



Hungarian Helsinki Committee

BACKGROUND NOTE ON ACT XII OF 2020 ON THE CONTAINMENT OF THE CORONAVIRUS

31 March 2020

Act XII of 2020 on the Containment of the Coronavirus (hereafter: Authorization Act), adopted by the Hungarian Parliament on 30 March 2020, provided the Hungarian Government with a carte blanche mandate without any sunset clause to suspend the application of Acts of Parliament, derogate from the provisions of Acts, and take other extraordinary measures until the “state of danger” declared on 11 March by Government Decree 40/2020. (III. 11.) is in place. Therefore, the Authorization Act fails to comply with the democratic set of criteria for a special legal order that also derives from Hungary’s Fundamental Law.¹

This background note covers the following issues:

1. What are the powers of the Parliament in the present situation?
2. The special role of the Constitutional Court
3. What kind of options did the Government have to contain COVID-19 without the Authorization Act?
4. What can the Government do under the Authorization Act?

Relevant articles of the Fundamental Law:

The state of danger **Article 53**

(1) In the event of a natural disaster or industrial accident endangering life and property, or in order to mitigate its consequences, the Government shall declare a state of danger, and may introduce extraordinary measures laid down in a cardinal Act.²

(2) In a state of danger, the Government may adopt decrees by means of which it may, as provided for by a cardinal Act, suspend the application of certain Acts, derogate from the provisions of Acts and take other extraordinary measures.

(3) The decrees of the Government referred to in paragraph (2) shall remain in force for 15 days, unless the Government, on the basis of authorization by the Parliament, extends those decrees.

(4) Upon the termination of the state of danger, such decrees of the Government shall cease to have effect.

¹ In more detail, see: Amnesty International Hungary – Eötvös Károly Institute – Hungarian Civil Liberties Union – Hungarian Helsinki Committee: *Unlimited power is not the panacea – Assessment of the proposed law to extend the state of emergency and its constitutional preconditions*, 22 March 2020, <https://www.helsinki.hu/en/unlimited-power-is-not-the-panacea/>. Several international stakeholders have voiced their concerns in relation to the Authorization Act, see for example: <https://www.europarl.europa.eu/news/en/press-room/20200324IPR75702/ep-stands-up-for-democracy-in-hungary-during-covid-19>, <https://www.coe.int/en/web/portal/-/secretary-general-writes-to-victor-orban-regarding-covid-19-state-of-emergency-in-hungary>, <https://twitter.com/CommissionerHR/status/1242036471508414464>, <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?LangID=E&NewsID=25750>, <https://www.osce.org/odihr/449311>, <https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=e419cf24-261b-4d09-a685-3e3e2570be65>, <https://rsf.org/en/news/covid-19-and-press-freedom-europe-must-oppose-measures-proposed-viktor-orban>.

² Adopting or amending “cardinal” Acts of Parliament require the votes of two-thirds of the Members of the Parliament present.

Common rules for the special legal order
Article 54

(1) Under a special legal order, the exercising of fundamental rights – with the exception of the fundamental rights provided for in Articles II and III, and Article XXVIII (2) to (6) – may be suspended or may be restricted beyond the extent specified in Article I(3).

(2) Under a special legal order, the application of the Fundamental Law may not be suspended, and the operation of the Constitutional Court may not be restricted.

(3) A special legal order shall be terminated by the organ entitled to introduce the special legal order if the conditions for its declaration no longer exist.

(4) The detailed rules to be applied under a special legal order shall be laid down in a cardinal Act.

1. What are the powers of the Parliament in the present situation?

According to the Authorization Act, the powers of the Hungarian Parliament are the following:

