



Hungary's Two Pandemics

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COVID-19 and
Attacks on
Media Freedom

Hungary's Two Pandemics: COVID-19 and Attacks on Media Freedom

June 2020 | Leipzig, Germany

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Media Freedom Rapid Response (MFRR), an Europe-wide mechanism, which tracks, monitors and responds to violations of press and media freedom in EU Member States and Candidate Countries. This project provides legal and practical support, public advocacy and information to protect journalists and media workers. The MFRR is organised by an consortium led by the European Centre for Press and Media Freedom (ECPMF) with ARTICLE 19, the European Federation of Journalists (EFJ), Free Press Unlimited (FPU), the Institute for Applied Informatics at the University of Leipzig (InfAI), International Press Institute (IPI) and CCI/Osservatorio Balcani e Caucaso Transeuropa (OBCT). The project is co-funded by the European Commission.
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Introduction

The COVID-19 pandemic is an unprecedented public health crisis, with few countries across the globe unaffected. However, this situation has brought about a different form of crisis; that of safeguarding the rule of law and fundamental freedoms as outlined in the Universal Declaration of Human Rights and in Europe, the European Convention of Human Rights. Under the guise of guaranteeing the ability to respond to the pandemic, the Hungarian government led by Prime Minister, Viktor Orbán has consolidated power and has passed legislation through Hungarian Parliament to enable Orbán to delay elections and suspend any existing law and implement others by decree, without parliamentary or judicial scrutiny. These new powers are extensive and provocative, establishing a range of new laws that target opposition and criticism, especially the independent media.

This approach cannot be read in isolation or be seen to emerge without context or history. Under Orbán's and Fidesz's leadership, the Hungarian government has developed an antagonistic relationship with the European Union and the independent press and media in Hungary. Before the onset of this pandemic, media freedom in Hungary was already placed on a precarious footing, with independent media outlets unable to source the necessary support and resources to continue their work with threats to their existence and staff, as well as a range of measures put in place to isolate, attack and demonise these outlets.¹ As seen in many other countries including Brazil, the UK, Slovenia and Poland, existing behaviour or threats to press freedom have increased in frequency, ferocity and complexity as a result to the COVID-19 pandemic. Whether through restricting access to information, manipulating the ability of journalists and media workers to access

ministers and policy-makers, establishing road blocks to gaining accreditation, blocking access to online media outlets, demonising journalists and media workers or the increase in threats of physical violence against journalists and media workers, the pandemic has proved ample cover for attacks against press and media freedom.

To explore how Hungary's legal response to the COVID-19 pandemic threatens press and media freedom and free expression more broadly, the European Centre for Press and Media Freedom (ECPMF) has commissioned Dr. Polyák Gábor of the Mertek Media Monitor (CMDS) to draft this legal opinion examining the legal and political basis of these amendments, interrogating their compatibility with existing legal and political safeguards, both domestic and Europe-wide, and what they mean for media freedom in Hungary.

Hungary's Justice Minister, Judit Varga, has announced her intention to submit legislation to Hungarian Parliament that would bring an end to the state of danger on 20th June 2020. While this may address a number of the concerns outlined by Dr Gábor in the following legal opinion, this analysis remains a vital and important document outlining the foundational threats to media freedom in Hungary, as well as broader issues that are relevant to other nations when responding to the unprecedented nature of the COVID-19 pandemic. The lessons raised in Hungary during this time of uncertainty can prove valuable both for the country itself, as well as other countries across the European Union, Candidate Countries and those further across the globe.

The Hungarian Government proclaimed the state of danger with the Decree Nr. 40/2020. (III.11.) on

¹ Gábor Polyák: How Hungary shrunk the media, ECPMF, 14.02.2019, <https://www.ecpmf.eu/archive/news/threats/how-hungary-shrunk-the-media.html>

11th March 2020, and it has also passed several decrees in connection with the fight against the COVID-19 pandemic. The Hungarian Parliament adopted a new bill related to the defence against the pandemic (Act XII of 2020) on 30th March 2020. It was promulgated the same day. The bill was sponsored by the governing parties, who hold the necessary two-thirds majority for passing any law. The law is referred to as Authorisation Act because its main aim is to equip the government with the opportunity to bring forward, amend or withdraw legislation and rule more generally by decree. Neither the scope of the rule by decree nor the duration and the scope of this Special Legal Order is defined in the law. The act also amended the Hungarian Criminal Code, complementing the crime of "Scaremongering" with a new type of behaviour.

This analysis focuses on the impacts of the Criminal Code amendment on the right to freedom of

expression and media and press freedom. It will examine if the new rule is in line with the Hungarian Basic Law, European law, and relevant case law of the European Court of Human Rights (ECtHR). However, the analysis also covers the general aspects of the Special Legal Order. The paper will also examine if the Authorisation Act meets the requirements defined in Basic Law about sharing power between the parliament and the government during the Special Legal Order.

The analysis explores significant legal concerns regarding both the Special Legal Order regulated in the Authorisation Act and the amendment of the Criminal Code. In summary, the legal framework meets neither the Hungarian constitutional requirements nor the European human rights requirements.

The legislative change

i. Political Background

The Hungarian Parliament adopted the bill related to the defence against COVID-19 (act XII of 2020²) on 30th March that was promulgated on the same day. The government bill was carried only by the governing parties; however, they represent the two-thirds majority necessary for passing any laws. The law is referred to as the Authorisation Act, because its main aim is to enable the government to rule by decree.

The Act XII of 2020 also amended the Criminal Code (Act C of 2012³). This amendment directly affects both freedom of expression and media and press freedom. With the new legislative changes, the crime "Scaremongering" has been extended to incorporate new behaviours, namely the "impediment of defence against pandemic situation".

The text of the newly adopted criminal rule:

Scaremongering⁴
Section 337

(1) At the scene of some public emergency (public danger), any conduct of claiming or spreading a false or distorted statement before the wide public in connection with the public emergency by which to violate public order or disturb the public peace at a place of public emergency is guilty of a felony punishable by imprisonment not exceeding three years.

