Розділ IV

ПРОБЛЕМИ КОНСТИТУЦІЙНОГО ПРАВА ТА МІСЦЕВОГО САМОВРЯДУВАННЯ

DOI: 10.33663/1563-3349-2022-33-273-277
УДК 342

Fruzsina Gárdos-Orosz
(director, Institute for Legal Studies, CSS)

Iván Halász
(senior research fellow, Institute for Legal Studies, CSS)

Presentation thesis for the Conference
on the 30 Anniversary
of the Independence of Ukraine

CONSTITUTIONALITY AND THE SPECIAL LEGAL ORDER

Introduction

The Covid 19 disease and its treatment in the national legal systems raised important questions of constitutionality. In this contribution to the anniversary of the independence of Ukraine, we will remember the importance of constitutionality even in situations of danger and extraordinary threats, natural or human attacks on the society, nature and economy. We are facing this situation now in times of the pandemic, the Covid19 virus that attack almost the entire globe.

According to the Venice Commission, that made a comparative report about the situation of democracy, rule of law, the protection of human rights in times of the pandemic in Europe [CDL-PI (2005)005rev], the only legitimate aim and legitimate ground for adoption of emergency measures is to help the State overcome an exceptional situation. It is the nature, severity and duration of this exceptional situation which determines the type, extent and duration of the measures that the State may lawfully resort to. Emergency measures should

© Fruzsina Gárdos-Orosz, Iván Halász, 2022

respect certain general principles which aim to minimize the damage to fundamental rights, democracy and rule of law. The measures are thus subject to the triple, general conditions of necessity, proportionality and temporariness.

We will first share some basic information about the structure of the special legal orders and their history in Hungary including the Ninth Amendment to the Fundamental Law that will enter into force in January 2023 that aims to change the present structure of the special legal order.

In the second part of the presentation, we will show the special legal orders in the Fundamental Law and highlight the relevance of constitutional guarantees.

The special legal orders in Hungary

The Hungarian legal system treats the special legal order in the constitutional framework currently in Chapter V of the Fundamental Law. The Fundamental Law says itself that it can not be suspended during the special circumstances, not even in the special legal order. This means that its core basic principles such as the protection of human rights and the separation of powers, the democracy and the rule of law are such rules that have guiding force also in the special legal order even if the related specific norms change.

During the democratic transition in 1989, a very detailed system was adopted that aimed to give adequate detailed rules to the different threats previewed. Some further details were regulated in acts adopted by the two thirds majority of the Parliament such as the catastrophe defence act or the act on public health.

Different rules were created for the declaration of the special legal order, different authorities were appointed to rule about and in the special legal order. Reversibility and temporality were the main objectives of the guarantees built into the constitutional system according to the reasoning of the constitutional revision in 1989 (in 1989 the former Act XX of 1949 on the Constitution was completely revised and transformed to a rule of law constitution).

This concept, a so called small constitution within the big constitution remained valid after 2012 when the Fundamental Law entered into force. The essence of this solution of building responses to the formerly expected threats. As you will see bellow several possible special threats were identified that call for special legal order and in these situations, different state authorities got different competence depending on the nature, extension and temporality of the situation.

The Ninth Amendment to the Fundamental Law changed this very detailed concept and grouped the special situations differently aiming to simplify the rules of the alteration from normalcy.

During the pandemic there were serious debates about the use of the state of danger, about its declaration and prolongation[1]. Changing the constitutional text was not a surprising answer to these constitutional difficulties.

[1] Zoltán-Szente – Fruzsina Gárdos-Orosz in Konrad Lachmayer (eds.): Pnademocracy, hart, 2021, forthcoming.

This is a simplified regulation, compared to the current system provided by the Fundamental Law. In the system in force 6 different special legal orders exist in the Fundamental Law as you can read bellow, and the state of emergency is such a legal order that allows the most serious alterations from the normal legal order. The state of danger was introduced at the break out of the Covid 19 pandemic that was created originally for natural disaster and industrial catastrophe and was extended to the pandemic only by the Catasthropne Act (which is not possible constitutionally). The special legal order about the terrorist threat was introduced only as a response to the migration crises that did not touch Hungary seriously.

In the special legal orders the temporality of the situations are guaranteed differently, but it is possible in all special legal orders that the authorised body adopt decrees that can overrule statutory regulations[2].

Important provisions in the Fundamental Law of Hungary as in effect in 2021 and before, during the pandemic disease.

