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*CORRESPONDENCE
Áron Őszе
✉ osze.aron@ga.sze.hu

†These authors have contributed equally to this work

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Constitutional court attitudes and the COVID-19 pandemic—case studies of Hungary, Serbia, and Croatia

Katinka Beretka[1†] and Áron Őszе[2*†]

[1]Faculty for Legal and Business Studies Dr. Lazar Vrkatic, Union University, Novi Sad, Serbia, [2]Deák Ferenc Faculty of Law and Political Sciences, Széchenyi István University, Győr, Hungary

The paper analyses the practice of the constitutional courts of Hungary, Serbia and Croatia, in terms of the constitutionality and legality of the normative responses to the COVID-19 pandemic in the countries examined. The goal is to critically present the arguments along which the constitutional courts ensured (or attempted to achieve) the balance between the protection of fundamental rights and the preservation of the public interest and public health in their decisions related to the COVID-19 pandemic; and to deduce whether any similarities can be discovered in the reasoning of the courts or they have adopted a completely different approach from each other. According to the results of the legislative research, regional experience of the examined neighbouring countries with similar legal and political traditions, constitutional court structures, and political leadership styles shows that even in circumstances of a global, uniform health crisis, distinct national reactions might be expected. However, on the other side, the case law research gave a completely different conclusion, supporting the highly similar reasoning of the constitutional courts that almost without exception have given priority to public interest in combating the epidemic over fundamental rights.

KEYWORDS

COVID-19, constitutional court, Hungary, Serbia, Croatia, protection of fundamental rights

1 Introduction

Due to COVID-19, basic research and judicial practice related to state of emergency and accompanying derogations of human rights have taken on a new dimension. The appearance of a previously unknown epidemic on a global scale raised questions for which most countries did not have prefabricated, adequate answers: neither in legal, economic, medical, nor in political sense (Landman and Smallman-Raynor, 2023) and required a much more systematic integrated approach to solving problems than any crisis experienced up to that point. While it was a global difficulty to find a balance between the public interest, i.e., the preservation of public health, and the necessary derogations of fundamental rights, it was neither possible to reach a unified position regarding whether the medical threat was serious enough to declare a state of emergency, or it could be handled in an ordinary legal order. Not to mention that not all national constitutions contain a clause on state of emergency or not all national clauses on state of emergency may apply to health emergencies (Diaz Crego and Kotanidis, 2020, p. 5). The states often hid behind the need for an urgent reaction and the unfamiliarity of the situation when they dispensed with the basic values of the rule of law, such as prohibition of arbitrariness, legality and legal certainty, separation of powers together with independence of the

judiciary, respect for human rights, hierarchy of norms and equality before the law (Venice Commission, 2010, p. 9), when adopting a restrictive measure. The courts also faced a challenge as to how much they could or should deviate from their already established practices in cases related to infectious diseases, if there was such a national practice at all, and to what extent the standards developed for classic crisis situations, such as natural disasters, wars or humanitarian emergencies could be applied to a pandemic (Ćorić and Knežević Bojović, 2021, p. 381–382).

National constitutional courts have shown varying degrees of tolerance towards the crisis management of the national authorities. Given the incomplete regulations experienced in the national legal systems, especially regarding the legal categorisation of an epidemic as the basis for the introduction of state of emergency, the constitutional courts had relatively wide latitude when examining the constitutionality and legality of restrictive measures. However, they had to be careful "not to make arbitrary decisions themselves, not to create their own value standards, not to make activist decisions or look for formal reasons in order to avoid making a meritorious decision" (Korpič-Horvat, 2015, p. 84). The paper examines the practice of the constitutional courts of three neighbouring countries in Central-Eastern Europe, Hungary, Serbia and Croatia, in connection with their COVID-19 decisions, with particular regard to the above requirements. Namely, what attitude did the constitutional courts show with respect to derogations of fundamental rights: how consistent they were; whether they applied the typical tests for the cases of human rights derogations (like the test of necessity and proportionality) or evolved new standards for the COVID cases.

The choice of the countries is not accidental. Hungary, Serbia and Croatia as post-socialist unitary countries have gone through mainly similar stages in their legal-political development—regardless of the fact that Hungary and Croatia are already EU members, and Serbia is still in the negotiation process. Their legal systems are based on similar principles; the constitutional courts exercise similar powers; each constitution contains a clause on state of emergency (under different names and categorisations) without explicitly mentioning health emergencies. Despite all these similarities, they differed in their crisis management (e.g., extent and intensity of closures, involvement of the military, introduction of COVID-19 certificates). The main research question of the paper is whether the practice of the constitutional court of Hungary, Serbia and Croatia also differed in decisions related to COVID-19. Given the relevant case law, the answer is clearly negative. Almost without exception, the constitutional courts gave priority to the public interest over the elementary preservation of fundamental rights or did not make a substantive decision.

In the first part of the discussion, after a short theoretical summary on state of emergency, the authors examine the relationship between the emergency clauses and COVID-19 in the light of national constitutions and constitutional court decisions—where this is relevant, given that the legal categorisation of COVID-19 largely determines the outcome of all court decisions related to the pandemic. While in the second part, the focus is on the protection of fundamental rights, i.e., what tests did the constitutional courts apply to preserve human rights against the restrictive measures of the authorities, and whether they were successful.

2 Materials and methods

The paper applies classic methods of legal research, relying both on primary and secondary legal sources in the countries examined. Primary legal sources, such as laws, by-laws, administrative regulations and constitutional court practice related to COVID-19 in Hungary, Serbia and Croatia are available online, through official databases, and although there are mostly no English translations, the authors were able to analyse the relevant sources in original, national languages without any difficulties. Given that the study deals with the legal solutions and constitutional court case law of three countries, the legislative, regulatory and case law research primarily relies on comparative legal methods.

As for secondary sources, in recent years a large number of articles have been published as a result of scientific research, not only in English. Not neglecting international journal articles in English, the paper principally interprets the primary legal sources with the help of articles and academic commentaries published in national legal journals and reviews in Hungarian, Serbian and Croatian, supplementing them with the authors' own insights.

Considering that the examined three countries have adopted different terminology and legal institutions when it comes to state of exception, the following concepts used in this paper have the meanings below:

State of emergency is a situation that cannot be handled within the normal operation of the state, and therefore requires faster and more serious intervention in the life of the individual and society. The Serbian Constitution contains separate mechanisms handling state of emergency when fundamental rights might be derogated by the parliament or common action of the executive to the extent necessary. In Croatia derogation of fundamental rights is possible by similar channels, but even without "official" declaration of state of emergency. Moreover, this term is not even used literally in the Croatian Constitution, but rather describes the situations in which it is possible to deviate from the normal functioning of the country.

In contrast to these two states, the Fundamental Law of Hungary (before 2012, the Hungarian legal system used the terminology of the "Constitution") imposes much more detailed rules in this regard, and uses different terminology, as well. Instead of a state of emergency, in Hungary *special legal order* should be introduced as a set of institutions, procedures and periods that are established to avert and manage a crisis situation. Also, the Fundamental Law contains provisions on *period that is qualified as a state of exception* which covers a crisis situation that falls within the scope of a state of emergency and which may be declared or applied under conditions laid down by the legislator.

