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The role of public participation and legal certainty in lawmaking in a special legal order – with particular reference to Central European practice

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This study deals with the issue of public participation and legal certainty in the context of legislation in special legal order. The hypothesis of the research is that in times of crises, we cannot fully disengage from the rule of law, as the special legal order does not result in a situation of extra-legalism, as its purpose is to restore normality. The aim of this thesis is to examine how the principles of quality legislation (e.g., the right to be consulted by society, the prior assessment of the impact of legislation, or the requirement for preparation time before the legislation is put into force) that can be defined in the normal legal order apply in special legal order situations. In examining this question, the study draws on literature and case law. After clarifying the basic doctrinal concepts, the study examines the qualitative legislative requirements in the normal legal system, and then takes these as a starting point to examine the differences in special legal order. The conclusion of the study is that public participation in legislation can be restricted in special legal situations (e.g., the right to consult on legislation or the right of assembly for the collective expression of opinions), while legal security requirements such as the requirement for the adequate preparation time or the linking of special legal norms to empowerment cannot be ignored. With regard to the latter, it is particularly important that the legislator does not deviate from the purpose justifying the introduction of the special legal order, as failure to do so will cause legitimacy problems both with regard to the legislation issued and the sustainability and social support for the special legal order introduced. Only by adhering to these principles can special legal order legislation remain a process within the constitutional legal order and not outside it, and only in this way can it effectively serve the quick and efficient return to normal legal order.

KEYWORDS

special legal order, legal certainty, legislation, democratic legitimacy, public participation, expression of opinion, prior impact assessment, requirement for preparation time

1 Introduction

The COVID-19 pandemic in 2019–2020, the Russian-Ukrainian war in 2022, and the resulting energy crisis that hit Europe as a whole have had an impact on all aspects of life, and in many cases are still having an impact today. This is no different in the way states work. Crises also cause and demand changes in the functioning of the state (Hromadskyi and Kos, 2017). In many cases, the impact of crises cannot be resolved within the normal legal

framework. Therefore, countries will introduce special legal orders (e.g., emergency situations) whose constitutional framework will be different from the normal framework.

In my study, I examine how the principle of democratic legitimacy, i.e., the role of society (the people) in the exercise of power, is implemented in the field of legislation in situations of crisis, i.e., in periods of special legal order. As a starting point, I will analyse the concept of society (people) and democratic legitimacy, the role of legal certainty in legislation and its requirements in the normal legal order, as well as the general characteristics of special legal order situations. On this basis, I examine how social participation and legal certainty are differently implemented in legislation in times of crisis. Thus, I will, inter alia, address the impact on legislation of public participation (e.g., public consultation on legislation), public expression (in particular the right of assembly), and legal certainty requirements (e.g., the importance of impact assessment, the time for legislation to enter into force) in specific legal orders. In my research, I give examples from the practice in Central European countries. The research methodology of the study is based primarily on the analysis of literature and (where appropriate and possible) case law.

The hypothesis of my study is that in times of crises, i.e., special legal orders, we cannot fully disengage from the rule of law, because the special legal order does not result in a situation of extra-legalism, as its purpose is to restore normality. This is no different regarding social participation required in legislation.

2 Dogmatic bases

In order to examine the issues identified in the introduction to the study, it is essential to clarify some basic dogmatic concepts. These include the constitutional concept of the people, democratic legitimacy, the social contract and the special legal order.

2.1 The constitutional concept of the people

First of all, it is necessary to examine the concept of society, i.e., the people, since the people can be seen as the bearers of people's sovereignty (Grotenhuis, 2016). In a democratic state, it is an unquestionable principle that the source of power is always the people, i.e., the people who have a public relationship with the state (primarily the citizens). People are the basis of social processes. However, it also follows that it is the responsibility of the individual to choose the society in which he or she lives (Komáromi, 2020). Society is built by people, and people are responsible for what they build. Therefore, shaping democratic power is not only a right but also a duty of man. International documents (e.g., Article 25 of the International Covenant on Civil and Political Rights) and the constitutions of democratic states (see, e.g., Article B of the Hungarian Fundamental Law) are almost unanimous in stating that the source of public power is the people. However, in the context of defining the concept of the people, it is important to stress that sovereign social groups as political units can only be expressed in terms that are substantially different from each other. In line with this, European constitutions also usually refer to the subjects of people's sovereignty by different names (e.g., *people*, *nation*). According to János Zlinszky, the people is an ethnic concept, which is to be understood primarily as a group of persons bound together by a common mother tongue and a common culture, who, although not racially united, are nevertheless consciously part of the people, regardless of nationality, political affiliation or social status (Zlinszky, 2006). On this basis, it is not possible to exclude from the concept of people, for example, neither the educated, nor the rich, nor those living in another country. By contrast, a nation is a political concept, whereby the citizens of a state belong to a sovereign nation (Grotenhuis, 2016). In Pope John XXIII's encyclical "*Pacem in terris*," the nation is considered political, and the term people is considered an ethnic category. According to this: „ A special instance of this clash of interests is furnished by that political trend (which since the nineteenth century has become widespread throughout the world and has gained in strength) as a result of which men of similar ethnic background are anxious for political autonomy and unification into a single nation. For many reasons this cannot always be effected, and consequently minority peoples are often obliged to live within the territories of a nation of a different ethnic origin. This situation gives rise to serious problems" [Pacem in Terris, 1963, point 94]. In the context of the constitutional definition of the people, it should be pointed out that it can be understood as a community of those living under the sovereignty (i.e., the population) and as a community of citizens (Yack, 2001). In my view, the concept of belonging to a people can be conceptualized on a scale, with a number of options between the two endpoints (i.e., one is *definitely being a member of the people,* and the other is *definitely not*). And to make a clear distinction, we need to define a reference point beyond which someone is clearly considered to belong to the people, and below which he or she is not. However, it is not easy to define this point, because however we define it, there are always critical voices: if we define too strong a bond, we exclude people who are undoubtedly members of the people (such would be the case, for example, if only citizens who pay personal income type taxes were considered members of the people), and if we require too weak a link, we include those who are clearly not members of it (e.g., if we consider everyone who temporarily stays in the country for at least a few months as part of the definition of the people). This is why the most commonly used benchmark is the requirement to have a citizenship. A further benchmark for determining membership of the electorate may be to determine membership of a community of voters (Preuß, 2019), but this is not an optimal choice, since it can hardly be said that a person who is not entitled to vote (e.g., a child) cannot be a member of the political community and thus the state should not take his or her interests into account. Finally, the concept of a people can also be defined as the sum of all those belonging to a cultural nation (Paruch, 2018), but this should be treated with reservation from this point of view, because according to this view, persons who are citizens of a given country but do not belong to a nationality that constitutes the majority of that country would not be members of the concept of the people. The exclusive use of the concept of cultural or ethnic nation in a democratic constitution to describe the political community would also be incompatible with the principle of moral equality, as it would exclude or disadvantage citizens who identify themselves as belonging to different minorities or are classified as such by others (Majtényi, 2014). It should be added, of course, that the meaning of the concept of the people cannot be defined uniformly in all cases relating to the exercise of people's sovereignty. However,

