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## **Hungary: Constitutionalized Populist Dictatorship**

### **ABSTRACT**

There is a misunderstanding in conjunction with the contemporary authoritarian populist regimes, which are characterized with anti-legal sentiments and considered political structure without legal theory. In fact, these kinds of regimes do have a specific legal and constitutional theory and the crisis of liberal democracy brought forward the clash of leader-based and legal-based political regimes. The rise of liberal democracy depoliticised the post-war political structures, which resulted, on the one hand, in a loss of control over neoliberal autocracy, and, on the other hand, in the break-through of right-wing authoritarian populism. By the crisis of liberal democracy, its main concern on rule of law over politics has also lost its hegemony. It is a new hegemonic struggle between law and politics, but the charismatic populist leaders are not about to crash legal systems and constitutionalism. That is why we can speak about populist constitutionalism and constitutional dictatorship, which have been analysed in this paper in the framework of the contemporary Hungarian Orbán regime. Authoritarian populist regimes are based on rule by law, moreover they are trying to constitutionalise this approach. So, what is to come is nothing other than the total reconfiguration of post-war legal/political order in an unprecedented war between law and politics.

### **INTRODUCTION**

The contemporary democracies are facing their deepest crisis and biggest challenge ever. Although several factors have changed, the core challenge remained: the oppression of authoritarian structures. In the second half of the 20<sup>th</sup> century the capitalism entered to its authoritarian neoliberal phase. At the beginning of the 21<sup>st</sup> century the authoritarian right has rapidly reborn in the field of authoritarian state, which can be called post-fascism. According to my concern, these two tendencies have tightly coupled in the framework of authoritarian right-wing populist regimes. Rosa Luxemburg showed that imperialism and imperialist war could not be overcome within the framework of capitalism. The rule of law based liberal democracy and liberal constitutionalism tried to put this militarist nature of capitalism into legal/constitutional frameworks. The failure of liberal democracy opened the contemporary way of authoritarian right-wing populism, which on the one hand remained integrated into neoliberal capitalism and on the other hand dismantled the legal basis of liberal constitutionalism (human rights, rule of law). A new hegemonic structure has been created in the USA under the Trump's administration, in Putin's and Erdoğan's systems as well, and it is most striking in Eastern Europe especially in the post-fascist Hungarian Orbán's regime.

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This paper is based on my forthcoming book *The Rise of Hungarian Populism: State Autocracy and the Orbán Regime* (Antal, 2019) which, analysing the Hungarian case, investigates how the authoritarian neoliberalism cooperates with authoritarian state ruled by the populist right. On this basis, I argue here that the authoritarian turn of our time is based on the common tyrannical nature of capitalism and post-fascist right-wing politics. My other main thought here is that the liberal democracy was undermined by not just the state autocracies, but the neoliberal autocracy. The authoritarian populism cannot be seen as an extreme form of freedom speech, nor the neoliberalism be considered as a form of economic freedom. Authoritarian populism and authoritarian neoliberalism are against freedom, justice, equality and democracy. The main challenges of our time how can we fight back against these constitutionalized dictatorships, because it is to say that authoritarian populism and neoliberalism are about to constitutionalize themselves.

## **1 AUTHORITARIAN POPULISM IN EASTERN EUROPE**

My main thought in this paper is the cooperation of neoliberal and populist autocracy investigated within the framework of the Orbán regime. There is a deep tradition of autocracy which can be unfolded within liberal and illiberal, democratic or formally democratic and non-democratic frameworks. The success of neoliberalization of the Western part of the Euro-Atlantic world in the 1980s and of the former Soviet bloc in the 1990s generate a very similar situation to the 1920s and 1930s. This is a new Weimarization (Morelock, 2018b, p. xxviii). Neoliberalism far from being equal with anti-statism, neoliberalization requires a massive state regulation in conjunction with liberalization, free trade and investments and suitable legal framework for capitalist labour. The closeness and collusion of neoliberalism and authoritarian populism can be justified with the fact that the term “authoritarian populism” was used by Stuart Hall when analysing Thatcherism in the late 1970s – this justifies that neoliberalism and authoritarian populism go hand in hand. In his edited volume, *Critical Theory and Authoritarian Populism*, Jeremiah Morelock argues that the term of authoritarian populism basically refers to prejudice and populism focused mostly on Nazism, but it has a broader meaning and “refers to the pitting of ‘the people’ against ‘elites’ in order to have the power to drive out, wipe out, or otherwise dominate Others who are not ‘the people.’ Generally, this involves social movements fuelled by prejudice and led by charismatic leaders that seek to increase governmental force to combat difference.” (2018b, p. xiv). In other words, authoritarian populism is about how to use biopolitics – analysed in the following section – to create permanent enemies and exceptional situations based on prejudice and led by a charismatic leader. The analysis of authoritarian populism dates back to the classical critical theory of the Frankfurt School to address the critique on fascism. Theodor W. Adorno and his colleagues published their seminal piece in 1950, *The Authoritarian Personality*. Their project was about creating the sociological and psychological profile of the “potentially fascistic individual” in the American society. Ever since this analysis has been a starting point when studying fascism and authoritarianism in U.S. politics (Kellner, 2018, p. xi). According to the so-called “F-scale” (Fascist-scale) the institutional and globalized framework of late capitalist societies contributed to regression and authoritarianism. As Samir Gandesha summarized “massification and the corresponding foreshortened space for individual initiative and judgment contributed to a propensity towards authoritarianism in the form of a relatively undisciplined Id, an overdeveloped Super Ego, and Ego weakness.

