Antal Zoltán MASASON: The Theoretical and Practical Context of Exceptional Power: Defence Authorization Acts in Hungary in the Period from the Era of Austro-Hungarian Monarchy until World War II

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1. Introduction: exceptional power as a particular situation in public law

In the day-to-day functioning of a constitutional state, citizens fundamentally expect state institutions and public officials exercising public authority to always preserve the constitutional framework of the state and respect constitutional guarantees of fundamental rights. Conversely, the 'normal' functioning of the state can never be considered exclusive; extraordinary events do occur from time to time which justify the introduction of a particular situation of public law — a period of exceptional power. Even the ancient Roman res publica society deemed it justifiable to temporarily introduce the position of dictator: in situations of imminent threat to the state and its population, typically during war or the threat of war, it is necessary to depart from the state's usual structures, which divide public power among several institutions, and entrust one person or public body with full public power.[1] The reason for this drastic decision is that the emerging problem — typically international armed conflict, but historically also including armed conflicts within a state and natural disasters — cannot be solved by maintaining the traditional framework of state structures based on the shared exercise of power. This is because the customary procedures are extremely slow and cumbersome in view of the guarantees that safeguard citizens' rights and the constitutional order. Therefore, they are not suitable for responding swiftly and effectively to emergency

[1] TRÓCSÁNYI, László: A különleges jogrend elméleti kérdései [Theoretical questions on special legal order]. In: NAGY, Zoltán – HORVÁTH, Attila: *A különleges jogrend és nemzeti szabályozási modelljei [Special legal order and its national regulatory models]* Budapest, 2021, Mádl Ferenc Institute of Comparative Law, pp. 26-36. (NAGY – HORVÁTH/2) https://doi.org/10.47079/2021.nzha.kulon.4_1

situations. For this reason, the public law system must move away from operating under guarantees in order to safeguard the lives of the population and its own existence, and must entrust the management of all state operations to a person or public body with the necessary expertise and decisiveness to ensure operational effectiveness.

In constitutional states, the executive – and its chief organ, the government – is usually considered the most capable of effective action among all state actors. This is because its organisational system contains relationships of hierarchical control and leadership that ensure precise implementation of instructions, as well as informal consultative formations that facilitate the swift adoption of professional political and governmental decisions. Decisions taken by a relatively small central government can quickly reach remote parts of the country through the public administration system, enabling fast, efficient and immediate intervention. However, monopolising executive power also carries risks. By maintaining or perpetuating exceptional power, the government can usurp the power it was previously vested with; by abusing power, it can dismantle constitutional structures founded on the sovereignty of the people; and by introducing restrictive measures, it can erode the fundamental rights of citizens. To avoid this, the legislative branch of power – typically parliament – which represents the sovereignty of the people, restricts the executive's power through defence authorisation acts. These statutes cover the legal instruments that the executive can create during a period of exceptional power, the extent to which fundamental rights can be restricted, how constitutional institutions will function, and the duration of exceptional power, including the procedure for promulgating the special legal order. Based on the defence authorisation act, the executive power is entitled to create rights and obligations independently during the period of exceptional power.

Before World War I, at the end of the Austro-Hungarian Monarchy, the Hungarian state of the civic era created the first statute codifying the regulatory framework concerning exceptional power. The exercise of exceptional power came into force with the introduction of Act 63 of 1912 on Wartime Emergency Measures and continued until the end of World War II, due to the special legal order being extended periodically. This study will present the regulation of the state of exception in the 20^(th)-century Hungarian state, including the main provisions of Act 63 of 1912 on Wartime Emergency Measures, Act 6 of 1920 on

Extending the Period of Exceptional Powers Granted During the Period of War, and Act 2 of 1939 on National Defence. This discussion will follow a review of the constitutional theories on exceptional power in the civic era. The study's primary objective is to analyse, compare and evaluate the various historical approaches to regulating exceptional power.