3 Discussion

3.1 The theory of state of exception

It is worth starting the theoretical examination with Carl Schmitt's findings. Perhaps the author's most famous quote is: Sovereign is he who decides on the exceptional case. The ordinary legal order means the validity and enforcement of the legal order, the exceptional case means the suspension of the legal order. The

main feature of the state of exception is the unlimited authorization, i.e., the suspension of the entire existing order, where the state has survived even when the right has disappeared. Thus, in an exceptional situation, the state has the upper hand over the validity of legal norms. The decision is freed from all normative ties and becomes absolute in the true sense of the word. The exceptional case is the clearest illustration of the essence of state authority: it is when the decision is divorced from the legal norm, when no law is necessary for the authority to create the law (Schmitt, 1992, p. 1, 16).

In Schmitt's conception of sovereignty, it can become a virtually unlimited political power in a state of exception. It is important to emphasise, however, that in his book *Political theology* this unlimited political power can in no way be seen as an end, aimed solely at building up his sovereign dictatorial power (Mészáros, 2017, p. 34–35).

Sooner or later, in every society, crises arise to which both the legislative and the executive branch, and the members of society must react in a different way from the ordinary legal order. The general characteristic of these crises is that the normal functioning of the state and the security of life and property of the population are threatened by some social and/or natural danger (Mógor and Horváth, 2009, p. 37), and which cannot be dealt with by the normal, customary means of state action (Csink, 2017, p. 8). Another important characteristic of crisis situations is that they can be defined in time, but it is extremely difficult to determine when they will end (Mészáros, 2017, p. 32). Consider that a crisis situation has not yet occurred but is already threatening society. For example, in a pandemic period, how many infected persons could justify the introduction of a special legal regime?

Therefore, the essence of a state of emergency is based on the fact that society is fundamentally vulnerable, and the state cannot provide maximum protection for the population (Kondás, 2015, p. 303). We could say that the rules of the state of emergency form a separate legal order within the constitution. In crisis situations threatening the existence of the state, these rules override or modify the framework of constitutional rules which prevent or make it difficult to safeguard the existence of the state (Kelemen, 2017, p. 39).

Taking into account historical experience, the above crisis situations can be grouped in several ways. Oren Gross has put forward the following typology:

a) grave political crises, which include
 i) international armed conflicts,
 ii) terrorist attacks,
 iii) riots, and rebellions,

b) economic crisis;
c) natural disasters and force majeure events (Gross, 2003, p. 1025).

Alongside Oren Gross, Pasquale Pasquino and John Ferejohn set up the following system of crisis situations:

a) emergencies that flow from an intentional threat to the political order (for example: wars, terrorism);
b) emergencies that are the result of human action, but not of human design (for example: economic emergencies);
c) emergencies caused by natural (as opposed to man-made) disasters (for example: epidemics and floods) (Elster, 2004, p. 240–241).

Comparing the above classifications of crisis situations, it can be concluded that while Gross typifies crisis situations according to their nature, Ferejohn and Pasquino focus on the factors that trigger them (Ősze, 2018, p. 34).

A recurring dilemma in relation to a state of emergency regulation is the possibility of abuse of power. It should be stressed that this dilemma can only be understood in a constitutional democracy, where the principles of constitutionality prevail, namely: separation of powers, popular sovereignty, rule of law, recognition and protection of fundamental rights, equality before the law (Kukorelli, 2014, p. 23).

A detailed examination of the literature on state of emergency tends to highlight as a problematic point the impairment of the principle of separation of powers (concentration of power) and the limitation of human rights to a greater extent than the standard developed in the ordinary legal order. Separation of power can be defined as one of the foundations of constitutional democracy. The sharing of public power is not an end, but a guarantee: an organisational guarantee that the exerciser or exercisers of the rights deriving from sovereignty do not abuse the opportunities arising from this privileged role (Erdős, 2019, p. 61). So, on the one hand, the separation of powers is a fundamental condition for the interpretability of a state of emergency. This criterion is specific to the rule of law, which makes public decision-making more complex and time-consuming (Farkas, 2017, p. 21).

Under a state of emergency, the executive—or a special body set up for this purpose—is usually empowered to govern by decree, but this must not be in breach of the principle of separation of powers. On the other hand, it is also necessary to ensure the dynamism of legislation, implementation and other measures, as this is a fundamental condition to avert a crisis. It is worth mentioning here the reassurance function of the empowered organ under a state of emergency. The short way to put it is "calm down, we are in control of the situation." In such cases, the empowered organ must act transparently and effectively, but also quickly. Indeed, it is usually the reassurance function that links the exceptional situation to the state of exception. This is likely to mean that the law needs a solution which, on the one hand, allows the state to take immediate action and, on the other, guarantees constitutionality once a state of emergency has expired, thus reassuring society (Mészáros, 2016, p. 191–192).

Another concern about the application of a state of emergency is the unnecessary and disproportionate violation of fundamental rights. The specific definition of fundamental rights and the rules for their limitation are laid down at constitutional level. Most of the fundamental rights can be restricted, and different tests must be applied to justify this restriction. A state of emergency can be interpreted as a special test, where on one side of the balance is the crisis (or its prevention) and on the other side is the fundamental right (or its restriction). The possibility of abuse lies in the reference to a crisis and the possibility of more concentrated action.

3.2 Legal regulation of state of emergency

3.2.1 Hungary

At the time of the change of regime in 1989 (the collapse of the Soviet Union and the democratisation of Hungary), the Constitution

of Hungary covered states of national crisis, state of emergency and state of danger. The list of crisis periods was extended in 1993 to include the unexpected attack and in 2004 to include the state of preventive defence. The next milestone is the entry into force of the Fundamental Law of Hungary in 2012, and its sixth amendment. From 2013, the security environment started to change noticeably. The Arab Spring, the crisis in Ukraine, the activities of the Islamic State terrorist organisation, the wave of terrorism in Europe, these developments have brought a clear and radical change to the security situation. In response to this, the constitution-maker increased the number of crisis periods to six by introducing the state of terrorist threat into the Fundamental Law. In parallel, new security challenges have emerged in the last few years, which have created a need for modern and applicable legislation (Kádár, 2020, p. 10–16). Because of this, and the conclusions drawn from the declaration and application of the state of danger (see later), the Parliament made comprehensive amendments to the special legal order rules in Hungary (Farkas, 2020, p. 14–15). It is worth stressing that the reform came after COVID. At the time of COVID, there were six periods that are qualified as a state of exception, currently there are free: the state of war, the state of emergency and the state of danger (Ősze, 2021, p. 9–19).

The National Assembly may declare a state of war

a) in the event of the declaration of a war situation or in the event of danger of war;
b) in the event of external armed attack, an act with an impact equivalent to an external armed attack, or imminent danger thereof;
c) or in the event of the fulfilment of an alliance commitment regarding collective defence (Art. 49, Para. 1)

For the declaration of state of war, the votes of two thirds of the MPs shall be required (Art. 49, Para. 2).

The National Assembly may declare a state of emergency

a) in the event of an act aimed at overthrowing or subverting the constitutional order or at exclusively acquiring power, or
b) in the event of a serious unlawful act massively endangering life and property (Art. 50, Para. 1).

For the declaration of state of emergency, the votes of two thirds of the MPs shall be required (Art. 50, Para. 2).

The Government may declare a state of danger in the event of an armed conflict, war situation or humanitarian catastrophe in a neighbouring country, or a serious incident endangering life and property, in particular a natural disaster or industrial accident, and in order to eliminate the consequences thereof (Art. 51, Para. 1).

