

Warsaw, 10 April 2020

## FOR Communication 14/2020:

### Hungarian and Polish governments use COVID-19 pandemic in fight for more power

#### Summary:

- On March 30<sup>th</sup>, 2020, Hungarian Prime Minister Viktor Orbán acquired for his government unlimited power of ruling by means of decrees.
- The Hungarian government's newly established right to govern by decrees – unlimited in time – is in no need of consultations with the opposition nor any other form of parliamentary debate. Such debates would have to take place if the government limited itself to introducing the state of danger enshrined in the constitution and followed the original, constitutional framework.
- Despite the fact that all constitutional conditions have been met, the Polish government consistently refuses to introduce the emergency state of natural disaster. Thanks to this, it is still theoretically possible to carry out the presidential elections in May 2020.
- Polish regulations on the state of natural disaster, one of the three possible states of emergency, allow for restrictions to be imposed on certain civil rights and freedoms, but hold the authorities under no obligation to use all available legal tools.
- Further restrictions with no legal and constitutional basis are being introduced in Poland

The outbreak of the COVID-19 epidemic has led to numerous legislative changes in countries around the world. However, some governments quickly recognized this as a unique opportunity for further concentration and consolidation of power. The governments in Hungary and Poland have been under constant observation by the EU institutions, the Venice Commission, numerous international and non-governmental organizations for the past several years. In the Rule of Law Index created by the World Justice Project, Hungary ranks 60th<sup>1</sup>, and Poland 28th<sup>2</sup> on the list of 128 countries. Poland appears just before the United Arab Emirates (ranked as 30<sup>th</sup>). This was caused by previous legislative changes, which led to the weakening of the rule of law and, consequently, the violations of fundamental civil rights.

In Hungary, Prime Minister Viktor Orbán, having received almost absolute power of ruling by means of decrees, will de facto autonomously decide (or not) to end the established state of emergency, which has been in force since March 11, 2020. Polish authorities, in turn, consistently refuse to introduce a state of natural disaster, constitutionally prescribed in event such as a raging pandemic. This is done with good knowledge of the fact that by introducing such special measures, the government will face constitutionally established restrictions. A good example of this is the provision which excludes the possibility of presidential elections in May of 2020.

## 1. The Hungarian emergency and the Polish epidemic

On March 11<sup>th</sup> 2020, due to the outbreak of the COVID-19 pandemic, a state of emergency was introduced in Hungary pursuant to art. 53 section 1 of the Hungarian Fundamental Law (Constitution). This moment turned out to be groundbreaking for two reasons. Covering up his real intentions with the

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<sup>1</sup> <https://worldjusticeproject.org/rule-of-law-index/global/2020/Hungary/>

<sup>2</sup> <https://worldjusticeproject.org/rule-of-law-index/global/2020/Poland/>

need to fight for the lives and health of Hungarians, Viktor Orbán introduced measures which permit his government to decide on all issues connected to (and those completely separate from) the COVID-19 pandemic by means of decrees.

The state of emergency itself is enshrined in the Hungarian Constitution. It is introduced by the government in the event of a natural or industrial disaster that endangers human life and property (and also to mitigate the consequences of such situations). In such an event, the government is authorized to introduce emergency measures, specified in cardinal acts, which must be passed by a majority of 2/3 of the MPs present. The government may further, within the framework defined by the abovementioned legal acts, suspend the effectiveness of certain acts by law, bypass the provisions contained therein, and apply other, extraordinary measures. These decrees remain in force for 15 days, unless the government, by authorization of the parliament, extends their duration. Following the end of the declared state of danger, decrees of this type lose their effect. Keeping in mind all the complexity of the Hungarian equivalent of the state of emergency, it should be emphasized, that according to art. 54 section 2 of the Hungarian Fundamental Law, despite significant restrictions on civil rights and freedoms, the Constitution alone cannot be suspended. The Constitutional Tribunal is also to operate. The Constitution also requires the state of emergency to be terminated by the same body that established it.

In the Hungarian legal system, elections may take place only after the end of the state of emergency. According to the current election schedule, the next parliamentary elections should be carried out in 2022. In accordance with art. 2 clause 3 of the Hungarian Constitution, parliamentary elections are held

in April or May after the end of the 4-year term of office of the previous parliament. Except for situations in which this body is dissolved or self-dissolved.