2. The international and Hungarian theoretical grounding of exceptional power in after 1867

In the second half of the 19th century and the first decades of the 20th century, the first modern theoretical trends emerged that examined the justifiability and dogmatic characteristics of exceptional power in terms of constitutional law and state theory. These divergent ideological statements were closely linked to the historical traditions and constitutional arrangements of the 'homeland' of the theory. Thus, there was a difference between the Anglo-Saxon approach and the continental German and Austrian approaches, both of which had a decisive influence on Hungarian theories of exceptional power. The following section will present the theoretical background to the special legal order in international terms, with a focus on the German-Austrian approach, as well as in Hungarian terms. Understanding the roots of constitutional theory may provide a more detailed and accurate picture of the regulatory environment in modern Hungary. Since the second half of the 19th century, two types of state theory approaches have emerged, describing the constitutional-dogmatic classification of exceptional power. One school saw the state of exception as an "*extra-legal phenomenon*"[2], with Carl Schmitt, Friedrich Koja and Robert Hoerni as its main representatives. In Koja's and Hoerni's view, the "*extraordinary circumstances*"[3], such as the threat of war and the unfolding internal anarchic conditions "*cannot be effectively dealt with by law*".[4] Therefore, a derogation from the guarantees of constitutional order was justified in that case. The constitutionally based legal order can only influence events during the state of exception in so far as it defines, "*designates the wielder of the exceptional power*"[5], which, according to the main theorist Schmitt, is "*the sovereign, the political power*"[6]. In his main work, *Political Theology*, he takes the theoretical position

[2] *Ibid.* p. 28.
[3] *Ibid.* p. 29.
[4] *Ibid.* p. 28.
[5] *Ibid.* p. 28.
[6] *Ibid.* p. 28.

that the normal legal order, "*the normal state of democracy and constitutionalism*"[7], which represents the structure of public power for the population in everyday life, is turned over by external or internal events that threaten the existence of the state. To address the acute problem, the executive must be granted "*unfettered discretionary authorization*"[8] so that it can use all possible means to deal with the threat, which will result in "*suspension of the rule of law*".[9] Consequently, the executive will not be constrained by any constitutional guarantees during the period of exceptional power. The central thesis of Carl Schmitt's state theory can be observed in the context of a state of exception: the sovereign state departs from the legal order it applied earlier, and indeed law becomes hierarchically subordinated to the aims represented by the state[10]. Although the constitutional framework of democratic state functioning is capable of "drawing the sovereign's teeth" (we might call this the rule of law), in the course of exceptional power, the executive of the state ultimately remains the sole actor capable of providing an effective and swift solution to the problem encountered; once it has the full range of instruments for the exercise of public power at its disposal, an "*ex lex situation*"[11] is established. The executive, as the embodiment of sovereignty, becomes free from any moral and normative constraints that should necessarily legitimise its actions: "*authority proves that to produce law it need not be based on law*"[12]. This inevitably leads to the realisation that there are little obstacles to the proclamation of a period of exceptional power – since the Government, the chief body of the executive, has majority support in the parliament that represents the legislative power in a parliamentary system of government, but the termination of the state of exception becomes uncertain, depending solely on the personal considerations and attitudes of the representatives of the executive acting as the holder of sovereignty, which is not an interpretable condition or guarantee in terms of constitutional law.

The findings of the above-mentioned school of constitutional theory are closely related to the centralised nature and traditional embeddedness of modern French and German forms of government. However, we shall not forget the Anglo-Saxon and French schools of

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[7] ANTAL, Attila: *Kivételes állapotban. A modern politikai rendszerek biopolitikája [In the state of exception. Biopolitics of modern political systems.]* Budapest, 2019, p. 63.
[8] *Ibid.* p. 63.
[9] *Ibid.* p. 63.
[10] *Ibid.*
[11] *Ibid.* p. 63.
[12] *Ibid.* p. 63.

