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Showing true illiberal colours –

Rule of law vs Orbán's pandemic politics

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Abstract

This Policy Insight examines the Hungarian government's responses to the coronavirus pandemic and their impacts on the rule of law. It argues that the pandemic does not create autocracies, but it shows more clearly their true illiberal colours.

The paper assesses the scope of the so-called 'Enabling Act' granting the government the power to rule by decree and its damaging implications for the effective democratic control of executive actions and other checks and balances such as media pluralism and freedom of association. The analysis argues that the Hungarian government is unequivocally violating the EU founding principles enshrined in Article 2 of the Treaty on European Union and its current pandemic politics are making this ever more transparent.

The paper recommends more EU centralisation and interinstitutional cooperation in the assessment and scrutiny of all member states' compliance with the trinity of the rule of law, democracy and fundamental rights. It concretely suggests first, the timely enforcement of EU standards by the European Commission and the Luxembourg Court through rule of law infringement proceedings, and second, the adoption of an interinstitutional EU Periodic Review (EUPR) on the rule of law, democracy and fundamental rights.

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1. Introduction

Coronavirus politics are spreading across the European Union. As a result of Covid-19, at the time of writing more than half of EU member states have introduced "states of emergency, alarm or danger" derogating fundamental constitutional checks and balances, individual rights and civil liberties (Carrera and Chun Luk, 2020). Authoritarians across the world are seizing the chance to introduce old and other 'creative' measures, from large-scale digital surveillance to doing away with national parliaments, judicial control and freedom of the press under the pretext of fighting the pandemic.

Extraordinary times might call for extraordinary measures, but they must not mean dismantling the founding principles liberal democracies are based on, such as the trinity of democracy, the rule of law and fundamental rights. These three values cannot be separated without inflicting harm on one another (Carrera, Guild and Hernanz, 2013).

Democracy must be understood in a context of checks and balances for legitimate executive action. The essence of the rule of law and fundamental rights are meant to prevent abuse of power and human rights violations.

Democracy is about enabling and conducting meaningful critical debates and governments having to justify their actions. This is only possible if people have access to information (Bayer et al., 2019; Blockmans and Russack, 2020), and if effective venues for democratic accountability and judicial control are effectively sustained. Scientific knowledge, cost-benefit analyses and impact assessments constitute a central tenet and need to be reinstated as rational elements of the system. Individuals need to remain alert to the scope and effects of both old and new policy measures on their lives and liberties.

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 its impacts on the rule of law and human rights. Moreover, placing emphasis on one policy or another is a government prerogative, but the procedure culminating in making that decision should be transparent as well as open to scrutiny and regular reassessment.

When people are frightened or panic – whether rationally or due to government- or media-induced fears, or a combination of these – they are ready to abandon rational decision-making and confer their most cherished liberties and rights (for which previous generations fought so hard) to a 'father figure' who claims to protect them. Also, while presented as 'temporary', such measures may in fact become more permanent and long term than what is initially portrayed, and may be a point of no return.

The Hungarian government has come under the spotlight after passing the so-called 'Enabling or Authorisation Act', declaring a state of danger in the country owing to Covid-19. But Hungary, once a poster child of transition, ceased to be a liberal democracy a long time ago. Pandemics never create autocracies – rather, they reveal such a system's true colours.

This paper examines the Hungarian government's political responses to the coronavirus pandemic. After briefly showing how the Hungarian government has abused each crisis during the past 10 years (section 2), the 'Enabling Act' is summarised, listing both what the law claims to do, and what it actually does (section 3).

The paper argues that Hungary has violated the basic tenets of European integration, and endangers the Union. Section 4 examines the EU responses so far and concludes that action by the EU institutions and by political party groups in the European Parliament has come too late, been too little and too political (Carrera and Bárd, 2018). Due to its silence and lack of timely enforcement, the Commission has rendered itself irrelevant in upholding the rule of law (Bárd and Carrera, 2017).

