Orban's Emergency

Kim Lane Scheppele

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Hungarian Prime Minister Viktor Orbán never lets a crisis go to waste. On 20 March, late on a Friday afternoon, he put before the Hungarian Parliament a law that would give him dictatorial powers under cover of declaring a state of emergency to fight the coronavirus. The law has been ably translated into English here.

Orbán sought an expedited procedure to ram through this law when the Parliament opened on Monday 24 March. The opposition united and denied Orbán the 4/5ths vote he needed to pass the law without the requisite parliamentary procedure. But the coronavirus emergency law – called by its critics the "Enabling Act" with all that implies – will be voted on by the Parliament in the coming week, probably on Tuesday 31 March. The law will need 2/3rds of the Parliament to pass, given that the law has constitutional implications. But Orbán has those votes.

Hungary is on the edge of dictatorship.

The law creates two new crimes. Anyone who publicizes false or distorted facts that interfere with the "successful protection" of the public – or that alarm or agitate that public – could be punished by up to five years in prison. And anyone who interferes with the operation of measures that the Hungarian government takes to fight the pandemic could also face a prison sentence of up to five years, a punishment that increases to eight years if anyone dies as a result of the interference.

While the law barring false or distorted facts may appear to be reasonably aimed at spreading malicious disinformation in a crisis, Orbán's terrible track record on press freedom creates the suspicion that the law is aimed at attacking the last remnants of an independent press in Hungary. It may well even sweep in foreign journalists reporting from Hungary. Already, state-controlled media whose messages echo the government are baying for their independent competitors to be punished for deviating from the party line.

The second new crime would punish those who break mandatory isolation orders or otherwise challenge what the Orbán government is doing to fight the virus. This power could well be used to sweep up anyone who violates a curfew or challenges what has become an increasingly controversial use of the military in domestic affairs. The Hungarian government declared a draconian curfew on Friday 27 March. This followed an order a week earlier for army units to deploy to 84 strategic factories to ensure their continued operation. And more extreme measures are to come. The crime included in the Enabling Act is written broadly enough to sweep in critics who challenge whether the government is acting sensibly or even whether a measure that the government is taking has any relationship to the virus at all. It is up to the government to determine what "obstructs" the implementation of its emergency program.

Both new crimes would give the public prosecutor, a firm friend of the prime minister's, huge discretionary power to detain anyone who challenges what the government is doing in the name of the threat. The Orbán government has a 10-year track record of using prosecutorial power to benefit his friends and hurt his political enemies, so such discretionary powers in the hands of the public prosecutor are especially worrisome.

These two new crimes would not be, strictly speaking, emergency powers. They would be permanent changes to the criminal law. They would not go away when the emergency is over.

Alarming though those new crimes are, the provisions of this law that implicate separation of powers

are even more disturbing and would end the appearance of constitutional and democratic government. (The reality of constitutional and democratic government ended some time ago, but appearances were maintained.)

Under this pending emergency law, Orbán would govern alone.

The law would give Orbán a free rein to govern directly by decree without constraint of existing law. He could "suspend the enforcement of certain laws, depart from statutory regulations and implement additional extraordinary measures by degree." (Sec 2.) The law is no more specific than this, implying that any law could be suspended or overridden as long as the emergency continues.

In short, it doesn't matter what any law in Hungary says today. This week, if this pending bill becomes law, any existing Hungarian law could be overridden at Orbán's whim.

The Hungarian Parliament, citing an abundance of caution, has already decided not to meet for the foreseeable future after it finishes this business. What happens when the Parliament is no longer around to hold Orbán to account? This new law spells it out: The government shall provide information about what it is doing to the speaker of the Parliament and the leaders of the parliamentary party groups, but the Parliament may not act to counter any measures taken by Orbán. (Sec. 4). In short, the Parliament will be sidelined by the government in the state of emergency.

The Hungarian Fundamental Law once built reasonable checks into its emergency powers, but those checks would be circumvented by this emergency law. While the constitution requires that the Parliament be able to veto an emergency, the pending emergency law asks Parliament to endorse Decree 40/2020 through which Viktor Orbán first declared an emergency on 11 March, and it also asks Parliament to endorse every other decree that the Prime Minister has or will have issued from his first emergency decree on 11 March through until the moment that the new emergency law is signed by the president. (He is currently up to decree 71/2020 and counting.) The Parliament would be therefore be writing a blank check that endorses all of these decrees plus any new decrees that the Prime Minister shovels into the National Gazette (*Magyar Közlöny*) before the loyal Hungarian President signs the coronavirus emergency law. We all need to keep our eyes on that publication to see what new authorizations sneak onto the books in the coming days.