In all three crisis periods, the Government has exceptional powers. As part of this, during the period of special legal order, the Government may adopt decrees by means of which it may, as provided for by a cardinal act (a cardinal act is an act, which requires the votes of two thirds of the MPs present); suspend the application of certain laws, derogate from the provisions of laws and take other extraordinary measures (Art. 53, Para. 1). Guaranteed rule, during the period of special legal order, the application of the Fundamental Law shall not be suspended (Art. 51, Para. 1); the operation of the Constitutional Court (hereinafter: "CC") shall not be restricted; and the Government shall be obliged to take every measure to guarantee the continuous operation of the CC and the National Assembly (Art. 51, Para. 3–4).

Due to the outbreak of the COVID in 2019, the Government declared a state of danger on 11 March 2020 with nationwide effect. And shortly after the COVID, the state of danger was reintroduced because of the Russian-Ukrainian war (Art. 51, Para. 1), which is still in force today. It should be stressed that no special legal order has ever been applied at national level, so there was no relevant practice after the change of regime in 1989.

The declaration of the state of danger has divided public opinion, including the scientific community, sometimes debating and sometimes justifying its constitutionality. It should be pointed out that when the state of danger was declared on 11 March 2020, the condition for declaring the state of danger was a natural disaster or industrial accident endangering life and property. And a state of emergency has been declared due to a "human pandemic causing mass disease." In the Hungarian constitutional system, however, a human pandemic cannot be interpreted as a natural or an industrial disaster. Thus, according to many authors, the declaration of the state of danger at the time was unconstitutional (Szente, 2020, p. 132).

According to Gábor Mészáros, the extraordinary measures could have been ordered without the risk of a significant limitation of fundamental rights under the ordinary legal order, which was made possible by the health crisis under the Act CLIV of 1997 on Health (Mészáros, 2019, p. 66). Others argue that the codification of the relevant provisions of the Act CLIV of 1997 on Health was hardly a global epidemic that would paralyse the whole country for months or years. It would be considered unrealistic and contrary to the principle of the Act for a specialised administrative authority under the Government to decide on the closure of all educational institutions, which would last for months and affect a significant part of society. On the other hand, it should also be pointed out that the Chief Medical Officer, who is not a legislator, could not have ordered the restrictive and prohibitive provisions by law. In the absence of a law, there remains the individual decision and the normative instruction, but neither could have been a legal solution (Horváth, 2021, p. 155).

As regards the constitutionality of the decree declaring the state of danger, the CC stressed that it is up to the legislator to decide whether the conditions for the declaration of a special legal order are met, whether the limitation of fundamental rights is justified and to what extent the limitation of fundamental rights is justified [Decision 23/2021 (VII. 13) of the CC, Reasoning (28)]. These are questions of expediency, and therefore the court has neither the competence nor the jurisdiction to examine the constitutionality of the decrees under a special legal order. Consequently, the CC did not examine the constitutionality of the government decree declaring the state of danger.

3.2.2 Serbia

In Serbia, "when a public danger threatens the survival of the state or citizens, the National Assembly declares state of emergency," (Constitution of the Republic of Serbia, 2006, Art. 200, Para. 1) by majority of the total number of MPs. The decision is valid for a maximum of 90 days, and after the expiration of this period, the decision's effect can be extended by another 90 days. Despite this clear jurisdiction of the parliament, on 15 March 2020, the state of emergency due to the COVID-19 crisis was declared by co-signature of the President of the National Assembly, the Prime

Minister and the President of Serbia (Sl. glasnik RS, No. 29/20). The Constitution of Serbia only allows for such joint decision-making, as an exception, "if the National Assembly cannot meet." Reasons for this are not defined in any law, nor are they specified in the Constitution itself. In fact, it is up to the President of the National Assembly to determine whether it is possible to convene the parliament, or not. The Rules of Procedure of the National Assembly do not contain provisions on electronic meetings, MPs vote publicly and in person. Therefore, any limitation on the physical assembly of people in one place—which was an essential tool to protect against COVID-19, especially in the early days—also affected the functioning of the parliament. Actually, this is how the President of the National Assembly subsequently explained why the National Assembly could not meet properly and declare state of emergency in the ordinary course of proceedings; notwithstanding that the official ministerial order on the ban on public gatherings in indoor places entered into force only on 21 March 2020 (Sl. glasnik RS, No. 39/20), 6 days after the declaration of the state of emergency, "bypassing" the legislator.

According to some views, "the mentioned constitutional provision refers to the factual impossibility of gathering of MPs. And no act of the Government or any executive body may be an obstacle to holding a session of the highest legislative body" (Glušac, 2021, p. 152). On the other hand, most MPs, except for a few opposition members, remained silent on the lack of parliament's substantive involvement in the process (Tepavac and Branković, 2020, p. 28). Self-marginalisation of the National Assembly in favour of the executive branch is a permanent feature of Serbian parliamentarism, "so it could not be expected that it would be different during the state of emergency" (Simović, 2020, p. 13). Moreover, according to the CC of Serbia, favouring efficiency over representation is just in the spirit of the Constitution, and not contrary to it, because "waiting" for the conditions to be met for a parliamentary session can have unpredictably harmful consequences (CC of Serbia, No. IUo-42/2020). However, pursuant to another view, maybe the National Assembly could not factually meet, but there was no legal obstacle to this. The constitutional right of the National Assembly to meet is stronger than any decision of the Government, and any other interpretation that legitimises the government's ability to limit or even ban parliamentary sessions, is equal to the institutionalisation of a *coup dětat* (Marinković, 2021, p. 131–132).

On 21 May 2020 the CC refused to start the examination of the constitutionality and legality of the declaration of the state of emergency which was challenged because of the procedure itself and the lack of material reasons. Concerning the way how the decision was adopted, like in Hungary, the CC accepted that it is a discretionary decision of the deputies how and according to which constitutional provision they act under conditions of rapid spread of an infectious disease. Organisational capabilities of the National Assembly to meet without delays is a factual, and not a legal issue that the CC cannot assess. As regards the material part of the introduction of the state of emergency, the CC emphasised "that it cannot be concluded that the constitutional basis for declaring a state of emergency did not exist" (No. IUo-42/2020). Based on the premise that *two negatives make a positive*, it can be concluded—even by a twisted logic—that the concrete case could threaten the survival of the country and its citizens, but the court was not competent to estimate to which extent (Beretka, 2023, p. 135).

According to the initiatives, successful management of the crisis in Serbia, caused by COVID-19 could have been resolved under the conditions of the so-called emergency situation (*vanredna situacija*). Unlike state of emergency, which must be introduced for the entire country directly on the basis of the Constitution, in the procedure described above, in order to preserve the survival of the state, an emergency situation arises in security cases that are unpleasant, vicious and dangerous, like a virus epidemic, but does not threaten the survival of the state and people in toto (Šabić, 2020). It has several degrees, depending on whether the risks and threats or the resulting consequences for the population, the environment and material and cultural assets occur scattered (only in certain regions or municipalities) or actually affect the whole country. In the latter case the risks and threats are of such scope and intensity that their occurrence or consequences cannot be prevented or eliminated by the regular action of the competent authorities, and the Government must declare an emergency situation for the entire country, based on the proposal of the Republic Headquarters for Emergency Situations. Although it is almost impossible to accurately define the border line between these legal categories (state of emergency and emergency situation in the entire country), there is no doubt that "the legal 'capacity' of an emergency situation does not guarantee such an effective response" (No. IUo-42/2020) as a state of emergency. Serbia's decision to introduce a state of emergency instead of declaration of an emergency situation can probably be justified by the postponement of the already called parliamentary elections; because derogation of voting rights was permissible only in a state of emergency. Otherwise, the health crisis caused by COVID-19 in Serbia could have been successfully handled by authorities within ordinary legal order, based on the laws regulating emergency situations (Marinković, 2021, p. 128–129).

