



## PROFESSIONAL ARTICLE

# Illiberalism Enabled by the Coronavirus Pandemic: An Existential Threat to Judicial Independence

Ingo Keilitz\*

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For more than a decade, we have witnessed an erosion of political freedoms and civil liberties across the world amidst a democratic backsliding toward autocracy, a system of government in which a single person (the autocrat) possesses absolute power to weaken institutions such as an independent judiciary that sustain the democratic system. At the same time, a surveillance-based economy and anti-democratic threats this poses have thrived. The coronavirus pandemic has enabled these trends, giving authoritarian leaders and surveillance capitalists the opportunity to make massive shifts and reprogramming of our sensibilities about privacy and civil liberties that may not be reversible. The author argues that judicial leaders and court administrators around the globe will need to readjust and adapt to the realities of governance in this new era of illiberalism. He recommends three key changes that courts and justice systems around the world may need to make to deliver justice in the face of the challenges: first, creating a new narrative, one that is less combative, one that aggressively eschews the past's sharply polarized relationships between the judicial branch and the other two branches of government, and one that makes people partners instead of opponents; second, a new approach that puts major emphasis on good governance of the judicial branch, with a focus on competence and performance, an approach that mutes the more strident demands by judicial leaders for absolute judicial independence, coequal status of the judiciary with the executive and the legislative branches of government, and a perfect balance of power between them; finally, "going global" and linking up with international partners for global solidarity and collective action, thereby gaining influence and strength from international support back home.

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## Introduction

It is notoriously hard for a person to stand back and deal with his own times. When enough years go by, historians develop a certain perspective, a certain consensus, which makes it easier for them to get a handle on a "period," even though they may be really relying on half-truths, distorted mirrors, hindsight, and faulty memory.

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\* Principal of CourtMetrics; Research Associate, Global Research Institute and Visiting Scholar, Public Policy Program, College of William and Mary, US, [ikeilitz@cox.net](mailto:ikeilitz@cox.net). This article is an expansion of a two-part blog post by the author at Made2Measure on May 4 and May 12, 2020.

Lawrence M. Friedman  
*A History of American Law, Second Edition* (1985)

In a April 2020 opinion piece in the *Wall Street Journal*, Joseph A. Ladapo, an associate professor at David Geffen School of Medicine, University of California in Los Angeles, wrote that the coronavirus pandemic has set the stage for a showdown between civil liberties and public health (Ladapo, 2020). The battle already may be lost. Infringements of privacy and restrictions of freedom of movement and assembly may be here to stay for a long time after the coronavirus pandemic is contained. Even before the first death from Covid-19 in December 2019, liberal democracy was on the defensive as the rule of law was being eroded in many parts of the world by authoritarian regimes and autocrats (Acemoglu & Robinson, 2019; Levitsky & Ziblatt, 2018; and Mounk, 2018).

Professor Lodapo undoubtedly is correct that the exercise of political power rather than public health during the pandemic is at play, and that the battles over liberty “will neither be trivial nor easily quieted.” However, I disagree with his apparent sympathy for the as-yet relatively small and marginalized groups of protests in the United States against stay-at-home orders who are calling for an immediate opening of society. The protests are, in my view and that of many observers, an unprincipled stagecraft directed by influential conservative groups with close connections to U.S. President Donald Trump’s White House (Vogel, Rutenberg & Lerer, 2020). I am also puzzled by Professor’s rather bizarre declaration that the coronavirus in the United States “poses little danger to a large percentage of the population,” minimizing the enormity of the 64,577 virus deaths reported by John Hopkins University on May 2<sup>nd</sup>, which *in less than four months* passed the toll of the Vietnam War’s American military deaths over a period of 16 years, from 1965 to 1971.<sup>1</sup>

In this article I explore surveillance technology and restrictions of privacy, freedom of assembly and travel, once reserved for deterring terrorism and espionage, that are being applied today to the public at large to curb the transmission and spread of coronavirus, as autocrats and would-be autocrats around prey on their citizens’ rights and civil liberties to justify their authoritarian rule. The article focuses on two pandemic-enabled trends working together to erode judicial independence, balance of powers, and the rule of law. The first is the widespread use of digital surveillance technology and restrictions of freedoms under state emergency powers enacted to combat the spread of the virus. The second is “autocratization,” pandemic-enabled power grabs by autocrats and would-be autocrats, not just in authoritarian regimes but liberal democracies such as South Korea, India, and the United States. Together these two trends threaten to destroy freedoms and rights upheld as sacrosanct by most of the free world before the outbreak of Covid-19 in December 2019. Articles in the “Leaders” and “International” sections of its April 25<sup>th</sup> edition, described governance under Covid-19 as a “pandemic of power grabs” and accompanied by an ominous cover picture (see nearby).

The pandemic may have enabled a massive shift and reprogramming of our sensibilities about data privacy and civil liberties. The viability of the doctrines of judicial independence, the separation of powers of the judicial, legislative, and executive branches, and the checks and balances among them – ideals and principles that are fundamental to the governance of democratic countries and institutions – is already diminished and in jeopardy.

