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PUBLIC JURIST

TRIUMPH OF ORBÁN'S ILLIBERAL DEMOCRACY? THE LAW AND POLITICS OF 2020 CORONAVIRUS ENABLING ACT OF HUNGARY



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ABOUT the PUBLIC JURIST



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PREFACE

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The coronavirus pandemic is not only a public health crisis. Its brutal effects on our lives have also been manifested in numerous other ways, including sabotaging world's economy, devastating our social and mental health and threatening the very survival of many political institutions that we had claimed as quintessential to modernity and far from fragility. One of such institutions is democracy. COVID-19 has prompted a lot of governments around the world to enact emergency measures that drastically expand executive power and curtail freedoms in the name of disease prevention, and Hong Kong is no exception.

Of course, emergency legislations themselves are not novel to legal systems globally and are of course not inherently detrimental to the healthy functioning of democratic institutions. What matters is whether adequate checks and balances are similarly instituted to pre-empt the improper and disproportionate deployment of emergency measures that may create irreversible harm. This very much depends on the existing democratic institutions, whether they are healthy enough to withstand such affronts. Against this background, it should not come as a surprise to many that threads of news reports lamenting that further democratic backsliding

started to appear since February as leaders of countries which already possess a track record of de-democratisation have capitalized on this opportunity to further weaken democracies.

One most prominent example is Hungary. Prime Minister Viktor Orbán, with the help of Parliament which his Fidesz party occupies a supermajority of seats, passed an Enabling Act in late March which indefinitely suspended Parliament and allowed him to rule by decree until the law is revoked. The sweeping powers conferred, as critics noted, push Hungary further to the category of autocracy. Although the government has announced its intention to withdraw the Act in late May, longlasting consequences are nonetheless anticipated as substitution bills are also put in place.

Against this backdrop, contributors in this issue, many of them coming from Hungary themselves, discuss the causes, characteristics and impacts of the emergency legislation in Hungary and beyond. They include Dr. Antal Attila, Professor Attila Ágh, Professor Tímea Drinóczi, Professor Umut Korkut and Professor Matthijs Bogaards. The Government and Laws Committee thanks all our authors and wishes an enjoyable read for all our readers.

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AN INTERVIEW WITH

DR. ANTAL ATTILA

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In an interview with Radio Television Hong Kong earlier this January, Hungarian Foreign Minister Péter Szijjártó defended the various measures taken by Prime Minister Viktor Orbán that are widely perceived to be authoritarian as reflecting the “will of the Hungarian people” (RTHK, 2020). He cited the 2/3 parliamentary majority of the Fidesz as well as it attaining 53% of the vote in the last European Parliament elections within the EPP bloc. Do you think his claim is true at all, and whether the “will of the people” can justify Viktor Orbán’s authoritarian tendencies?

I do not think so. This is a classical and direct misunderstanding and misrepresentation of political majority, representative democracy. Let’s start with the main problem of liberal democracy, this political regime underestimates the “voice of the people” and overrates the constitutional institutions. The authoritarian populism (AP), as I propose in my last book (*The Rise of Hungarian Populism: State Autocracy and the Orbán Regime*, Emerald Publishing, 2019) that the Orbán regime can be characterized with AP, is about the rehabilitation of *the people* and several scholars argue that these kinds of regime are not considered much the constitutional framework. I am arguing that the situation is much more complicated and the AP regimes, on the one hand, are constantly manipulating with the representation of the people’s will (that is happening in Hungary and that is why Orbán defines himself as the custodian of the will of the people); on the other hand, the constitutional rules are crucial for AP. The Orbán regime’s Fundamental Law, came into force in 2012, has been modified several times because of political reasons referring



Minister of Foreign Affairs and Trade of Hungary Péter Szijjártó appearing on RTHK current affairs programme "The Pulse" in early 2020 (Source: RTHK)

the interest of the people. In fact, according to AP regimes the will of the people is far not constitutionally defined, but the political leader maintains it according to daily political interests and this politically prescribed agenda is to be constitutionalized (in this line the Orbán regime enacted into the Constitution the criminalization of homelessness, the definition of marriage as relationship of a man and woman).

There is wide academic consensus that the EU has become what Professor Petra Bárd from the Central European University described as a “paper tiger” in face of Orbán’s tactics (*The Atlantic*, 2020). Commission President Ursula Von Der Leyen failed to even mention Hungary in her statement of concern regarding the use of emergency powers in fighting the coronavirus pandemic. Are there any tools left of the EU, other than invoking Article 7 TEU “nuclear option” which is almost certain to be blocked by countries like Poland, that can function as an

effective deterrent to Viktor Orbán?

I am convinced that there are two fundamental reasons why the EU can hardly take an action against the authoritarian threats raised by the Orbán regime. First, it is to say that the EU is in deep political and moral crisis, not just because of the COVID-19 crisis, but the pandemic situation deepened the overlapping crises. The EU was not able to give a coherent answer to the refugee and moral crisis, the main cause behind here is the hypocritical attitude. On the one hand, the Orbán’s European fortress position, which says Europe must be locked down and protected from the refugees, was criticized on the surface, on the other hand, this narrative has been accepted by the main European states and the EU as well (take a look at the EU-Turkey deal in conjunction with the refugees camps maintained and used as a blackmail by the Erdoğan’s regime). The second thing is the neo-liberal nature of EU as an economic community. There are several critiques, one of the most

significant elaborated by Wolfgang Streeck, on the neoliberal structure of the Eurozone and the EU itself. In this sense, due to the lack of political sovereign the EU is highly dominated by the most powerful member states', especially Germany, and neoliberal interest. That is why the capitalism can be operated in an authoritarian way on the (semi)periphery of the EU. Orbán recognized this peerless political instinct and he was able to create an emerging authoritarian populist regime based on multinational companies' financial interest. During the last ten years the German automobile companies got unprecedented state aids and a new Labor Code has been accepted which represents the employer interest. Due to these factors, whilst the European institutions criticized heavily the Orbán regime, we could never expect meaningful results from it. Moreover, the nature of the challenge raised by the Orbán regime is political, at the same time the EU was about to give a legal answer to this.

Viktor Orbán's version of illiberal democracy is said to have served as a good model for other aspiring authoritarians in the region, such as the Czech Republic. How likely is Hungary's authoritarian turn going to spillover to its neighbouring countries in Central and Eastern Europe, especially the post-communist states, not to mention Poland?

There is a worldwide revolt against liberal democracy, on the one hand, the authoritarian populists recognized that the capitalist structure do not need to be based on liberal democracy, on the other hand, left populism has always regarded it as a system serving capital interests. As I proposed here, Orbán is one of those who recognized that the fail of liberal democracy opens space for market-based autocracy in the

(semi)periphery. It is to say that not the Orbán regime is "prototype model" for hybrid regime or autocracy, but there is a "authoritarian moment" of our time and several political leaders are able to catch this moment. Nevertheless, the Eastern European counties seem to be much more vulnerable in the light of these authoritarian tendencies. This is far not because of the "authoritarian personality" (after Theodor W. Adorn and his colleagues) of the voters, but the failed regime changes which put a huge burden on these societies and these countries are highly subordinated to the exploitative system of capitalism.

There is an embedded neo-liberal structure inside of the Orbán regimes and the state favors the international business interest and the regime was able to crate a national bourgeoisie class which cooperates with the international players.

You are an expert in populism, in particular the deployment of Euro-sceptic and anti-migrant sentiments by Viktor Orbán's government. Do you think his playbook has been successful over the past few years, and why?

Yes, this is a tremendous success. Of course, there is a massive political support behind the regime, but the price such a politics based on hate politics

is being paid by an entire society. The Hungarian society is full of anger, hopelessness and Orbán is playing with these feelings and seeks to influence on nationalist sentiments embedded into historical grievances. Meantime, the Hungarian public health system and the universities is suffering from the regime neoliberal agenda, privatization, austerity. This is remarkable that the Hungarian remained silent despite deteriorating public services. It is to say that COVID-19 crisis showed, the regime can only be maintained by an open autocratic turn.



Prime Minister Viktor Orbán shook hands with European Union Commission President Ursula von der Leyen before the outbreak of the coronavirus pandemic (Source: European Commission)

You wrote that under Viktor Orbán's there is a new form of "post-modern nationalism which is based on discursive fight for sovereignty, but at the same time sacrifice it in the context of neoliberal capitalism". Can you explain this a little bit?

