security included.[57]

The former socialist speaker of the Parliament, by that time already an independent MP added a special aspect to the debate. Sharing an environmentalist general approach, Katalin Szili decided to submit an alternative draft-constitution closer to the earlier one, but with some key institutions added like a possible senate. After turning to the draft FL, she suggested to limit the possible suspension of the human rights in the SLO chapter because she found it disproportionate and unnecessary.[58] She challenged there an innovative element of the draft regulation, because the earlier Constitution differentiated between elements of the chapter from the perspective of deeper reduction of some fundamental rights. On the margin of the debate, the LMP emphasized their democratic expectations: limitations of majority-power, rule of law and

[56] *https://www.parlament.hu/web/guest/iromanyok-elozo-ciklusbeli-adatai?p_p_id=hu_parlament_cms_pair_portlet_PairProxy_INSTANCE_9xd2Wc9jP4z8&p_p_lifecycle=1&p_p_state=normal&p_p_mode=view&p_auth=hVuQxzdz&_hu_parlament_cms_pair_portlet_PairProxy_INSTANCE_9xd2Wc9jP4z8_pairAction=%2Finternet%2Fcplsql%2Fogy_naplo.naplo_fadat%3Fp_ckl%3D39%26p_uln%3D81%26p_felsz%3D22%26p_szoveg%3D%26p_felszig%3D22*

[57] https://www.parlament.hu/web/guest/iromanyok-elozo-ciklusbeli-adatai?p_p_id=hu_parlament_cms_pair_portlet_PairProxy_INSTANCE_9xd2Wc9jP4z8&p_p_lifecycle=1&p_p_state=normal&p_p_mode=view&p_auth=16UcV3DH&_hu_parlament_cms_pair_portlet_PairProxy_INSTANCE_9xd2Wc9jP4z8_pairAction=%2Finternet%2Fcplsql%2Fogy_naplo.naplo_fadat%3Fp_ckl%3D39%26p_uln%3D81%26p_felsz%3D132%26p_szoveg%3D%26p_felszig%3D132

[58] https://www.parlament.hu/web/guest/iromanyok-elozo-ciklusbeli-adatai?p_p_id=hu_parlament_cms_pair_portlet_PairProxy_INSTANCE_9xd2Wc9jP4z8&p_p_lifecycle=1&p_p_state=normal&p_p_mode=view&p_auth=16UcV3DH&_hu_parlament_cms_pair_portlet_PairProxy_INSTANCE_9xd2Wc9jP4z8_pairAction=%2Finternet%2Fcplsql%2Fogy_naplo.naplo_fadat%3Fp_ckl%3D39%26p_uln%3D81%26p_felsz%3D140%26p_szoveg%3D%26p_felszig%3D140

people's possibility to choose between options were the key factors are missing from the FL.[59]

According to the closing remarks by the Speaker, the FL supposed to [60] start from the national interests but should enforce them at the level of cooperating Europe of the 21st century. Closer to the threat perceptions Jobbik challenged the missing public order again, suggesting gendarmerie for rural parts of the country.[61] The Minister for Interior highlighted in his answer the monopoly of force by the state against paramilitary organizations, and questioned military type-organizations' role in maintaining public order in general.[62] The governmental approach changed dramatically compared to this narrative between 2011 and 2016. On the other hand, the opposition parties accepted at least elements of the governmental reasoning by 2016. Although their general approach on the FL has not changed, their threat-perception in terrorism

[59] https://www.parlament.hu/web/guest/iromanyok-elozo-ciklusbeli-adatai?p_p_id=hu_parlament_cms_pair_portlet_PairProxy_INSTANCE_9xd2Wc9jP4z8&p_p_lifecycle=1&p_p_state=normal&p_p_mode=view&p_auth=XvQ4kqLn&_hu_parlament_cms_pair_portlet_PairProxy_INSTANCE_9xd2Wc9jP4z8_pairAction=%2Finternet%2Fcplsql%2Fogy_naplo.naplo_fadat%3Fp_ckl%3D39%26p_uln%3D84%26p_felsz%3D2%26p_szoveg%3D%26p_felszig%3D2

[60] https://www.parlament.hu/web/guest/iromanyok-elozo-ciklusbeli-adatai?p_p_id=hu_parlament_cms_pair_portlet_PairProxy_INSTANCE_9xd2Wc9jP4z8&p_p_lifecycle=1&p_p_state=normal&p_p_mode=view&p_auth=XvQ4kqLn&_hu_parlament_cms_pair_portlet_PairProxy_INSTANCE_9xd2Wc9jP4z8_pairAction=%2Finternet%2Fcplsql%2Fogy_naplo.naplo_fadat%3Fp_ckl%3D39%26p_uln%3D84%26p_felsz%3D161%26p_szoveg%3D%26p_felszig%3D161

[61] https://www.parlament.hu/web/guest/iromanyok-elozo-ciklusbeli-adatai?p_p_id=hu_parlament_cms_pair_portlet_PairProxy_INSTANCE_9xd2Wc9jP4z8&p_p_lifecycle=1&p_p_state=normal&p_p_mode=view&p_auth=XvQ4kqLn&_hu_parlament_cms_pair_portlet_PairProxy_INSTANCE_9xd2Wc9jP4z8_pairAction=%2Finternet%2Fcplsql%2Fogy_naplo.naplo_fadat%3Fp_ckl%3D39%26p_uln%3D84%26p_felsz%3D6%26p_szoveg%3D%26p_felszig%3D6

[62] https://www.parlament.hu/web/guest/iromanyok-elozo-ciklusbeli-adatai?p_p_id=hu_parlament_cms_pair_portlet_PairProxy_INSTANCE_9xd2Wc9jP4z8&p_p_lifecycle=1&p_p_state=normal&p_p_mode=view&p_auth=XvQ4kqLn&_hu_parlament_cms_pair_portlet_PairProxy_INSTANCE_9xd2Wc9jP4z8_pairAction=%2Finternet%2Fcplsql%2Fogy_naplo.naplo_fadat%3Fp_ckl%3D39%26p_uln%3D84%26p_felsz%3D8%26p_szoveg%3D%26p_felszig%3D10

segment and evaluation of the possible roles of military came closer to the majority's new ideas.

1.4. Academic views from the civil society community (retrospective analysis 2)

Academic circles tend to share their alternative ideas with NGOs and with parties of the opposition. From the perspective of SLO chapter, it was first latent but later became visible by the 2016 amendment of the FL. There is a turning point, comparing their papers with the bills or speeches by MPs of the opposition: in the second phase, around the 2015 migrant crisis, the academic papers became more critical towards the whole idea of emergency measures. By the time of the sixth amendment, academic threat-perceptions diverged significantly, although they shared the mistrust with the opposition.

They criticized the non-participating style of the constitutional reform and some rule of law and human rights-related details, neither of them[63] connected with SLO chapter originally. Even former leaders of the Socialist-led Ministry of Justice, as civil experts published a private-constitution first, and challenged some elements of the FL later. According to their suggested alternative chapter,[64] they wanted to reduce the complexity dramatically:

- State of preventive defence and unexpected attack would have disappeared,
- State of national crisis and state of emergency would have been merged,
- Only State of danger would have remained as in FL.

[63] See András Arató et al (ed), "Vélemény Magyarország Alaptörvényéről", *Fundamentum* 2011.1. 61-77 http://fundamentum.hu/sites/default/files/11-1-06.pdf and Gábor Halmai - Kim Lane Scheppele (ed), "Amicus Brief a Velencei Bizottságnak az Alaptörvény negyedik módosításáról", *Fundamentum* 2013.3. 5-36 http://fundamentum.hu/sites/default/files/13-3-01.pdf

[64] Csaba Gáli et al, "Az új alkotmány egy tervezete", 2011, 93-96 https://issuu.com/korodijanos/docs/az_uj_alkotmany_egy_tervezete

From the perspective of operative centre of gravity, they wanted to authorize the prime minister instead of the traditional roles of the president or the Defence Committee, but they wanted to keep the initiating decision and supervision of the governmental measures at the supermajority of the Parliament. Regarding the fundamental rights, they suggested a broad negative list of defended rights for state of national crisis, and a short positive list of possible restrictions for catastrophes.

Comparing this alternative chapter to the FL's, it seemed to be more focused on effectivity of the government. A contrarily, it would have caused a turning point from the constitutional traditions, eliminating the compromises of earlier agreements. It would have made possible even for supermajority to re-introduce the compulsory military service even for peacetime. From the perspective of proclamation, the President's substituting role could have been crucial to avoid deadlocks.

They produced also a limited second alternative with suggested corrections of the FL.[65] They did not challenge the legitimacy of the FL, only suggested mandatory amendments according to their constitutional framework. The SLO chapter was outside the scope of this draft, with the cardinal status of acts regulating the emergency topic and all the five categories included. On the other hand, they mentioned connected topics, like

- promulgation of legal regulations valid for SLO and
- limited majority to amend military-related acts, use of force/violent methods kept only for cardinal acts.

Both alternatives suggested by the Tordai-workshop considered the specialities of the topic, although invocation of the emergency measures could have remained a bit uncertain. According to this reading, regulations had predominantly technical nature to keep a democratic state working, without causing systemic risks of democracy. Like medicines: they might harm not used as prescript, but without them, the danger of threats is comparably higher.

[65] Csaba Gáli et al, "Az alaptörvény köszöntése / Magyarország Alaptörvényének módosítása" https://igyirnankmi.blog.hu/2012/01/01/az_alaptorveny_koszontese

This is close to the reading of the military legal experts, researching the possibilities to improve the efficiency of the SLO in framework of system-analysis. The Hungarian Society for Military Law and the Law of War organized them collaborating with the Institute for Legal Studies of the Hungarian Academy of Science. [66] According to this interpretation, the constitutional regulations of a rule of law state should balance between legitimate security aims and temporary sacrifice of some human rights.[67]

According to the reading of human rights activists, the first part of the comparison is artificial, manipulated by the governmental secrecy. At the turning point of the migrant crisis, many civil publications chose a politicized approach, challenging the intents of the government, based on the unlimited power-narrative without focusing on textual problems. Further key characteristics of this trend were blogging[68] for real-time effect on one side, and partially drafting[69] in English to inform/involve international public and institutions both.

According to 2016 April blog by Professor Uitz, she framed the sixth amendment determined by the anti-migrant practice

[66] Pál Kádár, "Sarkalatos átalakulások – A kétharmados/sarkalatos törvények változásai a honvédelem területén 2010-2014.", *MTA Law WorkingPapers,* 2014/36. *jog.tk.mta.hu/uploads/files/mtalwp/2014_36_Kadar.pdf;* Szabolcs Till, "Tézisek az Alaptörvény és a honvédelem sarkalatos törvényi szintjének összefüggéseiről", *MTA Law WorkingPapers,* 2014/42. *jog.tk.mta.hu/uploads/files/mtalwp/2014_42_Till.pdf;* László Lakatos, "A különleges jogrend és a honvédelem szabályzása", *MTA Law WorkingPapers*, 2014/49. *jog.tk.mta.hu/uploads/files/mtalwp/2014_49_Lakatos.pdf*; András Jakab – Emese Szilágyi, "Sarkalatos törvények a magyar jogrendben", *MTA Law WorkingPapers* 2015/32. *jog.tk.mta.hu/uploads/files/mtalwp/2015_32_Jakab.pdf*.

[67] Andras Jakab, "German Constitutional Law and Doctrine on State of Emergency - Paradigms and Dilemmas of a Traditional (Continental) Discourse", *German Law Journal,* Vol. 5, pp. 453-477, 2005. https://ssrn.com/abstract=1918411

[68] Csaba Tordai, "Honvédek a menekültek ellen?" *igyirnankmi.atlatszo.hu/2015/08/26/honvedek-a-menekultek-ellen/*

[69] Renáta Uitz, "Hungary's attempt to manage threats of terror through a constitutional amendment" 2016 28 April. *www.constitutionnet.org/news/hungarys-attempt-manage-threats-terror-through-constitutional-amendment*

(outside the SLO chapter, consequently according to peacetime regulations), and blamed the government for mixing migration with terrorism, which is a no-go according to the liberal conceptualization. She had not challenged emergency measures in structural sense, only fought against the possible further competences of the government, and the secrecy of the negotiations.

