

Kovács, Kriszta

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Kriszta Kovács

## **Democracy in Lockdown**

ON MARCH 23, 1933, AN ACT WAS ADOPTED IN NAZI GERMANY, IN RESPONSE to the “crisis” of the Reichstag building fire, to enable Hitler to issue decrees independently of the Reichstag (parliament) and the presidency. Article 48 of the constitution of the Weimar Republic made this act possible. Eighty-seven years later, on March 23, 2020, the Hungarian parliament debated a piece of legislation so similarly sweeping that Hungarians now informally call it the “Enabling Act.” Seizing as a pretext the threat to public health caused by the spread of COVID-19, government members tabled a draft act on protecting against the coronavirus in accord with articles 48–54 of the Hungarian constitution. The act enables the government led by Prime Minister Viktor Orbán to issue decrees independently of the parliament.

### **EMERGENCY POWERS UNDER THE HUNGARIAN CONSTITUTION**

This similarity might be only a strange coincidence, but it is not the first time that Prime Minister Orbán has jumped on a crisis to increase his power. Since returning to office in 2010 (he had led the Hungarian government previously, from 1998 to 2002), Orbán has used countless “crises” to consolidate his hold on power (Kovács 2016).

For example, in 2011, a parliamentary supermajority justified the adoption of a new constitution with reference to the consequences of the 2008 global financial crisis and the country’s high level of public debt. The ruling majority gave its crisis management policy a constitutional rank: the 2011 constitution contains a debt ceiling, and it deprives the Constitutional Court of its power to review financial laws. These measures remain in effect.

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The 2011 constitution, sometimes called Hungary's "crisis management constitution," contains a detailed set of prescriptions for the state authorities to respond to emergencies. Articles 48–54 provide for special emergency powers in case of an imminent danger of war or external armed attack and in the event of a natural or industrial disaster. It contains an exhaustive list of situations in which the country could be deemed to be under threat, and it does not provide for the suspension of constitutional rights under any other circumstances.

Several years later, faced with a sharp rise in the number of asylum-seekers arriving in Hungary, Orbán saw another opportunity to expand his power. Since mass migration was not among the constitutionally listed situations that might justify the introduction of emergency rule, Orbán's government in 2016 instead used article 15(1) of the constitution— "The Government shall exercise powers which are not expressly conferred by laws on another state body"—to declare "a nationwide state of crisis due to mass migration" (decree 41/2016).

Today, even though the border with Serbia is hermetically sealed and not a single migrant can enter Hungary's territory (Inotai 2020), the "state of crisis due to mass migration" is still in effect because the government has renewed it every six months, most recently on March 5, 2020.

#### **DECREE ON THE PANDEMIC EMERGENCY**

Six days later, on March 11, 2020, once again citing article 15(1) of the constitution, Orbán's government declared a "state of danger because of the pandemic." (Decree 40/2020 also cited the state of danger clause in article 53 even though this article does not mention a pandemic as a source of danger.)

The decree on the pandemic emergency included an automatic sunset after 15 days without parliamentary authorization. With that deadline looming, Orbán's government introduced the new Act on Protecting against the Coronavirus (Hungarian Spectrum 2020). Offi-

cials argued that without the decree on the pandemic emergency, the government would not be able to properly respond to the crisis, and they pressed the parliament to act as quickly as possible.

The democratic parliamentary opposition was unified in rejecting the expedited procedure, so the decree expired on March 26. In the meantime, between March 26 and March 30, the government (decree 71/2020) and the head of the National Public Health Center (decision of March 26) issued new orders on restriction of movement. In the process, the government itself demonstrated that it could issue the regulations necessary to protect citizens from COVID-19 without granting Orbán indefinitely unhampered emergency powers.

No matter. Since the governing party had a parliamentary supermajority, it was able to pass the so-called Enabling Act on March 30.

### **THE ENABLING ACT: LOCKDOWN OF DEMOCRACY**

This new act lacks a sunset clause, unlike the German Enabling Act of 1933 (which was to last four years—it was subsequently renewed three times by the Reichstag). Although the Hungarian parliament is still in session, the act gives the government the power to take extraordinary measures, including suspending or abrogating statutory provisions without parliamentary approval during the crisis. Hence, it is the prime minister—and the prime minister alone—who decides how to respond to the crisis and when the crisis ends. Since April 1, Orbán's government has adopted over 90 decrees on the basis of the Enabling Act. Some are meant to tackle the pandemic, others to weaken the fragmented political opposition (Pardavi and Kádár 2020), including bleeding opposition-led municipalities dry (decrees 135/2020 and 136/2020).

The Enabling Act further decreases the enforceable checks on the executive's authority. It cancels elections already announced and all future by-elections and referenda until the crisis is over. It outlaws the obstruction of epidemiological control and the publication of false or distorted facts that interfere with the "successful protection"

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of the public. Both crimes are broad enough to be used against critics (Sandford 2020), and both will remain part of the legal system even when the pandemic is over (Scheppelle 2020).

