



Slovakia: Change of Government under COVID-19 Emergency

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At the time when Italy was trying to contain the COVID-19 outbreak in the northern region of Lombardy, politics in Slovakia were in the middle of a heated campaign in the run-up to the general election on 29 February 2020. Many holidaymakers used the opportunity to vote from abroad through postal ballot, without the need to return early from their travel abroad. The first case of the disease was confirmed in Slovakia on 6 March. Thereafter, everything unfolded quickly. The country closed its borders to non-residents and non-citizens on 13 March. All international travel by air and land halted. The number of confirmed cases was up to a hundred in the early days of the emergency, with no deaths.

The new government formed within three weeks of the election. The most substantial change in the executive for almost a decade happened inconspicuously because of the impending public health crisis, which overshadowed everything else. The new government headed by the winning party OĽaNO (Ordinary People and Independent Personalities) replaced in power the party of three-time PM Rober Fico. New PM Igor Matovič came into power on an anti-corruption platform, and it was immediately not clear if he was ready to fight against a global pandemic instead. The government, consisting of four parties with the constitutional majority, was formally appointed on 21 March and had to focus its attention on contingency planning immediately, without having the benefit of experience and comprehensive understanding of the processes in the healthcare system. Within four days of appointment, on 25 March, the government secured passage of omnibus emergency legislation ("COVID-19 emergency legislative package"), which focused primarily on two areas: quick adjustments to secure continuous functioning of the judiciary, and the implementation of a scheme for tracking and retaining phone data.

In the first two sections of this contribution, we examine the legal framework of the state of emergency in Slovakia and the key provisions of the omnibus legislation. In the third section, we pick five measures which temporarily restricted human rights and freedoms of specific groups of citizens, namely foreigners, persons returning from abroad, members of the ethnic minority in several hotspots of COVID-19, and seniors. The relative inexperience of the new government led to it committing mistakes that infringed In this contribution. We pick five of them, with the most consequence for the rights and freedoms of citizens.

State of emergency

The state of emergency was declared in selected hospitals in Slovakia on 15 March, and then in the whole country four days later, under Constitutional Act No. 227/2002 Coll., on State Security at the Time of War, State of War, State of Emergency and State of Crisis (CASS), which governs the state response in extraordinary situations. The state of emergency caused by a pandemic, or *force majeure*, may be distinguished from the state of war or crisis declared due to a terrorist attack, large-scale social unrest and rioting or a threat thereof. The CASS provides that if constitutional bodies are unable to perform their constitutional duties during wartime or state of crisis "in the place of their seat, they shall perform it in a reserve place" (Article 6(1)). However, under the state of emergency, the Parliament and other constitutional bodies continue to function uninterrupted.

The CASS limits the duration of the state of emergency to a maximum of 90 days, without a possibility of extension. This is unlike the state of necessity, which may be extended under Article 4(2) of the CASS. Therefore, even though the government did not provide an end date for the state of emergency, its duration is limited *ex constitutione*. The Act explicitly provides which rights can be limited to what extent in a state of emergency. Fundamental rights and freedoms that are not expressly listed in the Act cannot be restricted in the state of emergency. Even the enumerated rights in the Acts can only be restricted proportionately to the extent necessary, based on verifiable data.

Suspension of statutory periods for filing an action in court

The government's new COVID-19 emergency omnibus legislation, passed by the Parliament on 25 March stopped the clock on the statute of limitations for litigants to pursue their claims in court. Accordingly, statutory periods for bringing an action in private law and for filing of appeals in criminal law that would run out during the state of emergency were extended until 30 April. The extension did not apply to the prosecution since the public prosecutor's office was meant to "function without interruption even in times of emergency or crisis", according to the explanatory memorandum to the COVID-19 Emergency Act. The legislation further provided for an extension of the period for filing for bankruptcy, and a statutory prohibition against the execution of lien until the same end date. Courts, however, retained discretion to exceptionally deny the extension of the statutory period for filing an action "for reasons of danger to life, health, safety, liberty or substantial damage to the parties".

The explanatory memorandum to the legislation clarified that the intention of the government was to ensure that private citizens and businesses were not pressed by time to perform the actions or exercise their rights in civil or commercial law to their disadvantage due to the pandemic. Additionally, the suspension would also decrease the circulation of litigants in the court system.

