

Emergency Legislation in Times of COVID-19

Can the Hungarian legal response to the COVID-19 pandemic be considered in conformity with the EU values? If not, what implications might this have for the Union?

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During the COVID-19 pandemic, the declaration of a national state of emergency in many countries posed the risk of a shift in the balance of power between the legislative, judiciary and executive branch and limited or suspended civil liberties and human rights in order to prohibit the spread of the virus. In this context, this article seeks to examine emergency legislation and its consequences for the rule of law as the fundamental principle for upholding a democratic society, of which the protection of basic civil and political rights is a primary characteristic.

The primary part of the article consists of a case analysis of the emergency legislation that was introduced in Hungary¹. This analysis aims to investigate whether or not the legislation was in conformity with the international framework for emergency legislation as defined in the terms of legality, necessity and proportionality, and finally non-abuse of powers. These are embedded in the founding Treaties of the EU, of which

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¹ It should be noted that in June of 2020 the Hungarian parliament voted to end the state of emergency. However, the article was written previous to this development, and takes outset in the emergency legislation, as it was passed in March of 2020. Therefore, the conclusions reached in the article do not reflect developments following May of 2020.

Hungary is a member. Thus, it is also prudent to examine the substance of the mechanisms for addressing violations of the EU values.

Finally, the article considers whether the emergency legislative measures that were implemented has put focus on an impending crisis of a much larger scale; the future of EU. The article argues that the Hungarian emergency legislation is an example of a culminating political trajectory, undermining the support for intergovernmental cooperation in Europe, not only by the public but also on a governmental level. This trajectory threatens the future of an intergovernmental European cooperation that is based on a shared understanding of the rule of law and shared values regarding civil liberties and human rights.

1. Introduction

The outbreak of COVID-19 changed the world's view on what measures are necessary to protect the people from a public health crisis of such a caliber. The situation evolved swiftly, and the efforts to contain the pandemic resulted, for almost every country, in the rapid implementation of new legislation involving limitations on freedoms, which most people perceive as inalienable, in order to prohibit the spread of the virus until a vaccine was developed.²

The year 2020 marked the 70th anniversary for the establishment of a European cooperation, which has since become the European Union, as we know it today. Throughout the past years, critique has been raised as to whether the European intergovernmental cooperation is functioning as intended, especially in regards to handling the influx of refugees in Greece and Turkey, just as it has been claimed that the Union has failed to respond in a timely and adequate manner to global environmental issues. Simultaneously, in several cases the institutions of the Union have raised concerns towards some Member States for not complying with the fundamental values of the European Union.

This article is motivated by a shared concern as to whether the legislation, which by many Member States of the European Union was considered necessary

² McCaffrey, Darren: "Analysis: Is Hungary dumping democracy amid coronavirus crisis?" Euronews, 2020, <https://www.euronews.com/2020/04/06/analysis-is-hungary-dumping-democracy-amid-coronavirus-crisis>.

in handling a global health and economic crisis, might contribute to a more fundamental crisis for the EU. Especially the Hungarian emergency legislation was met with severe critique, both from academic scholars, the Secretary General of the Council of Europe³ as well as several Member States of the EU.⁴ The article is therefore based on a case study of the Hungarian emergency legislation, on the basis of which, it will be discussed what implications such legislation could have for the intergovernmental cooperation, should it persist indefinitely.

Firstly, the article will provide an outline of the regional European legal foundations against which national emergency legislation can be assessed as well as the framework, which can be used to address the legal and political concerns that may arise from the implementation of emergency legislation. Hereafter, the Hungarian emergency legislation implemented in response to the COVID-19 pandemic will be analyzed, as well as the existing mechanisms for addressing violations of EU values. Finally, the broader trends, which the national legislative responses to the COVID-19 pandemic shed light on, will be discussed.

2. The EU Constitutional and Regional European Framework for Emergency Legislation

In order to accede to the EU, a country must fulfill the Copenhagen criteria, which were first established in 1993 and later strengthened in 1995. The first criteria stipulates, that a Member State candidate must have stable institutions that guarantee the rule of law, human rights and respect for and protection of minorities.⁵ Furthermore, the conditions and principles, which a potential Member State must meet and adhere to in order to join the EU, are codified in

³ Secretary General to The Council of Europe, Marija Pejčinović Burić: "Letter for the Attention of Victor Orbán", 24 March 2020 <https://rm.coe.int/orban-pm-hungary-24-03-2020/16809d5f04>.

⁴ Bayer, Lili: "13 countries "deeply concerned" over rule of law.", Politico, 2020, <https://www.politico.eu/article/viktor-orban-hungary-13-countries-deeply-concerned-over-rule-of-law/>.

⁵ Criteria for accession to the EU of 1993 (Copenhagen criteria) as formulated by the Copenhagen European Council, https://eur-lex.europa.eu/summary/glossary/accession_criteria_copenhagen.html?locale=en.

Article 49(1) and Article 6 of the Treaty of the European Union (TEU) respectively.

Article 6 concerns the relationship between the EU and European human rights acts. In accordance with Article 6(1) the EU recognizes all rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union, and as such all Member States must respect these. However, the provisions of the Charter do not extend the competences of the EU beyond what is defined within the Treaties. Similarly, Article 6(2) stipulates that the EU, and thereby also all Member States, shall accede to the European Convention on Human Rights, while also not extending the competences of the EU as defined within the Treaties. Thereby, TEU binds all Member States by the principles of human rights as they are enshrined in the Charter and the ECHR. Human rights, both as guaranteed within the ECHR and the constitutional traditions of the Member States, constitute a fundamental set of values within the EU, cf. Article 6(3) TEU.

Article 49(1) stipulates, that any European State, committed to the principles following from TEU Article 2, can apply to become a member of the Union. These principles are as follows: respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, cf. Article 2(1) and they constitute a natural extension of the Copenhagen Criteria. The values enshrined within Article 2 are the fundamental values upon which the EU is built. As such, democracy and the separation of powers constitute the normative backbone of the Union, and must in turn also constitute the normative backbone of the Member States. Compliance with the fundamental values is both the basis for and the result of normative integration of a Member State into the EU.⁶

Article 7 TEU contains the measures that can be enacted to sanction a breach or a potential breach of Article 2. Following this provision, a proposal by one third of the Member States may determine a clear risk of a serious breach by a Member State of the values referred to in Article 2, cf. Article 7(1). The existence of a serious and persistent breach by a Member State may be sanctioned under Article 7(2).

