From Emergency to Disaster

How Hungary's Second Pandemic Emergency will Further Destroy the Rule of Law

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30.05.2020 doi: 10.17176/20200531-013514-0

This week, Prime Minister Viktor Orbán's government put before the Hungarian Parliament two draft laws that, if passed, would end the state of emergency and create a new legal framework for handing the pandemic from here on out. In doing so, the government was responding to those who criticized the unlimited power that the government had been given in the law creating a pandemic emergency, the Enabling Act of 30 March 2020. That law allowed the government to override any law by decree, a power that was unlimited in both scope and time and that violated Fidesz' own "illiberal" constitution the Fundamental Law.

The new laws are no better, and may even be worse. One of the draft laws is less than one page long accompanied by two pages of justification. It purports to repeal the initial Enabling Act (about which, more below). The other one is called the law on "transitional provisions" and at first it seems only to provide lots of technical answers to questions that arise about how to reset deadlines for various legal processes that were delayed when the economy stopped.

Buried deep in the 247-page highly technical law, however, is the introduction of another kind of quasi-emergency situation we can translate as a "state of medical emergency." This terminology was already present in the Health Act that the "transitional provisions" amend, but that old form now has an entirely new content. It looks a lot like the pandemic emergency for which the Hungarian government was criticized. That's why we call this giant "transitional provisions" law Enabling Act II. Like Enabling Act I, this law gives the government immense unchecked powers.

With this newly minted "state of medical emergency," the government extends an unconstitutional practice that started with the "state of migration emergency" in 2015. Never-ending emergency arrangements are now being built into ordinary law so that they can evade the checks and balances that accompany states of emergency regulated under a constitutional rubric.

It is already possible to become a little nostalgic for Enabling Act I, which at least tried to harmonize itself with the Hungarian constitutional framework for states of emergency. Based on Article 53 of the Fundamental Law which provided for a "state of danger," Enabling Act I gave lip service to the textual guarantees that Parliament and Constitutional Court would remain open and that most constitutional rights could not be infringed, and it required all decrees issued during a state of emergency to automatically sunset after 15 days unless renewed by the Parliament. Of course, in Enabling Act I, the Parliament delegated its power to renew decrees for the duration of the state of emergency to the government itself, so it unconstitutionally cancelled its most important check. But the fact that the Enabling Act I properly positioned the pandemic emergency within the general structure of the constitutional regulation of states of emergency created legal barriers to what the government wanted to do, barriers that then had to be explicitly overcome in plain sight. In fact, it was the explicitness of Parliament's assignment of its power to renew emergency decrees to the government itself that alerted the world that the pandemic emergency was dangerous.

The new framework proposed by the government – Enabling Act II – ignores the constitution and its various safeguards altogether. It is therefore stealthier, which does not make it better. The new frame-

work takes the preexisting framework of a medical disaster ("*egészségügyi válsághelyzet*" = literally, "medical crisis situation") and turns it into a major new legal source of emergency powers. This new "state of medical emergency" – for that is what it is – is inserted into ordinary law without the constitutional scaffolding that is supposed to guarantee checks on emergency powers. Enabling Act II not only gives the government back the almost unlimited decree power it had under Enabling Act I, but it awards that power to the government without any superficial requirement that Parliament approve of the decrees issued to carry out the new emergency. Under the new law, the government can just act on its own – both in declaring a "disaster" and in governing to meet the disaster it declares.

Enabling Act II also includes new powers and dangers beyond those in Enabling Act I. Among the most alarming is that the Hungarian military will now be permitted to operate more widely in daily life in Hungary. Under Enabling Act II, the military can receive permission to use weapons on the civilian population within the country. What will the military use these weapons for? Enabling Act II contemplates that the main task of the military will be to help the government eliminate the emergency situation. But as far as we know, weapons are not effective against viruses, so the government must have some other sort of targets in mind. The law provides a hint: It explicitly permits the military to harm people up to but not including death, a constraint that is only vaguely comforting. It is therefore a serious question why fighting a pandemic presumes the assistance of military forces with weapons unless it is to attack those whom the disease is also attacking.

