In its Nature—How Stealth Authoritarianism Keeps Stealing Along During the Pandemic, and How Can it be Stopped?

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Abstract

This essay illustrates, through certain measures taken by the Hungarian government during the COVID19-epidemic, how the very nature of illiberal regimes determines their ways of dealing with national crises. How at times that call for unity, they opt for increasing polarization; how instead of transparency, they choose to restrict freedom of expression; and how they use the crisis to further weaken checks and balances instead of reinforcing public trust in the government by strengthening oversight of the executive. The essay also argues that despite the undeniable difficulties such situations pose to human rights work, they also present a unique opportunity to—more effectively than before—re-explain and re-present human rights as a matter of importance to all members of society—majority and minority alike. The experience that in crisis situations belonging to the mainstream may not protect one from becoming vulnerable and exposed to abuses by those in power, may enable rule of law and human rights advocates to better convey the message that the accountability of the executive branch is crucial to a well-functioning democracy, while an illiberal regime does not provide sufficient protection against such instances of government overreach.

Keywords: COVID-19 epidemic; freedom of expression; Hungary; illiberal regimes; rule of law; state of danger

Introduction

In the movie ‘Mr Arkadin’, the main character tells a fable about the scorpion who wants to cross the river and asks the frog to carry it over. The frog is reluctant, fearing that it will
be stung. The scorpion argues that there is no logic in the frog’s concerns: if it stings the frog they will both die, the frog from the poison, the scorpion from drowning. Convinced, the frog allows the scorpion on its back, but in the middle of the river, the scorpion still stings it. When it asks the scorpion why it did so despite the fatal consequences, the scorpion responds: ‘I can’t help it, it’s in my nature’.

At a time that calls for unity, the Hungarian government has opted for increasing political polarization; at a time that calls for transparency, it has opted for limiting access to data and restricting independent media; at a time that calls for the reinforcement of public trust in the government, it has opted for further weakening checks and balances. Despite the potentially catastrophic consequences of the epidemic, it couldn’t help it, as it is in its nature.

However, the way the crisis highlights this illiberal nature may be a wake-up call to those who have been carrying the system on their backs within Hungary and those who have been tolerating it in the international arena.

1. Assembling the illiberal puzzle—the road leading up to the ‘Enabling Act’

When the Fidesz–KDNP coalition gained a constitutional supermajority in 2010, it started to systematically undermine the system of checks and balances by weakening or occupying those institutions that can exercise any control over the executive branch. The process started with the state infrastructure for offsetting the executive power, including human rights institutions, and continued with starving out and buying up or closing down independent media outlets and tailoring the electoral system to the needs of the ruling coalition. It then reached civil society, academia and the cultural sphere. Renewed attacks on judicial independence were for a long time fairly successfully repelled, but recent developments threaten increasing governmental influence over politically sensitive issues (see Hungarian NGOs 2020).

Freedom House—which has been publishing reports on the democratic trends in the former Soviet Union and Eastern bloc countries for 22 years—concluded in its most recent analysis that Hungary, ‘one of the three democratic frontrunners as of 2005 . . . , became the first country to descend by two regime categories and leave the group of democracies entirely’ (Csáky 2020: 2). The report covers events from 2019, hence the Hungarian constitutional system was already in a dire state before the pandemic hit the country.

2. Losing control—the passing of the ‘Enabling Act’

The ‘state of danger’ is a special legal regime regulated by Hungary’s constitution, the Fundamental Law. It can be declared by the government in case of a natural or industrial disaster, and it is also the government that can terminate it. During a state of danger, the government can adopt decrees that may, as provided for by an Act passed by two-thirds of members of parliament, suspend the application of or derogate from laws, and take other extraordinary measures. That Act is the 2011 Disaster Management Act, which expressly lists what types of decrees may be passed by the government during a state of danger. The special decrees expire after 15 days unless the Parliament authorizes their prolongation. Thus, the Fundamental Law offers two safeguards against overreach: (1) the Parliament must determine in advance what the government may do during a state of danger; and (2)
the decrees adopted on this basis lapse within a short period of time unless the Parliament allows for their prolongation.