Authoritarianism expressed itself, therefore, in an obsequious relation to authority and excessive cruelty towards those with comparatively less social power.” (2018, p. 61). Inglehart and Norris (2019) make very similar observations and investigate authoritarian populism in conjunction with professed and declined values. They argue that authoritarian populists are on the one pole of cultural cleavages and opposing the values of libertarian populists: post-materialist values, social liberalism, individual autonomy, and tolerance of multicultural lifestyles. Authoritarian populists are in favour of social conservatism, order, customary traditions, deference to strong leaders, and social stability (Norris & Inglehart, 2019, p. 78).

Harvey argues (2005), we have seen this in conjunction with neoliberal autocracy that neoliberalism encompasses accumulation by dispossession, deregulation, privatization, an upward redistribution of wealth. There is a strong collusion between neoliberalism and authoritarian populism, because the right-wing populist forces use the opportunity made by neoliberal economic insecurity and cultural anxiety via creation of surplus peoples, rising global inequality, and threats to identity (Gandeha, 2018, p. 62). Moreover, the contemporary surge and fertile ground of authoritarian right-wing populism in Eastern Europe is based on the fact that populism and nationalism has undoubtedly remained an integrated part of the Eastern European political spheres even after the regime changes. Stanley (2017) argues that the democratic transition period was an opportunity both to radical and to centrist populist parties. After the regime changes all the populist parties were nationalists at the same time and nationalist forces based their politics on populist discourse. Stanley interestingly applies the category of *political entrepreneur* to populism and states that “political entrepreneurs had clear incentives to create populist ideologies in the search for electoral support, rather than simply rely on a particular mode of political appeal” (2017, p. 140). He adds that “... the top-down nature of transition reforms and the multiple resentments and uncertainties generated by those reforms gave others the opportunity to create simple and compelling narratives of blame, solidarity, and moral solace. Populism’s conceptual structure is ideal for the articulation of such narratives, and its simple, easily communicable message about politics made it an attractive entrepreneurial strategy for politicians aiming to make an immediate impact upon a politically fluid and relatively unsophisticated electorate” (2017: 142.). In Eastern Europe *populist entrepreneurs* could easily use populism to simplify politics and nationalism to act like the representatives of communities and at the same time these populist and nationalist assumptions are deeply rooted in the political history of the 20<sup>th</sup> century.

There are two concepts in conjunction with the nature of Eastern European populism: radical and centrist populism. Political transitions in Eastern Europe were elitist projects, given the fact that regime changes can be characterized with anti-populism and have been extended to liberal democracies. The theory of radical populism claims that the reaction of the people against elites was likely to happen. According to the theory of *centrist populism* is an inherent part of Eastern Europe’s politics: the historical “legacies created a potentially fertile opportunity structure for populism at the centre of the party system. Parties which had not yet been tainted by participation in government... could appeal to the people against allegedly corrupt and incompetent mainstream elites. These parties would emphasize the need to reform political institutions and create new channels for democratic expression, tackle corruption, replace inefficient and incompetent elites, and offer new political actors the opportunity to govern.” (Stanley, 2017, p. 144).

The rise of populism is not just an Eastern European phenomenon, but there are similarities between Western and Eastern authoritarian populist tendencies. Analysing Trump's America Pippa Norris and Ronald Inglehart argue (2019) that there are two main explanations of populism on the demand-side. The most widely held view of mass support for populism emphasizes the *economic inequality perspective*. In this sense voter behaviour depends on the profound changes of transforming workforce and society in post-industrial economies (Norris & Inglehart, 2019). "According to this view, rising economic insecurity and social deprivation among the left-behinds has fuelled popular resentment of the political classes." (Norris & Inglehart, 2019, p. 349) This made the less secure spectrum of society to be exploited by the anti-establishment, nativist, xenophobic populist movements, parties and leaders. Norris and Inglehart put forward another explanation, which is *cultural backlash thesis*. According to this, voting for a populist party cannot only be explained by economic factors, but it is largely a reaction against progressive cultural changes. "This argument builds on the 'silent revolution' theory of value change, which holds that the unprecedentedly high levels of existential security experienced by the people of developed Western societies during the post-war decades brought an intergenerational shift toward post-materialist values, such as cosmopolitanism and multiculturalism, generating rising support for left-libertarian parties such as the Greens and other progressive movements advocating environmental protection, human rights, and gender equality." (Norris & Inglehart, 2019, p. 353). It has become obvious that the populist support was strengthened by anti-immigrant attitudes, mistrust of global and national governance, support for authoritarian values, and left-right ideological self-placement.

Gandesha found that recent theoretical perspectives on contemporary populism, Norris and Inglehart's cultural backlash thesis and Ernesto Laclau's discursive theory are underdeveloped and do not offer a proper explanation for understanding populism. He also argues that neither Norris and Inglehart nor Laclau adequately accounted for the insecurity caused by neoliberal austerity, they do not sufficiently address economic conditions or group/mass psychology (2018, pp. 60–63). I also argue that the aspects of economic inequality and cultural backlash are far from enough in understanding the authoritarian populist tendencies and we should put an emphasis on the biopolitics of populism.

