

The Hungarian response to the Coronavirus

Has Orban's government moved outside the constitutional furrow?

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In this article, **Antonio Fanì** analyses the historical and present context in which the Hungarian Government, led by Prime Minister Viktor Orbán, has issued the controversial Decree n. 40/2020, giving full powers to the Hungarian Executive.

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1. Historical Preamble

One of the most important aims of a State is to protect its citizens and its common legal, constitutional and economic values. In every historical period, a sudden threat from foreign attacks, rebellions or natural disasters had required an immediate response from the relevant constitutionally established power. For this type of situation, the definition generally accepted by the ECHR is:

"...an exceptional situation of crisis or emergency that affects the entire population and constitutes a threat to the organised life of the community of which the State is composed¹."

Before the creation of the (State) ordinary forces in 1715, various 'private' forces were the only Hungarian defence. The King had a very small army that was not sufficient to defend the entire kingdom, so he turned to the armies of the nobility, pontificates, counties and cities. The King and the nobility recruited their soldiers in an autonomous manner and independently took care of their economic sustenance. In a state of emergency, such as an unexpected attack, the King called upon the nobility, cities and counties to defend the State and had the right to suspend previously-issued acts by royal decree². According to Ferenc Deák, in case of war, the obligation of every nobleman was to engage in hostilities and to support his military unit; the mobilisation of forces was therefore not decided by the Parliament, but was the natural result of the current defense system³. Parliament's inability to do so was due to "the inability to sit", i.e. the impossibility of reopening a working session at short notice in view of the state of emergency (e.g. due to the state of war). The King's right to regulate by decrees was exceptional and it was always followed by a legislative power's post-declaration. These 'emergency decrees' were in force for as long as the state of emergency lasted⁴.

Later, defence and military systems changed throughout Europe and a professional State army was necessary: this was the direction taken by Law VIII of 1715, which established a stronger, more stable and ordinary army capable of defending the State more efficiently⁵. The same law also

1 Lawless v. Ireland, 332/57, 14 November 1960.

2 See Law IX of 1485.

3 F. Deák, *Adalék a magyar közjoghoz*, Pest, Pfeifer Ferdinánd, 1865 p. 134. Ferenc Deák (17.10.1803-28.01.1876) was a lawyer, a Hungarian statesman, member of parliament and minister of justice.

4 G. Ferdinandy, *Magyarország közjoga (alkotmányjog)*, Politzer Zs. és fia, Budapest, 1902, pp. 91 e 654.

5 F. Deák, *Adalék a magyar közjoghoz*, Pest, Pfeifer Ferdinánd, 1865 p. 136.

regulates the role of constitutional institutions during states of emergency, which is the historical basis of the current constitutional regulation⁶. Law VIII of 1715 allowed the executive power to regulate the State's response by issuing emergency decrees in the event of an attack by an enemy. The Hungarian constitutional system allowed this exceptional power only in the interest of the State and these strict rules applied not only to the King, but also to the Government, with the *post factum* approval of the Parliament⁷. Articles 3 and 4 of the aforementioned law stipulated that in the event of a foreign attack, when ordinary decision-making processes could not function properly, the highest offices in the country were to meet in council. These personalities were the *comes palatii*⁸, the *primate*⁹, the archbishops and prelates, the barons, the King's High Court, the representatives of the counties, and free *regiae civitas*¹⁰.

Following the Second World War, the communist Constitution of 1949 mentioned only a few regulations concerning *jogrend különleges*¹¹, mainly based on a special mandate from Parliament, while the 1989 democratic amendment to the 1949 Constitution for the reintroduction of the state of national crisis and the state of emergency had to wait¹². The 1989 amendment established five types of *jogrend különleges*: national crisis, emergency, preventive defence, danger and unforeseen attacks. There were several consultations and much pressure from the oppositions to introduce detailed control mechanisms;¹³ in order to coordinate the response during the state of national crisis, a new body has been introduced: the National

6 Underlying the current regulation, but also the regulation of the emergency decree in the Soviet Constitution.

7 K. Kmety, Magyar közjog tankönyve, Budapest, Politzer, 1907, pp. 28-29.

8 The highest office in Hungary after the king; deputy and guardian to the king. This office was established by King St. Stephen (1001-1038); the last to be appointed *palatii*, Nádor, was in his office until the revolution of 1848-49. After the conciliation of 1867, in the Austro-Hungarian monarchy his duties were transferred to the Prime Minister.