(2) At the time of a Special Legal Order, any conduct of claiming or spreading a false or distorted statement before the wide public by which to endanger or derail the successfulness of the defence is guilty of a felony punishable by imprisonment from one to five years.

Rémhírterjesztés

337. § (1) Aki közveszély színhelyén nagy nyilvánosság előtt a közveszéllyel összefüggésben olyan valótlan tényt vagy való tényt oly módon elferdítve állít vagy híresztel, amely a közveszély színhelyén alkalmas az emberek nagyobb csoportjában zavar vagy nyugtalanság keltésére, büntetett miatt három évig terjedő sza-

² <https://netjogtar.hu/jogszabaly?docid=a2000012.tv>; For a comprehensive analysis of the act see: Hungarian Helsinki Committee: Background note on act XII of 2020 on the containment of the coronavirus https://www.helsinki.hu/wp-content/uploads/HHC_background_note_Authorization_Act_31032020.pdf

³ <https://netjogtar.hu/jogszabaly?docid=a1200100.tv>

⁴ The source of the translations of all legal texts is the Kluwer Jogtár (<https://uj.jogtar.hu>).

badságvesztéssel büntetendő.

(2) Aki különleges jogrend idején nagy nyilvánosság előtt olyan valótlan tényt vagy való tényt oly módon elferdítve állít vagy híresztel, amely alkalmas arra, hogy a védekezés eredményességét akadályozza vagy megghiúsítsa, büntett miatt egy évtől öt évig terjedő szabadságvesztéssel büntetendő.

The text of the original criminal law before the amendment:

Scaremongering
Section 337

At the scene of some public emergency (public danger), any conduct of claiming or spreading a false or distorted statement before the wide public by which to violate public order or disturb the public peace at a place of public emergency is guilty of a felony punishable by imprisonment not exceeding three years.

Rémhírterjesztés

337. § Aki közveszély színhelyén nagy nyilvánosság előtt olyan valótlan tényt vagy való tényt oly módon elferdítve állít vagy híresztel, amely a közveszély színhelyén alkalmas az emberek nagyobb csoportjában zavar vagy nyugtalanság keltésére, büntett miatt három évig terjedő szabadságvesztéssel büntetendő

The amendment to Section 337 made the original rule – now paragraph 1 of Section 337 – more 'precise' by adding the condition that the claim made must be in connection with the emergency, as defined in paragraph 1. However, the new paragraph 2 establishes a specific case of scaremongering. This crime can be committed at the time of a Special Legal Order, with a statement that endangers or derails the successfulness of defence measures against the emergency and is false or distorted. The Basic Law of Hungary (The

Constitution of Hungary) from 2011⁵ lists seven different kinds of the Special Legal Order. These are the following:

- state of national crisis (danger of war)
- state of emergency (the Hungarian "szükséghelyzet" is not the same as the word used in the Criminal Code, "közveszély"; in the event of armed actions aimed at undermining law and order or at seizing con-

⁵ <https://netjogtar.hu/jogszabaly?docid=a1100425.atv>; in English: <https://www.kormany.hu/download/e/02/00000/The%20New%20Fundamental%20Law%20of%20Hungary.pdf>

trol of power, or in the event of grave acts of violence committed by force of arms, or by armed groups, which gravely endanger the lives and property of citizens on a mass scale)

- state of preventive defence (imminent threat of armed invasion or for fulfilling an obligation in connection with the country's commitment under an alliance treaty)
- emergency response to terrorism (major and imminent threat of terrorist attacks, or following a terrorist attack)

- unforeseen intrusion (the territory of Hungary subject to an unforeseen invasion by foreign armed units)

- state of danger (a natural or industrial disaster endangering lives and property, or in order to mitigate the consequences thereof).

The new criminal law can be applied in all aforementioned cases of the Special Legal Order.

ii. Constitutional Background

As listed in the previous point, the Basic Law of Hungary regulates six cases of the Special Legal

Order. The current situation is a case of the state of danger (Article 53 of Basic Law).

The text of the Basic Law:

State of Danger
Article 53

(1) In the event of a natural disaster or industrial accident endangering life and property, or in order to mitigate the consequences thereof, the Government shall declare a state of danger, and may introduce extraordinary measures laid down in a cardinal Act.

(2) 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.

(3) 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.

Common Rules for Special Legal Orders

Article 54

(1) Under a Special Legal Order, the exercise of fundamental rights – with the exception of the fundamental rights provided for in Articles II and III, and Article XXVIII(2) to (6) – may be suspended or may be restricted beyond the extent specified in Article I(3).

(2) Under a Special Legal Order, the application of the Basic Law may not be suspended, and the operation of the Constitutional Court may not be restricted.

(3) 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.

(4) The detailed rules to be applied under a Special Legal Order shall be laid down in a cardinal Act

A veszélyhelyzet

53. cikk

(1) A Kormány az élet- és vagyonbiztonságot veszélyeztető elemi csapás vagy ipari szerencsétlenség esetén, valamint ezek következményeinek az elhárítása érdekében veszélyhelyzetet hirdet ki, és sarkalatos törvényben meghatározott rendkívüli intézkedéseket vezethet be.

(2) A Kormány a veszélyhelyzetben rendeletet alkothat, amellyel – sarkalatos törvényben meghatározottak szerint – egyes törvények alkalmazását felfüggesztheti, törvényi rendelkezésektől eltérhet, valamint egyéb rendkívüli intézkedéseket hozhat.

(3) A Kormány (2) bekezdés szerinti rendelete tizenöt napig marad hatályban, kivéve, ha a Kormány – az Országgyűlés felhatalmazása alapján – a rendelet hatályát meghosszabbítja.

(4) A Kormány rendelete a veszélyhelyzet megszűnésével hatályát veszti.