## **2 THE COOPERATION BETWEEN AUTHORITARIAN NEOLIBERALISM AND AUTHORITARIAN POPULISM**

### ***2.1 The Fall of Liberal Democracy and the Politics of Anger***

I agree with those who argue that the Orbán's regime was born in the long agony of liberal democracy and far not in a "revolution" of 2010 (when the Fidesz gained super-majority in the Hungarian parliament and did so in 2014 and 2018). The fall of liberal democracy was a longer procedure. I propose here that the "premature welfare state and liberal democracy" in the late '80s put a huge burden on the Hungarian society as well as in other parts of Eastern Europe. There were constitutional and intellectual pillars of liberal democracy without a strong social acceptance. This has become even worse in Hungary, because the borderless neoliberal policies at first in the region hit the Hungarian society being dramatically transformed by the forces of the regime change.

In the end of 1980s and 1990s Hungary was the leading post-Communist country which implemented the legal and economic frameworks of liberal democracy. This aimed a massive construction of legal instruments and a fully integrated economy into the neoliberal world order. According to Adam Fabry: "As one of the frontrunners of the

transition to the market in the region, Hungary embraced neoliberal policies of liberalisation, privatisation and macroeconomic stabilisation in the late 1980s and early 1990s. Other countries in the region soon followed suit..." (2018: p. 2). This "hyper-liberal" concept of democracy based on legal constitutionalism and neoliberalism. Meantime, the anger in the societies has constantly been accumulated. Under the concept of legal constitutionalism very strong liberal democratic institutions can be created, and the procedural legitimacy of the constitutional system could be relatively strong, but there is a huge lack of trust in democracy which has become an all-absorbing black hole under the politics of austerity. Liberal democracy became a hegemonic political-legal framework in Eastern Europe which also means that the neoliberal elite was totally anti-populist. Given this, the political elite remained mostly uncritical towards global and local inequalities caused by the neoliberal hegemony, both at home and in the European Union.

The liberal democracy was not able to compensate the losers of neoliberal economic policy. The main cause behind this situation was the assumption that the fundament of liberal democracy is the (neoliberal) capitalism itself. The "reformist anger" has overloaded societies. This resulted the so-called politics of austerity, which was the main direction of international organizations (from IMF and World Bank to the EU) in which Hungary and other Eastern European countries got involved and the implementation of it caused several social catastrophes. Béla Greskovits argued that the situation would come to "the end of patience" in Eastern Europe. Indeed, according to Greskovits, Eastern Europeans, in the decade following the fall of communism, refrained from protesting violently whilst slowly shifting to second, informal economy or relying on their employers' capacity to enforce protective state intervention (1998: 180.). David Ost (2005) went further and stated that this situation accumulated the anger of "wrathful people" and strengthened the latent base of the subsequent populist turn.

## ***2.2 State and Neoliberal Autocracy in Hungary: The Cooperation of Neoliberalism and Nationalism***

The Orbán's regime is not just a product of declining liberal democracy, given the fact it is financed by the EU's neoliberal framework especially by the German automobile companies. According to Peter Bloom: "Germany has been charged with continuing a tradition of market driven political authoritarianism, updated for the 21st century, a classic and still tragic tale of a stronger country using its power to exploit a weaker nation at the behest of international finance. According to one commentator, the Greeks must 'confront neo-liberal authoritarianism'" (2015). Wolfgang Streeck argues very sharply: "The international relations embedded in the EMU consolidation state are highly asymmetrical. Economically weak countries, while in the majority, face a small number of economically strong countries in a position effectively to dictate to them, by threatening to withhold financial support. Germany, on account of its regained economic power after 2008 and as the main beneficiary of EMU due to its export strength and to currently low European interest rates, de facto governs the EMU as a German economic empire." (2016: 131). This definitely true not just in the case of the EMU, but the whole European project itself.

Hungary has become a "good province" of this neoliberal empire. From the first sight, it seems to be embarrassing that on the one hand the Orbán's regime has been criticized by Chancellor Merkel and the EU bureaucracy, on the other it has been financed by the EU and German industrial (especially automobile factory) interests, but this reveals the deep tensions inside the liberal democracy and neoliberal capitalism. The Hungarian

example is an anti-Greek story, while the Greek government tried unsuccessfully to get rid of neoliberal austerity, the Orbán's regime built up the autocracy in neoliberal framework. The cooperation of authoritarian neoliberalism and authoritarian statism/populism is not a new phenomenon, but the Hungarian example is unprecedented, because it is the first case when the authoritarian neoliberalism was able to unfold in the framework of the authoritarian state in the EU.

Since 2003 it is a legal possibility for the Hungarian governments to make non-refundable grants to companies willing to commit beforehand to creating a certain number of jobs. Moreover, there is an opportunity to make strategic agreements between the government and companies, which do not constitute direct financial support, but several strategic allies got non-refundable grant. In comparison of EU average, the Hungarian governments constantly supported huge industrial project since 2004. The vast majority of these subsidies went to German multinationals especially in the automobile sector. According to government information, 81 strategic partnership agreements have been concluded since 2012 (as of March 2019). The exposure of the Hungarian economy to Germany is illustrated by the fact that a significant part of these 81 agreements (15) were concluded with German companies' Hungarian subsidiaries, and it is particularly important that many strategic partner companies have received public support. It is also worth mentioning fact that these mostly automotive companies have enjoyed the grace of incumbent governments before 2010. It is rather strange that they were able to collaborate with the authoritarian regime emerging from 2010. It seems to be that all the times Hungarian governments tend to support the main neoliberal actors, but there are significant changes in this pattern. Before 2010 the social-liberal governments spent HUF 133 billion on non-refundable state aids (the German companies got HUF 40 billion from this amount), between 2010 and 2018 the nationalist Orbán-governments expended HUF 288 billion for the same purpose (the German interest is more than HUF 100 billion). This means that the Hungarian province aided in last 14 years the more than HUF 140 billion (which is one third of the whole money) the German enterprises.