in the case of parliamentary elections (the most important exercise of people's sovereignty), there is a general tendency for some European countries to require citizenship as a condition for active voting (Halász, 2018). This does not, of course, imply that the concept of people cannot be defined in other terms (indeed, in my view, states have a great deal of freedom in determining who they consider to be the bearers of people's sovereignty), but it does mean that, on the basis of European trends, the definition of people (i.e., the subjects of people's representation) can most often be linked to the existence of citizenship of the country in question.

2.2 Basic questions of democratic legitimacy

We can also look at the concept of democratic legitimacy as a further concept to be clarified. On the basis of the concept of democratic legitimacy (consistent with the above), its essence can be defined as follows: the unbroken chain of people's transfer of power effectively empowers the holder of power to exercise it (Kriesi, 2013). It follows logically from the principle of the democratic rule of law that the political will of the people must be formed: in modern constitutional democracies governed by the rule of law, the acts of public authority in the exercise of public power must always be traceable to the will of the people, and must ensure that the people can participate equally in the formation of the will of the public authorities (Petrétei, 2017). This so-called formation of political will also means forming the will of the people and the will of the state. The "*will of the people*" can be derived from the will of the individual through the legal process in accordance with the constitutional order. This process of will formation presupposes that all individuals can participate freely and equally so that the will formation produces the homogeneous will of the majority (Dieleman, 2015). The will of the people therefore does not exist separate from and independent of individual wills, but the will of the people is not just the sum of all individual wills. This idea is linked to the concept of the common good in the social teaching of the Catholic Church. In the encyclical Centesimus Annus (point 47) of Pope John Paul II, issued on the anniversary of the encyclical Rerum Novarum, he says: „[…] the common good [….] is not simply the sum total of particular interests; rather it involves an assessment and integration of those interests on the basis of a balanced hierarchy of values; ultimately, it demands a correct understanding of the dignity and the rights of the person." Therefore, in a democracy, the will of the people is not a given, but a political process in which all members of a constitutionally defined people can participate and influence through their participation. In a democracy, the will of the people is therefore formed in a free and open process of political will formation, and in constitutional terms it is formed on the basis of the freedom of democratic participation of individuals, and its content is outlined in this process (Petrétei, 2017). In constitutional terms, individuals belonging to the people can participate in the formation of political will by exercising their fundamental political rights and freedoms, which include in particular the right to vote and to participate in referendums (Komáromi, 2023), but it can also include involvement in the drafting of legislation. But the people are not just the source of power, they also participate in its exercise, so the principle of people's participation is one of the main pillars of the democratic exercise of power (Beckman, 2009).

2.3 Briefly about the concept of social contract

Among the dogmatic foundations, it is also necessary to say a few words on the question of the social contract in relation to the hypothesis of the study. As Jean-Jacques Rousseau had already said, the social contract gives people the right to participate in the making of laws on an equal basis with others (Bluhm, 1984). It follows from this that political sovereignty can only be exercised by the people as a whole, so neither representation nor power-sharing is acceptable (Rousseau, 1947). Point VI of the Declaration of the Rights of Man and of the Citizen, adopted at the time of the French Revolution, stated that every citizen had the right to participate in the making of the law, either in person or through representatives. In a democratic state, therefore, the participation of the people, i.e., the members of society, in the legislative process (and, more broadly, in the functioning of the state) is indispensable, and this principle must be applied not only in "peacetime" but also in times of crisis (i.e., special legal orders).

2.4 Briefly on the concept of a special legal order

The main question of the study is how the requirements of public participation and legal certainty in lawmaking change in times of crises, i.e., in special legal order. However, in order to examine this, it is also necessary to briefly discuss the concept of special legal order.