thought, which present opposing approaches to state theory, and the German positivist school, which was rooted in general state theory. According to these representatives of this branch of state and law philosophy, the constitution must also be enforced during the period of exceptional power to prevent abuse of power by the executive. Albert V. Dicey, drawing on the English historical tradition and the explicit defence of individual liberties in common law as an ideological background, argues that governmental action during a state of exception may also be "*subject to judicial review*"[13], so that the executive shall not take arbitrary, constitutionally illegitimate measures even during a state of exception, for it has to fear judicial review. According to Georg Jellinek, one of the most prominent representatives of German "*Allgemeine Staatslehre*", this control should be provided not by the judicial but by the legislative branch of power, and parliament can subsequently legitimise the provisions of the Government issued under its exceptional power, by means of a confirmatory decision.[14]. From the same German general state theory, the Austrian legal philosopher, Hans Kelsen arrives at a partly different, novel approach. In Kelsen's theory – in contrast to Schmitt's conception – sovereignty is not linked to the state, to the governmental power capable of influencing public conditions, but to the legal system; moreover, the sovereign state is in fact the everyday manifestation of the legal system.[15] From this it follows not only that "*institutional reaction circumventing the law is invalid*"[16], but also the fundamental thesis that the existence of exceptional power without law, without the limits of law, is conceptually impossible, and that there can never be a gap, a "black hole" in the constitutional binding of the executive power. French authors, Léon Duguit and Carré de Melberg, in comparison to the above-mentioned authors, interpret the legal binding of the executive power even more strictly: in their interpretation, the exercise of exceptional power is to be assessed[17] as a unilateral alteration of the constitution, and therefore, only in a narrow range – for example, in case of parliamentary obstruction – or cannot be justified at all.[18]

[13] NAGY – HORVÁTH/2, *op. cit.*, p. 29.
[14] *Ibid.*
[15] *Ibid.*
[16] *Ibid.* p. 29.
[17] *Ibid.*
[18] *Ibid.*

The above presented international theoretical trends, especially the German and Austrian constitutional theories, had a decisive influence on the Hungarian theory of public law, including the dogmatic approach to the exceptional power, which was taking shape in after 1867. Győző Concha, one of the most important scholars on the theory of public law of the Austro-Hungarian Monarchy, also linked the exercise of exceptional power to the executive, and in line with German regulatory practice,[19] he considered the provision of administrative and especially police functions as the decisive element of the "*exceptional power by the police*".[20] In his view, the special legal order is "*the most powerful manifestation of police activity*",[21] aimed at restoring normality of life, at "*suppressing attacks on public order more surely*"[22]. Concha distinguished between five types of state of exception, according to the government's response to an acutely emerging security problem, involving increasingly more extensive, more stringent, and more militarised administrative techniques in proportion to the scale of the threat. In a milder form of the exercise of exceptional power, a possible solution to the problem is (1) to expand the authority of the police, which would allow for more intensive restrictions on classical political freedoms (the right of assembly, freedom of the press), or (2) to loosen the guarantees of judicial enforcement, to tighten the process of judicial control (for example, by introducing martial law proceedings), and to optimise the length of proceedings as opposed to the right to a fair trial. In the case of a more serious threat, a combination of the two methods may be used for declaring the "*civic state of siege*" (3)[23]. If the threat becomes even more serious, the executive may delegate the tasks of civic administration to the military organisation, trusting that the highly hierarchical command and control structures of the military administration will better serve the effectiveness of the measures. The first phase of this is the "*military state of siege*" (4)[24], where the army will be responsible only for law enforcement tasks, and the final state is a

[19] KELEMEN, Roland: A kivételes hatalom kontinentális modelljének eredeti rendszerei: A német és osztrák kivételes hatalmi struktúra kialakulása és fejlődése az első világháborúig [Original systems of the continental model of exceptional power: Formation and development of the German and Austrian structure of exceptional power] *Honvédségi Szemle [Military Review]*, No. 3, 2021, pp. 126-134. (KELEMEN/2) https://doi.org/10.35926/HSZ.2021.3.10

[20] CONCHA, Győző: *Politika II. Közigazgatástan [Politics II. Theory of Public Administration]* Budapest, 1905, p. 386.

[21] *Ibid.* p. 386.

[22] *Ibid.* p. 386.

[23] *Ibid.* p. 387.

[24] *Ibid.* p. 387.

"*state of war*" (5)[25], when the military administration takes over all the powers of the civic administration and exercises the full range of public authority[26]. Although Győző Concha considered the executive the most appropriate state actor for the exercise of exceptional power, and even for determining the time to introduce special legal order[27], he recognized the danger that the executive might abuse its power, that exceptional power might be capable of "*overthrowing the internal freedom of the nation as a whole*"[28]. The protection against this scenario can be the acceptance and stability of the legislative, which is ultimately based on the constitutional attitude of the political community.[29]

The dogmatic characteristics and classification of exceptional power in terms of constitutional theory did not change in the interwar period. The reasons for this lay in the persistence of the special legal order after World War I and the traditionalism and legal continuity of the right-wing conservative policital system that came to power after the fall of the Hungarian Soviet Republic. Zoltán Magyary, famous professor of administrative law, also argued that the decision-making system of parliamentary democracy is not suitable for dealing with unexpected emergencies, so to increase efficiency, it is necessary to depart from the structures of the everyday, "normal" state system.[30] This theoretical approach persisted until the end of World War II, when the state organization was radically changed under the strong influence of the Soviet Union.