A különleges jogrendre vonatkozó közös szabályok
54. cikk

(1) Különleges jogrendben az alapvető jogok gyakorlása - a II. és a III. cikkben, valamint a XXVIII. cikk (2)-(6) bekezdésében megállapított alapvető jogok kivételével - felfüggeszthető vagy az I. cikk (3) bekezdése szerinti mértéken túl korlátozható.

(2) Különleges jogrendben az Alaptörvény alkalmazása nem függeszthető fel, az Alkotmánybíróság működése nem korlátozható.

(3) A különleges jogrendet a különleges jogrend bevezetésére jogosult szerv megszünteti, ha kihirdetésének feltételei már nem állnak fenn.

(4) A különleges jogrendben alkalmazandó részletes szabályokat sarkalatos törvény határozza meg.

So, the Basic Law empowers the government to issue decrees to suspend the application of certain laws or derogate from existing legal provisions, and to take a range of other extraordinary measures. However, these measures must be laid down in a special act; an act related to disaster management (Law CXXVIII from 2011⁶). The Special Legal Order also enables the suspension of certain fundamental laws.

However, the Basic Law defines two limits on the government's power. Firstly, the possible set of emergency measures should be defined by law. Secondly, the decree remains in force only for 15 days, except if the parliament authorises the

government to extend the effect of the decree. This means that the parliament may only approve the extension of decrees that were passed before the approval [the existing decree], but the parliament may not give the power to regulate new topics by decree. The Basic Law also allows for extensions of longer than 15 days, namely without specifying the duration of the extension. By failing to limit the extension of decrees, the Basic Law itself violates the rule of law principle; this failure cannot be remedied by any constitutional control.

As for the current situation, neither the regulation issues of the government decrees nor the dura-

⁶ <https://netjogtar.hu/jogszabaly?docid=a1100128.tv>

tion of this Special Legal Order is defined in the Act XII of 2020 (Authorisation Act):⁷ Section 2 of the Authorisation Act *expressis verbis* empowers the government to take measures that are not defined in the act related to disaster management.⁸ This is a clear violation of the Basic Law.

The Authorisation Act empowers the government itself to singlehandedly extend the duration of the decrees passed within the Special Legal Order to the entire duration of the Special Legal Order, without any further approval or any control of parliament. As a result, the government may extend the applicability of the decrees to the end of the situation that necessitated the Special Legal Order in the first instance. This is again a violation of the Basic Law. The only guarantee in the Authorisation Act is that the parliament may withdraw the authorization of the government to extend the duration of the decrees also before the state of danger is declared ended (Section 3). This competence of the parliament does not limit the power of the government to rule by decrees and does not mean that the parliament could stop the Special Legal Order. Furthermore, the government can also override this guarantee by decree, too. As a result, there is no effective limit in the law over the power of the government.

According to the Basic Law, the Special Legal Order – the state of danger – can be ceased exclusively by the government itself. Though the Authorisation Act empowers the parliament to abrogate it, it is only possible when the govern-

ment decides to withdraw the Special Legal Order. So as outlined in the current situation, parliament does not have the power or legal authority to control the actions of the government. It is true that the parliament keeps working during the Special Legal Order, but any act can be overridden by the government's decrees.

On 26th May, the government (the Deputy Prime Minister Zsolt Semjén) submitted to the parliament the Bill on Terminating the State of Danger (T/10747)⁹ and the Bill on Transitional Provisions related to the Termination of the State of Danger (T/10748). Despite the title of the bills and relevant government communication, the new regulation will instead equip the government with the continued opportunity to rule by decrees.¹⁰ The Bill T/10748 amends the rules of "state of medical emergency" by creating a new category. This is a new kind of Special Legal Orders that is not regulated in the Basic Law. It can be ordered by the government based on the proposal of the Chief Health Officer. During the state of medical emergency, the government may restrict by decree the exercise of some essential fundamental rights, such as the freedom of movement and indirectly the freedom of assembly, too. Restrictions may initially last for a period of six months but then may be extended by the government again and again, practically indefinitely. The parliament has no ability to control the measures of the government.

7 To the detailed analysis of the Authorisation act see: Szente Zoltán: A 2020. március 11-én kihirdetett veszélyhelyzet alkotmányossági problémái, MTA Law Working Papers - A Jogtudományi Intézet műhelytanulmányai, <https://jog.tk.mta.hu/mtalwp/a-2020-marcius-11-en-kihirdetett-veszelyhelyzet-alkotmanyossagi-problemai>;

8 A Kormány a veszélyhelyzetben - a katasztrófavédelemről és a hozzá kapcsolódó egyes törvények módosításáról szóló 2011. évi CXXVIII. törvényben meghatározott rendkívüli intézkedéseken és szabályokon túl - az állampolgárok élet-, egészség-, személyi-, vagyon- és jogbiztonságának, valamint a nemzetgazdaság stabilitásának garantálása érdekében rendeletével egyes törvények alkalmazását felfüggesztheti, törvényi rendelkezésektől eltérhet, és egyéb rendkívüli intézkedéseket hozhat.

9 <https://www.parlament.hu/irom41/10747/10747.pdf>

10 Based on: Hungarian Helsinki Committee, Hungarian Civil Liberties Union, Amnesty International Hungary: Never ending story? Rapid analysis of the Bill on Terminating the State of Danger (T/10747) & the Bill on Transitional Provisions related to the Termination of the State of Danger (T/10748), 27 May 2020, <https://www.helsinki.hu/en/never-ending-story/>

iii. Criminal Law Background

The original - and mostly unchanged - rule about scaremongering (see above) can be used against claims at the venue of and in connection to public emergencies, such as pandemics. According to existing case law, "public emergency" means an "objective situation where one or more undefined or numerous defined people, or things of higher value can be in danger" (BH1998. 304). This definition doubtlessly covers the current global pandemic.

However, Bencze and Ficsor points to the problem that the exact meaning of the "venue" of emergency is not precise either.¹¹ Neither the law nor existing case law makes it clear whether the venue of a global pandemic can be interpreted as the whole country or only as the concrete centre of the pandemic within the national jurisdiction. A further point of uncertainty is the "venue" of an online publication that was not published at the venue of emergency but is available there. To this, Bencze and Ficsor stress that there has been almost no case law related to the crime of scaremongering.