⁶ Mader, Oliver: "Enforcement of EU Values as a Political Endeavour: Constitutional Pluralism and Value Homogeneity in Times of Persistent Challenges to the Rule of Law". *Hague J Rule Law* 11, 133–170, 2019.

National emergencies require certain flexibility as regards legislation, and several of the international conventions on human rights contain provisions providing for such flexibility. Article 15(1) of the European Convention on Human Rights (ECHR) provides a derogation clause, which can be invoked in times of public emergency as regards the protection of human rights. With these provisions, the situation must be understood as a threat to the “life of the nation” which is to be decided upon by the national government.⁷

Certain criteria must be met when implementing emergency legislative measures, such as the universally recognized principles⁸ of legality, necessity and proportionality, and finally non-abuse of powers. Several international institutions have recognized these criteria, ex. the Council of Europe, as exemplified by the Rule of Law Checklist on States of Emergency, established by the Venice Commission to the Council of Europe. This list was adopted by the Venice Commission in March 2016 and states the abovementioned principles amongst others.

3. The Hungarian Situation

During the COVID-19 pandemic Hungary implemented numerous provisions in order to handle the crisis. The critique thereof mainly centered on limitations of several rights codified in the above-mentioned legal bodies by which Hungary is bound, including the right to assemble, right to free movement, freedom of speech as well as basic democratic principles. Similarly, concerns were raised as to whether the Hungarian legislation could be considered in conformity with the principle of rule of law. In the following section, the most relevant aspects of these provisions will be analyzed in accordance with the universally acknowledged principles of legality, necessity and proportionality, as well as the principle of non-abuse of powers.

⁷ Emmons, Cassandra: “International Human Rights Law and COVID-19 States of Emergency”, *Verfassungsblog*, 2020.

⁸ Ensig Sørensen, Karsten, et al: “Uddrag af EU-retten”, DJØF Forlag, 2014.

3.1 Concerning the Principle of Legality in Terms of National Law

The Hungarian Constitution is the primary law and foundation of the Hungarian legal system. It contains the fundamental democratic principles, which are safeguarded through a series of provisions that constitute classic checks and balances of power,⁹ and the Constitution acts as the primary defense of democratic principles.¹⁰ It is therefore first and foremost relevant to consider whether the emergency legislation was implemented in conformity with the Constitution.

The Hungarian government declared Hungary to be in a state of emergency on March 11th 2020 in accordance with Article 53(2) and Article 15(1) of the Constitution. A decree such as this has an automatic expiry after 15 days, cf. Article 53(3) of the Constitution. The declaration of a state of emergency allows the government to pass cardinal law, which allows for the suspension of or derogation from certain provisions of the Constitution, as well as the introduction of other extraordinary measures. In accordance with Article T(4) of the Hungarian Constitution, such law must be passed by the consent of two thirds of the parliamentary representatives.

In extension of the declaration of a state of emergency, the government proposed The Act XII of 2020 on the Containment of Coronavirus on March

⁹ Amongst other provisions Article 24(1) establishes a Constitutional Court, with the purpose of protecting the Constitution, and securing that all domestic law is in conformity with the Constitution. It follows from the Hungarian Constitution Article 24(2)e) that members and the President of the Constitutional Court are chosen by the Parliament, which in actuality renders it dependent upon the legislative branch.

¹⁰ It should be noted that the Hungarian Constitution in itself has been criticized by several legal scholars (e.g. Petra Bard, professor of European constitutionalism at the Central European University, and Laurent Pech, professor of European law at Middlesex University, in “No checks, no balances: the reality of Orbán’s autocratic constitutional revolution” published in 2019 at <https://reconnect-europe.eu/blog/no-checks-no-balances-bard-pech/>) in light of the development taking place in Hungary over the past decade. The more recent amendments to the Constitution raise questions concerning the democratic nature of the Hungarian State. It can therefore be argued, that conformity with the Hungarian Constitution, does not necessarily in itself guarantee that democratic principles are upheld.

23rd 2020, in order to extend the legal effect of the state of emergency. The Act was justified on the grounds that it allows the government to take the necessary measures to prevent the spread of the virus, and thereby protect the health and life of Hungarian citizens.¹¹

The government requested that the law be adopted by an expedited procedure, citing the urgency of the emergency at hand. The Parliament, however, denied an expedited procedure, and so the initial decree expired on the 26th of March.¹² In spite of this, the Act was approved and promulgated by the Hungarian government on March 30th 2020. As the Act was passed with the required majority, the Act has been adopted in conformity with the requirements of the Hungarian Constitution.

3.2 Concerning the Principles of Necessity and Proportionality

For emergency legislation to be in compliance with international obligations concerning the protection of civil and political rights, the necessity must be explicit for the protection of public health and to limit the existing threat. Upon first glance, the implementation of emergency measures constituted the response to a global pandemic, which developed at a pace that the world did not seem prepared for. This triggered a widespread implementation of emergency laws and restrictive legal measures of varying severity, emphasizing the necessity of a speedy response. However, the material substance of the Hungarian emergency legislation drastically limited civil liberties.

In the justification of the Act, the Hungarian Government declared, that the measures introduced were necessary *“with the aim of preventing and slowing down the propagation of the COVID-19, as well as supporting the fight against the infection (...) and subsequently mitigating the negative economic impact of the*

¹¹ “Rationale for the law on protecting against the coronavirus”, Hungarian Spectrum, 2020 <https://hungarianspectrum.org/2020/03/27/rationale-for-the-law-on-protecting-against-the-coronavirus/>.

¹² Kovács, Kriszta: “Hungary’s Orbánistan: A Complete Arsenal of Emergency Powers”, Verfassungsblog, 2020.

pandemic on Hungary.”¹³ By this justification the Hungarian Government implied a continuous necessity of the Act. Experts have pointed to social distancing as one of the most effective ways of combating the spread of the virus,¹⁴ and measures designed to effectuate social distancing, such as imposing a limit on the amount of people allowed to gather together, can therefore be seen as a direct necessity for limiting the spread of the threat.