3. Defence Authorization Acts and their regulatory environment in Hungary

In addition to the continental German public law doctrine, the regulation of the Hungarian special legal order at the beginning of the 20th century was decisively influenced by the exceptional power system of the Austro-Hungarian Monarchy's "over the river Leitha" territories. Moreover, the first draft legislation of the special legal order was developed by the common ministry of defence.[31] A brief description of the exceptional power in German

[25] *Ibid.* p. 387.
[26] *Ibid.*
[27] *Ibid.*
[28] *Ibid.* p. 391.
[29] *Ibid.*
[30] NAGY – HORVÁTH/2, *op. cit.*, MAGYARY, Zoltán: *Magyar közigazgatás. [Hungarian Public Administration]* Budapest, 1942.
[31] DOMANICZKY, Endre: A különleges jogrend magyar szabályozásának történeti fejlődése (a kezdetektől 2011-ig) [Historical development of the Hungarian regulation on special legal order

and Austrian law in this period will help us to understand the Hungarian legal environment. In this respect, we shall not forget the comparative analysis and historical contextualisation of the Hungarian laws describing the state of exception, namely Act 63 of 1912 on Wartime Emergency Measures, the Act 6 of 1920 on Extending the Period of Exceptional Powers Granted During the Period of War, and Act 2 of 1939 on National Defence.

From the second half of the 1800s, the Kingdom of Prussia and the Austrian Empire adopted the first modern laws governing exceptional power, which were adapted to the requirements of the dynamically evolving technological and strategic requirements of the military and were no longer explicitly based on the French concept of a state of siege.[32] Both the Prussian Exceptional Power Acts of 1851 and the Austrian Exceptional Power Acts of 1869 allowed for the introduction of a special legal order by the Government in the event of international armed conflicts, imminent war emergencies and internal armed conflicts. The Prussian legislation distinguished between the categories of "*state of external threat*" and "*state of internal threat*"[33], and in both cases, the executive branch of power was given well-defined purviews and titles to act. (In the case of a state of external threat, the "*military commander of the occupied fortress*", in the case of a state of internal threat, the "*Minister of State or the highest ranking military commander in the area*".)[34] The possibility of restricting fundamental rights, depending on the degree of danger, was very broadly defined by the Prussian law, in effect leaving the decision to be taken in this area to the discretion of the military leader.[35] The Austrian law limited the government's freedom to restrict fundamental rights more severely, as the standard for restriction under the state of exception could not be milder than the standard for restriction of fundamental rights[36] at the general statutory level; however, it allowed a broader scope for the exercise of the Government's powers. In addition to the "*decrees of exception*",[37] which could only be

(from the beginning until 2011)]. In: NAGY, Zoltán – HORVÁTH, Attila (eds.): *A különleges jogrend és nemzeti szabályozási modelljei [Special legal order and its national regulatory models]* Budapest, 2021, Mádl Ferenc Institute of Comparative Law, pp. 78–121. (NAGY – HORVÁTH/1) https://doi.org/10.47079/2021.nzha.kulon.4_4

[32] KELEMEN/2, *op. cit.*

[33] *Ibid.*, p. 128.

[34] *Ibid.,* p. 128.

[35] *Ibid.*

[36] *Ibid.*

[37] *Ibid.* pp. 129., 130.

issued during the state of exception and were to be submitted to the legislative branch of power, and which also appeared in the Prussian law, the Government could also issue "*emergency decrees*"[38], which allowed it to expand its own range of measures[39] by removing the purviews of the legislative branch. The instrument for communicating government measures to the public was the "*prospectus of exceptional power*"[40], which, as it did not contain new normative measures, but merely collected them in a list, was a kind of *pseudo-norm*.