This new legal regime is a disaster – both because it creates a state of disaster and because it is a disaster as a piece of law. It creates a highly discretionary, unchecked state of emergency without even the appearance of parliamentary oversight.

How the New Emergency Framework in Enabling Act II Works

Though Fidesz's own constitution regulates states of emergency in detail, this framework for this new state of medical emergency is inserted as an amendment to the Health Act, available for use by the government as part of normal law. The new emergency (disaster) will begin when the country's Chief Medical Officer (an appointee of the government) advises the government that a health emergency requires exceptional measures. This can occur when a sudden incident endangers, or disrupts lives, corporal integrity, and health of citizens, or jeopardizes the functioning of health care providers to such a degree that the situation may lead to a disequilibrium between the demand for health care and the locally available capabilities. But given that the new emergency also has an economic dimension – not enough hospital beds may be available because there are too many patients or because there is too little budget – this criterion is open to political adjustment.

While the initiation of this process by the Chief Medical Officer may appear to move responsibility out of the government's hands and put it in the hands of an expert, the Chief Medical Officer relies for her appointment directly on the government, which could remove and replace her at any time. So the appearance of both independence and science-based judgment at the base of a declaration of emergency are mere illusions. In practice, the "expert" decision that extreme measures are necessary is little different than if the Prime Minister could trigger the emergency himself. Once advised by the Chief Medical Officer that a health emergency is warranted, the government may then invoke emergency powers on its own remit with no consultation with Parliament – and the Parliament has no veto or ability to repeal such a declaration. Under Enabling Act I's state of danger, the government was required by the constitution to get parliamentary permission to continue an emergency beyond the 15 days – so that was why it was problematic that the Parliament gave the government the power to renew the emergency decree repeatedly until

the end of the state of danger. Under Enabling Act II, the government has no such constraint from the start, and therefore nothing to evade.

Enabling Act I was widely criticized, in particular because its powers were open-ended without any defined end point. It was up to the government to declare the emergency over. Enabling Act II appears to correct this problem by limiting the new state of medical emergency to six months. Buried in the small print, however, is the fact that the government, on its own remit, can keep renewing the emergency at six-month intervals indefinitely. So here, too, the emergency power is open-ended and at the discretion of the government. This reproduces the mechanism used in 2015 when the government introduced a "state of migration emergency," first declared in September 2015 and renewed at six-month intervals down to the present day. The government got away with this once before and now they are trying it again.

Once this new state of medical emergency is declared, the government is given an even wider latitude in which to operate than Enabling Act I originally allowed. Under Enabling Act I, the government was able to issue a decree on any subject, overriding any law that the government deemed necessary, but these decrees had to contain an explicit statement that they were being continuously renewed under devolved authority of the Parliament. Under the new state of medical emergency, however, the government does not have to even notify the Parliament of what it is doing – except the notification of the relevant parliamentary committee on the possible extension of the emergency after the six month period – nor indicate that only the Parliament's pre-approval allows these decrees to go forward. The government can declare the state of medical emergency, extend the state of emergency and issue decrees with infinite effect without ever needing to consult or reference the Parliament again.

An amendment to the Health Act creates the framework for this new emergency and specifies the legitimate scope of these new emergency decrees. There's a detailed list, so at first the government appears constrained. But a number of items on the list are framed so broadly that they instead point to a potentially dangerous expansion of government powers. The amendment allows the government to order any measures it deems necessary if the measures previously specified by Parliament are inadequate to deal with the crisis. This provision gives the government what are basically legislative powers to act where the Parliament has not. The government is also explicitly authorized to restrict the exercise of fundamental rights, such as the freedom of movement or the freedom of assembly.

In addition, the amendment to the Health Act provides that "the operation of all institutions, programs or activities that could promote the spread of the epidemic can be suspended." In our reading, the use of "institution" (*intézmény*) could cover the suspension of the courts – even the Constitutional Court, because after all, this emergency would not be carried out under the constitution's emergency provisions which would require the Constitutional Court to remain open. In addition, we are also concerned that this broad phrase would cover the suspension of elections because language suggests any political party or association (which are also institutions) or any assembly (covered as an activity "*tevékenység*") could be suspended or cancelled. The language is incredibly broad.