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<sup>1</sup> The United States passed the grim milestone of 100,000 deaths from Covid-19 in late May 2020.



### Surveillance capitalism

In her groundbreaking book, *The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power*, Shoshana Zuboff, the Charles Edward Wilson Professor Emerita at Harvard Business School, issues dire warnings about technology gone awry, a “surveillance-based economy,” and the anti-democratic threats this poses. She defines surveillance capitalism as “a new economic order that claims human experience as a free raw material for translation into behavioral data” and as an “expropriation of critical human rights that is best understood as a coup from above: an overthrow of the people’s sovereignty” (Zuboff, 2019, pp. 8–12).

Zuboff’s warnings focus mostly on the usual suspects in the digital revolution in the private sector – Google, Apple, Facebook, Amazon, and Microsoft – who do not have the best record of protecting consumer privacy. Billions of users of smart devices, she writes, are willing to give their “eyeball time” and the raw materials this provides to corporate data miners and analysts as a tradeoff for the ready access users get to the web’s goods and services (see also, Horwitz & Seetharaman, 2020).

In the public sector outside of China and a few other autocratic regimes, there were no extensive deployments of surveillance of the public at large before the outbreak of the coronavirus pandemic. The digital surveillance used by governments that Professor Zuboff warns us about was reserved for deterring terrorism and other national and international security threats. This has changed dramatically today. Fighting the virus requires finding out who is infected, monitoring them, tracing their contacts and whereabouts, and quarantining them. Today, ubiquitous smartphones have enabled governments and companies to use surveillance capabilities unimaginable at the beginning of 2020.

Joanna Stern, the *Washington Post’s* technology columnist, likens contact tracing and location tracking applications on smartphones to a public-health detective who asks people suspected to be infected by Covid-19 where they have been, who they interacted with, and when it happened (Stern, 2020). Continuing their detective work, they then track down the people and businesses, and warning them of their exposure to an infected person and recommending isolation, quarantining, and other measures.

### Invasions of privacy and restrictions of freedoms

All this spells more invasions of privacy and restrictions of freedoms such as contact-tracing, location tracking, and curtailing of assembly and movement than citizens would accept in

normal times. The pandemic has ushered in a new era of government-sponsored digital surveillance across the globe capturing personal information about coronavirus patients including age, gender, nationality, home and workplace addresses, travel history, links to previous coronavirus cases, identified contact persons, treatment locations, nature of confirmation of the disease, and the geographical location of patients (Lin & Martin, 2020).

Technology can only support, not replace, manual contact-tracing. Digital surveillance using smartphones is used by most nations in combination with armies of human contact-tracers who act as part detectives, part social-workers, part medical auxiliaries, and part data clerks and analysts. But no one today seems to be clear about how these armies will do their job, what they will be empowered to do, and what they will do if people do not share their names or do not isolate or quarantine.

Contact-tracing has a long history deployed to manage outbreaks of tuberculosis and sexually transmitted diseases. According to Marcel Salathé, a digital epidemiologist in Lausanne, Switzerland, we underestimate the nature of the work required. Inexperienced contact-tracers may not be prepared to deal with interviewees who react negatively to intrusive questions or worry that their responses may cause friends or relatives to be quarantined (Salathé, 2020). In the United States, states have struggled to keep up the efforts of contact-tracers.

Some governments – China, South Korea, and Taiwan – did not seek their citizens' permission to track their cellphones, though most welcomed the surveillance to combat the spread of the pandemic and to ease reopening of the economy after lockdowns. The reach of surveillance and restriction of privacy rights, movement and assembly (i.e., isolation, quarantine, and social distancing) depend on tough choices between: (1) voluntary or mandatory uses of smartphones and digital data; (2) collecting and storing data in centralized depositories (an approach favored by public health authorities in France, Norway, and the United Kingdom) or a decentralized approach (favored by Germany, Italy, Netherlands, and the United States following the release on May 20<sup>th</sup> by an application by Apple and Google) (Haggin, 2020); (3) collection of personal or anonymized data; and (4) public or private disclosure of information gathered about where and how people get infected.

The pandemic is testing the extent to which democracies are willing and able to curtail freedoms and impose the kind of stringent restrictions put in place in China and South Korea. In those countries, electronic payment and social media applications on personal phones are being tapped to track people's location and movements, to estimate their likelihood of infection, and to alert government authorities when quarantined individuals violate restrictions. Countries all over the world from Austria to Venezuela, and from Bangladesh to Togo, have developed smartphone applications for tracing and tracking the spread of the coronavirus pandemic. Below described are five different approaches taken by China, South Korea, Israel, Cambodia, and the United States.