The functioning of the judiciary

In Slovakia, all courts were ready to conduct their business remotely already prior to the COVID outbreak. The Constitutional Court may conduct its hearings and deliberation remotely under its new Rules of Procedure (2019), which is crucial, for only the Constitutional Court has the power to review the constitutionality of the state of emergency (Article 129(6) of the Constitution).

Lower civil courts can also hold hearings through a videoconference or by alternative means under Article 175(2) of the Code of Civil Procedure. Nevertheless, lawmakers decided to limit non-essential court business of the general judiciary by legislating that courts should continue holding hearings "only to the extent necessary". Judges were further given the authority to exclude the public from attending hearings on the grounds of protection of public health. Interested individuals retained a modicum of access to courts' business through a provision in the emergency legislation that obliged the court service to provide with an audio recording of the closed hearing anyone who requests it.

As mentioned above, some of these measures were implemented to decrease the circulation of litigants and public through courthouses, not only to protect court users but also judges from contracting the disease. In recent weeks, a higher number of senior judges, eligible for retirement, resigned from office, seemingly in connection with the COVID-19 outbreak.

Questionable restrictions of fundamental rights and freedoms

Five issues raise questions concerning fundamental rights and freedoms: 1) prohibition to enter the country for foreigners, 2) state quarantines, 3) location data, 4) marginalized Roma communities and 5) protection of rights of seniors.

Prohibition to Enter the Country for Foreigners

As effective from 13 March, the previous Slovak government has banned foreigners (non-citizens and non-residents) from entering the country. Even today, there is no legal basis which could justify this measure (only information of the Ministry of Interior referring to the conclusions of the Central Crisis Committee – *Ústredný krízový štáb* – available on its website, on the website of the Ministry of Foreign Affairs and the website of the Public Health Authority – Úrad verejného zdravotníctva (PHA)). The Ministry of Interior did not provide the specific legal basis either even based on a request for free access to information nor upon the request of the Ombudswoman.

State Quarantines

Isolation in state quarantine centres for all citizens and residents entering the country was a voluntary alternative to mandatory home isolation; it later became mandatory for those who were repatriated from abroad by the state; and finally, effective from 6 April, it was made mandatory for any form of travel, whether individual or organised. The obligation to undergo mandatory isolation in a state quarantine was imposed by the

measure of the PHA – which is a state organization financed from the state budget. The measure's legal nature is not immediately clear, as it has aspects of a normative legal act, but the PHA does not have the authority to issue normative legal acts, and such a normative legal act has not been issued in a form and way required by the Slovak law for normative legal acts (primarily it has not been published in a collection of acts). This problem regards not only the measure regarding state quarantines but also numerous other measures of the PHA (e.g. closing shops and other facilities, imposing an obligation to wear a face mask, closing schools, prohibiting mass public events *etc.*). Furthermore, according to the Constitution, fundamental rights and freedoms can be restricted only by a statute. However, in this case, they have been restricted by secondary legislation without explicit statutory delegation. In our opinion, even the limits of the restriction of fundamental rights laid down by the CASS have not been met and the measures could not pass the proportionality test (especially not its third step – necessity – as there are also other measures, which are similarly effective but less restrictive, e.g. home-isolation or obligation to submit a negative test before entering the country). This issue should be adjudicated by the Constitutional Court.

The rationale of the original scheme was to contain all positive cases coming from abroad and avoid an uncontrolled spreading of the virus. However, the execution of the scheme brought with it numerous problems: hours of waiting at the borders; transport to the quarantine centres in full buses without a possibility to keep a distance; lack of information about where, when, and how people are to be transported; due to the lack of capacity, accommodation of strangers in one room, which could lead to cross-infection among the roommates; excessively long forced stay for those who were tested positive but did not have any symptoms of COVID-19, as no rules were regulating how to treat these people; people were said to pay for these stays (officially just cover the meal charges usually in the amount of 13 euros per day, which you have to pay even if you did not want the meal provided there), even if they were forced by the state to be there. The legal ground for such payments was for a long time not clear at all. Later, the Ministry of the Interior referred to Art. 58 of the Act No. 355/2007 Coll., on Protection, Encouragement and Development of Public Health. However, it can be regarded as a valid legal ground only if the measure on state quarantine is legally binding, which is problematic (as stated above). Furthermore, police officers and soldiers had to decide about the exceptions from state quarantines because of health reasons, but they were not qualified for such a determination, and thus, some people had to undergo the state quarantine even if their health condition did not allow it; and in some of the state quarantines, the minimum decent hygiene standards had not been met.