A constitutional state may be confronted with a situation that threatens the state or the constitutional order, which cannot be averted or cannot be averted quickly enough within the normal legal order. Therefore, democratic states respond to such situations at the constitutional level by creating special rules of law that provide specific, but not extra-legal, rules for dealing with or averting the threatening situation. The purpose of the special legal order is, therefore, to return to the normal constitutional situation since exceptionalism conceptually implies the expectation of temporal limitation (Csink, 2017). In relation to special legal orders, a number of constitutional requirements can be laid down (Erdős and Tanács-Mandák, 2023; Agamben, 1998), which I will not go into in detail here, at the same time, it is important to state that any measure that allows for a solution that deviates from the general rules (for example, the regulation or restriction of fundamental rights by means of a decree, or the amendment of legislation by means of a lower level of legislation that does not take into account the provisions of the hierarchy of legal sources, or the "flexible" treatment of the *vacatio legis* requirement) must be justified, must fit into the constitutional order and must have the effect of ensuring a return to the "normal" constitutional state.

3 Requirements for quality legislation—under normal legal order

In order to examine the role of public participation and legal certainty in lawmaking in times of crises (i.e., special legal orders), it is important to briefly clarify what requirements we can formulate in general terms on the issue of quality legislation.

Legal certainty is inseparable from the rule of law (Lavoie and Newman, 2015), because the rule of law alone is not enough to achieve

the public weal. People must live by laws that are both the bearers and the implementers of values recognised by the community. According to Herbert Küpper, the rule of law can be defined—at the most basic level—as the ultimate and highest standard for all socially significant aspects of life in the rule of law (Küpper, 2011). And according to András Zs. Varga that the rule of law is nothing else but the primacy of legal norms in relation with the exercise of power; even more concisely: it is exercise of power bound to (preliminary drafted) law (Varga, 2019). In an early decision, the Hungarian Constitutional Court—which body, according to Csaba Varga adopted a formalistic and neutral approach to the rule of law that focused on legal certainty (Varga, 2021)—stated, for example, that procedural guarantees derive from the principles of the rule of law and legal certainty, which are of fundamental importance for the predictability of the operation of certain legal institutions. Only by following the rules of formalised procedure can a valid law be created, and only by following procedural norms can the administration of justice function constitutionally (Decision no. 11/1992 (III. 29.), 1992). Miklós Kocsis takes a similar view, considering as a general element of legal certainty the regularity of social relations, the clarity of legal regulation, the effective applicability of legislation, the avoidance of unjustified changes, the uniformity and predictability of the application of the law, and the enforceability of decisions by the law enforcement authorities (Kocsis, 2005). The rule of law must therefore apply to all decisions, actions, and omissions of the state (Küpper, 2011). Therefore, only such rules can meet the requirement of clarity arising from the principle of legal certainty that define the purpose, the framework, the criteria and the rules of the legal instrument. However, legal certainty does not mean that the legal system is unchangeable, but that the norms change within a predictable framework. This was confirmed by the Hungarian Constitutional Court when it ruled that the requirement of legal certainty cannot be absolutised in an interpretation that would effectively elevate the demand for unconditional (absolute) immutability of the legal system, without exception, to a constitutional requirement. The requirement of legal certainty therefore implies the requirement of relative stability and predictability (Decision no. 16/1996. (V. 3.), 1996).

Based on this, the requirement for quality legislation is an approach that promotes the achievement of short-, medium-, and long-term social and economic objectives through the public preparation, adoption, and support for the implementation of effective and enforceable legislation in a planned way (Drinóczi, 2011). According to Tímea Drinóczi, quality legislation can be understood in two senses: as a procedure on the one hand, and as the quality of the legislation on the other (Drinóczi, 2011). It is important to emphasise that in order to be able to provide a tangible opinion on the quality of legislation in a way that can be assessed by a wider range of legal entities, it is essential to go beyond the technical approach of norm preparation. People are less interested in how excellent the legislative arsenal of a given legislator is, because what matters to society is the actual consequences of the legislation (Osnabrügge and Vannoni, 2024). Ferenc Petrik formulates three legal policy theorems for legislation: the justification of regulation, the stability of legislation, and the democratisation of lawmaking (Petrik, 2008). However, the justification for the legislation is not determined by the purpose alone. In order to avoid over-regulation or duplication of regulation, it is necessary to define the purpose of the regulation with sufficient precision before the preparatory work on codification begins. It is important that this goal is defined in a way that can be achieved through legislation. In practice, the legislator often makes the mistake of defining the regulatory objective without first considering its feasibility, and simply creates the law without considering its effects. But the purposes should not be confused with the means, achieving a given objective may not require legislation (Mousmouti, 2018). This decision-making is helped by a proper ex-ante (i.e., before the legislation is adopted) impact assessment. But why is such an impact assessment important? Among other things, because impact assessment achieves the objective of ensuring that the legislator's decision-making position is well-founded. The Organisation for Economic Co-operation and Development defines impact assessment as: „impact assessment is an information-based analytical approach to assess probable costs, consequences, and side effects of planned policy instruments (laws, regulations, etc.). It can also be used to evaluate the real costs and consequences of policy instruments after they have been implemented." The real meaning of law lies in the consequences it produces, which is why it is important for the legislator to gather as much information as possible when preparing legislation. It is also important to emphasise that new legislation—in accordance with the criteria of quality legislation—can only be created if it is justified by a new life situation or if the previous legislation no longer meets the requirements of social development.

