Hungary's Struggle: In a Permanent State of Exception

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The Hungarian government has been busy these past several months with "fighting the migrants". In Spring 2015 the government launched a countrywide campaign. A national consultation on immigration and terrorism was launched and Hungarian language billboards were displayed which read: "If you come to Hungary, you have to keep our laws!" or "If you come to Hungary, you shouldn't take the jobs of Hungarians!". In Fall 2015 fences were built on the southern border, new laws made the crossing of the closed border illegal, and criminalized the illegal entry to the country. The government declared "a state of crisis" in two southern regions of Hungary without a definite constitutional mandate and in early 2016 initiated a constitutional amendment to widen the scope of constitutional emergency powers. Most recently it has called for a referendum on EU relocation quota plan and declared "nationwide migrant crisis".

The justification given by the government for these measures was the "massive immigration" which "endangers the jobs of Hungarians and redraws Hungary's cultural and religious identity". The argument went that, due to a "migrant crisis" the Hungarian government needed a greater room for maneuvre, not limited by constitutional constraints, in order to manage the crisis. This argument presupposes that, as a result of the migrant crisis, Hungary has ended up in a state of exception, when constitutional guarantees have to be limited or suspended; essential powers have to be concentrated in the hands of the prime minister, until the crisis is overcome.

State of exception in the constitution

Constitutional theories acknowledge that exceptional situations might demand exceptional measures. There are circumstances which might warrant temporary suspensions of constitutional guarantees, in such cases where the very survival of the constitutional democracy is at stake. However, as Dyzenhaus emphasizes, Kantians and Lockeans think different on how the rule of law can control politics in abnormal times. Indeed, there are disagreements in the democratic world on many questions concerning emergency powers. The last years' Paris attacks served as justification to strengthen police power in France. That country is a target destination of the asylum-seekers, and the French Muslim population is the largest in western Europe. Despite of that when France proposed constitutional amendments on the state of emergency and deprivation of citizenship, many questioned its compatibility with European standards. The Venice Commission report states that the recently adopted constitutional text should be amended "to avert the risk that the constitutional system for a state of emergency will be applied too widely".

There is a rival concept, which argues that in abnormal times (*Ausnahmezustand*) the sovereign is legally uncontrolled. In the view of Carl Schmitt, the "sovereign is he who decides on the state of exception", and in the name of public good the sovereign can go beyond the rule of law. This view serves as the intellectual basis for an unhampered executive power of the Hungarian prime minister. (Probably needless to say that – as opposed to France – Hungary does not have considerable Muslim populations and the country is not a target destination of asylum-seekers.)

The Hungarian Parliament adopted a new constitution in 2011 by referring to the state of exception. The government cited the consequences of the 2008 global financial crisis and the "paralyzed nature" of the then constitutional bodies as justification. The text contains a detailed set of prescriptions for the state authorities to respond to an emergency. It provides for special emergency powers, in case of an imminent danger of war and external armed attack, and in the event of a natural or industrial disaster (starting with

Article 48, like in the constitution of the Weimar Republic of Germany). In the latter case, it is even for the government to decide on how to respond to the emergency. The current text does not provide for suspension of constitutional rights in other situations. It contains an exhaustive list of those situations when the country is disturbed or endangered. That is why the government aimed at changing the constitution to enact a new instance that allows for special measures. (Although the proposal of the 6th Amendment was declared "top secret" by the government, officially not open to the public for thirty years, a Jobbik MP put it on one of the far right websites, which is how the public was informed about the plan.)

The 6th Amendment would have included Article 51/A on the "state of terrorist threat" in the constitution. There are already five instances (state of national crisis, state of emergency, state of war, state of preventive defense, unexpected attack) specified by the constitution that allow for special measures to be enforced for national security reasons. Under the proposal, there would be a sixth one: the government could declare a state of terrorist threat after a terrorist attack or during a period of high threat of terrorism. In such a case, the government would pass decrees that would suspend or deviate from certain laws, and it would introduce other extraordinary measures. The decrees would remain effective for sixty days and would expire if Parliament does not renew them before the sixty days are up. During this period even the army would be used to assist the police and the national security guard.

There are several problems with this proposal. First, the "terrorist threat" is a very vague notion, and under the proposed text, its interpretation is up to the government. Second, the government would declare the "state of terrorist threat" on its own, assuming there is no time to have the Parliament's approval, so the government would decide both that there is a threat and how to respond to it. Third, in state of terrorist threat the government could suspend fundamental rights by controlling or even switching off the internet, by prohibiting gatherings, by freezing the assets of individuals, organizations, or limiting the traffic, etc. And last but not least, there would be no enforceable checks on this authority. The proposal does not require the *prior* consent of Parliament and courts could not decide *posteriorly* on the proportionality of the special measures adopted.

State of exception in practice

What is a terror threat according to the government? "All the terrorists are basically migrants," the prime minister said. Accordingly, a Syrian man who took part in 2015 Röszke unrest has been charged recently with terrorism. It was a violent crash between migrants and the Hungarian authorities one day after Hungary closed its border and tightened migration laws. The frustrated migrants tried to enter into Hungary, they threw empty water bottles and stones at the police, the police responded with water cannon and tear gas.

After that, the government based upon a very vague authorization provided by Article 15 (1) of the constitution (the Government shall exercise powers which are not expressly conferred by laws on another state body) had declared "a state of crisis because of massive immigration" in two southern regions of Hungary by n. 269/2015. Governmental Decree, which allowed the government to shut down roads and speed up asylum court cases and declare that illegal border crossing was a crime.

This Governmental Decree would have been expired on March 15, but on March 9 a new decree (n. 41/2016 Governmental Decree) was adopted to declare "a nationwide migration crisis" allowing tougher measures to police and to the army to patrol borders and to search for illegal migrants throughout the country. As a justification, the Minister of the Interior argued that Slovenia, Croatia and Serbia implemented extraordinary measures on their borders allowing entry only under the Schengen regulations, i.e. those willing to enter must have valid passports and visa. In the Minister's view, it was uncertain what reactions these measures could create from the refugees and illegal migrants who were already in these countries.

By this time it was clear that the government would not be able to adopt the proposed 6th Amendment, because one or two votes were missing to pass it

in Parliament. Therefore the government changed its strategy and it called a referendum on EU relocation quota plan.

Today the government calls the referendum "a fundamental tool of democracy". Yet, in 2011 it preferred sending out not audited questionnaires to the electorate instead of calling a referendum to decide on the adoption or rejection of the constitution. In the last four years no one has succeeded in initiating a referendum either because of the 2011 referendum law or because of its interpretation given by the new Electoral Commission, the Curia or the Constitutional Court. Most recently even physical force has been used to prevent a politician from submitting a referendum question. This time the government initiated the procedure together with a new information campaign on terrorism and migration. Therefore it is most likely that there will be a referendum soon in Hungary. Is the government desperate to win an approval of the people to maintain the permanent state of exception?

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