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Human Rights and the State of Exception in the Covid-19 Era: The Cases of Hungary and Poland¹

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Abstract

The present paper examines the ways in which the Covid-19 pandemic and the resulting declarations of emergencies posed great threats to the rule of law and human rights. Giorgio Agamben's narratives on exception were used and constituted the theoretical framework of this study. The study begins with the clarification of the idea of state of exception and the explanation of a certain phenomenon; the "medicalization of politics". Subsequently, the cases of Hungary and Poland are being presented. The study concludes that the extreme measures undertaken by states in order to counter the health emergency, pose a huge threat to the operational qualification of the rule of law, as democracies tend to abuse the state of exception as a way to diverge from its provisions.

Keywords: Rule of Law; State of Exception; Covid-19; Hungary; Poland; Human Rights; Biopolitics

Introduction

During the first quarter of March 2020, in which coronavirus had already taken great and life-threatening proportions, W.H.O. (World Health Organization) declared that the world is dealing with a serious pandemic and urged the states to swiftly start taking measures in order to counter it (World Health Organization, 2020). Many governments, gradually, judging the situation was posing a fundamental threat to their countries decided to declare a "state of emergency". It was more than expected that some everyday behaviors and normal governmental functions were about to change in the name of public health. However, as the coronavirus was getting more and more contagious, it was also obvious that human freedoms were suppressed in order to decrease the infection rates. Strict curfews, school closures and press restrictions are some but a few of the most usual and widely applied measures by the states. In fact, certain countries saw the state of emergency as an opportunity or more correctly as a mean, to pass new bills which contradict the provisions of the rule of a law.

Around the same time, Giorgio Agamben, an Italian philosopher, famous for his work on the state of exception, raised certain concerns regarding the protection of democratic institutions combined with the strict measures undertaken by states. These strict measures, according to Agamben, pose unquestionably a huge threat to the operational qualification of the rule of law, as democracies tend

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to abuse the state of exception as a way to diverge from it (Agamben, 2008). Agamben also explains that the one with absolute sovereignty in their hands is protected by the constitutional legality, and by extension, they can control the application and refusal to apply the rule of law (Agamben, 2008).

This study aims to test Agamben's claim concerning the rule of law violations during the pandemic of Covid-19 in the European framework and explore those violations through certain case studies following an inductive reasoning process. It examines the cases of two of the most striking and intrusive examples of states in the European Union; Poland and Hungary, countries that had even declared some type of emergency in their domain during the pandemic (Diaz Crego and Kotanidis, 2020). It can be considered as a review paper that provides some examples of human rights violations during the Covid-19 era in two EU member-states, pursuant to the international human rights law.

Moreover, from the point of data collection, journals, researches and reports of international think tanks were used, as well as articles from periodical and non-periodical Press. In addition, data from human rights protection committees were also put in use. However, this paper should be read while considering that the pandemic is not over yet and that the human rights violations indicated from these particular countries are only the most prominent ones.

The structure of this present effort begins with analyzing the term of the state of exception while also linking it and examining it with a new phenomenon; "the medicalization of politics" (Salzani, 2021). Later, the cases of Hungary and Poland are being discussed in terms of human rights violations during the pandemic. And last but not least, the conclusions of this study are cited.

The state of exception and the medicalization of political and social life

The state of exception as a term has a very long history and Giorgio Agamben was not the first one to ever address it. It was mostly formulated by the German Philosopher Carl Schmitt and the German-Jewish cultural critic and analyst Walter Benjamin during the first half of the twentieth century. Benjamin's belief on the state of exception can be perceived as a state excluded from the juridical provisions of law on command of the sovereign (Benjamin, 2004). On the other hand, Carl Schmitt's interpretation revolves around the fact that the absolute sovereign is the one who is able to decide when the state of exception shall be declared (Carl Schmitt, 2005). Therefore, Schmitt's concept of sovereignty mainly concerns the ability to declare the state of exception and by extension, the ability to suspend the legal framework in which the sovereign is operating.

Agamben driven by Foucault's inquiry approaches this issue with a "biopolitical" lens. In order to understand his thought of the exception, it is vital to bear in mind that for Agamben by suspending the law in any way, people's lives are automatically affected as well. Moreover, his reasoning considers two types of lives; the private life which he calls "zoe" and the public one also known as "bios" (Agamben, 1998). However, this distinction derived from Aristotle, is extremely blurred by the sovereign in order to gain excessive powers over the citizens' lives as a whole and legitimize their actions (Giordanengo, 2016). The being created during this process is called "homo sacer".

