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



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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

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

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

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

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.

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

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/>.