As you can see, the provisions of Hungarian law have already provided Prime Minister Viktor Orbán with a variety of possible actions. Luckily enough, the Polish reality presents itself quite differently.

The Constitution of the Republic of Poland clearly defines, in art. 228 of its Constitution, the conditions that have to be met in order for the introduction of the so-called a state of emergency – a constitutionally enshrined mechanism which allows for the limitation of the rights and freedoms of citizens in order to improve the flexibility of actions taken by public authorities whose task is to eliminate the reason which caused the state of emergency to be called for in the first place. There are three types of states of emergency: a state of natural disaster, state of emergency (or endangerment) and martial law. In a situation where the authorities are combatting a pandemic, we are talking about the state of natural disaster. The Polish legal system provides the government with ready laws regarding the abovementioned states, including the Act of 18<sup>th</sup> April 2002 on the State of Datural disaster and the Act of 22<sup>nd</sup> November 2002 on Compensation for Property Losses Resulting from the Limitations of Freedoms and Human Rights During a State of Emergency.

In accordance with the provisions of the Act on the State of Natural Disaster, it is possible for the authorities to introduce specific restrictions, i.e. concerning the freedom of movement. It should also be emphasized that this Act only creates a legal possibility to introduce such limitations, it does not oblige the authorities to use all the tools available thanks to it. **In short – there are provisions in the Polish**

**legal order that on the one hand allow the limitation of civil rights and freedoms, but on the other hand they also limit public authorities in their actions.**

A good example for this is the ban on holding all elections to the Sejm (Polish lower chamber of parliament), the Senate, local government bodies and the elections of the President of the Republic of Poland during a state of emergency and within 90 days after its termination. In such an event, the terms of office of already governing bodies are extended accordingly.

Instead of introducing the state of natural disaster enshrined in the constitution, the government is attempting to deal with the current situation using regulations largely based on the provisions of the Act of 5<sup>th</sup> December 2008 on the Prevention and Combatting of Infections and Infectious Human Diseases. Hence, the state of epidemic threat introduced throughout the country by ordinance of the Minister of Health on March 13<sup>th</sup><sup>3</sup>, and the following state of epidemic on March 20<sup>th</sup><sup>4</sup>. Thus, according to the government, the presidential elections may be held in accordance with the law. After all the state of natural disaster has not been declared. It is worth emphasizing, that more and more legal opinions which appear in the public debate, rightly state that the state of emergency is already in full swing (even though it was never actually declared). Such an interpretation may, for example, undermine the very legality of the elections which are to be carried out in May.

The government in Hungary has gone much further. On March 30<sup>th</sup> 2020, the Hungarian Parliament adopted Act XII / 2020 on the Containment of the Coronavirus (the so-called Authorization Act)<sup>5</sup>. It is not only contrary to the legal standards arising from the Hungarian Constitution, but is also unlimited in

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<sup>3</sup> <http://dziennikustaw.gov.pl/D2020000043301.pdf>

<sup>4</sup> <http://dziennikustaw.gov.pl/D2020000049101.pdf>

<sup>5</sup> <http://abouthungary.hu/media/DocumentsModell-file/1585661547-act-xii-of-2020-on-the-containment-of-coronavirus.pdf>

time, which means that the ruling majority may uncontrollably suspend other laws, ignore the provisions contained therein and take further emergency measures in connection with the state of emergency. What is more, the state of emergency itself can only be revoked by the government. The justification given as the reason for why the Authorization Act was introduced (to enable the government to respond adequately to the challenges of coronavirus) is false. There already was a Law on Crisis Management that allowed the government in the event of a state of emergency, as reminded by the Hungarian Helsinki Committee<sup>6</sup>, to:

- ignore fiscal rules;
- impose additional obligations on local government entities;
- oblige entrepreneurs to cooperate in the supply of goods and services<sup>7</sup>.

Importantly, due to the adoption of the Authorization Act, Orbán is no longer required to obtain parliamentary consent every 15 days in order to extend the effectiveness of issued decrees (he would have to if the government based them only on the Crisis Management Act). It is obvious that, having a constitutional majority in parliament (2/3 of the MPs), Orbán had no reason to fear a refusal to extend the effectiveness of the 15-day decrees. However, the changes introduced by the Authorization Act exclude any parliamentary debate on the solutions introduced by the government, completely stripping the opposition of its voice.

