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State of Emergency in Slovenia
A legal theoretical analysis of some of its problems

In recent years, the invocation of the state of emergency as a mechanism for dealing with terrorism, mass migrations and even economic crises has become a contentious topic around the world. The CEE area is no exception to this trend, as the case of Hungary clearly demonstrates.

The problems attaching to the state of emergency as a constitutional mechanism for triggering extraordinary powers and human rights restrictions are manifold – as are the possible approaches to the subject: the state of emergency can be studied via national or comparative constitutional law, human rights law, international relations etc.

In Slovenia, there has been practically no discussion on the subject on either the political or the legal level. However, with the onset of the said phenomena – particularly the so-called migration crisis – the topic has attracted more interest. Regardless, very little doctrinal or legal theoretical work has been done in this regard. This inexplicable lack of jurisprudential interest on the matter is manifested also at the level of the normative regulation of the state of emergency. The normative (constitutional or legislative) provisions on the matter are scarce and indeterminate. Even a *prima facie* investigation reveals that profound problems arise with regard to practically every aspect and stage of emergency management. For example, it is unclear – and there is no practical precedent against which one could evaluate the normative material – what counts as an emergency in the first place; or when (based on which criteria) and how (using what legal acts and procedures) a state of emergency may be declared etc.

This paper focuses on one fundamental problem from this batch and regards the type of legal acts that are to be employed in decision-making during a state of emergency. While the Constitution provides no answer to this question, the National Assembly's Rules of Procedure determine that all decisions regarding the state of emergency are to be made by ordinances (i.e. a type of sub-statutory act). This, however, appears to contradict the Constitution, inasmuch as it determines that (i) human rights are exercised directly on the basis of the Constitution; (ii) the manner of their exercise can only be regulated by law, whenever the Constitution so provides or if it is necessary due to the nature of the right in question; (iii) human rights can be limited only by the rights of others and in the cases provided by the Constitution itself; and that (iv) human rights may be temporarily suspended and restricted only during war of a state of emergency. On my view, even though the state of emergency represents an exception with respect to the ordinary functioning of the legal system, should the constitution-maker wish that emergency decisions be adopted by a legal act different from, and inferior to, the law or even desire to defer the decision on the type of acts to be used during such times to the legislator, it would have had to explicitly determine so in the Constitution itself. I, therefore, argue that the current legal regulation is unconstitutional and that the relevant Constitutional provisions ought to be interpreted as requiring human rights suspensions or restrictions to be implemented only by law. If my analysis is correct, however, an apparent antinomy emerges. In this paper, I will provide an answer how to resolve this antinomy in a way that best respects "the spirit" of the Constitution and upholds the values of the Rule of Law.