Section 5 concludes by considering what EU instruments and procedures could be used to respond to rule of law decline. It argues that more EU centralisation in the assessment, scrutiny and support of member states' compliance with the rule of law and fundamental rights is crucial for the Union to have any future as a democratic value-based community.

In particular, the EU should activate rule of law infringement proceedings enforcing EU standards, under the scrutiny of the Court of Justice of the European Union (CJEU). There should also be a legally binding interinstitutional agreement between the Commission, the European Parliament and the European Council operationalising a common and consistent EU Periodic Review (EUPR) of the state of the rule of law, democracy and fundamental rights.

2. A pandemic does not create autocracies

Let us recall that Hungarian democracy has been in decline for at least a decade. Today, all relevant international and European reviews and indices show that it has ceased to be a liberal democracy based on the rule of law.

There has been a continuous decline, and by now Hungary is considered to be the worst member state, whether one consults the World Justice Project Rule of Law Index (World Justice Project, 2020), rankings by Sustainable Governance Indicators, the Bertelsmann Stiftung's assessment with regard to civil rights and political liberties, the academic freedom index (Kinzelbach et al., 2020) or implementation of judgments by the European Court of Human Rights.

Last year a point was reached, where – according to a Freedom House report – for the first time since the democratic transition started in 1989-90, and for the first time in EU history, an EU member state was downgraded from a free to a partly free country (Freedom House, 2019).

It is not that declared crises create autocracies. Hungary has for a long time abandoned values it promised to share and promote when acceding to the EU and signing the Lisbon Treaty respectively. The pandemic has just made the shift towards authoritarianism more visible.

Prime Minister Viktor Orbán is famous for jumping on every political crisis, whether resulting from a financial, migration or health emergency, using and abusing it. Constitution-making, for example, was not on the agenda during the 2010 election campaign. Yet, the Fidesz party justified it right after forming a government by a need to respond to the 2008 financial crisis, to fight a wage war and to lower Hungary's public debt.

During the last decade, the Hungarian government ceased to be a liberal democracy and to uphold EU values. The Coronavirus pandemic has made this authoritarian move and its impacts more visible.

In a dubious procedure it then passed the new controversial constitution, entitled Fundamental Law, entering into force on 1 January 2012 (Bárd and Pech, 2019). The same 'crisis' also justified preventing the Hungarian Constitutional Court (HCC) from reviewing financial laws, which continues today (Kovács, 2020b).

In 2015, another state of emergency was declared due to the so-called 'refugee humanitarian crisis' on the basis of a vague Article 15(1) of the Hungarian Fundamental Law authorising the government to exercise powers that are not expressly conferred to another body. The respective law introduced the term "crisis situation caused by mass immigration", which can be declared if the number of asylum seekers in Hungary is a least 500 per day for a month, 750 per day for two weeks or 800 per day for a week. The emergency has been prolonged again and again up to now, even though asylum seekers can no longer enter Hungary, and indeed the average Hungarian has never met one (Reporting Democracy, 2020).

The next 'war' is waged against another invisible enemy, but this time a very real one, Covid-19. Applying war rhetoric, the Coronavirus Operational Group set up by the Hungarian government consists of more military than healthcare professionals (Kovács, 2020a). And despite the fact that what we are witnessing is far from a war-like situation, the use of this political rhetoric means in practice an increased military presence in strategic companies, in critical industries and hospitals. Anyone who is under curfew must stick a large red sign on her door in a rather stigmatising manner, invoking the worst memories of another European war.

The use of war rhetoric by this government translates into an increasing military presence in strategic companies, critical industries and hospitals.

3. The Hungarian 'Enabling Act'

The government declared a 'state of danger' via Government Decree 40/2020 of 11 March 2020, again on the basis of the vague Article 15(1) of the Fundamental Law. The decree also cited the state of danger clause in Article 53 as a legal basis, but that provision does not list a pandemic or epidemic as a source of danger, which explains the additional reference to the flexible constitutional clause of Article 15(1).