The sovereign has complete control over the homo sacer as a political being but also over their natural life which results in creating barriers to their right to live. His most eminent example is that of the "camp", clearly referring to the Nazi concentration camps during the WW2. Inside the camp each person is denied their political rights and the right to live as decent human beings (Agamben, 1998).

These concerns were also present with the pandemic as a background but at the same time, the discussion of the medicalization of social and political life had already commenced. Since the beginning of 2020, it was evident that every aspect of life was immediately linked to this unprecedented health crisis. Plainly, any blunders in the managing of this issue were more than expected, however, by the medicalization of political measures resulted in some countries coming through conditions extremely dangerous for their safety and by extension, for the inviolability of their rights. For example in Belgium, the disproportionate usage of law enforcement officials in working class neighborhoods, where minorities also find residence, caused a wave of outrage from media and NGOs (Amnesty International, 2020). More specifically, in the period between the 18th of March and the 29th of May 2020, the Human's Rights League, gathered 102 cases of abusive police practices 40% of which were racial based (Human's Rights League, 2020).

The connection between the medicalization of politics and the exception is apparent. Medicalizing political decisions such as the enhancement of law enforcement personnel in minority-based areas with the reasoning of public health safety, is highly motivated by the conversion of the state of emergency into a state of exception. The tooling of this kind of state, gives the permission to legislators in a nonstandard way, to defy the rule of law in the name of common safety. The exception is continuingly an extension in its duration, giving reasons for further concerns regarding the protection of the rule of law provisions.

Case studies: Hungary and Poland

Hungary

The Hungarian government under the rule of Prime Minister Victor Orbán, saw the pandemic outbreak as an opportunity to acute its authoritarian ruling. From the beginning of the pandemic, Hungary started to resemble a typical autocratic state rather than an EU member-state. More precisely, on the 11th of March 2020 the government declared a “state of danger” in order to counter the coronavirus pandemic (Noémi, 2020). In this particular frame, given that the ruling party of Hungary has the majority of 2/3 in the Hungarian Parliament, the government passed an Authorization Act which gave it the power to rule without any parliamentary supervision (Human Rights Watch, 2021a). This Act permits the government to apply important restrictions, without time limitations, without any parliamentary discussion, and without any certainty whether there will be any constitutional review (Hungarian Helsinki Committee, 2020).

Practically, the most striking violations were noted on media and academic freedoms, the rights of asylum seekers but also on gender and sexuality based issues. More precisely, in March 2020, Orbán’s government passed a new legislation to criminalize “fake news” by which the accused persons could be sentenced up to five years in prison (International Press Institute, 2020). According to a Human Rights Watch report on Hungary, by July there were noted 134 criminal investigations related to “fear mongering” most of whom were critiques on the governmental regulations in handling the pandemic (Human Rights Watch, 2021a).

Considering immigration, the Hungarian government took certain measures that created overwhelming obstacles for the immigrants’ fair and lawful living in the country. The right to seek asylum is a fundamental right which is laid down on international law by the Refugee Convention of 1951. Instead, Hungary closed its borders and restricted the arrival of migrants in its territory, which caused the Union’s criticism towards Orbán’s measures to counter the virus spread. As a matter of fact, the European Commission sent a letter of formal notice to Hungary about the non-respect of EU asylum legislation (European Commission, 2020a). According to this letter, the European Commission judges that the new Hungarian procedures which include the beforehand application of non-EU national asylum seekers to Hungarian embassies outside the country, is highly against the Charter of Fundamental Rights of the European Union (European Commission, 2020a).

As far as academic freedom is concerned, the most striking example can be that of Hungary’s University of Theatre and Fine Arts. The government decided to appoint the University’s board

causing a wave of negative reactions as it was considered a way of undermining the University's autonomy (Reuters, 2020). This governmental move was going against the democratic principle of autonomous operation of academic institutions, discrediting the government's motives even more.

With regard to Women's and LGBTQ rights the government continued to drag them down. In May, the parliament hindered the confirmation of the Istanbul Convention – the first legal binding act for the prevention and combat against gender-based violence and domestic violence under the pretense of promoting “destructive gender ideologies” and “illegal migration” (The Guardian, 2020), which is perceived ideologically against Hungary's law and governmental belief system. More specifically, it was claimed that the Hungarian law already provides legal assurance for women's rights. The convention was already signed by the Hungarian regime in 2014, which was obliging it to follow certain lines of reasoning: to prevent domestic and gender-based violence, to protect survivors and to prosecute perpetrators (Humans Rights Watch, 2021a).