## **China**

Under its authoritarian rule, the mass surveillance of an entire or a substantial portion of its population was already the norm in China before the outbreak of Covid-19 ("Mass Surveillance in China," 2020). In Xingjiang, a region in Western China where most of the citizens are Uighurs, a Muslim minority, people were required to load an application on their smartphones that allow authorities to track them wherever they go and access their data. People were required to show identification at many checkpoints. Cameras that scanned faces involuntarily were everywhere. Elsewhere in China, using a range of personal data accessed by the government, citizens are rated as part of a "social credit system" that gives them "trustworthy" scores (Buckley & Mosur, 2019).

The country's surveillance is the most aggressive and invasive in the world so far. As the pandemic hit, the Chinese government used mobile phone numbers and location data to trace residents who had left Wuhan, the center of the early outbreak of the virus. The data was given to local officials who asked identified people to quarantine, though many did not show symptoms. Officials also began to track its citizens with software that analyzes their personal data to sort individuals into color-coded categories – red, yellow, or green – corresponding to their health status and level of risk for Covid-19 (Dukakis, 2020). The move alarmed leading international human rights advocates, who feared that the government is merely using the ongoing public health crisis as a “convenient justification” to expand monitoring of its population. “This is viewed as scary stuff from a human rights perspective,” Sophie Richardson, China director at Human Rights Watch, told ABC News on April 14<sup>th</sup>. “[It is] yet another way to gather information about people to potentially use it against them in ways for which there’s no legal basis.”

### **South Korea**

South Korea, a liberal democracy, was more aggressive than most countries in testing its citizens and systematically tracking coronavirus infections (Yoon & Martin, 2020; Lin & Martin, 2020). Its track-and-trace tools are the strongest in the world, tapping into credit card transaction, security camera footage, and smartphone data. The government publishes detailed reports about confirmed coronavirus cases including patients' ages, home and work addresses, trips taken, and restaurants visited. Authorities are using surveillance dossiers to identify people who are suspected of having come into contact with coronavirus patients and encouraging them to get tested or stay in their homes. The government claimed that it can identify and locate at-risk patients in ten minutes or less. Suh Chae-wan of the Minbyun Lawyers for Democratic Society stated that South Korea has accessed far more information on people than those with the virus (Lin & Martin, 2020).

After two months of intensive social distancing, South Korea lifted its most intrusive restrictions, but issued detailed guidelines for how people and communities should behave until a coronavirus vaccine becomes available including: the wearing of masks; hotels and restaurants taking the temperatures of patrons before entry; the sanitizing of hands before shopping at stores; ventilation of hotel rooms after travelers check out; requiring visitors to zoos and aquariums to remain six feet apart; and the discouragement of shouting and hugging at sporting events. A “prevention officer” must be appointed at wedding and funeral gatherings to take participants' temperatures and monitor other symptoms such as coughing. The guidelines were developed by a panel of 18 health officials, medical experts, and civic group officials formed on April 10<sup>th</sup>.

### **Israel**

Israel has tapped into its surveillance technology heretofore largely focused on terrorism and espionage to combat the coronavirus pandemic (Lin & Martin, 2020). With access to telecom data, the Israel Security Agency, better known by the acronym “Shin Bet,” coordinates with the country's health ministry to send text messages to citizens who have come into contact with coronavirus carriers telling them to quarantine for two weeks. Violators face fines.

Officials at the health ministry praised the Shin Bet effort calling it, according to *Wall Street Journal* reporting, “crucial to stopping the spread of the virus” (Lin & Martin, 2020). In a letter to Israel's parliament, the Israel Medical Association, however, questioned whether Shin Bet's intrusive monitoring was necessary given that most of the population was already confined to their homes by prior government orders. Within days of the letter, Israel's Supreme Court

ordered parliament to form a supervisory committee to oversee the Shin Bet monitoring and tracking. More troubling for privacy advocates as the country prepares to reopen its economy is a proposal of a digital health-ranking system, similar to China's, by Israel's defense minister that was awaiting approval by the attorney general and prime minister. The system would rank all citizens on a ten-point scale. People at higher risk would have a higher score. Those with a score of 9.5 or above would be required to be tested.

### **Cambodia**

The emergency law in Cambodia, a constitutional monarchy, empowers the government to impose "any measures deemed appropriate to fight Covid-19," far exceeding those of democratic governments including unlimited surveillance of its citizenry, restrictions of movements, banning of public gatherings, censoring of social media, seizing of property, and declaring martial law; violators face up to ten years in prison ("Protection Racket," 2020). Hun Sen, the longest-serving prime minister, has led Cambodia's population to steady gains in material living standards in exchange for his edicts according to the classic autocrat's bargain. Today Mr. Hun Sen and his Cambodian People's Party can act without any oversight of and opposition to their unlimited surveillance of the citizenry. The purpose of Cambodia's emergency law "is not unique, as there is this law already in other democratic countries" a spokesperson for the ministry of justice is reported saying to the *Economist* ("Protection Racket," 2020). When a news director accurately reported Mr. Hun Sen admitting that his government lacked the financial resources to ride out the pandemic, the news director was arrested, and his news site shut down.