As I proposed earlier, it is a misunderstanding that the Orbán regime is fighting for national sovereignty. Orbán faced that national sovereignty in the globalized capitalism is an imago, at the same time he created such a regime which discursively (fighting against international capital, migrant and refugees, everyone who can endanger our way of life) distributes to the people the pretense of sovereignty. It seems to be quite effective, but most importantly it does not endanger the capitalist interest. There is an embedded neoliberal structure inside of the Orbán regimes and the state favors the international business interest and the regime was able to create a national bourgeoisie class which cooperates with the international players.

In a podcast with UCL, Dr. Sean Hanley argued that authoritarians like Viktor Orbán is harnessing public health and economic crisis like the coronavirus pandemic to institute a form of *technocratic populism*. In gist, the government attempts to justify the use of authoritarian tactics by appealing to technocratic governance, public good and managerial competencies exhibited by illiberal governments rather than the nationalist appeal. Do you agree the coronavirus outbreak is engendering an alternative form of autocratisation based on the claim to technocratic expertise on top of nationalist appeals, or is it part of the authoritarian playbook all along?

The Orbán regime has found a way to capitalize on the pandemic situation. Contrary to the assessment of other commentators, the coronavirus did not bring about or even finalize the authoritarian turn. Rather the conditions of authoritarian rule pre-existed the crisis and were certain to define how the government would respond to the crisis. There is no ques-

tion that by enacting the Enabling Law (Act XII of 2020, came into force 31 March 2020), which grants absolute power to the Prime Minister, the Orbán regime has irretrievably become an authoritarian political system. Orbán has found a way to advance political aspirations that do not serve to tackle the pandemic, but to build a post-pandemic Hungary in his image. The regime has already started to implement its political agenda under the cover of epidemiological measures: stripping powers from mayors (which was eventually withdrawn); forcing the continuation of a contested construction investment project in Budapest; escalating the cultural war through tightened control of the theatres; classifying public data and making it difficult to enforce freedom of information; continuing to systematically clamp down on academic freedoms at state universities; financially plundering the opposition parties and municipalities; and denying state recognition of gender transition, to name but a few examples. That is to say, Orbán is trying to manage the coronavirus crisis politically, because his aim is to consolidate power, deepen neoliberal reforms and ensure that the state of exception remains in the post-pandemic world.

The crackdown on the free and independent media, often labeled as “Soros’ propagandists”, as well as wide discretion granted to the prosecutorial office in going away the opposition

had undoubtedly led to a chilling effect on the Hungarian civil society. An opinion poll conducted in March however revealed the majority of Hungarian citizens are in favour of more draconian measures in combating the coronavirus, even if it comes at the cost of democratic safeguards (Visegard Insight, 2020). How would you evaluate the role of the Hungarian citizenry and civil society in face of increasingly authoritarian turn of Viktor Orbán?

/ This is the greatest danger of the current moment: through the Enabling Act Orbán will be able to maintain a state of emergency even when it is no longer required. /

Before the COVID-19 crisis the Hungarian civil society was attacked and suppressed for ages and the pandemic situation put this even more complicated. The Enabling Act put literally Hungarian society into a political quarantine. The situation is extremely paradox, because social uprisings on the streets will weaken efforts to control the pandemic, but without

a strong protest movement the permanent Enabling Law will define the post-pandemic situation. This is the greatest danger of the current moment: through the Enabling Act Orbán will be able to maintain a state of emergency even when it is no longer required. The politics of austerity in the field of state health system and the universities has already started, the Hungarian workers got remarkable few helps from the government in this unprecedented circumstance. The social resistance can only be prevented with a more open system of authoritarian tools. It will define the future of the regime how the Hungarian people will react in this situation.

For readers who are interested in learning more about Dr. Antal Attila's research output, they are encouraged to visit <http://www.antalattila.hu/>





**THE NEW EU MEMBER STATES IN THE MIDST OF
THE CORONAVIRUS CRISIS
THE AUTOCRATIC ORBÁN REGIME IN HUNGARY
AS THE WORST CASE SCENARIO**

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The triple crisis in the new EU member states

The outbreak of coronavirus crisis has brutally discovered the deep contradictions of the Old World Order and the new situation with the emerging New World System has made necessary new and again the reconceptualization of the world system. In the spring of 2020 there has been a conceptual turn in social sciences with the whirling of the new issues and terms that has indicated a revolutionary change in the mindset of the populations. After the decades of the hyper globalization the triple crisis has erupted consisting of (1) the socio-economic crisis of the global production system with the reinforced inequalities that has become counterproductive in both economic and social respects; (2) the ecological crisis by the over-loading and fatally damaging the human environment; (3) joined

finally by the recent *coronavirus* crisis with its roots also in the social and personal over-connectedness by the excessive globalization. All the three crises have developed their own sub-system with its internal logic of workings, and at the same time they have been closely interwoven forming an interdependent system that has reached the stage of the common and cumulated *systemic* crisis.¹

Altogether, due to the increasing negative effects of the excessive globalization, the *coronavirus* crisis (COVID-19) has drastically displayed the overload of the global socio-economic and ecological systems in the present form of the global capitalism. This excessive globalization has been an over-driven process throughout the world, across the global chains of production and service, trade and transport, including the tourist industry. These long chains and networks damaged the ecological system “outside” and the social system due to the human over-connectedness “inside”. This unprecedented triple or cumulated crisis has manifested the inherent structural tensions of galloping globalization, and its inner contradictions have proved to be the imminent danger for the future of mankind. The triple crisis has revealed not only the vulnerability of the poor and fragile states and/or populations around the world, but also that of the developed countries after decades of deindustrialization and over-reliance on the global networks of production

and services, trade and transport, in the spirit of the high profit-seeking and the fetish of consumerism.²

The deepening Core-Periphery Divide has also been an obstacle to the EU crisis management in the present triple crisis, since the crisis has sharpened the dependency relationships between the West and East within the EU. The derailed European integration of the new member states has transformed the East into the global semi-periphery of the Core as the cheap labour extension of Western economies and societies as I have described in my recent book (Ágh, 2019). Therefore, the Core-Periphery tensions cannot be removed without reforming its internal relationships within the EU, by stopping the excessive neoliberal marketization in NMS. This reform has to include also the recognition of regional specificities, given the historical delay of NMS to elaborate a special road of EU integration without giving up the basic requirements of the mainstream EU development.

Due to their lopsided modernization, the NMS have much more vulnerability in the *coronavirus* crisis, since these weak countries are more open to the global changes and their transitory social structure are more fragile due to their half-way EU integration with the precarious position of the large mass of the new losers in the economy paralysed *coronavirus* crisis.

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¹ This paper is a short summary of my current long analysis entitled as “The triple crisis in the emerging New World System: The autocratization of the NMS in the EU”, written recently in the midst of the *coronavirus* crisis.

² The new generation of scholarly literature has condemned the excessive neoliberal globalization and it has shown as the main reason of the triple crisis (see e.g. Rodrik, 2020).

triple crisis has taken place in an extreme form in the weaker in EU member states, where the neoliberal type of the EU integration has led to the social disintegration and political decline as the “death” of democracy. The divergence of the NMS regional development from the main line of EU’s progress has rather characteristically cumulated in the negative features of these global processes mentioned above because both the socio-economic structure and the public health system has been in these countries much more vulnerable than in the developed EU member states. The disempowerment of NMS in the EU and the social recession of new losers in the NMS countries is still an ongoing process. After the outbreak of the triple crisis this special aberration of the socio-political development has become more evident in the international scholarship and media. It has been regularly mentioned that Hungary is “the poster boy” of the authoritarian system in Europe: “To see how a modern democracy can die, look at events in Europe, especially *Hungary*, over the past decade.” (Krugman, 2020).³

The new type of autocracy of the Orbán regime in Hungary

The major trend of the critical analysis on the new member states has recently focused on the backsliding of democracies. The NMS are the losers in the triple crisis in the socio-economic aspect, moreover as a “self-inflicted wound”, their political elites have been using the crisis for the political power games: “some governments, such as in Hungary, where the state of emergency could be extended indefinitely, are taking advantage of this to strengthen their power and reduce political freedoms.” (Maurice et al. 2020: 5). No wonder that after the outbreak after the coronavirus crisis there has also been an eruption of the critical literature on Hungary as the worst case scenario in the triple crisis with the worst decline of democracy