Accordingly, 15 days after its introduction, parliament has the power to extend the force of governmental emergency decrees. As a general rule, decrees cease to be in effect after 14 days, and prolongation of their effect can happen for a limited period. Fidesz has the required parliamentary majority to prolong the state of danger; moreover, opposition parties would have agreed to extend the rule by decree for 90 days. But Orbán wanted more.

The latest law causing international uproar was put forward on 20 March 2020, when the government tabled a bill to fight the epidemic. Civil society organisations objected and opposition politicians condemned the bill. More than a 100,000 signed a protest letter.

On 23 March 2020, the bill "on protecting against the Coronavirus" – termed the 'Enabling Act'[1]– was debated in parliament through an urgent procedure. For a bill to pass via an urgent procedure, a four-fifths majority is needed, whereas Fidesz only has a two-thirds majority in parliament. It was expected therefore that the urgent procedure would fail, as the opposition would reject the bill.

The political idea anyway was not to have it adopted, but to be able to blame the opposition for hindering the fight against the virus. Abandoning the idea of an urgent procedure and following the ordinary rules, the law was easily passed by the requisite parliamentary majority of two-thirds on 30 March 2020. It was immediately signed by the President of the State and published in the *Official Gazette* as Act XII of 2020.

Lawmakers envisaged that parliament might not be able to convene, and therefore the Act, while not suspending parliament, introduces rule by Executive Decree, without a sunset clause, i.e. for an indefinite period. The enforcement of statutory provisions can be suspended or abrogated, and additional extraordinary measures can be implemented by decree.

The government will brief parliament on a regular basis on the steps taken; should parliament later indeed be suspended, the Speaker of the House and party group leaders would be informed. The law makes the opposition voiceless and invisible.

The constitutional requirement enshrined in Article 53(3) of the Fundamental Law for the government to extend a state of danger upon a parliamentary authorisation has been overwritten by the ruling parliamentary supermajority giving *carte blanche* authorisation for the future. The 'Enabling Act' has now extended the decrees' applicability until a parliamentary majority *repeals* them, i.e. until Fidesz has a simple majority in parliament. Parliament may in theory withdraw this authorisation, but it is a highly unlikely scenario as long as Fidesz is in government.

The Enabling Act introduces rule by executive decree for an indefinite period and makes Hungary's parliamentary opposition voiceless and invisible.

The Act incorporates a provision on necessity and proportionality in Article 2(2). But this is of little relevance, since Article 54(1) of the Fundamental Law allows for the abandonment of these principles under a special legal order – including a 'state of danger' – except for very few rights such as human dignity, the prohibition of torture and some procedural guarantees.

Midterm elections and referenda must not be held during the state of danger.

Importantly, an amendment to the Criminal Code (Article 337) makes it a crime for anyone before grand public claiming or spreading a falsehood or distorted truth in relation to the

[1] The term 'Enabling Act' is now used unanimously by all Hungarian media sources, scholars, politicians and indirectly by the Hungarian government (Hungarian Government, 2020b). It invokes the darkest memories of European past. Hitler's *Ermächtigungsgesetz* was adopted in 1933 on the exact same day.

emergency in a manner that is capable of alarming or agitating a large group of people at the site of the emergency. Punishment is up to three years of imprisonment. Should the same behaviour in an extraordinary situation jeopardise or prevent the efficiency of protection, the sanction is one to five years of imprisonment.

This provision has been criticised for being open to abuse. That is especially so given that the independence of the judiciary is compromised and the office of the prosecutor also suffers several shortcomings – for going after the remaining independent journalists reporting about the disease and its handling in an already distorted media landscape in the country (Bárd and Bayer, 2016).

An amendment of the Criminal Code poses challenges to freedom of expression and media pluralism and is open to abuse.

Another amendment to the Criminal Code (Article 322/A) targets those who obstruct government measures to fight an epidemic with imprisonment of up to three years. Even though the government insists that the measures are 'temporary', and will only last as long as the epidemic lasts, the duration is entirely up to Orbán, and the criminal law measures are permanent changes to the Criminal Code.