Favouring the neoliberal agenda requires much more brutal elements. It is remarkable that the Orbán's is more generous financing the authoritarian neoliberalism, but the way how the Orbán's governments started to exploit the workers is totally unprecedented. After 2010 the regime incorporated the worst Thatcherism into the Hungarian labour law. The procedure far not begins with the so-called "slave law"<sup>2</sup> accepted in December 2018 and caused several protestations in the end of 2018 and early 2019. The new work law, accepted even in 2011, significantly weakened the protection of workers and the trade unions. At the same time the strike provisions have brutally disciplined, at the public sector the legal strike has become nearly impossible, because the government can politically prevent the agreement on the sufficient level of the service. The slave law, which forcing overtime on workers allowing companies to demand that staff work up to 400 hours overtime a year, has been the most brutal piece of this neoliberal puzzle. The Hungarian society clapped its own skin the multi-faced authoritarianism and how can the neoliberal autocracy be reinforced by the autocratic state.

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<sup>2</sup> Graham-Harrison, Emma (2019): Thousands in Budapest march against 'slave law' forcing overtime on workers. *The Guardian*, 5 January 2019. <https://www.theguardian.com/world/2019/jan/05/thousands-in-budapest-march-against-slave-law-forcing-overtime-on-workers>

### 3 AUTHORITARIAN POPULISM AND CONSTITUTIONALISM

Failures of liberal democracy and alienated nature of liberal/legal constitutionalism<sup>3</sup> caused in many ways the contemporary success of authoritarian populism. It is true that the mainstream parties made several problems taboo and populist parties addressed these questions in several ways never seen before. However, this is far from being the case of free speech or freedom of expression, because these authoritarian forces have no regard for the rule of law. The authoritarian populism cannot be seen as an extreme form of freedom speech, nor the neoliberalism be considered as a form of economic freedom. Authoritarian populism and authoritarian neoliberalism are against freedom, justice, equality and democracy. It is one of our core challenges how can we debate with authoritarian populists who claim their freedom of expression is limited, at the same time they favour hate speech, demonization others (migrants, refugees, political adversaries).

#### ***3.1 Populist Constitutionalism in Hungary***

Since 1989 legal constitutionalism has been the main paradigm of Hungarian legal and political thinking (Antal, 2017). The Constitution of 1989 and the jurisdiction of the Hungarian Constitutional Court were based on this concept. The Court's jurisdiction can be explained and characterized by legal constitutionalism.

In 2010, the Hungarian political right gained supermajority in parliament. Viktor Orbán's Government has completely redesigned the constitutional system and legal constitutionalism has collapsed. The initial constitutional concept adopted by the Orbán era is political constitutionalism. The new Fundamental Law was based on this concept. The foundational premise of political constitutionalism is that a constitution can only exist in 'the circumstances of politics (...) where we disagree about both the right and the good, yet nonetheless require a collective decision on these matters' (Bellamy, 2007, p. 5). This is very similar to Schmitt's conception of the Political. Bellamy argues that legal constitutionalism attempts to take certain fundamental constitutional principles outside of politics, viewing them as preconditions for the political system. This means depolitization and creates apolitical politics. Hence, politics and politicisation allow for much broader participation in determining core political debates via 'party competition and majority rule on the basis of one person one vote' (Bellamy, 2007, p. viii). According to this concept, democracy needs to be defended against judicial review. As Bellamy puts it, "[t]he judicial constraint of democracy weakens its constitutional attributes, putting inferior mechanisms in their place. That is not to say that actually existing democracy is

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<sup>3</sup> This concept has been elaborated in the United States and its practice has been supported by the US Supreme Court. Bellamy states that "[l]egal and political constitutionalism have often been identified with the American and British political systems respectively. The tendency to take an idealized version of the US Constitution as a model has been particularly prevalent among the highly influential generation of liberal legal constitutional theorists who grew to intellectual maturity under the Warren Court." (Bellamy, 2007, p. 10). According to this concept, constitutions secure the rights central to a democratic society. "This approach defines a constitution as a written document, superior to ordinary legislation and entrenched against legislative change, justiciable and constitutive of the legal and political system." (Bellamy, 2007, p. 1). The judicial review and the Constitutional Court are essential for surveying democratic practices. According to Bellamy, legal constitutionalism is founded on two pillars: "The first is that we can come to a rational consensus on the substantive outcomes that a society committed to the democratic ideals of equality of concern and respect should achieve. These outcomes are best expressed in terms of human rights and should form the fundamental law of a democratic society. The second is that the judicial process is more reliable than the democratic process at identifying these outcomes" (2007, p. 4).

perfect, and decisions made by judicial review necessarily imperfect, merely that the imperfections of the first cannot be perfected by the second” (Bellamy, 2007, p. 261). Political constitutionalism can be seen as a constitutional concept which recognizes the core element of the concept of the Political. Bellamy and Beaher pointed out the Schmittian roots of political constitutionalism: “Schmitt maintained that the decision over what is legitimate activity or not can only be made politically, not by a court on the basis of legal norms. He believed that the courts have neither the will nor the authority to act in such circumstances” (Bellamy & Beaher, 1993, p. 49).