³ The latest Nations in Transit Report has noticed the general decline of democracy in NMS and Hungary has received the worst score in this region (Freedom House, 2020: 25).

or the “autocratization” process, using with the term of the V-Dem Institute. The Orbán regime has become ill-famed as a “Potemkin democracy” that looks like a democracy from outside and from a distance, but its seemingly democratic institutions are just a paravan of the autocratic political system. Therefore, Hungary has most often been discussed in the fields of politics and rule of law, although the deepening social recession in Hungary has also come to the surface during the present triple crisis in the education, health and innovation, or in general in the public service, the civic security and media freedom.⁴

The Hungarian case therefore has been very much exposed in the international literature about the coronavirus crisis, at the same time it has to be emphasized that the introduction of the state of emergency has been a global process. Accordingly, the V-Dem Institute has described the Pandemic Democratic Backsliding at the global level by constructing the Pandemic Backsliding Risk Index with four types: Green Low Risk, Orange Medium Risk, Red High Risk and Black Closed Autocracy. The V-Dem Institute has also established democratic standards for emergency situations and outlined the new rules for the democratic process during the pandemic. The theoretical foundation of this ranking has been given in the paper of Lührmann and Rooney (2020) in the paper entitled as *Autocratization by Decree: States of Emergency and Democratic Decline*. Basically, they have argued that some political leaders have recently abused the emergency situation by introducing excessive measures and keeping these provisions in place after the situation improves. As the most characteristic case, the Institute’s rankings paper (Lührmann et al. 2020) has mentioned on the front page that on 30 March 2020 the Hungarian parliament ceded extensive powers to its Prime Minister, Viktor Orbán, enabling his indefinite rule by decree in the *Enabling Act*.

⁴ From the avalanche of the recent papers, essays and blogs on the socio-economic developments see Scheiring (2020), on the cultural life Kováts and Smejkalova (2020) as well as Kováts and Zacharenko (2020) and on the media freedom the recently issued report in CoE, 2020: 41-42).

The story of the ill-famed Enabling Act

For the general presentation of the NMS case it deserves to deal with the Enabling Act for two reasons that will be presented below in very short summaries. First, although this Act concerns directly Hungary, but it indicates also the general tendency in NMS and beyond. Second, this rampant violation of rule of law has wider implications in the entire society, including the media freedom and cultural life. It has been explored for instance in the analyses of Bárd and Carrera (2020), Hegedűs (2020a,b), Kovács (2020) and Scheppele (2020), described as follows on in great outlines.

Kim Scheppele is an eminent expert of the rule of law violations in the new member states who has discussed their entire legal historical trajectory since the 2010s. In the recent analysis of “Orbán’s Emergency” she has focused on the latest developments of the rule of law violations through their condensed legal form in the Enabling Act. This Act “would give him dictatorial powers under cover of declaring state of emergency to fight the coronavirus ... The law hands to Orbán the fully-fledged dictatorial powers he would need in order to cling to office.” Notably, “The Hungarian Fundamental Law once built reasonable checks into its emergency powers, but those checks would be circumvented by this emergency law.” This analysis put the emphasis on the contrast between the current emergency legislation in the democratic countries and its Hungarian “dictatorial” case: “In short, Orbán’s emergency gives him everything he ever dreamed of: The absolute freedom to do what he wants. ... Governments all over the world are using emergency powers to deal with the very real threats posed by the COVID-19.” This contrast leads already to the wider implications of the coronavirus crisis. Scheppele has pointed out that the tough situation in Hungary is “the product of Orbán regime in the last decade: Hungary is more vulnerable than most countries in the developed world because its health system was in a state of near collapse even

before the virus appeared on its doorstep.” (Scheppele, 2020:1-2)

The analysis of Bárd and Carrera goes along this line opening up for the wider legal and political implications of the Enabling Act for the society as a whole in the Orbán’s “pandemic politics”, since “Even if a policy measure has been found to be ‘effective’ in responding to a public health need, the wider ramifications must also be considered for it to be deemed ‘legitimate in a democratic society’, chiefly on its impacts on the rule of law and human rights.” As they have pointed out, in general and also in the particular Hungarian case: “Pandemic does not create autocracies. ... The pandemic has just made the shift towards authoritarianism more visible.” (Bárd and Carrera, 2020: 2-3). The authors have concluded about the “rogue government” in Hungary that “The novelty of the ‘Enabling Act’ is that through it, the Hungarian government has abandoned even the semblance of democracy.” Finally, Bárd and Carrera have suggested that the EU has to end “the absurd situation of supporting autocracies in violation of EU values out of EU funds.” (Bárd and Carrera, 2020: 6,9).

Along the same line, Kovács (2020: 2-3) has described this “lockdown of democracy” in Hungary, in which the checks and balances have been decreased further because the midterm elections and referenda have also been cancelled. Moreover, new rules have been introduced to curb the remaining free press by criminalising the publication of “false facts” about the crisis management for the “successful protection” of the public. She has drawn attention to the fact that “Under Orbán, Hungary has become a deeply militarised country” and the “war rhetoric” has gone through the history of the Orbán regime. It has reached its peak in the management of the coronavirus crisis, since “The Coronavirus Operational Group consists of more military than healthcare professionals.” Accordingly, “The strong man image Orbán” is trying to convey the message that the government has been able “to comfort people and integrate society. On



Summit of the leaders of the Visegrad Group consisting of NMS (Czech Republic, Poland, Hungary and Slovakia) (Source: Hungary Today)

the contrary, all of his political steps have had the effect of paralysing public services, turning people against each other and weakening the cohesiveness of society.”

Finally, the “reports” of Hegedűs on the recent crisis have underlined that the “state of danger” situation in Hungary has belonged to the very nature of the Orbán regime because the Enabling Act is only the peak of the state of emergence legislation since 2015 when it was first introduced with the reference to the migration crisis and it has been prolonged by the two-third majority of Fidesz. By now, according to Hegedűs (2020a: 3) “Hungary has reached a point where the democratic appearance of the regime has evaporated.” This is indeed a new “state of danger” also for the EU, since there are similar developments present in the NMS region as well. The EU has to counter “the autocratization trends” in NMS, since “The deterioration in democracy and rule of law in Central and Eastern Europe has been alarming for some time and coronavirus pandemic can make it much worse.” (Hegedűs, 2020b: 3).

The NMS “recovery” from the coronavirus crisis

On the Europe Day, 9 May 2020 with the official celebrations and declarations the Conference on the Future of Europe symbolically began. Anyway, the ongoing EU crisis management of the coronavirus crisis started in the May 2020 as a gradual process of “recovery” in Europe. This situation has reached a turning point by shifting the focus from the health care issues to the relaunching of the economy, despite the obvious conflicts between the two fields by the threat of the second wave of crisis due to the too early start in the economy as well as by the neglect of “social distancing” in the personal contacts.

Paradoxically, the new member states have suffered less from the direct health consequences of this crisis than most of the older member states, but the socio-economic consequences might have been more severe for them, although the accounts have not yet completed, the final data will be delivered in September 2020 (Eurofound, 2020). For the social inequalities in Europe in general –

including the health inequalities – the case of the migrant or cross border workers has been the most shocking story during the coronavirus crisis. The migrant workers from NMS have been counting millions in the West and they have been employed not only in the industrial and agricultural production, but mainly in services, first of all in the health care service. Thus, the coronavirus crisis with the closed borders has caused a “care crisis” in the West, the health care system in the developed countries has cope with the coronavirus crisis, but the skilled manpower has been missing on other fields of health care, first of all for the care of elderly people. Strangely enough, the rich Western countries in their crisis management has made an exception with the large group of the Eastern care workers – and also with the seasonal workers in agriculture -, since in the midst of the coronavirus crisis, at the time of closed borders, they have been carried by planes and trains to the countries concerned. This absurd situation indicates the health inequality between the old and new member states from a different angle. This action demonstrates a serious capacity or resource transfer of ten thousands of the skilled manpower, doctors and nurses from East to West, which can shed light on the process how and why the NMS have become “health desert” to a great extent.