As the relevant constitutional provision states, "when the decision on the state of emergency has not been made by the National Assembly, the National Assembly confirms it within 48 h of its adoption, i.e., as soon as it is able to meet" (Art. 200, Para. 8) This took place on 28 April 2020, after all security preparations had been made for a face-to-face meeting of representatives (protective gear and barriers to enable the respect of physical distancing). Finally, the state of emergency in Serbia was lifted on 6 May 2020, by decision of the National Assembly.

3.2.3 Croatia

"Unlike many other national constitutions, the Croatian Constitution does not necessitate a parliamentary declaration of the 'state of emergency' or provide the Government with any emergency powers exceeding its regular mandate for as long as the Parliament is capable of assembling" (Bačić Selanec, 2020). Instead, it only stipulates that in times of war, immediate threats to the independence and unity of the state, or major natural disasters the Croatian Parliament decides by two-thirds majority on the derogation of fundamental rights. Ergo, "state of emergency" exists as a matter of fact, not requiring an official legal declaration. It therefore logically arose whether or not COVID-19 counts as a natural disaster. Terminologically different terms referring to emergencies usually do not imply substantial differences and are generally reduced to large-scale natural disasters or other threats (Karovska Andonovska, 2022, p. 39). However, while the constitutions of North Macedonia and Republic of Srpska specifically mention the epidemic as the basis for the introduction of a state of emergency, in

the case of Croatia classification of COVID-19 as a natural disaster generated a constitutional legal debate. Namely, if the COVID-19 is a natural disaster, the Parliament can only suspend fundamental rights with a qualified majority. Otherwise, Article 16 of the Constitution shall be applied, which refers to the limitation of rights in "peacetime," within ordinary legal order. Article 16 does not require qualified majority or any special circumstances to restrict fundamental rights; the only condition is that the restriction should be prescribed by law, and it must be proportionate to the goal to be achieved. However, the CC of Croatia did not consider this issue to be so complex. According to the court decision, it is up to the parliamentary representatives to decide which constitutional provision to refer to when restricting a fundamental right. In the particular case, the Croatian Parliament did not find that COVID-19 represents such a threat that could be equated with a major natural disaster. Although every epidemic is also a natural disaster, COVID-19 was not a "sufficiently strong reason" for the activation of Article 17 of the Constitution.

To avoid any confusion, the Citizens' Initiative "Let us decide together!" (*Odlučujmo zajedno*) submitted a proposal for calling a referendum to amend the relevant constitutional provision by adding the words "epidemic, i.e., pandemic." As stated in the explanation "only amendment of Article 17 can guarantee that in the future, in a state of epidemic, i.e., pandemic, the Croatian Parliament must decide on the derogations of freedoms and rights by the highest qualified majority recognised by the Constitution of the Republic of Croatia." This proposal also corresponds to an academic standpoint: measures related to the fundamental values of every society must be decided upon in crisis situations only by the highest level of agreement. There is no room for political games because only "the broadest social consensus contains the idea of finding the best quality measures, acceptable to as many people as possible" (Gardašević, 2020).

Although from a formal and legal point of view the referendum question met the requirements of constitutionality, the CC of Croatia has found that it was not in accordance with the Constitution: looking at the Constitution as a whole, the referendum question did not meet "the requirement of reasonable purpose and effectiveness of the referendum, which are inherent to the rule of law as one of the highest constitutional values" (No. U-VIIR-2180/2022). The court decision was widely criticised, considering that the CC, by exceeding its authority, limited direct democracy of citizens, and supported the Parliament's unlawful luxury of choosing among the powers guaranteed by the Constitution in Article 16 and 17, with almost no restrictions.

"In Croatia the government tried to find alternatives to gain the necessary legal base for emergency management without declaring a state of emergency" (Jashari et al., 2021, p. 823). Unlike in Hungary and Serbia, where in addition to declaring a state of emergency, the executive branch took over all decision-making powers from the parliament, in Croatia the representatives chose a more controversial solution. Although the Croatian constitution also contains a provision in case the Parliament is prevented from doing its work (then the President of the Republic issues decrees with force of law at the proposal of the Government and co-signed by the Prime Minister) (Art. 101, Para. 2), the Croatian Parliament decided to maintain the ordinary legal order and by an "ordinary law"—passed by simple majority, in urgent legislative procedure—established the authority of the Crisis Headquarters that's got almost total authorization to impose restrictions on human rights due to COVID-19. The Crisis Headquarters as a "professional, operational and coordinating body for the implementation of civil protection measures and activities in major accidents and disasters" under the direct supervision of the Government, ordered security measures to prevent the spread of the virus, in collaboration with the Minister of Health (No. U-I-1372/2020). The fact that the Crisis Headquarters could limit fundamental rights based on amendments to a law and not on the basis of the Constitution and took over the role of the Parliament was not a concern for the CC. Like the Serbian CC, the CC of Croatia accepted that the parliament's self-restraint is the sovereign right of the MPs, even if it means assigning quasi-legislative powers in "peacetime" on a body that is not under direct parliamentary control. The Croatian Parliament can only through the Government control its bodies, including the Crisis Headquarters, request special reports on their work and, in case of dissatisfaction, initiate a vote of no confidence in the Government (Gardašević, 2021, p. 115). For the CC, this is acceptable as long as the CC's follow-up control is ensured.

3.3 Derogation of fundamental rights in constitutional court practice

3.3.1 Hungary

According to the Fundamental Law, during the period of special legal order, the exercise of fundamental rights—with the exception the right to life and human dignity, the prohibition of torture, inhuman treatment or slavery, and the guarantees of criminal procedure and the right to a legal remedy—may be suspended or may be restricted beyond what is required by the necessity-proportionality test (Art. 52, Para. 2). The necessity-proportionality test applies under an ordinary legal order, which is defined in the Fundamental Law as follows: A fundamental right may only be restricted to allow the effective use of another fundamental right or to protect a constitutional value, to the extent absolutely necessary, proportionate to the objective pursued and with full respect for the essential content of that fundamental right (Art. I. Para. 3). The three basic elements of the necessity-proportionality test are: legitimate goal, necessity and proportionality. Of these, the proportionality aspect often receives more attention in the analysis. According to Zoltán Pozsár-Szentmiklósy, a conceptual order can also be identified in the analysis criteria: Only the means capable of achieving the legitimate aim can be considered necessary, and only the necessary means can be subject to the proportionality. As suitability is often examined in the context of necessity, it is also possible that only proportionality is examined in the procedure. However, it is important to note that this is a risky practice. Some elements of the examination criteria require objective answers, and only in the final phase of the examination is subjective judicial discretion possible (Pozsár-Szentmiklósy, 2014, p. 30).