From a terminological aspect, she mixed up the two possible meaning of *emergency* (general term versus definite article) with the extra-constitutional term of *exigency* used by Convention. It might have been accidental, but some publications of the human rights-oriented periodical *Fundamentum* used similar argumentations pushing the evaluation of possible dangers from Ackerman's positive arguments towards Giorgio Agamben's negative camp-utopia, based on psychical operation campaigns of governments to generate fear first, than *permanent exceptionality*.[70] According to Mészáros some real dangers might legitimate restrictions, as of

- physical invulnerability of the population,
- political independence of the state,
- the states' territorial integrity or
- operability of the state, but

there is a general governmental tendency to transform exceptionality to normality, as erosion of the normativity.[71]

It is a counter-historical argumentation, whether the government would have invoked the originally suggested "*counter-migration emergency situation"* in case of availability. Factually, without FL-amendment, similar peacetime regulations were used/abused pending on the narrative of the analyst. On the other hand, factually – as it is significant for the SLO chapter in general – innovations of the added sixth antiterrorism-option were newer invoked by now. Containing terrorism in the SLO chapter with compromises resulted higher-level acceptance of normality from the governmental side than preventing a further constitutional category in 2015. According to a further possible reading, limiting the scope

[70] Gábor Mészáros, Egy „menekültcsomag" veszélyei – Mit is jelent valójában a tömeges bevándorlás okozta válsághelyzet? *Fundamentum* 2015.2-3. 107-119 http://fundamentum.hu/sites/default/files/fundamentum-15-2-3-11.pdf
[71] Mészáros ibid 108.

of the SLO chapter pushed the government towards *permanent exceptionality*.

Whether an institution is needed and affordable, pending on the expectations of the foreign institutions also. We strive for identification of relevant international actors, regarding rule of law and some alternative programs with interface to the SLO chapter.

PART II
SOME INTERNATIONAL READINGS OF THE EMERGENCY PROBLEMS

2.1. The relative novelty of the problems

Caused by the Russian invasion of Crimea in 2014 and almost simultaneously the mass-migration crisis trough the Balkan-route the reaction became a hot political topic defining the self-limitations of a state. The Yellow Vest movement, the state-level post-terrorism reactions, even President Trump's Mexican Wall-idea belong to the spectrum of the topic. The second round of debates in Europe started after 13 years of the critical interpretation of the post-9/11 US war on terror.

However, not necessarily the states are free to constrain themselves: international organizations, like NATO, or sui generis entities, like the EU might initiate tasks with effects on the national constitutional regulations. Both the EU and the CoE has some *post-facto* supervisory mechanism, which might gain preliminary relevancy: instead of fact checking, they might use a role to exclude alternatives, even systems. This role of international organizations on the affordability of these limitations is a bit latent. Nevertheless, they might define the scope both ways: pushing programs and excluding ways to reach them.

Like the consolidation of the European financial system after 2008 limited the possible scope of our topic,[72] the hybrid threats might have pushed to extend the considerations. Finally, the topic relates to the very centre of the sovereignty, even it defines it

[72] Financial emergency was a typical tool earlier. Giorgio, Agamben, "A Brief History of the State of Exception", An excerpt from *State of Exception* https://www.press.uchicago.edu/Misc/Chicago/009254.html

according to Carl Schmitt's theory.[73] How free is a NATO-member EU state to determine own emergency legal system and are there disharmonies between the EU and NATO-based requirements? As a starting assumption, we might consider that openness principle from the EU's side might have different consequences as military secrecy and *"need to know"* principle from NATO's side. Both the organizations themselves or the states implementing their programs might use or misuse the principles. Moreover, it might coincide with the *decline of the West*-paradigm, about values and methods to save them in a broader context. Our topic not necessarily belongs to this paradigm, although they share the basic dilemma: organizing a state-society is not a suicide-pact.

If something wrong and dangerous happens, the state must act on an effective way to survive first the emergency, then going back to the normal procedures. On the other hand, extended power might be used or misused against the state, society, or the international organization. How to contain the possible misuse? Where is the role of international actors? Is the EU still an international actor, or is it so close to the federative method already, that it might use the two-level German model?

A contrarily, is it possible to create a legal system without emergency measures? In an idealistic world obviously, but not according to a realist approach. Since Thucydides, there is a wish for empowering the state in dangerous circumstances for its survival. Searching for better regulatory solutions is the legalistic scope of the problem. The material toolkit, the military and police force to handle practically the threats and challenges are another level of the answer. Building alliances and partnerships is the internationalization-tool for multiplication of the available solutions. Challenging the right of states to react is another possible way of thinking.

[73] Roland Kelemen, "Az Alaptörvény különleges jogrendi rendszerének egyes dogmatikai problémái – kitekintéssel a visegrádi államok alkotmányának kivételes hatalmi szabályaira"; *KATONAI JOGI ÉS HADIJOGI SZEMLE* 2017/1-2. 1-2 http://epa.oszk.hu/02500/02511/00007/pdf/EPA02511_katonai_jogi_szemle_2017_1-2_037-068.pdf

In sum, different international organizations with overlapping memberships might cause multiple effects on the state: one might prefer the regulatory way limiting the member states' freedom by legally binding norms; another one may choose constant political re-interpretations to react on similar and overlapping challenges. In addition, not only the means, but also even the conceptualization of the problem-catalogue (end state) might be positioned differently on a spectrum from single-issue organizations to a multi-level government model. The different perceptions and working methods constantly challenge the room of manoeuvre of the double-member states at constructing their basic procedural regulations.

'Does it mean that I told a lie?' It is a basic form of transforming an ongoing debate to a more ideological level, to avoid answering the real question, transferring it to a zero-sum game. Although dictatorships tend to prefer unlimited power, the uniqueness of the situation might force even a democracy to consolidate its basic norms towards effectiveness in or after emergencies. The ongoing debate tends to turn to over-simplifications based on generalizations like measuring or blaming the opponent as extremists like fascist/populist/autocrat or even communist/liberal internationalist without considering the threat perceptions and the effectiveness of the suggested tools. On the other hand, after something terrible has happened, we might tend to blame the same government for missing or misinterpreted information and data, overreaction, or inefficiency even at international courts. It is the *lawfare*[74]-reasoning, using the explanation of the facts and interests on a legitimizing/de-legitimizing way. The general narrative of the commenter might cause a different consideration of the same tool, although death because of a good man's mistake is not necessarily better than just surviving a murder-attempt.

[74] Charles J. Dunlap, "Lawfare Today: A Perspective", *Yale Journal of International Affairs* Winter 2008 146-154 https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=5892&context=faculty_scholarship

We should consider this *"double edge sword"*-allegory related to rule of law argumentation: denial of the consultation method,[75] as legitimizing tool from international institutions might be an aim from the perspective of the regime-change. [76] On the other hand, questioning in general the sovereignty of a state should cause immediate and long-term effects, for example as precedents. The whole idea of emergency measures is favouring the stability of a regime, so obviously challenges back the regime-change aim. From this perspective, this atypical chapter-level tool contributes to the constitutional stability aim.

A contrarily, even the best principles/doctrines might have suicide consequences. Taking the basic example of 9/11: theoretically, in an extreme situation an Air Force fighter pilot might break the chain reaction by shooting at the airplane sacrificing all the passengers. The base of mainstream legal reasoning is non-measurability of lives and formally, a prohibition of an international agreement originated from the ex-soviet case. At shooting or not the pilot should consider the possible damages also if terrorists attack a nuclear power plant that way. 9/11 was a shocking event, because of its black swan-effect: terrorists used some civilian airplanes as weapons of mass destruction on a coordinated way, outside the original imagination. Only one-step forward would have been to combine the action with a WMD attack. Nevertheless, it happened before the conceptualization of hybridity.[77] Modelling and regulating similar circumstances are about considering the possible effects of the extreme situations multiplied by the possibility of the spectrum from inability via react to overreact by mistake or purpose, even for a hidden historical sin. Challenging the axiom of *'suicide*

[75] Renáta Uitz, "A jogállamiság párbeszéd útján történő védelmének buktatói", *Fundamentum* 2019.1-2. 42-52 http://fundamentum.hu/sites/default/files/fundamentum-19-1-2-04.pdf

[76]Orsolya Salát, "A jogásznemzet esete az autokráciával", *Fundamentum* 2018.2-3. 45-46 and Gábor Halmai, "A jogállami gondolkodás csapdája", *Fundamentum* 2018.2-3. 47-50 http://fundamentum.hu/sites/default/files/teljes-szamok/fundamentum-18-2-3-teljes-szam.pdf

[77] Early antecedents of the concept might be found already at Sun Ce. SZUN-CE A HADVISELÉS TÖRVÉNYEI *(Szun-ce ping-fa)* Fordította: Tőkei Ferenc https://mek.oszk.hu/01300/01345/01345.htm

pact' means that the system inherently consists of possibility of misuse. A realistic aim might be to reduce it.

Comparing the bases of the Hungarian constitutional system of emergency measures from 1989 and 2011 means a way from inefficiency by self-restrictions towards a manageable system. Whether the adaptation of the regulations is resistant to an attempt by misuse, is outside the scope of this paper. The Warsaw Pact and the North Atlantic Treaty defined the attack quite similarly, although they would have considered 9/11 differently because the eastern text focused on state actors.[78]

Might the texture of Constitutions become a possible future battlefield? Could the international organizations contribute to this de-legitimizing procedure based on the claims of some NGOs? Lawfare is a relatively new American concept about the use of legal argumentation to reach strategic aims without the real use of military force. To sell this concept might be easier to military people because this sociology-based idea is challenging the normative concept of the legal systems' autonomy. It is not enough to be just or fair, the legal system should be presented well also in mass-media circumstances. Combination of value-based legal maxims hijacked by destructive lawfare argumentations might cause difficult consequences. An obvious example is the R2P, the responsibility to protect argumentation used in extreme circumstances. Comparison of the Kosovo non-precedent to the Crimea independence-claim is a destructive lawfare argumentation, misuse of some claims.

Possibly the EU prefers much more the value based meta-legal contents and argumentation than NATO. Regulatory approach and functional spill over are much closer to the DNA of the EU, supported by the EU law activist's interpretations, with all their consequences at national constitutional court reflexions or even constitutional amendments. It is less known, that even the NATO enlargement had a constitutional level reading, based on the idea of

[78] *'Pacta sunt servanda'* versus *'clausula rebus sic stantibus'* is an old dilemma of the international law, based on theories from Roman legal tradition. See https://definitions.uslegal.com/p/pacta-sunt-servanda/ and https://definitions.uslegal.com/c/clausula-rebus-sic-stantibus/

legal interoperability:[79] for example, to be able to contribute out of area missions, the alliance challenged the length of national decisions on military border-crossing procedures. Similar debates were about EU battle groups, mostly aiming extraterritorial force projections. Although both the EU and NATO had a dominant extraterritorial approach until 2014, this rivalry might have had secondary importance from the point of view of the national constitutions. Germany sometimes missed the opportunity to participate missions because of the missing reasoning or majority support at parliamentary level and the new NATO members were pushed politically to amend their constitutions with preferential procedures. Making possible the contribution or making it mandatory are two distinct level of the interoperability. The key difference is the freedom of a state to limit the contribution practically towards political standing by, to show the flag only.

The next divergent issue, the self-defence has deeper consequences on the territory of the states itself: although it seemed to be the prerogative of NATO, since the invention of the Common European Foreign and Security Policy's military leg, a solidarity or mutual responsibility-based reasoning became part of the EU's vocabulary also. Allied and neutral nations following different interpretations of neutrality are bind together with a framework even challenging the key position of the attacked nation from the perspective of competences, because of the broad understanding of security issues with overlaps between foreign and domestic policies.

The French example in 2015 altered the discourse regarding the European alternative solutions. The bridge between NATO's and the EU's tasks supposed to be the concept of domestic resilience, coming this time from NATO-sense. In this case, the planning capacity of NATO might be combined with the EU's regulatory framework to have direct effects at the level of member states. Although it not necessarily affects the constitutional level regulatory toolbox, it should be at least considered. Everything close to individual or collective self-defence has overlaps with emergency

[79] John R. Deni, "Maintaining transatlantic strategic, operational and tactical interoperability in an area of austerity," *International Affairs,* 90:3, 2014, 583-600

measures inherently, as terrorism might have also. There are similar methods of the international organizations to influence different aspects of the topic, so their contributions might be evaluated, not only their different lenses. We might differentiate the human rights' focus from the security and show a mixed EU-perspective.

2.2. Different readings of the same human rights' framework

2.2.1. The text itself

From the perspective of the CoE institutions, we should focus on different types of legal documents, also their interpretations, not all of them legally binding. Therefore, the procedure follows a circle of

- text of Convention for the Protection of Human Rights and Fundamental Freedoms (Convention) and its amendments by states
- judicial review by court
- state practices following the cases
- generalized consequences and demands by councils
- reports on legal norms or drafts by the states (constitutions included)
- deduction of standards of rule of law, based on comparison of all available legal documents and "best practices".

