

COVID-19 AND THE RESPONSIVENESS OF THE HUNGARIAN CONSTITUTIONAL SYSTEM

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SUMMARY: I. *Introduction.* II. *Governmental Declaration of the State of Danger – the limits of constitutional interpretation.* III. *The unlimited Parliament authorisation of the Government to rule further by decrees.* IV. *The role of the Constitutional Court.* V. *On the wide list of emergency situations in and outside the Fundamental Law, on the effect of the exceptional legal regimes on constitutional democracy.* VI. *The quality of the governing with decrees and legal security.* VII. *Substantive questions of rights protection: free movement, speech rights and the operation of the courts.* VIII. *Conclusion.*

I. INTRODUCTION

This report analyses the constitutional framework of the Hungarian government's use of emergency powers to control the COVID-19 pandemic. I will focus here on the most debated issues of public law. This account summarizes the results of the related projects of the Institute for Legal Studies.¹

The findings bellow are based mostly on a database on all related Government Decrees, developed by the Institute and four related papers²

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² Győry, Csaba – Nyasha Weinberg: “Emergency Powers in a Hybrid Regime. The Case of Hungary” *Theory and Practice of Legislation*, accepted, forthcoming in 2020. Balázs, István – István Hoffman: “Közigazgatás koronavírus idején, A közigazgatási jog rezilienciája” (Administrative law in times of corona virus – the resilience of the administrative law) *MTA Law Working Paper* 2020/21. <https://jogtk.mta.hu/mtakwp/kozigazgatas-koronavirus-idejen-a-kozigazgatasi-jog-rezilienciaja>. Drinóczi, Tímea, “Hungarian Abuse of Emergency Regimes, also in the

and several blog posts³ that have been published in the project so far. In response to the Covid19 pandemic, a “*State of Danger*” (one of the six) constitutional emergency regime was applied in Hungary according to the Fundamental Law adopted in 2011. A “*State of Danger*” (Art 53.) is declared by the Government and it empowers the Government to issue decrees suspending the application of certain parliamentary acts or completing them, creating new decrees with the effect of an act of Parliament in order to tackle the situation of danger. Natural disasters and industrial accidents are named in this paragraph of the Fundamental Law as Danger. Under the Fundamental Law a cardinal act (meaning its enactment requires the vote of 2/3 of the MPs present) defines further extraordinary measures. This is the Catastrophe Defense Act. The list of such measures include, among others, changing administrative procedure rules, asking businesses to enter into contracts, such as the delivery of essential services, bringing privately owned businesses under the government’s control, restricting of transportation, gatherings, movements to facilitate defence.⁴

The “state of extreme danger” (Art. 53) was declared on March 11th.⁵ The Hungarian case is unique in international comparison, because already in March and April publications qualified the situation a “constitutional coup”⁶ and a “power grab”,⁷ and described Hungary as “on the verge of dictatorship”.⁸ The Hungarian rules were criticised on domestic, European and international fora for the following constitutional matters.

light of Covid 19 Crisis, *MTA Law Working Papers* 2020/13. <https://jog.tk.mta.hu/mtalwp/hungarian-abuse-of-constitutional-emergency-regimes-also-in-the-light-of-the-covid-19-crisis>; Szente, Zoltán. “A 2020. március 11-én kihirdetett veszélyhelyzet alkotmányossági problémái” (Constitutional problems related to the emergency situation declared on the 11 March 2020), *MTA LAW Working Papers* 2020/9. The database on the analysis of the Government decrees issue in the period of emergency was designed by senior research fellows of the Project and was built primarily by Lilla Rácz junior research fellow.

³ Covid19 Related Challenges and the Law Blog Series of the Institute for Legal Studies (partly in English) <https://jog.tk.mta.hu/blog>.

⁴ Act Nr. 128/2011, Sections 47-49.

⁵ 40/2020. (III.11) Korm.rend. a veszélyhelyzet kihirdetéséről (Government Decree Nr. 40/2020 on the declaration of the state of danger)

⁶ Baer, Daniel “The Shocking ‘Coronavirus Coup’ in Hungary was a Wake-up Call”, *Foreign Policy*, 31 March 2020 <<https://foreignpolicy.com/2020/03/31/viktor-orban-hungary-coronavirus-coup/>>.

⁷ Editorial, ‘The Guardian View of Hungary’s Coronavirus Law – Orban’s Power Grab’, *The Guardian*, 29 March 2020 <<https://www.theguardian.com/commentisfree/2020/mar/29/the-guardian-view-on-hungarys-coronavirus-law-orbans-power-grab>>.

⁸ Scheppelle, Kim Lane “Orban’s Emergency”, *Verfassungsblog*, 29 March 2020 <<https://verfassungsblog.de/orbans-emergency/>>.

