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**The Liability of the State in Special Legal Order, in Light of the State of Danger due to
the Coronavirus Pandemic**

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Thesis of doctoral dissertation

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Introduction – The Topic and Relevance of the Research

The special legal order may be declared in the event of an incident of exceptional gravity that threatens the state, the constitutional order, and constitutional values, or to mitigate or avert their adverse consequences; it is a framework defined at the constitutional level that differs from the state's normal system of government—which operates under ordinary circumstances and is based on the principle of separation of powers—and involves the concentration of executive power as well as the possibility of suspending and extensively restricting fundamental rights.¹ The topic of special legal order has generated considerable interest in recent years. On the one hand, this is because a category that previously existed almost exclusively in theory and had been studied purely from a scientific perspective became a reality following the declaration of a state of danger² in response to the health crisis caused by the coronavirus pandemic. Thus, starting in March 2020, the government was empowered to take extraordinary measures, which later took the form of restrictions on the right to freedom of movement and the right of assembly, among other things. Furthermore, after the pandemic situation had subsided, the government declared a state of danger³ again on 25 May 2022, effective throughout the entire territory of Hungary, in light of the armed conflict and humanitarian disaster unfolding in Ukraine. As a result of several extensions of its temporal scope, the state of danger remained in effect until mid-May 2026; thus, with a brief interruption, the state operated continuously in the framework of special legal order for nearly six years. The state of danger has thus become a concrete reality for society. The previously abstract concept has now been realised in practice. This provided an opportunity to apply these theories to the measures and provisions that had been adopted, as well as to the functioning of the various constitutional bodies. On the other hand, the Hungarian constitutional framework of special legal order has undergone significant changes in recent years. The adoption of the Fundamental Law of Hungary did not bring any significant changes to the substance of the constitutional provisions. The regulatory framework, which has continued to expand both before and after the adoption of the Fundamental Law of Hungary, has become increasingly detailed over the years and, according to the prevailing view in the

¹ See e.g. Csink Lóránt: Mikor legyen a jogrend különleges? *Iustum Aequum Salutare*, 2017/4. 7.; Jakab András – Till Szabolcs: Alkotmányvédelem – Különleges jogrend. In: Csink Lóránt – Schanda Balázs – Varga Zs. András (szerk.): *A magyar közjog alapintézményei*. Budapest, Pázmány Press, 2020. 1034.

² Government Decree No. 40 of 2020. (III. 11.) on the declaration of a state of danger

³ Government Decree No. 180 of 2022. (V. 24.) on the declaration of a state of danger and certain emergency rules in view of the armed conflict and humanitarian disaster in Ukraine and in order to avert the consequences thereof in Hungary

literature, has become overregulated.⁴ Constitutional provisions thus increasingly failed to fulfill their original purpose. The coronavirus pandemic and the state of danger declared to respond to it highlighted numerous shortcomings and contradictions in constitutional and statutory regulations; as a result, the simplification and reform of the regulations of special legal order – which had already been deemed necessary – became inevitable. Accordingly, the Ninth Amendment to the Fundamental Law of Hungary implemented a comprehensive reform of the special legal regime, to which further changes were made through the Tenth and Fifteenth Amendments. Thus, over the past few years, Hungarian regulation of special legal order has undergone significant changes, clearly in response to the criticism that has arisen in connection with its practical application.

The Subject and Objective of the Research – Questions Examined in the Dissertation

By outlining the various stages in the development of the current regulation of special legal order, it is examined whether the regulation meets the requirements inherent in the concept of special legal order and whether the conditions set forth in the definition are fulfilled. It is also considered whether comprehensive reform had resulted in regulations capable of providing adequate responses to future challenges. To what extent can the established constitutional framework be regarded as a set of regulations that has organically evolved from provisions concerning specific periods, which in turn arose as a result of the development of a democratic rule of law? What experiences led to the comprehensive reform of regulation of the special legal order, and how did the fact that the definition of state of danger was revised again shortly thereafter affect that reform and its future applicability? In addition to presenting and evaluating the regulations from this perspective, the practical implementation of the special legal order is examined from a similar angle, focusing primarily on the management of the health crisis caused by the coronavirus pandemic. The necessity and constitutionality of the prolonged state of danger are examined, with particular attention paid to governance by decree, the restrictions imposed on fundamental rights, and the exercise of the National Assembly's oversight function. To what extent have the safeguards designed to ensure that the special legal order is limited to its intended purpose and to prevent the abuse of extraordinary powers been implemented? In