The Enabling Act II also gives the government the power to use special "epidemic" measures provided in other laws, which permits the catalogue of special powers to be supplemented by future legislation.

With Enabling Act II, the government circumvents the guarantees of Fidesz's own Fundamental Law, which permits the suspension of laws only in cases initially allowed in the "cardinal" (requiring a two-third majority) Disaster Management Act. Now the government can act, both on its own across a very broad landscape of vaguely defined powers inserted into this previously unproblematic law, which will not only make it harder to track the government's actions but will also give Parliament no opportunity to intervene even if it objects. In fact, given the broad wording of the new government power to suspend any "institution" or "activity," one might well wonder

whether this would give the government the power to suspend the Parliament itself.

The End of the First Pandemic Emergency?

Enabling Act II is one of two draft bills on the Parliament's agenda at the moment, and it would appear that the other draft bill – the one-page law – is much more straightforward. One of the two substantive paragraphs of the short bill repeals Enabling Act I, while the other calls on the government to end the state of danger introduced by a governmental decree three weeks prior to the Act. In fact, the Parliament, under the terms of the Enabling Act, is not permitted to repeal the law while an emergency is ongoing, so all it can do is to plead with the government to end its emergency first. The repeal of Enabling Act I is therefore done prospectively. When Enabling Act I is repealed (if it finally is), then Enabling Act II can swoop in to turn the constitutional pandemic emergency into an extra-constitutional pandemic emergency. This is not an improvement.

The short act purporting to repeal Enabling Act I then reverses the usual relationship between government and Parliament. With this bill the government proposes to itself through the Parliament to end the ongoing state of emergency. As the Hungarian Helsinki Committee, the Hungarian Civil Liberties Union and Amnesty International Hungary rightly pointed out in their joint statement, this paradoxical short law reveals that in Viktor Orbán's illiberal autocracy it is not the Parliament which has its own government, but rather the unbound executive which has its own pet Parliament. As a result, the short law repealing Enabling Act I can only come into force when the government is ready to call the present emergency to an end. We suspect it will do so only when it has created a new structure under the emergency powers provided for in Enabling Act II. So when the government will claim – as it no doubt will – that the Parliament *has already* repealed Enabling Act I when this law is passed, that will be false.

The official reasoning of the bill mentions that the government's emergency measures were the subject of an unprecedented, coordinated political campaign and hysteria within and outside Hungary, and argues that a historic responsibility lies with all those who questioned the extraordinary measures and tried to undermine the legitimacy of government decisions. The State Secretary at the Prime Minister's Office at a press conference even called upon 'the authors and disseminators of fake news', 'the Hungarian opposition, international media outlets and liberal political actors' to apologise to the Hungarian government. Enabling Act I is being repealed! As we have seen above, however, it is being substituted by Enabling Act II which is even worse.

The sudden move to repeal Enabling Act I may be motivated by Orbán's fear that he will finally be sanctioned by the EU. Calls to suspend European Structural and Investment Funds to Hungary for violating the rule of law have increased, so Orbán evidently wants to look like he listened to criticism. He assumes that no one will read the complex cross-referencing nearly incomprehensible 250-page law in Hungarian to discover that it doesn't really take anything back.

The request for critics to apologize reminds us of the captured chicken thief who wants to be rewarded for giving back the stolen chicken. But then it turns out that even this gesture is a lie when the thief reveals that, actually, he wants to keep the chicken. Like a simple chicken thief, the Hungarian government has no intention of giving up its emergency powers, stolen from the constitution. It may appear to offer those powers back to create a constitutional government, but actually it wants to keep the chicken.

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SUGGESTED CITATION

Halmai, Gábor; Mészáros, Gábor; Scheppele, Kim Lane: From Emergency to Disaster: How Hungary's Second Pandemic Emergency will Further Destroy the Rule of Law, Verfassungsblog, 30.05.2020, doi: 10.17176/20200531-013514-0.

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Langzeitarchiviert bei IntRechtDok unter: doi.org/10.17176/20200531-013514-0.