Constitutional Rights in the Time of Pandemic

The Experience of Hungary

Lóránt Csink[*]

Abstract

Special circumstances may require special measures. This article is to highlight the importance of constitutional rights, also in the time of a pandemic. Its hypothesis is that constitutional rights are not luxuries one can only afford in peacetime, they are much rather at the core of civilization and democracy. History shows that a world without rights may easily turn into a nightmare. The article first focuses on the Hungarian constitutional basis of the state of emergency (Section 2). Next, it analyses the text of the constitution with respect to the limitation of fundamental rights and elaborates on the various interpretations through the lens of the case-law of the Constitutional Court (Sections 3-4). Finally, the article concludes that despite the rigid wording of the Hungarian Fundamental Law, constitutional rights can be restricted only if the restriction meets the necessity-proportionality test (Section 5)

Keywords: state of emergency, emergency powers, restriction of fundamental rights, Fundamental Law, Constitutional Court of Hungary.

1. Introduction

On 28 February 1933, the day after the German Parliament, the *Reichstag* burnt down, Paul von Hindenburg, president of the German Empire, issued a decree to protect the People and the State.[1] Referring to Article 48 of the Weimar Constitution, he authorized the Government to restrict constitutional rights. On 23 March 1933 the German Parliament confirmed the decree in an Act of Parliament and suspended fundamental rights for four years; the expiry date of the Act was prolonged both in 1937 and in 1941. It is noteworthy that in 1933 the Nazi party did not have majority in the Parliament, nevertheless, the act was adopted with a qualified (two-thirds) majority.

We all know what followed. 1933 was the year of the Nazi takeover and the start of brutal infringements on constitutional rights. The Weimar Constitution, which otherwise served German society well in the mid-war period, earned a bad

* Lóránt Csink: associate professor of law, Pázmány Péter Catholic University, Budapest; counselor, Constitutional Court of Hungary, Budapest.

1 Verordnung des Reichspräsidenten zum Schutz von Volk und Staat.

doi: 10.5553/HYIEL/266627012021009001003

reputation exactly because of the *Notverordnung* (Authorization Clause), which made it possible for the executive to restrict and suspend constitutional rights.

Almost ten years thereafter, on 16 February 1942, a couple of months after the Japanese Empire attacked Pearl Harbor, President Franklin D. Roosevelt issued Executive Order 9066, which allowed military leaders to intern Japanese-Americans from the West Coast to concentration camps in the middle of the country, depriving them of all constitutional rights. At the time, the Supreme Court found the measure constitutional. The decision rendered in *Korematsu v United States*[2] upheld the regulation and found that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast during the war against Japan.

To be fair, in the political climate just after the burn of the Reichstag or the bombing of Pearl Harbor, it may have seemed a wise and popular decision to limit constitutional rights. Such measures most likely met people's expectations: violent demonstrations must be stopped; the war must be won. In hindsight, however, it is clear that short-term solutions may come at a high price.

Today, decades after the restrictions mentioned above, the world has a very different challenge to face. The COVID-19 pandemic resulted in a huge number of infections and deaths, ruined the economy and impaired the mental health of many members of our societies. The situation called for strict restrictions in virtually all countries: the closure of shops, schools and services, the limitation of social interaction and, obviously, the restriction of constitutional rights.

I admit that *special circumstances may require special measures*. This article, however, *attempts to highlight the importance of constitutional rights, also in the time of a pandemic*. Its hypothesis is that constitutional rights are not luxuries one can only afford in peacetime but are much rather at the core of civilization and democracy. History shows that a world without rights may easily turn into a nightmare.

The article first focuses on the Hungarian constitutional basis of state of emergency. Secondly, it analyses the text of the constitution with respect to the limitation of fundamental rights and elaborates on the various interpretations through the lens of the case-law of the Constitutional Court. Finally, the article draws some conclusions.

2. Constitutional Background: The Former Constitution and the Current Fundamental Law

Compared with other constitutional texts, the Hungarian regulation on special legal order is extremely complicated. During the transition, at the roundtable talks the special legal order proved to be a key question. The opposition was in full distrust of the future president, who, according to the expectations at the time, was to be nominated by the Communist party. They were anxious that the Polish scenario, where president Jaruzelski introduced a special legal order and

2 323 U.S. 214 (1944).

doi: 10.5553/HYIEL/266627012021009001003

intended to break down the transition, would repeat itself. In 1989, the Soviet Army was still stationed in Hungary and there was little knowledge of how the Russian presence would affect the transition. Therefore, the opposition fought for detailed and rigorous rules to govern the special legal order in which the Parliament (and not the President) was to be the key actor.[3]

As a result, the *Constitution stipulated three different special legal orders. (i)* First, the "State of national crisis" (Section 19/B) refers to war under international law: when official armies of countries fight each other. *(ii)* Secondly, the "State of emergency" (Section 19/C) involves a revolution or a civil war when different groups of Hungarian nationals fight each other. *(iii)* Thirdly, natural disasters or industrial accidents result in a "State of danger" [Section 35(1)(i)].