The Act, however, also introduced changes to the penal code, by criminalizing obstruction of epidemic prevention and publication of false facts, which impeded the protection of the public. This also extended to those who might criticize the actions of the government, and as such severely limited free press and speech. Such limitations pose a threat to the maintenance of a democratic society, by censoring media, which keeps the public informed, and thus capable of being critical of their government.

This provision was justified in reference to protecting public order from the turmoil and panic that the spread of false information might incite, cf. Section 10 of the Act.¹⁵ Though the spread of false information might be detrimental to the successful containment of COVID-19, it is questionable whether the justification could be considered legitimate, or whether the prevention of public turmoil in fact was more conducive to maintaining control of the nation, than to actually combating the pandemic. It is therefore doubtful that such a broad limitation of the freedom of speech can be considered necessary.

Once it has been determined whether the emergency measures can be considered necessary and in conformity with international obligations as codified in the treaties, the proportionality of the implemented provisions must be considered. The declaration of a state of emergency allows a government to invoke the derogation clauses set forth in Article 15 of the ECHR, however, this is only allowed if the measures can be considered proportionate in relation to the

¹³ “Rationale for the law on protecting against the coronavirus”, Hungarian Spectrum, 2020 <https://hungarianspectrum.org/2020/03/27/rationale-for-the-law-on-protecting-against-the-coronavirus/>.

¹⁴ Coronavirus disease (COVID-19) advice for the public, WHO, 2020 <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/advice-for-public>.

¹⁵ “Rationale for the law on protecting against the coronavirus”, Hungarian Spectrum, 2020 <https://hungarianspectrum.org/2020/03/27/rationale-for-the-law-on-protecting-against-the-coronavirus/>.

objective that they are designed to achieve. The Venice Commission has issued a list of checkpoints that, once fulfilled, ensure compliance with the ECHR. Most importantly, emergency legislative measures must have a time limit, as they cannot last longer than the emergency itself.

The ECtHR has previously found that Article 15(3) ECHR implies a requirement of permanent review for the necessity of the emergency measures, and the implementation of these must leave room for a dynamic development and assessment.¹⁶ The Hungarian Parliament has access to terminating the Act at any given time upon the end of the emergency, cf. Section 8.¹⁷ However, the Act did not provide any sunset clauses as such, giving the Hungarian Parliament unlimited resources until decided otherwise by the Parliament. This lack of a time-limiting provision is at odds with the values, which support rule of law and democratic standards guaranteed by TEU and ECHR.

3.3 Concerning the Abuse of Power

To some extent, the limitation of civil liberties can be justified as a necessary and proportionate response to the COVID-19 pandemic. Such limitations, however, can only be considered proportionate while fundamental democratic principles are simultaneously being upheld. Checks and balances function to ensure that limitations on civil rights and liberties, which are invoked in times of crisis, remain of a temporary character. As illustrated above, the scope of the Hungarian emergency measures was broad and therefore specific provisions, which ensured that checks and balances were being upheld, were necessary in order to maintain a functioning democracy.

The Act was passed with basis in Articles 15(1) and 53 of the Hungarian Constitution. Article 15(1) of the Constitution states that “*(the government’s) responsibilities and competences shall include all matters not expressly delegated by the Fundamental Law or other legislation to the responsibilities and competencies of another body*”. Legal scholars have criticized the legislative basis found in Article

¹⁶ Compilation of Venice Commission Opinions and Reports on States of Emergency [https://www.venice.coe.int/webforms/documents/?pdf=CDL-PI\(2020\)003-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-PI(2020)003-e).

¹⁷ Kovács, Kriszta: “Hungary’s Orbánistan: A Complete Arsenal of Emergency Powers”, *Verfassungsblog*, 2020.

15(1) as a vague legal basis for the implementation of the emergency legislative measures.¹⁸ The provision extends to the executive branch an amount of power that is only defined in negative terms, and thereby not clearly demarcated. A vague legal basis can more easily be stretched, and thus ultimately allow for abuse of power. Following Section 2 of the Act, the emergency law gave unlimited decree power to Viktor Orbán to “*suspend the enforcement of certain laws, depart from statutory regulations and implement additional extraordinary measures by decree.*”¹⁹ The vague nature of Article 15(1) does not clearly regulate the scope of power that can be conferred upon the executive branch. It can be argued, that granting the executive branch extraordinary power such as that granted by the Act, should be based in clear legislation, which very specifically defines the scope and limits of power being transferred.

Furthermore, the Act cancelled elections and referenda until the Parliament had declared the end of the emergency. The functioning of the Courts was impacted as well. The Constitutional Court remained operational, however, cases could normally be brought before this instance through the ordinary courts. As these were closed, this was no longer possible.²⁰ Even though the Constitutional Court remained open, it can be argued, as also pointed out by Kriszta Kovács, scholar of global constitutionalism at Wissenschaftszentrum Berlin, that judicial review of the emergency legislation might be of an illusory character as the Constitutional Court largely consists of political allies of the government.²¹ As such, any judicial review of the emergency legislation was effectively severely limited.

Kovács further argues that the government and the head of the National Public Health Center issued orders on the restriction of movement already in the period between the 26th of March and the 30th of March, before the Act was adopted by the Parliament. Thus, the Government demonstrated that it was

¹⁸ Kovács, Kriszta: “Hungary’s Orbánistan: A Complete Arsenal of Emergency Powers”, *Verfassungsblog*, 2020.

¹⁹ Halmai, Gabor and Scheppele, Kim Lane: “Don’t be Fooled by Autocrats!” *Verfassungsblog*, 2020.

²⁰ Kovács, Kriszta: “Hungary’s Orbánistan: A Complete Arsenal of Emergency Powers”, *Verfassungsblog*, 2020.

²¹ Kovács, Kriszta: “Hungary’s Orbánistan: A Complete Arsenal of Emergency Powers”, *Verfassungsblog*, 2020.

capable of issuing necessary legislation and restrictions to implement social distancing without further augmentation of its power.²² This in itself negates the necessity of the Act and the access to bypass checks and balances on the executive branch that it allows.