Also in May 2020 the government worsened trans and intersex people's position by passing a new law, which was making it impossible for them to transition legally. The move in question posed a great threat to these specific individuals as it made them hermits to discrimination, harassment and everyday inconveniences in which identity documents were put in use. Dunja Mijatovic, Council of Europe Human Rights Commissioner, stated that she was disturbed by the accentuating stigmatization of LGBTQ people and the political use of their dignity by the government (Council of Europe, 2020).

To conclude on Hungary's case, it must be mentioned that the Authorization Act was for the most part, a permission to Orbán's government to abuse the state of danger and by extension to undermine fundamental human rights or to minimize the parliamentary opposition. The mandate in question deteriorated the already deconstructed checks and balances in the country and it provided yet another instrument to the government for future declaration of health-related emergencies. It can be perceived that the state of emergency, or danger in this present case, suspended the legal framework in which the parliament and the government were collaborating, by limiting or silencing the parliamentary voice and the constitutional limitations and provisions were overruled by the government's powers. The Authorization Act was called-off in the beginning of summer of 2020 but the Hungarian government managed to introduce a new law allowing the government to declare future health-related emergencies while to apply measures without any parliamentary approval (Human Rights Watch, 2021a). Under this certain pretext, it is manifested that political actions were medicalized in order to justify their cause of existence and to restrict the reactions of public opinion, while creating the perfect

authoritarian frame for further limitations on individual rights. The line between peoples' public and private life was also extremely blurred, as it was uncertain when the state of danger would be uplifted, enabling the sovereign to legitimize his excessive gain of power.

Poland

In the case of Poland, the Covid-19 pandemic also threatened the integrity of the rule of law provisions. The country's health minister, Łukasz Szumowski, declared the state of epidemic emergency under a recently updated special act passed in order to counter the covid-19 pandemic (Notes from Poland, 2020). This particular act gives provides powers as imposition of mandatory vaccination, prohibiting certain types of movement, limiting or banning the sale or use of certain items, banning assemblies, and restricting the functioning of specific institutions and workplaces, while also allowing authorities to access to properties and means of transport for the purposes of countering the epidemic.

In addition during the same period, due to concerns of unfairness in the upcoming elections, the country's presidential elections scheduled for March 2020 were postponed to July, much to the ruling party's disapproval. In fact, the so-called Law and Justice party, under the presidency of Andrzej Duda, requested that the elections should be held in May through a mail-in vote system or to extend the present term of Andrzej Duda by two years, raising important concerns about the democratic conduct of the elections (Human Rights Watch, 2020b). Duda's conservative nationalist government won the two-round ballot in July by a slight eminence, however, the opposition insisted on its accusations about the undemocratic process that was followed (Deutsche Welle, 2020). During that year, the judiciary and media freedom continued to face important challenges, but also immigrants', women's, children's and LGBTQ peoples' rights were put in danger.

The government continued its attacks on members of the judiciary. Judges and prosecutors are facing important challenges when defending the principles of rule of law or pointing out deficiencies in judicial reforms, a situation which interferes with their judicial independence. For example, in December 2019, the government passed a law about firing judges, with the excuse of efficient judicial control, which in extension raised the concerns of the European Union (Euro News, 2019). This law leaves no ground for judges to question the credentials of judges designated by the President. The very same law restricted the statements and actions of judges, courts and other independent bodies and prohibited from questioning the powers of judicial and constitutional bodies and law enforcement agencies (Human Rights Watch, 2020b). In response, on 29 April 2020, the Commission introduced

an infringement procedure on the law of 20 December 2019 amending certain legislative acts concerning the functioning of the justice system in Poland (European Commission, 2020b). As for the presidents of courts, after the dismissal of more than 70 by the Minister of Justice, no means have been proposed for their restoration, despite the expressed concerns of national institutions and the Venice Commission (European Commission, 2020c).

Moreover, the government strengthened its control over the press and the media. The independence and transparency of Polish media is ensured by law, however, in reality it seems to differ. According to Reporters Without Borders, in the lead up to June elections, 97% of the items on Poland's public television presented President Duda in a positive light, while references of the opposition were 87% negative (Reporters Without Borders, 2020a). The harassment of journalists was also eminent. For example, in January 2020, two independent and experienced journalists from Poland's public broadcaster were dismissed without any given reason (Reporters Without Borders, 2020b). Physical attacks on journalists also took place. In October 2020, during the protest against the abortion restrictions, at least three reporters covering it were injured by masked men (Makarenko, 2020). Other journalists were charged or fined after covering protests by the All-Poland Women's Strike movement, which played a key role in the October demonstrations (Human Rights Watch, 2020b).