The regulatory techniques described above have manifested themselves in the codification of exceptional power in Hungary in several areas and legal institutions. From the establishment of the Austro-Hungarian Monarchy, statutes were passed covering certain[41] aspects of the exceptional power, but no detailed code was ever drawn up. It has become crucial for the leading Hungarian politicians to describe the special legal order in a way that precisely defines the purviews of the executive and does not fully subordinate the civil administration to the armed, military administration, nor does it give it a "*general authorization*" during the period of exceptional power.[42] In October 1912, the Hungarian Ministry of Defence drafted a government proposal containing the definitive version of the bill, which was enacted after a short parliamentary debate.[43]

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[38] *Ibid.* p. 130. This type of decree was a *normative governmental legal act* that could be issued during "normal", everyday governing, if the parliament was hindered in its task by some circumstance. The normative legal act had "*provisional legal force*" and could be subsequently approved by the legislature. See *Ibid.* p. 131.

[39] *Ibid.*

[40] *Ibid.* p. 131.

[41] These included, for example, the Act 40 of 1868 on the Defence Forces and the Act 21 of 1886 on the Municipalities. See: KELEMEN, Roland: A háború esetére szóló kivételes intézkedéseket tartalmazó 1912. évi LXIII. törvény országgyűlési vitája és sajtóvisszhangja. [The parliamentary debate of the Act LXIII of 1912 on Wartime Emergency Measures and the reaction of the press] *Parlamenti Szemle [Parliamentary Review]*, No. 1, 2016, pp. 72., 73. (KELEMEN/1). The peculiarity of the latter legislation was also reflected in the fact that in the county/city with county righs, the lord-lieutenant (*supremus comes*) who mediated the will of the government "*could dispose of the office apparatus of the deputy-lieutenant (vice-comes), mayor who did not obey the central will*", which undermined the autonomy of local governments in a potential state of exception. See: *Ibid.* p. 73.

[42] *Ibid.*, p. 76., NAGY – HORVÁTH/1, *op. cit.* The experience of the constitutional crisis of the years 1905-1906 also spurred Hungarian public life to the importance of clarifying the government's purviews. See KELEMEN/1, *op. cit.* At the time, the Hungarian government did not even support the reintroduction of the originally German institution of the government commissioner. See: *Ibid.*

[43] *Ibid.* Because of the obstruction, the House Leader, count István Tisza, "*had the opposition removed*" from the house of commons, therefore, no explicitly sharp, substantive debate had been held on the bill in the body composed of the people's representatives. However, criticism had been

The consolidated text of Act 63 of 1912 on Wartime Emergency Measures, under the influence of the Emperor Franz Joseph I, introduced several legal provisions known from the Austrian Exceptional Power Act, such as the possibility of military jurisdiction[44] over the civil population, and laid down the Government's right to issue decrees under the special legal order[45] in a exhaustive list. The introduction (reintroduction[46]) of the position of government commissioner is worth analysing in more detail. A "*Hungarian citizen*"[47] with the mandate of a government commissioner mediated the will of the government in the entire territory of municipal administration established as his area of competence during the state of exception, and had extensive titles of command to issue instructions to the territorial-local organs of the civic and armed governmental administration and their functionaries to enforce this will, and non-compliance with the measures issued by him in his capacity as a public authority was considered a misdemeanour.[48] However, his activities were not left without supervision; his decisions could be appealed to the "*competent minister*"[49]. The Hungarian Exceptional Power Act of 1912 also provided intensive possibilities for restricting[50] fundamental rights and the rights of municipal autonomy: in order to "*protect the legal order and public safety by increasingly effective means*",[51] the freedom of assembly and of association, the freedom of the press and privacy-related rights (such as the right to personal freedom)[52] could only be exercised within narrow limits, and new forms of

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voiced in the upper house about the proclamation of the state of exception in the event of a threat of war and the definition of the Government's purviews, but this did not prevent its adoption, which, by means of a comprehensive regulation, excluded - at least in principle - the possibility of governmental arbitrariness. See *Ibid.*, pp. 77., 82.

[44] *Ibid.*, Act 63 of 1912 on Wartime Emergency Measures § 12. Point 4.