It can be argued that the Hungarian Parliament remained in session to receive reports from the Government as well as fulfilling other parliamentary duties, thereby upholding the semblance of parliamentary control and infusing the Act with the credentials of democratic legitimacy. However, though the Parliament did have a technical access to repeal the emergency legislation upon the end of the crisis, the Fidesz Party, led by Orbán, holds two thirds of the seats in the Hungarian Parliament,^{23,24} and is thereby in a position to exercise decisive control. Ultimately, the parliamentary control that remains in place following the Act is rendered somewhat illusory. It should be noted, that Orbán was recently reelected²⁵, upholding the composition of the Hungarian Parliament.

As illustrated above, the Act quite clearly allowed for the extensive removal of checks and balances upon the power of the executive branch. The legislation can on this basis be considered problematic. However, a temporary grant of power to the executive branch can be necessary in times of crisis. In extension thereof, it can be argued that the implementation of a clearly defined state of emergency signals that the laws introduced, and whatever shifts in power and limitations of civil rights and freedoms these result in, are invoked in response to something very specific. Failing to officially derogate from obligations under international human rights law risks the normalizing of the exceptional measures taken in response to the crisis. This might in turn enable the permanency of

²² Kovács, Kriszta: "Hungary's Orbánistan: A Complete Arsenal of Emergency Powers", *Verfassungsblog*, 2020.

²³ Scheppelle, Kim Lane: "Legal but not Fair: Viktor Orbán's New Supermajority", *Verfassungsblog*, 2014.

²⁴ Rankin, Jennifer: "Hungary election: Viktor Orbán declares victory - as it happened", *The Guardian*, 2018, <https://www.theguardian.com/world/live/2018/apr/08/hungary-election-viktor-orban-expected-to-win-third-term-live-updates>.

²⁵ Garamvolgyi, Flora and Robert Tait: "Viktor Orbán wins fourth consecutive term as Hungary's prime minister", *The Guardian*, 2022, <https://www.theguardian.com/world/2022/apr/03/viktor-orban-expected-to-win-big-majority-in-hungarian-general-election>.

these measures. Notably, however, Hungary has not officially derogated from its obligations under ECHR, cf. art. 15, and likewise the state of emergency is not clearly defined in temporal scope.²⁶ In contrast, the Hungarian Minister of Justice, Judit Varga, claims that the new legislation contains a sunset clause, as it provides a guideline for the termination of the emergency legislation.²⁷ This may refer to the vague access that Parliament has to repeal the Act. However, upon casting a glance backwards on the history of Hungarian emergency legislation, the government appears to have a tendency of maintaining a national state of emergency, even when physical circumstances, which originally provoked the state of emergency, no longer exist.²⁸ This may indicate an emerging pattern of using emergencies as leverage to strengthen the government's position of power.

The Hungarian emergency legislation constituted quite a clear breach of the democratic principles upon which the EU is built, as it shifted power from both the legislative and judiciary branches to rest almost exclusively with the executive branch. Despite the global health crisis, the Hungarian response cannot be considered proportional, largely because the new legislation had no expiry date at the time. The new legislation effectively granted the Government unlimited power for an unlimited period of time. As such, it can be argued that it de facto constituted not just a limitation of civil liberties of the public, but also an indefinite suspension of the checks and balances designed to protect the rule of law. As becomes apparent in the fact that both the ECHR and ICCPR allow derogations in some cases, the limitation of civil liberties may be acceptable to

²⁶ Greene, Alan: "States should declare a State of Emergency using Article 15 ECHR to confront the Coronavirus Pandemic", Strasbourgh Observers, 2020, <https://strasbourghobservers.com/2020/04/01/states-should-declare-a-state-of-emergency-using-article-15-echr-to-confront-the-coronavirus-pandemic/>.

²⁷ Zsiros, Sandor: "There is definitely a clause' to scrap state of emergency, says Hungary's Justice Minister", Euronews, 2020 <https://www.euronews.com/2020/04/02/there-is-definitely-a-clause-to-scrap-state-of-emergency-says-hungary-s-justice-minister>.

²⁸ This has been illustrated, i.e. by the response of the Hungarian government to the mass migration of 2015, in which the government declared a national state of crisis in 2016. Though the physical circumstances, which provoked the state of emergency, are no longer present, the government has continually renewed the national state of crisis.

some degree. However, the suspension of democratic checks and balances is a different matter altogether, cf. the fundamental values enshrined in Article 2 TEU.

4. Mechanisms for Addressing Violations of EU Values

Derogations that are small and limited in scope (largely due to the fact that checks and balances of democracy remain in place), do not necessarily threaten the substance and integrity of the EU. However, the Hungarian response to the COVID-19 pandemic challenged the very autonomy and success of the EU legal order.²⁹ The rule of law concept is complex and cannot be defined in singular legal terms. Similarly, the matter of enforcing violations of the EU values is not solely legal.³⁰ A number of mechanisms already exist and will be discussed in the following.

4.1 Political and Legal Mechanisms

4.1.1 Article 7 TEU

The power to enforce the basic values of the EU, as enshrined within Article 2 TEU, lies within Article 7 TEU.³¹ The sanctions, which can be employed in accordance with Article 7(3) TEU, are specified by the Council upon their decision to enact them and can relate to any rights deriving from membership of the Union.³² The possibilities include the suspension of certain political rights

²⁹ Mader, Oliver: "Enforcement of EU Values as a Political Endeavour: Constitutional Pluralism and Value Homogeneity in Times of Persistent Challenges to the Rule of Law". *Hague J Rule Law* 11, 133–170, 2019.

³⁰ Mader, Oliver: "Enforcement of EU Values as a Political Endeavour: Constitutional Pluralism and Value Homogeneity in Times of Persistent Challenges to the Rule of Law". *Hague J Rule Law* 11, 133–170, 2019.

³¹ The procedure in Article 7 TEU is complemented by a number of other mechanisms established by the European Commission as well as the Council. These function primarily as monitoring mechanisms, which are designed to help early identification of threats to the rule of law within the EU, and likewise to have a preventive effect, but do not allow for the possibility of sanctioning violations.