But the crucial point is that Orbán is asking the Parliament in this law for a pre-endorsement of anything he does – and he does so in a way that makes it much harder for the Parliament to change its mind later. To rein in Orbán's emergency powers once it has endorsed them, Parliament would have to pass another law overturning the decrees that it has already endorsed. Since the coronavirus emergency law is a so-called cardinal law because it affects constitutional provisions, it would have to be passed by a two-thirds vote, but also repealed by a two-thirds vote. And if the Parliament decides it has given away too many of its powers and manages to muster the two-thirds to repeal this law, Orbán's close political ally, the Hungarian President, could simply refuse to sign it. The emergency provisions in the constitution allow the Parliament to end a state of emergency in a simple resolution. The pending law effectively cancels that safeguard by requiring Parliament to suspend emergency decrees in a law.

(A technical point for those who want to look more closely: Section 3 of the law is the most dangerous part. But why it's dangerous isn't obvious. Parliament is given the power in Section 3.2 to withdraw the authorization of the emergency decrees set out in Section 3.1. That makes it sound like there is a safeguard for the Parliament to cancel the state of emergency. But then all of the decrees that are mentioned in Section 3.1 are repeated in Section 3.3 with the additional 31-and-counting "blank check" decrees included by implication there. The decrees listed in Section 3.3 are not covered in the permission given in Section 3.2 to Parliament to withdraw its support from the emergency decrees. The overwhelming bulk of the decrees are still extended indefinitely under the operation of Section 3.3. Bait and switch.)

Could anyone legally challenge this emergency law or any government action taken under it? As I write, the trial-level courts in Hungary have already been suspended out of fear of spreading the virus, and if the ordinary courts are closed, no ordinary person can initiate a case that could get to the Constitutional Court. There are some other political actors who could take a case directly to the Court invoking abstract review but Orbán controls all of those offices. Though the Constitutional Court is required by the Hungarian Fundamental Law to remain open through an emergency (and the pending law makes much of honoring this "guarantee"), it is hard to see how any case could get to the Constitutional Court in the present moment. The only possibility is that one-quarter of the Parliament, a number that would require the far-right and the left to act in concert, could challenge this law or decrees endorsed by it. But that is unlikely even now.

In any event, the Constitutional Court has been a reliable rubber stamp for Orbán since it was captured in 2013, so no one expects serious constraints on the Prime Minister to issue from those quarters even if were possible to generate a case for the Court to consider. The appearance of the Constitutional Court in this emergency law appears to put a rule-of-law stamp on the whole special legal regime, but that is all for show.

It gets worse. For the duration of the emergency no elections may be held. Not byelections if a member of parliament succumbs to the virus. Not local elections even if a local government is dissolved. Not regular elections if the emergency lasts that long. No elections at all. And no referenda either. Democracy is in suspension for the duration.

And the emergency has no end date. The constitution specifies that the emergency must end when the crisis ends, but the determination of that moment is left to the prime minister.

In short, Orbán's emergency gives him everything he ever dreamed of: The absolute freedom to do what he wants.

Of course, reality does have a way of undermining dreams, and Orbán may find that his are no different.

Governments all over the world are using emergency powers to deal with the very real threats posed by COVID-19. In most cases, those emergency measures have been tailored to fight a pandemic and are appropriately limited and checked. The measures in the Hungarian law are so sweeping and unlimited that they do not appear to be tailored to the battle that in fact must be fought. Why is Orbán giving himself unlimited powers now? I suspect it is because he knows better than anyone that the coronavirus crisis in Hungary will be exceptionally severe.

Hungary is more vulnerable than most countries in the developed world because its health care system was in a state of near collapse even before this virus appeared on Hungary's doorstep. The underfunded and understaffed hospital system may well fall into dysfunctional chaos with even a mild outbreak of this virus in the country. And that would be a real emergency. The threat of coronavirus in Hungary is serious and Orbán no doubt knows that the country is not ready to handle it.

Even before Hungary has very many cases, the inability of the Hungarian health care system to handle a real pandemic is clear. Already, the last remaining independent press outlets in Hungary are reporting a coronavirus death rate at 4.19% of detected cases, higher than anyplace else in the region except northern Italy, which is recording 9.26% following the collapse of its health care system. But the Hungarian figures were from 23 March, when Hungary only had 167 reported cases. Imagine what will happen when these numbers climb to the thousands and tens of thousands. Already, the deputy chief of mission from the UK to Hungary has died of the disease, completely puzzling unless you know how overstretched, underfunded and ill-supplied Hungarian hospitals are. More deaths will surely follow. Orbán can clearly see that the health care system in Hungary is already failing under even the smallest pressures, and this is just the beginning.

Orbán's emergency law does nothing to strengthen the Hungarian health care system. (Some of the decrees issued since the law was published do – but not all.) This new emergency regime instead gives

Orbán powerful tools to use when and if the virus takes a toll in Hungary and the citizens of the country rebel at the avoidable losses that his government should have protected them against. With these new emergency powers, Orbán would have the power to lockdown his own population with draconian decrees backed by force. The law hands to Orbán the fully-fledged dictatorial powers he would need in order to cling to office when the full weight of the pandemic hits.

ABOUT THE AUTHOR

Kim Lane Scheppele
Kim Lane Scheppele is the Laurance S. Rockefeller Professor of Sociology and International Affairs in the Princeton School of Public and International Affairs and the University Center for Human Values at Princeton University.

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