The coronavirus crisis management has also produced new disadvantages in the economic competitiveness for the NMS. The richer countries, first of all Germany, in order to relaunch their economies have given much more state support for their firms than the poorer less developed countries that has increased the built-in advantages of their enterprises. In such a way, the gap of the international competitiveness between the old and new member states will increase that may create new socio-economic problems and internal tension in the EU. All in all, however, despite the old and new tensions between East and West under the tremendous pressure of the triple crisis the EU can use this opportunity for the European Renewal, since this crisis situation has reached a turning point.

The Report of the European Policy Institutes Network (EPIN) has stated: “It is a ‘moment of truth’ that will define whether the EU was just a single market or a political project where the human factor is prioritised over economics. ... the EU should now take the lead in coordinating the exit strategies across Europe. Public support for greater EU competences in dealing with this public health emergency should encourage member state governments to put more energy into finding ways of sharing both the benefits and the burdens of EU membership.” (Russack, 2020: 2-3). Thus, there is a chance that the EU member states will transform themselves under the pressure of the triple crisis into the “social-ecological states” and accordingly the EU will initiate a new type of green globalization.

Postscript

Hungary has recently been in a process of the hectic authoritarian legislation, the Enabling Act was just one of them. The Orbán government has decided to give it up in the present form under the pressure of the international protest, but its content has returned in several new Acts.

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HUNGARIAN DEMOCRATIC BACKSLIDING IN LIGHT OF THE RECENT EMERGENCY CORONAVIRUS LEGISLATION

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At the beginning of June 2020, it is still difficult to assess what exactly is going on in Hungary in terms of democratic backsliding. It is even truer when the constitutional emergency declared in 11 March 2020 is planned to be terminated in mid-June and a newly created statute-based emergency, which leaves less power at the Government, is to be introduced until the end of the year. There are mainly three positions. The first is that of the Government, which argues that all the emergency governmental measures have been necessary and constitutional. Critics say that the COVID-19 pandemic was used by the Government, more precisely the Prime Minister, to seize unlimited power to govern – which is viewed as a sign of a totalitarian regime.¹ The third opinion dismisses

¹ Gábor Halmai and Kim Lane Scheppele, “Orbán is Still

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neither of these findings. It merely claims that Hungary still demonstrates illiberal constitutionalism² at work,³ which, undoubtedly, has received new impetus or generated “accelerative measures” during the pandemic. As a result, the accelerated backsliding of Hungary could reach a point where the existence of authoritarianism cannot be denied. Nevertheless, the slipping into authoritarianism is, most probably, a gradual process, and it can only be precisely determined whether it has happened retrospectively. That is why this short piece can only embark on identifying four of these stimuli that have caused further deterioration of the Rule of Law, democracy, and human rights protection, as compared to the already hollowed-out substantial constitutional democracy – which is called illiberal constitutionalism.

As the last ten years show, in Hungary, “illiberal legality” means the hollowed-out European Rule of Law, which accentuates the instrumental and opportunistic use of domestic law in both legislation and the application of the law.

Illiberal constitutionalism, as it has been developed in Hungary and Poland, is viewed as the functioning of a public power that upholds the main constitutional structure but lacks a normative domestic constitutional commitment to constraints on public power, even while, to a certain extent, it remains within the boundaries set by EU law and politics, as well as international minimum requirements. In these states, all elements of constitutional democracy, such as the Rule of Law, democracy, and human rights, are observable, yet none prevails in its entirety. Illiberal constitutionalism is not the opposite of

liberal constitutionalism and does not equate to authoritarianism; it departs from the former and tends towards the latter. Thus, constitutional democracy still exists, but its formal implementation outweighs its substantial realization. As the last ten years show, in Hungary, “illiberal legality”⁴ means the hollowed-out European Rule of Law, which accentuates the instrumental and opportunistic use of domestic law in both legislation and the application of the law. Another

characteristic is the weak constraint that the European Rule of Law wields over domestic public power, because it merely requires the implementation and application of EU law, i.e. both the values and the *acquis*. Illiberal democracy in this context means the formal, manipulated, profoundly majoritarian and non-inclusive democracy in which constitutional institutions, such as elec-

tions, electoral rights and principles, representation and accountability, and the central tenets of democratic law-making, are, to a certain extent, misused, abused, or neglected. The illiberalization of the human rights regime, which could also have a constraining effect, is a much slower and more gradual process than the remodeling of the Rule of Law and democracy. First, the positive obligation of the state to provide an adequate legislative and institutional framework for human rights protection is considerably weakened, which is then followed by decreases in the importance of human rights protection, sensitivity to human rights violations, and tolerance towards “otherness”. It is accompanied by attacks on politically and economically sensitive rights like media freedom, academic freedom, and the right to assembly.⁵

the Sole Judge of his Own Law”, *Verfassungsblog*, 30 April 2020, available at: <https://verfassungsblog.de/orban-is-still-the-sole-judge-of-his-own-law/>

2 Drinóczi, T., & Bień-Kacała, A. (2019). Illiberal Constitutionalism: The Case of Hungary and Poland. *German Law Journal*, 20(8), 1140–1166.

3 Tímea Drinóczi and Agnieszka Bień-Kacała, “Illiberal Constitutionalism at Work The First Two Weeks of COVID-19 in Hungary and Poland”, *Verfassungsblog*, 31 March 2020, available at: <https://verfassungsblog.de/illiberal-constitutionalism-at-work/>

4 Tímea Drinóczi, “The European Rule of Law and illiberal legality in illiberal constitutionalism: the case of Hungary”, MTA Law Working Papers, available at: https://jog.tk.mta.hu/uploads/files/2019_16_Drinoczi.pdf

5 Freedom House, “Freedom in the World 2020: Hunga-

This is the context in which the Government declared the constitutional emergency, called “state of danger”.⁶ It asked for and received an unconstitutional unlimited authorization in the Coronavirus Act 2020,⁷ based on which it started to govern by emergency decrees without any meaningful parliamentary oversight by a completely functioning Parliament. All of these matters fit into the logic of illiberal constitutionalism,⁸ the role model of which is the Coronavirus Act. This Act satisfies the Government’s understanding of the Rule of Law, i.e. illiberal legality: it partly implements the partisan constitution but does not comply with the rule on temporal parliamentary supervision of governmental emergency measures. Observing this rule would have been just the pretence of oversight, as the Government has a supermajority in Parliament, but it would have shown willingness to cooperate with the opposition, which does not fit in with the idea of an autocratic populist leader. The elimination of oversight has made democratic control impossible during this crisis, which is also another example of how an illiberal democracy is conceptualized in Hungary. The Coronavirus Act also amends the Criminal Code by creating a new crime concerning spreading “false information” during an emergency. This ambiguously formulated rule, reportedly, was enacted against “fake news”, but it could have a chilling effect on journalism and academia. If this latter happens, this Act and its practice will also exemplify the relativization of human rights. While, with the termination of the emergency, the Coronavirus Act will be withdrawn, the amendments to the Criminal Code stays, but the introduced new crime can only be “committed” during a declared “state of danger”.

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6 Tímea Drinóczi, “Hungarian Abuse of Constitutional Emergency Regimes – Also in the Light of the COVID-19 Crisis”, MTA Law Working Papers, available at: <https://jog.tk.mta.hu/mtalwp/hungarian-abuse-of-constitutional-emergency-regimes-also-in-the-light-of-the-covid-19-crisis>

7 Hungarian Spectrum, “Translation of Draft Law “On Protecting Against the Coronavirus””, available at: <https://hungarianspectrum.org/2020/03/21/translation-of-draft-law-on-protecting-against-the-coronavirus/>

8 *Supra* note 4

The other three “accelerative measures” appear in emergency governmental decrees. These are the designation of “special economic areas”, the suspension of rights of data subjects – as determined in the GDPR (2016)⁹ and the Hungarian data protection and freedom of information Act (2011)¹⁰ – and making timely access to public information impossible.