- Article 8 of the Authorization Act sets out that “repealing [the Authorization Act] shall be decided on by the Parliament upon the termination of the state of danger”. However, this provision in itself does not provide a real possibility for control for the Parliament, for the following reasons. According to Article 53(1) of the Fundamental Law, **the state of danger shall be declared by the Government**, and under Article 54(3), **the Government shall terminate it as well**, so the Parliament can decide to repeal the Authorization Act only after the Government terminated the state of danger. The **Government is not bound by any other actor when making its decision** on whether to terminate the state of danger – neither by the opinion of the Members of the Parliament nor by the opinion of Hungary’s Chief Medical Officer or the World Health Organization. Thus, **MPs will not have any possibility to decide on whether upholding the state of danger any longer is justified or not**. Accordingly, **Article 8 of the Authorization Act does not prevent the Government from upholding the state of danger for an unlimited period of time**. This does not flow from the shortcomings of the Authorization Act, but from the Fundamental Law itself. However, this does not mean that the Fundamental Law does not set out any kind of limitation on what the Government can do in a state of danger.
- According to the concept outlined by the Fundamental Law, the activities of the Government in a state of danger would be restricted by the Parliament in substance, because the special decrees adopted in the state of danger would remain in effect after an initial period of 15 days only with the Parliament’s support. The Authorization Act eliminates this substantive restriction when it authorizes the Government to extend the effect of future, not-yet-adopted special decrees, the content of which is of course unknown.
- This does not mean that the Parliament does not have any possibility to amend or repeal the Authorization Act.
 - Article 3(1) of the Authorization Act sets out that, on the basis of Article 53(3) of the Fundamental Law, the Parliament **authorizes the Government to extend the effect of the government decrees** adopted in the state of danger under Article 53 (1) and (2) of the Fundamental Law **until the termination of the state of danger**. According to Article 3(2) of the Authorization Act, **the Parliament may withdraw this authorization also before the termination of the state of danger**. It is important to note, however, that withdrawing this authorization would not mean that the state of danger is terminated (since that can be terminated only by the Government). Thus, practically, the Government would be able to adopt decrees overriding Acts of Parliament even if the Parliament would withdraw its authorization on extending the effect of government decrees on the basis of Article 3(2) of the Authorization Act, since issuing such decrees would be still possible under

the state of danger declared by the Government itself. However, these decrees would be in effect for only 15 days.

- The Parliament may adopt, under the applicable general rules, an Act of Parliament any time that repeals or amends the Authorization Act, irrespective of Article 3 and 8 of the Authorization Act.

At the same time, one shall recall at this point that the **governing parties currently have a two-thirds majority in the Parliament**, which makes it unlikely that the Parliament would make use of any of the above two possibilities. These steps would require governing party MPs to go against the will of the Government – the same governing party MPs who contributed actively with their votes to the demolishing of the rule of law in Hungary in the past years.

Why would it still be important that the Parliament has the possibility from time to time to discuss whether it is justified to extend the effect of the various decrees adopted in the state of danger? Because **the Parliament is the stage for representative democracy and the open debate attached to that**, where the opposition parties have, albeit limited, rights and possibilities. For example, opposition MPs could take the floor and debate whether it is still justified to uphold the state of danger, could question whether it is necessary to extend the effect of certain decrees adopted by the Government under the Authorization Act, etc. If the Government “rules by decree”, there is no possibility for that.

Furthermore, it is important to note that certain provisions of the Authorization Act are so-called “cardinal” provisions, which means that amending or repealing them would require the votes of two-thirds of the MPs present. Such cardinal provisions include Article 2 of the Authorization Act, which sets out that the Government may adopt decrees by means of which it may suspend the application of certain Acts of Parliament, derogate from the provisions of Acts, and take other extraordinary measures. By contrast, Article 3(1) of the Authorization Act (which sets out that on the basis of Article 53(3) of the Fundamental Law, the Parliament authorizes the Government to extend the effect of the government decrees adopted in the state of danger under Article 53(1) and(2) of the Fundamental Law until the termination of the state of danger) can be amended by more than half of the votes of the MPs present.

2. The special role of the Constitutional Court

In a special legal order, and so in a state of danger, due to the Government’s special mandate, constitutional oversight performed by the Constitutional Court must be strengthened. That is why the Hungarian Helsinki Committee and other civil society organizations proposed³ that jurisdictional and procedural preconditions are put in place to ensure that the Constitutional Court will be able to swiftly and effectively assess whether special legal order measures are constitutional.

The Authorization Act does not include restrictions in relation to turning to the Constitutional Court. In addition, in Article 5(1) it explicitly says that the President and the Secretary General of the Constitutional Court “shall provide for the continuous operation of the Constitutional Court during the state of danger”. Furthermore, Article 5(2) provides for the possibility to hold the sessions of the Constitutional Court “by using electronic communication means” in the state of danger, on the basis of a decision by the President of the Constitutional Court. This is in line with Article 54(4) of the Fundamental Law as well, which sets out that the operation of the Constitutional Court may not be restricted under a special legal order either.

