

RESPONSE TO COVID19 PANDEMIC OUTBREAK IN CROATIA AND HUNGARY

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1. Introduction

Any pandemic not only presents a threat to people's health and safety but also poses a serious risk to their rights and freedoms. In 2020, we encountered a sudden circumstance to which no one knew how to respond. There were numerous options, but each would have implications that would inevitably restrict the rights of individuals. The Covid19 pandemic itself poses a threat to the exercise of human rights, particularly the rights to life and health. Additionally, it emphasizes the interdependence of human rights while also highlighting conflicting interests that are occasionally difficult to compromise. In accordance with international human rights legislation, countries may restrict the use of most human rights when doing so is required to uphold the rights of others or a group's interests. The Covid19 global pandemic has created unusual circumstances that have resulted in greater limits on human rights than would often be the case, both in terms of their scope and their duration. This article introduces the Covid19 conditions for a legal derogation as well as the countries, Croatia and Hungary, special right to derogate human rights in cases of national emergency.

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2. Overview of Relevant International Documents

As WW2 ended, after the huge human losses, the Universal Declaration of Human Rights¹ was passed in 1948. It enshrined human dignity in its preamble: “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.” Further, the European Convention on Human Rights² as a fundamental document for the protection of human freedoms contains some provisions that are applicable in unexpected situations like this pandemic. Article 15 of the ECHR states that derogating measures must be strictly required by the exigencies of the situation and not inconsistent with its other obligations under international law.³ Further, the second paragraph forbids any derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Article 3 (prohibition of torture), Article 4 paragraph 1 (prohibition of slavery and forced labor) and Article 7 (concept of no punishment without law).

Regarding the rights of people who are deprived of liberty, it is worth mentioning the International Covenant on Civil and Political Rights.⁴ Its Article 10 guarantees that all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

3. Croatian Response to the Covid19 Pandemic

3.1. Relevant Provisions of the Constitution of Republic of Croatia

The possibility to restrict human rights and freedoms in Croatian legal order has its basis in the Constitution.⁵ Article 16 predicts restrictions of freedoms and rights by law only in order to protect the freedoms and rights of other, the legal

¹ *Universal Declaration of Human Rights*. United Nations, 1948.

² *Convention for the Protection of Human Rights and Fundamental Freedoms*. Council of Europe, 1950.

³ Audrey LEBRET: COVID-19 pandemic and derogation to human rights. *Journal of Law and the Biosciences*, 2020.

⁴ *International Covenant on Civil and Political Rights*. UN General Assembly, 16 December 1966.

⁵ Constitution of the Republic of Croatia. *Official Gazette* no. 56/90, 135/97, 08/98, 113/00, 124/00, 28/01, 41/01, 55/01, 76/10, 85/10, 05/14.

order and public morals and health. Any restriction of freedoms or rights shall be proportionate to the nature of the need for such restriction in each individual case. Further, Article 17 states that individual constitutionally guaranteed freedoms and rights may be restricted during a state of war or any clear and present danger to the independence and unity of the Republic of Croatia or in the event of any natural disaster. Such restriction shall be decided upon by the Croatian Parliament by a two-thirds majority of all Members of Parliament. However, if the Croatian Parliament is unable to convene, at the proposal of the Government and with the countersignature of the Prime Minister, it shall be decided by the President of the Republic. As Constitution further demands, the extent of such restrictions must be appropriate to the nature of the threat and may not result in the inequality of citizens with respect to race, color, gender, language, religion, or national or social origin. Even in cases of clear and present danger to the existence of the state, no restrictions may be imposed upon the provisions of this Constitution stipulating the right to life, prohibition of torture, cruel or degrading treatment or punishment, and concerning the legal definitions of criminal offences and punishment, and the freedom of thought, conscience and religion. Even though in Croatian legal system we do not have the explicit term 'state of emergency' (*izvanredno stanje*), according to Article 17 we can differentiate 3 types of extraordinary circumstances: 1) state of war 2) clear and present danger to the independence and unity of Republic of Croatia and 3) the event of any natural disaster. In addition, Article 101, paragraph 2, specifies the fourth category of extraordinary circumstances, which is an incident that prevents government entities from regularly carrying out their constitutional obligations. The president of the republic may act in the event of a clear and present danger to the independence, integrity, or existence of the state, or when the government bodies are prevented from regularly carrying out their constitutional obligations. As a result, Article 101 distinguishes between three exceptional circumstances: the first is the state of war (par. 1), the second is the immediate threat to the independence, unity, and existence of the state and the third is when the government institutions are prevented from routinely carrying out their constitutional obligations (par. 2). The aforementioned clause in Article 101, paragraph 2, also implies that these two circumstances are essentially set as alternative circumstances, i.e., that the existence of a clear and present (immediate) danger to the state does not necessarily imply that governmental bodies are prohibited from carrying out their constitutional obligations.