The Criminal Code contains two other crimes that are applicable against abusive communication during the pandemic situation.

- Incitement against a decree of authority (Section 336) is committed by any person who publicly incites others to common disobedience against any decree of an authority

in a way that can disturb public peace; this behaviour is punishable by imprisonment not exceeding three years.¹²

- Threat of public endangerment (Section 338) is committed by any person who states or disseminates any untrue fact intended to disturb the public peace, or gives the impression that there is imminent danger for the occurrence of an event that is likely to bring harm to the general public; this behaviour is punishable by imprisonment not exceeding three years. The penalty of imprisonment between one to five years is available if the threat of public endangerment has resulted in a grave disturbance of public peace.¹³

All in all, prior to the amending of the Criminal Code, the existing Hungarian criminal law was more than sufficient to provide tools against any abusive communication. Moreover, these rules, prior to amendment, were already applied during the current pandemic. The police reported on the liquidation (shut down) of "fake news" sites dealing with issues related to the COVID-19 pandemic as threats of public endangerment in February 2020.¹⁴ These measures have largely escaped public criticism due to the nature of their content. In April 2020, the police announced that it was investigating operators of "fake news" sites; the grounds for the investigation was the crime of making threats of public endangerment, not that of scaremongering.¹⁵

11 Bencze, Mátyás – Ficsor, Krisztina: A koronavírus kihívásai és a jogtudomány: a rémhírterjesztés tényállásának jogalkalmazási kérdései, JTIBlog, 2 April 2020, https://jog.tk.mta.hu/blog/2020/04/a-remhirterjeszt-es-tenyallasanak-jogalkalmazasi-kerdesei#_ftnref13

12 Hatósági rendelkezés elleni uszítás – 336. § Aki nagy nyilvánosság előtt, a köznyugalom megzavarására alkalmas módon hatóság rendelkezése ellen általános engedetlenségre uszít, büntett miatt három évig terjedő szabadságvesztéssel büntetendő.

13 Közveszéllyel fenyegetés – 338. § (1) Aki a köznyugalom megzavarására alkalmas olyan valótlan tényről állít, híresztel, vagy azt a látszatot kelti, hogy közveszéllyel járó esemény bekövetkezése fenyeget, büntett miatt három évig terjedő szabadságvesztéssel büntetendő. (2) A büntetés egy évtől öt évig terjedő szabadságvesztés, ha a közveszéllyel fenyegetés a köznyugalom súlyosan megzavarta.

14 <http://www.police.hu/hu/hirek-es-informaciok/legfrissebb-hireink/bunugyek/fake-news>

15 <http://www.police.hu/hu/hirek-es-informaciok/legfrissebb-hireink/bunugyek/kattintasvadasz-cimek-alhirek>

iv. Hungarian media coverage of the corona crisis

To assess the importance of the new criminal law, it is necessary to trace the cumulative impact of the policies aimed at the media over the last few years that have negatively impacted and transformed the media environment in Hungary. This is inexplicably connected to the weakening of safeguards for media freedom and restrictions in place for independent media practitioners and outlets. This process rests on three pillars:

- the undermining of the independence of the organisations responsible for overseeing private and public media;
- the manipulation of access to the market resources necessary for media market activities; and
- the manipulation of the information environment by controlling the access to public information and the political agenda.

These pillars establish a media environment with an extremely concentrated media market where the pro-government media have near unlimited access to market resources and information. This expansion is supported by the decisions of the media authority, and the governing party who are able to use the established media system to exercise tight control of public discourse.

In the early stages of the COVID-19 crisis, news about the pandemic was predominantly covered by independent media outlets alone, while the

pro-government media eco-system that controls large segments of the market sought to downplay the issue. After proclaiming the state of emergency on 11th March, the government and pro-government media outlets focused nearly exclusively on a small number of Iranian students and sought to frame the entire COVID-19 epidemic as a problem stemming from migration. Independent media, by contrast, pointed to systemic problems in the Hungarian government's handling of the pandemic, such as the low number of tests and the shortage of personal protective equipment (PPE), such as clothing and masks.

One of the government's most brazen attacks against the independent media occurred on 15th March at a press conference hosted by the Government Spokesman, Zoltán Kovács. In response to a question by a journalist of the online newspaper, 444.hu, Kovács forcefully asserted that 444.hu and other independent media outlets should not try to act smarter than the epidemiology experts.¹⁶ The Government Spokesman failed to provide a substantial answer to the question.

The information about the COVID-19 crisis is entirely centralised now. The only source of information is the daily press conference delivered by the Operational Staff (Operatív Stáb),¹⁷ for which journalists can submit questions online. This leads to questions being selected in a process that is not only lacking in terms of transparency or openness to independent scrutiny but is discriminatory to independent media outlets. The government has prohibited the Directors of the

¹⁶ Coronavirus in Hungary: "You do not need clarification on the protocol," official tells reporters, Index.hu, 15 March 2020, https://index.hu/english/2020/03/15/hungary_coronavirus_press_conference_15_march/

¹⁷ Operational Staff Responsible for Defence against the Corona Virus Pandemic. It is launched in the resolution of the government nr. 1012/2020. (I. 31.); it is available at <https://net.jogtar.hu/jogszabaly?docid=A20H1012.KOR>. – The Operational Staff is lead by the minister of interior in cooperation with the minister of human capacities. It has 11 members listed in the resolution of the government. The members are partly some members of the government, leaders of some healthcare institutions, and some leaders of the police and the secret services.

hospitals from providing information about the pandemic situation.¹⁸ According to the report of the Hungarian Civil Liberties Union (Társaság a Szabadságjogokért, TASZ), doctors are afraid of talking to the journalists because of the expected negative consequences.¹⁹

The TASZ report also covers the opinion of journalists in regard to the new regulation of scare-mongering. The journalists label the new law as a "rubber rule" that does not give clear guidelines for their work and makes the response to their work unpredictable. They believe that the new law requires increased levels of documentation to prove all statements in possible court proceedings. More than that, in the current situation, they lack the tools to check and confirm the information. As a result, while journalists have outlined and acknowledged the negative effects of the new law on their work, they continue to work by obeying existing professional standards.