The Government issued an emergency decree designating a part of an opposition-led town, where the Samsung plant is located, a “special economic area”. This territory became controlled by the county municipalities (where the governing party has a majority) instead of by the municipal government (Göd). This designation has tax and ownership implications as well: it will be the county, instead of the city, that collects taxes and gains ownership of properties previously owned by the town. Critics say that there are at least two political intentions behind this measure, which pretends to assist the defence against the economic effects of the pandemic. First, it is used to render the operation of the opposition-led town impossible.¹¹ Second, the Government wants to support Samsung even against the opinion of residents. This support could be contrary to the EU law on direct state support,¹² and even to the EU temporary measures on state aid during the pandemic.¹³

9 ‘Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)’ (2016) *Official Journal* L119, p.1

10 Act CXII of 2011 on the right to informational self-determination and on the freedom of information, available at: http://njt.hu/translated/doc/J2011T0112P_20190426_FIN.pdf

11 Dániel Karsai, “Let’s not fool ourselves either! Some remarks on Professor Halmi’s and Professor Scheppele’s blogpost”, *Verfassungsblog*, 27 April 2020, available at: <https://verfassungsblog.de/lets-not-fool-ourselves-either/>

12 European Commission, “State aid: Commission opens investigation into proposed public support for Samsung plant in Hungary”, 14 October 2019, available at: https://ec.europa.eu/commission/presscorner/detail/en/IP_19_6078

13 European Commission, “State aid rules and coronavirus”, available at https://ec.europa.eu/competition/state_aid/what_is_new/covid_19.html



Hungarian Constitutional Court (Source: MTI)

This measure is about to be transformed into a statute – still during the emergency. This exercise is not unique: it happens with the rules taking away the revenue of vehicle tax from local governments. At first, it served the fight against the coronavirus; now, as a part of the budget bill, it is a “legitimate” contribution of local governments to the state budget. Both the reasons and the pretence of the Government fit into the logic of illiberalism. Bypassing EU law shows the ever-weakening power of constraint of EU law, and the opportunistic use of the law (illiberal legality) and disregarding the opinion of locals and the opposition, and the principle of local autonomy, indicates an even worsening tendency to disrespect democracy.

Another emergency decree suspended the right to data protection and made it extremely difficult to access information. Its antecedent was yet another emergency decree, which entitled the Minister for Innovation to have access to personal data that are needed for fighting the coronavirus. The new decree makes this authorization unlimited by eliminating the rights of the data subject, and makes it impossible to get timely information about any decisions. Both decrees indicate a hostile attitude toward fundamental rights, especially in a crisis when both

rights (data protection and freedom of information) are essential, notwithstanding the possible need for some limitations.

During the crisis, the “the data protection and freedom of information decree” does not allow authorities, including courts, to take actions for the enforcement of the rights of the data subject under GDPR and the Hungarian Act. Thus, the right to consent to data processing, the right to rectification and erasure, and the right to restriction of processing are suspended. Access to public data is more difficult than it was previously. The authorities have 45 days, instead of the previous 15 days, to comply with a data request, if it is probable that providing the data within 15 days would threaten their ability to perform tasks required because of the emergency. This deadline can be extended by an additional 45 days, instead of the previous 15 days.

The Hungarian constitution (Fundamental Law, FL) allows emergency decrees to suspend statutes and derogate from their provisions. However, it does not mention the possibility of suspension of and derogation from EU law. Nevertheless, the logic of the emergency regime is to provide for a legitimate chance to respond to challenges while not observing rules that

have been adopted during “normal times” for “normal behaviours”. From this perspective, suspension of EU law, which is, according to the FL, a “generally binding rule”, just like statutes but not a “statute”, could be justified. This argument would, however, be quite weak. There does not seem to be a clear answer from a EU law perspective on the suspension of EU law by Member States in a declared emergency. Therefore it might be better to have a look at the human rights aspect of the issue. The constitution allows for irregular restrictions of fundamental rights. In emergencies, the exercise of most of the fundamental rights may be suspended or restricted beyond the extent (necessity and proportionality) specified in the FL. The Hungarian constitutional emergency regime is informed by the principle of necessity and proportionality. It should be applicable for human rights derogations as well, even if the constitution *expressis verbis* does not require the observance of this principle in the provision that allows for the suspension of rights. In the case of data protection and freedom of information, it is doubtful if the emergency measure is necessary and proportionate at all.

These restrictions are applicable only during the constitutional emergency and are to be withdrawn by the termination of the “state of danger”. Nevertheless, the rule on the suspension of rights does not only raise the issue of unconstitutionality but unconformity to EU law, as well, and shows the attitude of illiberal constitutionalism towards human rights.

The continuous operation and the actual behaviour of the packed Constitutional Court (CC), which is ensured by the FL and the implementing Coronavirus Act, also leaves us puzzled – but maybe not surprised. It still delivers decisions, but when an emergency related submission arrives, it does not move fast. The rule came into effect on 31 March, on 7 April an advocate requested the CC to decide on the constitutionality of the criminal conduct of spreading “false information”.¹⁴ His constitutional complaint was

assigned only on 11 May. The CC discussed it on 26 May, but delivered no decision; a new round will, reportedly, be needed to reach a decision. On 15 May, Göd requested the CC to examine the decree on the designation of “special economic areas”. They alleged the violation of the right to property, similarly to the “vehicle tax” case, which was submitted on 13 May by ¼ of the Members of Parliament. The assignment of these cases took a week.

Enforcement mechanisms such as the CC are in place, unaffected by the COVID-19 pandemic – they operate according to the law. The law did not dictate an accelerated procedure during an emergency. So there is no legal possibility for fast(er) decision-making on the pandemic-related issues, even though the CC is able to decide within even two weeks. This operation of illiberal legality could also accelerate the Rule of Law backsliding.

It is concluded that we need to look, with an open mind, at the whole picture that provides for the social, political, and legal context in which the COVID-19 crisis is being managed – which is illiberal constitutionalism. This assessment could change, however, by the actual end of the pandemic or the year 2020, depending on the synergy of all the measures taken. There are already clearly identifiable “accelerative factors” that cannot be ignored. The question remains whether they still exemplify the business-as-usual operation of illiberal constitutionalism or have already led us to the antechamber of authoritarianism. As regards the latter, however, we need to know how the CC will decide in the mentioned cases. If it supports the Government, and the Government will misuse its power during the statute based emergency or continue its illiberal legislative practices, the European community, of which Hungary is a member, should take these changes more seriously than ever.

14 <https://www.facebook.com/daniel.karsai.355/posts/10157877679272931>





HUNGARY CORONAVIRUS EMERGENCY LEGISLATION 2020

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Since its 2004 enlargement to the East, the European Union has faced major crises including the global financial crisis in 2008, the abrupt increase in the number of irregular migrant arrivals in 2015, and finally the coronavirus crisis in 2020. These crises have waged survival tests for political leaders. While many western democracies faced economic vulnerabilities, increasing populism, challenges to political systems, and see electoral defeat of incumbent leaders, the leaders of neo-authoritarian states are looking for ways to

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weather the crises by bolstering their leadership. As an example, the sudden increase in the number of irregular migrant arrivals to Europe in 2015 made extreme right politicians such as Salvini in Italy and Le Pen in France central actors of European politics while it challenged the leadership of Angela Merkel in Germany. Finally, the coronavirus pandemic and the health and economic crisis hitting Europe is posing increased challenges to almost all incumbent political leaders.

It is interesting to draw parallels between the three crises, i.e., financial, migration, and coronavirus, that hit the EU, and Viktor Orbán's ascendance to power and entrenching his total control of Hungary. There seems a pattern as to how Orbán carved a leadership role for him by appealing to public insecurities that such crises have fostered amongst the general population. This short article follows this pattern to understand how leaders can manipulate particular crisis contexts to consolidate their leadership via both formal institutions and strategic discourses, and entice the public opinion to their support amidst crises. To this extent, it reflects on the coronavirus crisis but takes into consideration the institutional and discursive construction of leadership amidst crises. The article investigates how leaders stimulate the processes by which their followers' understanding of the world is produced (van Leuwen 2007, 95) during crises. The theoretical foundation of the article relies on leaders' social knowledge production, legitimation, and inculcation of such knowledge among their followers (van Leuwen 2007; Reyes 2011) to foster collective rationality.