On 11 March 2020 the government declared the state of danger, and adopted a series of decrees to combat the epidemic. Although it was obvious that 15 days of restrictions would not be sufficient, the bill for the prolongation of the decrees was not submitted until 20 March. Consequently, a deviation from the House Rules would have been necessary for it to be passed before the first set of decrees lapsed. This would have required the approval of the opposition. And this is the first point where the illiberal regime could not resist its nature and, at a time that calls for unity, set a political trap for the opposition.

The draft bill envisaged a removal of both constitutional safeguards. It proposed (1) to authorize the government to derogate from laws and take other measures beyond what the Disaster Management Act foresees, and (2) to give approval for the emergency decrees to be prolonged without a sunset clause. The draft bill also proposed to amend the offence of ‘fear-mongering’ to criminalize and sanction with imprisonment the dissemination of any untrue fact or misrepresentation.

This carte blanche authorization and the overbroad wording of the proposed new offence were unacceptable for the opposition. They expressed willingness to support the deviation from the House Rules and vote for the Enabling Act, but on condition that the removal of the existing safeguards was offset by (1) a sunset clause, and (2) provisions ensuring easier access to the Constitutional Court.

The government rejected both requests, so the vote could not take place and some emergency decrees lapsed before the Enabling Act (Act XII of 2020) was passed on 31 March. Although the effects of the outgoing decrees could be maintained through alternative measures, the government immediately started to blame the opposition for hindering efforts to contain the virus (Walker 2020), even claiming that the opposition ‘is cheering for the virus’. In Larry Diamond’s 12-step programme of autocrats (Diamond 2017), step no. 1 is the demonization and delegitimization of the opposition. What could be a more effective way to do it than accusing your opponents of wishing a lethal pandemic to spread?

3. Moments of truth—the impact of the Enabling Act and emergency decrees on access to information and freedom of expression

Although the Hungarian government insisted that it had no intention to use this unprecedented authorization for ulterior purposes, its critics were sceptical because of its track record. What happened justified the fears.

While Hungary has been so far quite successful/lucky in combating the virus, some developments have shown the inevitable limitations stemming from the nature of illiberal regimes when it comes to handling crises that would require extensive cooperation from society.

Access to information and open communications are crucial in a pandemic. However, the Hungarian government centralized epidemic-related information and made access to it extremely difficult. The press conferences of the government’s COVID-19 task force were held online. Journalists had to send their questions in advance with no possibility for follow up questions. The task force disregarded questions from independent media with conspicuous frequency (Hungarian Civil Liberties Union 2020: 5).

The most emblematic example for withholding information was the case of a circular sent by the Health Minister to hospitals instructing them to evacuate 60 per cent of their
beds within two weeks. Thousands of people—many with severe health conditions—were sent home overnight. Some died shortly after their evacuation, including a client of the human rights NGO Hungarian Helsinki Committee, who was sent home with a kidney tumour, a thrombosis in her legs, unable to move, go to the toilet or swallow. After six days of suffering, she had to be taken back to the hospital, where she died the following day.

The numbers of hospitalized COVID patients did not seem to warrant such a drastic measure. The envisaged number of evacuated beds was 39,500 at a time when there were 1,400 active COVID patients, of whom 729 were in hospital. In Lombardy (with a comparable population), even at the peak of the crisis approximately 27,000 patients were hospitalized at a given time (Cseke 2020).

Two hospital directors were dismissed for refusing to comply with the circular. The Hungarian Medical Chamber, in an open letter, requested the minister to make the circular accessible to the public and share widely the government’s action plan along with the data and projections underlying it (Hungarian Medical Chamber 2020). Instead of providing the information, the minister accused the Chamber of engaging in politics, and generating tensions and uncertainty during a crisis (Kolozsi 2020).

An opposition MP tried to discover the actual numbers of patients concerned, but was rejected by 91 hospitals quoting the ministry’s (again confidential) ban on providing any information about the epidemic (Magyari 2020). To prevent timely freedom of information litigation, the government used its special authorization to quickly adopt Decree 179/2020, which radically increased the required response time to freedom of information requests (from 15 + 15 days to 45 + 45 days). The government openly stated that the decree had been passed because ‘some people kept bothering the hospitals with information requests’ (Presinszky and Pintér 2020).