The issue of quality legislation cannot be separated from other aspects classically linked to the principle of legal certainty. One such issue is the question of substantive validity, i.e., how the law fits into the hierarchy of legal sources (Pino, 1999). It is also important to highlight the requirement for preparation time (Article 10: Date of Coming into Force, 1935), which is also an essential element of the requirement of legal certainty. The preparation period before a law enters into force is essential to allow members of society (i.e., the people) to adapt to the changing regulatory environment. However, the length of this period cannot be objectively determined. It can only ever be specified on a case-by-case basis. It is usually up to the constitutional courts to decide on this.

It can be concluded from the above that the legislative process can only be conducted in accordance with the principle of legal certainty if the procedural guarantees that are intended to ensure this are respected. In Giovanni Sartori's view," mass-produced" laws are norms in name only, not worthy of the name in content (Vincze, 2001).

4 Result and discussion

Under the *social contract*, as stated above, the state has the duty to take into account the will and opinion of society, i.e., of the people, when creating binding rules of conduct (i.e., norms), and, on that basis, must make laws which, while meeting the constitutional requirements for legislation, benefit society. However, in the course of various crises (i.e., special legal order situations)—as I have already mentioned in subsection 2.4 –, these requirements must be deviated from in many cases in order to restore the "normal" situation, i.e., the disturbed normal constitutional situation, as soon as possible. In my view, the special legal order legislation raises two important issues with regard to the requirements of public participation and legal certainty: firstly, the extent to which the opportunities for members of society to have a say and form their opinions are reduced, or may be reduced, under a special legal order, secondly, whether it is possible

to deviate from the quality requirements expected in the legislative process (e.g., prior impact assessments, sufficient preparation time) and if so, to what extent.

4.1 Public participation in lawmaking in times of crisis

The members of society, i.e., the people in the constitutional sense, in a normal legal order, can have a say in the course of legislation on the basis of a *social contract* (Williams, 2007). This can take many levels and means, from individual opportunities to express their views (e.g., the obligation to consult on legislation) to community communication (including opinions expressed through the exercise of the right of assembly and ultimately even binding decisions in referendums). However, these options are not or not fully applicable in times of crisis situations with a special legal order.

4.1.1 The possibility of social consultation on legislation

When legislating, it is of paramount importance that the norm in question has a high level of acceptance among members of society (Canen et al., 2023). The obligation to comply with the law, which derives from the principle of the social contract, will only be effectively implemented if the recipients of the norm feel that the content of the binding norm is "their own." This acceptance can be significantly increased by the institution of social consultation on legislation (Piróg, 2019). The aim of social consultation is therefore to ensure that as many opinions as possible are taken into account in order to produce sound legislation (Reçi and Kuçi, 2023). There are two forms of public consultation (according to the Hungarian legislation): the consultation provided through the contact details on the website (general consultation), and the direct consultation of persons and organisations involved by the minister (direct consultation). From the point of view of the members of society, the first group of cases is undoubtedly more relevant. Ensuring the possibility of social consultation is also a priority for the European Union. The European Union sees this as a quasi-rule of law requirement. This is also confirmed by the fact that in autumn 2022, the European Commission demanded that the Hungarian Government strengthen the process of social consultation on legislation and only allow its omission in narrow exceptions.

However, in a crisis situation (i.e., in a special legal order), the requirement for social consultation of legislation cannot (fully) be met. Because, as I will discuss in section 4.2 below, it is important to react quickly in a special legal order. Because the prevention of a circumstance that gives rise to the introduction of a special legal order (be it a pandemic, an energy crisis or a war), and the prevention of its consequences, justifies an immediate reaction by the legislator (in most of these cases, the government), with the rapid enactment of legislation. This, however, does not allow for social consultation of the special legal order's norms. In a crisis situation, therefore, the possibility of social consultation of legislation cannot be provided, or can only be provided in very justified and narrow cases.

4.1.2 The collective expression of opinions by members of society

It is important to emphasise that the members of the constitutional people cannot only have an individual say in the legislative process (by giving their opinion on a specific piece of legislation).,there are also forms of collective participation. The institution of the referendum—which I do not intend to go into in detail in this study, but there is a wealth of literature on the topic (see, e.g., Komáromi, 2023; Kużelewska, 2018; Pomarański, 2018)—is the most powerful instrument since it is a direct exercise of power by the people, i.e., in a referendum the members of the constitutional people do not formulate an opinion on a law, but "create" it themselves. It is worth noting, however, that there is another form of referendum in general, where the people do not take binding decisions, but merely express their opinion (Cserny et al., 2013). However, this form of referendum is not allowed in some countries, such as Hungary.

