Illiberal Constitutionalism at Work

The First Two Weeks of COVID-19 in Hungary and Poland

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Hungary's and Poland's responses to COVID-19 demonstrate how illiberal constitutionalism works in practice. In both countries, national constitutional or sub-constitutional emergency regimes provide the framework for government action. Different political and constitutional contexts, however, mean that their specific proceedings diverge: In Hungary, in the beginning, governmental actions followed the non-partisan constitutional procedural and technical rules. When it was, however, not beneficial anymore, the Government simply ignored a particular constitutional provision. In Poland, on the other hand, upcoming presidential elections and financial considerations would turn an application of the Polish Constitution into a potential threat to the ruling majority. Instead of observing the Constitution, the Polish government has decided to use statutory means. These are not only inadequate for the current stage of the crisis but also undermine the liberal 1997 Constitution, informally creating its very own illiberal constitution.

On March 11, Hungary declared the so-called "danger of crises". Poland followed suit, declaring the "state of epidemic threat" on March 13 and the "state of epidemic" on March 20. In the weeks that followed, non-food stores have closed in both countries. Restaurants in Poland can serve only take-out, in Hungary they shut their doors after 3pm. Cinemas are closed. Schools and universities have closed and resorted to distance learning. Borders are closed – Hungarians and Poles can return home from abroad, but have to undergo health checks and other precautions. In both Poland and Hungary, there is a radical limitation on outside activities, such as gatherings and assemblies. Limitations of everyday life have been introduced gradually as the virus spread. While there is no curfew yet in Poland, Hungary has introduced a partial one for 15 days on March 28. The number of infections and fatalities continues to grow.

Both Hungary and Poland have provided an extraordinary answer to the deepening crisis. However, they have applied different measures. The "danger of crises" is a constitutional institution described in detail by the Hungarian Fundamental Law (FL). Even if the content of the FL is objectionable in many ways, its regime on emergencies might be an exception. Based on Hungary's former Constitution, the FL's emergency provisions define situations, authorize, delegate, require cooperation and continuity, set deadlines, limits, and guarantees. The Polish "state of epidemic threat" and the "state of epidemic", on the other hand, are regulated by the statute on infectious diseases. Polish authorities have decided not to declare the "state of natural disaster", which is a constitutional means for extraordinary situations like epidemics or pandemics. Although the Polish Constitution (hereafter: Constitution) is not as precise as the FL in this respect, it still regulates "who", "when" and "for how long" the state of natural disaster can be introduced. It also contains provisions on which human rights may be limited, proportionally to the degree of threat, with the intention to swiftly restore conditions allowing for the State to function normally.

Cooperation during the crisis

The FL and the Constitution both rely on existing organs of state that should operate during extraordinary situations. They stipulate that constitutional courts (the Hungarian CC and the Polish CT) cannot be suspended and that the branches of government need to cooperate. Right now, we do not know if the CC or the CT will receive any petitions concerning the emergency measures, but courts and other bodies can initi-

ate procedures. Right now, the courts are on an extraordinary break in order to avoid physical contact, but they have not completely stopped working. The same applies to the prosecutors. We should, however, remember that both the CC and the CT are packed.

As for the Parliaments, neither Government can suspend their operation or dissolve them. In Hungary, the Parliament can dissolve itself but this option has not been discussed thus far. The keynote of political communication in Hungary is that parliamentary sessions are not „gatherings" and must continue "even during wartime" – a rule that follows from the FL. In Poland, unlike Hungary, the *Sejm* decided on March 26 to work and vote online; the *Senat* is also prepared to do so.

Some controversies

Transmission from the Hungarian Parliament is limited: Journalists no longer have their permanent entry pass (they are allowed to enter on a daily basis), have to be healthy (although it is unknown how this is checked), and are encouraged to listen to the online transmission instead of personally attending parliamentary sessions. In Poland, entry to the Parliament is limited as in other places; everyone's body temperature is measured, even MPs'; *Sejm* workers mainly telework, and media staff is asked to reduce the number of entries as they can only use one door. Transmissions are happening as usual. Polish governmental bodies send out updates several times a day. Media participation is reduced, but meetings can take place in person if a two meters distance is kept. In Hungary, there are daily press conferences from the Operative Corps. Since March 19, these are broadcast instead of taking place physically. Journalists can submit their questions beforehand; and either receive an answer or not. In the case of anti-government media, it is usually a "not".

There seems to be no trust in the people in Hungary. While in Poland, information on the spreading epidemic is sufficiently provided via the official website and social media, the Hungarian government website on the coronavirus contains little information. The Hungarian Operative Corps repeatedly do not answer questions concerning the public statistical data on the geographic range of the virus and do not give proper justification. The protection of personal data might not be the best argument: what is requested is statistical data, and, in the case of statutory confinement, it is not observed at all (the infected is required to put a red document indicating the fact of the infection on their door, in a well visible place). Hungarian and Polish officials keep saying that health workers have all the equipment necessary to stay safe while treating patients – contradicting reports from health care practitioners.

In Hungary

According to the FL, the Hungarian government can issue decrees to suspend the application of certain Acts, derogate from the provisions of Acts and take other extraordinary measures, as provided for by a cardinal Act. These decrees are in force for 15 days, which the Government can extend if it receives the approval of the Parliament. In the fight against the virus, the Government has adopted many decrees in order to enforce similar measures as have been introduced in many countries. It had submitted an Authorisation Bill before deadlines for some decrees affecting schools, universities, border control, court break expired. The opposition did not support a fast-track procedure; the Bill could not be passed in time but on March 30.