3.2. Implemented Measures

During the time of the pandemic outbreak, a state of emergency was not declared in Croatia. However, it was the executive branch, the government in the first place, that took the initiative from the very beginning⁶ and in late January 2020, with still no confirmed Covid19 case in Croatia, adopted precautionary measures regarding the pandemic. The main proposal was to create a special body for coordinating all public services during the situation of a pandemic outbreak. Based on the Law on Civil Protection System,⁷ the Civil Protection Headquarter of the Republic of Croatia⁸ was established on 20 February as an operational expert body of the Ministry of Health. Almost a month later, after few recorded Covid19 cases, based on the Law of the Protection of the Population from Infectious Diseases,⁹ the Minister of Health on March 11 declared a Covid19 pandemic for the whole territory of Croatia.¹⁰ Consequently, the Croatian government as an executive branch became in charge of adopting measures, while the state of emergency was not declared in Croatia during the whole time of the pandemic. Soon after, the Parliament amended the normative framework, all in the expedited procedure. First, on 19 March the amendment of the Law on Civil Protection System gave Civil Protection Headquarters broadened powers to manage the pandemic. They almost immediately started adopting various measures that authorize them to make decisions and instructions implementing it at regional and local levels. The issue here was that such measures can be enacted in the event of special circumstances. That *per se* implies the occurrence of unpredictable situations which can not be put under any kind of control. Further, on 18 April, the Law on the Protection of the Population from Infectious Diseases was amended. This amendment authorized Civil Protection Headquarters to enact special security emergency epidemiological measures, such as quarantines, restriction of movement, self-isolation, travel bans, which were usually ordered by the Minister of Health. That response of the Croatian government triggered discussion in the public sphere, whereas

⁶ Andrej ABRAMOVIĆ: Ustavnost u doba virusa. IUS-INFO, 30. 03. 2020., <https://www.iusinfo.hr/aktualno/u-sredistu/41073> (accessed 08.02.2023.)

⁷ Law on Civil Protection System. *Official Gazette* no. 82/15, 118/18, 31/20, 20/21, 114/22.

⁸ <https://tinyurl.com/2jr4nbhc> (accessed: 08.02.2023.)

⁹ Law of the Protection of the Population from Infectious Diseases. *Official Gazette* no. 79/07, 113/08, 43/09, 130/17, 114/18, 47/20, 134/20, 143/21

¹⁰ <https://tinyurl.com/29b4sypc> (accessed: 08.02.2023.)