However, bringing a case before the Constitutional Court is not easy under the general rules in force:

- Under the Fundamental Law, the constitutional review of laws, including government decrees (i.e. an abstract ex-post constitutional review) may be initiated by the Government, one-quarter

³ Amnesty International Hungary – Eötvös Károly Institute – Hungarian Civil Liberties Union – Hungarian Helsinki Committee: *Unlimited power is not the panacea – Assessment of the proposed law to extend the state of emergency and its constitutional preconditions*, 22 March 2020, <https://www.helsinki.hu/en/unlimited-power-is-not-the-panacea/>

of the MPs, the President of the Curia (the highest judicial forum of Hungary), the Chief Prosecutor, or the Commissioner for Fundamental Rights (the Ombudsperson of Hungary).⁴

- According to Article 26 of Act CLI of 2011 on the Constitutional Court, a constitutional complaint may be submitted only by “a person or organization affected by the specific case”.

These provisions significantly limit the possibilities to bring an issue before the Constitutional Court. Therefore, it would have been necessary **to extend, as a temporary measure, the scope of persons eligible to initiate the procedure of the Constitutional Court** in a state of danger, allowing, for example, individual MPs, or at least the heads of parliamentary groups to initiate the abstract ex-post constitutional review of governmental decrees adopted in relation to the state of danger.⁵ This **would have only required amending Act CLI of 2011 on the Constitutional Court**, and such an amendment would have been possible also under the Fundamental Law.⁶

Furthermore, **the law does not foresee any deadline for the Constitutional Court** to deliver a decision in the above types of procedures, which is especially problematic in a state of danger, with the Government’s strong and open-ended mandate: it is of significance whether it takes months (or even years) or just days for the Constitutional Court to decide for example on whether suspending or derogating from certain Acts of Parliament affecting fundamental rights is constitutional or not. This is why it would have been necessary for the Authorization Act to set out that the Constitutional Court shall decide in merit on petitions regarding the state of danger itself and measures adopted under the state of danger within a concrete, short deadline (e.g. within three days).⁷

We deemed these amendments, and so **providing for the chance of an effective constitutional review** necessary even if the legislative steps taken by the governing majority in the past years have significantly undermined the independence of the Constitutional Court, and there are serious concerns as to what extent the Constitutional Court is able in reality to perform its role as the guardian of constitutionality in an effective manner.⁸

3. What kind of options did the Government have to contain COVID-19 without the Authorization Act?

According to Article 53(2) of the Fundamental Law, under the state of danger, the Government may adopt decrees “as provided for by a cardinal Act”. Such a cardinal law has been in place already before the Authorization Act was adopted: Act CXXVIII of 2011 on Disaster Management and Amending Certain Related Acts of Parliament (hereafter: Disaster Management Act).

According to the Disaster Management Act, in a state of danger⁹ the Government may, “to the extent and in the area necessary”, issue decrees in the following areas, among others:

- it may derogate from the rules on public finances;
- it may establish administrative obligations for mayors and local notaries;

⁴ Fundamental Law, Article 24(2)(e)

⁵ In our view, extending the scope of stakeholders eligible to initiate an abstract ex-post constitutional review would be expedient in any event.

⁶ The amendment would have been possible under Article 24(2)(g) of the Fundamental Law, which sets out that the Constitutional Court “shall exercise further functions and powers as laid down ... in a cardinal Act”.

⁷ It is true that under Article 5(3) of the Authorization Act the President of the Constitutional Court may, during the state of danger, “permit derogation from the rules of procedure of the Constitutional Court”, but this does not solve the problem detailed above.

⁸ For more details, see: *Stating the Obvious – Rebutting the Hungarian Government’s response to the Reasoned Proposal in the Article 7 procedure against Hungary*, https://www.helsinki.hu/wp-content/uploads/NGO_rebuttal_of_Article_7_Hun_gov_info_note_18102019.pdf, p. 5.

