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Progress and Tradition

András Koltay^{*} , Miklós Könczöl^{**} , András Lapsánszky^{***} , Ákos Tussay^{****} 

* University of Public Service, e-mail: koltay.andras@uni-nke.hu

** Centre for Social Sciences, e-mail: konczol.miklos@tk.hu

*** University of Győr, e-mail: lapsanszky.andras@sze.hu

**** University of Public Service, e-mail: tussay.akos@uni-nke.hu

The journal, *Public Governance, Administration and Finances Law Review (PGAF LR)* was launched in 2016 as a Central and Eastern European based law journal which was committed to facilitating an interdisciplinary forum of public law within the so-called Visegrád countries. Over the past six years, the journal's Editorial Team was constantly facing with a somewhat thorny issue, namely a theoretical discussion of CEE problems might, in many cases, not be confined within the journal's original and initial aims and scope. As a result of this, the Editorial Team was forced to refuse otherwise relevant pieces of scholarship, or to accept papers that strictly-speaking did not fall within the journal's scope.

In 2020, after publishing five volumes with a total number of ten issues, the Editorial Board decided to put an end to the above-mentioned practice and transform *PGAF LR* into a law journal with global coverage that accepts articles on all facets of public administration, public policy and public management within the region and with other parts of the world as well. As part of this transformation, the Editorial Board was partly renewed and several new members outside of the CEE area were invited to join. This process also brought along some changes within the Editorial Team itself. The work, which was initiated by *PGAF LR*'s two past editors, Gábor Hulkó and Tamás Kaiser, is now shared, under the watchful eye of founder Editor-in-Chief, András Lapsánszky, among three new editors: András Koltay, who is also the Rector of the University of Public Service, Miklós Könczöl, who is currently editor of two other prestigious Hungarian journals and Ákos Tussay, former secretary of the previous Editorial Team.

However, this transformation signals neither the end of a progress, nor a break with past traditions; rather, the Editorial Team wishes to uphold all the values, academic commitments and good practices that characterised the journal's past six years of operation. As a manifest sign of this expectation, the Editorial Team has decided to even continue with the former editors' last initiative, namely, as a follow up to the *Pandemic*

and Governance conference, organised in November 2020, the editors convened a second conference, *Post-Pandemic Politics: Perspectives and Possibilities*, in June 2021. Encouraged by the conference's success, the Editorial Team invited the conference's speakers to submit their manuscripts to be published in the journal's pending issue.

Thus, the first issue of our 2021 volume is partly a conference proceeding and partly an ordinary issue. The list of its articles is opened by the conference's keynote speaker's, Raphael Cohen-Almagor's, paper who considers Israel's response to the challenges raised by the Covid-19 pandemic with a specific focus on the invoked public policies and the related political, economic and legal concerns. After outlining the keys for the initial Israeli success, namely, the government's swift and effective reaction to the pandemic, the close cooperation and coordination between the organisations that were mobilised to counter the pandemic, and the effective implementation of governmental policies, the Author indulges into a fuller consideration of the mistakes and the moral of the vaccination campaign too.

The second paper is Bence Gát's *Coronavirus Test of the European Union's Policy on the Rule of Law*. In this article, the Author gives a general overview of the European Union's approach towards the idea of the rule of law just to set out that an extraordinary situation, such as the current pandemic, reveals that the EU institutions cannot provide sufficient guarantees for any objective examination of the issue.

Next, István Hoffman and István Balázs's article describes the impact of Covid-19 on the Hungarian body of administrative law. They argue that several new rules have been incorporated into the Hungarian legal system and that the 'legislative background' of the pandemic offered an opportunity to the central government to pass significant, yet rather controversial reforms.

The fourth study is Mina Hosseini's article which raises legal and ethical concerns regarding those dilemmas that hinge around the production and distribution of Covid-19 vaccines. As a possible solution the Author proposes the need to emphasise the vital significance of public rights as opposed to focusing exclusively on individual rights, such as those intellectual property rights that hinder the world-wide manufacturing of Covid-19 vaccines.

In the fifth article, András Karácsony and Szabolcs Nagypál investigate how and by what constitutional mandate the Hungarian Government deviated from the normal constitutional situation in 2020. Based on Carl Schmitt's and Giorgio Agamben's idea of the 'state of exception', they argue that the Hungarian situation in 2020 did not fall within this category; rather, it shall be described as an extraordinary situation.

Finally, the last article of the conference's proceedings is a study from Oana Șerban in which the Author proposes that the models of good governance in the post-pandemic world must be shaped by leftist principles, in order to ensure not the reopening, but the reconstruction of public life.

Next to these six conference papers, the present issue publishes two research articles as well. The first article is authored by Tibor Buskó and it provides an all-encompassing overview of the lower-middle level of public administration in Hungary, while Csaba Lentner's study endeavours to outline the development of Hungary's monetary policy from the late 1980s to the present.

CONFERENCE PROCEEDINGS

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Israel Facing Covid-19¹

Raphael Cohen-Almagor 

* University of Hull, Chair in Politics and Director of the Middle East Study Group (MESG),
e-mail: R.Cohen-Almagor@hull.ac.uk

Abstract: This paper considers Israel's response to the challenges raised by the Covid-19 pandemic with a specific focus on the invoked public policies and the related political, economic and legal concerns. I first provide some background information. Then, I outline the keys for the initial success in confronting the coronavirus pandemic. Three factors contributed to the initial Israeli success, namely: the government's swift and effective reaction to the pandemic; the close cooperation and coordination between the organisations that were mobilised to counter the pandemic, and the effective implementation of governmental policies. However, mistakes were made during the second wave of the pandemic.

Keywords: Covid-19, health, Israel, pandemic, public cooperation, resourcefulness, vaccination

1. Introduction

Israel is a country of 9.3 million people and a relatively small territory of 20,072 km² (Israel Central Bureau of Statistics, 2021). It is a Western democracy; life expectancy is, on average, 82 years which is quite similar to those of the Western countries (Cohen, 2019). Its demography is important to consider when we come to analyse the effects of Covid-19 on society. 79% of the population is Jewish. Of them, 14% are ultraorthodox *Haredi* (Israel Central Bureau of Statistics, 2018). 21% of the population is Arab–Palestinian (Times of Israel, 2019).

This paper considers Israel's response to the challenges raised by the Covid-19 pandemic with a specific focus on the invoked public policies and the related political, economic and legal concerns. The paper outlines the keys for the initial success

¹ This paper is based on the key lecture "Israel Facing COVID-19: Challenges, Problems and Successes", *Pandemic and Governance: Towards an Approximation of Covid-19's Legal, Administrative, Fiscal and Political Dilemmas*, The Eötvös József Research Centre of the University of Public Service, Budapest (30 June 2021). It was further developed for the Annual Conference of the European Consortium for Political Research (ECPR) (30 August – 3 September 2021). The author expresses gratitude to Gary Edles, Yuval Rotem, Yoav Tenenbaum, Aharon Mor, Eugénie de Saint-Phalle, Avi Ohry and Ehud Toledano for their constructive comments.

in confronting the pandemic. Three factors contributed to the initial Israeli success, namely: the government's swift and effective reaction to the pandemic, the close cooperation and coordination between the relevant bodies and organisations that were mobilised to counter the pandemic, and the effective implementation of the invoked governmental policies, especially the rapid vaccination of the adult population. However, mistakes were made during the second wave of the pandemic. I explain them in some detail.

2. First wave: some initial success

The novel coronavirus, known as Covid-19, is part of a family of viruses that includes the common cold and respiratory illnesses such as Sars. It affects the lungs and airways. For many people it causes mild symptoms, while for others it can be far more serious and can cause death. The disease is very infectious and spreads very easily. It spreads primarily through droplets of saliva or discharge from the nose when an infected person coughs or sneezes. The average incubation period – the time between coming into contact with the virus and experiencing symptoms – is 5 days, but it could be anything between 1 and 14 days (Age UK, 2021).²

The world first learned about Covid-19 in December 2019. A close scrutiny of the reports shows that between late December 2019 until June 2020, approximately 18,000 people were infected with the coronavirus in Israel and 295 of them died due to a medical condition directly related to the infection. One may conclude that Israel's handling of the pandemic at the initial stages was quite successful for the figures clearly indicate a tight control over the pandemic. Three factors contributed to this success:

First, the Israeli Government was quick to respond to Covid-19. This aptitude is immensely important as pandemics spread quickly by human interactions. The first case of Covid-19 in Israel was recorded on 21 February 2020 (Miller, 2020). This patient was an Israeli citizen who came from the Diamond Princess cruise ship and by the time of his return to Israel, it was clear that he was carrying the infection. Israel immediately barred travellers from certain countries from entering Israel, and quarantined Israelis arriving from those countries. Thus, the following day, 22 February 2020, two hundred Israeli students were quarantined after being exposed to a group of South Korean tourists (Miller, 2020).

On 9 March 2020, a mandatory two-week quarantine was announced for all people who visit Israel from abroad because it was believed that within two weeks it is possible to discern if people are infected or not. On 12 March 2020, the Israeli Government ordered a closure of all schools and universities (Miller, 2020). On 16 March 2020, thousands of public sector employees were told to either work from home or were placed on paid leave in order to minimise human interactions. Then, on 19 March 2020, Prime Minister Netanyahu declared a national state of emergency that enabled him to wield special powers in dealing with the pandemic. The first Israeli fatality, the 88 years

² For a general overview, see Bonotti & Zech (2021).

old Arie Even, was recorded on 23 March 2020. Even was a Holocaust survivor and reports of his death carrying all the implications that come to the news and to the hearts of people in Israel when they hear the word “Holocaust”. Subsequently, on the very next day, 24 March 2020, Prime Minister Netanyahu announced a new way of life for Israelis, shutting down restaurants, malls, museums and all the places of social interaction. At that time, the very controversial digital tracking measure was also introduced.

The second element of success has to do with effective coordination. Since its foundation in 1948, Israel had to prepare itself for the possible scenario of security crisis, or any other kind of disaster that may come upon the country. The wars that the country endured (1948, 1956, 1967, 1973, 1982–2000, 2006) pushed leaders to develop the necessary expertise to manage emergency situations. The establishment has also established strong partnerships and exchanges of knowledge between the Israeli Defence Forces, the private sector and the public sector. In the face of the pandemic, the government, the Israeli Defence Forces, the internal security force (SHABAC), the Mossad, the health sector, and the private companies were mobilised to tackle the virus. This all-encompassing and tight cooperation, as well as the thoughtfulness of the Israeli population is well exemplified by the quick adjustment of the Israel Aerospace Industries. Normally, these industries produce private jets for the high-flying one percent of the world population; but early on during the pandemic, these industries started manufacturing ventilators, thinking that many people might be in dire need of these life-saving machines. This example attests not only to the coordination and the resourcefulness of the Israeli people but also to their ability to take people with knowledge in one sphere and move them to another sphere by giving them the instruction and immediately transform a factory to support a nation in need.

Thirdly, the implementation of the policy was thorough. The Israeli policies were carried out via close cooperation between the ministries, health services, the police corps and the Israeli Defence Forces. Soldiers were mobilised early on to support the national endeavour against Covid-19. Many people ensured that orders were obeyed. Furthermore, private companies were hired to do the vaccination so that nurses could continue doing their routine work. Efforts were made to ensure that the rapid vaccination campaign did not hinder the regular operation of the health sector.

Finally, Israel introduced a traffic light system to tag the level of infections. Cities and towns were characterised by colours in accordance with the number of infections in the vicinity. Green was the less severe; orange indicated that the number of infections was significant, while red indicated a high number of infections. Red towns and cities were closed so that no one could enter, or exit the city under quarantine. This prudent measure enabled the continuation of operations in the green zones and avoided a situation where the entire country would be put in a complete shutdown situation. At the same time, it should be noted that the system was not immune to flaws. Prime Minister Netanyahu acted at times in accordance with partisan political interests and not in accordance to what was required of him to do. This was especially noticeable regarding ultraorthodox cities, such as Bnei Brak, that were not always classified as red, and their lockdown was not maintained as it was warranted.

3. Second wave: the mistakes

Despite the initial success, in the second phase of the pandemic, the Israeli crisis management has failed quite miserably. From 8 June until the end of October 2020 there were more than 300,000 infections and 2,537 people died as a result of Covid-19 (Israel Central Bureau of Statistics, 2020). These figures indicated that something went wrong in the Israeli pandemic management. Israel became the world record holder in the number of Covid-19 carriers in relation to population size. The number of Covid-19 verified carriers per 1 million people was more than 245, the highest in the world. During that period, there was a sharp jump of 2,236% (Pilot, 2020; see also Drukman, 2020). What were the reasons for such an increase?

By the end of May 2020, Israel had witnessed a strong economic pressure stemming especially from owners of small businesses who were struggling to provide for their families. As a result of increased public pressure, Israel opened up too early. The government also allowed large gatherings and the entering of international flights into Israeli territory. Consequently, a large number of tourists arrived, some of them carried the virus. And the large gatherings where social distancing was not kept triggered the rapid spread of the virus.

The decision to return to normal pre-Covid life had direct economic rationale. It was also influenced by narrow political considerations. The government at that time was comprised of several parties, including ultrareligious *haredi* parties. The ultraorthodox population takes direct orders from their rabbis. They are less amenable to listening to the government. Many of the leading rabbis opposed the government policies and ordered their followers to continue with their normal way of life. They refused to abide by the instructions to wear masks, keep social distancing and avoid crowded places. The *haredi* men continued to attend their places of study, and they continued to have large wedding celebrations and funerals (Shraki, 2020). They ignored the traffic light system and travelled between cities and towns. As a result, they transmitted the coronavirus all around the country.³ Due to partisan political reasons, the government failed to implement its own policies.

Furthermore, the other minority group, the Israeli Palestinians, also did not abide by the government instructions. Just like the *haredi* population, the Israeli Palestinians also held large gatherings, weddings and funerals (Harel, 2020). Those transgressions also contributed to the rapid increase in the number of infections.

4. The vaccination campaign

The vaccination campaign in Israel was very successful. By now it has become a truism that vaccination is the key in fighting Covid-19. If a country vaccinates its population

³ In comments on a draft of this paper, Yoav Tenenbaum noted that there was a clear difference between the Ashkenazi (of European origins) population, which, on the whole, tended to behave irresponsibly, and the Oriental (of Asian–African origins) *Haredi* population, which, on the whole, heeded the instructions of the Ministry of Health.

than it has better chances to tackle the virus and get back to the life we knew before the outbreak of the global pandemic. In Israel, the vaccination campaign was launched very early, on 19 December 2020. The previous month the government signed an agreement with Pfizer (PressNewsAgency, 2020). Israel paid an advance sum of money and agreed to supply Pfizer with data regarding the effects of vaccination on the Israeli population. The exact details of the agreement between Pfizer and the Israeli Government were never disclosed. Prime Minister Netanyahu disclosed that he reached the deal with Pfizer's chief executive to speed up vaccine deliveries to Israel, saying: 'Israel will be a global model state... Israel will share with Pfizer and with the entire world the statistical data that will help develop strategies for defeating the coronavirus' (Ben Zion, 2021).

In terms of territory, Israel is a relatively small country. Its population is less than 10 million people. It is world-renowned for its high-tech innovations and advanced information technologies that facilitate effective prioritisation, allocation and documentation of vaccines for eligible individuals. Israeli health providers are efficient. Its medical know-how is very advanced. I mentioned the effective cooperation between government, private and public stakeholders and its experience in carrying out rapid large-scale emergency responses. Israel has a highly developed public health system and very efficient health providers that have computerised records of all their members' medical files. These databases also allowed for the effective monitoring of the effect of vaccines. Thus, it is not difficult for Israel to manage an effective vaccination campaign. These factors made Israel an attractive partner for Pfizer that has an obvious interest in attaining accurate information on the country's implementation of the vaccine. One may assume that the agreement was designed to measure and analyse the epidemiological data arising from the product roll-out to generate and evaluate epidemiological and populational level vaccine data, and to determine whether herd immunity can be achieved.

Israel has rolled out the largest per capita vaccination campaign worldwide. Within four months, it delivered more than 10 million doses of vaccine. By 19 April 2021, 54% of the entire population, and 88% of people aged 50 years or older, had received two doses (Leshem et al., 2021). By 11 August 2021, 5,827,742 people received the first dose, and 5,406,232 received first and second doses (Ministry of Health, 2021a). Figure 1 below shows the importance of full vaccination, especially when the older population is concerned.

In August 2021, the Ministry of Health recorded 85.6 severe Covid-19 cases per 100,000 people among the unvaccinated over the age of 60, compared to 16.3 per 100,000 people among those who are fully vaccinated. This makes the unvaccinated elderly more than five times as likely to experience a severe infection compared to immunised people. While the risk of experiencing severe symptoms increases with age for all people, it rises much more dramatically among those who are unvaccinated (Sokol, 2021). Earlier during the pandemic crisis, it was thought that there was no need to vaccinate people under the age of 20. That reasoning has changed. In February 2021, the government decided to expand vaccination to people of the age of 16 and above (Times of Israel, 2021).

On 12 August 2021, the Health Ministry (2021a) advised that 6,593 people died as a result of the pandemic, and there were 42,203 people who were infected with the virus. 748 of them were hospitalised, 87 in critical condition.

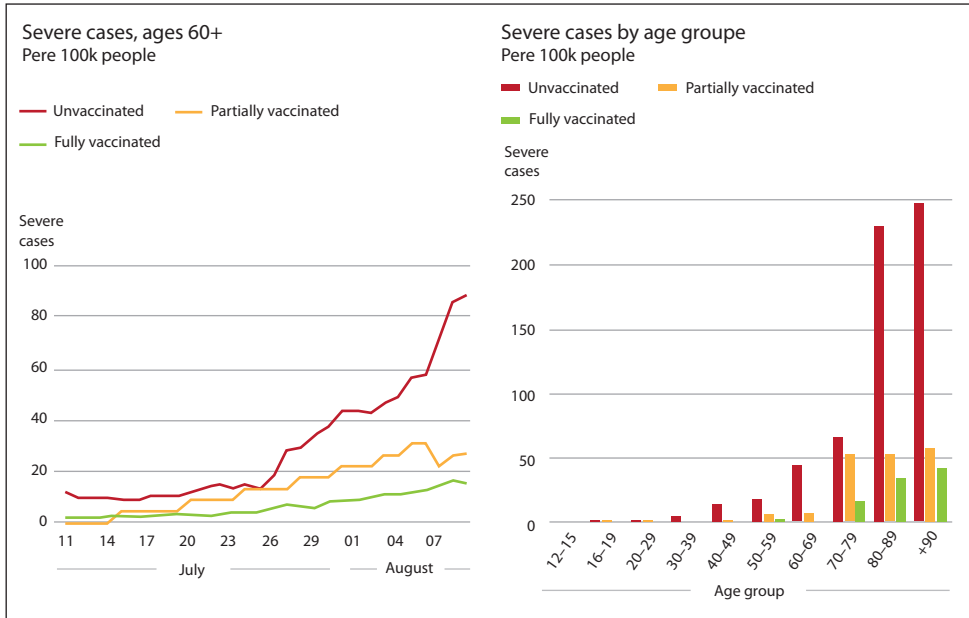


Figure 1. Severity of infection in 60+ people compared to other age groups

Source: Sokol, 2021.

Since May 2021, the Israeli market has returned to full activity including shops, restaurants, theatres, sports and musical events. Because Israel relies heavily on tourism, in late May 2021 the government decided to open Israel to tourists, acknowledging the risks that are involved in taking this decision. From an epidemiological perspective, tourism is amongst the most difficult challenges.

5. Conclusion

With all of its flaws Israel is still a success story. The table below (Table 1) shows the long list of countries that performed worse than Israel in tackling Covid-19. In Israel, one does not see millions of people infected and hundreds of thousands dead as a result of the pandemic. In 2021, Israel was able, largely speaking, to return to almost a normal way of life. There are fears of another wave of infection. Critics hold that the previous Netanyahu Government made a mistake in lifting all restrictions and the current Bennet

Government is mistaken for failing to institute tough restrictions right from the beginning of the current wave. Further criticism is levelled against the government for permitting people to gather in the synagogues, especially during the High holidays of Rosh Hashana (New Year), Yom Kippur and Sukkot, all take place in September. A million people have not been vaccinated at all yet (Corona virus, 2021). According to the Ministry of Health, 97% of those aged 60 and over in the general society are vaccinated, compared with 81% in Arab society and 80% in ultraorthodox (Drukman, 2021). On 13 August 2021, 5.83 million people were vaccinated in one or two jabs, which is 79.7% of the group that can be vaccinated (aged 12 and over). In the Arab population, only about 884,000 people were fully or partially vaccinated and they constitute 59.1% of the total group eligible for the vaccine (Globs, 2021). There is an increased pressure on the unvaccinated to get the jabs as the majority tries to protect itself against the refusing minority. Some urge for another closure while others, especially the business sector, press to prevent further closure.

Still, the successful vaccination campaign provides a robust shield of defence. The key to the Israeli success was rapid and full vaccination of the adult population. Vaccination according to age appeared to be a good policy. Resourcefulness of the Israeli people and their cooperation and attentiveness are also crucial. Resourcefulness manifested itself when nurses took the initiative and invited people from the street for immediate vaccination without an appointment in order to avoid destroying unused vaccines. This option seemed preferable to dumping the unused vaccines. Similarly, cooperation and attentiveness are crucial. In August 2021, Minister for Regional Cooperation Issawi Frej of the Meretz Party expressed sharp criticism of Israeli Palestinians who were traveling abroad, especially to Greece and Turkey, with fake vaccination or immunity documents. Frej said: 'Arabs are flying in huge numbers to Turkey and Greece and showing an utter lack of responsibility in doing so... They also present faked documentation in order to return to Israel' [and dodge quarantine requirements] (Arutz Sheva, 2021). Frej, who is himself an Israeli Arab, called for an in-depth study of those concerns.

Providing people with the third jab proved to be effective. It protects, especially the more elderly people, against the harms of the Delta variant of the coronavirus that was spreading in the country and in the world at large. With time, there is a decrease in the level of vaccine effectiveness among some adults. Therefore, the government decided to vaccinate with this booster all people aged 12 and above (Ministry of Health, 2021b; Cohen, 2021). By late August 2021, almost 1.5 million people received the third jab (MivzakLive, 2021).

Resourcefulness, quick decisions and public cooperation are essential. They are decisive factors that distinguish between success and failure when fighting against the spread of the pandemic.

Table 1.
Cases and mortality by country

Country	Confirmed	Deaths	Case fatality	Deaths/100k pop.
Peru	2,127,034	197,102	9.3%	606.27
Hungary	810,046	30,037	3.7%	307.44
Bosnia and Herzegovina	206,476	9,694	4.7%	293.67
The Czech Republic	1,675,179	30,369	1.8%	284.63
Brazil	20,212,642	564,773	2.8%	267.60
San Marino	5,194	90	1.7%	265.80
North Macedonia	158,681	5,513	3.5%	264.61
Montenegro	104,264	1,637	1.6%	263.13
Bulgaria	429,628	18,288	4.3%	262.16
Colombia	4,846,955	122,768	2.5%	243.88
Argentina	5,041,487	108,165	2.1%	240.69
Moldova	261,000	6,291	2.4%	236.71
Slovakia	393,160	12,543	3.2%	229.97
Belgium	1,143,127	25,279	2.2%	220.12
Paraguay	455,680	15,341	3.4%	217.77
Italy	4,406,241	128,273	2.9%	212.73
Slovenia	260,372	4,433	1.7%	212.31
Croatia	365,335	8,275	2.3%	203.44
Poland	2,884,361	75,285	2.6%	198.27
The United Kingdom	6,146,642	130,813	2.1%	195.73
Mexico	2,997,885	245,476	8.2%	192.42
Chile	1,624,823	36,138	2.2%	190.68
The United States	36,055,002	618,137	1.7%	188.32
Ecuador	491,831	31,788	6.5%	182.97
Tunisia	613,628	21,089	3.4%	180.33
Romania	1,085,412	34,323	3.2%	177.32
Spain	4,643,450	82,227	1.8%	174.67
Uruguay	382,721	5,990	1.6%	173.03
Portugal	990,293	17,502	1.8%	170.43
France	6,407,288	112,575	1.8%	167.87
Andorra	14,873	129	0.9%	167.22
Georgia	455,846	6,182	1.4%	166.17
Panama	443,718	6,918	1.6%	162.91
Lithuania	286,943	4,433	1.5%	159.07
Armenia	232,610	4,658	2.0%	157.49
Bolivia	478,671	18,004	3.8%	156.38
Liechtenstein	3,107	59	1.9%	155.19

Country	Confirmed	Deaths	Case fatality	Deaths/100k pop.
Sweden	1,106,821	14,658	1.3%	142.51
Latvia	139,587	2,561	1.8%	133.89
Luxembourg	74,437	825	1.1%	133.09
Namibia	121,507	3,204	2.6%	128.44
South Africa	2,546,762	75,201	3.0%	128.42
Switzerland	729,024	10,915	1.5%	127.29
Kosovo	110,756	2,273	2.1%	126.68
Ukraine	2,346,560	55,937	2.4%	126.03
Greece	521,399	13,087	2.5%	122.12
Austria	664,133	10,751	1.6%	121.11
Lebanon	573,959	7,952	1.4%	115.99
Suriname	26,103	669	2.6%	115.07
Iran	4,238,676	95,111	2.2%	114.71
Russia	6,404,960	163,629	2.6%	113.34
Germany	3,803,351	91,824	2.4%	110.45
The Netherlands	1,921,568	18,175	0.9%	104.86
Serbia	727,246	7,146	1.0%	102.89
Costa Rica	422,344	5,169	1.2%	102.41
Ireland	315,385	5,044	1.6%	102.08
Jordan	779,019	10,148	1.3%	100.46
Seychelles	18,714	98	0.5%	100.38
Estonia	135,512	1,277	0.9%	96.26
Belize	14,578	341	2.3%	87.36
Albania	134,201	2,460	1.8%	86.19
Malta	34,953	428	1.2%	85.15
Monaco	3,021	33	1.1%	84.69
Bahrain	270,290	1,384	0.5%	84.33
Honduras	309,029	8,202	2.7%	84.16
Trinidad and Tobago	40,574	1,144	2.8%	82.01
Botswana	130,771	1,832	1.4%	79.52
Oman	298,942	3,948	1.3%	79.36
Bahamas	15,915	308	1.9%	79.08
Eswatini	32,798	889	2.7%	77.43
West Bank and Gaza	318,181	3,615	1.1%	77.16
Israel	910,569	6,571	0.7%	72.58
Guyana	22,992	561	2.4%	71.67
Canada	1,451,040	26,635	1.8%	70.86
Guatemala	394,372	10,845	2.7%	65.32
Turkey	5,968,838	52,437	0.9%	62.85

Source: Johns Hopkins, 2021.

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Coronavirus Test of the European Union's Policy on the Rule of Law

Ákos Bence Gát 

* Junior Research Fellow, University of Public Service, Eötvös József Research Centre, Europe Strategy Research Institute, e-mail: gat.akos.bence@uni-nke.hu

Abstract: The issue of the rule of law has been on the European Union's (EU) agenda since the beginning of the 2010s. The legal history of the EU shows that the EU's approach to the topic of the rule of law underwent significant changes. Initially, the Member States called for guarantees of fundamental rights in EU institutions. This trend began to change in the late 1990s and early 2000s, when the possibility of European rule of law control over Member States and the predecessor of the current Article 7 of the Treaty on European Union (TEU) were introduced by the Treaty of Amsterdam. However, the idea that the EU institutions can constantly monitor the Member States in the name of the rule of law has only emerged and started dominating the European political agenda since the early 2010s. Over the last decade, the EU institutions have continuously expanded their toolkit for monitoring Member States in this regard.

Following calls from some Member States and the European Parliament, in 2014 the Commission set up the new EU framework to strengthen the rule of law. In the same year, the European Council introduced an annual rule of law dialogue. In 2016, the European Parliament proposed the establishment of an annual rule of law report that monitors all Member States. At first, the European Commission was reluctant to accept this idea, but finally it introduced an annual rule of law report in 2020. However, the EU's policy on the rule of law suffers from fundamental shortcomings, which were especially visible during the first wave of the coronavirus crisis in the spring of 2020. In the pandemic situation, it has become even more apparent that the EU's policy on the rule of law raises a significant issue of EU institutions exceeding their competences and stands on a questionable legal basis.

Criticisms formulated against Hungary during the pandemic have revealed that the EU institutions do not provide sufficient guarantees for an objective examination of the situation of the rule of law in the Member States. The situation brought about by the coronavirus has also raised a number of questions regarding the lawful functioning of EU institutions, which shows the need for a rule of law mechanism capable of verifying that the EU institutions themselves also properly respect the rule of law.