According to the inherent logic, this procedure compares first a generally agreed international text (rules and exceptions included) with characteristically unique cases than combines some doctrines summarizing consequences of the cases with expectations based on comparative approach. The Convention has inherently a focus defending individual rights, although they should be measured against other interests also, like security. From the perspective of

our research, the key factor is Article 15, [80] with the title directly targeting the emergencies. Some basic considerations are the following:

- Paragraph 1: circumstances
  - War is the only situation used by the article, but not defined.
  - There should be at least one further reason for possible derogation.
  - Exigencies are special circumstances of the situation, but not defined either.
  - Derogations are compared with problems caused by a special situation.
  - The derogation should be proportionate.
  - In case of uncertainty, rights are privileged.
  - Other international legal obligations should be kept also.
- Paragraph 2: limits
  - There are absolute rights, not allowing further restrictions, defined by the Convention.
  - Related to right to life at least one exception might happen.
  - Lawful acts of war are privileged, but what means lawful, somebody should interpret.

[80] "ARTICLE 15 Derogation in time of emergency
1. 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.
2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.
3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed". https://www.echr.coe.int/Documents/Convention_ENG.pdf 13-14

  - Further absolute rights are ban of torture and other inhuman treatment.
  - Key procedural rights are absolute also.
- Paragraph 3: procedural requirements
  - Before using this article, the CoE should be informed.
  - Derogation should be reasoned.
  - Derogation should be announced as early as possible.

The text agreed by states consists of all these consequences. It is not there however, which type of limitation should be used or how many situations might be differentiated: structure of derogations is connected with the SLO-categories, but the tool from the Convention might or might not be connected with all or some of them. No derogation is possible without an invoked emergency, but a SLO might be managed without derogation. We should focus on certain claims caused by measures, and not on the structure of public emergencies because only nine countries announced derogations until July 2019.[81] Having extreme situations behind, the case law is limited on number and in extension both. On the other hand, based on Paragraph 3 an administrative mistake might cause a lost precedent, without considering the measures themselves. In such cases, judges measure them against the requirements and restrictions of the normal situations.

2.2.2. The jurisdiction

To identify the related segment of the court's jurisdiction, some semi-official compilations are available based on keywords as national security, terrorism, or derogations of Article 15.[82] Their

[81] ECHR Factsheet - Derogation in time of emergency, July 2019 https://www.echr.coe.int/Documents/FS_Derogation_ENG.pdf 2 (ECHR Factsheet – Derogation)

[82] ECHR Factsheet – Armed conflicts, September 2019 https://www.echr.coe.int/Documents/FS_Armed_conflicts_ENG.pdf (ECHR Factsheet – Armed conflicts), ECHR Factsheet – Terrorism and the ECHR October 2019 https://www.echr.coe.int/Documents/FS_Terrorism_ENG.pdf (ECHR Factsheet – Terrorism), and ECHR Factsheet – Derogation, all with a

different focuses make possible to highlight some general expectations. This paper does not aim to evaluate the jurisdiction in a detailed form, only to highlight some interpretations diverging from the agreed text itself. The general aim to extend the level of human rights seems to determine the judicial interpretation,[83] which typically contradicts the aims to solve the exigencies quickly.

Before evaluating the case law of Article 15, we should consider an alternative conceptualization based on the legitimacy of restrictions based on *"national security"*-related aims. The Convention uses the phrase many times, but there are rights without mentioning it. On the other hand, the meaning is not obvious either; even not possible to give an exact definition, they might collect only typical forms.[84] The phrase has obviously an overlap with threats to *"the life of the nation",* although a limited level of danger seems to be necessary for security reasoning. We should add also, that even in a Hungarian case they judged a secret anti-terrorist surveillance tool as a violation in an abstract level, without practical use.[85] Based on that argumentation almost all emergency norms might be questioned as theoretical grievance.

The key findings by the ECtHR regarding the national security-related restrictions are the following:

1) *"Any interference in private life must be in accordance with the law, justified by one of the legitimate aims listed and necessary in a democratic society*." [86]

note: "This Factsheet does not bind the Court and is not exhaustive". See also Guide on Article 15 of the Convention – Derogation in time of emergency Council of Europe/European Court of Human Rights, 2019 https://www.echr.coe.int/Documents/Guide_Art_15_ENG.pdf (Article 15 Guide), and RESEARCH DIVISION National security and European case-law, Council of Europe / European Court of Human Rights, 2013. https://www.echr.coe.int/Documents/Research_report_national_security_ENG.pdf (National security case law)

[83] *"Indeed, the Court has emphasised the Convention's role as a "constitutional instrument of European public order" in the field of human rights."* ECHR Factsheet – Derogation 4.

[84] National security case law 5, Paragraphs 3-5

[85] ECHR Factsheet – Terrorism 30-31 Szabó and Vissy versus Hungary.

[86] National security case law 7, paragraph 13

2) National security is used in Articles 8, 10 and 11 of the Convention as legitimate aim for restriction.[87]
3) The term itself is vague and could not be defined comprehensively, causing margin of appreciations for the States.[88] Substantive elements are *"the protection of state security and constitutional democracy from espionage, terrorism, support for terrorism, separatism and incitement to breach military discipline."*[89]
4) *"In accordance with the law"* collects three conditions together: regulated in domestic law, on an accessible way, with foreseeable consequences.[90]
5) The *"law should indicate the scope of any such discretion conferred on the competent authorities and the manner of its exercise with sufficient clarity, having regard to the legitimate aim of the measure in question, to give the individual adequate protection against arbitrary interference."*[91]
6) Strict necessity means *"adequate and effective guarantees against abuse."* The assessment depends on circumstances*, "such as the nature, scope and duration of the possible measures, the grounds required for ordering them, the authorities competent to authorise, carry out and supervise them, and the kind of remedy provided by the national law."*[92]
7) *"The individual must be able to challenge the executive's assertion that national security is at stake."* based on reasons and evidences considering procedural limitations caused by classified information,[93] but drug-related crimes are excluded from term of national security.[94]

[87] National security case law 5, paragraph 3
[88] National security case law 5, paragraph 4
[89] National security case law 5, paragraph 5
[90] National security case law 8, paragraph 18
[91] National security case law 9, paragraph 19
[92] National security case law 12, paragraph 32
[93] National security case law 16, paragraph 42
[94] National security case law 16-17, paragraph 44

8) Democracy is part of the considerations related to national security; consequently, sharia law is not a legitimate aim.[95] Furthermore, refused condemnation of violence might be sign of support of terrorism.[96]
9) The ECtHR *"tends to require national bodies to verify that any threat has a reasonable basis in fact."*[97]
10) *"The State's margin for appreciation in cases connected with national security is no longer uniformly broad."* Limitations are exclusion at absolute rights, restriction by alternative of less restrictive measures and *"strict requirement for independent courts."*[98]
11) Article 15 is only a secondary consideration, *"the Court will first examine whether the measures taken can be justified under the substantive articles of the Convention; it is only if it cannot be so justified that the Court will go on to determine whether the derogation was valid."*[99]

The restricted use of national security reasoning for peacetime has consequences on emergency cases also. We should consider that filing complaints against adversary states was already a tool of the Cyprus-Turkey conflict but became extensively used after Crimea 2014.[100]

[95] *"The Court acknowledges that the sharia, which faithfully reflects the dogmas and divine rules laid down by religion, is stable and invariable in nature. Principles such as pluralism in the political sphere or the constant evolution of public freedoms have no place in it. A regime based on the sharia appears incompatible with the values of the Convention, notably with regard to its rules on criminal law and criminal procedure, the place it assigns to women in the legal system and its intervention in all fields of private and public life, in accordance with religious rules."* National security case law 21, paragraph 61 versus 23, paragraph 65: In general, freedom of religion is protected from restrictions based on national security.
[96] National security case law 22, paragraph 62
[97] National security case law 41, paragraph 139
[98] National security case law 42, paragraph 142
[99] Article 15 Guide 5 paragraph 4
[100] ECHR Factsheet – Armed conflicts 15-18

According to the most complex summary, the Article 15 checklist of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) consist of:

- sufficiency of ordinary laws,
- genuine response nature of the measures,
- granted purpose,
- reasoned and limited nature,
- review of the need for derogation,
- attenuation about the measures,
- available safeguards,
- importance of the right and judicial control of purpose of limitation,
- practicability of judicial control,
- proportionality and non-discrimination,
- lawful measure according to a legally prescribed procedure,
- national judges' views (with limited supervision).[101]

According to our evaluation the most challenging elements are

- the formal requirements required for a derogation,
- the *"necessity in a democratic society"* test,
- the implied requirements of "legally prescribed" nature and
- the procedural legs connected with Articles 2 and 3.

It is easy to make an administrative mistake related to the first requirement, and an early derogation makes possible to target more restrictions than used in practice. One accepted way is a not too late derogation, as part of the national complain-procedure.

The second restriction makes possible to judge the same restriction differently based on the assumptions related to the regime. Even complains by third states might produce precedents against national instruments of shared programs initiated by international organizations challenging the regime generally or using the *"least limiting alternative"* reasoning.

[101] Article 15 Guide 8-9 Paragraph 21. Detailed relevant elements of the case law are collected in the Annex.

Related to the quality of law: constitutional legal standards are typically less punctual than detailed acts. Critics might evaluate them as "vague", like many definitions of the international agreements themselves. Related to right to life and ban of torture: invention of "procedural leg"-model amended the Convention itself, creating from *"Right to an effective remedy"* of Article 13 a further absolute right.

On the other hand, Article 15 derogation is not necessarily simultaneous with invocation of any emergency period. We might consider a SLO without derogation, but not an announced derogation without formal invocation of a SLO. Both concepts obviously have overlaps, but they are not synonyms. At least not according to the ECtHR.

2.2.3. Generalized expectations

There is another level of CoE-related documents, officially accepted by the Venice Commission, and one of them targeted the FL directly. They evaluated the general standards of the human rights contrasting with the requirements of the emergencies from the case law. We start from the country-specific Opinion from 2011;[102] based on general requirements from 2006, later we compare it with the Rule of law handbook from 2016. We will conclude the CoE-part with the evaluation of the FL compared to the requirements until 2016.

Only 9 from 150 paragraphs of the 2011 Opinion on the Hungarian FL target the emergency measures, but on a more systematic way than used to be at the level of Factsheets. Two third of the comments are about the SLO chapter itself, and three further paragraphs about connections of normal and special legal norms. Because of the close relation, we should mention also two further

[102] *EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW (VENICE COMMISSION) OPINION ON THE NEW CONSTITUTION OF HUNGARY Adopted by the Venice Commission at its 87th Plenary Session (Venice, 17-18 June 2011)Strasbourg, 20 June 2011 Opinion no. 621 / 2011 CDL-AD(2011)016* https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2011)016-e

paragraphs dedicated to the armed forces. Key findings of the Opinion are about

- the armed forces and police:
  - it is part of the local tradition and not a requirement to regulate these organizations at constitutional level;
  - tasks of the military are determined by values and open to international contributions;[103]

- SLO:
  - the aim highlights, that the regulations dedicated to special circumstances should not be available for everyday exert power;
  - although the system was already more sophisticated than any foreign alternatives by that time, the solution was clustered to the German-Polish alternative;[104]
  - different types of categories are compared with specific conditions and available tools both,[105]
  - assumed *"European standards"* of the human rights' restrictions should be followed,[106] a contrarily to Article 54 Paragraph (1) with exception from the general rule of Article I Paragraph (3) of the FL;
  - Article 54 Paragraph (1) is also limited by the general derogation-regimes of the international agreements;[107]
  - they evaluated the chapter generally on a positive way,[108] with some comments related to the limited clarity of wording, based on two possible reading of the texts with or without connection to Article 54 Paragraph (4).[109]

[103] CDL-AD(2011)016 Paragraphs 132-133, 27 *133.*
[104] CDL-AD(2011)016 Paragraph 134, 27
[105] CDL-AD(2011)016 Paragraph 135, 27
[106] CDL-AD(2011)016 Paragraph 136, 27
[107] CDL-AD(2011)016 Paragraph 139, 28
[108] CDL-AD(2011)016 Paragraph 137, 27
[109] CDL-AD(2011)016 Paragraph 138, 27-28

- Legal norms:
  - One of the comments questions the role of legal norms valid only for state of national crisis (issued by National Defence Council), for state of emergency (issued by the President), and others issued by the Government for the other 3 (later 4) SLO situations,[110] although
  - the same comment pushes towards the proportionality-demand at the secondary-level regulation of cardinal acts, although finishing a quotation losing a relevant part causes misinterpretation also.[111] According to the valid text, there is a difference from the perspective of the needed votes between the FL and cardinal acts.[112]

Summing up, although the chapter kept most of the institutions of the Constitution, the Commission questioned it partly based on an altered quotation and expectations deducted from the case law of the Court. The evaluation based also on an earlier document, which we should comment also. As mentioned at footnote 46 of the Opinion,[113] earlier opinion measuring counter-terrorism tasks against human rights pre-defined European standards, although they mentioned only two concluding elements of the 2006 Opinion, paragraphs 35 and 38.[114] The first one defines

[110] CDL-AD(2011)016 Paragraph 54, 12

[111] *"Article T(4) defines "cardinal acts" as "[a]cts of Parliament, the adoption and amendment of which requires a two-thirds majority of the votes of Members of Parliament" (...)."* CDL-AD(2011)016 Paragraph 54, 12

[112] *"Cardinal Acts shall be Acts, for the adoption or amendment of which the votes of two-thirds of the Members of the National Assembly present shall be required."* (Emphasis added.) THE FUNDAMENTAL LAW OF HUNGARY http://www.njt.hu/translated/doc/TheFundamentalLawofHungary_20190101_FIN.pdf Instead of 133 supporting votes might be 67 enough for an amendment.

