



Hungarian Helsinki Committee

EXPLANATORY NOTE FOR BILLS T/10747 AND T/10748 PENDING BEFORE THE HUNGARIAN PARLIAMENT

12 JUNE 2020

On 26 May 2020, the Deputy Prime Minister submitted to Parliament two **Bills related to the state of danger declared by the Hungarian Government**:

1. Bill T/10747 on Terminating the State of Danger (hereafter: **Termination Bill**),¹ and
2. Bill T/10748 on the Transitional Provisions related to the Termination of the State of Danger (hereafter: **Transitional Bill**).²

The Termination Bill, as the Hungarian Helsinki Committee, Amnesty International Hungary and the Hungarian Civil Liberties Union jointly stated, “is nothing but an optical illusion”: if the Bills are adopted in their present form, that will allow the Government to again rule by decree for an indefinite period of time, with significantly weakened constitutional safeguards.³

The Transitional Bill would, among others, fundamentally alter the current legal framework of the state of danger as defined by Act CXXVIII of 2011 on Disaster Management and Amending Certain Related Acts of Parliament (hereafter: Disaster Management Act) and the state of medical crisis as defined by Act CLIV of 1997 on Health Care (hereafter: Health Care Act).

This explanatory note will

- Provide details of the proposed new framework concerning the state of danger and the state of medical crisis;
- Compare the scope of decrees the Government may issue during a future state of danger, a future state of medical crisis, and while Act XII of 2020 on the Containment of the Coronavirus (hereafter: Authorization Act) remains in force;
- Demonstrate how the decision to lift the current state of danger will remain at the discretion of the Government even after the Termination Bill is adopted.

The present explanatory note is based on the text of the Bills as submitted to the Parliament on 26 May 2020, and the proposed amendments to Bill T/10748 submitted by the Parliamentary Committee on Legislative Affairs on 11 June 2020.⁴

1. BILL T/10748 ON THE TRANSITIONAL PROVISIONS RELATED TO THE TERMINATION OF THE STATE OF DANGER

1.1. Amending the Disaster Management Act

The table below compares the rules applicable in a state of danger before and after the adoption of the Authorization Act and under the Transitional Bill. In all three variations, **the state of danger shall be declared and terminated by the Government and so the Government will decide how long the state of danger will last. The Parliament has no power to oblige the Government in any way to end the state of danger.**

¹ The full text of Bill T/10747 as submitted to the Parliament is available here in Hungarian: <https://www.parlament.hu/irom41/10747/10747.pdf>.

² The full text of Bill T/10748 as submitted to the Parliament is available here in Hungarian: <https://www.parlament.hu/irom41/10748/10748.pdf>.

³ Amnesty International Hungary – Hungarian Civil Liberties Union – Hungarian Helsinki Committee, *Never-Ending Story? Rapid analysis of the Bills T/10747 and T/10748*, 27 May 2020, https://www.helsinki.hu/wp-content/uploads/Never-Ending_Story_HHC-AI-HCLU_rapid_reaction_27052020.pdf

⁴ Available here: <https://www.parlament.hu/irom41/10748/10748-0014.pdf>.

	How long are government decrees in force?	What can the Government issue a decree about?
State of danger before the Authorization Act	For 15 days – after that, they remain in force only if the Government receives an authorization from the Parliament to extend their effect.	<ul style="list-style-type: none"> • About the issues listed in the Disaster Management Act.
State of danger under the Authorization Act	Until the termination of the state of danger (regarding which the Government has full discretion).	<ul style="list-style-type: none"> • About the issues listed in the Disaster Management Act. • In addition, it may suspend the application of any Act of Parliament, derogate from the provisions of Acts and take other extraordinary measures by means of a decree, in order to guarantee for citizens the safety of life and health, personal safety, the safety of assets and legal certainty, as well as the stability of the national economy.
State of danger under the Transitional Bill	For 15 days – after that, they remain in force only if the Government receives an authorization from the Parliament to extend their effect.	<ul style="list-style-type: none"> • About the issues listed in the Disaster Management Act. • In addition, it may suspend the application of any Act of Parliament, derogate from the provisions of Acts and take other extraordinary measures by means of a decree, in order to guarantee for citizens the safety of life and health, personal safety, the safety of assets and legal certainty, as well as the stability of the national economy.

