Constitutionality Under Exceptional Circumstances

Security of a society can be threatened not only by military conflict but by natural disaster as well, or just like in our case; by an epidemic. A widespread outbreak of an infectious disease can be as much of a problem as the escalation of street violence could be. Prepared for such circumstances the legal structure of nations provides constitutional possibilities to introduce extraordinary measures, where constitutionality is to be emphasized. This way confrontation of challenges, despite it is a divergence from ordinary functioning of the state of law, still remains within its boundaries. In connection to sovereignty Carl Schmitt did examine the law in state of exception. Two of his works are to be mentioned: *Die Diktatur* (1921), concerning history of sovereignty-theory and the *Politische Theologie* (1922). In *Die Diktatur* two types of dictatorships were separated, the *pouvoir constitué* (power based on constitution) and the *pouvoir constituant* (power to modify constitution). The "commissar" (assigned with a certain purpose) and the "sovereign" dictator. Base of differentiation between the two is: how the emergence of the norms can be ensured and how can new norms be created? Commissar is proceeding from the existing constitutional order and is supposed to implement it under special circumstances in which the application of the constitutional *procedures* does not ensure the acceptable existence of the constitutional order in the political body. In this state of exception (*Ausnahmezustand*) his purpose is to restore the ordinary (constitutional) order. This form of dictatorship is limited in time. As an example, Schmitt cited the dictator of the Roman Republic Era, when the dictator, elected for one year, was assigned with facing severe foreign threat. By doing so, the dictator dissolved the contraposition between the legal norms and the norms of execution with political decisions in order to avert danger. To put it simply; the "commissar" kind of dictator suspends the constitution in order to protect it. Schmitt thought this situation to be identical to the state of siege (*Belagerungzustand*). Its counterpart, the "sovereign" kind of dictator on the other hand does not simply suspend the existing constitution but he also would like to create a situation in which the emergence of a new constitutional order can be enabled. His activity can be described as *pouvoir constituant*, power to constitute.

Less than a year after *Die Diktatur*, Schmitt published his new book on the political theology in which he no longer mentioned the commissar, but the sovereign. We can say that he radicalized his theory on the sovereign and – in accordance with that – the state of exception. The first sentence of his book ("Sovereign is he who decides on the exception.") is cited with frequent regularity. In this writing Schmitt's attention is focused on the *final decision* – a decision that can not be derived from the legal norm. This in itself shows already the breaking with the concept of state of law, and in its background one can recognize Schmitt's confidence that the state is superior compared to the law. The conclusion of the legal system does not have to be followed by the termination of every system of society, for the state's (political) order is still there. Bottom line is; there is no legal order during exceptional state, there is order created by the political will only. According to Schmitt, the state of exception is always a condition in which the law is bypassed and in which the political power is all the force that is manifested. It must be emphasized that the state of exception was introduced in Hungary and in all the V4 based on the constitutional order.

To understand Schmitt, one must know the legal history of Germany from his era. Following the First World War, 48.§. of the Weimar Constitution, entering force in 1919, already provided the Imperial President with wide powers for state of exception – without specifying whether it is internal or external threat or state of emergency. 25 & 53.§. of the same constitution also authorized the President to dissolute the Imperial Assembly (*Reichstag*) and to appoint or discharge the Chancellor. This way the President was given wide powers that are today critically considered to be the foundation of the Imperial President's tyranny. Indeed, this resulted that in the political – and often street – fights and struggles President Friedrich Ebert made 136 edicts between as early as 1919 and 1925. These edicts often contained application of violence. Later this tendency magnified which is very well represented by the fact that in 1931 the Reichstag made no more than 34 acts, while in 1932 just 5, and parallelly with the decline of legislation the frequency of parliamentary sessions decreased dramatically as well. Therefore, the disproportional exaggeration of the executive branch already started before the Nazi takeover. According to a saying from the times just before Hitler's era, "on the imperial level the parliamentarism is technically concluded". Political and legal situation following the Second World War had a drastic impact on the regulations within the German Constitution (*Grundgesetz*) of 1949. An attempt to fill the deficiencies regarding the regulations of the state of emergency took place in 1968 with the so called *Notstandsgesetzgebung*. The clouting was not completely successful as was proved all too obviously in connection with COVID-19 endemic.