Keywords: European policy on the rule of law, conferral of competences, legality of the functioning of European institutions during the coronavirus pandemic

1. Introduction

The rule of law is a constitutional concept which inherently has no fixed, universal definition. However, there is agreement that its key elements include lawfulness of political decisions, legal certainty, respect for fundamental rights, and the existence of checks and balances. In a state based on the rule of law, the legislative power itself has also legal, constitutional limits (Council of Europe, 2011, p. 10). In the last decade, a new European public policy has developed around the notion of the rule of law. Public policy is ‘the action programme of one or more administrative or governmental authorities’ (Hassenteufel, 2011, p. 7). This definition is also applicable to European policy on the rule of law as various EU institutions, EU politicians, non-governmental organisations and researchers have invested significant energy in developing newer and newer ways for the EU to monitor Member States in the name of the rule of law. Since 2011 numerous reports, resolutions, official documents and academic articles have shaped the action plan that the European Union continues to follow today.¹ The aim of this paper is to provide a concise overview of European policy on the rule of law with a special emphasis on the impact of the coronavirus pandemic in this field.

The EU’s approach towards the notion of the rule of law went through a significant change during the history of European integration. Initially, the fear was that citizens’ fundamental rights would be threatened not by Member States, but by European institutions. It may seem odd in the context of current European politics, but originally it was national authorities which demanded stronger guarantees of fundamental rights for their citizens to defend against potential abuses by the European institutions, and not the reverse. Then a spectacular turnaround took place and EU institutions now take any opportunity to voice their concern about Member States not providing enough protection to the rule of law. The EU developed a complex, constantly expanding set of instruments among which parallels and duplications may be observed which reflect political and institutional concurrence between different EU institutions. In the spring of 2020, the first phase of the coronavirus pandemic provided an opportunity to observe how the EU’s relatively new policy on the rule of law functions in exceptional circumstances. The coronavirus has created an extraordinary context, not only for the Member States but also for the EU’s institutional system, in which the shortcomings of European policy on the rule of law become more apparent.

2. The rule of law’s changing role in the European Union from a legal historical perspective

The European Communities, the predecessor of the EU, were primarily about economic rather than value-based cooperation (Téglási, 2014, p. 154). While the protection of fundamental rights became the premise of Member State constitutional practices after the World Wars, the protection of fundamental rights and the rule of law were only

¹ For a more detailed analysis see Gát (2019).

inserted into the treaties that shaped the predecessors of the EU after many decades of delay. In the first three decades of the European Communities, the founding Treaties did not mention fundamental rights, including only a few legal bases for the protection of a few special rights. Such special rights were, for example, a general prohibition of discrimination on the grounds of nationality, freedom of movement for workers, freedom to provide services, improved working conditions and improved standards of living for workers and equal pay for men and women (Ferraro & Carmona, 2015, p. 3).

Initially, fundamental rights appeared only in symbolic declarations. Following the 1973 Copenhagen European Summit, the nine Member States of the European Communities adopted the Declaration on European Identity.² This document states that 'sharing as they do the same attitudes to life, based on a determination to build a society which measures up to the needs of the individual, they are determined to defend the principles of representative democracy, of the rule of law, of social justice – which is the ultimate goal of economic progress – and of respect for human rights'. In 1977, the Parliament, the Council and the Commission adopted a brief declaration, comprising only two paragraphs, in which they emphasised that they 'stress the prime importance they attach to the protection of fundamental rights, as derived in particular from the constitutions of the Member States and the European Convention for the Protection of Human Rights and Fundamental Freedoms'.³

As the Community's legal, political and economic importance has increased, it has become increasingly essential for the new European political entity to provide legal guarantees for the protection of fundamental rights against potential breaches by European institutions. In this regard, the so-called Solange judgment of the German Constitutional Court of 29 May 1974 was a milestone. In its decision, the Karlsruhe Court stated that it would continue reviewing Community legislation from a fundamental rights perspective for as long as the European Communities failed to ensure the protection of fundamental rights to the same degree as Germany. In reaction to the judgment of the Constitutional Court, the Court of Justice of the European Union (formerly the Court of Justice of the European Communities, hereinafter: the Court) sought to establish guarantees for the protection of fundamental rights. In the light of today's debate on the rule of law in the EU, this may have been forgotten, and it should be emphasised that the Court, similarly to the 1977 statement by Parliament, the Council and the Commission, referred to the constitutional traditions of the Member States, and relied on them when it upheld that the protection of fundamental rights is part of the general principles of Community law. It later further extended the legal basis for the enforcement of fundamental rights and international conventions, in particular the European Convention on Human Rights, which became an additional source of inspiration.

Despite the developments in case law, the idea that there is an inherent fundamental rights gap of the European Communities is supported by the fact that, for a long

² Déclaration sur l'identité européenne (Copenhague, 14 décembre 1973).

³ Joint Declaration of the European Parliament, the Council and the Commission on Fundamental Rights, 27 April 1977.

time, the EU did not have its own instrument for the protection of fundamental rights. The so-called Charter of Fundamental Rights was proclaimed on 7 December 2000 in Nice. The proclamation of the Charter, however, was in the form of an interinstitutional agreement, which could not be considered equivalent to the Treaties. It would only be given the same legal weight as the Treaties much later, in the draft of the Treaty establishing a Constitution for Europe ('the Constitutional Treaty'). Since the draft Treaty was rejected in referenda in two Member States, however, the Charter remained a mere interinstitutional agreement. The Charter of Fundamental Rights was only elevated to the level of the Treaties around a decade ago, when the Treaty of Lisbon entered into force in 2009.

Regarding the Treaties, the first explicit reference to the rule of law only appeared 35 years after the establishment of the European Communities, in the 1992 Treaty of Maastricht. Again, it is important to note that back then, the issue of the protection of the rule of law had not been raised in relation to EU Member States, but basically in relation to third countries. At the same time, in line with the case law of the Court, Article F of the Maastricht Treaty stated that 'the Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law' (Maastricht Treaty, Article F).

In comparison, the 1997 Treaty of Amsterdam brought about a significant change in approach. With the new Treaty, Article F (1) of the Treaty of Maastricht was amended as follows: 'The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States' [Treaty of Amsterdam, Article 1(8)]. It can be observed that in this wording, the EU has progressed to referring to fundamental rights as its own principles, and there is no indication that these legal principles became part of the EU legal order thanks to the Member States' constitutional traditions.

The Treaty of Amsterdam also introduced the predecessor to current Article 7 of the Treaty on European Union, well known from the political debates of the past years. Article F.1 of the Treaty of Amsterdam stated that 'the Council, meeting in the composition of the Heads of State or Government and acting by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the assent of the European Parliament, may determine the existence of a serious and persistent breach by a Member State of principles mentioned in Article F(1), after inviting the government of the Member State in question to submit its observations'. This procedure for sanctioning of Member States on their adherence to the rule of law has been strengthened and supplemented by the Treaties of Nice and Lisbon.

Based on the legal historical analysis of the Treaties, it can be established that, in the European Union, the protection of the rule of law is a relatively recent issue. It is also important to note that originally the Member States required the EU to introduce minimum guarantees of fundamental rights in its own legal system. Nowadays, this trend changed considerably and EU institutions require the Member States to provide more guarantees of the rule of law at national level. The idea of the EU monitoring the

rule of law situation in Member States appeared in the Treaty of Amsterdam. This control still takes the form of an exceptional procedure, subject to strict conditions in Article 7 of the current Treaty on European Union.

In the procedure set out under Article 7(1), a four fifths majority of the Council and the consent of the European Parliament are required to determine a clear risk of a serious breach by a Member State of European values. In the procedure under Article 7(2), determining a serious and persistent breach of values shall be subject to the unanimous vote of the Heads of State or Government of the Member States and the consent of Parliament.

The Article 7 procedure, due to its exceptional nature, would not in itself have been capable of making rule of law control over Member States one of the top issues of European politics. The rule of law control over Member States is on the EU's political agenda because various European institutions and political actors translated it into a new European public policy. In the 2010s, one was able to observe a proliferation of debates, action plans, political and institutional documents examining the rule of law situation in certain Member States, especially the ones which joined the Union after 2004. Over the last decade, the EU's rule of law toolbox has been constantly expanding.

3. Expanding institutional toolbox of European policy on the rule of law

Over the last decade, various EU political actors and institutions have launched a number of initiatives with the aim of establishing a control over Member States in the name of the rule of law.

On 6 March 2013, the Foreign Ministers of four EU Member States, Germany, Finland, Denmark and the Netherlands addressed a letter to the President of the European Commission requesting the establishment of an EU rule of law mechanism.⁴ The letter sets out the main lines of action that EU institutions have followed to date in the field of policy on the rule of law, from the idea of a rule of law mechanism to the issue of potential financial sanctions, which were highly debated during the 2020 multi-annual financial framework negotiations.

On 3 July 2013, the European Parliament adopted a resolution on the basis of the report of MEP Rui Tavares (European Parliament, 2013). The resolution contained a broad list of criticism formulated by the European left wing regarding the political and legal developments in Hungary after 2010. Similarly to the above mentioned letter of some foreign ministers, this resolution also already advocated the adoption of a swift and independent monitoring mechanism and an early-warning system coordinated at the highest political level to monitor EU values, without however clarifying the details of such a mechanism.

⁴ Letter from the German, Dutch, Finnish and Danish Foreign Ministers to the President of the European Commission, 6 March 2013.

On 11 March 2014, the European Commission announced in a communication the establishment of 'a new EU Framework to strengthen the Rule of Law' (European Commission, 2014) (hereinafter: rule of law framework), which was the first concrete tool for the EU to monitor the situation of the rule of law in Member States. This document outlined the mechanism that the Commission intended to apply in cases it would suspect that an EU Member State breaches the rule of law. The basis of this mechanism is a structured dialogue with the Member State concerned and consists of three phases. In the first phase, the Commission assesses whether there are any clear indications that the rule of law is at risk in a Member State. If, on the basis of its preliminary assessment, it concludes that there is a systemic threat to the rule of law, it will enter into a dialogue with the Member State and send the state concerned its 'rule of law opinion'. In the event that the first phase does not bring results, in the second phase the European Commission sends a 'rule of law recommendation' to the Member State, the main elements of which it makes available for the public opinion. In its recommendation, the Commission is supposed to clearly state the reasons for its concerns and call on the Member State to resolve the issues outlined within a set period of time. The third phase is the 'follow-up to the Commission's recommendation', in which the Commission monitors the implementation of the recommendation addressed to the Member State concerned. If that Member State does not follow the recommendation satisfactorily within the set deadline, the Commission may initiate one of the mechanisms provided for in Article 7 TEU.

The structure of the rule of law mechanism developed by the Commission is based on the analogy of the procedural structure applied in infringement procedures. The structured dialogue takes place in a similar way: the Member State concerned and the Commission communicate and negotiate with each other and further steps only take place if they fail to reach an agreement at any stage. However, significant differences may be observed between the two procedures in relation to the next steps. In the event of an infringement procedure, in the absence of an agreement between the Member State and the Commission, the Commission may refer the matter to the Court of Justice of the European Union. In comparison, in the rule of law framework the judicial phase is completely missing. For this reason, the sanctions that may be envisaged also differ significantly. In an infringement procedure, the Court can condemn the Member State and order it to change its national legislation or practice to fall in line with the Commission's expectations, and can impose a fine. The rule of law framework does not include similar legal sanctions, failing which the Commission can only exert pressure on the Member State by initiating one of the procedures under Article 7 TEU.

Shortly after the announcement of the Commission's rule of law framework, the Council developed its own rule of law instrument. In its press release of 16 December 2014, the Council announced that it would organise an annual political dialogue between Member States to promote and protect the rule of law. The Council emphasised that 'this dialogue will be based on the principles of objectivity, non-discrimination and equal treatment of all Member States'. It also stated that its mechanism 'will be without prejudice to the principle of conferred competences, as well as the respect of national identities of Member States inherent in their fundamental political and

constitutional structures [...], and their essential State functions' (Council of the European Union, 2014a). The Council has thus set up its own rule of law instrument in parallel with the Commission's rule of law mechanism. On the one hand, this demonstrated that it did not want to remove completely the topic of the rule of law from the European political agenda. On the other hand, it also indicated that by limiting the procedure to an intergovernmental dialogue respecting the equality and sovereignty of the Member States, the Council wanted to keep the EU's rule of law control over Member States within strict boundaries. The reasons of this prudent approach were not only political, but also legal. At the next point, I will present more in detail that the Council's Legal Service found the idea of EU institutions controlling the rule of law situation in Member States highly problematic from a legal perspective.

The Council was not the only EU institution to criticise the Commission's rule of law framework. Although from a different standpoint, the European Parliament also voiced its dissatisfaction. The institution started to develop a third, alternative rule of law mechanism with the justification that it did not deem the Commission's solution to be sufficiently comprehensive. The Parliament's solution is set out in its resolution adopted on 25 October 2016, which proposed that the Commission should establish an EU mechanism on democracy, the rule of law and fundamental rights (European Parliament, 2016).

Unlike the Commission's rule of law framework, the rule of law mechanism proposed by Parliament would not only be applied to individual countries 'if necessary', on a case-by-case basis. At the contrary, all EU Member States would be regularly monitored each year and EU institutions would keep all Member States under continuous surveillance. This resolution outlined the structure of a mechanism in which the Parliament, as well as various non-governmental organisations, would have been assigned a much more significant role than in the Commission's rule of law framework.

Different EU institutions have proposed different ways for the EU to monitor the rule of law in the Member States, and these mechanisms even compete with each other. For example, the Commission rejected the Parliament's October 2016 proposal, stating that it had serious doubts about the need and the feasibility of an annual Report and a policy cycle on democracy, the rule of law and fundamental rights prepared by a committee of 'experts' and about the need for, feasibility and added value of an inter-institutional agreement on this matter. It explained that 'some elements of the proposed approach, for instance, the central role attributed to an independent expert panel in the proposed pact, also raise serious questions of legality, institutional legitimacy and accountability'. It considered that 'first, the best possible use should be made of existing instruments, while avoiding duplication' (European Commission, 2017).

The Commission nevertheless changed its position after a few years. In its communication of 17 July 2019, it announced the introduction of an annual rule of law report, through which it assesses the rule of law situation in each Member State on a regular basis (European Commission, 2019). However, a significant difference from the mechanism proposed by the European Parliament in 2016 is that, in its annual rule of law report, the Commission plays the central role.

By this new rule of law instrument, the Commission sends a strong message of principle: it feels entitled to bring all Member States under constant political control. However, from a practical point of view, doubts may be raised as to whether this regular review affects all Member States to the same extent. Examples from recent years have shown that the Union has turned a blind eye to mass demonstrations and ongoing police violence against citizens in some Western European countries. At the same time, in case of other Member States that joined the EU more recently, the EU is willing to monitor closely every rule of law criticism that may appear against the government. The EU's policy on the rule of law raises a number of other similar dilemmas as well, which became especially visible during the coronavirus crisis and are worth closer examination.

4. Rule of law policy during the coronavirus pandemic: growing concerns

In spring 2020, the first wave of the coronavirus created a special context for the EU institutional system that systematically scrutinises the rule of law in Member States. While the predictable functioning of the state is an important element of the rule of law, during the pandemic, Member States took a series of emergency measures: in Italy, settlements and entire regions were hermetically sealed; in numerous Western European countries strict curfews were put in place, violations of which were punished by the police, and Member States closed the EU's internal borders one after the other.

Different countries defended themselves against the virus in different ways, but basically every Member State focused on the fight against the coronavirus. Hungary, which has been in the crossfire of EU rule of law criticism for about a decade now, also concentrated on its defence strategy. The government introduced a state of danger on the basis of Article 53(1) of the Fundamental Law, and on 30 March 2020 the Parliament adopted Act XII of 2020 on the containment of coronavirus. This law authorised the Government to introduce emergency measures to protect the country's citizens against the virus and to maintain the emergency measures taken earlier for this purpose. This law did not set a specific end date for the authorisation of the government; however, it expressly provided that the National Assembly could terminate the effect of the legislation when the state of danger is over. Even more, the law also provided the National Assembly with the power to revoke the authorisation given to the government at any time before the end of the period of state of danger, either in general or in the case of specific measures. The law also amended the Criminal Code and introduced a new form of fearmongering during the extraordinary period. Under Section 337(2) of the Criminal Code, a person who, during the period of a special legal order and in front of a large audience, states or disseminates any untrue fact or any misrepresented true fact that is capable of hindering or preventing the efficiency of the protection against the epidemic became punishable by imprisonment for one to five years.

The draft law was submitted to the Hungarian Parliament on 20 March 2020, and almost immediately became the subject of fierce international criticism. The critiques

were based on two allegations: one that in Hungary the Government has been given unlimited authorisation to rule by decree, abolishing the scrutinising role of the Parliament, and the other that the authorities had drastically restricted freedom of expression. By 23 March, a Member of the European Parliament had sent an email to 704 Members of the European Parliament, expressing concerns about the situation of democracy and the rule of law in Hungary, and collected signatures for a joint letter she intended to send to the European Commission the following day (Mandiner, 2020). The social media was flooded with condemnatory declarations by various European politicians and non-governmental organisations. Representatives of international organisations also expressed their concerns, including the Council of Europe Commissioner for Human Rights, the Organization for Security and Co-operation in Europe Representative on Freedom of the Press, and the Secretary General of the Council of Europe. When the Hungarian law was adopted, 13 EU Member States⁵ issued a joint statement highlighting the importance of the rule of law during the coronavirus crisis, including Member States in which much stricter measures were in place than in Hungary.⁶ On this occasion, the European Commission made more cautious statements than usual, indicating that it would carry out an examination on this issue of concern. During the crisis, the European Parliament switched to a restricted mode of operation via teleworking arrangements, in essence limiting its work to matters related to the coronavirus. In this context, on 17 April 2020, it adopted a resolution on EU coordinated action to combat the Covid-19 pandemic and its consequences. It used Paragraph 46 of this resolution to make sharp criticisms of Hungary and Poland, the only EU Member States singled out in this way (European Parliament, 2020). A number of lessons may be learned from these reactions in relation to the EU's policy on the rule of law, which has again revealed the fundamental dilemmas that characterise this European public policy.

4.1. The issues of legal basis and the division of competences between the EU and the Member States

The first and most fundamental question is on what basis the EU institutional system questions the protection measures of some Member State Governments in times of a global health crisis in the name of the rule of law. We may approach this dilemma in different ways.

In a moral sense, the question is how European organisations can justify criticising and exerting political pressure on the defence measures adopted by certain Member States during the most serious period of the Covid-19 emergency. When all European countries fight desperately for protecting human lives, such pressuring on some Member

⁵ Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain and Sweden (Bayer, 2020).

⁶ For example, Pierre de Combes de Nayves drew attention in Dalloz, a major French legal journal to the severe sanctions for breaches of curfew measures in France (de Combes de Nayves, 2020).

States makes necessarily their fight even harder. This moral, ethical question is maybe the most easily perceivable for citizens.

From a more political approach, the problem with such pressuring is that European institutions exert this pressure while they bear no political responsibility and are not accountable for handling the coronavirus crisis in Member States. It is obvious, that Member States' governments that are directly accountable to their citizens should have the liberty to choose the measures they found the best for containing the pandemic.

Finally, this issue can be approached also from a legal perspective, which means an inquiry in the legal basis of European rule of law control over Member States. It is worth examining this issue more in depth, since the question of legal basis constitutes a dilemma from the beginning of the construction of European policy on the rule of law. The inherent contradiction of the EU's policy on the rule of law policy is that EU institutions try to control Member States in the name of the rule of law, without having adequate legal basis to do so, in consequence by breaching themselves the very basis of the EU's rule of law. Article 2 TEU sets out the values of the EU and Article 7 sets out the procedure that may be used in the EU in the event that a potential breach of those values by a Member State occurs. Other instruments developed by the EU institutions in addition to this lack an adequate EU legal basis. In 2014, the Council's Legal Service also highlighted this problem in an expert opinion,⁷ which found that the Commission had neither the legal basis nor the competence to establish the rule of law framework introduced in 2014 (Council of the European Union, 2014b).

The Council's Legal Service pointed out that "according to Article 5 TEU, 'the limits of Union competences are governed by the principle of conferral.'" The consequence of this is that 'competences not conferred upon the Union in the Treaties remain within the Member States' (Clause 15). The opinion points out that:

Article 2 TEU does not confer any material competence upon the Union but, similarly to the Charter provisions, it lists certain values that ought to be respected by the institutions of the Union and by its Member States when they act within the limits of the powers conferred on the Union in the treaties, and without affecting their limits. Therefore, a violation of the values of the Union, including the rule of law, may be invoked against a Member State only when it acts regarding a subject matter for which the Union has competence based on specific competence-setting Treaty provisions (Clause 16). [...] Respect of the rule of law by the Member States cannot be, under the Treaties, the subject matter of an action by the institutions of the Union irrespective of the existence of a specific material competence to frame this action, with the sole exception of the procedure described at Article 7 TEU (Clause 17).

⁷ This body, part of the General Secretariat of the Council, gives opinions to the Council in order to ensure that its acts are lawful and well-drafted both in form and content. The Legal Service also represents the Council in judicial proceedings before the European Court of Justice, the General Court and the Civil Service Tribunal.

The Legal Service also stated that 'the non-binding nature of a recommendation does not allow the institutions to act by issuing such type of acts in matters or subjects on which the Treaties have not vested powers on them'. It added that 'to build a permanent mechanism for a rule of law study and proposal facility operated by the Commission on the combined bases of Article 7 TEU and Article 241 TFEU would undermine the specific character of the procedure of Article 7(1) – particularly concerning the way it can be initiated' (Clause 21). The Legal Service clearly concluded that:

There is no legal basis in the Treaties empowering the institutions to create a new supervision mechanism of the respect of the rule of law by the Member States, additional to what is laid down in Article 7 TEU, neither to amend, modify or supplement the procedure laid down in this Article. Were the Council to act along such lines, it would run the risk of being found to have abused its powers by deciding without a legal basis (Clause 24).

In recent years, the EU's policy on the rule of law has been able to evolve without major obstacles, despite the fundamental legal concerns expressed by the Council's Legal Service in 2014. The political narrative that has been repeatedly voiced in European political forums and the international media – that the rule of law is so seriously threatened in some EU Member States that the EU, as an organisation that places human rights and universal values above all, must respond – was able to override the legal problem that the EU has no competence to examine Member States' domestic policy in issues not affecting EU law. Despite this very basic legal dilemma, more and more statements and resolutions were issued to condemn the measures of the governments of certain Central and Eastern European Member States. However, several constitutional law practitioners and authors of political science drew attention to the importance of the division of competences within the European Union. French constitutional law professor Bertrand Mathieu, for example, deduced that democracy developed in nation states, so democracy is directly threatened if the right to adopt crucial political decisions is taken away from national governments and illegally transferred to supranational, international entities, in violation of Member State sovereignty. At the end of the day, this would necessarily lead to citizens lose their control on political decisions (Mathieu, 2017).

4.2. The issue of objectivity

During the coronavirus pandemic, while all the EU Member States introduced emergency measures, Hungary and Poland found themselves again in the main focus of investigations and criticisms. In its resolution of 17 April 2020, mentioned above, the European Parliament voiced its concerns about the rule of law in Hungary and Poland. Hungary was also the subject of a debate in the plenary session of the European Parliament on 14 May 2020, entitled 'Emergency governance in Hungary and its impact on the rule of law and fundamental rights'. This uneven emphasis has once again drawn

attention to the question if EU rule of law instruments are capable to ensure an objective rule of law control over Member States.

Objectivity is an essential element of any set of instruments, which in principle, is designed to protect the rule of law against political arbitrariness. However, the EU's policy on the rule of law is characterised by a lack of objectivity. This structural problem stems from the fact that although EU institutions conduct rule of law investigations in the name of legal principles, the procedures themselves are political in nature. On the one hand, the reason for this is to be found in the subject of the investigations, which is political in each and every case: EU institutions examine governmental policy measures and parliamentary decisions of Member States. On the other hand, it may also be observed that the debate on a measure can always be traced back to a division related to some deeper differences in political worldviews and visions of the European Union. Most of the debates on the rule of law can be traced back to broader debates on constitutional and political theory, surrounding the relationship between democracy and liberalism, or to the competition between federalist and nation state concepts of the European Union (Gát, 2019, p. 200–234). Third, the main actors in the rule of law policy are political institutions rather than neutral judicial forums, and consequently political considerations rather than objectivity play a key role in their decisions. With regard to the European Commission, former Commission President Jean-Claude Juncker said in a speech that the Commission is a political body and he wanted to make it highly political (Juncker, 2014). The European Parliament consists of elected representatives who take their decisions on a party-political basis. The Council consisting of the Ministers of the Member States is not a neutral institution either, but one of the main stages of European policy and diplomacy.

Against this background, the question of whether the EU's policy on the rule of law can itself become a tool of political arbitrariness is a logical one. In his book, professor of constitutional law, András Zs. Varga analysed the theoretical dangers of the totalitarian use of the rule of law concept in detail (Varga, 2019). He pointed out that there was a danger that the idea of the rule of law, originally intended to limit political arbitrariness, would become a means of achieving arbitrariness.

4.3. The need for guarantees that EU institutions respect the rule of law

In order for the EU's policy on the rule of law not to become an instrument of political arbitrariness, in addition to the settling of the above mentioned structural problems of legal basis and objectivity it is also extremely important to ensure that EU institutions themselves respect the rule of law, i.e. the lawfulness of individual policy measures, in their daily operation. With regard to the EU institutional system, dysfunctions were seen in this area even before the coronavirus crisis. In the European Parliament, for example, the debate on the Sargentini report that initiated the rule of law procedure against Hungary under Article 7 raised the question of how the extraordinary majority required to initiate the procedure is to be calculated. Hungary disputed the Parliament's procedure for not taking into account abstention votes cast when determining the

voting results. In another case in 2019, during the appointment procedure of the members of the Von der Leyen Commission, in case of the Hungarian commissioner-designate, political and legal procedures were confusingly merged. In the autumn of 2019, the commissioner-designates from each country were heard in public by the relevant thematic committees of the European Parliament. The public hearing of the Hungarian Commissioner-designate was scheduled to take place in the Foreign Affairs Committee. However, referring to a potential conflict of interest, the MEPs of the European Parliament's Committee on Legal Affairs voted against the candidate in advance in a closed session, thus making it impossible for a public hearing to take place before the relevant parliamentary committee.

When the coronavirus epidemic broke out in the spring of 2020, several rule of law dilemmas arose over the functioning of the European Parliament. The Parliament's Rules of Procedure were not prepared for such an emergency and the EP switched to a virtually ad hoc mode of operation, without developing the appropriate legal environment. A Hungarian Member of the European Parliament exposed these anomalies in a scientific legal analysis (Szájér, 2020). He noted that 'there is no particular legal basis, which would exempt the institutions from the obligation to comply with the EU norms and standards in force.. [...] In the case of the European Parliament [sic] physical presence is an immanent, essential condition, core concept of the entire functioning, since all the provisions of the Rules of Procedure are based on the condition of Members' physical presence. Presence is a legal fact and it has numerous legal effects in the Rules of Procedure, in many cases related to the validity of acts.' The study details the legal uncertainties that have arisen in connection with the issues of quorum, parliamentary thresholds, the exercise of the right to speak and voting procedures.

Another characteristic contradiction in the functioning of the European Parliament during the coronavirus epidemic was manifested in the already mentioned debate in the European Parliament on 14 May 2020 entitled 'Emergency governance in Hungary and its impact on the rule of law and fundamental rights' (European Parliament, 2020a). The plenary debate was the result of the process described above, in which Hungary was accused of, among other things, restricting the freedom of expression. Paradoxically, however, the President of the European Parliament has repeatedly rejected the Hungarian Government's request for its Minister of Justice to speak on behalf of the Hungarian Government in the debate on Hungary (Magyar Nemzet, 2020).

5. Conclusion

The development of the legal history of the EU shows that initially Member States called for guarantees of the rule of law in EU institutions. This trend began to shift in the late 1990s and early 2000s, when a provision allowing for a European supervision of fundamental rights in the Member States in certain cases was inserted into the Treaty of Amsterdam. In practice, however, it was not until the beginning of the 2010s that the European political agenda became increasingly dominated by the discourse that the EU institutions were responsible for monitoring the rule of law situation in Member States.

Over the last decade, the EU institutions have continuously extended their set of tools for monitoring Member States in the name of the rule of law. However, the EU's rule of law policy, as thus established, suffers from fundamental shortcomings, which were clearly revealed during the first wave of the coronavirus pandemic in the spring of 2019. The European policy on the rule of law is built on a questionable legal basis and lacks guarantees of objectivity. The EU rule of law monitoring is always directed at Member States; it does not hold the EU institutions to account, even though numerous recent dilemmas have arisen about their lawful functioning.