The undermining of the credibility of independent media outlets is an essential part of the attacks against them. Public (state) media outlets have started to produce segments as part of their news programmes disclosing alleged "fake news" related to the COVID-19 pandemic. However, the listed "fake news" is exclusively critical reporting published by independent media outlets. The government's biggest think-tank, Századvég, published a list²⁰ of the reporting that it categorised as "fake news". But again, these news items – oftentimes published in independent media outlets or on Facebook pages of opposition politicians or NGOs – were not fake, only critical of the government's measures and approaches. The publishing of the list was not followed up with any legal procedure against the "fake news distributors". However, these lists mirror how the government-affiliated institutions understand and use the notion of "fake news" to undermine and threaten independent media outlets, even without bringing legal action.

18 Az EMMI utasításba adta a kórházaknak, hogy a járvány ügyében ne nyilatkozzanak, 444.hu, April 26, 2020, <https://444.hu/2020/04/26/az-emmi-utasitasba-adta-a-korhazaknak-hogy-a-jarvany-ugyeben-ne-nyilatkozzanak>

19 Így akadályozza az állam a koronavírusjárványról tájékoztató újságírókat, Tasz.hu, 27 April 2020, https://tasz.hu/a/files/koronavirus_sajto_kutatas.pdf

20 <https://szazadvég.hu/uploads/media/5e996bf37b2b4/a-koronavirus-torveny-kapcsan-jelent-meg-a-legtobb-alhir-az-el-mult-hetekben-tablázat-20200409.pdf>

Impact of legal changes on press freedom

The COVID-19 crisis was classified as a state of danger event. However, this classification itself is grounds for debate because it is not obvious that a pandemic can be interpreted as a "natural disaster" as outlined in the law related to disaster management, CXXVIII, which interprets the notion of state of danger (Section 44) and defines human pandemic or the danger of human pandemic that can cause mass illness as a case of state of danger. Mészáros states that it is unconstitutional for the law related to disaster management to extend the cases of "state of danger" as defined in the Basic Law.²¹ Szenté expressed the same opinion.²² He argued that the law related to disaster management does not categorise the human pandemic as a natural disaster but as a case of "danger of another origin" (Section 44). However, the government and the majority of the parliament have taken the pandemic as grounds for the use of the rule on state of danger.

A further fundamental question is whether the new law adequately covers additional behaviours that fall outside the remit of the original law, and as a result whether it was necessary to bring forward a new criminal law that has such a significant impact on free expression in Hungary²³. As described above, the Hungarian Criminal Code was already applied against abusive communication leading to panic or other serious consequences during the pandemic situation. It means that the limitation of freedom of expression and media and press freedom outlined in the amendment was not necessary for defending other fundamental rights or constitutional values.

By considering the proportionality of limiting fundamental freedoms, the preciseness and unambiguousness of any proposed amendments is an essential aspect. The Hungarian Constitutional Court stated that any law is unconstitutional "if it is not interpretable for the court, or it makes different interpretations possible, and as a result it is unpredictable from the point of view of the impacts of the norm, or it generates unforeseeable situations for the addressee of the norms, or the text of norm is too general and therefore it makes the subjective, arbitrary application possible".²⁴

As for the new criminal law, the formulation of the crime does not meet these constitutional obligations. The notion of "defence" – namely all measures brought against the emergency – can be interpreted widely: the government can argue that any legal, economic or communication measure during the emergency has a direct or indirect impact on the defence. This constitutional risk cannot be eliminated by moderate interpretation of case law, because this rule can be misused any time in the future.

The "successfulness of the defence" is also not defined, therefore it cannot be predicted which behaviour will endanger or derail the potential defence. However, the successfulness of the defence can be more adequately evaluated after the emergency. As a result, it is a rather subjective notion. In several cases it is not immediately obvious what are the short- and long-term effects of a measure aimed at the defence. During the emergency, the debate about the impact of the claim concerning the state of danger cannot

²¹ Mészáros, Gábor: Koronavírus és hatalom, Élet és Irodalom 24 April, 2020, <https://www.es.hu/cikk/2020-03-27/meszaros-gabor/koronavirus-es-hatalom.html>

²² Szenté Zoltán: A 2020. március 11-én kihirdetett veszélyhelyzet alkotmányossági problémái, MTA Law Working Papers - A Jogtudományi Intézet műhelytanulmányai, <https://jog.tk.mta.hu/mtalwp/a-2020-marcius-11-en-kihirdetett-veszelyhelyzet-alkotmanyossagi-problemai>

²³ Réhmírtérjesztés újratöltve, Helsinki.hu, 27 March 2020, <https://www.helsinki.hu/remhirterjesztes-ujratoltve/#>

²⁴ 571/B/2010. AB

be clearly decided. Moreover, the impacts of a unique statement on the defence are harder to assess.

According to the law, the real impact of any published or communicated statement is not a necessary condition of the committing of the crime. The crime is already committed if the claim "endangers" the "successfulness" of the defence. Neither the notion of endangering nor the one of successfulness can be unambiguously defined and interpreted for a concrete situation. This accumulation of unclear notions makes the risk of arbitrary application extremely high.