⁹ According to the Fundamental Law, “in the event of a natural disaster or industrial accident endangering life and property, or in order to mitigate its consequences, the Government shall declare a state of danger, and may introduce extraordinary measures laid down in a cardinal Act”. The definition of a state of danger is provided in more detail in Article 44(1) of the Disaster Management Act. Its (ca) subsection states that “a human epidemic causing mass morbidity or a risk of epidemic” constitutes a state of danger. (In this analysis we do not examine the constitutionality of the Disaster Management Act’s de facto expansion of the definition of the state of danger as provided for by the Fundamental Law.)

- it may derogate from certain provisions of the law on the rules of administrative procedure (e.g. in these areas: scope of decisions by authorities that cannot be challenged before a court, procedural and other deadlines, rules of appeals, rules of enforcement, etc.);
- it may prescribe that in order to ensure that production, supply, and service provision obligations are met, the Minister in charge of disaster management may order that entities carrying out economic activities that are otherwise obliged to provide services must enter into certain contracts;
- it may, in case of an imminent risk of aggravation of the state of danger, in order to prevent it, bring the operations of an entity under the supervision of the state, etc.¹⁰

Besides the above, the Government may issue decrees that authorize the implementation of the following, among others:

- road, rail, water and air traffic might be limited to a certain time period, or to a certain area (course), or might be forbidden in part or in the whole of the territory of Hungary;
- stay of the population on the streets or other public places might be restricted;
- organization of assemblies or events in public places, if holding those would be detrimental to the interests of protection, might be forbidden by the police;
- it may be ordered that the population must leave a particular area of Hungary for a necessary time;
- entering or staying at a given area of Hungary might be limited or tied to permission;
- the Minister in charge of education may define in a resolution the tasks in relation to the operations and management of public education institutions, as well as those in relation to the organization of the school year.¹¹

The Authorization Act does not affect the applicability of the above provisions of the Disaster Management Act,¹² with the following exception: ordinarily, the effect of the government decrees adopted on the basis of the Disaster Management Act would need to be extended by the Parliament after 15 days (i.e. the Parliament would need to authorize the Government to extend their effect), this limitation is removed by the Authorization Act.

Act CLIV of 1997 on Health (hereafter: Health Act) includes the concept of “health crisis”,¹³ as well as specific epidemic control regulations. “The fact of an epidemic outbreak is established by the public health administration, without the introduction of a special legal order. In this case, the following might be restricted or forbidden: the operation of any institution, as well as any event and activity that may facilitate the spread of the epidemic; passenger traffic, transport of livestock or goods between certain areas; contact between populations of different areas; visiting hospitals; leaving certain areas; selling or consuming certain food items, consuming drinking water; keeping certain animals. Furthermore, in the event of an outbreak, in order for measures to be effective, the public health administration may restrict the exercise of the right to personal liberty, as well as the rights of patients; and may oblige natural and legal persons, as well as organizations without legal personality, to tolerate or carry out certain measures.”¹⁴

¹⁰ In detail, see: Disaster Management Act, Article 45(1) and Articles 47–48

¹¹ In detail, see: Disaster Management Act, Article 45(1) and Articles 49–51

¹² The Authorization Act sets out the following: “During the state of danger, the Government may – *in addition to the extraordinary measures and regulations set forth in Act CXXVIII of 2011 on Disaster Management and Amending Certain Related Acts of Parliament* – suspend the application of certain Acts of Parliament, derogate from the provisions of Acts and take other extraordinary measures by means of a decree, in order to guarantee for citizens the safety of life and health, personal safety, the safety of assets and legal certainty, as well as the stability of the national economy.”

¹³ According to Article 228(2)(a) of the Health Act this also includes a public health emergency of international concern as defined by the International Health Regulations of the World Health Organization issued in 2005, irrespective of whether a state of danger is in effect.