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Administrative Law in the Time of Corona(virus): Resilience and Trust-building¹

István Hoffman^{*} , István Balázs^{**} 

* Eötvös Loránd University, Centre for Social Sciences in Budapest, Institute for Legal Studies, Maria Curie-Skłodowska University in Lublin, e-mail: hoffman.istvan@ajk.elte.hu

** University of Debrecen, Centre for Social Sciences in Budapest, Institute for Legal Studies, e-mail: balazs.istvan@law.unideb.hu

Abstract: The Hungarian administrative law has been significantly impacted by the Covid-19 pandemic. Several rules – which were introduced during the state of danger based on the epidemic situation – have been incorporated into the Hungarian legal system. The administrative procedural law has been influenced by the epidemic transformation. However, the rules on e-administration have not been reformed significantly (due to the digitalisation reforms of the last years), but the rules on administrative licenses and permissions have been amended. The priority of the general code on administrative procedure has been weakened: new, simplified procedure and regime have been introduced. The local self-governance has been impacted by the reforms. The transformation has had two, opposite trends. On the one hand, the Hungarian administrative system became more centralised during the last year: municipal revenues and task performance have been partly centralised. The Hungarian municipal system has been concentrated, as well. The role of the second-tier government, the counties (*megye*), has been strengthened by the establishment of the special economic (investment) zones. On the other hand, the municipalities could be interpreted as a ‘trash can’ of the Hungarian public administration: they received new, mainly unpopular competences on the restrictions related to the pandemic. Although these changes have been related to the current epidemic situation, it seems, that the ‘legislative background’ of the pandemic offered an opportunity to the central government to pass significant reforms. From 2021 a new phenomenon can be observed: the state of danger has remained, but the majority of the restrictions have been terminated by the Government of Hungary. Therefore, the justification of the state of danger during the summer of 2021 became controversial in Hungarian public discourse.

Keywords: Hungarian administrative law, administrative procedure, self-governance, administrative licenses and permission, Covid-19 pandemic, epidemic, state of danger

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1. Introduction

The first state of danger – which has been declared in Hungary during the first wave of the Covid-19 – ended on 18 June 2020, but it has been expected to leave lasting traces in the Hungarian legal system. The administrative procedural law has been partly transformed by the regulations on the verified notifications: the primacy of Act CL of 2016 on the Code of General Administrative Procedure (hereinafter: CGAP) has been weakened by these special statutory rules, which appear as a specific underlying rule for (administrative) permitting and licensing procedures (Fazekas, 2020, p. 194). The interpretation of local self-governance has also changed. The financial autonomy of the municipalities has been restricted, first of all, by the centralisation of several local or shared taxes and the amendment of their rates and, secondly, by the establishment of the special economic zones. It could be emphasised, the provisions that remain permanently in Hungarian administrative law are those which were only indirectly related to epidemiological measures. The ‘legislative background noise’ related to the current epidemic situation seems to have served as a kind of backdrop for certain amendments and transformations that would otherwise receive more attention. In addition, a new, specific, quasi-emergency situation used to deal with the second wave of the epidemic, as well as the legislation issued in this regard, raises several dogmatic issues that tension the current system of administrative law.

In our study, the emergency operations of the public administration is analysed from a legal point of view, comparing the dogmatic foundations and empirical experience of these actions. The starting point of our research is that the framework of these actions is provided by the conditions and demands based on the rule of law administration. In our paper, the integration of the measures and practices introduced during the emergency is analysed as well as the new, quasi-emergency, epidemiological emergency into the ‘normal’ operation of the legal system.

For reasons of length, this paper should not be intended to provide a comprehensive answer to all the emerging dogmatic problems of administrative law in emergency administrative legislation but is limited to an overview of the most controversial, important administrative law issues. We try to outline a kind of problem map that can serve as a basis for further research in legal dogmatics and empirical methodology.

2. The epidemic and the special legal order (emergency): An overview of the legal regulation in Hungary

The primary research field of the epidemiological situation can be the issues related to the introduction and regulation of the special legal order in Hungary. However, these mainly concern the field of constitutional law, this paper only deals shortly with these questions. If we look at the Hungarian constitutional regulation, it should be emphasised that the Fundamental Law of Hungary (25 April 2011) (hereinafter: Fundamental Law) has closed taxation on the reasons which justify the state of danger. Para. 1 Article 53 of the Fundamental Law states, that the state of danger (*veszélyhelyzet*) can be

declared ‘in the event of a natural disaster or industrial accident endangering life and property’. Thus, the epidemic situation has not been among a justifiable reason of the declaration of special legal order. The detailed regulation on the establishment and introduction of the state of danger as a special legal order (emergency) is regulated by Act CXXVIII of 2011 on Disaster Management (hereinafter: DMA). The rules of the Fundamental Law are interpreted broadly by point c) Article 44 of the DMA. The regulation states, ‘human epidemic disease causing mass illness and animal epidemic’ is a justifiable reason of the declaration of the state of danger.² In case of a special legal order (emergency), in accordance with the Fundamental Law, most of the measures defined by Chapters 21–24 of the DMA could be introduced by the Government, which may issue decrees with a content contrary to the acts of Parliament for a transitional period of 15 days. In addition to the emergency government decree regulations, a limited number of ministers, such as the minister responsible for education and vocational training or the minister responsible for national property, may also take decisions that constitute individual acts.

It is shown by the above regulation that the Hungarian public administration – like other European administrations – was unexpectedly affected by the Covid-19 pandemic at the level of constitutional regulation. At the beginning of the pandemic – when Hungary has not been affected by it – the institution of ‘health crisis’ (defined by Act CLIV of 1997 on Health Care) was used (by which the provision of the health care services can be transformed) (Asbóth et al., 2020, p. 39). The Hungarian system – which has been typically modelled for the treatment of industrial and elemental disasters³ – did not contain detailed provisions for an emergency situation related to the management of a pandemic.

Within the above-mentioned framework, the state of danger – due to the Covid-19 human epidemic – was declared by Government Decree no. 40/2020 (11 March 2020). Based on the constitutional regulation and the provisions of the DMA, the Government had the opportunity to suspend the application of acts of Parliament in its (emergency) decrees, to deviate from certain statutory provisions, and to take other (otherwise statutory, parliamentary) extraordinary measures. Based on para. 3 Article 53 of the Fundamental Law, these decrees shall remain in force for 15 days as a general rule, unless the scope of these (emergency) decrees is extended by the Parliament. Because the epidemic risk and its management could take more than 15 days, the Parliament – passing a bill submitted by the Government – decided to extend the scope of the emergency decrees by a general authorisation, which was Act XII of 2020. However, the law did not enter into force within 15 days of the adoption

² According to other views, this regulation of the DMA ‘goes beyond the provisions of the Fundamental Law, i.e. it is contrary to the text of the Fundamental Law. The provisions of the Fundamental Law could not be overwritten by an Act of Parliament’. According to this view, it is not an expanding interpretation, but a covert, statutory amendment to the constitution that can be considered unconstitutional (Szente, 2020; Vörös, 2020, pp. 24–27).

³ In Hungary, after the Democratic Transition, state of danger has been declared several times, although typically not the whole territory of the country was covered by this emergency. Thus, for example, the government declared a state of emergency during the flood on the Danube in 2002 (Government Decree no. 176/2002, 15 August 2002) and after the red mud (industrial) disaster in Devceser (Government Decree no. 245/2010, 6 October 2010).

of the first emergency government decrees, to maintain the measures, the national chief medical officer resorted to a special solution. These restrictions and rules were maintained as a general decision of the national chief medical officer based on the epidemic emergency. The above-mentioned solution was born of coercion, and the challenges of casuistic regulation on emergency can be observed by it. This decision of the national chief medical officer is difficult to interpret in the current Hungarian legal system. The decision – as it is highlighted by the government information page on the coronavirus, but not by the actual text of the decision⁴ – is a normative one. On the one hand, the chief national medical officer is not authorised by para. 1 Article 23 of Act CXXX of 2010 on Legislation to pass such a normative decision. On the other hand, the decision does not comply with rules of Act CLIV of 1997 on Health Care (hereinafter: HCA); however, there were indications that this decision may be interpreted in this context. The national chief medical officer, as a national epidemiological authority, is entitled to make individual decisions and not general rules the scope of which covers the whole country (Dósa et al., 2016, pp. 197–198).

The shortcomings of the regulation of the constitutional regulation were also recognised by the legislation. The legal basis for imposing specific restrictions was created by Act LVIII of 2020 on transitional rules related to the termination of the emergency and on epidemiological emergency (hereinafter: Transitional Act), by which a new institution, the epidemiological emergency was introduced by the amendment of the HCA. The regulation on health crisis has been reshaped significantly by that Act. Different restrictions – based on the epidemiological emergency, which is defined by the Act as a special type of health crisis – can be introduced by the government. These restrictive measures can be the special rules on the operation and opening hours of shops, travel, transport and freight restrictions, restriction on sale and consumption, special regulation on the public education (public education, vocational training and higher education, e.g. the introduction of digital learning). During the epidemiological emergency, the Hungarian Armed Forces can be involved in the management of health care institutions and the provision of health care services can be transformed during that special situation. However, the Fundamental Law does not contain regulation on this epidemiological emergency, it is regulated only by the HCA, but it can be interpreted as a new type emergency. This solution fits into the trend in the Hungarian legislation, that several quasi-emergencies have been institutionalised by Acts of Parliament, because a similar, quasi-emergency situation is regulated by the DMA during natural and industrial disasters, which are not as serious that the declaration of the state of danger could be justified.

The first state of danger – which was declared on 11 March 2020 – was terminated by Government Decree no. 282/2000 (17 June 2020). Act XII of 2020 – which extended the scope of the emergency government decrees – was repealed by Act LVII of 2020 on the termination of the state of danger.

The application of the special rules created for the period of the emergency was extended by the Transitional Act, typically until 31 August 2020. Based on the new

⁴ See Nemzeti Népegészségügyi Központ, 2020.

provisions on epidemiological emergency, this state was declared by Government Decree no. 283/2020 (17 June 2020) for half a year. Several restrictive regulations were based on that special situation, e.g. rules on obligatory wearing face masks and some restrictions on foreign travelling (especially travel bans outside the EU). These rules were the basis for even stricter restrictions. At the end of summer, extremely strict travel restrictions and mandatory quarantine were introduced by Government Decree no. 408/2020 (30 August 2020). However, several legal concerns have been raised about the Decree and other related regulations. Several exceptions were provided, which were difficult to justify. One of the controversial exceptions was the special regulation on the travelling of the citizens of the V4 countries (the Czech Republic, Slovakia and Poland). The citizens of these countries could enter into Hungary without mandatory lockdown. These exceptions were permitted by separate government decrees. The travel ban (and even the exceptions) was extended by other decrees. It should be emphasised that infringement proceedings were envisaged by two commissioners of the European Commission due to the selective (discriminative) nature of the travel ban. Therefore, the regulation has been amended, and other exceptions – especially the exception to mandatory lockdown in case of business travel – have been institutionalised.

The regulation on epidemiological emergency was a transitional regime between the first and second waves of Covid-19 in Hungary. During late autumn a second, and a serious wave of infections and illnesses evolved in Hungary. Because of the serious epidemiological situation, the state of danger was declared on 3 November 2020 (the state of danger entered into force on 4 November). The new Act CIX of 2020 was passed. The scope of the emergency government decrees were extended by this Act. But opposite to the regime of Act XII of 2020, the extension was not indefinite. The Act declared a 90 days deadline for the authorisation (and for the scope of itself). Thus, the major criticism (Drinóczy & Bień-Kacala, 2020, p. 184; Gárdos-Orosz, 2020, pp. 159–161) on the former regulation was corrected by the Parliament. The Government of Hungary has not received indefinite authorisation for passing emergency decrees. Even the constitutional regulations were amended at the end of the year 2020. The Fundamental Law was amended by the 9th Amendment by which the legal regulation on the state of emergencies were transformed. Similarly, the regulation on state of emergencies in acts passed by qualified majorities was amended during 2021. However, the new rules will enter into force in 2023, the detailed constitutional regulation which has been based on the closed taxation of the justifiable reasons and the extraordinary government measures remained, but the expiry of the extraordinary measures became more flexible. The expiry of the extraordinary measures is not defined by the constitutional rules but by the Act of Parliament which can be passed by a qualified (two-third) majority (Hoffman & Kádár, 2021, pp. 26–28).

It should be noted that the travel restrictions have remained, and they have been enforced by the new Act CIV of 2020. New sanctions have been introduced by this regulation, which have not been clear enough. It was not specified by the Act whether these sanctions are objective (Nagy, 2010, pp. 39–74) ones or they are based on the imputability of the citizens, and therefore, the nature of these sanctions is partly obvious.

3. Administrative procedural law and the Covid-19 pandemic

One of the major features of the special legal order (state of emergency, etc.) is that certain fundamental rights can be restricted more widely (Barnett, 2002, pp. 821–822). Related to that constitutional principle, fundamental (administrative) procedural rights can be restricted during the state of danger in Hungary.⁵ These procedural constraints may be particularly acute in an epidemiological situation, because procedural regulation should be impacted by the reduction of human contacts. This necessarily entails the requirement to amend the rules of administrative procedures. Challenges of modern epidemics include their economic effects. In a globalised world, travel and trade restrictions can necessarily be linked to a decline in economic production, which should be – at least, partly – treated or compensated by administrative measures.

If we look at the impact of epidemiological measures on the Hungarian administrative procedures, it can be emphasised that the issues related to the reduction of the number of contacts have appeared in procedural law and the changes related to economic administration have had a more significant role.

Administrative proceedings are typically file-based proceedings in which the presence of clients is not as important as in court proceedings (litigation) based on the constitutional principle of public hearing. Therefore, in the administrative procedures – in contrast with court procedures – it has not been issued a general and uniform special regulation for the state of danger, an ‘emergency administrative procedural code’ has not been published. The administrative procedures have been based on the regulation of the CGAP, just several additional sectoral regulations have been published by emergency government decrees. The peculiarity of the Hungarian solution was that – unlike other European and American countries (like the United States of America, Canada, Germany and Spain where sectoral – special provisions have been introduced by the countries or by their member states) (Huang et al. 2020, p. 8.) – special rules have been used relatively narrowly by the procedural regulation related to employment policy and social benefits, i.e. these procedures have been regulated primarily by the general (non-pandemic, non-emergency) rules. It has been an ‘unorthodox’ regulation, because the number of registered jobseekers (unemployed people) has been significantly increased by the economic crisis related to the restrictions imposed by the coronavirus epidemic (see Figure 1).

⁵ Article 54 para. 1 of the Fundamental Law: ‘Under a special legal order, the exercise of fundamental rights – with the exception of the fundamental rights provided for in Articles II and III, and Article XXVIII (2) to (6) – may be suspended or may be restricted beyond the extent specified in Article I (3).’ A similar regulation has been institutionalised by the 9th Amendment of the Fundamental Law (amended para. 2 Article 52 of the Fundamental Law).

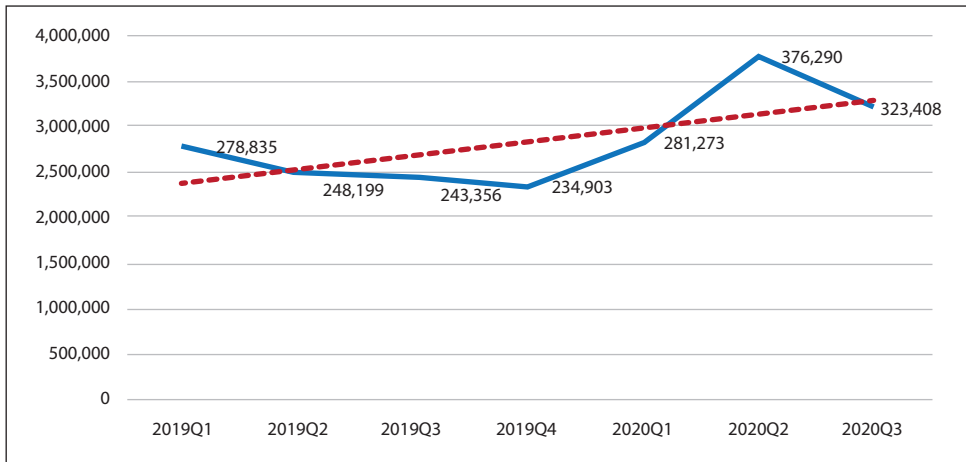


Figure 1.

Number of registered jobseekers (unemployed people) (2019–2020) and its linear trend line

Source: Hungarian Central Statistical Office, 2020.

Therefore, the number of employment policy cases increased significantly (by 17.01%) in the first half of 2020 (compared to the number of cases in the first half of 2019) (see Figure 2). Because the general rules should be applied by the employment authorities, the average administration time in employment cases increased similarly, by 71.42% (see Figure 3).

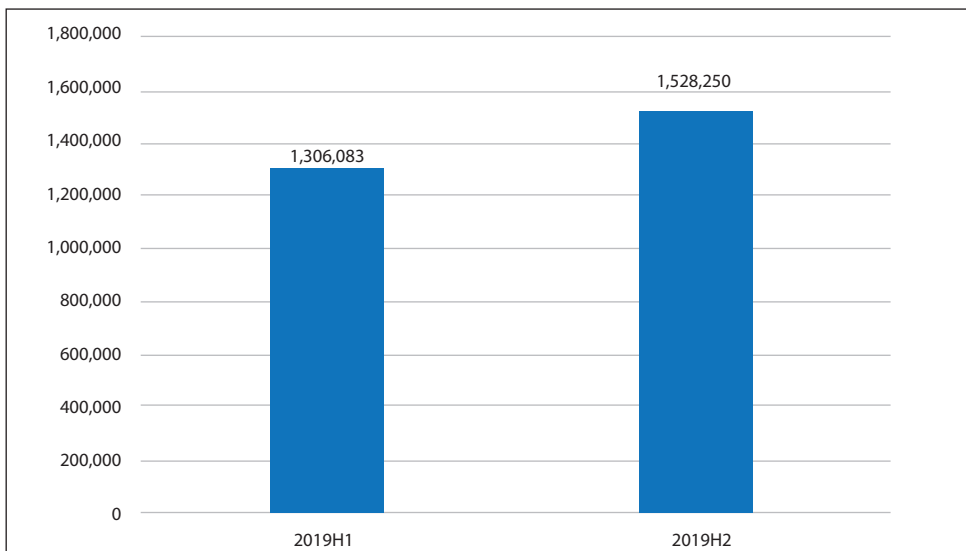


Figure 2.

Number of employment decisions (in 2019H1 and 2020H1)

Source: Országos Statisztikai Adatgyűjtési Program (OSAP) 2019 and 2020.

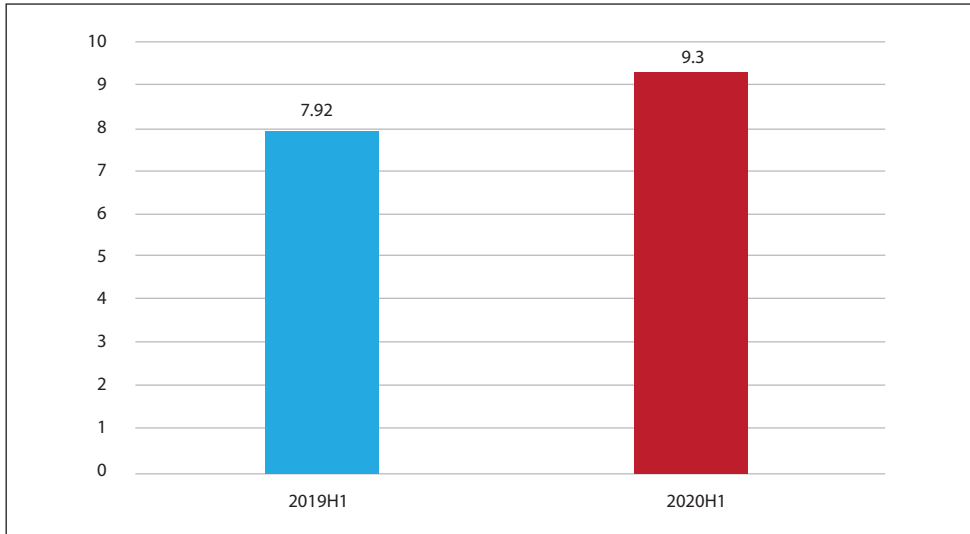


Figure 3.

Average administration time of employment cases (in 2019H1 and 2020H1)

Source: Országos Statisztikai Adatgyűjtési Program (OSAP) 2019 and 2020.

However, the regulation on social and employment procedure has not been amended, a new legal institution has been established during the first wave of the pandemic. It is the so-called ‘controlled notification’. This reform was justified by the reduction of bureaucracy, the simplification of the procedures, thus reducing obstacles to economic activities. The traditional administrative permissions have been widely erased because the majority of the administrative licensing cases are now under the scope of the new rules. A new, separate regulatory regime has been established. The CAGP is just a subsidiary regulation in the ‘controlled notification’ cases, thus the primacy of the CAGP has been weakened by these new rules (Potěšil et al., 2021, p. 15). Not only the bureaucracy is increased by the institutionalisation of administrative permission means, but the protection of the rights of opposing clients are provided by these procedures, as well. However, the legal protection of these clients is provided only moderately by the newly institutionalised controlled notification. It is stated by the Transitional Act – which contains the permanent rules on controlled notification – that the protection of public interest is primarily in this procedure. The rights and interests of other persons or clients adversely affected can be protected by the authority, if apparently only to the extent that, in the course of the proceedings, the authority may prohibit the activity of the applicant client if ‘the notification constitutes an abusive exercise of a right’. Thus, the rights of the opposing clients can

hardly be enforced by the administrative procedure, they are encouraged to submit much more expensive and cumbersome civil lawsuits (mainly property and tort lawsuits). It is highlighted by the literature, that in addition to the limited enforceability of opposing client rights and the difficulty of protecting the legal interests of opposing clients, there are stronger corruption risks in this type of cases because, in case of a silence, the infringements of the authorities (based on corruption) are less conspicuous than in a formal decision of a permission (licensing) case (Alaimo et al., 2009, pp. 141–142).

The reduction of the number of the administrative cases can be observed by the analysis of the administrative statistics. The number of the cases of the major Hungarian first instance administrative bodies, the district offices in the second half of 2020 was 81.85% of the number of the cases of the first half of 2020. However, the number of the administrative cases is always lower in the second half year – because there are cases which should be decided once in a year, mainly in the first half year (i.e. yearly benefits, taxes etc.) – but the drop of the cases is significant in 2020. In the second half of 2019, the number of the administrative cases in the district offices was 97.80% of the number of the cases in the first half of 2019. Thus, the drop of the cases are mainly around 2–3% and not nearly 20%, like in 2020 (see Figure 4 and 5) (Rozsnyai et al., 2021, p. 314).

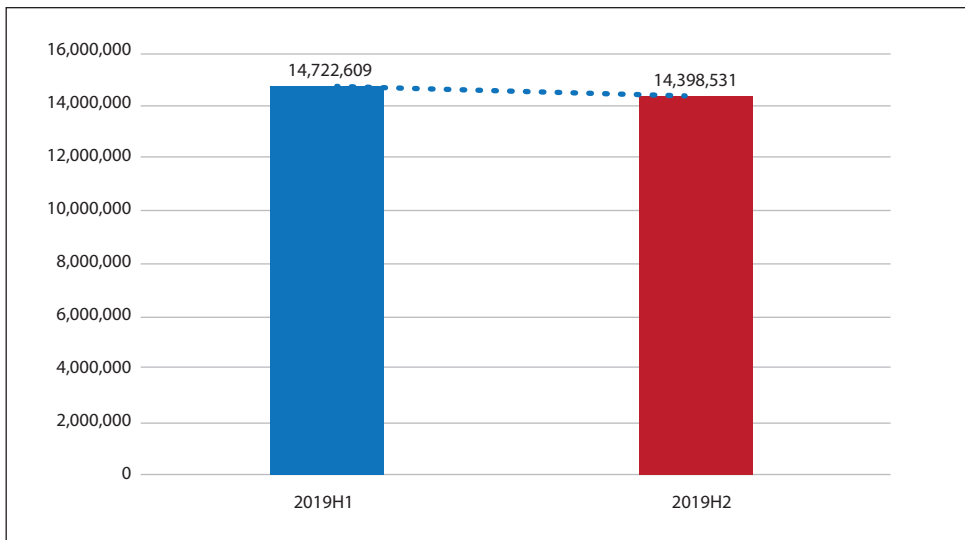


Figure 4.

Number of administrative cases of the district offices in 2019 (with linear trend line)

Source: Országos Statisztikai Adatgyűjtési Program (OSAP) 2019.

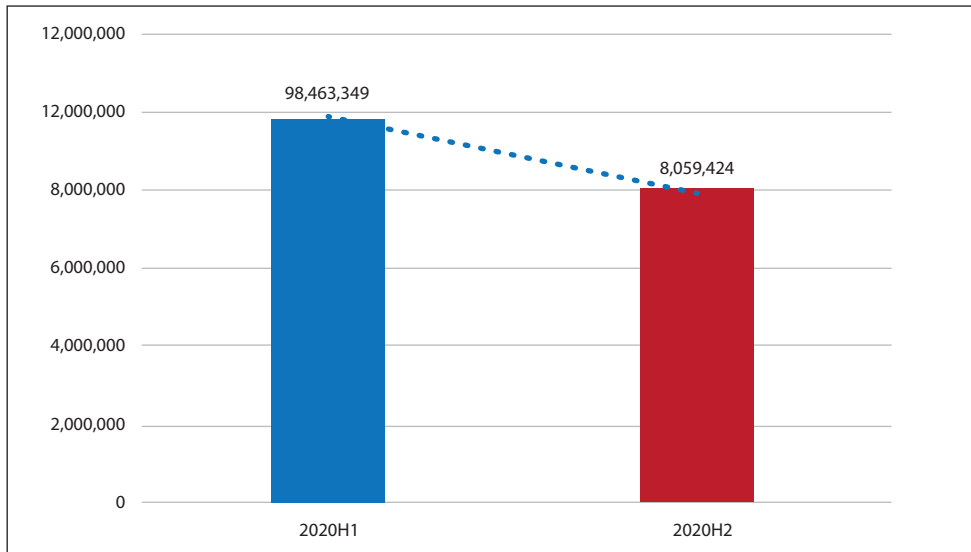


Figure 5.

Number of administrative cases of the district offices in 2020 (with linear trend line)

Source: Országos Statisztikai Adatgyűjtési Program (OSAP) 2020.

It should be emphasised, that special procedural rules have been established for administrative court procedures – which is part of the broad administrative procedural law – in contrast to the administrative procedures of the authorities. The main aim of the pandemic emergency regulation of the administrative court procedure has been the reduction of personal contacts.

4. Local self-governance in the time of corona(virus)

The issue of self-government is important in administrative legal research related to the coronavirus epidemic. The epidemiological situation and the socio-economic crisis, which has been partly caused by the epidemic restrictions, are a situation that is clearly pointing in the direction of strengthening centralisation trends. In crisis situations, centralisation steps and these administrative reforms have traditionally taken precedence over decentralisation (Kostrubiec, 2021, pp. 112–113). The Hungarian municipal system and regulation have been significantly influenced by the Covid-19 pandemic. Therefore, the municipal administration and organisation issues have been transformed based on the emergency (state of danger) situation. Secondly, the municipal tasks have been changed during the time of the pandemic. Thirdly, alternative, local solutions of the communities have evolved during the time of the pandemic. We would like to analyse these amendments and transformations.

A special regime of the municipal decision-making has been introduced by the emergency regulations in the Hungarian public law. Because of the extraordinary

situation which requires quick answers and decisions, the council-based municipal decision-making is suspended by the DMA. It is stated by para. 4 Article 46 of the DMA, that the competences of the representative body (*képviselő-testület*) of the municipality is performed by the mayor when the state of danger is declared by the Government of Hungary. There are several exceptions, thus the decisions of the mayor on the local public service structure cannot be amended and restructured by the mayors. Therefore, the mayors have the local law-making competences, as well. The mayors can pass local decrees, which remain in force after the end of the state of danger. The mayor can pass and amend the local budget and they can partly transform the organisation of the municipal administration, as well. The mayors can decide the individual cases. The scope of the competences (of the mayors) – set out in the previous sentences – is not fully clear but based on the legal interpretation of the supervising authorities (the county government offices and the Prime Minister's Office), the competences of the committees of the representative bodies shall be performed by the mayors, as well. The position of the mayor is similar to the 'dictators' of the Roman Republic: because of the extraordinary situation, the rapid decision-making is supported by personal leadership. The role of the mayor was strengthened in early 2021. The DMA declared that the competences of the representative body (actually the municipal council) should be performed by the mayor. There were no direct rules on the competences of another municipal body, even collegial bodies, like the committees of the representative body. Therefore, it was questionable, because these bodies are collegial, and it could be justified that the competences of these bodies should be performed by the mayors. During the first wave of the pandemic, a joint communication of two state secretaries "recommended" for the mayors to fulfil the competences of the committees. But this communication is not a real legal norm, and therefore, this solution was controversial, because it hardly fitted in the concept of the rule of law. During the second wave of the pandemic, it was officially declared by Government Decree no. 15/2021 (22 January) that the competences of the committees should be performed by the mayors.