The claiming of a distorted statement – claiming a true fact in a distorted way – is not a newly defined behaviour in (criminal) law; it was one of the behaviours outlined in the previous formulation of scaremongering. Further to this, there is significant civil case law concerning personal rights, such as protecting reputation. Nevertheless, this formulation makes it easier to attack any public statement which contradicts the official standpoint about the defence. According to the established case law, distorted claims should be untrue in their general meaning perceived by the public. But the government can practically target a true statement alleging that it is communicated in a misleading or deficient context, even if it concerns the publishing of raw data such as the number of infected or deceased persons, without explaining the broader context, such as the number of tested persons. Bodolai argues that justified conclusions and opinions drawn from true facts can also serve as ground for taking legal actions, only because these conclusions

and opinions put the fact into a new context that contradicts the official interpretation of the given facts.²⁵

It is not necessary to be sentenced by the court for journalists and media outlets to avoid covering sensitive topics related to the pandemic; participating in an unsuccessful legal proceeding also has a strong chilling effect. To be accused is threatening enough and participating in legal proceeding takes time and a lot of resources from the media outlet. Further to this, the unclear notions upon which the law is based, makes it disproportionately easy to initiate legal proceedings. However, if the police commence legal proceedings against a journalist or media outlet, and seizes journalistic equipment, it can significantly impede the work of journalists, even if the court eventually clears the journalist.²⁶

All in all, neither the formulation of the law nor the case law gives precise meaning for the new restrictions to freedom of expression and the freedom of the press and media. Therefore, the new law offers a significant but uncertain threat to free expression, public debate and independent journalism.

The new law can also be applied to non-Hungarian citizens. The Criminal Code defines its general territorial and personal scope in a way that the Hungarian criminal law shall apply to any criminal offenses committed in Hungary, including these committed by foreigners, as well as any act committed by non-Hungarian citizens abroad against a Hungarian citizen or against a legal person or unincorporated business association established

25 Bodolai, László: Rémhírek és vélemények, *Élet és Irodalom*, 27 March 2020, <https://www.es.hu/cikk/2020-03-27/bodolai-laszlo/remhirek-es-velemenyek.html>

26 Így akadályozza az állam a koronavírusjárványról tájékoztató újságírókat, *Tasz.hu*, 27 April 2020, https://tasz.hu/a/files/koronavirus_sajto_kutatas.pdf

under Hungarian law, which are punishable under the Hungarian law, Section 3.²⁷ At first look, it can theoretically lead to a situation where a non-Hungarian Facebook user publishes a critical post about the measures on the Hungarian Government from abroad in other language than Hungarian and he/she will be punished based on the crime of scaremongering. However, in the case of scaremongering even if there is no identifiable citizen being singled out or targeted, the crime is committed because the object of this crime is the "public peace", not the safety or interest of individual and identifiable persons. However, the risk of punishing non-Hungarian citizens for publishing anything abroad is low.

The competences of the European Union (EU) to directly intervene in the member states' criminal legislation in general is limited. According to the Lisbon Treaty, the area of criminal justice belongs to the ordinary legislative procedure, and the

former framework decisions remain applicable too. But the harmonisation of criminal law covers only a few aspects of the restrictions to free expression. Scaremongering, or the publishing and spreading of false information are not within the scope of the framework decisions related to hate speech²⁸ or other legislative actions. Because the legislation does not serve any EU law harmonisation measure, the Charter of Fundamental Rights as a framework of interpretation of EU law cannot be referred to.

However, in its jurisprudence, the European Court of Human Rights (ECtHR) has also made clear that Article 10 of the European Convention on Human Rights (ECHR) requires that laws restricting speech must be "clear and precise" and must indicate with clarity the scope of any legal discretion. The ECtHR stated in the case of *Ahmet Yildirim v. Turkey* that "The question here is whether, at the time [the limiting freedom of

²⁷ Section 3

(1) Hungarian criminal law shall apply:

a) to criminal offenses committed in Hungary;

b) to criminal offenses committed on commercial ships or watercraft sailing, or aircraft flying under Hungarian flag outside the territory of Hungary;

c) to any act of Hungarian citizens committed abroad, which are criminalized in accordance with Hungarian law.

(2) Hungarian criminal law shall, furthermore, apply:

a) to any act committed by non-Hungarian citizens abroad, if:

aa) it is punishable as a criminal offense under Hungarian law and in accordance with the laws of the country where committed,

ab) it is recognized as an offense against the State, excluding espionage against allied armed forces and espionage against European Union institutions, regardless of whether or not it is punishable in accordance with the law of the country where committed,

ac) it constitutes a criminal act under Chapter XIII or XIV, or any other criminal offenses which are to be prosecuted under international treaty ratified by an act of Parliament;

b) to any act committed by non-Hungarian citizens abroad against a Hungarian national or against a legal person or unincorporated business association established under Hungarian law, which are punishable under Hungarian law.

(3) In the cases described in Subsection (2) criminal proceedings are opened by order of the Prosecutor General.

3. § (1) A magyar büntető törvényt kell alkalmazni

a) a belföldön elkövetett bűncselekményre,

b) a Magyarország területén kívül tartózkodó magyar felségjelű úszólétesítményen vagy magyar felségjelű légi járművön elkövetett bűncselekményre,

c) a magyar állampolgár által külföldön elkövetett olyan cselekményre, amely a magyar törvény szerint bűncselekmény.

(2) A magyar büntető törvényt kell alkalmazni

a) a nem magyar állampolgár által külföldön elkövetett cselekményre is, ha az

aa) a magyar törvény szerint bűncselekmény, és az elkövetés helyének törvénye szerint is büntetendő,

ab) állam elleni bűncselekmény, - kivéve a szövetséges fegyveres erő ellen elkövetett kémkedést és a kémkedést az Európai Unió intézményei ellen - tekintet nélkül arra, hogy az az elkövetés helyének törvénye szerint büntetendő-e,

ac) a XIII. vagy a XIV. Fejezetben meghatározott bűncselekmény, vagy egyéb olyan bűncselekmény, amelynek üldözését törvényben kihirdetett nemzetközi szerződés írja elő,

b) a magyar állampolgár, a magyar jog alapján létrejött jogi személy és jogi személyiséggel nem rendelkező egyéb jogalany sérelmére nem magyar állampolgár által külföldön elkövetett olyan cselekményre is, amely a magyar törvény szerint büntetendő.

(3) A (2) bekezdésben meghatározott esetekben a büntetőeljárás megindítását a legfőbb ügyész rendeli el.