⁴ See e.g. Gerencsér Balázs Szabolcs: Special Legal Orders. In: Varga Zs. András – Patyi András. – Schanda Balázs (szerk.): *The Basic (Fundamental) Law of Hungary. A Commentary of the New Hungarian Constitution*. Budapest, CLARUS Press, 2015. 308.; Kelemen Roland: Az Alaptörvény különleges jogrendi rendszerének egyes dogmatikai problémái – kitekintéssel a visegrádi államok alkotmányának kivételes hatalmi szabályaira. *Katonai Jogi és Hadijogi Szemle*, 2017/1–2. 68.

this regard – and even more so following the comprehensive reform – the National Assembly plays a key role. It is worth considering whether, given the significant role of parliamentary oversight, there is any place for the direct exercise of power during special legal order. Are there legal frameworks in place, and is it conceivable in practice that institutions of direct democracy – primarily referendums – could be implemented, or perhaps play a similar oversight role with regard to the special legal order? The state of danger that has been in effect in Hungary for a long time due to the coronavirus pandemic and the war in Ukraine has provided an opportunity to examine the constitutional links between the referendum and the special legal order, and to scrutinize the possibility of this hypothetical scenario actually coming to pass.

Taking into account any additional guarantees that may apply, we may also ask whether the state is liable for compensating damages resulting from the lack of crisis measures, legislative delays, or the crisis measures adopted that restrict fundamental rights. During special legal order, in order to resolve a crisis that threatens the constitutional order and values with sufficient speed and effectiveness and to restore normal constitutional conditions, fundamental rights may be extensively restricted or even suspended. To what extent is the state responsible for the extraordinary measures it has taken under such circumstances, which undoubtedly place a certain segment of society at a disadvantage? This issue is examined in the context of Hungarian legislation, with reference to Polish legislation and practice; the Polish legal system, in fact, enshrines at the constitutional level the state's obligation to provide compensation for damages resulting from restrictions on fundamental rights under special legal regimes. The coronavirus pandemic has provoked serious public debate, and legal scholarship has also devoted significant attention to the issue of what legal basis might exist for state compensation for damages incurred during Poland's pandemic response. In addition, we examine the case law in Germany regarding the pandemic, where the question of potential state compensation arose as soon as the very first restrictive measures were adopted.

The comparative legal approach is a central focus of the thesis. According to some opinions, it may be problematic to compare the constitutional provisions governing the special legal order of different states and draw far-reaching conclusions from them. This is due, on the one hand, to the misleading nature of the various terms used, and, on the other hand, to a lack of practical experience.⁵ The latter argument holds less weight in light of the coronavirus pandemic, as the pandemic has affected every country in the world with similar intensity. From the perspective of this study, it may be relevant to consider which countries deemed the situation serious enough

⁵ Csink (2017) i. m. 10–11.

to introduce a special legal regime, and which countries assessed the same circumstances differently and therefore reached a different conclusion. Naturally, this may also have been influenced by what the available constitutional and legal frameworks allowed decision-makers to do. By comparing the crisis management approaches of different European countries – categorized according to the legal framework for managing the coronavirus pandemic – with Hungarian measures, a comparative legal perspective can be gained on how Hungarian legal practice compares to that of other countries. It is equally relevant to compare the regulation of special legal order of Hungary with the constitutional frameworks of European Union member states, focusing primarily on the depth of these frameworks, since, throughout the development of Hungarian legislation, arguments emphasizing the need to simplify special legal order rules have consistently highlighted the overregulation of the provisions of the Fundamental Law of Hungary.

Structure of the Dissertation

Based on the criteria outlined above, this dissertation presents the current Hungarian legislation following a theoretical foundation of the concept of a special legal order, reflecting on the legal-historical precedents of the development of this legal institution and emphasizing the comprehensive reforms contained in the Ninth Amendment to the Fundamental Law of Hungary, while also comparing it with the constitutional regulations of the European Union's member states. In order to provide a well-founded assessment of Hungary's special legal order, it is necessary to briefly address the legal framework for managing crisis situations that require rapid intervention and foreshadow some unexpected change, operational disruption, or threatening circumstances, yet do not necessitate the declaration of a special legal order. However, these quasi-special legal order rules do, to some extent, allow for the application of solutions that differ from those of the normal legal order. As part of an analysis of the Hungarian practice of special legal order, the dissertation examines the necessity and constitutionality of the measures taken to manage the coronavirus pandemic – specifically, the introduction of decree-based governance and the restriction of fundamental rights – while comparing Hungary's approach with the pandemic management strategies of certain European countries. Similarly, within the framework of a brief international comparison, the state of danger declared in response to the armed conflict and humanitarian crisis in Ukraine is evaluated, with a view to examining the possibility of declaring other categories of special legal order, and thus the unnecessary nature of amending constitutional provisions. With regard to additional potential safeguards under the special legal order, this examination focuses on the role of referendums

within that framework and the issue of the liability of the state under the special legal order, addressing not only theoretical considerations but also practical issues arising from the management of the state of danger during the coronavirus pandemic.

The author's publications related to the topic

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