several questionable decisions¹¹ ended up before the Constitutional Court. The first critique in line was that according to the law in force at the moment, only the Minister of Health has the authority to order emergency measures. Second, since Croatia did not declare a state of emergency, the Covid19 pandemic was regulated through a legislative framework– the Law on Civil Protection System and the Law on the Protection of the Population from Infectious Disease. Both laws served as a base for enforcing restrictive measures with the aim of preventing the spread of diseases and were adopted following the procedure prescribed by Article 16 of the Constitution which enables restriction of certain rights and freedoms in normal circumstances, following standard legislative procedure. However, Article 17 of the Constitution which regulates emergency regime and demands for such restrictions to be decided upon by the two-thirds majority of all Member of the Parliament must be mentioned. Bearing in mind those two articles of Croatian Constitution, the public revolt started with many accusations on the count of the Government. Some of the complaints were that they are excessively using legislative powers, lack of transparency, retroactively giving legality to those measures and, in the end, the dissatisfaction of not declaring a state of emergency. Soon, a number of mentioned complaints were challenged before Constitutional Court. In this regard, in September 2020, Constitutional Court confirmed that the executive body, in this case, Civil Protection Headquarters, was legally entitled to adopt restrictive measures based on the legislative framework passed by the Parliament. As Court stressed, they had the legal authority to take anti-epidemic measures with the aim of protecting the health and life of citizens. Further, regarding the control of such measures, Court stated that they were undoubtedly under the supervision and control of executive, legislative and judicial power, and also subjected to Constitutional Court review. Court confirmed that Croatian Parliament can adopt measures based on two constitutional grounds: first, Article 16 – in ordinary circumstances and Article 17 – in emergency situations. Deciding on that dilemma, the Constitutional Court expressed its opinion,¹² underlining that the Constitution does not dictate the Croatian Parliament to pass laws and decisions/measures restricting fundamental human rights and freedoms solely on the basis of Article 17 of the Constitution and that in the end, the decision on application of Article 16 or 17 is in the domain of the Parliament. The Constitutional Court supported

¹¹ See decisions of the Constitutional Court in cases no. U-II372/2020, U-I-1999/2020, U-I-2075/2020, U-I-2233/2020, U-I-2161/2020, U-I-2234/2020, 14.09.2020., *Official Gazette* 105/2020.

¹² There were three dissenting opinions and two concurring opinions.

this kind of approach of executive and legislative toward the prevention of the spread of the pandemic in the majority of cases. One exception was regarding the constitutional review of the Standing Orders of the Croatian Parliament.¹³ Standing Orders were amended in October 2020 to regulate the functioning of the parliament in special pandemic circumstances. The amended article limited the number of members of parliament who can attend the sessions. The alternative was attending the meeting by using electric devices (that also included voting from a distance). However, in this case, Court decided to annul the amendment emphasizing that any restriction of the rights and duties of the members of parliament must be objectively and reasonably justified. Even though the aim was to prevent the spread of COVID-19, Constitutional Court did not find that as a reason good enough to limit members' right to be present at sessions.

4. Hungarian Response to the Covid19 Pandemic

4.1. Relevant Provisions of the Fundamental Law of Hungary

Hungarian Fundamental Law (FL), adopted in 2011 introduced the term special legal order (SLO), which is a comprehensive term that embraced, in a time of COVID-19 outbreak, six emergency situations: 1) state of national crisis (*rendkívüli állapot*), 2) state of emergency (*szükségállapot*), 3) state of preventive defence (*megelőző védelmi helyzet*), 4) state of terrorist threat (*terrorveszélyhelyzet*), 5) unexpected attack (*váratlan támadás*), 6) state of danger (*veszélyhelyzet*). When any type of SLO has been declared, special provisions shall govern the restrictions on fundamental rights. Fundamental Law in Article I (3) says: The rules for fundamental rights and obligations shall be laid down in an Act. 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. According to the part of Fundamental Law that regulates special legal orders, it is stated that the exercise of fundamental rights, with the exception of rights guaranteed in Article II (right to life and human dignity) and III (prohibition of torture, inhuman or degrading treatment

¹³ Standing Orders of the Croatian Parliament. *Official Gazette* no. 81/13, 113/16, 69/17, 29/18, 53/20, 119/20

or punishment), and Article XXVIII (criminal law related fundamental rights) (2) to (6), can be suspended or restricted beyond the extent specified in Article I (3). Considering that Hungary has little experience with special legal orders, apart from its enforcement during the Covid19 pandemic, there is a gap in case law.