Political constitutionalism is founded “on a normative claim, namely that only political methods for resolving disagreements can be conducted in a way that respects political equality” (Glencross, 2014, p. 1165). Summarizing the main elements of current Hungarian political constitutionalism are: the restriction of the Constitutional Court’s power, which was the main counterweight institution of the Government’s power; the reinforcement of the Government’s power; the stable majority of the Government in the Parliament; the control over the Parliament by the Government; the power of Government to overrule decisions of the Constitutional Court, raising the dilemma of an unconstitutional constitution; concentration of powers instead of separation of powers.

In this sense, the Orbán regime restructured the constitutional framework according to political constitutionalism which will be analysed in the next section. Political constitutionalism has become a determinative concept inside of the Orbán regime. As the regime became more and more authoritative, several signs indicated that Orbán and his circle changed the direction of their constitutional concepts and have moved from political to populist constitutionalism. The concept of populist constitutionalism (Blokker, 2018; Blokker & Bugarcic & Halmai, 2019) has become a highly debated concept.<sup>4</sup> Blokker argues, investigating constitutional tendencies in Hungary and Poland, “[p]opulism is explicitly present in the constitutional developments... and is causing significant tensions in the European Union, which is formally grounded in the values of democracy, the rule of law, and fundamental rights. The populist-constitutional phenomenon spawns debates on democratic backsliding and illiberal democracy in Europe as well as on the supranational monitoring of democracy...” (2018, p. 113). Blokker characterizes populist constitutionalism with three main pillars. First of all, populists are about to reconsider the concept of popular sovereignty which is, according to them, insufficiently guaranteed in legal/liberal constitutionalism. Populist constitutionalism can moreover be characterized with legal scepticism, this takes back Schmitt legal and political theory, because it is “wary of the institutions of and limits of liberal constitutionalism” (Blokker, 2018, p. 114). Populist are convinced that their political and legal theories need to be constitutionalized, that why they have an engagement in constitution-making and constitutional reform (Blokker, 2018, p. 114). It is to say that all mentioned elements have become crucial in conjunction with the Hungarian case and the move from political to populist constitutionalism is determined by the three two-third election victory which has been interpreted by the regime as an unlimited authorization to display popular sovereignty against any other branches of power.

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<sup>4</sup> In April 2019, *German Law Journal* published a special issue on populist constitutionalism which is available from here: <https://www.cambridge.org/core/journals/german-law-journal/issue/0F9B4B67BD86371F777DD9D26547212A>



### **3.2 Rule of Law and Human Rights under Populist Autocracy**

The Orbán regime is an autocratic populist system and it is very hard to oppose such a system which is not rule of law anymore. The main challenge of autocratic populist regimes is the fact that it attempts to constitutionalize itself. It seems to be crucial analysing the structure and methods of autocratic populism, because on the surface there is a functioning legal system, but it is governed by the authoritarian politics. We should distinguish between *rule of law* and *rule by law*. The rule by law is a way how the political sphere [or in Carl Schmitt's (2007) term *the Political*] dominates the legal system. In a rule by law regime the law is subordinated by and subjected to the autocratic leader. While the rule of law is referring to objectively defined rational law, the rule by law system is personal, irrational, unpredictable. There is law in autocratic populist state, but without democratic legitimation.

This is very similar what Giorgio Agamben calls the *state of exception*. According to Agamben "the state of exception appears as the legal form of what cannot have legal form" (2005: 1.). In the autocratic populist regimes "[a] formal state of exception is not declared, and we see instead that vague non-juridical notions – like the security reasons – are used to install a stable state of creeping and fictitious emergency without any clearly identifiable danger." (Agamben 2014). Agamben argues there is a seminal transformation in conjunction with the idea of government, "which overturns the traditional hierarchical relation between causes and effects. Since governing the causes is difficult and expensive, it is safer and more useful to try to govern the effects." (Agamben 2014). The autocratic populist regimes started to manage the effects of the crisis made by them and this is a considerable change. This situation offers for these regimes a convenient place to criminalize political groups and claim that these groups are enemies and the regimes is about to protect the people from these created enemies. This is the situation where the normal sets of governing have been replaced by the police forces and the normal situation has become exceptional in which anything is conceivable.

There is no rule of law in the exceptional situation, because the politics overrules the whole legal system. But it does not mean that the legal framework is unnecessary in these systems. Autocratic populist regimes need to be justified and legitimized by legal (especially constitutional) frameworks. That is why all the mentioned autocratic elements of the Orbán regime have been constitutionalized or legalized.