II. GOVERNMENTAL DECLARATION OF THE STATE OF DANGER – THE LIMITS OF CONSTITUTIONAL INTERPRETATION

The constitutionality of the declaration of the state of danger by the Government was immediately criticised by constitutional scholars, because the Fundamental Law in Art. 53. did not mention the pandemic. The pandemic is not the natural disaster which is mentioned in this paragraph and although there were no heated debates in Parliament or in the media about this interpretation of the words of the constitution, some scholars warned about the dangers of this “purposive interpretation” or rather unconstitutionality.⁹ As in Hungary the Government majority has a constitution making two thirds majority in Parliament, in case, the Government wished to revoke the State of Danger exceptional legal order, they could have changed the wording of the Fundamental Law by an amendment procedure to avoid this *de facto* constitutional amendment by Governmental interpretation. In sum, the very first constitutional dilemma was a genuine one about the limits of constitutional interpretation.

The second question was, whether it is necessary to declare the State of Danger at all, because the government has the authority anyway, under Act on Public Health,¹⁰ to impose restrictions in order to contain the spread of the epidemic. Under this law, the chief public health officer can order compulsory testing¹¹ and quarantine¹² for anyone infected or suspected to be infected during an epidemic, and the detainment of people suspected to be infected for testing and quarantine.¹³

The overlap between the government’s emergency powers in a state of Danger and the authority of the Chief Public Health Officer to impose restrictions during an epidemic was made apparent by the fact that the latter used this authority to reimpose restrictions initially imposed by government emergency decree.¹⁴ This was also interesting from a competence point of view, which I will explain later, but here it shows the uncertainty of whether this extraordinary legal order was necessary at all to be declared in Hungary.

⁹ Szente op.cit.

¹⁰ Act Nr. 154 of 1997

¹¹ Section 59 of the Act Nr. 154 of 1997.

¹² Sections 65-69 of the Act Nr. 154 of 1997.

¹³ Section 70/A of the Act Nr. 154 of 1997

¹⁴ Order of the Chief Public Health Officer of 26th March 2020. <https://koronavirus.gov.hu/cikkek/az-orszagos-tisztiforvos-tilto-es-kotelezo-hatarozata-jarvanyugyi-helyzetre-tekintettel>.

III. THE UNLIMITED PARLIAMENT AUTHORISATION OF THE GOVERNMENT TO RULE FURTHER BY DECREES

The government submitted a bill, which was voted in by a two-thirds majority on Monday 30th March and entered into force as the Coronavirus Defence Act on April 1st (also known as the Authorization Act).¹⁵

The adopted legislation grants the Government unlimited authorisation, though revocable by Parliament, to rule by decree after 15 days in order to handle all legislative problems of any nature caused by or under Covid 19, without further temporal or other thematic restrictions, aside from those limits enshrined in the Fundamental Law protecting certain basic rights in this exceptional constitutional order equally.

Some argued that the authorization given by Parliament is so broad that the act turned the country into a dictatorship.¹⁶ The bill has also been deemed the “Enabling Act” in reference to the Ermächtigungsgesetz, the (unconstitutional) law that created the legal base for Nazism.¹⁷

The blanket authorization certainly limits parliamentary oversight. The question is if such an authorisation runs contrary to the principles of the constitution, especially to the separation of powers and more specifically to the goal of this very provision to provide for parliamentary oversight even if the authorisation is duly constructed in a formal legislative sense.¹⁸

A counterargument can be made that the Authorisation Act allows Parliament to revoke the authorization at any time,¹⁹ but critics mentioned that the Parliament can simply be not convened, prevented from sitting and in that case there is no operating parliament that could decide about the end of this authorisation. So this provision in its final assessment offers no legally enforceable guarantees.

IV. THE ROLE OF THE CONSTITUTIONAL COURT

The Act stipulates that the Constitutional Court shall remain in session, following the constitutional provision that the Constitutional Court cannot be sus-

¹⁵ Act Nr. 12. Of 2020 on the Defence Against Coronavirus

¹⁶ Scheppele op. cit.

¹⁷ Halmai, Gabor “How Covid Unveils the True Autocrats: Orbán’s Ermächtigungsgesetz” *iConnectBlog*, 1 April 2020 <http://www.icconnectblog.com/2020/04/how-covid-19-unveils-the-true-autocrats-viktor-orbans-ermachtigungsgesetz/>.

¹⁸ Szente op.cit.; Győry – Winberg. op. cit.