[113] CDL-AD(2011)016 Paragraph 137, 27, footnote 46

[114] OPINION ON THE PROTECTION OF HUMAN RIGHTS IN EMERGENCY SITUATIONS Adopted by the Venice Commission at its 66th Plenary Session

the preferred way of emergency regulations with basic elements at constitutional level, even comparing different types of emergencies connected with differently restricted/derogated human rights, to create *"guarantees against abuse of power"*.[115] The two level system used by Hungary (complexity of SLO chapter and cardinal act on defence from 2011) was even better from this perspective than the French option with one of the possible alternatives outside the scope of the constitution.

The other mentioned paragraph is about some limitations of derogations, mentioning absolute rights, procedural conditions and ban of using emergency measures against peaceful protests, added to the catalogue of the absolute rights.[116] According to these two paragraphs, a legal system with differentiated emergencies should be part of a European constitution, where the basic guaranties should remain at constitutional level. Using these two quotations, they measured the legal system against human rights regimes at a theoretical level, even without putting any of the elements into practice. On the other hand, they have not mentioned and measured against the Hungarian system the earlier chain of thought. They might have highlighted also

- Paragraph 5 on the positive obligations of states to protect people, or the public interests, based on a more active role of states pending on the situational background,[117]
- Paragraph 6 about the structure of limitations in a bit different way, considering the rights of others also, as background for precautionary measures against planned attacks,
- the reasoning from Article 17 against misuse of argumentation at individual level, even explaining the

(Venice, 17-18 March 2006) Opinion no. 359/2005, Strasbourg, 4 April 2006 CDL-AD(2006)015 The Opinion was originally Restricted, but it is publicly available on the official CoE homepage. https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2006)015-e

[115] CDL-AD(2006)015 Paragraph 35, 13

[116] CDL-AD(2006)015 Paragraph 38, 13

[117] CDL-AD(2006)015 Paragraph 5, 2

potentially restricted rights of possible victims and suspects,[118]

- Paragraph 7 about the logical steps of the evaluations of limitations according to different expectations from the jurisdiction:
  - legally regulated way, as transparency and accessibility,
  - "necessity in a democratic society" versus "pressing social need": effectiveness and proportionality together, measured against reasons/interest protected,
  - strict conditions of precise definitions,[119]
- Paragraph 8 about possible modifying effects of the circumstances: pending on necessity even more strict regulations might become valid, with respect on some core elements of the rights,[120] and
- even a test for justification of the level of emergency in a situation is available according to Paragraph 10, based on
  - actual or imminent nature,
  - extension, effects on the nation,
  - consequences on the life of the community, and
  - inadequacy of the available restricting tools in peacetime.[121]

This test is synchronised also with UN expectations.[122] According to Paragraph 22, even preventive measures might be legitimate, pending on immanent nature of the danger,[123] although the necessity test from Paragraph 27 is strict,[124] but a holistic approach also needed, balancing between security interests and human rights. Terrorists intend to challenge the harmonic fine-

[118] CDL-AD(2006)015 Paragraph 6, 2-3
[119] CDL-AD(2006)015 Paragraph 7, 3
[120] CDL-AD(2006)015 Paragraph 8, 3
[121] CDL-AD(2006)015 Paragraph 10, 3
[122] CDL-AD(2006)015 Footnote 14, 5
[123] CDL-AD(2006)015 Paragraph 22, 9
[124] CDL-AD(2006)015 Paragraph 27, 10

tuning of balances by abuse of their rights.[125] All these instruments are about expectations towards the future legislative activities of states, and secondarily towards the concrete measures applied by police or armed forces in conflict-situations. As a concluding expectation towards a new constitution, they might have used Paragraph 36 also, to legitimate an even more balanced approach without jeopardizing human rights:

> *"The assessment of the fairness and proportionality of the balancing of public and private interests has to be determined by the concrete situation and circumstances. The bottom line, however, is that the right or freedom concerned may not be curtailed in its essence. The domestic courts must have full jurisdiction to review measures of restriction and derogation for their legality and justification, and for their conformity with the relevant provisions of the ECHR."*[126]

From another perspective, missing elements of the 2006 Opinion could have produced arguments for the sixth Amendment, after the 2014 deterioration of the security situation in Europe caused by state and non-state actors both. On the other hand, the Venice Commission generalized and supervised the expectations by that time in general, as a chapter of the rule of law handbook.[127] The short chapter is a list of structured questions, followed by Paragraphs 51-52 about the expected level of guaranties.

To evaluate compatibility of the FL, we should start with the two paragraphs. Paragraph 51 confirms the vital interest of public security and safety of a democratic state, even via temporary

[125] CDL-AD(2006)015 Paragraph 34, 12

[126] CDL-AD(2006)015 Paragraph 34, 12 is the last paragraph before the concluding chapter, summarizing some general issues not totally connected to post-9/11 abuses or anti-protest violence.

[127] EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW (VENICE COMMISSION) RULE OF LAW CHECKLIST Adopted by the Venice Commission at its 106th Plenary Session (Venice, 11-12 March 2016) Council of Europe, May 2016 https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2016)007-e

amendment of the division of powers, pending on a strictly limited *"duration, circumstances and scope"*. Role of control by parliament and judicial review is to limit the emergency to its mandatorily limited level.[128] Internationally recognized exceptional circumstances and absolute rights limit the derogations according to Paragraph 52.[129] Starting from these expectations, the possible Hungarian answers on the structured questions[130] are the following:

– *"Are exceptions in emergency situations provided for by law?"*

Yes, they are. The FL regulates six possible options at first level, and secondarily cardinal laws from 2011. Amendments were synchronised in 2016.

– *"Are there specific national provisions applicable to emergency situations (war or other public emergency threatening the life of the nation)? Are derogations to human rights possible in such situations under national law? What are the circumstances and criteria required in order to trigger an exception?"*

Yes, there are. The migrant-related regulations from 2015 are outside the scope of the SLO, so they should remain also outside the scope of Article 15, as peacetime regulations. The FL framework regulated all further alternatives with all criteria. All available measures dedicated to situations are in a cardinal law.

– *"Does national law prohibit derogation from certain rights even in emergency situations? Are derogations proportionate, that is limited to the extent strictly required by the exigencies of the situation, in duration, circumstance and scope?"*

[128] RULE OF LAW CHECKLIST 22
[129] RULE OF LAW CHECKLIST 23
[130] RULE OF LAW CHECKLIST 22

Yes, Article 54 Paragraph (2) of the FL limits derogations mentioning absolute rights, as

- right to life extended with human dignity,
- ban of torture, inhuman or degrading treatment or punishment, servitude, extended with ban of human trafficking, cloning and experimentation without voluntary consent on an informed way, and
- basic criminal procedural rights as presumption of innocence, "right to defence at all stages of the proceedings" with the rights of defence counsels included, *"nullum crimen"* according to its international reading with the ban of double punishment.

Furthermore, any international legal obligations might broaden the scope of absolute rights via Article Q, Paragraphs (2)-(3). This solution applies also for limitations based on duration, circumstances, and scope together with the detailed regulations of different categories dedicated to proportionality and sui generis limitations pending on the reasons of the emergency measures.

– *"Are the possibilities for the executive to derogate from the normal division of powers in emergency circumstances also limited in duration, circumstance and scope?*

In the most serious two cases, derogation exists, but not in favour of executive power: they are dedicated to the National Defence Council in war-like state of national crisis and to the President in state of emergency. The FL or a cardinal law defined all further limitations.

– *"What is the procedure for determining an emergency situation? Are there parliamentary control and judicial review of the existence and duration of an emergency situation, and the scope of any derogation thereunder?"*

The role of Parliament is differentiated and pending on the targeted alternative. Determination belongs to the supermajority

typically; freedom of the executive relates to less serious exigencies and are timely limited, partly outside the scope of human rights. Article 54 guarantees

- all the rights of the Constitutional Court,
- ban of suspension of the FL and
- a positive requirement to terminate the SLO as soon as possible. On the other hand, this determination is more a political and only secondarily legal decision.

Finally, the current text of the FL seems to be an over-complicated version, which might be consolidated again soon. A constitutional legal system should keep its inherent freedom by amending/interpreting elements of the regulations, on a comparable way with needs/limitations coming from the international organizational practices, based on changing circumstances of the real world also, perceived threats included. A complicated system might be dysfunctional, but it is at least not against the CoE reading of rule of law. We should also consider the missing European trend, already discovered in 1995:

> *"The concept of emergency rule is founded on the assumption that in certain situations of political, military and economic emergency, the system of limitations of constitutional government has to give way before the increased power of the executive (including military power in a martial law). However, emergency rule is a legal regime governed by the principles of legality of administration, based on the rule of law. The rule of law means a system where governmental agencies must operate within the framework of law, and their actions are subject to review by independent courts. In other words, the legal security of individuals should be guaranteed."*[131]

[131] EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW (VENICE COMMISSION) EMERGENCY POWERS CDL-STD(1995) 012 Science and technique of democracy No. 12 Strasbourg, 1995 https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-STD(1995)012-e 26

Considering the available means of reducing the complexity, the legislator should focus not only on the theoretical structure, but also on the possible application of the regulations, never tested in Hungary from a violent perspective. Having lower number of alternatives inside the concept of SLO remains under the cover of Article 15 of the Convention, if the government makes derogations timely and the reasons behind are valid. On the other hand, regulating outside the scope of the SLO chapter (and/or without derogation) causes jurisdiction according to the peace-standards of the judges. It might exclude the public order or national security from reasoning, pending on the agreed text without mentioning them for some fundamental rights. It might justify the restrictions alone without using the Article 15-based further elements.

2.3. Comparison of NATO and EU-related issues

Theoretically, NATO or the EU should not determine national constitutions with the focus on emergency measures. On the other hand, there are many other EU-clauses in different constitutions and even NATO appears sometimes. Regulation of emergencies is a diverging topic based on historical choices of the different countries, as one level of *punctuated equilibrium*[132]. Considering the effects of globalization, we should assume that there is a legitimate interest at the level of international organizations to influence the member states' behaviour by programs. If threats are evaluated and clustered at international level, preparations should cause agreed procedures, which might challenge even some basic national working methods regulated at constitutional level.

Typically, political documents consist of these international expectations, based on linking and interpreting some general

[132] *"…once a path is taken it canalizes future developments."* Stephen D. Krasner, *Power, the State, and Sovereignty / Essays on international relations,* Routledge 2009, 85

regulations of agreements, similarly to the practice of CoE institutions. Based on these techniques, legitimate aims of the international organizations might even target the emergency regulations, if they wish to react collectively. Shared threat perceptions and decision making in time pressure are at least essential overlaps with national constitutions, legitimizing aims for intervention. On the other hand, the targeted constitutional institutions, like size and potential of the member states are really diverging.

To include another level of comparisons, we should start with evaluation of the two models of emergencies in Europe represented by the federal German *Grundgesetz* and the French Constitution.[133] Comparing the FL with the German and French alternatives has a history behind, as the transition-model of the 1989-1990 Hungarian Constitution was dominantly a translation and adaptation of the German model without its federal aspects (supplementary decision makers included) and the 2011 socialist-close alternative seems to be inspired by the French way of thinking.

Comparison of the triangle of the Weimar Republic's Constitution, *Grundgesetz* and the Hungarian Constitution is focused on the German theoretical dilemmas related to the *"constitution-centered, textually bound approach with a moral complement"*, compared to a more *"textually bound constitutional-centrist"* Hungarian approach.[134] The privileged way of proclamation, the Chancellor-type government, even the original three emergencies have German origin. The three added Hungarian categories are theoretically constructed, but on a diverging way from the German example. A contrarily, the French version is much more about practice: how to

- manage very vaguely drafted, almost unlimited powers regulated in Constitution (*libertacide*-debate);

[133] The British model is not mentioned because of absence of charter-type single Constitution. We will not touch the US Constitution either, because of missing EU-relevance. The shared element of this both systems, the *martial law* is not part of the Hungarian tradition either.