With regard to migration, in March, Poland had refused entry to asylum seekers from Belarus, in response to the pandemic. This unlawful action made it impossible for asylum seekers to access Poland. It was recommended that the government would prolong the state of emergency along the border, while it was declared for 60 more days. Reports of people being shut off for weeks and five confirmed migrant deaths in the Poland-Belarus border, raised human rights activists' responses stating that those measures are unjust and inhumane (Euro News 2021).

Concerning women's rights, the government followed an aggressive policy. In July, it was declared that Poland is going to withdraw from the Istanbul Convention, claiming the Convention is "harmful" as it requires educators to teach children about gender (BBC, 2020). At the same time, during the lockdown, domestic violence rates gradually increased but the government took no measures to prevent or to protect the victims by ensuring availability of services and appropriate police response. However, one of the most striking events in Poland concerning women's rights was the near-total ban on abortions causing great waves of protests in the country. It would only be allowed in cases of rape, incest or when the mother's life is in danger. Hospitals and medical physicians would no longer be allowed to conduct the abortion procedure in the case of a foetal anomaly. These cases consist the

majority of terminations in the country, which had already had, even before the ban, the strictest abortion law in Europe.

The rights of the LGBTQ community were also threatened in this period. In fact, in August, police made arrests of LGBTQ activists, under the pretext of placing rainbow flags on public monuments (Human Rights Watch, 2020b). Duda also stated that the LGBTQ is not people but an ideology even more harmful to mankind than communism, while also signing a “Family Charter” pledging to “protect children from LGBTQ ideology” and banning the propagating of LGBTQ ideology on public institutions (Euro News, 2020).

All in all, the pandemic gave Duda’s ruling party a chance to medicalize his political actions in order to gain more power and to pass down inhumane laws in the name of public health. According to Agamben’s argument, Duda can be considered the one deciding the exception, thus the absolute sovereign. However, right now the exception in Poland is more of normality rather than a fleeting condition. The endless extension of emergency permits the government to influence aspects of everyday life and to threaten the integrity of rule of law provisions.

Conclusions

In conclusion, Agamben’s argument on the state of exception and the disproportionate measures undertaken by states during the Covid-19 era, is not a result of conspiracy theories or unfounded logic rather than in sense where modern biopolitics are laying with the overall control of human life for the benefit of the sovereign. The zone of anomie, in which the rule of law provisions start to dull, creates fertile ground for totalitarian means of governing. The state of exception is becoming the very paradigm of everyday life. Hungary and Poland constituted important examples of rule of law subversion during the pandemic, as an excessive amount of fundamental human rights were put on hold in the name of the pandemic. Moreover, in the constitutional framework of these countries, many laws were replaced, reshaped or even introduced.

Bearing the above in mind, it is considered that it is better for the states’ democratic conservation, not to abuse their emergency powers and to avoid disproportionate measures of countering the crisis in general. While it is widely recognized and acknowledged that the severity of this particular crisis is of great range, the responses must not pose discrimination and democratic disruption. According to UN experts it was pointed out that “...emergency declarations based on the Covid-19 outbreak should not be used as a basis to target particular groups, minorities, or individuals. It should not function as

a cover for repressive action under the guise of protecting health nor should it be used to silence the work of human rights defenders” (United Nations, 2020).

States in which rule of law is trespassed, are states in which the citizens are suffering great violations of their rights. Equality and plurality in combination with media freedom, educational and judicial independence and the respect of human dignity, should be regarded as the primordial goal of international institutions that aim to safeguard democracy. For example, in the cases of Hungary and Poland, both EU member states, the EU must pose stronger and stricter inspections over the member-states’ constitutional operations. In cases of diversion from the fundamental rule of law precautions, stronger institutions to guarantee the separation of powers via checks and balances are essential.

Global emergencies, in general, shouldn’t actually be treated as a challenging factor to the rule of law and its human rights provisions. In fact it would be more efficient to be perceived as an opportunity to enhance and upgrade the dealing standards for these crises. During these times states have proved to develop their emergency defenses and therefore, institutions must grab this opportunity to further develop emergency laws and practices in order to counter current and future emergencies. However, as a health crisis is a global phenomenon, it suggests international cooperation mechanisms to ensure effectiveness. For example, as national health systems are not narrowed in national levels anymore, but are gradually becoming a matter of international interest, collaborations, common ratings and joint motives interwoven with the principles of international law should be encouraged. In the same pattern, as the legal sector is more nationally based, justice systems should consider the multilateral approach on an international level in order to renew and redefine the importance of rule of law’s importance.

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