However, the "real" means of collective expression in the legislative process is the exercise of the right of assembly (Hajas, 2014). In assemblies, the people are able to express their views on the functioning of the state (and ultimately on legislation) collectively and much more quickly, which, with sufficient "force" (i.e., a significant number of people in one place at one time), can also be sufficient pressure—directly or through a petition (Bódi, 2018)—on the legislator. An example of this in Hungary is the so-called "internet tax" protest in 2014, which was a response to the government's legislative plan to make users pay a tax on the use of internet services. After the legislative plan came to light, tens of thousands of people (some say hundreds of thousands) took to the streets to protest against the proposed legislation, which eventually forced the government (or legislature) to back down. This example also illustrates perfectly that the exercise of the right of assembly has or can have a significant impact on legislation. However, in the context of a special legal order, an additional aspect arises: the presence of members of society in the same place at the same time (for the purpose of forming a common opinion) may entail security risks under the special legal order (e.g., an escalation of an epidemic situation). This is why, for example, during the coronavirus pandemic, assembly was restricted or even banned in many countries (Kurunczi, 2023). These bans were then examined by the constitutional courts of these countries. Of the countries that have introduced a total ban on assembly, Albania (Decision no. 11/2021., 2021; Hajdini and Skara, 2022) and Hungary (Decision no. 23/2021. (VII. 13.), 2021) were the only ones where the Constitutional Court declared that the complete ban was justifiable along the lines of the necessity-proportionality test. Several authors (Chronowski, 2022; Orbán, 2023) have criticised this Hungarian decision, particularly in relation to the proportionality test. It is particularly interesting to examine this in the light of the fact that the Slovenian Constitutional Court (Kurunczi, 2023) justified the unconstitutionality of the rule on the grounds of disproportionality. At the same time, the position of the Hungarian Constitutional Court—shared by the Constitutional Courts of Kosovo (Kurunczi, 2023) and Slovenia –, stating that it is not the task of the Constitutional Courts to judge public health rules in a pandemic, should not be overlooked. In this context, it is questionable, for example, whether a constitutional court may, when examining the constitutionality of a restriction of a fundamental right, declare unconstitutional a means of defence against an epidemic—the right of assembly, which is a fundamental right that can only be exercised by a number of people (case of Patrick Coleman v. Australia, 2006), and in the case of a rapidly spreading epidemic, necessarily carries dangers—and thus remove one of the means of defence of a politically responsible government. If there is a subsequent increase in the number of cases

due to infection (which then places a heavy burden on the health care system), the political responsibility for this must lie with the government, while the decision to increase the number of cases was not taken by the government. Of course, the answer to this question from a constitutional point of view is that it can and must declare this means of defence unconsitutional (see for example the case of Kosovo or Slovenia), but in the meantime, it is also possible to argue for the position taken by the Hungarian Constitutional Court. On the basis of all this, it can be concluded that under a special legal order, the most important instrument of society for the formation of collective opinion, which also influences legislation, i.e., the exercise of the right of assembly, is not as strong and effective as under a normal legal order.

In addition to the above, it is worth noting another common opinion-forming "opportunity', which was a very specific phenomenon in Hungary during the coronavirus pandemic. In the process of lawmaking, even under normal legal order, it is not unusual for a legislator to assess the "expectations" of society before adopting a law, i.e., to create a law that reflects the will of the people, their need for regulation (e.g., a tax has been reduced because the people or even opposition politicians repeatedly raise the need for this). This can be seen as a kind of populism, but it is (unfortunately or not) part of politics. In Hungary, during the special legal order introduced in spring 2020, there were numerous examples of government legislation following the expectations of society (i.e., the public mood). The best examples of this are the closure of schools and kindergartens in spring 2020 and the switch to online education. There was no intention on the part of the government to close the schools and kindergartens in the first place, and this was strongly communicated. In the meantime, however, there had been a growing demand from the people (especially on social media) to close these institutions. Presumably as a result of this, on the same day that government communications said in the morning that the schools and kindergartens would remain open, the Prime Minister announced in the evening that they would be closed and that they would switch to online education. In addition to this example, there are many other similar situations, such as the introduction of curfews (which were also preceded by strong social expectations and demands), or the removal of them (which often would not even be justified by the epidemic situation). These examples also show that the populist character is also strongly present in legislation, which is even more so in a special legal order that arouses or reinforces a sense of fear among the people. However, this undoubtedly works against thoughtful and responsible legislation.

4.2 Changes to the requirement of legal certainty in a special legal order

In section 3 of this study, I have already discussed in detail the normal legal order's requirements for quality legislation. These aspects (fitting in the hierarchy of legal sources, adequate preparation time, and prior impact assessment) can be identified as key legal certainty requirements. However, in a crisis situation, the devaluing effect of the requirement to react quickly also comes into play in this area. In the following, I will therefore consider the legislative aspects that cannot be fully or at all applied in a special legal order. But before I get to that, it is important to note one important viewpoint. A special legal order is *per definitionem* linked to the reason for its introduction. In this context, Szabolcs Till argues that the periods of special legal order that deviate from the normal legal order—even with all these possibilities of deviation—can only be interpreted within the concept of constitutionality: there are constitutional limits and institutions whose task is to enforce the conditions for the exercise of power so that the abusive exercise of rights does not result in the arbitrary exercise of state power (Till, 2019). It is therefore of paramount importance in special legislation that the legislation adopted in this area is consistent with the reason for the introduction of the crisis situation (Erdős and Tanács-Mandák, 2023). Failure to do so creates problems of legitimacy, both in terms of the sustainability and social support for the legislation enacted and the special legal regime introduced. This problem of legitimacy can lead to a breach of the principle of legal certainty (A Facade of Legality: COVID-19 and the Exploitation of Emergency Powers in Hungary, 2022).