Hungary's Constitutional Court, which is discussed in Article 5 of the 'Enabling Act', is a theoretical check on governmental powers. Its switch to operating online – unlike that of parliament – is foreseen. But since 2011, in practice it has been nothing but the puppet of the government. It is not a meaningful check. Even if it were, there is no *actio popularis* any more, i.e. for a constitutional complaint to be filed, applicants' direct involvement in the controversy is required, meaning that cases have to go through ordinary courts first, which in turn have limited operations due to the pandemic. So, it became increasingly difficult for a constitutional complaint to effectively reach the HCC.

Hungary's Constitutional Court is no longer independent from the government and does not constitute an effective judicial check on executive action.

The individuals who can submit files to the HCC are serving at captured institutions and therefore are unlikely to make this move. A quarter of the MPs may also file a complaint, however, due to the capture of the HCC, they are unlikely to succeed.

4. Teleological rule of law in action

The novelty of the 'Enabling Act' is that through it, the Hungarian government has abandoned even the semblance of democracy. One could decipher the real relevance of laws by checking their objectives against Martin Krygier's teleology of the rule of law. His claim is that the rule of law is about tempering power and arbitrariness (Krygier, 2016). If this is not the objective of a law, then it should be constitutionally suspect. With the 'Enabling Act', this tedious exercise can be spared and the bad faith of the lawmaker is obvious.

The alleged public policy goal of the Hungarian authorities has been to address the pandemic. As Justice Minister Judit Varga stated, "the measures Hungary has taken are necessary, proportionate and limited to fighting the pandemic" (Varga, 2020). Fidesz officials rather

arrogantly dismiss any doubt about this and government criticism, by invoking the state of danger and contending that this is their only priority now. As Minister of State Zoltán Kovács said, "we're in a state of emergency, by the way. Lives are at stake" (Kovács, 2020).

Orbán also used very plain language when addressing – or rather refusing to address – the concerns of the European People's Party secretary general: "With all due respect, I have no time for this!" And in his response to the concerns formulated by the secretary general of the Council of Europe, Orbán finishes this line of thought: "If you can't help, the least you can do is not hinder us".

But if the government's objectives were honest, why was there a need to do away with parliament, which is anyway on the government's side? Fidesz had all the tools and power available to fight the virus even before adopting the 'Enabling Act'. The use of extraordinary powers would have been agreed by the opposition, as long as there was a temporal limit to it. Logically, there must have been different objectives – serving many interests – behind insisting on an indeterminate period of the state of danger.

The declaration of indefinite extraordinary powers serves other government interests than those of addressing the Covid-19 pandemic.

If we look at the government's first steps, our suspicion about hidden objectives becomes justified. The real aim seems to be a power grab and even more control of government criticism on the one hand, and scapegoating on the other. The Hungarian state has been labelled a kleptocracy, with little money left for health care (*The Economist*, 2018). Hospitals and medical personnel are gravely underfinanced. Should the epidemic hit Hungary hard, the system is highly unlikely to be able to tackle it.

And for this critical political scenario, as usual, a scapegoat is needed. For once, refugees do not serve this purpose; George Soros is still referenced frequently but this has become increasingly embarrassing, especially since he has donated €1 million to Budapest to fight the epidemic. Thus, it is more important than ever to have a grip on journalists potentially reporting the government's handling of the pandemic and able to transmit the message that the opposition objects to it.

Other steps include classifying business deals with China; constructing a museum quarter in the capital, which has so far been subject to a long and bitter controversy between Budapest City Council and the government; providing free real estate to a foundation belonging to Mária Schmidt, a close Fidesz ally and historian contributing heavily to Fidesz's identity politics; and increasing the number of supervisory board members over theatres from three to five, with three being appointed by the state. And the list goes on (*Hungarian Spectrum*, 2020).