²⁸ 2008/913/JHA

speech] was issued, a clear and precise rule existed enabling the applicant to regulate his conduct in the matter."²⁹

The Hungarian criminal law against abusive communication during the Special Legal Order does

not comply with this obligation. This is an important ground for disputing its accordance with Article 10 of the ECHR.

Challenging legislative changes

To date, there have been no formal judicial complaints against the new law. According to the Basic Law of Hungary, the application of the Basic Law may not be suspended, and the operation of the Constitutional Court may not be restricted under a Special Legal Order. Further to this, the Authorisation Act of 2020 does not restrict the functioning of the Constitutional Court.

However, the general rules about the proceeding of the Constitutional Court also define the opportunity of initiating the constitutional review on a very limited basis:

- The constitutional review of laws, including government decrees may be initiated by the Government, one-quarter of the MPs, the President of the Curia, the Chief Prosecutor, or the Ombudsperson of Hungary (Basic Law of Hungary, Section 24).
- According to Act CLI of 2011 on the Constitutional Court, a constitutional complaint may be submitted only by "a person or organization affected by the specific case" (Section 26).

Since the independence of the Constitutional Court is highly contested, the opinion of Mihály Tóth can be seen as expressing a general sense of distrust: "It is not worth initiating a Constitutional Review (...) It is not to expect that the current Constitutional Court would make a decision that has the similar quality or even the similar content as the decision of the Constitutional Court from 20 years ago."³⁰ Namely because of the personal composition of the Court: "The proportion of judges nominated and elected unilaterally by Fidesz-KDNP showed a continuous increase."³¹ Since 2010, the nomination of the judges is carried out by the two-thirds majority. The only nomination and election proceeding when the Fidesz did not have a two-thirds majority in the parliament took place in 2016, where there was one opposition party taking part in proceedings who helped Fidesz nominate and elect four new judges. From the current 14 judges, these four are the only ones nominated by parties other than Fidesz exclusively. As a result, "through their party politically biased jurisprudence, the judges discard the accepted standards of constitutional review".³²

²⁹ Case of Ahmet Yildirim v. Turkey (Application no. 3111/10) 18 December 2012

³⁰ Tóth, Mihály: Közveszély és rémhír, *Élet és Irodalom*, 17 April 2020, <https://www.es.hu/cikk/2020-04-17/toth-mihaly/koz-veszely-es-remhir.html>

³¹ EKINT (Eötvös Károly Intézet): CC judges nominated and elected unilaterally by the government majority, Ekint.org, 30 March 2017, http://ekint.org/lib/documents/1490874872-DRI_EKINT_indicators_2016.pdf

³² Gábor Halmai: Dismantling Constitutional Review in Hungary, European University Institute, November 2018, https://me.eui.eu/gabor-halmi/wp-content/uploads/sites/385/2018/11/Bocconi_HCC_Halmi.pdf

Application of laws against journalists

On 29th April 2020, the Operational Staff reported 78 proceedings for cases of scaremongering.³³ While the website of the Hungarian police department reports some of these cases,³⁴ it does not give a comprehensive picture. But it is clear that the criminal law is applied mostly against non-organised, non-professional users of social media.

Atlatzso.hu published an article about the biggest Hungarian "fake news" sites and prominent promoters of conspiracy theories in Hungary. The article concludes that the criminal law is not used against the biggest and most influential players, including many operators of well-known and popular "fake news" sites identified in the article.³⁵

There is no public information about proceedings against professional journalists and media outlets. However, the TASZ analysis cited the editor-in-chief of the independent investigative news portal, Atlatzso.hu, who said that Atlatzso.hu received two requests from the police. The TASZ report also refers to an article relating to a family member of the Secretary of State for Sport who offered batches of masks and disinfectants for purchase on the internet.³⁶

Even if there are no proceedings against larger and more established media outlets, the high number of the proceedings against those less able to access legal resources, is a clear message for all professional and non-professional communicators.

Even if journalists were not victims of legal attacks based on the new law, the police have misused the rule against simple Facebook users. The police held a 64-year-old man for questioning in relation to a Facebook post where he criticized the government and the Prime Minister by using strong wording, e.g. by labelling Orbán as a dictator. However, there was no false statement in the post.³⁷ In another case, the Fidesz party Mayor of Gyula denounced a local opposition activist for posting a statement on Facebook about the number of hospital beds vacated by the government in the town.³⁸ The statement was true, but the man was detained by the police and his house was searched. In both cases, the Prosecutor stopped the proceeding. However, these cases could have significant impact on the exercising of freedom of speech, and it also showed that the new law can be interpreted in a very broad way.

33 A kormány szerdai ülésén tárgyalja a május 3. utáni új kijárási szabályokat, Hirado.hu, 29 April 2020, <https://hirado.hu/belfold/kozelet/cikk/2020/04/29/a-kormany-szerdai-ulesen-targyalja-a-majus-3-utani-uj-kijarasi-szabalyokat>

34 E.g. <http://www.police.hu/hu/hirek-es-informaciok/legfrissebb-hireink/bunugyek/remhirterjesztes-miatt-fogtak-el-a-rendorok>; <http://www.police.hu/hu/hirek-es-informaciok/legfrissebb-hireink/bunugyek/remhirterjesztoket-allitotak-elo-a-rendorok>; <http://www.police.hu/hu/hirek-es-informaciok/legfrissebb-hireink/bunugyek/a-jarvannyal-kapcsolatosan-terjesztettek-alhirt>

35 A rendőrség bohócokat kerget, a konteócsatornák zavartalanul nyomják a koronavírus hülyeséget, Atlatzso.hu, 28 April 2020, <https://atlatzso.hu/2020/04/28/a-rendorseg-bohocokat-kerget-a-konteocsatornak-zavartalanul-nyomjak-a-koronas-hulyeseket/>