[134] Jakab 2005 ibid

- invoke emergency situations by the President (Article 16 – *povoirs exceptionnels*) or by the Government (Article 36 – *état de siège*);
- include extra-constitutional options from an earlier law than the Constitution itself, based on examples from the time of de-colonialization (*état d'urgence*).[135]

According to our conclusions, considering reduction of the Hungarian alternative elements of SLO neither of the two options are adaptable:

- the French version became challenged by terrorism as example of the unlimitedly extended use of emergency measures followed by broadened availability of counter-terrorism measures in peacetime,[136]
- the federal aspect of the German System makes their regulations distant from the perspective of a more text-based reading.

Although the FL-system might be overcomplicated, it combines limitations with effectiveness in the most proportionate way and confirmed by Venice Commission. Following the French idea to outsource constitutional elements into cardinal acts would have consequences for the available reduction level of individual rights, although the legal construction would remain a constitutionally framed legislative decision and not based only on practice of the executive power. The first branch might, the second one should consider obviously the changeable expectations of the international environment, pushing harder the smaller states.

From this perspective we should consider the differences of the expectations from NATO- and the EU. Are they built in the

[135] Jenő Spitzer, *A különleges jogrend szabályozása az egyes alkotmányokban IV. Különleges jogrendi szabályozás a francia jogrendszerben*, Budapest 2019 Magyar Katonai Jogi és Hadijogi Társaság ISSN 2416-1365 http://www.hadijog.hu/wp-content/uploads/2019/03/2019-4-Spitzer.pdf

[136] Ádám Ságvári, "Különleges jogrend a francia jogban. Az állandósult kivételesség", Iustum Aequum Salutare XIII. 2017. 4. 179–188. http://ias.jak.ppke.hu/hir/ias/20174sz/12_SagvariA_IAS_2017_4.pdf

system of treaty law originally, or they might come only from political expectations? Regarding NATO, it is obvious, that at least the core of the North-Atlantic Treaty, Article 5 has inherently overlaps with state of national crisis or state of preventive defence.[137] Connected with the EU, we have only some not as so obvious text-based connections.

The key element is the Charter of the Fundamental Rights of the EU, because its official Explanation highlights the negatively defined elements of the treaties outside the scope of the Union:

> *"The Charter does not affect the possibilities of Member States to avail themselves of Article 15 ECHR, allowing derogations from ECHR rights in the event of war or of other public dangers threatening the life of the nation, when they take action in the areas of national defence in the event of war and of the maintenance of law and order, in accordance with their responsibilities recognised in Article 4(1) of the Treaty on European Union and in Articles 72 and 347 of the Treaty on the Functioning of the European Union."*[138]

According to this quotation, there are inherent possibilities of the member states based on the Convention for the Protection of Human Rights and Fundamental Freedoms to keep decisions at state

[137] Article 5: "The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defence recognised by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area.(…)" The North Atlantic Treaty, Washington D.C. - 4 April 1949 https://www.nato.int/nato_static_fl2014/assets/pdf/stock_publications/20120822_nato_treaty_en_light_2009.pdf

[138] EXPLANATIONS RELATING TO THE CHARTER OF FUNDAMENTAL RIGHTS (2007/C 303/02) Explanation on Article 52 — Scope and interpretation of rights and principles, https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32007X1214(01)&from=EN

level without interference from EU's side. The treaty-elements mentioned there are both from the Treaty on European Union (TEU)[139] and from the Treaty on the Functioning of the European Union (TFEU)[140] connected with home defence and violent policing tasks at home.

According to the mentioned Article 4 of the TEU, national security matters, including the territorial integrity of a state also should remain outside the scope of the EU institutions.[141] From the perspective of the TFEU two elements are relevant:

- Article 72 excludes the internal emergency situations from the Area of Freedom, Security and Justice Title[142], and
- only the possible side-effects on internal market belong to EU level, caused by national measures against the most serious threats challenging domestic law and order or peace (serious disturbances, threat of war),[143] and the terminology is a bit different from

[139] CONSOLIDATED VERSION OF THE TREATY ON EUROPEAN UNION https://eur-lex.europa.eu/resource.html?uri=cellar:9e8d52e1-2c70-11e6-b497-01aa75ed71a1.0006.01/DOC_2&format=PDF

[140] CONSOLIDATED VERSION OF THE TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012E/TXT&from=HU

[141] "Article 4

1. In accordance with Article 5, competences not conferred upon the Union in the Treaties remain with the Member States.

2. The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State."

[142] "Article 72 (ex Article 64(1) TEC and ex Article 33 TEU)

This Title shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security."

[143] "Article 347 (ex Article 297 TEC)

Member States shall consult each other with a view to taking together the steps needed to prevent the functioning of the internal market being affected by measures which a Member State may be called upon to take in the event of serious

ECtHR's: "emergencies" and "exigencies" are not used at al, "public danger" is written instead of.

Starting from these legal positions EU should have remained out of the circle of stakeholders although some programs like counter-terrorism issues inherently affect the freedom of the nations. On the other hand, based on some further treaty-elements, use of the interpretation-based methods made it possible to intervene without considering the original limitations. This method shared by both international organizations although the original limitation is asymmetric.

2.3.1. Reverse-engineering of some threat-related NATO concepts

There is a general uncertainty related to military matters because of the complexity of issues. This chapter supposed to explain some concepts behind the legal and political texts, using the technic of reverse engineering. Our example is Article 4 of the current NATO Strategic Concept,[144] to demonstrate the blurred lines between foreign and domestic politics, also the limitations of the different concepts used by international organizations.

This example is relevant for predictions regarding NATO's and EU's possible futures, with some side effects on the constitutional level legislations of the member states also. According to an optimistic reading it could have constructed a security net against the over-limitations at state level, but another reading is also valid, more focusing on possibility to challenge the very basic ideas of the international system.[145]

internal disturbances affecting the maintenance of law and order, in the event of war, serious international tension constituting a threat of war, or in order to carry out obligations it has accepted for the purpose of maintaining peace and international security."

144 https://www.nato.int/nato_static_fl2014/assets/pdf/pdf_publications/20120214_strategic-concept-2010-eng.pdf

145 *"As the concepts of state sovereignty and independence have come under attack in recent decades, (…) very division between home and abroad, domestic*

These ideas contrasted with some President Trump-related debates, from a European perspective symbolize the crossroads of NATO and the EU's defence-related issues. Believing that NATO is not obsolete, to show some evidence against the neorealist-based approach, still the 2010 Strategic Concept seems to be the adequate starting point. Although they drafted the text for a decade, it even might be partly outdated, but it is still the most important open source document of NATO, which wanted to fine-tune the complex strategical reading of the agreed treaty-text. It is a politically accepted document of strategic communication, edited by experts[146] with limited contribution from the nations' side, reflecting the ongoing debates of the first decade of the 21st century.

The methodology became its definitive factor: it is not a democratic way accepted omnibus-like agreement, but a logical vision based on realities and reflecting on the known challenges and considering technically available further options. The expert-group-model and the optimistic attitude became even the example for the 2016 EU Global Strategy also,[147] reflecting on challenges and limitations, but keeping ambitions, although from a purely legalistic point of view, the methodical aspect reduces the legitimacy of both documents.

The evaluation of Article 4 of the NATO Strategic Concept[148] is about mapping the tasks and the concepts behind,

and foreign, inside and outside has been brought into question from a number of different viewpoints, conceptual and political." Christopher Hill, *The Changing Politics of Foreign Policy,* Palgrave 2003, 1

[146] NATO 2020: assured security; dynamic engagement, Analysis and recommendations of the group of experts on a new strategic concept for NATO, 17 May 2010 https://www.nato.int/strategic-concept/expertsreport.pdf

[147] Nathalie Tocci, "The making of the EU Global Strategy", *Contemporary Security Policy* 37:3 (2016): 461-472.

[148] "4. The modern security environment contains a broad and evolving set of challenges to the security of NATO's territory and populations. In order to assure their security, the Alliance must and will continue fulfilling effectively three essential core tasks, all of which contribute to safeguarding Alliance members, and always in accordance with international law:

a. Collective defence. NATO members will always assist each other against attack, in accordance with Article 5 of the Washington Treaty. That commitment remains firm and binding. NATO will deter and defend against any threat of

compared with some theoretic frameworks to demonstrate their interrelations, limitations and challenges to the domestic-international dichotomy, based on a predominantly ethical dilemma[149] of the Western politico-military establishment. As international example of *punctuated equilibrium* by the time of drafting, the NATO members already had answered the key dilemma: they choose the liberal internationalist *out of area* solution instead of the "out of business" suggestion of realists. NATO started actions abroad, but – compared to the EU – without textual base at treaty level.[150]

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aggression, and against emerging security challenges where they threaten the fundamental security of individual Allies or the Alliance as a whole.
b. Crisis management. NATO has a unique and robust set of political and military capabilities to address the full spectrum of crises – before, during and after conflicts. NATO will actively employ an appropriate mix of those political and military tools to help manage developing crises that have the potential to affect Alliance security, before they escalate into conflicts; to stop ongoing conflicts where they affect Alliance security; and to help consolidate stability in post-conflict situations where that contributes to Euro-Atlantic security.
c. Cooperative security. The Alliance is affected by, and can affect, political and security developments beyond its borders. The Alliance will engage actively to enhance international security, through partnership with relevant countries and other international organisations; by contributing actively to arms control, non-proliferation and disarmament; and by keeping the door to membership in the Alliance open to all European democracies that meet NATO's standards." https://www.nato.int/nato_static_fl2014/assets/pdf/pdf_publications/20120214_strategic-concept-2010-eng.pdf 7-8

[149] *"The changing contemporary environment, however, has given extra force to one particular normative issue (…), namely how much responsibility to take for shaping the lives of others outside one's own society, and for the international milieu as a whole."* Hill ibid 17

[150] The so called Petersberg Tasks are mentioned at TEU Article 42 1. (ex Article 17 TEU) and defined at Article 43 1.
"Article 42 1. The common security and defence policy shall be an integral part of the common foreign and security policy. It shall provide the Union with an operational capacity drawing on civilian and military assets. The Union may use them on missions outside the Union for peace-keeping, conflict prevention and strengthening international security in accordance with the principles of the United Nations Charter. The performance of these tasks shall be undertaken using capabilities provided by the Member States."
"Article 43 1. The tasks referred to in Article 42(1), in the course of which the Union may use civilian and military means, shall include joint disarmament

Article 4 of the Strategic Concept canonized the model of three core tasks. According to the introductory part, concepts throughout lenses with some inherent consequences determine these tasks. They used an institutional evolutionary approach for a liberal aim on a nation-state base, using the primacy of the international law, which caused a bit institutionalist / constructivist accent. In Article 4 of the 2010 version, the spectrum of the broad sense-used security is divided by geography and time, in interrelation between the outside and the inside world with the inherent danger of reactive mode. People and territory doubled the subjects, and the text subordinated the catalogue of tasks to the mission (safety). The precondition of legality also causes some inherent limitations: legal argumentation might challenge the politically binding "amendment" of the North Atlantic Treaty, or legal argumentation based on analogies might be misused.

The conceptually introduced structure of three core tasks consists of the collective defence, crisis management and cooperative security. The basic consideration behind might have been about the trends of different types of conflicts,[151] but without disclose the core of the Alliance, the collective self-defence issue. The 2010 paraphrases of the *"All for one and one for all"* slogan confirmed, and a bit broadened the original 1949 version. It is based on some earlier examples, connecting the reaction (to defend) with prevention (to deter), and broadening the scope from armed attack to a long catalogue of challenges, if they reach the level of threats, without highlighting their armed characteristics.

operations, humanitarian and rescue tasks, military advice and assistance tasks, conflict prevention and peace-keeping tasks, tasks of combat forces in crisis management, including peace-making and post-conflict stabilisation. All these tasks may contribute to the fight against terrorism, including by supporting third countries in combating terrorism in their territories." (Emphasis added.) The missions should be operational outside the EU member states territory only.

[151] *"Because the state system as a whole lacks a sovereign, wars are always a possibility. (…) With the advent of nuclear weapons, major interstate conflict threatens to destroy human existence."* Krasner ibid 85

The sentence is a mix of the original Articles 5 and 4 of the Washington Treaty,[152] extending the binding defence commitment towards deterrence. Latter is an offensive concept used to avoid the need of defence, inherently theoretically debated from perspective of banned threat by force. According to NATO's definition: deterrence is an ability to convince a potential aggressor that the consequences of coercion and/or armed conflict would outweigh the potential gains. It is based on multiplication of three components, as Capability x Credibility x Communicated will, where the consideration of possible MAD, the mutually assured destruction, as rational argumentation about the missing option to win a full-scale nuclear war limits its effectiveness. A less aggressive element of the theory is the deterrence by denial, when the better-organized resilience of the system limits the effects of a possible destruction.