[45] MEZEY, Barna – GOSZTONYI, Gergely (eds.): *Magyar alkotmánytörténet [Hungarian Constitutional History]* Budapest, 2020, pp. 337-342. If war had not broken out four months after the introduction of exceptional power due to the threat of war, the measures in decrees introduced by the Government up to that time had to be repealed under § 1. of the Act, in the absence of the approval by the Parliament.

[46] According to Endre Domaniczky, the position had been instituted already between 1848 and 1849. See NAGY – HORVÁTH/1, *op. cit.,* p. 85.

[47] Act 63 of 1912 § 4.

[48] Act 63 of 1912 § 15.

[49] NAGY – HORVÁTH/1, *op. cit.*, p. 86.

[50] Act 63 of 1912 §§ 7-17., NAGY – HORVÁTH/1, *op. cit.*

[51] General explanation of Act 63 of 1912

[52] MEZEY-GOSZTONYI, *op. cit.*, NAGY – HORVÁTH/1, *op. cit.* Interestingly, a procedural rule change allowed the government to designate a court without competence to hear the dispute. See: Act 63 of 1912 § 12.

behaviour were criminalised by the legislator during the state of exception[53]. In addition to the measures restricting fundamental rights, the legislation also contained provisions with economic and private law effects: it imposed a "*suspension*" on civil law claims for the duration of the exceptional power and ensured the introduction of regulatory prices for essential foods.[54]

After the introduction of Act 63 of 1912 on Wartime Emergency Measures, the Government, specified the restrictions by decree on certain fundamental rights which persisted even throughout World War I. With regard to the right to personal freedom, the Act 50 of 1914 supplementing the Act 68 of 1912 on Wartime Emergency Measures and the Act 67of 1912 on the War Requirements, and the Decree of the Minister of Interior Affairs No. 4352/1920 contained provisions on police measures against people titled dangerous to economic and public safety, while restrictions on freedom of the press were regulated by the Decree of the Prime Minister No. 6357/1920[55] following the introduction of total censorship in 1919.

The techniques of exceptional power regulation persisted in the Hungarian public law even after the Great War. Although restrictions on certain fundamental rights were eased during the period of the Hungarian People's Republic associated with Count Mihály Károlyi, the soviet system that overthrew the republic radically changed the nature of the state structure, to which the ruling "*law and order"-party governments* that came to power in the summer of 1919 responded with the restrictions on fundamental rights and by legislating and administering with exceptional power. The application of the special legal order in this way could, in Endre Domaniczky's view, ensure "*a smooth transition to peace and an easier reorganization of the country*"[56]. These reasons could have justified the adoption of Act 6 of 1920 on Extending the Period of Exceptional Powers Granted During the Period of War, § 1 of which provided for the extension of the exceptional power for one year; after the expiry of the one-year period, the period of the state of exception was extended again and again.

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[53] Act 63 of 1912 §§ 18-30.

[54] Act 63 of 1912 §§ 7., 16., MEZEY, Barna (ed.): *A magyar jogtörténet forrásai. Szemelvénygyűjtemény [Sources of Hungarian History of Law. Collection of Extracts]* Budapest, 2006, p. 606.

[55] MEZEY-GOSZTONYI, *op. cit.*

[56] NAGY – HORVÁTH/1, *op. cit.*, p. 91. This can be evidenced by the extension of the hitherto limited scope of the freedom of association in the process of consolidation in favour of workers' associations by the Decree of the Minister of Interior Affairs No. 7700/1922. See MEZEY-GOSZTONYI, *op. cit.*, p. 341.