¹⁴ Gábor Mészáros: *Indokolt-e különleges jogrend koronavírus idején? – Avagy a 40/2020. (III. 11.) Korm. rendelettel összefüggő alkotmányjogi kérdésekről [Is Special Legal Order Justified in the Time of Coronavirus? – On the Constitutional Law Issues Related to Government Decree 40/2020 (III. 11.)]*, Fundamentum, 2020, <http://fundamentum.hu/sites/default/files/onlinefirst/meszáros-gabor-dokkom-indokolt-e-a-kulonleges-jogrend-koronavirus-idejen.pdf>

The Schengen Borders Code provides for the possibility to reintroduce border control at internal borders without the Government having to declare a state of danger,¹⁵ and domestic legislation allows for the temporary closing of external borders even at times when no state of danger is in place.¹⁶

The above list is not exhaustive. Moreover, we do not aim to examine in detail which of the above provisions provided grounds for the various government decrees and other measures adopted by the Government prior to the Authorization Act's entering into force, or at what point did declaring the state of danger become actually necessary. However, on the basis of the above, it can be stated that many of the measures taken before the submission or adoption of the Authorization Act, or the upholding of these measures, would not have required the mandate granted by the Authorization Act.¹⁷

This is not to say that the announcement of the state of danger was unnecessary – not least because the above provisions of the Disaster Management Act can only be applied during a state of danger. Nor do we claim that the decrees adopted due to the state of danger (or at least the vast majority of them) were unnecessary, even though certain legislative solutions leave much to be desired. Neither do we claim that it is inconceivable that there are measures that could become necessary to control an epidemic or to mitigate its economic effects that are not provided for by the Disaster Management Act or the Health Act. In this sense, an authorization act was therefore needed, but not with the unrestricted scope and for unlimited time as it was adopted.

4. What can the Government do under the Authorization Act?

According to Article 2(1) of the Authorization Act, during the state of danger, the Government may, in addition to the extraordinary measures and regulations set forth in the Disaster Management Act, "suspend the application of certain Acts of Parliament, derogate from the provisions of Acts and take other extraordinary measures by means of a decree, **in order to guarantee for citizens the safety of life and health, personal safety, the safety of assets and legal certainty, as well as the stability of the national economy.**" According to Article 2(2), the Government may exercise this power "**for the purpose of preventing, controlling and eliminating the human epidemic**" referred to in Government Decree 40/2020. (III. 11.) on Declaring a State of Danger, **and for the purpose of "preventing and averting its harmful effects, to the extent necessary and proportionate to the objective pursued"**.

Thus, the Authorization Act

- explicitly prescribes the application of the principles of necessity and proportionality, and
- sets out that the Government may exercise its powers for certain, widely formulated purposes related to the state of danger.

This very broad framework should serve as a yardstick when reviewing the constitutionality of each government decree.

In the case of COVID-19, it may become necessary from one day to another to take drastic measures, and unprecedented restrictions may need to be introduced for the purposes of containing the virus and to mitigate the effects of the epidemic. In this situation, it indeed would not have been feasible for the Authorization Act to list for example all the Acts of Parliament the Government may derogate from in its decrees. However, **in such a dynamically changing situation, it would have been especially important that the Parliament can decide at specified intervals** whether, in the light of the

¹⁵ Article 28(1) of Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code). It must be noted that the Government reintroduced border control at the Hungarian-Austrian and the Hungarian-Slovenian border sections precisely on the basis of this regulation in Article 1 of Government Decree 41/2020. (III. 11.).

¹⁶ Article 12 (1) and (2)(b) of Act LXXXIX of 2007 on State Borders

¹⁷ In detail see Gábor Mészáros: *Indokolt-e különleges jogrend koronavírus idején? – Avagy a 40/2020. (III. 11.) Korm. rendelettel összefüggő alkotmányjogi kérdésekről [Is Special Legal Order Justified in the Time of Coronavirus? – On the Constitutional Law Issues Related to Government Decree 40/2020 (III. 11.)]*, Fundamentum, 2020, <http://fundamentum.hu/sites/default/files/onlinefirst/meszáros-gábor-dokkom-indokolt-e-a-kulonleges-jogrend-koronavirus-idejen.pdf>

current situation, the available information, expert opinions, etc., it is justified or not to extend the effect of various government decrees. It would have been necessary for the same reason to ensure that **decrees raising constitutional concerns can be brought before the Constitutional Court easily and that the Constitutional Court shall decide on the constitutionality of the decrees within a short timeframe.**

On the other hand, it may be argued that it would have been expedient and justified to identify in the Authorization Act the areas where, based on common sense, it is impossible or at least it has a very low probability that overriding legal provisions in force in order to contain COVID-19 would be necessary and constitutionally justified. For example, it could have been set out in the Authorization Act that the decrees may not affect certain fundamental aspects of the Parliament's operation, or that fundamental rights enjoying special protection, such as the freedom of expression or the right to liberty shall not be restricted beyond the limitations already included in the laws in force. (However, even this list could have been reviewed from time to time by the Parliament, with a view to the developments related to the coronavirus.)