### **United States**

While such invasive surveillance measures may be more difficult to implement in the United States, privacy advocates are alarmed and pressing for federal legislation (Wilson, 2020), and such measures are today being introduced and developed at a rapid pace at the national, regional, and local levels. Smart phones and Bluetooth – the wireless technology which allows digital devices to easily transfer files at high speeds – are central to the planned efforts.

As reported by the *New York Times* (Otterman, 2020) and the *Wall Street Journal* (Armour, 2020), manual systems of contact tracing, a once obscure public health measure, have become an important part of the battle against the coronavirus and the push to reopen businesses in cities and states. To safely reopen the economy, the United States needs between 30,000 and 300,000 coronavirus contact tracers to supplement data collected by the smartphone technology according to various estimates by the Centers for Disease Control (CDC), the National Association of County and City Officials, and the Association of State and Territorial Health Officials. The state of Virginia alone is recruiting 13,000 on-the-ground tracers, data analysts, and tracing supervisors.

As Americans are returning to work with the spread of the pandemic easing, companies are planning unprecedented surveillance of employees as the only way to reopening businesses without risks to their employees' health. As many Americans are heading back to factories and offices, some companies are employing heretofore draconian measures similar to China's "social credit system" that assigns "trustworthy" scores to citizens (see above) (Putzier & Cutter, 2020). PricewaterhouseCoopers (PwC), the second largest professional services firm network in the world, is preparing to launch a smartphone contact-tracing application that analyzes workers' interactions with coworkers. More than 50 of its clients have expressed interest in the tool. For example, the Interpublic Group of Companies, Inc., an American advertising company that employs 9,700 people in New York City, is considering using the app in classifying employees into three levels. An employee who has had the coronavirus and

tests positive for the presence of antibodies would be classified at Level 1, the lowest risk, and would be allowed to return to work in a first wave of returning workers when states and cities lift stay-at-home restrictions. Employees without coronavirus antibodies, including those who are under 65 years old, who do not live in the same household with high-risk people, and who do not have serious underlying conditions, could return to work in a second wave. At-risk employees at Level 3, including those over 65 years old, pregnant women, and those with chronic diseases would be the last allowed to return to work.

Another client of PwC, the real-estate company RXR, is testing a smartphone application that scores employees on the degree to which they comply with social-distancing rules. The more time an employee stays more than six feet from coworkers translates to a higher score.

No agreed upon standards exist today for what tools are effective, and how they should be used protect privacy and security. Steven Feldstein, an associate professor who studies digital surveillance at Boise State University in Idaho, said that we are “in a bit of a Wild West.” Without federal guidelines or other regulations, it is a “free for all right now in terms of who’s doing what,” he said. Jason M. Schultz, professor of clinical law at New York University, predicted that such surveillance tools stay put after the coronavirus pandemic. “Employers don’t really have any incentives to remove surveillance once they install it,” Schultz is quoted saying. And, Scott Rechler, RXR’s chief executive, predicts that office workers will get used to surveillance, just as they did for check-ins after the 9/11 terrorist attacks (Putzier & Cutter, 2020).

Each state or public health system in the U.S. will be deciding what contract tracing application to use, which is likely to mean incompatible applications with different smartphone technologies using Bluetooth contact or location data – or some combination of the two – with varying degrees of accuracy and privacy protections. The *Wall Street Journal*’s Joanna Stern tested two such systems, one called Care19 intended for use in North and South Dakota, and Utah’s Healthy Together smartphone tool, and found both wanting in accuracy and privacy protections (Stern, 2020). She found the location data services – based on GPS and cellular W-Fi signals – most troubling for privacy protections. Before rushing out to download such applications that are made available at the regional and local level in the United States, she counselled readers to investigate the applications’ technology (the Care19 app located Ms. Stern in an establishment she may have been near, but never entered), to weigh the privacy and protection tradeoffs (if too few infected people agree to use the app, it won’t work and users will have allowed access to their data for no protection), and “go low tech” and manually record where, when, and with whom you interact (a combination of automated and manual systems is essential).

As reported by major news outlets in March, Apple and Google, the two Silicon Valley giants that control the operations of most of the smartphones on earth and the major drivers of surveillance capitalism, announced what was unthinkable before the outbreak of Covid-19 (Mickle, Copeland & Schechner, 2020; “App-based Contact-tracing,” 2020). They agreed to work together to track the virus using an application that health officials can use, along with conventional means that rely on people’s memory of where they have been and with whom they interacted, to identify sickened patients’ movements, provided that they agree to provide that information.

Less than two months later on May 20<sup>th</sup>, the two companies released their jointly developed smartphone application (Haggin, 2020). Their contact tracking tool uses Bluetooth-enabled proximity sensors to track whether users’ phones are within a certain distance of another by exchanging digital codes. If a user tests positive for coronavirus and volunteers to participate in the system, other phone users will be able to tell whether they got close to the infected person to risk a potential exposure. The Bluetooth technology connects phones by changing

the digital signals, or “keys,” periodically to hide users’ unique identity, a feature designed to protect security and privacy. But as reported by the *Washington Post* on May 5<sup>th</sup>, Bluetooth’s complexity – its specifications are several thousand pages long – makes the technology vulnerable to security and privacy breaches (Stupp, 2020).