36 Maszkokat és fertőtlenítőt kínálnak eladásra nagy tételben Szabó Tünde államtitkár rokonságában, Atlatzso.hu, 23 March 2020, <https://blog.atlatzso.hu/2020/03/maszkokat-es-fertotlenitot-kinalnak-eladasra-nagy-tetelben-szabo-tunde-allamtitkar-rokonsagaban/>

37 „Elmondtam a rendőröknek is, hogy engem valószínűleg bekussoltatnak”, 444.hu, 12 May 2020, <https://444.hu/2020/05/12/elmondtam-a-rendoroknak-is-hogy-engem-valoszinuleg-bekussoltatnak>

38 Rémhírtérjesztésért bevitték a gyulai ellenzéki kör helyi vezetőjét, a Momentum tagját, Narancs.hu, 13 May 2020, <https://magyararancs.hu/kismagyarorszag/a-gyulai-kossuth-kor-elnoket-remhirtterjesztes-miatt-a-rendorseg-hajnalban-eloallitotta-129717>

Local and international outcry against the law

The Authorisation Act and the state of Hungarian democracy during the pandemic has been debated and criticised worldwide. There has also been significant criticism from the institutions and member states of the European Union. The new formulation of scaremongering is also a central object of criticism. Independent media outlets, media and journalism organisations, NGOs, scholars, opposition parties, European politicians and representatives of the EU and other organisations have expressed their concerns about the law.

The protesters from Hungary include (not a complete list): Magyar Újságírók Szövetsége, the biggest association of the journalists,³⁹ Amnesty International Hungary,⁴⁰ Hungarian Helsinki Committee,⁴¹ Hungarian Civil Liberties Union,⁴² Transparency International Hungary,⁴³ Mertek Media Monitor,⁴⁴ Eötvös Károly Institute⁴⁵. In addition, some critical voices from abroad include the European Commission,⁴⁶ International Press Institute,⁴⁷ Reporters without Borders,⁴⁸ Freedom House⁴⁹, Committee to Protect Journalists⁵⁰, European Centre for Press and Media Freedom (ECPMF).

39 <https://muosz.hu/2020/03/26/a-muosz-a-felhatalmazasi-torvenytervezetrol-aki-a-nyilvanossag-es-a-sajto-ellen-harcol-az-nem-a-jarvanyt-akarja-legyozni/>

40 <https://www.amnesty.hu/news/2691/a-kormany-nem-lehet-korlatlan-hatalma-jarvany-idejen-sem>

41 <https://www.helsinki.hu/remhirterjesztes-ujratoltve/#>

42 https://ataszjelenti.blog.hu/2020/03/24/megbenithatjak_a_szerkesztosegeket_ha_nem_hisznek_az_allamnak

43 <https://transparency.hu/a-rendkivuli-jogrend-csak-idoben-korlatos-lehet-a-transparency-international-magyarorszag-allasfoglalasa/>

44 <https://mertek.eu/en/2020/03/24/the-end-of-days-for-independent-media-in-hungary/>

45 <http://www.ekint.org/alkotmanyossag/2020-03-22/meg-egyszer-a-koronavirus-elleni-vedekezesrol-szolo-torvenytervezetrol-allasfoglalas>

46 <https://www.telegraph.co.uk/news/2020/04/02/european-commission-chief-criticises-hungarys-coronavirus-laws/>

47 <https://ipi.media/hungary-press-freedom-threatened-as-orban-handed-new-powers/>

48 <https://rsf.org/en/news/council-europe-must-review-hungarys-new-coronavirus-emergency-law-sake-press-freedom>

49 <https://freedomhouse.org/article/hungarys-troubling-coronavirus-response>

50 <https://cpj.org/2020/03/proposed-hungarian-laws-could-imprison-journalists.php>

Conclusion

I. The Authorisation Act and the laws against scaremongering are not in line with the Basic Law of Hungary because of the following reasons:

a.) The Authorisation Act *expressis verbis* empowers the government to take measures that are not defined in the Law CXXVIII, or the act related to disaster management. This is a clear violation of the Basic Law.

b.) The Authorisation Act empowers the government to extend the duration of the decrees passed within the Special Legal Order, without any further approval of the parliament. The government may extend the applicability of the decrees to the end of the emergency situation. This is again a violation of the Basic Law.

c.) It is also highly questionable whether a human pandemic can be categorised as a case of state of danger as defined by the act in a manner that is in line with the Basic Law.

d.) The Hungarian Criminal Code was already able to respond to abusive communication leading to panic or other serious consequences during a pandemic situation. It means that the limiting of the freedom of expression and freedom of press and media as identified with the amendment was not necessary for defending other fundamental rights or constitutional values.

e.) Neither the formulation of the law nor existing case law gives precise meaning for the new restrictions of freedom of expression and the freedom of the press and media. Therefore, the new law offers a significant but uncertain threat

to free expression, public debate and independent journalism

II. The Authorisation Act and the laws against scaremongering are not in line with EU law and values, due to:

a.) The lack of parliamentary oversight over the actions of the government results in an incompatibility between the law and the rule of law principles outlined in Article 2 of the EU Treaty.

b.) In its Article 10 jurisprudence, the European Court of Human Rights has also made clear that Article 10 of the European Convention on Human Rights requires that laws restricting speech must be "clear and precise" and must indicate with clarity the scope of any legal discretion. This law falls short of these principles in a number of key aspects.

III. The impact of the Authorisation Act and the laws against scaremongering on media freedom and professional journalism is significant because:

a.) To date, the law has not been used against established journalists or media outlets, instead focusing on several, mostly non-professional communicators, such as social media users. However, the broadness of the law means that there is nothing to stop it being used against journalists or media outlets in the future.

b.) It is documented that the new law can lead to self-censorship, not only and not firstly by the journalists but also by informants and sources.

c.) The centralised information about the pandemic leads to the discrimination of independent media outlets and amplification of pro-government outlets. This undermining of independent media outlets is an essential part of the attacks against them. The whole information environment, including the new law relating to scare-mongering, hinders the reporting and sharing of fair and comprehensive information about the pandemic situation.



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