And the state of danger caused by the coronavirus pandemic has significantly changed the CC's practice on the limitation of fundamental rights. The first stage of the change is the decision of the CC 15/2021 (V.13). The petitioners invoked a violation of the right to access data of public interest, as the Government extended the deadline for the submission of a request for data of public interest due to the effectiveness of the fight against the COVID-19. According to the petitioners, the Government violated the right to access data of public interest by extending the deadline for complying with the data request. The Government cited the successful defence against the

coronavirus. The petition was rejected. According to the CC, the necessity-proportionality test must be applied in the case of limitation of a fundamental right under a special legal order, but the circumstances in which the state of danger was declared must be considered. Accordingly, it examined the triad of legitimate goal, necessity and proportionality in relation to the disputed legislation. The epidemic situation as a circumstance justifying the declaring of a special legal order appeared in all three aspects, although rather concisely: the legitimate goal is to combat the epidemic, the disclosure of data of public interest hinders the fight against the epidemic, so the extension of the deadline for the execution of the request is justified, necessary and not disproportionate. A similar argument could be conceivable under any ordinary legal situation (Erdős and Tanács-Mandák, 2023, p. 562).

The next step in defining the type of test to be applied was the decision of the CC 23/2021 (VII.13). This decision follows a complete ban on the right to assembly and according to the CC, the decree did not violate the freedom of assembly. In this decision, it was no longer a requirement that the legislator must choose the most moderate intervention, it is sufficient that the measure applied is suitable for the containment, eradication or mitigation of the consequences of the epidemic situation. In the context of proportionality, the decision drew attention to the importance of temporality (Erdős and Tanács-Mandák, 2023, p. 563–564). The longer the period of suspension of a fundamental right is, the stronger the justification needed to maintain the limitation is. The legislator must recurrently consider—as it does in other cases—the collision between the exercise of the fundamental right and the achievement of the epidemiological goals and, where the epidemiological goals permit, allow at least partial exercise of the fundamental rights [Decision of the CC 23/2021 (VII.13), Reasoning (34)].

The third step in the definition of the test of limitation of the fundamental right under a special legal order is the decision of the CC 27/2021 (XI.5). The Government has decreed that from 1 May 2021, certain activities (e.g.: attending sporting events, participating in cultural events, restricting visits to restaurants and accommodation) can only be used if people can prove that they are protected against the coronavirus. The petitioners claimed that the decision was discriminatory. According to the CC, the decision did not violate any fundamental rights, since those who are protected do not form a homogeneous group with those who have not received the vaccination or have not been infected. In this decision, the CC stressed that it cannot decide on questions of scientific truth, cannot evaluate scientific research, and referred to the results of national and international scientific forums [decision of the CC 27/2021 (XI.5), Reasoning (82)–(94)]. And the Court has already examined Article 53 (3) of the FL instead of the proportionality test for establishing the requirements of periodic review (Erdős and Tanács-Mandák, 2023, p. 565).

Finally, decision of the CC 3128/2022 (IV.1) summarised the results of the development of the special legal order test. In the case, the CC had to decide on the constitutionality of the compulsory use of the coronavirus vaccination by employees of state institutions, but the measure did not violate fundamental rights (for example: human dignity; prohibition of torture; right to freedom of thought, conscience and religion; right to work). Describing its steps of evolution in relation to the general test other than the special (public interest, reasonableness) test as follows: based on the test on the restriction of fundamental rights under a special legal order, it is to be examined whether:

a) There has been an intervention to the fundamental right in question,
b) The restriction of fundamental right has a legitimate goal,
c) The restriction of fundamental right is suitable for achieving the legitimate goal, and, subject to Article 53 (3) of the Fundamental Law, whether.
d) The legislature has periodically ascertained whether the maintenance or extension of the restriction is justified [Decision of the CC 3128/2022 (IV.1), Reasoning (168)].

By not giving the legislator a blank mandate for emptying fundamental rights referring to the possibility of their suspension, the CC has preserved its role as a constitutional guardian and has given meaning to the provision of the Fundamental Law that prohibits restrictions on its operation even in a special legal order. The CC strengthened this approach further by using the special legal order test only for those legal acts adopted in a special legal order which were concretely related to epidemic control. By gradually modifying the test to apply under a special legal order, the CC has developed a slightly less rigorous test but one which ensures that the legislator cannot use the special legal order legislation for a purpose unrelated to the elimination of the circumstance giving rise to its imposition and to reducing its consequences, or for undertaking a task which requires expertise that the Government does not possess, or one that withdraws the chance of rapid intervention by the rapid intervention by the Government (Erdős, 2022, p. 118–119).

Although the paper focuses on the practice of restriction of fundamental rights during the coronavirus epidemic, it is worth briefly mentioning that the Hungarian Government also declared a state of danger because of the Russian-Ukrainian war. In this context, the Court pointed out that an armed conflict poses a completely different challenge than a pandemic. Consequently, the role of the Government in the constitutional system is also different in the two crises. This is evidenced by the abolition of the limited duration of government decrees in emergency situations. In the decision of the CC 3004/2024 (I.12), the Court was dealing with an infringement of the freedom of enterprise and created a new test. In the case it is to be examined whether:

a) There has been an intervention to the fundamental right in question.
b) The restriction of fundamental right has a legitimate goal.
c) The restriction of fundamental right is suitable for achieving the legitimate goal.
d) The disadvantages caused by the restriction of a fundamental right outweigh the advantages of achieving a legitimate aim (proportionality) [Decision of CC 3004/2024 (I.12), Reasoning (56)–(57)].

A necessary element of the special legal order is that the Government can act quickly and effectively to avert a crisis, which necessarily entails a reduction in the control function of other state organs. This can be seen with the reformulation of the necessity-proportionality test of the CC. It is worth pointing out, however, that the reduction in the control function of the CC is not due to the

provisions of the Fundamental Law, as the body appointed its own position, which was not an easy task due to its lack of competence in special legal order. The starting point for finding this position was that the CC refused to examine the constitutionality of the decree declaring the state of danger. On the other hand, the reduction of the control function can be explained mainly by the increased importance of the legislative discretion of the state of danger in the decision-making process of the Court. As an excellent example, in the decision on a request for access data of public interest, the Court simply stated that an extension of the deadline for responding would not infringe the right to access data of public interest if it was indeed necessary to avert the epidemic [Decision of CC 15/2021 (V.13), Reasoning (43)]. And whether this is really necessary is for the legislator to decide, it cannot be examined from a constitutional point of view.

The CC also stressed that it is up to the Government to decide what measures are appropriate to avert the crisis. If justified, it may decide to maintain restrictions on certain fundamental rights. It is true that the Court formulates it as a requirement that it is a question of constitutionality whether the legislature applies the fundamental rights test when adopting rules. If this is not done, the restriction of the fundamental right is disproportionate, leading to the annulment of the rule. The legislator must constantly monitor whether the general suspension of a fundamental right is indeed an indispensable measure to achieve the goals pursued by the special legal order. It is not the declaration of a state of emergency, but the specific circumstance giving rise to the declaration of a state of danger that justifies the restriction of fundamental rights. Only a state of danger does not justify the total exclusion of a fundamental right, but it is necessary to decide on an ongoing basis whether the circumstances justify the suspension of a fundamental right [Decision of CC 23/2021 (VII.13), Reasoning (35)]. From this decision, we can also conclude that the CC practically leaves the discretion of the proportionality of the restriction of fundamental rights to the discretion of the legislator and the measure of this is temporality.

