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ARTICLE

Constitutional Risk Management in the V4 Countries – Diverging Practices and the Need for Convergence

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Abstract

Our special issue examines the regulation and practice of constitutional risk management in the V(isegrád)-4 countries (Czech Republic, Hungary, Poland and Slovakia). Unfortunately, the treatment of the COVID-19 pandemic made this enterprise relevant, as all four countries had to face a similar health emergency. This article presents the most important experiences and trends in the constitutional crisis management of the four countries, identifying the challenges that the constitutional emergency regulatory regimes have encountered so far. Our paper argues that despite the basically similar constitutional frameworks, these countries typically handled the crisis in a different way, and in the process many constitutional problems arose for which there was no clear or uniform solution. Since the purpose of the international comparative research that is the basis of our special issue was to examine the emergency constitution of these four countries in general (since it will have to be applied to possible later, other types of emergencies), in the last chapter of the article we examine the possibilities of a proposition that represents a novelty in the constitutional discourse on emergency situations: this is an option for the convergence of emergency constitutions.

Keywords: constitutional convergence; constitutional risk management; quasi special legal orders; V4 countries

I. Introduction

In this special issue, we examine the constitutional legal frameworks of constitutional risk management in the V4 countries in wider comparative context,[1] as well as their functioning, with special regard to the handling of the COVID-19 pandemic. The geographical framework of the research was almost self-explanatory. Closer cooperation between the Czech Republic, Hungary, Poland and Slovakia began with the 1991 Visegrad Declaration, based on "the similar character of the significant changes occurring in these countries, their traditional, historically shaped system of mutual contacts, cultural and spiritual heritage and common roots of religious traditions."[2] The cooperation was renewed after the accession of the four Central and Eastern European countries to the EU, also inspired by the "interlinked history of these countries and (...) similar political, economic and social developments in the past decades."[3]

[1] See the article of Attila Horváth in this special issue.
[2] Visegrad Declaration, 1991, available at <https://www.visegradgroup.eu/documents/visegrad-declarations/visegrad-declaration-110412>.
[3] Visegrad Declaration, 2004, available at https://www.visegradgroup.eu/documents/visegrad-declarations/visegrad-declaration-110412-1.

These similarities are also evident in the constitutional systems of the four states, which deal with emergencies in broadly similar ways: each of them provides for a specific legal framework for dealing with extraordinary threats, characterised by a constitutional framework that does not give the executive unlimited prerogatives and maintains the principle of the separation of powers and the protection of fundamental rights, even if in a different form from the normal one, in dealing with an exceptional situation.[4]

Our research was primarily aimed at examining how these broadly similar constitutional emergency regimes work in reality. There is no doubt that the topic was put on the agenda in legal discourse chiefly in connection with the emergency situations caused by the COVID-19 pandemic,[5] but we have examined the constitutional rules and their application beyond this special kind of emergency in order to look ahead: are pre-existing constitutional frameworks suitable for averting future potential crises (whatever type they will be)? The coronavirus pandemic tested the constitutional risk management systems of the V4 countries, and the constitutional disputes that arose highlighted the shortcomings of regulation. As the individual country reports (somewhat like case studies) show, risk management differs significantly even within these similar frameworks, which in turn creates the opportunity for a kind of "emergency constitutional benchmarking."

II. Similarities in emergency constitutions, differences in constitutional practice

The emergency regulatory regimes of the four countries are basically similar: all the constitutions enable the promulgation of a state of exception in order to avert essentially the same types of threats through the introduction of exceptional powers – namely, in the case of war, other violent acts that seriously threaten the lives, health or property of citizens, or natural disasters and man-made catastrophes (even if using different names or structures) – if they cannot be dealt with through the normal process of the exercise of public power. The relevant constitutional rules also determine which body can exercise extraordinary power, under what conditions (requirements of the rule of law) and what institutional counterbalances must exist. These criteria (such as the temporary nature of the special legal order and the purposefulness and proportionality of the special measures) are also broadly similar, as are the forms of institutional control of government by decree (distinguishing between political control exercised by the legislature and judicial review for checking the lawfulness of the emergency measures).