Unlike many countries’ contact tracing apps that collect data in a centralized manner in government servers, contact data collected and stored in a decentralized manner privately on users’ own phones such as the Apple-Google technology may be beyond the reach of unscrupulous developers and untrustworthy governments. Many countries, including Germany, Italy, Switzerland, Estonia, and Austria, were already building applications to track infections, but now stand ready to rewrite their software to take advantage of Apple’s and Google’s joint effort. U.S. states including North Dakota, Alabama, and South Carolina, as well as 22 countries, reportedly have been given access to the Apple-Google technology (Schechner & Strasburg, 2020).

Governments around the world beyond the five described above have or are planning to institute digital surveillance in addition to isolation and quarantining of varying degrees of intrusiveness including: the installation of surveillance gadgets in the homes of people placed under quarantine (Western Australia); imposition of curfews (Serbia); facial recognition to catch people violating quarantine (Russia); “geofencing” that builds virtual fences around quarantine zones (India and Hong Kong); the use of drones to spot violators of stay-at-home orders (England); social distancing and isolation of members of the political opposition (Azerbaijan); censorship and jailing of those who spread misinformation or cause uncertainty for the population (Turkey, Thailand, and Bolivia).

### **Autocratization and illiberalism: The new normal?**

For more than a decade, we have witnessed an erosion of political freedoms and civil liberties in countries across the world – as chronicled by V-Dem (Lührmann & Lindberg, 2019), Freedom House (Repucci, 2020), the Economist Intelligence Unit (2019), the Pew Research Center (Wike, Silver & Castillo, 2019), and other nongovernmental, nonpartisan advocacy and research organizations – not only among the usual suspects, China, Russia, Iran, Turkey, and Venezuela – but also in established democracies such as the United States and India, the two largest democracies, whose chief executives, President Donald Trump and Prime Minister Narendra Modi, are increasingly willing to break down institutional safeguards like judicial independence and a balance of powers. This *illiberalism* is a form of governance and state organization that in practice steers clear of the principles of Western democracy including elections between multiple distinct political parties, a separation of powers into different branches of government, the rule of law in everyday life as part of an open society, civil rights, civil liberties, and political freedoms for all citizens.<sup>2</sup>

*Autocratization* is democratic backsliding, a trend toward autocracy, a system of government in which a single person (the autocrat) possesses absolute power to weaken institutions such as an independent judiciary that sustain the democratic system. Advocacy groups and news outlets have raised concerns that the coronavirus pandemic is accelerating democratic backsliding in many parts of the world. In what the *Economist* described on March 28<sup>th</sup> as “the most dramatic extension of state powers since the second world war,” the coronavirus pandemic has been seized by unscrupulous strongmen, autocrats and would-be autocrats, as an opportunity to assume extraordinary powers (“Autocrats See Opportunity in Disaster,” 2020).

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<sup>2</sup> The term “illiberal democracy” was perhaps first used by Fareed Zakaria in an oft-cited 1997 article in the journal of *Foreign Affairs*.



We know from history that a crisis can be a turning point for societies. A school siege by terrorists in Beslan, a town near the Russian border with Georgia, gave Russian President Vladimir Putin the opportunity to seize extra executive power. Turkey's President Recep Tayyip Erdogan has "ruled like a sultan" after he imposed a state of emergency after a failed coup in 2016. Political prisoners were excluded from the 90,000 prisoners to be released to halt the spread of the virus in Turkey ("Protection Racket," 2020). The corona pandemic presents opportunities to grab even more power. Rahm Emanuel, the former Chicago mayor and chief of staff to President Barack Obama, on March 22<sup>nd</sup> during the debate over how U.S. lawmakers should respond to the coronavirus pandemic, reprised his rallying cry during the 2008 financial crash, saying: "Never allow a good crisis go to waste. It's an opportunity to do the things you once thought were impossible" (Emanuel, 2020).

Governments need high-tech surveillance tools such as contact tracing and location tracking to fight the spread of the virus, as well as emergency laws vesting extra powers in the executive – which most countries have enacted to date – giving them the authority to use those tools. Autocrats need to have such extensive security apparatus not only to repress but also to monitor and understand their citizenry, a feedback mechanism democracies can achieve by means of freedom of expression.

Will these powers be relinquished when we are past the pandemic? The *Wall Street Journal* on April 16<sup>th</sup> reported Jim Harper, an original member of the U.S. Department of Homeland Security's Data Privacy and Integrity, warning that once surveillance powers such as contract tracing and location tracking are in place, they rarely are pulled back and can be repurposed as political tools (Lin & Martin, 2020).