The extended offensive approach is not fully compliant with the democratic peace theory with its inherent critic of wars after WW2,[153] originally applied by the Article 2 Paragraphs 3-4 of the UN Charter. The bit idealistic approach combined with (limited) realism and liberal institutionalism became codified without deciding between the competing aims of peace, security and justice, introducing an apparent ban of force and even its threat.[154] On the other hand, they codified an applied democratic peace theory,

[152] Article 4: "The Parties will consult together whenever, in the opinion of any of them, the territorial integrity, political independence or security of any of the Parties is threatened." https://www.nato.int/nato_static_fl2014/assets/pdf/stock_publications/20120822_nato_treaty_en_light_2009.pdf

[153] *"The puzzle is why democratic dyads are unusually peaceful when democracies are not."* James D. Morrow, "International Conflict: Assessing the Democratic Peace and Offense-Defense Theory"*,* in: *Political Science: State of the Discipline,* I. Katznelson and H. V. Milner (eds), New York, W. W. Norton, 2002, 177

[154] *"3. All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.*
4. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations" http://www.un.org/en/charter-united-nations/

compared to its inherent limitations represented by self-defence clause of Article 51 of the Charter,[155] in a bit extended sense including a collective right of group of nations.

A bit closer to realities and the limitations of the democratic peace theory mapped by Morrow:[156] it should not be a suicide pact, which is managed by the twice double aim in text included: maintaining or restoring peace or security makes four different readings possible at the same level, sacrificing the aim of coherency. The meaning is the inherent right of the Member-states instead of general ban of force. The collective applicability might mandate to attack back the attacker, and the response not necessarily limited to statehood according to the text of the UN Charter. In addition, this level of constructive ambiguity caused different wordings for different international organizations competing each other time to time.

NATO's lessons learned from 9/11 precedent mean consequently a broadened perspective by combined Article 4 and 5 for preparation to react quickly. The Strategic Concept re-opened the territorial limitations of Article 6 after de-colonization at the reaction's side and broadened the threat perceptions towards non-state level. Later it included the foreign fighter versus homegrown terrorist debate and because of the grey zone war theory also the cyber means and NGO demonstrations, leading towards the direction of hybrid war theory of the Gerasimov doctrine.

The trend of expansive explanation might be found also at the further 2 core tasks from 2010, which became integrated after

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[155] *"Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security."*

[156] *"Democracies are more likely to win the war they fight than autocracies are (…); in wars between democracies and autocracies, the democracies initiate the war more often than the autocracies (…); and democracies that initiate wars suffer lower costs than autocracies that initiate wars (…)."* Morrow ibid 182

2016 with the terminology of *Projecting Stability* originally abroad, with inherent interpretation-problems challenging actions and non-actions both.[157] This part is outside of the Washington Treaty context of original self-defence responsibility and leads out of area. The arguments of crisis management missions are twofold according to the Strategic Concept: from the side of the available political and military tools and form the hypothetical effect of the foreign problems towards escalation on NATO-s territory. It means a broad responsibility to manage ongoing and potential crises without time-limitations. It has overlaps with the "Responsibility to Protect"-concept, but it based on NATO's decision only,[158] not on UN Security Council consensus.

The defining factor is the contribution to the security of the Alliance: it does not mean police of the word, but responses based on the overlaps of territories. On the other hand, crisis management procedures might be used not only in out of area sense, because crises might appear at home also. In addition, at this point the connection is obvious with our researched topic.[159] Only one difference remains: an out of area mission should not cause any possible emergency, because it should remain outside of the territories of NATO allies.

Cooperative security, the last core task of Article 4 connects the outside world to the member states territory by the perspective of membership pending on democratic standards. This perspective clouded the difference based on the missing security guaranty: partners might share common interest, even values, but the safety

[157] *"On the other hand, democracy has the potential both to turn a state inward and to press it into external crusades on the basis of what are perceived as universal values."* Hill 2003 ibid 23

[158] *"War, and/or interventions in other countries, should be an absolute last resort, and not the ready instrument of political engineering. It may be needed for serious humanitarian purposes, (…) but the destructive and mediatised nature of modern conflict means that the risks are very high, at home and abroad."* Christopher Hill, *Bringing War Home: Foreign Policy-making in Multicultural Societies,* University of Cambridge, UK 2007 278

[159] *"Emergency powers may be required to meet such an exceptional challenge, but they are likely to be counterproductive unless tightly limited in time and scope."* Hill 2007 ibid 277

net of the alliance is missing without membership and not replaceable by public statements. A contrarily, the partnership topic was part of the ongoing Russia-NATO disagreements based on overt and covert claims on near abroad versus the right of self-determination of the Nations belonging to the same neighbourhood. By the time of drafting of the Strategic Concept, the difference might have been obvious based on the Georgian example from 2008.[160] Crimea in 2014 confirmed that the lines are still there between Article 5 and partnership relations, which might limit the intentions of partners. On the other hand, reassurance and resilience of member states might cause further member states' responsibilities, pushing towards quick reactions and administrative and logistical enablers.

Resilience was not a buzzword in 2010, only a possible concept marginalized earlier as bipolar world legacy. Although Article 3[161] of the Washington Treaty used only *"to resist"* format, it was interpreted as resistance originally. Hybrid threats were also outside the 2010 scope, becoming part of the reasoning based on Summit decisions in Wales and Warsaw (2014-2016). Their elements have the biggest overlap with SLO issues. According to one possible logic, the home-based cases or attacks Hungary should consider first at national level than might communicate towards NATO. Further possible options caused from outside have SLO reading also:

- everything considered as Article 5-close scenario (kinetic, hybrid or cyber), might cause considerations on state of national crisis versus state of preventive defence,
- missions abroad are normally outside the scope, but side effects (foreign fighters back, terrorists or mass-migrants) might lead to state of terrorist threat versus state of

[160] *"On the other hand, defensive advantages increase the ability to hold the sized territory afterward (…) Fait accompli is an attractive tactic under such conditions."* Morrow ibid 190

[161] *"In order more effectively to achieve the objectives of this Treaty, the Parties, separately and jointly, by means of continuous and effective self-help and mutual aid, will maintain and develop their individual and collective capacity to resist armed attack."*

emergency choice. On the other hand, state of preventive defence instruments might help staffing the participation itself.

Obviously, it is always an option to use the peacetime regulations, outside the scope of the SLO chapter. Many recent amendments of the act on home defence aim to reduce the time for hypothetic reactions on national or foreign causes, still without invoking emergency. The model supposed to fit into NATO Crisis Response System (NCRS) originated from 2005, and into some further acronyms based on the speed of decision-making. Exercises check interoperability regularly. [162] Accelerated speed of NATO decisions causes time-pressure at national level for execution, which has constitutional side effects if some decisions are dedicated to top-level authorities. For example, substitution of the premier minister might gain relevance theoretically.

We should highlight, that participation at speedy decision-making procedures still include the consensus element of NATO structures, even pre-authorization originates from a decision with consent on perceived threat. On the other hand, invoke an emergency remains a national choice, even re-structuring the system means national considerations based on comparison of different threat-perceptions. NATO programs, like cyber[163] or resilience[164] pledges seem to be binding by the final year of the researched period, but not legally: they are programs agreed by leading politicians, but without institutions to enforce them. Comparing all

[162] László Keszely, "A NATO válságreagálási rendszerével összhangban álló nemzeti intézkedési rendszer és a különleges jogrend összefüggései", *Katonai Jogi és Hadijogi Szemle 2013/1* http://epa.oszk.hu/02500/02511/00002/pdf/EPA02511_katonai_jogi_szemle_2014_01_191-221.pdf

[163] Cyber Defence Pledge, Issued by the Heads of State and Government participating in the meeting of the North Atlantic Council in Warsaw, 8-9 July 2016 https://www.nato.int/cps/en/natohq/official_texts_133177.htm

[164] Commitment to enhance resilience, Issued by the Heads of State and Government participating in the meeting of the North Atlantic Council in Warsaw, 8-9 July 2016 https://www.nato.int/cps/en/natohq/official_texts_133180.htm

Hungarian cases of constitutional amendments reasoned with NATO-related aims of the last 20 years we might conclude that all of them caused a better interoperability, but national considerations determined the chosen tool. After all, there is not any legal instrument to exclude a member state from the club. It might be marginalized, but not forced.

2.3.2. Is the case with the EU the same or a bit different?

The first invocation of Article 5 of the Washington Treaty defined the post-bipolar history of NATO, responding on coordinated and sequenced terrorist attacks of 2001. According to the text of Article 5

- the territorial scope was limited,
- the possible reactions were connected to an attacked member state without being limited to actions by states and
- instead of automatism, the text allowed an open-end consideration of alternatives of the mandatory help.

The invocation after 9/11 mirrored a reverse image of the original perception of a possible war in Europe: although automatism was limited because of US national implications, the extended interpretation of the text made possible the use of NATO tools in the USA and attack of a third country found responsible for *"safe haven"* of terrorists. The French reaction on serious terrorist attacks in 2015 broke this example by choosing one of the alternative EU options. Although it could have been phrased according to the European strategic autonomy[165] objective, French considerations behind might have wanted to

- connect domestic elements with out of area missions,

[165] The "EU is an actor, whereas NATO is an instrument." Sven Biscop, "EU-NATO Relations: A Long-Term Perspective", *Nação e Defesa 2018 N.º 150* 86 http://www.egmontinstitute.be/content/uploads/2018/11/NeD150.pdf and *"If Russia were actually to invade Latvia, and Donald Trump were to apply his "Montenegro test" for Article 5, strategic autonomy would need to be seriously robust."* Jolyon Howorth, "Autonomy and Strategy: What Should Europe Want?", *Security Policy Brief* No. 110 April 2019 2 http://www.egmontinstitute.be/content/uploads/2019/04/SPB110.pdf?type=pdf

- keep the leading role at national level instead of the community model and
- push further member states towards more binding responsibilities.[166]

This choice coincided with the agreement between NATO and the EU leaders countering the hybrid threats. These examples show that the EU-related instruments should have benefit compared the available NATO tools. Whether they reached the level of emergency regulations of the constitutions also, this chapter should answer.

Limited to European states only, an unconditional approach for full spectrum assistance is the base of the WEU-originated Lisbon Treaty-elements. The drafters could not have translated it into EU institution without reflecting the relations with NATO after many years of permanent enlargement, causing neutral states' memberships without aiming a participation in a defence-organization, also extended responsibilities for the 22 Allies affected in reverse. Consequently, the mutual assistance clause (MAC - TEU Article 42.7)[167] became more than solidarity but less than collective defence. Moreover, there is the alternative of Solidarity Clause (SC - TFEU Article 222)[168], which might offer a

[166] Thierry Tardy, "Mutual Defence - One Month On"*, Issue Alert* 55/2015. Dec 2015https://www.iss.europa.eu/sites/default/files/EUISSFiles/Alert_55_Article_42.7.pdf

[167] *"If a Member State is the victim of armed aggression on its territory, the other Member States shall have towards it an obligation of aid and assistance by all the means in their power, in accordance with Article 51 of the United Nations Charter. This shall not prejudice the specific character of the security and defence policy of certain Member States. Commitments and cooperation in this area shall be consistent with commitments under the North Atlantic Treaty Organisation, which, for those States which are members of it, remains the foundation of their collective defence and the forum for its implementation."* https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012E/TXT&from=HU

[168] *"1. The Union and its Member States shall act jointly in a spirit of solidarity if a Member State is the object of a terrorist attack or the victim of a natural or man-made disaster. The Union shall mobilise all the instruments at its disposal, including the military resources made available by the Member States, to: (a) —*

further framework for security-related responsibilities on a de-militarized way, responding on disasters and terrorist attacks. According to Rehrl,[169] the key differences are:

	MAC	**SC**
Responsibility	Member States	Priority of the Union
Area	Not limited geographically	Limited to EU territory
Tools	all available and appropriate national means and assets	National means and assets and instruments of the Union

prevent the terrorist threat in the territory of the Member States; — protect democratic institutions and the civilian population from any terrorist attack; — assist a Member State in its territory, at the request of its political authorities, in the event of a terrorist attack; (b) assist a Member State in its territory, at the request of its political authorities, in the event of a natural or man-made disaster. 2. Should a Member State be the object of a terrorist attack or the victim of a natural or manmade disaster, the other Member States shall assist it at the request of its political authorities. To that end, the Member States shall coordinate between themselves in the Council. 3. The arrangements for the implementation by the Union of the solidarity clause shall be defined by a decision adopted by the Council acting on a joint proposal by the Commission and the High Representative of the Union for Foreign Affairs and Security Policy. The Council shall act in accordance with Article 31(1) of the Treaty on European Union where this decision has defence implications. The European Parliament shall be informed. For the purposes of this paragraph and without prejudice to Article 240, the Council shall be assisted by the Political and Security Committee with the support of the structures developed in the context of the common security and defence policy and by the Committee referred to in Article 71; the two committees shall, if necessary, submit joint opinions. 4. The European Council shall regularly assess the threats facing the Union in order to enable the Union and its Member States to take effective action." https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012E/TXT&from=HU

[169] Jochen Rehrl, "Invoking the EU's Mutual Assistance Clause. What it says, what it means" (20 November 2015) http://www.egmontinstitute.be/invoking-the-eus-mutual-assistance-clause-what-it-says-what-it-means/

It means that France chose a tool not dedicated originally to the terrorist threat, to keep both NATO and EU behind the national considerations. Evaluating the spectrum further, we might agree with Biscop[170] about the continuum of security challenges with different limitations on the EU:

- domestic security (terrorism, cyber and borders included) belongs to member states, and the EU should coordinate and strengthen their capabilities,
- military led security options at home are missing from EU's scope,
- Article 5-like scenarios are not manageable without US/NATO.