Special laws were also adopted in each country containing detailed rules for handling the COVID-19 pandemic, regardless of which type of constitutional emergency was declared or whether a special legal order was introduced at all. However, these statutes are to be distinguished from those laws which institutionalise a so-called quasi state of emergency, which, compared to constitutional-level states of exception, allow for more moderate rights restrictions and special authorisations with the purpose of averting less extensive or serious crises. The difference between the constitutional level emergencies and quasi special legal orders is not only that the former provide more expanded public power for state authorities and allow for much greater state intervention into the realm of

[4] M Florczak-Wątor, F Gárdos-Orosz, J Malíř and M Steuer, "States of Emergency and Fundamental Rights in Books and in Action: The Visegrad Countries and the COVID19 Pandemic" in M Florczak-Wątor, F Gárdos-Orosz, J Malíř and M Steuer (eds), *States of Emergency and Human Rights Protection. The Theory and Practice of the Visegrad Countries* (Routledge, London and New York 2024) pp 1–15; Z Nagy and A Horváth (eds), *Emergency Powers in Central and Eastern Europe. From Martial Law to COVID-19* (Ferenc Mádl Institute of Comparative Law, Central European Academic Publishing, Budapest 2022).

[5] T Drinóczi, A Bień-Kacała, "COVID-19 in Hungary and Poland: Extraordinary Situation and Illiberal Constitutionalism" (2020) 8 The Theory and Pracice of Legislation 8, 187–8.

fundamental rights but also that the legality of the measures taken in sub-constitutional – that is, quasi – states of emergency can be reviewed according to the standards of the normal legal system.

According to the constitutions of all four countries, the exercise of exceptional power must be subject to political control and judicial review. The former is exercised by the national legislatures on the basis of the government's political responsibility towards parliament, while the latter is undertaken by the high and ordinary courts.[6]

The 1997 Polish Constitution establishes a well-defined special legal regime, though its activation is rare, with the only recent example being in 2021 due to the migration crisis at the Polish–Belarusian border. During the COVID-19 pandemic, Poland managed crisis control at a statutory level, avoiding a special constitutional legal order and thus bypassing specific constitutional guarantees tied to such an order.[7]

The constitutional system of the Czech Republic includes three distinct special legal orders for states of emergency, as outlined in the Constitutional Law on Public Security. Beyond these constitutional provisions, Czech law also recognises quasi-special legal orders for regional or sector-specific crises, such as those addressed in the Health or Energy Acts, enabling limited rights restrictions without invoking a full constitutional emergency. During COVID-19, the Czech government employed such a quasi-emergency under the Pandemic Law, which allowed the Supreme Administrative Court to review emergency measures, reducing the Constitutional Court's role in pandemic-related issues.[8]

Slovakia also faced challenges due to blurred distinctions between constitutional and statutory levels of emergency regulation. The Slovak legal framework distinguishes four emergency categories, yet, in practice, only the state of emergency has been utilised, particularly during COVID-19. In this country, the Constitutional Court has significant oversight over both the promulgation and extension of special legislation, in contrast to the limited role of its administrative courts. This structure grants the Constitutional Court an important role in overseeing government actions during emergencies.[9]

In Hungary, the government streamlined power by adjusting constitutional conditions to make it easier to enact special legal orders. This effectively removes some barriers that might otherwise limit executive power during such times. By simplifying the framework for invoking these orders, the Hungarian government can arguably act more swiftly or broadly when deemed necessary, but this also raises concerns about potential executive overreach.[10]

The V4 constitutional courts addressed various constitutional questions during the COVID-19 pandemic, such as whether the act enacting the special legal order was constitutional; the relationship between the constitutionally defined special legal order

[6] W Sadurski, "Judicial Review in Central and Eastern Europe: Rationales of Rationalizations?" (2012) 42 Israel Law Review 500–27; W Sadurski (ed), *Constitutional Justice, East and West: Democratic Legitimacy and Constitutional Courts in Post-Communist Europe in a Comparative Perspective* (Kluwer Law International, The Hague, London and New York 2003).

[7] See the contribution of Florczak-Wątor in this issue, and M Ziółkowski, "States of Emergency in Poland: A Model under Construction" in M Florczak-Wątor, F Gárdos-Orosz, J Malíř and M Steuer (eds), *States of Emergency and Human Rights Protection. The Theory and Practice of the Visegrad Countries* (Routledge, London and New York 2024) pp 55–77.

[8] See Zdenek Kühn's article in this issue and J Malíř and J Grinc, "States of Emergency and COVID19: Czech Republic" in M Florczak-Wątor, F Gárdos-Orosz, J Malíř and M Steuer (eds), *States of Emergency and Human Rights Protection. The Theory and Practice of the Visegrad Countries* (Routledge, London and New York 2024) pp 17–42.

[9] See also Tomas Gabris's and Max Steuer's paper in this issue and M Steuer, "Models of States of Emergency in Slovakia and Their Political Context: 'We'll Manage … Somehow?'" in M Florczak-Wątor, F Gárdos-Orosz, J Malíř and M Steuer (eds), *States of Emergency and Human Rights Protection. The Theory and Practice of the Visegrad Countries* (Routledge, London and New York 2024) pp 78–100.