**In short, the Hungarian government, by adopting the Authorization Act, has given itself the unlimited right to govern by decrees, which it also does not need to consult with the opposition.** Thus, any opportunity

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<sup>6</sup> [https://www.helsinki.hu/wp-content/uploads/HHC\\_background\\_note\\_Authorization\\_Act\\_31032020.pdf](https://www.helsinki.hu/wp-content/uploads/HHC_background_note_Authorization_Act_31032020.pdf)

<sup>7</sup> Article 45 clause 47-48 of the Law on crisis management

to question the government's decisions through parliamentary debate is lost. There is also currently no real chance of repealing the Authorization Act itself. According to art. 3 clause 2 of the Act, the parliament has the power to withdraw the decree power granted to it by the government. To do this, however, Orban's MPs would have to vote against their own interests.

**Both in Poland and Hungary, the fact that the authorities have extensive rights in a state of emergency does not imply an obligation for them to use all available legal tools.** For example, in Poland, the military may or may not be used to support measures to combat the COVID-19 epidemic. In accordance with art. 18 of the Act on the State of Natural Disaster, this can happen, if the use of other forces and means is impossible or insufficient. In addition, on March 18, 2020, the Minister of National Defense issued a decision on the use of troops and sub-units of the Armed Forces of the Republic of Poland to assist the Police forces in their daily activities regarding the epidemic<sup>8</sup>. The Minister of Development, Jadwiga Emiliewicz, threatened that declaring a state of emergency would lead to soldiers on the streets<sup>9</sup>. Yet again, a government's argument proves to be invalid – since the army is on the streets already today.

It is worth mentioning, that in the days preceding the adoption of the Authorization Act by the Hungarian parliament, there were numerous international voices of opposition to such actions. Amongst others, the Secretary General of the Council of Europe, Marija Pejčinović Burić, called on Viktor Orbán to respect the essence of democracy and the rules that govern it in an official letter<sup>10</sup>. The

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<sup>8</sup> <http://www.dz.urz.mon.gov.pl/zasoby/dziennik/pozycje/tresc-aktow/pdf/2020/03/Poz. 52 dec. 41-sig.pdf>

<sup>9</sup> <https://wiadomosci.radiozet.pl/Koronawirus/Stan-kleski-zywiolowej-i-koronawirus.-Emilewicz-wojsko-na-ulicach-pozamykane-portale>

<sup>10</sup> <https://www.coe.int/en/web/portal/-/secretary-general-writes-to-victor-orban-regarding-covid-19-state-of-emergency-in-hungary>

Hungarian Helsinki Committee and Amnesty International reminded the public in their statements that unlimited power is not a panacea for the COVID-19 pandemic<sup>11</sup>. On March 24<sup>th</sup>, 2020, the Civil Liberties Committee in the European Parliament expressed its concern over the extension of the power of the Hungarian government, which clearly makes use of the epidemic crisis<sup>12</sup>. In addition, many members of the European People's Party, chaired by Donald Tusk, are calling for the expulsion of Viktor Orbán's party -Fidesz<sup>13</sup>.

Individual politicians have also repeatedly spoken out on the matter. Donald Tusk noted that building a "permanent state of threat" is politically unacceptable and morally reprehensible<sup>14</sup>. Former Italian prime minister Matteo Renzi called directly to remove Hungary from the European community<sup>15</sup>. Many observers also point to the worrying fact that Hungary de facto still operates under the state of emergency announced in 2015 in connection with the immigration crisis<sup>16</sup>.