### **The poster child of autocratization**

The prime minister of Hungary, Victor Orbán, is the posterchild of this autocratization. In a speech delivered on July 26, 2014, before an ethnic Hungarian audience in neighboring Romania, Mr. Orbán said he wanted to turn Hungary, a member of both NATO and the European Union, into a state that "will undertake the odium of expressing that in character it is not of liberal nature," citing as models Singapore, China, India, Turkey and Russia for his new political model of "illiberal democracy." He added: "We have to abandon liberal methods and principles of organizing a society, as well as the liberal way to look at the world" ("Hungary's Illiberalism," 2014; Hinshaw & Walker, 2018; see generally, Lendvai, 2017).

Under Hungary's emergency "coronavirus law," passed by its parliament on March 30<sup>th</sup>, Mr. Orbán can rule by decree, becoming in effect a dictator, until parliament revokes his powers, which is unlikely to happen any time soon since parliament is dominated by Mr. Orbán's nationalistic political party, Fidesz (Hinshaw & Szabolcs, 2020; "Protection Racket," 2020). Mr. Orbán touts the virtues of illiberal democracy and he is, no doubt, willing to dispense with such constitutional niceties as an independent judiciary and the separation of powers because, he might argue, such arrangements impede economic growth by making it harder for his government to respond quickly and flexibly to changing circumstances and national crises like the coronavirus pandemic. "The new state we are building," Mr. Orbán said in a speech soon after his re-election in 2014, is an illiberal state, a non-liberal state. He expressed his fascination for "systems that are not Western, not liberal, not liberal democracies, and yet making nations successful" (Hinshaw & Walker, 2018).

Mr. Orbán has for more than a decade hollowed out the state, undermined the courts, corroded the checks of his authority, and weakened civil society and the free press. As part of 2012 judiciary reform the Hungarian legislature lowered the age of retirement for judges from 70 to 62, forcing 57 experienced judges including the head of the Supreme Court to leave the judiciary (Halmai, 2017). The reform also established a centralized court administration

under the new National Judiciary Office headed by Ms. Tünde Handó, the wife of József Szájer, the vice-president of Fidesz (Kovacs, 2015). Under Handó, who served as the inaugural president of the National Judiciary Office from 2012 to the end of 2019, her office weakened judicial self-governance and independence. Orbán's government dismissed widespread criticism by judges, judicial organizations, and democracy advocacy groups in Hungary, as well as by international observers.

Hungary's sweeping emergency law allows Mr. Orbán to suspend the enforcement of certain laws, pull back statutory regulations, and implement additional extraordinary measures by decree. For example, it imposes as much as five years of imprisonment for anyone who spreads "distorted truth" that is seen as detrimental to Hungary's efforts to combat the virus and address its economic impact, a provision similar to a spate of such measures throughout Europe. Mr. Orbán said during a radio broadcast March 29<sup>th</sup> defending his actions: "I said to EU nit-pickers ...this is not the time to come to me pontificating about all sorts of no doubt fascinating legal and theoretical questions. Because now we have a crisis, now we have an epidemic, now we must save lives" (Hinshaw & Szabolcs, 2020). According to Human Rights Watch, Hungary's emergency law "virtually abolish[es] all democratic checks-and-balances."

On April 13<sup>th</sup>, amidst debate about when and how the United States should ease its Covid-19 lockdown of the economy, President Donald Trump claimed "absolute power" to decide against the approaches of most state governors ("Protection Racket," 2020). No serious legal scholars agreed, citing clear constitutional limits to his authority. His claim of absolute power was largely ignored. The next day he was forced to retreat. This is in sharp contrast to Hungarian media welcoming Mr. Orbán's "corona coronation."

The coronavirus crisis has prompted governments on the European continent to close borders across what is now known as the Schengen area, an area including 26 European nations that have officially abolished all passport and all other types of control at their mutual borders. Mr. Orbán has used the pandemic to advance his previously held views restricting free movement and fencing off Hungary's borders to migrants (Hinshaw & Szabolcs, 2020). Similarly, in the United States, President Donald Trump has seized on the pandemic as an opportunity to cement his long-held restrictive immigration policies. As reported by the *Wall Street Journal* on May 9<sup>th</sup> (Hackman & Restuccia, 2020), senior administration officials are operating on the "assumption that the public, during the pandemic, will be willing to accept new limits on immigration."

Other leaders of similar stripes in Poland, the Czech Republic, Austria, Serbia, and Montenegro, further afield in Eastern Europe in the Ukraine and Moldova, and in other parts of the world, including Venezuela, Brazil, and India, all seem to be following Mr. Orbán's playbook. "Political leaders could abuse the coronavirus crisis to undermine democracy," wrote Andras Racz, senior fellow at the German Council on Foreign Relations, quoted by the *Wall Street Journal*. "Europe's biggest risk is Hungary," he continued (Hinshaw & Szabolcs, 2020).