Act 2 of 1939 on National Defence brought about significant changes to the special legal order. The Act also allowed the proclamation of a state of exception[57] in the event of "*war and imminent threat of war*", with the peculiarity that in the event of "*international tension directly threatening the country*"[58] the period of exceptional power could be four months, which could be extended for a further four months[59] with the consent of Parliament. In preparation for the war, the Act reintroduced *general conscription*[60] and specified in detail the scope of *obligation of national defence*, as well as the scope of *labour draft* and *obligation of civil air defence*[61]. Moreover, the Act limited the purview of the Government to issue decrees: in the matters covered by § 141 Subsection (3) (central organisation of the state system, modification - abolition of the system of territorial-local government, *ultra vires* modification of the rules of substantive criminal law) the Government's decree could not be contrary to an Act of the Parliament.[62]. The creation of a "*special state commission*" of delegates of the legislative branch of power, which had to supervise the activities of the executive during the state of exception and could even initiate the establishment of the responsibility of the Government's members before the Parliament in connection with the regulation in decrees deemed unlawful[63], should be considered a special feature contrary to Act of 1912. The National Defence Act also provided the Government with a wide range of possibilities to restrict fundamental rights.[64] § 221 authorised the executive to impose martial law in general, and § 106 restricted the right to personal freedom, including the right to property and freedom of movement and of residence, by stating that only "*trustworthy people*" could own real estate property in "*areas close to the enemy*". Repeated criminalisation has occurred within the framework of the Government's authorization, for

[57] Act 2 of 1939 on National Defence § 141. Subsection (1)
[58] Detailed explanation of Act II of 1939 § 141.
[59] Act 2 of 1939 § 141. Subsection (8), NAGY – HORVÁTH/1, *op. cit.* We can draw paralel between this norm and § 1 of Act 63 of 1912, which, in this case, provided for the repeal of decrees of the executive.
[60] Act 2 of 1939 § 26.
[61] Act 2 of 1939 §§ 2., 6-13., 83-95., 131-140.
[62] Act 2 of 1939 § 141. Subsection (3), MEZEY, *op. cit.*
[63] Act 2 of 1939 § 141. Subsection (4). Nevertheless, the commission's work in giving its opinion had no effect on the entry into force by the Government's decrees under subsection (6) of the same §.
[64] In this context, we shall not forget the increasingly severe discrimination against people of Israelite origin in a manner contrary to humanity, the anti-Jewish statutes (Act 15 of 1938, Act 4 of 1939, Act 15 of 1941, Act 15 of 1942).

example to protect the operation of key economic establishments representing "*the paramount interest of national defence*".[65]

Under the National Defence Act, the Government extensively issued decrees during World War II, and exceptional power was temporarily maintained after the war until it gave way to republican legislation based on a short-lived constitutional democracy, although it was formed under strong Soviet influence.

4. Conclusion: Differences in periods of exceptional power in Hungary

As it has been shown above, the roots of exceptional power were already present at the beginning of the time of Austro-Hungarian Monarchy, but it was only by 1912, that the tasks and purviews of the executive were comprehensively extended. Constitutional theory approaches to the doctrinal types of exceptional power in the context of codification have been partly superseded (think of Concha's concept of the *state of siege*), but in some respects, they have continued to exert a decisive influence: the executive remained the only branch considered capable of dealing effectively with an acute problem, but its purviews could not remain without strict, taxative regulation, in accordance with Kelsen's (later) teachings and the doctrines of *Allgemeine Staatslehre*, in order to prevent the spread of governmental arbitrariness. The legal institutions introduced (e.g. the position of the government commissioner, military adjudication) were closely linked to the German-Austrian public law tradition, which provided the legal-cultural context. In the wake of World War II, although exceptional power legislation was extended with new key guarantees in public law (think of the taxative limits on the Government's decree-regulation or the special state commission overseeing exceptional power legislation), the increasing extent of the restriction of fundamental rights – especially the introduction of the anti-Jewish statutes – represented a huge step backwards from the liberal-conservative state system existing before World War I. In the light of these provisions, the theoretical background of public administration for the effective management of the state of exception increasingly points to the prevalence of Carl Schmitt's approach.

[65] Detailed explanation of Act 2 of 1939 § 203. A noteworthy feature with regard to the legislation on misdemeanours is the "*conferring power to the government commissioner considering misdemeanours*". See: NAGY – HORVÁTH/1, *op. cit.*, p. 92.

We should not forget that the legal institution of exceptional power has not lost its relevance even today; it is (can be) still used in the event of serious armed or public health crises (such as the coronavirus epidemic). But the "executive breaking loose" is not necessary: the constitutional attitude, the "*theory of the invisible constitution*"[66], can stand in the way of governmental arbitrariness, which oversteps its constitutional purviews by claiming to solve an acute problem.

[66] Parallel opinion of dr. László SÓLYOM to the Decision of the Hungarian Constitutional Court No. 23/1990. (X. 31.) Section 1.