4.2. Implemented Measures

First Covid19 case in Hungary was recorded on 4 March 2020, but the Government had in advance formed an operational task force with the aim of preventing the spread of the virus. A week after, on 11 March, a state of danger was declared.¹⁴ Regarding the given circumstances, several polemics took place in the public sphere. Some argued there was actually no need to declare the state of danger¹⁵ since the pandemic outbreak could have been regulated under the existing provisions of the Health Care Act¹⁶ (HCA). On the other hand, the common opinion that prevailed is that special provisions of HCA are not designed to manage a pandemic that paralyzes the entire country for a longer time. A special legal order can be terminated by the body that is authorized to introduce it if the conditions for its announcement are no longer met. Thus, the decree of the Hungarian government did not set a specific time limit for the state of danger. Very soon, the decree and its legality became a subject of public discussions. The legal base was Fundamental Law, 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. Additional to the constitutional foundation, the Act of Disaster Management (DMA)¹⁷ in Hungary defines a state of danger as one described in Article 53 of the Fundamental Law with the addition of paragraph 3, which states that a state of danger can be declared for "other hazards, especially human pandemics causing a mass disease outbreak". Some scholars¹⁸ notice the inconsistency between FL

¹⁴ Government Decree 40/2020. (11.III.) on the declaration of state of danger.

¹⁵ LATTMANN, Tamás: Vajon „elemi csapás” egy járvány, van-e alaptörvényi alapja a veszélyhelyzet kihirdetésének? 2020., <https://tinyurl.com/25nd9jts> (accessed: 10.02.2023.); MÉSZÁROS, Gábor: Indokolt-e a különleges jogrend koronavírus idején? Avagy a 40/2020. (III. 11.) Korm. rendelettel összefüggő alkotmányjogi kérdésekről. *Fundamentum*, 2019. 63–72.

¹⁶ Act CLIV of 1997 on Health Care.

¹⁷ Act CXXVIII of 2011 on Disaster Management and Amending Certain Related Acts.

¹⁸ HORVÁTH, Attila: A veszélyhelyzet közjogi és jogalkotási dilemmái – mérlegen az Alaptörvény 53. cikke. *Közjogi Szemle*, 2020.. 17–25.; SZENTE, Zoltán: A 2020. március 11-én kihirdetett veszélyhelyzet alkotmányossági problémái. *Állam- és Jogtudomány*, 2020. 115–139.

and DMA in the sense that FL allows the declaration of a state of danger only in case of natural disaster (taxatively) while DMA extends the list. Further, as aforementioned, there was no legal span for the declared state of danger. However, the sunset clause says that these decrees remain in force for 15 days unless Government, authorized by Parliament, extends them. The Government submitted a proposal to the Parliament on 20 March asking permission to rule by decree for an indefinite period of time, given that Government was pressed by the time, they asked the Parliament to derogate from the provisions of the Rules of Procedure of the National Assembly. This idea raised conflicts between Government and the opposition. Considering that this kind of decision requires at least four-fifths votes of Parliament Members, which Government didn't have, they failed. Consequently, a new law called Coronavirus Act I¹⁹ (CVA I) was passed on 30 March. Therefore, the Government decree ceased to have an effect. In order to still keep some of the useful measures in force, Chief Medical Officer issued the so-called normative decision²⁰ on 26 March, which prohibited foreign citizens from entering Hungary and students from attending higher educational institutions. Again, this provoked polemics from the constitutional law perspective. According to the Act of Lawmaking²¹, Chief Medical Officer had no authority to act so and also to make decisions that will affect such a wide range of people. Later, the Government took action and after the promulgation of Coronavirus Act, issued new decrees reintroducing the same restrictions. Due to the improved situation, at the request of the Hungarian parliament, the Government terminated the special legal order on June 18, 2020. However, since the Fundamental Law stipulates that upon the termination of a state of danger, the issued decree cease to have an effect, and the measures were still needed, the Parliament passed so-called Transitional Act.²² That Act established a new concept called a state of medical crisis and epidemiological preparedness as a rationalization for maintaining a government's power to introduce various measures without declaring a state of danger. After the second wave of COVID-19, the Government for the second time²³ declared a state of danger in early November 2020. Bearing in mind that issued decrees remain in force for 15 days, if not extended, the Government again needed to obtain parliamentary

¹⁹ Act XII of 2020 on the Containment of Coronavirus.