¹⁹ Section 3 (2) of the Authorization Act

pended in any state of exception (Art 54 (2)). The Constitutional Court, thus, is allowed to rule on the constitutionality of government decrees or that of the Authorisation Act. Whether this control is effective is unclear and debated, because the Constitutional Court is widely known as being deferential to the Government, especially in extraordinary situations such as the financial crisis etc.²⁰

So far, the Constitutional Court did not bring such decisions that would have qualified any of the Government's acts unconstitutional. It has, however, stated that the Government should have according to the Fundamental Law the competence to decide on the necessity of some regulative measures and the Constitutional Court is often not qualified to review it in the substance. The newest case was about a government decree classifying as of national strategic importance the merge of the Central European Press and Media Foundation. This exceptionally protected merge of "strategic importance" was claimed to be against the plural media communication by the motion, but the Constitutional Court declared that it is not in conflict with the Fundamental Law. The Constitutional Court referred to its deference in this question of the qualification of the national strategic importance.²¹

V. ON THE WIDE LIST OF EMERGENCY SITUATIONS IN AND OUTSIDE THE FUNDAMENTAL LAW, ON THE EFFECT OF THE EXCEPTIONAL LEGAL REGIMES ON CONSTITUTIONAL DEMOCRACY

The emergency powers granted to the government in Art. 53. of the Fundamental Law are very broad compared to international examples. Constitutional discussions touch upon the question of the nature of this emergency regime in general in Hungary, whether it is too broad, whether it gives too much space to the Government and whether it is just a problem of the codification or an intentional wording. In Hungary there are different kinds of extraordinary regimes regulated in the Fundamental Law and also outside of that, in legislative acts.²²

²⁰ Szente, Zoltán– Fruzsina Gárdos-Orosz: *New challenges to Constitutional Adjudication in Europe*. London: Routledge 2018.

²¹ <https://hunconcourt.hu/announcement/the-government-decree-classifying-as-of-national-strategic-importance-the-intention-to-extend-the-central-european-press-and-media-foundation-is-not-in-conflict-with-the-fundamental-law>.

²² E.g. emergency situation caused by mass migration in the 2007. LXXX. Act on migration or the new pandemic danger situation declared in the Act. LVIII. of 2020 after the State of danger ended.

In these regimes, however, the nature of democracy transforms, because the constitution itself creates a prerogative state instead of the normative constitutionalism. It is a prerogative state created by the constitution, but in case it is too wide, the exception can become a rule.²³

Theoretically, they could be abused easily, as they offer a legal basis for a more overtly authoritarian state. They face the challenge of defining formal legality, and whether this exercise of power is still constitutional in a material sense. One set of theories: “*abusive constitutionalism*”,²⁴ “*illiberal constitutionalism*”,²⁵ and “*authoritarian constitutionalism*”²⁶ all stress that Hungary adhere to formal constitutional requirements and formally proper legal rules for the exercise of power. “Autocratic legality” makes difference between formal and substantive legality arguing that such regimes do not hold up to the substantive understandings of constitutionalism. There is a lot of scholarly debate about how to place this Covid19 period into these theoretical concepts, but all agree that the Government received almost unlimited power to rule in the months of Covid19, but it used this unlimited authorisation finally moderately.²⁷

VI. THE QUALITY OF THE GOVERNING WITH DECREES AND LEGAL SECURITY

In Hungary mostly Government decrees were adopted to rule the situation although in some cases the Chief Medical Officer of the State also had an important role as a regulative authority.

As to the Government Decrees issued in this period, the constitutional question was mostly focused on the quantity, quality and the content. Finally there was over 200 decrees issued in this period between 11 March 2020 and 17 June 2020, the end of the State of Danger.

The analysis shows that although the number is high, not all of the decrees are original legislation; many are amendments of earlier decrees, some of which needed to be amended because of the evolving situation (tightening and then easing the curfew, for example), while others simply

²³ Gyóry –Weinberg op.cit.

²⁴ Landau, David (2013): *Abusive Constitutionalism*. U.C. Law Review.

²⁵ Drinóczi, Tímea – Bień-Kacała, Agnieszka “*Illiberal Constitutionalism: The Case of Hungary and Poland.*” *German Law Journal*, 20.8 (2019) 1140-1166. doi:10.1017/glj.2019.83.

²⁶ Tushnet, Mark (2018): *Authoritarian Constitutionalism*. Cornell Law Review, 397-461. <https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=4654&context=clr>.

²⁷ Drinóczi op.cit. Gyóry-Weinberg op.cit.

corrected drafting mistakes. The quality of these decrees varies. Some are extremely poorly drafted, which can be attributed to the urgency of the situation and to the large amount of legal change required to respond to the crisis. Often it appears that “a political decision has been made and decrees reflect the legal repercussions of the decision requiring a flurry of legislation to patch holes in other decrees”. Most decrees issued under the authorisation act are clearly relevant to assess the legal impacts on Covid-19.²⁸ In sum, in relation to the Government Decrees the constitutional question was rather about the necessary content, related to Covid19 and if the relation of the parliamentary law making that was ongoing in this period is hurt by the governmental competence.