This regulation resulted from different solutions in the Hungarian large municipalities. It shall be emphasised that the mayor has a greater power, but his or her responsibilities are increased by this regulation. For example, in the largest Hungarian municipality, in the Capital Municipality of Budapest, a special decision-making regulation has been introduced during the period of the state of danger. The decisions of the Capital Municipality are made by the Mayor of Budapest, but there is a normative instruction issued by the Mayor (no. 6/2020 [13 March] Instruction of the Mayor of Budapest), that before the decision-making the Mayor shall consult the leaders of the political groups (fractions) of the Capital Assembly. After the 1st state of danger, the decrees issued by the Mayor were confirmed by a normative decision of the Capital Assembly (no. 740/2020 [24 June] Assembly Decision). However, this decision can be interpreted as a political declaration, but it shows that the Mayor of Budapest tried to share his power and even his responsibility. There are different patterns among the Hungarian large municipalities, as well. For example, in the County Town Győr several unpopular decisions and land planning regulation were passed by the mayor, who fully exercised his emergency power.

However, the state of emergency remained, the competences of the representative bodies and committees have been restored by Government Decree no. 307/2021 (5 June), by which the regulations of the DMA and Government Decree no. 15/2021 (22 January) was actually rewritten.

As a second issue, the centralisation of the municipal tasks and revenues should be analysed. As we have mentioned earlier, centralisation is encouraged by crises, especially the centralisation of the economic (budget) resources. These tendencies can be observed in Hungary, especially in the field of local taxation. (Emergency) Government Decree no. 140/2020 (published on 21 April) stated that tourism taxation has been suspended for the year 2020. (Emergency) Government Decree no. 92/2020 (published on 6 April) centralised the revenues of the municipalities from the shared vehicle tax, and later the vehicle tax became a national tax (before the Covid-19, the revenues from vehicle tax were shared between the municipalities and the central government, but the taxation was the responsibility of the municipal offices). The most significant centralisation of the taxation was (Emergency) Government Decree no. 639/2020 (published on 22 December) by which the local business tax rate was maximised at 1% (instead of the former 2%) for the small and medium enterprises which have less than yearly HUF4 billion (approximately EUR10.8 million) balance sheet total. It has been a significant intervention into the local autonomy, and especially into the autonomy of the larger municipalities, because the local business tax is one of their most important revenues (see Table 1).⁶

Table 1.
Business tax revenues in Hungary

Year	2015	2016	2017	2018	2019
All revenues at regional and local level (in million HUF)	2,745,138	2,240,787	2,437,439	2,508,116	2,774,200
All tax revenues at regional and local level (in million HUF)	770,375	805,446	845,975	923,664	1,006,066
Business tax revenue (in billion HUF)	523,125	584,380	638,731	711,276	788,308
Business tax revenue as % of all local revenues	19.05	26.08	26.20	28.36	28.42
Business tax revenue as % of tax revenues at local level	67.90	72.55	72.50	77.01	78.36

Source: Hungarian Central Statistical Office, 2020.

⁶ This tax reduction, as a state aid for small and medium enterprises has been approved by the European Commission based on the Temporary Framework for the coronavirus-related state aids. See EU Commission Press, 2021.

Similarly, the government declared that the municipalities could not charge parking fees, by which decision the urban municipalities have been impacted, because parking is a typical urban issue, and these municipalities introduced differentiated parking charge regulations.

As a part of the concentration, a new regulation evolved. A new institution, the special investment area was introduced – originally by (emergency) Government Decree no. 135/2020 (published on 17 April), later, as a permanent regulation by Act LIX of 2020. It is stated by Act LIX of 2020 that the Government of Hungary can establish a special investment area for those job-creating investments whose value is more than HUF5 billion (approximately EUR13.5 million). If a special investment area has been established, the municipal property of the area and the right to local taxation are transferred to the county government from the 1st tier municipality. The justification of the regulation was to ensure a more balanced revenue system for the environment of these investments, by which the benefits of the investments can be shared with other municipalities. *Prima facie*, it seems a justifiable transformation, but there are different open questions. First of all, the county government did not get service provision competences, therefore, the local public services shall be performed by the 1st tier municipalities. The county governments cannot aid the performance of these services, they can only give them development aids. Secondly, this model is not widespread. Till early 2021 only one special investment area has been established, in the town of Göd based on the Samsung investment. Therefore, this seemingly fair concentration of the municipal tasks seems to be an individual measure, driven by extrajudicial considerations.

However, the centralisation trend has been dominant during the legislation of the last year, different tendencies can be observed, as well (Fazekas, 2014, p. 292). As we have mentioned, the municipalities can be the ‘trash cans’ of public administration. This ‘trash can’ role can be observed in Hungary, as well. During the first wave of the pandemic, the municipalities were empowered to pass decrees on the opening hours and shopping time for elderly people for the local markets, and they were empowered to pass strict regulations on local curfew. These measures were restrictive; therefore, they can be interpreted as unpopular decisions. Similarly, after the second wave of the pandemic, it was declared that face masks were mandatory on the streets and other public spaces if the municipality had more than 10,000 inhabitants. The detailed regulation on these measures was passed by the municipality. Therefore, the unpopular measures on public space mask wearing became municipal tasks, as well.

Last, but not least, the municipalities as grassroot administrative bodies can solve several problems locally, therefore, alternative policies and solutions are evolved by their activities, especially in the time of crises.

Especially, the large municipalities – which have significant revenues – have enough economic power to provide additional services for their citizens. Those large municipalities, which are led by opposition leaders, can use this opportunity to offer and to show alternative solutions for the national policies, therefore the (national) opposition-led municipalities are traditionally active in the field of facultative tasks (Hoffman & Papp, 2019, pp. 47–48). If we look at the decision-making of the large Hungarian municipalities, it can be highlighted that not only the opposition-led municipalities, but even the

government-led local governments tried to introduce several voluntary services and benefits related to the health and socio-economic crises caused by the Covid-19. The major fields of these municipal non-mandatory (voluntary) tasks have been the institutionalisation of new social benefits, by which the moderate central benefits could be supplemented (in Hungary, the increase of the social benefits related to the Covid-19 crisis has been very limited, e.g. the sum and the period of the unemployment benefit has not been amended). Similarly, several municipalities established special aid for the local small enterprises. Different public services – especially social care and health care services – have been performed (e.g. mass testing of SARS-CoV-2, aid for flu vaccination and provision of free face masks for the local citizens). The fate of this municipal activity is ambiguous this year because the coverage of these measures has been the local tax revenues. As we have mentioned, the major tax revenue of the municipalities is the local business tax, the rate of which has been radically reduced by the latest legislation.

5. State of emergency with limited (reduced) restrictions (?)

The approach of the Hungarian administrative law has been significantly transformed during the summer of 2021. The majority of the restrictions were recalled, even those restrictions which were linked to the so-called ‘immunity card’ which proved and declared that the given person was infected and recovered of Covid-19 or was vaccinated against the disease. For example, the obligatory wear of face masks was terminated and even sport events, cultural events etc. were opened (with limited restrictions). Similarly, the major transformations in the field of administrative law – as we have mentioned earlier, for example, the amended competence performance in the municipalities – were terminated or suspended. Therefore, the justification of the state of emergency became a topic of public discourse. The justification became controversial during the debates, because the major elements of that kind of state of emergency were linked to the extraordinary and mainly personal leadership and the simplified administrative procedures. During the summer, the majority of these elements were reduced or dissolved. It is now a question, whether this ‘reduced’ state of danger should be maintained or not.

6. Conclusions

It is clear now, that the Covid-19 pandemic leaves lasting traces on the Hungarian legal (and administrative) system. Several important regulations will remain after the Covid-19 pandemic, such as the health emergency (which was institutionalised by a sectoral act of Parliament and not by the constitutional rules or by an act which should be passed by a qualified majority of two-third of the Parliament), the special statutory rules weakening the primacy of the CAGP (especially the controlled notification), and the provisions for special economic zones. Precisely those regulations were only indirectly

linked to the epidemiological measures. Thus, the 'legislative background noise' due to the threat of an epidemic seems to have served as a kind of backdrop for certain changes and transformations that would otherwise receive more (public and political) attention. However, this may mean the Hungarian legal system resilience, as well, which would also be justified by further research.

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A Covid Competition Dilemma: Legal and Ethical Challenges Regarding the Covid-19 Vaccine Policies during and after the Crisis

Mina Hosseini 

* Assistant Professor, University of Science and Culture, Tehran, Iran, e-mail: mina.hosseini@usc.ac.ir

Abstract: The Covid-19 pandemic has impacted multiple facets of our lives and created a number of legal and ethical dilemmas. One of the greatest challenges at present is the production and distribution of the Covid-19 vaccine. Refusing to supply Covid vaccines widely could affect millions worldwide, and the pandemic may last for a long time. The competition authorities' monitoring of the health sector in many countries has been subject to changes in the current crisis. The question is whether we can force the Covid-19 vaccine manufacturers, legally and ethically, to sell their products and share their information with their competitors. Furthermore, what are the post-pandemic consequences of policies adopted during the pandemic? This paper employs a descriptive-analytical method to examine the importance of competition and intellectual property policies as they relate to Covid-19. It concludes that instead of focusing on individual rights in a crisis, public rights need to be emphasised. However, we should not underestimate the post-pandemic consequences of policies adopted during the Covid-19 pandemic.

Keywords: Covid-19, competition law, vaccine policy, ethics, intellectual property

1. Introduction

The pharmaceutical industry is of vital importance due to its direct relationship with individuals and public health. Competition rules, intellectual property rights, price mechanisms, consumer protection and patient's health, are all factors which intersect in the pharmaceutical market. Some practices in the healthcare industry, such as anti-competitive agreements and firms' abuse of their dominant position, can increase prices, lead to a shortage of drugs, infringe consumer rights, endanger the health of consumers and put public health at risk (Cseres, 2005, pp. 207–210). In the pharmaceutical market, implementing competition rules aims to increase access to affordable drugs while also encouraging innovation. Regulating the pharmaceutical sector heavily depends on intellectual property rights and innovations originating from research and development.

As such, controlling the market and interfering with policies must be conducted with great caution.

The vaccine market has proven to be one of the most profitable markets in the pharmaceutical industry, with an upward trend (Pitruzzella & Arnaudo, 2017, p. 350). After the start of the Covid-19 pandemic, research and development budgets have significantly expanded globally to tackle the virus and prevent it by using vaccines. Global vaccine market revenue in 2020 was 59.2 billion US dollars (Statista, 2021a), and the forecast for 2021 is much higher. The vaccine industry before Covid-19 was a stable oligopoly globally, with the top four players – GlaxoSmithKline, Merck & Co., Sanofi Pasteur and Pfizer – controlling 80 per cent of the total market share (Pitruzzella & Arnaudo, 2017, p. 352). According to recent statistics, up to this point (August 2021), ‘32.4% of the world population has received at least one dose of a COVID-19 vaccine, and 24.4% is fully vaccinated. 4.93 billion doses have been administered globally, and 34.25 million are now administered each day. Only 1.4% of people in low-income countries have received at least one dose’ (Mathieu et al., 2021).

There are serious concerns regarding the distribution and allocation of the Covid-19 vaccine, and this is not a new problem; in another global pandemic (Influenza A) that broke out in 2009, several wealthy and developed countries bought all the stocks of vaccines, and the shortage of vaccines for developing countries became a severe issue (Bollyky et al., 2020, pp. 2462–2463). During the Covid-19 pandemic, the competition authorities’ monitoring of the health sector in many countries underwent significant changes. Along with other active undertakings in the health sector, vaccine manufacturers were encouraged to collaborate because of the necessity of these efforts for citizens’ welfare.

The problem of the vaccine manufacturer’s intellectual property rights is a critical issue. Due to the principle of freedom of contract, the supplier’s choice of whether to deal with specific individuals should not be prohibited or limited by the legislator. Still, in exceptional circumstances, such as when one firm is dominant, the refusal to supply can jeopardise the market competition. In a pandemic situation, pharmaceutical companies’ exclusive intellectual property rights and the right to health may come into conflict. There has been a great deal of ethical debate regarding waiving intellectual property rights, compulsory licensing and the conflict between public and private rights.

This paper is divided into two parts. The first part deals with the competition authorities’ reactions to the Covid-19 pandemic in the pharmaceutical sector (especially their vaccine policies), and the second part is dedicated to Covid-related intellectual property policies and discusses the challenges facing policy-makers from a legal and ethical point of view.

2. Covid-19, competition law and vaccines policies

Since the beginning of the Covid-19 crisis in the pharmaceutical sector, the competition authorities have had to make various decisions. Many competition authorities around the globe changed their competition policies to combat this unexpected outbreak. Some

countries designed a specific framework for emergency competition law; for example, the European Commission released a 'Temporary Framework Communication' (European Commission, 2020a) on 8 April 2020 to regulate companies' collaboration regarding the Covid-19 outbreak. This communication was primarily aimed at facilitating cooperation to address shortages of essential hospital medicine supplies. According to the European Union (EU) Covid-19 policy, suppliers of critical and scarce goods are permitted to cooperate in production and distribution. Even some behaviours which are usually in direct violation of EU competition law regulations can be regarded as appropriate and even beneficial in the Covid era. Outside the scope of this declaration and the essential circumstances of the pandemic, such arrangements are not approved by the EU competition authorities (Costa-Cabral et al., 2021, p. 21). The publication of comfort letters was also of importance in this regard. The European Commission provided a comfort letter to Medicines for Europe (European Commission DGC, 2020), that suggests voluntary cooperation in the pharmaceutical sector to decrease the risk of the shortage of medicines to treat Covid-19 patients.

A popular competition policy involved granting licenses to economic enterprises in the pharmaceutical sector to exchange information and enter into agreements with competitors; European competition authorities encouraged cooperation between competitors in vaccines production as part of its Covid competition policies. In March 2020, the UK Competition and Markets Authority (CMA) published an 'Open letter to the pharmaceutical and food and drink industries'. In this, CMA responded to some behaviours (including charging unjustifiably high prices for essential goods or making misleading claims about efficacy [Competition and Markets Authority, 2020]). On 25 March 2020, the CMA indicated in a guidance note entitled 'CMA approach to business cooperation in response to Covid-19' that it facilitates collaboration between competitors, but only when that cooperation is to discuss problems resulting from the Covid-19 crisis. It would not go further or last longer than is essential (Competition and Markets Authority, 2021).

Another competition policy in the pandemic situation involved collaboration between competition authorities and sector regulators to control and monitor some agreements between competitors. For example, in Iceland, sector regulators have played an essential role in designing emergency competition policies. These regulators in particular sectors (such as the Icelandic Directorate of Health and the Icelandic Medicines Agency in the pharma sector) have access to the cooperation between undertakings during the Covid-19 period. The Icelandic competition authority handles the requests for exemption on time-sensitive problems related to Covid-19 within 48 hours after their receipt. Some examples of these exemptions are given on the Authority's website. For instance, cooperation between pharmaceutical importers and distributors ensures access to critical pharmaceuticals (Decision No. 11/2020; Icelandic Competition Authority, 2020).

Prompt and decisive confrontation with some anti-competitive practices that were to the detriment of consumers (such as excessive pricing in the pharmaceutical sector and collusion between competitors to divide the market or raise prices) has also proved to be an effective policy. For example, the Spanish competition watchdog (CNMC)

declared that it had launched inquiries into various sectors after several anti-competitive behaviours were discovered in the health sector. CNMC emphasised that the authority is actively tracking pricing and supply shortages in the health products industry (in connection with products such as sanitising gels and the raw materials used in their production) to detect anti-competitive activities leading to possible price changes (Rakić, 2020, p. 31).

In the same vein, the Greek competition regulator started to monitor prices of goods on the health market during the crisis. It sent information requests to numerous companies engaged in the production, distribution, and marketing chains of health-related goods (Costa-Cabral et al., 2021, pp. 16–17). The requested information was mainly connected with reports of and complaints about price rises and output limits (Hellenic Competition Commission, 2020). A team of economists reviewed the results. The Greek competition authority also conducted inquiries into businesses that did not respond to its request. Vaccine policies were among the competition policies of competition authorities. The World Health Organisation (WHO) reports that several different vaccines (from different producers) such as the AstraZeneca, Janssen, Pfizer-BioNTech, Moderna and Sputnik V vaccines have been provided up to this time (World Health Organization, 2021a).

According to EU officials, the EU vaccines strategy is based on meeting objectives such as: ‘Ensuring the quality, safety and efficacy of vaccines, securing swift access to vaccines for the member states and their populations while leading the global solidarity effort and ensuring equitable access to an affordable vaccine as early as possible’ (European Commission, 2021b). The European competition authorities have also been encouraging cooperation between competitors in vaccines production. The Matchmaking Experience was an online event hosted on b2match, a third-party website run by Sociedade Portuguesa de Inovação, on 29 and 31 March 2021. Several meetings between potential alliances and participating companies were scheduled to exchange information and Covid-19 vaccine-related data. The European Commission issued a comfort letter on 21 March 2021 (European Commission, 2021a), stating that in the light of competition law considerations, the collaboration between participating companies in the Matchmaking Event, particularly the sharing of related commercial details, does not pose questions under Article 101 of the Treaty on the Functioning of the European Union, as long as the competition law principles are followed. In parallel to the EU, each Member State has taken measures to promote competition in the Covid-19 vaccine market.

The European Union’s policies during the Covid-19 crisis encouraged state aid, especially in connection with health-related products. European Commission guidance (on 8 April 2020) and the EU Communication from the Commission on an Amendment to the Temporary Framework for State aid measures to support the economy in the current Covid-19 outbreak, of 3 April 2020, states that the manufacturing of essential drugs, in particular, should be improved where possible or kept at current levels. Member states were advised to encourage companies to expand their manufacturing capability, primarily through tax incentives and state aid.

State aid policies have been subject to change in the Covid period. Within the EU Commission's Temporary Framework, there are several instances of state aid. Germany, for example, created an umbrella scheme to fund some aspects of Covid-19-related research and development, as well as investments in testing and upscaling the infrastructures that contribute to the development of Covid-19-relevant pharmaceuticals and facilities (European Commission, 2020b). The Italian state aid vaccine development project by ReiThera, an Italian 40 million euro measure that aims to support the development of a new coronavirus vaccine,¹ is another example of Covid-19 state aid cases. The European Commission Directorate General for Competition has also established a dedicated mailbox and phone number to assist the Member States with any questions or requests to discuss the Temporary Framework. The Directorate General for Competition has released a number of templates to assist Member States in creating their national strategies under the Recovery and Resilience Facility (European Commission, 2021c).²

One of the successful competition cases regarding this issue was the investigation into Roche Diagnostics. The competition authority of the Netherlands announced on 3 April 2020 that it would take no further steps in the inquiry into Roche Diagnostics. The problem had been the refusal of this firm to comply with the expansion of capability for Covid-19 testing. Roche and the competition authority came to an agreement whereby Roche committed to sharing technology with its competitors to scale up production (Authority for Consumers and Markets, 2021). The necessity of these actions and the supremacy of public health over individual benefit is apparent in this case and can be used as an example of sharing vaccine information and data to overcome the crisis. Overall, the most effective way to enforce competition law rules in the pandemic era is by combining the above solutions.

3. Intellectual property Covid policies: A legal and ethical challenge

As mentioned in the UN Sustainable Development Goal (The United Nations, 2015): Up to 2030, 'to achieve universal health coverage, including financial risk protection, access to quality essential healthcare services and access to safe, effective, quality and affordable essential medicines and vaccines for all' is an important goal for the UN. As the WHO Director-General stated in January 2021, 'the world is on the brink of a catastrophic moral failure – and the price of this failure will be paid with lives and livelihoods in the world's poorest countries' (World Health Organization, 2021b). The right to receive therapeutic and life-saving interventions is one of every patient's most basic rights in pandemic situations. The right to health as one of the fundamental human rights is declared in numerous international human rights documents (Tobin, 2012),

¹ SA.61774 COVID-19, State Aid SA.61774 (2021/N) – Italy COVID-19: Vaccine development project by ReiThera S.r.l., Brussels, 26.2.2021 C (2021) 1458 final.

² See also Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility.

such as Article 55(a) of the UN Charter, the Constitution of the World Health Organization, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Racial Discrimination (1965) and the Convention on the Elimination of All Forms of Discrimination against Women (1979). According to Article 12 of the International Covenant on Economic, Social and Cultural Rights, governments must provide adequate and prompt treatment to protect citizens' right to health (Ssenyonjo, 2011, pp. 969–971).

There has been much debate regarding waiving intellectual property rights, compulsory licensing, and the conflict between public and private rights. Intellectual property waivers request that countries be excluded from the requirements of the Agreement on Trade-Related Aspects of Intellectual Property Rights (Love, 2021). In compulsory licensing, the government allows a third party to use the patented vaccine. The question concerns the possibility of violating the rights of a particular group of people under the pretext of protecting society. This challenge is severe in a pandemic. Article 31 of TRIPS requires governments, in certain circumstances, to allow domestic producers to produce a patented product without the patent holder's consent. In addition, Article 31 will enable countries to impose compulsory licenses in a 'social emergency or other extraordinary situations' or in the case of 'public non-commercial use' (World Health Organization, 2002).

In October 2020, India and South Africa requested World Trade Organization (WTO) representatives to waive patent, copyright, industrial design and undisclosed information (trade secrets) in the context of the 'prevention, containment, or care of COVID-19'. Furthermore, they asked for this waiver to continue until universal vaccination is in effect worldwide and the majority of the world's population has achieved immunity (Council for Trade-Related Aspects of Intellectual Property Rights, 2020). This issue had a mixed reception among scholars and governments, with many arguing both in support of and against such special dispensation.

3.1. Opponents' arguments

The United States (at first), the EU, Switzerland, Germany, the United Kingdom and Japan were all against the TRIPS waiver. However, on 5 May 2021, the U.S. Government announced that it 'supports the waiver of those protections for COVID-19 vaccines' (Office of the United States Trade Representative, 2021), although this support only covers vaccines, leaving other products like diagnostics, treatments, ventilators, respirators, syringes and refrigerators that keep doses cold during preparation and transport unprotected (Bonadio & Fontanelli, 2021). Some of the essential arguments of opponents of waiving intellectual property and compulsory licensing are as follows: The right to own private property, freedom of contract and the protection of the inventor's intellectual rights are legally protected rights. Moreover, intellectual property waiving and compulsory licensing are morally wrong because they are considered a kind of theft. Furthermore, waiver and compulsory licenses destroy the pharmaceutical companies'

ability to innovate and incentives to produce and distribute new drugs and vaccines (Bagley, 2017, pp. 2468–2470; Sangameshwaran, 2021).

Some scholars argue that intellectual property waiving of Covid-19 vaccines is futile and symbolic. They believe that even if the developing countries can remove intellectual property barriers and obtain permits to manufacture vaccines, they lack the know-how expertise, infrastructure and qualified staff to produce these pharmaceutical products. Furthermore, current TRIPS flexibilities have done little to help (Huizen, 2021). In its opposition to TRIPS waiver, the U.K. Government, in a statement on July 2021 in WTO, asserted that '[i]t was the intellectual property regime that has enabled the extraordinary scientific advances of the last year, including the development of safe and effective vaccine'.

Germany, as one of the most vigorous opponents of TRIPS waiver, argues that 'the protection of the intellectual property is a source of innovation and must remain so in the future' (DW, 2021). Germany was the WHO's most significant donor during Covid-19, contributing 881.6 million dollars. It is also a substantial contributor to the COVAX, having donated over 2.58 billion dollars to date (Sangameshwaran, 2021).

The statement of International Federation of Pharmaceutical Manufacturers and Associations on 'WTO TRIPS intellectual property waiver' published on 5 May 2021 called the U.S. Government solution 'the wrong answer to what is a complex problem'. The Federation emphasises that 'waiving patents of COVID-19 vaccines will not increase production nor provide practical solutions needed to battle this global health crisis' (International Federation of Pharmaceutical Manufacturers & Associations, 2021). Albert Bourla, Chairman and Chief Executive Officer of Pfizer, at an open day on 10 May 2021, emphasised that 'equity does not mean we give everyone the same. Equity means we give more to those that need more' and in opposition to the TRIPS waiver he argued that 'entities with little or no experience in manufacturing vaccines are likely to chase the very raw materials we require to scale our production, putting the safety and security of all at risk' (Bourla, 2021).

3.2. Proponents' arguments

A popular opinion also argues that global public health depends on the free availability of these products (Bagley, 2017, pp. 2492–2493). According to the freedom of contract principle, the supplier's will to enter into a contract with certain individuals, and refuse to supply others is not illegal, nor can be prohibited by the legislator (Williston, 1920; Cserne, 2012). Nevertheless, when a firm is in a dominant position, such a refusal to supply can put the market competition in danger, and must be managed by competition law rules. Refusal to supply by non-dominant firms is not prohibited in EU competition law, although it may harm some markets. In Case T-41/96 *Bayer v Commission of the European Communities* such an issue was addressed by the European Court of Justice.

Some believe that the arrangements for technology transfer and production sharing have already been established (such as those between BioNTech and Pfizer, Oxfarm/AstraZeneca and Novavax with the Serum Institute). The existence of these

arrangements proves that the claims that technology transfer is too complicated or takes too long are exaggerated (Love, 2021). Furthermore, as there may be only one solution, if developing countries seek to acquire the scientific and technical knowledge necessary for vaccine production without using the existing expertise of vaccine intellectual property holders and scientists, the results might be a great disappointment. This may prolong the pandemic indefinitely and lead to an irrational waste of resources.

The violation of individual rights to social protection is similar to violating personality rights in order to protect community rights. As every person has the right to physical integrity, any physical assault on a person is prohibited and entails the assailant's criminal and civil liability. However, there are exceptions to such protection, and waiving the intellectual property rights is one of them. During the Covid-19 pandemic, the breach of individual rights can be sanctioned to protect the right to public health (McMahon, 2021, pp. 142–148). Although some frameworks, including COVAX, are designed to distribute vaccines in low-income and middle-income nations in the current pandemic, it seems that these arrangements are insufficient, and more solutions are required to end this health crisis (Roope et al., 2020, pp. 558–560; Vercler, 2020, pp. 1–3; Catania, 2021, pp. 455–459).

It appears that ensuring collective benefits, even if it harms certain individuals, is morally justifiable. Even in non-pandemic contexts, the theory of essential facilities³ and compulsory pharmaceutical licensing has justified the coercion of producers for the benefit of society (Son, 2019; Lo Bianco, 2020, pp. 2–4).

In an open letter published in July 2021, more than 120 academic lawyers and intellectual property experts from around the globe called on governments to support a TRIPS waiver to battle the Covid-19 pandemic. They claimed that '[t]he intellectual property system has failed in the past to create market incentives for vaccine development' and 'in the case of COVID-19 vaccines, such a market failure has been mitigated with unprecedented public funding and de-risking of research and development costs through advance market commitments by governments' (Kang et al., 2021, p. 2). Jecker and Atuire (2021) also supported the anti-waiver analyses from a utilitarian and deontological ethics point of view. The utilitarian analysis examines the idea that intellectual property protection is essential to keep motivation and innovation alive. The authors then asked how much money is enough to ensure the survival of this motivation and innovation, as well as could pharmaceutical companies and vaccine producers 'earn less and the incentive to innovate remain intact?' From the deontological point of view, 'no one can rightfully take what is theirs'. They argued that producing Covid-19 vaccines would be impossible without a massive amount of public investment (Jecker & Atuire, 2021, p. 596).

A recent development in this regard occurred in Brazil. On 29 April 2021, the Brazilian Senate approved a bill facilitating the compulsory licensing of Covid-19 vaccine

³ In response to a written question in 2020, the European Commission stated that: 'In our competition enforcement, the "essential facility doctrine" may require a dominant firm to share its assets with others, if an asset is "essential" (indispensable) for others to compete effectively in the market and if refusing access would eliminate effective competition on that market and thus cause consumer harm.' www.europarl.europa.eu/doceo/document/E-9-2020-000595_EN.html

patents. The Senate passed the bill on 12 August 2021. The bill will now go to the Brazilian President for his signature. It modifies some aspects of Brazilian patent law addressing compulsory licensing and allows for the waiver of patent rights in times of international or national crisis and emergency (Eakin, 2021).

4. Post-pandemic effects of Covid-19 policies

An important question associated with the competition and IP policies relating to the Covid pandemic relates to the post-Covid situation. It is essential to consider this because there are so many concerns regarding the post-pandemic effects of pandemic policies. It remains unclear the degree to which the post-pandemic period will be different from the pre-pandemic era. At this stage of understanding, it seems that competition law enforcement during a crisis is vital, and cooperation among rivals can benefit consumers. However, we should not underestimate the post-crisis repercussions of competition crisis policies. Data sharing, competitor collaboration, vaccine intellectual property challenges, and anti-competitive behaviour by pharmaceutical companies are all critical concerns in the post-pandemic times.

