



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

A carte blanche mandate for the Hungarian government with no sunset clause is not the panacea to the emergency caused by the COVID-19 virus in Hungary. We need strong rule of law safeguards and proportional and necessary emergency measures, not unlimited government rule by decree that can last beyond the actual epidemic crisis.

► Background

On 20 March 2020, the Hungarian government submitted a *Bill on Protection against the Coronavirus (Bill T/9790)* ("the Bill") to Parliament, seeking parliamentary authorisation to extend the **state of danger** that it had ordered by government decree from 11 March 2020.¹ The government justified its decision to declare a state of danger, which is one of the particular types of special legal order under the Hungarian Fundamental Law, with the need to prevent and mitigate the consequences of the COVID-19 pandemic causing mass infections.

On Monday, 23 March 2020, Parliament will vote whether to allow an urgent vote on the Bill to go forward on the next day, Tuesday, 24 March. A departure from the normal House Rules requires a four-fifths majority of MPs, hence the agreement of at least some of the opposition. If the government is not able to secure support for an urgent procedure, the Bill is expected to be voted in a regular voting procedure eight days later. Because the government has a constitutional two-thirds majority in Parliament, this vote would not require any support by opposition MPs.

¹ Unofficial English translation available at <https://hungarianspectrum.org/2020/03/21/translation-of-draft-law-on-protecting-against-the-coronavirus/>

The Bill has two pillars of provisions. First, it seeks a parliamentary mandate for the government to rule by decree without a sunset clause or any other provision that would guarantee that Parliament can exercise its role of effective oversight.

Second, the law creates two new crimes. Anyone who publicizes false or distorted facts that interfere with the “successful protection” of the public – or that alarm or agitate that public – could be punished by up to five years in prison. Anyone who interferes with the operation of a quarantine or isolation order could also face a prison sentence of up to five years, a punishment that increases to eight years if anyone dies as a result. Media pluralism has been in decline for years in Hungary, and the relationship between the government and the government-critical press became severely hostile in recent days.

► Summary of concerns and recommendations

In the past decade, we’ve seen that the Hungarian government does not tolerate constitutional limitations on the exercise of its powers. The Bill on Protection against the Coronavirus (Bill T/9790) (“the Bill”) reveals this as well. Hence we hereby put forth our position on criteria for assessing the Bill and related recommendations.

The Bill in the form it has been submitted to Parliament fails to comply with the democratic set of criteria for a special legal order that also derives from Hungary’s Fundamental Law. In our view, it is imperative that the law to be adopted should fulfill the following criteria:

1. The state of danger to be introduced as a special legal order is not an extra-constitutional situation and should not be allowed to become one.
2. The special legal order cannot last forever; instead, it should be in place for a limited period of time which, if necessary, can be extended in case the “state of danger” continues to exist.
3. The fundamental rules of the rule of law cannot be superseded in case of epidemic danger.
4. Citizens are entitled to fundamental rights protection even in case of an emergency. These rights may only be restricted in the interest of averting a threat.

Based on the foregoing criteria, we recommend that by way of the particular rules of the state of danger,

1. Parliament should only grant an extraordinary legal mandate to the government for a predefined period of time,
2. The scope of persons eligible to initiate a procedure of the Constitutional Court should be temporarily extended so that any member of parliament, or at least the head of parliamentary groups, should be allowed to initiate an abstract constitutional review process,
3. A short, e.g. three-day time limit should be set for the Constitutional Court to make in-merit decisions about petitions related to the special legal order and individual measures taken thereunder.

► Detailed recommendations

1. In an extraordinary situation the government may well have extraordinary privileges. The state of danger introduced as part of a special legal order is not an extra-constitutional situation and cannot be allowed to become one.

Pursuant to Government Decree no. 40/2020, as of 15:00 pm on 11 March 2020, the Hungarian government has declared a state of danger. In this situation, the government as well as everyone else is responsible for acting in the interest of decreasing and averting the threat/[danger]. In taking action against the COVID-19 epidemic, protecting human health is our shared responsibility and local and global solidarity are its main tools.

In the state of danger specified in the Fundamental Law, the government has particular privileges that are authorised by the Fundamental Law and cardinal laws, which specify these special legal measures. The state of danger is an established special legal order in the Hungarian legal system, which does not render governmental action “extrajudicial” or extra-constitutional. It is exactly due to this that, if the Fundamental Law is interpreted correctly, it cannot be allowed that the state of danger becomes an extra-constitutional situation where the government can take any action without any limitations.

2. The open-ended government mandate to maintain the state of danger is unacceptable. The Parliament should decide, on a frequent and periodic basis, whether it’s justified to maintain the state of danger.

Under the Bill, the government would be granted an open-ended mandate to maintain the state of danger. **However, the situation caused by the COVID-19 virus will not last indefinitely. Hence, in a state under the rule of law, the special legal order may also only last as long as the circumstances warranting it, i.e. the threat itself, are present. In order for the state of danger to be terminated at some future point in time, it is essential that it may only be extended under a parliamentary mandate that has a sunset clause.**

The substance of the state of danger is comprised of the special decrees that the Government is entitled to adopt in this situation by diverting from the ordinary rules. Under the Fundamental Law, upholding these government decrees after an initial period of 15 days requires the Parliament’s support. However, the state of danger has to be terminated if the circumstances based on which it was ordered (i.e. the epidemic) are no longer present. This should be periodically reviewed, hence the parliamentary mandate cannot be granted for an indefinite period of time.