[10] See the article of Fruzsina Gárdos-Orosz and Evelin Burján in this issue and K Kovács, "The COVID-19 Pandemic. A Pretext for Expanding Power in Hungary" in J Grogan and A Donald (eds), *Routledge Handbook of Law and the COVID-19 Pandemic* (Routledge, New York and London 2022) pp 259–270.

and the quasi-emergency; the legal basis for each emergency measure; the types of norms that can be adopted within the legal system; and the extent to which fundamental rights can be restricted.

Having regard to the basically similar constitutional frameworks, the differences in the constitutional handling of the same threat (ie, the pandemic) are particularly striking, the constitutional practice of risk and crisis management showed fundamental differences. While, for example, a constitutional state of emergency was introduced in the Czech Republic, Hungary and Slovakia due to the coronavirus pandemic, this did not take place in Poland, where the health crisis was managed on the basis of new legislation, even though the constitution would have allowed for the declaration of a state of emergency.[11] In this way, the special measures were applied without the constitutional guarantees associated with the special legal order.

Nonetheless, in the absence of explicit constitutional rules, the practice was also different in countries that declared a state of exception, namely in terms of whether the legal norm introducing the state of emergency was subject to judicial review. The review of such norms does not fall under the competence of the Constitutional Court in the Czech Republic, unlike in Slovakia, while in Hungary, the possibility of judicial control did not even arise in the case of the politically subordinated Constitutional Court.[12] In fact, besides this specific issue, there were significant differences between the countries under examination regarding the control of the exceptional power granted to the executive during the state of emergency. Amid the COVID-19 pandemic, the same constitutional actors had a significantly different level of influence on crisis management. In the Czech Republic, for example, Parliament was more important in overseeing exceptional power than the Constitutional Court; furthermore, the Czech Pandemic Act of 2021 transferred to the Supreme Administrative Court the power of judicial review of the applicable legislation in individual complaint cases.[13] In contrast, in Slovakia, the focus was on judicial control, and Parliament had little role, while the Constitutional Court made important decisions, even if, in some cases, our study showed that the Constitutional Court was rather passive and too late with its decisions to provide effective remedy in the situation.

Another difference is that although the Russo-Ukrainian war, in principle, affects the four countries in the same way due to their geographical proximity, a state of emergency was declared only in the Czech Republic and Hungary, while not in Slovakia and Poland.

Hungary's situation differs from that in the other countries as the special legal order has become permanent: for more than four and a half years (since March 2020), the government has continuously exercised exceptional powers, although the stated reason for maintaining the state of emergency has changed from the health crisis due to the COVID-19 pandemic to the Russo-Ukrainian war.[14]

III. The problems of emergency constitutions and the need for convergence – a conclusion

In this special issue, the examination of the V4 countries' constitutional crisis management practices – ie, their application of special legal orders and the means, exercise and limitations of exceptional powers – finds that, in spite of the similarity of the general constitutional concept, they are significantly different in terms of the operation of crisis management procedures and institutions. In this regard, a number of constitutional

[11] See Monika Florczak-Wątor's article in this issue.

[12] F Gárdos-Orosz, *Constitutional Justice under Populism. The Transformation of Constitutional Jurisprudence in Hungary since 2010* (Akadémiai Kiadó, Budapest 2024).

[13] See Zdenek Kühn's article in this issue.

[14] Z Szente, *Constitutional Law in Hungary* (4th ed, Kluwer Law International, Alphen aan den Rijn 2024) p 115.

problems can be identified from the individual country studies and when the countries are compared. For example, the inflation of emergency constitutions can be observed to varying degrees – with the possible exception of Poland, it can be noticed everywhere. This is mainly manifested in the fact that emergency regulation at the statutory level has become more and more extensive; in addition, some of its elements have been integrated into the normal legal order, on the one hand, potentially replacing the "real" states of emergency in certain cases, but on the other hand, perpetuating certain rules that were originally intended to be extraordinary. The most serious situation in this respect clearly exists in Hungary, where the special legal order and the government's actual unlimited power seem to be never-ending.

A problem closely related to this is that the boundaries of risk management at the constitutional and statutory levels have become partially blurred: this is concerning because if governance is almost always seen as a kind of crisis management in a certain sense, then fundamental rights restrictions that would not be acceptable under normal circumstances may become much more frequent and extensive.

It is also seen that legal systems that are similar in many respects have responded to the same or similar challenges in substantially different ways; this may cause problems because if countries that are otherwise closely linked in political, economic and cultural terms (such as the neighbouring V4 states) apply different forms of risk management, the level of legal protection will differ and their use of various means may mutually undermine the efforts of other states. This becomes even more evident when the perspective of the analysis is broadened; the diversity of constitutional arrangements[15] further increases the possibility of different responses to similar crises.