Given the dominant position of vaccine producers, widespread horizontal cooperation, price gouging (Williams, 2020, pp. 183–184), interrupted supply chains (Yu et al., 2021) and excessive protectionism during the crisis (Jenny, 2020), it appears that post-crisis competition law and policy will differ from the pre-crisis era. Some pharmaceutical companies will regard themselves as ‘pandemic champions’, and post-crisis competition law enforcement may be difficult. One of the concerns regarding the TRIPS waivers in the long term centres on incentives for innovation and investment. Some believe that it would simply slow vaccine research and development and make it more challenging to prevent and combat subsequent pandemics. Opponents of a TRIPS waiver ask who has the motive to create next-generation vaccines if intellectual property rights are required to be waived?

On 9 November 2020, BioNTech, a German biotech firm, and Pfizer, a U.S. pharmaceutical company, were the first to declare that a validated Covid-19 vaccine would be available for mass manufacturing. For the last 10 to 20 years, several small creative start-ups such as BioNTech and Moderna have pioneered mRNA technology for cancer therapy, often without generating a profit. BioNTech reported an annual operational loss of about 82.4 million euros in 2020 compared to a 181.5 million euro loss in 2019. At the same time, BioNTech’s annual operational losses were in the thousands of euros range from 2017 to 2020 (Statista, 2021b). These businesses will spend more extensively on innovative cancer treatments and infectious disease vaccinations, thanks to the profits gained from the Covid-19 vaccines. Corporations will think carefully before risking their investment in the event of a future health crisis because they know it may harm the firm in the long term. These concerns are well-founded, but it is important to remember that decreasing post-pandemic incentives cannot be more important than human lives. In low- and middle-income countries, the number of people dying because of Covid is much higher than in developed countries. In one

world, many people are fully vaccinated and waiting for a booster dose. At the same time, many people, including influential scientists, physicians, health providers, artists and scholars, are dying without vaccines in another world.

In the pandemic and post-pandemic era, the pharmaceutical industry will continue to have a monopoly on vaccine expertise and technological platforms. Every company is indeed more concerned with profitable operations than with global health. Still, competition policy and intellectual property policies must monitor and manage the vaccine markets even in the post-pandemic times. The pharmaceutical companies gained a great deal during the pandemic, and the dominant positions of vaccine producers have led to price increases of the vaccines. In August 2021, the price of the Pfizer vaccine was raised by more than a quarter, and Moderna by more than a tenth in their latest contract with the EU (Financial Times, 2021). The dominant position of these companies can generate some concerns about competition and lead to anti-competitive practices.

Harm to consumers is another possible effect of competition and intellectual property policies. Data sharing, cooperation, collaboration and information exchange among competitors can lead to collusion, price increases and the endangering of consumer's health. Sharing information without technological platforms, technology transfer and training can also lead to low-quality products that harm consumers.

5. Conclusion

Competition authorities must formulate appropriate rules to manage the crisis effectively. These regulations should be regularly updated as the dimensions of the situation become apparent, and some efforts should be allocated to the post-crisis phase. Immediate investigation and prosecution of anti-competitive practices, while permitting some agreements and exchange of information, especially regarding medicines and vaccines during the health crisis, is necessary. Some anti-competitive practices, such as excessive pricing, collusion between pharmaceutical companies and refusal to deal have increased in the Covid-19 era. Some of the presently permitted data-sharing and collaborations between competitors may harm consumers in the post-Covid period, and the consequences are not yet clear.

Vaccines are an essential part of pandemic-related products, and some competition authorities up to this point have not had clear policies regarding vaccines. Where the lives of millions of people worldwide are in danger, these authorities must use various methods to encourage or even compel vaccine producers to collaborate with rivals and exchange the necessary data.

Creating a balance between the intellectual property rights of Covid-19 vaccine producers, the public right to health and the competition rules is thus the key to an effective competition policy to help overcome this global crisis.

In a situation where the lives of millions of people worldwide are in danger, the competition authorities, using various mechanisms, must force the companies that possess the vaccine technology to cooperate with competitors and share the data, technologies and information as required. Because the right to health and receiving

appropriate treatment are among the fundamental human rights, the issues regarding waiving intellectual property rights and compulsory licensing of Covid-19 vaccines are legally and ethically justifiable.

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The Rule of Law and the Extraordinary Situation

András Karácsony¹, Szabolcs Nagypál²

* Professor, Eötvös Loránd University, Faculty of Law and Political Sciences, Department of Legal and Social Theory, e-mail: karacsony@ajk.elte.hu

** Head of the Law School, Mathias Corvinus Collegium (MCC); Assistant Professor, Eötvös Loránd University, Faculty of Law and Political Sciences, Department of Legal and Social Theory, e-mail: nagypalszabi@ajk.elte.hu

Abstract: The various legal theorists dealing with the operation and effect of law have mostly examined situations that can be described as occurring in the usual, regular, *normal state* of social life. Over the last half century, and particularly since the formation and later enlargement of the European Union, the requirement of the rule of law has emerged as a key topic. The test of the rule of law is as follows: it is necessary to examine in an abnormal situation or, as it were, in an *extraordinary situation* exactly how it is possible to take political decisions that are of fundamental importance to society while also guaranteeing that these decisions remain within the rule of law at all times.

The aim of this study is to investigate how and by what constitutional mandate the Hungarian Government deviated from the normal constitutional situation in 2020. The “state of exception” theorised by Carl Schmitt and Giorgio Agamben means the suspension of the law. It is important to understand their views in order to see that the Hungarian situation in 2020 is utterly dissimilar to such a state of exception. In short, we need to distinguish a state of exception from an extraordinary situation, because the latter does not imply the suspension of law in general or, more specifically, the suspension of the rule of law, but that parliamentary and government decisions remain within it. The special legal order applied in an extraordinary situation is not in fact a suspension of *democracy*, still less of the *rule of law*. On the contrary, it actually falls within both: in a state of national crisis, this situation is democracy itself and the rule of law itself, and – accordingly – strict laws (both democratic and imposed within the rule of law), or rather laws of cardinal importance, make its conditions and its functioning possible and regulate it.

Keywords: rule of law, extraordinary situation, state of exception, Carl Schmitt, Giorgio Agamben, pandemia

1. Introduction

The various legal theorists dealing with the operation and effect of law have mostly examined situations that can be described as occurring within the usual, regular, *normal state* of social life. In such circumstances, society is not in the throes of revolution, civil

war, or other horrors and disasters. In short, life proceeds in the normal and usual way. Over the past century and a half, legal and political thinkers have not only analysed the state of law but have also formulated various requirements for the way that law operates. In this regard, the requirement to establish and maintain the legal state (*Rechtsstaat*) and the rule of law has been set up quite specifically.¹ The legal state, as the phrase implies, is not only about the law, but also about the state.

Over the last half century, and particularly since the formation and later enlargement of the European Union, the requirement of the rule of law has emerged as a key condition. The test of the rule of law is as follows: it is necessary to examine in an abnormal situation or, as it were, in an *extraordinary situation* exactly how it is possible to take political decisions that are of fundamental importance to society while also guaranteeing that these decisions remain within the rule of law at all times. The shocking experience of the past few months, dominated by the *epidemic threat*, shows that various misunderstandings and unfounded assumptions of one kind or another are held by the general public. The objective of this paper, which focuses primarily on the Hungarian situation, is to show, that even this extraordinary situation can be managed and controlled within the normal framework of the rule of law.

2. The state of national crisis is not a state of exception

The epidemic has shown how well governments in European countries were able to respond quickly and effectively to the ever-changing problems they have faced. The general expectation, of course, was that government policy in this particular, special situation should be consistent with what is permitted within the framework of the rule of law. However, criticisms have been levelled at Hungary (such as Donald Tusk's comment in *Der Spiegel* about the Hungarian Prime Minister [Müller & Puhl, 2020] that the German legal and political thinker Schmitt, who is known to have been unafraid of the state of exception and to have been a fervent supporter of Adolf Hitler in the early years of the National Socialist regime, would have been proud of Viktor Orbán) which demonstrate either a complete lack of knowledge of the actual circumstances or an expression of mere political antipathy.

The aim of the study is to shed light on how and by what constitutional mandate the Hungarian Government deviated from the normal constitutional situation in 2020. It is worth clarifying a few concepts at the beginning of this inquiry. In doing so, we shall draw on various works by Schmitt and related studies by Agamben. Both thinkers have analysed historical and political situations in which the normal, ordinary world of law does not prevail; more specifically, they have discussed extraordinary or exceptional situations. Schmitt wrote a hundred years ago, whereas Agamben continues to work today. Because of the long-lasting influence they have had, they are both classics in this field.

¹ The relationship between the concepts of the legal state and the rule of law (differences and similarities) will not be discussed in this paper.

In the normal state (when the normal course of life is not disrupted by natural disasters or political and military crises affecting countries), the normal functioning of the legal system provides security through predictability. However, there are situations – outside the normal situation – where the traditional formal legal requirements are not sufficient to ensure the safe protection of life, but where the emergency itself must be addressed first and foremost. The security of a society can be threatened not only by armed conflict, but also by a natural disaster or, as the case may be, an epidemic. A health problem on a massive scale can be as serious as a multitude of violent actions on the streets. In anticipation of such a situation, the constitutional order of states which function under the rule of law provides for the legal possibility of deviating from the normal situation. It should be emphasised that it is only possible to deviate from the normal legal situation in a legally regulated manner. As such, the confrontation with extraordinary situations, while modifying the normal order of law-making, is still part of the overall functioning of the rule of law.

Schmitt examined how the state of law deviates from the normal state in relation to the question of sovereignty. Two of his books address this in detail: one, *Dictatorship* (*Die Diktatur*, 1921), which examined the history of ideas on the question of sovereignty; the other, *Political Theology* (*Politische Theologie*, 1922). In his 1921 work, he described two types of dictatorship, one based on *pouvoir constitué* (constitutional power) and the other on *pouvoir constituant* (constituent power): the *commissar* (i.e. the dictator entrusted with a specific task) and the *sovereign dictator*. The distinction is based on the following question: what can guarantee the enforcement of the given norms and how can a new norm be created?

The *commissarial dictator* always starts from the existing constitutional order and seeks to implement such constitutional order in a situation where the application of constitutional *procedures* does not ensure the existence of a constitutional order accepted by the political community. In this state of exception, his task is to *restore* the normal legal (i.e. constitutional) situation. This kind of dictatorship is limited by time. Schmitt gave the example of the Roman Republic, when it was the task of the dictator, elected for one year, to bridge the gap or conflict between the norms of law and the norm of law enforcement (the implementation of law) in the face of a serious external threat, by making political decisions to resolve the emergency. In short, the commissar-like dictator suspends the constitution in order to defend that same constitution. Schmitt compared this situation to a state of siege.

In contrast, the *sovereign dictator* does not simply suspend an existing, specific constitution based on the law, but seeks, by its suspension, to create a situation in which a new constitutional order becomes possible. His activity is characterised by the *pouvoir constituant*, or constituent power. The *pouvoir constituant* knows only rights, but not obligations; a *pouvoir constitué*, on the other hand, knows only obligations and not rights. The relationship between *pouvoir constituant* and *pouvoir constitué* is captured by Schmitt in a parallel analogy with nature, as the difference between *natura naturans* (nature that creates) and *natura naturata* (nature that is created). What the two types of dictatorship analysed by Schmitt have in common, however, is that the possibility of each occurring is legally regulated, and both aim to create a constitutional state of

normality. The first does this by reinforcing the old *status quo*, the second by creating a new one.

Less than a year later, Schmitt's book on *political theology* appeared, in which there was no mention of the commissar at all, only of the sovereign. One might suppose that the author had radicalised his position on both the sovereign and, in line with this, the state of exception. The very first sentence of the work – 'Sovereign is he who decides on the state of exception' – has since been quoted countless times (Schmitt, 2005, p. 5). Schmitt here focused on the *final decision*, i.e. the decision that cannot be deduced from the legal norm (this alone shows his departure from the rule of law principle). Underlying all this was his conviction that the state (politics) takes precedence over the law. The end of the legal order does not mean the end of all orders, as there is the order of the state (politics).

Incidentally, we wish to note that it is here that Schmitt's dispute with Hans Kelsen lies, as Kelsen interpreted the state order only in the context of legal regulation, and analysed only the normal situation of life. For Schmitt, the sovereign's power originates in itself; it is not derived from something else, nor is it a power deduced from some norm. However, this sovereign is no longer the same as the sovereign dictator formulated a year earlier, because that type of dictator was tied to the constitutional situation, whereas this sovereign is no longer tied. The sovereign therefore stands alone, with only the power behind it by which it can act as sovereign, and the suspension of the existing legal order is the end point of its potential for power. In essence, in the state of exception there is no legal order; there is only the order established by political will.

What did Agamben (2004) add to Schmitt's thoughts on sovereignty? He made it clear that the state of exception is a situation where, on the one hand, there are effective laws that are *not* applied and, on the other hand, there are actions that *have no place* under the laws. They have power, but not the force of law. The state of exception, simply put, is a no-man's land. The no man's land lying between public law and political facts, between the legal order and life. It is therefore a *borderline situation*, not just for the individual, but also for the community.

It is not only totalitarian regimes which are characterised by the introduction of a state of exception. In the same way, according to Agamben, the Patriot Act passed on 26 October 2001 and the other related provisions have created a state of exception in the United States of America, which, among other things, has made it possible to detain people considered suspicious for many years without judicial review. This is of course a rather paradoxical situation, since the law itself regulates the suspension of fundamental rights. The state of exception is therefore a phenomenon where life and law are in conflict, i.e. where the decision-making domains of law and politics diverge.

3. Constitutional principles of the special legal order in Europe and in Hungary

What does all this have to do with the state of national crisis introduced in Hungary as a response to the epidemiological emergency? In short: nothing. In Schmitt's view,

a state of exception is always a state of lawlessness, where only political power is manifested, whereas the Hungarian state of national crisis was introduced on the basis of the *constitutional order*.² However, it was precisely to make this difference clear that it was necessary to recall the interpretation of the Schmittian state of exception, to show how wrong it is to equate the decisions taken in this epidemic situation with the state of exception.

Having examined the different theoretical approaches to law (the ideas of Schmitt and Agamben) that have paid particular attention to the operation of law in a non-normal situation, it is now worth briefly examining the constitutional framework of the Hungarian legal response to the threat of epidemic. This will clearly show that the handling of the situation has not reached even close to a level which could be called a state of exception; in other words, the country has remained fully within the rule of law. It is important to note that the core of the criticisms and doubts concern the relationship and correlations between the *special legal order* and *human rights*. Perhaps one of the decisive theoretical foundations to be taken into consideration is that the special legal order itself is not in fact a kind of suspension of (liberal) *democracy* (the people's rule), still less of the *legal state* and the rule of law but, on the contrary, it is part of both. In a state of national crisis, this new situation is democracy itself and the rule of law itself, and – accordingly – strict laws (both democratic and imposed within the rule of law), or rather laws of cardinal importance, make its conditions and its functioning possible and regulate it.

In *international (public) law*, two main groups of human rights can be distinguished.³ On the one hand, there are human rights that *cannot be restricted* in any respect, even in a special legal order, and which can therefore be considered absolute and retain the highest priority, as a minimum requirement of constitutionality.⁴ The International Covenant on Civil and Political Rights, adopted by the United Nations (UN) in 1966, highlights seven such human rights. These are included in the group of rights that cannot be subject to restrictions pursuant to Article 4(2).

Two of the four 1949 conventions that are part of the so-called Geneva Conventions and which predate the international law developed by the UN, namely the third convention on prisoners of war and the fourth on the status and protection of civilians (both dated 12 August 1949), contain similar provisions. Furthermore, both of the 1977 Additional Protocols (both dated 8 June 1977) give priority to certain human rights: the first Additional Protocol provides for the protection of victims of international armed conflicts; the second Additional Protocol contains various legal provisions on the protection of certain victims of non-international armed conflicts, i.e. civil wars.

The currently effective Hungarian Fundamental Law (the country's constitution) defines the following rights as inalienable rights: the right to life and *human dignity*; the prohibition of torture, inhuman and degrading treatment or punishment;

² A sophisticated contemporary press analysis comes to the same conclusion (Téchet, 2020).

³ For example, András Jakab's study provides an overview of the German constitutional law, which is a model for Europe (Jakab, 2007).

⁴ Doctoral dissertations are also being written on the theoretical systematisation of regulations made under special legal order see, for example, Mészáros, 2017.

the prohibition of slavery and trafficking in human beings; the prohibition of medical or scientific experimentation without voluntary consent; the prohibition of human selective breeding or the use of the human body or parts of the human body for profit and furthermore the prohibition of human cloning; the presumption of innocence (*praesumptio innocentiae*); the right of defence; the principle of “no crime without law” (*nullum crimen sine lege*); and the prohibition of multiple convictions.⁵

On the other hand – and the vast majority of human rights fall precisely into this category – there are also human rights that *cannot* be regarded as *unrestrictable* by definition. For instance, in case of a conflict (i.e. collision) between human rights, the *necessity* and proportionality (fundamental rights) tests guide the (possibly reciprocal) restriction.⁶ The exercise and enjoyment of these human rights and their enforcement may therefore *be suspended* in a special legal order, even beyond the limits allowed by the necessity and proportionality tests.⁷ The key feature of this is the temporary nature, however.⁸

Constitutional law must always strike a *balance* (although of course it will never be, nor can it be, a perfect one) between, on the one hand, ensuring that the protection against a given threat is secure and implemented by swift and effective measures,⁹ and on the other hand, protecting fundamental rights in a constitutional democracy and the rule of law. The *proportionality* requirement ensures that the resulting concentration of power is limited to what is strictly necessary.

The *extraordinary legal order* was introduced into the Hungarian constitutional order in 1989, and its effects are still felt today. Compared to the two previous authoritarian regimes, it is therefore a legal achievement of the democratic transition and the establishment of the rule of law.¹⁰ In the new Fundamental Law of 2012, a separate chapter is devoted to the *special legal order* – now bearing a slightly changed name – which refers to the current Defence and Disaster Management Act (2011. évi CXXXVIII. törvény a katasztrófavédelemről és a hozzá kapcsolódó egyes törvények módosításáról) in terms of detailed rules. In the Hungarian Fundamental Law, the qualified periods were supplemented in 2016 with rules on the protection of internal security, i.e. rules to be followed in the event of a terrorist emergency, in response to the growing international threat of terrorist acts.

The regulation of the *special legal order* can be regarded as very sophisticated in the Hungarian system, if compared to other regulatory practices, for example in Europe. In many countries, no distinction is made at constitutional level between different types of emergency. Currently there are *six types* of emergencies in Hungary: state of national crisis, state of emergency, state of preventive defence, state of terrorist threat, unexpected

⁵ On the question of fundamental rights and their limitations in English see Kiss, 2013.

⁶ The necessity and proportionality test, for example, provides a constitutional safeguard in times of the special legal order (Mógor & Horváth, 2009).

⁷ The restrictions on fundamental rights were already essentially the same in principle in the previous constitution see Kiss, 2008.

⁸ All measures must be of a temporary nature see Kádár, 2014.

⁹ This fundamental contradiction (dilemma) of special legal orders is well summarised in the study by Barnabás Kiss (Kiss, 2018).

¹⁰ For an analysis of the development of Hungarian constitutional law see Szabó & Horváth, 2012.

attack and state of extreme danger.¹¹ The type of emergency just introduced in relation to the epidemic is the mildest of these.¹² The promulgator is the Parliament in the first four cases and the Government in the last one, whereas there is no promulgation in case of an unexpected attack. In the last four cases, extraordinary measures may be taken by the Government, in the first case by the Defence Council, and in case of a state of emergency by the President of the Republic.

It can be seen that, in terms of the *structure of the state*, the principle of *separation of powers* will temporarily change, and a temporary concentration of power may occur for practical reasons. Once the emergency is over, this must be restored to its original state, and in the meantime strong checks and balances must be built in (primarily by the National Assembly and the Constitutional Court).¹³

In the first six months of 2020, the Covid-19 epidemic fundamentally tested the European states and showed in practice the level of response and ability to react to various crisis situations in each country, including the legislative framework, the institutional system and infrastructure, and also the coordinating political leadership which brings nations together (Sándor, 2020a). Obviously, the extent of the threat to basic needs was such that state intervention was urgently needed, beyond the means normally available under the legal system. The fact that there is no uniform name for the different modes and types of special legal order in the European Union has made comparison between the various approaches applied in different European states considerably more difficult (Sándor, 2020b). In addition to legal incompetence and journalistic sloppiness, translation difficulties have often contributed to misunderstandings (Kelemen, 2019).

A fundamental characteristic of crisis situations is the need to step outside the normal legal framework and systems of everyday life and to provide quick and decisive responses and reactions, which is what the institution called the state of national crisis provides.¹⁴ In such cases, a natural tension is created between *security* and *freedom*: one could label this as a paradox of the rule of law, when the legal mandate or authority must be both sufficiently detailed and at the same time provide sufficient freedom to act (Csink, 2017). As is evident from this review, the state of national crisis introduced in Hungary because of the epidemic has nothing to do with the state of exception coined by Schmitt. The latter means the suspension of the law, whereas the solutions applied now were based on the *constitutional order*, the legal order. This means, simply put, that the critical references to Schmitt, to dictatorship and to the dissolution of Parliament simply have nothing to do with reality.

To summarise, the extraordinary legal order in Hungary is ‘a constitutional state, not a state of unconstitutionality’ (Koja, 2003). To put it another way, it is not the end of the *legal state* (or the rule of law), but – despite the extreme challenges facing the country and the state – precisely the *celebration* of it.

¹¹ A typological analysis of the six periods can be found in Jakab & Till, 2016.

¹² A short summary analysis of the measures introduced is also available in English in Szilvay, 2020.

¹³ For a review of the safeguards and guarantees see Till, 2019.

¹⁴ Of course, the reasons behind the restrictions of the extraordinary legal order always reveal some political philosophy see Földi, 2020.

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The Biopolitical Turn of the Post-Covid World. Leftist and Neoliberal Insights of Puzzling Biopolitics

Oana Șerban* 

* University of Bucharest, Faculty of Philosophy, e-mail: oana.serban@filosofie.unibuc.ro

Abstract: As the 21st century became shaped by the matters of public health, the Covid-19 pandemic revealed that it is a trap to believe that we have to choose between the medicalisation of politics and the politicisation of medicine. My thesis is that models of good governance in the post-pandemic world must be shaped by leftist principles, values and practices, in order to ensure not the reopening, but the reconstruction of public life, which needs more than ever overcoming social inequalities and political polarisations, whereas liberal principles should be implemented in order to fix standards of economic performance and efficiency after applying mechanism of recovery. Governments as well as electoral spheres are reticent to biopolitical incursions, historically associated with panoptic systems. I claim that it is time to plead for positivising biopolitics as political humanism. My research will expose twelve themes for disseminating biopolitics as political humanism, focused on sensitive key-domains such as labour, social cohesion, security, infodemia, domestic life and good governance.

Keywords: biopolitics, biosecurity, biohumanism, good governance, panoptic systems

1. Immunising communities: A biopolitical framework inspired by Robert Esposito

The pandemic raised by the spread of Covid-19 has rapidly developed what politically is known as a state of exception: human rights have been narrowed or even suspended for a determined period of time and the management of the sanitary crises has been doubled by the management of population. Such coordinates depict what Foucault, Agamben and Esposito claim as a biopolitical scenario: governments face the exclusive responsibility of securing biological life (*zoe*), revealing the non-biological life (*bios*), reduced to economy, politics, culture, as a secondary priority. It is well known that biopolitics is one of the worst nightmares of political philosophy: it activates only in cases of natural emergencies, such as pandemics, or contractual break-ups that lead to political general conflicts or wars. At a first glimpse, the biopolitical power draws on the rationality invested by governments in shaping and controlling populations by procedures of constraint and coercion that tend progressively to barrow, counterweights of civil freedom. Traditionally, biopolitics becomes the ‘politics of life’ (Siisiäinen, 2018, p. 18), that

tracks a particular *raison d'État* that quantifies freedoms and liberties as variables influenced by states of exception (Agamben, 2005) that 'do not foreclose all possibilities of historical specificity' (Walsh, 2014, p. 9). Nevertheless, biopolitics is an equation of power that frames sovereignty and biopolitics as two mutually productive forces: the more a situation is exceptional, the more the administration of life by disciplinary practices is needed. At the threshold of modernity, biopolitics has been grasped as a form of governance that articulates sovereignty by maximising mechanisms of control and surveillance; thus 'the production of a biopolitical body is the original activity of a sovereign power' (Agamben, 1998, p. 6). According to Agamben, albeit such states of exception reflect a suspension of normality and consequently impose certain power practices, societies rather assume that as long as a juridical content is rational, they can abandon themselves to it. Therefore, in a biopolitical frame, individuals do not expect to be banned by the law; they are abandoned to the law (Agamben, 1998, p. 31). This phenomenon happens because of two major causes: on the one hand, each legal content is determined by the *jus divinum* and therefore, we tend to respect the law because we acknowledge our respect towards a messianic form of rationality, that is subsequent to any juridical imperative; on the other hand, because we abandon ourselves to the law by the law, or, to be more specific, 'abandonment respects the law, it cannot do otherwise' (Nancy, 1983, 149). But how far can we address nowadays such abandonment? In the traditional paradigm of biopolitics, it was conceived as a proof of trust and obedience in front of a superior ontological authority that inspires power; nonetheless, today, in a secular world, such aspects are hardly conceived as parts of a reliable, valid argument. After the 21st century, political philosophy turned biopolitics towards a form of biopower that has nothing to do with a divine rationality of state. The dark decades of this historical time have been shaped by a radical biopolitics that advanced not the politicising of life, but the politicising of death. Political bodies have been nationalised, and historical subjects have been regarded as exceptions, meaning as *conditio inhumana*, lacking the dignity and the right to live as long as they were declared undesirable subjects within a state border. We do not know if God lived at Auschwitz (see Agamben, 2002), but it is clear that biopolitics feed the mentalities behind panoptic systems that renounced to subtlety and shift to dominant, dictatorial control mechanisms, specific to death camps. Therefore, biopolitics operates in a double sense: from the oppressor to the oppressed and vice versa, meaning that it measures the biopower that annihilates life and the resistance of the victims against invalidating their *bios* and retracting their *zoe*. The dominant exegetic part of biopolitics is mainly concentrated on the negative project of biopower: authors such Foucault and Agamben insist on the destruction phenomenon behind the architectonic of disciplinary and punitive societies. Nevertheless, authors such as Esposito bring to the spotlight a more balanced, equilibrated perspective, according to which disadvantaged communities have strengthened their capacity to survive and overcome obstacles dictated by a discretionary biopower and that a biopolitical project is equally represented by the attempt to face, resist and recover from such dictatorial regimes. This latter acceptance of biopolitics should rather be reinforced nowadays when the Covid-19 pandemic activated a biopolitical undertaking of good governance and resilience. The main aim of the current analysis is to prescribe

a biopolitical positive project that could depict solutions for raising durable resilient societies governed in the name of life without sacrificing bios, namely culture, religion, society or economics. Such endeavour reflects a great opportunity to address biopolitics as a new humanism, that we have expected after Camus's and Heidegger's claims (inspired by different reasons¹) that humanism is no longer possible in our contemporary history. This would be biopolitical humanism that targets resilience as a product of cultural mentalities invested in immunising civilisations against the abnormal life caused by pandemics. First, we should briefly overview the advantages of a biopolitical critique of this pandemic.

A biopolitical governance will help individuals to secure life and maximise its quality. This biopolitical background reshapes, of course, the major priority of governance models. We are used to governing by administering regenerable resources – forms of capital, highly criticised by leftist approaches and rather preferred by liberal convictions. Nonetheless, we have never been challenged by now to govern life as an unregenerable resource, for which a biopower is needed to conserve the life and safety of populations and to aim at developing nations in due course.

The correct question is not 'how compromised is the sanitary and economic normality of the state?', but 'how far are we from understanding that any crisis is an opportunity?' *Krisis* is not possible without *krinein*: the crisis imposes a judgment, a choice, thus, an opportunity. We have the possibility to choose biopolitics as a solution to the project of good governance to combat the effects of the health crisis on the well-being of society and to increase resilience, orienting it towards progress. A biopolitical judgment frames the management of the Covid-19 pandemic out of the classical, divisionary perspective that aims to separate the right and the left; it rather pleads to bring them together, jointly, around a core objective that inspires securing life and developing culture by advancing first, leftist measures to combat inequalities and disparities raised by the pandemic and only afterwards right-wing practices to stimulate recovery and growth.

At the Western level, the spirit of the European pan-community has rather been considered a matter of axiological consensus. States have arbitrated differently, through a rational calculation, the gradual closure of borders and the maximisation of social isolation protocols to total quarantine ("lockdown"). Citizens looked at maximising surveillance and control of the population under the sign of a test of autonomy and freedom, which reactivated the biopolitical appetite for interrogating what should and could, in these conditions, reflect good governance?