9 The *primate* of Hungary is the office due to the bishop of the metropolitan diocese of Esztergom-Budapest.

10 For more information on *jogrend különleges* in the historical constitution, see I. Ereky, *Jogtörténeti és közigazgatási jogi tanulmányok*, Eperjes, Sziklai Henrik, 1917 pp. 544-551; M. Desider, *Ungarisches Verwaltungsrecht*. Tübingen, J.C.B. Mohr, 1912, pp. 104-110; I. Szabó, *Adalékok Közép-Európa Polgári Alkotmánytörténetéhez*, Budapest, Szent István Társulat, 2000, pp. 42-44.

11 Trad. "Special legal systems" or "special law" depending on the context.

12 In a non-democratic state, where Parliament is not at the centre of the country's political sovereignty, the codification of emergency responses is not so important.

13 A. Jakab, *Az Országgyűlés akadályoztatása különleges állapotokban*, in A. Jakab, (edited by), *Az alkotmány kommentárja*, II ed, Budapest, Századvég, 2009, pp. 633-671.

Defence Council, composed of the President of the Republic, the President of Parliament, the heads of the parliamentary groups, the Prime Minister, ministers and the head of national defence staff¹⁴. While this system was in force, the Council, the President and, in some cases, the Government were allowed to adopt extraordinary decrees under parliamentary supervision.

2. The emergency decree in the Fundamental Law of 2011

In menacing situations, it is necessary to give the main constitutional bodies the opportunity to provide rapid and effective protection with the aim of eliminating threatening situations. A rapid response requires a special legal regime that abandons the traditional democratic framework, but at the same time is limited as long as the cause remains in place. The constitutional regulation on *jogrend különleges* loosens constitutional constraints, yet, on the other hand, provides protection against loosening¹⁵ itself: the ultimate objective of a special law is to ensure a return to law and ‘ordinary’ order¹⁶.

The Hungarian Fundamental Law has a rather detailed regulation which does not represent a *unicum* in European constitutionalism, and was indeed compared by the Venice Commission¹⁷ to Polish and German emergency response systems.¹⁸ It is accepted by the doctrine that the institutions created in the 1989 transition remain in today’s Fundamental Law. In fact, the five types of *jogrend különleges* are regulated with the same ratio and assumptions, and try to give answers to the questions that arose in a similar way in the 1989 amendment.

The **national crisis** (Article 49) is declared in case of a state of war or danger of war, i.e. imminent danger of armed attack by a foreign power. In this situation, the Parliament establishes the National Defence Council, which exercises the rights, delegated by the Parliament, of the President of the Republic and the Government. This is the highest level of emergency that

14 The latter had only advisory rights.

15 F. Kojá, *Állami szükségállapot és szükségállapotra vonatkozó jog*, in P. Takács, *Államtan. Írások a XX századi általános államtudomány köréből*, Budapest, Szent István Társulat, 2003, pp. 797-817.

16 Jakab, op. cit, p. 636.

17 Opinion on the Hungarian Constitution, (Grabenwarter, Christoph et al.), European Commission for Democracy through Law (Venice Commission) CDL-AD(2011)016. point 134.

18 On German constitutional traditions, cfr. McHugh, James T., *Comparative Constitutional Traditions*, New York, Washington e Baltimora, Peter Lang, 2002, pp. 159-174.

refers in particular to the mobilisation of military defence. The President of the Council of Defence is the President of the Republic; the members of the Council of Defence are the President of the National Assembly, the heads of the National Assembly, the Prime Minister, the ministers and - with the right of consultation - the Chief of Staff of the National Security.