## 2. Censorship and punishment as an authoritarian way of containing the virus

The Hungarian Authorization Act also amended the Hungarian criminal law. According to the new art. 337 section 2 of the Hungarian Penal Code, those who, during a state of emergency, state or promote untrue or misrepresented facts, which makes it possible to violate the effectiveness or prevent effective protection of society, and do so in public, are guilty of a crime and face imprisonment from one to five

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<sup>11</sup> <https://www.amnesty.hu/data/file/4846-unlimited-power-is-not-the-panacea-20200322.pdf?version=1415642342>

<sup>12</sup> <https://www.europarl.europa.eu/news/en/press-room/20200324IPR75702/ep-stands-up-for-democracy-in-hungary-during-covid-19>

<sup>13</sup> <https://wyborcza.pl/7,75399,25851615,po-przylaczyla-sie-do-apelu-o-wyrzucenie-fideszu-z-europejskiej.html>

<sup>14</sup> <https://twitter.com/donaldtuskEPP/status/1245350196076089344>

<sup>15</sup> <https://twitter.com/matteorenzi/status/1244631516510072834?s=20>

<sup>16</sup> <https://foreignpolicy.com/2020/03/31/hungarys-orban-given-power-to-rule-by-decree-with-no-end-date/>



years. This means that, for example, informing about the progressing epidemic without referring to government sources has become a serious prohibited act. It is not difficult to imagine a situation in which public authorities consider information published in the local newspaper, obtained, i.e. directly from doctors working in the city hospital, as incorrectly presented facts. After all, they have not been filtered by all government data and statistics and have not been presented in the perspective of the country, which could, for example, lead to panic.

Hungarian criminal law (Article 322a of the Hungarian Penal Code), following the amendment from the 30<sup>th</sup> of March, penalizes an unspecified "interruption" of quarantine, isolation or other precautionary measures taken to combat an epidemic. The penalties can amount even to 8 years of imprisonment if the consequence of the perpetrator's actions is the death of a third party. Serious criminal sanctions and poorly defined provisions are some of the main sins of the so-called penal populism – which consists of ad hoc, repressive and quite impossible to implement solutions and introducing them into the legal order.

## **2. The rule of law in times of plague**

On April 7<sup>th</sup>, 2020, the Council of Europe published a handbook for the governments of member states, which contained recommendations regarding the need to respect the rule of law and human rights in times of crisis related to the COVID-19 pandemic<sup>17</sup>. The main recommendations include the principle of legalism, meaning that public authorities can act only on the basis and within the limits of the law. Both Poland (by introducing changes to the Electoral Code and not introducing the state of natural disaster)

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<sup>17</sup> <https://rm.coe.int/sg-inf-2020-11-respecting-democracy-rule-of-law-and-human-rights-in-th/16809e1f40>

and Hungary (by introducing the possibility to govern by decrees) have already violated this principle.

The Hungarian Prime Minister has additionally guaranteed himself the right not to cancel the emergency, which is why he can use the coronavirus to maintain the continuity of almost absolute power. **In Poland, the restrictions introduced by ordinances have no constitutional basis. According to art. 31 section 3 of the Polish Constitution, restrictions on constitutional freedoms and rights may be limited only by an act of law passed by MPs, Senate and signed by the President, and only when necessary. Under no circumstances may these restrictions infringe the essence of freedom and rights.** Also in the event of a state of natural disaster being introduced, the Polish Constitution states, in art. 233 paragraph 3, which freedoms and rights may be restricted (freedom of economic activity, personal freedom, inviolability of housing, freedom of movement and stay on the territory of the Republic of Poland, right to strike, property right, freedom to work, the right to safe and hygienic working conditions and the right to rest). All other restrictions are still subject to Art. 31 section 3 of the Constitution.

It is therefore clearly visible, that the restrictions currently introduced by ordinances largely cover the ones mentioned in art. 233 paragraph 3 of the Polish Constitution. Nothing prevents the government from declaring a state of natural disaster. This would allow for the the authorities to introduce the necessary restrictions in a manner complaint with the Constitution and clear to citizens in terms of the sanctions threatening them (the Act on the State of Natural Disaster already contains certain criminal provisions). Nothing but the presidential election.

## Civil Development Forum

The Civil Development Forum (FOR) was founded in 2007 by Prof. Leszek Balcerowicz to effectively protect freedom and promote truth and common sense in public discourse. Our goal is to change the awareness of Poles and the current and planned law towards freedom.

FOR accomplishes its objectives through the organization of debates and the publication of reports and analyses that address important socio-economic issues, in particular: the state of public finances, the situation on the labour market, economic freedom, justice and law-making. On the initiative of FOR, a public debt counter was launched in the centre of Warsaw and on the Internet, which draws attention to the problem of growing national debt. FOR's activities also include projects in the field of economic education and participation in campaigns to increase voter turnout.

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