Gradually, the political and civil spheres were crossed by common moral dilemmas that suggest that the only way to reconcile them is a biopolitical platform. Is it normal to

¹ According to Heidegger, the age of technical rationality lead to violence and oppression, therefore, our human reason that trusted wholeheartedly technique has failed and humanism has more than ever disappointed us. Thus, philosophy will move frontwards but only following the anti-humanist path, whereas Camus considers humanism still possible as long as the metaphysics of sufferance framed by the 21st century can be integrated into a political project that will defy and defeat colonialism, war and oppression. In the end, we must imagine Sisyphus being happy, and this is exactly the task that this new humanism should fulfil by all its means (see Heidegger, 2013 and Camus, 1942, 1951).

give political priority to securing public health at the expense of privacy? How far can we sacrifice individual freedoms in the name of the principle of prudence? Why does the state of emergency become the source of normative contents that perpetuate the militarisation of society in order to protect the population? Is civil cooperation possible to develop biosecurity through collective health discipline, as long as the authorities are considered with scepticism and even distrust by citizens?

To do politics starting from life means to put *humanism* at the heart of political action. Not just any humanism, but a biopolitical humanism. This is not an ideological fad, despite the fact that today we live in an age crossed by the continuous dynamics of ideologies. Some ideologies updated, such as nationalism, others performed as ‘autoimmune’, such as liberalism, which is becoming more and more pronounced illiberalism. The principle of this humanism is that political power must be biopolitical. But it must be put at the service of the community, not at the basis of constructing a certain immunity in the face of social solidarity. These two words that are quite abused along public speeches framing the management of the pandemic, *community* and *immunity*, are bridged by a common radical, the Latin *munus*. For this argument, I engage the biopolitical theory of Robert Esposito.² Translated both as ‘obligations’ and as *habits* naturally developed by a community, *munus* is suppressed, in times of Covid-19, by social distancing. In the attempt to raise *immunisation* in the face of disease, communities distance their members more and more, alienating them from traditional obligations and habits, from their natural quality of being social beings. What makes us authentic, sociability, makes us sick (Harari, 2020). But let us keep in mind for now that *munus* is shared by community and immunity, in order to track the multiple implications of such consubstantiality in biopolitical terms.

How can we ensure that ‘immunity’ does not destroy our ‘community’? This is a biopolitical issue. ‘Munus’ must be rewritten today so that we can preserve all our obligations to the community and our habits together, becoming immune to the disease. But can current politics make this image a reality? Can politics choose first and foremost life and only after power? In times of pandemics, power must come to us from life. The fact that everyone’s life depends on power is the greatest disease we suffer from. Therefore, biopolitics, which none of us knows how to do yet, must be the new obligation and habit of the political class. Politicians must simultaneously operate the priorities of biological life (*zoe*) and the superstructures of non-organic life (*bios*). Thus, the biopolitical challenge for a post-pandemic world is to draw principles of good governance that pursue equally and responsibly the guarantee, by the state, of all the necessary

² Esposito embraces the traditional position of biopolitics defined as ‘a science by the conduct of states and human collectivities, determined by laws, the natural environment, and ontological givens that support life and determine man’s activities’, a statement that lacks, however, ‘a categorical generalness’ (Esposito, 2008, p. 21). In his perspective, physics and power conceive sovereignty in different regimes that turn us back to the Kantian question surrounding the rationality of governance, that progressively goes, along the 19th century, towards the Foucauldian challenge of understanding the power’s hold over life (Esposito, 2008, 32). Esposito rather prefers the Foucauldian acceptance that life is no longer ‘a scientific concept’, but ‘an epistemological indicator’ (Esposito, 2008, 40) of classifying and discerning scientific discourses that do not exclude those oriented towards the analysis of power. Thus, modernity grasps the age of bio-history that transforms human life throughout bio-power. In these terms, preserving life becomes a priority, coined as *conservation vitae*.

resources for the preservation of organic life, integrity and body health. Only in this manner will be possible the biopolitical tone of development of all non-organic fields such as politics, society, economy and culture, starting from their potential to preserve and improve the quality of life.

2. Who is afraid of biopolitics?

In its own way, biopolitics is a civilisational barometer. It shows us how life has been valued and protected in various historical contexts noted as states of emergency, such as pandemics, wars, civil conflicts, in the context in which the security of life is both a legal and disciplinary issue. The pandemic forces us to rethink the social contract, a process in which the main challenge is that of *population management*. In this regard, a clarification is needed: in the career of the term, the positive meanings of biopolitics, as a government strategy for managing the population in order to preserve safety and the phenomenon of life, corresponded to negative meanings, such as *biopower* or *bioterror*. It usually depicted political situations in which a category of individuals was considered undesirable to a totalitarian society and this led to their exclusion, marginalisation or closure in devices of supervision, control and discipline.³ In migration issues, such as the management of refugee groups, biopolitics has often indicated abusive, repressive governing bodies. But these negative meanings are not the subject of this discussion. Through its scale, the pandemic has activated biopolitical discourse. We may have prejudices against this term, but they come only from ignorance or from an impermissible error of extending the concept to a project of power with an iron fist. It is not necessary to do so.

We live, as I have said on other occasions, in an age in which citizens feel *governed by fear*. It is the fear of disease, which sometimes arouses distrust in the authorities responsible for managing the epidemiological risk, to the point that the idea of a sanitary dictatorship dangerously seduces not corona-sceptics, but *bona fide* citizens, who respect all prudential rules. But who no longer resist the anxieties caused by the unpredictable extension of restrictions. Fighting the government by fear is a biopolitical project. Authors such as Lorenzini argue that biopolitics is back since the pandemic activated new 'genres of quarantine' (Lorenzini, 2020), leading to control, discipline and even surveillance, all conceived as Covid-19 responses. If Foucault used to address the nationalisation of the biological, nowadays, in times of pandemics, we face its internationalisation. Lorenzini closely observes that each biopolitical regime advances 'a blackmail': usually, individuals must be for or against a regime of governance, but biopolitics forces us to conceive each political measure as the best option – in a utilitarianist perspective – within a crisis, thus reflecting a reasonable compromise. Therefore,

³ In my opinion, one of the greatest authors on biopolitics is Hannah Arendt with her *Origins of Totalitarianism* (1973), yet, unrecognised as such by exegetes. It is not the place nor the strike of this article to follow such endeavour here; however, we must say that Arendt's opinion that Jewish communities had to immunise themselves in front of two circulating, well-spread prejudgments, the myth of eternal anti-Semitism and the myth of the scapegoat, reflect a biopolitical undertaking of the genealogy of totalitarianism.

biopolitics expects from us not acceptance or refusal, nor conformity or anarchism, but a justificatory thought. Traditionally, the Foucauldian argument on biopolitics states that biopower is not exclusively explicit: it can act implicitly, in subtle manners, multiplying its effects and diversifying in order to perform global obedience from populations reflected as masses at risk. Therefore, if we look to the ‘dark’ side of biopolitics, resistance is not the key for a proper and ingenious philosophical analysis of such phenomena, but the power of biopolitics to mirror our resilience, conformity and reasonability, thus becoming an expression of what Foucault would call ‘the critical ontology of ourselves’ (Foucault, 1984, 47). Lorenzini defines biopolitics as ‘a politics of differential vulnerability’: social inequalities occasioned by this pandemic should be solutioned by an efficient governance method. Therefore, biopolitics is the correct political framework not only in times of pandemic but especially in depicting a post-pandemic world.

At the same time, resilience is a biopolitical expression, before being a psychological, affective, social one. The global response to the coronary crisis is to secure humanity both biologically and morally. Authors such as Giorgio Agamben, Michel Foucault, Robert Esposito, Yuval Harari point out that the policy of a pandemic tends to develop authoritarian implications on the part of democracies. On the other hand, the state of emergency in which the golden principle is ‘follow the rules to recover’, challenges us to understand how citizens follow the rules imposed in a state of emergency and why deviating from them means not recognising the rationality of these rules. Who pays for disobedience, for making others sick, for freedom? This remains an open question that highlights the fact that each of us is responsible for the other’s biological life, not only for his/her own and that convinces us, once more, that biopolitical discourses are adequate for depicting a post-pandemic world.

Last but not least, the medical drama, as we have all seen in Italian hospitals, reengaged the biopolitical protocol. At a first glimpse, this is a bioethical problem: doctors forced to choose, in conditions of insufficient material resources in the fight against the pandemic, the life of which patient will rather be saved: that of a young man who, mathematically, has more chances of cure, or that belonging to an old man who has comorbidities and thus, less chances of going through the disease? Such a choice leads to medical bioethics under the sign of biopolitics.

To put all in a nutshell, we see how all these problems indicate a very simple phenomenon: either we will seek to understand bio-politically this pandemic, looking for solutions to combat it, or we will turn a global disease into a pretext for internal power games, with incredible and unfortunate costs for everyone’s life. Running away from the term – *biopolitics* – just because it reminds us of the most difficult political regimes from our humanity, is not a solution. The return of biopolitics to our situation, in order to understand how humanity has reacted, over the years, to similar pandemic contexts, what mistakes have cost lives and what misunderstandings have affected rights and freedoms, is a gesture of responsibility these days.

3. Biopolitical governance is not a simple exercise of population management: De-politicising biopolitics

A biopolitical platform for governance is not a left or right project. This is an absolutely necessary construction of a political humanism starting from the revision of the following 12 principles and measures, puzzling Leftist and Neoliberal Insights. My research will expose twelve themes for disseminating biopolitics as political humanism, as it follows:

3.1. The new model of social cohesion is based on the principle of solidarity in solitude.

Social distancing and (self) isolation test our civility and social responsibility. The boundaries of empathy, trust and mutual cooperation in the absence of direct interaction are equally reshaped. Living exclusively at home involves a certain routine, in the ergonomics of which work, loneliness or cohabitation find, as the case may be, new forms of manifestation. Solidarity in solitude is a challenge both at the level of individual life and at the level of states, which, although they react as ‘closed societies’, seek to maintain a sense of the European pan-community through an open morality. Compassion without cooperation cannot be a space for the administration of life through solidarity. According to de Mata (2020), in the attempt to align health and other perspectives, such as relaunching the economy and reopening public sectors of cultural, social and educational activity, the principle of solidarity in solitude must precede the priority of tracking recovery and resilience. The biggest threat for any community becomes, from a certain point, ‘the isolation fatigue’ (de Mata, 2020, p. 20), that lead not only to a vulnerable sense of mutual commitment and unity, but also to the fragmentation of unitarian projects, such as the European Union. Nevertheless, it is not like solidarity has never been a core value for our communities by now – it reflects the central belief at the heart of the European union; what has radically changed in understanding its social role in increasing bonding and cooperation is represented by the effects of this pandemic that ‘brought solidarity and appreciation to the front lines that, although have always been there working for the population, were previously ‘invisible’ to the public eye’ (Cuschieri, 2020, p. 6). This pandemic has the power to develop a more emphatic sense of solidarity, by engaging compassion: ‘once we understand ourselves as interconnected, we can collectively construct a disaster imaginary of solidarity. In this way, pandemics can be ethically innovative disasters’ (Pascoe & Stripling, 2020, p. 443). Therefore, whoever expects resilient society to overlap to solidarity communities has fallen into a trap: solidarity should be the primary value determining not a pandemic world, but a post-pandemic one.

3.2. Social inequality is a topic for public debates devoted to the improvement of life standards and quality in remote work paradigms for protecting citizens and increasing safety.

The home quarantine protocol takes up the main concerns of the leftist political agenda on social inequalities and class privileges, on the basis of which comfort, security and quality of life are assessed. Carrying out professional activities at home is far from the romantic rhetoric of quarantine. The distinction between working time and free time is doubled by that between living space and space for professional activity. The (non) material costs involved in these new contexts make their mark on the quality and privacy, in most cases exceeding the financial strength of individuals. In different occasions, the physical distancing protocol must be maintained between family members belonging to different risk groups and cohabiting in a space where it is impossible to minimise the interaction. In addition, in the name of securing the lives of citizens through isolation at home, the state has often failed to ensure their physical and moral integrity. Statistics show that crime in the public space is declining, but cases of domestic violence and abuse are dramatically increasing. There is also a cynicism of the isolation protocol: there are many individuals who do not have a home. For these vulnerable categories of citizens, protecting life means taking life from the beginning, with the support of the state. This is why leftist measures are prior to right-wing practices in governing this pandemic and constructing a post-Covid world. The public spheres has been crossed by different and intriguing opinions, such as Jane Fonda's statement, that the coronavirus has been 'God's gift to the Left': elections from this pandemic revealed that the political spectre has been radically inclined in favour of left-wing parties that chose to solve social disparities before accelerating economic growth in terms of a post-pandemic world scenario. Therefore, ideologically, left-wing politics is more equipped to face the social challenges occurred by this pandemic, whereas in what concerns the fate of liberalism, many authors insist that 'the spread of the virus complicates the implementation of policies consistent with liberal international order, potentially destroying the order in which liberal democracies participate' (Norrlöf, 2020, p. 799). Consequently, I defend the idea that biopolitics ensures a cyclical, natural and progressivist alternance of left-wing and right-wing principles, such ideological nuances regaining their doctrinaire nuances only in a post-pandemic world: to reboot this pandemic society, we need to depoliticise biopolitics, thus, to govern not for the sake of the left or the right, but for the good of a society that has no need of political competition, but of political cooperation.

3.3. The compatibility of public health measures to protect the lives of citizens with human rights should be coherent and attainable, so that the temporary suspension of universal rights will not lead to censorship, discrimination, xenophobia.

Governance must provide conditions for biopolitics, not thanatopolitics (Foucault, 2003). It is not the arbitration of death, but the protection and disposition of life in the

social space that is the main concern of political action. The public sphere pointed out some of the important themes of this direction. For example, limiting access to medical services regardless of the severity of the medical case, invoking caution in social distancing and avoiding overloading the health system; access to key medicines in a treatment regimen as a form of respecting the right to health;⁴ non-compliance with the principles of the right to privacy by limiting travel in order to reconcile professional and family life or forms of civil partnership; limiting religious freedom by imposing robust and essential restrictions in combating the spread of coronavirus on public cult activity, etc. It is not the effects of the medical crisis that will be ungovernable at the end of this pandemic, but the social reactions to the medical crisis.

3.4. Democratisation of biopolitical security. We need the transparency of any form of protecting the life and health of citizens in public spaces through biometric surveillance.

There are gaps in communication between the state and citizens in the administration of protocols to prevent the spread of coronavirus. The progressive increase of state intervention in the administration of civil life has generated panic among the population. People thus knew the invisible and subtle force of the 'invisible hand'. The fact that there is a virtual biometric surveillance only ensures the effectiveness of this protocol and the production of disciplinary effects on subjects or patients. This does not mean that the measure cannot be felt as invasive. We live within digital societies, whose advantages can be valued not only along the informational or cognitive sphere, but also within medical or social environments. However, the transparency of biocommunicability is a crucial measure to make known to citizens that the surveillance of the disease does not coincide with the surveillance of individuals; governing the Covid-19 crisis overlaps with the limits of prudence and biosecurity. Authors such as Albert et al. argue that 'COVID-19 is a threat to global security by the ontological crisis posed to individuals through human security theory and through high politics, as evidenced by biosecurity' (Albert et al., 2020, p. 1). Although such arguments are quite plausible and embraced by experts in the fields of biopolitics, a problem still remains: biosecurity will be reshaped from now on, as the biggest danger is not the virus itself, as Harari would put it, but the behavioural effects, in terms of control and surveillance, of this pandemic. According to Harari, Covid-19 taught us that contemporary history struggles between 'the choice between totalitarian surveillance and citizen empowerment'. It is not surveillance for the

⁴ In this pandemic, the access to Euthyrox has been restricted for many weeks to patients suffering from thyroid disorder. The crisis of Euthyrox began in Romania in April 2020, at first being speculated that its missing from the market was the effect of infodemia: people thought that its administration could prevent the spread of Covid-19. In fact, the distribution of medicines in time of Covid has been one of the greatest challenges of this pandemic. The same happened with Siofor, a drug applied in the medical scheme of treating T2D, or with Vitamin D. Therefore, the Romanian Government considered the possibility to produce part of this medicines internally, so that importations would not affect the right of patients to medical services. One of the greatest outcomes of this crisis was to raise the awareness on the fact that we begin to import more and to produce less; hence, in a post-pandemic world, different countries should focus on increasing the capacity of self-production in vulnerable industries.

sake of combating the virus the worst danger threatening our democracies, but surveillance for other reasons than sanitary ones. It is one thing to have your phone ringing after passing by a Covid-19 infected person – as tracking applications monitor the circulation of non/diagnosed patients, and it is another thing to use this pandemic as a precedent for perfecting systems inside- or over-the-skin-surveillance that could easily emerge in dystopian, newer totalitarian regimes (Harari, 2021).

3.5. Controlling the effects of automatising labour in different economic sectors in order to reconsider and preserve the value of manual labour, individual effort, working time, within both essential and non-essential industries.

As Covid-19 induced automation and labour disparities, leftist agendas began to seduce public spheres as they have been focused on reducing job losses and increasing the role of the human intelligence and force work within different industries. Recent 'findings suggest that COVID-19-induced automation may exacerbate labour market disparities, as females with mid to low levels of wages and education appear to be at the highest risk of being negatively affected' (Chernoff & Warman, 2021). In fact, this pandemic reduced physical interaction as much and, as incidences of Covid-19 became lower, the economic scenario that this crisis added a 'shadow cost' (Korinek & Stiglitz, 2021) on labour has increased. For example, the costs of adapting a business to Covid-19 conditions have accelerated the appetite for remote or automatic work, by case. However, by the time we will see if this pandemic caused a new Industrial Revolution, we must understand that in different non-essential domains, many jobs have been conceived as redundant and, consequently, attracted a modest financial support from the state. On the one hand, many non-essential domains should be redefined as essential domains: for example culture, in order to save the production of culture and arts and the employees of creative cultural sectors from collapse. On the other hand, labour markets still have to implement technology in order to ensure a so-called material progress of automatising labour. The greatest impact of this pandemic will be, in terms of revaluing human work and effort, a new wealth distribution supported by the degree of automatising labour in each society.

3.6. Increasing human empathy by assuming solidarity with all life forms. From this point of view, species life is a political strategy.

Preserving and improving life does not reflect a simple task of the biopolitical agenda, but also an ecological turn of state policies. However, this is not a matter of reflection on natural policy. The climate crisis caused by technological exuberance and its improvement with the social isolation of individuals forces us to reconsider the relationship between nature and individuals through the prism of nonhuman species. This pandemic was an opportunity to restart ecosystems: nature took back Venice, as cruise ships disappeared and its biosphere began to manifest freely, from ducks to dolphins. However,

the moral is that lockdowns have been a benefit for certain species but ‘nature will not heal’ (Owens, 2021) in two months of emergency-state that suppressed any human public activity.

3.7. Combating forms of national isolation in the name of state biosecurity.

The delayed reaction of solidarity promoted by the European Union towards certain countries radically affected by the pandemic – such as Italy – may set a risky precedent for increased hostility, not transnational hospitality.⁵ An external biopolitical platform is one of the few projects that can optimise common biosecurity standards for the future of the European Union. Governing the coronavirus crisis means, in a biopolitical framework, governing the mobility of the population in all its aspects: professional migration, economic cooperation, free or cultural tourism, as correlated phenomena in terms of inclusion and social emergency. Fragility must not become a lesson in humiliation between states, but a morality of common sense. As we see, the pandemic occasioned a particular context in which racist discourses began to flourish: we have seen the European waves of Asianophobia, after the Wuhan case, and the riposte of Asian French citizens who rise the campaign *#JeNeSuisPasUnVirus*, and nowadays we see that this trend begins to reactivate older forms of racism, such as antisemitism. Moreover, during this pandemic, resilience became the core value of our contemporary societies. The need for social distance called, in turn, for the principle of solidarity in solitude. Isolation forms raised beyond anxiety, hate, racism and lack of empathy. A study recently published by INSHR-EW (The “Elie Wiesel” National Institute for Studying the Holocaust in Romania) revealed that the pandemic reactivated anti-Semitic attitudes that began to manifest progressively in online spheres. Therefore, costs of isolation can be, at least from a political standpoint, devastating for cultivating civilised and emphatic public spheres.

3.8. Legislative innovations in the field of increasing security and protecting the lives of citizens should not take advantage of the anomy or vulnerabilities of democratic models.

This is possible in the direction of maximising state intervention at the level of individual life. History has shown us that politics tends to turn any crisis into a field of totalitarian experiences. Therefore, to any biopolitical action of the state, the citizens react, naturally, by suspicion. Individuals question whether prevention measures are far too restrictive. Citizens wonder if the measures imposed for population surveillance and control do not develop, symptomatically, disciplinary effects that can turn into authoritarian reflexes. People need to understand organically that the state of emergency is not a pretext for

⁵ See the Kantian distinction between hospitality and hostility from *Perpetual Peace*, later on retaken critically by Derrida.

turning these interim measures into long-term surveillance protocols, which increase state intrusion into civilian, community and individual life. But in order to assume that the state of emergency does not develop rules that will last even after dropping such crisis, nor does it offer a way to compensate the vulnerabilities of democracy only for a class of privileged subjects, citizens must confirm their trust in the state, as a long-lasting process grounded on culture, which nowadays is mostly considered a non-essential domain.

3.9. No pandemic should be doubled by infodemia. Fake news feeds civil disobedience, anxiety and panic of the population.

Regaining the pragmatism of public communication in terms of biocommunication could bring an advantage to the media. Providing accurate information on public safety would reduce the state's information monopoly in strategic communication to combat the pandemic. At the same time, the immediate effect would be to democratise access to culture and truth. Otherwise, the state will remain, in its biopolitical vocation, a pure agent of information management on disease dynamics.

3.10. Consolidation of public space as an extension of domestic space.

Cohabitation between individuals is possible through social distancing without affecting cultural values, free time, social liberties, social segregation and respect between individuals. By maintaining protocols of social isolation, people oppose, in a sense, to their own nature: to socialise, to be together. No power is credible if it reduces its governable to an amorphous biomass. It should be a democratic, reflective power, the one that governs critical masses. Biopolitics involves thematising the cultural values associated with life through which we understand the predispositions of a people or a society to empathy, tolerance, cooperation, sacrifice. The model of open or closed societies arising from the management of the pandemic is nothing but the effect of cultures that adopt different mentalities and beliefs in the management of life. Returning to normal means returning to the community. But only culture has the capacity to gradually increase the participation of citizens in the dynamics of society and the state in which they live.

3.11. Reconsidering the relations between the Church and the state in the management of life could lead to more emphatic and efficient social spheres.

It is not just about recognising the church's ability to expand the cultural, symbolic and material capital of a form of spirituality in adapting people to the experience of a sanitary crisis. The Church has developed an eschatology of pandemics (Cunningham, 2008, p. 29) as narratives of the dynamics of this world and solidarity between

individuals. But its role remains to complete the social agenda of a state through a space of intervention in which philanthropy, missionary work and spirituality maintain the ideals of solidarity and community cohesion. The state must not miss the opportunity to turn the Church into a partner for its interventions and social responsibilities. The dialogue between the state and the Church is not an element of anti-modernity. Public power is divided between a political and a social sphere. The state must arbitrate not the freedom of the two, up to mutual immunisation, but their potential to provide citizens with security and trust. The pandemic is not a test of faith. But biopolitics can be a test of secularisation.

3.12. Designing public policies in biopolitical terms.

The epidemic generates risk areas and groups, isolation and immunisation areas, domestic outbreak, militarisation. These things show that the profile of the politician capable of governing such a crisis resists through two political virtues: pragmatism and resilience. Unaccompanied by a historical sensibility, these are not virtues, but only skills. Voters are less and less used to looking at politicians as authors of a country project. This biopolitical crisis recovers the author's function as a competent and virtuous legislator. In recognising the legitimacy of measures to combat the pandemic but also in recognising their reasonableness, people link the authority of the law to the authority of the author. Who develops, in other words, public policies? What credibility and competence do politicians have in proposing laws that are both just and moral for the preservation of the lives and safety of citizens? What is the trust capital and expertise that public policy makers must have for the law not to produce immoral effects when it concerns sensitive topics such as freedom, privacy and human rights? This time, the elaboration of public policies must be done situating as a source, but also as a goal, the life of individuals.

4. Instead of conclusions

One can reject a biopolitical platform for the sake of maintaining governance on either side of the political spectrum. Both the leftist and the right-wing oriented political measures could build their own biopolitical ideological agenda based on these foundations. However, in times of a post-pandemic world, it would be reasonable and lucid to drop political rivalries in order to advance a biopolitical regime that makes use of both wings of the political spectre by securing biological life in front of non-biological undertakings of life, from cultural and economic insights to social ones. The biopolitical left and biopolitical liberalism cross at the heart of biopolitics: these twelve topics could map a post-Covid political agenda for any reasonable governance that would value and cherish the pandemic experience as an opportunity to strength, not to fault contemporary, imperfect democracies. Along this article, a positive sketch of biopolitics as a moderated regime that has nothing to do with its negative governmental tradition has been engaged in order to offer a new perspective on the multiple manners in which not

only our lives, but equally this domain experienced radical changes that redesign the priorities of political interventions across public spheres. In the end, it is not a post-Covid world defying the pandemic the one we would like to live in, but one that turns such despicable historical crises into an opportunity for progress. Resilience is not incompatible with progress: as long as this statement will be supported by empirical facts revealed by governmental decisions that chose to defend life not to use it for electoral advantages, biopolitics will earn a positive place in our future.

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ARTICLES

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Re-thinking the Lower-middle Level of Administration in Hungary with Particular Reference to the Web 3.0. Era

László Tibor Buskó 

* University of Public Service, e-mail: busko.tibor.laszlo@uni-nke.hu

Abstract: This paper will evaluate the current situation and role of the Hungarian (administrative) lower-middle level and make projections about its future. Centralisation efforts since 2010 have had a non-negligible impact on the administrative and non-administrative (common institution maintenance, micro-regional development policy) tasks assigned to the lower-middle level. However, it may be argued that the transition to the Web 3.0 era – the era of the most advanced, most intelligent and customised web technologies – may put such centralisation efforts into a new context. Revitalisation of formations similar to the multi-functional micro-regional associations of local self-governments which largely disappeared after 1 January 2013 may be justifiable in the forthcoming period in order to promote local synergies. If this is correct, a re-think of the public administration system at the lower-middle level may become a very important task for the public administration as along with regional discourse.

Keywords: districts, local self-government associations, public administration, territorial policy, local public services, Hungary

1. Introduction

The subject matter of this paper is what is known as the lower-middle level of administration, which – with some simplifications – I have placed in the category of the local equivalents of the European Union’s local administrative units (LAU) level 1, as used before 1 January 2017, when EUROSTAT disbanded levels LAU 1 and LAU 2, and implemented a unified LAU classification. In Hungary, as in the majority of EU member states, the new LAU levels implemented in 2017 are equivalent to the former LAU 1 levels (3,155 towns, at the town level) (Local Administrative Units [LAU], s.a.). The primary aim of the study is to make recommendations on the ideal size and desirable functions of lower-middle level of administrative units in Hungary, especially with

regard to the challenges of the upcoming era of the most advanced, most intelligent and customised web technologies, i.e., the Web 3.0 era (Mitra, 2014). The second section of the paper will briefly outline the prehistory of the lower-middle level in Hungary in order to provide a proper context for the situation and role of the current district system, which constitutes the most important representative of the lower-middle level after 2010. In the third section, based on the professional literature on the ideal size and desirable functions of districts, I conclude that it would be a mistake to identify the lower-middle level with one single geographical delimitation, such as the current district system, and that research on the ideal size and desirable functions of lower-middle level administrative units should focus on the needs of users, in line with one of the fundamental postulates of the concept of the neo-Weberian state. Based on this, the fourth section seeks to rethink the ideal size of districts in the transition to the Web 3.0 era through empirical research. The results of this research suggest that a reduction in the frequency of administrative acts requiring personal presence could lead to a reduction in the current number of districts. Furthermore, the concluding part of the paper will discuss in more detail the fact that there may even be a resurgence of formations smaller than the current districts, which may be best placed to fill the void left by the marginalisation of the multi-purpose associations of small municipalities after 2013.