The difference between a special legal order and a dictatorship is that constitutional safeguards prevail in the former. Hence all the constitutional safeguards that are not put aside by the Fundamental Law’s provisions on the state of danger should remain operational. It has to be ensured that the extraordinary exercise of state power does not permit unilateral exercise of power. The provisions in the Fundamental Law on the state of danger do not foresee a scenario whereby Parliament would not be able to sit and would not be able to perform its constitutional functions (in contrast, for example, to the state of national crisis or state of emergency). As long as Parliament is

able to carry out its constitutional duties, it should continue to do so. Essentially, rules should be established that ensure that Parliament, its committees and its members are able to perform their duties even in this novel situation. Parliament may only authorise the government to rule by decree in a state of danger for a limited period of time, thus the government mandate may not be anything other than temporary. Only this can prevent the exercise of power being taken for good from the representative body. Without this, the government could go on ruling by decree during the state of danger with no parliamentary oversight at all, which would place it beyond the constitutional framework.

Scientists and society in general have a significant role to play in discussing how long the state of danger should go on. This debate should take place in the public domain and the decision about it should lie with the Parliament. If the extension of the government mandate requires a recurring debate and decision in Parliament, this presents an opportunity for scientific, medical, economic and other arguments to be considered during the political decision-making process. Thus the decision about the mandate always presents an occasion to debate whether the danger still exists, since that is the precondition for upholding the state of danger. That's why the government having the exceptional mandate in a state of danger cannot decide on its own, only based on information available to it and no one else, how long this exceptional mandate should last.

3. Citizens are entitled to fundamental rights protection even in an emergency, and these rights cannot be arbitrarily restricted. During a state of danger, fundamental rights restrictions that otherwise in a regular legal order would be qualified as unconstitutional are only permissible if they serve to avert the danger, and are not arbitrary.

While our fundamental rights may be restricted even in a regular legal order as well, the Fundamental Law permits restrictions to be wider in scope during a state of danger. This, however, does not mean that the exercise of any fundamental right may be suspended or may be restricted for any reason or to any degree whatsoever. The Fundamental Law also doesn't permit any derogation in a state of danger from the application of the right to life and human dignity, from the ban on torture and inhuman, degrading treatment or punishment, the ban on medical or scientific experiments on human beings without their consent, the ban on practices aimed at eugenics, the use of the human body or its parts for financial gain, human cloning, as well as the main safeguards of the right to a fair criminal process.

All other fundamental rights may only be severely restricted as compared to a regular legal order if the restriction serves to avert the danger on which the special legal order is based, and the restriction is reasonably connected to averting the epidemic threat. Although the Fundamental Law does soften the strict necessity and proportionality test for restricting fundamental rights at times of danger, this has no bearing on the rule of law safeguards in the Fundamental Law. All the constitutional limits on the exercise of public power remain intact during the state of danger. The rule of law prohibits the arbitrary exercise of power. Therefore **no arbitrary rights restrictions may be imposed that are unsuited to decrease the threat of the epidemic.** Moreover, only such deviations from rules on rights restrictions are allowed that are necessitated by the epidemic situation. Restrictions cannot be extremely disproportionate to what averting the danger requires. If the measures taken during the special legal order fail to comply with these criteria, they will be unconstitutional and should be repealed.

Implementing human rights safeguards is conducive to successfully countering the pandemic. Transparent decision-making is in our shared interest. If people understand why the government adopts restrictive measures, public trust in authorities improves and they will be more likely to follow guidelines from the authorities.

For example, we see how in countries where access to public information or the right to publish information, as part of the right to freedom of expression, is severely curtailed, the consequences of the epidemic have been extremely serious, while the countries that have been most successful in countering the virus have significantly facilitated public information and the sharing of available information.

This pandemic and the emergency measures affect us all, but not all of us are affected equally. Respect for human rights ensures that the elderly, women, people living in poor housing and homelessness, as well as medical, law enforcement and retail workers receive the protection they need in a state of danger.

4. The constitutional oversight of both the decision to extend the state of danger and measures taken during the special legal order has to be ensured. For this, as a temporary measure, the rules on initiating the procedure of the Constitutional Court should be simplified and the Court must act swiftly and effectively.

Constitutional norms require enforcement -- this remains true in a state of danger. During a special legal order, due to the government's special mandate, constitutional oversight must be strengthened.

- The continuous operation of the Constitutional Court must be guaranteed, to enable faster and more effective judicial decision-making than what exists today.
- The jurisdictional and procedural preconditions need to be put in place to ensure that the Constitutional Court will be able to swiftly and effectively assess if the decision to extend the state of danger or the individual measures taken thereunder are constitutional. While the constitutional test for the former will be whether it is necessary to uphold the state of danger, the latter should be assessed on the basis of the standards for rights restrictions in a special legal order.
- As a temporary measure, the scope of persons eligible to initiate an abstract constitutional review procedure of the Constitutional Court should be extended to include those who are not directly concerned (any member of parliament, or at least the head of parliamentary groups, should be allowed to initiate the process, as permitted under Article 24(2)(g) of the Fundamental Law).
- The Constitutional Court should proceed with short deadlines to make in-merit decisions about petitions regarding the special legal order itself and measures related to the special legal order (the three-day deadline in election cases could serve as an example).

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