One of the most serious concerns is that the diversity of emergency constitutions leads to different levels of fundamental rights protection. For example, as already noted, the promulgation of a special legal order that often authorises severe legal restrictions is subject to judicial review in some countries, while in others, there is no possibility of such legal protection. The situation is similar in the case of the limitation of particular fundamental rights and liberties: restrictions of the freedom of movement, the right to privacy, or even political rights to different degrees from country to country may pose the risk of serious discrimination. This may be inevitable if individual countries are coping with crises of different types and severity, but it is unreasonable if states that are otherwise closely connected and share the same values are faced with the same threats.

If the risks and costs of threats to the V4 countries are understood not only as crisis-specific damages (such as the death rate in the case of the COVID-19 pandemic or environmental and other physical damages that are a consequence of natural disasters) but also serious violations of fundamental rights, democracy and rule of law values, then the further, more detailed convergence of the constitutional frameworks, as well as the harmonisation of constitutional practice between the countries concerned, is a plausible response to the mentioned problems. The country reports point out that the differences in constitutional crisis management stem from partly diverse constitutional rules and the different application and interpretation of similar institutions and principles. If this is so, then a similar definition of the standards of emergency constitutions and the harmonisation of their use (that is, further constitutional convergence) may be the solution. By constitutional convergence, we mean the approximation of emergency constitutional rules and standards and their method of application.

[15] See Attila Horváth's article in this issue. See also PB Heymann, "Models of Emergency Powers" (2003) 33 Israel Yearbook on Human Rights, pp 1–12; J Ferejohn and P Pasquino, "The Law of the Exception: A Typology of Emergency Powers" (2004) 2 International Journal of Constitutional Law, pp 210–239; VV Ramraj and M Guruswamy, "Emergency Powers" in M Tushnet, T Fleiner and C Saunders (eds), *Routledge Handbook of Constitutional Law* (Routledge, London and New York 2015) pp 85–96.

However, this normative claim is not self-evident; as a matter of fact, there are serious arguments against such kinds of constitutional changes that require responses before the latter can be considered a valid option for the development of constitutional crisis management. First, emergency power is a traditional part and core area of national sovereignty that states would hardly want to relinquish. But this is not only an abstract question of sovereignty. National governments would probably not want to give up control in extraordinary circumstances, which is understandable since they have political responsibility for governance, which may be increased in extreme cases such as states of exception. In addition, national authorities may also think that although having the same emergency standards may undoubtedly be associated with advantages, the more serious a crisis, the more serious its consequences may be, and in the course of averting them, individual states have their own interests to consider – which, precisely because of the seriousness of the consequences, must be asserted even against the interests of other countries. Another argument against constitutional convergence may also be that crises that justify the introduction of a special legal order are usually localised, that is, geographically isolated (especially in the case of natural or industrial disasters, for example). Even global crises affect individual countries and regions to varying degrees, so the centralisation of crisis management is not justified.

Notwithstanding, these are not compelling arguments against constitutional convergence. The issue is not one of sovereignty; the same or at least similarly interpreted emergency constitutional standards would leave national crisis management intact. There is no doubt that this approach would encourage cooperation between the states concerned and similar legal instruments and responses to threats, but this is actually the purpose of convergence. Ensuring the same level of judicial protection against the abusive utilisation of exceptional power and the acceptance and application of similar rule of law requirements for emergency situations does not mean supranational or centralised crisis management or policy making. Accordingly, the necessary balance between authority and responsibility is not violated: the formulation of risk management policy remains in the hands of national governments but within the framework of internationally recognised constitutional standards that the affected states themselves undertake to comply with. To be added to this – in connection with possible objections regarding the preservation of core sovereignty – it may be mentioned that the Member States of the European Union moved away from the traditional, Westphalian concept of sovereignty a long time ago and renounced such fundamental elements for the sake of common security and economic development, such as control of an independent national army (in the framework of NATO), and a common currency (within the Eurozone). Finally, as for the counterargument regarding the unnecessary centralisation of risk management, it can only be repeated that constitutional convergence only creates legal frameworks for closer cooperation between states without elevating crisis management policy to a supranational level and, on the other hand, that defining the ultimate rule of law criteria of the exceptional power[16] would be a useful means of guaranteeing that the exercise of public power is maintained within a democratic framework even under extraordinary circumstances.

[16] For more details, see Z Szente, "How to Assess Rule-of-Law Violations in a State of Emergency? Towards a General Analytical Framework" (2024) 17 Hague Journal on the Rule Law 1, pp 117–138.

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