3.3.2 Serbia

During the state of emergency, when examining the constitutionality of the restrictive measures, the Serbian CC should primarily check whether the degree of deviation from fundamental rights did exceed the necessary level—as stated in the Constitution (Art. 202, Para. 1). And this necessary level, according to the Court, was the preservation of public interest, i.e., the citizens' health.

There are authors who by deviation from fundamental rights mean their temporary, but complete abolition (Simović and Petrov, 2018, p. 133–134; Rajić, 2011, p. 711), but it seems that the Constitution allows "a dosed narrowing of the scope of exercising rights" (Đurić and Marković, 2021, p. 40). This is proven by the attitude of the CC regarding the acceptable limitation of the external element of the freedom of religion, but the simultaneous preservation of its internal aspect. Namely, most petitions to the CC were based on Serbia's very strict restrictive measures regarding freedom of movement. Although the country continuously reviewed the conditions of the ban on leaving the residence, the protection of fundamental rights was seriously questioned in several cases (see Petrović and Pokuševski, 2021). One of the bans on leaving the residence at the weekend also extended to the time of the Orthodox Easter holiday, due to which violation of freedom of religion was also considered by the court. However, it found that in this specific case, it is not about a measure derogating from freedom of religion, but about a measure derogating from freedom of movement during a religious holiday. The freedom to manifest religion by performing religious ceremonies or attending a religious service can be limited by law even in a regular situation if it is necessary in a democratic society. However, this does not mean that one cannot practise the religion of his own choice in a home environment (No. IUo-45/2020). Some of the restrictive measures also extended to churches and gatherings there, which raised the issue of the secular character of the state according to the Constitution. On the other hand, the CC has already taken a position that in the case of Serbia separation of state and church is based on cooperative foundations (No. IUz-455/2011), i.e., a relationship in which the state and the church legislation and activities intertwine and complement each other (Avramović, 2011, p. 296). Anyway, returning to the basic question itself, the coherence of the text of the Constitution dictates that "if it is possible to limit the freedom of religion on regular occasions for certain reasons (life and health of people, morals of a democratic society, freedom and rights of citizens, prevention of causing or inciting religious, national or racial hatred, etc.) which represent a superior value (or goal) in relation to freedom of religion, then it is all the more possible in a state of emergency that was declared precisely for the purpose of protecting that superior value" (Milošević, 2020, p. 190).

According to the court the strict rules on leaving residence did not mean deprivation of liberty neither according to its purpose, nor according to its content. The purpose of those measures was to protect especially vulnerable persons additionally and effectively from a dangerous infectious disease, while the content of those measures essentially came down to creating the necessary conditions for this protection. On the other side, the centres for social protection, hospitals, retirement homes did not allow visitors, neither did the ombudsman, who highlighted in a 2020 report that he was unable to fulfil his function in field of prevention of torture in these institutions as he was not allowed to enter (Zaštitnik građana, 2021, p. 16–17).

Although a few petitions highlighted that some of the restrictive measures particularly discriminated against older persons (e.g., citizens over the age of 65 were not allowed to leave their homes except once a week, when they could go shopping in the early hours of the morning, or those who were still actively working could not work compared to younger people), the court did not deal with this issue in more detail. During a state of emergency, the Serbian Constitution treats the equal rights policy differently than in "peacetime" and does not prohibit "'any form of discrimination' which would allow any form of discrimination to be included in the interpretation of this constitutional provision" (Pajvančić, 2009, p. 266) but enumerates prohibited grounds severally. According to the Art. 200, Para. 2, in a state of emergency, only those measures are not permitted that make difference between people because of their race, gender, language, religion, nationality, and social origin. The age is not specifically mentioned. On the other side, after the end of the state of emergency (but still during the fight against the spread of the virus) a Government decree that permitted longer working hours for catering facilities and night clubs in the territory of the city of Belgrade compared to other municipalities in Serbia, was challenged before the court due to alleged discrimination based on residence and seats, but the CC did not accept that as a constitutionally relevant reason (No. IUo-100/2020).

Measures restricting movement had practical consequences, but most of the relevant violations did not reach the CC, with a few exceptions. For example, the court established the violation of the right to trial within a reasonable time in several cases, in which closures due to COVID-19 indirectly contributed to the prolongation of the procedures but did not decisively influence their length (see, CC of the Republic of Serbia, No. Už-10648/2020, Už-1572/2019, Už-6390/2020). On the other side, in another case, the court found a violation of the right to a fair trial because the High Commercial Court "did not take into account the specific social circumstances of that period, and the factors that made it difficult to comply with compulsory legal deadlines" (No. Už-1061/2021).

The only case that reached the tolerance threshold of the CC concerned the possibility of double punishment and the violation of the *ne bis in idem* principle. Namely, during the state of emergency for certain misdemeanours due to non-compliance with the movement ban, misdemeanour proceedings could be initiated and completed, even if a criminal proceeding had been already initiated or was ongoing against the perpetrator of the act that included the features of that misdemeanour—regardless of the constitutional category of *ne bis in idem* (Sl. glasnik RS, No. 39/20). The court applied the *Engel* criteria from the practice of the ECHR which primarily refers to the assessment of whether the two procedures (in the concrete case a misdemeanour proceeding and a criminal proceeding) are sufficiently closely related in terms of content and time (see, Engel and Others v. The Netherlands). Based on the test carried out, the court established that even though conducting two procedures, which concern different subjects, arising from the same life event, and from which two sanctions can also arise, is not absolutely excluded—if certain conditions are met (taking into account the type of those different procedures, the appropriate connection in terms of time and space, the character of different sanctions), in the examined case the challenged regulation did not reach "a fair balance between the interests and rights of the individual protected by the principle of *ne bis in idem* and the public interest which mandates/enables the conduct of two procedures in a specific case" (No. IUo-45/2020). The CC retroactively determined that these provisions related to potential double-sentencing and double-punishment of a misdemeanour due to violation of the prohibition of movement in a certain period, and a crime of not complying with health regulations during the COVID-19 pandemic—with regard to the same act—were not in accordance with the Constitution during their validity. Not to mention that during a state of emergency no derogation from legal certainty in criminal law is allowed, an integral part of which, otherwise, is the principle of *ne bis in idem* (Škulić, 2022, p. 82).

3.3.3 Croatia

In Croatia, the Crisis Headquarters had a central role in the adoption of restrictive measures, which regulated all issues in separate decisions. Instead of limiting freedom of movement, freedom of assembly, or work-related rights in a general act, it created separate rules for all social areas, e.g., for visiting playgrounds, funerals, working hours of commercial establishments, marriages, border crossing, public transport, and other public gatherings. According to the statement of the CC of Croatia, with appropriate amendments to the Law on the Protection of the Population against Infectious Diseases and Law on the Civil Protection System, the Crisis Headquarters was authorised to regulate all these issues that otherwise fall within the competence of the Croatian Parliament, including the limitation of fundamental rights. The fact that the challenged Law was not adopted on the basis of Article 17 of the Constitution (by two third majority applicable during crisis situations), did not by itself make this act unconstitutional (No. U-I-1372/2020). And the assumption of constitutionality also applies to all restrictive measures adopted by the Crisis Headquarters on the basis of the disputed law, at least in terms of the existence of a valid legal basis (Ljubanović and Đanić Čeko, 2022, p. 505). Although some of the justices criticised the decision—because such an attitude supported the activity of a "parallel legislator, headed by the Minister of Police, who did not have to be burdened by constitutional restrictions or legislative procedures" (dissenting opinion in No. U-I-1372/2020), this did not have any particular practical consequences in the end.