The expressions of discontent with the evacuation of hospital beds and other measures were quickly discouraged through oppressive application of new legislation. Based on the new formulation of ‘fearmongering’, two people were apprehended and taken to the police station for questioning regarding Facebook contents critical of how the government handled the epidemic. A client of the Hungarian Helsinki Committee, Mr János Csóka-Szűcs, was charged for posting—factually accurately—that in his home town ‘over a thousand hospital beds have been evacuated’, and adding that this ‘in fact means sending home terminal patients, helpless old people and injured persons in need of rehabilitation’. His laptop and phone were seized, he was interrogated without a lawyer and compelled to give away his passwords. He reports that although he has a disability, after his release he was left alone to stagger home. The video footage on the apprehension of the other suspect (who had criticized the government’s plan to ease the restrictions right after the expected peak of the epidemic) was posted on the police’s YouTube channel and got over 75,000 views (Bayer 2020).

The prosecution eventually terminated both investigations for the lack of a criminal offence. The Justice Minister commented that ‘where work is done, mistakes are made’ (Biró 2020), although what happened justified the fears of the critics, who warned that the overbroad formulation of ‘fearmongering’ would have a serious chilling effect on the freedom of expression. Journalists have reported that ‘even with the guarantee of anonymity, sources do not easily agree to speak to [them] because they [especially health-care workers] are afraid of retaliation’ (Hungarian Civil Liberties Union 2020: 5).

These developments cast a sharp light on the specific way illiberal regimes approach crisis situations like the pandemic. They centralize information to reduce to the minimum the
number of those with an accurate and comprehensive picture of the actual state of affairs. In Hungary, even the Hungarian Medical Chamber’s attempts to start a dialogue with the decision-makers were rejected. Second, to secure this information monopoly, they hinder access to crucial data, and third, they limit the freedom to impart information. However, this is all done in a very peculiar, softer manner that allows for maintaining the impression of a properly functioning democracy. Freedom of information requests are not outlawed, only the deadlines are prolonged to an extent that makes most issues outdated by the time the response arrives. People are not actually sent to jail for criticizing the government—the cases were eventually dropped (which the regime can even use to prove that there are checks on police overreaches), but a clear message was sent out: if you publicly criticize the government’s performance, the police may knock on your door at dawn.

A similar outcome can be expected regarding protesters who demonstrated against the hospital evacuations by honking their car horns at a junction close to the Prime Minister’s office. Although this form of demonstration complies with the requirements of social distancing, they were heavily fined by the police based on Decree 46/2020—that is, curfew rules adopted again on the basis of the Enabling Act. In order to spare the participants from the excessive fines, the organizers eventually called off the demonstrations (Vass 2020). The fines are likely to be reduced or even abolished, but the regime has silenced the protests.

4. A gesture from the ‘good king’—the end of the state of danger

On 26 May the government submitted to Parliament two bills: one on terminating the state of danger and one on transitional provisions related to the termination. The government hails them as allaying the fears of those who had warned about the dangers of the Enabling Act; it even sent out letters demanding public apologies from some of the critics (Schmitz 2020). However, the bills do not dispel fears, and they shed sharp light on the true nature of the regime.

The bill on terminating the state of danger does not actually terminate it: it contains a ‘call’ from the Parliament to the government to end the special legal regime, however, this ‘call’ does not bind the government in any way. In fact, since the bill was submitted by the Deputy Prime Minister, it is practically a call from the government to itself, only with a detour through the Parliament. The bill’s function is to prove that the Enabling Act did not do away with parliamentary oversight; however, it actually shows that it is not the parliament that has a government, rather the government has a parliament (Hungarian Helsinki Committee 2020). This impression is reinforced when Prime Minister Viktor Orbán, says that—like an enlightened ruler—he is ‘prepared to hand back emergency powers’ (Makszimov 2020). In a system meeting the rule of law requirements it does not make a difference whether an angel or a demon is in position: the checks and balances make sure that either is accountable. So when one has to hope that the ruler will be enlightened enough to hand back control to the Parliament, we already have a problem.

However, a closer look at the other bill shows that the control has not even been handed back to a full extent. If passed, it will definitively remove one of the two constitutional guarantees regarding the state of danger: it will do away completely with the pre-set menu of the Disaster Management Act, and will allow the government to adopt any decree it sees fit if a state of danger is declared again.
What now?—challenges and chances

In spite of the above, there are at least two positive conclusions to be drawn from the developments: one concerns the international and one the domestic arena.