2. A historical overview

The term ‘district’ (*járás* in Hungarian), the most characteristic Hungarian equivalent of the lower-middle administrative level, is quite controversial. On the one hand, its use dates back a long time: Historical research has found evidence of districts known as *iudex nobilium* from as early as the fifteenth century (Csité & Oláh, 2011, pp. 21–24; Hoffman, 2012, p. 23). On the other hand, in a geographical sense, these districts did not constitute fixed regional units. As Bálint Csatári put it, ‘Their boundaries, their seat, and the roles, number and importance of district-level administration or supply institutes have been often changing’ (Csatári, 1995, p. 11). To understand current problems with districts, it is vital to first shed some light on how their real career started. They were introduced in the socialist era, when districts – which were construed until then as areas of jurisdiction of ‘on-site’ county bodies – were established as fully-fledged administration levels on a par with counties or cities. This change, resulting in a three-level administration, was introduced by Act XX of 1949 (The Constitution of the Hungarian People’s Republic) and Act I of 1950 (the first act of the Council). However, bestowing such powers upon districts was based on specific political circumstances: They were meant to facilitate taking control over agricultural activities, including the collectivisation process, which was considered strategically important at the time (Szoboszlai, 1973). Since in smaller villages, no adequate and reliable party officials were available, the governing (and only) party intended to rely on this administration level in realising its goals. As a result of this intention, the three-level administration could not survive completion of the collectivisation process, or the disruption of the strictly centralised plan- and instruction-based regime. For this reason, the dissolution of districts or

merging them with other districts started as early as the 1950s. Ultimately, Act I of 1971 (third act of the Council) sped up the process. Pursuant to the legislation, to ensure a gradual loss of power, the district councils were first replaced by so called district offices, and as of 1 January 1984, the last districts were dissolved. They were replaced by so-called city environs administrations. This change was introduced to improve cost-efficiency, specifically the government intended to improve efficiency of territorial administration by allocating former district-level tasks to central cities and their associated specialised administration bodies. Another point worth considering is that in the late Kádár era, these measures which were meant to improve cost-efficiency proved insufficient to offset the trend of cutbacks in central grants, and an increasing 'competition for development resources' (Vági, 1982) resulted in sharp conflicts between city environs centres and the councils in their catchment areas, in spite of the fact that by creating so-called city environs funds, the central city, as a net contributor, tried to prevent a further increase in inequalities by adding its own humble offerings (Pfeil, 2003, p. 53).

Following the regime change, it briefly seemed that the lower-middle administration levels might be forced to the periphery. Spurred by the unpleasant memory of the city environs administrations and the lobby of local influencers, Act LXV of 1990 on Local Self-Governments (Local Self-Government Act 1990) implemented a local self-government structure that was not only decentralised (one town – one local self-government), but which also allocated the majority of local-level tasks and authorisations to municipalities. However, it did not take long for it to become apparent that local self-governments do not have adequate resources to perform these tasks or fulfil their mandates. The current era has seen a trend of decreasing central grants, and only a few local self-government bodies were lucky enough to have sufficient income to fund the adequate performance of the tasks they were charged with. An illustration of this is that, whereas legislators in 1990 would have left 100 per cent of personal income tax paid by locals with the local government, by 1991, only 50 per cent remained with them, and by 2010, this number had decreased to 40 per cent. Moreover, only 8 per cent remained with the respective local government, the other 32 per cent was re-distributed to various local governments in line with normative indicators (Kovács, 1991, p. 34; Lentner, 2019, p. 25). Accordingly, a revitalisation of the lower-middle administrative level became inevitable in the early 1990s, though the diversity of local-level tasks and authorisations, and the conflicts of interests between individual municipalities or between the municipality level and the central government made it almost impossible to establish a nationwide, unified and overlap-free lower-middle administrative level.

As regards the local level of *public administration*, the Local Self-Government Act 1990 imposed heavy burdens on mayor's offices operating under individual local self-governments, and on joint heads of the local self-government offices alike. The Local Self-Government Act 1990 only provided recommendations for villages with less than 1,000 residents to establish a joint head of the local self-government offices. As the unpleasant memories of joint town councils from the communist era still lived on, joint heads of local self-government offices were scarce, even in regions with the most fragmented village-structures. Typically, the small number of joint heads of the local

self-government offices or the number of participating villages decreased even further (1991: 529 and 1,535), and this trend only reversed in 1997/98 (1997/98: 492 to 505; and 1,360 to 1,391 – Szigeti, 2009, p. 8).

Due to the urgent nature of public utility investments in the years after the regime change, and due to the fact that individual institutes providing some local public services could only be operated jointly, the necessity of local-level collaboration in the *organisation of local public services* and *territorial development* was recognised fairly early on. The first local self-government associations were created in the early 1990s, and the institutionalisation of domestic territorial development, by the promulgation of Act XXI of 1996 on Territorial Development and Spatial Planning (Territorial Development Act) and the appearance of decentralised financial aid promoted the spread of more complex territorial development associations. Subsequently, the reinforcement of the lower-middle administrative level was mostly hindered by the conflicts of interests between the municipality level and the government. In particular, the government insisted on the idea of a nationwide, unified and overlap-free lower-middle administration level, while in reality at local level a complicated system of local interests and conflicts prevailed. The issue of how to force constitutionally autonomous town local self-governments into a unified system was finally resolved by Section 1(2) of Act CVII of 2004 on Multipurpose Micro-Regional Associations which replaced duress with indirect incentives (various statutory grants) for municipalities willing to integrate into the centrally defined and limited lower-middle administrative level (into the system of multipurpose micro-regional associations). The minimum requirements of integration were a commitment on the joint performance of tasks related to education, social and healthcare, and territorial development. Meanwhile, in relation to the local level of public administration, Section 1(2) of Government Decree no. 244/2003 (XII.18.) set out that ‘the area of jurisdiction of the organ performing public administration authority tasks may only differ from the area of the respective micro-region, if the characteristics associated with the performance of the tasks and the exercise of the respective authority justify such a difference’. After a short detour, the unified lower-middle administration level had apparently been restored in Hungary.

As it transpired, when the FIDESZ–KDNP coalition came to power in 2010, they initiated a centralisation process which fundamentally changed the role of the lower-middle administrative level in the Hungarian administration system. The amendment of the Territorial Development Act (Act CXCVIII of 2011) dissolved the micro-regional development councils, transferring lower-middle administrative level territorial development tasks to the county local self-governments. Although, in relation to the *organisation of local public services*, possibilities continued to exist to perform tasks associated with the lower-middle level, with the repeal of Act CVII of 2004 on 1 January 2013 and the subsequent cessation of micro-regional statutory grants, multifunctional micro-regional associations practically fell apart. However, the most significant change took place at the local level of *public administration*. Act XCIII of 2012 on the Establishment of Districts and the Amendment of the Associated Statutes primarily re-allocated some of the local level public administration tasks to newly established district offices, that had formerly been carried out by local governments, primarily by notaries, who were local

self-government employees, and local state administration bodies with general authorities at the same time. To summarise the post-2010 trends in one sentence, the existence of a unified lower-middle administrative level had been questioned, if not outright denied. Below, I will attempt to define the present situation and future perspectives of the lower-middle administrative level in an era when bespoke answers to specific challenges will dominate even in the field of administration.

3. Districts versus lower-middle level

Based on the circumstances outlined in the introduction, I will develop an approach to the term lower-middle administrative level, which, instead of consisting of an exclusive lower-middle administrative level (where lower-middle level = a specific district distribution), is flexible enough to facilitate the solution of today's special challenges. This approach is based on the fact that the characteristics of Hungarian lower-middle administrative levels was defined by districts, which – despite being unstable – increasingly assumed the form of self-evident units of administrative spatial planning. The following section will explore the reasons.

Paul David, in the course of researching the causes of the Remington company's commercial success, argues that, since certain random events in the past can fundamentally affect the current course of events, sometimes it is necessary to accept that only history can explain a current situation (David, 1985). However, it should be added that due to a general resistance to change in society, adjustment to such eventualities may prove to be a difficult task. To paraphrase the most important conclusion of David's classic study, this may be regarded as a special case of path dependency, as traditional districts encompassing areas within about one day's walk (about 15–20 km) could have been allocated in a more favourable way in the present era. Indeed, in the twentieth century, an increasing divergence became apparent between the practice of Hungarian lower-middle administrative level spatial planning, and their treatment by academics. It is worth quoting one of the classics of Hungarian administration studies, István Bibó, who in a paper originally published in 1975 pointed out that, although the district system was launched with 140 districts in 1950 and this number had gradually decreased, at that time, professional discourse still considered the 80–90 larger district regions or city environs as the quintessential elements of the lower-middle administrative level.

This number of 80–90 occasionally recurs in our discourse of spatial planning. In one of the closing chapters of his book entitled *Magyar város*, Ferenc Erdei assumes about 80 centres, and... Károly Eszláry, who introduced three alternatives for administrative spatial planning (the large county, middle-sized county and small county systems) in the *Városi Szemle* in 1947, divided the country into almost the same number of basic elements in all versions: Large counties encompassed 87 districts, middle-sized counties had 93 districts, while in the small county system, the country was divided into 90 small counties. This author published another work entitled *Magyarország városhálózatának kiépítése* in 1949, wherein, based in Ferenc Erdei's theories, he took into account 98 city environs (Bibó, 1990, vol. III, p. 214).

The reason why this is remarkable is that, despite the fact that the number of Hungarian cities with a lower-middle level catchment area is well below 140, mainstream middle level spatial planning kept insisting on similar numbers even after the regime change. The number of statistical micro-regions created by Notice No. 9006/1994 (S.K.3) of the President of the Hungarian Central Statistical Office on the Delimitation of Statistical Micro-Regions (138) only slightly differs from that of the system introduced in 1950. Moreover, most probably due to local level political bargains, the number of micro-regions thus defined continuously increased. The number of statistical micro-regions created in 1994 was first increased by Notice No. 9002/1998 (S.K.1) of the President of the Hungarian Central Statistical Office, to 150. A second increase, enacted by Government Decree no. 244/2003 (XII.18.), took it to 168, while a third change, Act CVII of 2007 increased it further to 174. Finally, Act CXLIX of 2010 brought the number of micro-regions to 175 by 2011.

With the implementation of the new district system on 1 January 2013, even though the actual centres and limits of districts differ from that of the statistical micro-regions here and there, legislators did not set out to intervene in the structure of the lower-middle administrative level. One hundred seventy-five districts were established, which more or less corresponded to the number of statistical micro-regions just dissolved. Apart from the dissolution of the Polgárdi district, this number remains unchanged (presently, the lower-middle administrative level in Hungary consists of 174 districts plus 23 capital city districts).

Since, ideally, a lower-middle level administrative unit is identical to a real (functional) city and its catchment area (city district), it is inevitable, when clarifying the number of districts, to ask the question: How many cities are there in Hungary? Polemics on the topic in the academic literature generally start from the fact that the large number of cities that only became cities for political reasons after the regime change has resulted in an extremely fragmented ‘barely-city’ structure (Murányi, 2011), which presently includes 346 cities.¹ In a study in 2006, Pál Beluszky and Róbert Győri concluded that out of the 289 cities officially recognised at the time, only 210 actually function as a city to an extent, and a further 122 cities with incomplete city functions are deducted, the number goes down to 80–90, the number of larger district regions or city environs mentioned by Bibó (Beluszky & Győri, 2006, p. 68). In a parallel paper, Géza Salamin et al. estimated that there were only 57 actual cities with real city functions (Salamin et al., 2008). However, Imre Körmendy points out that the latter authors define a functional city in such a way that it meets another common criterium, namely the minimum of 20 thousand residents defined in the UN’s Demographic Yearbook (Körmendy, 2018). The aim here is not to determine a number or to define our lower-middle level administrative units according to Bibó’s approach or to the UN guidelines but to address the more pressing question of how to handle the meaning of contents associated with the lower-middle administrative level.

To arrive at a contextualised definition of the lower-middle administrative level, it is essential to understand the concept of the neo-Weberian state. It is well known that

¹ <https://statinfo.ksh.hu/Statinfo/themeSelector.jsp?&clang=en>

the dominance of the market-friendly approach attributable to the New Public Management was largely replaced after the recession in 2008 by the concept of the neo-Weberian state, involving strong state engagement. Christopher Pollitt, while admitting that, in a neo-Weberian state, strengthening the state's dominance may even be regarded as a traditional Weberian element, points out that the replacement of external orientation by internal orientation with more focus on bureaucratic rules, along with the consideration of citizen's needs and wants, clearly indicates that this is a 'neo-' or innovative version of the concept (Pollitt, 2007, p. 21). These parallels are also present in the state concept of the FIDESZ–KDNP coalition since it attained power in 2010. Focusing only on the creation of the districts mostly associated with the lower-middle administrative level: Although establishing districts (or allocating tasks formerly fulfilled by municipalities, notaries or formerly deconcentrated state administrative organisations to the district offices) may be considered a clear sign of Weberian centralisation, this ignores the fact that this does not only (or primarily) serve to concentrate powers in the hands of the state but also to take into consideration citizens' needs and wants in carrying out administrative tasks. As far as the Hungarian literature is concerned, it is enough to recall István Balázs's comment on the establishment of a system of government offices and districts that establishes a direct link between the state and its citizens (Balázs, 2020, pp. 29–30).

This is even more clearly evidenced by the institutionalisation of government customer service points, facilitating a one-stop-shop style of customer service. Although the first government customer service points were brought into existence before the district reform (they have been present since 2011), they became the determining elements of the administration reform at the time when the districts were established. More precisely, pursuant to Section 1(1) of the no longer effective Government Decree no. 515/2013 (XII.30.), 'Capital City and county Government Offices... shall operate an integrated customer service (hereinafter: Government customer service point) in the district (capital city district) offices'. On the other hand, based on Section 3(1) of Government Decree no. 86/2019 (IV.23.) on Capital City and County Government Offices and District (Capital City District) Offices, which is currently in force, government customer service points are even more closely linked to the even stronger district (capital city district) offices. The legislation describes government customer service points and document offices 'operated by the district office'. Even though, at first glance, defining government customer service points as the bodies of the district office would appear to reinforce the dominance of the district within the lower-middle administrative level, it turns out that the neo-Weberian postulate of 'meeting citizens' needs and wants' can still override efforts aimed at reinforcing both districts at all costs and centralisation at the same time.

This suggests that districts have clearly shifted the focus of local level public administration tasks to the lower-middle administrative level. However, in terms of territorial development and the organisation of local public services, the lower-middle administrative level is better characterised by the void created by the dissolution of multifunctional micro-regional associations. Nevertheless, this current void may also imply that these

tasks would be better placed at the lower-middle administrative level, and not – as is presently the case – at the level of county local self-governments or municipalities.

To summarise the above reasoning, a double conclusion can be drawn. On the one hand, it is a mistake to identify the lower-middle administrative level with *one single* geographical delimitation. Moreover, should a demand for such delimitation appear, be it about the practice of Hungarian lower-middle administrative level spatial planning, or in regard to a relevant academic argument, it may be presumed that the underlying cause is a lack of critical analysis of ‘path dependency’. On the other hand, in line with one of the fundamental postulates of the concept of the neo-Weberian state, the viability of aiming to meet citizens’ needs is accepted. If the final decision in such matters lies with the citizens themselves, we must not obstruct an increasing focus on customers in terms of spatial use within the lower-middle administrative level.

The short piece of empirical research below aims to give an insight into an even more customer-focused pattern at the lower-middle administrative levels. Its starting point is the fact that at the lower-middle administrative level, the objectives of the transformation of the Hungarian administration after 2010 have primarily been manifested by the establishment of districts and government customer service points. Therefore, based on the publicly accessible data of the Hungarian Central Statistical Office and the district-level and town-level data of government customer service points, I will outline a few simple correlations that may indicate a possibly fruitful direction for the development of the middle-lower administration level in Hungary.

4. Reporting results

My empirical research is aimed both at highlighting a few characteristics of the lower-middle administrative level since 2010 and suggesting a possible direction for future development. Perhaps the most important feature I would like to point out is that the existence of a unified lower-middle administrative level is questionable. In the light of the multipurpose micro-regional associations’ reduced influence, this becomes clear. I must add that even after the most important results of the reforms of 2010, the district system appears to be fragmenting further. Within the territories of the present 174 districts and the 23 capital city districts, currently 304 government customer service points were in operation on 4 February 2020. Although the distribution is slightly uneven, this yields 1.54 government customer service points for each district and capital city district, loosening the unified district-system further by creating what are termed ‘government customer service catchment areas’. However, the expression ‘catchment area’ is placed within quotation marks for a reason. Namely that integrated customer services are precisely based on the notion of facilitating the running of official errands for everyone, in any of the customer service offices. Of course, an individual’s rational choice is the closest or the most easily accessible office. This rules out the official existence of government customer service’s areas of jurisdiction, yet based on the customary use of territories, a structure defining the new elements of the lower-middle administrative level could be established. These elements would be smaller than districts, and in a sense,

they would represent competition for the former. Below, I will argue that such a fragmentation of district levels is not only an indication of the situation at present, but also, it may be used to establish the future course of development for the lower-middle administrative level.

Let us start out from a peculiar contradiction. On the one hand, the legislators obviously created government customer service points to facilitate an easy procedure for private individuals to resolve official matters. On the other hand, apparently, the majority of cases formerly requiring a personal presence will be replaced by using various communication means or e-government technology. To support the second notion, in an extreme case, it could reach the point where, in the imminent era of Web 3.0, the existence of districts becomes simply unnecessary, as people will be able to run their official errands (and not only the ones related to administration) online, even from the smallest village. For the time being, however, it is not necessary to go this far: It is enough to presume that with e-government technologies gaining traction, (which is forecasted for the near future), personal presence in the government customer service points may become rarer, which may then lead to a cutback in the number of government customer service points operated by each district office, or even to a decrease in the number of the districts themselves.

Considering this, it can be hypothesised that, within the territory of districts with higher levels of Internet coverage, more people are already able to run their official errands electronically than by reporting to the government customer service points in person. Furthermore, if this finding is valid, in a rational area distribution and spatial planning system, districts with more developed Internet coverage will need fewer government customer service points than those with lower levels of Internet coverage. As is described below, I attempted to find a correlation between the two indicators, but, considering the differences between the characteristics of each region, I conducted the analysis separately for the districts of the seven planning and statistical NUTS 2 regions before 1 January 2018, specifically: Western Transdanubia (Győr-Moson-Sopron, Vas and Zala counties), Middle Transdanubia (Fejér, Komárom and Veszprém counties), Southern Transdanubia (Baranya, Tolna and Somogy counties), Middle Hungary (Budapest and Pest county), Northern Hungary (Borsod-Abaúj-Zemplén, Heves and Nógrád counties), the Northern Great Plain (Hajdú-Bihar, Jász-Nagykun-Szolnok and Szabolcs-Szatmár-Bereg counties), and the Southern Great Plain (Bács-Kiskun, Békés and Csongrád counties). For the sake of completeness, please note that, since 1 January 2018, Middle Hungary has been divided into two NUTS 2 regions, Budapest and Pest County. However, I have not yet taken this split into account in my analysis as Budapest and a large part of Pest County can be considered a single functional unit of the Budapest agglomeration, regardless of the recent changes in the NUTS system.

Based on the above data, the following correlation was found between Internet penetration (the percentage of Internet subscriptions among the permanent residents of the subject districts, or – due to the lack of data on Internet penetration in the capital city districts – the capital, Budapest) and the *availability of government customer service points* (the percentage of residents of the municipalities with a government customer service point within the permanent residents of the subject districts, or Budapest), in 2018:

Table 1.

Correlations between Internet penetration and the availability of government customer service points in Hungarian NUTS 2 regions before 1 January 2018, broken down by districts or for Budapest as a whole (2018)

	correlation (r)
Southern Transdanubia	0.79
Western Transdanubia	0.77
Middle Transdanubia	0.72
Northern Great Plain	0.65
Southern Great Plain	0.60
Northern Hungary	0.55
Middle Hungary	0.31

Source: Compiled by the author based on data from the KSH dissemination database.²

This table shows that in Hungary, contrary to what might be expected, at this time, the residents of municipalities of districts with better Internet penetration also have access to more government customer service points than residents of districts with lower Internet penetration, making reporting in person to use government customer services more difficult in the latter districts. More specifically, based on Joy Guilford's approach (1942), in the majority of the NUTS 2 regions in question, a high (Pearson's) positive correlation (distinct association) or a medium positive correlation (significant association) is present between the variables of Internet penetration and the availability of government customer service points. The only exception is the Middle Hungarian region, encompassing Budapest Capital City and the adjacent agglomeration, where the Pearson's correlation value of 0.31 suggests a weak, yet stable correlation. In this region, the percentage of Internet subscriptions was by far the highest in the country in 2018 (38.1 per cent). However, in terms of availability of government customer service points (58.9 per cent of residents live in the territory of a municipality where a government customer service point is available), no similar dominance is present in the Middle Hungarian region. Moreover, this region is clearly inferior to the Southern Great Plain region in this sense (67.7 per cent), while the Northern Great Plain region shows a similar value (58.9 per cent). In Budapest, a city with 56.4 per cent of the population of the Middle Hungarian region, not only were Internet penetration values the highest (for Budapest, the percentage of Internet penetration is 45.1 per cent, compared to 40.7 per cent in the Debrecen district, which has the highest internet penetration outside the Budapest area) but also the government customer service points were available in every district of the capital, which is even more remarkable. The smaller anomaly is mainly attributable to the fact that, although the population significantly increased in some municipalities of Budapest's agglomeration after the regime change,

² <https://statinfo.ksh.hu/Statinfo/themeSelector.jsp?&lang=en>; town-level data of government customer service points; <https://kormanyablak.hu/hu/kormanyablakok>

policy makers still concluded that there is no need to provide local outlets to facilitate the official errands of private individuals in these 'dormitory towns'. The underlying assumption was that the majority of residents of these satellite settlements commute to Budapest in the first place, and for the rest of the population, traveling to Budapest is not very inconvenient, either. The result of this reasoning is perhaps demonstrated best by the example of the Dunakeszi district. Although this district has 86,992 residents, (its seat of the same name has 43,813 residents, putting it in second place after the town of Érd with county rights with 69,014 residents in the agglomeration), it is the only district with no government customer service point at all.

By the same token, the unavailability of government customer service points in Dunakeszi district or Dunakeszi city is most probably caused by other contingencies outside of the scope of this paper, and not by an intentional policy. It is also clear that, except for in the Middle Hungarian region, Internet penetration – and the closely associated general socio-economic development level – and the availability of government customer service points are positively correlated. Theoretically, this discrepancy could be decreased by opening new government customer service points. The unlimited possibilities of such efforts are demonstrated by the example of Óriszentpéter, the village in Hungary with the smallest number of residents (1,166) which has a government customer service point, operating an integrated customer service despite the fact that it is not even a district seat. However, opening such a large number of government customer service points would not be feasible, as the maintenance of the present system already imposes a heavy burden on the state. To illustrate this, and most probably due to the permanent lack of personnel and the low pay for civil servants, the government customer service office in that village, which was formerly open between 08:00 am and 08:00 pm every working day, (Fibinger et al., 2017, p. 5), now operates full-time on Wednesdays only, significantly restricting the opportunities for in person business.

5. Conclusion and further implications

As I mentioned above, the Local Self-Government Act 1990 implemented a quite fragmented local self-government structure, although the multipurpose micro-regional associations institutionalised by Act CVII of 2004 were able to create good opportunities for expanding local level synergies. Unfortunately, in the early 2010s, these formations were marginalised as a result of centralisation efforts. Furthermore, the system of multipurpose micro-regional associations had a significant and inherent defect since, due to the nature of associations, the former collaborations were not always able to provide a stable framework for administration, since instead of being organised from bottom up, the multipurpose micro-regional associations were defined and limited from above, and kept together by indirect instructions from above, as opposed to by a mutual recognition and management of interests. As a result, after their statutory grants were cut in 2013, these organisations fell apart perhaps too easily, and, considering the increasingly limited possibilities of the local level, without justification. The author of this paper is of the opinion that the near future should bring a process of simplification

based on the mutual recognition of interests, similarly to that which took place after the regime change: Individual local self-governments which are weak by themselves should work together again, supported by the pillars of the lower-middle level described above.

The theoretical underpinnings of the study pointed out that it would be a mistake to identify the lower-middle level with one single geographical delimitation, such as the current district system, and that research on the ideal size and desirable functions of lower-middle level administrative units should focus on the needs of users, in line with one of the most fundamental postulates of the concept of the neo-Weberian state. The subsequent empirical research suggested that problems arising at the local level of *public administration* cannot be adequately solved by the current district system or by government customer service points alone. The transition to the Web 3.0 era will be long and ponderous in Hungarian regions at lower levels of socio-economic development, and government customer service points are already short of personnel to fulfil their intended function (to facilitate the in person handling of official tasks after work). The currently prevailing approach, that is, the network of mobile district assistants (Keló, 2019), or the mobile government customer service points which appear from time to time in smaller villages, burden the system further, and do not represent a permanent solution, with the gradual transition to the use of the technologies offered by the Web 3.0 era. A system of information hubs operated or supported by local self-governments in the centres of micro-regions, for example, developed on the basis of the current Digital Welfare Programme Hubs (Digitális Jólét Program pontok), where people could receive help with solving their official issues electronically would potentially solve this problem. This would encourage citizens to familiarise themselves with and embrace the technologies offered by the Web 3.0 era, and – to a limited extent, so far – it would channel people away from district level offices, allowing them to deal with more important cases requiring personal presence. In the longer term, this could even result in a decrease in the number of districts compared to today, possibly down to the number of 80–90 mentioned by Bibó and which recurs in the professional discourse.

Moving on to the further implications beyond the tasks of public administration, the role of local self-governments is also crucial in terms of the *territorial development tasks* associated with the lower-middle administrative level. Although the current legislation requires *all* municipalities to follow an independent town development policy (for example to draft the strategic document of the town development concept independently), this does not imply neglecting territorial development tasks which go beyond local level. Government Decree no. 314/2012 (XI.8.) on City Development Concepts, Integrated City Development Strategies and Urban Planning Means, and Individual Specific Legal Institutions Associated with Urban Planning, for example, clearly stipulates that urban development concepts for cities with city rights shall contain a vision of the role the city will play in the region, which makes joint review and planning of territorial development problems affecting the city and its catchment area alike unavoidable.

It is also worth saying a few words about the problems of the *organisation of local public services*. In this respect, it is obvious that collaboration at the lower-middle administrative level is essential, as Section 11(2) of Act CLXXXIX of 2011 on

Hungary's Local Self-Governments detailing unnecessary yet required tasks clearly sets out that 'the statute shall differentiate when establishing the mandatory tasks and scope of authorities'. Thus, the joint maintenance of the associates' tasks and different institutes (for example, in an association under the auspices of a gestor municipality) is still a working practice today. The re-establishment of bottom-up associations at the lower-middle administrative level – under the old name of multipurpose micro-regional association or with a new, different name – could facilitate the more rational and clear operation of these associations. They could also partly relieve the burden on the 'ideal district', which is mentioned in the Hungarian Public Administration and Public Service Development Strategy, as a typical level of the organisation of public services in the long term (Közigazgatás- és közszolgáltatásfejlesztési stratégia, 2014–2020, p. 51).

Finally, allow me to make a few closing remarks. On the one hand, I have discussed the possible question of considering the geographical scale of the associations operating below district level, primarily by supplementing and relieving them, instead of competing with them. Hungary's cities with city rights, as micro-region centres, could provide an adequate starting point in this regard. However, it has to be understood that, to achieve the re-institutionalisation of these lower-middle level administrative units, willingness is necessary on the part of the state. Due to the decrease in the number of districts forecasted for the Web 3.0 era, the creation of such associations may potentially be in the interest of building a neo-Weberian state aiming to meet citizens' needs and wants (and ultimately, downsizing administration to a smaller, more human scale).

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Outline of the Evolution of the Hungarian Monetary Policy from the Restoration of the Two-level Banking System to the Present Day

Csaba Lentner^{*} 

* Professor, University of Public Service, Department of Governance and Public Policy, e-mail: lentner.csaba@uni-nke.hu

Abstract: This study outlines the development of Hungary’s monetary policy, and the course and changes in its objectives and instruments since the beginning of the market economy transition in the late 1980s. The author’s basic thesis is that the period since the two-level banking system was reinstated after four decades of a planned economy system, in 1987, can be basically divided into three development phases with significantly different characteristics. The first phase was an ‘attempt to introduce’ an imported monetary mechanism, or perhaps an urge to comply with it, while the second phase was an approach of a monetary regime change launched in 2013 and supporting economic growth and financial stability strongly and directly, which lasted until the appearance of the traumatic elements of the Covid-19 pandemic crisis. The third phase is evolving today, under the circumstances of adapting to the conditions of the real essence of the twenty-first century, i.e. a new type of international competitiveness, which is pursued by the Central Bank of Hungary as stipulated by the Fundamental Law and the cardinal Central Bank Act of Hungary.

Keywords: regime change, monetary policy, pressure for competitiveness

1. Introduction – the general nature of central banking policies

In Continental Europe, until the crisis of 2007–2008, it was generally believed that monetary policy was an activity of fiscal policy, in the course of which the monetary government influenced interest terms and thereby also impacted macro-economic demand.¹ In practice this means and entails that the most important instrument for the implementation of the monetary policy for most central banks was the determination of the levels of applicable interest rates. Increasing the applicable interest rate and consequently reducing the money supply are known as restrictive monetary policy. A restrictive policy temporarily holds back economic growth, but it also helps to curb

¹ The study seeks to follow A. P. Samuelson & D. W. Nordhaus’s classification (2005, pp. 479–489), although deviance from that is justified by time and changed practice and circumstances.

inflation. Implementing measures aimed at expanding the money supply by lowering the applicable interest rate is referred to as an expansionary monetary policy. This temporarily stimulates the economy, although it may adversely affect inflation.