A **state of emergency** (Article 50) is declared by Parliament in the case of actions aimed at overturning the constitutional order or the exclusive acquisition of power, and serious acts of mass violence threatening life and property, committed with weapons or in any way involving the use of weapons. The most important powers are exercised by the President of the Republic. During the state of emergency, the extraordinary measures are introduced by decree of the President of the Republic.

The **state of preventive defence** (Article 51) is declared by the Parliament for a predetermined period of time, which defines the Government's initiatives and a series of administrative actions focusing on the declaration of a qualified legal status and the achievement of higher levels of protection in the Hungarian public administration, defence forces and law enforcement authorities. These measures shall ensure that the administration, defence forces and law enforcement authorities immediately carry out the functions necessary to deal with the threat or possible obligations of military alliances.

The term '**unexpected attacks**' (Article 52) refers to the possibility of an unexpected invasion of Hungarian territory by external armed groups. In this case, the Government will be obliged to act immediately with forces properly prepared and proportionate to the attack in order to repel it and safeguard the territory of Hungary. The Government must protect public order, life, property and public security, and to this purpose, it may adopt special measures through the use of decrees.

In a **state of danger** (Article 53), the Government has the right to immediately intervene and take extraordinary measures in the event of natural disasters or industrial accidents that endanger life or property, or to mitigate their consequences. This state is usually declared even in a level of danger below the state of emergency. The natural or industrial hazard may include natural disasters, inland water floods, industrial accidents, mass diseases and pollution of drinking water, and the environment in case of serious obstacles caused by snowfall, or blocked railway lines or main roads within the region simultaneously. The extreme danger state can be located in one village, region, province, parts of the country or throughout the entire country. The Government decree remains in force for fifteen days, unless the Government - based on the authorization of the National

Assembly - extends such period. The Government's decree lapses with the cessation of the state of danger.

In all five *jogrend különleges*, the holders of special powers may suspend the application of certain laws, deviate from the provisions of the law, and also implement other extraordinary measures.

3. The Covid-19 emergency response

On March 11 2020, through Decree n. 40/2020, the Government introduced the state of danger following the procedure provided by the Fundamental Law. However, on March 30 2020, the executive completely went against the constitutional furrow. The National Assembly approved (137 votes for and 53 against) an extension *sine die* of the state of danger, giving full powers to the Hungarian executive, which range from the possibility of issuing decrees without consulting the National Assembly, to the possibility of **suspending and dissolving the Parliament**. In addition to the extension of the state of danger, there is a further provision introduced by the Assembly: **imprisonment from 1 to 5 years for anyone who spreads fake news**.

4. The limits to emergency legislation

The Fundamental Law, in Art. 54, 1, states that the introduction of 'other extraordinary measures' may **limit fundamental rights** with the exception of:

"...the right to life and human dignity; the prohibition of torture, inhuman or degrading treatment or punishment, slavery, trafficking in human beings, medical and scientific experiments on human subjects without their free and informed consent, eugenics, use of the human body for profit and human cloning; a fair trial, the presumption of innocence and the fundamental rights of criminal law."

This means that during a natural disaster, a pandemic or a minor flood, social rights, minority rights, children's rights and even religious rights may be restricted. In spite of a largely flexible constitutional text on the guarantees inherent in the rule of law, with the last green light on the 30th March, the Hungarian Government further pushes constitutional limits, finding itself with almost unlimited power in the absence of the natural

parliamentary counterweight. The last upholder remains the Constitutional Court, a Court which, since 2011, has always refused to discuss *jogrend különleges*.

All we can do is wait and see how the political and legal situation in Hungary evolves. Nevertheless, we can state that, in the actual scenario, this situation is not considerate of basic human rights, as should be the case in a democratic European State.