The Hungarian Prime Minister Viktor Orbán has carved out his leadership since 2010 amidst three crises at the detriment of democracy in Hungary. In response to the coronavirus crisis as well, Orbán pursued a self-made moral leadership to manage crisis governance. The enfeebled institutional accountability due to weakened judiciary and parliamentary oversight due to the earlier constitutional changes in Hungary after

2011 have so far allowed Orbán to manipulate crises in a way to discursively present Hungary as a pillar of stability in Europe. This has served his claim for moral leadership even if morality and legitimacy of his executive role lack confluence. Orbán has also exploited public insecurities facing either increasing number of irregular migrant arrivals earlier or the coronavirus crisis recently to establish a knowledge-regime that require swift but authoritative executive action.

Joseph's (2006, 13 in Reyes 2011, 784) elaboration on the persuasive nature of political discourse sheds light on the Hungarian context. Persuasive political discourse allows politicians to present their goals as their audiences' goals while "the inspiring orator can lead a people, or rather mislead them, into believing that the narrow self-interests of the governing party are actually the interest of the people as a whole". In this understanding, "the hierarchical assumption of leadership embodied in a single person at the apex of a unitary organization" is replaced by change agency for a broad range of collaborators and co-creates "a shared vision towards which they work" (Mabey and Freeman 2010, 513). The coronavirus crisis provided Orbán with a chance to set the parameters of a shared vision to fight against the virus while presenting himself as the sole change agency to face the upcoming challenges. Discursively and amidst enfeebled accountability structures including the media, Orbán has assumed his crisis leadership once again.

Similar to the financial crisis (Korkut 2012) and during the time of the abrupt increase in the number of irregular migrant arrivals to Europe in 2015 (Gyollai 2018), during the coronavirus crisis as well Viktor Orbán sought to regulate the everyday narrative around the crisis situation. What is remarkable this time, however, was how his government received a rule by decree power from the Hungarian Parliament effectively indefinitely in March 2020¹ in order to enhance

¹ Német Tamás, Pintér Luca and Presinszky Judit, "Megszavazta az Országgyűlés a koronavírus-törvényt, Áder pedig ki is hirdette", *Index*, 30 March 2020, available at: <https://index.hu/belfold/2020/03/30/koronavirus-tor->



Prime Minister Viktor Orbán met with Charles Michel, President of the European Council (Source: Council of the European Union)

Orbán's crisis leadership. Given the two-thirds control over the Parliament by Fidesz and the dominance of Fidesz-appointed judges at the Constitutional Court, basically the legislation delivered the country to Orbán fully without any checks and balances. In order to guarantee continuity of control in the Parliament, the Fidesz also introduced a clause that whilst the crisis situation continues there can be no by-election or referendum². This was an attempt to hinder the Hungarian opposition from any attempts to tarnish the parliamentary control of the Fidesz government and won against the government thanks to building electoral alliances³.

veny_koronavirus_szavazas_parlament/

2 Fábíán Tamás, "Tisztázunk mindent a koronavírus-törvényről", *Index*, 23 March 2020, available at: https://index.hu/belfold/2020/03/23/koronavirus_felhatalmazasi_torveny_szajbarago/

3 Umut Korkut, "The new mayor of Budapest has shown us how to defeat authoritarian populists like Viktor Orbán", *Independent*, 14 October 2019, available at: <https://www.independent.co.uk/voices/populism-brexit-orban-hungary-budapest-mayor-boris-johnson-a9155226.html>

After two months of emergency rule, Orbán signalled that he is now ready to relinquish his extraordinary powers at the end of May 2020, and his government is looking to shift from "crisis governance" to play "a modest role in pandemic preparedness" according to the government spokesperson Gergely Gulyás⁴. There are some, who may consider this a sign of well-functioning democracy in Hungary⁵. However, if we approach his crisis governance amidst the pandemic and particularly his discursive style, we can grasp the legacy of the rule by decree will leave in Hungary. The discursive construction of his crisis government involved anti-western discourses with praises of technocratic governance at the expense of democratic accountability structures. It is

4 Biró Marianna and Presinszky Judit, "Gulyás Gergely: Szerény jogkörei maradnak a kormánynak a járványügyi készütség idején", *Index*, 28 May 2020, available at: https://index.hu/belfold/2020/05/28/kormanyinfo_frissulo_osszefoglalo_csutortok_koronavirus_veszelyhelyzet/

5 Andreas Stefanovszky, "Letter: In defence of Orbán's pandemic policies", *Financial Times*, 20 May 2020, available at: <https://www.ft.com/content/6f91af5e-f963-46c1-b0b2-12fo818675cf>

important to note that even when the rule by decree is annulled, these two discursively and institutionally ordered governance mechanisms will remain latent in Hungarian public philosophy.

The rule by decree received in March 2020 showed Orbán's pragmatism and how his party could exploit the health panic in the country at the face of the coronavirus crisis. It also presented him with a chance to regain his party's control over politics in the aftermath of its relative weakening at the 2019 local election⁶. Finally, an important point to make is that how a political machine such as Fidesz that has always claimed legitimacy by popular election and its capacity to represent the Hungarian nation thanks to two-thirds majority has exploited crises to entrench an executive rule for the PM. Orbán followed a similar strategy during the self-declared "refugee crisis" as well when faced with the sudden increase

in the number of irregular migrant arrivals to Europe in 2015. The Hungarian government then declared a "state of crisis due to mass migration" giving unfettered powers to the army and the police to quash any unrest⁷. This self-defined extraordinary situation enhanced the government's sway later over the third sector organisations active in migrant integration field and controlled everyday narrative sometimes by

6 <https://www.google.com/search?client=safari&rls=en&q=2019+hungarian+local+elections&ie=UTF-8&oe=UTF-8>

7 Daniel Gyollai, "Hungary – Country Report Legal & Policy Framework of Migration Governance", Working Papers – Global Migration: Consequences and Responses, May 2018, available at: <http://uu.diva-portal.org/smash/get/diva2:1248319/FULLTEXT01.pdf>

circulating its own fake news⁸. One more thing to note is that the Hungarian legislation used the term of "state of emergency"⁹. Recently, the Czech Republic as well turned to state of emergency to face the coronavirus crisis¹⁰. Yet, the Hungarian decree came with severe punishment clauses. Under its provisions, intentionally spreading false information about the virus will be punishable by a prison sentence of up to five years¹¹. The Hungarian false information clause remained very vague

suggesting punishing rumour and alarming news, and also raising questions regarding what happens to those that share these "rumours". In fact, two people were taken into custody for raising rumours with their Facebook posts¹².

Furthermore, the discourse around the Hungarian crisis governance facing the coronavirus was embellished with anti-western tones. At the outset of the crisis, Orbán stated that the coronavirus crisis has

The enfeebled institutional accountability due to weakened judiciary and parliamentary oversight due to the earlier constitutional changes in Hungary after 2011 have so far allowed Orbán to manipulate crises in a way to discursively present Hungary as a pillar of stability in Europe.

8 Umut Korkut, "Hungary sanctions: don't expect Viktor Orbán to back down after parliament vote", *The Conversation*, 13 September 2018, available at: <https://theconversation.com/hungary-sanctions-dont-expect-viktor-orban-to-back-down-after-parliament-vote-103128>

9 *Supra* note 2

10 "3 ülkede daha koronavirüs nedeniyle olağanüstü hal ilan edildi", *Anadolu Agency*, 16 March 2020, available at <https://www.aa.com.tr/tr/dunya/3-ulkede-daha-koronavirüs-nedeniyle-olaganustu-hal-ilan-edildi/1767279>

11 Valerie Hopkins, "Orban handed power to rule by decree in Hungary", *Financial Times*, 30 March 2020, available at: <https://www.ft.com/content/4dc85972-e917-4c8d-9db1-8e72400b9e8a>

12 Pálfi Rita, "Már két embert is elvittek a rendőrök Facebook-poszt miatt a rémhírtérjesztési törvényre hivatkozva", *Euronews*, 14 May 2020, available at: <https://hu.euronews.com/2020/05/13/mar-ket-embert-is-elvittek-a-rendorok-facebook-poszt-miatt-a-remhirterjesztési-torvenyre-h>

exposed the EU's "weaknesses" and failure to help in times of need¹³ and justified his anti-western tone with a trope that "help does not really come from here". Alleging the EU's institutional structures with deficiencies in responding to the crisis, he continued "there are times when you can't be polite" and "he made it clear to EU "squeakers" that now is not the time to "reason" with legal, theoretical issues because there is an epidemic, lives need to be saved". He continued to say that "the high-salaried EU epidemiology office staff" i.e., the

The discursive construction of his crisis government involved anti-western discourses with praises of technocratic governance at the expense of democratic accountability structures.

