

The Ukraine War Perpetuates Hungary's Government by Decree

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Never-Ending Exception

On the evening of 3 May, justice minister Judit Varga submitted the 10th amendment of the Fundamental Law of Hungary. On her social media accounts she stated, that the 'Russian-Ukrainian war has resulted in a humanitarian situation not seen since the Second World War and has also changed the economic outlook in Europe ... To meet and counter these challenges our country must ensure the capacity to develop an effective and rapid national response'.

The amendment aims to rewrite the current rules of Article 53 of the constitution, which allows the government to declare a state of danger (and rule by decree as it did during the last two years) in the event of a natural or industrial disaster endangering lives and property, or to mitigate the consequences thereof. According to the proposed new rules, the government will also be able to declare this kind of emergency 'in the event of armed conflict, war or humanitarian catastrophe in a neighbouring country'.

This is just the latest chapter in the story of the democratic and rule-of-law backsliding in Hungary. The Orbán regime started its direct war against liberal democratic values long ago and exceptional measures are now so common that even constitutional lawyers find it hard to track the government's actions. The threshold between exceptional and ordinary laws and measures is fading away, and the COVID-19 pandemic (and now also the war against Ukraine) has worsened the situation so much that democratic values no longer mean anything to Hungarian voters, as the recent parliamentary elections exemplified. It is also remarkable that the 'COVID emergency' allowed Orbán to rule by decree, a habit he enjoys a lot. Although we can find examples of how the emergency measures leaked into the normal legal order and how the emergency became permanent in recent years (state of migration emergency, state of medical emergency, Enabling Acts etc.), the government's use of emergency decrees made an already autocratic way of government even worse.

When, on 10 November 2020, the Hungarian government (again) entered a state of danger by using the Fundamental Law's 'Special Legal Orders' nobody realized that this was the first element of an apparently never-ending emergency. The government maintained the state of danger even after the health-related pandemic restrictions were lifted on 4 March 2022, as the state of danger was not repealed. Under the ongoing state

of emergency regime, the government prefers to use emergency decrees, even in situations which have nothing to do with the pandemic. For example, food and fuel price caps have been enacted and extended by these means, while the constitutional background of maintaining the state of emergency was the global COVID pandemic and not an economic crisis. Although the emergency decree issued in March repealed the most important measures previously enacted to handle the pandemic (obligatory wearing of face masks, entry restrictions, the requirement to show an immunity card or 'green pass' to use domestic services or enter events etc.), the government issued decrees (and continued the existing ones) under the state of emergency regime that can hardly be understood as measures to handle the threat of an epidemic.

Rewriting the constitution's emergency chapter again

On 3 April Fidesz again won the parliamentary elections and gained a two-thirds majority for the fourth time in a row. Despite this overwhelming victory and the government's solid majority in the Parliament, it seems that Orbán is in love with the dictatorial exercise of power and would like to use the (super)majority only when he needs formal affirmation of some of his acts and to demonstrate (especially for the European Union) that parliamentary democracy is still alive.

Like the 9th, the new 10th amendment of the Fundamental Law again intends to rewrite the structure of 'Special Legal Orders'. The prime minister (who signs the government's decrees) seemingly prefers to rule by (emergency) decrees without the control of parliament, which could explain why the government spokesperson, Gergely Gulyás, said at the government's first briefing after the electoral victory that it is important to amend the Fundamental Law as 'war requires a government that is capable of action'. As this would be the first major legal action of the new two-thirds majority, some explanation was needed; he also stated that the government plans to end the current state of danger, prompted by the pandemic, on 31 May.

From a pandemic 'state of danger' to a humanitarian 'state of danger'

We can easily predict that it is only a matter of time for parliament to accept the new amendment, enabling the government to prolong the state of danger for (again) an undefined period. However, it seems that in June the state of a pandemic emergency will be substituted by a new state of humanitarian emergency, although both regimes operate under a state of danger.

The new amendment is on the one hand unnecessary, and on the other does not fulfil basic constitutional requirements. Unnecessary because since 2015 the Hungarian legal system has known the state of migration emergency, which is however unknown within the Fundamental Law's (seemingly) coherent and solid emergency chapter, and which has been implemented by ordinary law. The government previously communicated that it is important to uphold this quasi-emergency regime as it ensures the cabinet can act accordingly when a new migration crisis occurs. Although these special restrictions were

used against those who flee from wars (and from terrorism) in the Near East, there is no acceptable explanation of why the government does not use the already active migration emergency for the current situation in relation to the war in Ukraine.

The new amendment does not meet basic constitutional requirements because the concept of 'humanitarian catastrophe' is unknown in the Hungarian legal system. The Military Act contains the terms 'humanitarian (military) operation' and 'humanitarian action in a foreign country', which describe the humanitarian tasks of the Hungarian military when an industrial or natural disaster, or armed conflict, in a foreign country necessitates the help of the military. Moreover, the Fundamental Law already recognises the state of preventive defence, which can be declared in the event of an imminent threat of armed invasion or if deemed necessary in connection with the country's commitment under an alliance treaty. This kind of emergency ensures the possibility of preliminary protection of the country when there is an armed conflict that could endanger its security; however, the state of preventive defence can be declared by parliament instead of the state of danger, where the decision-maker is the government.

The reasoning of the amendment states that, before declaring a state of danger because of an armed conflict, war or humanitarian catastrophe, it is important that the exceptional situation in the neighbouring country is real and could have a serious economic and humanitarian effect on Hungary, although the wording of the new provision does not contain the economic effect.

But why is it so important to amend the Fundamental Law again instead of using the statutory measures already in force (the state of migration regime and the Military Act)? The answer could be that the war in the neighbourhood allowed Viktor Orbán to carry on his practice and use emergency measures as the common form of exercising power.

Exception as 'normalcy'

The main problem with this new amendment is that it substantially broadens the range of situations in which the state of danger can be declared; it appears that it is up to the government to decide which situations or actions meet the description 'humanitarian catastrophe' in a neighbouring country. I agree that a humanitarian crisis could have a great impact on a neighbouring country, but it is hard to believe that a humanitarian problem in another country justifies emergency powers and nearly unlimited governmental power to rule by decree without parliamentary oversight.

Emergency powers should be temporary and ultimately aim to restore normalcy. This also means that constitutional emergency regulations must be clear when describing the relevant situations that may lead to a declaration of a state of emergency. Although emergencies are many and diverse in kind, they mostly include external attacks, internal conflicts, natural disasters, catastrophes, epidemics and sometimes economic crises in modern constitutions. A humanitarian catastrophe in another, neighbouring country is simply not equal to the mentioned threats.

We are all aware of the story of the Weimar Republic, when the constitution neither authorized nor prohibited the delegation of legislative powers to the executive, at the same time, the delegation was accepted in reality during times of crisis. We also know the end of the story, which it appears is being repeated after nearly a hundred years in a previously democratic country. With this new amendment, the government can wield unlimited power without parliamentary control by simply pointing to a threat of mass migration, an epidemic or an undefined humanitarian issue; circumventing parliamentary oversight accelerates decision-making, there are no 'disturbing' questions from the opposition, and the risk of possible exposure of these measures is absent. In Hungary, at least two things were certain in recent years: the two-thirds majority of the Fidesz/Christian Democrat coalition and the permanent state of exception.

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