After the epidemic subsided, the Croatian parliament tried to retroactively enact the restrictive measures of the Crisis Headquarters by amending the above-mentioned laws. Although the CC indicated the faults of the Parliament because of incomplete justification, it finally rejected the petitions that challenged the amendments' constitutionality: "In connection with the ongoing COVID-19 pandemic, the CC expects the legislator to provide a justification for the (mandatory) measures to be taken in the future, on the basis of which the addressees of the measure and the public can find out for what reason each measure was taken, and which shows that the constitutional principle of proportionality was respected" (No. U-I-5781/2021).

The CC—otherwise being too lenient with the Crisis Headquarters (Blagojević and Antunović, 2023, p. 133)—remained consistent concerning the outcome of constitutional reviews in COVID cases: it either rejected or did not accept proposals to initiate proceedings to assess the constitutionality and legality of restrictive measures, except in three cases.

First, the court found (acting *ex officio*) that the ban on the operation of commercial establishments on Sundays was not in accordance with the Constitution because when determining a non-working day during the week, the Crisis Headquarters did not act in accordance with the principle of proportionality. The court could not *prima facie* rule out the constitutionality of this measure, or that there were actually objectively and rationally justified epidemiological reasons for its adoption. Therefore, it examined whether the ban on the operation of commercial objects on Sunday was proportionate to the goal to be achieved. According to the Government's justification, the highest traffic usually occurred on Fridays, and Sunday was classified as a moderately risky day from an epidemiological point of view. So, it was considered an optimal choice in the sense of the maximum reduction of the epidemic risk, but it minimally damaged the lives of citizens and the normal conduct of commercial activities. However, the court did not find this explanation convincing (Kokić-Hinović, 2022, p. 176). Although the decision was quite short, it was followed by lengthy dissenting opinions. According to Justice Šumanović the court did not determine which fundamental right was violated by the measure; it did not establish the extent and intensity of the interference with this right, or its consequences, and it was also how to determine the proportionality between the positive effects of the measure in question and the negative consequences of the restriction of the given right. "Since it is an emergency measure, the duration of which is limited, the court must not take over the role of the legislator, in this case the role of the Crisis Headquarters, just

because, in its opinion, another measure would have been better in terms of its effectiveness or adequacy. That is why it can only examine whether the measure was apparently illegal or unacceptable, or whether an obviously inappropriate measure was chosen" (No. U-II-2379/2020). That is another question is "how precisely Sunday trade is detrimental to the epidemiological situation in the country whereas mass gatherings in places of worship, coffee shops and hairdressing salons are no" (Horvat Vuković and Kuzelj, 2020, p. 62). Namely, not all economic activities were limited or prohibited on Sundays, only certain ones. But the court did not consider this to be discriminatory, or that the state favoured certain economic sectors (No. U-II-1373/2020).

Second, the court did not accept that the autonomy of universities extended to the authority of the university management to decide on the exclusion of students from the implementation of the Decision on mandatory testing for the SARS-CoV-2 virus and mandatory presentation of evidence of testing, vaccination or passing this infectious disease in order to enter public premises. According to the challenged decision (Narodne novine, No. 121/21. and 10/22), public employees or anyone who worked in a state-owned and managed institution might not enter the public premises if they could not prove their vaccination status, or that they had been infected, or tested. This also applied to customers. The decision did not apply only to university students who were in university halls, unless the university management had decided differently. The decision was annulled only in this part because in this specific case, the deviation from the exception (exemption for students from testing, presenting vaccination status etc.) which was tried to be explained with university autonomy, was not justified by the COVID-19 pandemic and the related epidemiological and other objective and verifiable data; so it was not in line with the announced legitimate goal. The CC accepted the reasons why the decision did not apply to students during their stay in higher education institutions. However, it is considered constitutionally unacceptable that a higher education institution could decide otherwise because it falls outside the framework of the university autonomy (see no. U-1902/1999). As for the rest of the decision, according to the court, the aim of the measure—the orderly and continuous provision of state, local and general public affairs—was legitimate (no. U-II-7149/2021). Since the costs of testing were borne by the state in the case of employees, the question of discrimination against clients, who paid for it themselves, arose. But according to the CC these two categories of citizens are not comparable, and the cost of testing does not represent an excessive burden on the citizens, who do not necessarily visit these institutions every day.

In addition to the previously mentioned public administration workers, social and health workers were also required to obtain a COVID certificate if they wanted to work. The CC accepted the Government's explanation that by refusing such an employee to enter the business premises, the employer protected the life and health of others, which is/was also an obligation according to the labour protection law. To what extent the right to work is violated in specific cases, the CC should decide separately in each individual case in the procedure initiated with a constitutional complaint (No. U-II-5417/2021). On the other hand, there were no sanctions for workers in the disputed decisions, but it only instructed the employer that a worker without COVID certificate cannot start work. Therefore, in this context, "there is a legal gap that allows extensive interpretations by employers, based on which the labour law status of workers may be threatened, without there being any legal basis for such behaviour" (Bilić, 2022, p. 536).

In the third exception the CC did not find a reasonable and objective justification for the technical restrictions that significantly limited the active participation of the deputies at the sessions of the Parliament, in the conditions of the pandemic (No. U-I-4208/2020). Namely, each parliamentary group had the right to designate at least one member who could attend the session of the Parliament, the time for comments was shortened, the possibility of audiovisual and electronic voting was introduced. In view of the latter, according to the court, there were the means for all elected representatives to participate in the work of the Parliament, not just the selected ones.

Given that the ordinary legal order was maintained in Croatia during the pandemic, the CC primarily applied the classic proportionality test when examining the potential violations of fundamental rights related to restrictive measures. And according to the court, the disputed measures could only be considered proportionate if they were necessary to protect against the spread of the virus, and based on available scientific data they had no alternative, and there was no less drastic legal solution that would achieve the same goal with a lesser degree of violation of fundamental rights (test of the least restrictive or the less onerous measure) (No. U-I-5781/2021). On the other side, a parallel opinion of Justice Mlinarić and Justice Šeparović highlighted that the test of strict necessity could not be applied in the period when the epidemic was still "alive" because actually the same epidemiological measures were used from the beginning, and they differed only in their scope, intensity and duration (obviously there was no other effective measure, or the profession did not know about it). An example of this is the mandatory wearing of masks as one of the most basic and lasting protective measures almost all over the world. In Croatia it was constitutionally acceptable in general, but the CC examined separately how much this measure violated the dignity or other rights of the individuals in individual cases. Due to the strong public interest, the mandatory wearing of masks was a social necessity, especially considering the Article 69 of the Croatian Constitution (everyone is obliged to contribute personally to health protection). Ergo, wearing a mask is not a matter of personal choice, as this choice can potentially endanger others (No. U-II-3170/2020). A treatment violates human dignity if it has at least minimal weight that always depends on the specific case, how long it lasted, what were the physical and mental consequences, in some cases the gender, age and health status of the victim may also be relevant (No. U-III-6559/2010, No. U-IIIBi-268/2020). The court, for example, upheld the constitutional complaint in which a citizen suffering from asthma was punished for not wearing a mask in a shop. According to the assessment of the CC, it does not matter whether the specific case is about short-term or long-term wearing of a protective mask, as explained by the lower courts. Although not having specialist medical knowledge, the lower court put itself in the position of a medical expert and drew its own conclusions about how long the patient could or could not wear a protective mask without endangering his health (No. U-III-4208/2022).

