

“With all due respect, I have no time for this”

The Hungarian Case

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1. The Pandemic Crisis in Hungary. Background.

In Hungary, like in many other countries, the Covid19 pandemic and the envisaged measures to prevent its expansion determined the approval of emergency laws.

The Hungarian Government declared the state of danger on 11 March 2020. On that occasion the power to issue decrees in order to suspend the application of certain laws and to take other extraordinary measures was granted for a period of 15 days, except if the Government – on the basis of an authorization from Parliament – decided to extend the effect of the decree. In effect, on 30 March 2020, this extension has been granted by the Parliament on broad terms: “until the endangering situation cease to exist.”

It is now undisputable the absence of any defined time limit for the extensive powers conceded to the national Government.

In the particular case of the functioning of the courts, on 14 March, the Government declared an extraordinary period of judicial vacations. This means that for the duration of judicial vacation, no regular trial hearing should be scheduled except in urgent court cases. Hearings must be held by videoconference. If the personal contact during the hearing is unavoidable a special protocol were applicable for the protection of health.

However, the situation of courts changed on 30 March since the Government issued a new decree that ended the judicial vacations and, accordingly, ordered the application of electronic devices during the hearings (videoconferencing, e-mail summoning, telephone calls etc.) in all cases, urgent or not urgent. Similarly to other EU State members, the enforcement of the new decree has proved very challenging due to the many difficulties in implementing a system based in the described technologies. In practice, in Hungary, courts are closed at a large extension plus the fact that their supervisory powers have been greatly curtailed in recent years.

Regarding the new Bill two crucial problems should be highlighted in terms of the serious risks towards Rule of Law.

First and foremost, the law gives an unacceptable power to the government to freely rule by decree without a “sunset clause”, a time limit. There is no provision to assure that the Parliament and, in particular, the Courts exercise their role of an effective oversight.

Second, the law creates new crimes. In particular, it should be mentioned that 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.

The risk of violations on the fundamental right of “freedom of expression”, particularly by “media”, is, obviously, now enhanced.

The Emergency Bill approved in Hungary causes an irremediable damage on the basic rules of Democracy. They seem to give reason to the findings expressed by the Democracy Report 2020ⁱ pointing out Hungary as “a particularly striking case of contemporary autocratization”. According to this report published before the pandemic crisis, Hungary emerges as the first member of the EU ever to host an electoral authoritarian regime and it is the most extreme case of democratic regression in recent times.

During the past recent years the European Association of Judges (EAJ) has denounced the continued backslide of Rule of Law in European Union and has concretely measured the situation of the Hungarian judiciary in order to uphold Judicial Independence, the core mission of EAJ.

In 2019, on request of the Association of Hungarian Judges (Magyar Bírói Egyesület – MABIE) and of the National Judicial Council of the Hungarian Judiciary (Országos Bírósági Tanács - OBT) the EAJ Working Group on the Situation of Member Associations was commissioned by the EAJ Assembly to carry out a “fact finding mission” with the Hungarian Judiciary in Budapest.

A committee was appointed. The EAJ committee consisted of the President of the EAJ-Working Group On the Situation of Member Associations, Supreme Court Judge Stephan Gass, from Switzerland, and Honorary Presidents of the International Association of Judges (IAJ), Judge Gerhard Reissner, and Judge Günter Woratsch, from Austria.

The mandate addressed only some very specific aspects of the Hungarian judiciary namely the lacks in collaboration between the National Office for the Judiciary (NOJ) and the National Judicial Council (NJC), the practice of appointing judges and court leaders under the authority of the President of the National Judicial Office and the observance and safeguarding of rights of

ⁱ Anna Lührmann, Seraphine F. Maerz, Sandra Grahn, Nazifa Alizada, Lisa Gastaldi, Sebastian Hellmeier, Garry Hindle and Staffan I. Lindberg. 2020. Autocratization Surges – Resistance Grows. Democracy Report 2020. Varieties of Democracy Institute (V-Dem).

participation in regard to groups of representatives, the Association of Hungarian Judges (MABIE) in particular.ⁱⁱ

Although the investigation were circumscribed to these particular issues the conclusion extracted was elucidative: “it is in any case obvious, that to guarantee functioning of the balance of powers, additional amendments of the law regarding the appointment of judges and presidents, criteria for the President of the Supreme Administrative Court, and enlargement of the powers of the National Administrative Judicial Council are necessary.”

Thus, the threats to judicial independence in Hungary, like in other EU countries especially in Poland, are been one the major preoccupations for European Judges expressed in multiple “fora” by EAJ.

During recent years the judicial independence has been systematically undermined during consecutive “judicial reforms”; one example, condemned by the European Court of Human Rights (ECtHR), was to force judges, in case the President of the Supreme Court, to retire (see the Grand Chamber judgment of the ECtHR, case *Baka v Hungary*). In the reasoning of its ruling the ECtHR argued with an unambiguous approach: “it appears that the premature removal of the applicant from his position as President of the Supreme Court defeated, rather than served, the very purpose of maintaining the independence of the judiciary, contrary to what has been argued by the Government. Furthermore, the premature termination of the applicant’s mandate undoubtedly had a “chilling effect” in that it must have discouraged not only him but also other judges and court presidents in future from participating in public debate on legislative reforms affecting the judiciary and more generally on issues concerning the independence of the judiciary.”