### **3.3 Constitutionalizing a Dictatorship**

I argue here that contemporary authoritarian populist regimes can be characterized with exceptional governments which means managing the crisis made by them. After Agamben I called it the permanent state of exception. As Agamben puts forward the theory of state of exception's first and isolated appearance was Carl Schmitt's (2014) book of *Dictatorship* published in 1921 (2005, p. 6.). There was a rise of a debate on state of exception between 1934 and 1948, because of the collapse of European democracies and discourse on state of exception unfolded within the framework of constitutional dictatorship. The debate was maintained by Article 48 of the Weimar Constitution granted emergency powers the president of the Reich. In the Schmittian sense, the state of exception and constitutional dictatorship are inseparable. In 1926 Schmitt summarized his definition on dictatorship: "Dictatorship is the exercise of state power freed from any legal restrictions, for the purpose of resolving an abnormal situation – in particular, a situation of war and rebellion. Hence two decisive elements for the concept of dictatorship are on one hand the idea of a normal situation that a

dictatorship restores or establishes, and on the other the idea that, in the event of an abnormal situation, certain legal barriers are suspended in favour of resolving this situation through dictatorship.” (cited by Hoelzl & Ward, 2014, p. xxiii). Schmitt distinguishes the two types of dictatorship in conjunction with regulation on the state of emergency, on the one hand “a dictatorship that, despite all its extra-legal authorisation, remains within the prescriptions of a constitutional order and in which the dictator is constitutionally mandated (commissary dictatorship); and on the other hand a dictatorship in which the whole existing legal order is rendered obsolete and a completely new order is intended (sovereign dictatorship)” (cited by Hoelzl & Ward, 2014, p. xxiv). If commissary dictatorship is about the continuous extension of state of exceptions, sovereign dictatorship prevails now as the constitutional system grabbed and institutionalized by a sovereign dictator. Schmitt argues in his *Political Theology* that “sovereign is he who decides on the exception” (2006, p. 5), in this sense ultimate sovereignty means a constitutionalized dictatorship. Contemporary authoritarian populist regimes and leaders are convinced that there is a core need to reformulate and acquire political sovereignty by them. Schmitt’s approach inspired many others theorizing dictatorship as a state of exception. One of the well-known authors was Clinton Rossiter (1948) who seeks to justify constitutional dictatorship. He argues that democratic regimes work under normal circumstances, “in time of crisis a democratic, constitutional government must temporarily be altered to whatever degree is necessary to overcome the peril and restore normal conditions. This alteration invariably involves government of a stronger character; that is, the government will have more power and the people fewer rights” (1948, p. 5).

Agamben convincingly argues that we witnessed that the 20th century was about “legal civil war” and his seminal example is the Nazi State (2005, p. 2). After Hitler took power, he proclaimed in 28 February 1933 the Decree for the Protection of the People and the State by which the parts of the Weimar Constitution concerning personal liberties were suspended. Given the fact that the decree was never repealed, the Third Reich could be seen a continuously extended state of exception that lasted for twelve years. Agamben states: “modern totalitarianism can be defined as the establishment, by means of the state of exception, of a legal civil war that allows for the physical elimination not only of political adversaries but of entire categories of citizens who for some reason cannot be integrated into the political system (2005, p. 2).” I am arguing that the political system that Schmitt desired as sovereign dictatorship is not the Third Reich, but contemporary authoritarian populist regimes. In fact, Schmitt was not able to accept that Hitler’s sovereign dictatorship had never been established. Moreover, he could not accept that the state of exception was wholly confused with the rule. In *Dictatorship* he had already stated that arriving at a correct concept of dictatorship is impossible as long as every legal order is seen ‘only as a latent and intermittent dictatorship’” (Agamben, 2005, p. 58). In this sense the Third Reich was based on the mixture of rule and state of exception and Hitler pursued the organization of this “dual state”, that is why a new constitutional system was not created. At the same time, contemporary authoritarian populist regimes are constantly transforming themselves into constitutional dictatorships. Here I put forward that the Orbán regime can be seen as an authoritarian populist regime and given the fact these kinds of systems are much more autocratic than democratic, it is more precise to say that the Hungarian regime after 2018 (when super-majority in the parliament elections was gained for the third time.) has increasingly become constitutional dictatorship.

I put an emphasis on how such dictatorships can develop. In my view, the constitutionalized dictatorships are far from being anti-capitalist systems, capitalism plays a crucial role in making these regimes evolve and stabilize instead. From 1929 the Great Depression brought the era of ruining the old liberal economic order and new forms of state-centric capitalism in Europe were established (Abromeit, 2018, p. 7). After the financial crisis of 2008 very similar processes took place by the recent surge of authoritarian populism. In 1941 Friedrich Pollock described his theory on state capitalism as “advanced industrial societies were converging in basic structure, toward a durable state-controlled market” (Morelock, 2018, p. xviii). According to Pollock (1941) state capitalist systems can be democratic and authoritarian; he subsumed Nazism, Soviet communism, and the New Deal under this category. Morelock described that the Frankfurt School was split on the state capitalism theory: Pollock’s assumptions were backed by Horkheimer and opposed by Neumann, Kirchheimer and Gurland (2018, p. xviii). Neumann and Kirchheimer argued Hitler’s Germany was still monopoly capitalism. Neumann “showed monopoly capital was very much operative in Nazi Germany, and the class structure – far from being eradicated – sharpened... instead of ‘state capitalism’ offered the term ‘totalitarian monopoly capitalism’” (Morelock, 2018, p. xix). We accept either theory, the debate between Pollock and Neumann only shows the capitalist nature of authoritarian populism. Bloom also argues that the critical scholarship emphasized the function of the state in maintaining capitalist relations, in this sense “governments worked in conjunction with dominant capitalist classes to ensure elite rule, facilitating political authoritarianism both informally and at times formally” (Bloom, 2016, p. 3). There is a core and embarrassing collusion between market and state autocracy. Wolfgang Streeck, investigating Heller’s and Schmitt’s concepts, analyses the distinction between the idea of total state and authoritarian state elaborated by Schmitt (Streeck, 2015, p. 362). The Schmittian total state can be identified with the pluralist democracy of Weimar, which was maintained by several social groups, especially the organized working class. What Schmitt called authoritarian state, argues Streeck, “was a liberal-authoritarian state, one that was, in the classical liberal way, strong and weak at the same time: strong in its role as protector of ‘the market’ and ‘the economy’ from democratic claims for redistribution... and weak in its relationship to the market as the designated site of autonomous capitalist profit-seeking” (Streeck, 2015, p. 362).