The first point I would like to address is the issue of ex-ante impact assessment. As I have already mentioned, the purpose of the impact assessment is to provide a preliminary assessment of the expected (economic and social) effects of the legislation. This is of particular importance, as it is the basis for deciding whether or not this legislation is really necessary, and is an important element of quality legislation. However, in a crisis situation (as in the case of public consultation on legislation), it is not expected that time will be allowed for a prior impact assessment to be carried out. The resolution of a situation giving rise to a special legal order, and the prevention of possible imminent damage or threats requires an immediate response, which is not a preliminary impact assessment, but rather a preliminary assessment or anticipation. However, as legislation is often very fast in such a situation, it is also possible to change the law more quickly, which means that the absence of an ex-ante impact assessment will not cause a significant legal certainty problem.

The question of the entry into force of legislation under the special legal order is also an important issue. I have already mentioned in point 2.4 of the study that flexibility in dealing with the *vacatio legis* requirement in a special legal order is at least as important as the existence of a reasonable length of preparation period in a normal legal order (which will, of course, vary from case to case). In a crisis situation, there are often situations that can justify an entry into force time of up to half an hour (such was the lifting of the petrol price freeze in Hungary in December 2023, which came into force half an hour after its promulgation, in order to avoid supply problems; a similar situation was where countries such as Slovakia or Poland have ordered border closures with short deadlines to prevent the spread of the coronavirus). In general, however, it cannot be said that a special legal order is equivalent to the elimination of the *vacatio legis* principle. If it is compatible with the purpose and the principle of effectiveness of the legislation in a special legal order, then, of course even at this time, there must be sufficient time for the legislation to enter into force.

Finally, it should also be mentioned that the requirement of fitting into the hierarchy of legal sources cannot be interpreted in the case of a special legal order. A specific feature of special legal order legislation is that, contrary to the principle of the hierarchy of legal

sources, it is possible to derogate from act at the level of decree. This is possible because the derogation from the act is temporary (Csink, 2017). The derogation will also be allowed because it will be the quickest and most effective way to respond to the crisis. However, it is important that the derogation—as I have already indicated above—is not arbitrary and unjustified. In any case, it will be up to the constitutional courts to examine this (for more on the powers of constitutional courts, including the Hungarian Constitutional Court, see more: Erdős and Tanács-Mandák, 2019). However, in addition to this, there is another viewpoint in the legal literature, according to which these so-called "force of act" orders/regulations are inherently part of the legislative hierarchy, being on the same level as the act/statute of parliament (Cserny et al., 2018).

5 Conclusion

The exercise of power by the sovereign people (i.e., society) in a democratic state is not only possible through elections every 4 or 5 years. It is important that members of society also have a say in the exercise of power between two elections (Kilberg, 2014). The strongest way to do this is, of course, through a referendum. However, a successful referendum is extremely lengthy and complicated to conduct, and even then, it may not be successful. Therefore, between two elections, the members of the people can effectively influence the exercise of power in two ways: by expressing their opinions individually or collectively. However, the scope of these possibilities will be narrower in a special legal order (i.e., in a crisis situation). In many cases, there are constitutionally justified reasons for the restrictions (primarily on the basis of the need for the restriction/measure), however, we must always strive to ensure that this is at most a restriction and never a total disenfranchisement because a special legal order is not a situation outside the law, it is never a "legal" dictatorship.[1] Since, therefore, in a crisis situation, the influence of the members of society on the functioning of the state will be more limited, greater attention must be paid to the requirements of legal certainty in legislation (legal safeguards are therefore needed, such as ensuring that deviations from the hierarchy of norms are only temporary and in no way arbitrary). At the same time, however, the requirements of quality legislation cannot be fully taken into account in a special legal order. However, the justification for certain derogations (e.g., the absence of an impact assessment or public consultation, or the extremely short period of entry into force) can be constitutionally justified. Concurrently, it is very important that the state respects the basic rule of law requirements (e.g., notgoing beyond the purpose of introducing the special legal order, i.e., not making rules not related to the crisis situation by abusing the special legal order mandate), because only in this way can the legislation in special legal order remain a process within the constitutional legal order and not outside it, and only in this way can it effectively serve the quick and efficient return to normal legal order. However, all this requires appropriate legal guarantees (at the level of the act or even in the constitution of the country concerned), which can be enforced primarily by constitutional courts. Such a legal guarantee could be, for example, the possibility that if the legislator, during a special legal order, creates a norm that exceeds the mandate on which the special legal order is based (i.e., makes a rule inconsistent with the mandate), the constitutional courts may abolition this norm without any further examination, based on this circumstance alone. It would also increase the transparency of norms adopted under a special legal order if the procedure for constitutional review of these norms were subject to a short time limit. This would avoid the constitutionality of a norm being decided by the constitutional courts only after the norm in force at the time of the special legal order has ceased to be in force (such a situation has been repeatedly reversed in Hungarian practice, and in such cases the Hungarian Constitutional Court has decided to terminate the proceedings instead of examining the merits, which, however, does not serve the 'development' of legislation under the special legal order). In my view, if these guarantees were implemented, legislation under the special legal order would also be more transparent and compatible with the rule of law.

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The author(s) declare that no Gen AI was used in the creation of this manuscript.

1 Because the special rules of law can easily be misused. For example, deportations in Hungary during the communist dictatorship of the 1950s were carried out with reference to the special legal rules of Article II of the 1939 National Defence Act. (Horváth, 2014).

Publisher's note

References

A Facade of Legality: COVID-19 and the Exploitation of Emergency Powers in Hungary (2022). Available online at: https://www.icj.org/wp-content/uploads/2022/02/Hungary-A-Facade-of-Legality-legal-briefing-2022-ENG.pdf (Accessed March 24, 2025).