²⁰ <https://tinyurl.com/mryzztnd>

²¹ Act CXXX of 2010 on Lawmaking.

²² Act LVIII of 2020 on the Transitional Rules and Epidemiological Preparedness related to the Cessation of the State of Danger.

²³ Government Decree no. 478/2020. (XI.3) on the declaration of state of danger.

authorization. This time the situation was slightly different. The Parliament granted authorization, this time not unlimited like in CVA I, and on 10 November passed a new law, Coronavirus Act II²⁴ (CVA II), with its own term validity for 90 days after the promulgation. When the 90 days expired, on 8 February 2020, CVA II was automatically repealed. Nevertheless, this did not mean the final termination of the state of danger because the Government introduced the special legal order of a state of danger for the third time²⁵ on 29 January 2021. The decree was soon followed by a law, Coronavirus Act III²⁶ (CVA III), by which Parliament once again granted authorization for the Government to rule by decree. Additionally, two restrictions that upset the public were when at the beginning of the second wave of the pandemic, the Government declared a ban on initiating local or national referendums²⁷ and suspended the right to assemble.²⁸ By doing so, it would be impossible to hold any sort of public gathering, protest, or political demonstration.

Some say that regulation with more SLO categories can prevent government overreaction, while others suggest that too many categories make legislation too complicated, provoking unnecessary debates. Moreover, it is worth mentioning that Hungary faced domestic and international criticism mainly because of the general authorization granted in the CVA I.²⁹ Finally, Hungary opted for the first solution and changed Fundamental Law introducing only 3 special legal regimes (state of war, state of emergency and state of danger) with the new Amendment that entered into force on 1 November 2022.

²⁴ Act CIX of 2020 on the Containment of the Second Wave of Coronavirus.

²⁵ Government Decree 26/2021. (I. 29.) on the termination of the state of danger declared by Government Decree 478/2020. (XI. 3.).

²⁶ Act I of 2021 on the Containment of Coronavirus.

²⁷ Government Decree 483/2020. (XI. 5.) on transitional provisions relating to by-elections during the period of state of danger.

²⁸ Government Decree 484/2020 (XI.10.) on the second phase of protective measures during emergency.

²⁹ Zoltán NAGY – Attila HORVÁTH: The (too?) Complex Regulation of Emergency Powers in Hungary. In: Zoltán NAGY – Attila HORVÁTH (eds.): *Emergency Powers in Central and Eastern Europe: From Martial Law to COVID-19*. Budapest–Miskolc, Ferenc Mádl Institute of Comparative Law – Central European Academic Publishing, 2022. 149–187.

5. Conclusion

In unexpected events like this pandemic, the executive power has to react promptly and effectively to imminent danger while bearing in mind the rights inherent to democratic society. Both, Croatia, and Hungary, like the rest of Europe, found themselves in extraordinary situations caused by the COVID-19 pandemic. Comparing the response of those two countries, we can detect some similarities. Commendable is a fact that both countries prepared for the possible outbreak by forming special bodies to manage the situation when pandemic outbreaks. Croatia decided to take action based on the legal framework already in place, primarily public health legislation, which already included certain crisis management tools,³⁰ while the model for which Hungary opted with the explained types of the special legal regime was introduced for the entire state for the first time in modern history. Additionally, both countries' policies were not well received by the general public, which led to a number of complaints that were ultimately challenged before the Constitutional Court. Even though the health systems of each country were the ones most affected by Covid19, the effects on law, the economy, and education are widespread. Due to the pandemic's rapid spread, the majority of the countries were not prepared and, at one point, did not know how to react. The same was evident for Croatia and Hungary, whereas both reacted by implementing various measures and modifying legal frame through amending old and adopting new laws while at the same time balancing between legality and efficiency.

³⁰ Petar BAČIĆ – Marko IVKOŠIĆ: The Croatian “Emergency Constitution” on Test. In NAGY–HORVÁTH op. cit. 97–129.