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STATE OF EMERGENCY AND HUMAN RIGHTS – THE SITUATION OF HUNGARY

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Summary. In the first days of 2020, the nations of Europe could hardly imagine that their lives were going to change so drastically in a couple of months. SARS – Covid 19, aka coronavirus resulted in a great change in all societies on the globe. Most countries introduced a state of emergency and made restrictions on many aspects of people’s lives. The present paper intends to give an overview of the measures that the Hungarian government has taken so far. For this purpose, it first analyses the legal background of state of emergency that would help understand the present situation. Secondly, it describes the measures taken, and finally it evaluates how the measures affect human rights, especially free movement, freedom of enterprise and free speech.

Keywords: state of emergency, human rights, Hungary, COVID-19.

Stan wyjątkowy a prawa człowieka – sytuacja na Węgrzech – W pierwszych dniach 2020 roku obywatele Europy nie mogli przypuszczać, że ich życie zmieni się aż tak drastycznie w ciągu kilku miesięcy. SARS-Covid 19, znany również jako koronawirus spowodował ogromne zmiany we wszystkich społeczeństwach na całym świecie. Większość krajów wprowadziła stan wyjątkowy i ograniczenia wielu aspektów ludzkiego życia. Celem niniejszego artykułu jest przedstawienie przeglądu działań, które rząd węgierski podjął do tej pory. W tym celu w pierwszej kolejności zostanie poddane ana-

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lizie prawne tło wprowadzenia stanu wyjątkowego, aby pomóc w lepszym zrozumieniu obecnej sytuacji. Następnie przedstawiono podjęte środki, a na koniec oceniono, w jaki sposób środki te wpływają na prawa człowieka, zwłaszcza na swobodę przemieszczania się, prowadzenie działalności gospodarczej i wolność słowa.

Słowa kluczowe: stan wyjątkowy, prawa człowieka, Węgry, COVID-19.

1. SPECIAL LEGAL ORDER IN THE HUNGARIAN FUNDAMENTAL LAW

Comparing other constitutional texts, the Hungarian regulation on special legal order is extremely complicated. To make it more complicated, there is also a linguistic gap: the internationally used “state of emergency” does not cover all special legal orders. Therefore, this paper refers to the present situation as “state of danger”, as the Fundamental Law does.

Before the transition, the Constitution contained no regulation on special legal order. If a country is not under the rule of law, there is no need to regulate extraordinary situations and measures; the state may exercise special power anyway. During the transition, at the roundtable talks the special legal order proved to be a key question. The opposition was in full distrust of the future president, who, according to the expectations that time, was to be nominated by the Communist party. They were wary of the Polish scenario where president Jaruzelski introduced special legal order and intended to break down the transition. In 1989 the Soviet Army was still stationed in Hungary and there was little knowledge of how the transition would affect that. Therefore, the opposition fought for detailed and rigorous regulations for special legal order in which the Parliament (and not the president) was to be the key actor.

As a result, the Constitution stipulated three different special legal orders. First, “State of national crisis” covers practically war under international law: when official armies of countries fight against each other. Secondly, “State of emergency” involves a revolution or a civil war when different groups of Hungarian nationals fight. Thirdly, natural disasters or industrial accidents result in a “State of danger”.

In 1992 a new special legal order emerged. This was the time of the Balkan war between Serbs and Croats, during which Serbian troops, presumably unintentionally, sometimes came across the Hungarian side of the border causing a threat to the local communities. As Hungary was not in war with Serbia, a “State of national crisis” was inapplicable. Therefore, a new special legal order was added for such purposes: the “Unexpected Attack”. In such cases the Government may take measures to repel the attack.

The fifth one is “State of Preventive Defence”. It became one of the special legal orders in 2004. Before 2003 there was obligatory military service for men; they were recruited after secondary school or university to fulfil their service for six months. A political campaign then started to abolish obligatory military service, and as a result, the Constitution was amended abolishing recruitment into the army during times of peace, i.e. when there is no special legal order. “State of Preventive Defence” involves either the danger of external armed attack or the fulfilment of obligations arising from alliance.

The Fundamental Law of 2012 made very little change to the regulation of special legal orders; it repeated the provisions of the previous Constitution. Later, in 2016 the Sixth amendment to the Fundamental Law introduced a new one: “State of Terrorist Threat”. Although there has been no terrorist attack in Hungary so far, the Parliament intended to emphasise its commitment against terrorism.