Citing the threat from COVID-19, on March 15, the government proclaimed an “extraordinary judicial holiday,” and on March 31, issued a decree putting much discretion in the hands of judges to postpone trials and close judicial proceedings to public view until the end of the “state of danger” (decree 74/2020).

The only nongovernmental state institution that continues in operation essentially unchanged is the Constitutional Court. But this court cannot serve as a check on the government. Cases have to come to the Constitutional Court through the ordinary courts, but since their operations are effectively suspended, this avenue is blocked. Certain officials (e.g., the prosecutor general, the ombudsman, and the government) may ask for constitutional review, but the government is unlikely to ask for a review of its legal measures, and these officials, in any case, have all been picked by Orbán’s government.

A mechanism does allow one-quarter of the MPs—that is, members of the parliamentary opposition—to bring cases to the Constitutional Court for review. Unfortunately, the Constitutional Court itself has been packed with Orbán’s political allies. A parliamentary referral to the court is likely to be futile.

We often hear that extraordinary situations might require extraordinary responses. Indeed, when taking action against the coronavirus, it might be justified to restrict some of our fundamental rights (e.g., the right to assembly, freedom of movement) in proportion with the danger. It might also be justifiable to adjust the functioning of the democratic institutions, for instance by limiting public access to court buildings. One can even imagine that the operation of democratic institutions might be temporarily suspended, and the distribution of powers modified in favor of the executive in order to manage the crisis. Still, as the example of the Weimar Republic suggests, we should be extremely suspicious of all acts that are passed in moments of crisis.

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The Council of Europe's secretary-general (CoE Secretary General 2020), the Civil Liberties Committee of the European Parliament (LIBE 2020), the OSCE Office for Democratic Institutions and Human Rights (OSCE-ODIHR 2020), and the UN high commissioner for Human Rights (UNHCHR 2020) have all raised concerns about the impact of Hungary's Enabling Act. In response, Viktor Orbán has said, in effect: If you cannot help, fine, the least you can do is not hinder the country from defending itself on its own soil. We are at war, and the country is operating on a military plan (Orbán 2020a, 2020b).

### **INDEFENSIBLE WAR RHETORIC**

Under Orbán, sharp distinctions between political friend and foe have been repeatedly mobilized to maintain a sense of constant crisis, in which ordinary norms are suspended (Schmitt 1996). The government felt inclined to "wage war" against the financial crisis, against "illegal migrants," against "terrorists," and most recently against the "invisible and unknown enemy" called COVID-19.

Hungary's Coronavirus Operational Group consists of many more army commanders in uniforms than healthcare professionals. There is an increased military presence in hospitals: officers are taking part in medical decisions. The military has already sent control teams to the country's 104 "strategic" companies to monitor the "operations of key companies in telecommunications, transport and health care," and the government plans to set up military task forces at 80 more companies (Hungary Today 2020). Moreover, a state takeover has happened at a publicly traded company that manufactures folding boxes. This is not a nationalization with the payment of compensation; the company is simply under a state-directed leadership (Balogh 2020).

Meanwhile, those in compulsory home quarantine are obliged to post a sign from the authorities (a "red card") on their door to warn others that a potentially infected person inside is under disease control observation (About Hungary 2020). Yellow warning cards are displayed on apartment buildings in which there are apartments

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wherein potentially infected persons are quarantined. Hungarians have seen these signs on doors before. Even the right-wing populist Slovak prime minister Igor Matovič has condemned the regulation (Demecs 2020), comparing the red-card houses of 2020 to the yellow-star houses in Budapest during World War II: a yellow star indicated the residence of a Jew.

In Budapest, people are queuing to buy guns out of fear that once the pandemic reaches its peak, the state will not be able to maintain law and order (Dunai and Szabo 2020).

Orbán himself, despite the dictatorial power he now wields, is proving unable to comfort and reassure the Hungarian people. Instead, all his political steps have had the effect of paralyzing public services, including the healthcare system, turning people against each other, and weakening the cohesiveness of society. The country seems on the verge of a Hobbesian *bellum omnium contra omnes*—a war of all against all.

Of course, nobody knows what the future holds. One might think that the similarities with Weimar Germany suggest that Hungary may be turning into a dictatorship. However, there are decisive differences between the two cases. Beyond the crucial differences in the economic and social environments, there are important legal differences: Weimar Germany had a semi-presidential system rather than the parliamentary system Hungary currently enjoys—though these differences may not matter much in the end.

Even more important is the difference in the international situation, especially Hungary's membership in the European Union. Among the conditions for membership in the Union is "the existence of stable institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities." So far, the Union has continued to stand by (as it has in the past), even as Hungary's prime minister has assumed dictatorial powers. We can only hope that the political ramifications of Orbán's latest power grab will convince the European Commission to pursue the remedies at its disposal (even though all of them present serious challenges).

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In any case, recent events in Hungary show how easy it is for a cunning autocrat to subvert an essentially liberal democratic system, destroying it from within.

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