Agamben, G. (1998). Homo Sacer: Sovereign power and bare life. Stanford-California: Stanford University Press, 170–171.

Article 10: Date of Coming into Force (1935). Article 10. Date of Coming into Force. *Am. J. Int. Law* 29, 787–799. doi: 10.2307/2213677

Beckman, L. (2009). The Frontiers of democracy – The right to vote and its limits. Chippenham and Eastbourne: CPI Antony Rowe, 36.

Bluhm, W. T. (1984). Freedom in 'the social contract': Rousseau's 'legitimate chains. *Polity* 16, 359–383. doi: 10.2307/3234555

Bódi, S. (2018)." Petíciós jog" in Internetes Jogtudományi Enciklopédia, ed. Jakab, A. and Fekete B. Available online at: http://ijoten.hu/szocikk/peticios-jog (Accessed March 24, 2025).

Canen, N., Jackson, M. O., and Trebbi, F. (2023). Social interactions and legislative activity. *J. Eur. Econ. Assoc.* 21, 1072–1118. doi: 10.1093/jeea/jvac051

Chronowski, N. (2022). "Covid-járvány és demokrácia: az információszabadság és a gyülekezési jog esete Magyarországon" in Demokrácia-dilemmák. Alkotmányjogi elemzések a demokráciaelv értelmezéséről az Európai Unióban és Magyarországon. eds. N. Chronowski, B. Szentgáli-Tóth and E. Szilágyi (Budapest: ELTE Eötvös), 347.

Cserny, Á., Orbán, B. A., and Téglási, A. (2018). "Az integrált jogforrási rendszer" in Alkotmányjog. ed. I. Halász (Budapest: Dialóg Campus), 159–214.

Cserny, Á., Téglási, A., and Halász, I. (2013). "Népszuverenitás és népképviselet" in Alkotmányjog. ed. Á. Cserny (Budapest: Nemzeti Közszolgálati Egyetem), 119–142.

Csink, L. (2017). Mikor legyen a jogrend különleges? *Iustum Aequum Salutare* 4, 287–295.

Decision no. 11/1992 (III. 29.) (1992). AB of Hungarian Constitutional Court.

Decision no. 16/1996. (V. 3.) (1996). AB of Hungarian Constitutional Court.

Decision no. 23/2021. (VII. 13.) (2021). AB of the Hungarian Constitutional Court.

Decision No. 11/2021 (2021). Constitutional Court of Republic of Albania.

Dieleman, S. (2015). Epistemic justice and democratic legitimacy. *Hypatia* 4:796. doi: 10.1111/hypa.12173

Drinóczi, T. (2011) in "Adminisztratív terhek csökkentése – EU – Magyarország" in Alkotmány és jogalkotás az EU tagállamaként. ed. N. Chronowski (Budapest: HVG Orac), 265.

Erdős, C., and Tanács-Mandák, F. (2019). "Use of foreign law in the practice of the Hungarian constitutional court – with special regard to the period between 2012 and 2016" in Judicial cosmopolitanism – The use of foreign law in contemporary constitutional system. ed. G. F. Ferrari (Boston: Brill/Nijhoff), 620–621.

Erdős, C., and Tanács-Mandák, F. (2023). The Hungarian constitutional Court's practice on restrictions of fundamental rights during the special legal order (2020–2023). *Eur. Politics Soc.* 25, 556–573. doi: 10.1080/23745118.2023.2244391

Grotenhuis, R. (2016). "Nation-building: sovereignty and citizenship" in Nation-building as necessary effort in fragile states. ed. R. Grotenhuis (Amsterdam: University Press), 109–124.

Hajas, B. (2014). You could have put it more politely': remarks on the constitutional regulations of freedom of assembly. *Hungarian Yearb. Int. Law Europ. Law* 2, 559–572. doi: 10.5553/HYIEL/266627012014002001033

Hajdini, B., and Skara, G. (2022). "The right to freedom of peaceful assembly during the COVID-19 pandemic in the light of ECHR standards" in The recovery of the EU and strengthening the ability to respond to new challenges – Legal and economic aspects. eds. D. Duic and T. Petrasevic (Osijek: International Scientific Conference).

Halász, I. (2018). "Választójog" in Emberi Jogi Enciklopédia. ed. V. Lamm (Budapest: HVG Orac), 175.

Horváth, A. (2014). "A szovjet típusú diktatúra (1949-1990)" in Magyar állam- és jogtörténet. ed. A. Horváth (Budapest: Nemzeti Közszolgálati Egyetem, Közigazgatás-tudományi Kar), 327–350.

Hromadskyi, A., and Kos, A. (2017). Crisis management in case of functioning of public administration units. Globalization, the State and the Individual 1, 39–47.

Kilberg, A. G. I. (2014). We the people: the original meaning of popular sovereignty. *Va. Law Rev.* 5, 1061–1109.

Kocsis, M. (2005). "Jogállam és jogbiztonság" in Jogállam és jogbiztonság. ed. M. Weller (Budapest: Emberi Jogok Központja Közalapítvány), 50.

Komáromi, L. (2020). "Demokrácia" in A magyar közjog alapintézményei, eds. L. Csink, B. Schanda and Zs Varga. A. (Budapest: Pázmány Press), 311–313.