Under Article 53(2) of the Fundamental Law, in a state of danger, the Government may adopt decrees “as provided for by a cardinal Act”. Such a cardinal law had been in place already before the Authorization Act was adopted: it was the Disaster Management Act. According to the **Disaster Management Act**, in a state of danger⁵ the Government may, “to the extent and in the [geographical] area necessary”, issue decrees in a number of areas (e.g. it may derogate from the rules on public finances; may establish administrative obligations for mayors and local notaries, etc.) and may issue decrees that authorize the implementation of measures such as limiting road, rail, water and air traffic; forbidding assemblies and events in public places; etc.⁶ Thus, by **listing the areas in which the Government is authorized to issue decrees in a state of danger**, the Disaster Management Act draws clear boundaries as to what the Government may and may not do in a state of danger. The **Authorization Act widened the scope of these potential areas in an excessively broad manner** and practically provided a carte blanche mandate for the Government when it set out in Article

⁵ According to the Fundamental Law, “in the event of a natural disaster or industrial accident endangering life and property, or in order to mitigate its consequences, the Government shall declare a state of danger, and may introduce extraordinary measures laid down in a cardinal Act”. The definition of a state of danger is provided in more detail in Article 44(1) of the Disaster Management Act. Its (ca) subsection states that “a human epidemic causing mass disease outbreaks or a risk of epidemic” constitutes a state of danger.

⁶ In detail, see: Disaster Management Act, Article 45(1) and Articles 49–51. For a summary in English, see: Hungarian Helsinki Committee, *Background note on Act XII of 2020 on the Containment of the Coronavirus*, 31 March 2020, https://www.helsinki.hu/wp-content/uploads/HHC_background_note_Authorization_Act_31032020.pdf, pp. 4-5.

2(1) that during the state of danger, the Government may, in addition to the extraordinary measures and regulations set forth in the Disaster Management Act, “suspend the application of certain Acts of Parliament, derogate from the provisions of Acts and take other extraordinary measures by means of a decree, in order to guarantee for citizens the safety of life and health, personal safety, the safety of assets and legal certainty, as well as the stability of the national economy”.⁷ For example, in the pre-Authorization Act period until 31 March, it would not have been possible to introduce government decrees a moratorium for bank loans, or to prolong the deadline for freedom of information responses, because the Disaster Management Act does not list these as possible areas for Government action. The Authorization Act however created a legal basis for both measures.

Article 339 of **the Transitional Bill would introduce a new provision into the Disaster Management Act that is a practically verbatim copy of Article 2 of the Authorization Act, which excessively widens the scope of the decrees the Government may issue during a state of danger.** Accordingly, the Disaster Management Act would set out the following in Article 51/A:

*(1) During a state of danger declared in order to prevent a human epidemic causing mass disease outbreaks endangering life and property, to eliminate its consequences, and to protect the health and life of Hungarian citizens, **the Government may – in addition to the extraordinary measures and regulations set forth in Subchapters 21–24 [of the Disaster Management Act] – suspend the application of certain Acts of Parliament, derogate from the provisions of Acts and take other extraordinary measures by means of a decree, in order to guarantee for citizens the safety of life and health, personal safety, the safety of assets and legal certainty, as well as the stability of the national economy.***”

Similarly to the Authorization Act, the Transitional Bill would add a provision prescribing the application of the principles of necessity and proportionality, and would set out that the Government may exercise the above powers for certain, albeit widely formulated purposes related to the state of danger: “*The Government shall exercise its powers conferred under paragraph (1) to the extent necessary and proportionate to the objective pursued, so as to prevent, control and eliminate the human epidemic, and to prevent and avert the harmful effects thereof.*” However, this provision is overshadowed by the fact that according to Article 54(1) of the Fundamental Law, under a special legal order and so in a state of danger the exercise of fundamental rights, save certain rights, may be suspended or may be restricted beyond the extent specified in Article I(3), i.e. the general rules of the Fundamental Law on restricting fundamental rights.