In 1994, a new special legal order emerged. This was the time of the Balkan war between Serbs and Croatians during which Serbian troops, presumably unintentionally, occasionally crossed the Hungarian border causing a threat to locals. As Hungary was not in war with Serbia, a "State of national crisis" was inapplicable. Therefore, a new special legal order was inserted into the Constitution for such purposes: the "Unexpected Attack" (Section 19/E). In such cases, the Government may take measures to respond to the attack.

The fifth one is the "State of Preventive Defense" [Section 35(1)(m)]. It was included in the Constitution as a special legal order in 2004. Before 2003, military service was mandatory for men; they were recruited after secondary school or university to fulfil their service. A political campaign was launched to abolish obligatory military service, and as a result, the Constitution was amended abolishing recruitment into the army during times of peace, *i.e.* when there is no special legal order. The "State of Preventive Defense" involves either the threat of external armed attack or the fulfilment of obligations arising from alliance.

The new Hungarian constitution, the *Fundamental Law* that entered into force in 2012 made very few changes to the regulation of special legal orders; *the very essence of the provisions of the previous Constitution remained unchanged*. Later, in 2016 the Sixth amendment to the Fundamental Law introduced a new special legal order: the "State of Terrorist Threat". Although there has been no terrorist attack in Hungary so far, the Parliament intended to emphasize its commitment to the fight against terrorism.

While the number of special legal orders has risen continuously, the Ninth amendment to the Fundamental Law adopted in 2020 reconsidered special legal orders and reduced their number to three: the "state of war", the "state of emergency" and the "state of disaster". The amendments will enter into force in 2023.

To further complicate matters, there is also a linguistic gap: the internationally used "state of emergency" does not cover all special legal orders. In the following, I still use the term "state of emergency" to encompass all special legal orders, as the article focuses on the restriction of rights irrespective of the situation in question.

3 Csaba Tordai, 'A Társadalmi Szerződéstől az Alkotmánybíróság határozatáig: Kísérletek az államfői tisztség jogi szabályozására', *Politikatudományi Szemle*, 1998/4, pp. 68 and 71.

3. Constitutional Provisions Governing the Restriction of Rights

Can a constitution give a blank cheque to the executive in a state of emergency? The recent COVID-19 situation recalled the century-old *Jacobson v Massachusetts*[4] that concerned the question whether a state may make vaccination compulsory during an epidemic. Interestingly, the interpretation of the case varies: certain courts view *Jacobson* as virtually a blank cheque for government actions; others apply standard constitutional doctrines with little heed to the emergency.[5]

Considering the Hungarian legal framework, Article I(3) of the Fundamental Law stipulates that

> "A fundamental right may only be restricted to allow the effective use of another fundamental right or to protect a constitutional value, to the extent absolutely necessary, proportionate to the objective pursued and with full respect for the essential content of that fundamental right."

This provision is for 'ordinary times' and is very much in line with the European Convention on Human Rights on restricting fundamental rights. However, for times of emergency, the Fundamental Law contains a separate provision. Article 54 (1) provides that

> "Under a special legal order, the exercise 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)."

The key question seems to be *how this latter provision relates to the general rule*. Plain meaning interpretation dictates that Article 54 is a special provision and provides exception from the general rule of Article I(3). Consequently, all fundamental rights that are not mentioned in Article 54 (criminal procedure guarantees, ban of torture, right to life and dignity) can be suspended or restricted more than in 'peacetime'. In other words, the Government is free to introduce any restriction in a state of emergency; even measures that are not connected to the emergency in question. That seems dangerous: too often, policymakers are resorting to law enforcement and national security-oriented measures that not only suppress individual rights unnecessarily but have proven to be ineffective in stopping the spread of the disease and saving lives.[6]

Are there any other interpretations besides the literal one? Absolutely. First, Article R(3) states that

4 197 U.S. 11 (1905).

5 Daniel A. Farber, 'The Long Shadow of Jacobson v. Massachusetts: Epidemics, Fundamental Rights, and the Courts', *San Diego Law Review*, Vol. 57, Issue 1, 2020, p. 833.

6 George J. Annas *et al*., *Pandemic Preredness*. American Civil Liberties Union, 2008, at www.aclu.org/sites/default/files/pdfs/privacy/pemic_report.pdf.

doi: 10.5553/HYIEL/266627012021009001003

> "The provisions of the Fundamental Law shall be interpreted in accordance with their purposes, the National Avowal contained therein and the achievements of our historic constitution."