More than eleven thousands of Slovaks travelling from abroad signed apetition to abolish the state quarantine scheme. The conditions in these facilities gradually improved, but the damage and breach of fundamental rights and freedoms of some of the returnees could not be undone. The state quarantine has affected so far more than 18,000 Slovak citizens and residents. Finally, after lots of criticism, the Parliament passed on 15 May, 2020, an amendment to the Act No. 355/2007 Coll., which should allow replacing the state quarantine with 14-day-home-isolation, if the person returning

from abroad voluntarily agrees to use a mobile app to monitor his/her isolation (the so-called "smart quarantine"). This amendment should have been effective from 18 May, 2020, but the government announced on this day, that "the smart quarantine" will be launched after internal testing and that the public will be informed by means of a press conference.

Location Data

The COVID-19 emergency legislation package also supplemented ActNo. 351/2011 Coll., on Electronic Communications, by a provision enabling the PHA to access phone-location data. The provision stipulated that data otherwise subject to telecommunications secrecy may be made available to the PHA in times of emergency or crisis for collection, processing and retention. The PHA may collect, process and store data processed for the duration of the state of emergency in health, and until 31 December 2020, at the latest. The provision requires a causal link to a pandemic or spread of a contagious disease, and allows for the processing of data for three purposes subject to certain conditions:

- a. in anonymized form – for statistical purposes of identifying, preventing and modelling threats to life and public health;
- b. to identify individuals, who should be notified of special PHA measures interest of protection of life and health,
- c. processed exclusively to the extent necessary to identify users in order to protect life and health.

Opposition MPs have argued that the scheme disproportionately infringes the rights of data subjects and does not provide a robust control mechanism, and have challenged the regulation before the Constitutional Court. At the time of writing of this blog, the Court has suspended parts of the scheme, until the final decision in the case, because of the absence of checks against the misuse of the collected data.

Marginalized Roma communities

Another problem regarding a potential breach of fundamental rights and freedoms was the case of a lockdown and deployment of the military into five marginalized Roma communities in early April to prevent a potential spread of the disease into and out of the communities. This measure was adopted as a "Plan to solve the disease COVID-19 in Marginalized Roma Communities" by a government and executed by the PHA and regional public health authorities in relation to individual communities. This practice was criticized by prominent human rights activists and NGOs as a "kind of measure that sparks concerns about discriminatory behaviour and that stigmatize Romani men and women as the origins of infection" who pointed out that other locations with similar or even higher amount of positively tested persons had not been completely locked down. The Prime Minister did not respond well to the criticism and instead of focusing on the substance of the message, retaliated against the messenger, when he called his critics on Facebook (where he is especially active) so-called "human rights activists" (in

quotes) adding that they are "only courageous behind keyboards in Bratislava" disregarding the fact that many of them have worked on the ground with Roma communities for years. They returned then their criticism against the PM. Four of the five settlements have had the quarantine lifted in the meantime.

Protection of the Rights of Seniors

When a hotspot of positive cases was uncovered in several social care homes, resulting in numerous deaths, the government started with extensive testing in these facilities and also adopted other measures to protect seniors. One of the measures was a measure of the PHA from 21 April, which prohibited senior citizens from shopping outside of 9-11 a.m. on workdays, and in doing so, severely limited their freedom of movement. The Chief Hygienist, who is the head of the PHA, lifted the ban after criticism, including protest from the Ombudswoman and constitutional lawyers stating that such a measure unproportionally interferes with fundamental freedoms.

Conclusion

The Slovak experience with the COVID-19 pandemic has been affected by the fact that the outbreak took place at the time of a change in government. The new government, because of its relative inexperience and populist tendencies, has made mistakes, often amounting to an infringement of citizens' fundamental rights and freedoms, especially the freedom of movement. The new government now needs to remedy mistakes that were made in the fight against the pandemic in order to be ready to face the next crisis better when it comes. Will it accept them and learn from them or deny them and wait years for the courts' decisions? How do the courts in Slovakia, especially the Constitutional Court with numerous new members, decide facing their first actions and complaints against the new government? Not only the new government, but also the Slovak citizens and residents, will face new challenges, as the trust placed in the new government in the recent election was quite high and the democratical political alternatives are quite few.

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