This “chilling effect” has been totally ascertained in subsequent years.

The recent welcomed rulings of the European Court of Justice (ECJ) about the so-called “judicial reforms” in Poland should have also an impact on Hungary. It seems now undisputable that ECJ put together a far-reaching concept of judicial independence. The order in April 8th of the Court in Case C-791/19 R (*Commission v Poland*) ruling that Poland must immediately suspend the application of the national provisions on the powers of the Disciplinary Chamber of the Supreme Court with regard to disciplinary cases concerning judges probes the point we are arguing; in the reasoning of the decision there is a specific approach to the systemic impact that the lack of independence of a particular body of the judiciary - the disciplinary chamber – would have on the

ⁱⁱ The final and very thorough report can be found in the website of the International Association of Judges: <https://www.iaj-uim.org/iuw/wp-content/uploads/2019/05/Report-EAJ-Hungary.pdf>.

judicial system as a whole. In paragraph 90 the ECJ pointed out that the “mere prospect” for Polish judges to “face the risk of a disciplinary procedure”, which could bring them before a body whose independence would not be guaranteed, is likely to affect their independence regardless of how many proceedings may have been initiated or the outcomes of these proceedings to date. It is easily anticipated how this systemic method could determine a completely negative assessment on the independence of the Hungarian judiciary.

Thus, in this already intricate context, the recent measures taken by the Hungarian Government following the pandemic crisis have eroded, once again, basic principles of Democracy and Rule of Law in Hungary, still a EU Member State.

2. The reaction of European Union

The discretionary powers granted to the Government using the pretext of the present corona virus crisis for this Emergency Bill were received in European Union with displeasure and a concrete disapproval.

The negative legacy of Hungarian political authorities in the past years constitute yet another indication about the real purposes behind this new Law.

Although not revealing the name of the country, the President of the European Commission, Ursula von der Leyen, issued a statement calling for all emergency measures to be “limited to what is necessary and strictly proportionate. They must not last indefinitely.” Some days later, the President of the European Commission finally added: “I am concerned that certain measures go too far – and I’m particularly concerned with the situation in Hungary.”

Reactions from different European major representatives were expressed in similar manner. The Council of Europe’s Secretary-General, the Civil Liberties Committee of the European Parliament and the UN High Commissioner for Human Rights raised serious concerns about the impact of the Hungarian measures. The EAJ equally shared the same apprehensions.ⁱⁱⁱ

In a broader approach, it must be said that a state of danger can be introduced as a special legal order; no question about it.

However, the fundamental principles of Rule of Law cannot be ever superseded even (especially, I would say) in case of an emergency. These rights can be restricted but only in the interest of averting a threat and because of this threat; in the present circumstance the present crisis is entirely restricted to a health issue and must remain in this precise area.

ⁱⁱⁱ *Being a Judge in Times of Pandemic*; José Igreja Matos, EU Law Live, accesible here: <https://eulawlive.com/weekend-edition/weekend-edition-no12/>

In European Union our founding values of freedom, democracy and respect for human dignity are mandatory imposed by our Treaties. The fight against covid-19 requires extensive measures; however the fight against this virus cannot be used as to extend the state of emergency indefinitely in order to surpass the fundamental mechanisms of “checks and balances”, which defines Rule of Law.

The special case of Hungary generated a public uproar and led, for instance, thirteen European centre-right parties belonging to European Peoples Party (EPP) to react publicly in a vigorous manner calling for the expulsion of the Fidesz, the political party that rules the country, from the EPP. The answer from the Hungarian Prime Minister Mr. Victor Orbán, could not be stronger in its evasiveness.

“With all due respect, I have no time for this,” responded the Prime Minister in a letter to EPP Secretary General Antonio Lopez-Isturiz.

3. A brief conclusion.

Hungary is an eloquent example on how Rule of Law can be ignored in times of emergency.

The Hungarian Parliament is not by all means suspended but nevertheless the new emergency law provides the government the power to suspend or abrogate statutory provisions without parliamentary approval during the crisis.

Transparent decision-making is essential on a democratic society. In countries where the right to publish information, as part of the right to freedom of expression, is severely diminished, the consequences of the epidemic have been extremely serious, while the most successful countries have significantly facilitated public information.

This pandemic and the emergency measures affect us all, but not all of us are affected equally. That is the reason that is absolutely essential that Hungarian judges, like all judges in EU, continue to work at the service of each citizen anytime an urgent measure must be decided, anytime a ruling must be taken in matters that imply with fundamental rights, protecting, in particular, the more vulnerable members of our communities. The control and repression of abuses in the enforcement of emergency measures must be real and only judiciaries can provide an impartial and independent supervision.

The balancing exercise to be guaranteed by each EU Member State must follow the crucial command of the principle of proportionality, as Article 52(1) of the EU Charter of Fundamental Rights determines. It might be worth it to quote, as often as necessary, this Charter norm: ‘Any limitation on the exercise of the rights and freedoms recognized by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives

of general interest recognized by the Union or the need to protect the rights and freedoms of others.’

Rule of Law is a fundamental value for European Union. It should always demand the best of our time. As much time as needed; the longer, the better.