The common feature of all of these regulations is that the ordinary legislation and decision-making process can be overruled and special measures can be introduced that would otherwise not be constitutional. In a State of national crisis (practically: war) all powers are delegated to a body that otherwise does not exist in the legal system: the National Defence Council. It is comprised of the President of the Republic, the members of the Government and the leaders of parties in Parliament. In a State of emergency (practically: civil war) the President of the Republic is empowered, and in all other cases the Government has the authority to introduce extraordinary measures.

As a guarantee, the Fundamental Law stipulates that its application may not be suspended, and the operation of the Constitutional Court may not be restricted. Consequently, the operation of the Parliament cannot be suspended either. According to the wording of the Fundamental Law, there is both political and constitutional control over the activity of the Government in times of a special legal order.

Except for the State of danger, special legal orders have never been introduced so far. A State of danger was introduced a couple of times because of natural disasters (especially floods) and once due to an industrial accident in 2010. Every time the State of danger pertained only to a specific area of the country; before 2020 there had been no special legal order that was applied nationwide.

2. STATE OF CORONAVIRUS DANGER

Similarly to many other countries, the threat of Covid-19 emerged in mid-March; events have speeded up since. On 11 March at 3pm the Government

announced a state of danger. A number of questions have arisen whether an epidemic falls under the notion of a state of disaster; according to the Fundamental Law, a state of disaster can be ordered in case of ‘natural disasters’, which only covers events caused by nature (floods, volcanic activity, earthquakes) but not by diseases.² Admittedly, ‘nature’ in this sense refers to natural disasters and not viruses. Yet the context of the Fundamental Law suggests that the state of danger covers events that “endanger life and property” due to non-human activity. As infectious diseases undoubtedly endanger life and they also have a great impact on the economy, I accept that the corona virus is a possible ground for a state of danger.

It is noteworthy that introducing a special legal order does not result in any change in itself, but simply authorises the Government to take special measures.

As soon as the state of danger was introduced, the preparations for Hungary’s national holiday (15 March, freedom fight against the Hapsburgs in 1848) were cancelled, universities stopped in-person education, indoor gatherings above 100 and open air events above 500 people were banned, restaurants, shops other than food shops and pharmacies had to close at 3 pm every day.

Although primary and secondary schools were to operate further, a couple of days after, on 16 March they also closed. That proved to be a great burden; one million children in the country remained at home; teachers started preparations for online education and parents had to find out how to cope with home schooling.

On 17 March Hungary closed its borders; only Hungarian nationals could enter the country. All measures were introduced by Government decrees.

Besides the closure of schools, the measure affected the population the most was the decree on restricting movement, which was issued on 27 March. The lockdown was less severe than in many countries. In practice, although there is a general restriction of leaving one’s home, there is a large number of exceptions; not only shopping and visiting the doctor but also individual recreational sport activities, providing for animals, walking pets and access to hairdressing or manicure services. It also introduced “time-shift” in shopping: people above 65 can only do their shopping between 9 am and 12 am and the rest of the opening hours is for people under 65.

According to the Fundamental Law, measures introduced in a state of danger are in force for fifteen days, unless the Parliament decides otherwise. Conse-

² Sz. Zoltán, *A 2020. március 11-én kihirdetett veszélyhelyzet alkotmányossági problémái* (Constitutional Problems of the State of Danger of 11 March 2020), MTA Law Working Paper 2020, No.9, p. 15.

quently, after fifteen days, the Parliament has to approve of the measures taken. The wording of the Fundamental Law is clear: not the state of danger but the measures taken need the approval of the legislation.

The Government introduced a bill requesting the approval, yet the opposition did not agree in overriding the standing orders, so the Act was adopted late; the Government decrees had already expired. The gap overlapped with some particular measures, which was a constitutional nonsense; police and disaster-management organs had no authorisation to introduce such measures.

Finally, on 31 March the Parliament adopted the Act on the containment of coronavirus; politicians and media often refer to the Act as the “Authorisation Act”³. The Act affirmed the Government decrees passed previously and authorised the Government to introduce measures for the prevention of life and property and for the elimination of the consequences of coronavirus. The Act was criticised mostly because of the authorisation of the Government for an indefinite time period. The extraordinary power of the Government lasts as long as the state of danger exists and it is the Government that decides the termination of the state of danger.

The Act neither stipulates the latest possible time of the state of danger nor does it require parliamentary reaffirmation for the measures introduced. Yet it is noteworthy that the Parliament can withdraw the authorisation at any time.