Considering the purpose of the provisions of state of emergency, one may conclude that the main goal is to defeat the causes and bring life back to normalcy. There is no need to introduce measures that are unrelated to the extreme situation. Neither is it legitimate to restrict fundamental rights more than it is necessary. One may conclude that necessity and proportionality are required elements of the restriction, also in a state of emergency.

The Fundamental Law also guarantees that Government measures are subject to political and judicial control. The Parliament supervises the activity of the Government and measures do not expire after fifteen days only if the Parliament gives its consent thereto [Article 53(3)]. The activity of the Constitutional Court cannot be restricted [Article 54(2)], which means that the Fundamental Law establishes permanent constitutional review for all legislation, also in a state of emergency.

Secondly, the Fundamental Law stipulates that the detailed regulations of state of emergency are contained in separate laws: the Act on Disaster Management and the Military Act (literally: National Defense Act). Both laws declare that emergency measures must be necessary and proportionate. *Government power is not, and cannot be unlimited and uncontested, even in a state of emergency*.

Arriving at the conclusion that the Fundamental Law does not give absolute power to the Government in a state of emergency, the question arises what the constitutional test for restriction is. Is it the general test Article I(3) of the Fundamental Law prescribes or is it a specific one?

My position is that *a special regulation is necessary only if the general rule is not applicable*; I argue that the general restriction test functions well, even in a state of emergency. At first glance it is obvious that in a state of emergency fundamental rights prevail in a narrower scope (*i.e*. they can be restricted to a greater degree). However, stronger restrictions may also be constitutional according to the general rule. The general rule is not objective: the greater the danger is, the more severe restrictions may become acceptable. The inviolable essence of a fundamental right may vary, depending on the situation at hand. Consequently, if a measure is necessary to face the challenge and it is proportionate to the aim, then it is constitutional, even if it results in a grave restriction. On the contrary, if the measure does not help defeat the causes of the state of emergency or it causes greater damage than it intends to avoid (disproportionate), then the measure is unconstitutional.

4. Case-Law of the Constitutional Court

The Hungarian Constitutional Court has little jurisprudence on COVID-19 legislation. One obvious reason is that little time has passed since the outbreak.

Considering the average duration of the procedure, constitutional review takes a couple of months. As emergency measures change quickly, the law in question is easily out of force by the time the review takes place. If the petition is not geared towards a particular decision, the Constitutional Court has no possibility to review 'expired' legal norms.[7]

The other reason for less active review is beyond constitutionalism. The present danger caused by the pandemic is estimated to be great enough to overrule all other purposes, including fundamental rights. It is very tempting for courts (including constitutional courts) not to contribute to the easing of the restrictions, for fear of being accused of a failure to defend the country, whatever 'failure' may mean. Experience suggests that courts are very cautious when challenging an emergency restriction.

Nevertheless, there are cases concerning COVID-19 legislation. *Decision No. 15/2020. (VII. 8.) AB* examined the amendment to the Criminal Code.[8] In Spring 2020, the Parliament adopted an Authorization Act that, among other provisions, amended the Criminal Code. It modified the provision of *'Scaremongering'*: "at times of a special legal order, anyone who expresses a false statement that may hinder the efficiency of the protection can be imprisoned for three years". This provision is invoked when someone falsely states that COVID-19 does not exist; the amendment of the Criminal Code seems to be against conspiracy theories.

Freedom of expression is the most basic political right, as it encourages individuals to participate in public debates. It shapes public opinion and therefore it can be deemed an essential criterion of democracy.[9] Despite the high rank of freedom of expression within the scope of fundamental rights, it is impossible to accept all opinions as equal. Most European countries that have a history of totalitarian regimes are less hesitant to establish content-based restrictions. The rationale behind that is that states are obliged to maintain public order, especially in 'hard times'. However, such a limitation must meet strict criteria. As for the particular case, the decision stated that the law is constitutional only in case two criteria are fulfilled: *(i)* on the one hand, the perpetrator *needs to know at the time of the perpetration that the statement is false* (subjective criteria); and *(ii)* on the other hand, *the information must be capable of hindering the defense against the pandemic* (objective criteria). As a result of the decision, there remained little room to use this provision for scaremongering. The Constitutional Court though

7 Order No. 3413/2020. (XI. 26.) AB refused to review the exceptional provisions on access to information; neither did Order No. 3388/2020. (X. 22.) AB examine the government and a municipality's quarrel over a territory – in both cases the law in question was out of force by the time of the review.