³² Besselink, Leonard: "The Bite, the Bark and the Howl: Article 7 and the Rule of Law Initiatives", *Oxford Scholarship* – Oxford University Press, 2017, p. 130.

within the EU, such as the voting rights of the Member State's representative in the European Council. At first glance, such a reduction in the influence of a Member State seems to have potential as both an appropriate, effective and logical sanction. However, it should be noted, that though this serves as a punishment, it might not actually address the domestic cause of the violation.³³

Similarly, it is questionable, whether the provision can live up to its inherent potential. The power held within Article 7 is highly political by nature.³⁴ Activation of the Article 7 procedure requires large majorities within the institutions of the EU, and is therefore often contentious, as such large majorities often are undermined by a tendency of European Parties to protect and support the Prime Ministers within own ranks.³⁵ None of the institutions conferred with power under Article 7 are judicial by nature, and as such the assessment is not made on basis of legal criteria, but rather of a socio-legal-political nature. If all required majorities are reached, the Council can still decide not to sanction.³⁶ Thus, the procedure has been broadly criticized as unlikely to result in any actual sanctions, even in case of activation.³⁷ ³⁸ In light of this, the procedure seems to possess little clout and the actual efficiency of the procedure has yet to reveal itself.

³³ Mader, Oliver: "Enforcement of EU Values as a Political Endeavour: Constitutional Pluralism and Value Homogeneity in Times of Persistent Challenges to the Rule of Law". *Hague J Rule Law* 11, 133–170, 2019.

³⁴ Besselink, Leonard: "The Bite, the Bark and the Howl: Article 7 and the Rule of Law Initiatives", *Oxford Scholarship – Oxford University Press*, 2017, p. 132.

³⁵ Albanesi, Enrico: "The use of the EU infringement procedures to protect de facto the rule of law via development of the parameter" *Routledge*, 2020, p. 231.

³⁶ Mader, Oliver: "Enforcement of EU Values as a Political Endeavour: Constitutional Pluralism and Value Homogeneity in Times of Persistent Challenges to the Rule of Law". *Hague J Rule Law* 11, 133–170, 2019.

³⁷ State of the Union Address of 2013 of the former President of the European Commission, Jose Manuel Barroso, https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_13_684

³⁸ Mos, Martijn: "Ambiguity and interpretive politics in the crisis of European values: evidence from Hungary", *Taylor & Francis Online*, 2020

4.1.2 Infringement Procedures under Articles 258-260 TFEU

The infringement procedures under Articles 258-260 of the Treaty on the Functioning of the European Union (TFEU) constitute the most established tools, with which Member State compliance with EU law before the Court of Justice of the EU can be secured. The official legal position of the European Commission, as also supported by the European Parliament, is that it is not possible to use the infringement procedures under Article 258-260 TFEU to explicitly protect the fundamental values enshrined in Article 2 TEU.³⁹ However, it has been argued by some scholars that the European Commission, despite this position, has made use of the infringement procedures to address violations of the European Treaties as well as the Charter; violations which also de facto have conflicted with fundamental values, such as the rule of law.⁴⁰ However, unlike the procedure in Article 7 TEU, the infringement procedure is restricted by the fact that it can only be invoked as response to acts or omissions, which have relation to matters that are regulated by EU law. It cannot be used to enforce the values under Article 2 in matters, which are solely national, despite the fact that these may be in conflict with the rule of law, and other fundamental EU values.

4.2 Exclusion

Membership of the EU and thereby compliance with the Treaties, including the values enshrined in Article 2 TEU, is, in its essence, a voluntary matter. On that basis a Member State cannot be coerced into compliance. Similarly, there are no provisions allowing the forceful exclusion of a Member State within the Treaties. A Member State can only leave by free will, cf. Article 50 TEU. As long as remaining within the Union is beneficial, and the sanctioning of a violation of Article 2 TEU is minimal, it is doubtful that a Member State will leave of its own accord, but similarly also doubtful that a Member State will mend its ways.

The activation of an Article 50 procedure requires notification of the European Council of this intention, cf. Article 50(2) TEU. The provision does

³⁹ Albanesi, Enrico: "The use of the EU infringement procedures to protect de facto the rule of law via development of the parameter" Routledge, 2020, p. 230.

⁴⁰ Albanesi, Enrico: "The use of the EU infringement procedures to protect de facto the rule of law via development of the parameter" Routledge, 2020, p. 230.

not specify any temporal, formal or material criteria pertaining to this notification. On that basis it can be considered whether repeated violations of the EU values signify a wish no longer to be bound by the Treaties, and in extension thereof, a desire to no longer be a member of the Union.⁴¹ Recognizing such behavior as notification of the intent to leave, would allow the EU to react in accordance with Article 50 TEU, and instigate the two-year period designated for negotiations to make the necessary arrangements for the exit of a Member State. It is, however, unlikely that consistent breaches of the fundamental EU values can be characterized as a sufficient notice of leave. Similarly, a notification of intention to leave is neither definitive nor irrevocable,⁴² and it is doubtful that the offending Member State, when confronted with the potential of leaving, should wish to do so. Considering this in light of the highly complicated procedure, which the activation of Article 50 gives rise to, the exclusion or willingly exit of an offending Member State does not seem a likely option.

In summary, violations of the fundamental EU values can primarily be addressed through the activation of Article 7 TEU while cases that lie within the scope of EU law, can be adjudicated before the CJEU. Despite some apparent shortcomings, scholars argue, that when made use of to its fullest extent, and in a prompt, forceful and coordinated manner, the EU system is sufficiently comprehensive to at least contain lapses in conformity with the values under Article 2 TEU, including the rule of law principles,⁴³ though it is not without room for improvement.⁴⁴ Ultimately all factors indicate, that though the EU possesses a number of tools to handle violations of the EU values, it is questionable whether these are adequate, and perhaps more importantly also whether the EU is in possession of the necessary political will and coordination

⁴¹ Hillion, Christophe: “Poland and Hungary are Withdrawing from the EU”, *Verfassungsblog*, 2020.

⁴² C-621/18, *Wightman and others*, pr. 49, as cited in Hillion’s article “Poland and Hungary are withdrawing from the EU”.