As the joint NGO statement pointed out, this means that by amending the Disaster Management Act, the Transitional Bill “**would do away with an important safeguard in the Fundamental Law.** The Fundamental Law wishes to maintain the balance of power between the branches of government by permitting the government to suspend and set aside laws, but only insofar and in such a manner as allowed by parliament in the Disaster Management Act. Now, under [the] proposed amendment of the Disaster Management Act, the government may order any measures it deems necessary if the measures previously specified by parliament are inadequate. This renders futile the provision of the Fundamental Law that the government may only exercise powers under a special legal order in accordance with the provisions of cardinal laws – from now on, cardinal laws will no longer restrict this power and will permit anything that the government deems necessary in the given circumstances.”⁸

An important difference between the Authorization Act and the envisaged new regime of the Disaster Management Act is the time decrees remain in force:

- Article 3 of the **Authorization Act authorized the Government to extend the effect of the government decrees** adopted in the state of danger **until the termination of the**

⁷ For the implications of this, see in more detail: Hungarian Helsinki Committee, *Background note on Act XII of 2020 on the Containment of the Coronavirus*, 31 March 2020, https://www.helsinki.hu/wp-content/uploads/HHC_background_note_Authorization_Act_31032020.pdf, pp. 6–10.

⁸ Amnesty International Hungary – Hungarian Civil Liberties Union – Hungarian Helsinki Committee, *Never-Ending Story? Rapid analysis of the Bills T/10747 and T/10748*, 27 May 2020, https://www.helsinki.hu/wp-content/uploads/Never-Ending_Story_HHC-AI-HCLU_rapid_reaction_27052020.pdf

state of danger, i.e. it authorized the Government to extend the effect of future, not-yet-adopted decrees without separate parliamentary approval. Thus, it removed the constitutional safeguard that government decrees adopted in a state of danger remain in force after an initial period of 15 days only with the Parliament's support.⁹

- The Transitional Bill does not include such an authorization, and so **decrees adopted under the new provision of the Disaster Management Act would remain in force for 15 days, unless extended** by the Government **upon the decision of the Parliament**.

1.2. Amending the rules of the "state of medical crisis"

The Transitional Bill amends the rules of the "state of medical crisis" (*egészségügyi válsághelyzet*), regulated by the Health Care Act, significantly widening the possibilities of adopting restrictive measures under such a state of medical crisis.

Unlike the "state of danger", the "state of medical crisis" is not one of the special legal orders provided for by the Fundamental Law, but a stand-alone regime **ordered when certain epidemiological and public health scenarios** described in the Health Care Act **occur**. Furthermore, declaring a state of danger is not a precondition to ordering a state of medical crisis. According to Article 302 of the Transitional Bill, **the Government would be able to declare a state of medical crisis upon the motion of the responsible Minister, which motion shall be based on the proposal of the Chief Medical Officer**. The Chief Medical Officer is appointed by the Minister hence the post is not independent of the Government. According to Article 303, the Government terminates the state of medical crisis upon the recommendation of the Minister, based on the initiative of the Chief Medical Officer, provided that the preconditions of ordering a state of medical crisis no longer prevail. Thus, in practical terms, **ordering as well as terminating the state of medical crisis is up to the Government's decision**.

According to Article 303 of the Transitional Bill, the **state of medical crisis may initially last for a period of six months, and may be extended practically indefinitely** if the preconditions for a state of medical crisis still prevail.

This raises two issues with regard to the government decrees adopted under a state of medical crisis:

- **Government decrees** adopted under a state of medical crisis **will stay in force as long as the Government wishes**, i.e. there is no guarantee that they will lapse after a certain period of time, unlike in the case of the decrees adopted in a state of danger. Moreover, the wording of the Transitional Bill is vague about when these decrees would lose force. The Bill says that the Government may adopt various restrictive measures "under a state of medical crisis in a decree", which can be interpreted in a way that the decrees themselves shall be in effect only for the period of the state of medical crisis (if the term "under a state of medical crisis" is meant to define the temporal effect of the decrees), but it may also refer to the period during which the passing of such decrees is allowed without any impact on how long the decrees passed during the medical state of emergency remain in force. In any case, there is no provision in the Bill that would explicitly state that the decrees shall be in effect only as long as the state of medical crisis is in place.
- **Parliamentary approval is not needed to keep the decrees adopted under a state of medical crisis in force**, unlike in the case of the decrees adopted in a state of danger.