The strength of Orbán’s slow but very systematic approach to building his illiberal regime has been that the viewer must simultaneously look at the big picture and carry out a very nuanced analysis of complex issues in order to fully understand what is going on. For a good while, this approach provided a sufficiently thick smokescreen to hide his true intentions and effectively prevented international actors, including the EU and its member states, from comprehending the dimensions of the problem.

However, the warranty of this strategy seems to be expiring. The passing of the Enabling Act triggered extensive international criticism from the very beginning (see e.g. Strupczewski et al. 2020 and Council of Europe Secretary General 2020), and although the Hungarian government resorted to its usual tactic of pointing to other European countries where the emergency legislation had no sunset clause, this time it did not really work. One of the reasons that Orbán decided to hand back his special authorization is most probably the fact that maintaining the indefinite rule-by-decree would have put him into a precarious situation during the negotiations on the EU’s next financial cycle as well as the distribution of the EU’s COVID-19 recovery fund. (The other reason is that, since the epidemic has not hit Hungary as badly as was expected, he does not have to worry about some of his members of parliament falling ill causing the ruling coalition to lose its supermajority in Parliament, which reduces the importance of the special authorization.)

It is important however for international actors to maintain close scrutiny of developments (especially the very technical amendments envisaged by the transitional bill), which might be particularly difficult in the noise created in the combat against the pandemic and its socioeconomic consequences.

As far as the domestic arena is concerned, the health-care crisis can become a moment of truth for Hungarian society about the nature of illiberalism. Combating the epidemic requires sacrifices and cooperation from all members of society. People must accept serious limitations of their rights: they have to respect the lockdown rules, accept reduced working hours and salaries, or undertake the duty to care for seriously ill relatives sent home from hospitals.

Any democratic government can only expect cooperation and sacrifices if it explains its strategy openly and is ready to enter into a discussion about that strategy. The Hungarian developments—the refusal to allow for more parliamentary oversight or the secrecy around the hospital evacuations—have shown that an illiberal regime is incapable of this kind of openness even when it must rely on increased cooperation from society: it is simply not in its nature.

And while this makes human rights work in an already critical situation even more difficult, it is also a unique opportunity to point this out to the majority which—due to the majoritarian nature of the regime—is not exposed in ‘peace times’ to government overreaches to the extent that minorities are.

This has been realized by several human rights activists, including watchdog NGOs that either intensified their already existing health-care related work, like the Hungarian Civil Liberties Union, or extended their profile to provide assistance to patients and health-care professionals, like the Hungarian Helsinki Committee. Through this type of work, it seems possible to—more effectively than before—re-present human rights as a matter of importance to all members of society—majority and minority alike. The experience that in crisis...
situations belonging to the mainstream may not protect one from becoming vulnerable and exposed to abuses by those in power, may enable rule of law advocates to better convey the message that the accountability of the executive branch is crucial to a well-functioning democracy, while an illiberal regime does not provide sufficient protection against such instances of government overreach.

That this is not an overly optimistic scenario is shown by the fact that, although Hungary has been hit much less hard by the virus than many Western democracies, the government’s popularity is stagnating. The country was reached by the epidemic relatively late, at a stage when it was clear not only how devastating it can be, but also what strategies may be effective against it. Due to a number of reasons (the dreadful Italian example, state socialism’s behavioural heritage of tolerating state interference into private matters, awareness of the grim state of affairs in the health-care system), people were very disciplined and respected the limitations to a great degree. These factors—probably along with BCG vaccination having been compulsory in Hungary since the 1950s—resulted in low numbers of infections and deaths.

And despite this, its enormous media empire and effective campaigning methods, as well as the ‘rally around the flag’ effect (that is, the tendency of growing support for the incumbent in crises), the Orbán government’s popularity has increased since the outbreak of the pandemic to a smaller extent than that of the incumbents in most European countries (Political Capital 2020). This shows that it is more than just wishful thinking to presume that this is a good time for advocates to try to have yet another go at explaining how—as opposed to illiberalism that benefits only a few—consistent implementation of human rights norms benefits the entire society.

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