⁴³ Pech, Laurent and Kochenov, Dimitry et al., “Strengthening the Rule of Law Within the European Union: Diagnosis, Recommendations, and What to Avoid”. RECONNECT Report, 2019.

⁴⁴ Pech, Laurent and Kochenov, Dimitry et al., “Strengthening the Rule of Law Within the European Union: Diagnosis, Recommendations, and What to Avoid”. RECONNECT Report, 2019.

to make adequate use of these tools. Similarly, experience teaches that democracy or compliance cannot be forced upon an unwilling State.⁴⁵ It is therefore relevant to consider the mechanisms that drive the aberrant behavior of offending Member States.

5. Three Emerging Trends

With the present section the article seeks to discuss the implications of the legislative reactions by national parliaments to the COVID-19 pandemic, however, continuously drawing examples from the Hungarian case. This will be done by outlining three different trends in regard to the intergovernmental cooperation in extension of the COVID-19 pandemic. The three trends that will be focused on are: the derogation from international obligations, fragmentation within and decreasing national support for the EU, and an internal debate concerning the EU values.

5.1 Trend: Prioritizing National Security

It is not only in Hungary that extreme measures were introduced to the detriment of basic civil rights and democratic principles. Many countries experienced serious limitations of the public's rights. Such actions can be explained through the theory of securitization, developed by the Copenhagen School of Security Studies.⁴⁶ This theory concerns the way by which countries justify their actions and legislative measures in states of emergency, specifically during times of war. The theory offers a constructivist model for distinguishing the process of securitization from that of politicization. Securitization studies aims to understand "who securitizes (securitizing actor), on what issues (threats),

⁴⁵ Exemplified in the fact that some countries continuously violate obligations under International Human Rights Instruments in spite of repeated convictions before the adjudicating institutions.

⁴⁶ The theory of securitization was developed by Danish professor Ole Wæver in 1993 with Barry Buzan et al.. The Copenhagen School offers a constructivist model for distinguishing the process of securitisation from that of politicisation.

for whom (referent object), why, with what results, and not least, under what conditions.”⁴⁷

Victor Orbán turned the matter of public health in Hungary into a matter of national security. By doing so, Orbán and the Hungarian Government, legitimized the possibility of enacting extraordinary measures derogating from “normal” obligations by international conventions in order to secure the functioning of the nation and its people from the outside threat through the sovereign power of the State.⁴⁸

The audience of these “necessary” measures was the public of Hungary, as they were to comply with the emergency laws being implemented. Victor Orbán therefore constructed a situation where the emergency legislation was necessary from an objective point of view for the survival of the nation. The effective success of this move could be attributed to Orbán’s position of power in the Hungarian society as well as the global rhetoric regarding the pandemic. Orbán and the Hungarian Government declared, “*fighting against the coronavirus and protecting the Hungarian people is our own common task, and the important decisions must be made by the Parliament and the government.*”⁴⁹ This is a clear example of how Orbán seized the opportunity to declare the country at war with the coronavirus⁵⁰ ensuring that the crisis appeared to be of such a magnitude⁵¹ that extraordinary measures were needed to protect civil society. The government further sought to justify and legitimize the emergency measures in claiming that other EU Member States have taken similar steps in order to

⁴⁷ Buzan, Barry, Wæver, Ole and de Wilde, Jaap, *Security: A New Framework for Analysis* (Boulder: Lynne Rienner Publishers, 1998), p. 32.

⁴⁸ Buzan, Barry, Wæver, Ole, Kelstrup, Morten and Lemaitre, Pierre: *Identity, Migration and the New Security Order in Europe* (London: Pinter, 1993), chapter. 2.

⁴⁹ “Rationale for the law on protecting against the coronavirus”, Hungarian Spectrum, 2020 <https://hungarianspectrum.org/2020/03/27/rationale-for-the-law-on-protecting-against-the-coronavirus/>.

⁵⁰ Kovács, Kriszta: “Hungary’s Orbánistan: A Complete Arsenal of Emergency Powers”, *Verfassungsblog*, 2020.

⁵¹ It should be noted that the authors do not wish to negate severity of the COVID-19 crisis. However, the crisis cannot de facto be ascribed as a state of armed conflict, and as also explored in the article, comparing the crisis to such is a rhetorical tool employed in a political context.

handle the crisis.⁵² Though this was indeed the case, several other Member States, such as Denmark⁵³, included a sunset clause, thereby seeking to uphold democratic checks and balances. This constitutes a significant difference, as such a clause is key in enacting democratic values.

According to Wæver⁵⁴ it is to be expected that the political response to a crisis of this caliber constitutes a political state of emergency, in which the norms, regulating the relationship between state and individual, cease to apply. Wæver notes that this is not limited to countries such as Hungary. Using Denmark as an example he underlines that this is the case in many countries throughout the world, regardless of whether the country can be considered to have a strong rule of law or not. However, an issue arises, when the state of emergency becomes “the new normal” and is not revoked. Thus, conversely “securitization” does not allow much leeway for the critical opposition to maneuver and secure checks and balances.

This seems to have been exactly the case in Hungary. Several scholars, as previously referred to in this article, have described Orbán as an authoritarian leader, who seized a “convenient” time to silence the critics and consolidate power. This view is based on emergency measures, such as the amendment of the Hungarian Penal Code Section 337 giving 3 years of prison to those distributing “false” information, which, as mentioned earlier, hardly can be considered necessary or proportional. As also stated by Kenneth Roth: “*When independent media is silenced, governments are able to promote self-serving propaganda rather than facts*”,⁵⁵ clearly recalling why the Hungarian Act, in

⁵² Varga, Judit: “No Power Grab in Hungary”, Politico, 2020, <https://www.politico.eu/article/coronavirus-hungary-no-power-grab/>.

⁵³ LBK nr 1444 af 01/10/2020, “Bekendtgørelse af lov om foranstaltninger mod smitsomme og andre overførbare sygdomme”

⁵⁴ In an interview by Gjerding, Sebastian: “Faren ved undtagelsestilstand er, at den bliver normaltstand. Men det sker næppe her, mener ekspert”. Dagbladet Information, 2020 <https://www.information.dk/indland/2020/03/faren-ved-undtagelsestilstand-normaltilstand-sker-naeppe-mener-ekspert>.