Per Article 307 of the Bill that introduces Article 232/D (1) to the Health Care Act, during a state of medical crisis, the Bill would authorize the Government to issue decrees that

⁹ Article 53 of the Fundamental Law sets out the following: (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 15 days, unless the Government, on the basis of authorization by the Parliament, extends those decrees.*

"a) restrict or prohibit

aa) **the operation of all institutions and facilities, attending or organizing events, and performing activities that may facilitate the spread of the epidemic, [...]**

ac) passenger traffic [...] between certain areas of the country or between Hungary and other countries,

ad) physical contact between inhabitants of certain areas of the country as well as between inhabitants of Hungary and other countries,

ae) visits to certain institutions, especially outpatient care facilities, inpatient hospitals, public education, vocational training, higher education, social, child protection, child welfare and public education institutions,

af) leaving certain areas, [...];

b) introduce measures on the provision of medicines and medical aids and access to health care services;

c) introduce measures to preserve medical supplies, and for that purpose the participation of the Police or the Hungarian Armed Forces may be set forth, the participation of law enforcement agencies or the Hungarian Armed Forces may be set forth to perform hospital commander duties, the tasks of the hospital commander and the obligations of the head of the institution may be set forth, and the operation of the hospital commander may be extended to institutions providing permanent or transitional care for the elderly; [...]

e) impose traffic restrictions or traffic bans;

f) lay down provisions for epidemiological separation; [...]

i) order epidemiological measures that are provided by law;

j) may adopt other provisions specified by law."

Such an authorization would explicitly allow the Government to restrict fundamental rights. Moreover, this seemingly exhaustive list in fact leaves the scope of potential decrees open through subsections aa), i) and j).

Further provisions on rules applicable in a state of medical crisis and in a state of danger are scattered throughout the Bill and are included in provisions amending other laws beyond the Health Care Act. These amendments range from the rules of criminal procedure in a state of medical crisis, through the powers of soldiers in a state of danger, to permitting deviation from public procurement rules upon the decision of the Prime Minister in certain cases under a state of medical crisis and many more. Providing an exhaustive list and a full assessment of these is beyond the scope of the present explanatory note.

According to the Transitional Bill, Article 232/D (2) of the Health Care Act would also explicitly set out that the Government may issue decrees in a state of medical crisis *"to the extent necessary and proportionate to the objective pursued, so as to prevent, control and eliminate [the epidemiological and public health scenarios as detailed by the Health Care Act as a basis for a state of medical crisis], and to prevent and avert the harmful effects thereof"*.

There are two **important distinctions between the decrees adopted in the framework of a state of danger and the decrees adopted under a state of medical crisis:**

- Decrees adopted under a state of medical crisis cannot, in principle, suspend the application of or derogate from the provisions of Acts of Parliament;
- Since the state of medical crisis is not a special legal order, the rule in Article 54(1) of the Fundamental Law that allows restricting fundamental rights beyond the extent allowed by the Fundamental Law in ordinary circumstances, does not apply to decrees adopted under a state of medical crisis.

Irrespective of the above differences, both types of decrees **allow the Government to introduce restrictions without any guarantee for the swift and effective constitutional review of the respective decrees:** the Transitional Bill fails to e.g. extend the scope of persons eligible to initiate

the procedure of the Constitutional Court in a state of danger or a state of medical crisis, or to set out any deadline for the Constitutional Court to adjudicate related cases.¹⁰

The table below compares the state of danger and the state of medical crisis as envisaged by the rules of the Transitional Bill. Both are ordered/declared and terminated by the Government alone.