8 Act C of 2012 on the Criminal Code.

9 Péter Smuk, 'The Constitutional Guarantees of Democratic Political Discourses and their Regulation in Central Europe', *in* András Koltay (ed.) *Comparative Perspectives on the Fundamental Freedom of Expression*, Wolters Kluwer, Budapest, 2015, p. 89.

doi: 10.5553/HYIEL/266627012021009001003

it obvious to use the general test to determine the constitutionality of the law in question.[10]

The first time the Constitutional Court reviewed an emergency measure on its merits was *Decision No. 15/2021. (V. 13.) AB*. In this case, the Government introduced a decree that overruled the Information Act: if the pandemic encumbers the authority to the degree that it cannot give access to data within 15 days (as required by the Information Act), then the authority has 45 (in certain cases 90) days to provide the information. The majority opinion concluded that the extension of the time for providing data is a restriction on the access to information, even if the scope of the accessible data is unchanged. The Constitutional Court found that *timing was very important in respect of this fundamental right; as time passes, data may lose their relevance*. The most important part of the decision is the *interpretation of Article 54(1) of the Fundamental Law*: the majority opinion refused the idea that fundamental rights can be entirely restricted in a state of emergency. If it had accepted that all rights not stipulated in Article 54(1) could be suspended, the Constitutional Court would not have reviewed the petition on its merits: freedom of information is a right that can be suspended in a state of emergency. The Constitutional Court relied more heavily on the logical and theoretical interpretation than the plain meaning of the provision. Although the Constitutional Court failed to explicitly declare that the general limitation test of Article I(3) is applicable, the Constitutional Court further evaluated the restriction upon the necessity-proportionality test. The Constitutional Court arrived at the conclusion that *special tasks in times of pandemic may legitimize the longer time to provide the requested data*, but on each occasion, *the authority must give reasons for the delay*.

The question that *Decision No. 23/2021. (VII. 23.) AB* raised is even more interesting. A group of people intended to organize a demonstration in support of rainbow families and against the amendment of the Fundamental Law. Cautious of the pandemic, the demonstrators planned to sit in their own cars (taking care to exercise social distancing) and to raise public attention by blowing their horns and showing posters. However, both the authorities and the courts banned the assembly as according to the emergency measure, no gathering can be organized. For a scholar, *it is quite unclear how a general ban on freedom of assembly can be constitutional*, especially when it is entirely unrelated to the pandemic. The question remains open whether the Government distinguishes between activities, allowing for certain activities while introducing a general ban on others.

5. Conclusion

Scholars of constitutional law unanimously believe that a state of emergency is not a state of extra-constitutionalism. The legalists argue that emergencies must

10 About the decision and the scaremongering-related case-law of the Hungarian Constitutional Court, *see* András Koltay, 'On the Constitutionality of the Punishment of Scaremongering in the Hungarian Legal System', *Hungarian Yearbook of International Law and European Law*, Vol. 9, 2021.

be handled by entirely legal responses, though these responses might well be different from those applicable in normal times. Legalists think that this is the only way to preserve constitutionalism and the rule of law.[11] Emergency measures must fit into the framework of the constitution. However, in reality, it is very tempting to broaden these frameworks or to simply overrule the constitution in order to provide greater protection against the present danger. Avoiding danger is in accordance with the expectations of the public, whether the danger entails a violent attack against democracy, an enemy bombing a country or a pandemic causing death and ruining the economy and distressing society. One may say that in such cases the restriction of fundamental rights may be a price that we can afford to pay.

History shows it is wise to resist this temptation. The lack of fundamental rights may easily turn into an abuse of constitutionalism. The crisis sparked by the global lockdown only reinforces this destabilizing scenario, and instability is a fertile ground for totalitarianism.[12] The key question is how legislation can balance between fundamental rights and state security.

Such balancing is extremely difficult on an abstract level. The possible reasons for a state of emergency vary to such an extent that no constitution can provide the specific measures in advance. I find that the guarantee is not in detailed descriptions but in political and constitutional guarantees. A properly functioning parliament and constitutional court provide a greater guarantee than any detailed regulation.

The Hungarian Constitutional Court faced a new challenge of reviewing emergency measures. It is promising that the Constitutional Court interpreted the measures related to the state of emergency in a way that there is no possibility for a total restriction of fundamental rights. Hopefully, the Constitutional Court will continue with that approach and examine emergency measures on the merits.

Evaluating emergency measures during an emergency is always easier in hindsight. Still, the responsibility of the judiciary is to uphold rights and not to defeat the pandemic. Social, economic and medical issues may only provide the context but not the goals for a court.

11 Gábor Mészáros, 'Carl Schmitt in Hungary: Constitutional Crisis in the Shadow of Covid-19', *MTA Law Working Papers*, 2020/17, p. 5.

12 Andrea Cioffi *et al*., 'COVID-19 Pandemic and Balance of Constitutional Rights', *La Clinica Terapeutica*, Vol. 172, Issue 2, 2021, pp. 119-122.

doi: 10.5553/HYIEL/266627012021009001003