⁵⁵ Roth, Kenneth: “How Authoritarians Are Exploiting the COVID-19 Crisis to Grab Power”, Human Rights Watch, 2020 <https://www.hrw.org/news/2020/04/03/how-authoritarians-are-exploiting-covid-19-crisis-grab-power>.

reference to the Enabling Act by the Nazi-regime in 1933,⁵⁶ has been referred to many as the Enabling Act. In light hereof, it seems clear, that the recognition of public willingness to accept great change of circumstances in times of crisis was for Orbán an opportunity to undermine national checks and balances in the seeming pursuit of his own political agenda, while greatly affecting the democratic rule of law.

The trend of securitization also impacts national support to the EU and can result in countries withdrawing from the European community if leaders see withdrawal as a necessary action in protecting national interests including, as in the case of COVID-19, national public health. If the EU fails to act and respond to problems and issues occurring in the respective societies, an opportunist leader, e.g. Orbán, can make use of this as a chance to solidify his autocratic power. In extension thereof, it can be argued that the growing number of crises the EU has encountered since the financial crisis in 2008, has weakened the national trust in the Union, which in turn can be exploited by domestic politicians using securitization as an excuse for solidifying autocratic power. It can therefore be argued that the COVID-19 pandemic created ideal conditions for the perpetuation of a preexisting tendency towards an increased focus on the nation state instead of an intergovernmental cooperation across the EU.

5.2 Trend: Accumulation of Dissonance within the EU as a Socio-Political System

The public support of the authoritarian form of government in countries such as Hungary can be explained by the theory of social conflict and social change by Lewis Coser linking security policy and classic sociology. Through this lens the support of strong leadership as a bulwark against a common threat is strengthened in times of crisis. Similarly, crises create a sense of emergency, and the public expects strong leadership, which empowers the executive branch to gain greater authority at the expense of the legislative branch. This approach is one of the fundamental laws of sociology as a strengthened unity and centralization is often caused by an outer threat. In order to address this

⁵⁶ Encyclopaedia Britannica: "The Enabling Act", 2018
<https://www.britannica.com/topic/Enabling-Act>.

(potential) threat state leaders increase their power, thereby centralizing the power to the national government.

According to Coser, changes of a system happen gradually over time, and he compares the changes to the changes of an earthquake; “A stable earth is a dead earth” arguing that systems that are more stretchable can more easily adapt to and address changes or conflicts.⁵⁷ Therefore, what appears to be changes of a system (i.e. Hungary moving from a democratic system to an authoritarian system) can be the sum total of changes within the system. However, these changes do not happen overnight or simply as a single response to prohibit the spread of a pandemic. Furthermore, for this strengthened unity to apply, a prior feeling of community and patriotism is required. For this reason the similar public support for authoritarian leadership does not appear in all Member States to the EU. It is interesting to consider the recent reelection of Orbán in light of his approach to the COVID-19 pandemic. According to Coser’s theory, this reelection seems to be a natural result of the need for strong leadership in times of crisis. However, Orbán’s continued popularity within Hungary constitutes a seemingly sharp contrast to the external opinions within the EU, which remain concerned about the precarious state of the rule of law in Hungary.⁵⁸

Every social system needs the allocation of powers to function as a social system rather than anarchy. However, there can never be consensus between groups and individuals within the social system, that such allocation is just and fair. When a social system has institutionalized norms and values to govern the conduct of component actors, such as the EU and its member states, and the access to these goals of society is limited to some members, deviation from the social norms and values is bound to occur.⁵⁹ This also applies, when the norms and values are not institutionalized, as the actors will begin to express discontent. The consequence therefore might be a complete denunciation of previous conformity with the institutionalized values and goals, in some cases resulting in

⁵⁷ Coser, Lewis A.: “Social Conflict and the Theory of Social Change”, *The British Journal of Sociology*, Vol. 8, No. 3, 1957, p. 202.

⁵⁸ Verellen, Thomas: “Hungary’s Lesson for Europe Democracy is Part of Europe’s Constitutional Identity. It Should be Justiciable”, *Verfassungsblog*, 2022.

⁵⁹ Coser, Lewis A.: “Social Conflict and the Theory of Social Change”, *The British Journal of Sociology*, Vol. 8, No. 3, 1957, p. 203.

new value systems,⁶⁰ as can be observed in the cases of Hungary, Poland and Russia.^{61,62}

In conclusion, if the EU as a social system is able to adjust to the COVID-19 crisis, we will only see gradual changes within the system. However, if the EU is not able to stretch and adjust to the occurring issues it will allow for the accumulation of conflict within the system. Actors, such as Hungary, with their new system of values, may threaten to split the consensus of the EU as a whole.⁶³

5.3 Trend: Conflicting Values within the EU

Though the Hungarian government may have justified the measures taken in response to COVID-19 as necessary to secure the nation, the response appears to be the continuation of a growing political trajectory, which clearly conflicts with the fundamental values of the EU.

It must be noted that “*the rule of law has progressively become a dominant organizational paradigm of modern constitutional law in all the EU member states*”.⁶⁴ With this statement Laurent Pech defines the rule of law as shared political ideal of constitutional value, and a principle of great importance for membership of the Union. If the founding values are not respected, the cornerstone of the EU is lost. However, it is of great importance to include domestic and/or supranational interests in the equation to truly understand the actions and principles of the EU.

⁶⁰ Coser, Lewis A.: “Social Conflict and the Theory of Social Change”, *The British Journal of Sociology*, Vol. 8, No. 3, 1957, p. 203.

⁶¹ Pech, Laurent and Scheppele, Kim Lane: “The EU and Poland: Giving Up on the Rule of Law?”, *Verfassungsblog*, 2016.

⁶² Dzehtsiarou, Kanstantsin: “Between a Rock and a Hard Place: The Dilemma of Continuing or Ceasing Russian Membership in the Council of Europe”, *Verfassungsblog*, 2016.

⁶³ R. K. Merton, *Social Theory and Social Structure*, Ope cit., pp. 42-3 and 116-17, as referred to in Coser, “Social Conflict and the Theory of Social Change”, p. 204.