	How long does it last?	How long are government decrees in force?	What can the Government issue a decree about?
<p>State of danger according to the Transitional Bill (Rules in the Fundamental Law and the Disaster Management Act)</p>	<p>It shall be terminated by the Government if the conditions for its declaration no longer prevail.</p>	<p>For 15 days – after that, they remain in force only if the Government receives an authorization from Parliament to extend their effect.</p>	<ul style="list-style-type: none"> • About the issues listed in the Disaster Management Act. • In addition, it may suspend the application of any Act of Parliament, derogate from the provisions of Acts and take other extraordinary measures by means of a decree, in order to guarantee for citizens the safety of life and health, personal safety, the safety of assets and legal certainty, as well as the stability of the national economy.
<p>State of medical crisis according to the Transitional Bill (Rules in the Health Care Act)</p>	<p>Initially for 6 months, but may be extended indefinitely if the conditions for ordering it still prevail.</p>	<p>Until the end of the state of medical crisis (presumably – there is no clear rule on this in the Bill).</p>	<ul style="list-style-type: none"> • About the issues listed in Article 232/D (1) of the Health Care Act (to be introduced by Article 307 of the Transitional Bill). • In addition, the Government may order epidemiological measures that are provided for by an Act of Parliament, and any other measure defined by an Act of Parliament.

2. BILL T/10747 ON TERMINATING THE STATE OF DANGER

In contrast with its title, the Termination Bill **does not terminate the state of danger which was** ordered by the Government on 11 March 2020. In fact, the Parliament cannot terminate the state of danger under the Fundamental Law, since under its Article 54(3) special legal regimes, including the “state of danger” (*veszélyhelyzet*), shall be terminated by the body entitled to introduce the given special legal regime, which in the case of the state of danger is the Government.

In addition, the Termination Bill **does not set an exact deadline for repealing the Authorization Act**. The reason for this is that Article 8 of the Authorization Act sets out that repealing the Authorization Act “shall be decided on by the Parliament upon the termination of the state of danger”. Accordingly, the Termination Bill could have repealed the Authorization Act only by amending Article 8 of the Authorization Act – which the Parliament would have had the legislative power to do.

¹⁰ For more details on this issue, see: Hungarian Helsinki Committee, *Background note on Act XII of 2020 on the Containment of the Coronavirus*, 31 March 2020, https://www.helsinki.hu/wp-content/uploads/HHC_background_note_Authorization_Act_31032020.pdf, pp. 3–4.

Instead, the Termination Bill sets out the following:

Article 1

The Parliament calls on the Government to terminate the state of danger under Government Decree 40/2020. (III. 11.) on Declaring a State of Danger, according to Article 54(3) of the Fundamental Law.

Article 2

Act XII of 2020 on the Containment of the Coronavirus is repealed.

Article 3

(1) The present Act of Parliament shall enter into force on the day after its promulgation, with the exception included in paragraph (2).

(2) Articles 2 and 4 [of the present Act of Parliament] shall enter into force upon the termination of the state of danger.

(3) The calendar day when Articles 2 and 4 [of the present Act of Parliament] shall come into force shall be established by the Prime Minister's individual resolution, published without delay in the official gazette Magyar Közlöny after the respective calendar day becomes known [i.e. after the state of danger is terminated by the Government].¹¹

Article 4

Article 2 of the present Act of Parliament qualifies as cardinal¹² under [certain listed articles] of the Fundamental Law.

Thus, the Government proposes through the Bill that the Parliament calls upon the Government to terminate the state of danger. In addition, the Termination Bill does not set any deadline for when the state of danger should be terminated and, as a consequence, for when the Authorization Act shall be repealed. The **timing of the decision to end the state of danger is still entirely up to the Government.**

¹¹ Cf. Article 11 of Act CXXX of 2010 on Law-making: "If a law or provision of law enters into force or is repealed upon the fulfilment of a specific future condition, a decision confirming the fulfilment of the condition, specifying its calendar day, shall be published, except where entry into force of the law is linked to the entry into force of another law. Laws shall specify the minister responsible for having the decision published in the official gazette Magyar Közlöny [...]."

¹² Adopting or amending "cardinal" provisions require the votes of two-thirds of the Members of the Parliament present.