If it is the case, we might consider that national emergency regulations should not interest the EU. Its role is only to help when national assets are not enough. A contrarily, there is another reading which should be considered evaluating the French choice. If the EU is an actor, its organs, like the Commission and Parliament might push projects towards limiting the member states, according to a federalist self-interest. This reading could have contributed to the French choice in 2015, after others' considerations of invocation of the SC because of migration.[171]

Whether mass migration belongs to catastrophes, might be denied according to the context of the Treaties. A contrarily, it might be considered based on extended definitions of the Implementing Decision.[172] If causes are mixed, even the answers should be

[170] Sven Biscop, "FIGHTING FOR EUROPE, European Strategic Autonomy and the Use of Force", *Egmont Paper* 103, January 2019 15 http://www.egmontinstitute.be/content/uploads/2019/01/EP103.pdf?type=pdf

[171] Antonio Missiroli, "After Paris: why (now) the Lisbon Treaty", *Issue Alert 50/2015. Nov 2015* https://www.iss.europa.eu/sites/default/files/EUISSFiles/Alert_50_Lisbon_Treaty_after_Paris.pdf and Roderick Parkes, "Migration and terrorism: the new frontiers for European solidarity", *Issue Alert* 37/2015. Dec 2015 https://www.iss.europa.eu/sites/default/files/EUISSFiles/Brief_37_Article_222.pdf

[172] According to Article 3 of the COUNCIL DECISION 2014/415/EU of 24 June 2014 on the arrangements for the implementation by the Union of the solidarity

according to a hybrid-treat consideration. Hybrid techniques might be negative images of comprehensive approach, but actors might use the available tools countering them for further aims, like changing the basic structures of EU towards a federation. The strategic autonomy might be relevant at this point based on Howorth's critic because the only reason for pushing responsibilities towards the EU is legitimate if the tasks are better manageable at this level. At least the idea of a hybrid union went close mixing up the SC with MAC to create a coherent EU emergency regime, with resistance from some member states. The bottom line is, that all critics towards emergency regimes of states might be translated also to federative level, loosing closer look of the national authorities highlighted by ECtHR also.

To conclude this chapter, we should compare the EU's toolbox with available NATO assets. Let us start with legal aspects: EU is a legally governed complex political project, but NATO is a single-issue politico-military organization, which might consider law as part of hybrid-instruments, in its different functions.[173] Although both organizations use human rights and rule of law-based arguments, verification-methods of the EU are more developed.

The security-related programs are determined from EU side by the duplicity of intergovernmental cooperation versus community model, from NATO's side by the military focus and the missing civilian capabilities. There are overlapping civil competences of the Community, which may shadow security-related issues. The key examples are human rights, procurement

clause disasters and crises are measured according to their possible impacts and political relevance. https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014D0415&from=EN 3

[173] *"This concept of "abuse of right" relates to situations where states or international organisations (or other subjects of international law) as parties to an international agreement interpret and apply its provisions depending on the particular circumstances in order to benefit from such a deviation. In this context, the party not applying the agreement can claim circumstantially that the other party exercises the agreement's provisions abusively."* Sascha Dov Bachmann and Andres B Munoz Mosquera, "Lawfare and hybrid warfare – how Russia is using the law as a weapon", *Amicus Curiae* Issue 102, Summer 2015 1-4 http://eprints.bournemouth.ac.uk/24296/1/Lawfare%20Amicus%20Curiae%20FEB%202016%20(Julian%20Harris)(1)%20(2).pdf

regulations, European transport nets, energy, critical infrastructure, and exclusive competences like trade. From this perspective, TEU Article 4 might be challenged.

From the perspective of out of area missions, Lisbon Treaty codified Petersberg Tasks, even the missing territorial limits[174] are advantages compared to the North-Atlantic focus. Although the military leadership instruments of NATO are much better developed, competences of the Commission and the European Parliament might determine the decisions by choosing between the available options. As representatives of a multi-purpose organization, they might arrange packet-deals by prioritizing or connecting different issues like missing workforce and migration.

Considering the chain of events: they might contribute to prevent by sharing data, to stop or to limit the consequences, but they might wish to gain the leading role to reach an upper hand on programming.

Although the case of emergency seems to be dedicated to national constitutions, the available solidarity clause at least one time was attempted to gain extra power: in the case of migration, it started as an interim measure with the secondary aim to keep the procedure as permanent arrangement. Although the official inter-institutional model has a limited scope according to the Joint Framework,[175] we might consider an activist model challenging the competences of the nations also, based on the combination of

[174] Rehrl, ibid.

[175] In EUROPEAN COMMISSION, JOINT REPORT TO THE EUROPEAN PARLIAMENT, THE EUROPEAN COUNCIL AND THE COUNCIL on the implementation of the Joint Framework on countering hybrid threats from July 2017 to June 2018, Brussels, 13.6.2018 JOIN(2018) 14 final https://eeas.europa.eu/sites/eeas/files/joint_report_on_the_implementation_of_the_joint_framework_on_countering_hybrid_threats_from_july_2017_to_june_2018.pdf Action item 20 is the closest to the constitutional relevancy. See also EUROPEAN COMMISSION HIGH REPRESENTATIVE OF THE UNION FOR FOREIGN AFFAIRS AND SECURITY POLICY, JOINT COMMUNICATION TO THE EUROPEAN PARLIAMENT, THE EUROPEAN COUNCIL AND THE COUNCIL Increasing resilience and bolstering capabilities to address hybrid threats, Brussels, 13.6.2018 JOIN(2018) 16 final https://eeas.europa.eu/sites/eeas/files/joint_comm

arguments from the European Parliament's two-step-evaluation-approach,[176] like

- scope of hybrid conflicts,
- incapacity of states,
- available majority votes ('passerelle' clauses),
- extended fields of jurisdiction,
- human rights' focus,
- rule of law-based argumentation, and
- easier modification of the treaties bypassing states.

Such project-proposals push towards re-distribution of power between states and the Union, using individual rights'-focused arguments from *"like minded nations"* against "non-European" practices of more collectivist members. On the margin of this re-interpretation of roles, NATO might also lose its relevance without a self-sufficient European alternative: *"lawfare is much like a tool or weapon that can be used properly in accordance with the higher virtues of the rule of law – or not. It all depends on who is wielding it, how they do it, and why."*[177] For a while, the French decision limited the scope of solidarity, transforming it from a not used article to a political slogan…

[176] European Parliament resolution of 16 February 2017 on possible evolutions of and adjustments to the current institutional set-up of the European Union (2014/2248(INI)) TA(2017)0048 http://www.europarl.europa.eu/doceo/document/TA-8-2017-0048_EN.html European Parliament resolution of 16 February 2017 on improving the functioning of the European Union building on the potential of the Lisbon Treaty (2014/2249(INI)) TA(2017)0049 http://www.europarl.europa.eu/doceo/document/TA-8-2017-0049_EN.html

[177] Dunlap ibid 148

PART III
WHY HUNGARY? - CONCLUSION

We should consider many simultaneous projects sharing the idea of countering hybrid threats, which is itself an unsettled concept, based on different cases caused according to misused ad-hoc weaknesses. Consequently, threat perceptions are different pending on time, geographical distance, and narratives behind. The same example and efficiency-based reasoning might be used to push towards community model in long term via modified treaties or to improve national level legal frameworks, like emergencies.

Nations have legal obligations, but general aims and principles support more the EU level. Principles are great to challenge detailed regulations, without producing solutions. A NATO-close article[178] considered many relevant aspects of the hybrid paradigm:

- timely reaction is crucial, challenged by cyber-threats,
- traditional, WW2-based ways and means might be not applicable, even obsolete because of the private-dominated ownership-structure¸
- transnational infrastructural grids/corridors are inherently attached,
- economics and ability to decide are targeted (securitization), and
- resilience is needed to keep societies working (to avoid anarchy).

The problem is even more complicated, because hybridity is not the only element of the security challenges-spectrum from long

[178] Jamie Shea, "Resilience: a core element of collective defence", *NATO Review* 30 March 2016 https://www.nato.int/docu/review/articles/2016/03/30/resilience-a-core-element-of-collective-defence/index.html

time threats like climate change via terrorism and migration towards interstate wars. Threats should be perceived, and there must be found a first responder at the multi-level way managed system. The EU might be fit for reacting with civilian capabilities, but their conceptualization outlawed Article 5-like scenarios of self-defence despite of the Ukrainian example. Only the states cover it and NATO as secondary responder. NATO used a general approach of tasking the nations even recognizing the constitutional relevancy, but without challenging the basic roles of NATO itself.

Before Ukrainian derogation in 2015 only Greece, Ireland, the United Kingdom and Turkey *"had to justify the measures taken"*[179] at ECtHR, almost all of them targeted by separatism, half of them with questionable level of democracy that time. The two continental models of emergency regulations, Germany and France were outside the scope of justification of the derogations. On the other hand, content of the Ukrainian derogation became known by Russia, limiting the effectiveness of the measures already, making lawfare arguments available against the attacked state also according to the hybrid scenario. Since 2015, many complains started from Ukrainian and Russian side both, partly at individual and partly at state level. Their general aim behind might have been to de-legitimize the state actions if they were concerted. Of course, on the other state's side the general aim was to legitimize, even the use/threat of force.

Both the challenges form Eastern and Southern neighbourhood affect Hungary geographically. We should consider the perceived threats combined with general level questions related to rule of law both domestically and from other EU member states, and the overcomplicated system of SLO outside the scope of the two basic models. Critics might question all the measures introduced based on

- quality of law (structure of the SLO chapter and peacetime measures both),
- *"necessity in a democratic society"*-test,
- disclaim of lawfare argumentation, or

[179] ECHR Factsheet – Derogation 2

– general level debates of nation-based focus versus Unionist perspective.

These are rule of law-conform interpretations of the FL explained at the CoE chapter, but all earlier questions are still valid. When Hungary wishes to participate in NATO's, the EUs or their joint projects for security reasons, with tools also restricting human rights, should consider also the inherent dangers. For a text-based constitutional system, the incoherencies of precedents are challenges, and they might question passed, but not enforced laws at ECtHR by NGOs to produce further examples of systematically damaged rule of law.

In case of debates between the EU und Hungary this argumentation might be used to effect diverging positions as energy-dependency, interpretation of democracy, partnerships, or migration. It is not an aim as such, to target the SLO chapter, but used as a tool might destabilize the regime. It is a paradox, because the aim of the emergency system is to have last result solutions for stability in crises. Nevertheless, the EU also interested in similar solutions.

Evaluating the researched elements of the puzzle, we should consider that although all international institutions use the technic of re-interpretation of legal texts, the EU is in a unique role to evaluate member states' emergency systems on a complex way. NATO defines programs with politically binding aims, but nations decide to fulfil them. ECtHR might preclude elements of legal systems based on incompatibility with human rights' precedents, but they are only punctual in nature. Venice Commission aims to reach a higher level of complexity, but their opinions are not binding either. Only the EU institutions might combine interpretation, programming, evaluation, and sanctioning on orchestrated and legally binding way.

An earlier *"end of history"*-feeling de-militarized emergency measures according to EU's expectations. The countries are not able to manage all threats and risks alone. Countering hybrid threats means consideration of securitization with a limited re-militarization. Without exact European standards of emergency

legal systems, ad hoc political decisions on perceived threats challenge the constitutional legal systems. On the other side of the coin, the interpretation-based model reached its limit regarding the solidarity/MAC clauses. Without an agreement of states on renewed common and national competences to handle the mixed foreign and internal security challenges seems to remain a deadlock, while others criticize Hungary for preferring a procedural reading of democracy instead of a consensual one.

Radically diverging threat-perceptions of some member states and the federalist core of the EU might cause litmus-test situations, challenging each-other's legal reasoning, or third parties. Even the perpetrator might challenge the first responder. Role of militaries abroad or acting foreign militaries or gendarmes inside a state have inherently sovereignty element: it is a relevant topic for many constitutions also.