Common rules for the state of national crisis and the state of emergency

The National Assembly shall declare a state of national crisis and set up a National Defence Council in the event of the declaration of a state of war or an imminent danger of armed attack by a foreign power (danger of war); or shall declare a state of emergency in the event of armed actions aimed at subverting the lawful order or at exclusively acquiring power, and in the event of serious acts of violence massively endangering life and property, committed with weapons or with instruments capable of causing death.

If the National Assembly is prevented from making such decisions, the President of the Republic shall have the right to declare a state of war, to declare a state of national crisis and set up the National Defence Council, or to declare a state of emergency. As soon as the National Assembly is no longer prevented from acting, it shall at its first sitting review whether the declaration of a state of war, state of national crisis or state of emergency was justified, and decide on the legality of the measures adopted.

During a state of national crisis or a state of emergency, the National Assembly may not dissolve itself and may not be dissolved. During a state of national crisis or a state of emergency, no general elections of Members of the National Assembly may be called or held (8) The National Assembly that has dissolved itself or has been dissolved may be convened also by the National Defence Council during a state of national crisis, and by the President of the Republic during a state of emergency.

State of national crisis

The National Defence Council shall exercise:

---

[1] Read about the Hungarian special legal orders in more details in English in Zoltán Szente: The Constitutional Law of Hungary, Wolters Kluwer, 2021.

a) the powers delegated to it by the National Assembly,

b) the powers of the President of the Republic,

c) the powers of the Government.

(3) The National Defence Council shall decide: a) on the deployment of the Hungarian Defence Forces abroad or within Hungary, on their participation in peacekeeping, on their humanitarian activity in a foreign operational area, or on stationing them abroad,

The National Defence Council 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.

State of emergency

The Hungarian Defence Forces may be deployed during a state of emergency if the use of the police and the national security services proves insufficient. During a state of emergency, if the National Assembly is prevented from acting, the President of the Republic shall decide on the utilisation of the Hungarian Defence Forces and it can issue decrees.

Extraordinary measures introduced by means of decrees shall remain in force for thirty days, unless the National Assembly or, if it is prevented from acting, the committee of the National Assembly dealing with national defence issues extends them.Upon the termination of the state of emergency, such decrees of the President of the Republic shall cease to have effect.

State of preventive defence

In the event of a danger of external armed attack or in order to meet an obligation arising from an alliance, the National Assembly shall declare a state of preventive defence for a fixed period of time, and shall simultaneously authorise the Government to introduce extraordinary measures laid down in a cardinal Act. The period of the state of preventive defence may be extended.

During a state of preventive defence, 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. Upon the termination of the state of preventive defence, such decrees of the Government shall cease to have effect.

State of terrorist threat

In the event of a significant and direct threat of a terrorist attack or in the event of a terrorist attack, the National Assembly shall, at the initiative of the Government, declare a state of terrorist threat for a fixed period of time, and shall simultaneously authorise the Government to introduce extraordinary measures laid down in a cardinal Act. The period of the state of terrorist threat may be extended

Unexpected attack

In the event of an unexpected incursion of external armed groups into the territory of Hungary, until the decision on the declaration of a state of emergency or state of national crisis, the Government shall be obliged – if necessary, in accordance with the armed defence plan approved by the President of the Republic – to take immediate action using force proportionate to and prepared for the attack, to repel the attack, to defend the territory of Hungary with domestic and allied readiness forces of the air defence and air forces, in order to protect lawful order, life and property, public order and public safety.

State of danger

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.

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.

The decrees of the Government referred to in paragraph (2) shall remain in force for fifteen days, unless the Government, on the basis of authorisation by the National Assembly, extends those decrees. (4) Upon the termination of the state of danger, such decrees of the Government shall cease to have effect.

Conclusion: common guarantees for the special legal orders – the preservation of coinstitutionality

Under a special legal order, the exercise of fundamental rights may be suspended or may be restricted beyond the extent of the ordinary proportionality test. Some fundamental rights are non deraogable also in times of special legal orders such as the human dignity or the right to fair trial or the right to life.

Under a special legal order, the application of the Fundamental Law can not be suspended, and the operation of the Constitutional Court can not be restricted. This is the most important guarantee for the protection of the separation of powers and the human rights also in these situations, although it is important the good applications arrive to the constitutional judiciary to check the emergency powers.

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. Temporality of the special legal order is the other most important guarantee.

The detailed rules to be applied under a special legal order shall be laid down in a cardinal Act. it is also an important constitutional guarantee that the detailed rules should be in specific rules of qualified majority to provide a full fledged system of constitutional guarantees also in these situations.

We conclude that in all states, it is of high importance to create constitutional guarantees not only in the times of peace and order but also in the times of crisis within the constitutional framework.