Below, taking into consideration the questions we received on various platforms as well, we provide **examples** of the following:

- what are the areas, being of key importance in terms of the rule of law and fundamental rights, where the Authorization Act allows the Government to derogate from or suspend provisions of Acts of Parliament;
- what are the areas where in our view overriding the provisions of Acts would most probably not meet the requirements of necessity and proportionality; and
- what are boundaries set by the Fundamental Law, which the Government cannot violate even in a state of danger. (According to Article 54(2) of the Fundamental Law, "[u]nder a special legal order, the application of the Fundamental Law may not be suspended", thus, the Government cannot overwrite the provisions of the Fundamental Law even in a state of danger.)

These examples serve the purpose of demonstrating that the Authorization Act allows the Government to introduce significant restrictions, practically without any time limit, without any debate in the Parliament, and without any guarantee for the swift and effective constitutional review of the respective decrees.

It shall be added that since the governing parties have a two-third majority in the Parliament, they could amend the Acts referred to in the examples below any time anyway. However, in that case, the adoption of the amendments would be preceded by a debate in the Parliament, in the case of Bills prepared by the Ministries it would be obligatory to publish the text and consult the public before submitting the Bill to the Parliament, etc. These are important guarantees even if the transparency and the quality of the legislative process in Hungary leave much to be desired. Furthermore, the Authorization Act may cause a controversial situation: if the governing parties would lose their two-thirds majority in the Parliament in the future for whatever reason, and so would not necessarily be able anymore to amend cardinal laws under the general rules solely with the votes of their own MPs, the Government would still be able to overwrite cardinal laws with its decrees.

4.1. Elections and the right to vote

It was a recurring question whether the Authorization Act may endanger the general parliamentary elections to be held in 2022 – it may not.

Article 6 of the Authorization Act includes restrictions with regard to by-elections and national and local referendums, for example by setting out that "[n]o by-elections may be called until the day following the termination of the state of danger; the [by-]elections already called shall not be held", and that "[n]o national and local referendums may be initiated until the day following the termination of the state of danger; the national and local referendums already called shall not be held". Thus, the Authorization Act does not include any restriction in relation to the general parliamentary elections. Furthermore, Article 2(3) of the Fundamental Law sets out that the "general elections of the Members of the

Parliament shall be held in the month of April or May of the fourth year following the election of the previous Parliament, except for elections held due to the Parliament dissolving itself or to it being dissolved". Thus, it is prescribed not by an Act of Parliament, but by the Fundamental Law that parliamentary elections shall be held in every fourth year, and the Government cannot overwrite the Fundamental Law in the state of danger either.

However, the rules of the election procedure can be superseded. This may be justified for example to mitigate the epidemiological risks of holding the elections, e.g. through extending the already existing possibility of voting by mail or establishing the possibility to vote online. Similarly, it would be justified to amend the rules of collecting recommendations necessary to run as a candidate. (Of course, these amendments would only be justified if the general parliamentary elections would be held in the upcoming months.)

In contrast, it would not comply with the requirement of necessity and proportionality if for example exercising the right to vote would be made more difficult by putting in place additional procedural (administrative) requirements. An example of this would be the "prior voter registration" that the current governing parties planned to introduce in 2012, which would have required those with suffrage to register prior to the elections in order to be allowed to vote.¹⁸

4.2. The operation of the Parliament

The rules on the Parliament's mandate, dissolution and quorum are included in the Fundamental Law, and so these rules cannot be overwritten by the Government on the basis of the Authorization Act either. The list of the stakeholders allowed to submit a Bill to the Parliament is included in the Fundamental Law as well. At the same time, the detailed rules of several areas of the Parliament's operations are included not in the Fundamental Law, but in lower-level laws (primarily in cardinal Acts), from which the Government can derogate and which it can suspend according to the Authorization Act:

- The provisions ensuring regular sittings of the Parliament are laid down in a cardinal Act.¹⁹
- The Parliament's Rules of Procedure, which establish the rules of its operation and the order of its debates, are also issued in the form of a lower-level legal norm.²⁰
- The Parliament's Rules of Procedure prescribe as well how the Speaker of the Parliament shall exercise its policing and disciplinary powers, "in order to ensure the undisturbed operation of the Parliament and to preserve its dignity".²¹

In the situation caused by COVID-19, amendments such as establishing the possibility for MPs to vote online may be justified. In contrast, for example, an amendment that would make it impossible for stakeholders to put a Bill on the agenda of the Parliament would not be justified.