Komáromi, L. (2023). "Népszavazás és népi kezdeményezés" in Internetes Jogtudományi Enciklopédia. eds. A. Jakab, M. Könczöl, A. Menyhárd and G. Sulyok. Available online at: https://ijoten.hu/szocikk/nepszavazas-es-nepi-kezdemenyezes (accessed March 24, 2025).

Kriesi, H. (2013). Democratic legitimacy: is there a legitimacy crisis in contemporary politics? *Politische Vierteljahresschrift* 54, 609–638. doi: 10.5771/0032-3470-2013-4-609

Küpper, H. (2011). A jogállam követelményei az Európai Unióban és Magyarország Alaptörvénye. *Jura* 2:97.

Kurunczi, G. (2023). Restrictions on the right to peaceful assembly during the COVID-19 pandemic, in particular with regard to the imposition of a general ban on assembly. Alkotmánybírósági Szemle special issue, 12–19.

Kużelewska, E. (2018). "Direct democracy in Czechia" in Handbook of direct democracy in central and Eastern Europe after 1989. ed. M. Marczewska-Rytko, 85–95. doi: 10.3224/84742122

Lavoie, M., and Newman, D. (2015). "Resource development, aboriginal rights, and the rule of law" in Mining and aboriginal rights in Yukon: How certainty affects investor confidence. eds. M. Lavoie and D. Newman (Vancouver: Fraser Institute), 16–18.

Majtényi, B. (2014). Alaptörvény a nemzet akaratából. *Állam- és jogtudomány* 1:80.

Mousmouti, M. (2018). Making legislative effectiveness an operational concept: unfolding the effectiveness test as a conceptual tool for lawmaking. *Europ. J. Risk Regul.* 3, 445–464. doi: 10.1017/err.2018.53

Orbán, E. (2023). Gyülekezési szabadság a pandémia idején. JTI Blog. Available online at: https://jog.tk.hu/blog/2023/03/gyulekezesi-szabadsag-a-pandemia-idejen (Accessed March 24, 2025).

Osnabrügge, M., and Vannoni, M. (2024). Quality of legislation and compliance: a natural language processing approach. *Polit. Sci. Res. Methods* 1–9, 1–9. doi: 10.1017/psrm.2024.21

Pacem in Terris (1963). Available online at: https://www.vatican.va/content/john-xxiii/en/encyclicals/documents/hf_j-xxiii_enc_11041963_pacem.html (Accessed March 24, 2025).

Paruch, W. (2018). Between political nation and ethnic-cultural nation: nations in Central-Europe in the 20th century. *Politeja* 57, 107–124. doi: 10.12797/Politeja.15.2018.57.07

Patrick Coleman v. Australia (2006). Communication No. 1157/2003, U.N. Doc. CCPR/C/87/D/1157/2003

Petrétei, J. (2017). "A politikai akaratképzésről" in A szabadságszerető embernek Liber Amicorum István Kukorelli. eds. N. Chronowski, Z. Pozsár-Szentmiklósy, P. Smuk and Z. Szabó, vol. *67–69* (Budapest: Gondolat), 73–74.

Petrik, F. (2008). "A jogalkotás elvi kérdései" in A törvényalkotó dilemmái. ed. F. Petrik, vol. *401* (Budapest: HVG Orac).

Pino, G. (1999). The place of legal positivism in contemporary constitutional states. *Law Philos.* 5, 513–536.

Piróg, T. (2019). Shortage of local civil dialogue – an institutional perspective. *Polish Soc. Rev.* 205, 19–32. doi: 10.26412/psr205.02

Pomarański, M. (2018). "Direct democracy in Hungary" in Handbook of direct democracy in central and Eastern Europe after 1989. ed. M. Marczewska-Rytko. Barbara: Budrich Publishers.

Preuß, U. K. (2019). Challenges to the idea of a constitutional polity. *Polish Soc. Rev.* 208:419. doi: 10.26412/psr208.02

Reçi, M., and Kuçi, B. (2023) "Implementation of public consultations" in A Decade of Consultation Law in Albania – Call for Reform, ed. Reçi, M., and Kuçi, B. Available online at: https://idmalbania.org/wp-content/uploads/dlm_uploads/2023/09/Eng-Consultation-Law-Study.pdf (Accessed March 24, 2025).

Rousseau, J.-J. (1947). Társadalmi szerződés. Budapest: Phönix-Oravetz.

Till, S. (2019). "Különleges jogrend" in Internetes Jogtudományi Enciklopédia. eds. A. Jakab and B. Fekete.

Varga, A. Z. (2019). From ideal to idol? The concept of the rule of law. Budapest: Dialóg Campus, 9–39.

Varga, C. (2021). Rule of law. Mádl Ferenc Institut: Contesting and Contested. Budapest, 107–108.

Vincze, A. (2001). Jogállamiság Magyarországon – különös tekintettel a jogbiztonságra. *Jogi Tanulmányok* 1:277.

Williams, D. L. (2007). Ideas and actuality in the social contract: Kant and Rousseau. *Hist. Polit. Thought* 3, 469–495.

Yack, B. (2001). Popular sovereignty and nationalism. *Political Theory* 4, 517–536. doi: 10.1177/0090591701029004003

Zlinszky, J. (2006) in "Tudjátok-e, mi a haza?" in Formatori Iuris Publici – Ünnepi kötet Kilényi Géza professzor hetvenedik születésnapjára. eds. B. Hajas and B. Schanda (Budapest: Szent István Társulat), 599.