As to the normative order of the Chief State Medical Officer, one interesting constitutional insight could be given here that also did not get much publicity. As the first 15 days of the Government decree issuing the State of Danger expired some days before the Government received the Authorisation from the Parliament to extend the temporal effect of the situation, the Hungarian legal order reacted with a normative order to the CSMO that kept in force all emergency measures. This again shows the flexibility of understanding law in Hungary in these times, and is another example of how, after the declaration of the State of Danger, the actions taken by the state authorities were only possible with a very broad understanding of legality, overstepping the textual interpretation of the constitution or of the laws in order to create a stable legal situation, legal certainty.²⁹ However, this practical understanding of the applicable rules is highly debatable.

VII. SUBSTANTIVE QUESTIONS OF RIGHTS PROTECTION: FREE MOVEMENT, SPEECH RIGHTS AND THE OPERATION OF THE COURTS

In Hungary, like in many other countries, there were measures to enforce social distancing, restricting the right to free movement. Measures included closing schools and universities, bars, bans on gatherings and attending sports events etc.³⁰ A limited curfew was introduced through a ban on leaving home for all but essential reasons, such as receiving medical care, shopping, exercise etc. The borders were closed for all cross-border traffic

²⁸ See for further analysis, Gyóry-Weinberg *op.cit.*

²⁹ Balázs and Hoffman *op.cit.*

³⁰ Decrees Nr. 41/2020 (III.11), Nr. 45/2020 (III.14.) and Nr. 46/2020 (III.16.).

except for freight, and an entry ban was introduced for all but Hungarian citizens and legal residents.

The decrees included a 14-day quarantine on those infected with Covid-19, alongside anyone in contact with an infected person³¹. A new amendment to the Criminal Code was introduced to sanction those who breached the quarantine, the status of which was not very clear in criminal law.³² Fortunately, in practice, there was a great degree of obedience to the rules,³³ so the new provision was not debated greatly in public.

Specific rules on the operation of the justice system were on the other hand more echoed in scholarship. The government imposed an extraordinary ‘justice break’ on 15 March.³⁴ A ‘justice break’ is a period when courts do not sit, apart from adjudicating urgent matters such as emergency injunctions or pre-trial detentions. The decree ordering the break due to Covid-19 failed to include precise rules. This left it unclear how the break affected deadlines of filing motions and other work and caused a great uncertainty in the first times concerning the access to justice. Finally, the head of the National Office of the Judiciary issued norms regulating these issues,³⁵ but under Hungarian law organisational norms only bind justice personnel, but not ordinary citizens. The government acted only two weeks later in the form of the longest and most exhaustive decrees.³⁶

One of the most debated issue, however, was about scare mongering, where the Government introduced a new provision to the Criminal Code. The law which criminalises scare-mongering during an epidemic applies to anyone equally who knowingly spreads false information. The Constitutional Court upheld the regulation. The appeal submitted to the court claimed that the law carrying a five-year prison sentence restricted the freedom of speech and was ill-defined, with the risk that it may be applied arbitrarily. The Constitutional Court said that it was necessary and proportionate to put limits on speech if there was an overriding social interest in doing so, therefore the provision is constitutional.³⁷

³¹ Decree Nr. 81/2020 (IV.1.).

³² Miklós Hollán, “Bolyongás a járvány büntetőjogi fogalma körül” *MTA Law Working Papers*, 2020/8. <https://jog.tk.mta.hu/mtalwp/bolyongas-a-jarvany-buntetojogi-fogalma-korul>.

³³ Balázs Fekete “Az emberekből előbukkant az empátia (The people care)” *MTA Law Working Paper* 2020/18. <https://jog.tk.mta.hu/mtalwp/az-emberekbol-elobukkant-az-empatia-mikro-antropologiai-kutatas-a-tarsadalmi-tavolsagtartas-szabalyainak-mukodeserol>.

³⁴ Decree Nr. 45. of 2020. Section (1).

³⁵ Orders of the Head of the National Office of the Judiciary Nrs. 35 (III.15.), 36 (III.16.), 37 (III.17.), 38 (III.17.), 40(III.24.), 42 (III.26), 47(IV.1.) of 2020.

³⁶ In more detail, see Győri and Weinberg, Decree Nr. 74. of 2020.

³⁷ IV/00699/2020 CC Decision.

VIII. CONCLUSION

Questions of substantive constitutionality could be further listed with regard to the intrusion to private contractual relationships, with regard to tax questions, unemployment, social rights and social aid, the state overtake of the lead of certain companies etc. Referring to the constraints of this report I would summarize that the related constitutional questions are partly substantive, partly procedural and worth to be examined in detail respectively to be able to learn more about the nature of the emergency situations. In case the analysis shows grey or black holes in the constitutional protection in international comparison, it is better to reconsider the concept of the exceptional legal orders in constitutional theory as well. The Hungarian example certainly calls for it.