Different perspectives might conceptualize similar issues: arguments from the blocked consensus of the Union, but also from the possible outvoted member state might be valid both. For a bigger member state, it is not part of the possibilities because of the measured majority votes. For a country, many times in minority position, it is a real counter-constitutional option. We should highlight again: the EU still does not want to cover at least the self-defence element of the SLO-spectrum, and according to the current situation, the first responders are the states, without the luxury to outsource any of the threats. Their tools might not be enough, but they must try to respond at least speedily, deciding under sub-optimal circumstances and knowledge.

Even a different conceptualization might be a real deadlock: if Agamben has right, the tendency of transformation of interim solutions towards normal practice might be a reason of the Hungarian position against the EU-proposals. If judges validate the system for emergency, does not mean necessarily, that the system is valid as a peacetime regulation also, considering shared competences. A position might be unfair, but it still might be legitimate. Decisions in emergencies are inherently suboptimal ones. Although promptness might not necessarily acknowledge mistakes, a rule of law reasoning based on generalized punctual

examples is another level of the de-legitimizing technique, already reaching the level of lawfare. Defining unified threats without knowledge on all relevant circumstances, deciding promptly on countermeasures considering all the tools, trade-offs, potential timely and geographical limitations without considering specialities of the minority groups is not necessarily the most democratic possible option.

If a state makes a mistake by decision, the consequence might be fatal and illegal, but it is more limited in effect compared to a forced war as consequence of a supranational outvote by majority. The first decision is crucial: who might decide on invocation. By now, always the states, but at least – according to the presented drafts – some EU institutions might have a vision, supported by combination of blurred lines by hybridity and the rule of law. Combination of two vague concepts might have fatal consequences. They might be questioned based on the same elements of reasoning, which are typically used against Hungarian practice.

Emergencies are inherently about reduction of different people's rights, based on the comparison of acceptable levels justified by necessity and proportionality. A possible extended EU-competence reasoned only at the level of principles, without considering side effects is a critical challenge for the future of the EU itself. As NATO considered its limitations, the EU should not always focus on *"missed crises"* as tools of deepening the integration. At the end of the day, a unique national example might be relevant from the perspective of the EU's future also.

EPILOGUE

The paper was mostly about a hypothesis connected with the procedures of different international organizations with a possibility to gain a further level from EU side summarizing different aims, working methods and procedures regarding the violent sub-categories. Both this anticipation and the EU itself failed by the end of May 2020.

The current phase of the saga is dominated by COVID-19, causing a momentum of the Venice Commission, and possibly later the ECtHR as a new, more prescriptive phase.[180] But comparison of the national procedures measured against the international expectations belongs already to a further research.

[180] See CDL-PI(2020)005rev-e Report - Respect for Democracy Human Rights and Rule of Law during States of Emergency - Reflections https://www.venice.coe.int/webforms/documents/?pdf=CDL-PI(2020)005rev-e and CDL-PI(2020)003-e Compilation of Venice Commission Opinions and Reports on States of Emergencyhttps://www.venice.coe.int/webforms/documents/?pdf=CDL-PI(2020)003-e

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ANNEX - ELEMENTS OF THE ECTHR CASE LAW BASED ON ARTICLE 15

Paragraph 1 – Circumstances

War	The definition was never interpreted by now.[181]
Other reason(s) for derogation	*"The words "in time of war or other public emergency threatening the life of the nation" refer to an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed."*[182]
Exigencies	Verification of a derogation: *"the State's appraisal is only called into question in exceptional cases."*[183]
	By justification, combined factors might be relevant, as violent activities by a secret organization, operating also abroad challenging also neighbouring relations and increase of terrorist activities.[184]
	Imminence does not start at the first attack, so preventive measures might be legitimate.[185]
	Temporality is not required, because the danger may last long.[186]

[181] Article 15 Guide 6 paragraph 7
[182] National security case law 37, paragraph 119
[183] National security case law 37, paragraph 120
[184] ECHR Factsheet – Derogation 2
[185] Article 15 Guide 7 paragraph 12
[186] Article 15 Guide 6 paragraph 10

Comparison of problems	Purpose of a restriction is measured against further alternative reasoning.[187]
	Conceptualization of a real threat might supervised as home grown versus foreign terrorists' non-discrimination.[188]
	"Even in a state of emergency (...) every effort should be made to safeguard the values of a democratic society, such as pluralism, tolerance and broadmindedness."[189]
Proportionality	*"The emergency should be actual or imminent;"* it might be regional only, but exceptional nature of crisis or danger means, *"that the normal measures or restrictions permitted by the Convention for the maintenance of public safety, health and order are plainly inadequate."*[190]
	The ECtHR checks the facts known by time of derogation, but subsequent information might consider also.[191]
	"All measures taken by States to fight terrorism must respect human rights and the principle of the rule of law, while excluding any form of arbitrariness, as well as any discriminatory or racist treatment, and must be subject to appropriate supervision."[192]
	A contrarily, *"the legislative measures and administrative practices"* not needed in democracies breaching of Conventional provisions might not be used for justification of Article 15.[193]

[187] National security case law 37, paragraph 118
[188] National security case law 38, paragraph 122
[189] Article 15 Guide 8 paragraph 19
[190] Article 15 Guide 6 paragraph 9
[191] Article 15 Guide 7 paragraph 14
[192] ECHR Factsheet – Terrorism 27
[193] ECHR Factsheet – Derogation 3

	Violent aims are incompatible with the Convention, they might mean abuse of rights based on Article 17.[194]
	"…the fact that the applicants' projects were in contradiction with the concept of "a democratic society" and entailed a considerable threat (…) led the Court to hold that the sanction imposed on the applicants had been proportional to the legitimate aim" of Article 11 § 2.[195]
	Harshness of sentences might be considered as *"disproportionate to the legitimate aims of preventing disorder and crime and the protection of the rights and freedoms of others."*[196]
Privilege of rights	Strictly required nature is measured against *"the nature of the rights affected by the derogation, the circumstances leading to, and the duration of, the emergency situation."*[197]

Paragraph 2 – Limits

Absolute rights	Extended list of absolute rights is: • abolished death penalty in peacetime, • abolished death penalty in all circumstances, • *"the right not to be tried or punished twice",* based on Protocols No 6, 13, and 7.[198]
Right to life	National security is not *sui generis* aim for restriction but might be considered as a legitimate purpose as relevant circumstance. *"Lethal force might, for example, be used in the event of*

[194] ECHR Factsheet – Terrorism 35
[195] ECHR Factsheet – Terrorism 36-37
[196] ECHR Factsheet – Terrorism 37
[197] Article 15 Guide 8 paragraph 20
[198] ECHR Factsheet – Derogation 1 and Article 15 Guide 10 paragraph 28

	absolute necessity, in legitimate defence or to defend a person against violence linked to national security – most frequently terrorist attacks, the arrests of suspects or prevention of their escape, or the quelling of a riot or insurrection against a state institution".[199]
	The *"absolutely necessary"* is *"stricter and more compelling"* test than the normally used *"necessary in a democratic society": "the force used should be strictly proportionate to the achievement of the aims set out in Article 2 § 2 (a), (b) and (c)."*[200]
	Alternative options against lethal force should be considered as part of the absolutely necessity test.[201]
	Tools to avoid unnecessary use of lethal force include: procedural safeguards, professional training, legal limitations of use of force and compensation of victims.[202]
	Judges might consider presumed deaths when investigations are inadequate.[203]
	Failure of effective and independent means violation of right to life, used also as *"procedural limb"*.[204]
	"States are under the obligation to protect the fundamental rights of everyone within their jurisdiction against terrorist acts."[205]
	Use of force (gas) against terrorists is not necessarily violation, but inadequate planning and implementation, ineffective investigation into

[199] National security case law 25, paragraph 72
[200] National security case law 25, paragraph 72
[201] ECHR Factsheet – Armed conflicts 3
[202] ECHR Factsheet – Armed conflicts 4
[203] ECHR Factsheet – Armed conflicts 4-5
[204] ECHR Factsheet – Armed conflicts 13, 14-15
[205] ECHR Factsheet – Terrorism 25

	them and missing medical assistance are symptoms.[206]
	Missed preventive measures consist of information and planning combined. Possible lessons learned are *"raising awareness of applicable legal and operational standards, and deterring similar violations in the future."*[207]
Lawful acts of war	Used together with Article 2 *"Article 15 § 2 adds the additional exception that the right to life will not be violated if the death results from a lawful act of war."*[208]
	This exception was never used "out of area" by any derogation.[209]
Torture / inhumane treatment	Prohibition of inhuman and degrading treatment or torture is non-derogable absolutely.[210]
	Stricter conditions of detention might be accepted in terrorist cases before trial, but never *"on the pretext of obtaining information which would enable the attack to be prevented."*[211] 26, paragraph 77
	Absolut nature of Article 3 valid for deportation cases also.[212]
	Article 3 is extended with *"the concept of effective remedy"* aiming a rigorous examination based on Article 13.[213]
	Disappearance in dangerous circumstances might considered as continuous violation of prohibited inhuman treatment (and right to liberty), [214]

[206] ECHR Factsheet – Terrorism 25
[207] ECHR Factsheet – Terrorism 25-26
[208] Article 15 Guide 10 paragraph 31
[209] Article 15 Guide 7 paragraph 16
[210] ECHR Factsheet – Terrorism 2
[211] National security case law 26, paragraph 77
[212] National security case law 27, paragraph 79
[213] National security case law 27, paragraph 80
[214] ECHR Factsheet – Armed conflicts 3

	Non-investigation of disappeared people means a systemic problem, and they cause positive obligations against a state.[215]
	According to ECtHR *"sentence to life imprisonment without any possibility of conditional release"* means inhuman treatment.[216]
	By planned deportation, ECtHR might supervise the assurances by the targeted state.[217]
	Interim measures might be needed to avoid serious risk of ill-treatment caused by expulsion of suspected terrorists.[218]
	By extradition, states should consider mental illness as possible obstacle.[219]
	European states are responsible for CIA tortures on their territories or for permitting movements to sites abroad. According to "*US Senate report on CIA torture",* they were *"Detention Site Black"* in Romania, and *"in Afghanistan (Detention Site Brown) or in Lithuania (Detention Site Violet)."*[220]
	Destruction of a home might mean inhuman treatment.[221]
Procedural rights	No punishment without law: *"is an essential element of the rule of law"* highlighted by its absolute nature.[222]
	A valid notice of derogation might legitimize a bit longer stay in custody without judgement compared to normal circumstances.[223]

[215] ECHR Factsheet – Armed conflicts 11
[216] ECHR Factsheet – Terrorism 4
[217] ECHR Factsheet – Terrorism 6
[218] ECHR Factsheet – Terrorism 10
[219] ECHR Factsheet – Terrorism 8
[220] ECHR Factsheet – Terrorism 14
[221] ECHR Factsheet – Terrorism 28
[222] ECHR Factsheet – Derogation 14
[223] National security case law 29, footnote 99

	"Any measure restricting the rights of the defence has to be absolutely necessary" and they should use the least restrictive alternative.[224]

Paragraph 3 - Procedural requirements

Information	Without formal and official notice of derogation, Article 15 is not applicable.[225]
	Checking formal requirements of a derogation belongs to sufficient information element of the official notice, checked by the ECtHR *"of its own motion".*[226]
	"If copies of all relevant measures are not provided, the requirement will not be met."[227]
	Territorial limits of a derogation are strict.[228]
Reasoning	Being closer to the pressing needs national authorities should consider the presence of emergency and "*the nature and scope of the derogations necessary".* ECtHR considers whether *"the States had gone beyond the "extent strictly required by the exigencies" of the crisis."*[229]
	Imminent threat might justify preventive measures. *"A State could not be expected to wait for disaster to strike before taking measures to deal with it."*[230]
	Confirmed margin of appreciation is based on the real nature of local threat, limited scope of derogation, reasoning and safeguards.[231]

[224] National security case law 33, paragraphs 103 and 105
[225] ECHR Factsheet – Derogation 9 and Article 15 Guide 11 paragraph 34
[226] ECHR Factsheet – Derogation 11
[227] Article 15 Guide 11 paragraph 35 and ECHR Factsheet – Derogation 10
[228] ECHR Factsheet – Derogation 7-8, 11
[229] ECHR Factsheet – Derogation 4
[230] ECHR Factsheet – Derogation 5
[231] ECHR Factsheet – Derogation 7

Time limits	Notification after the measure: 12 days after entry force is still acceptable as derogation immediately,[232] but 3-month period is too late.[233]
	Permanent review of the emergency measures is expected. [234]
	After withdrawal of a derogation, normal rules should apply.[235]

[232] ECHR Factsheet – Derogation 10-11
[233] Article 15 Guide 11 paragraph 36
[234] Article 15 Guide 12 paragraph 39
[235] Article 15 Guide 12 paragraph 40


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