European Centre for Disease Prevention, failed in January and February months to prevent the pandemic in Europe¹⁴. Instead, Orbán chose to endorse the Chinese credentials of the fight against the coronavirus. Him and the Chinese Ambassador to Budapest met a Chinese plane with medical supplies at the Budapest Airport earlier in the crisis while the Hungarian media provided the images of Orbán and the Ambassador of China meeting each other with elbow greetings to emphasise the conviviality between the two regimes¹⁵.

13 Lili Bayer, "Viktor Orbán criticizes EU's coronavirus crisis response", *Politico*, 27 March 2020, available at: <https://www.politico.eu/article/coronavirus-viktor-orban-criticizes-eu-crisis-response/>

14 "Szombattól érvényes kijárási korlátozást vezet be a kormány", *hirado.hu*, 27 March 2020, available at: <https://hirado.hu/belfold/kozelet/cikk/2020/03/27/kijarasi-korlatozast-vezet-be-a-kormany>

15 "Videóból derült ki: fontos döntéseket hoz Orbán Viktor és az akciócsoportok", *Portfolio*, 25 March 2020, avail-

To conclude the Hungarian case shows how amidst the crisis, rather than ensuring the accountability of their decisions, governments can exclude parliamentary control over their course of action. In fact, this exclusion imbued with anti-western discourses in the case of Hungary aimed to demote an accountability-oriented response style to the pandemic in order to promote technocratic governance as the most effective means. This is the reason why while Orbán may now be relinquishing the rule by decree the legacy of his response will remain and qualify how governments can fight crises "successfully".

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DE-DEMOCRATIZATION IN HUNGARY: EMERGENCY RULE AND AUTHORITARIANISM

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Is COVID-19 the first virus to kill a democracy? Recent events in Hungary, where prime-minister Orbán has been ruling by decree since March 2020, seem to suggest so. Typical for this pandemic, the virus has proven most lethal in a patient that was already ill, critically ill according to the many critics of Hungary's steady de-democratization since Orbán returned to power in 2010.¹ Earlier developments have been analyzed elsewhere, this contribution will examine the past two years leading up to the present.² The key question

¹ Recent qualifications include "Caesarian politics" (Sata and Karolewski) and "tyranny", defined as a regime in which "a single person (generally male) decides everything that happens in a country and nothing can happen against this person's will" (Heller, p.2). See: Sata, Robert and Ireneusz Pawel Karolewski, 2020, "Caesarian Politics in Hungary and Poland". *East European Politics*, 36(2), 206-225; Heller, Agnes, 2019, "Hungary: How Liberty Can Be Lost". *Social Research*, 86(1), 1-22.

² Bogaards, Matthijs, 2018, "De-Democratization in Hungary: Diffusely Defective Democracy". *Democratiza-*

BTI indicator	Democratic defect	2010	2012	2014	2016	2018	2020
Free elections	Exclusive democracy	10	9	9	7	7	6
Association rights	Exclusive democracy	10	9	9	7	7	7
Freedom of expression	Exclusive democracy	10	8	7	6	6	5
Independent judiciary	Illiberal democracy	9	8	7	6	6	6
Civil rights	Illiberal democracy	9	8	8	8	7	7
Separation of powers	Delegative democracy	10	7	6	5	5	5
Abuse of office persecuted	Delegative democracy	8	8	8	7	6	5
Effective power to govern	Tutelary democracy	10	10	10	10	10	10
Democracy status		9.25	8.35	7.95	7.6	7.15	6.80
Democracy classification		Dem.	Dem.	Defect.	Defect.	Defect.	Defect.

Table 1: Defective democracy in Hungary: Quantitative indicators (Sources: Own compilation based on BTI data and methodology described in Bogaards (2018))

Legend: Dem. = democracy in consolidation, Defect. = defective democracy.

is what the emergency law and subsequent legislation mean for the state of Hungarian democracy. Concretely: is Hungary a defective democracy, an electoral authoritarian regime, or an autocracy?

Table 1 provides an overview of Hungary's scores on the main dimensions of democracy as recorded by the bi-annual Bertelsmann Transformation Index (BTI).³ The starting year is 2009, one year before Orbán returned to power with a landslide electoral victory that gave him the qualified majority in parliament to unilaterally adopt a new constitution. The last

year for which the BTI has data is 2019. As can be seen in the second column of table 1, the BTI indicators are organized by type of democratic defect. Following the German political scientist Wolfgang Merkel, we can distinguish between four types of defective democracy: exclusive, illiberal, delegative, and tutelary.⁴ If there is a problem with voting rights, free, fair and competitive elections, or political participation rights, than this points to an exclusive democracy. If civil rights are not fully protected and the courts do not guarantee equal access and treatment, we are dealing with an illiberal

tion 25(8), 1481-1499.

³ Available at: <https://www.bti-project.org/en/meta/downloads.html>.

⁴ Bogaards, Matthijs, 2009, "How to Classify Hybrid Regimes? Defective Democracy and Electoral Authoritarianism". *Democratization*, 16(2), 399-423.

democracy. If horizontal accountability mechanisms do not work properly, normally because the executive is overly powerful, this indicates a delegative democracy. Finally, if the power to govern is restricted by non-democratic actors, often the military, then we have a tutelary democracy, also known as a democracy with reserved domains.

Different from the defective democracies described previously in the comparative politics literature, Hungary exhibits defects in all four respects, making it a “diffusely defective democracy”. The only criterion where Hungary still has full marks is effective government, which is correct for the moment, but utterly misleading in case the opposition would come to power. The Fidesz-controlled parliament has adopted a variety of institutional barriers that make it difficult to change policies and institutions without the kind of super majority Orbán’s party has been enjoying in the past decade. These measures include the excessive use of cardinal laws that need a qualified majority to be changed, the introduction of new organs that can sabotage the next government, and the appointment of ruling party loyalists to key positions for unusually long tenures. In other words, Orbán has already tied the hands of the next government.⁵

Judged by the overall BTI score, Hungary in 2019 was still a “defective” democracy (6-7.99) not a “moderate autocracy” (4-5.99).⁶ But this is not the whole story. Democracies can stop

⁵ See the detailed BTI country report, available at: https://www.bti-project.org/content/en/downloads/reports/country_report_2020_HUN.pdf.

⁶ However, if Hungary is downgraded on the criterion of effective government control, then most likely the overall score would recode the regime as a “moderate autocracy” since 2019.

being democratic in multiple ways. For each indicator in table 1 there is a separate threshold below which a country is considered autocratic. For elections the tipping point is a score lower than 6, for the others a score lower than 3. Because recent elections in Hungary have been free, but not fair, Hungary is on the edge. On all other indicators, there still seems to be a safe distance. But that was before the government used the pandemic to award itself emergency powers. What is the situation now?

In March 2020, prime minister Orbán asked parliament for emergency powers to battle the pandemic and the resulting economic crisis. The two-thirds majority of the ruling party, in alliance with the small Christian Democratic People’s Party (KNDP), duly voted to marginalize itself, allowing the government to rule by decree. There is no time

limit to the emergency powers, though a two-thirds majority of parliament could conceivably at any time change or repeal the enabling act. It is doubtful that the process and outcome are constitutional or that there ever was a need for this kind of drastic measure.⁷ What interests us here is how the emergency powers and subsequent government action might affect the quality of democracy using the framework introduced above.

Table 2 provides some examples of the impact of Orbán’s handling of the pandemic on the state of democracy in Hungary. The information shows that at least six out of eight criteria are affected and three out of four types of democratic defects. Orbán has used his emergency power to issue over one hundred decrees by now. Only

⁷ Hegedüs, Daniel, 2020, “Ungarns Autoritärer Notstandstaat: Machtergreifung durch Pandemiebekämpfung”. *Osteuropa*, 70(3-4), 33-48.

There can be no *electoral* authoritarianism without elections and these have been suspended. For now, at least, “Orbán governs as a dictator”.