⁶⁴ Pech, Laurent: *The Rule of Law as a Constitutional Principle of the European Union*, Jean Monnet Working Paper 04/09, New York University School of Law, 2009, p. 44.

Several European countries have stressed their concern over the apparent Hungarian disregard of the rule of law principle.⁶⁵ It has been reiterated that emergency measures should be limited to what is strictly necessary, proportionate and temporary in nature, confirming the guidelines set out by international institutions and further supporting the initiative from the European Commission “*to monitor the application of emergency measures to ensure the fundamental values of the Union are upheld*”.⁶⁶ Though Hungary was not directly named in the statement, the statement indirectly addressed the controversial provisions of the Act.⁶⁷ Furthermore, the President to the Commission of the EU, Ursula von der Leyen stated “*it is of utmost importance that emergency measures are not at the expense of our fundamental principles and values as set out in the Treaties*.”⁶⁸

Some scholars argue that the EU is suffering from “illiberalism within”.⁶⁹ This is underlined in the above case study of the Hungarian response to COVID-19. Similar tendencies have previously become apparent in other (namely eastern) European countries, e.g. during the refugee crisis in 2015 where the “Visegrad countries” strongly opposed a shared quota for allocation of refugees. In connection with the responses to the COVID-19 pandemic, this highlights a much deeper value crisis, illustrating that some European countries may perceive European solidarity as a practice moving only in one direction. Furthermore, such a conflict of values becomes apparent in different approaches concerning abortion legislation, environmental issues as well as financial aid. It

⁶⁵ Diplomatic statement by Belgium, Bulgaria, Cyprus, Denmark, Estonia, Finland, France, Germany, Greece, Ireland, Italy, Latvia, Lithuania, Luxembourg, the Netherlands, Portugal, Romania, Spain, Sweden, published by the Government of the Netherlands. <https://www.government.nl/documents/diplomatic-statements/2020/04/01/statement-by-belgium-denmark-finland-france-germany-greece-ireland-italy-luxembourg-the-netherlands-portugal-spain-sweden>.

⁶⁶ Ibid.

⁶⁷ Bayer, Lili: “13 countries ”deeply concerned” over rule of law.”, Politico, 2020, <https://www.politico.eu/article/viktor-orban-hungary-13-countries-deeply-concerned-over-rule-of-law/>.

⁶⁸ Statement by President von der Leyen on emergency measures in Member States: https://ec.europa.eu/commission/presscorner/detail/en/statement_20_567.

⁶⁹ Mos, Martijn: “Ambiguity and interpretive politics in the crisis of European values: evidence from Hungary”, Taylor & Francis Online, 2020.

seems that there remains a divide between the mentalities of the countries previously (before 1989) “locked behind the iron curtain” and the “old” western European countries. If this conflict of values continues to escalate, it may result in the breakdown of dialogue and ultimately put the intergovernmental cooperation between the Member States of EU at risk.

It is unquestionable that the EU is facing a considerable challenge, originating from within its own constituent members. All three trends identified in this section concern national political support to the EU. If these trends continue, it can result in undermining the support for intergovernmental cooperation in Europe, not only by the public but also on a governmental level.

The COVID-19 pandemic has not in itself changed the EU, but rather it has highlighted and reinforced already existing tendencies. This gives rise to concern for the future of the EU. Member States’ repeated and seemingly blatant defiance of the Treaties undermines the very purpose of the EU. Continued defiance while still remaining within the EU and with only the limited consequences allowed for by the EU legislative framework greatly weakens the democratic cooperation, agency and effectiveness of the EU, and risks great damage to the legal order, which is established in the Treaties. Likewise, it is conducive to mistrust miscommunication and conflict between the Member States. It is therefore not unfounded to question whether the Union can thrive, and perhaps even if it can survive.

6. Conclusion

The rule of law is fundamental in upholding a democratic society, of which the protection of basic civil and political rights is a primary characteristic. As such the two concepts are inseparable and complementary in a democratic state. A strong rule of law is necessary for the protection of human rights within society, and likewise rule of law cannot exist if human rights are not protected. Therefore, the rule of law acts as a mechanism for the implementation of human rights and protection of democracy, by turning these values from principle into reality.⁷⁰ Derogation from democratic principles undermines the very structure

⁷⁰ Rule of Law and Human Rights, United Nations, <https://www.un.org/ruleoflaw/rule-of-law-and-human-rights/>.

protecting the people from autocratic abuse of power and arbitrary limitation or suspension of their civil and political rights. However, by their very nature, such derogations are also more difficult to qualify and remedy.

Overall the COVID-19 pandemic resulted in various responses as regards states of emergency. Particularly, the Hungarian response has raised concerns regarding the emergency legislative measures' conformity with the fundamental EU values as enshrined in the Treaties. On the basis that this emergency legislation de facto had no clearly defined expiry date, the derogations could not be considered proportionate. Thus, they constituted a breach of the international human rights bodies by which Hungary is bound. Similarly, the legislation resulted in a marked shift in power from both the legislative and judiciary branches to the executive branch, of which the temporal scope was also indefinite. The Hungarian response thereby also constituted a suspension of the democratic checks and balances designed to protect the rule of law.

Our analysis sheds light on three emerging trends, which illustrate a more general political trajectory within the EU. Hesitation from the EU to address the derogations of a Member State demonstrates that the mechanisms in place do not constitute a credible threat. This allows for other countries to follow a similar political agenda and such cumulative disregard of fundamental EU values ultimately risks the dismantling of the EU.

Though the Hungarian emergency legislation was reversed in time, the tendency that the legislation is indicative of has not ended. There continues to be a fundamental debate within the EU and we continue to see examples of divergence from EU values. Every crisis we face will test the integrity of the EU and the continuation of the abovementioned trends risks the potential breakdown of cooperation and thereby poses a risk to the function of the EU. However, though problematic, these trends do not necessarily constitute the end of the EU. Instead the COVID-19 crisis may be the very thing that catalyzes a comprehensive response to the growing value crisis by highlighting the need of a shared understanding of the fundamental values, through which the function of the Union can be secured.