Another controversy relates to government measures that will prevent transgender people from having their gender correspond to their identity on official documents after transitioning (*Euractiv*, 2020). As a consequence, they will not be able to change their names either. Such a move is not only irrelevant from the viewpoint of the pandemic, but is also contrary to the case law established two decades ago by the European Court of Human Rights.

Concrete legal steps were made to gain political and financial profits. Through Decree 128/2020, the government brought the packaging company Kartonpack under state control. Once the decree was published, the government commissioner in charge of Kartonpack fired the board of directors without consulting the shareholders – an obligation under Hungarian company law – and replaced them with new ones, the majority of whom are important Fidesz members (Halmai and Scheppele, 2020).

The government issued Decree 135/2020 ruling that "special economic zones" could be created in areas deemed to be of national importance. In these areas, the local industry tax will not be collected by the town municipalities in the future, but by the county administration. With Decree 136/2020, the government established one such zone in a town with an opposition mayor, the city of Göd, where a large Samsung company is located. Göd consequently loses the business tax that was earlier collected from Samsung – which is one-third of its overall budget (Karsai, 2020).

A further likely objective is testing the self-declared system of illiberalism by "giving up any pretence of being a democratic leader" (*Washington Post*, 2020). The 'Enabling or Authorisation Act' turns a "competitive autocracy [into] 'authoritarianism without adjectives'" (Hegedüs, 2020). This move is important in building networks with other wannabe authoritarians to see how the EU reacts, or more importantly whether it reacts at all or if one can get away with an autocracy with impunity. In the event of EU inaction, it might "kick-start a constitutional pandemic", and jeopardise the European Union (Uitz, 2020).

5. EU responses so far

The EU has acted like a paper tiger in the past. The building of an authoritarian regime in the heart of Europe has happened in broad daylight, with the EU unable to put a halt to backsliding, or even the enabling of backsliding via political and financial support. Responses to the 'Enabling Act' illustrate this point too well.

In an interview, Věra Jourová stated that the Commission "will have to wait and see how the increased emergency powers of the government are applied. So far the Hungarian emergency law is comparable with other laws in EU." Commission President Ursula von der Leyen gave a statement about the importance of values, but without mentioning Hungary expressly (European Commission, 2020a).

A group of initially 13 member states issued a statement in a similar vein (*Politico*, 2020), but since they also failed to mention Hungary by name, in a rather sarcastic move, Hungary joined the signatories, thereby ridiculing the whole action and rendering it meaningless (Hungarian Government, 2020a). As Justice Minister Varga cynically tweeted, the text "felt so empty without us".

This move probably made von der Leyen issue another statement calling the problem child by its name before she was trolled too, but did not go further than expressing her concern about the situation. The European People's Party (EPP), which has been trying to eject Fidesz for more

than a year now, has been busy drawing and redrawing red lines that Fidesz never fails to cross, but cannot meaningfully sanction it.

EU Justice Commissioner Didier Reynders promised to evaluate the new law with a special focus on the criminal law provisions. The Commission also emphasised the importance of free speech and journalism in times of crises. Yet, rule by decree should be treated at least as seriously as amendments to the Criminal Code (*EUobserver*, 2020).

Thankfully, the Commission has also stressed that all emergency measures have to be temporary, and closely relate to the declared emergency they seek to tackle. But its action will only be successful if the Commission – and all other EU institutions for that matter – use the tools they have available by way of the Treaties.

In this respect, it is notable that the informal video-conference of the EU ministers of justice organised under the Croatian Presidency on 6 April 2020 discussed the impact of the coronavirus pandemic on the judiciary (Croatian Presidency, 2020). The ministers of justice underlined that "any extraordinary measures taken should be in line with the fundamental values of the Union", and acknowledged the European Commission's first Rule of Law Annual Report expected to be published during September 2020 (European Commission, 2020b; European Commission, 2020c).