The Act allows for the Constitutional Court to hold its sittings via electronic communication. It leaves room for the possibility of constitutional review, yet it is unclear why the Act does not grant the same option for the Parliament and its committees that would help establish the political control over the government. Transmission from the Hungarian Parliament is also limited: Journalists no longer have their permanent entry pass (they are allowed to enter on a daily basis), they have to be healthy (although it is unknown how this is checked), and they are encouraged to listen to the online transmission instead of attending parliamentary sessions in person.⁴

Before the weekend of Easter (9–13 April) there were expectations towards the Government on both sides: to ease and to tighten the restrictions. Finally, the Government authorised municipality mayors to decide locally whether to introduce more severe restrictions. This possibility of the mayors pertain only to weekends.

³ The name Authorisation Act has evil forebodings in the region: it recalls the *Notverordnung* of the Weimar Constitution that became the start of Nazi dictatorship in Germany. Interestingly, the nomination was out of topic.

⁴ T. Drinóczi, A. Bien-Kacala, *Illiberal constitutionalism at work*. <https://verfassungsblog.de/illiberal-constitutionalism-at-work/?fbclid=IwAR17PNaEXMJq7ITS3eNBC9NV40wJMwm4MeucArqDGF2Xg2C2X17y8mpBJI>

Besides the regulations mentioned, the Government issued a large number of bills pertaining to economic activity, simplifying procedural rules at judiciary, suspending redemption of debts, etc.

3. HUMAN RIGHTS IN THE STATE OF CORONAVIRUS DANGER: FREE MOVEMENT

In most of the international conventions “free movement” is a migration right; it ensures people to move from one place to another. The Hungarian Fundamental Law is broader; the rights pertains to cases when individuals literally “move”, i.e. when they leave their house, visit a place, etc. So the restriction of movement also pertains to this right.

In every country, lockdown was one of the first steps. In Hungary, the restriction of visiting public places was introduced later than in many countries, and was definitely less severe than others. The violation of the restriction is considered a misdemeanour (minor offence) and can be fined up to ca. 140 EUR. In most of these cases, however, the police does not impose the fine. The restriction has not met any considerable criticism by now.

Not hosting foreign nationals also seems to be a general restriction worldwide. In Hungary, the pertaining regulation entered into force on 17 March. The police has the possibility to make exceptions and may let someone enter the country upon individual claim. NGOs say that police determined the claims favourably and granted the permission in nearly every case.⁵

Hungarians arriving from “dangerous” places with regards to Covid-19 (China, Iran, Italy and Korea) were quarantined for 14 days.

The most debated regulation of free movement was that the Government banned soldiers, doctors and public employers (employers of ministries and government agencies) to leave the country, unless individual permission is provided. The regulation is obvious in the case of soldiers; their profession includes that they remain in the country any time the Government wants them to. The restriction also makes sense in the case of doctors; the virus may affect so many patients that all doctors are needed. However, their constitutional obligation is very different from the case of soldiers. The regulation restricting all public employers to travel abroad does not seem to be proportionate at all.

⁵ https://index.hu/belfold/2020/04/20/koronavirus_kulfoldiek_belepese_magyarorszagra_itt_elo_csalad_tasz/

Otherwise the regulations concerning free movement have largely been accepted as reasonable. It is in accordance with Hobbes' theory on freedom and security: the greater danger you are in, the more you are ready to surrender your freedom. People felt unsafe, so the restrictions of free movement was widely accepted, especially that the restrictions were not too severe compared to other countries. Moreover, in the early days of the state of danger, many claimed for greater restrictions.

4. HUMAN RIGHTS IN THE STATE OF CORONAVIRUS DANGER: FREEDOM OF ENTERPRISE

Needless to say, the Covid-19 crisis has a very negative impact on most sectors of the economy and enterprise. More precisely, the virus itself has not caused so many diseases to influence economy, but the government restrictions affected lots of enterprises.

Freedom of enterprise is restricted the most when businesses are not allowed to run. Needless to say: the closure of shops, stores, restaurants and practically all services is a restriction of the freedom of enterprise. Such restrictions are rather global and most of the population understood their usefulness. However, the selection among services might be found arbitrary: according to the Government decree, hairdressers and manicure services are free to operate, while beauticians are not⁶. Veterinaries continued to work while dentists hosted only the most urgent cases.