4 Concluding remarks

Many studies have been published on the effects of the COVID-19 pandemic on human rights. The present paper is one of

those that seeks to compare the reactions of states otherwise facing the same danger, and more precisely, the position of the constitutional courts regarding human rights derogations in the fight against the virus.

Comparing the practice of Hungary, Serbia and Croatia, it reveals several similarities and differences. As for the differences, all three countries regulate the state of exception in different ways and have also activated different constitutional provisions due to COVID-19. While the state of emergency and the so-called special legal order was introduced in Serbia and Hungary, ordinary legal order was maintained in Croatia; but regardless of this, the executive power took over control of the epidemic management in all three cases. As stated by the ECHR, it is up to each contracting state, within its own responsibility for the survival of the nation, to determine whether survival is threatened by a public danger and, if so, how far it is necessary to go to avoid that danger (case of Aksoy v. Turkey). Therefore, not introducing a state of emergency is not necessarily contrary to the protection of fundamental human rights as long as the purpose of the decision is legitimate. And this is also true in reverse: the goal of the declaration of state of emergency is legitimate as long as "it is not aimed at introducing a dictatorship or violating human rights, but at removing serious dangers and quickly returning the country to normal functioning" (Nastić, 2020, p. 73). Considering that the state of exception in Hungary has lasted for several years and still exists today, serious questions are raised about the constant dominance of the executive power over the parliament, as well as the almost limitless possibility of measures that can restrict fundamental rights. Currently, there is a special legal order in Hungary because of the Russian-Ukrainian war. It seems that the CC has adapted to the situation, as it has developed a new test for the restriction of fundamental rights, giving the green light to government measures.

Although the constitutionality of the declaration of state of danger in Hungary has been questioned by several authors, the CC has not examined the declaration decree, arguing that it is for the Government to decide whether the conditions for this are met. Similarly, the Serbian and Croatian CC found that the sovereign right of the MPs to decide who introduces, or does not introduce, the state of exception, and in which procedure. The constitutional courts also did not investigate in depth whether the pandemic was a natural disaster or not, while this raised a constitutionally relevant question in Hungary and Croatia as well. In Serbia, the question was whether it was necessary to declare a state of emergency across the entire country, or whether it would have been possible to successfully manage the crisis through the so-called emergency situation. But as we have already mentioned, despite the different legal frameworks, the constitutional courts did not examine the merits of the legality of the solutions; and in this way the legal basis of the restrictive measures was not questioned either from a constitutional point of view.

However, what turned out to be a much more complex problem was the extent to which it is necessary to limit fundamental rights due to COVID-19, especially considering "that basically the whole humankind has been and will remain subjected to some compulsory measure, irrespective of whether a concrete individual is infected or not" (Sándor, 2020, p. 389). In the case of previous epidemics, the restrictions and bans primarily affected sick persons. However, due to the nature of COVID-19, many people without symptoms were classified as a source of danger, which required a new medical and also legal approach. As a result, the discriminatory nature of the entire system also came to the fore, although no constitutional court has ruled this in the examined cases.

In Serbia, most of the measures restricting fundamental rights were adopted by amendments to the Government Decree on the Measures during the State of Emergency (Sl. glasnik RS, No. 31/2020, 36/2020, 38/2020, 39/2020… 60/2020) which was no longer in force during its constitutional review. Other Government decrees passed with the co-signature of the Head of State in the examined period mostly related to technical and organisational issues, financial support, and fiscal measures, and only some of them were subject to constitutional review. The CC of Serbia also decided on far fewer cases than the constitutional courts in Hungary and Croatia, where restrictive measures were usually included in a large number of separate decrees. As a result, a much richer constitutional court practice has developed in these two countries in the field of the relationship between fundamental rights restrictions and the COVID-19, than in Serbia.

In the Hungarian constitutional system, the general test for the restriction of fundamental rights is the necessity-proportionality test. This was applied by the CC during the state of danger, as well. However, the test was modified favorasing the public interest almost without exception, and the court accepted the restriction of fundamental rights as a legitimate tool in the fight against the virus, putting special emphasis on the legislative discretion as much more relevant. Although most of the COVID decisions in Croatia were affected by a whole series of dissenting opinions, pointing out the limitations of the necessity test during a still ongoing crisis, the consistency of the CC can be seen in action here as well, without exception giving priority to the "we-health" over the "me-health." A similar conclusion can be made in Serbia, although the proportionality test was applied less strictly in the case of restrictive measures adopted during the state of emergency.

In global terms, the most questionable situation was mandatory vaccination that was introduced only in Hungary in certain public institutions, among the examined countries. The CC did not consider it unconstitutional, justifying this decision by scientific results. Although mandatory immunisation against COVID-19 was not introduced in Serbia and Croatia, in both countries, a precedent immunisation doctrine already existed, which, according to some authors, could also be applied to the COVID-19 vaccinations (with very similar outcome than in Hungary). Namely, during the constitutional review of the Law on Medical Protection against Infectious Diseases, the Serbian CC adopted the following, related position: "the constitutional right to protect an individual's health is correlated, on the one hand, with the state's obligation to take appropriate protective measures, including preventive protective measures aimed at the entire population, and on the other hand, with the obligation of each individual to undergo certain measures which purpose is to realise others' right to health" (No. IUz-48/2016). So, the aforementioned obligation logically indicates the infeasibility of refusing vaccination, according to the court. Eliminating certain diseases from the entire population is a legitimate goal, and at the same time an obligation of the state. As it is a professional issue, the CC cannot get involved in examining the justification of the mandatory vaccination from a medical point of view; but as far as the legislator prescribes such health protective measures that have been determined by acknowledged medical experts to achieve the most favourable results in preventing the spread of infectious diseases,

individuals cannot call for the protection of their right to physical integrity against the protection of public health. Also, according to the Croatian CC "in the case of vaccination, it is an obligation to provide and accept health services of standardised quality and equal content for all persons … it is not a question of experimental treatment or examination, in such a way that a person is the object of scientific research without his consent or the consent of her parents but about the duty/obligation to vaccinate against certain infectious diseases" (No. U-III-7725/2014). Although the COVID vaccines do not fall within the scope of routine vaccination against diseases well known in med-science, in general, it is probable that deciding in such cases the national constitutional courts, but also the ECHR will accept "the flexible application of the test of necessity in a democratic society with the horizontal test of proportionality as well as the wide field of discretion recognised for the states" (Marochini Zrinski, 2022, p. 34).

Such flexibility, wide margin of discretion and emphasising the public interest and public health above all else generally characterised the examined constitutional court practices, proving that despite the very different crisis management and legal background, the constitutional courts were similarly lenient with the country's "excesses" in the case of derogations from fundamental rights—mainly due to the uncertainty, unpredictability and uniqueness of the situation. But as life goes on, and the more similar health challenges humanity faces, it will soon become clear how this attitude pays off against the preservation of centuries-old traditions of the rule of law and fundamental rights doctrine.

Data availability statement

The original contributions presented in the study are included in the article/supplementary material, further inquiries can be directed to the corresponding author.

Author contributions

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