The Council of Europe Venice Commission concluded that past experience has shown how the gravest human rights violations happened during declared "states of emergency" (CoE Venice Commission, 1995). As the EU Fundamental Rights Agency (FRA) Director Michael O'Flaherty, writing in a FRA Bulletin on the "Coronavirus Pandemic in the EU – Fundamental Rights Implications" argues, "the current situation powerfully underlines that human rights and public health are not an 'either/or' choice" (FRA, 2020).

The EU has been so far unable to halt rule of law backsliding by the Hungarian government. Timely and effective enforcement of EU values must take preference over diplomatic strategies.

The argument that this is "not the moment to pick a fight" is ill advised (*New York Times*, 2020). This is even more so as the end of the Covid-19 pandemic cannot be foretold. If there is one lesson to be learned from rule of law backsliding in Hungary over the past 10 years, it is that time is on the side of those who want to dismantle the values of Article 2 of the Treaty on European Union (TEU). Responding later will be too late.

6. Conclusions and recommendations

The EU has a plethora of instruments ready to be deployed any time as part of an EU rule of law toolkit. These instruments might not compel authoritarian governments to make a U-turn, but they could slow down constitutional capture. It could put an end to dismantling the EU from within and also to the absurd situation of supporting autocracies in violation of EU values out of EU funds.

Currently, all EU institutions, including the Commission as the guardian of the Treaties, continue to believe in the force of political dialogue, and prefer this over other techniques of enforcing application of the values enshrined in Article 2 TEU.

All EU institutions must recognise that the discursive approach might work well with the member states that voluntarily respect the rules of the game and in the overall assessment adhere – in both the letter of the law and practice – to the concept of 'liberal democracy'. But when it comes to *systemic rule of law backsliding,* with governments consciously and instrumentally engaging in dismantling constitutional checks and balances, the effectiveness of any EU reaction hinges on its response or enforcement.

After a decade of rule of law violations by the Hungarian government and with several other member states showing similar developments, EU institutions must realise that any other approach is entirely ineffective vis-à-vis rogue governments. Prolonged, fruitless procedures only grant sufficient time for governments to complete state capture. Once this happens, it is extremely difficult to revert to constitutionalism and reintroduce constraints on state power.

One of the most promising ways to deal with rule of law backsliding seems to be rule of law infringement procedures (Bárd and Śledzińska-Simon, 2019). Once the negotiating phase proves fruitless, in cases with a rule of law element, the Commission should without delay turn to the Court of Justice of the European Union (CJEU) in Luxembourg, which again should prioritise and accelerate the procedure, and introduce interim measures.

This has happened recently in three Polish cases: i) the unlawful logging of trees in the Białowieża Forest; ii) the attempted capture of the Supreme Court; and most recently, iii) with regard to the powers of the Disciplinary Chamber of the Supreme Court (CJEU, Orders *European Commission* v *Poland*). Preferably, the CJEU should also consider the use of dissuasive lump-sum penalties for non-compliance. Such rule of law infringement procedures are particularly important in the face of EU institutions being of little use in halting or reversing rule of law backsliding in the member states.

There should be room for member states under review to present their arguments and evidence underpinning their positions. But once it becomes clear that a government is acting in bad faith, the EU institutions should acknowledge that any delay in rendering a condemning judgment may cause irreparable damage to the EU legal system and individuals.

The Council, the Commission and the European Parliament have been developing and fine-tuning their own instruments on member states' compliance with Article 2 TEU principles (Council of the EU, 2019; European Commission 2019; European Parliament, 2020). The emerging picture is one of competing tools, with different EU institutional actors claiming to know best about Article 2 TEU risks and threats.

Moreover, they also present major differences regarding their material scope. Contrary to the European Parliament's recommendation, the Commission's forthcoming Rule of Law Report will not cover aspects related to democracy and fundamental rights, such as crucial issues

related to minorities' protection, including antigypsyism (Carrera et al., 2019; van Ballegooij, 2020).

While it is a welcome and necessary step that each EU Institution, including the European Parliament, equips itself with the best independent knowledge and research, their efforts should ultimately come together under the umbrella of a single, consistent EU Periodic Review (EUPR) of the state of the rule of law, democracy and fundamental rights (Carrera, 2019).