Most of the restrictions concerning the freedom of enterprise might be reasonable and are in accordance with the global trend during a state of emergency. It is much more dubious why the Government took control over private companies.

Kartonpack Ltd. is a private company; its business is packing and providing food and medicine industries with packaging. The Government issued a decree that considered the activity of the company essential to the state and for the protection against Covid-19 and practically socialised the company. It suspended the directors of the company and took control over the activity of the company.

The Act on disaster management allows the Government such measures and this is not the first time in history that the Government took control over a private

⁶ In practice, beauticians are in the "grey zone"; they are out of the exception list that could further operate according to the decree (which means they are locked down) but in practice many cosmeticians continued to work.

law entity. Yet the previous case was utterly different. In 2010 there was an industrial accident that caused great damage in the environment and killed dozens of people. That time the company *that caused the damage* was taken control of in order to better manage the crisis and to hinder the concealment of evidence. Now Kartonpack has no connection at all with the emergence of Covid-19, on the contrary, it has a role in the protection by serving packages. Neither is it convincing that without the company the protection would not be successful: there are likely to be other companies to serve packages if Kartonpack failed to do so.

I presume that the seizure of a private law entity must lay on very serious grounds and must always be proportionate to the aim; even in a state of danger. I do not find the Government's reasoning convincing enough.

5. FREEDOM OF EXPRESSION

The Authorisation Act amended the Criminal Code; it modified the provision of "Scaremongering": at times of a special legal order, anyone who expresses a false statement that may hinder the efficiency of the protection can be imprisoned for three years.

By now, we have not had many cases. In some cases this provision is called when people stated that Covid-19 does not exist; the amendment of the Criminal Code seems to be against conspiracy theories. It is not known if there had been any criminal sentences so far.

Freedom of expression is the most basic political right, as it ensures individuals to participate in public debates. It forms public opinion, therefore, it can be deemed as an essential criterion of democracy⁷. Despite the high rank of freedom of expression, it is impossible to accept all opinions as equal. Most European countries that have the sad memories of totalitarian regimes are less confused to establish content-based restrictions. The rationale behind that is that states are obliged to keep the public order, especially in "hard times" However, such a limitation must meet strict criteria. First, limitation must have a legitimate aim, then it must meet the necessity-proportionality test.

The protection against the virus is a legitimate aim that may serve as a ground for restricting free speech. Also, admittedly, it may be necessary to take steps against those who may hinder the Government's plan of protection. Yet it

⁷ P. Smuk, *The Constitutional Guarantees of Democratic Political Discourses and their Regulation in Central Europe*, [in:] *Comparative Perspectives on the Fundamental Freedom of Expression*, András Koltay (ed.), Budapest 2015, p. 89.

is unclear if “coronavirus-denial” can hinder proper protection. If a conspiracy theory is obviously ill-founded and people hardly believe it, then it may not cause “scare” in the population and may not be ground for sentencing someone for scaremongering.

I conclude that the new provision of the Criminal Code meets the constitutional criteria of restricting a fundamental right but it should not involve the cases of coronavirus-denial. The proper interpretation is the task of the judiciary.

6. TO CONCLUDE

The way Hungarian governance handle the Covid-19 epidemic is subject to international criticism among scholars and politicians: the European Parliament considered that the Hungarian measures are not in accordance with the values stipulated in Article 2 of TEU.

I find that the most apparent measures (new provision in the Criminal Code, restriction of free movement, providing special power to the Government) in themselves do not infringe the basic constitutional values. They are rather common in European countries. Another criticism is that the Government will fail to return the special power when the epidemic is over. By now, it is impossible to foresee, but I find it unlikely that the Government upheld the state of danger longer than other countries.

I accept that some measures are dubious (like the seizure of the Kartonpack), although I find the problem elsewhere. I presume that special measures require special control; both political and legal. The Authorisation Act sets the basis for the online sittings of the Constitutional Court (the general constitutional control does exist), but there is no special possibility to speed up the procedure of the Court and to handle individual complaints and abstract law reviews fast enough to control the fast Government legislation during the state of danger. Normally, the Court makes its decision in couple of months, which is not adequate to the emergency legislation.

As for the political control, the Parliament still has sittings conducted in person. The two-third government majority in Parliament leaves little room for political control and there is no need to find the consensus between the governing parties and the opposition.

The Hungarian regulation on emergency situations is one of the most detailed ones amongst all constitutions. The present epidemic is the first real test as to how it works in practice and if they need reconsideration in the future.

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