After these decades of applying this approach (that is, the monetarist solution), usually considered as an axiom during boom phases, was overridden by the crisis which arose in Anglo-Saxon subprime markets, and, although the determination of the base rate enjoyed primacy in the Federal Reserve's target system and the set of instruments aligned with it (and at the same time, in the entire Anglo-Saxon central banking practice), its outcome dimension is measured by the extent to which it alleviates unemployment and improves the employment rate, while making the inflation index 'bearable' is only its umpteenth objective.

In the boom phases of developed countries central banks play a prominent role in controlling the money supply, within the framework of which so-called quantitative reference values are applied. These quantitative reference values are determined by mid-term price stability, the interest rates of long-term loans, government deficit, the level of government debt (essentially, the Maastricht nominal convergence criteria) as well as changes in the money supply, the velocity of money and the strength of the exchange rate (for more detail, see Huszti, 2006).

This one-dimensional monetary model, based on controlling the money supply and with a correspondingly loose approach to banking regulation ended in worldwide failure. Economic growth and financial stability 'built' on price stability had faltered by 2007–2008.² That is, central banks were mostly (in Hungary, to a lesser degree) successful at achieving price stability, but in the meantime, risks undermining financial stability had emerged. Perhaps the collapse of Anglo-Saxon subprime markets could have been avoided if in practice unreasonable and barely controlled lending for building residential properties, real estate investments and other ludicrous trade transactions in order to boost the economy increasingly vigorously and high leverage ratios had not saturated the market relatively rapidly, which resulted in a significant rise in the ratio of non-performing and doubtful loans. Ultimately, the financial actors of the decades preceding the crisis had followed (unfortunately) without criticism Alan Greenspan's former basic concept, that 'the market-stabilizing private regulatory forces should gradually displace many cumbersome, increasingly ineffective government structures.'³ Greenspan's theoretical guidance was widely put into practice not only in the United States but, with the globalisation of financial market operations, all over the world.⁴

In the late twentieth century, the traditional banking system was globalised also in its branches of business, i.e. it became a banking system with a homogeneous practice (mostly with a concentrated, international ownership background) prevailing internationally, with various financial activities (insurance, leasing, factoring, capital market

² Essentially, I am using Olivier Blanchard's approach (2012), with 'an added value', noting that in emerging markets placing the burden of the exclusivity of price stability on their central banks' consequences were even more severe.

³ Adopted from The Financial Crisis Inquiry Report, 2011.

⁴ For the description of the excessive lending practice of American monetary markets see Lentner (2012) and Kecskés (2015). For the meltdown of the Hungarian loan market stifled by foreign currency loans see Kovács (2013) and Lentner (2015).

businesses) included in one single ‘plant’, which the supervisory and controlling practice was unable to keep pace with. The Washington Consensus, the ‘dismantling’ of the Glass Steagal, the Maastricht and Copenhagen Criteria and the market practice which formed in line with the European Union’s four freedoms all ultimately created a neoliberal market economy model, in which the innovation of banking products was not followed by the development of supervisory and control activities.⁵

According to the approach which prevailed for decades, the bank (the plant), as a market operator, enforcing the laws of supply and demand – based on Greenspan’s logic – is able to make responsible decisions, particularly when granting loans. In fact, neither self-restraint, a prudent decision-making mechanism nor effective regulation and supervision were exercised. The collapse of the system by 2007–2008 forced not only the reconsideration of regulation and supervision in a strict sense, but also placed the further operation of the neoliberal system of the market economy under stricter state regulation.⁶

2. The fundamental problem of the monetary practice of the transitioning Hungarian economy (1987–2013)

From the late 1980s onwards, three reforms: the Companies Act (Act no. VI of 1988) promoting the market economy transition, the act guaranteeing investments by foreigners and the decision allowing for the establishment of a two-tier banking system steered Hungary towards a market economy. The transformation of the economic model was accelerated by the excessive indebtedness of the country, the almost complete dysfunctionality of public assets, narrowing foreign export markets, a sharp decline in the demand of domestic market outlets, and, in particular, an increasingly marked demand for Western products of higher quality. Clearly, reactivating an economy requires high volumes of working capital and financial capital imports capable of further financing an exceptionally high government debt. There was neither the intellectual capacity nor the patience to fix the economy by means of internal resources. All that existed was a vague political promise to create a social market economy made in right-wing political circles which were organising and preparing themselves for a regime change from the late 1980s. It should also be noted that this was the period when the social market economy model existed only in fragments in Western Europe and was being replaced by a neoliberal mode of production applying the principle of freedom of multinational companies and an economy without any limitations.

The transformation of the Hungarian economic regime, including the introduction of a two-tier banking system, and in particular, the development of the central bank’s roles, took place in accordance with the expectations of this lopsided, but increasingly neoliberal world. Commercial banks, ‘seceding’ from the Central Bank of Hungary

⁵ The American practice basically ‘bypassed’ the attention of the supervisory authority and lost its transparency as securitisation processes became common and vigilance against risks was artificially relaxed. See Kecskés (2017).

⁶ Its main components include: the Dodd-Frank Act, stricter regulation of and control over credit rating agencies, enhancing micro- and macroprudential supervision by central banks and other authorities.

(Magyar Nemzeti Bank, MNB), as well as brand new, domestically established banks, struggled with capitalisation and management problems from the very start. Their operations were overwhelmed by a situation where they simultaneously had to manage the increasingly doubtful loans of inefficient state-owned companies and the resource requirements of a new entrepreneurial class lacking capital and business knowledge. In addition to forced credit exposures, the situation of state subsidies provided by the central budget was also characterised by similar duress. Private start-up companies were granted loans not according to efficiency criteria but only to a degree necessary for keeping them operable, but due to 'confusion' and the lack of coordination of comprehensive financial (taxing, aiding, market, central banking) instruments, both credit and state aid was used with low efficiency.

In the early 1990s, government deficit much more depended on how roles in financing companies were divided between the budget and the credit system rather than how much additional demand was created by the state... companies, including their subsidies, were financed from continuously rolling loans. In other words, the credit system assumed quite a significant part of public (fiscal) functions, therefore also a significant part of the demand created by the state was realised in the form of companies' credit expansion, that is, bypassing the budget (Antal, 2004, p. 75).

The (initially) increasing value and efficiency of the banking sector can be accounted for by the fact that from 1987 to 1990 sectoral profit increased by 223.7 per cent (Nyers, 1991). The impact of the unfolding transformational crisis, however, could also be felt in the banking sector, as the downturn of the real sector also negatively affected the performance of the banks, resulting in a series of bank consolidations.

Supervision over the operations of commercial banks is exercised by the central bank, which influences financial institutions through its regulatory activities. From the early 1990s, however, the MNB began to continuously remove its refinancing instruments, gradually phasing out refinancing loans with lower interest rates and longer terms in the undercapitalised corporate sector, so that by the mid-1990s start-up companies and farmers found themselves in a hopeless situation due to the gradually reduced state subsidies and simultaneous phasing out of protective duties in what had become an increasingly fiercely competitive market. They were 'dragging down' the commercial banks, which were stumbling from one consolidation to the other. The same kind of process of dismantlement took place in the field of the refinancing of government debt by the MNB (Kolozsi & Lentner, 2006), i.e. the MNB also let the fiscal sector down, and due to the government's failed taxation and state aid policies, additionally financing a continuously increasing government deficit and debt required the involvement of foreign investors, which, due to risk premiums being set higher than the market rate, caused a massive outflow of revenues from the country and even entailed vulnerability to international markets.

The central banking practice applied in developed market economies was also adopted in the central banking policy of Hungary after the regime change, which had destructive effects on both the national economy and society and which caused severe

problems in financing both Hungarian enterprises and government debt, and even the loss of resources and income. The second wave of adopting Western banking practice without criticism dates to the period after the turn of the Millennium, when the corporate clientele – as a result of the above processes – had a decreasing demand for loans and were being financed by parent companies and capital market instruments, which encouraged the banking sector to shift towards the retail market, especially demographic groups with low credit ratings even by Hungarian standards, which over time led to a culture of excessive lending. Despite this trend, no substantial measures were taken by the MNB to curb retail credit outflows without adequate collateral, and this would be one of the main contributors to the crisis which unfolded at the end of the 2000s.

The function of the banking system is to build market conditions and, in the period following its consolidation, this is expected to strengthen the market economy, which serves the national economy as a whole through financing real market operators, therefore reducing government deficit and debt. Instead, as a result of its excessive lending operation in the 2000s, the banking system in Hungary inflicted further budgetary and social damage, which had to be repaired by further fiscal and central banking sacrifices since 2010, now within an active state-governed framework.

‘The function of the Central Bank is, by influencing the changes in the value of the currency, to achieve such a state of employment and the international payment position that is considered desirable, and through this, to promote economic growth accepted as optimal’ (Hagelmayer, 1969, p. 165). Of these functions, the MNB’s attempts to increase employment and growth were pushed into the background in the first decades of the market economy. Ernő Huszti (1987), argued that the MNB’s room for manoeuvre depends on the share of the growth of the annual credit volume which is accounted for by the amount of loans granted to the budget. The MNB can influence the expansion of solvent demand, also manifested in the growth of the aggregate money supply, only to this extent. The MNB, however, provided an opportunity for this expansion of commercial loans by playing a smaller and smaller role in financing the budget, as less and less resources were allocated to it. Huszti believed that the MNB has primacy in shaping commercial banks’ lending and controlling solvent demand. Since the capacity to refinance the real sector dropped in the activities of the MNB after the first third of the 1990s, and its role in refinancing the budget had also finished by 2000, the contingent assets of the MNB could be focussed to a significant degree on the aggregate money supply and the regulation of commercial banks’ lending, thereby aiming at boosting macroeconomic progress.

In the 1990s, Hungary was not yet a Member State of the European Union, but it implemented its central banking regulatory guidelines rapidly and without adequate consideration. The main objective of the regulation adopted within the EU on 1 January 1994 was to make the public sector subject to the same conditions pertaining to indebtedness as applied in the private sector. In order to enhance the market sensitivity of the public sector, central banks were prohibited from purchasing government securities directly at the time of their issue, but they could purchase securities on the secondary market without limitations, as securities purchased there had already been ‘priced’ by the market. The aim of this regulation was to give fiscal policy a better perception of the

price of deficit, but if the structure of the budget is poor, this perception and its expected positive effect are hardly significant, because the generation of deficit is permanent, despite its heightened interest rate sensitivity. Furthermore, the expectations of the EU and international financial institutions (such as the International Monetary Fund and the World Bank) to reduce the level of aid provided to the real economy and indirectly to reduce social policy aid, and the swift compliance with these requirements by Hungary – without an adequate transition – also caused internal problems, since domestic, less creditworthy start-up enterprises would have had an enormous demand for the MNB's refinancing loans.

As the management of the economy produced temporary potential for growth despite the boom following the world economic shock in 1997–1998, the results achieved by the Hungarian economy between 1999 and 2002, and then a loose fiscal policy after 2002 put the commercial banking sector onto a dynamic, credit-expanding path. Despite the improvements in some of the macroeconomic figures in the real sector, the standard of living and real wages in Hungary fell short of the expectations of the population. However, excessive lending, which was common internationally, and the 'globalisation' of this trend spreading into Hungary (Lentner, 2015), led to Hungarian banks issuing spectacular credit quotas after the turn of the Millennium, while the Hungarian retail and local government sectors created an inexhaustible demand for this credit supply. The MNB, designed to regulate the loan market, exhibited a laissez-fair attitude (Matolcsy et al., 2015; Bethlendi et al., 2015), while the government was unable to provide solvent demand at a satisfactory and expected level (in terms of wages and social benefits), which resulted in a peculiar 'compensation' or 'supplementation' (of loans) being provided by the banks. Lending, however, lagged behind the creditworthiness of borrowers, which later, after the outbreak of the global economic crisis, caused problems in society and for the national economy, which later triggered a series of consolidation measures by the central bank. Although both external empirical experiences of a new type of crisis management (for example, Galema & Lugo, 2017), in particular in the field of central banking and internal theoretical approaches (for example, Neményi, 2009; Neményi, 2011) were directly available after the outbreak of the crisis, substantial crisis management measures were implemented only after the change of government in 2010, particularly after the change of the central banking regime in 2013.

When the Economic and Monetary Union was established, it was generally considered that, with the introduction of the euro, the elimination of the exchange rates of national currencies, and the enforcement of strict regulations on the operation of the EMU, including the control of the central budget balances of Member States, Member States would be free of financial imbalances or crises (Losoncz, 2010). The Maastricht convergence criteria, which are applicable to the candidate countries of the EU and to euro zone aspirants, who are required to meet them, presumed a quasi crisis-free situation. However, due to the weakness of fiscal positions, the banking crisis which arose in 2007–2008 soon caused a fiscal shock and a government debt crisis across Europe, particularly in Hungary and other significantly indebted countries, the banking systems of which had been weakened more severely than average.

The ability of fiscal policy to generate solvent demand sufficient for social and corporate needs fell short of expectations, and the banking system sought to fill this gap by making loans but ignoring classic lending regulations. After the banking crises, however, commercial banks –partly to meet their needs for state consolidation – adopted more ‘low-key’ business policies, in which the acceptance of tightening regulations and corporate social responsibility prevailed in a more comprehensive and robust way. The mandate-objective system of central banks, which has assumed a key role in crisis management since 2008, also underwent certain changes, by which the value system of central banks’ social responsibility was also modified, as it became more carefully adapted to the macroeconomic dimension and the social context. However, the Central Bank of Hungary started to align with this only in 2013 (Lentner, 2013; Zéman et al., 2018).

3. The central banking regime change after 2013

The framework of monetary policy substantially changed as a result of the crisis of 2007–2008. According to Blanchard (2012), the separation between monetary and prudential competencies became less rigid within the new monetary policy framework and, in addition to price stability, financial stability also became a priority for central banks, while some unconventional elements were added to the central banking toolkit, as a result of which central banks started to play a greater role in crisis management. During crisis management, most developed central banks soon achieved an interest rate level of zero and in many cases interest rates sank into the negative range. However, the reduction of interest rates did not prove to be a sufficient remedy, so the central banks of developed countries increasingly put emphasis on quantitative easing. The central banks of the United States, the euro area, Japan, the United Kingdom and Sweden launched securities purchase programmes, in particular programmes to purchase government bonds (Abidi & Ixart 2018; Macchiarelli et al., 2017; Arrata & Nguyen, 2017; Funashima, 2018; Ramcharan & Yu, 2016).

Emerging economies took a different path and near-zero interest rate levels were far less characteristic of them. In this group of countries, Eastern and Central European countries were able to achieve a relatively low interest rate level, while the interest rate levels of emerging Asian and South American central banks were farther from zero. Higher risk premiums, resulting from the greater external vulnerability of these economies and their inflation rates, which are higher than those of developed economies, as well as their more dynamic growth, largely account for these differences.

The distinct and independent monetary policy of the MNB presents an opportunity to create a constructive harmony between fiscal and the central banking policy. Nevertheless, the operation of the central bank and the programmes it implements are determined under the Central Bank Act, Section 3(1) of which includes the following provision: The primary objective of the MNB shall be to achieve and maintain price stability. Section 3(2) states that, without prejudice to its primary objective, the MNB shall support the maintenance of the stability of the system of financial intermediation,

the enhancement of its resilience and its sustainable contribution to economic growth; furthermore, the MNB shall support the government's economic policy, using the instruments at its disposal.

Between 2012 and 2019, the MNB, taking its statutory powers and assigned tasks into account, reduced the base rate from 7 per cent to 0.9 per cent and kept it at that level. This decline in yields significantly reduced the Government's interest expenditure, saving 4.5 per cent of the GDP (1,600 billion forint) between 2013 and 2018. The Funding for Growth Scheme, announced in the spring of 2013 as one of the MNB's credit incentives, offered banks a refinancing loan at a 0 per cent interest rate, which would enable them to lend to small and medium-sized enterprises (SMEs) at an interest rate margin capped at 2.5 per cent (Kolozsi et al., 2017). In 2015, the Funding for Growth Scheme was replaced by the Growth Supporting Programme, which aimed at transitioning corporate lending to market conditions. The MNB introduced the Self-Financing Programme in the middle of 2014 to reduce external vulnerability (exposure to foreign currency risk). In this programme, the MNB encouraged banks to keep their liquid assets in other liquid assets, particularly in forint-denominated government securities, instead of in deposits at the MNB. The accommodation of banks to the measures of the MNB was manifested in the increase of the purchase of government securities by banks, which considerably contributed to the improvement of the structure of financing government debt (through the increase of the banks' holdings of government securities and the decrease of foreign currency debt). When household loans denominated in foreign currencies were being phased out, the MNB took a pro-active role in the negotiations between the government and the Hungarian Banking Association, and after that, it substantially contributed to the conversion of foreign currency-denominated household loans into Hungarian forint-denominated ones by providing the required foreign currency liquidity (9 billion euro) for the banking sector. By the end of 2015, the balance of Hungarian households had practically no foreign currency-denominated loans, and this risk was eliminated once and for all from the Hungarian economy (for more details, see Matolcsy & Palotai, 2018).

In Hungary, the corporate credit portfolio shrank by 4–5 per cent annually between 2009 and 2013. The sustainability risks of Hungarian processes are well illustrated by the fact that while in other countries hit by a major financial crisis the decline in lending usually stopped by the fifth year following the crisis, Hungary's loan portfolio was still decreasing in 2013. The resolution of the lending anomaly became one of the priority objectives of the Hungarian economic policy. Above all, the general reduction of interest rates aimed to halt the decline in lending. The sharply falling trend of the corporate credit portfolio was broken after 2013 and a credit freeze became avoidable. The SME credit portfolio, which had been decreasing for years prior to 2013, has seen continuous growth since 2015. In 2017, the growth dynamics of the corporate credit portfolio reached 10 per cent, and taking private entrepreneurs also in consideration, the credit portfolio of the SME sector expanded by 12 per cent. By Q2 of 2018, the annual growth dynamics reached 15 per cent. In line with the MNB's forecasts, the increase of SME lending has stabilised in between 5 and 10 per cent, which is within the range considered necessary for sustainable economic growth by the MNB.

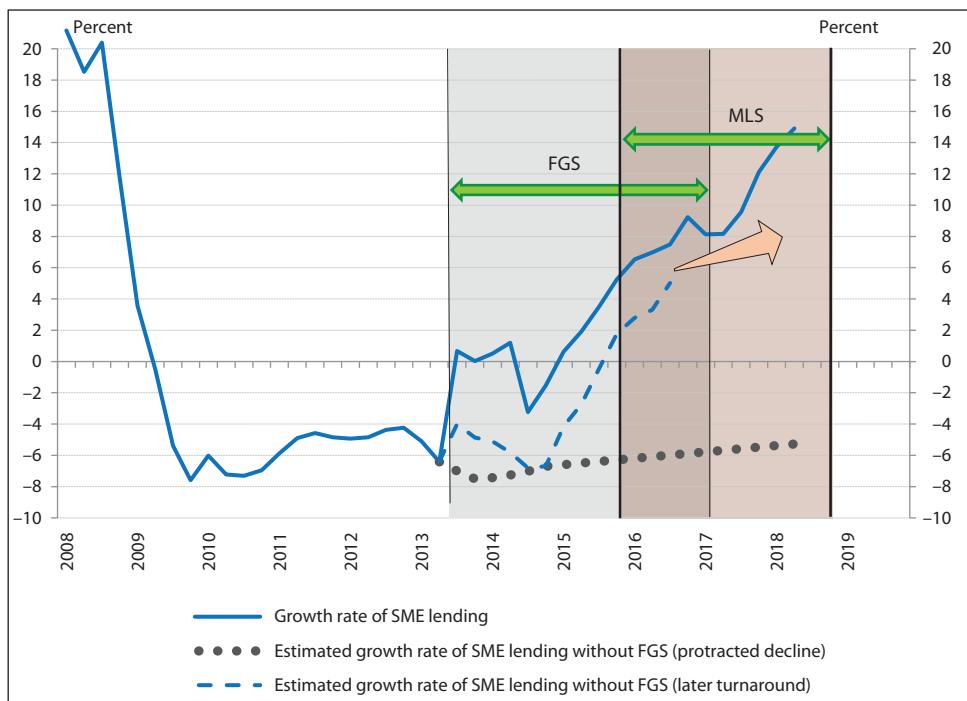


Figure 1.
Annual changes in SME lending

Source: From the charts of the Central Bank of Hungary, 2019.

The financial crisis which broke in 2008 and soon expanded globally, hit Hungary in a fragile and vulnerable state. One of the main reasons for this was that, in an international context, the amount of external and foreign currency-denominated debt of the Hungarian national economy was outstanding. A large proportion of this high external and foreign-currency denominated debt was related to public finances, as the state relied heavily on foreign investors and international organisation which were financing Hungary in 2008, particularly the International Monetary Fund. After the change of direction in the monetary policy in 2013, the MNB considered the reduction of external vulnerability to be a strategic goal.

The gross external debt of public finances started to moderate in 2014 and to decrease markedly during 2015. From 2014–2016, the gross external debt of the state dropped from 50 per cent of the GDP to 40 per cent. The foreign currency ratio of the gross debt of the central budget decreased from 42 per cent in March 2015 to less than 30 per cent in March, 2016, and to 27.1 per cent in June, reaching pre-crisis levels, and was subsequently further reduced.

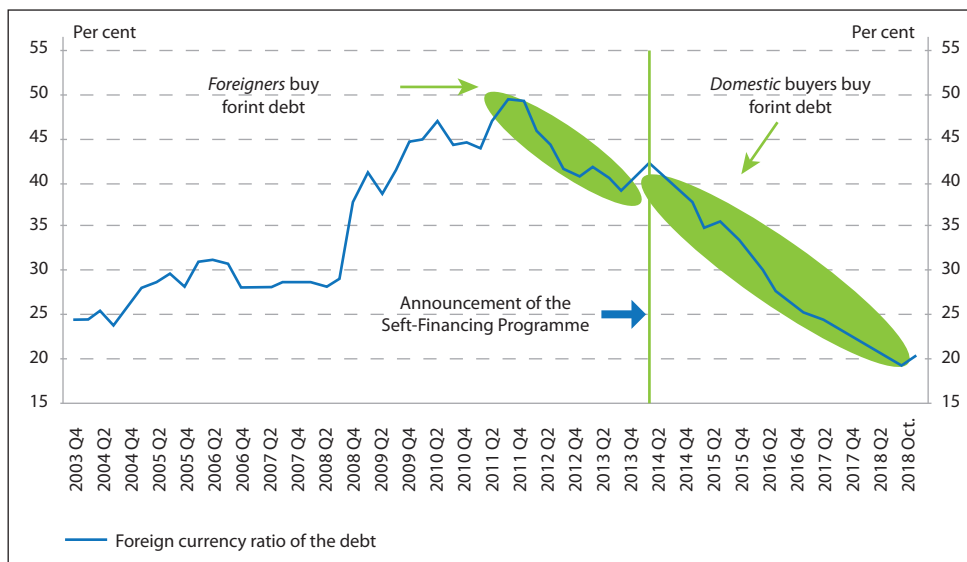


Figure 2.

Development of foreign currency ratio of the gross debt of the central budget

Source: From the charts of the Central Bank of Hungary, 2019.

4. Conclusions and consequences – at the beginning of a new central banking path

The policy followed by the central bank between 2013 and 2020 can be accounted for by the fact that the pursuit of a set of macroeconomic objectives (moderating inflation, promoting growth and achieving financial equilibrium) and goals for society (improving public welfare and the situation of disadvantaged groups of the population, such as foreign currency borrowers) and the instruments adopted to achieve them have contributed to the improvements in the positions of the national economy and society to a very large extent. A different set of objectives and instruments (as in the decades prior to 2013), i.e. focussing exclusively on inflation (but handling even that poorly) had a clearly destructive effect. Put another way, monetary policy elements or even systems which are not in line with the economic characteristics of the country and which are mostly imported are neither appropriate nor effective.

International experience shows that excessive intervention to improve the processes of the national economy adversely affects the direction of monetary development when central banks may almost convince themselves that the reasonable operations of commercial banks can reasonably be sacrificed on the altar of firm demand management (Huszt, 1996, p. 53). This theorem may be true for the refinancing activity of central banks. After the crisis of 2007–2008, central banks also played a role in the recovery of the economies. This is particularly true of the Hungarian central banking practice after 2013. If a central bank, however, also adopts an almost passive fiscal policy in

reorganising the economy and then steering it towards the path of competitiveness (and exerts a substitution effect instead of an auxiliary one), serious problems could occur.

Hungary's fiscal policy was successful between 2010 and 2013. Income tax decreased by 20–21 per cent, corporate tax was basically halved, the aspects of sharing public burdens also prevailed more strongly; therefore, Hungary was characterised by simultaneous financial stability and economic growth until the pandemic crisis of 2020. After 2013, however, the reduction of income type taxes came to a halt, and the primary objectives of the Ministry of Finance did not include exerting economic control to pursue an intensive growth path and the improvement of the economies of scale of the SME sector, but instead the maintenance of the financial equilibrium attained earlier, while the MNB pursued a refinancing policy which also endured during the spring and autumn waves of the pandemic. Ultimately, it can be concluded that the hyperactivity of the Central Bank has become a kind of counterbalance to a slowdown in fiscal practice.

The unimplemented fiscal and SME sector reforms are being seen in a lower added value of products manufactured and services provided in Hungary, especially by the corporate sector, which has failed to achieve economies of scale in the past three decades and, in particular, in the dynamic economic context of the decade preceding the pandemic crisis. Seventy per cent of the employees of the market sector are in the SME sector, which has a 40–45 per cent share of the GDP, but receives only 30 per cent of the investments in the national economy. This on its own suggests a deficit of efficiency, in particular in domestically owned enterprises, only a small number of which are capable of producing an exportable commodity base and which cannot even implement a rise in the statutory minimum wage without support from the state. Of some 756 thousand employers, 710 thousand have fewer than 10 employees. In Hungary, the productivity of micro-enterprises is 20 per cent, that of small enterprises is 35 per cent and of medium-sized enterprises is about 40 per cent that of the large (mostly multinational) company sector. This is by far the worst worldwide, even in comparison with neighbouring countries. Evidently, corporate structures and sizes have not developed which would enable more efficient production. Meanwhile, significant investment resources are being received and expected from the Reconstruction Fund; furthermore, Hungary is also awaiting considerable investment loans from China and Russia.⁷ The problems are compounded by a budget deficit planned by the Ministry of Finance at a level well above that stipulated by the Maastricht Fiscal Criterion of 3 percent, which produces significant further solvent excess demand in the economy, which may entail rampant inflation. Preserving the stability of the value of incomes earned by companies and the population has become a primary task in Hungary, and the responsibility for moderating inflation specifically belongs to the MNB. Consequently, the MNB has been forced to moderate the refinancing role it assumed in the previous decade and in

⁷ The annual normative support from the EU amounts to 2.7 per cent of the GDP (HUF1,500 billion), HUF3,390 billion is expected from the Reconstruction Fund, the planned Chinese and Russian loans give a total of HUF4,000 billion, and beyond that, the Ministry of Finance calculates a deficit of 5.9 per cent for 2021 after the downturn and the deficit of 5.1 per cent in 2020. To illustrate the overheating economy and the multiplier effect of investments, cf. Hungary's annual GDP is approximately HUF50,000 billion.

the first year of the pandemic crisis since the refinancing resources of the MNB, resulting in newer investments, would further increase inflation in the economy, and – it should be added – most of these investments would be directed at a still uncompetitive SME sector which has become reliant on subsidies.

A new situation has also arisen in the world at large; therefore, a central banking policy returning to an emphasis on the control of inflation again is not unique. More sophisticated cooperation between fiscal and monetary policies has become more important, which orients central banks that had earlier excelled at refinancing towards holding back macroeconomic and social stimuli.⁸ Meanwhile, after earlier fiscal and monetary turnarounds, the MNB is turning even more towards the development of a knowledge- and capital-intensive economy,⁹ since Hungary, despite the fact that it has achieved the most successful ten years of the past one hundred years in the past decade, has had relatively poor results in the catching-up competition among the new states of the European Union (see Table 1).

Table 1.
Per capita GDP measured at purchasing power parity as a percentage of the EU28

Name of country	2010	2019	Extent of improvement (catching-up)
Estonia	65.3	83.3	18%
Latvia	52.9	68.6	15.7%
Lithuania	60.3	83.0	22.7%
Hungary	65.1	72.7	7.6%
Poland	62.4	72.4	10%
Romania	50.9	69.2	18.3%
Slovakia	69.7	75	5.3%

Source: Eurostat. MNB – 2020 (euro data as a percentage of the GDP).

The circumstances which have evolved by the end of 2021 justify an adjustment to the path of the MNB in its fiscal policy, with less emphasis on an intensive growth path, the first signs of which have been manifested in the increase of the base rate, and, as a result, the improvement of the exchange rate, the moderation of the inflationary spiral, and a stronger orientation towards environmental aspects, in that the MNB has received a sustainability mandate as its fourth mandate from the National Assembly of Hungary.

⁸ On the new, prominent responsibility of central banking policies see Borio and Disyatat, 2021.

⁹ For details of the opportunities of the Hungarian economy embedded in an international context see Matolcsy, 2020.

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