Democratic criterion	Impact of emergency legislation
Free elections	No elections or by-elections
Association rights	?
Freedom of expression	Criminalization of critical reporting on the government's handling of the pandemic
Independent judiciary	No cases will reach the Constitutional Court
Civil rights	No access to courts, military control over companies and hospitals
Separation of powers	Concentration of all legislative power in the executive
Abuse of office persecuted	Increase in corruption, no access to the courts
Effective power to govern	-

Table 2: How Orbán's Handling of the Pandemic Affects the State of Democracy (Source: Own compilation based on sources quoted in the text)

some measures can be highlighted here. First, the military was called in to run hospitals and what the government termed key companies. Tellingly, “the Coronavirus Operational Group consists of many more army commanders in uniforms than healthcare professionals”.⁸ Second, “in Hungary these days, the trial-level courts are effectively closed – or rather selectively opened depending on whether Orbán wants them to be”.⁹ This also makes it unlikely the Constitutional Court, in any case packed with Fidesz loyalists, will get new cases. Third, the concentration of all legislative powers in the executive has undone any separation of powers. Whether parliament takes back control is in the hands of the government and its ruling party. This fact alone pushes Hungary into the realm of electoral authoritarianism. Sadly, even that qualification might be too generous. There can be no *electoral* authoritarianism without elections and these have been suspended. For now, at least, “Orbán governs as a dictator”.¹⁰

At the end of May, the Hungarian government introduced two bills in parliament aimed to succeed the enabling act.¹¹ The new legislation would allow the Chief Medical Officer, appointed by the government, to request the government to declare a “state of medical emergency” that gives the government even more unlimited decree power than the first enabling act. Parliament is not even asked after the fact to turn executive decrees into proper laws, but sidelined altogether. The government itself decides whether it wants to renew the emergency at six-month intervals and whether it deems the country safe for elections. The government thus appears to continue its practice of “fluid legislation”, meaning that “whenever the government ran into a legal obstacle, the leadership did not modify the intended policy but instead it changes the laws to serve day-to-day politics”.¹² The result is “autocratic legalism”.¹³

⁸ Kovács, Kriszta, 2020, “Hungary’s Orbánistan: A Complete Arsenal of Emergency Powers”. *Verfassungsblog*, available at: <https://verfassungsblog.de/hungarys-orbanistan-a-complete-arsenal-of-emergency-powers/>.

⁹ Halmai, Gábor and Kim Lane Scheppele, “Don’t Be Fooled by Autocrats”. *Verfassungsblog*, available at: <https://verfassungsblog.de/dont-be-fooled-by-autocrats/>.

¹⁰ *Ibid.*

¹¹ Halmai, Gábor, Gábor Mészáros, and Kim Lane Scheppele, 2020, “From Emergency to Disaster”. *Verfassungsblog*, available at: <https://verfassungsblog.de/from-emergency-to-disaster/>; “Never-Ending Story? Rapid Analysis of the Bills T/10747 and T/10748”, available at: <https://www.helsinki.hu/en/never-ending-story/>.

¹² Miklóssy, Katalin, 2018, “Lacking Rule of Law in the Lawyers’ Regime: Hungary”. *Journal of Contemporary European Studies*, 26(3), 270-294, this quote at p.278.

¹³ Scheppele, Kim Lane, 2018, “Autocratic Legalism”. *The University of Chicago Law Review* 85(2), 545-583.



Military police officers on patrol in Budapest (Source: AP)

In conclusion, for most years after Orbán's return to power in 2010, Hungary has been a defective democracy. The government's resort to emergency rule following the pandemic has now pushed the regime over the threshold to authoritarianism. As long as elections are suspended, Hungary has to be regarded as an autocracy. When elections are possible again, Hungary will have moved into the category of electoral authoritarianism.¹⁴ This is without precedent in the European Union, which has a proud tradition of democracy promotion abroad but so far has shown less resilience to de-democratization among its own members.¹⁵ It is too early to tell how permanent the damage of the emergency powers to Hungarian democracy

will be, but there is little reason for optimism: "In Hungary, the regime has done and will continue to do everything possible to make itself irremovable".¹⁶

¹⁴ Levitsky and Way date this regime change earlier, but that is mostly because their typology does not include diminished subtypes of democracy, making it more likely that regimes that fall short of liberal democracy are classified as "competitive authoritarian". Levitsky, Steven and Lucan Way, 2020 "The New Competitive Authoritarianism". *Journal of Democracy*, 31(1), 51-65.

¹⁵ Kelemen, R. Daniel, 2020, "The European Union's Authoritarian Equilibrium". *Journal of European Public Policy*, 27(3), 481-499.

¹⁶ Kornai, János, 2016, interview published in *Hungarian Spectrum*, available at: <https://hungarianspectrum.org/2016/12/29/vulnerable-democracies-an-interview-with-janos-kornai/>.

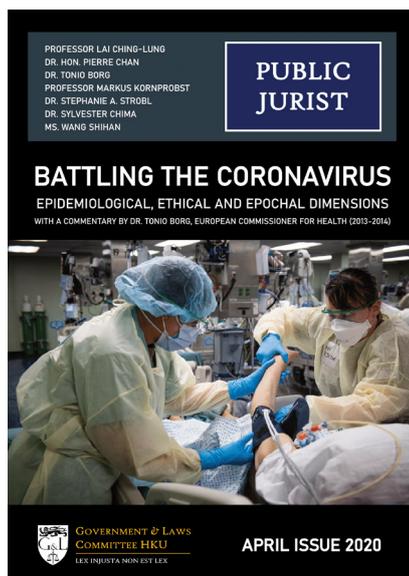


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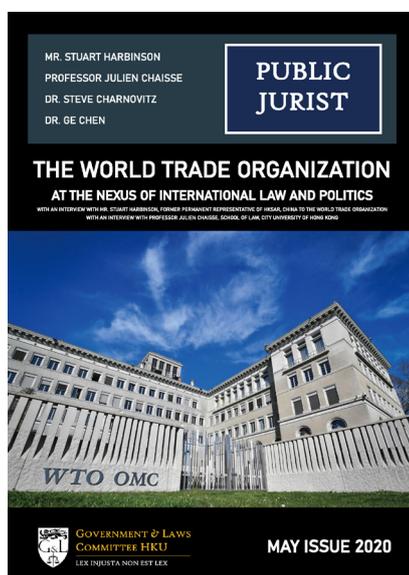
This symposium on 2020 Russian Constitutional Amendments brings together global scholars from Russia and beyond and attempts to unearth the meanings of these amendments. Contributors include Professor Richard Sakwa, Professor Eugene Huskey, Professor Sanjay Kumar Rajhans, Mr. Punsara Amarasinghe and Dr. Emil Avdaljani. Associate Professor Alexey D. Muraviev, Associate Professor of National Security and Strategic Studies at Curtin University, Western Australia was also interviewed on the implications of the amendments towards the geopolitical strategies of Russia as well as prospects of Russian Democracy, among other topics.



APRIL ISSUE 2020

BATTLING THE CORONAVIRUS

This issue of *Public Jurist* explores the political and legal implications brought by the novel coronavirus, both domestically and internationally. Illuminating insights are offered from interviews with Professor Lai Ching-lung, Chair of Medicine and Hepatology at the Li Kai Shing Faculty of Medicine, The University of Hong Kong, and Dr. Hon. Pierre Chan, Legislative Council Member for the Medical functional constituency. Moreover, remarkable articles from renowned scholars, namely former European Commissioner for Health (2013-2014) Dr. Tonio Borg, Professor Markus Kornprobst, Dr. Stephanie A. Strobl, and Dr. Sylvester Chima, explore the global significance of COVID-19.



MAY ISSUE 2020

THE WORLD TRADE ORGANISATION

This issue of *Public Jurist* explores the role and authority of the World Trade Organization (WTO) in an increasingly polarizing international political landscape, including delving into Hong Kong, China, and the United States. The issue features in-depth discussions from interviews with Mr. Stuart Harbinson, former permanent representative of HKSAR, China to WTO, and Professor Julien Chaisse, celebrated scholar on international economic law. Renowned scholars Dr. Ge Chen and Dr. Steve Charnovitz contributed illuminating commentaries on the WTO's legacy and future.

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