Article 7 of the Fundamental Law sets forth MPs' right to pose questions and interpellations, listing the potential addressees as well. However, the inquiry activities of parliamentary committees, which have an important role in parliamentary control, and the obligation to appear before such committees is regulated by a cardinal Act, from the provisions of which the Government may derogate according to the Authorization Act.

As far as the legal status of MPs is concerned, the Fundamental Law sets out that MPs shall be entitled to immunity,²² but, for example, the rules of deciding on whether to lift an MP's immunity or on whether an MP's immunity was violated are included in Resolution 10/2014. (II. 24.) on the Parliament's Rules of Procedure. It may also cause problems that according to Article 4(2) of the Fundamental Law, the public offices which may not be held by MPs shall be specified by a cardinal law, that may also set out

¹⁸ In 2013, the Constitutional Court found the amendment unconstitutional:
[http://www.codices.coe.int/NXT/gateway.dll/CODICES/precis/eng/eur/hun/hun-2013-1-001?fn=document-frameset.htm&f=templates\\$q=\\$uq=\\$x=\\$up=1\\$force=1711](http://www.codices.coe.int/NXT/gateway.dll/CODICES/precis/eng/eur/hun/hun-2013-1-001?fn=document-frameset.htm&f=templates$q=$uq=$x=$up=1$force=1711).

¹⁹ Fundamental Law, Article 5(8)

²⁰ Fundamental Law, Article 5(7)

²¹ Fundamental Law, Article 5(7)

²² Fundamental Law, Article 4(2)

other cases of incompatibility or conflict of interest – these legal provisions may also be derogated from under the Authorization Act.

4.3. Fundamental rights

As far as fundamental rights are concerned, the Fundamental Law itself sets out certain limitations for the Government: in Article 54(1) it identifies the fundamental rights the exercising of which may not be suspended or may not be restricted beyond the extent specified in Article I(3) of the Fundamental Law.²³ These fundamental rights are the following:

- the fundamental rights included in Article II of the Fundamental Law (the right to life and human dignity),
- the fundamental rights included in Article III of the Fundamental Law (the prohibition of torture, inhuman or degrading treatment or punishment, the prohibition of human trafficking, etc.),
- the fundamental rights included in Article XXVIII (2)–(6) of the Fundamental Law (the major fair trial guarantees).

With regard to certain fundamental rights, it is evident that restricting them might become justified at some point in order to the fight against the epidemic effectively, and that restricting these rights will most probably comply with the test of necessity and proportionality (depending also on the current epidemiological situation). These fundamental rights include the following:

- the right to freedom of assembly,
- the right to move freely (however, unjustified discrimination is not permitted: it is constitutional to prescribe for example that between 9 and 12 a.m. only persons over 65 can be present in grocery stores, but the personal characteristic serving as a basis for the limitations should be something that has relevance in terms of the fight against the epidemic),
- the freedom to practice one's religion jointly with others if that would entail gathering in the same physical space,
- the right to a public trial (but the other procedural rights included in Article XXVIII (2)–(6) shall be respected), or
- certain aspects of the right to property.

In contrast, there are fundamental rights in the case of which it is almost impossible that their suspension or their restriction beyond the extent specified in Article I(3) of the Fundamental Law could be justified by the need to "prevent, control and eliminate the human epidemic" or to "prevent and avert its harmful effects", and restricting them would not comply with the requirements of necessity and proportionality, but at the same time the governing majority has shown in the past more than once that it would deem it desirable to further restrict these rights. These fundamental rights include the following:

- The newest example of imposing further restrictions on the freedom of expression and the freedom of speech is actually included in the Authorization Act itself. Article 10 of the Authorization Act has introduced stricter rules into Act C of 2012 on the Criminal Code in relation to the criminal offence of scaremongering. According to the adopted text, a "person who, during the period of special legal order and in front of a large audience, states or disseminates false or distorted facts in such a way that is capable of hindering or obstructing the efficiency of the protection efforts is guilty of a felony and shall be punishable by imprisonment for one to five years". This criminal offence can easily be used to launch criminal procedures against journalists, further eroding the freedom of the press in Hungary. Under the Authorization Act, the Government may, for example, prescribe more severe punishments for the above offence (or any other criminal offence), or may introduce special rules of procedure for it.
- The possibility of derogating from the Criminal Code or from Act XC of 2017 on the Code of Criminal Procedure may be problematic from the aspect of the right to liberty as well. The Authorization Act allows the Government to amend for example the rules of pre-trial detention,

²³ "The rules on fundamental rights and obligations shall be laid down in an Act of Parliament. A fundamental right may only be restricted to allow the enforcement of another fundamental right or to protect a constitutional value, to the extent strictly necessary, proportionate to the objective pursued, and with full respect for the essential content of that fundamental right."

restricting the scope of those who can be released pre-trial (e.g. excluding those who are suspected of committing the above offence of scaremongering, or any other specified criminal offence), or extending the possibility for unlimited pre-trial detention. (The possibility of unlimited pre-trial detention was introduced by the current governing majority in 2013.²⁴)

- Under the Authorization Act, the governing majority could further hinder the enforcement of the freedom of information, for example by amending the respective legal rules²⁵ in a way that data on the public funds spent on or public procurement procedures conducted in relation to the fight against the epidemic, or even the data on the detected infections are excluded from the concept of public interest data,²⁶ or by increasing the extent of fees to be paid for accessing data.²⁷
- Criminalizing homelessness is an emblematic element of the governing parties' criminal policy. Therefore, it is not surprising that the rules of Government Decree 71/2020. (III. 27.), setting out curfew-type restrictions, do not exempt homeless persons from having to comply with the rules they obviously cannot follow, or from having to pay a fine for violating the curfew rules. What is more, under the Authorization Act the Government could prescribe even stricter sanctions than those in effect for homeless persons residing on public premises.
- It is also worrying that the right to an independent and impartial tribunal and the right to seek remedy are not among the procedural guarantees that cannot be suspended or restricted beyond the extent set out by Article I(3) of the Fundamental Law. This makes it possible to amend procedural rules in a way that affects journalists, human rights organizations or citizens seeking justice in general in a negative way.

The above shows that the Authorization Act does not include adequate guarantees and does not provide sufficient defence against the Government making use of the state of danger and violating fundamental rights or further restricting the possibilities of the opposition in the Parliament. The Constitutional Court may, of course, declare unconstitutional and repeal any government decree, but since there are no guarantees in place to ensure that the decrees reach the Constitutional Court swiftly and that the Constitutional Court decides on the matter within a short timeframe, this possibility in itself does not dissolve the serious concerns in relation to the Authorization Act. It may even happen that the state of danger is long over when the Constitutional Court declares a decree adopted under the state of danger unconstitutional. Accordingly, the Authorization Act and the open-ended mandate granted by it is a dangerous weapon in the hands of the two-thirds governing majority that systematically dismantled the system of checks and balances in Hungary in the past decade, and it provides yet another opportunity for the Government to override the constitutional limitations on its powers.

²⁴ In more detail, see: http://helsinki.hu/wp-content/uploads/UNWGAD_HUN_HHC_Addendum_25November2013.pdf.

²⁵ Act CXII of 2011 on the Right to Informational Self-Determination and on the Freedom of Information (Information Act)

²⁶ For a long time, Hungarian authorities refused to disclose the territorial division of detected infections, citing privacy concerns. As a response to a question from a journalist, the President of the National Authority for Data Protection and Freedom of Information submitted that if no concrete person can be identified on the basis of the data, then it is considered statistical data (and so public), but then raised the attention to the fact that in a state of danger the practice may derogate from the otherwise applicable legal provisions pertaining to the public nature of public interest data (<https://infostart.hu/belfold/2020/03/19/kiadhatok-a-koronavirus-teruleti-adatai-itt-a-naih-valasza>).

²⁷ According to Article 29 of the Information Act, the organ performing public duties and processing the data may charge a fee amounting to the costs incurred by the fulfilment of the freedom of information request.