#### **4 THE RISE OF THE EXECUTIVE POWER IN THE ERA OF EXCEPTIONAL GOVERNMENT:**

##### ***4.1 Unitary Executive Theory and Authoritarian Populism***

There is an emergence of executive power in the era of exceptional government which means on the one hand that the executive power is extremely strengthened, on the other hand the theory of separation of powers has totally been redesigned and this has a huge impact on the landscape of democracy. In this paper the theoretical bases of Unitary Executive Theory (UET) and the Authoritarian Populism (AP) are investigated. It is proposed here that main common foundation of UET and AP is Carl Schmitt and his theory on the political sovereignty and the state of exception. Given these, UET and AP has been investigated here in the framework of presidentialization in the time of permanent state of exception. I am trying to critically investigate the rise of the executive branch in the West is held in the framework of democracy and in the East this phenomenon is blamed as a new rise of totalitarianism. I will point out that expansion of executive power is an inevitable danger, because the representative and parliamentary

democracy has become empty by that the executive leaders pretend as the main political representative of their political communities. Upon the case of COVID-19 crisis the dangers caused by the uncontrolled executive power are even more present. It has been investigated in my paper how the authoritarian populist Orbán regime relied on the state of exception declared during the pandemic. Moreover, I am arguing here that the common form of UET and AP regimes is constitutional dictatorship which is about to reformulate and acquire political sovereignty.

#### ***4.2 The Forms of Presidentialization in the Era of Exceptional Government***

I am arguing here that by now the presidentialization is far not a phenomenon of normal state of politics, the state of exception and the rise of the dictator can be seen as a specific form of the rise of the executive power. In this sense we can speak about a democratic and authoritarian way of Presidentialization. The rise of the exceptional government has changed the nature of presidentialization and the strengthening the executive power contributed the contemporary authoritarian tendencies.

According to Giorgio Agamben there is a seminal transformation in conjunction with the idea of government, “which overturns the traditional hierarchical relation between causes and effects. Since governing the causes is difficult and expensive, it is safer and more useful to try to govern the effects.”. The executive power has started to manage the effects of the crisis made by them and this is a considerable change not just in the concept of government, but in penal politics. Agamben described this situation in the following way: “The ancient regime aimed to rule the causes; modernity pretends to control the effects. And this axiom applies to every domain, from economy to ecology, from foreign and military politics to the internal measures of police. We must realize that European governments today gave up any attempt to rule the causes, they only want to govern the effects.”.

I propose here that presidentialization in era of exceptional power unfolded in two main forms, on the one hand the Unitary Executive Theory (UET) in the USA and its application on “War on Terror”, on the other hand the right-wing authoritarian populism in Europe. The contemporary strengthening of executive power cannot be seen as the classic presidentialization in normal state of the politics, because the governments and their leaders are about to create a new political landscape in which politics is not subordinated to the law. It is interesting that the reconfiguration of executive power has become dominant at the period on both sides of the Atlantic. In the USA the framework of UET it is tried to justify the expansion of presidential power, in Europe and other parts of the world the rise of right-wing AP reinforced the political leaders.

#### ***4.3 Unitary Executive Theory (UET)***

There are several debates on the centralization of the executive power in the USA. The UET has a long past, because as record shows that presidents from Harry S. Truman through George W. Bush consistently defended the unitariness of the executive branch, vitiating any claim that a custom of allowing congressional incursions on the unitary executive has emerged.”. One of the main focus is “whether the Constitution created a »unitary executive« in which all executive authority is centralized in the president, rather than the »executive by committee« that existed under the Articles of Confederation”. According to Chehab the “»Unitary Executive Theory« (UET), underlying current presidential logic, seeks to effectively liberate the President from legislative or judicial constraint. The result is a self-styled conception of emergency constitutionalism.”. 9/11 brought up the most controversial arguments in conjunction with the constitutional justification of the Bush Administration in terms of the expansion

of presidential power. The main textual arguments justification of the UET based Article II, Section II., which deals with the Executive Branch of government. According to so-called "Vesting Clause": "The executive Power shall be vested in a President of the United States of America.". The another is based on the Commander-in Chief Clause of Article II. "It is believed that as the highest-ranking civilian authority on the military, the President has the power to circumvent established legal principles for alleged national security concerns." (Chehab, 2007: 1502.). The UET also interpret the Article II, Section II. in that way (this is the "Oath Clause") which ensures "broad power for the Executive to independently interpret provisions of the Constitution and to even refuse to defend those which are deemed by his sole discretion as unconstitutional".