The Authorization Act has received broad criticism beyond the opposition. The Act mainly repeats and implements the FL, regarding, for example, the CC, the possibility of governmental law-making, including the suspension of and derogation from legislative provisions, the requirement of necessity and proportionality. Most importantly, it extends the effect of the decrees adopted, and it agrees on their content, which is, again, implementing the FL.

The Act also extends, ex-ante, the effect of any decrees that the Government will adopt until the end of the crisis. This is quite disturbing because it bypasses the 15-day deadline of the FL, authorizes something the content of which is unknown, and effectively eliminates the possibility of oversight. While the Act does allow Parliament to withdraw its authoriza-

tion at any time, the parliamentary majority of Fidesz makes this guarantee rather meaningless. The deadline, although constitutionally mandated, in reality only serves as decoration. Although the measures do not expire, the Act ensures oversight on their content: the Government regularly has to inform either Parliament or, if it cannot hold a session, the Speaker and the leaders of the factions. This provision is also meant as a guarantee – but there is no rule on what happens if Parliament does not agree. While, theoretically, Parliament can withdraw the authorization, the de facto majority of Fidesz makes this unlikely. It is how illiberal constitutionalism works.

The Act does not allow any by-elections and referenda, and the representative body of the local government cannot be dissolved. This rule alone might seem as if it were attacking democracy. However, it does so in a crisis, in which social distancing is a rational demand, through a cardinal Act, and following the logic of the FL on the termination of the parliamentary mandate. This restriction is also in line with the FL's human rights derogation provision. The Act furthermore adds two epidemic-related crimes to the Criminal Code: violating confinement and spreading false information. Especially the second one should make us suspicious, as it is vague and very complex at the same time. It most probably will be of little help in fighting the virus, will not give adequate guidance as to how it shall correctly be applied, and might discourage critical opinions. We will see how judges will apply it.

In the last days of March, the Government had to deal with decrees whose effects expired and which, due to parliamentary voting, were not extended. It could have repeatedly issued them – as many might have expected. Instead, earlier last week, it seemed that it would choose another, less unconstitutional path: The initial plan was, firstly, to ask the management of universities and nurseries to extend the break, under their discretion, so that students and children can be legally kept away from the premises. Secondly, the Minister of Interior was to issue an order on the control of the internal Schengen borders. The Minister of Justice and the President of the National Judicial Office would then have discussed the extraordinary break at courts. Unfortunately, the Government preferred a purely unconstitutional path: On March 26, the Chief Medical Officer issued a normative decision, which reissued the content of the decrees on universities and the border. Merely based on the Act on Legislation, this normative decision is unconstitutional as the content of no normative decision can affect natural persons (only laws, such as Acts, decrees, etc. can have this effect). Even in an emergency, it is only the Government that can deviate from statutory provisions: the Chief Medical Officer has no power to do so.

In Poland

In situations of particular danger and if ordinary constitutional measures are inadequate, the Polish Constitution allows for the introduction of the following extraordinary measures: martial law, a state of emergency, or a state of natural disaster. Regarding the COVID-19 pandemic, the most suitable seems to be a state of natural disaster. The Government, however, disagrees. The Constitution stipulates that the Government can declare a state of natural disaster in order to prevent or tackle the consequences of a natural catastrophe or a technological accident exhibiting characteristics of a natural disaster, for a period no longer than 30 days. It can be extended only if the *Sejm* consents.The "Act on a state of natural disaster" provides that the state of natural disaster may be introduced if massive infections occur – as is the case in the current coronavirus crisis. The Constitution also requires that only a published regulation, issued upon the basis of an Act, can introduce extraordinary measures, such as the state of natural disaster. This Act also has to specify to what extent it plans to limit fundamental rights, as prescribed in the Constitution. During states of natural disasters, the Constitution allows for limitations of the freedom of economic activity, personal freedom, the inviolability of the home, the freedom of movement and sojourn on the territory of Poland, the right to strike, the right to ownership, the freedom to work, the right to safe and hygienic conditions of work, and the right to rest. The measures applied in this emergency, however, limited the freedom of assembly as well – which is constitu-

tionally impossible, even if a state of natural disaster applies. While such a limitation may both necessary and proportionate in the case of the COVID-19 pandemic, it is illegitimate, as the Act on infectious diseases does not allow for such a restriction.

Politically, the problem lies elsewhere. The Constitution foresees special provisions for the duration of an extraordinary measure and a period of 90 days after it ends: the term of office of the *Sejm* may not be shortened, and nationwide referenda, elections to the *Sejm*, to the Senate, organs of local government or elections for the Presidency may not be held. Accordingly, the term of office of these organs would be prolonged. In Poland, the presidential election campaign is ongoing, with the election scheduled for 10 May 2020. The epidemic seems to work in favour of President Andrzej Duda, who can still move around in his capacity as President, while other candidates are more restricted. Therefore, introducing the state of natural disaster is politically unlikely at the moment.

Furthermore, according to the Constitution, an Act specifies how to compensate for the loss of property resulting from the fundamental right limitations in the context of, for instance, the state of natural disaster. The relevant Act provides for proper compensations, especially for entrepreneurs, and would be activated together with a state of natural disaster. However, the economic loss seems to be unbearable for Polish authorities, who have allocated most of the public money to social programs. We expect the ruling majority to compulsively pass legislation that pretends to provide economic help for workers and entrepreneurs.

Finally, during a state of natural disaster, the constitution requires strict cooperation among local and central government and other public bodies. The current government, however, seems to be unwilling to share the power and cooperate with local governments that are led by the opposition.

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