As Pierre Thielbörger and Benedikt Belehrt pointed out in their analysis on the constitution, with the coronavirus outbreak it became clear that the regulations of the state of emergency in the *Grundgesetz* are skimpy, abstruse, and are way too defenseless to solutions based on political compromises. It appears to be a special problem, that based on the German Constitution the necessary measures of responding to the danger posed by COVID-19 endemic appears to belong to the purview of the member states. It is not a coincidence that during the negotiations between the *Bund* and the representatives of the member states on 16th of March, directives were determined only as the federation and the cabinet had no competency to order the member states to make certain measures. Limitation of the fundamental civil rights in connection with the regulations regarding state of emergency are equally disturbing. A great weakness of the German Constitution is – as was mentioned earlier – that it offers authority for the state to narrow civil rights during state of emergency in connection with the right to free movement exclusively (11.§.). There is actually no constitutional authorization to limit any other fundamental right to this extent.

Unlike in Germany, Sebastian Kurz's cabinet of Austria did not employ the constitutional regulations of the state of exception, it rather kept things in the scope of the legal acts concerning national healthcare and epidemics. A whole set of new acts were designed to set up a legal structure for the disaster management of the COVID endemic and therefore the declaration of the state of emergency did not take place. This is exactly what Konrad Lachmeyer, expert on the constitutional law opposed; in his critical opinion the Austrian cabinet limited fundamental civil rights drastically which suggested to the people of Austria that there actually was a state of emergency, but the constitutional background for such measures had not been provided.

Given the imminent danger of the pandemic the nations of the Visegrád Alliance turned to different legal solutions as well. Based on Constitutional Act of Law No. 110/1998 on the

Security of the Czech Republic the parliament of Czechia could allow the cabinet to introduce necessary measures of disaster management. Fundamental Law of Hungary gives the most detailed regulation of the special forms and cases of the state of exception and therefore the declaration of state of danger based on Article 53 (3) had no legal obstacles. Quite similarly regulation on the matter in the Slovakian Constitution is clear based on Article 119 n). Only Poland did choose a different but still constitutional soliton. Despite it would have been possible to declare state of emergency based on Article 229-234. of Chapter XI. of the constitution, the Sejm chose another way. Rules of state of emergency include a mandatory postponement of the general elections which was not the intention of the Sejm (but which eventually did take place), Poland specified the situation of medical emergency in a separate act of law instead. The *"Specustawa"*, which had passed legislation on 2nd of March, allowed for the cabinet and the Minister of Health to make the necessary regulations for a period of 180 days, which is the double of the interval of the state of emergency. Given the legal authorization explained above, Hungary declared state of danger on 11th of March, Czechia and Slovakia both declared state of emergency on 12th of March while Poland declared state of epidemic on 20th of March.

Measures introduced by the nations of the Visegrád Alliance include restoration of border control with restriction of travel both inwards and outwards and obligatory home-quarantine of 14 days for those who return home from abroad. The shutting of education facilities was also a firm action which took place in different paces in the countries but in the end, it did resulted suspension of the fulltime training everywhere with reservation of the possibility of graduation. Limitation of free movement was also introduced allowing for citizens to leave their homes and travel for the purposes of work, basic shopping and solitary sport activity. All kinds of public assembly were prohibited or – like in case of the religious activities – at least strictly limited.

Considering statistics of the pandemic the results of the disaster management become obvious. By 16th of July, there are 13.475 registered cases to be found in Czechia, 39.054 in Poland, 4.279 in Hungary, and 1.951 in Slovakia. Out of those cases, in exactly the same order, 355, 1.605, 595 and as few as 28 proved to be fatal. Arithmetic mean for these data is 773 infections and 36 casualties per million inhabitants of the Visegrád Group in average. For comparison, with 19.655 validated infections in Austria, the arithmetic mean there is 2.182 cases per million inhabitants out of which 79 were fatal in average, while the numbers of Germany are 2.421 infections and 109 casualties per million. Statistics of Western Europe are even worse; 45.000 fatalities of the United Kingdom results 664 per million in average, while in Spain and France ca. 30.000 infections proved to be lethal. In France this is even more drastic if one compared the total number of fatal cases with the recoveries which would result an extraordinary death rate of 38%, so high that out of epidemical diseases Ebola alone could compete with it.

It is safe to assume that the nations of the Visegrád Alliance managed to handle the first outbreak of COVID-19 pandemic between January and July of 2020 with increased efficiency compared to most other Westerner states and by doing so thousands of lives were saved. Also, we can add that while doing so, the measures introduced by the cabinets of the V4 retained the constitutional boundaries and regulations of their legal systems.