### **Readjustment and adaptation of court administration needed in the era of autocratization and illiberalism**

Judicial leaders and court administrators will need to readjust and adapt to the new realities of governance under autocratization and illiberalism. "When facts change our thinking," John Maynard Keynes famously told a critic, "I change my mind. What do you do, sir?" What is an effective justice response to the pandemic in an era of autocratization and illiberalism? What are some key adjustments that courts and justice systems around the world may need to make to deliver justice in the face of the challenges?

First and foremost, I believe a new narrative is needed, one that frames new strategies and tactics of readjustment and adaptation, one that is less combative, one that aggressively

eschews the past's sharply polarized relationships between the judicial branch and the other two branches of government, and one that makes people partners instead of opponents. In a May 18<sup>th</sup> essay in *Time* entitled "Now is the Moment to Change the World," the Dutch historian Rutger Bregman, who for the last five years has studied how scientists have switched from a cynical to a more hopeful view of humanity, reminds us: "Human beings, they say, have not evolved to fight and compete, but to make friends and work together. Our unique ability to cooperate may explain the success of our species" (Bregman, 2020a; see also Bregman, 2020b, 2020c).

Second, we need an approach that puts major emphasis on good governance of the judicial branch, with a focus on competence and performance, an approach that mutes the more strident demands by judicial leaders for absolute judicial independence, coequal status of the judiciary with the executive and the legislative branches of government, and a perfect balance of power between them. Finally, I suggest that national judicial systems "go global" and link up with international partners for global solidarity and collective action to have a voice on the international stage, thereby gaining influence and strength from international visibility and support back home.

### A new narrative

When we name things and weave them into a coherent framework, we make it more difficult to ignore them. "Naming is the simplest form of matching language to reality," writes Felipe Fernández-Armesto in *Truth: A History and a Guide for the Perplexed*. "In many systems of thought ...knowing a name gives one power over things named" (Fernández-Armesto, 1997, p. 4). Without a new narrative to substitute the *don't tread on me* stance taken by many judicial leaders today, we may have no connection to today's realities and challenges.

In a December 2018 article critical of the European Network of Councils for the Judiciary's (ENCJ) framework and vision of the independence, accountability, and transparency of the judiciaries in the member states of the European Union (Keilitz, 2018, pp. 35–36), I concluded with a warning about the "politicization of the judiciary," troubling developments that many saw as a retreat from democracy and the rule of law in Europe and in many other parts of the world. In the article, I first explored risks to judicial independence at two levels: *decisional independence* (e.g., when a judge perfunctorily places a court's imprimatur on decisions made by the other branches of government) and *institutional independence* (e.g., when the executive branch meddles improperly in judicial selection, retentions). I saw judiciaries' concerns at these two levels as relatively narrow, and largely internal, "inward-focused" on judges' concerns (e.g., salaries) courts' processes and operations (e.g., transfers of judges). I warned about ignoring the more serious risks at a third national level – *governance independence* – that are "external" and much broader than threats to *decisional independence and institutional independence*.

In many countries – I wrote more than a year before the outbreak of the coronavirus pandemic and opportunistic pandemic-enabled illiberalism – lip service is paid to democratic principles in constitutions that are ignored in practice. Strongmen such as Hungary's Viktor Orbán who rule in authoritarian oligarchies amid corruption and political chaos in countries that once looked like they were democratizing, today seem to be moving in an opposite direction toward autocratization and illiberalism. As they cling to power, embattled strongmen show no inclination towards sharing power with others, never mind their own judiciaries.

As the Israeli historian Yuval Harari suggests in his book, *21 Lessons for the 21st Century*, our sense of justice may be out of date, and liberal democracy might "become obsolete" over the coming century as "old stories have collapsed and no new story has emerged" (Harari, 2019,

pp. 230–237).<sup>3</sup> To meet the challenges of illiberalism, justice systems need to develop a new story and new narratives for reform strategies in which ideology and doctrine – separation of powers, coequal branches of government, and judicial independence – are not central, a new narrative that eschews a polarization between the judicial branch and the other two branches of government and instead seeks comity. The new narrative should feature good governance of the courts and justice institutions as seen through the eyes of nations' citizenry.

### Good governance

What do citizens care about? What do they want from their governments?

First and foremost, they care about results. “Few people care (and why should they?),” wrote Lawrence M. Friedman in *A History of American Law* (Friedman, 1985, pp. 65), “about whether government is big or not at any level,” whether it is decentralized or centralized, whether it has checks and balances, and whether or not there is a tilt of power toward the executive and away from the judiciary. Even when “political theory” is preached, it is really but a surrogate – a “shopping list” – of down to earth interests and demands.

People care about performance, not just promises and rhetoric framed by conceptual jurisprudence. They want real life problems fixed. They care about competence, effectiveness, and trustworthiness in their governments' abilities to provide needed services and do no harm: health ministries and departments to keep people healthy, education ministries to deliver education, labor ministries to provide people with jobs that earn a good living, defense ministries to keep them safe and secure, and courts to deliver justice. And they want to trust these units of government to work together for the common good.