The EU should adopt a periodic review, anchored in a legally binding interinstitutional agreement so as to comply with EU Better Regulation Guidelines and the Principle of Interinstitutional Balance.

This should be based on a clear legal framework shaped by an interinstitutional agreement between the Commission, the Council and the European Parliament flowing from Article 295 of the Treaty on the Functioning of the European Union (TFEU), which would lay out the specific arrangements for cooperation (European Parliament, 2016). An agreement would ensure a legally binding commitment and an equal say by all the relevant actors involved – in line with EU better law-making guidelines and the interinstitutional balance principle – and judicial oversight by the Luxembourg Court.

The analysis backing up EU institutions' rule of law assessment must be based on independent research and scientifically-driven, and take into account impacts on EU legal system specificities, such as the principle of mutual recognition (Carrera and Mitsilegas, 2018). The EUPR would cover all EU member states and provide a qualitative (country-specific) assessment of rule of law, democracy and fundamental rights-related issues by Union members as well as the EU institutions (European Parliament Research Service, 2016). The results should be made public. A key challenge will be to preserve the EUPR's autonomy and legitimacy when governments – and the various EU institutions – accuse it of being political and non-neutral.

The EUPR should be based on independent research that provides a country-specific qualitative diagnosis and shifts the burden of proof to all national governments and relevant EU institutions.

Therefore, a particularly strong emphasis should be placed on solid treaty bases, legitimacy, and accountability; a variety of sources should feed into the system, and at the same time a neutral decision-making body should be at the core of regular, context-specific analyses of all aspects of the rule of law, democracy and fundamental rights. Equal treatment of member states should also be cautiously respected so as not to give the impression that governments can be given preference or disadvantaged on a geopolitical basis or purely because some rogue governments are shielded by their political party groups in the European Parliament.

On the basis of such an assessment, the burden of proof should shift to all national governments to justify and provide evidence of the goals and (intended/unintended) effects of their policies in light of Article 2 TEU commitments (Bárd et al., 2016). Such an exercise should be transparent and open to the public.

Even at times of a declared state of emergency, governments must justify the lawfulness of national measures in light of both their necessity (effectiveness) *and* legitimacy in a democratic society (International Commission of Jurists, 1985). Interference with constitutional checks and

balances, and fundamental rights, must be the least intrusive and underpinned by scientific knowledge.

As underlined by Secretary General of the Council of Europe Marija Pejčinović Burić, and the CoE Toolkit for member states for "respecting democracy, rule of law and human rights in the framework of the COVID-19 sanitary crisis", during a declared state of emergency EU governments must also ensure the principle of legality, and guarantee parliamentary oversight, independent judicial control and effective domestic remedies (Council of Europe, 2020).

Governments must comply with the rule of law, democracy and fundamental rights, even and most crucially at times of declared emergencies. They must justify why national measures are proportionate and legitimate in a democratic society.

As evidenced in this paper, this has not been the case with the Hungarian government. Governments must also refrain from distorting or withholding information, and the EU could proactively contribute to whistleblowers' protection and put a halt to the abuse of litigation against journalists by adopting anti-SLAPP (strategic lawsuit against public participation) legislation.

Rule of law conditionality in distributing funds would put an end to the absurdity of the EU financing autocracies. Suspending funds to a member state will always be deliberately misinterpreted by rogue governments, but such a move during an epidemic is even more dangerous. The Commission should nevertheless adhere to what it preached back in 2014 in its guidance on ensuring respect for the Charter of Fundamental Rights of the European Union when implementing the European structural and investment funds, and at least require the existence of an independent judiciary capable of examining complaints concerning the distribution of funds.

The Union has to realise that there is an existential need for it to react firmly. All institutions must accept that the survival of the Union and its core functioning principles, such as primacy, direct effect, loyalty and mutual recognition, are at stake. It is impossible to uphold European integration as we know it without taking the rule of law, democracy and fundamental rights seriously.

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