The most remarkable application of the UET appeared in a legal memorandum drafted by John Yoo as Deputy Assistant Attorney General of the United States and signed in August 2002 by Assistant Attorney General Jay S. Bybee, head of the Office of Legal Counsel of the United States Department of Justice. They argued on the use of enhanced interrogation techniques: mental and physical torment and coercion such as prolonged sleep deprivation, binding in stress positions, and waterboarding, and stated that such acts, widely regarded as torture, might be legally permissible under an expansive interpretation of presidential authority during the "War on Terror". This "Torture Memo" ensured the legal parameters for Bush Administration policy in dealing with alleged "terrorist" detainees abroad first of all in Guantánamo which was established in 2002 under the War on Terror, under the presidency of George W. Bush. The establishment of the prison was legally authorized by Military Order of November 13, 2001— Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism. This can be seen as an authoritarian application of UET which is interpreted by Giorgio Agamben in the following way: "I spoke rather of the prisoners in Guantánamo, and their situation is legally-speaking actually comparable with those in the Nazi camps. The detainees of Guantanamo do not have the status of Prisoners of War, they have absolutely no legal status. They are subject now only to raw power; they have no legal existence.". The UET opens the possibility of the authoritarianization of the executive power, because it "seems to legitimate an obscurely broad and undefined scope of powers, thereby mitigating potential checks from judicial or congressional branches of government".

### **CONCLUSION: THE COMMON FORM OF UET AND AP IS CONSTITUTIONAL DICTATORSHIP**

I argued here that contemporary UET and AP regimes can be characterized with exceptional governments which means managing the crisis made by them. After Agamben I called it the permanent state of exception. As Agamben puts forward the theory of state of exception's first and isolated appearance was Carl Schmitt's book of Dictatorship published in 1921. There was a rise of a debate on state of exception between 1934 and 1948, because of the collapse of European democracies and discourse on state of exception unfolded within the framework of constitutional dictatorship. The debate was maintained by Article 48 of the Weimar Constitution granted emergency powers the president of the Reich. In the Schmittian sense, the state of exception and constitutional dictatorship are inseparable. In 1926 Schmitt summarized his definition on dictatorship: "Dictatorship is the exercise of state power freed from any legal restrictions, for the purpose of resolving an abnormal situation – in particular, a situation of war and rebellion. Hence two decisive elements for the concept of dictatorship are on one hand the idea of a normal situation that a dictatorship restores

or establishes, and on the other the idea that, in the event of an abnormal situation, certain legal barriers are suspended in favour of resolving this situation through dictatorship.”

Contemporary authoritarian populist and UET-regimes and their leaders are convinced that there is a core need to reformulate and acquire political sovereignty by them. Schmitt’s approach inspired many others theorizing dictatorship as a state of exception. I am arguing that the political system that Schmitt desired as sovereign dictatorship is not the Third Reich, but contemporary authoritarian populist and UET-regimes. In fact, Schmitt was not able to accept that Hitler’s sovereign dictatorship had never been established. Moreover, he could not accept that the state of exception was wholly confused with the rule. In *Dictatorship* he had already stated that arriving at a correct concept of dictatorship is impossible as long as every legal order is seen ‘only as a latent and intermittent dictatorship’”. In this sense the Third Reich was based on the mixture of rule and state of exception and Hitler pursued the organization of this “dual state”, that is why a new constitutional system was not created. At the same time, contemporary authoritarian populist and UET-regimes are constantly transforming themselves into constitutional dictatorships.

The multi-faced autocracy and constitutionalized dictatorship using the tool of state of exception can be investigate in a broad sense in the light of the clash of leader- and legal-based political regimes. The raise of liberal democracy depoliticized the post-war political structures which resulted on the one hand to lose the control over neoliberal autocracy, and on the other hand the break-through the right-wing authoritarian populism. By the crisis of liberal democracy, its main concern on rule of law over politics has also lost its hegemony. There is a new hegemonic struggle between law and politics, but the charismatic populist leaders are not about to crash legal systems and constitutionalism. That is why we can speak about populist constitutionalism, constitutional dictatorship. Authoritarian populist regimes are based on rule by law, mover they are trying to constitutionalize this approach.

The Hungarian situation is very similar to the Weimarization in the interwar period: a weak democracy based on rule of law turned to an autocracy based on rule by law. We should reconsider the theory of rule of law established on Hans Kelsen’s theory. What we are facing today is the hegemony of Carl Schmitt over Kelsen, again. We should put an emphasize on the theory of Gustav Radbruch, who was very critique with Kelsen’s positivist theory. Radbruch argued that justice is the prime element of legality. He formulated his so-called *injustice thesis*, which basically entails that a grave injustice of a law renders such law invalid as law: “A law that is at such apparent and grave conflict with the principles of justice and the normative demands of humanity loses... its validity.” (Coskun, 2007, p. 328).<sup>5</sup> This is “unrichtiges Recht”. I propose here that the law which has been accepted by rule by law in authoritarian populist regimes has lost its validity. In other terms: “With autocratic tendencies increasing all over the world, it is important to recognise debate as the core of every democracy. There must be no monopoly on the right attitude and neither does one have to accept any opinion without criticism. If a debate culture functions according to this standard, then the populist argument of limited freedom of expression has no persuasive power and becomes

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<sup>5</sup> Radbruch convincingly pointed out when “the conflict between statute and justice reaches such an intolerable degree (...), the statute, as ‘flawed law’ (‘unrichtiges Recht’), must yield to justice. (...) Where there is not even an attempt at justice, where equality, the core of justice, is deliberately betrayed in the issuance of positive law, then the statute is not merely ‘flawed law’, it lacks completely the very nature of law.” (Cited by Paulson, 2006, p. 26).

recognisable as a distraction. Populists do not fight for their own freedom of expression, but against that of their opponents. To counteract this, confrontation with them is needed.” (Römmele & Napierala, 2019).

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