In addition to competence and accountability for performance, a “good governance” narrative should emphasize comity in governmental relations and present a vision of what it means to work together cooperatively instead of sowing divisiveness. Judicial independence and separation of powers do not mean absolute autonomy or isolation of the judicial branch. The five standards in the performance area of independence and accountability in the seminal *Trial Court Performance Standards* (Commission on Trial Court Performance Standards, 1995) combine the principles of separation of powers and judicial independence with the need not only for public accountability, but also comity. Black's Law Dictionary (5th ed. 1979) defines “comity” as courtesy, complaisance, respect, and a willingness to grant a privilege, not as a matter of right or obligation, but out of deference and good will. The *Standards* takes the doctrine of comity beyond the legal sphere into judicial administration, i.e., the practices, procedures, and organizational structures concerning the management of the administrative systems of the courts. Standard 4.1 of the *Standards*, “Independence and Comity,” states: “A trial court maintains its institutional integrity and observes the principle of comity in its governmental relations,” suggesting that comity is integral to public accountability and trust. The commentary of this standard states:

For a trial court to persist in both its role as preserver of legal norms and as part of a separate branch of government, it must develop and maintain its distinctive and independent status. It also must be conscious of its legal and administrative boundaries and vigilant in protecting them. Effective trial courts resist being absorbed or managed by the other branches of government.... Effective court management enhances independent decision making by trial judges. ... The court must achieve independent

<sup>3</sup> It should be noted that, though he discusses the shortcomings of the liberal view and democratic systems, Professor Harari nonetheless believes that liberal democracy is the “most successful and most versatile political model humans have so far developed for dealing with the challenges of the modern world.”

status, however, without damaging the reciprocal relationships that it maintains with others. Trial courts are necessarily dependent upon the cooperation of other components of the justice system over which they have little or no direct authority.

In the Covid-19 pandemic, everywhere people are scared. They want to be led to safety and health. Strongmen are grabbing power with coercive tools they have always craved in order, they say, to protect public health and safety.

The lesson for courts and justice systems is to develop a narrative that eschews ideology and dogma, dogmatics that may be sacrosanct for constitutional scholars but be seen by ordinary citizens as theoretical handwringing over abstractions that they may not comprehend or that they see as irrelevant to the ends that they really care about. As Professor Harari pointed out, ideological dogmas are attractive today “precisely because they offer us a safe haven from the frustrating complexity of reality.” He continues: “While such doctrines provide people with intellectual comfort and moral certainty, it is debatable whether they provide justice” (Harari, 2019, p. 337). Good governance means that governments deliver what a country’s citizens want, and they do not want dogmatics. They want courts that are accessible to them. Once they have gained access, they want dispute resolution in a timely fashion. They want to be treated fairly and equally with dignity and respect. They want a justice system that is well governed, that is competent, and is trusted to deliver the justices services.

### **Make It Global**

In an essay in the April 25<sup>th</sup> edition of the *Economist*, titled “Learning to Fight the Next Pandemic” (Gates, 2020), Bill Gates, the cofounder of Microsoft and the co-chair of the Bill & Melinda Gates Foundation, recommended that we “make it global.” His focus was on medical breakthroughs and science, but his recommendation is apt for what may well be an era of diminished power of the judiciary and a balance of power shifted to the executive branch. “In the years after 2021, I think we’ll learn from the years after 1945,” he writes. “With the end of the second world war, leaders built international institutions like the UN to prevent more conflicts. After Covid-19, leaders will prepare institutions to prevent the next pandemic... These will be a mix of national, regional, and global organizations.”

In a similar vein, courts and judicial systems should not go at it alone but “go global,” joining other nations in international efforts to counter the forces of illiberalism and autocratization. The European Network of Councils for the Judiciary, the International Association of Judges, the Network of Presidents of the Court of Justice of the European Union, the International Association for Court Administration, the International Consortium for Court Excellence (ICCE), and other similar organizations provide a forum for unity and support for reform efforts, including tools such as ICCE’s *International Framework for Court Excellence* (International Consortium for Court Excellence, 2014) and the *Global Measures of Court Performance* (Keilitz, Glanfield & Hall, 2018) that can strengthen nations’ efforts back home at the national and regional level.<sup>4</sup>

### **Conclusion**

No doubt, especially in today’s adverse environments, countries need a competent functioning judiciary to protect the common good and restrain power grabs by the state in countries experiencing autocratization and illiberalism. In this article, I have focused on the basic issue of power, where it is and who exercises it. In the final analysis, it may be best to keep in mind Professor Friedman’s wise counsel that securing judicial independence and the checks

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<sup>4</sup> The State Courts of Singapore are a good model of “going global” (see State Courts of Singapore, 2017).

and balances of power is in no sense – except from the standpoint of legal dogmatics and the sophistry of conceptual jurisprudence – a “problem” to be resolved once and for all, but rather an ongoing struggle in the context of real-life problems such as pandemics and social unrest or “whatever society defines as a situation gone wrong” (Friedman, 1985, p. 661–662).

### Competing Interests

The author has no competing interests to declare.

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